

Canada's Justice for Victims of Corrupt Foreign Officials Act
("Sergei Magnitsky Law")

CIVIL SOCIETY SUBMISSION TEMPLATE

(WITH SAMPLE TEXT)



May 2020

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Acknowledgements

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This template does not represent the official position of the Allard School of Law, the University of British Columbia or the Government of Canada.

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Table of Contents

INTRODUCTION	3
SECTION 1. PERPETRATOR INFORMATION.....	5
SECTION 2. NATIONAL INTEREST ARGUMENT & SUMMARY OF IMPACT	7
SECTION 3. CASE TYPE & INTERPRETATION OF THE LAW	13
SECTION 4. SUMMARY OF EVIDENCE.....	16
SECTION 5. APPLICATION OF CANADA’S JVCFOA.....	21
SECTION 6. DISCUSSION OF CONTRARY EVIDENCE/ARGUMENTS	24
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APPENDIX A: HOW TO CONVERT US MAGNITSKY SUBMISSIONS INTO CANADIAN JVCFOA SUBMISSIONS	25
APPENDIX B: DEFINITIONS	29
DEFINITIONS PERTAINING TO HUMAN RIGHTS ABUSE:	29
DEFINITIONS PERTAINING TO CORRUPTION:.....	31

Introduction

The purpose of this manual is to assist individuals and non-governmental organizations with their submissions to the Canadian Government under the Justice for Victims of Corrupt Foreign Officials Act (the “JVCFOA,” also known as the “Sergei Magnitsky Law”).¹ The JVCFOA allows the Canadian government to institute a “dealings prohibition” (effectively an asset freeze) on any foreign national listed under the regulations.² Listed individuals, other than permanent residents, are also inadmissible to Canada under the Immigration and Refugee Protection Act.³

This template outlines six steps for submitters to follow to ensure their submissions are robust and meet the requirements of the JVCFOA. These steps, discussed in the six sections below cover the following areas:

- 1) Perpetrator information
- 2) Canadian national interest and impact statement
- 3) Case types
- 4) Evidence summary
- 5) Information required by Canadian law and
- 6) Contrary evidence and arguments

Each section provides tips to strengthen submissions followed by sample text. The sample text, based on human rights abuses in the fictional country of Generica, is meant solely as an instructive example. A one-page summary of the argument with details on the alleged perpetrator, the crime, and the potential significance of sanctions is recommended at the beginning of your submission.

Appendix A to this template describes how to convert submissions made under the United States’ Global Magnitsky Human Rights Accountability Act (the US Magnitsky Law) to submissions that will meet Canada’s requirements under the JVCFOA. While both the JVCFOA and the US Magnitsky Law allow for sanctions for gross human rights abuses and significant acts of corruption, there are differences between the two Acts, including different legal thresholds and evidentiary requirements, which reflect the differences in the Canadian and US legal systems.

Appendix B provides various provisions of Canadian law relevant to human rights abuses, which can be cited in JVCFOA submissions. These include the definitions of extrajudicial killing; cruel,

¹ SC 2017, c 21.

² See *Regulations Amending the Justice for Victims of Corrupt Foreign Officials Regulations* entered into force on November 29, 2018.

³ SC 2001, c 27.

inhuman or degrading treatment; unlawful or arbitrary detention; torture; bribery; and money laundering.

Canada's Minister of Foreign Affairs administers the JVCFOA. Finalized submissions should be sent to Global Affairs Canada at: sanctions@international.gc.ca or

Global Affairs Canada
Sanctions Policy and Operations Coordination Division (PER)
125 Sussex Drive
Ottawa, Ontario
Canada K1A 0G2

Telephone (toll-free): 1-833-352-0769
Telephone (local): 1-343-203-3975
Fax: 1-613-995-9085

You are unlikely to receive a response or acknowledgement of your submission.

Section 1. Perpetrator Information

(1) Only individuals can be designated under the JVCFOA. Entities cannot be designated in Canada, although they can be in other countries' version of the Magnitsky Law.

(2) Be consistent in names of entities and roles and use formal names to the extent possible.

(3) Where the submission alleges responsibility due to an individual's status as a leader or official of an entity (such as a state military unit) that perpetrated the alleged acts, the NGO should seek to include an organizational chart and as much other background information as is available to illustrate the manner in which officials within various entities or departments have authority over the ultimate perpetrators of the human rights abuses or corruption.

