

IN SEARCH OF A FORUM FOR THE FAMILIES OF THE GUANTANAMO DISAPPEARED

PETER JAN HONIGSBERG[†]

ABSTRACT

The U.S. government has committed grave human rights violations by “disappearing” people during the past decade into the detention camps in Guantanamo Bay, Cuba. And for nearly thirty years, beginning with a 1983 decision from a case arising in Uruguay, there has been a well-developed body of international law establishing that parents, wives, and children of the disappeared suffer torture or cruel, inhuman, or degrading treatment (CID).

This Article argues that the rights of family members were severely violated when their loved ones were disappeared into Guantanamo. Family members of men disappeared by the United States have legitimate claims for torture or CID against the government under both international and American law. However, rather than provide a forum to address the plaintiffs’ sufferings of egregious human rights violations, the United States seeks to block all claims and evade accountability. In skirting claims, the United States has proven to be a powerful and skilled adversary both domestically and internationally.

My work with the Witness to Guantanamo project—in which we have filmed full-length interviews of former detainees and others, including military and government officials who have lived or worked in Guantanamo and family members of former detainees—has inspired me to write this Article, and informs its content. Our nation must address its human rights violations.

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[†] Peter Jan Honigsberg is a professor at the University of San Francisco School of Law and director of the Witness to Guantanamo project. He is immensely grateful to law student Wendy Betts, whose outstanding research and in-depth knowledge of human rights issues were invaluable to his writing of this Article. Professor Honigsberg also wishes to thank librarian extraordinaire Lee Ryan, Professor Richard Leo, and law student Priya Brandes for their exceptional assistance.

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INTRODUCTION

The United States is a nation that “disappears” people. As a nation, we have disappeared people into Central Intelligence Agency (CIA)-controlled “black sites” and foreign prisons;¹ into the pitch-black underground “dark prison” in Kabul, Afghanistan;² into the massive prison

1. See CENTRAL INTELLIGENCE AGENCY, BACKGROUND PAPER ON CIA’S COMBINED USE OF INTERROGATION TECHNIQUES 2 (2004), available at http://reckoningwithtorture.org/wp-content/uploads/Reading_2.pdf (noting the CIA’s extraordinary rendition program).

2. Stephen Grey, *Extended Interviews: Bisher al Rawi*, PBS.ORG (Oct. 8, 2007), <http://www.pbs.org/frontlineworld/stories/rendition701/interviews/bisher.html>; Interview with Bisher al Rawi, former Guantanamo detainee, in London, Eng. (Aug. 2, 2011); David Rose, *A Secret Agent’s Story*, GUARDIAN.CO.UK (July 28, 2007), <http://www.guardian.co.uk/world/2007/jul/29/usa.guantanamo>.

facility in Bagram, Afghanistan;³ into the torture chambers of Abu Ghraib in Iraq;⁴ and into the detention center at Guantanamo Bay, Cuba.⁵

The innocent victims—the parents, wives, and children of the people who were disappeared—suffered the worst thing imaginable: not knowing what happened to their loved ones. The parents of the disappeared lost contact with their sons, the wives with their husbands and the children with their fathers. And since 1983, the international community has recognized that close family members have suffered torture or cruel, inhuman, or degrading treatment (CID) when their loved ones were disappeared by the state.⁶

This Article will focus on only one site where the United States has disappeared people: Guantanamo Bay, Cuba. The first planeload of twenty captives was flown from Afghanistan to Guantanamo Naval Base on January 11, 2002.⁷ Ultimately, approximately 779 men were brought to Guantanamo.⁸ It was not until the spring of 2006 that the U.S. government officially released the names of the men held in the Guantanamo detention center.⁹ Until then, their family members either did not know, or suspected but could not be certain, that their loved ones were disappeared into Guantanamo. And while their men were disappeared into Guantanamo, the families suffered torture or CID.

