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## 1. Introduction

This briefing paper was written by the Center for Justice and Accountability and TRIAL International, in partnership with Civitas Maxima and the Open Society Justice Initiative. It provides an overview of the United States' national legal framework on universal jurisdiction over substantive human rights crimes including statutory and case law, and its application in practice. Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. The U.S. government does not typically use the language of universal jurisdiction when investigating and prosecuting human rights crimes. This Report thus refers to these U.S. offenses as “substantive human rights crimes.” These substantive human rights crimes include genocide, torture, the recruitment or use of child soldiers and war crimes as codified in its federal criminal code.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.<sup>1</sup>

The content is based on desk research by U.S. attorneys. In addition, interviews with national practitioners were conducted by the authors on the practical application of the law. Respondents are not named in order to protect their identities and affiliations with certain institutions or organizations.

To date, the U.S. has only successfully prosecuted one individual under the substantive human rights statutes.<sup>2</sup> Rather, prosecutions related to human rights offenses often occur in the immigration or terrorism context. In addition, owing to specific civil statutes providing for extraterritorial jurisdiction, U.S. civil litigation for human rights violations is far more robust than in most national legal systems. In the U.S., courts have applied the principle of universal jurisdiction in the civil context to adjudicate cases involving serious human rights violations committed

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<sup>1</sup> See all briefing papers at [https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/?utm\\_content=Netherlands%2CTrial%2CFrance%2CUniversalJurisdiction%2CGermany&utm\\_campaign=social&utm\\_source=twitter&utm\\_medium=TRIAL+International](https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/?utm_content=Netherlands%2CTrial%2CFrance%2CUniversalJurisdiction%2CGermany&utm_campaign=social&utm_source=twitter&utm_medium=TRIAL+International).

<sup>2</sup> See Laura Richardson Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles “Chuckie” Taylor Jr.*, 9 WASH. U. GLOB. STUD. L. REV. 331, 333 (2010).

outside the U.S.<sup>3</sup> For this reason, this briefing paper includes a chapter on immigration fraud and perjury as well as civil remedies as other avenues to accountability.

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<sup>3</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

## 2. Part 1: Prosecution of Core Crimes under International Law

### a. Substantive Human Rights Crimes Invoking Universal Jurisdiction

Genocide, torture, and the recruitment or use of child soldiers are criminal offenses under U.S. federal law, regardless of where the acts were committed or the nationalities of the victims and perpetrators, as long as the alleged offender is present in the U.S.<sup>4</sup> Although the U.S. has criminalized war crimes, the War Crimes Act of 1996 requires that the defendant or victim be a U.S. national or member of the U.S. armed forces.

#### *i. Genocide*

The genocide statute, 18 U.S.C. § 1091, defines the criminal offense of genocide as the following:

Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

1. kills members of that group;
2. causes serious bodily injury to members of that group;
3. causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
4. subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
5. imposes measures intended to prevent births within the group; or
6. transfers by force children of the group to another group;
7. shall be punished...<sup>5</sup>

This definition is similar to, but slightly narrower than, the definition provided in the Genocide Convention. While the Genocide Convention defines the intent for genocide as “intent to destroy, in whole or in part,” a protected group, the United

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<sup>4</sup> See 18 U.S.C. § 1091 (Genocide); 18 U.S.C. §§ 2340-2340A (Torture); 18 U.S.C. § 2442 (Recruitment or Use of Child Soldiers). The U.S. substantive human rights statutes also include the crime of Female Genital Mutilation, 18 USC § 116 which is not discussed in this report.

<sup>5</sup> 18 U.S.C. § 1091(a).

States requires “intent to destroy, in whole or in *substantial* part.”<sup>6</sup> U.S. law then clarifies that the term “substantial part” means “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”<sup>7</sup> In addition, while the Genocide Convention identifies causation of “serious . . . mental harm” as one of the acts that can constitute genocide, U.S. law requires “the *permanent* impairment of the mental faculties . . . through drugs, torture, or similar techniques.”<sup>8</sup>

Genocide is punishable by up to twenty years in prison, or, where death results, by death or life imprisonment.<sup>9</sup>

Since the enactment of 18 U.S.C. § 1091 in 1988, there have been no indictments issued for genocide under this statute in U.S. courts. Experts posit various reasons why genocide charges remain so limited in the United States,<sup>10</sup> including the high evidentiary thresholds necessary to prove genocidal acts and intent, and that those impacted constitute a protected group.<sup>11</sup> Moreover, as discussed *infra* in Temporal Application, it was not until 2007 that the genocide statute was

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<sup>6</sup> Compare Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention], art. II with 18 U.S.C. § 1091(a) (emphasis added).

<sup>7</sup> 18 U.S.C. § 1093(8).

<sup>8</sup> Compare Genocide Convention, *supra* note 6, at art. II(b), with 18 U.S.C. § 1091(a)(3) (emphasis added).

<sup>9</sup> 18 U.S.C. § 1091(b).

<sup>10</sup> See, e.g., TODD F. BUCHWALD & ADAM KEITH, U.S. HOLOCAUST MEM’L MUSEUM, SIMON-SKJODT CTR. FOR THE PREVENTION OF GENOCIDE, BY ANY OTHER NAME: HOW, WHEN, AND WHY THE US GOVERNMENT HAS MADE GENOCIDE DETERMINATIONS (2019), [https://www.ushmm.org/m/pdfs/Todd\\_Buchwald\\_Report\\_031819.pdf](https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf); Beth Van Schaack, Leah Kaplan Visiting Prof. of Hum. Rts., Stan. L. Sch., Written Testimony at the Hearing Before the U.S. Commission on International Religious Freedom on Ending Genocide: U.S. Government Genocide Determinations and Next Steps 1-3 (12 May 2021) [hereinafter Van Schaack, USCIRF Hearing Testimony], <https://www.uscirf.gov/sites/default/files/Beth%20Van%20Schaack%20Final%20Testimony.pdf>.

<sup>11</sup> See, e.g., Van Schaack, USCIRF Hearing Testimony, *supra* note 10, at 3-6; Beth Van Schaack, Leah Kaplan Visiting Prof. of Hum. Rts., Stan. L. Sch., Written Testimony at the Hearing Before the Tom Lantos Human Rights Commission, House Committee on Foreign Affairs, on Pursuing Accountability for Atrocities 6 (13 June 2019) [hereinafter Van Schaack, TLHRC Hearing Testimony], [https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability\\_VanSchaack.pdf](https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf); Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18’s Blind Spots*, in ARCS OF GLOBAL JUSTICE 341, 348-49, 352 (Margaret M. deGuzman & Diane Marie Amann eds., 2018); *Ending Genocide: Accountability for Perpetrators*, Hearing Before the U.S. Commission on International Religious Freedom & Tom Lantos Human Rights Commission, House Committee on Foreign Affairs, 117th Cong. 34, 98-99 (28 July 2021) (statements of Stephen Rapp, Former Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State).

expanded to provide jurisdiction for acts of genocide committed overseas as long as the defendant is present in the U.S.<sup>12</sup> This amendment does not apply retroactively, even to events that would otherwise fall within the legal framework.<sup>13</sup>

## **ii. Torture**

The Torture Act, 18 U.S.C. §§ 2340-2340A, imposes criminal liability for the commission, attempt and conspiracy to commit torture outside of the United States.<sup>14</sup> The definition of torture under the statute includes four key elements: (1) “an act committed by a person acting under the color of law”; (2) “specifically intended to inflict”; (3) “severe physical or mental pain or suffering [...] upon another person”; (4) “within [the defendant’s] custody or physical control.”<sup>15</sup>

The first three elements of the U.S. definition of torture are effectively identical to the definition in the Convention Against Torture (CAT).<sup>16</sup>

Regarding the first element, U.S. courts have interpreted the phrase “acting under the color of law” to have the same meaning as the CAT’s requirement that the perpetrator act with the consent or acquiescence of a person “acting in an official capacity.”<sup>17</sup>

Regarding the second element, the U.S. definition omits the explicit requirement found in the CAT that torture must be inflicted “for such purposes as

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<sup>12</sup> In 2007 the Genocide Accountability Act extended jurisdiction to include lawful permanent residents and anyone “found” or “brought into” the United States. *See* Genocide Accountability Act of 2007, Pub. L. 110-151, 121 Stat. 1821 (2007). In 2009, the “found” and “brought into” bases for jurisdiction were removed from 18 U.S.C. § 1091 by the Human Rights Enforcement Act of 2009 (HREA), which replaced those bases with jurisdiction for all those “present in” the United States. *See* Human Rights Enforcement Act, Pub. L. 111, 123 Stat. 3480 (2009) § 3(d) and (e); 18 U.S.C. § 1091(d) and (e).

<sup>13</sup> For more commentary on the limitations of prosecuting genocide in the U.S., *see, e.g., Ending Genocide, supra* note 11, at 46, 92-93 (statements of Stephen Rapp); Van Schaack, TLHRC Hearing Testimony, *supra* note 11, at 4, 12-13; Van Schaack, *Crimes Against Humanity, supra* note 11, at 348-49.

<sup>14</sup> 18 U.S.C. § 2340(A)(a) (“Whoever outside the [United States](#) commits or attempts to commit [torture](#) shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”)

<sup>15</sup> 18 U.S.C. § 2340(1).

<sup>16</sup> *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 (entered into force 26 June 1987) [hereinafter CAT], art. 1(1).

<sup>17</sup> *United States v. Belfast*, 611 F.3d 783, 808-09 (11th Cir. 2010) (“There is no material difference between this notion of official conduct and that imparted by the phrase ‘in an official capacity.’”).



obtaining [...] information or a confession, punishing [...], or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”<sup>18</sup> U.S. courts, however, have held that the “for such purposes” language in the CAT is intended to reinforce the intent requirement and provide a non-exhaustive list of possible motives for torture, and that therefore the definition in the Torture Act, which requires specific intent, is not materially different from the definition in the CAT.<sup>19</sup>

The Torture Act provides additional clarity on the third element, defining “severe mental pain or suffering” as:

[P]rolonged mental harm caused by or resulting from—

- (a) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (c) the threat of imminent death; or
- (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>20</sup>

The Torture Act’s definition diverges from the definition under the CAT in its fourth element, which requires that the victim be within the defendant’s “custody or physical control,” language absent from the CAT definition.<sup>21</sup> Although the Torture Act and jurisprudence interpreting it do not further define the term “custody or physical control,” jurisprudence under an analogous civil statute, the Torture Victim Protection Act (TVPA), provides some clarity on the term.<sup>22</sup> Courts hearing civil cases under the TVPA have interpreted “custody or physical control” to include situations not only where a victim is in the perpetrator’s physical custody, but also where a victim’s freedom of movement is so restrained

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<sup>18</sup> Compare 18 U.S.C. § 2340(1), with CAT, *supra* note 14, at art. 1(1).

<sup>19</sup> See *Belfast*, 611 F.3d at 807-08.

<sup>20</sup> 18 U.S.C. § 2340(2).

<sup>21</sup> Compare 18 U.S.C. § 2340(1), with CAT, *supra* note 14, at art. 1(1).

<sup>22</sup> See 28 U.S.C. § 1350 note (providing a civil cause of action for torture and defining it effectively the same as under the criminal Torture Act).

by a concrete threat that the victim is considered to be within the perpetrator's custody or control.<sup>23</sup>

Torture is punishable by a maximum of twenty years in prison, or, where death results, by death or life imprisonment.<sup>24</sup> At the time of writing, the United States has prosecuted only one case under the Torture Act. In 2006, Charles "Chuckie" Taylor Jr., an American citizen and son of the former president of Liberia, was charged with two counts of torture for his activities leading an elite military force during Liberia's civil wars.<sup>25</sup> Chuckie Taylor was convicted of torture and sentenced to 97 years in federal prison.<sup>26</sup> Two other individuals have been indicted for violating the Torture Act — former Western Bosnian army member Sulejman Mujagic, who was later extradited to Bosnia to stand trial for murder in addition to torture,<sup>27</sup> and former Gambian paramilitary member Michael Correa, who is awaiting trial in the United States at the time of drafting this report.<sup>28</sup>

As with genocide prosecutions, experts attribute the dearth of prosecutions under the Torture Act to stringent legal requirements, including the "acting under the color of law" doctrine as well as the requirement that the defendant either be a U.S. national or be present in the United States.<sup>29</sup> Other factors also play a role, such as how far in the past these incidents occurred; witnesses no longer being available because they are difficult to find or have since passed away or may have difficulty recalling the events in detail; accessing evidence that is often only available overseas; difficulties getting the necessary permission to enter a foreign

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<sup>23</sup> See, e.g., *Jane W. v. Thomas*, No. 18-569, 2021 WL 4206665, at \*16 (E.D. Pa. 15 September 2021) (finding that victims hiding in a church during a massacre were within soldiers' custody or control because the soldiers were firing guns at all angles and victims could only survive by remaining hidden among corpses); see also *Boniface v. Viliena*, 338 F. Supp. 3d 50 (D. Mass. 2018).

<sup>24</sup> 18 U.S.C. § 2340A(a).

<sup>25</sup> Laura Richardson Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles "Chuckie" Taylor Jr.*, 9 WASH. U. GLOB. STUD. L. REV. 331, 332-33 (2010).

<sup>26</sup> *Id.* at 333.

<sup>27</sup> U.S. Dep't of Just., Press Release, *Bosnian National Extradited to Stand Trial for Murder and Torture* (3 June 2013), <https://www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture>.

<sup>28</sup> U.S. Dep't of Just., Press Release, *Gambian Man Indicted on Torture Charges* (11 June 2020), <https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges>.

<sup>29</sup> See, e.g., Van Schaack, *TLHRC Hearing Testimony*, *supra* note 13, at 6, 10-11, 16-17; *Ending Genocide*, *supra* note 11, at 46 (statement of Stephen Rapp).

country to conduct an investigation, as well as the cost of carrying out investigations on foreign soil.<sup>30</sup>

**iii. Recruitment or Use of Child Soldiers**

The Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442, makes it a federal crime to knowingly “(1) recruit[], enlist[], or conscript[] a person to serve while such person is under 15 years of age in an armed force or group; or (2) use[] a person under 15 years of age to participate actively in hostilities; knowing such person is under 15 years of age”.<sup>31</sup>

The statute creating the offense defines the term “participate actively in hostilities” as “taking part in [...] (A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or (B) direct support functions related to combat, including transporting supplies or providing other services.”<sup>32</sup> “Armed force or group” is defined as “any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association.”<sup>33</sup>

The recruitment or use of child soldiers is punishable by a maximum of 20 years in prison, or, where death results, by life imprisonment.<sup>34</sup> There have been no prosecutions of the recruitment or use of child soldiers under 18 U.S.C. § 2442 in U.S. courts. The absence of prosecutions can be explained at least in part by many of the same doctrinal limitations faced by U.S. prosecutions for torture and genocide, including that the statute only applies to acts committed after its enactment in 2008.<sup>35</sup>

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<sup>30</sup> Expert Interview, 29 October 2021.

<sup>31</sup> 18 U.S.C. § 2442(a).

