Aut Dedere, Aut Judicare: U.S. Obligations to Prosecute or Extradite Under the Convention Against Torture

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Abstract

Despite submitting a laundry list of Reservations, Understandings, and Declarations alongside ratification of the Convention Against Torture ("CAT"), the United States was a strong proponent of the CAT and an advocate for the importance of the "extradite or prosecute" provision of the CAT. In the twenty-five years since U.S. ratification of the CAT and codification of the provision that allows for prosecutions of extraterritorial acts of torture, the "Torture Act" has resulted in only two viable prosecutions and one extradition. This paper examines the apparent underutilization of this statute and whether actions taken against the many other perpetrators of extraterritorial torture found on U.S. soil since its enactment were in compliance with the CAT.

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TABLE OF CONTENTS

I. INTRODUCTION 106
II. ACCOUNTABILITY GAP 108
III. U.S. TOOLS FOR PROSECUTING EXTRATERRITORIAL TORTURE 111
A. Background: Bases for Jurisdiction over Extraterritorial Crimes 111
B. Convention Against Torture Obligations 112
C. The U.S. and the CAT 115
D. Federal Torture Statute 118
IV. LACK OF TORTURE PROSECUTIONS UNDER SECTION 2340A 121
V. SECTION 2340A PROSECUTIONS: RISKS AND CHALLENGES 124
A. Human Rights and Special Prosecutions Section 125
B. Barriers to Prosecutions 127
C. Immigration-Related Strategies 129
VI. *AUT DEDERE, AUT JUDICARE*: IS THE U.S. IN COMPLIANCE? 132
VII. CONCLUSION 136

I. INTRODUCTION

> The United States is committed to the world-wide elimination of torture, and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.[1]

Core international crimes, such as genocide, torture, crimes against humanity, and war crimes too frequently end in impunity due to continued instability or political compromise in the state where the crime occurred.[2] Even where states may have the motivation and resources to prosecute perpetrators, they are often unable to do so because the perpetrator has fled. It is no longer largely pirates who are migratory; perpetrators of various core international crimes today flee or migrate through regular channels.[3] It is in this situation where another state, one without a direct connection to the crime, potentially becomes responsible for facilitating criminal accountability for the

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[1] Presidential Statement on United Nations International Day in Support of Victims of Torture 2003, 39 WEEKLY COMP. PRES. DOC. 825 (June 26, 2003).

[2] M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000).

[3] *See* DANIELE ARCHIBUGI & ALICE PEASE, CRIME AND GLOBAL JUSTICE 18–19 (2018) (discussing how universal jurisdiction was "originally developed to allow states to try stateless individuals, mostly pirates for extraterritorial crimes").

perpetrator under international law.[4] As stated by the International Law Commission ("ILC") in a report addressing this responsibility, "[i]n cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State."[5]

The obligation to extradite or prosecute, *aut dedere aut judicare*, is found in many international conventions that target core international crimes.[6] While the U.S. is party to and has incorporated many of these treaties into law, this paper will focus on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and its federal criminal implementing statute. Under the authority of customary international law principles, the CAT, and this federal statute, the U.S. possesses the necessary legal tools to prosecute extraterritorial instances of torture in many contexts. Despite possessing these tools, the U.S. has prosecuted perpetrators of extraterritorial torture under its CAT obligations only twice since the federal criminal statute was enacted nearly three decades ago.[7] This paper will examine the various legal tools available to the U.S. for prosecuting cases of extraterritorial torture crimes carried out under color of law and the reasons why these tools are underutilized. It will not only focus on situations in which the offender is not a U.S. national, but will also touch on some of the complexities that arise due to the availability of the federal statute at issue for prosecutions of both U.S. nationals and non-U.S. nationals.

The U.S.' neglect in the context of prosecuting core international crimes, and specifically torture crimes, cannot be explained by one single factor. Instead, there exists a combination of interrelated factors that explain the inability, or sometimes the hesitancy, of U.S. prosecutorial bodies in confronting extraterritorial human rights abuses that fall within their jurisdiction. For example, temporal limitations can significantly restrict

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[4] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 140–41 (2014).

[5] *Id.* at 153.

[6] *Id.* at 141.

[7] *Gambia: US Charges Alleged 'Death Squad' Member with Torture*, TRIAL INT'L, https://trialinternational.org/latest-post/gambian-death-squad-member-charged-with-torture-in-the-united-states/ (June 16, 2020) [hereinafter Trial International]; *e.g.*, Press Release No. 09-021, *Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges*, U.S. DEP'T OF JUST.: OFF. OF PUB. AFFS., https://www.justice.gov/opa/pr/roy-belfast-jr-aka-chuckie-taylor-sentenced-torture-charges (Sept. 15, 2014); *e.g.*, Press Release No. 20-534, *Gambian Man Indicted on Torture Charges*, U.S. DEP'T OF JUST.: OFF. OF PUB. AFFS., https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges (June 12, 2020); *see, e.g.*, Annie Hylton, *How the U.S. Became a Haven for War Criminals*, NEW REPUBLIC (Apr. 29, 2019), https://newrepublic.com/article/153416/us-became-haven-war-criminals.

prosecutions of these crimes.[8] Instead of prosecuting for torture or extraditing an offender to be charged with torture by another complying state, the U.S. frequently employs alternative strategies. As will be shown, these strategies do not always support the objectives of the CAT. While, based on statements and promises put forth by the federal government, it may appear that the U.S. Department of Justice ("DOJ") and other federal divisions are committed to complying with U.S. obligations under the CAT, more effort is still needed for the U.S. to fully comply with its extradite or prosecute obligations.

II. ACCOUNTABILITY GAP

The creation of the International Criminal Court ("ICC") in 2002 by adoption of the Rome Statute created a new major mechanism for accountability targeted at core international crimes, one that was meant to be permanent and in place of ad hoc tribunals.[9] However, the ICC has proven to be insufficient on its own in addressing the pervasive lack of accountability for core international crimes. Limitations on the types of cases the ICC can adjudicate allow many instances of mass human rights abuses to go unpunished. This is because the ICC can only adjudicate "the most serious crimes," which are genocide, crimes against humanity, war crimes, and the crime of aggression.[10] While torture is considered a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population," or a war crime if perpetrated during conflict in a widespread manner, other limitations apply that prohibit the ICC from taking up many torture cases.[11] The ICC is limited by which states have ratified the Rome Statute; it can only prosecute crimes that occurred in states-party to the Rome Statute.[12] Article 17 of the Rome Statute contains an additional list of reasons for not accepting a case, including "[t]he case is not of sufficient gravity to justify further action by the Court."[13]

In effect, the extensive list of restrictions on the types of cases the ICC will accept excludes many human rights abuse cases from its purview. Nearly half of the communications submitted to the ICC from its creation up until 2010 were rejected on the basis of jurisdiction.[14] To date, the ICC has only

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[8] *Guide to Human Rights Statutes*, U.S. DEP'T OF JUST.: HUM. RTS. & SPECIAL PROSECUTIONS SECTION [HRSP] (Oct. 2017), https://www.justice.gov/criminal-hrsp/file/1002896/download.

[9] Rome Statute of the International Criminal Court art. 1, July 1, 2002, 2187 U.N.T.S. 38544.

[10] *Id.* art. 5.

[11] *Id.* art. 7–8.

[12] *See* ARCHIBUGI & PEASE, *supra* note 3, at 74.

[13] Rome Statute of the International Criminal Court, *supra* note 9, art. 17.

[14] International Criminal Court [ICC], *Policy Paper on Preliminary Examinations*, at 5 (drft., Oct. 4, 2010). Communications submitted to the ICC are akin to a criminal complaint.

taken on thirty cases and has handed down ten convictions.[15] The ICC, however, was meant to be complementary to domestic prosecutions by states, rather than a replacement.[16] Whether this idea of complementarity as opposed to a broader scope of jurisdiction was intended to preserve resources or to appease potential States Parties concerned with preserving sovereignty, some argue this limitation is "a clear step backwards in terms of jurisdiction" as it restricts the ICC's jurisdiction to instances where states did not, and are not, going to investigate or prosecute.[17] This limitation provides a potential opportunity for impunity where a state makes a showing in bad faith of an attempt towards accountability or does not possess adequate resources to complete a thorough investigation and prosecution. Article 17 attempts to account for this by labeling cases inadmissible only where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute[.][18]

The addition of the word "genuinely," in theory at least, helps to account for this issue by allowing the ICC jurisdiction over a perpetrator where a determination has been made that the state in question was not pursuing accountability in good faith.

Notwithstanding jurisdictional and discretionary issues, such as considering the gravity of a case, the ICC does not have the capacity to prosecute all perpetrators of core international crimes. Capacity issues, significant limitations on jurisdiction, and various discretionary bases upon which the ICC can reject a case, leave many instances of impunity for grave human rights abuses.[19] The jurisdiction of the ICC, as well as of other international tribunals, is "'limited temporally, spatially, and materially."[20] Thus, it is necessary for individual states to take responsibility by way of domestic courts in order to bring accountability to human rights abusers.

European Center for Constitutional and Human Rights, *Glossary*, https://www.ecchr.eu/en/glossary/communication-icc/.

[15] *About the Court*, ICC, https://www.icc-cpi.int/about (last visited Feb. 17, 2022).

[16] Rome Statute of the International Criminal Court, *supra* note 9, art. 1.

[17] ARCHIBUGI & PEASE, *supra* note 3, at 28.

[18] Rome Statute of the International Criminal Court, *supra* note 9, art. 17 (emphasis added).