Inevitably, these family members painfully suffer the disappearance and loss of a loved one. A wife has to raise children by herself. She becomes both mother and father. She may also find that after her husband is disappeared, few neighbors care to talk to her—effectively branding her the wife of a “terrorist.”¹⁰ A child suffers from the loss of a father during his early years and his transition from youth to adulthood. Another child born after her father was disappeared will have never hugged her father; she will not even know him. If and when the father returns home, the children will sometimes refuse to respect or even acknowledge the father as a parent, showing allegiance and loyalty only to the mother who raised them. The parents of the disappeared no longer sleep peacefully as

3. See Hilary Andersson, *Red Cross Confirms 'Second Jail' at Bagram, Afghanistan*, BBC.CO.UK (May 11, 2010, 1:04 PM), <http://news.bbc.co.uk/2/hi/8674179.stm>.

4. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

5. PETER JAN HONIGSBERG, *OUR NATION UNHINGED passim* (2009).

6. U.N. Human Rights Comm. *Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶ 14, U.N. Doc. CCPR/C/19/107/1981 (July 21, 1983) (expressing views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, submitted by Maria del Carmen Almeida de Quinteros on behalf of her daughter Elena Quinteros Almeida, and on her own behalf).

7. HONIGSBERG, *supra* note 5, at 76.

8. *The Guantanamo Docket*, N.Y. TIMES (Dec. 11, 2012), <http://projects.nytimes.com/guantanamo>.

9. *Pentagon Discloses Detainees' Names*, N.Y. TIMES, May 16, 2006, at A17.

10. Eighty to ninety percent of the men taken to Guantanamo were sold by their Afghani and Pakistani holders to the Americans for ransom. HONIGSBERG, *supra* note 5, at 77–78. By the time President Bush left office, five hundred of the men had been released.

they can only imagine day and night what terror their child is enduring. Even worse, these parents fear the worst tragedy that can ever befall a parent—the possibility that their child will perish before they do.

Much has been written about the harsh treatment of the men in Guantanamo—the CID, as well as the torture that they suffered.¹¹ But little, if anything, has been written about the trauma inflicted upon the parents, spouses, and children of the disappeared.

Family members of the men disappeared by the United States have legitimate claims for torture or CID against the government under both international and American law. Unfortunately, the United States has proven to be a powerful and skilled adversary. It has successfully skirted the jurisdiction of all but one of the international oversight bodies that would otherwise have the authority to rule on challenges to the U.S. government's mistreatment of individuals. In addition, the United States is able to impede access to federal courts on jurisdictional, immunity, statute of limitations, and other procedural grounds, thwarting the normative goal of providing remedies for grave harms. In essence, although the United States should be held accountable to the families of the disappeared, accountability waits in the wings.

No matter what one can say about the people we have held in Guantanamo—whether they are terrorists or not—we are mistreating their family members who are wholly innocent and painfully vulnerable. This Article is written in search of both an international and a domestic forum in which to hold the United States accountable for the sufferings of the family members whose loved ones were disappeared into Guantanamo. Part I of this Article defines “enforced disappearance” as recognized under international law. Part II of this Article describes the landscape in the detention facilities in Guantanamo Bay, Cuba, into which the men were disappeared. It also introduces the issue of notice to the families of their loved ones' disappearance. Part III examines the venues and cases that have recognized a cause of action for torture or CID by close family members for the disappearance of loved ones under international law. This part also looks at whether the United States can be held accountable in an international forum for its role in disappearing men into Guantanamo.

Part IV explores the possible causes of action brought by parents, wives, children, and other close family members against the United States in American courts for the disappearance of the men into Guantanamo. Included in this part is an analysis of the roadblocks in filing claims under the Alien Tort Statute (ATS), the Federal Tort Claims Act (FTCA), and the Torture Victims Protection Act (TVPA). This part will

11. See generally HONIGSBERG, *supra* note 5; JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS passim* (2008).

also suggest one possible way to bypass dismissal of the claims in federal court. Part V concludes by suggesting possible alternate forums for families to successfully pursue claims against the United States, including filing a claim for declaratory relief under the ATS, filing a claim in the courts of other nations under the theory of universal civil jurisdiction, and filing a claim with the Inter-American Commission on Human Rights (Inter-American Commission).