<sup>32</sup> 18 U.S.C. § 2442(d)(1).

<sup>33</sup> 18 U.S.C. § 2442(d)(2).

<sup>34</sup> 18 U.S.C. § 2442(b).

<sup>35</sup> See, e.g., Van Schaack, TLHRC Hearing Testimony, *supra* note 13, at 4-6.

#### **iv. War Crimes**

The War Crimes Act of 1996, 18 U.S.C. § 2441, defines war crimes to include the following conduct:

1. a “grave breach” of the Geneva Conventions or any protocol to the Geneva Conventions to which the United States is a party;<sup>36</sup>
2. a violation of Articles 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land;
3. certain violations of common Article 3 to the Geneva Conventions, when “committed in the context of and in association with” a non-international armed conflict; and
4. the “willful[] kill[ing]” of or causation of “serious injury” to civilians “in relation to an armed conflict” and in breach of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.<sup>37</sup>

Common Article 3 violations actionable under the statute are limited to: torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.<sup>38</sup> The statute further defines each of these acts and related terms.<sup>39</sup> War crimes are subject to a maximum punishment of life imprisonment, or, where death results, by death.<sup>40</sup>

To date, there have been no prosecutions of war crimes under the War Crimes Act in U.S. courts. Experts outline numerous challenges that have rendered the statute a “dead letter” since its enactment in 1996, including challenges faced by all legal systems in prosecuting war crimes, such as “the technicality of some constitutive [legal] elements, the difficulties of amassing sufficient available evidence to meet applicable burdens of proof, the vagaries of unreliable or unavailable witnesses,

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<sup>36</sup> The U.S. has ratified all four Geneva Conventions and Additional Protocol III (recognizing a third protected symbol), but has only signed and not ratified Protocol I and II. See U.S. Department of Defense, Office of General Counsel, Official Treaty Documents Related to the Law of War, <https://ogc.osd.mil/Law-of-War/Treaty-Documents/>.

<sup>37</sup> 18 U.S.C. § 2441.

<sup>38</sup> 18 U.S.C. § 2441(d)(1).

<sup>39</sup> 18 U.S.C. § 2441(d)(1)-(2).

<sup>40</sup> 18 U.S.C. § 2442(a).

and the often-impenetrable khaki wall of silence.”<sup>41</sup> Experts also detail idiosyncratic legal barriers specific to the United States, including the jurisdictional requirement that the crimes be committed by or against U.S. persons, unfavorable interpretations by the U.S. Department of Justice excluding enemy noncitizens in unoccupied territory from the scope of protections, and substantive complications such as needing to prove the existence of an underlying armed conflict and whether such conflict is international or non-international in nature.<sup>42</sup> As a result of these many challenges, atrocities that could be prosecuted under the War Crimes Act instead repeatedly have been charged under U.S. immigration and antiterrorism laws (under Immigration Fraud).<sup>43</sup>

## b. Modes of Liability

The modes of liability for genocide, torture, war crimes and the recruitment or use of child soldiers are governed by the aforementioned statutes defining these crimes, as well as by the general modes of criminal liability set out in the U.S. criminal code.

### *i. Principal Liability*

Principal liability is recognized under 18 U.S.C. § 2(a), which authorizes the punishment, as a principal, of anyone who “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission.”<sup>44</sup> An offense against the United States is understood as any offense that is recognized as a crime in the U.S. Each of the substantive laws codifying international crimes recognizes principal liability.<sup>45</sup>

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<sup>41</sup> Beth Van Schaack, *Animating the U.S. War Crimes Act*, 98 INT’L L. STUD. (forthcoming Dec. 2021) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3851614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851614) [hereinafter Van Schaack, *Animating the U.S. War Crimes Act*].

<sup>42</sup> *See id.* (manuscript at 1, 14–21); Van Shaack, TLHRC Hearing Testimony, *supra* note 11, at 3, 5-8; Van Schaack, *Crimes Against Humanity*, *supra* note 11, at 342, 346; Beth Van Schaack & Zarko Perovic, *The Prevalence of “Present-In” Jurisdiction*, 107 AM. SOC’Y INT’L L. PROC. 237, 241 (2013); *Ending Genocide*, *supra* note 11, at 44, 46, 90 (statements of Stephen Rapp).

<sup>43</sup> *See, e.g.*, Van Schaack, *Animating the U.S. War Crimes Act* (manuscript at 21).

<sup>44</sup> 18 U.S.C. § 2(a).

<sup>45</sup> 18 U.S.C. § 1091(a) (recognizing liability for anyone who commits genocide); 18 U.S.C. § 2340A(a) (recognizing liability for anyone who “commits ... torture”); 18 U.S.C. § 2441(a) (recognizing liability for anyone who “commits a war crime”); 18 U.S.C. § 2442(b) (recognizing liability for anyone who “violates” the act prohibiting recruitment or use of child soldiers).

**ii. Aiding and Abetting and Indirect Perpetration**

Aiding and abetting liability, also referred to as accomplice or co-principal liability, is also recognized under 18 U.S.C. § 2, which states in full:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.<sup>46</sup>

Whereas § 2(a) establishes aiding and abetting liability, § 2(b) clarifies that liability extends not only to defendants who work through culpable intermediaries that are themselves liable for the underlying offense as aiders and abettors, but also to defendants who work through innocent intermediaries that are not themselves liable.<sup>47</sup>

As developed in U.S. case law, aiding and abetting liability requires proof of four elements:

- (1) that the accused had the specific intent to facilitate the commission of a crime by another;
- (2) that the accused had the requisite intent of the underlying substantive offense;
- (3) that the accused assisted or participated in the commission of the underlying substantive offense; and
- (4) that someone committed the underlying substantive offense.<sup>48</sup>

To satisfy the intent elements, the defendant must both intend for the crime to be committed and intend that their acts will assist in the crime's commission.<sup>49</sup> Intent to commit a different or lesser offense is insufficient, as "the intent must go to the specific and entire crime charged."<sup>50</sup> The Supreme Court has held that intent can

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<sup>46</sup> 18 U.S.C. § 2.

<sup>47</sup> CHARLES DOYLE, CONG. RSCH. SERV., R43769, ACCOMPLICES, AIDING AND ABETTING, AND THE LIKE: AN OVERVIEW OF 18 U.S.C. § 2, at 7-9 (2020).

<sup>48</sup> *United States v. Sineneng-Smith*, 910 F.3d 461, 482 (9<sup>th</sup> Cir. 2018), *vacated on other grounds*, 140 S. Ct. 1575 (2020); 2472. *Elements of Aiding and Abetting*, in UNITED STATES DEPARTMENT OF JUSTICE CRIMINAL RESOURCE MANUAL (1998); *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

<sup>49</sup> *United States v. Sineneng-Smith*, 910 F.3d 461, 482 (9<sup>th</sup> Cir. 2018).

<sup>50</sup> *Rosemond v. United States*, 572 U.S. 65, 76 (2014).

be inferred from a defendant’s “full knowledge of the circumstances” in advance of their participation or assistance.<sup>51</sup>

Regarding the third element, a defendant’s assistance or participation in the crime may come in the form of “words, acts, encouragement, support, or presence.”<sup>52</sup> The assistance or participation need not be substantial, and it also need not contribute to every element of a crime.<sup>53</sup> Finally, the last element requires completion of the criminal offense, though it does not require conviction or identification of a principal offender.<sup>54</sup>

### **iii. Conspiracy**

Conspiracy as a mode of liability is established under each of the substantive human rights criminal statutes.<sup>55</sup>

Conspiracy liability requires proof of four elements:

- (1) an agreement between two or more persons;
- (2) to commit a crime;
- (3) where the defendant has knowledge of the agreement and voluntarily participates in it; and

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<sup>51</sup> *Rosemond v. United States*, 572 U.S. 65, 77-78 (2014) (holding that the “intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense” and that “advance knowledge” is required, meaning “knowledge at a time the accomplice can do something with it—most notably, opt to walk away”).

<sup>52</sup> *Rosemond v. United States*, 572 U.S. 65, 73 (2014).

<sup>53</sup> *Rosemond v. United States*, 572 U.S. 65, 72-3 (2014) (holding that “[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] ... all [were] principals as to the whole,” and that “[t]he quantity [of assistance was] immaterial,’ so long as the accomplice did ‘something’ to aid the crime”).

<sup>54</sup> *Standefer v. United States*, 447 U.S. 10, 19-20 (holding that legislative “history plainly rebuts petitioner’s contention that [18 U.S.C.] § 2 was not intended to authorize a conviction of an aider and abettor after the principal had been acquitted of the offense charged,” and in convicting an aider and abettor, “the fate of other participants is irrelevant”); *United States v. Mullins*, 613 F.3d 1273, 1290 (10<sup>th</sup> Cir. 2010) (“It is not even essential that the identity of the principal be established. The prosecution only need prove that the offense has been committed.”)

<sup>55</sup> See 18 U.S.C. § 1091(d) (establishing liability for “[a]ny person who ... conspires to commit an offense under” the genocide statute); 18 U.S.C. § 231(c) (establishing liability for “a person who conspires to commit” torture); 18 U.S.C. § 2441(d)(1) (defining grave breaches of common Article 3 of the Geneva Conventions and recognizing liability for anyone who conspires to commit any of the specified prohibited acts); 18 U.S.C. § 2442 (recognizing liability for “[w]hoever ... conspires to violate” the act prohibiting recruitment or use of child soldiers).

(4) at least one conspirator commits an overt act in furtherance of the conspiracy.<sup>56</sup>

The first element may be proven by direct or circumstantial evidence that suggests “unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy.”<sup>57</sup>

The third element of intent requires that the defendant “knew of the existence of the [criminal] scheme ... and knowingly joined and participated in it” with the “*specific intent* to violate the substantive statute.”<sup>58</sup> Knowledge that “*some* crime would be committed is not enough.”<sup>59</sup>

For the fourth element, the overt act need not be committed by the defendant,<sup>60</sup> nor must it constitute a crime or even an element of a crime.<sup>61</sup> Conspiracy does not require commission of the agreed-upon crime.<sup>62</sup>

Conspiracy is also a crime in and of itself under 18 U.S.C. § 371, and applies when “two or more persons conspire ... to commit any offense against the United States ... and one or more of such persons do act to effect the object of the conspiracy.”<sup>63</sup> The object of the conspiracy need not be completed for the criminal charge of conspiracy to apply as long as some overt acts were taken in support of the conspiracy. Defendants may also be prosecuted for both the conspiracy to commit a crime and for the crime itself as a co-conspirator if the object of the conspiracy was completed.<sup>64</sup>

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<sup>56</sup> Madeleine Cane, et al., *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 928 (2021); *see also* *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9<sup>th</sup> Cir. 2008); *United States v. Wardell*, 591 F.3d 1279, 1287 (10<sup>th</sup> Cir. 2009).

<sup>57</sup> *United States v. Wardell*, 591 F.3d 1279, 1288 (10<sup>th</sup> Cir. 2009).

<sup>58</sup> *United States v. Hassan*, 578 F.3d 108, 123 (2<sup>d</sup> Cir. 2008) (emphasis in original).

<sup>59</sup> *Id.* (emphasis in original).

<sup>60</sup> *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9<sup>th</sup> Cir. 2008).

<sup>61</sup> *Iannelli v. United States*, 420 U.S. 770, 785 n.17.

<sup>62</sup> *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9<sup>th</sup> Cir. 2008).

<sup>63</sup> 18 U.S.C. § 371.

<sup>64</sup> Madeleine Cane, et al., *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 948 (2021); CHARLES DOYLE, CONG. RSCH. SERV., R41223/12, FEDERAL CONSPIRACY LAW: AN ABBREVIATED OVERVIEW 6, 8-9 (2020), <https://crsreports.congress.gov/product/pdf/R/R41223/12>.



#### **iv. Incitement to Commit Genocide**

The statute criminalizing genocide under U.S. law recognizes liability for anyone who “directly and publicly incites another” to commit genocide.<sup>65</sup> “Incites” is further defined as: “urges another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct.”<sup>66</sup> Incitement is not available as a theory of liability for other substantive human rights crimes.

#### **v. Attempt**

The federal statutes criminalizing genocide, torture, war crimes and recruitment or use of child soldiers all expressly establish attempt liability.<sup>67</sup>

Attempt requires proof of two elements: (1) the intent to commit the crime, and (2) “an act or omission constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime.”<sup>68</sup>

#### **vi. Accessory after the Fact**

Liability as an accessory after the fact is established by 18 U.S.C. § 3, which states: “[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”<sup>69</sup>

Conviction as an accessory after the fact requires proof of three elements:

- (1) the commission of an underlying offense against the United States;
- (2) the defendant’s knowledge of that offense; and

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<sup>65</sup> 18 U.S.C. § 1091(c).

<sup>66</sup> 18 U.S.C. § 1093(3).

<sup>67</sup> See 18 U.S.C. § 1091(d) (establishing liability for “[a]ny person who attempts ... to commit an offense under” the genocide statute); 18 U.S.C. § 2340A(a) (establishing liability for “[w]hoever ... attempts to commit torture”); 18 U.S.C. § 2441(d)(1) (defining grave breaches of common Article 3 of the Geneva Conventions and recognizing liability for anyone who attempts to commit any of the specified prohibited acts); 18 U.S.C. § 2442 (recognizing liability for “[w]hoever ... attempts ... to violate” the act prohibiting recruitment or use of child soldiers).

<sup>68</sup> MODEL PENAL CODE § 5.01(1)(c); see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 106-07 (2007); CHARLES DOYLE, CONG. RSCH. SERV., 42001, ATTEMPT: AN OVERVIEW OF FEDERAL CRIMINAL LAW 3-6 (2020), <https://sgp.fas.org/crs/misc/R42001.pdf>.

<sup>69</sup> 18 U.S.C. § 3.

(3) assistance by the defendant in order to prevent the apprehension, trial, or punishment for the offender.<sup>70</sup>

An accessory after the fact is not treated the same as the principal offender and is limited to a sentence or fine that is at most half of that prescribed to the crime of the principal offender.<sup>71</sup>

### **vii. Corporate Liability**

The U.S. Supreme Court has established that corporations can be held criminally liable for the federal crimes that their employees, officers or agents commit within the scope of their employment and for the benefit of the corporation.<sup>72</sup> The statutory offenses outlined above hold liable “whoever” commits, attempts or conspires to commit the offense.<sup>73</sup> “Whoever” is defined to include corporations and other legal entities.<sup>74</sup> While the U.S. legal framework permits corporate criminal liability for genocide, torture, war crimes and the recruitment or use of child soldiers, the U.S. has yet to prosecute any corporation for these crimes.

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<sup>70</sup> *United States v. White*, 771 F.3d 225, 232-33 (4<sup>th</sup> Cir. 2014); *United States v. De La Rosa*, 171 F.3d 215, 221 (5<sup>th</sup> Cir. 1999).

<sup>71</sup> 18 U.S.C. § 3 (“Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.”).

<sup>72</sup> *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494-95 (1909). For a broader discussion of corporate criminal liability, see CHARLES DOYLE, CONG. RSCH. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW (2013), <https://sgp.fas.org/crs/misc/R43293.pdf>.