SAMPLE TEXT

Insert
Photo
Here

Full Legal Name of Perpetrator: Colonel John Smith

Country: Generica

Title or Position: Director-General of Ministry of Security (since July 2016);

former Director of the Directorate of Criminal Interrogation (2015)

Date of Birth: 12/14/1971

Other Known Personal Identifiers (passport number, address, etc.): located in Metropolis, Central Province; Passport 66666666; Generica identification number 3333333

Insert
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Full Legal Name of Perpetrator: Colonel Edward Doe

Country: Generica

Title or Position: Director of the Directorate of Criminal Interrogation (since January 2015)

Date of Birth: 10/09/1980

Other Known Personal Identifiers (passport number, address, etc.): located in Metropolis, Central Province; Passport 999999999; Generica identification number 22222222

List of Assets Associated with Colonel John Smith:

Description of Asset	Nexus to Perpetrator	Location of Asset	Value of Asset
Bank account at Generica National Bank (GNB)	Owned by perpetrator	GNB is incorporated in Central Province, Generica	Unknown
Residential property in Miami, Florida	Property owner listed as wife of perpetrator	1234 Miami Street Miami, FL 1234	Appraised in 2016 at \$35 million USD
Luxury yacht	Reportedly owned by perpetrator ⁴	Unknown, previously docked in Barcelona	Reportedly purchased for \$60 million USD

List of Facilitators Associated with Colonel John Smith:

Name of Facilitator	Bio identifiers	Relationship to Perpetrator
Jane Smith	Nationality: Generica DOB: 1/2/1980	Wife of perpetrator, holds property on behalf of perpetrator in her name
Juan Doe	Nationality: Spain DOB: 2/1/1970	Agent for perpetrator; buys properties and procures contracts on perpetrator's behalf. ⁵

List of Assets Associated with Colonel Edward Doe:

Edward Doe has no known assets.

List of Facilitators Associated with Colonel Edward Doe:

Edward Doe has no known facilitators.

⁴ See News Report A

⁵ See Spanish Investigation Report B

Section 2. National Interest Argument & Summary of Impact

(1) Given that use of the JVCFOA is discretionary, the Canadian government must be convinced that it is in Canada's national interest to sanction a particular individual. Use this section to assess and describe the impact of a sanctions designation and how it would benefit Canada's national interest. The Treasury Board Secretariat has defined national interest as "the security and the social, political and economic stability of Canada."⁶

(2) Global Affairs Canada considers the JVCFOA one of the tools in their diplomatic toolbox. Sanctions are a measure of last resort when other diplomatic pathways have been exhausted or are not having the desired effect. The JVCFOA is used when sanctions are likely to be successful in influencing behaviour, promoting compliance, and ending impunity. It would be helpful to explain why the use of the JVCFOA is the right method given the circumstances, as well as what effect is sought and how sanctions could achieve that effect. Where there is political will or an international crisis requiring an urgent response, the expeditious use of sanctions is more likely. Include those points in the argument if they are relevant.

(3) Global Affairs Canada also prefers to engage with allies and deploy multilateral rather than unilateral sanctions, adopting the view that action is more effective when working together with economies that are larger than Canada. Therefore, addressing if any other countries have sanctioned the individuals is also important.

(4) We are advised by government officials that detailing how the imposition of sanctions against certain individuals might further Canada's commitment to promoting and protecting the fundamental rights of women, girls and the LGBTQ2S+ community around the world would be a valuable element to include in this section. Canada's Feminist International Assistance Policy states that "Canadians are safer and more prosperous when more of the world shares our values. Those values include feminism and the promotion of the rights of women and girls...Women's

⁶ Treasury Board Secretariat, "Glossary," online: <<https://www.tbs-sct.gc.ca/pol/glossary-lexique-eng.aspx#gloss-lex-N>>.

rights are human rights.”⁷ Other action areas include, among others, inclusive governance, “including democracy, human rights, the rule of law and good governance,” and peace and security.⁸

(5) While the rationale for a particular designation can and should include the Canadian government’s interest in upholding its stated commitment to promoting human rights and fighting corruption (as noted in the preamble to the JVCFOA), the most compelling arguments will also explain why a particular designation will work to advance Canadian interests, diplomacy, and international peace and security more broadly. An overarching goal of the JVCFOA is to end impunity and hold those who commit gross human rights violations and acts of significant corruption to account.

Arguments could explain the threat posed by the individual(s) to citizens, to the global financial system, and to democratic ideals, as well as highlight the value Canada places on protecting rights, freedoms, equality, and the rule of law. Additionally, arguments could address the ways in which sanctioning a particular individual could send a targeted message to a government, government faction or military unit, isolate an individual spoiler, curb illicit finance, limit future human rights abuses within a particular unit, improve a security situation, and/or provide leverage in a diplomatic discussion. As applicable, the summary of impact should also seek to explain how sanctioning the perpetrator(s) in question could deter similarly situated actors from engaging in human rights abuses and/or corruption.

