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U.S. War Crimes and Accountability with the International Criminal Court: A Critique

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**U.S. WAR CRIMES AND ACCOUNTABILITY WITH THE INTERNATIONAL
CRIMINAL COURT (ICC): A CRITIQUE.**

By

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Introduction

On March 5, 2020, the Appeals Chamber of the International Criminal Court (ICC) authorized ICC Prosecutor Fatou Bensouda’s request to begin an investigation of alleged war crimes committed in the Islamic Republic of Afghanistan since May 1, 2003.¹ This judgement amended the decision of Pre-Trial Chamber II of April 12, 2019, which had rejected the Prosecutor’s initial request made on November 20, 2017. It declared the Prosecutor was authorized to investigate within the original parameters identified in the initial request. Said parameters included, “alleged crimes committed on the territory of Afghanistan in the period from 1 May 2003, as well as other alleged crimes linked to the armed conflict in Afghanistan and committed on the territory of other States Parties to the Statute, since July 1, 2002.”² A preliminary examination of the situation in Afghanistan by the Office of the Prosecutor had revealed reasonable ground to believe the following crimes in violation of the Rome Statute and within the Court’s jurisdiction had occurred:

- i. Crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network;
- ii. War crimes by the Afghan National Security Forces (“ANSF”), in particular, members of the National Directorate for Security (“NDS”) and the Afghan National Police (“ANP”), and
- iii. War crimes by members of the United States (“US”) armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency (“CIA”) in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.²

The last violation prompted the subject of this research paper— an examination and analysis of the Afghan war crimes and others that the United States armed forces committed in the 20th and 21st century. I have identified five cases of human rights violations in zones of war between 1943 and 2006. For each I have examined and analyzed the conditions under which these crimes occurred, the international treaties, laws, or agreements that the U.S. violated, and

¹ Afghanistan: ICC Appeals Chamber authorises the opening of an investigation. (2020, March 05). Retrieved from <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>

² Office of the Prosecutor. (2017, November 20). The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan. Retrieved from <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>

have outlined the consequences or disciplinary actions, if any, taken by the United States to serve justice.

Background

An understanding of the International Criminal Court (ICC), its history, relevant international human rights statutes, treaties, or laws are essential prior to detailing the timeline of events for each war crime.

a) History of the International Criminal Court (ICC)

On July 17, 1998, in Rome, 120 member states adopted the Rome Statute of the International Criminal Court. The Statute thus established the ICC which entered into force on July 1, 2002.³ The 20th century bore witness to some of the most egregious crimes against humanity, many of which went unpunished. Leaders of the United Nations General Assembly agreed on the necessity for an international judicial body whose jurisdiction would allow the investigation, prosecution, and trying of individuals guilty of devastating crimes against humanity, among them, genocide and the crime of aggression on the territories of member States as outlined in Article 5 of the Rome Statute.⁴ Simultaneous to the beginning of the Rome Statute negotiations, the international community bore witness to the widespread ethnic murders in the former Yugoslavia and in Rwanda,⁵ which prompted the United Nations Security Council to establish *Ad Hoc*⁵ tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) in May 1993 and the International Criminal Tribunal for Rwanda (ICTR) in November 1994.

The former Yugoslavia, officially The Socialist Federal Republic of Yugoslavia (SFRY) established in 1918, was composed of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. In the early 1990s three of these began their secession from the SFRY: Slovenia, Croatia, and Bosnia. War between Serbia and the latter two countries soon followed with civilians undertaking their own campaigns of ethnic cleansing. When Bosnia attempted to secede, Serbia invaded the country and, beginning in April 1992,

³ ICC. Understanding the International Criminal Court. Retrieved from <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>

⁴ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>

⁵ Latin shorthand meaning “for this specific purpose” ; usually appointed to solve a particular problem. *Ad hoc*. (n.d.) *West's Encyclopedia of American Law, edition 2*. (2008). Retrieved October 31 2020 from <https://legal-dictionary.thefreedictionary.com/ad+hoc>

Serbian militias along with ethnic Bosnian Serbs, embarked on a plan of ethnic cleansing to systematically murder Bosnian Muslims- known as Bosniaks.⁶ Most infamously the Serbian militia invaded the town of Srebrenica, the majority Bosniak civilian population of which had fled to a nearby United Nations base where the Serbian militia leader was able to persuade UN personnel to separate the men from the women and children. Over 7,000 men were massacred.⁷

In Africa, civil war in Rwanda broke out in 1990 as tensions between the majority Hutu population (85%) and the Tutsi minority (18%) grew.⁸ The Rwandan genocide was sparked on April 6, 1994 with the death of Rwandan President Juvenal Habyarimana when his plane was shot down, igniting a campaign of mass violence and massacring of the Tutsi people and anyone suspected of having ties to them. An estimate of more than one million people were brutally murdered and between 150,000 to 200,000 women raped.⁹ It was these two appalling events, in addition to other crimes against humanity witnessed throughout the 20th century, that played a significant role in the decision to convene the conference in 1998 that would establish the Rome Statute.

b) Relevant International Statutes, Treaties, and Laws

i. The Rome Statute

The preamble of the Rome Statute states that, "...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."⁴ Under international law, every state has the responsibility to prosecute perpetrators of suspected war crimes, international crimes, and crimes against humanity. The ICC is a court of last resort to step in and exercise jurisdiction when a member party's government is unwilling or unable to prosecute those responsible.¹⁰ Crimes within the jurisdiction of the Court as outlined in Part 2 of the Rome Statute include the crime of genocide, crimes against humanity, war crimes, and the crime of

⁶ Holocaust Museum Houston. (n.d.). Genocide in Bosnia. Retrieved from <https://hnh.org/library/research/genocide-in-bosnia-guide/>

⁷ Yale University Genocide Studies Program. (n.d.). Case Study: Yugoslavia (Former). Retrieved from <https://gsp.yale.edu/case-studies/yugoslavia-former>

⁸ United to End Genocide. (n.d.). The Rwandan Genocide. Retrieved January, from <http://endgenocide.org/learn/past-genocides/the-rwandan-genocide/>

⁹ Outreach Programme on the 1994 Genocide Against the Tutsi in Rwanda and the United Nations. (n.d.). Rwanda: A Brief History of the Country. Retrieved from <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>

¹⁰ HRW. (2020, October 28). Q&A: The International Criminal Court and the United States. Retrieved from <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>

aggression. The definition of “crimes against humanity” and “war crimes” as written in the Rome Statute are outlined below:

- *Article 7, Crimes against humanity, paragraph 1*: “means any of the following acts when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; Extermination; Enslavement; Deportation or forcible transfer...; Imprisonment...severe deprivation of physical liberty in violation...of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization...sexual violence...; Persecution against any identifiable group...on political, racial, national, ethnic, cultural, religious, gender...; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of similar character intentionally used to cause great suffering...”¹¹
- *Article 8, War Crimes, paragraph 2, section (a)*: “For the purpose of this Statute ‘war crimes’ means: grave breaches of the Geneva Conventions of 12 August 1949...following acts against persons or property protected under the provisions...: Wilful killing; Torture or inhuman treatment...; Wilfully causing great suffering or serious injury...; Extensive destruction and appropriation of property, not justified by military necessity...; Compelling a prisoner of war...to serve in the forces of a hostile Power; Wilfully depriving a prisoner of war...the rights of fair and regular trial; Unlawful deportation or transfer or unlawful confinement; Taking of hostages.”¹¹
[sections (b), (c), and (e) further detail other serious violations not outlined above.]

The United States participated in the initial negotiations which founded the Court but has since had a contested relationship with this international justice institution.

ii. *The Hague Conventions*

The Hague Conventions consist of a series of international treaties and declarations negotiated at the two Hague International Peace Conferences in 1899 and 1907. The two versions of the Convention only differ slightly, being among the first formal identifications and regulations of the laws of war and war crimes, and some of the most enduring value instruments

¹¹ The International Criminal Court. (2002). *Rome Statute of the International Criminal Court* (Vol. 2187, Ser. 385447, pp. 3-7). Rome: The International Criminal Court.

of law today.¹² The Hague Conventions importantly provide regulations concerning prisoners of war and enshrined the legal status of POWs in international law in Article 4:

“Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.”¹³

Along with the Geneva Conventions, the Hague Conventions make up the foundation of international humanitarian law and are considered to embody the customary international law that defines the main rules of warfare as well as the legal status of their participants.¹⁴ The rules embodied in Conventions were reaffirmed by the two additional protocols to the 1949 Geneva Convention adopted in 1977 and are binding to its states party.¹⁵ The United States ratified the Hague Conventions in 1902 and 1909 respectively.

iii. *The International Military Tribunal at Nuremburg*

After the end of World War II, on August 8, 1945, the United Kingdom, Northern Ireland, France, the Soviet Union, and the United States established the International Military Tribunal (IMT) at Nuremburg to prosecute major European Axis war criminals. Twelve trials were held in Nuremberg between 1945 and 1949 where almost 200 defendants stood trial. Article 6 of the Tribunal’s Charter outlines its jurisdictional powers over “crimes against peace,” “war crimes,” and “crimes against humanity” to prosecute and punish those who were judged to be guilty.¹⁶ Many scholars view the Nuremburg Tribunal as a milestone in the modern development of international law, setting a judicial precedent for International Military Tribunals. It also set the precedent that violation of previously established international legal principles such as treaties,

¹² Hayashi, N. (2017). *The Role and Importance of the Hague Conferences: A Historical Perspective* [Scholarly project]. In *The United Nations Institute for Disarmament Research (UNIDR)*. Retrieved from <https://www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf>

¹³ The Hague Convention (IV)- Chapter II: Prisoners of War- Regulations: Article 4. (1907). Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200014?OpenDocument>

¹⁴ Baisymakova, D. (2016). *Defining the Regulations of War in the Hague Convention of 1907*[Scholarly project]. In *The European Proceedings of Social & Behavioural Sciences*. Retrieved from https://www.europeanproceedings.com/files/data/article/38/829/article_38_829_pdf_100.pdf

¹⁵ The Hague Convention (IV). (1907). Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788>

¹⁶ United Nations. (8 August 1945). *Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)*, available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

conventions, or agreements, can be interpreted as an international crime and that individuals would be held accountable.¹⁷ The Nuremberg charter laid the groundwork for modern international law. Never before had practices of war been designated as criminal or established a court to punish those culpable. The Nuremberg Tribunal's protection of humanity whose jurisdiction transcended sovereign state borders to hold governments and individuals accountable was affirmed by the United Nations and set precedent for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in the eventual establishment of the ICC.

iv. *The Convention on the Prevention and Punishment of the Crime of Genocide*

The Convention on the Prevention and Punishment of the Crime of Genocide, commonly referred to as The Genocide Convention, was unanimously adopted by the United Nations General Assembly on December 9, 1948 and was entered into force on January 12, 1951. The Genocide Convention was adopted in response to human rights atrocities committed during World War II and the UN General Assembly passed Resolution 180(II) on December 2, 1947 which recognized genocide as a crime punishable under international law, whether committed in war or in peacetime.¹⁸ This definition has been largely adopted at the international level and is echoed in the Rome Statute of the ICC. The Convention has been widely accepted by the international community, with 152 state ratifications, including the United States.¹⁹ The Genocide Convention was the first human rights treaty that the UN General Assembly adopted and another key step in the development of international human rights and criminal law we know today.