<sup>73</sup> See, e.g. 18 U.S.C. 2340A (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both”) (emphasis added).

<sup>74</sup> 1 U.S.C. § 1; see also 18 U.S.C. §§ 116, 1091, 2340A, 2441, 2442.

## c. Temporal Application

### *i. Beginning of Temporal Application*

Article 1, section 9 of the U.S. Constitution prohibits the enactment of criminal laws which apply *ex post facto*.<sup>75</sup> As a result, the temporal jurisdiction of the U.S. criminal statutes creating offenses for genocide, torture, the recruitment or use of child soldiers and war crimes begins as of the enactment of the implementing statute. There is no retroactive application of the criminal law based on violations of customary international law.

#### 1.1 GENOCIDE

Genocide was first criminalized in 1988, but the prohibition extended only to conduct committed by U.S. nationals or to conduct committed within the United States.<sup>76</sup> The federal criminal law was amended in 2007 to expand the scope of liability to acts committed on foreign soil by any defendant, regardless of nationality, found present in the United States.<sup>77</sup> As a result, the temporal jurisdiction for the crime of genocide begins on 4 November 1988 for conduct committed by U.S. nationals or within the United States, and on 21 December 2007 for conduct committed by non-U.S. nationals, regardless of where the conduct took place.

#### 1.2 TORTURE

The statute criminalizing torture came into force on 20 November 1994, the date on which the United States became a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and is therefore

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<sup>75</sup> U.S. CONST. art. I, cl. 3; *see also Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“The ex post facto prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’”).

<sup>76</sup> Genocide Convention Implementation Act of 1987 § 1, Pub. L. 100–606, 102 Stat. 3045 (1988), <https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg3045.pdf#page=3>; *see generally* U.S. DEP’T OF JUSTICE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, GUIDE TO HUMAN RIGHTS STATUTES (2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download>.

<sup>77</sup> Genocide Accountability Act of 2007 § 2, Pub. L. 110-151, 121 Stat. 1821 (2007), <https://www.govinfo.gov/content/pkg/STATUTE-121/pdf/STATUTE-121-Pg1821.pdf#page=1>. The language providing jurisdiction over non-U.S. nationals was amended once more through the Human Rights Enforcement Act of 2009 to reflect the current language of the statute. *See* Human Rights Enforcement Act of 2009 § 3(a), Pub. L. 111-122, 123 Stat. 3481 (2009), <https://www.govinfo.gov/content/pkg/STATUTE-123/pdf/STATUTE-123-Pg3480.pdf#page=1>.

only applicable to conduct after that date.<sup>78</sup> At that time, the statute only provided criminal liability for the commission of torture or attempted commission of the act of torture. The statute's provision criminalizing conspiracy to commit torture, 18 USC § 2340A(c), was enacted later, on 26 October 2001, and is only applicable to violations amounting to conspiracy under the statute committed after 2001.<sup>79</sup>

### 1.3 RECRUITMENT OR USE OF CHILD SOLDIERS

The statute criminalizing the recruitment or use of child soldiers was enacted on 3 October 2008 and is only applicable to conduct after that date.<sup>80</sup>

### 1.4 WAR CRIMES

The federal war crimes statute was enacted on 21 August 1996, and is therefore only applicable to conduct after that date.<sup>81</sup>

#### ***ii. Statute of Limitations***

Under U.S. law, the statute of limitations – or period within which an indictment must be filed against an accused – runs from the commission of the offense. The U.S. government can seek the federal court's permission to suspend the statute of limitations for up to three years if evidence of the offense is located in a foreign country and an official request has been made for the evidence.<sup>82</sup> The human rights crimes described in this report are each subject to different limitation periods, as detailed below.

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<sup>78</sup> See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 506(a), Pub. L. 103–236, 108 Stat. 463 (1994), <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg382.pdf> (noting that the section on torture became effective on the later of 30 April 1994, or the date on which the United States has become a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (20 November 1994)).

<sup>79</sup> USA Patriot Act § 811(g), Pub. L. 107–56, 115 Stat. 381 (2001), <https://www.sec.gov/about/offices/ocie/aml/patriotact2001.pdf> (amending Torture, 18 USC section 2340A to include the crime of conspiracy to commit torture); see also U.S. DEP'T OF JUSTICE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, GUIDE TO HUMAN RIGHTS STATUTES (2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download>. Prior to 2001, however, the general criminal conspiracy statute, 18 U.S.C. § 371, may apply. See section on *Conspiracy infra*.

<sup>80</sup> Child Soldiers Accountability Act of 2008 § 2(a)(1), Pub. L. 110–340, 122 Stat. 3735 (2008), <https://www.congress.gov/110/plaws/publ340/PLAW-110publ340.pdf>.

<sup>81</sup> War Crimes Act of 1996 § 2(a), Pub. L. 104–192, 110 Stat. 2104 (2008), <https://www.govinfo.gov/content/pkg/PLAW-104publ192/pdf/PLAW-104publ192.pdf>.

<sup>82</sup> An application must be made to the district court before a grand jury is called to investigate the offense, and the application must show that official request has been made for the evidence and the evidence is in a foreign country for the extension to apply. 18 U.S.C. § 3292.

## 2.1 GENOCIDE

The statute of limitations for genocide was eliminated by an act of Congress on 22 December 2009, making a crime of genocide committed after 2009 subject to prosecution at any time.<sup>83</sup> Prior to this amendment, the statute of limitations for genocidal acts was five years from the date of commission, unless the conduct resulted in death, in which case there would be no limitation period for prosecution.<sup>84</sup>

## 2.2 TORTURE

The statute of limitations for torture ranges from eight years to no limitation at all, depending on the severity of the crime. If the conduct results in death, no limitation period applies.<sup>85</sup> If the conduct does not result in death, but created a foreseeable risk of death or serious bodily injury to the victim, no limitation period applies.<sup>86</sup> In cases where death does not occur and death or serious bodily injury is not reasonably foreseeable, the statute of limitations is eight years.<sup>87</sup> The statute of limitations for conspiracy to commit torture runs when the conspiratorial agreement comes to an end or when the defendant has withdrawn from the conspiracy.<sup>88</sup>

## 2.3 RECRUITMENT OR USE OF CHILD SOLDIERS

Criminal charges for the recruitment or use of child soldiers must be brought within ten years of commission.<sup>89</sup>

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<sup>83</sup> See Human Rights Enforcement Act of 2009, P.L. 111-122 (2009).

<sup>84</sup> Genocide Convention Implementation Act of 1987 § 1, Pub. L. 100-606, 102 Stat. 3045 (1988).

<sup>85</sup> See 18 U.S.C. § 3281 (“An indictment for any offense punishable by death may be found at any time without limitation.”); 18 U.S.C. § 2340A(a) (“[A]nd if death results to any person from conduct prohibited by this subsection, [he] shall be punished by death or imprisoned for any term of years or for life.”).

<sup>86</sup> See 18 U.S.C. § 3286(b) (“[A]n indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable [sic] risk of, death or serious bodily injury to another person.”); 18 U.S.C. § 2332b(g)(5)(B) (listing torture under section 2340A as applicable).

<sup>87</sup> See 18 U.S.C. § 3286(a) (extending statute of limitations for certain terrorism offenses, including torture).

<sup>88</sup> See 652. *Statute of Limitations for Conspiracy*, in UNITED STATES DEPARTMENT OF JUSTICE CRIMINAL RESOURCE MANUAL (2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-652-statute-limitations-conspiracy>.

<sup>89</sup> 18 U.S.C. § 3300 (limitations period for the recruitment or use of child soldiers).

## 2.4 WAR CRIMES

A five-year statute of limitations applies to prosecution of war crimes in federal court, unless the conduct results in death, in which case no limitation period will apply.<sup>90</sup>

### d. Universal Jurisdiction Requirements

#### *i. Presence of Suspects or Other U.S. Contacts*

The federal human rights offenses do require some connection to the United States, such as the defendant being a U.S. national or the presence of the defendant within the United States. Although presence of the defendant is required to indict under the statutes (when other forms of jurisdiction such as territorial or jurisdiction based on nationality do not apply), the likelihood of an individual's presence in the U.S. may be sufficient to trigger an investigation by the relevant authorities, especially if other factors such as severity of the crime and availability and strength of the evidence weigh in favor of opening an investigation.<sup>91</sup>

## 1.1 GENOCIDE

The U.S. crime of genocide has the following jurisdictional requirements:

- (1) [T]he offense is committed in whole or in part within the United States; or
- (2) regardless of where the offense is committed, the alleged offender is—
  - (a) a national of the United States [...];
  - (b) an alien lawfully admitted for permanent residence in the United States [...];
  - (c) a stateless person whose habitual residence is in the United States; or
  - (d) present in the United States.<sup>92</sup>

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<sup>90</sup> See 18 U.S.C. §§ 2441(a), 3281; see also U.S. DEP'T OF JUSTICE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, GUIDE TO HUMAN RIGHTS STATUTES (2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download>.

<sup>91</sup> Expert Interview, 10 November 2021.

<sup>92</sup> 18 U.S. Code § 1091 (Genocide) (internal citations omitted). According to 8 U.S. Code § 1101 (a)(22), “[t]he term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” According to 8

Accordingly, any perpetrator of genocide can be prosecuted in U.S. federal court, regardless of where the conduct occurred, as long as they are a U.S. national or are otherwise found in the United States.<sup>93</sup>

## 1.2 TORTURE

The crime of torture has the following jurisdictional requirements:

- (1) the alleged offender is a national of the United States; or
- (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.<sup>94</sup>

The crime of torture only encompasses conduct taking place outside of the United States.<sup>95</sup>

## 1.3 RECRUITMENT OR USE OF CHILD SOLDIERS

The crime of the recruitment or use of child soldiers has the following jurisdictional requirements:

- (1) [T]he alleged offender is a national of the United States or an alien lawfully admitted for permanent residence in the United States;
- (2) the alleged offender is a stateless person whose habitual residence is in the United States;
- (3) the alleged offender is present in the United States, irrespective of the nationality of the alleged offender; or
- (4) the offense occurs in whole or in part within the United States.<sup>96</sup>

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U.S. Code § 1101 (a)(3), “[t]he term ‘alien’ means any person not a citizen or national of the United States” (as that term is defined in section 101 of the Immigration and Nationality Act.

<sup>93</sup> 18 U.S. Code § 1091; *see also* “Guide to Human Rights Statutes,” U.S. Department of Justice, <https://www.justice.gov/criminal-hrsp/file/1002896/download>.

<sup>94</sup> 18 U.S.C. § 2340A (Torture).

<sup>95</sup> The prohibition against torture within the U.S. is enshrined in the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. *See* U.S. Const. amend. VIII. There is no federal criminal statute explicitly prohibiting domestic acts of torture, but the constitutional prohibition is enforced through 18 U.S. Code section 242, which makes it a criminal offense for a public official to deprive someone of their constitutional rights (including their right to be free from cruel and unusual punishment). Torture can also be prosecuted under other criminal statutes such as assault or rape. Some state legislatures have also adopted laws explicitly criminalizing torture. *See, e.g.*, California Code, Penal Code - PEN § 206 (defining the crime of torture).

<sup>96</sup> 18 U.S.C § 2442 (d) (internal citations omitted).

#### 1.4 WAR CRIMES

While the federal war crimes statute applies to conduct committed anywhere in the world, the offense requires that either the victim or the defendant be a U.S. national or member of the U.S. armed forces.<sup>97</sup> Presence in the United States alone does not fulfill the jurisdictional requirements for the war crimes offense; rather, active nationality and passive personality jurisdiction are necessary.

##### *ii. Double Criminality*

None of the human rights offenses require the conduct to be recognized as a crime in the foreign state where the conduct occurred.

##### *iii. Prosecutorial Discretion*

As discussed below (under Key Steps in Criminal Proceedings), only attorneys within the U.S. Department of Justice can initiate a federal criminal prosecution. Federal prosecutors are given broad discretionary power to seek charges in criminal matters. Each U.S. Attorney (the lead prosecutor for each federal judicial district) has absolute authority to manage the federal criminal matters within their district.<sup>98</sup> Included in this authority is a broad discretionary power in relation to all aspects of initiating and litigating federal criminal matters, including (but not limited to): investigating suspected or alleged offenses against the United States; causing investigations to be conducted by the appropriate federal law enforcement agencies; declining prosecution; authorizing prosecution; determining the manner of prosecuting and deciding trial related questions; recommending whether to appeal or not to appeal from an adverse ruling or decision; and dismissing prosecutions.<sup>99</sup>

Multiple factors go into decisions on whether to initiate a federal case, including the severity of the alleged crime, strength of the evidence, federal interest in prosecution and the availability of alternatives to criminal prosecution.<sup>100</sup> One key

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<sup>97</sup> See 18 U.S.C. § 2441 (b).

<sup>98</sup> 28 U.S.C. § 547; see also Department of Justice Manual, 9-2.001, available at <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.001>.

<sup>99</sup> Department of Justice Manual, 9-2.001, available at <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.001>.

<sup>100</sup> *Prosecutors on the Front Line: A Q&A with Teresa McHenry, Head of the Human Rights and Special Prosecutions Section of the U.S. Department of Justice*, PHILIPPE KIRSCH INSTITUTE (Feb. 13, 2019), <https://www.kirschinstitute.ca/prosecutors-front-line-qa-teresa-mchenry-head-human-rights-special-prosecutions-section-u-s-department-justice/> [hereinafter *Q&A with Teresa McHenry*]; see also Elise



concern is whether the case contains sufficient evidence to prove a criminal charge beyond a reasonable doubt.<sup>101</sup>

#### ***iv. Political approval***

Although a U.S. Attorney's office is the main body tasked with charging a federal crime within its district, substantive human rights crimes detailed in this report require coordination with the Department of Justice's Human Rights Special Prosecution Unit (HRSP) and express approval by the Assistant Attorney General (AAG) of the Criminal Division.<sup>102</sup> When a U.S. Attorney opens a matter involving any of the substantive human rights offenses, their office must promptly notify HRSP and provide it with updates on any significant developments in the matter. If the investigations also involve international terrorism, then coordination and notification must go through the Counterterrorism Section of the Department of Justice's National Security Division.<sup>103</sup>

For prosecutions of human rights crimes to proceed, “[p]rior, express approval of the Assistant Attorney General (AAG) of the Criminal Division (or his or her designee) is required.”<sup>104</sup> This authorization is necessary before the U.S. Attorney can pursue a search warrant or file the criminal complaint. Approval from the AAG must also be obtained if the U.S. Attorney seeks to dismiss a charge that was previously approved by the AAG (including as part of a plea agreement). The process for seeking approval is coordinated by the HRSP.<sup>105</sup> The HRSP functions as a liaison between the U.S. Attorney's office and the AAG and will provide an initial assessment on whether the prosecutor's case has merit, and whether or not a case meets the requirements for substantive human rights crimes.<sup>106</sup> The HRSP will also make recommendations on other available charges if human rights

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Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 599 (2020).