I. ENFORCED DISAPPEARANCE DEFINED AND RECOGNIZED UNDER INTERNATIONAL LAW

Enforced disappearance is defined in the International Convention for the Protection of All Persons from Enforced Disappearance as

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹²

The United States is not a party to this Convention. However, because ninety-one nations are signatories, an argument can be made that the Convention has become customary international law.¹³ If the Convention were regarded as customary international law, the United States would be found in breach of the Convention.¹⁴ Even if the Convention and enforced disappearance have not become customary international law, international oversight bodies have found nations to have disappeared peo-

12. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. A/RES/61/177, art. 2, U.N. Doc. A/HRC/RES/2006/1 (Dec. 20, 2006) [hereinafter Enforced Disappearance Convention].

13. By becoming signatories, the ninety-one countries affirm that they will not participate in enforced disappearances and support the belief that the act of enforced disappearance violates a human rights norm. Although only thirty-six nations have ratified the convention, the absence of ratifications does not necessarily indicate a rejection of the norm. Bureaucratic, administrative, political, and legislative enactment concerns may impede the process of ratification. An argument can also be made that as soon as a convention is initiated, it becomes customary international law—the theory being that a significant number of countries have met for years to agree on the wording of the convention and in doing so, these states have proclaimed their belief in the principle proclaimed by the document.

14. Of course, the United States could argue that it is not a party to the convention and, consequently, is not bound by the customary norm. However, the United States has never argued that position and it would certainly be an embarrassing and absurd position for the United States to advocate, given its public declaration for the promotion of human rights. In addition, it is the conventional wisdom that once customary international law is formed, a nation cannot withdraw from customary international law, unless it formally objects during the period that the customary norm is forming. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 233 (2010). Finally, an argument could be made that even if the United States is not bound by this customary international law, it nevertheless factually disappeared people, an act the United States would not want to be accused of having committed. See *infra* Part II.

ple for nearly thirty years and have subsequently held nations accountable based on their findings.¹⁵

As for the United States violating the Convention as customary international law, the two key elements of the Convention are easily met. First, the United States abducted and deprived the liberty of men who were transported to Guantanamo. A person can disappear under the Convention even if he is not killed or tortured, as neither death nor torture is required to satisfy the first element.

Second, the United States refused to acknowledge the fate or whereabouts of the disappeared persons for up to four years,¹⁶ holding them outside the protection of the law. In fact, John Yoo, the author of several torture memos written while he held the post of Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel, wrote that "[n]o location was perfect," but Guantanamo "seemed to fit the bill."¹⁷ He added, "The federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction."¹⁸

Because the victim's whereabouts are unknown or at least uncertain, disappearance is a distinct human rights violation. An early report issued in 1977 from the Inter-American Commission to the General Assembly of the Organization of American States (OAS) described disappearance as "cruel and inhuman."¹⁹ A disappearance is not only "an arbitrary deprivation of freedom but also a serious danger to the personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest and to due process."²⁰

The same report noted the serious impact of enforced disappearance on a family: "[I]t is, moreover, a true form of torture for the victim's family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance."²¹

15. See HONIGSBERG, *supra* note 5, at 192–94; see also *infra* Part III.

16. The United States did not release an official list of names of prisoners until 2006. See *infra* Part IV.D.2.

17. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142 (2006).

18. *Id.*

19. TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 342 (2007) (quoting Annual Report of the Inter-American Commission on Human Rights 1977, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II.43, doc. 21 corr. 1, pt. II (1978)) (internal quotation marks omitted).

20. *Id.* (quoting Annual Report of the Inter-American Commission on Human Rights 1977, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II.43, doc. 21 corr. 1, pt. II (1978)) (internal quotation marks omitted).

21. *Id.* (quoting Annual Report of the Inter-American Commission on Human Rights 1977, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II.43, doc. 21 corr. 1, pt. II (1978)) (internal quotation mark omitted).