[19] *See* KRIANGSAK KITTICHAISAREE, THE OBLIGATION TO EXTRADITE OR PROSECUTE 315 (2018).

[20] *Id.*

The preliminary processes of the ICC in considering cases can create awareness around a human rights issue and prompt civil society and consequently states to act.[21] It has been suggested that some states passed human rights legislation after the enactment of the Rome Statute in order to avoid "ICC interference," while others have suggested that the obligation to extradite or prosecute has "attained heightened significance" due to the principle of complementarity found in the Rome Statute.[22] Many European states have in fact taken up the call to fill the gap in accountability by developing stronger mechanisms for prosecuting these crimes, with the support of the European Union and the Eurojust Genocide Network.[23] Some have begun utilizing universal jurisdiction to prosecute perpetrators found within their territorial boundaries for crimes that occurred in other countries such as, for example, Syria.[24]

Universal jurisdiction, or "the most remote form of extraterritorial jurisdiction," allows states to exercise jurisdiction over offenses that fall outside the typical categories of jurisdiction that are based upon territory, or nationality of the victim or perpetrator.[25] Instead, jurisdiction is based upon the gravity of the crime, and the international law principle first contained within the Geneva Conventions that details the duty of states to repress these crimes by bringing "such persons, regardless of their nationality, before its own courts."[26] Active participation and collaboration between more states, including the U.S., are needed to cover gaps in accountability for perpetrators of torture and other grave crimes.

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[21] Thomas Obel Hansen, *The Policy Paper on Preliminary Examinations: Ending Impunity Through 'Positive Complementarity'?* 24–25 (Transnat'l Just. Inst., Working Paper No. 17-01, 2017).

[22] Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 665 (2010); NO PEACE WITHOUT JUSTICE, CLOSING THE GAP 26 (Alison Smith ed., 2010).

[23] *See, e.g.*, *Syrian Civil/Criminal Cases & Investigations of War Crimes (2011-Present)*, CTR. FOR JUST. & ACCOUNTABILITY 5–7, 12 (2019), https://cja.org/wp-content/uploads/2019/02/Syria-Cases-Updated-February-2019-12.pdf [hereinafter CJA] (showing pending universal jurisdiction prosecutions and convictions of core international crimes in Germany, Sweden, Austria, and the Netherlands); *see e.g.*, Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap Between International and National Justice (EC) No. 6783/13 of 22 Feb. 2013, art. 1, 2013, 1, 2; *see, e.g.*, *Genocide Network*, EUROJUST, https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network (last visited Mar. 12, 2022).

[24] CJA, *supra* note 23, at 5–7, 12.

[25] AISLING O'SULLIVAN, UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW 89 (2017).

[26] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 287.

III. U.S. TOOLS FOR PROSECUTING EXTRATERRITORIAL TORTURE

A. Background: Bases for Jurisdiction over Extraterritorial Crimes

Jurisdiction over core international crimes in the U.S. is governed by domestic law, treaty law, and customary international law.[27] The *Restatement (Fourth) of the Foreign Relations Law of the United States* outlines three types of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.[28] In theory, states can directly apply international law that criminalizes torture to a perpetrator's actions in an exercise of adjudicatory jurisdiction.[29] However, a more common route taken by states in addressing core international crimes is to codify, in their domestic law, principles of customary international law or treaty provisions criminalizing core international crimes, and then apply the domestic law provision to the perpetrator's actions.[30] Applying international law embodied in domestic law has been determined to be an exercise of prescriptive jurisdiction, rather than adjudicatory.[31] Even where the domestic law directly reflects a treaty provision or principle of customary international law, it is still considered to be an exercise of prescriptive jurisdiction.

Six different justifications for exercising prescriptive jurisdiction are recognized in international and U.S. law, and "the exercise of prescriptive jurisdiction often rests on more than one basis."[32] The exercise of prescriptive jurisdiction can be based on territory, effects, the nationality of the perpetrator, the nationality of the victim, or the protective principle, covering circumstances where there is "certain conduct outside its territory by persons not its nationals or residents that is directed against the security of the United States or against a limited class of other U.S. interests."[33] The sixth basis is universal jurisdiction, which allows states to exercise prescriptive jurisdiction

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[27] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 401 (AM. L. INST. 2018).

[28] *Id.* (stating jurisdiction to prescribe is "the authority of a state to make law applicable to persons, property, or conduct;" jurisdiction to adjudicate is "the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals;" and the jurisdiction to enforce is "the authority of a state to exercise its power to compel compliance with law").

[29] Chimène I. Keitner, *Transnational Litigation: Jurisdiction and Immunities*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 794, 795 (Dinah Shelton ed., 2013).

[30] *See Universal Jurisdiction over War Crimes*, INT'L COMM. OF THE RED CROSS 2 (2018), https://www.icrc.org/en/download/file/167011/dp_consult_38_universal_jurisdiction.pdf. Prescriptive jurisdiction is occasionally referred to as "legislative jurisdiction." *Id.*

[31] *See* Keitner, *supra* note 29, at 795.

[32] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. §§ 402(1), 402 cmt. b (AM. L. INST. 2018).

[33] *Id.* § 402.

over "certain offenses of universal concern," including torture.[34] While there can be multiple bases for prescriptive jurisdiction, U.S. prosecutions of core international crimes that occurred outside of U.S. territory, where there is no genuine connection between the crime and the U.S., are exercises of prescriptive universal jurisdiction.[35]

Where there are offenses that a state has an obligation under a treaty to prosecute, it can be said that the state is exercising mandatory universal jurisdiction, as opposed to permissive universal jurisdiction.[36] The U.S. is a party to several of these types of treaties that provide not just the authority, but also the obligation to apply universal jurisdiction to core international crimes where an alleged offender is found within their territory.[37] These treaty principles have in turn been codified in federal statutes, many of which contain express extraterritorial allowances for "misconduct so universally condemned that they fall within federal jurisdiction regardless of any other jurisdictional considerations as long as the offender flees to the United States, is brought here for prosecution, or is otherwise 'found in the United States' after the commission of the offense."[38] The CAT is one such treaty; it calls for state-parties to exercise jurisdiction over qualifying torture crimes that occur outside a state's territory where the offender is present in the state.[39]

B. Convention Against Torture Obligations

The CAT calls for states to "take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . . .[40] States should take the offender "into custody or take other legal measures to ensure his presence . . . for such time as is necessary to enable any criminal or extradition proceedings to be instituted."[41] After taking the alleged offender into custody, the State Party must then immediately begin an investigation and notify other relevant States Parties, such as the state which the offender is a national of or the state where the offense occurred.[42] Treaties such as the CAT, which contain what the International Court of Justice ("ICJ") has identified as the second of two versions of *aut dedere, aut*

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34 *Id.*

35 *Id.* § 402 cmt. j.

36 *Universal Jurisdiction over War Crimes*, *supra* note 30, at 2.

37 *See* CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 17 & n.85 (2016).

38 *Id.* at 17.

39 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, ¶ 2, Dec. 10, 1984, 80 Stat. 271, 1465 U.N.T.S. 85 [hereinafter CAT].

40 *Id.*

41 *Id.* art. 6, ¶ 1.

42 *Id.* art. 6, ¶¶ 2, 4.

judicare formulas, prioritize prosecution over extradition. Article 7 of the CAT contains the relevant clause, declaring that the state "in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."[43] The ILC has written that:

> Clauses in the second category impose upon States an obligation to prosecute ipso facto in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.[44]

The ICJ's opinion in *Belgium v. Senegal* leads to the conclusion that, "the choice between extradition and submission for prosecution does not mean that the two alternatives are to be given the same weight."[45] Extradition is an option; prosecution is an "international obligation" under the CAT formula.[46]

The extradite or prosecute formula is primarily designed to avoid impunity for perpetrators who may be mobile and out of reach of the more natural choice for jurisdiction, such as the state where the perpetrator holds citizenship. To achieve this goal, states must aim to take actions to ensure a fair and genuine trial for the alleged offender, whether this means prosecution by the state in which the offender is found, or extradition to a requesting state that intends to genuinely investigate and prosecute an alleged offender.

The language of the CAT itself, along with the ILC report, clearly supports a conclusion that the obligation to prosecute or extradite is not so flexible as to allow substitutions for either prosecution for torture, or extradition to a country willing to prosecute for torture. Article 5(2) of the CAT uses the language of establishing jurisdiction over "such offences," referring back to the offense of torture.[47] The ILC report reiterates that this

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43 *Id.* art. 7, ¶ 1.

44 Int'l Law Comm'n, *supra* note 4, at 157. This type of treaty obligation is a variation of what is referred to as "The Hague Formula" according to its origin in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. The original Hague Formula states, "'[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution." *Id.* at 145 (citing The Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105). This formulation, as opposed to the formula in CAT, focuses on extradition, with prosecution as an option only if extradition is not requested.