<sup>101</sup> Expert Interview, 28 October 2021; *Q&A with Teresa McHenry* (“[T]he fundamental principle is that prosecution should commence if the prosecutor believes that the potential defendant's conduct constitutes a federal crime and that the admissible evidence will probably be sufficient to obtain and sustain a conviction”).

<sup>102</sup> Department of Justice Manual, 9-2.139, <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.139>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 9-2.139 (E).

<sup>105</sup> *Id.*

<sup>106</sup> Expert Interview, 10 November 2021.

crimes are not available.<sup>107</sup> Once substantive human rights criminal charges have been approved by the AAG, the prosecutor can proceed with the criminal complaint and the HRSP will continue to consult and provide guidance on the case, including on issues involving “investigative tactics and strategies, discovery, jury instructions, sentencing issues, the use of expert witnesses, and the use of cooperating witnesses and cooperating defendants from other jurisdictions.”<sup>108</sup>

#### **v. Subsidiarity**

Nothing in the statutes requires the U.S. to relinquish jurisdiction to other countries or international tribunals that may seek to indict an individual on the same facts. However, the U.S. may choose to extradite individuals to face prosecution for substantive human rights charges before other courts when an extradition is deemed legal and appropriate.<sup>109</sup>

### **e. Key Steps in Criminal Proceedings**

#### **i. Investigation Stage**

##### **1.1 INITIATION OF INVESTIGATIONS**

In the United States, only federal investigators and prosecutors in the offices of the U.S. Attorneys and federal agencies can initiate investigations into federal crimes, including the substantive human rights crimes described above.<sup>110</sup> In 2008, the Department of Homeland Security established the Human Rights Violators and War Crimes Center (HRVWCC), which brings together federal agencies to investigate and prosecute suspected human rights violations and international crimes, in partnership with U.S. Attorneys’ offices. The HRVWCC is led by the U.S. Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI) Human Rights Violators and War Crimes Unit (HRVWCU)

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 9-2.139 (D).

<sup>109</sup> For example, former Western Bosnian army member Sulejman Mujagic was indicted under the torture statute in the U.S. and later extradited to Bosnia to stand trial for murder in addition to torture. See U.S. Dep’t of Just., Press Release, Bosnian National Extradited to Stand Trial for Murder and Torture (June 3, 2013), <https://www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture>.

<sup>110</sup> See *Steps in the Federal Criminal Process: Investigation*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/investigation> (last visited 29 September 2021).

with counsel from the ICE Office of the Principal Legal Advisor's Human Rights Violator Law Division.

Members of the HRVWCC include the Department of Justice's Criminal Division's Human Rights and Special Prosecutions (HRSP) Section, the Department of Justice's Civil Division Office of Immigration Litigation Enforcement Section, the Federal Bureau of Investigations' (FBI) International Human Rights Unit, the Department of State, and U.S. Citizenship and Immigration Services.<sup>111</sup>

Although private individuals and NGOs cannot initiate investigations or require that prosecutors initiate investigations, they can provide information to agents within the HRVWCC that may trigger investigations.<sup>112</sup> In particular, agents seek information from witnesses and victims who may have first-hand knowledge of human rights violations and international crimes and may rely on NGOs or community-based organizations to provide contacts and connections to these witnesses.<sup>113</sup> Leads for investigations have come from victims, community-based organizations, adjudicators at the U.S. Citizenship and Immigration Services, anonymous tips through the HRVWCC tip line, referrals from other countries and international law enforcement partners and open-source records such as newspaper articles or declassified government documents.<sup>114</sup>

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<sup>111</sup> See *Human Rights Violators & War Crimes Center*, US IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/partnerships-centers/hrvwcc> (last visited Sep. 29, 2021); *About the Section*, U.S. DEP'T OF JUSTICE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, <https://www.justice.gov/criminal-hrsp/about-hrsp> (last visited Sep. 29, 2021); *International Human Rights Violations*, FEDERAL BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit> (last visited Sep. 29, 2021).

<sup>112</sup> See, e.g., U.S. DEP'T OF JUSTICE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION, GUIDE TO HUMAN RIGHTS STATUTES 4 (2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download>; *International Human Rights Violations*, FEDERAL BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit> (last visited 29 September 2021); *Safe Haven for Victims of War Crimes and Atrocities*, HRVWCC, <https://www.justsecurity.org/wp-content/uploads/2019/02/HRVWCC-Brochure-1.pdf> (last visited 5 November 2021); see also Eric Katz, *How the Justice Department Uses Historians to Prosecute War Criminals*, GOVERNMENT EXECUTIVE (24 December 2015), <https://www.govexec.com/defense/2015/12/how-justice-department-uses-historians-prosecute-war-criminals/124750/>.

<sup>113</sup> See *International Human Rights Violations*, FEDERAL BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit> (last visited 29 September 2021); Expert Interview, 25 October 2021.

<sup>114</sup> *Q&A with Teresa McHenry*; Expert Interview, 29 October 2021.

Members of the public can share information regarding individuals suspected of engaging in human rights abuses or war crimes with the HRVWCC by contacting:

- Domestic: 1-866-347-2423
- International: 00-1-802-872-6199
- Email: [HRV.ICE@ice.dhs.gov](mailto:HRV.ICE@ice.dhs.gov)
- Online: [tips.fbi.gov](https://tips.fbi.gov).<sup>115</sup>

During the investigation stage, attorneys, historians, analysts and special agents within the HRVWCC work together, including across agencies, to gather evidence of human rights violations and international crimes.<sup>116</sup>

Investigations into human rights violations and international crimes are often lengthy, resource-intensive and expensive.<sup>117</sup> The length of an investigations will vary depending on the nature and complexity of the case.<sup>118</sup>

Investigations often require accessing evidence located outside the United States that relates back to events that occurred years or decades prior.<sup>119</sup> Investigators gather physical, testimonial and documentary evidence such as witness statements, photographs, videos, country condition reports from organizations monitoring the country or relevant human rights situation, Department of State reports, unclassified or declassified government records, foreign government records, UN reports, foreign conviction records and immigration records, expert witness testimony, as well as historical records.<sup>120</sup> Historians within both the

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<sup>115</sup> *Safe Haven for Victims of War Crimes and Atrocities*, HRVWCC, <https://www.justsecurity.org/wp-content/uploads/2019/02/HRVWCC-Brochure-1.pdf> (last visited 5 November 2021).

<sup>116</sup> Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 615 (2020); *Q&A with Teresa McHenry*.

<sup>117</sup> *Q&A with Teresa McHenry*; Eric Katz, *How the Justice Department Uses Historians to Prosecute War Criminal*, GOVERNMENT EXECUTIVE (24 December 2015), <https://www.govexec.com/defense/2015/12/how-justice-department-uses-historians-prosecute-war-criminals/124750/>.

<sup>118</sup> Expert Interview, 25 March 2020.

<sup>119</sup> *Q&A with Teresa McHenry*; see also Eric Katz, *How the Justice Department Uses Historians to Prosecute War Criminal*, GOVERNMENT EXECUTIVE (Dec. 24, 2015), <https://www.govexec.com/defense/2015/12/how-justice-department-uses-historians-prosecute-war-criminals/124750/>.

<sup>120</sup> Expert Interview, October 25, 2020; Expert Interview, October 28, 2021. Expert Interview, October 29, 2021. For more information on the Department of Justice's internal protocols regulating investigations, including obtaining records from foreign jurisdictions, see 9-13.000 – *Obtaining Evidence*, in UNITED

HRVWCC and the HRSP provide information that helps contextualize suspected crimes and further investigations.<sup>121</sup> Ultimately, a prosecutor must review and analyze the evidence and use their discretion to file criminal charges (under Prosecutorial Discretion).

While private individuals and NGOs cannot play any formal role in investigations, they can provide documentation and evidence to investigators, to help investigations progress more quickly. Special agents rely heavily in their investigations on private parties with “on the ground” knowledge.<sup>122</sup> Often, these parties will help identify witnesses, gain access to crime scenes, gather documentation, coordinate with local governments and assist with identifying partner organizations and resources.<sup>123</sup> Investigators do not rely on private individuals and NGOs to interview and take statements from witnesses and victims.<sup>124</sup>

## 1.2 COMPLETION OF INVESTIGATION

Prosecutors and special agents do not release any formal decisions when their investigation is complete.<sup>125</sup> At the conclusion of an investigation, prosecutors will review all available evidence to determine whether the case should be presented to a federal grand jury, which would then decide whether charges should be formally brought.<sup>126</sup> The use of a grand jury is required for confirming all federal

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STATES DEPARTMENT OF JUSTICE MANUAL (2020), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.500>.

<sup>121</sup> See Eric Katz, *How the Justice Department Uses Historians to Prosecute War Criminals*, GOVERNMENT EXECUTIVE (Dec. 24, 2015), <https://www.govexec.com/defense/2015/12/how-justice-department-uses-historians-prosecute-war-criminals/124750/>.

<sup>122</sup> Expert Interview, 25 March 2020; Expert Interview, 29 October 2021; Expert Interview, 2 November 2021.

<sup>123</sup> Expert Interview, 25 March 2020.

<sup>124</sup> Expert Interview, 25 March 2020.

<sup>125</sup> Expert Interview, 4 November 2021.

<sup>126</sup> *Steps in the Federal Criminal Process: Investigation*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/investigation> (last visited 29 September 2021); *Steps in the Federal Criminal Process: Charging*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/charging> (last visited 29 September 2021); see also 1 WHARTON’S CRIM. PRO. § 4:12 (14th ed. 2021).

felony charges, including genocide, torture, war crimes and the recruitment or use of child soldiers.<sup>127</sup>

If a prosecutor seeks to pursue charges, they will present evidence, including witnesses, before a grand jury, which meets in secret.<sup>128</sup> After listening to the presentation of evidence, the grand jury votes whether to issue an indictment charging a defendant with a crime.<sup>129</sup> There is no constitutional right of public access to grand jury proceedings. Defendants do not have a constitutional right to testify before or present evidence to a grand jury.<sup>130</sup> Once an indictment is issued, the defendant will be given formal notice that they are suspected of committing a crime.<sup>131</sup>

Prosecutors have discretion in deciding whether to present evidence before a federal grand jury and whether to prosecute the charges once an indictment is issued. Neither the legislature, courts nor private actors can challenge the prosecutors' decisions whether to prosecute a case regardless of the severity of the crime at issue.<sup>132</sup>

### 1.3 ARREST WARRANT

After an indictment is issued, the court must issue an arrest warrant for each defendant named in the indictment, and the warrant should be delivered to an

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<sup>127</sup> See *Steps in the Federal Criminal Process: Charging*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/charging> (last visited 29 September 2021); 18 U.S.C. § 1091(b) (genocide punishable by death or life imprisonment where death results, or where death does not result, by 20 years in prison); 18 U.S.C. § 2340A(a) (torture punishable by death or life imprisonment where death result, or where it does not, by 20 years in prison); 18 U.S.C. § 2441(a) (war crimes punishable by death, if death results, or where it does not, by life in prison); 18 U.S.C. § 2442(b) (recruitment or use of child soldiers punishable by life imprisonment where death results, or where it does not, by 20 years in prison).

<sup>128</sup> *Steps in the Federal Criminal Process: Charging*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/charging> (last visited 29 September 2021).

<sup>129</sup> *Id.*

<sup>130</sup> 1 WHARTON'S CRIM. PRO. § 4:18 (14<sup>th</sup> ed. 2021).

<sup>131</sup> *Steps in the Federal Criminal Process: Charging*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/charging> (last visited 29 September 2021).

<sup>132</sup> Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 226-31, 236-39 (2020), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1166&context=djclpp>; 1 WHARTON'S CRIM. PRO. §§ 1:1, 1:4 (14<sup>th</sup> ed. 2021).

officer authorized to execute it.<sup>133</sup> Issuance of a warrant is not discretionary; a court must issue a warrant upon a valid indictment.<sup>134</sup>

Once a defendant is arrested, they must be brought before a magistrate judge without unnecessary delay.<sup>135</sup> The judge must inform the defendant of the charges against them as well as their constitutional procedural rights, such as the rights to counsel and against self-incrimination.<sup>136</sup> The judge must also determine whether to release or detain the defendant pending trial.<sup>137</sup> Federal law requires the defendant's release unless they pose a flight risk or danger to others in the community.<sup>138</sup> Detention is permitted only where a judicial officer determines that no set of conditions imposed on the defendant's release will reasonably ensure the defendant's appearance at trial and the safety of the community.<sup>139</sup>

#### 1.4 VICTIM RIGHTS AT THE INVESTIGATION STAGE

Two federal statutes govern duties owed to victims in federal criminal proceedings. The Crime Victims' Rights Act (CVRA) governs individuals' rights as victims of federal crime, and the Victims' Rights and Restitution Act (VRRRA) establishes services the government is required to provide to victims of federal crimes.<sup>140</sup> The Department of Justice has an Office for Victims of Crime, established in 1988 to assist crime victims and administer the Crime Victims Fund, which supports programs and services to assist victims (under Reparation). The Department of Homeland Security also has a Victim Assistance Program to ensure victims have access to the rights and services to which they are entitled by law.<sup>141</sup>

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<sup>133</sup> FED. R. CRIM. P. 9(a).

<sup>134</sup> 1A FED. PRAC. & PROC. CRIM. § 152 (5th ed. 2021).

<sup>135</sup> FED. R. CRIM. P. 5(a)(1).

<sup>136</sup> FED. R. CRIM. P. 5(d)(1).

<sup>137</sup> 1 FED. PRAC. & PROC. CRIM. § 71 (4th ed. 2021).

<sup>138</sup> 18 U.S.C. § 3142(b).

<sup>139</sup> 18 U.S.C. § 3142(e)(1).

<sup>140</sup> *Rights of Victims*, DEP'T OF JUSTICE, <https://www.justice.gov/enrd/rights-victims> (last visited 29 September 2021); see also Crime Victims' Rights Act, 18 U.S.C. § 3771; Victims' Rights and Restitution Act, 34 U.S.C. § 20141.

<sup>141</sup> *About OVC*, OFFICE FOR VICTIMS OF CRIMES, <https://ovc.ojp.gov/about> (last visited Sep. 29, 2021).

#### 1.4.1 DEFINITION OF VICTIM

The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense.”<sup>142</sup> The VRRRA similarly defines “victim” as “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.”<sup>143</sup> Under both the CVRA and the VRAA, when the victim is under 18 years old or is incompetent, incapacitated or deceased, the crime victim’s legal guardian, estate representatives, family members or another individual appointed by the court can exercise their rights under the Acts.<sup>144</sup>

#### 1.4.2 VICTIMS’ RIGHTS

The CVRA and the VRRRA provide crime victims with the following limited rights at the investigation stage:

- (1) **Right to information**, including the right to be given “the earliest possible notice of [...] the status of the investigation of the crime [...] the arrest of a suspected offender; [...] [and] the filing of charges against a suspected offender;”<sup>145</sup> “[t]he reasonable right to confer with the attorney for the Government in the case,”<sup>146</sup> and the right to be informed of their rights under the CVRA and VRRRA.<sup>147</sup>
- (2) **Rights to security and protection**, in particular, “[t]he right to be reasonably protected from the accused”<sup>148</sup> and from “persons acting in concert with or at the behest of the suspected offender.”<sup>149</sup>
- (3) **Rights to privacy and respect**, in particular, “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.”<sup>150</sup>

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<sup>142</sup> 18 U.S.C. § 3771(e)(2)(A).