In its ratification of the Genocide Convention, the United States submitted two reservations, the second of which faced objections by multiple states party to the Convention. Reservation (2) made by the United States of America states, "that nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the

¹⁷Lopardo, Mary Jean (1978) "Nuremberg Trials and International Law," University of Baltimore Law Forum: Vol. 8: No. 2 , Article 18. Available at: <https://scholarworks.law.ubalt.edu/lf/vol8/iss2/18>

¹⁸ UN General Assembly. (9 December 1948). *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations, Treaty Series, vol. 78, no. 1021, available at <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

¹⁹ ICRC (n.d.). *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948. Retrieved from <https://ihl-databases.icrc.org/ihl/INTRO/357>

Constitution of the United States as interpreted by the United States."²⁰ Ten governments, including the United Kingdom, objected to this second reservation on the grounds that, "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty," that it creates uncertainty of the United States government's willingness to assume the obligations of the Convention and that the U.S. cannot interpret its own domestic law as a means of overriding the provisions of the Agreement.²⁰

v. *The Universal Declaration of Human Rights*

On December 10, 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) in France. The horrors of the Second World War made it clear that every sovereign state had a duty to protect the rights and dignity of all human beings. A landmark achievement in the history of human rights, the UDHR recognized the protection of fundamental human rights at the international level for the first time; "the inherent dignity and of the equal and inalienable rights of human family is the foundation of freedom, justice, and peace in the world," and is principally agreed to be the underpinning of international human rights law.²¹ The Declaration outlines thirty universal human rights and freedoms, among them, civil, political, economic, social, and cultural rights such as the right to be free from torture, the right to freedom of expression, the right to education, the right to seek asylum, and the rights to life, liberty, and privacy. Although the Declaration is not a treaty, and therefore not legally binding, it is an expression of fundamental values and has set the framework for a rich body of legally binding international human rights laws and treaties to be promoted and incorporated in domestic legal frameworks.²² To date, 192 member states of the United Nations have signed the UDHR, including the United States. The UDHR has influenced more than 80 international human rights treaties, declarations, conventions, bills, and provisions which comprise an extensive, legally binding system for the protection of fundamental human rights.²³

²⁰ UN Treaty Collection (n.d.). CHAPTER IV HUMAN RIGHTS- Convention on the Prevention and Punishment of the Crime of Genocide. Retrieved November 14, 2020, from <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND>

²¹ UN General Assembly. (10 December 1948). "Universal declaration of human rights" Preamble. (217 [III] A). Paris. Retrieved from <http://www.un.org/en/universal-declaration-human-rights/>

²² Amnesty International. (n.d.). Universal Declaration of Human Rights. Retrieved November 14, 2020, from <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/>

²³ United Nations. (n.d.). Human Rights Law. Retrieved November 14, 2020, from <https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html>

vi. *The Geneva Convention*

The Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, is the fourth and final of the Geneva Conventions and among the significant human rights conventions which followed the adoption of the UDHR. Arranged in the aftermath of World War II, the Fourth Geneva Convention updated the first three Conventions established in 1864, 1906, and 1929. The Conventions apply in circumstances of declared war or any other armed conflict between nations. Common to all four Geneva Conventions is Article 3 which extended humanitarian treatment under situations of non-international armed conflict which includes, but is not limited to, civil wars, internal armed conflict or multinational force intervention alongside a state government.²⁴ Article 3 establishes the fundamental rule that the derogation of human life is not permitted. Article 4 under *General Provisions, Part I* defines “protected persons” as:

- “...those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it.”²⁵

Further key provisions in the Geneva Convention include articles of *Part III, Status and Treatment of Protected Persons, Section I*, notably:

- *Article 27*- “Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats...”;
- *Article 30*- “Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.”;

²⁴ ICRC. (2010, October 29). The Geneva Conventions of 1949 and their Additional Protocols. Retrieved from <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

²⁵ International Committee of the Red Cross (ICRC). (1949, August 4). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Article 4. 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html>

- *Article 32*- “...prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands...applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.”²⁵

The International Committee of the Red Cross (ICRC), a humanitarian organization founded in Switzerland in 1863, has always had a special relationship with international humanitarian law. The organization is formally recognized by Article 5 of the Geneva Conventions as “to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law” (Article 5.2c), and “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof” (Article 5.2g).²⁶ The ICRC is essentially mandated to monitor the application and respect for the third and fourth Geneva Conventions, acting as the “guarding angel” of respect for international humanitarian law among High Contracting Parties to the Conventions. Nations which ratify the Geneva Convention must abide by the humanitarian principles laid out in the treaties and take legal action against those who violate them.²⁷ All four Geneva Conventions have been ratified by 196 countries, including all UN member states. The United States was a signatory to the Convention on August 12, 1949 and ratified the treaty on August 2, 1955.²⁸

Development

a) *Biscari Massacre (July 14, 1943)*

vii. *Timeline of Events*

²⁶ Sandoz, Y. (1998, December 31). The International Committee of the Red Cross as guardian of international humanitarian law. Retrieved from <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>

²⁷ American Red Cross. (2011, April). Summary of the Geneva Conventions of 1949 and Their Additional Protocols. Retrieved from https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf

²⁸ ICRC. (n.d.). Treaties, States Parties and Commentaries- Geneva Conventions of 1949 and Additional Protocols, and their Commentaries. Retrieved 16 November, 2020 from https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380

The Biscari Massacre refers to two sets of killings by the United States Army which occurred on July 14, 1943 at the Biscari airfield in Santo Pietro, a small village in southern Sicily, Italy. Seventy-one Italian and two German unarmed prisoners of war taken during the capture of the Biscari airfield were murdered by troops of the 45th Division 180th Infantry Regiment of General George S. Patton's Seventh Army.²⁹ Lieutenant Colonel William E. King, the 45th Division chaplain, discovered the bodies of thirty-six Axis prisoners on the road to the airfield with an excess of U.S. ammunition nearby. They were missing shirts and shoes – all were shot in either the head or chest. Upon arrival at the airfield, King was informed of more corpses nearby, which had been “mowed down.” When he inquired with a GI, King was alarmed to learn that, “we have been told not to make any prisoners.” The first group of prisoners was brought to Sergeant Horace T. West by the 1st Battalion's commander with vague orders to remove them from the airfield. With a detail of nine men, West marched the prisoners south of the airfield, lined them up, and killed them with a Thompson submachine gun. Captain John C. Compton ordered the second set of killings after one of his Company C men captured over 40 unarmed and cooperative men in both civilian and Italian Army attire. A firing party of about two dozen men murdered the surrendered prisoners. After a brief investigation, two cases were brought to trial in September and October of 1943.³⁰

viii. *Applications of International law*

On April 10, 1806, the very first United States Congress authorized 101 Articles of War, which the military justice system operated under until May 31, 1951, when the Uniform Code of Military Justice went into effect. These Articles governed the armies of the United States at all times and in all places. Article 2 under *section I. Preliminary Provisions* defines “persons subject to military law,” includes all officers, members, and soldiers belonging to the regular Army of the United States; cadets; officers and soldiers of the Marine Corps when detached for service with the armies of the U.S.; all persons accompanying or serving with the armies of the U.S. without the territorial jurisdiction; all persons under sentence adjudged by courts-martial; and all

²⁹ Borch, F. L. (2014, January 01). War Crimes in Sicily. Retrieved from https://www.americanbar.org/groups/litigation/publications/litigation_journal/2013-14/winter/war_crimes_sicily/

³⁰ Weingartner, J. (1989). Massacre at Biscari: Patton and an American War Crime. *The Historian*, 52(1), 24-39. Retrieved from <http://www.jstor.org/stable/24447601>

persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.³¹
Article 92 under *section F. Miscellaneous Crimes and Offenses*, declares:

- ART. 92. MURDER-RAPE.- Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by a court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.³¹

Relevant to the Biscari Massacre is the Geneva Convention of 1929, officially named the “Convention relative to the Treatment of Prisoners of War,” was signed on July 27, 1929. Article 2 under *Title I. General Provisions* provides that:

- “Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited.”³²

The United States ratified the treaty on February 4, 1933.

ix. *Consequences and Outcomes*

Sergeant Horace T. West of Company A, 180th Infantry Regiment, 45th Infantry Division was charged with the alleged violation of the 92nd Article of War; that he had murdered 37 prisoners of war “with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation.” All testimony revealed that West had done almost all the shooting himself, having declared that he was acting under orders before opening fire. None of the nine other GIs present attempted to restrain him. West pleaded not guilty, claiming to have been fatigued and under extreme emotional stress, essentially claiming temporary insanity, although a five-person medical board had found him to be sane at the time of the massacre. Much of West’s defense also hinged on the argument that he believed U.S. troops were under orders to only take prisoners under limited circumstances which involved Lieutenant General George S. Patton’s remarks to officers of the 45th Infantry Division before the invasion of Sicily:

³¹ Special subcommittee of Committee on Military Affairs, House of Representatives, 66th Congress, 2nd session, United States. (1920). *Revision of the Articles of War 1912-1920*(Vol. 2, pp. 3-24).

³² Switzerland. (1929). *Convention of July 27th, 1929, Relative to the Treatment of Prisoners of War* (Treaty Series 846). Geneva. Retrieved from <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0932.pdf>

“...When we meet the enemy, we will kill him. We will show him no mercy...he must die...when you get within two hundred yards of him and he wishes to surrender, oh no! That bastard will die! You will kill him... You will tell your men that. They must have the killer instinct...”

At least one witness interpreted this remark to mean no prisoners whatsoever were to be taken. West’s evidence was not compelling enough for the seven-officer court that found him guilty and sentenced him to life imprisonment. Although dishonorable discharge normally accompanied a conviction under the 92nd Article of War, West retained his U.S. Army status and was kept in a military detention center in North Africa. However, after barely serving six months of his life sentence, West’s brother began requesting information about his case. The War Department’s Bureau of Public Relations recommended West be granted clemency before the Inspector General’s Department had even completed its investigation with the provision that no publicity be given to the case. Sergeant Horace T. West was released and on November 23, 1944; his sentence was remitted, and he was restored to duty with the rank of private.

Captain John C. Compton commanded Company C of the 45th Infantry Division’s 180th Infantry Regiment during the battle for Biscari Airfield; he was the sole defendant of the second trial and, like West, was equally charged with violating the 92nd Article of War. Compton also pled not guilty, arguing that he had been acting under orders, again citing General Patton’s inflammatory rhetoric as central in his actions. The question of whether the victims were in uniform or not became a relevant question. Compton had made no effort to determine if any of the prisoners had been civilians or not. According to the testimony of one officer, Patton’s speech would have provided justification for their destruction, alleging that the commander of the Seventh Army had said:

“If the people living in the country or the people living in the cities persisted in staying in the vicinity of the battle..., we were to ruthlessly kill them and get them out of the way.”

The core of Compton’s defense was that Patton’s instructions amounted to an order: “a three-star general’s advice...is good enough for me and I took him at his word” or could have been reasonably interpreted as such. The judge advocate noted that such an order would have been illegal. Captain John C. Compton was acquitted of the charge.