45 KITTICHAISAREE, *supra* note 19, at 179.

46 *Id.*

47 CAT, *supra* note 39, art. 5, ¶ 2.

obligation requires states to establish jurisdiction over and prosecute for torture, specifically.[48] The obligation for States Parties to criminalize torture crimes that occur abroad and to establish jurisdiction over perpetrators of torture are preparatory steps in fulfilling the prosecute or extradite obligation. It follows that in order to fulfill the obligation, a state must prosecute for torture specifically, not a substantially different crime, or that a state must extradite the offender, as extradition will, in theory at least, lead to a prosecution by the receiving state. Other forms of removing an alleged offender, such as deportation, clearly would not fulfill the obligation in CAT, as only extradition provides for a guarantee of an investigation and potential prosecution. The United Nations ("UN") Office on Drugs and Crime's 2004 Model Law on Extradition, based on the "prevailing trends in extradition law" that informed the original UN Model Treaty on Extradition, along with updates to the law, defines extradition: "'[e]xtradition means the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence."[49] Extradition, by definition, ends in prosecution for an extraditable offense, such as torture. Deportation, also known as expulsion or removal, is "a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; *it does not include extradition to another State . . .*"[50]

While there is an underlying assumption that a request for extradition implies that a requesting state plans to prosecute, it is possible that perpetrators could escape accountability if the requesting state does not follow through on its obligation. A report from the ILC on the obligation to extradite or prosecute more or less addresses this issue. "Whatever the conditions under domestic law or a treaty pertaining to extradition, they must not be applied in bad faith, with the effect of shielding an alleged offender from prosecution in or extradition to an appropriate criminal jurisdiction."[51] Extradition of an offender to a state that the sending state has reason to believe will not follow through with investigating and prosecuting the offender would not be a fulfillment of CAT obligations; rather it would be a "serious breach of international legal obligation," according to the ILC Working Group on the Obligation to Extradite or Prosecute.[52] The UN Model Law on Extradition, along with most bilateral extradition treaties, has requirements that compel the requesting state to send information and documents, along with their extradition request, that indicate the offense upon which the extradition is

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48 Int'l Law Comm'n, *supra* note 4, at 149.

49 UNITED NATIONS OFF. ON DRUGS & CRIME, MODEL LAW ON EXTRADITION 8 (2004), https://www.unodc.org/pdf/model_law_extradition.pdf [hereinafter UNODC].

50 Int'l Law Comm'n, *supra* note 4, at 20 (emphasis added).

51 *Id.* at 165.

52 KITTICHAISAREE, *supra* note 19, at 70.

based; if the request for extradition is based on a pending prosecution, an arrest warrant should be sent.[53] The requirements detailed in extradition treaties should provide the sending state with sufficient information to determine whether a legitimate investigation and prosecution is likely to result, and whether approving extradition will fulfill its obligations under the CAT. If a state decides to refuse extradition based on a belief that the requesting state will not comply with international obligations, that state must then prosecute the offender.[54]

The doctrine of specialty, widely applied in bilateral extradition treaties and by the U.S., also suggests that extradition should only result in prosecution of the offense included in the warrant of extradition, unless the sending state consents to other charges.[55] Seeing as the extraditable offense is itself the basis for agreeing to extradite an offender, it follows that in addition to not prosecuting additional offenses not agreed to by the two states, the receiving state must also at the minimum thoroughly investigate the offender for the extraditable offense. Prosecution or extradition requirements in the CAT and other treaties are formulated to focus in on the offense or offenses that are targeted by the treaty; they do not simply encourage prosecution as a general punishment for any potential crime committed by the offender. Prosecutions or extraditions that result in convictions for offenses other than torture, where the offender is guilty of torture, along with deportations in place of extradition, arguably do not fulfill CAT obligations.

C. The U.S. and the CAT

Throughout the 1980's, the U.S. was heavily involved in the negotiations leading up to the signing of the CAT.[56] The stated goals of the U.S. included helping to "focus the Convention on torture rather than other less abhorrent practices" and helping to push for strong measures "that would ensure that torture is a punishable offense."[57] After the signing of the CAT, the Senate Committee on Foreign Relations met and voted unanimously to push forward a resolution of ratification.[58] The Committee comments noted that "[t]he strength of the Convention lies in the obligation of States Parties to make torture a crime and to prosecute or extradite alleged torturers found in their

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[53] *See* UNODC, *supra* note 49, at 26–27.

[54] KITTICHAISAREE, *supra* note 19, at 225.

[55] M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 538 (6th ed. 2014). The doctrine of specialty says that, "the requesting state, after securing the surrender of a person, can only prosecute and punish that person for the offense or offenses for which he/she was surrendered by the requested state . . ." *Id.*

[56] S. EXEC. DOC. NO. 101-30, at 2–3 (1990).

[57] *Id.*

[58] *Id.*

territory."[59] The Committee stated that considering the active role played by the U.S. in the preparatory stages leading up to the adoption of the CAT by the UN General Assembly, ratification was necessary. The high level of U.S. involvement in the early stages of the CAT, followed by a joint resolution by Congress to approve the Convention, the signing of the CAT by President Reagan, the eventual ratification in 1994, and the large bipartisan support the Convention received all reinforce the commitment to addressing torture crimes taken on by the U.S. when it ratified the Convention.[60]

While the Convention had strong bipartisan support and was in fact eventually ratified, the process was delayed due to ongoing debates about the content of the reservations, understandings, and declarations ("RUDs") to which U.S. consent to the Convention would be subject.[61] The U.S. ratified the CAT but with a laundry list of RUDs. The reservation regarding Article 16 "narrowed the definition of torture by stating that it would only seek to prevent cruel, inhuman and degrading treatment or punishment as these terms' definitions were understood in the context of the 5th, 8th and 14th amendments of the US Constitution."[62] The U.S. also further edited the definition of torture for its own purposes, departing from the CAT definition in an understanding attached to Article 1 of the Convention.[63] The U.S. submitted a declaration that articles 1–16, containing the substantive articles of the treaty, were not "self-executing."[64] The Committee explained that this was to further "clarify that further implementation of the Convention will be through implementing legislation."[65]

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[59] *Id.* at 3.

[60] Ginetta Sagan & Jeffrey Scheuer, *Basic Human Decency Calls for Speedy Senate Action on the U.N. Torture Treaty*, L.A. TIMES (May 5, 1988, 12:00 AM), https://www.latimes.com/archives/la-xpm-1988-05-05-me-3287-story.html; *CVT Celebrates 25th Anniversary of U.S. Signing UN Convention Against Torture*, CTR. FOR VICTIMS OF TORTURE (Apr. 17, 2013), https://www.cvt.org/sites/default/files/Release_Report_CAT_25thAnniversary_April2013.pdf.

[61] *See* Sagan & Scheuer, *supra* note 60. *See* Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of The Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311, 311–12 (1990) (discussing the debate in Congress about the RUDs that were to be submitted alongside ratification of the CAT).

[62] Alex Severson, *Top 10 Things You Wanted to Know About UNCAT but Were Afraid to Ask*, AMNESTY INT'L (Nov. 5, 2010), https://www.amnestyusa.org/top-10-things-you-wanted-to-know-about-uncat-but-were-afraid-to-ask/.

[63] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec.

[64] *Id.*; *e.g.*, Renkel v. United States, 456 F.3d 640, 644 (6th Cir. 2006) ("Those articles are not, however, expressly self-executing.").

[65] S. EXEC. DOC. NO. 101-30, at 10 (1990).

Because "the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law," the only new legislation needed for compliance was a statute on criminal jurisdiction, specifically targeted at extraterritorial acts of torture referenced in Article 5(2) of the CAT.[66] As previously discussed, codification of specific international law provisions is much more common than direct application of international law, and, in the U.S., is required for treaties that are not self-executing.[67] The U.S. eventually passed legislation that reflected the extradite or prosecute requirement of the CAT, in the form of legislation known as the "Torture Act," sections 2340-2340A of Title 18 of the U.S. Code.[68] Even the Reagan Administration, which was criticized for promoting a list of RUDs that seriously constricted U.S. obligations under the CAT, agreed that compliance with Article 5(2) of the CAT was a priority. President Reagan, in his message to the Senate when transmitting the CAT for advice and consent, delivered the following message:

> The core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called "universal jurisdiction.'" Each State Party is required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution . . . By giving its advice and consent to ratification of this Convention, the Senate of the United States will demonstrate unequivocally our desire to bring an end to the abhorrent practice of torture.[69]

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66 *Id.*

67 *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2, 15–16 (2018) ("Courts generally have understood treaties and executive agreements that are not self-executing generally to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling.").

68 18 U.S.C. §§ 2340–2340A (2018). Seemingly, the delay in passing the implementing legislation at issue ultimately delayed U.S. ratification of the CAT. "I regret that the legislation proposed by the Administration to implement the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has not yet been enacted. This proposed implementing legislation would provide a tougher and more effective response to the problem, putting in place for torturers the same international 'extradite or prosecute' regime we have for terrorists. The Senate gave its advice and consent to the Torture Convention on October 27, 1990, but the United States cannot proceed to become a party until the necessary implementing legislation is in place. I again call upon the Congress to take prompt action to approve the Torture Convention implementing legislation." Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 11 (Mar. 12, 1992).

69 Presidential Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 20 (May 20, 1988).

D. Federal Torture Statute

The Torture Act, section 2340, criminalizes the offense of committing or attempting to commit torture outside of the U.S., while expressly providing jurisdiction over perpetrators of torture who are either a national of the U.S. or are present in the U.S., "irrespective of the nationality of the victim or the alleged offender."[70] With this last element, section 2340A(b)(2) makes clear that prosecutions under this part of the statute are not an exercise of either active personality or passive personality jurisdiction, but instead of universal jurisdiction; that is, a non-U.S. national offender need only be found in the U.S. for jurisdiction under this section to exist.[71] Section 2340A also details the possible penalties for violating the statute; the original version of the statute included a potential fine, imprisonment for no more than twenty years, or, if death occurs as a result of torture, imprisonment for life or any term of years.[72] Section 2340A was amended shortly after enactment as part of the Violent Crime Control and Law Enforcement Act of 1994 to include the death penalty as a potential punishment if death results from conduct covered by section 2340A.[73] The statute was again amended by the USA Patriot Act in 2001, at which point a provision was added to criminalize conspiracy to commit torture abroad as "part of a broader effort to ensure that individuals

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[70] 18 U.S.C. § 2340A(a)–(b) (2018). A memorandum addressing the geographic scope of the CAT, issued by the Department of State in 2013, clarifies that the proper understanding of the CAT is that it does not force upon states the obligation to prosecute defendants *in absentia*. "The limitation of universal jurisdiction to persons 'present in any territory under its jurisdiction' both recognizes that trials *in absentia* are not required and that the State's practical capacity to prosecute is limited to that context, where a state exercises appropriate control." Harold Hongju Koh, U.S. Dep't of State: Off. of the Legal Adviser, Memorandum Opinion on the Geographic Scope of The Convention Against Torture and Its Application in Situations of Armed Conflict 19 (Jan. 21, 2013) (available at https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf).