(6) Where applicable, this section would benefit from an analysis of how sanctioning certain perpetrators might promote the development of a fair and open marketplace that is beneficial to Canadian businesses. Submissions may also include an assessment of financial assets that could be frozen/blocked when an individual is listed. A significant consideration in determining the value of an individual sanction action is understanding the extent of financial assets owned or controlled

⁷ Global Affairs Canada, “Canada’s Feminist International Assistancy Policy,” online: <https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng>.

⁸ Ibid.

by the alleged perpetrator that can be disrupted. Such assets can include bank accounts; real property; luxury goods; and ownership, stock shares, or other valuable interest in businesses.

(7) The government has helpfully framed some ways that unchecked corruption can be harmful, which could support an argument made in this section: “Corruption is increasingly recognized as a harmful problem that impedes economic and social development. Corruption undermines the rule of law and reduces the efficiency and proper functioning of a market economy. Billions of dollars in global government revenues are lost each year to corruption, often in developing economies where such funds are required for human development and basic infrastructure. Corruption harms ethical companies and may cause them to unfairly lose important business opportunities. Corrupt environments also raise company investment costs, threaten profitability and add to investment and reputational risks.”⁹

Canada is a State Party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Inter-American Convention against Corruption, the United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption. The government has stated that it promotes and supports several specific standards. These include the OECD Guidelines for Multinational Enterprise, the World Bank Group International Finance Corporation Performance Standards, the Voluntary Principles on Security and Human Rights, and the Global Reporting Initiative for Corporate Social Responsibility reporting by the extractive sector. Each of those standards addresses a variety of human rights and corruption concerns and commitments.¹⁰

(8) Reviewing National Interest Summaries for treaties that Canada has assented to and that cover topics relevant to the sanctions submission could provide ideas for arguments that have already been accepted in a different capacity. Before Canada assents to a treaty, it is tabled in the House of Commons with a brief Explanatory Memorandum that provides information about the treaty’s

⁹ Global Affairs Canada, “Policy and procedures for reporting allegations of bribery abroad by Canadians or Canadian companies.”

¹⁰ Global Affairs Canada, “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector.”

content. One section that is included is a National Interest Summary, which describes reasons why Canada should become a party to the treaty. The Explanatory Memorandum may provide insights into what factors Canada considers when determining what is in the national interest.

SAMPLE TEXT

The Generic Security Service (GSS) is organized under the Ministry of Security (MoS) of the People’s Republic of Generica, as reflected in the attached MoS Organizational Chart. Human Rights for Generica (HRG) has compiled the details of individual cases of torture by the GSS, which are attached as Annex A.

As demonstrated through these individual cases, the GSS has engaged in a pattern and regular practice of human rights abuses in Generica over an extended period of time, including routinely throughout the past five years.¹¹ The pattern shows that individuals are arrested and brought to the GSS, where they are tortured for a number of hours or days, exceeding multiple months in some cases. The torture inflicted by the GSS has regularly included severe beatings, sleep deprivation, threats to family members, withholding food and water, forced standing and other stress positions, exposure to dangerously cold temperatures, sexual abuse and electric shock.¹² HRG has confirmed that at least one of the tortured individuals died in GSS custody. Detainees are most often tortured for the purpose of coercing a confession (which many claim was false and only given to end the torture), which is used in the subsequent trial against them and results in their conviction. Charges generally relate to domestic offenses, including “participating in protests” and “illegal assembly,” as well as charges of “terrorist activity,” the validity of which has been called into question by credible UN experts and human rights organizations.¹³ Some of

¹¹ *Citation with link to online availability, if possible.* Sample text: For a general overview of the GSS’s pattern of torture and other forms of human rights abuses, see NGO Report A, NGO Report B, UN Report C, and UN Report D.

¹² For details, see NGO Report B, p. 4.

¹³ UN and NGO reporting here.

the detainees subjected to these abuses have been as young as 15. Life imprisonment and death sentences are often imposed as a result of these confessions coerced through torture.¹⁴

The individuals recommended for sanction in this submission are each either currently a high-ranking officer within the MoS or GSS, or previously held a high-ranking position there. As required for designation under the Justice for Victims of Corrupt Foreign Officials Act (the JVCFOA), each of the individual perpetrators named in this submission is or has been a leader or official of a governmental entity that has engaged in and whose members have engaged in gross violations of human rights. Moreover, the evidence discussed in this submission confirms that there is a pattern and practice of human rights abuse by the GSS that could exist only if condoned by officials at all levels of authority. Due to the widespread and regular nature of these abuses, and the fact that these incidents of torture have been well known and documented and have occurred repeatedly for a period of many years, HRG submits that each of the individuals recommended for sanction were knowingly complicit in, and knows or should know that the government entities they have led, or their subordinates within those entities, have been engaged in ongoing human rights abuses. Furthermore, the named individuals failed to take necessary measures to halt the abuses or to investigate them in a genuine effort to impose punishment on the perpetrators. As such, HRG recommends these individuals be listed in the Justice for Victims of Corrupt Foreign Officials Regulations.