Lieutenant General George S. Patton was not a defendant in either case, but his leadership became a matter of controversy in the Biscari Massacre. Word of his responsibility for

the atrocities spread to the United States and three officers with substantial knowledge of the incidents were interviewed by Brigadier General Philip E. Brown, the deputy inspector general, in February 1944. Colonel Forest E. Cookson, commander of the 180th Infantry Regiment to which both West and Compton were assigned to at the time of the massacres indicated that he didn't believe Patton's remarks were meant to encourage killings of the kind committed at Biscari; however, he did say that the General's conduct had violated the Geneva Convention of 1929 and that many captured American soldiers in Sicily had to reason to be grateful the enemy had not received similar orders. Lieutenant Colonel Curtis L. Williams of the Inspector General's Department was ordered to question Patton about the allegations against him. Patton claimed that nothing he said could have been interpreted, "by the wildest stretch of the imagination," as ordering the murder of prisoners of war, which Williams seemed to have accepted, even though the testimony of multiple witnesses demonstrated that Patton had encouraged the killing of enemy troops even if they offered surrender. Major General Everett S. Hughes, a lifelong friend of General Patton, expressed his opinion that Patton had not at any time advocated for the murder of prisoners of war in any way to another old friend, Major General E. L. Peterson, inspector general of the U.S. Army. The investigation of General George S. Patton by the Inspector General's Department went to no further after this correspondence.³⁰

b) No Gun Ri Massacre (July 26, 1950)

i. Timeline of Events

The Korean War (1950 to 1952) has largely remained a "forgotten war," with little attention paid to it by the world public. After World War Two the Korean Peninsula was divided along the 38th parallel between the Soviet-backed government in the North and a U.S.-backed government in the South. On June 25, 1950, war broke out along the parallel as North Korean troops attacked and began to head for Seoul, South Korea. President Harry Truman swiftly committed American forces to a UN military effort sent to the Korean Peninsula. He dubbed the U.S presence as a "police action" and did not seek a formal declaration of war from Congress.³³ Many of the Korean War's bloody battles were mitigated underneath the guise of an anti-communist crusade or a war between good and evil by American political leaders.³⁴ With the

³³ Elsey, G. M. (2016, September 7). US Enters the Korean Conflict. Retrieved from <https://www.archives.gov/education/lessons/korean-conflict>

³⁴ DONG CHOON KIM (2004) Forgotten war, forgotten massacres—the Korean War (1950–1953) as licensed mass killings, *Journal of Genocide Research*, 6:4, 523-544, DOI: [10.1080/1462352042000320592](https://doi.org/10.1080/1462352042000320592)

growing movement of McCarthyism coupled with the communist Red Scare at home, the Truman administration found itself under increasing pressure to not appear soft on communism abroad, thus arguing the U.S. presence as an opportunity to “save” a noncommunist country from invasion by North Korean Soviet-backed communist troops.

The massacre at No Gun Ri was not unique during the Korean War and went essentially unreported until the Associated Press (AP) published their findings of the massacre almost half a century later in September 1999. The American soldiers who were rushed into South Korea were not sufficiently trained; they were poorly equipped, inexperienced, and uneducated about cultural difference and history of the Korean peoples. Within the first two weeks of the American troops’ arrival about 380,000 South Korean civilians fled the North Korean attack south through U.S.-Korean lines on foot.³⁵ American commanders and political leaders feared that these civilian refugee groups were infiltrated with communists. It was under these conditions of ill-preparedness and paranoia that the U.S. Eighth Army, the highest command in Korea, issued a policy to American units on July 25, 1950, with the directive that, “that no refugees would be permitted to cross battle lines at any time, and the movement of all Koreans in groups was to cease immediately.”³⁶

The same day between five and six hundred villagers were evacuated by U.S. troops from their homes in Im Gae Ri and Joo Gok Ri. As the refugees headed south, they reached an American roadblock on July 26 near No Gun Ri where U.S. troops of the 7th Cavalry Regiment of the 1st Cavalry Division stopped them and ordered civilians onto the railroad tracks above the road where the Americans searched their personal belongings for any prohibited items such as weapons or military contraband. Shortly afterwards, although no such items were found, the soldiers ordered an air attack, which dropped bombs while firing machine guns on the refugee civilians atop the tracks.³⁶ Some 150 villagers were killed immediately while those who survived ran and hid for cover under a tunnel beneath the railroad tracks. After interviewing surviving Korean witnesses between 1999 and 2001, the Truth and Reconciliation Commission of the Republic of Korea (TRCK) found that U.S. soldiers then fired into both ends of the tunnel over the next four days, killing an estimated 300 additional civilians.³⁵ On July 29, U.S. troops finally

³⁵ Hanley, C. J. (2010). No Gun Ri- Official Narrative and Inconvenient Truths. *Critical Asian Studies*,42(4), 589-622. doi:14672715.2010.515389

³⁶ CONWAY-LANZ, S. (2005). Beyond No Gun Ri: Refugees and the United States Military in the Korean War. *Diplomatic History*, 29(1), 49-81. Retrieved November 22, 2020, from <http://www.jstor.org/stable/24914784>

pulled away from No Gun Ri and those who had survived by using dead bodies as shields were, ironically, visited by North Korean soldiers offering their condolences over the miserable scene in the tunnel. A survivor of the massacre, Yang Hae-Suk, recalled in an interview, "...if they [North Korean soldiers] did not come to No Gun Ri...if American soldiers stayed there longer, no one would have survived."³⁷

ii. *Applications of International law*

At the time of the No Gun Ri Massacre on July 26, 1950, the Geneva Convention of 1949 (Convention IV Relative to the Protection of Civilian Persons in Time of War) had not yet been in effect, and would not until the following October 1950, a barrier to the application of the Convention to the case. As the previous three Geneva Conventions of 1864, 1906, and 1929 did not include any provisions concerning the protection of civilians, and the United States did not ratify the fourth Convention until 1955, Korean civilians were not protected under the Convention during the war.

Customary international law refers to the many unwritten laws of war. Comment *j* to section 102 of the *Restatement of the Foreign Relations Law of the United States* states that, "customary international law and law made by international agreement have equal authority as international law," meaning that these unwritten rules and norms still hold ground in the theater of international law.³⁸ Customary international has also been recognized in the *United States Army Field Manual*:

"The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces...The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country."³⁹

³⁷ Choi, S. (2008). Silencing Survivors' Narratives: Why Are We "Again" Forgetting the No Gun Ri Story? *Rhetoric and Public Affairs*, 11(3), 367-388. Retrieved November 22, 2020, from <http://www.jstor.org/stable/41940374>

³⁸ Houck, J. (1986). Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions. *The International Lawyer*, 20(4), 1361-1390. Retrieved from <http://www.jstor.org/stable/40706792>

³⁹ United States, Department of the Army Field Manual, Department of the Army. (1956). *The Law of Land Warfare FM27-10*. Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf

The five basic principles of the so-called ethics war include: 1) military necessity; 2) unnecessary suffering (humanity); 3) proportionality; 4) distinction; and 5) chivalry.⁴⁰ While U.S. military officials may have argued the military necessity in the case of the No Gun Ri Massacre due to fear of North Korean enemies disguised among Southern Korean civilian refugee groups, the military necessity does not justify such an atrocious and unremitting attack, and also violates the principle of humanity.

The massacre is also a direct violation of the 92nd Article of War (*see pp. 11*), “Murder-Rape,” which the military justice system operated under until May 31, 1951. The application of the IMT Nuremberg Charter is also relevant in the case of No Gun Ri by providing the definitions of three major crimes under international law:

- (a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁶

The Charter also set the precedent that the violation of previously established international legal principles can be interpreted as an international crime. The provisions of the Hague Conventions of 1899 and 1907 are also worth considering as relevant applications to No Gun Ri, as they are

⁴⁰ Curtis E. Lemay Center for Doctrine Development and Education. (2019, March 15). Basic Principles of the Law of War and their Targeting Implications. Retrieved from https://www.doctrine.af.mil/Portals/61/documents/Annex_3-60/3-60-D33-Target-LOAC.pdf

considered to be the embodiment of customary international law, meaning that Korea was under their protection.⁴¹ Important to note is the Preamble of the Hague Conventions which deals with the protection of “populations” or civilians and can be used as the legal basis for applying the Conventions to No Gun Ri:⁴²

“...these provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations...populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience...”⁴³

The United States ratified both of the conventions in 1899.

iii. Consequences and Outcomes

Not only did the 1999 Associated Press (AP) investigative report prove that the No Gun Ri massacre occurred and implied outright and deliberate war crimes, it also brought forth at least 16 documents that revealed orders from high ranking U.S. officers authorizing the shooting (i.e. murder) of refugees during the first few months of the war.⁴⁴ South Korea’s Truth and Reconciliation Commission has investigated over 200 alleged cases of civilian massacres committed by U.S. soldiers during the Korean War while the U.S government has only investigated one: the No Gun Ri massacre following the release of the AP report, a Department of the Army Inspector General inquiry which exonerated the U.S. military of any wrongdoing.³⁵ After years of dismissing allegations, the U.S. Department of Defense released its *No Gun Ri Review (NGRR)* on January 11, 2001 after a year-long investigation. While there were a

⁴¹ ICRC. (n.d.). Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Retrieved from <https://ihl-databases.icrc.org/ihl/INTRO/195>

⁴² Baik, T. (2012). A War Crime against an Ally's Civilians: E No Gun Ri Massacre. *Notre Dame Journal of Law, Ethics & Public Policy*, 15(2), symposium on international security, 486-490. Retrieved from <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1319&context=ndjlepp>

⁴³ ICRC. (n.d.). Preamble Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument>

⁴⁴ Hanley, C. J. (2015). In the Face of American Amnesia, The Grim Truths of No Gun Ri Find a Home. *The Asia-Pacific Journal*, 13(10), 4th ser. Retrieved from <https://apjif.org/2015/13/9/Charles-J.-Hanley/4294.html>

multitude of excluded documents and contradictions in the U.S. review in comparison to the AP report, perhaps one of the most important was under findings of Part G of Section VI:

- *Key Issue 7: Issuance of Order to Fire on Refugees:* "...U.S. Review Team concluded that U.S. commanders did not issue oral or written orders to shoot and kill Korean civilians during the last week of July 1950 in the vicinity of No Gun Ri... Although the U.S. Review Team found four references (entry in the 8th Cavalry Regiment Message Log, 25th Infantry Division Commander's order, Colonel Rogers' memorandum, and an extract from the U.S. Navy's Aircraft Carrier Valley Forge Activity Summary) discussing actions against civilians, it did not find evidence of an order given to soldiers by a U.S. commander, orally or in writing, to kill Korean civilians in the vicinity of No Gun Ri in the last week of July 1950."⁴⁵

The U.S NGRR failed to include documents on the issuance of orders to fire upon refugees: a letter dated July 26, 1950, from John J. Muccio, then U.S. ambassador to South Korea, to Dean Rusk, the then assistant secretary of state for Far Eastern Affairs informed him that the U.S. Army had adopted a policy of shooting approaching refugees. This suppressed document was discovered in 2005 by American historian Sahr Conway-Lanz among the Army investigation's own processed files at the National Archives.³⁸ Muccio warns that the refugee problem had "developed aspects of a serious and even critical military nature." He was writing "in view of the possibility of repercussions in the United States," due to the use of such deadly tactics.⁴⁶ He then went on to inform the State Department of decisions made at the meeting on July 25, 1950 arranged at the request of the Eighth Army's between the Office of the Home Minister, the administration and personnel section (G-1), the intelligence section (G-2), the provost marshal, the Home and Social Affairs ministries, and the director of the National Police, namely that:

1. "Leaflet drops will be made north of U.S. lines warning the people not to proceed south, that they risk being fired upon if they do so. If refugees do appear from north of U.S. lines they will receive warning shots, and if they then persist in advancing they will be shot."⁴⁰

⁴⁵ United States of America, Department of the Army Inspector General, Department of Defense. (2001, January). *No Gun Ri Review*. Retrieved from <https://permanent.fdlp.gov/websites/armymil/www.army.mil/nogunri/BookCoverJan01Summary.pdf>