[71] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 413 cmt. a (AM. L. INST. 2018).

[72] 18 U.S.C. § 2340A(a).

[73] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1800. Ironically, the death penalty constitutes torture itself. "[D]ue to their immutable characteristics, both death sentences and executions deserve to be stigmatized as acts of torture – the word used to characterize the worst kind of cruelty and inhuman brutality." Additionally, some countries may refuse to extradite an offender to the U.S. if the offense they are accused of may warrant punishment by death. "[T]he Supreme Court of Canada – in interpreting the Canadian Charter of Rights and Freedoms – specifically ruled in 2001 that extraditing offenders to the U.S. would not be permitted absent assurances that the death penalty would not be sought." JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE xxv, xvii (2017). Note that there is an exception in both the CAT and in Section 2340 for pain and suffering arising from lawful sanctions, an exception which attempts to justify punishing a perpetrator of torture with an irreversible act referred to by Justice Brennan as "barbaric and inhuman."

engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place."[74]

The Human Rights and Special Prosecutions Section ("HRSP") of the DOJ breaks down section 2340, explaining that it applies to "acts committed outside the United States by a person acting under the color of law, if the person specifically intended to inflict severe physical or mental pain or suffering upon another person within the perpetrator's custody or physical control."[75] This language corresponds with the understanding the U.S. attached to ratification of the CAT with regard to Article 1.[76] In a report to the Committee Against Torture, the governing body of the CAT, the U.S. responded to concerns submitted by other States Parties to the CAT, including an explanation of this particular understanding. The report states that clarification is needed for the definition of torture included in the CAT in order to match the "precision required under United States domestic law," while also declaring that this narrowed definition included in section 2340 "conforms to the definition in the Convention, as interpreted by the understandings expressed by the United States at the time of ratification."[77]

The places in which section 2340A language diverges from the CAT do not appear to have had a large effect in practice, though only the prosecutions of Charles Taylor and Michael Correa exist as examples of its practical effects. "Under color of law," while typically referring to under color of U.S. law, has been interpreted by U.S. courts to have the same meaning in this context as "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity," which is the language in the CAT.[78] The Convention does not mention a temporal limitation, but the ILC has stated that extradite or prosecute obligations are only required for conduct which occurred after a state becomes party to a treaty, unless the treaty says otherwise.[79] The Convention does not impose specific time limitations for prosecutions under Article 5(2), but the ICJ has clarified that prosecutions must be brought "within a reasonable time."[80] Section 2340A includes an eight-year statute of limitations, but

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74 Memorandum from John C. Yoo, Off. of the Deputy Att'y Gen., U.S. Dep't of Just., to the Hon. Alberto R. Gonzales, Couns. to the President 2–3 (Aug. 1, 2002) (available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf).

75 *Guide to Human Rights Statutes*, *supra* note 8.

76 *See* CAT, *supra* note 39, art. 1, ¶ 1.

77 Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 94, 194, U.N. Doc. CAT/C/28/Add.5 (2000).

78 United States v. Belfast*,* 611 F.3d 783, 808 (11th Cir. 2010).

79 *See* Int'l Law Comm'n, *supra* note 4, at 62.

80 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, at 6, 14 (July 20, 2012), https://www.icj-cij.org/public/files/case-related/144/17086.pdf. ("The Court notes that, while Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily

allows for the elimination of a statute of limitations where death or serious injury occurs as a result of torture, or even where there was risk of death or serious injury.[81] The conspiracy provision in section 2340A, added later, is in line with Article 4 of the CAT, which requires states to additionally criminalize and establish jurisdiction over "an act by any person which constitutes complicity or participation in torture."[82]

One difference in language between the Convention and section 2340A that could have a practical difference for prosecutions relates to intent. The CAT implicates intent in the definition of torture, saying that it is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . " and then details potential objectives, such as obtaining information, punishing the victim, or objectives based on discrimination.[83] Section 2340A diverges here, with which the wording instead suggests and was in fact interpreted by some to mean the objective of the offender must be to cause severe pain and suffering, as opposed to one of the objectives detailed in Article 1 of the CAT, with severe pain and suffering occurring as a byproduct.[84] However, this interpretation, detailed in a 2002 DOJ memorandum, was then explicitly rejected by a 2004 DOJ memorandum:[85]

> In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur") . . . . We do not reiterate that test here.[86]

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implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention, which is why proceedings should be undertaken without delay.").

81 *See Guide to Human Rights Statutes*, *supra* note 8; *see also* DOYLE, *supra* note 37, at 29.

82 *Compare* CAT, *supra* note 39, art. 4, ¶ 1 ("Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."), *with* 18 U.S.C. § 2340A(c) (2018) ("A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.").

83 CAT, *supra* note 39, art. 1, ¶ 1.

84 *E.g.*, Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 793 (2012).

85 Daniel L. Levin, U.S. Dep't of Just.: Off. of the Legal Couns., Memorandum Opinion for the Deputy Attorney General on the Definition of Torture Under 18 U.S.C. §§ 2340–2340A 237 (Dec. 30, 2004).

86 *Id.* at 314 n.27.

The 2004 memorandum repudiates the earlier interpretation and says that the intent element for section 2340A would be met if "defendant performed an act and 'consciously desire[d]' that act to inflict severe physical or mental pain or suffering," which better tracks the CAT intent element.[87]

Statutory Limitations on Prosecutions Under Section 2340A[88]			
Temporal	**Location**	**Offender**	**Conduct**
o Conduct occurred after enactment of 2340A, *i.e.* after Nov. 20, 1994 o Default 8-year statute of limitations beginning at time of conduct o No statute of limitations if risk of serious injury or death, or if results in serious injury or death o Conspiracy provision only applies to conduct which occurred after Oct. 26, 2001	o Conduct must have occurred outside the U.S.[89]	o Offender is a U.S. national; or	o Carried out under color of law o Specifically intended to cause severe pain, mental or physical o Victim was in perpetrator's custody or physical control

IV. LACK OF TORTURE PROSECUTIONS UNDER SECTION 2340A

The act of criminalizing torture that occurs outside of U.S. territory, even where neither the offender nor victim is a U.S. national, is a clear signal that the U.S. intended to comply with its obligations under the CAT. Yet, as previously mentioned, there have only been two prosecutions for extraterritorial torture under section 2340A since the statute's enactment in 1994, which is over twenty-five years ago.[90] This is not for lack of offenders. The DOJ has been aware of many offenders of torture and other grave human rights violations residing in the U.S. over the years.[91] *United States v. Belfast* marked the first use of section 2340A to prosecute an offender for extraterritorial torture. After an indictment on eight counts by a grand jury,

[87] *Id.* at 243, 314.

[88] Guide to Human Rights Statutes, *supra* note 8.

[89] "'United States' means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." 18 U.S.C. § 2340(3) (2018).

[90] *See supra* INTRODUCTION and note 7.

[91] *See, e.g.*, *Additional Resources*, U.S. DEP'T OF JUST.: HRSP, https://www.justice.gov/criminal-hrsp/additional-resources (Nov. 18, 2021) (showing, among other things, a list of grave human rights violators the DOJ was aware of going back to 2013, none of whom were prosecuted specifically for human rights violations).

Roy M. Belfast, Jr., better known as Chuckie Taylor, was convicted on seven of the counts for torture and for conspiracy to commit torture in Liberia and was sentenced to ninety-seven years in prison.[92] Between 1999 and 2003, Taylor, son of then President of Liberia Charles Taylor, committed and ordered others to commit horrendous atrocities in his capacity as leader of what was known as the "Demon Forces" in Liberia, officially called the Anti-Terrorism Unit.[93]

While at first glance it seems that *Belfast* is an example of the extraterritorial provision being applied to its fullest extent, Taylor was a U.S. citizen at the time he committed these atrocities, meaning in reality there were no prosecutions for extraterritorial torture by a non-U.S. national present in the U.S. until the summer of 2020 when Michael Correa was indicted.[94] Additionally, Taylor was originally going to be prosecuted only for immigration crimes, rather than the substantive human rights violations committed, but he was indicted for the torture charges a day prior to his scheduled sentencing for immigration fraud.[95] Despite this, *Belfast* is a success story of section 2340A application. In defending his case, Taylor argued that section 2340A was unconstitutional for many reasons, one being that Congress did not have the authority to pass the statute.[96] The *Belfast* court stated that after applying the rational relationship test, they were "satisfied that the Torture Act is a valid exercise of congressional power under the Necessary and Proper Clause, because the Torture Act tracks the provisions of the CAT in all material respects."[97] This determination by the court provides support for future prosecutions of human rights violations under statutes which track treaty obligations, but it also displays the court's understanding that section 2340A is a domestic codification of U.S. obligations under the CAT.[98]

Taylor additionally argued that section 2340A could not be applied extraterritorially to his actions in Liberia.[99] However, as the court noted, the presumption against extraterritoriality is clearly overcome in the case of section 2340A, the language of which shows Congress's intent for it to apply

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[92] United States v. Belfast, 611 F.3d 783, 799–801 (11th Cir. 2010).