<sup>143</sup> 34 U.S.C. § 20141(e)(2).

<sup>144</sup> 18 U.S.C. § 3771(e)(2)(B); 34 U.S.C. § 20141(e)(2)(B).

<sup>145</sup> 34 U.S.C. § 20141(c)(3)(A)-(C).

<sup>146</sup> 18 U.S.C. § 3771(a)(5).

<sup>147</sup> 18 U.S.C. § 3771(a)(10).

<sup>148</sup> 18 U.S.C. § 3771(a)(1); *see also* 34 U.S.C. § 20141(c)(2).

<sup>149</sup> 34 U.S.C. § 20141(c)(2).

<sup>150</sup> 18 U.S.C. § 3771(a)(8).



The VRRRA also requires that officials provide information and assistance on obtaining emergency medical and social services, as well as counseling, treatment, and other support.<sup>151</sup>

#### 1.4.3 REMEDIES FOR DENIAL OF RIGHTS

The CVRA established two mechanisms, one administrative and one judicial, to ensure victims' rights under the statute.<sup>152</sup> If a crime victim believes their rights under the CVRA have been violated, they may file an administrative complaint with the Department of Justice's Crime Victims' Rights Ombudsman (VRO).<sup>153</sup> The VRO will investigate complaints and determine whether it is necessary to take action. Where a violation is found, two actions are permitted:

- (1) training for employees who violated a victim's rights, where the violation was not wanton or willful, or
- (2) discipline of employees who wantonly or willfully violated a victim's rights.<sup>154</sup>

Victims cannot recover damages for any violation of their rights under the CVRA.<sup>155</sup> Violation of a victim's rights under the CVRA also will not provide grounds for a new trial against the defendant.<sup>156</sup>

The CVRA also authorizes crime victims to file a motion, i.e., a formal request, to enforce their rights in federal district court.<sup>157</sup> Victims may make such a motion

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<sup>151</sup> 34 U.S.C. § 20141(c)(1).

<sup>152</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-54, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 18-19 (2008).

<sup>153</sup> *Crime Victims' Rights Ombudsman*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman> (last visited 29 September 2021); *DOJ Procedures: § 45.10 Procedures to promote compliance with crime victims' rights obligations*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/doj-procedures> (last visited 29 September 2021); *Crime Victims' Rights Ombudsman – Filing a Complaint*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/filing-complaint> (last visited 29 September 2021).

<sup>154</sup> *DOJ Procedures: § 45.10 Procedures to promote compliance with crime victims' rights obligations*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/doj-procedures> (last visited Sep. 29, 2021).

<sup>155</sup> 18 U.S.C. § 3771(d)(6).

<sup>156</sup> 18 U.S.C. § 3771(d)(5).

<sup>157</sup> 18 U.S.C. § 3771(d)(3); see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154, at 3, 19 (describing the right to move for relief).

verbally or in writing before the court where the prosecution is taking place or, if no prosecution is underway, the court in the district where the crime occurred.<sup>158</sup> The motion may allege the violation of a victim's CVRA rights or general concerns regarding the provision of such rights.<sup>159</sup> If the respective district court denies the motion, the victim may petition the federal court of appeals in which the district court sits for a writ of mandamus, which commands the district court to grant the relief sought.<sup>160</sup> Nonetheless, crime victims are largely unaware of their right to file such motion, and many courts remain unfamiliar with the statute and have yet to settle when CVRA rights attach and how they are properly upheld.<sup>161</sup>

## **ii. Pre-Trial and Trial Stage**

### **2.1 PRELIMINARY HEARING AND DISCOVERY**

After charges are filed, a preliminary hearing is held, where the prosecutor must demonstrate that sufficient evidence exists to support the charges. If the judge finds there is probable cause to believe the defendant committed the alleged crime, a trial will be scheduled. If evidence is found to be insufficient, the judge will dismiss charges.<sup>162</sup>

As the prosecutor and defense prepare for trial, they engage in discovery, the formal process of exchanging information about witnesses and evidence that both parties will present at trial.<sup>163</sup> During discovery, the prosecutor and the defense will interview witnesses and prepare evidence for trial.<sup>164</sup> The prosecutor and the

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<sup>158</sup> See 18 U.S.C. § 3771(d)(3); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154, at 19.

<sup>159</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154, at 19.

<sup>160</sup> 18 U.S.C. § 3771(d)(3); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 154, at 3, 19 (describing the right to petition for a writ of mandamus).

<sup>161</sup> Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. L. REV. 1495, 1537-38 (2014).

<sup>162</sup> *Steps in the Federal Criminal Process: Preliminary Hearing*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/preliminary-hearing> (last visited 29 September 2021).

<sup>163</sup> *How Courts Work*, AMERICAN BAR ASSOCIATION (9 September 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/discovery/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/).

<sup>164</sup> *Steps in the Federal Criminal Process: Discovery*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/discovery> (last visited 29 September 2021).

defense must then provide each other copies of evidence they plan to rely on at trial and a list of witnesses they expect to call to testify at trial.<sup>165</sup>

## 2.2 TRIAL

Federal criminal trials are prosecuted by United States Attorneys in federal district courts.<sup>166</sup> At trial, the prosecution and defense present their cases to a 12-person jury or, in the event of a bench trial, to a judge. A judge oversees the trial to ensure that procedural rules are followed and to determine what evidence can be presented, but the jury decides the defendant's guilt or innocence. The prosecution presents their witnesses and other evidence first, and the defense has an opportunity to cross-examine or question the prosecution's witnesses. After the prosecution rests, the defense presents their evidence and witnesses, which the prosecution can cross-examine.<sup>167</sup>

Following the presentation of evidence and closing arguments by both sides, the jury receives instructions on the law and then deliberates in private. In a federal criminal proceeding, a jury can only convict a defendant if all 12 jurors unanimously agree the defendant is guilty beyond a reasonable doubt. Once the jury has reached a decision on the verdict, they announce it in court.<sup>168</sup>

If a defendant is found guilty, the judge will determine the sentence, based on statutory minimum and maximum punishments, the United States Sentencing Commission's guidelines, aggravating and mitigating factors and statements from the victims, defendant and lawyers.<sup>169</sup>

At the time of writing, only one criminal trial for substantive human rights violations and international crimes identified in this report has been completed in the United States – the prosecution of Chuckie Taylor for torture.<sup>170</sup> All other

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<sup>165</sup> *Id.*

<sup>166</sup> See *Mission*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/mission>.

<sup>167</sup> *Steps in the Federal Criminal Process: Trial*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/trial> (last visited 29 September 2021).

<sup>168</sup> *Id.*

<sup>169</sup> *Steps in the Federal Criminal Process: Sentencing*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/sentencing> (last visited 29 September 2021).

<sup>170</sup> *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing before the Subcomm. On Human Rights and the Law of the Comm. On the Judiciary*, 111th Cong. 24 (2009) (responses of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice, submitted by Senator Coburn); see also U.S. DEP'T OF JUSTICE CRIM. DIVISION, HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION HUMAN RIGHTS PORTFOLIO (April 2020), <https://www.justice.gov/criminal-hrsp/page/file/931511/download>.

cases investigated and brought by the HRVWCC have been for criminal immigration fraud (for making false statements about involvement in human rights abuses), perjury, criminal denaturalization, re-entry after removal from the United States, or under the Military Extraterritorial Jurisdiction Act.<sup>171</sup>

Third party interventions through *amicus curiae* filings are not possible at the trial stage in criminal proceedings. At the appeals stage, *amicus curiae* can intervene with permission of the court.

### 2.3 POSSIBLE CHALLENGES BY VICTIMS OR NGO

No party — whether prosecutors or third parties such as victims — can challenge acquittals because of constitutional protections against double jeopardy.<sup>172</sup> Defendants, however, can appeal convictions to the appropriate Circuit Court of Appeals and ultimately the Supreme Court.<sup>173</sup>

### 2.4 VICTIM RIGHTS AT THE TRIAL STAGE

In addition to the rights during the investigation stage, crime victims have the following limited rights at the trial stage under the CVRA and VRRRA:

- (1) **Right to information**, including the rights “to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime;”<sup>174</sup> “to be informed in a timely manner of any plea bargain or deferred prosecution agreement;”<sup>175</sup> and to be informed of “the release or detention status of an offender or suspected offender.”<sup>176</sup>
- (2) **Right to timely proceedings**, in particular “[t]he right to proceedings free from unreasonable delay.”<sup>177</sup>

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<sup>171</sup> See U.S. DEP’T OF JUSTICE CRIM. DIVISION, HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION HUMAN RIGHTS PORTFOLIO (April 2020), <https://www.justice.gov/criminal-hrsp/page/file/931511/download>.

<sup>172</sup> *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (“Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that ‘(a) verdict of acquittal ... could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.’” (citation omitted)).

<sup>173</sup> *Steps in the Federal Criminal Process: Appeal*, OFFICES OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usao/justice-101/appeal> (last visited 29 September 2021).

<sup>174</sup> 18 U.S.C. § 3771(a)(2); see also 34 U.S.C. §§ 20141(c)(3)(D), 20141(c)(5)(A).

<sup>175</sup> 18 U.S.C. § 3771(a)(9); see also 34 U.S.C. § 20141(c)(3)(F).

<sup>176</sup> 34 U.S.C. § 20141(c)(3)(E).

<sup>177</sup> 18 U.S.C. § 3771(a)(7).

- (3) **Right to be present**, including “[t]he right not to be excluded from any ... public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.”<sup>178</sup>
- (4) **Right to be heard**: victims have the “reasonable right to confer with the attorney for the Government in the case”<sup>179</sup> and “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”<sup>180</sup> This includes the right to submit a victim impact statement to the judge for consideration during the sentencing of a crime. Victim impact statements provide victims the opportunity to outline the emotional, physical and financial impact of a crime, all of which may be relied upon by a judge in determining the appropriate sentence a defendant should receive and what amount of restitution damages are owed to the victims. Victims may choose to submit a statement in written form and orally before the judge at sentencing.<sup>181</sup>
- (5) **Right to restitution**, in particular “[t]he right to full and timely restitution as provided in law”<sup>182</sup> (under Reparation).
- (6) **Other rights include**: the “right to be reasonably protected from the accused” and “the right to be treated with fairness and with respect for the victim’s dignity and privacy.”<sup>183</sup>

As discussed above (under Remedies for Denial of Rights), victims can file complaints with the Department of Justice’s VRO and a motion before the appropriate federal district court if they believe their rights under the CVRA have been violated. If the district court denies a victim’s motion, the victim may petition the appropriate federal court of appeals for a writ of mandamus directing the district court to grant the relief sought.

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<sup>178</sup> 18 U.S.C. § 3771(a)(3).

<sup>179</sup> 18 U.S.C. § 3771(a)(5).

<sup>180</sup> 18 U.S.C. § 3771(a)(4).

<sup>181</sup> See Victim Impact Statements, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal-vns/victim-impact-statements> (14 December 2020).

<sup>182</sup> 18 U.S.C. § 3771(a)(6).

<sup>183</sup> 18 U.S.C. § 3771(a)(1), (8); see also *Victim Rights*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal-vns/victim-rights-derechos-de-las-v-ctimas> (8 December 2020).

## 2.5 THIRD PARTY INTERVENTIONS AND PRIVATE PROSECUTIONS

Third party interventions in criminal cases and private prosecutions of criminal cases are not permitted in the United States.<sup>184</sup>

### f. Evidentiary Burden for Investigation and Prosecution

Prosecutions for substantive human rights crimes are subject to the ordinary rules of evidence applicable in federal criminal trials in the United States.

#### *i. At the Investigation Stage*

##### 1.1 THRESHOLD FOR OPENING INVESTIGATIONS

According to the Attorney General’s Guidelines, a criminal investigation may be initiated “when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed.”<sup>185</sup> While “[t]he standard of ‘reasonable indication’ is substantially lower than probable cause,” it does require proof of “specific facts or circumstances indicating a . . . violation,” as well as “an objective, factual basis” for the investigation, rather than a “mere hunch.”<sup>186</sup>

Where a “reasonable indication” of criminal activities is lacking but investigators believe that further scrutiny is required beyond the limited checking of initial leads, the Attorney General’s Guidelines allow investigators to open a “preliminary inquiry” that involves “some measured review, contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.”<sup>187</sup> Inquiries should be limited in duration and are intended to obtain information necessary to determine whether an investigation is necessary.<sup>188</sup> Where the inquiry fails to uncover information justifying an investigation, the matter should be closed.<sup>189</sup>

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<sup>184</sup> Expert Interview, 28 October 2021.

<sup>185</sup> *Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, DEP’T OF JUSTICE ARCHIVES, <https://www.justice.gov/archives/ag/attorney-generals-guidelines-general-crimes-racketeering-enterprise-and-domestic> (last visited 29 September 2021).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

## 1.2 THRESHOLD FOR INDICTMENT

As discussed above (under Completion of Investigations), at the conclusion of an investigation, a prosecutor will determine whether to present evidence to a federal grand jury, which then has the power to issue an indictment. The rules of evidence that apply in criminal trials do not apply during grand jury proceedings.<sup>190</sup> Therefore, prosecutors may present hearsay evidence to the grand jury.<sup>191</sup> However, prosecutors shall not present evidence to the grand jury where they know the evidence was obtained as a direct result of a violation of an individual's constitutional rights.<sup>192</sup>

After the grand jury hears the evidence presented, it determines whether the evidence is sufficient to issue an indictment and formally bring charges against the defendant. In order for the grand jury to issue an indictment, at least 12 grand jurors must concur that there is probable cause to believe the defendant committed the alleged crime.<sup>193</sup> Probable cause is a flexible standard to be applied by “reasonable and prudent” persons<sup>194</sup> and exists where the facts and circumstances are known and reasonably trustworthy and sufficient to warrant a reasonably cautious person to believe that the defendant has committed the offense.<sup>195</sup>

## 1.3 THRESHOLD FOR ARREST WARRANT

The Fourth Amendment of the U.S. Constitution provides that any arrest warrant must be issued “upon probable cause, supported by Oath or affirmation, and particularly describing [...] the persons [...] to be seized.”<sup>196</sup> An indictment meets these requirements, as it requires proof of probable cause, is made on the oath of

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<sup>190</sup> FED. R. EVID. 1101(d)(2).

<sup>191</sup> FED. R. CRIM. P. 6(f); *9-11.232 Use of Hearsay in a Grand Jury Proceeding*, in UNITED STATES DEPARTMENT OF JUSTICE MANUAL (2018), <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.232>.

<sup>192</sup> *9-11.231 Motions to Dismiss Due to Illegally Obtained Evidence Before a Grand Jury*, in UNITED STATES DEPARTMENT OF JUSTICE MANUAL (2018), <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.231>.