⁴⁶ Muccio, J. J. (1950, July 26). [Foreign Service Correspondence from Ambassador Muccio to Assistant Secretary Dean Rusk]. Retrieved from https://upload.wikimedia.org/wikipedia/commons/c/c2/No_Gun_Ri_06a_-_Muccio_letter_26_July_-_Decision_to_shoot_refugees.png

This additional piece of evidence that the Pentagon's report *conveniently* left out makes their claim that U.S. commanders did not issue orders to shoot upon refugees in the vicinity of No Gun Ri hard to sustain. It presents clear evidence that the order to shoot refugees was widespread across American units up and down the chain of command. Further testimony from American veterans supports the widespread policy of shooting and air bombing civilians. In interviews with U.S. Air Force pilots during the war for the AP report, Air Force retiree Herman Son of St. Louis said, "We were concerned, very concerned... it was by no means clear on the surface who these people were."⁴⁷

The Pentagon's report offered a different version of the No Gun Ri Massacre than the one provided by Korean witnesses but did ultimately, though vaguely, conclude that a number of civilians were killed in the vicinity of No Gun Ri in July 1950. On January 11, 2001, shortly after the U.S. report was released, President Clinton issued a brief statement expressing his "deep regret" for the Korean lives lost at No Gun Ri, offering his condolences but maintaining that, "we have been unable to determine precisely the events that occurred at No Gun Ri."⁴⁸ The Clinton administration offered no compensation to the families whose lives were gruesomely torn apart, and instead offered \$4 million for a monument to be built at No Gun Ri and a scholarship fund which the survivors' committee rejected. The United States never assumed full responsibility for the massacre.

c) *My Lai Massacre (March 16, 1968)*

i. Timeline of Events

Though it was by no means the only war crime committed against the Vietnamese people during the nearly 20-year war, the My Lai Massacre is one of the most horrendous acts unprovoked murder by U.S. forces of unarmed civilians during the Vietnam War. Troops of the Charlie Company, a unit of the 11th Infantry Brigade commanded by Lieutenant William Calley and under Task Force (TF) Barker, an Americal Division commanded by Lieutenant Colonel Frank A. Barker, had been assigned to the Song My village in the Quang Ngai Province. This was an area where the National Liberation Front of Southern Vietnam (commonly known as the

⁴⁷ Choe, S., Hanley, C. J., & Mendoza, M. (1999, September 29). The 2000 Pulitzer Prize Winner in Investigative Reporting, Associated Press. Retrieved from <https://www.pulitzer.org/winners/sang-hun-choe-charles-j-hanley-and-martha-mendoza>

⁴⁸ Clinton, B. (2001, January 11). No Gun Ri: Clinton's Statement. Retrieved from https://www.pbs.org/newshour/politics/asia-jan-june01-clinton_01-11

Viet Cong), allies to the communist government in Northern Vietnam fighting the war against South Vietnam and the U.S., was known to fight with land mines, booby traps, and hit-and-run attacks. After suffering substantial casualties two days prior, the 11th Brigade commander, Colonel Oran K. Henderson, urged commanders of the TF Barker to press forward aggressively and eliminate the 48th Viet Cong Local Force Battalion. Following these remarks, Barker addressed his gathered troops and issued an operations order. According to the “Department of the Army Review of the Preliminary Investigations into the My Lai Incident” (the Peers Inquiry), the company commanders, including Lt. William Calley, were told that most of the civilian populations of Song My were Viet Cong sympathizers and Barker ordered the commanders to “burn houses, kill the livestock, destroy the foodstuffs and perhaps close the wells.”⁴⁹ Following these words, Captain Ernest L. Medina, Lt. Calley’s superior officer, embellished Baker’s orders in a subsequent briefing to his troops who were made to believe that only the enemy would be present in My Lai the following morning and that they were to be absolutely destroyed.⁴⁹

The assault on My Lai began the morning of March 16, 1968, with artillery fire both on the ground and from helicopters, launching rockets and employing machine gun fire, killing Vietnamese civilians who attempted to flee the area as the U.S. soldiers entered My Lai.⁵⁰ Although, “no resistance was encountered at this time or later in the day,”⁴⁹ and the Viet Cong battalion they sought was not present, Charlie Company proceeded to destroy the defenseless village, murdering over 500 Vietnamese civilians, women, men, and children in the process.⁵¹ Members of the platoons slaughtered everyone they encountered, young and old, and some of the GIs raped or gang-raped women and girls, sexually mutilated several of the victims, and mutilated other corpses.⁵⁰ In a letter written by Vietnam veteran Ronald Ridenhour and sent to President Nixon, senior officials of the State Department and Pentagon, and members of

⁴⁹ United States, Department of Defense, Department of the Army. (1970). *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (Peer's Inquiry)* (Vol. 1, pp. 2-1-2-13). Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf

⁵⁰ Hagopian, P. (2014). Chapter Four: “Uncharted Legal Waters” The My Lai Massacre and the Jordan Memorandum. In *American Immunity: War Crimes and the Limits of International Law*. University of Massachusetts Press.

⁵¹ Moser, R., & Lynch, T. J. (2013). My Lai Massacre. In P. S. Boyer (Ed.), *Oxford encyclopedia of American history: The Oxford encyclopedia of American military and diplomatic history*. Oxford University Press, Inc. Credo Reference:
http://uri.idm.oclc.org/login?url=https://search.credoreference.com/content/entry/oupomad/my_lai_massacre/0?institutionId=4949

Congress in the spring of 1969, the young GI recounts eyewitness accounts he gathered from other soldiers while still on active duty in Vietnam about the My Lai Massacre:

“I ran into Sargent Larry La Croix...He had been a witness of Kally’s [Lt. William Calley] gunning down of at least three separate groups of villagers. ‘It was terrible. They were slaughtering the villagers like so many sheep.’ Kally’s men were dragging people out of bunkers...putting them together in a group...men, women, and children of all ages. As soon as he felt the group was big enough, Kally ordered an M-60 (machine-gun) set up and the people killed...Kally ordered Pfc Torres to man the machine-gun and open fire...This Torres did, but...he refused to fire again. After ordering Torres to recommence firing several times, Lieutenant Kally took over...”⁵²

Ronald Ridenhour’s report and eventual eloquent and effective witness testimony would prompt an official investigation and legal proceedings against suspects.

ii. *Applications of International law*

Before considering the application of international rules to the My Lai Massacre, it is important to understand the jurisdictional limitations within the United States military court apparatus as the primary reason for the government’s legal response to the massacre. While it is unclear exactly how many of the 105 members of Charlie Company participated in the slaughter, only a handful were indicted, and a single commander convicted. The primary reason was the 1955 *United States ex rel Toth v. Quarles* Supreme Court case which found Article 3(a) of the Uniform Code of Military Justice (UCMJ) unconstitutional.⁵³ Article 3, “Jurisdiction to Try Certain Personnel”, section (a) of the UCMJ stated that:

- “Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this Code, any offense against this Code may be retained in such status or, whether or not such status has terminated, placed in an active duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such an action.”⁵⁴

⁵² Ronald Ridenhour Letter. United States, Department of Defense, Department of the Army. (1970). *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (Peer's Inquiry)*(Vol. 1, pp. 1-7-1-11). Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf

⁵³ *United States ex rel. Toth v. Quarles* (November 6, 1955) (Justia US Supreme Court, Dist. file). Retrieved from <https://supreme.justia.com/cases/federal/us/350/11/>

⁵⁴ United States, Committee on a Uniform Code of Military Justice, The Secretary of Defense. (1949). *Uniform Code of Military Justice* (p. 7). Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf

Before being found unconstitutional, the section allowed for continued military jurisdiction over discharged veterans, enabling courts martial to try ex-servicemen found to have committed a serious crime during their service outside of the United States. In the case of My Lai, this meant that only those who still had ties with the military could be prosecuted by the military court system and that former soldiers could essentially get away with murder.

The principles of the Nuremberg Charter are important when applying international rules to the My Lai Massacre. The acts of murder, rape, assault, and maiming inflicted upon the hundreds of civilian victims at My Lai are in clear violation of the “war crimes” section under Article 6 of the Charter:

- (a) “*War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;”¹⁶

More than 20 years before My Lai, on December 11, 1946, the UN General Assembly unanimously passed Resolution 95(I) which affirmed “the principles of international law recognized by the Charter of the Nuremberg Trial and the judgement of the Tribunal,” setting the precedent that the violation of previously established international legal principles could be interpreted as a violation of international laws or customs.⁵⁵ While judicial precedents are not clearly binding in international law, the United States had demonstrated its intent to be bound by the Nuremberg principles through its active participation in the tribunal and in its approval of the UN Resolution 95(I). Lastly, the defense of “military necessity,” as outlined in the war crimes section of the Nuremberg Charter, is not applicable to the My Lai massacre because of the U.S. Government’s own indictments, which allege the violation of the UCMJ, and thus invalidated.

The Geneva Convention of 1949 (Convention IV Relative to the Protection of Civilian Persons in Time of War) was applicable at the time of My Lai and it is evident that the massacre constituted a grave breach of the Convention, specifically Articles 27 and 32 (*see pp. 9-10*),

⁵⁵ UN General Assembly. (11 December 1946). *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, A/RES/95. Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=955674CD9E2A80AFC12563CD00519DD1>

which entitles persons to respect, honour, humane treatment, protection against violence, and prohibits the causing of physical suffering and extermination which applies to torture, murder, punishments, brutality, mutilation, and more.⁵⁶

Also relevant at the time was the recently approved UN International Covenants on Human Rights, which consists of both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. The latter of which is relevant to the My Lai Massacre. Together with the Universal Declaration of Human Rights, the Covenants form the International Bill of Human Rights. The International Covenant on Civil and Political Rights was adopted and opened for signature and ratification by the GA resolution 2200A (XXI) on December 16, 1966. Under the covenant, civilians are entitled to the inherent right to life protected by the law while also prohibiting torture, and cruel, inhuman or degrading and unusual punishment.⁵⁶ However, the United States did not sign the Covenant until 1977, and only ratified it in 1992.

iii. Consequences and Outcomes

The horrors at My Lai were successfully covered up by the U.S. Army until Ridenhour came forward with his letter. *Stars and Stripes* the Army publication originally reported, “a bloody day-long battle with Communists.”⁵⁷ Army officials claimed to have killed 128 Viet Cong during the operation and Captain Medina maintained that “only” 20 to 28 civilians had been killed by artillery gunfire. Two investigations into the Massacre ensued: the Army’s original investigation and then the Peers Inquiry, which was a special legislative investigatory committee commissioned to investigate the adequacy of the Army’s initial investigation under the direction of Lieutenant General William Peers. The initial investigation of the My Lai operation was conducted by Colonel Oran K. Henderson under the orders of Brigadier General George H. Young, who was the executive officer of Americal’s Division. In his report, Col. Henderson affirmed that all persons living in the My Lai area were considered to be Viet Cong or Viet Cong sympathizers and concluded that 20 noncombatants were inadvertently killed, dismissing the allegations that U.S. troops killed between 400 and 500 civilians as Communist propaganda

⁵⁶ General Assembly United Nations. (1966). *International Covenant on Civil and Political Rights* (Resolution 2200A (XXI)). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁵⁷ Russell, K. (1970). My Lai Massacre: The Need for an International Investigation. *California Law Review*, 58(3), 703-729. doi:10.2307/3479613. Retrieved from <https://www.jstor.org/stable/3479613>

against the United States.⁵⁸ His investigation maintained that at no time were civilians rounded up and killed by U.S. soldiers, a contention that would later be proved to be true by corroborating eye witness testimony.