It is in the Canadian government's interest to ensure that torture and other prohibited forms of ill treatment will not go unnoticed or unpunished. The GSS's abuses are well known and well documented. The designation of one or more high ranking individuals within the GSS would demonstrate the commitment and leadership of Canada to holding human rights violators accountable and ensuring that criminal convictions against individuals are aligned with international standards of fair trial rights.

These designations are aligned with the aims set out in the preamble of the JVCFOA, in which Parliament articulated that "all violators of internationally recognized human rights should be treated and sanctioned equally throughout the world" and that doing so would "further Canada's

¹⁴ See NGO Report D, pp. 15-16.

support for human rights and advance its responsibility to protect activists who fight for human rights.” While torture for any purpose is a gross violation of human rights, torture for the purpose of coercing confessions is particularly dangerous as it degrades confidence in the rule of law. Discarding the rule of law is a threat to global peace and security when practiced by our enemies but an even greater threat when openly tolerated by our allies. Notwithstanding Generica’s cooperation with Canada on regional security initiatives, the GSS is clearly engaged in systematic and widespread gross human rights abuses, which are undoubtedly the type of activity Parliament intended to target in passing the JVCFOA.

Furthermore, as described in multiple analyses conducted by credible analysts, Generica’s domestic counterterrorism policies, including instances of torture perpetrated by members of the GSS, are having the effect of alienating, and in some cases radicalizing, members of Generica’s minority population.¹⁵ Debriefs of Generica fighters returning from the Middle East have shown that roughly 80% of radicalized militants elected to take up arms due to a sense of personal and communal grievance driven by the Government of Generica’s repressive policies.¹⁶ Sanctioning members of the GSS shown to have engaged in or directed torture would send a powerful signal that the Canadian government finds the Government of Generica’s actions not only illegal, but also strategically counterproductive. Given Generica’s key role in the fight against regional violent extremism and security partnership with Canada, the Canadian government could consider combining sanctions designations with diplomatic outreach and security sector assistance aimed at strengthening elements of Generica’s security services known not to have engaged in torture.

¹⁵ See, for example, Think Tank Report A.

¹⁶ See Think Tank Report B, pp 6-7.

Section 3. Case Type & Interpretation of the Law

(1) Specify the type of case you are documenting. The JVCFOA allows the Canadian government to sanction any foreign national if the Governor in Council is of the opinion, on the standard of reasonable grounds to believe, that the individual is within the listing criteria. The triggering circumstances for imposing sanctions are listed in s. 4(2) of the JVCFOA, which reads:

Circumstances

(2) The circumstances [when an individual may be sanctioned] are the following:

(a) a foreign national is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek

(i) to expose illegal activity carried out by foreign public officials, or

(ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections;

(b) a foreign national acts as an agent of or on behalf of a foreign state in a matter relating to an activity described in paragraph (a);

(c) a foreign national, who is a foreign public official or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources — which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question in the acts; or

(d) a foreign national has materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, an activity described in paragraph (c).

(2) The legal standard of the JVCFOA is that the Governor in Council must be “of the opinion” that triggering circumstances are present. While this language has yet to be judicially considered, it likely imports a standard that is less than the criminal standard of “beyond a reasonable doubt.” Given that a determination under the JVCFOA concerns foreign affairs, a subject traditionally

treated with a great deal of deference by the courts, the standard likely contemplates a broad discretion to consider a multitude of relevant factors.

(3) If it can be demonstrated that the individual committed, or was complicit in, extra-judicial killings or torture, then the element of responsibility or complicity is made out. If the action falls into the category of “other gross violations,” there is an additional burden to articulate why the violation rises to the level of “gross.” Likewise, an act of corruption should be described in a way where the determination can be made that it is “significant.”

(4) The JVCFOA is victim-centred, so the submission must identify a victim or group of victims. Being vague about human rights abuses committed broadly will not suffice. The victim must be acting as a whistleblower or a human rights defender. However, this is interpreted broadly to include people trying to exercise their human rights, including protestors or victims seeking to preserve their right to life.

(5) The act must occur outside of Canada, and the perpetrator must hold a legislative, administrative, or judicial position; perform public duties or functions for a foreign state; or be an official or agent of a public international organization formed by two or more states.

(6) “Complicity” is not defined in the JVCFOA and its meaning has not been judicially considered in the JVCFOA context. However, given that the acts targeted by the JVCFOA are generally international crimes, it is reasonable to assume that Canada will rely on its understanding of “complicity” in international criminal law. Canada has interpreted international law to require a “significant contribution” by the individual to the acts in order to impose liability for them. This was explained by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 68:

“In sum, while the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group’s criminal purpose. At a minimum, complicity under

international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group.”