[93] *Id.* at 793–94.

[94] Trial International, *supra* note 7.

[95] Elise Keppler et al., *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, 15 HUMAN RIGHTS BRIEF 18, 20 (2008).

[96] *See Belfast*, 611 F.3d at 803.

[97] *Id.* at 806.

[98] Other human rights violations, such as genocide, are also criminalized by statutes with express extraterritorial reach over anyone, "present in the United States," which correspond to international human rights treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide. *See* 18 U.S.C. § 1091 (2018).

[99] *Belfast*, 611 F.3d at 810.

outside the U.S.[100] Additional arguments made by Taylor and subsequently dismissed by the court as meritless included a claim that the statute was unconstitutional due to incongruencies with the CAT, and because it applies during armed conflict.[101] Section 2340A was upheld as constitutional as applied to extraterritorial acts of torture that meet the criteria laid out in the statute, at least in the Eleventh Circuit.[102] An additional issue addressed by the lower court in *Belfast* was Taylor's claim that the prosecution was a violation of the Foreign Sovereign Immunities Act ("FSIA") as he was being charged in his official capacity.[103] His argument was immediately rejected by the District Court as "the Eleventh Circuit has already held that the FSIA does not apply in criminal cases against foreign officials."[104] This decision is supported by the actual language of the FSIA, which appears to be directed at civil litigation only, and by the DOJ.[105] Further dispositive evidence that the FSIA would not apply here, or to other similar offenders, is the holding from *Samantar v. Yousuf*, which states that the FSIA does not apply to individuals, as opposed to foreign states.[106] Future convictions under similar circumstances to *Belfast*, even where the offender is not a U.S. national, such as in the case of Michael Correa, will likely be upheld in other jurisdictions as well due to the clear history and language of section 2340A and this positive precedent emerging from the Eleventh Circuit.

Notwithstanding *Belfast* and the recent indictment of Michael Correa, there have only been "almost prosecutions" under section 2340A and prosecutions for alternate, non-human right violation crimes of perpetrators of torture found to be in the U.S. One such "almost prosecution" occurred in the case of Sulejman Mujagic, former commander of the Autonomous Province of Western Bosnia Army during the Bosnian war. Mujagic was indicted by a federal grand jury in 2012 for "physical and mental torture" under section 2340A, but the DOJ then sought to dismiss the indictment based on an extradition request from Bosnia, pursuant to both an extradition treaty

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100 The presumption against extraterritoriality, as restated in the *Restatement (Fourth) of Foreign Relations Law*, is the principle that "[c]ourts in the United States interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States *unless there is a clear indication of congressional intent to the contrary*." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404 (AM. L. INST. 2018) (emphasis added).

101 *Belfast*, 611 F.3d at 807–09.

102 *See id.* at 793.

103 United States v. Emmanuel, No. 06-20758, 2007 WL 2002452, at *13 (S.D. Fla. July 5, 2007).

104 *Id.* at *14.

105 *See generally* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (2018). In a brief submitted to the U.S. Supreme Court in 2019, the Solicitor General stated that, "in the government's view, the FSIA does not apply to execution of judgment in criminal matters." Brief for the United States in Opposition at 28, *In re* Grand Jury Subpoena (2019) (No. 18-948), 2019 WL 916761, at *1.

106 Samantar v. Yousuf, 560 U.S. 305, 308, 319 (2010).

between Bosnia and Herzegovina and the U.S., and pursuant to the CAT.[107] This move was supported in part because if extradited, Mujagic could be convicted for murder in addition to torture.[108] Although this did not end in a successful prosecution for torture under section 2340A, actions taken by the U.S. with regard to Mujagic did comply with CAT obligations. The U.S. first attempted prosecution for torture, but then ceded to the state in which the conduct occurred after an extradition request was received, for the crimes of torture and murder.

Belfast and *In re Mujagic* were two success stories of ensuring accountability for perpetrators of torture under color of law, and *United States v. Correa* has this potential as well. However, many more cases in which perpetrators of torture, as defined by section 2340A, are present in the U.S. seem to go unprosecuted or are prosecuted for crimes that do not address the grave human rights violations committed; in many of these instances, civil society organizations take over.[109] In other cases, U.S. actions may in fact impede accountability efforts by other states with regard to torture crimes.[110] *Belfast* and *In re Mujagic* showcase both ends of the obligation to extradite or prosecute and display instances of U.S. compliance with their obligations under the CAT. These cases also indicate the general willingness of the U.S. to utilize the tools at their disposal to hold perpetrators of torture accountable. The question then becomes, if the goal of the U.S. is to pursue accountability in these situations, why have there only been two instances of clear compliance by the U.S. with the *aut dedere, aut judicare* obligations under the CAT?

V. SECTION 2340A PROSECUTIONS: RISKS AND CHALLENGES

Evidently, the most common reason why perpetrators of torture are not prosecuted is due to temporal restrictions and ex post facto concerns. These

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107 *Pursuing Accountability for Atrocities: Hearing Before the Tom Lantos Human Rights Commission* 8 (2019) (statement of David Rybicki, Deputy Assistant Att'y Gen., Dep't of Just.: Crim. Div.) [hereinafter Statement of David Rybicki]; *In re* Extradition of Sulejman Mujagic, 990 F. Supp. 2d 207, 224, 228 (2013).

108 Statement of David Rybicki, *supra* note 107, at 8–9.

109 *E.g.*, *Atrocities During Indonesian Occupation of Timor-Leste* (Doe v. Lumintang), CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/doe-v-lumintang/ (last visited Feb. 20, 2022); *e.g.*, *Terror Campaign Against Human Rights Defenders* (Boniface v. Viliena), CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/boniface-v-viliena/ (last visited Feb. 20, 2022) (showing examples of cases where prosecution may have been possible, but was not pursued by the Department of Justice and civil society organizations brought civil suits against perpetrators to hold them accountable instead) [hereinafter *Terror Campaign*].

110 *E.g.*, HUM. RTS. WATCH, BREAKING THE GRIP? OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLUMBIA 82 (2008) (discussing how U.S. extraditions for narco-trafficking impeded efforts to address human rights crimes in Colombia).

procedural limitations, however, do not fully explain why there has only been one prosecution under section 2340A since its enactment. An analysis of the processes and actors responsible for section 2340A prosecutions, and various motivations and limitations on these actors, helps to explain the lack of torture prosecutions in the U.S.

A. Human Rights and Special Prosecutions Section

Cases of human rights violations falling under statutes such as section 2340A are opened at the level of regional U.S. Attorney's Offices, by an Assistant U.S. Attorney ("AUSA").[111] If an AUSA's investigation may implicate torture under section 2340A, or crimes covered by the war crimes, genocide, or child soldiers statutes, they must "promptly notify the Human Rights and Special Prosecutions Section ("HRSP") of the Criminal Division."[112] HRSP, a division of the DOJ created in 2010, is the department responsible for investigating and prosecuting human rights violators, including violators of the Military Extraterritorial Jurisdiction Act as well as "members of international criminal networks who seek to evade our immigration laws, such as by smuggling persons into the United States."[113] The division developed in 2010 when two distinct divisions were merged to make the Criminal Division of the DOJ more effective in human rights enforcement.[114]

Another body responsible for investigations of human rights violations is the Human Rights Violators and War Crimes Center of Homeland Security Investigations ("HSI"), a part of U.S. Immigration and Customs Enforcement ("ICE").[115] HRSP, the Federal Bureau of Investigations, and attorneys, historians, and specialists make up the War Crimes Center; they are meant to work together to encourage "the provision of mutual assistance among the participating Homeland Security and Justice Department components in developing cases."[116]

Notably, one of HRSP's stated goals is denying safe haven in the U.S. to perpetrators of human rights violations.[117] In a 2019 statement given before

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[111] *See* U.S. Dep't of Just., Just. Manual §9-142.000 (2018).

[112] *Id.*

[113] *Human Rights and Special Prosecutions Section (HRSP)*, U.S. DEP'T OF JUST.: CRIM. DIV., https://www.justice.gov/criminal-hrsp (last visited Feb. 19, 2022) [hereinafter HRSP]. "In its MEJA enforcement work, HRSP coordinates and participates in investigations and prosecutions of individuals employed by or supporting United States military forces overseas who commit murder, sex crimes, and other federal felony offenses." *Id.*

[114] Statement of David Rybicki, *supra* note 105, at 2.

[115] *Human Rights Violators & War Crimes Center*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/partnerships-centers/hrvwcc (May 6, 2021).

[116] Statement of David Rybicki, *supra* note 107, at 3.