After an extensive inquiry into the Army and Col. Henderson's handling of the case, the Peers Inquiry concluded that:

1. "During the period of 16-19 March 1968, troops of Task Force Barker massacred a large number of Vietnamese nationals in the Village of Son My;
2. Knowledge as to the extent of the incident existed at company level, at least among the key staff officers and commander at the Task Force Barker level, and at the 11th Brigade command level;
3. Efforts at the Americal Division command level to conceal information concerning what was probably believed to be the killing of 20-28 civilians actually resulted in the suppression of a war crime of far greater magnitude;
4. The commander of the 11th Brigade, upon learning that a war crime had probably been committed, deliberately set out to conceal the fact from proper authority and to deceive his commander concerning the matter;
5. Investigations concerning the incident conducted within the Americal Division were superficial and misleading and not subjected to substantive review;
6. Efforts were made at every level of command from company to division to withhold and suppress information concerning the incident at Son My;
7. Failure of Americal Division headquarters personnel to act on information received from GVN/ARVN officials served to suppress effectively information concerning the Son My incident;
8. Efforts of the Americal Division to suppress and withhold information were assisted by US officers serving in advisory positions with Vietnamese agencies."⁴⁹

The report could not determine the exact number of Vietnamese civilians murdered but acknowledge that it was at least 175 and conceded that the real number may exceed 400. The Peers report ultimately recommended the names of members of the Army their investigation had determined to be culpable be referred to their court-martial authorities for possible disciplinary action. Enough evidence had previously been gathered to charge Lt. William Calley with multiple murders on September 5, 1969, one day before he was due to be discharged from the Army.⁵⁹ On March 17, 1970, after the release of the Peers investigation, the Army took a significant step in filing charges against 13 officers for violating one or more provisions of the

⁵⁸ Oran K. Henderson *My Lai Operation Report of Investigation* (Rep.). (1968). San Francisco, CA. Retrieved from http://www.digitalhistory.uh.edu/active_learning/explorations/vietnam/henderson.cfm

⁵⁹ Belknap, M.R. (2002). *Chronology, The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*. Lawrence: University Press of Kansas. Retrieved from <https://muse.jhu.edu/book/55581>

Uniform Code of Military Justice by failure to investigate and report the My Lai massacre accurately, including Captain Medina.⁵³ With the strong media attention that the case received, government officials attempted to characterize the atrocity as wholly unrepresentative of military operations and the Nixon Administration characterized the slaughter as an “isolated incident,”⁵³ although a number of Vietnam veterans have come forward reporting other instances of brutality against civilians.⁶⁰ In the end only one soldier was convicted, the rest were acquitted or found not guilty in the Army court martial system. On March 31, Lt. William Calley was sentenced to life imprisonment with hard labor. However, after public outcry against the verdict, believing that Calley was being used as a scapegoat, President Nixon ordered that Calley be confined to his apartment while he appealed the conviction, which resulted in his life sentence being reduced to twenty years. Calley was transferred to multiple different locations of confinement before District Judge J. Robert Elliot orders Calley released from Fort Leavenworth September 25, 1974.⁵⁵

d) *Bagram Torture and Abuse (2001-2014)*

i. Timeline of Events

On September 11, 2001, the al-Qaeda terrorist attacks on the United States prompted congress to pass the Authorization to Use Military Force (AUMF) a week later on September 18. The Act gave the president the authority “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred...,” which included the Taliban regime in Afghanistan that had been sheltering Osama bin Laden, al-Qaeda’s leader.⁶¹ The now nearly 20-year Afghanistan War, began less than a month later on October 7, 2001, when President Bush launched Operation Enduring Freedom. In Afghanistan, the Parwan Detention Facility situated next to the Bagram Air Base, an abandoned Soviet base, is the country’s main military prison. Initially established by the United States under George W. Bush in 2001, then known as the Bagram Theater Internment Facility (BTIF) and commonly referred to as Bagram Prison, the facility was

⁶⁰ Short, W., & Seidenberg, W. (2019). *Waging Peace in Vietnam: US Soldiers and Veterans Who Opposed the War*(Carver R., Cortright D., & Doherty B., Eds.). NYU Press. doi: 10.2307/j.ctv12pnnzs

⁶¹ U.S. Cong. (2001). *PUBLIC LAW 107-40—SEPT. 18, 2001- AUMF*[Cong. Res. 115 STAT. 224 from 107th Cong.]. Washington D.C. Retrieved from <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

eventually transferred from the U.S. Armed Forces to the Afghan government on December 11, 2014.⁶²

Twelve years earlier, on February 7, 2002, President Bush, citing the AUMF, issued a Presidential memo on the subject of the humane treatment of al-Qaeda and Taliban detainees. The memo states that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva,”; furthermore, “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.”⁶³ However, at the end of the memo, Bush reinforces the United States’ commitment to humane treatment and support of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War. He also wrote that US Armed Forces would continue to treat detainees humanely “to the extent appropriate and consistent with military necessity,” despite having just declared that the protections extended by the Geneva Convention would not apply. Labeling detainees as “unlawful enemy combatants” allowed the government to claim detainees did not have to be regarded as combatants, nor as civilians under the 1949 Geneva Convention. The message, as it moved down the military chain of command was not one of humane treatment, but one that provided official endorsement for harsh, violent, and degrading interrogation methods, and the presumption that detainees were guilty of valuable information.

By the end of President Bush’s second term, at least 2,000 people had been detained at Bagram prison, including most of the 779 prisoners who would end up at Guantánamo Bay, the U.S. detention facility in Cuba, known as the “legal black hole” and, for many, an international symbol of injustice because of its illegal policies in the treatment of prisoners, including the denial of habeas corpus, abusive interrogation techniques, and indefinite detention, features which Bagram Prison shared.⁶⁴ As the primary screening facility for the so-called war on terror,

⁶² Graham-Harrison, E. (2014, December 11). US finally closes detention facility at Bagram airbase in Afghanistan. Retrieved from <https://www.theguardian.com/world/2014/dec/11/afghanistan-us-bagram-torture-prison>

⁶³ Bush, G. W. (2002, February 7). *Presidential Memo of Feb. 7, 2002, Humane Treatment of Al Qaeda and Taliban Detainees*(United States, Department of State, The White House). Retrieved from <https://www.aclu.org/legal-document/presidential-memo-feb-7-2002-humane-treatment-al-qaeda-and-taliban-detainees>

⁶⁴ Hajjar, L. (2011). Bagram, Obama's Other Gitmo. *Middle East Report*, (260), 8-17. Retrieved December 3, 2020, from <http://www.jstor.org/stable/41408015>

some Bagram detainees had been arrested, not only from the Middle East, but also from Southeast Asia, Africa, Europe, and those who had been transferred from CIA “black sites.” By mid-2006, more than 600 were detained in Bagram prison.⁶⁴ Many of the detainees brought to Bagram were local men who had been arrested during U.S. raids on villages. Brutality between 2002 and 2005 became routine and extreme. In August 2002, Bagram Prison was turned over to the 519th Military Intelligence Battalion from Fort Bragg, North Carolina, bringing with them a new head of the interrogation unit, Captain Carolyn Wood.⁶⁵ Other soldiers at the detention center included reservists from the 377th Military Police Company under the command of Captain Christopher M. Beiring. Wood rewrote the previous group’s interrogation policy and added nine techniques which had not been approved by military doctrines, nor were they included in Army field manuals. These included the use of dogs, stress positions, sleep deprivation, sensory deprivation and other techniques such as the removal of clothing and use of phobias.⁶⁵ Four months after the 519th Battalion and Wood took over Bagram Prison, two detainees died in custody, 30-year old Mullah Habibullah and 22-year old Dilawar, a taxi driver. The deaths occurred in separate isolation cells, both victims having been chained to the ceiling and beaten by blunt force to the legs, according to Pentagon officials.⁶⁶ Habibullah died on December 4 of a pulmonary embolism caused by blood clots that had formed in his legs due to the beatings and six days later, Dilawar died from a heart attack also attributed to the brutal beatings he endured.

Military intelligence officers were aware of the extreme abuses carried out at the time but failed to stop and report them. Shortly after the deaths of Habibullah and Dilawar, military coroners concluded that both were the result of blunt force trauma to the legs. Autopsies ruled the deaths as homicide.⁶⁷ Despite these findings, Army investigators recommended the cases be closed without levying any criminal charges, even after other soldiers at Bagram confirmed that military guards and interrogators had repeatedly struck and beat both men while they were shackled. Crucial witnesses were not interviewed, and senior military intelligence officials failed

⁶⁵ Bazelon, E. (2005, March 01). From Bagram to Abu Ghraib. Retrieved from <https://www.motherjones.com/politics/2005/03/bagram-abu-ghraib/>

⁶⁶ Shanker, T. (2004, October 15). U.S. Army Inquiry Implicates 28 Soldiers in Deaths of 2 Afghan Detainees. Retrieved from <https://www.nytimes.com/2004/10/15/politics/us-army-inquiry-implicates-28-soldiers-in-deaths-of-2-afghan.html>

⁶⁷ Golden, T. (2005, May 22). Army Faltered in Investigating Detainee Abuse. Retrieved from <https://www.nytimes.com/2005/05/22/world/asia/army-faltered-in-investigating-detainee-abuse.html>

to file reports which are mandatory in cases of suspected misconduct.⁶⁷ The brutal mistreatment and torture that Habibullah and Dilawar were forced to endure were not isolated acts committed by U.S. Armed personnel at the prison, nor unique throughout the war. Afghan detainees from Bagram have described being constantly shackled, forced to kneel, or stay in painful positions for extended periods of time, held in detention for weeks on end, intentionally kept awake, and being doused with freezing water.⁶⁸

In July 2010, the Open Society Foundations published a report on their research into the conditions of confinement at Bagram Prison after allegations of abusive mistreatment and poor living conditions were being widely reported in the media. Based on the interviews conducted, researchers found that detainees were subjected to numbers of inhuman treatments including: exposure to excessive cold; inappropriate and inadequate food; inadequate bedding and blanketing; excessive exposure to light; disorientation and lack of natural light; sleep deprivation due to an accumulation of circumstances; denial of religious observances; lack of physical exercise; and nakedness upon arrival.⁶⁹ Similar allegations were made of other U.S. military bases and detention facilities in Kandahar and the cities of Jalalabad and Asadabad. Some interrogators and other U.S. military personnel would later be transferred to Iraq and assigned to duty in the infamous Abu Ghraib prison.

ii. Applications of International law

While operatives of al-Qaeda and the Taliban show little to no willingness or intention to abide by international humanitarian, law, standards, or principles — and have committed gross violations of the laws of war and Afghan law — their abuses, no matter how abhorrent, do not justify the violations committed by the United States Armed Forces. Rule 140 of the Geneva Convention, which has been established as a norm of customary international law in both international and non-international armed conflict, states that the High Contracting Parties have “the obligation to respect and ensure respect for international humanitarian law does not depend of reciprocity.”⁷⁰

⁶⁸ Sifton, J. (2016, November 08). "Enduring Freedom". Retrieved from

<https://www.hrw.org/report/2004/03/07/enduring-freedom/abuses-us-forces-afghanistan>

⁶⁹ Horowitz, J. (2010, October 14). *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base* (Rep. No. Policy Brief No. 3). Retrieved <https://www.opensocietyfoundations.org/publications/confinement-conditions-us-screening-facility-bagram-air-base>

⁷⁰Rule 140. Principle of Reciprocity. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html>

On February 7, 2002, White House Press Secretary Ari Fleischer released a statement clarifying the administration's view on the Geneva Convention and the status of Taliban and al-Qaeda detainees in Afghanistan: President Bush had decided that the protections of the Geneva Convention would apply to the Taliban, but not to the al-Qaeda, detainees.

“Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention...however, Taliban detainees are not entitled to POW [Prisoner of War] status...Al Qaeda is an international terrorist group...therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.”⁷¹

The White House statement meant that the Geneva Convention does not cover every circumstance in which people may be captured or detained by U.S. military forces. This position of not extending the protections of the Geneva Convention to al-Qaeda is at odds with the basic principles of the convention. The Bush Administration's argument that the U.S. government does not recognize the Taliban as legitimate is immaterial to the treatment of their fighters as well as those of its al-Qaeda allies, together with whom they effectively controlled almost 90 percent of Afghanistan territory because the Afghani government, which is a High Contracting Party, recognizes it as legitimate.⁷²

U.S. “night raids” on suspected insurgent locations killed dozens of civilians and often apprehended suspects who were innocent. In 2009, a 700-page report by Major General Douglas Stone on Bagram Prison found that 400 of the 600 detainees were innocent and posed no threat to U.S. or Afghan forces. Many had been detained for several years on no criminal charges and without trial.⁷³ This abrogation of justice and human rights calls into question how many of the estimated 2,000 detainees held at Bagram by the end of George Bush's second term had also been innocent. Within his first year in office, President Barack Obama informed the International Committee of the Red Cross (ICRC) of a second secret prison located at the Bagram airbase. The

⁷¹ Fleischer, A. (2002, February 7). White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees (February 7, 2002). Retrieved from <https://2009-2017.state.gov/s/1/38727.htm>

⁷² Terry, J. (2003). XXVI- Al Qaeda And Taliban Detainees-An Examination Of Legal Rights And Appropriate Treatment. *International Law Studies*, 79. Retrieved from <https://www.hsdl.org/?view&did=449304>

⁷³ Bowman, T., Inskip, S., & Montagne, R. (2009, August 20). U.S. Gen. Urges Release Of Bagram's Detainees. Retrieved from <https://www.npr.org/templates/story/story.php?storyId=112051193>

existence of this CIA “black jail,” where detainees were discreetly held without oversight of the ICRC as required by the Geneva Convention, had initially been denied by the Department of Defense.⁷⁴ Consistent testimonies of detainees who say they had been held in the “black jail” revealed stories of outright abuse, allegations which the U.S. has denied.

While wanton violence by the Taliban and al-Qaeda against innocent Afghan civilians are irrefutable and inexcusable. The Bush Administration’s crafted legal arguments contending that the U.S. should be exempt from human rights requirements of the Geneva Convention and the Universal Declaration of Human Rights in addition to federal anti-torture laws are also morally reprehensible. In 2002, the Deputy Assistant Attorney General drafted a set of legal memoranda, known as the “Torture Memos,” that were signed by Assistant Attorney General Jay S. Bybee. The memos consisted of an extensive interpretation of executive authority and stated that acts largely regarded as torture could be considered legally permissible in the context of the “war on terror.” This systematic torture of detainees used by the CIA and Department of Defense became known by the euphemism as “enhance interrogation techniques”; these so-called techniques included mental and physical torment or coercion in the forms of prolonged sleep deprivation, waterboarding, and binding stress positions.⁷⁵ This has been a contentious subject among legal and human rights professionals, who have argued that the convention does indeed apply to all detainees in Afghanistan. Even if detainees were not able to rely upon the Geneva Convention, they could be entitled to the rights outlined in the International Covenant on Civil and Political Rights (ICCPR), generally applied to situations in which the Geneva Convention does not. Under the covenant, civilians are entitled to the inherent right to life protected by the law while also prohibiting torture, and cruel, inhuman or degrading and unusual punishment.⁵⁶ The United States ratified the Covenant in 1992.

iii. *Consequences and Outcomes*

In *The Terror Presidency*, published in 2007, former Assistant Attorney General of the DOJ’s Office of Legal Counsel (OLC) Jack Goldsmith, who succeeded Assistant Attorney Jay S. Bybee, described the message of the conclusions reached in the Torture Memos:

⁷⁴ Fischer, B., & Graves, L. (2011). *International Law and the War on Terror* [Scholarly project]. In *Brown University Watson Institute for International & Public Affairs*. Retrieved from <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2011/International%20Law%20and%20the%20War%20on%20Terror.pdf>

⁷⁵ Yoo, J. C. (2003, March 14). *Military Interrogation Of Alien Unlawful Combatants Held Outside the United States*(U.S. Department of Justice, Office of the Deputy Assistant Attorney General Legal Counsel). Retrieved from https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf

“Violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under the color of presidential authority.”⁷⁶

The OLC had interpreted what constitutes “torture” extremely narrowly, determining that in order for inflicted pain to be considered torture, it must be “equivalent in intensity to the pain accompanying serious injury, such as organ failure, impairment of bodily function, or even death.”⁷⁵

On October 14, 2004, an Army Criminal Investigation Command implicated 28 active duty and reserve soldiers in the deaths of Mullah Habibullah and Dilawar at Bagram Prison. The soldiers investigated came from two units that had been deployed at Bagram, the Army Reserve 377th Military Police Company and the active-duty unit Company A of the 519th Military Intelligence Battalion.⁶⁶ Fifteen soldiers were charged — the outcomes of this investigation are as follow:

- Sergeant (Sgt.) James P. Boland of the 377th MP unit was charged with maltreatment, dereliction of duty and assault. All charges were later dropped, Boland was given a letter of reprimand, and he eventually left the Army;
- Specialist (Spc.) Brian Cammack (377th MP) pled guilty to assault and two counts of false official statements. After being sentenced to three months in prison and reduced to rank of private, he was given a bad-conduct discharge;
- Private First Class (Pfc.) Willie V. Brand (377th MP) was convicted of assault, maiming, maltreatment, and a false official statement. His rank was reduced to private;
- Sgt. Anthony Morden (377th MP) pled guilty to assault and two counts of dereliction of duty. He was sentenced to 75 days in prison, reduced to rank of private and given a bad conduct discharge;
- Sgt. Christopher W. Greatorex (377th MP), despite another Army sergeant testifying that he saw Greatorex repeatedly hitting Habibullah in the knees⁷⁷, was acquitted on charges of on assault, maltreatment, and a false official statement;
- Sgt. Darin M. Broady (377th MP), accused of beating Habibullah alongside Greatorex, was acquitted of charges of assault, maltreatment, and a false official statement;

⁷⁶ Goldsmith, J. (2007). Torture and the Dilemmas of Presidential Lawyering. In *The Terror Presidency: Law and Judgment Inside the Bush Administration* (pp. 143-144). W.W. Norton & Company. Retrieved from <https://books.google.com/books>

⁷⁷ Buell, C. (2005, September 07). Army reservist acquitted of Afghanistan abuse charges. Retrieved from <https://www.jurist.org/news/2005/09/army-reservist-acquitted-of/>

- Captain Christopher M. Beiring, commander of the 377th MP unit, before the Army dropped its case against him,⁷⁸ had been charged with dereliction of duty and making a false official statement;
- Staff Sgt. Brian L. Doyle (377th MP) was charged with maltreatment and dereliction of duty before being acquitted;
- Sgt. Duane M. Grubb (377th MP) was acquitted of charges of assault, maltreatment, and making a false official statement by an all-male jury of four officers and four enlisted men who made their decision in about 30 minutes⁷⁹;
- Sgt. Alan J. Driver (377th MP), charged alongside Grubb, was also cleared of charges;
- Spc. Nathan A. Jones (377th MP), charged with assault, maltreatment, and a false official statement, also had all charges dropped;
- Spc. Glendale C. Walls (519th MI Battalion) pled guilty to charges of assault and dereliction of duty. He was sentenced to two months in prison, reduced to the rank of private, and discharged on bad conduct;
- Sgt. Selena M. Salcedo (519th MI Battalion) pled guilty to assault and dereliction of duty. She was reduced in rank, fined \$250 a month for four months and given a letter of reprimand;
- Sgt. Joshua Claus (519th MI Battalion) pled guilty to charges of maltreatment and assault. He was sentenced to five months in prison;
- And in the final trial on June 1, 2006, after a jury made up of five senior sergeants, two lieutenant colonels, and two colonels had deliberated for less than 30 minutes, Pfc. Damien M. Corsetti (519th MI Battalion), head of his interrogation platoon and nicknamed the “King of Torture,”⁸⁰ was acquitted of beating and sexually humiliating a detainee.⁸¹

In the vast majority of abuse cases identified by military investigators, weak non-judicial disciplinary measures were often used instead of a criminal court martial. Most of those who were brought to court either received prison sentences of less than a year or non-jail punishments such as discharges or rank-reduction. These half-hearted investigations and, in effect, slaps-on-the-wrist punishments demonstrate, according to Tom Malinowski, the Washington advocacy director for Human Rights Watch, that the “government seems more interested in managing the

⁷⁸ Golden, T. (2006, January 08). Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates. Retrieved December 06, 2020, from <https://www.nytimes.com/2006/01/08/world/asia/case-dropped-against-us-officer-in-beating-deaths-of-afghan.html>

⁷⁹ Caldwell, A. (2016, May 19). Jury clears Army sergeant of abuse in Afghanistan: Associated Press. Retrieved from <https://www.mrt.com/news/article/Jury-clears-Army-sergeant-of-abuse-in-Afghanistan-7696970.php>

⁸⁰ Golden, T. (2006, June 02). In Final Trial, G.I. Is Acquitted of Abusing Jailed Afghans. Retrieved from <https://www.nytimes.com/2006/06/02/world/asia/02bagram.html>

⁸¹ The Associated Press. (2005, December 20). A look at soldiers accused in Afghanistan abuse investigation. Retrieved from <https://www.mrt.com/news/article/A-look-at-soldiers-accused-in-Afghanistan-abuse-7691043.php>

detainee abuse scandal than in addressing the underlying problems that caused it.”⁸² The underlying issue is the failure of accountability of abuse at the command level. The majority of military personnel investigated for abuse have been enlisted personnel, not the supervising military officers they take orders from. There must be accountability through the top of the military chain of command, without which torture and abuses will not be deterred.