SAMPLE TEXT

HRG submits that these perpetrators are subject to sanction under the Justice for Victims of Corrupt Foreign Officials Act, section 4(2)(b) by acting as “agents of or on behalf of a foreign state” in activity that amounts to gross human rights abuse against those who seek to promote human rights abroad.

Section 4. Summary of Evidence

(1) Provide a narrative of the facts surrounding the case you are recommending to the Canadian government, supplemented by footnoted links to supporting documents and/or annexes for documents not in the public domain.

(2) Include a summary description of the NGO's sources and methods of obtaining the factual information included in the submission (e.g., first-hand victim accounts, interviews with family members, documents reviewed, etc.).

(3) Strong cases will include as many unique sources of credible, verifiable information corroborating your claim as possible. It is preferable when evidence can be obtained and corroborated from multiple sources (in other words, a single NGO's internal information concerning a human rights violation, combined with that NGO's formal, publicly available report on the same incident(s), is likely to be viewed as a single source, and thus represent a weaker case than if the NGO's reporting can be combined with, e.g., that of a UN investigative committee).

(4) As much as possible, relying on open source information for evidence is preferable. This would allow the information to be shared in court if litigation arose as a result of a listing.

(5) Where submissions targeting multiple perpetrators are submitted, it is helpful to detail the role(s) of each alleged perpetrator with some specificity. If the submission relies on the perpetrator's role as an official of an entity which engaged in, or whose members engaged in, human rights abuses or corruption, include the perpetrator's job description and the line of authority. If possible, an organizational chart would be a useful inclusion.

(6) For human rights abuse cases, or cases in which you are recommending that a leader or official in a particular unit be designated on account of that unit's involvement in human rights abuses, your documentation should include:

- (i) Details on the nature of the abuse(s) and victim(s).

- The human rights violation must be specified, rather than a vague reference to a broad act. Every human right is susceptible to a “gross violation” depending on the severity of the particular violation. Explain why the violation rises to the level of “gross.”
 - You should clearly identify the victim or group of victims and note how the victim(s) were involved with whistleblowing, defending human rights, or otherwise expressing or exercising their fundamental freedoms.
- (ii)** The relationship between the perpetrator and the documented human rights abuse(s).
- a. A leader/commander must be tied directly to a particular case of gross human rights abuse through “command responsibility.” Command responsibility for the actions of subordinates is a principle of customary international law. For example, where a leader/commander did not directly order an act of gross human rights abuse, the Trial Chamber for the International Criminal Tribunal for the Former Yugoslavia states that command responsibility for failure to act can be found where there is:
 - (i) the existence of a superior-subordinate relationship
 - (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
 - (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹⁷
- (iii)** Any evidence demonstrating that actions alleged to have been committed by the perpetrator were not unique to the specific case(s) documented but are indicative of a wider pattern of abuse.

¹⁷ Judgment, *Prosecutor vs. Krnojelac* (IT-97-25-T), Trial Chamber II, 15 March 2002, para. 115.

- a. The strongest cases against a particular perpetrator will include multiple, independent accounts of the alleged crimes (such as through witness or victim testimonies), coupled with credible reporting of a more general nature on abuses known to have occurred.
- (6) For corruption cases, or cases in which you are recommending that a leader or official in a particular entity be designated on account of that entity's involvement in corruption, your documentation should include:
- (i) Details on the nature of the corrupt acts, including whether they included the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation of the transfer of the proceeds of any of these acts. Note how they rise to the "significant" threshold.
 - o The strongest cases against a particular perpetrator will include both direct and circumstantial evidence demonstrating knowledge and intent to commit a corrupt act. In addition to witness statements, documentation may include banking records or other evidence not in the public domain.
 - (ii) Information demonstrating that an alleged corrupt actor is a current or former government official, or a person acting on behalf of such an official, or a person who materially assisted, sponsored, or provided support to such an official.

SAMPLE TEXT

The GSS has previously been identified in the human rights community as responsible for frequent instances of torture and ill treatment in Generica.¹⁸ HRG has documented individual cases in Annex A, with the most recent reported instance of torture taking place earlier this year. Many of the individuals were arrested without a warrant, with multiple individuals reporting that the arresting forces wore civilian clothing or were otherwise unidentifiable. These officers would then transport the individuals to the custody of the GSS for interrogations, during which they would subject the individuals to torture. The methods of torture most frequently employed are beatings, electric shock, sexual assault or threats of rape, forced standing, stress positions, forced nudity, and sleep deprivation.