[117] HRSP, *supra* note 113.

the Tom Lantos Human Rights Commission of the U.S. House of Representatives, Deputy Assistant Attorney General David Rybicki affirmed the DOJ and other departments' commitment to fighting impunity for human rights abuses which occur abroad, while also providing insight into potential motivations, unrelated to treaty obligations, for fighting impunity:

> The Department pursues human rights violators and war criminals because respect for human dignity is fundamental to who we are as a nation and because impunity for these perpetrators puts at risk the lives of countless innocent persons abroad, including the brave men and women of our armed forces who serve in conflict zones overseas.[118]

The DOJ has only two true success stories to claim when it comes to holding offenders of extraterritorial torture accountable: *United States v. Belfast* and *In re Mujagic*.[119] *Belfast* was prosecuted prior to the creation of the HRSP, by the Domestic Security Division, one of the divisions of the DOJ that later became HRSP. The extradition of Sulejman Mujagic occurred after the creation of HRSP, and was led by HRSP, as well as ICE and the Human Rights Violators and War Crimes Center, INTERPOL Washington, and the DOJ's Office of International Affairs, the office that oversees extraditions.[120] The recent indictment of Michael Correa, touted by HSI as an "example of our commitment to pursue those who attempt to evade accountability for their actions by fleeing to the United States," is still an ongoing prosecution, and the outcome remains to be seen.[121] *Belfast* is repeatedly highlighted as a DOJ success story in DOJ fact sheets, reports, and interviews, but it is rarely mentioned as the only one, excluding the ongoing prosecution of Correa. Instead, DOJ press releases and interviews claim many successful "prosecutions" of violators of grave human rights abuses, such as torture, who are found in the U.S.[122] At a second glance it becomes clear that additional prosecutions referred to are not for substantive human rights abuses, but are instead for crimes such as narco-trafficking, immigration fraud, or perjury, such as in *United States v. Mohammed Jabbateh*, a case in which a former

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[118] Statement of David Rybicki, *supra* note 107, at 2.

[119] *Human Rights and Special Prosecutions Section: Human Rights Portfolio*, U.S. DEP'T OF JUST.: CRIM. DIV., https://www.justice.gov/criminal-hrsp/page/file/931511/download (Apr. 2020) [hereinafter *Human Rights Portfolio*].

[120] *See Bosnian National Extradited to Stand Trial for Murder and Torture*, U.S. DEP'T OF JUST.: HRSP NEWSLETTER (June 2013), https://www.justice.gov/criminal-hrsp/file/1119811/download.

[121] Press Release No. 20-534, *supra* note 7.

[122] Assegid Habtewold, *Interview with Deputy Chief Kathleen O'Connor*, YOUTUBE (Jan. 29, 2016), https://youtu.be/CvHW7yvBLHA.

commander of the United Liberation Movement of Liberia for Democracy was convicted of immigration fraud and perjury as opposed to torture.[123]

B. Barriers to Prosecutions

When asked about some of the challenges that arise when attempting to bring charges against violators of human rights, the Chief of HRSP, Teresa McHenry, replied saying "time is almost always our greatest enemy" and that evidentiary issues are often a barrier as well.[124] "The large gap in time in our human rights cases, combined with our physical distance from the crime scenes and the fact that we cannot compel the collection of evidence outside of our country's borders, means that these cases can be difficult, time consuming, and resource intensive."[125] She goes on to say that the DOJ has "secured a number of important convictions" and lists a few cases, again, without clarifying that these were convictions for non-human rights related offenses.[126]

An additional barrier identified in an interview with the former Deputy Chief of HRSP, Kathleen O'Connor, is the issue of *respondeat superior*.

> We do not have, in the United States, this concept of superior liability. So just because a person was in charge of a unit, in charge of the military, in charge of a government organization, they are not necessarily liable, under our law, unless we can show that they, participated in it, that they ordered it, that they witnessed and didn't do anything about it, that they watched torture occur and they didn't do anything about it.[127]

In the same interview, she identifies or alludes to issues that HRSP considers as barriers to prosecution, such as difficulties with charging current foreign public officials who may be present in the U.S. for just a visit, to, again, temporal limitations. With regard to temporal limitations, she discusses a case in which a special forces soldier in Guatemala, along with his unit, carried out the massacre at Dos Erres, where forces primarily killed children

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[123] Press Release, U.S. Att'y's Off.: E. Dist. of Pa., *Liberian National Found Guilty of Immigration Fraud and Perjury*, U.S. DEP'T OF JUST. (Oct. 18, 2017), https://www.justice.gov/usao-edpa/pr/liberian-national-found-guilty-immigration-fraud-and-perjury. Jabbateh carried out, or ordered others to carry out, an extensive list of atrocities as a commander for ULIMO, including torture, public rapes and sexual enslavement of women, and killing persons, "because of race, religion, nationality, ethnic origin or political opinion." *Id.*

[124] Teresa McHenry, *Prosecutors on the Front Line: A Q&A with Teresa McHenry, Head of Human Rights and Special Prosecutions Section of the U.S. Department of Justice*, 3 PHILLIPE KIRSCH INST. [PKI] GLOB. JUST. J. 41 (2019) [hereinafter Interview with Teresa McHenry].

[125] *Id.*

[126] *Id.*

[127] Assegid Habtewold, *supra* note 122.

from the village.[128] The perpetrator in question sought asylum in the U.S., which was denied, but he later gained U.S. citizenship after marrying a U.S. citizen.[129] An official in Guatemala brought him to the attention of HRSP who began an investigation.[130] However, they were barred from prosecuting him under any substantive federal human rights statutes, including section 2340A.[131] O'Connor explains, "[h]ere again, is a case where we could not charge him with the substantive crime, of war crimes, or torture, or extrajudicial killings, because the conduct occurred before our statutes were enacted, but, we could charge him with immigration fraud . . ."[132]

In addition to openly discussed barriers to prosecution, other possible explanations for the DOJ's inaction may stem from political or foreign policy considerations. In particular, many civil society organizations have criticized the U.S. for appearing to be champions in the fight against impunity for foreign perpetrators of torture, but not as consistently for U.S. perpetrators of torture. For example, in a shadow report submitted to the Committee Against Torture in 2014, the International Human Rights Clinic at Harvard School of Law wrote, "[t]he Government Report lists several statutes as establishing criminal sanctions for torture, none of which the United States has actually used to prosecute senior-level officials for the torture of detainees in U.S. custody abroad."[133]

The American Civil Liberties Union created a database dedicated to pushing the U.S. to pursue accountability for U.S.-perpetrated torture that occurred during the Bush Administration; section 2340 is the first tool they suggest using to prosecute offenders.[134] Human Rights Watch has also addressed this issue, additionally noting that the DOJ has "wide discretion" in deciding whether or not to prosecute these cases:

> Human Rights Watch has long urged that senior US officials, such as Donald Rumsfeld and ex-CIA Director George Tenet,

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128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 TRUDY BOND ET AL., ADVOCS. FOR U.S. TORTURE PROSECUTIONS, SHADOW REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE REVIEW OF THE PERIODIC REPORT OF THE UNITES STATES OF AMERICA 14 (2014).

134 Am. Civ. Liberties Union (ACLU), *After September 11, 2001, U.S. Officials Authorized the Cruel Treatment and Torture of Prisoners Held in Afghanistan, Iraq, Guantanamo, and the CIA's Secret Prisons Overseas.*, THE TORTURE DATABASE, https://www.thetorturedatabase.org/search/apachesolr_search (last visited Feb. 19, 2022); ACLU, ACCOUNTABILITY FOR TORTURE: WHY A CRIMINAL INVESTIGATION IS NECESSARY 2 (2014), https://www.aclu.org/other/why-criminal-investigation-necessary. The main period of time targeted by the ACLU for this project occurred under President Bush, whose quote, declaring the United States a member in the fight against torture, begins this paper.

> should be investigated for potential liability in war crimes and torture. There are a number of statutes including the War Crimes Act of 1996 (18 USC § 2441), as well as the extraterritorial torture statute, under which prosecutions could be brought.[135]

The Committee Against Torture also raised this issue in their 2014 report on U.S. compliance with the CAT. They first praised the U.S. for their "unequivocal commitment to abide by the universal prohibition of torture and ill-treatment everywhere," but the report goes on to express concern at the lack of transparency regarding U.S. detention facilities abroad, and at serious allegations of torture at the hands of U.S. officials.[136] Widespread criticism of torture perpetrated by U.S. officials may be a factor considered by the DOJ in deciding when to prosecute non-U.S. perpetrators of torture and for which crime.

C. Immigration-Related Strategies

While before the Tom Lantos Human Rights Commission, David Rybicki stated the DOJ is "committed to bringing criminal prosecutions against individuals for substantive human rights-related violations," but that this is not always possible due to the "significant jurisdictional, temporal, and evidentiary limitations" of the statutes.[137] In many cases in which a prosecution for substantive human rights violations is not brought, whether due to the issues raised by Rybicki, or due to other considerations alluded to earlier, the DOJ instead pursues charges for immigration fraud. Typically, these prosecutions eventually lead to removal proceedings, sometimes after offenders having spent time in federal custody.[138] The DOJ frames these prosecutions as "human rights cases" although the charges are for immigration offenses.[139]

One such case is that of Jean Leonard Teganya, a medical student accused of helping to identify Tutsi patients to be killed in the hospital in which he worked and participating in multiple killings and rapes during the Rwandan

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[135] *Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia*, HUM. RTS. WATCH (Sept. 23, 2008, 3:00 AM), https://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jrs-trial-united-states-torture-committed-liberia#.

[136] Comm. Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5, at 3–4 (2014).

[137] Statement of David Rybicki, *supra* note 107, at 4.

[138] *See, e.g.*, Off. of Special Investigations, *OSI's Prosecution of World War II Nazi Prosecutor Cases*, *in* 54 U.S. ATT'Y'S BULL. 1, 13, 25, 33 (2006) [hereinafter OSI Bulletin]. This guide pre-dates the creation of HRSP but refers to the work of the Office of Special Investigations (OSI), one of the divisions which merged to become HRSP.