In October 2007, the Military Commission Act of 2006 (MCA, HR-6166) was signed into public law by President Bush. The Act’s stated purpose, “to authorize trial by military commission for violations of the law of war and for other purposes,” trivializes the sweeping provisions of the law which were intended to shelter President Bush and his administration from the legal consequences of their actions in Afghanistan. The MCA was in large part a retaliation on the part of the Bush Administration in response to a 2006 Supreme Court decision, *Hamdan V. Rumsfeld*.⁸³ In this case, the Supreme Court rejected President Bush’s military commissions by executive order, upheld that the protections of the Geneva Convention applied to the war in Afghanistan, and the right of detainees in Guantánamo to challenge their detention in U.S. federal courts.⁸⁴

The MCA was a massive legislative affront on fundamental rights and essentially allowed for limited accountability by narrowing directions of judicial review for non-citizens in U.S. custody through suspension of the right to habeas corpus; created narrow re-definitions of interrogation and torture which allowed for some statements obtained under torture to be used in prosecutions; narrowed the scope of the 1996 War Crimes Act which is the U.S. apparatus for the prosecution of war crimes; limited the application of international law in U.S. courts; and, granted retroactive immunity to some U.S. officials who have engaged in illegal actions.⁸⁵ Although the Supreme Court’s June 2008 decision in *Boumediene v. Bush* overturned section 7 of the MCA after finding it an unconstitutional suspension of the writ of habeas corpus, determining that detainees

⁸² Human Rights Watch. U.S.: More Than 600 Implicated in Detainee Abuse. (2006, April 26). Retrieved from <https://www.hrw.org/news/2006/04/26/us-more-600-implicated-detainee-abuse>

⁸³ Center for Constitutional Rights. FAQs: The Military Commissions Act. (2011, January 11). Retrieved from <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-military-commissions-act>

⁸⁴ *Hamdan v. Rumsfeld* (No. 05-184) (June 29, 2006) (Legal Information Institute, Cornell Law School, Dist. file). Retrieved from <https://www.law.cornell.edu/supct/html/05-184.ZS.html>

⁸⁵ *Military Commissions Act of 2006: A Summary of the Law* (Rep.). (2007, October 17). Retrieved https://ccrjustice.org/files/report_MCA.pdf

did indeed have the right to petition the federal courts, many of the MCA's concerning provisions remain intact.⁸⁶

Parts of the Committee on Armed Services United States Senate's "Inquiry into the Treatment of Detainees in U.S. Custody" report approved on November 20, 2008, were made public the following month. It provides the most thorough Congressional review and detailed evidence yet that harsh and cruel investigation techniques used on terrorism suspects were approved at the highest levels of the Bush administration. The review rejects claims made by former Secretary of Defense Donald H. Rumsfeld that Pentagon policies were not involved in the brutal treatment of detainees at U.S. military facilities.⁸⁷ Keith Urbahn, spokesperson for Mr. Rumsfeld, dismissed the report as "unfounded allegations against those who have served our nation."⁸⁸ The report was jointly issued by Democratic chairman of the panel, Senator Carl Levin and the top Republican, Senator John McCain. The patterned abuse of prisoners was not the result of a few soldiers acting on their own, the report maintained, acknowledging that "Interrogation policies endorsed by senior military and civilian officials authorizing the use of harsh interrogation techniques were a major cause of the abuse of detainees in U.S. custody. The impact of those abuses has been significant."⁸⁹

Regardless of whether or not it was "legal" to treat al-Qaeda and Taliban detainees with such brutality and harshness, some may argue that the disregard for human life and the laws of war which these groups have shown justifies such treatment by U.S. military. In May 2007, General David Petraeus sent a letter to his troops explaining why this mindset and such treatment of detainees is misguided and in contradiction to American principles of human rights.

"Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right," Gen. Petraeus wrote, "Adherence to our values distinguishes

⁸⁶ *Boumediene v. Bush*, 553 U.S. 2 (2008)

⁸⁷ Knowlton, B. (2009, April 21). Report Gives New Detail on Approval of Brutal Techniques. Retrieved from <https://www.nytimes.com/2009/04/22/us/politics/22report.html>

⁸⁸ Shane, S., & Mazzetti, M. (2008, December 11). Report Blames Rumsfeld for Detainee Abuses. Retrieved from <https://www.nytimes.com/2008/12/12/washington/12detainee.html>

⁸⁹ U.S. Cong., Committee on Armed Services U.S. Senate. (2008). *Inquiry into the Treatment of Detainees in U.S. Custody* (pp. xxv-xxvii) (1106736461 837114682 C. Levin, Author) [Cong. Bill from 110th Cong., 2nd sess.]. Retrieved from https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf

us from our enemy. This fight depends on securing the population, which must understand that we- not our enemies -occupy the moral high ground.”⁹⁰

In this statement of U.S. principles, Gen. Petraeus did what no senior military official had yet done: he asserted the dishonor and immorality that the torture and abuse authorized at the highest levels of authority had brought upon the United States.

e) *Abu Ghraib Prison (2003-2006)*

i. *Timeline of Events*

On March 20, 2003, the U.S. Army, together with coalition forces from the United Kingdom, invaded Iraq in what was designated as Operation Iraqi Freedom. The Bush administration based much of its case for the war on illusionary and discredited evidence that under dictator Saddam Hussein, Iraq was in the process of developing weapons of mass destruction (WMD).⁹¹ Two years later, a presidential commission concluded that “not one bit” of prewar intelligence that might have suggested Iraqi WMD ever panned out.⁹² Economically, politically, socially and in the loss of human lives, the Iraq War has been one of the costliest U.S. conflict since the Vietnam War. The Iraq Body Count project has collected data on civilian casualties from violence in Iraq based on 51,607 database entries since the beginning of the war until 2017. According to their data, between 2003 and 2011 when the war ended, 134,562 civilians had lost their lives to war violence.⁹³ According to a report by the Department of Defense, between March 2003 and August 2010, the total U.S. casualties during Operation Iraqi Freedom stood at 4,431.⁹⁴

As in Afghanistan, the U.S. Armed Forces established and operated military detention facilities in Iraq, the largest of which was the Abu Ghraib Correctional Facility just outside of Baghdad and operated by the 800th Military Police Brigade. By the summer of 2003, members from the 519th Military Intelligence Battalion that had run Bagram Prison in Afghanistan were

⁹⁰ Petraeus, D. (2010, May 10). Petraeus Comes Through: General David Petraeus Letter to Troops. Retrieved January, from <https://www.theatlantic.com/daily-dish/archive/2007/05/petraeus-comes-through/228598/>

⁹¹ War in Iraq Begins. (2009, November 24). Retrieved December 7, 2020, from <https://www.history.com/this-day-in-history/war-in-iraq-begins>

⁹² Aftergood, S (maintained by). (2005, April 28). The WMD Commission Report: Final Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. Retrieved from <https://fas.org/irp/offdocs/wmdcomm.html>

⁹³ *Documented civilian deaths from violence*. (n.d.). Retrieved December 7, 2020, from <https://www.iraqbodycount.org/database/>

⁹⁴ U.S. Department of Defense Operation Iraqi Freedom Casualty Status. (2014). Retrieved from <https://www.defense.gov/casualty.pdf>

redeployed to help run Abu Ghraib, implementing remarkably similar interrogation rules as those used at Bagram.⁶⁴ On April 28, 2004, photographs of U.S. soldiers abusing and torturing detainees at Abu Ghraib aired on CBS News, and broadcasted worldwide, led to global outrage. The photos showed U.S. soldiers “celebrating as prisoners were sexually humiliated and otherwise abused.”⁹⁵ Other forms of abuse included threatening detainees with dogs, sexually assaulting them, and putting them on leashes while another photo shows a hooded prisoner with wires attached to him standing on a box; he was falsely told that if he fell off he would be electrocuted.⁹⁶ Military officials and the Bush administration struggled to contain the outrage and mitigate concern among its allies.

In February 2004, the International Committee of the Red Cross (ICRC) submitted a report on American abuses to the United States government entitled the “Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation,” raising the ICRC’s concerns after Brigadier General Janis L. Karpinski, the commander of the 800th MP Brigade at Abu Ghraib, wrote the ICRC that isolation of prisoners of significant value was required by military necessity and that they were not entitled to full Geneva Convention protections.⁹⁷ The report, pulling from observational visits the ICRC made between March and November 2003, draws attention to numerous serious violations of International Humanitarian Law which were documented and occasionally observed while visiting protected persons by the Geneva Convention (referred to in the report as “persons deprived of their liberty”).⁹⁸ By collecting allegations of abuse through interviews with detainees, the ICRC found that the main frequent violations included:

⁹⁵ Shin, A. (2018, April 17). In 2004, CBS aired photos of prisoner abuse at Abu Ghraib. Retrieved from https://www.washingtonpost.com/lifestyle/magazine/in-2004-cbs-aired-photos-of-prisoner-abuse-at-abu-ghraib/2018/04/17/f1fb902e-2c6a-11e8-8ad6-fbc50284fce8_story.html

⁹⁶ Milbank, D. (2004, May 01). U.S. Tries to Calm Furor Caused by Photos. Retrieved from https://www.washingtonpost.com/archive/politics/2004/05/01/us-tries-to-calm-furor-caused-by-photos/16da7c6c-af53-4e8a-9baa-6527b87e7724/?itid=ik_inline_manual_19

⁹⁷ Jehl, D., & Lewis, N. (2004, May 23). U.S. Military Disputed Protected Status of Prisoners Held in Iraq. Retrieved from <https://www.nytimes.com/2004/05/23/world/reach-war-prisoners-us-military-disputed-protected-status-prisoners-held-iraq.html>

⁹⁸ ICRC. (2004). *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Rep.). Retrieved from <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf>

- “Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury;
- Absence of notification of arrests of persons deprived of their liberty to their families causing distress among persons deprived of their liberty and their families;
- Physical or psychological coercion during interrogation to secure information;
- Prolonged solitary confinement in cells devoid of daylight; and,
- Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.”⁹⁸

Red Cross investigators also reported that “they were told by unnamed coalition military intelligence officers that an estimated 70 to 90 percent of Iraqi detainees proved to have been arrested by mistake,” a figure that was corroborated by other investigations.⁹⁹

On May 6, President Bush stated that “the actions of those folks in Iraq do not represent the values of the United States of America,” assuring the public that these instances of torture were isolated and that the “wrongdoers will be brought to justice.”¹⁰⁰ However, as the ICRC report makes explicitly clear, there was a broad and patterned system of abuse that ran from soldiers in Iraq, to high level military officials at the Department of Defense.

ii. Applications of International law

The lawfulness of the Iraq invasion has been a topic of debate since the 2003 invasion. On September 16, 2004, the BBC News revealed that then UN Secretary General Kofi Annan deemed the U.S.-led invasion of Iraq as an illegal act which violated the UN Charter.¹⁰¹ When the United Nations was founded in 1945, its Charter became the foundational law of international relations and supplanted existing norms and customs. According to Article 2(4) of the Charter states that, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,” making the prohibition of

⁹⁹ Balestrieri, E. (2004). ABU GHRAIB PRISON ABUSE AND THE RULE OF LAW. *International Journal on World Peace*, 21(4), 3-20. Retrieved December 10, 2020, from <http://www.jstor.org.uri.idm.oclc.org/stable/20753463>

¹⁰⁰ U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison. (2004). *The American Journal of International Law*, 98(3), 591-596. doi:10.2307/3181656

¹⁰¹ B.B.C. (2004, September 16). Middle East | Iraq war illegal, says Annan. Retrieved from http://news.bbc.co.uk/2/hi/middle_east/3661134.stm

aggressive war a core value.¹⁰² Because the U.S invaded a sovereign nation without authorization from the international community (i.e. the UN Security Council) is a basic violation of Article 2(4).¹⁰³ Although U.S. and British officials have argued that this reasoning can be rendered null by the exceptions provided in Article 51 which acknowledges that states have the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations,” Iraq did not attack the U.S., nor was there reason to believe imminent threat of an attack was possible.¹⁰⁴

While the Bush administration invoked Article 51 in its defense and sought to link Iraq to the Al-Qaeda September 11, 2001 attacks on the U.S., it is clear that the circumstances described in the Article did not apply to the Iraqi crisis. President Bush thus created a new category of self-defense, pre-emptive self-defense, embedding the roots for his argument in his September 12, 2002 address to the UN General Assembly. The administration claimed that “pre-emptive self-defense” provided the legal justification for U.S. aggression in the post-September 11 world.¹⁰⁵ International law does not authorize any kind of preventative warfare. The U.S. claim that it held the legal right to rewrite law and initiate a preventative war, as threatened by the Bush administration’s National Security Strategy, was an affront on international law.