In addition to HRG's documentation of individual cases, several other leading human rights organizations have identified the GSS as part of a pattern of human rights abuses. Human Rights International published a report in July 2016, detailing a number of human rights abuses in Generica, including torture by the GSS.¹⁹ HR International noted that "[m]any detainees and former detainees allege they were tortured while under interrogation by the GSS at their facility in Metropolis."²⁰ HR International's report specifically corroborates some of HRG's individual cases, including those of Jane Doe (¶2 in Annex A)²¹ and John Doe (¶3 in Annex A).²² Additionally, Human Rights Today published a report in 2018 which documented several cases of torture by the GSS in 2016 and 2017.²³ Both the Human Rights International and Human Rights Today reports detail similar instances of torture, including beatings, electric shock, sexual assault, and threats of rape, accompanied by demands from the interrogators to confess to criminal acts. Other instances of individual acts of torture have been reported by the Center for Human Rights,²⁴ among others.

¹⁸ See NGO Reports A, B, C, and D.

¹⁹ Citation with link to online availability, if possible.

²⁰ *Cite.*

²¹ *Cite.*

²² *Cite.*

²³ *Cite.*

²⁴ *Cite.*

The United Nations has also addressed cases of torture by the GSS, through various communications from the Human Rights Council Special Procedures Offices on individual complaints submitted to the Special Procedures Offices (“SPOs”). As early as 2012, the SPOs were sending communications to Generica concerning reports of torture by the GSS — that year, two Special Procedures mandate holders sent an Urgent Appeal concerning the torture of John Doe by the GSS.²⁵ Following his torture, Mr. Doe was charged with “unlawful assembly,”²⁶ a blatant violation of the right of freedom of expression. In a communication to the Generica government earlier this year, the Special Procedures office noted reports of the torture and ill treatment of Jane Doe (¶2 in Annex A).²⁷ In another communication in 2017, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment detailed reports of abuse and torture committed by GSS officers in the case of James Smith (¶5 in Annex A).²⁸

Finally, investigative reporting undertaken by credible press outlets, including the New York World and German news weekly Heute Zeitung has independently corroborated instances of torture by the GSS, including in facilities known to have held Jane Doe and John Doe.²⁹

²⁵ *Cite.*

²⁶ *Cite.*

²⁷ *Cite.*

²⁸ *Cite.*

²⁹ *Cite.*

Section 5. Application of Canada's JVCFOA

(1) Be sure to include discussion of any references to external definitions or sources that may be used to interpret the terms in the JVCFOA and application to any particular case. For example, appropriate provisions in the Canadian Criminal Code,³⁰ or domestic pieces of legislation in the country where the perpetrator resides or resided at the time of the offence. See Appendix A for a list of useful definitions.

(2) If there have been prior designations under the JVCFOA, those should be discussed as well.

(3) The roles of the individual perpetrators recommended for designation should be discussed in as much detail as possible, along with specific references to their wrongdoing where available. If they are being recommended based on command responsibility, take care to describe with as much specificity as possible their role and the extent to which they have (or had) control over and/or involvement in the activities of those who directly participated in abuses.

SAMPLE TEXT

1. Serious Human Rights Abuses

The Justice for Victims of Corrupt Foreign Officials Act may be used against those acting as agents “of or on behalf of a foreign state” where the state entity at issue or its members have engaged in “gross violations of internationally recognized human rights” and command responsibility can be established. It is clear that the egregious and widespread abuses, including torture, observed to have been committed by the GSS meet this standard.

The actions taken by individuals within the GSS (including those individuals listed as perpetrators) have shown a pattern of abuse, torture, and ill-treatment that has continued from at

³⁰ RSC 1985, c C-46 [*Criminal Code*].

least 2010 until the present. These actions constitute torture under the Canadian Criminal Code, as they were acts inflicting severe physical and mental pain and suffering for the purpose of intimidation and coercion in hopes of obtaining a statement from an individual in custody.³¹ However, the Canadian definition applies only to perpetrators and acts under the territorial or personal jurisdiction of Canada. As such, the international definition must also be considered, notably that found in the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These actions also meet the definition of torture under the CAT, as they were intentionally inflicted by public officials for the purpose of obtaining confessions, intimidation, or punishment.³² As such, these cases meet the threshold of a “gross violation of internationally recognized human rights” and HRG hereby submits these individuals to be considered for sanctions under the JVCFOA for their roles within a government entity that has perpetrated these abuses.

2. Roles of the Individual Perpetrators

The JVCFOA may be used to sanction those individuals who are acting as agents “of or on behalf of a foreign state in a matter relating to . . . gross violations of internationally recognized human rights” where command responsibility can be established. As explained previously, the GSS is organized under the Ministry of Security of Generica, as reflected in the attached Ministry of Security Organizational Chart. Each of the perpetrators named in this submission held an officer level or otherwise leadership position within the Ministry of Security or the GSS specifically during the period in which the human rights abuses detailed above and in the accompanying evidence were perpetrated. They each qualify for criminal sanction under the definition of command responsibility as provided by the ICTY.