<sup>193</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (describing the role of the grand jury as “determining if there is probable cause to believe that a crime has been committed”); see also *9-27.200 Initiating and Declining Prosecution—Probable Cause Requirement*, in UNITED STATES DEPARTMENT OF JUSTICE MANUAL (2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.200>.

<sup>194</sup> *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

<sup>195</sup> See *Carroll v. United States*, 267 U.S. 132, 162 (1925); see also *United States v. Grubbs*, 547 U.S. 90, 95 (2006).

<sup>196</sup> U.S. CONST. amend. IV.

grand jurors, and must particularly describe the persons to be charged with the crime.<sup>197</sup>

## **ii. At the Trial Stage**

### **2.1 BURDEN OF PROOF AT TRIAL**

The presumption of innocence is an “axiomatic and elementary [principle], and its enforcement lies at the foundation of the administration of [U.S.] criminal law.”<sup>198</sup> At trial, the prosecution has the burden of proving all elements of a crime beyond a reasonable doubt.<sup>199</sup> There is no single definition for “reasonable doubt,” but it is often described as “the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act.”<sup>200</sup>

### **2.2 PRINCIPLE OF DISCLOSURE**

The prosecution is required to disclose evidence to the defense under procedural and evidentiary rules, federal statutory law and the Constitution. Disclosure rules require the prosecution to disclose to the defense, *inter alia*, exculpatory evidence, documents and objects material to the defense, prior statements by the defendant and the names and prior statements of testifying victims and witnesses.<sup>201</sup> A more comprehensive discussion of the rules of disclosure are beyond the scope of this report.

### **2.3 GENERAL RULES OF ADMISSIBILITY OF EVIDENCE**

The Federal Rules of Evidence apply to all federal criminal trials, including prosecutions for human rights violations and international crimes. These rules are supplemented by rules of evidence developed in federal common law. While the intricacies of the rules of evidence are beyond the scope of this report, this section discusses general principles of evidence relevant to criminal prosecutions.

At trial, the prosecution and defense can present any evidence that is relevant and is not subject to an exclusionary rule.<sup>202</sup> Evidence is relevant if “(a) it has any

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<sup>197</sup> 1A Fed FED. PRAC. & PROC. CRIM. § 152 (5th ed. 2021).

<sup>198</sup> *Coffin v. United States*, 156 U.S. 432, 543 (1895).

<sup>199</sup> *In re Winship*, 397 U.S. 358, 363 (1970).

<sup>200</sup> *Holland v. United States*, 348 U.S. 121, 140 (1954).

<sup>201</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); 18 U.S.C. § 3500; FED. R. CRIM. P. 16(a)(1); FED. R. EVID. 404(b), 413, 414.

<sup>202</sup> FED. R. EVID. 402.



tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>203</sup> There are many exclusionary rules found in the Federal Rules of Evidence, the Constitution, federal statutes and federal common law.<sup>204</sup> Two key exclusionary rules are discussed below (under General Rule Against Hearsay and Exclusion of Unlawfully Obtained Materials).

Only the prosecution and defense can introduce evidence at trial; victims, NGOs and third parties cannot introduce evidence. Evidence may come in the form of testimony from victims or witnesses; physical evidence such as weapons from a crime scene; and documentary evidence, including written documents such as military orders, photographs or videos, or open-source documentation such as online written posts or videos.<sup>205</sup> When a party introduces evidence, they must authenticate it by “produc[ing] evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>206</sup> Rules specific to introduction of open-source evidence are discussed below (under Open-source Evidence).

### 2.3.1 GENERAL RULE AGAINST HEARSAY

Hearsay evidence is an out of court statement offered to prove the truth of the matter asserted.<sup>207</sup> For example, the statement by a soldier “my commander ordered me to kill civilians” is hearsay if it is offered to prove that the soldier’s commander did in fact order the soldier to kill civilians. However, if the same statement is offered to prove the effect of the statement on the soldier—for instance, that the commander’s order was frightening and caused the soldier to act in a certain way—then it is not hearsay. Hearsay evidence is inadmissible, except where an exception is recognized by the Federal Rules, federal statutes or by federal common law.<sup>208</sup>

Hearsay is generally excluded because it is viewed as less reliable than live testimony in trial.<sup>209</sup> Hearsay carries the risks that the declarant misperceived, misremembered or miscommunicated events; the declarant’s statement did not

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<sup>203</sup> FED. R. EVID. 401.

<sup>204</sup> See FED. R. EVID. 402.

<sup>205</sup> See Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 602-06 (2020).

<sup>206</sup> FED. R. EVID. 901(a).

<sup>207</sup> FED. R. EVID. 801(c).

<sup>208</sup> FED. R. EVID. 802.

<sup>209</sup> 4 FEDERAL EVIDENCE § 8:3 (4<sup>th</sup> ed. 2021).

sincerely communicate their view; or the listener misunderstood the declarant's statement. When an out of court statement is simply repeated in court, the jury does not have the full context of the statement and is not as well-placed to evaluate its credibility. In contrast, live in-court testimony reduces the risks of misrepresentation, miscommunication and misunderstanding because it requires a witness to testify under oath and undergo cross-examination. It also allows the jury to evaluate the witness's credibility for themselves, by observing the questioning and the witness's demeanor.<sup>210</sup>

Despite the risks of hearsay evidence, there are exceptions where hearsay evidence is admissible, either because that hearsay evidence is viewed as trustworthy, or out of necessity, because no more trustworthy evidence would be available.<sup>211</sup> Hearsay that is admissible because it is viewed as more trustworthy includes statements describing present events or conditions, statements relating to startling events or conditions and expressed under the stress of excitement, statements describing a then-existing state of mind, statements made for the purpose of medical diagnosis or treatment, records of regularly conducted activities, public records, religious records, property records and court convictions.<sup>212</sup> Necessity-based hearsay exceptions include the following statements, but only when the declarant is unavailable: former in-court testimony, statements made under the belief of imminent death, statements against the declarant's interests, statements of personal family history and statements by a declarant that the opposing party intentionally rendered unavailable as a witness.<sup>213</sup>

### 2.3.2 EXCLUSION OF UNLAWFULLY OBTAINED MATERIALS

The U.S. Supreme Court has ruled that evidence obtained in violation of a defendant's constitutional rights may be excluded from trial. The exclusionary rule is "a judicially created means of deterring illegal searches and seizures" and is a remedial measure for violations of constitutional rights.<sup>214</sup> Accordingly, the Supreme Court has held that the exclusionary rule does not apply in every instance of illegally obtained evidence but only "where its remedial objectives are

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> FED. R. EVID. 803.

<sup>213</sup> FED. R. EVID. 804.

<sup>214</sup> *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998).

thought most efficaciously served” and “where its deterrence benefits outweigh its substantial social costs.”<sup>215</sup>

Evidence subject to the exclusionary rule includes physical and testimonial evidence resulting from an illegal search or seizure violating the Fourth Amendment of the U.S. Constitution, such as tangible objects seized during an illegal search, testimony regarding items observed during an illegal search and statements overheard during an illegal search.<sup>216</sup> Under the “fruit of the poisonous tree doctrine,” any evidence that is derived from illegally obtained evidence is also excluded, unless the government can demonstrate a break in the chain of events such that the later-obtained evidence did not result from the constitutional violation.<sup>217</sup>

### 2.3.3 OPEN-SOURCE EVIDENCE

Open-source evidence is defined as open-source information—meaning “publicly available information that any member of the public can observe, purchase or request without requiring special legal status or unauthorized access”—that has evidentiary value and “may be admitted in order to establish facts in legal proceedings.”<sup>218</sup> Examples of open-source evidence that may be used in prosecutions for human rights violations or international crimes include social media posts (including photographs and videos) and satellite imagery.<sup>219</sup>

Open-source evidence is subject to the same admissibility rules as other types of evidence in U.S. courts. Likely the biggest hurdle in admitting open-source evidence is authentication. All evidence that is introduced must be authenticated,

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<sup>215</sup> *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); see also *United States v. Janis*, 428 U.S. 433, 454 (1976) (“If ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.”).

<sup>216</sup> *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); see also 23 C.J.S. CRIMINAL PROCEDURE & RIGHTS OF ACCUSED §§ 866, 877 (2021).

<sup>217</sup> *Segura v. United States*, 468 U.S. 796, 804-05 (1984).

<sup>218</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS & UC BERKELEY SCHOOL OF LAW HUMAN RIGHTS CENTER, BERKELEY PROTOCOL ON DIGITAL OPEN-SOURCE INVESTIGATIONS, 6-7 (2020) [https://www.ohchr.org/Documents/Publications/OHCHR\\_BerkeleyProtocol.pdf](https://www.ohchr.org/Documents/Publications/OHCHR_BerkeleyProtocol.pdf).

<sup>219</sup> See, e.g., Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 FORDHAM INT’L L. J. 283, 316-19 (2018) (discussing use of satellite imagery, YouTube videos, and online audio clips as open-source evidence in the prosecution of Al Mahdi at the International Criminal Court).

meaning its “proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>220</sup>

## g. Witness and Victim Protection

### *i. Protection During Trial*

In the United States, defendants have a constitutional right to directly confront witnesses testifying against them.<sup>221</sup> This right generally requires a defendant to be able to know the identity of any witnesses testifying against them, and to freely cross-examine the witnesses in court. While a defendant’s constitutional right to confrontation may limit the types of measures that can be taken to protect witnesses, it does not mean witness protection is impossible.<sup>222</sup>

A defendant’s right to confrontation is not absolute, and anonymous witness testimony has been allowed in cases where the government has established a specific threat to the witness. U.S. courts have held that defendants do not have an absolute right to discover the name and identifying details of a witness whose personal safety is threatened by either the defendant or third persons.<sup>223</sup> Where a witness’s safety is threatened, the government must disclose the witness’s identifying details and the threat *in camera* to the judge, who will then determine whether the witness’s identity must be disclosed to the defendant in order to satisfy their constitutional right to confrontation.<sup>224</sup> Although a witness’s identity must be disclosed in “almost all circumstances,”<sup>225</sup> courts have allowed anonymous witness testimony where a witness faced a credible and significant security threat based on their testimony.<sup>226</sup>

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<sup>220</sup> FED. R. EVID. 901(a).

<sup>221</sup> U.S. CONST. amend. VI.

<sup>222</sup> See *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

<sup>223</sup> *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991), *cert. denied sub nom. Clark v. Lewis*, 506 U.S. 838 (1993).

<sup>224</sup> *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969).

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., *United States v. Ramos-Cruz*, 667 F.3d 487, 500-01 (4th Cir. 2012) (allowing two El Salvadorian government witnesses to testify anonymously because they would face threats by providing testimony against an MS-13 gang member, the government disclosed to the defendant the substance of the testimony in advance, and the witnesses were only testifying generally about MS-13 operations and not specifically about the defendant); *United States v. Zelaya*, 336 Fed. Appx. 355, 358 (4th Cir. 2009) (same); *United States v. Celis*, 6087 F.3d 818, 830-32 (D.C. Cir. 2010) (allowing use of pseudonyms by government witnesses from Colombia in prosecution for drug conspiracy, where there were threats to kill

In addition, the U.S. Supreme Court has held that a defendant’s right to face-to-face confrontation may be abridged “where there is a case-specific finding of necessity.”<sup>227</sup> For instance, a child witness in a child abuse case may testify out of the defendant’s presence, via a one-way closed-circuit television, if testifying in the defendant’s presence would subject them to serious emotional trauma and make them communicate less effectively.<sup>228</sup>

### **ii. Witness Protection Program**

The U.S. Marshals Service operates the U.S. federal Witness Security Program, also known as the Witness Protection Program.<sup>229</sup> The program is available to witnesses testifying in a case involving organized crime, drug trafficking and other serious federal felonies, where the witness may be subject to violent retaliation because of their testimony and cooperation with the U.S. government.<sup>230</sup> Admittance to the program is based on vetting by the U.S. Attorney supporting the potential witness, the U.S. Marshals Service and the Department of Justice’s Office of Enforcement Operations.<sup>231</sup>

Witnesses within the program, as well as their immediate family members and close associates, may be relocated and given new identities, if necessary to protect them from bodily injury and other harms.<sup>232</sup> Individuals within the program may be provided documents to establish their new identity, as well as housing, transportation, employment and financial assistance.<sup>233</sup>

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witnesses); *United States v. El-Mezain*, 664 F.3d 467, 492-93 (5th Cir. 2011) (allowing Israeli security agents to testify under pseudonyms because Hamas and terrorist organizations seek out the identities of Israeli security agents and target them and the government disclosed to the defense significant amounts of information to allow the defense to cross-examine the witnesses).

<sup>227</sup> *Maryland v. Craig*, 497 U.S. 836, 857-58 (1990) (quotations omitted).

<sup>228</sup> *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

<sup>229</sup> FACT SHEET: WITNESS SECURITY, U.S. MARSHALS SERVICE (2021), <https://www.usmarshals.gov/duties/factsheets/witsec.pdf>.

<sup>230</sup> 9-21.100 *Eligibility for the Witness Security Program*, in UNITED STATES DEPARTMENT OF JUSTICE MANUAL (2020), <https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.100>; see also 18 U.S.C. § 3521.

<sup>231</sup> FACT SHEET: WITNESS SECURITY, U.S. MARSHALS SERVICE (2021), <https://www.usmarshals.gov/duties/factsheets/witsec.pdf>.

<sup>232</sup> 18 U.S.C. § 3521(a)(1).

<sup>233</sup> 18 U.S.C. § 3521(b)(1)(A)-(F).

## h. Reparations for Victims in Criminal Proceedings

### *i. Restitution*

The Mandatory Restitution Act of 1996 requires defendants to pay victims of federal crimes restitution for certain losses that resulted from the defendant's commission of the crime.<sup>234</sup> Restitution is available to cover the cost of lost income, property damage, counseling, medical expenses, funeral costs or other financial costs directly resulting from the crime. Judges will consider restitution in every case as it is mandatory. Victims of a crime may identify their losses and request restitution through a Victim Impact Statement, and a judge will rely on this information and enter an order for restitution at the sentencing stage.<sup>235</sup> However, even when restitution is ordered, it is often not fully recovered because many defendants lack sufficient assets to repay victims, especially when a large number of victims were harmed.<sup>236</sup>

### *ii. The Crime Victims Fund*

The Crime Victims Fund (CVF), established by the Victims of Crime Act of 1984 (VOCA), provides financial assistance to victims of crimes to cover costs they incur because of the crimes committed against them.<sup>237</sup> The CVF is financed mostly by fines collected from persons convicted of offenses against the United States, including the substantive human rights crimes discussed herein and acts of terrorism committed abroad.<sup>238</sup> Each year, the U.S. Congress establishes the

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<sup>234</sup> 18 U.S.C. § 3663A; MANDATORY RESTITUTION ACT OF 1996, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/sites/default/files/usao-az/legacy/2006/09/26/restitut.pdf> (last visited 5 October 2021).

<sup>235</sup> See *The Restitution Process for Victims of Federal Crimes*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/file/414321/download> (last visited 10 November 2021).