Having previously been stripped from as-Qaeda and Taliban prisoners, the war in Iraq was supposed to be governed by the Geneva Conventions. However, Secretary of Defense Donald Rumsfeld, so impressed with the “success” of interrogation techniques on al-Qaeda detainees at Guantánamo Bay, seemingly set in motion actions leading to their use in Iraq.¹⁰⁶ International humanitarian law (IHL) rests upon three basic pillars; the 1907 Hague Convention, the four Geneva Conventions, and Protocol I (First Additional Protocol of 1977 to the 1949 Geneva Convention).¹⁰³ The language of Protocol I expressed in Articles 51 and 54 prohibits

¹⁰² United Nations. (1945, October 24). *Charter of the United Nations*, Article 2. Retrieved from <https://www.un.org/en/sections/un-charter/chapter-i/index.html>

¹⁰³ Kramer, R., & Michalowski, R. (2005). WAR, AGGRESSION AND STATE CRIME: A Criminological Analysis of the Invasion and Occupation of Iraq. *The British Journal of Criminology*, 45(4), 446-469. Retrieved December 10, 2020, from <http://www.jstor.org/stable/23639249>

¹⁰⁴ United Nations. (1945, October 24). *Charter of the United Nations*, Article 51. Retrieved from <https://www.un.org/en/sections/un-charter/chapter-i/index.html>

¹⁰⁵ Taylor, R. S. (n.d.). The United Nations, International Law, and the War in Iraq. Retrieved from <https://www.worldpress.org/specials/iraq/>

¹⁰⁶ Barry, J., Hirsch, M., & Isikoff, M. (2004, May 24). The Roots of Torture: The road to Abu Ghraib began after 9/11, when Washington wrote new rules to fight a new kind of war. Retrieved from <https://www.globalpolicy.org/component/content/article/157/26905.html>

indiscriminate attacks on civilians or civilian objects including “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰⁷ According to the Human Rights Watch, the numerous cluster bombs and strikes attempting to target senior Iraqi officials were found to be responsible for hundreds of civilian deaths in the early days of the invasion while Amnesty International estimated that over 1,000 Iraqi civilians were killed within the first year of the war alone.¹⁰³ Although a signatory to the Protocol, the U.S. never ratified it. However, civilians should still be protected under the 1949 Geneva Convention; both prisoners of war and civilians detained by an occupying power have the right to be humanely treated at all times.

Also applicable to Abu Ghraib and the War in Iraq is The Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, which entered into force June 23, 1987. Commonly referred to as The Convention Against Torture, the treaty obligates its signatories to prohibit and prevent torture as well as cruel, inhuman or degrading treatment or punishment in all circumstances, compelling signatories to investigate and bring to justice all allegations of torture while also providing a remedy to victims.¹⁰⁸ Article 2 (2) of the Convention Against Torture makes clear that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁰⁹ The U.S. Constitution itself holds that treaties are the law of the land and because U.S. ratified the Convention Against Torture in 1994, it is obligated to follow its provisions.

iii. *Consequences and Outcomes*

The Detainee Abuse and Accountability (DAA) Project, a joint project between New York University’s Center for Human Rights and Global Justice, Human Rights First, and Human Rights Watch presents the first comprehensive record of credible allegations of abuse and torture while U.S. custody in Iraq, Guantánamo, and Afghanistan. When the abuse of detainees in U.S.

¹⁰⁷ International Committee of the Red Cross (ICRC). (1977, June 8). *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. Retrieved from <https://ihl-databases.icrc.org/ihl/INTRO/470>

¹⁰⁸ ACLU (n.d.). FAQ: The Convention Against Torture. Retrieved from <https://www.aclu.org/other/faq-convention-against-torture>

¹⁰⁹ UN General Assembly. (1984, December 10). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

custody at Abu Ghraib became public in 2004, U.S. officials were quick to condemn the actions as illegal and promised that the perpetrators would be held accountable. By the time the DAA Project was released two years later in 2006, it was quite clear that U.S. authorities had failed live up to their promises. The project collected hundreds of allegations of abuse which implicated over 600 U.S. military and civilian personnel, finding that many allegations were never investigated and, of the few courts-martial that did take place, many resulted in either a prison sentence less than a year or simple discharge or rank reductions. Only 54 of the more than 600 military personnel implicated were known to have been convicted by a court-martial, 40 of which were sentenced to mostly minimal prison time. Furthermore, only about half of the hundreds of allegations of abuses collected by the DAA Project were properly investigated, many of which appear to have been closed prematurely by military investigators. Finally, no military officer was held accountable for the gross criminal acts of abuse committed by their subordinates, approximately 95 percent of military personnel investigated were enlisted soldiers, not commanding officers.¹¹⁰

By October 2006, eleven U.S. soldiers had been convicted of detainee abuse crimes at Abu Ghraib.¹¹¹ Former Corporal Charles A. Garner received one of the longer sentences, ten years in prison for assault, battery, dereliction of duty, indecent acts, and maltreatment, but was released after serving six and a half years.¹¹² Michael Rubin, a scholar at conservative think tank, the American Enterprise Institute and previous political advisor to the U.S.-led Coalition Provisional Authority, viewed the Abu Ghraib scandal as a total disaster saying that “five or six people have managed to soil the reputation of American soldiers worldwide,” referring to the enlisted soldiers directly responsible.⁹⁶ However, there is something to be said about the lack of accountability for abuse at the command level. The Taguba Report, officially titled “Article 15-6 Investigation of the 800th Military Police Brigade,” is a detailed report published in 2004 containing the findings of a military inquiry into the Abu Ghraib prisoner abuse by Major General Antonio Taguba. Lieutenant General Ricardo Sanchez, the most senior officer in Iraq, requested an investigation

¹¹⁰ CHRGI, HRF, HRW. (2006). *By the Numbers: Findings of the Detainee Abuse and Accountability Project*. Retrieved https://chrgj.org/wp-content/uploads/2016/11/By_The_Numbers.pdf

¹¹¹ The Associated Press, Baltimore Sun. (2006, October 16). Soldiers convicted in Abu Ghraib scandal. Retrieved from <https://www.baltimoresun.com/news/bal-ghraib-story.html>

¹¹² Dishneau, D. (2011, August 06). Key figure in Abu Ghraib scandal freed from prison. Retrieved from <https://www.nbcnews.com/id/wbna44045295>

of detention operations citing recent reports of detainee abuse and accountability lapses. In part one of his Findings and Recommendations, Gen. Taguba wrote that:

“between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. These systemic and illegal abuse of detainees was intentionally perpetrated by several member of the military police guard force.”¹¹³

Four years after his report was published and testifying before Congress on his findings, Gen. Taguba wrote the preface to *Broken Law, Broken Lives: Medical Evidence of Torture by US Personnel and its Impact*, a report by Physicians for Human Rights in June 2008. The report profiles eleven former detainees from Iraq, Afghanistan, and Guantanamo Bay, all of whom were detained without being charged of a crime. In the preface, Gen. Taguba writes, “the Commander-in-Chief and those under him authorized a systematic regime of torture...Our national honor is stained by the indignity and inhumane treatment these men received from their captors,” and that “there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held accountable.”¹¹⁴ Without such accountability at the higher levels of command, torture and abuse is likely to continue.

Conclusion

On June 11, 2020, an executive order authorized by President Donald Trump initiated asset freezes and family travel bans against ICC officials and others who assist ICC investigators in an attempt to thwart the Court’s investigation into U.S. war crimes in Afghanistan. Such sanctions by the U.S. of ICC personnel are typically reserved for human rights violators, points out Richard Dicker, the international justice director at Human Rights Watch, “by targeting the ICC, the Trump administration continues its assault on the global rule of law, putting the U.S. on the side of those who commit and cover up grave abuses, not those who prosecute them.”¹¹⁵ On September 2, 2020, the Trump administration announced that the U.S. had identified the ICC

¹¹³ Taguba, A. M. (2004). *Article 15-6 investigation of the 800th Military Police Brigade*. United States. Retrieved from <https://fas.org/irp/agency/dod/taguba.pdf>

¹¹⁴ Taguba, A. M. (2008). Preface to *Broken Laws, Broken Lives*. Retrieved from http://brokenlives.info/?page_id=23

¹¹⁵ HRW. (2020, June 11). US Sets Sanctions Against International Criminal Court. Retrieved from <https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court>

prosecutor Fatou Bensouda, and head of the Office of the Prosecutor's Jurisdiction, Complementarity, and Cooperation Division, Phakiso Mochochoko, for sanctions, giving effect to the executive order issued in June.¹¹⁶ This unprecedented imposition of sanctions upon human rights workers seeking justice for victims displays the United States government's contempt towards international law and egregious disregard for the victims of crimes against humanity.

The ICC is a court of last resort. This means it is only meant to step in if national authorities fail to conduct proper domestic investigations and proceedings. Major U.S. objections to the court include its professed concern of politically motivated investigations and prosecutions, the erroneous argument that the court violates due process, and the fallacious argument that the ICC threatens national sovereignty by claiming jurisdiction over nationals of countries who have yet to ratify the Rome Statute.¹¹⁷ All of these objections ignore the Rome Statute's many safeguards; the ICC crimes are rigorously defined with the some of the most extensive due process guarantees ever written and ignores the fact that U.S. citizens who are accused of crimes overseas would already be subject to a foreign jurisdiction. While the U.S. has continued to refuse the Rome Statute and long since opposed the ICC's jurisdiction over nationals of non-member countries, Afghanistan became an ICC member country in 2003, giving the Court authority to investigate crimes committed by anyone on Afghan territory.¹¹⁵ When the ICC first entered into force in 2002, the Bush administration was extremely active in its opposition and began to pressure other countries into bilateral agreements with the U.S., using the threat of terminated economic aid and military assistance as leverage, which would have required the countries not to surrender U.S. nationals to the ICC.¹¹⁸

As this research paper has laid out, the United States has a long history of committing atrocious war crimes followed by limited investigations, minimal sentencing, and a lack of proper accountability at high-end command for senior-level military and civilian officials who often carry the responsibility for these abuses. President of the Assembly of States Party to the Rome Statute, O-Gon Kwon, released a statement rejecting the United States' June 2020

¹¹⁶ HRW. (2020, September 02). US Sanctions International Criminal Court Prosecutor. Retrieved from <https://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor>

¹¹⁷ Trahan, J., & Egan, A. (2003, January 01). U.S. Opposition to the International Criminal Court. *ABA Publications: Human Rights Magazine*. Retrieved from https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/winter2003/irr_hr_winter03_usopposition/

¹¹⁸ *Human Rights Watch World Report 2003- Global Issues* (Rep.). (2003). Retrieved from <https://www.hrw.org/legacy/wr2k3/pdf/justice.pdf>

measures against the ICC and said that the unprecedented actions “undermine our common endeavor to fight impunity and ensure accountability for mass atrocities.”¹¹⁹ As a global leader, under its claimed role of international peacekeeper and defender of human rights, the United States has an ethical obligation to support the ICC and show a willingness to hold its own nationals accountable for crimes against humanity. If the United States continues to repudiate international forum when its own conduct is called into question, the credibility of international law is undermined.

¹¹⁹ The International Criminal Court, Assembly of States Parties. (2020, June 11). *ASP President O-Gon Kwon rejects measures taken against ICC* [Press release]. Retrieved from <https://www.icc-cpi.int/Pages/item.aspx?name=pr1527>

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