[139] *See, e.g.*, Statement of David Rybicki, *supra* note 107, at 5.

genocide.[140] He was convicted of immigration fraud and perjury in the U.S. and was sentenced to eight years in prison.[141] While this was not explicitly a torture case, it provides helpful insight into how the DOJ, or in this case, ICE, responds to the presence of grave human rights violators when a substantive prosecution is unavailable.[142] Here, prosecution under the genocide statute was unavailable, as the amendment allowing for extraterritorial prosecution for genocide against non-U.S. nationals was not enacted until after the Rwandan genocide occurred.[143] However, when comparing the offenses, and their corresponding punishments, it seems unthinkable to prosecute a perpetrator of genocide for mere immigration fraud. Paralleling the punishments for torture under section 2340A, the potential sentence under the genocide statute, section 1091, is imprisonment for life, or even death.[144] The maximum sentence for immigration fraud, meanwhile, is ten years.[145] Federal prosecutors in this case did attempt to argue for a higher sentence for Teganya due to the seriousness of the crimes he lied about committing.[146] The U.S. District Judge overseeing the case, however, stated that "the punishment should fit the offense," and that he was "not comfortable sentencing Teganya above the federal sentencing guidelines for the immigration-related crimes he

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[140] *Rwandan Human Rights Violator Convicted on Immigration Fraud, Perjury Charges Connected with 1994 Genocide in Case Led by ICE HSI Boston, ICE Human Rights Violators and War Crimes Center*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/news/releases/rwandan-human-rights-violator-convicted-immigration-fraud-perjury-charges-connected (Nov. 19, 2021) [hereinafter ICE].

[141] Nate Raymond, *Rwandan Man Gets Eight Years in U.S. Prison for Lying About Genocide Role*, REUTERS (July 1, 2019, 12:43 PM), https://www.reuters.com/article/us-massachusetts-crime-rwanda/rwandan-man-gets-eight-years-in-u-s-prison-for-lying-about-genocide-role-idUSKCN1TW3P2.

[142] If not for temporal limitations, this prosecution could have been brought by HRSP under section 2340A. Sexual violence against women has been declared to be a form of torture by the Committee Against Torture. "It is well established that rape and other forms of sexual violence can amount to torture and ill-treatment. In addition to the severe physical trauma, the mental pain and suffering inflicted on victims are often exacerbated by the social stigma they face. The incidence of rape, including gang rape and the impunity for its commission, are exacerbated during times of conflict and when women are on the move or deprived of liberty." *Gender-Based Crimes Through the Lens of Torture International Women's Day – Tuesday 8 March 2016*, UNITED NATIONS: OFF. OF THE HIGH COMM'R FOR HUM. RTS. [OHCHR] (Mar. 4, 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17152&.

[143] *See Guide to Human Rights Statutes*, *supra* note 8, at 2; *see also* Genocide Accountability Act of 2007, Pub. L. No. 110-151, § 2, 121 Stat. 1821, 1822 (2007).

[144] 18 U.S.C. § 1091(b)(1) (2018).

[145] Press Release, U.S. Att'y's Off.: Dist. of Mass., *Rwandan Man Charged with Immigration Fraud and Perjury*, U.S. DEP'T OF JUST. (Aug. 4, 2017), https://www.justice.gov/usao-ma/pr/rwandan-man-charged-immigration-fraud-and-perjury.

[146] *See* Raymond, *supra* note 141.

was convicted of to punish him for crimes that he could not be charged over in the United States."[147]

Teganya and others are not exceptions to the rule; many violators of grave international core crimes who are present in the U.S. are or have been pursued for immigration offenses. Others are simply prevented from entering the U.S. in the first place. The Human Rights Violators and War Crimes Center ("War Crimes Center") reported that since 2003, it has prevented more than 260 individuals suspected of human rights violations from entering the U.S.[148] The War Crimes Center also "supported ICE's removal of 908 known or suspected human rights violators" and "facilitated the departure of an additional 122 such individuals" without elaborating on the meaning of facilitating a suspect's departure.[149] They additionally report having leads on nearly 2,000 suspects in the U.S. from ninety-five countries.[150] Kathleen O'Connor from HRSP confirmed in an interview that:

> 1 million people each year become legal permanent residents in the United States . . . but a small portion of those individuals are serious human rights violators. So we, acting on tips, oftentimes from other immigrants from those countries, we investigate, we gather evidence, and we charge those individuals.[151]

Again, the charges she refers to are not for substantive crimes, but for immigration offenses.[152]

The DOJ and the War Crimes Center, while often referring to immigration fraud cases as "human rights cases," are relatively open about their use of prosecutions for immigration offenses as a replacement for substantive human rights offenses. The landing page for HRSP on the DOJ's website states that, "HRSP investigates and prosecutes human rights violators for genocide, torture . . . and for immigration and naturalization fraud arising out of efforts to hide their involvement in such crimes."[153] Both the director and deputy chief of HRSP discussed in interviews the use of immigration charges as an alternative, frequently utilized by HRSP and ICE, to prosecuting for substantive human rights offenses.[154]

This policy of prosecuting human rights violators for immigration offenses began long before the creation of HRSP; the Office of Special Investigations ("OSI"), HRSP's predecessor, began using this tactic as early

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147 *See id.*

148 ICE, *supra* note 140.

149 *Id.*

150 *Id.*

151 Voice of America (VOA) Africa, *U.S. Justice Criminal Division*, YOUTUBE (Jan. 14, 2014), https://www.youtube.com/watch?v=Ei0Vft9MGpg [hereinafter VOA: Africa].

152 *Id.*

153 HRSP, *supra* note 113.

154 VOA: Africa, *supra* note 151; Assegid Habtewold, *supra* note 122.

as 1979 while "hunting Nazi war criminals" found to be in the U.S.[155] In addressing the problem of the "new generation of international human rights abusers living in the United States," the Senate Judiciary Committee explained a provision subsequently added to the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA").[156] The provision, according to the Committee, was meant to allow the Department of Homeland Security ("DHS") and other departments to "investigate and take legal action to denaturalize any naturalized U.S. citizen who participated abroad in acts of genocide or, acting under color of foreign law, participated in acts of torture or extrajudicial killing. It also mandates the exclusion and removal of such persons . . ."[157] OSI's understanding of obligations under the CAT only seemed to extend so far; one OSI Attorney's Bulletin clearly acknowledged that section 2340 was enacted in order to comply with obligations under the CAT, but then explained that this new IRTPA provision provides for the "exclusion and removal of aliens who, under color of foreign law, 'committed, ordered, incited, assisted, or otherwise participated' in 'torture' (as defined in 18 U.S.C. § 2340 . . .)."[158] Preventing the entry of offenders of torture, or removing them if they are found in the U.S., in place of prosecution or extradition, is clearly an approved, oft-used policy for the DOJ and DHS.

VI. *AUT DEDERE, AUT JUDICARE*: IS THE U.S. IN COMPLIANCE?

As is clear from situations where temporal limitations apply, evidentiary issues arise, or section 2340A elements are not met, viable prosecutions under section 2340A are not always obtainable against offenders of torture found to be in the U.S.. Nonetheless, there are cases in which these limitations do not seem to apply, yet prosecutions for lesser crimes are pursued instead, often ending in deportation after or in lieu of prison sentences. Even more confounding is the DOJ response to offenders like Jean Morose Viliena, against whom charges for torture under 2340A likely could have been brought, but where no charges were pursued whatsoever, even for immigration fraud as of yet.[159] Additionally, the answer to the question of why only two Torture Act prosecutions have occurred is not that there is a lack of offenders; interviews with HRSP attorneys confirm that the DOJ continually

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155 *See* OSI Bulletin, *supra* note 138, at 25 (quoting S. REP. NO. 108-209, at 7 (2003)).

156 *Id.*

157 *See* OSI Bulletin, *supra* note 138, at 25.

158 *Id.* at 27.

159 *See Terror Campaign*, *supra* note 109. Viliena became a permanent resident of the United States and was residing in Massachusetts when a civil suit was brought against him for torture and other international crimes, by survivors of his crimes. Boniface v. Viliena, 338 F. Supp. 3d 50, 56–57, 68 (D. Mass. 2018).

receives information on many perpetrators of torture, present in the U.S., "living the American dream," as HRSP's Deputy Chief said.[160]

While the overarching goal of the CAT is to eradicate torture worldwide, in large part by way of the requirement to extradite or prosecute, the policies and strategies employed by the U.S. reflect a goal of simply insulating itself from perpetrators of torture. The U.S. is arguably not acting in compliance with its *aut dedere, aut judicare* obligations under the CAT when offenders found within its borders are prosecuted for immigration fraud instead of torture, particularly when they are subsequently deported to the country in which they committed the crimes. The results of the prosecutions for immigration fraud in the cases of Teganya, Jabbateh, the Dos Erres massacre, and many others highlight the problems with the immigration fraud strategy. First, deporting offenders is not equal to extradition; there is no guarantee of investigation or prosecution after removal. Additionally, removal as a penalty itself is hardly equal to the potential sentences for a conviction of torture under color of law. Removal can also re-jeopardize survivors who may still be present in the state in which the conduct occurred. Second, a prosecution for substantive human rights violations cannot be substituted with a prosecution for immigration fraud and perjury. Sentences for immigration fraud, as opposed to torture, are significantly shorter, and trials for immigration offenses may not fully reveal the extent of the offender's actions. In addition to accountability and the potential for deterrence for offenders, prosecutions for torture can provide some redress for survivors and the families of victims.