<sup>236</sup> *Restitution Process*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-vns/restitution-process> (last visited 5 October 2021).

<sup>237</sup> Victims of Crime Act of 1984, Pub. L. No. 98-473, tit. II, ch. XIV, § 1402, 98 Stat. 2170, 2170-71 (codified as amended at 34 U.S.C. § 20101); see also LISA N. SACCO, CONG. RSCH. SERV., R42672, THE CRIME VICTIMS FUND: FEDERAL SUPPORT FOR VICTIMS OF CRIME 1 (2020) (providing an overview of the Fund); *OVC Fact Sheet: Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/crimevictimsfundfs/intro.html> (last visited 3 November 2021) (same).

<sup>238</sup> See 34 U.S.C. § 20101(b)(1); SACCO, *supra* note 236, at 2.

minimum amount of CVF funds that will be made available for the upcoming year, an average of over \$2.5 billion annually since 2015.<sup>239</sup>

CVF funds are first allocated to specially designated federal programs and entities that support crime victims, such as FBI Victim Witness Specialists, with the bulk reserved for the states to distribute to crime victims and support programs.<sup>240</sup>

Victims can receive compensation from the CVF to cover medical costs, funeral and burial expenses, mental health counseling and lost wages or loss of support that result from the commission of a crime.<sup>241</sup> In addition, the CVF provides financial support to state and community-based organizations and public agencies for providing crime victims direct services such as crisis intervention, temporary housing, emergency transportation, counseling and legal advocacy.<sup>242</sup>

## i. Immunities

U.S. courts have adopted the customary international law rule that sitting heads of state are absolutely immune from both criminal prosecutions and civil suits, and will defer to U.S. State Department determinations with respect to whether an individual is recognized by the United States as a head of state or head of government.<sup>243</sup> The United States is also a party to the Vienna Convention on Diplomatic Relations and has domesticated the Convention's provisions concerning diplomatic immunity at 18 U.S.C. § 254a *et seq.*, granting immunity from civil and criminal liability to foreign diplomatic agents.<sup>244</sup>

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<sup>239</sup> See SACCO, *supra* note 236, at 5 tbl.1 (listing funds made available for distribution through fiscal year 2020).

<sup>240</sup> *Id.* at 7.

<sup>241</sup> See 34 U.S.C. § 20102(b)(1); U.S. Dep't of Just., Press Release, Department of Justice Awards over \$1.8 Billion in Grants to Assist Victims Nationwide (6 October 2020), <https://www.justice.gov/opa/pr/departments-justice-awards-over-18-billion-grants-assist-victims-nationwide>.

<sup>242</sup> See 34 U.S.C. § 20103; SACCO, *supra* note 236, at 7, 10-11; *OVC Fact Sheet*, *supra* note 236; U.S. Dep't of Just., *supra* note 240.

<sup>243</sup> See *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fl. 1990) (“Grounded in customary international law, the doctrine of head of state immunity provides that a head of state is not subject to the jurisdiction of foreign courts, at least as to official acts taken during the ruler's term of office.”), *aff'd* 117 F.3d 1206 (11th Cir. 1997); see also *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260, 263-64 (D.D.C. 2012) (dismissing civil suit filed against the President of Sri Lanka because the U.S. State Department issued a suggestion of immunity finding that President Rajapaksa was entitled to head of state immunity, and that suggestion of immunity was binding on the court), *aff'd* 711 F.3d 178 (D.C. Cir. 2013).

<sup>244</sup> Vienna Convention on Diplomatic Relations art. 31, *entered into force* Apr. 24, 1964, 500 U.N.T.S. 95; 18 U.S.C. § 254a *et seq.*

The U.S. also recognizes the immunity of foreign officials on “special missions” for their governments, and provides immunity for members of certain diplomatic missions that are temporary or transient in nature.<sup>245</sup> However, such forms of status-based immunities – i.e., immunities that apply to individuals based on their current status as head of state, diplomatic and special mission immunity – ends as soon as the individual is removed from office or no longer holds the official status.<sup>246</sup>

Lastly, the U.S. has also entered into an agreement with the United Nations regarding the headquarters of the United Nations in New York, which provides immunity to certain representatives of the United Nations while they are within the territory of the United States.<sup>247</sup>

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<sup>245</sup> See Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1157 (2011).

<sup>246</sup> *Id.* at 1154.

<sup>247</sup> Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, *entered into force* June 26, 1947, 11 U.N.T.S. I 1, art. V (4).



### 3. Part 2: Other Avenues to Accountability

#### a. Criminal Prosecution of Immigration Fraud & Perjury

The United States has only successfully prosecuted one individual for torture. The United States has never initiated prosecutions for genocide, war crimes or the recruitment or use of child soldiers. However, the U.S. Attorneys, with support of the HRVWCC, have prosecuted individuals accused of human rights abuses and war crimes for criminal denaturalization, immigration fraud, perjury and other offenses.<sup>248</sup>

If an individual responsible for human rights violations travels to or immigrates to the United States and subsequently makes misrepresentations in their visa or naturalization submissions about their participation in those violations, they can be prosecuted for immigration fraud or perjury.<sup>249</sup> Criminal charges most often pursued for immigration fraud relating to human rights violations include:

**(1) Fraud and Misuse of Visas, Permits, and Other Documents:**

Knowingly forging, counterfeiting, altering, or falsely making a visa, permit, or other document for entry into or stay in the United States; knowingly using, possessing, accepting, or receiving such document; or knowingly making a false statement under oath or penalty of perjury regarding a material fact in a document required by immigration laws.<sup>250</sup>

**(2) Unlawful Procurement of Citizenship or Naturalization:** Knowingly procuring or attempting to procure naturalization or citizenship through unlawful means.<sup>251</sup>

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<sup>248</sup> See *Human Rights Violators Investigations*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT (3 July 2019), <https://www.ice.gov/factsheets/hrv> (listing a number of criminal immigration fraud cases under “Significant Success Stories”).

<sup>249</sup> See Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 600 (2020).

<sup>250</sup> 18 U.S.C. § 1546; see, e.g., *United States v. Mudahinyuka*, 2011 WL 528804 (N.D. Ill. 2011); *United States v. Barreiro*, 2007 WL 9254281, dkt 07-00151 (E.D. Va. 2007); *United States v. Boskic*, 545 F.3d 69 (1<sup>st</sup> Cir. 2008); *United States v. Lopes*, No. 07-10437-MLW (D. Mass. Feb. 6, 2009).

<sup>251</sup> 18 U.S.C. § 1425; see, e.g., *United States v. Mumenyezi*, 2010 WL 2607161 (D. N.H. 2010); *United States v. Jordan*, 432 Fed. App’x 950 (11<sup>th</sup> Cir. 2011); *United States v. Jordan*, 432 F. App’x 950 (11<sup>th</sup> Cir. 2011); *United States v. Sosa*, 608 F. App’x 464 (9<sup>th</sup> Cir. 2015); *United States v. Ngombwa*, 2016 WL 111434 (N.D. Iowa 2016); *United States v. Mitrovic*, 890 F.3d 1217 (11<sup>th</sup> Cir. 2018). See also 18 U.S.C. § 1015 (criminalizing false statements related to naturalization, citizenship or alien registry).

(3) **Perjury:** Willfully stating or declaring a matter not believed to be true while under oath or penalty of perjury.<sup>252</sup>

Immigration fraud, denaturalization, and perjury can be pursued where charges for substantive human rights crimes are unavailable, for example because the statute of limitations has run, the violations were committed before the substantive criminal statutes were passed, the victims were not U.S. nationals or members of the armed forces (as is required by the War Crimes Act), or the perpetrator was not acting under the color of law (as is required by the Torture Act).<sup>253</sup> Such matters often require alleging and proving violations of substantive human rights offenses as a basis for the fraud.<sup>254</sup> The defendant's role in serious human rights offenses can also be grounds for seeking a higher criminal sentence for the immigration related crimes.<sup>255</sup>

One example of a criminal immigration fraud prosecution is the case of Mohammed Jabbateh, who commanded the rebel group United Liberation Movement of Liberia for Democracy ULIMO from 1992 to 1995, during Liberia's first civil war. As commander, Jabbateh was responsible for serious human rights violations and international crimes, including murder of civilians, sexual enslavement, torture, conscription of child soldiers and execution of prisoners of war. Jabbateh immigrated to the United States in 1998 and lied about his responsibility for human rights violations when applying for immigration

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<sup>252</sup> 18 U.S.C. § 1621; *see, e.g. United States v. Lopes*, No. 07-10437-MLW (D. Mass. Feb. 6, 2009); *United States v. Montano*, 12-10044 (D. Mass. 2011). *See also* 18 U.S.C. § 1001 (within any matter of the jurisdiction of the executive, legislative or judicial branch of the United States government, knowingly and willfully (1) falsifying, concealing, or covering up a material fact; (2) making a materially false, fictitious or fraudulent statement; or (3) making or using writings containing materially false, fictitious, or fraudulent statements are punishable by up to 8 years in prison).

<sup>253</sup> Expert Interview, 29 October 2021; *see also* Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 600-01 (2020); Alexandra Insigna, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SECURITY (7 November 2017), <https://www.justsecurity.org/46801/mohammed-jabbateh-conviction-human-rights-trial-cloaked-immigration-crimes/>.

<sup>254</sup> For example, in the immigration fraud prosecution of Beatrice Munyenyezi, the prosecutor presented evidence demonstrating that Munyenyezi concealed her role in the 1994 Rwandan genocide and that, as a member of the Interahamwe, Munyenyezi participated, aided and abetted in the persecution and murder of Tutsi people during the genocide. *See United States v. Munyenyezi*, 2010 WL 2607161 (D. N.H. 2010); *Rwandan national sentenced to 10 years for fraudulently obtaining citizenship*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT (July 15, 2013), <https://www.ice.gov/news/releases/rwandan-national-sentenced-10-years-fraudulently-obtaining-citizenship>.

<sup>255</sup> Expert interview 4 November 2021; *see* U.S. Sentencing Guidelines for Offenses Involving Immigration, Naturalization, and Passports §2L2.2 (b)(4)(A)-(B) (1 November 2016), [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/CHAPTER\\_2\\_L-X.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/CHAPTER_2_L-X.pdf).

benefits, asylum status and legal permanent residency. In 2017, Jabbateh was convicted on two counts of fraud in immigration documents and two counts of perjury and sentenced to 30 years in prison.<sup>256</sup>

## b. Civil Remedies

While United States law does not allow for private prosecutions or civil party status for victims in prosecutions, victims and their family members do have the opportunity to pursue separate civil actions for human rights violations under several statutes against those responsible for the abuses. The only remedy available from these civil actions is an award for monetary damages; civil actions cannot directly result in imprisonment of the defendant or removal of the defendant from the United States. Instead, civil actions provide an opportunity for victims to confront the accused in court in an effort to hold them responsible for the alleged human rights violations, and provide an opportunity to seek redress through an award of damages. Civil actions in the United States require plaintiffs to prove the elements of their claim by a preponderance of the evidence, a lower burden of proof than the “beyond a reasonable doubt” standard required for criminal convictions.<sup>257</sup>

As discussed above (under Immunities), the U.S. recognizes certain status-based immunities for sitting heads of state and diplomats. These immunities apply to civil as well as criminal litigation.<sup>258</sup> Absent a treaty or statute, sitting and former state officials may also have immunity from civil suits for official acts committed within the scope of their duties under the common law.<sup>259</sup> As part of this analysis, courts will consider whether the foreign state requested a “suggestion of immunity” on behalf of the official from the U.S. State Department and whether

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<sup>256</sup> *Liberian Warlord ‘Jungle Jabbah’ Receives Historic Sentence in Immigration Fraud Case*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT (20 April 2018), <https://www.ice.gov/news/releases/liberian-warlord-jungle-jabbah-receives-historic-sentence-immigration-fraud-case>; see also Prue Clarke, ‘Jungle Jabbah’ was Accused of Cannibalism and Other Horrors in Liberia. How a U.S. Court Brought Him to Justice., WASHINGTON POST (14 April 2018), [https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef_story.html).

<sup>257</sup> See 3 FED. JURY PRAC. & INSTR. § 104:01 (6<sup>th</sup> ed., 2021).

<sup>258</sup> See Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT’L L. 1141, 1155-56 (2011).

<sup>259</sup> *Yousuf v. Samantar*, 699 F.3d 763, 775 (4<sup>th</sup> Cir. 2012) (“[A] foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where ‘the officer purports to act as an individual and not as an official’”).

the State Department granted it.<sup>260</sup> Importantly, some courts have recognized that violations of *jus cogens* norms such as “torture, extrajudicial killings and prolonged arbitrary imprisonment of political and ethnically disfavored groups” can never be deemed official acts, and therefore cannot shield a former official or former head of state from a civil suit.<sup>261</sup>

### ***i. Alien Tort Statute***

The Alien Tort Statute (ATS) is a federal statute enacted in 1789 that grants U.S. federal courts jurisdiction over claims filed by non-U.S. citizens for torts (a wrongful act that leads to civil liability) committed in violation of the laws of nations.<sup>262</sup> In 1979, the ATS was used to litigate human rights claims for the first time in *Filártiga v. Peña-Irala*. It was filed on behalf of a young man who was tortured and killed in police custody in Paraguay against one of the officers responsible, who was present in the United States.<sup>263</sup>

Since the 1980s, victims have successfully brought cases under the ATS for serious violations of human rights, including torture, sexual violence, extrajudicial killing, crimes against humanity, war crimes and arbitrary detention.<sup>264</sup> In 2004, the U.S. Supreme Court affirmed in *Sosa v. Alvarez-Machain* that claims for international human rights violations could be maintained under the ATS, holding that the statute grants federal courts jurisdiction over violations of “specific, universal, and obligatory” norms of international law.<sup>265</sup>

In recent years however, the U.S. Supreme Court has limited the types of claims that can be brought under the ATS. In 2013, the Supreme Court ruled in *Kiobel v.*

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<sup>260</sup> *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010).

<sup>261</sup> See *Yousuf v. Samantar*, 699 F.3d 763, 777-78 (4<sup>th</sup> Cir. 2012) (“[U.S.] courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims.... We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.”).

<sup>262</sup> 28 U.S.C. § 1350; see also *The Alien Tort Statute*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visited 30 September 2021).

<sup>263</sup> *Filártiga v. Peña-Irala*, CENTER FOR CONSTITUTIONAL RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala> (last visited 30 September 2021).

<sup>264</sup> *The Alien Tort Statute*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visited 30 September 2021).

<sup>265</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see also *The Alien Tort Statute*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visited 30 September 2021).