At the time of the commission of the offences in question, a superior-subordinate relationship existed between the listed officials and those involved in the direct commission of the crimes described. Moreover, the evidence discussed in this submission confirms that there is a

³¹ *Criminal Code*, s. 269.1(1).

³² *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85.

pattern and practice of human rights abuse by the GSS that could exist only if condoned by officials at all levels of authority. Due to the widespread and regular nature of these abuses, and the fact that these incidents of torture have been well known, documented, and occurred repeatedly for a period of more than several years, HRG submits that each of the named individuals were knowingly complicit in, and knew or should have known that the government entities they have led, or their subordinates within those entities, engaged in ongoing human rights abuses. Furthermore, the named individuals failed to take necessary measures to halt the abuses or to investigate them in a genuine effort to impose punishment on the perpetrators.

Section 6. Discussion of Contrary Evidence/Arguments

- (1) Do not omit any known contradictory, countervailing, or exculpatory evidence. Please note any such evidence and reasons why your case still meets the JVCFOA's legal standard.
- (2) Assume that any arguments and/or evidence that is public or available to the government of the designees' country will be shared with the Canadian agencies charged with reviewing these designations. As such, it is advantageous to address such arguments directly in these submissions as it is unlikely that you will receive another opportunity for rebuttal.
- (3) In particular, discuss why any contrary statements by the Government regarding their human rights record or efforts to address human rights complaints domestically should not be credited and provide citations to evidence where available.

SAMPLE TEXT

HRG is not aware of any contradictory, countervailing, or exculpatory evidence concerning the alleged responsibility of Col John Smith and Col Edward Doe for acts of torture committed by GSS members under their command. While the Government of Generica has routinely denied that members of the GSS commit torture, HRG finds these claims lack credibility given the extensive documentation of such acts by credible bodies, as referenced throughout this submission.

Appendix A

How to Convert US Magnitsky Submissions into Canadian JVCFOA Submissions

This Appendix A describes how to convert submissions made under the United States' Global Magnitsky Human Rights Accountability Act (the US Magnitsky Law) to submissions that will meet Canada's requirements under its Justice for Victims of Corrupt Foreign Officials Act (JVCFOA). The Sections below reference the six sections outlined in the submission template above.

Section 1: Perpetrator Information

No change.

Section 2: National Interest Argument and Summary of Impact

There will be significant overlap in the national interest portion regarding the desire to promote human rights abroad, democratic values and institutions, and security of the person. The same also holds for economic analyses pertaining to free and open marketplaces that could provide opportunities to Canadian businesses. However, a fully informed national interest argument should also consider any political and economic impacts that are specifically Canadian, taking into account Canada's unique relationship with the country and perpetrator in question. The departmental priorities found on the Global Affairs Canada website — which currently include revitalizing the rules-based international order; eradicating poverty; pursuing diversified, modern and inclusive trade; and strengthening Canada's place in North America — may be helpful in constructing your

national interest section, particularly in explaining how a particular sanction might help Canada meet its identified national priorities.³³

Section 3: Case Type

The precise wording of this section will need to be converted to reflect the Canadian legislation. The U.S. law applies different criteria and is broader in scope than the Canadian JVCFOA, as it allows the U.S. government to sanction even those who are “indirectly engaged” in serious human rights abuse. The Canadian law outlines four separate types of cases, roughly corresponding to certain provisions under US Executive Order 13818 (EO 13818):

Canadian Case Type 1 (Roughly corresponding to EO 13818 section 1(ii)(a)):

(1) To be responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek

- (i) to expose illegal activity carried out by foreign public officials, or
- (ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections;

Canadian Case Type 2 (Roughly corresponding to EO 13818 section 1(ii)(c)(1) as it pertains to 1(ii)(a)):

(2) To be acting as an agent of or on behalf of a foreign state in a matter relating to an activity described in (1).

³³ Global Affairs Canada, “Plans at a glance and operating context,” online <<https://www.international.gc.ca/gac-amc/priorities-priorites.aspx?lang=eng>>.

Canadian Case Type 3 (Roughly corresponding to EO 13818 section 1(ii)(b)):

(3) To be a foreign public official or an associate of such an official, responsible for or complicit in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources — which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national’s influence or position of authority or the complicity of the government of the foreign state in question in the acts.

Canadian Case Type 4 (Roughly corresponding to EO 13818 section 1(iii)(a)):

(4) To have materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, an activity described in (3).