Comments from members of the Working Group of the ILC on the obligation to extradite or prosecute have supported the clear conclusion that removal, or "facilitating a suspect's departure," is not a means of complying with extradition as mandated by the CAT:

> While states may find it easier to resort to deportation to rid themselves of suspected criminals, the chairman of the Working Group submitted that deportation might be insufficient to fulfil the obligation to extradite or prosecute unless there was a guarantee that the deported persons would be prosecuted in the States with the necessary jurisdiction.[161]

The DOJ appears to believe otherwise and has said it considers removal a "severe penalty," while also displaying an understanding of the uncertainty of removal by stating "*ideally*, those accused of crimes against humanity will be tried in their home countries."[162] In reality, some deported offenders are

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[160] Assegid Habtewold, *supra* note 122.

[161] KITTICHAISAREE, *supra* note 19, at 64.

[162] Prue Clarke, *'Jungle Jabbah' Was Accused of Cannibalism and Other Horrors in Liberia. How a U.S. Court Brought Him to Justice*, WASH. POST (Apr. 14, 2018), https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-

not just met with impunity in their home country; some are permitted to return to positions of power again.[163]

An article from Frontpage Africa, an investigative Liberian newspaper, describes the distress experienced by survivors after George Boley, an offender of grave international crimes including torture, was removed to Liberia.[164] Survivors expected Boley to, at minimum, be prosecuted for immigration crimes and imprisoned for a significant amount of time, as Mohammed Jabbateh was.[165] Instead, while being fully aware of Boley's crimes, ICE removed him to Liberia, where the president at the time had "shelved most of the TRC [Truth and Reconciliation Commission] recommendations," and where Boley went on to become a representative in the National Legislature.[166] The general sentiment of survivors interviewed for the article was that they felt anger towards the lack of accountability, guaranteed by his removal to a country without the "political will to prosecute past crimes because the people who should [initiate prosecutions] are listed in the TRC report."[167] Boley's removal to Liberia also provided him the opportunity to threaten some of the survivors who had testified against him for the TRC.[168] The article stated that "[h]is election to the legislature was an embarrassment to US law enforcement."[169] Deportation of an offender may allow the U.S. to avoid reckoning with the presence of human rights violators in its territory, but it will frequently lead to impunity because "[p]rosecution of the big fish in domestic courts of the territorial State is usually practicable only after a *regime change* in that State."[170]

A conviction for immigration fraud requires proving that a defendant gave "a false statement under oath in any document required by the

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and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef_story.html (emphasis added).

[163] *Id.* "Human rights activists view this logic skeptically, pointing to the case of George Boley, one of the leaders of Liberia's rebel factions, who was deported in 2012. Liberia's president at that time, Ellen Johnson Sirleaf, defied pressure to convene a war crimes court. Last year, Boley was elected to the country's parliament." *Id.*

[164] *Liberia: War Survivors Angry Boley Not Jailed in America*, FRONT PAGE AFRICA, https://frontpageafricaonline.com/liberia-war-crimes-trial/liberia-war-survivors-angry-boley-not-jailed-in-america/ (Sept. 19, 2019) [hereinafter Frontpage Africa]. "Boley's forces were implicated in rape, torture, and killings during Liberia's wars," said Elise Keppler, International Justice Program senior counsel at Human Rights Watch. "Whether in the United States or Liberia, he should be criminally investigated for these horrific offenses." *Liberia: Warlord's Arrest in US Shows Need for Justice*, HUM. RTS. WATCH (Feb. 22, 2010, 4:32 PM), https://www.hrw.org/news/2010/02/22/liberia-warlords-arrest-us-shows-need-justice.

[165] Frontpage Africa, *supra* note 164.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] KITCHARAIRSAREE, *supra* note 19, at 315.

immigration laws or regulations."[171] While a trial for immigration fraud might include testimony from survivors and evidence of the atrocities committed, as it did in the Jabbateh case, it is possible that for some trials this may not be necessary at all.[172] Proving the full extent of an offender's actions is likely not required to show they made a false statement under oath; it may be sufficient, for example, to simply show a defendant lied about being a commander of a military unit known for committing grave human rights violations. The one successful conviction for torture under section 2340A, on the other hand, involved a six-week trial and extensive testimony from survivors regarding the substantive crimes committed by Charles "Chuckie" Taylor.[173] The DOJ repeatedly equates prosecutions for torture with prosecutions for immigration offenses, yet the ability for survivors and families of victims to have their day in court is in fact not equal at all in these two scenarios.

While the differences between removal and extradition and prosecutions for immigration fraud as opposed to torture are clear, the DOJ may in fact be exercising its best available alternative in situations where a prosecution for immigration fraud is pursued due to limitations of section 2340A. Comments from HRSP's Deputy Chief suggest that prosecutions for immigration fraud, where torture could not be charged, do in fact allow survivors a chance to testify and explain what happened to them, and that HRSP has significant resources for protecting and working with witnesses.[174] Referring to the ninety-four AUSA offices in the U.S., she explained that:

> [E]ach of those offices has a victim witness office, and victim witness coordinators who work closely with witnesses and victims to make sure they understand the proceedings, their safety concerns are met, their health concerns are met, their . . . psychological concerns are met, and we make sure that the victim and witness concerns are primary to us going forward in a case.[175]

It is possible that HRSP and the other relevant agencies have made the calculation that prosecutions for immigration offenses, while not necessarily in compliance with CAT obligations, are better than nothing at all. However, when these substitute prosecutions end in removal, often allowing

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171 U.S. Dep't of Just., Just. Manual §9-73.600 (2020).

172 "The jury knew her only as Witness 18. The woman, dressed in the colorful traditional garb of rural Liberia from where she had come, said the man on trial was not an entrepreneur living quietly in Southwest Philadelphia, as he claimed. Rather, she told the court, Mohammed Jabbateh was 'Jungle Jabbah,' a ruthless militant commander responsible for barbarous war crimes committed decades ago." Clarke, *supra* note 162.

173 Press Release No. 09-021, *supra* note 7; *see Transcript of Press Conference Announcing Indictment of Roy Belfast, Jr., AKA Chuckie Taylor, on Torture Federal Charges*, U.S. DEP'T OF STATE (Dec. 6, 2006), https://2001-2009.state.gov/m/ds/rls/77567.htm.

174 Assegid Habtewold, *supra* note 122.

175 *Id.*

perpetrators to escape accountability, threaten survivors, and even become government officials again, they are arguably not the best possible alternative.

The Committee Against Torture has criticized the U.S. for impeding accountability efforts for offenders of torture in the past, and for not prosecuting substantive human rights offenses. The Committee expressed concern about instances in which the U.S. has requested extradition of human rights offenders to the U.S., but for non-human rights offenses, such as narco-trafficking.[176] They additionally stated that "[t]he lack of an effective legal framework for guaranteeing the obligations entered into under the Convention hinders victims' access to justice, the truth and redress and contravenes the State's responsibility to investigate, try and punish crimes of torture . . ."[177] Finally, the Committee stated that "[t]he State party should ensure that future extraditions take place within a legal framework that recognizes the obligations imposed by the Convention."[178]

In addition to criticism from the governing body of the CAT, human rights activists and members of the U.S. Senate have criticized HRSP for failing to prosecute human rights violators found in the U.S. A 2018 *Washington Post* article reported that some human rights groups have said that HRSP "routinely rejects cases . . . they've labeled the unit risk-averse and ineffective. The one case it litigated under the human rights statutes dates back to 2009."[179] The groups point to "comparatively high record of success among the unit's European counterparts" as an example of how HRSP is falling behind.[180] Senator Richard Durbin, a proponent of using section 2340A and other statutes to prosecute war criminals, expressed concern over the "apparent inaction" on the part of HRSP.[181] The U.S. Senate has also generally communicated concern at the "large number of suspected human rights violators from foreign countries who have found safe haven in the United States," and in 2018, directed the DOJ Criminal Division to "continue its efforts to investigate and prosecute serious human rights crimes, including genocide, torture, use or recruitment of child soldiers, and war crimes."[182]

VII. CONCLUSION

The DOJ frequently conflates prosecutions for human rights crimes with prosecutions of human rights offenders, but for immigration crimes. The DOJ additionally appears to equate deportations of human right offenders with

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176 Rep. of the Comm. Against Torture, Forty-Third Session, Forty-Fourth Session, at 22, U.N. Doc. A/65/44 (2010).

177 *Id.*

178 *Id.* at 22–23.

179 Clarke, *supra* note 162.

180 *Id.*

181 *Id.*

182 S. REP. NO. 115-275, at 73 (2018).

extraditions. The goal of the CAT and the obligations of the U.S. to the Convention do not match with the goals and actions of the U.S. with regard to their *aut dedere, aut judicare* obligation. Language used by the U.S., and the DOJ specifically, suggests an understanding of the goal of the CAT; that *no state* should become a safe haven for perpetrators of core international crimes. In reality, U.S. actions often suggest a different goal: that the U.S. cannot become a safe haven for offenders.

While prosecutions for immigration offenses may provide some degree of accountability, they are clearly not what was intended under the CAT. Moreover, as shown in the case of George Boley, these prosecutions and removals can instead contravene the purpose and objective of the CAT. Instead of allowing for redress for survivors and families of victims, U.S. actions have at times risked the lives of survivors. Instead of preventing impunity for offenders of torture, U.S. actions have allowed some perpetrators to go free and become another state's problem. Instead of working to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world," the U.S. has employed a strategy that often suggests more isolationist objectives.[183]

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[183] *See* CAT, *supra* note 39, pmbl.