*Royal Dutch Petroleum* that the ATS only grants federal courts jurisdiction over international law violations that “touch and concern the territory of the United States [...] with sufficient force to displace the presumption against extraterritorial application” of U.S. statutes.<sup>266</sup> In its 2018 ruling in *Jesner v. Arab Bank, PLC*, the U.S. Supreme Court held that foreign corporations cannot be held liable under the ATS, though it did not preclude liability for U.S. corporations.<sup>267</sup> In 2021, a majority of the Supreme Court found in *Nestle v. Doe* that the ATS applies to corporations, but found in that case that “general corporate activity—like decision making” that occurs within the United States and aids and abets in human rights violations in a foreign country is insufficient to overcome the presumption against extraterritoriality; claims need a stronger connection to the United States in order to meet *Kiobel*’s “touch and concern” test.<sup>268</sup>

To bring a claim under the ATS:

- (1) The defendant must be within the reach of U.S. courts (either present in the U.S. or have sufficient contacts to the U.S.);
- (2) The human rights abuse alleged must violate a specifically defined, universally accepted, and obligatory norm of international law, such as torture, extrajudicial killing, crimes against humanity, war crimes, genocide, or slavery;
- (3) The claims must have a sufficient nexus to the U.S.;<sup>269</sup> and
- (4) The perpetrator must be either directly or indirectly liable.<sup>270</sup>

Moreover, most courts require that claims be filed within 10 years after the cause of action arose.<sup>271</sup> However, plaintiffs are entitled to equitable tolling of the statute

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<sup>266</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

<sup>267</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

<sup>268</sup> *Nestle USA, Inc. v. Doe*, 593 U.S. \_\_, \_\_ (2021) (slip op., at 3-5).

<sup>269</sup> Following the Supreme Court’s *Kiobel* ruling, the violation must “touch and concern” the United States, meaning it must have sufficient ties to the United States to overcome the general presumption against extraterritorial application of U.S. statutes. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

<sup>270</sup> *The Alien Tort Statute*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visited 30 September 2021).

<sup>271</sup> While the ATS does not provide its own statute of limitations, courts have held that the TVPA is a close analogy to the ATS and thus the TVPA’s 10-year statute of limitations applies. *See, e.g., Chavez v. Carranza*, 559 F.3d 486, 493 (6<sup>th</sup> Cir. 2009) (holding that the TVPA’s 10-year statute of limitations applies to claims under the ATS); *see also* 28 U.S.C. § 1350 note § 2(c) (establishing a 10-year statute of limitation for claims under the TVPA).

of limitations where extraordinary circumstances beyond their control prevented them from filing a suit.<sup>272</sup>

In a suit filed under the ATS, both primary and secondary forms of liability are available. Accordingly, the defendant could be found liable under the ATS based on direct perpetration, directing and ordering, command responsibility, conspiracy and aiding and abetting.<sup>273</sup>

Dozens of human rights cases have been filed and won under the ATS, with courts awarding millions in compensatory damages—money intended to compensate a party for loss or injury—and punitive damages—money intended to punish a wrongdoer for their misconduct—for the violations suffered.<sup>274</sup>

For more information on litigation under the ATS, see the American Society of International Law’s Benchbook on International Law<sup>275</sup> or visit CJA’s website.<sup>276</sup>

## **ii. Torture Victim Protection Act**

The Torture Victim Protection Act (TVPA) is a federal statute enacted in 1992 that gives U.S. and non-U.S. citizens the right to file a civil suit in U.S. courts for

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<sup>272</sup> See, e.g., *United States v. Midgley*, 142 F.3d 174, 179 (3<sup>d</sup> Cir. 1998); *Arce v. Garcia*, 434 F.3d 1254, 1261 (11<sup>th</sup> Cir. 2006).

<sup>273</sup> See, e.g., *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1161 (11<sup>th</sup> Cir. 2005); *Arce v. Garcia*, 434 F.3d 1254 (11<sup>th</sup> Cir. Fla. 2006) (detailing command responsibility); *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756, at \*11 (D. Mass. 14 August 2013) (“Aiding and abetting liability under the ATS has been accepted by every circuit that has considered the issue.”); see also Am. Soc’y Int’l L., *Human Rights*, in Benchbook on International Law § III.E-14, 15 (Diane Marie Amann ed., 2014), available at [www.asil.org/benchbook/humanrights.pdf](http://www.asil.org/benchbook/humanrights.pdf) (last visited 4 November 2021) [hereinafter Benchbook].

<sup>274</sup> See, e.g., *Ahmed v. Magan*, 2013 WL 4479077, \*7 (S.D. Ohio 20 August 2013) (awarding USD 5,000,000 in compensatory damages and USD 10,000,000 in punitive damages for torture under the TVPA and ATS); *Samantar v. Yousuf*, 2012 WL 3730617, \*16 (E.D. Va. 28 August 2012) (awarding USD 7,000,000 in compensatory damages and USD 14,000,000 in punitive damages for torture and extrajudicial killing under the ATS and TVPA); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1159 (E.D. Ca. 2004) (awarding USD 5,000,000 in compensatory damages and USD 5,000,000 in punitive damages under the TVPA and ATS for the assassination of Archbishop Romero); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1359 (N.D. Ga. 2002) (awarding USD 10,000,000 in compensatory damages and USD 25,000,000 in punitive damages per plaintiff for torture, arbitrary detention, war crimes, and crimes against humanity under the ATS and TVPA).

<sup>275</sup> Benchbook, § III.E.1.

<sup>276</sup> *The Alien Tort Statute*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visited 4 November 2021).

torture and extrajudicial killing committed in a foreign country.<sup>277</sup> The act was intended to supplement the remedies available to non-U.S. citizens under the ATS in order to permit U.S. citizens to bring claims for torture and extrajudicial killing.<sup>278</sup> The first case under the TVPA was filed by Sister Dianna Ortiz against Guatemala's former Defense Minister Hector Gramajo, alleging that he was responsible for her abduction, rape and torture by Guatemalan military forces.<sup>279</sup>

To bring a claim under the TVPA:

- (1) Plaintiffs must allege torture or extrajudicial killing (including attempted extrajudicial killing) as defined under the act.<sup>280</sup> No other human rights violation is actionable under the TVPA;<sup>281</sup>
- (2) The defendant must be a natural person, and they must be properly served with the lawsuit, which typically requires in-person service while the defendant is present in the United States;<sup>282</sup> and
- (3) The defendant must have been acting in an official capacity, or under actual or apparent authority, of a foreign nation. The TVPA does not provide a cause of action against either U.S. officials or individuals acting in a purely private capacity.<sup>283</sup>

Unlike the ATS, the TVPA is explicitly extraterritorial and the claims do not need to include a U.S. nexus.<sup>284</sup> However, plaintiffs must have exhausted all “adequate

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<sup>277</sup> 28 U.S.C. § 1350 note; *see also Torture Victim Protection Act*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> (last visited 1 October 2021).

<sup>278</sup> American Society of International Law, *Human Rights*, in BENCHBOOK ON INTERNATIONAL LAW § III.E.2 (Diane Marie Amann ed., 2014), available at <https://www.asil.org/sites/default/files/benchbook/humanrights.pdf>.

<sup>279</sup> *Torture Victim Protection Act*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> (last visited 1 October 2021).

<sup>280</sup> 28 U.S.C. § 1350 note §§ 2(a), 3(a)-(b).

<sup>281</sup> *See* 28 U.S.C. § 1350 note § 2(a); *see also Torture Victim Protection Act*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> (last visited 1 October 2021).

<sup>282</sup> *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 451 (2012).

<sup>283</sup> *Id.*, at 459; *see also* 28 U.S.C. § 1350 note § 2(a); *see also Jaramillo v. Naranjo*, Case No. 10-21951-CIV-TORRES, 20 (S.D. Fla. 30 September 2014) (“When a claim requiring state action is based on conduct by a private actor, ‘there must be proof of a symbiotic relationship between a private actor and the government that involves the torture or killing alleged in the complaint to satisfy the requirement of state action.’”) (quoting *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008)).

<sup>284</sup> The language of the TVPA is explicitly extraterritorial and applies only when someone acted “under actual or apparent authority, or color of any foreign nation....” 28 U.S.C. § 1350 note § 2(a); *see also*

and available” remedies in the country where the offense occurred.<sup>285</sup> Plaintiffs can meet this requirement by showing that efforts to pursue relief in the country “would be futile.”<sup>286</sup> Moreover, like with ATS claims, TVPA claims must be filed within 10 years after the cause of action arose.<sup>287</sup> However, plaintiffs are entitled to equitable tolling of the statute of limitations.<sup>288</sup>

As with the ATS, both primary and secondary modes of liability may be alleged under the TVPA, such as ordering, aiding and abetting, command responsibility, conspiracy and joint criminal enterprise.<sup>289</sup>

Dozens of human rights cases have been filed and won under the TVPA, often also alleging claims under the ATS, with courts awarding the victim-plaintiffs millions in compensatory and punitive damages for the violations suffered.<sup>290</sup>

For more information on litigation under the TVPA, see the American Society of International Law’s Benchbook on International Law<sup>291</sup> or visit CJA’s website.<sup>292</sup>

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Benchbook, § III.E.28 (“By its terms the Act authorizes civil suits for torture or extrajudicial killings in an extraterritorial context”).

<sup>285</sup> 28 U.S.C. § 1350 note § 2(b); *see also Torture Victim Protection Act*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> (last visited 1 October 2021).

<sup>286</sup> *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005); *see also Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff’d*, 767 F.2d 908 (2<sup>d</sup> Cir. 1985).

<sup>287</sup> 28 U.S.C. § 1350 note § 2(c).

<sup>288</sup> *See, e.g., United States v. Midgley*, 142 F.3d 174, 179 (3<sup>d</sup> Cir. 1998); *Arce v. Garcia*, 434 F.3d 1254, 1261 (11<sup>th</sup> Cir. 2006).

<sup>289</sup> *See Chavez v. Carranza*, 559 F.3d 486, 498-99 (6<sup>th</sup> Cir.), cert. denied, 558 U.S. 822 (2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11<sup>th</sup> Cir. 2005); *Warfaa v. Ali*, 33 F. Supp. 3d 653, 666 (E.D. Va. 2014) (identifying joint criminal enterprise as a viable theory of liability under the TVPA).

<sup>290</sup> *See, e.g., Ahmed v. Magan*, 2013 WL 4479077, \*7 (S.D. Ohio 20 August 2013) (awarding USD 5,000,000 in compensatory damages and USD 10,000,000 in punitive damages for torture under the TVPA and ATS); *Samantar v. Yousuf*, 2012 WL 3730617, \*16 (E.D. Va. 28 August 2012) (awarding USD 7,000,000 in compensatory damages and USD 14,000,000 in punitive damages for torture and extrajudicial killing under the ATS and TVPA); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1159 (E.D. Ca. 2004) (awarding USD 5,000,000 in compensatory damages and USD 5,000,000 in punitive damages under the TVPA and ATS for the assassination of Archbishop Romero); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1359 (N.D. Ga. 2002) (awarding USD 10,000,000 in compensatory damages and USD 25,000,000 in punitive damages per plaintiff for torture, arbitrary detention, war crimes, and crimes against humanity under the ATS and TVPA).

<sup>291</sup> Benchbook, § III.E.2.

<sup>292</sup> *Torture Victim Protection Act*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> (last visited 1 October 2021).



### **iii. Foreign Sovereign Immunities Act**

The Foreign Sovereign Immunities Act (FSIA) governs immunity of foreign states and their agencies or instrumentalities from civil litigation, but does not extend this immunity to foreign officials or state agents.<sup>293</sup> Under the FSIA, foreign states are immune from suit in the United States, unless an exception applies.<sup>294</sup> The FSIA recognizes certain exceptions to the general rule of immunity against foreign sovereign states.<sup>295</sup> The following exceptions are the ones most relevant to core international crimes:

- (1) the foreign state has implicitly or explicitly waived immunity;<sup>296</sup>
- (2) the suit seeks to recover money damages from a foreign state for personal injury, death or damage or destruction of property in the United States caused by a tortious act or omission of a foreign state or its employee or official or by an act of international terrorism;<sup>297</sup> or
- (3) the suit seeks to recover money damages from a designated state sponsor of terror for personal injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support or resources for such act.<sup>298</sup>

To pursue a claim under the exception to the FSIA set out in (3) above:

- (1) The defendant must be a foreign state designated by the U.S. Department of State as a state sponsor of terrorism at the time the offense occurred or as a result of the offense, and the state must remain designated as a state sponsor of terrorism at the time the case is filed or within the six-month period prior to filing.<sup>299</sup>

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<sup>293</sup> *Samantar v. Yousuf*, 560 U.S. 305, 315, 319 (2010).

<sup>294</sup> 28 U.S.C. § 1604.

<sup>295</sup> *In re Grand Jury Subpoena*, 749 Fed. Appx. 1, 2-3 (D.C. Cir. 2018).

<sup>296</sup> 28 U.S.C. § 1605(a)(1).

<sup>297</sup> 28 U.S.C. §§ 1605(a)(5), 1605B(b).

<sup>298</sup> 28 U.S.C. § 1605(A)(a)(1). Designated State Sponsors of Terror are: “Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism” and are officially designated “pursuant to three laws: section 1754(c) of the National Defense Authorization Act for Fiscal Year 2019, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act of 1961.” U.S. Dept. of State Bureau of Counterterrorism, *State Sponsors of Terrorism* (last reviewed 8 October 2021), <https://www.state.gov/state-sponsors-of-terrorism/>. At the time of drafting, only four countries are designated under these authorities: Cuba, the Democratic People’s Republic of Korea (North Korea), Iran and Syria.

<sup>299</sup> 28 U.S.C. § 1605A(a)(2)(A)(i)(I).

- (2) At the time of the relevant conduct, the claimant or victim was a U.S. national, a member of the U.S. armed forces or an employee or contractor of the U.S. government, acting within the scope of their employment.<sup>300</sup>
- (3) If the act occurred in the defendant foreign state, the plaintiff must have afforded the state a reasonable opportunity to arbitrate the claim.<sup>301</sup>

As with ATS and TVPA claims, the FSIA recognizes a 10-year statute of limitations. Claims must be filed within 10 years after the cause of action arose, or for acts that occurred before the FSIA was passed, within 10 years after 24 April 1996, the date the Act was passed.<sup>302</sup> As with ATS and TVPA claims, equitable tolling is available to plaintiffs.<sup>303</sup>

One prominent case under the FSIA was *Colvin v. Syria*, a suit filed against the Syrian government in the District Court for the District of Columbia by the family of Marie Colvin, an acclaimed American war correspondent. In February 2012, Colvin was reporting on Syrian government atrocities from a media center in the besieged city of Homs. Syrian military and intelligence forces identified Colvin's location at the media center and targeted it with rocket shelling, killing her and French photographer Rémi Ochlik, while injuring others.<sup>304</sup> The court held the Syrian government liable for Colvin's targeted killing under the FSIA and awarded USD 302,000,000 in damages.<sup>305</sup>

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<sup>300</sup> 28 U.S.C. § 1605A(a)(2)(A)(ii).

<sup>301</sup> 28 U.S.C. § 1605A(a)(2)(A)(iii).

<sup>302</sup> 28 U.S.C. § 1605A(b).

<sup>303</sup> S. Rep. No. 102-249, at 10-11 (1991).

<sup>304</sup> *Colvin v. Syria*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/colvin-v-syria/> (last visited 1 October 2021).

<sup>305</sup> *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019).



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