Section 4: Summary of Evidence

This section will be very similar in Canadian and US submissions. However, tailoring the description of evidence to highlight items that are relevant to the particular wording of the Canadian law and national interest analysis will strengthen the submission. For example, evidence that bolsters an argument for the existence of command responsibility will be relevant to the Canadian context, but not necessarily under the US law. Similarly, though the US legislation only demands credible evidence of “serious” human rights abuse, the Canadian legislation requires credible evidence of “gross” human rights abuse, a higher standard. This distinction may require re-framing the evidence in the US submission, conducting further research or producing additional supporting information in order to meet the higher standard.

Section 5: Application of the Act

Appendix B contains some useful definitions of domestic and international crimes that can be raised when describing the alleged conduct. Most international sources of definitions can be directly translated into the Canadian context, but references to domestic US legislation should be replaced by references to the Canadian Criminal Code definitions provided in Appendix B. The second portion outlining the corrupt or abusive acts will need to be similarly altered to clearly meet the (generally) higher standards outlined by Canadian law. Finally, in cases where command responsibility is alleged, a new analysis must be added to the “roles of individual perpetrators” section, explaining how the relationship between each perpetrator and his or her subordinates meets the standard of command responsibility.

Section 6: Discussion of Contrary Evidence/Arguments

Similar to the sections above, the analysis in this section must be adjusted to make sure that the arguments are being made in relation to the higher standard of human rights abuse and the criteria of command responsibility as set out under the JVCFOA.

Appendix B

Definitions

Definitions Pertaining to Human Rights Abuse:

1. Extrajudicial Killing:

Extrajudicial Killing under the Fourth Geneva Convention (ratified by Canada):

“the carrying out of executions without previous judgment by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”³⁴

2. Torture

Torture under Canada’s Criminal Code:

any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

- (i) obtaining from the person or from a third person information or a statement,
- (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
- (iii) intimidating or coercing the person or a third person, or

³⁴ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Article 3.

(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.³⁵

Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Canada has ratified:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³⁶

3. Cruel, inhuman, or degrading treatment

Cruel, inhuman, or degrading treatment as defined by the European Commission on Human Rights (not binding on Canada, though persuasive):

“inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable,” while “degrading” treatment grossly humiliates the individual before others or drives the individual to act against his will or his conscience.³⁷

4. Unlawful or arbitrary detention

³⁵ *Criminal Code*, s. 269.1(2).

³⁶ *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85.

³⁷ European Commission on Human Rights, *1969: The Greek Case*, (1972) Yearbook of the European Convention on Human Rights, at 186.

Unlawful or arbitrary detention is defined by the International Criminal Tribunal for the Former Yugoslavia as occurring when these criteria are met:

1. An individual is deprived of his or her liberty.
2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the [physical perpetrator] with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.³⁸

Definitions Pertaining to Corruption:

1. Bribery

The Canadian Criminal Code defines bribery in relation to “judicial officers,” who are themselves defined as “holder[s] of a judicial office, or [members] of Parliament or of the legislature of a province,” as having occurred when an individual

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by them in their official capacity, or
- (b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by that person in their official capacity.³⁹

³⁸ Judgment, *Prosecutor vs. Krnojelac* (IT-97-25-T), Trial Chamber II, 15 March 2002, para. 115.

³⁹ *Criminal Code*, s. 119(1).

Canada's Criminal Code similarly defines bribery in relation to "officers," themselves defined as "a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law," as having occurred when and individual

(a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment with intent

(i) to interfere with the administration of justice,

(ii) to procure or facilitate the commission of an offence, or

(iii) to protect from detection or punishment a person who has committed or who intends to commit an offence; OR

(b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(i), (ii) or (iii).⁴⁰

Bribery of national public officials, when committed intentionally, is defined under the United Nations Convention Against Corruption (which Canada has ratified) as:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; OR

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.⁴¹

The United Nations Convention Against Corruption defines bribery of foreign public officials or officials of public international bodies as, when committed intentionally:

⁴⁰ *Criminal Code*, s. 120.

⁴¹ *United Nations Convention Against Corruption*, 31 October 2003, GA res. 58/4, UN Doc. A/58/422 [UNCAC].

(1) . . . the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; OR

(2) . . . the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.⁴²

2. Money Laundering/Transferring the Proceeds of Crime

Under Canada's Criminal Code the crime of "laundering the proceeds of crime" is committed if an individual:

uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.⁴³

Money Laundering, or the "Transfer of the Proceeds of Corruption" is defined under the United Nations Convention Against Corruption as:

- (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of

⁴² *Ibid.*

⁴³ *Criminal Code*, s. 462.31(1).

helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; or

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.⁴⁴

⁴⁴ UNCAT, *supra* note 32.