In addition, the Inter-American Court of Human Rights (Inter-American Court) has indicated that in cases that involve the forced disappearance of persons, the violation of the psychological and moral integrity of the victim's next of kin is a direct consequence of the disappearance, causing the family members to suffer. Furthermore, the suffering is aggravated by the State's continued refusal to provide information on the victim's whereabouts.²²

Claims for torture or CID by family members have been brought by family members before, and been recognized by, international oversight bodies throughout the continents: the Human Rights Committee (HRC)²³ the European Court of Human Rights (European Court)²⁴, the Inter-American Court,²⁵ the African Commission on Human and People's Rights,²⁶ and the Human Rights Chamber of Bosnia-Herzegovina.²⁷

The international provisions that have been violated include article 7 of the International Covenant on Civil and Political Rights (ICCPR),²⁸ article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),²⁹ article 5 of the American Convention on Human Rights,³⁰ and article 5 of the African Charter on Human and People's Rights.³¹ Analysis of the development of international law violations for enforced disappearance appears in Part III.

22. Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 48, ¶ 50 (Jan. 22, 1999); Bámaca Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 165 (Nov. 25, 2000); Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 97 (Sept. 22, 2006).

23. See U.N. Human Rights Comm., *supra* note 6, ¶ 1.1.

24. Çakıcı v. Turkey, 1999-IV Eur. Ct. H.R. 583.

25. Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 48, ¶ 50.

26. Amnesty International, Comité Loosli, Bachelard, Lawyers' Comm. for Human Rights, Assoc. of Members of the Episcopal Conference of East Africa v. Sudan, Commc'n Nos. 48/90, 50/91, 89/93, ¶ 54, in African Commission on Human and Peoples' Rights, *Thirteenth Annual Activity Report*, at 24 (1993); The Law Office of Ghazi Suleiman v. Sudan, Commc'n Nos. 222/98, 229/99, ¶ 44, in African Commission on Human and Peoples' Rights, *Sixteenth Annual Activity Report*, at 39 (2003).

27. Palic v. Republika Srpska, Case No. CH/99/3196, Partial Decision on Admissibility, ¶ 5 (July 6, 2000). See generally Selimovic et al. v. Republika Srpska, Case Nos. CH/01/8365, et al., Decision of Admissibility and Merits, Human Rights Chamber for Bosnia and Herzegovina, ¶¶ 183-85 (Mar. 7, 2003).

28. International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.")

29. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Apr. 11, 1950, C.E.T.S. No. 005.

30. Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to have his physical, mental and moral integrity respected. . . . No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.")

31. African Union, African (Banjul) Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5. ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.")

The analysis in this Article might additionally support lawsuits brought by close family members of people who were disappeared in other prisons and detention centers throughout the world, as in the case of the CIA's extraordinary rendition cases in foreign nations and black sites or in Abu Ghraib. Also, close family members could conceivably bring lawsuits on behalf of two American citizens, Jose Padilla and Yaser Hamdi, and an American legal resident, Ali al-Marri, who were disappeared into the naval brig in South Carolina, severely sensory deprived, and held for years in strict isolation and incommunicado.³² Finally, the family of "American Taliban" John Walker Lindh may likely have a claim for John Lindh's disappearance, who when first captured was held incommunicado for fifty-four days in Afghanistan.³³ However, because the author is most familiar with the issues in Guantanamo Bay, Cuba, and the jurisprudence on Guantanamo Bay is sufficiently more advanced,³⁴ this Article will focus on the claims of close family members—particularly parents, spouses, and children—of men who were disappeared into Guantanamo.

II. DISAPPEARING INTO GUANTANAMO BAY, CUBA

A. *A Brief Description of How the Men Disappeared into Guantanamo Bay, Cuba*

On January 11, 2002, the first planeload of twenty men arrived at Guantanamo Bay, Cuba, after a terrible eighteen-hour plane ride from Afghanistan.³⁵ The men, in orange jumpsuits, were shackled to the floor of the plane. Their hands were short-shackled to a belly chain. They wore earmuffs to cancel out all sounds and blackened goggles to block out their vision.³⁶ Some also wore hoods. The men were offered peanut butter sandwiches and apples.³⁷ However, because their hands were chained

32. See HONIGSBERG, *supra* note 5, at 41–70. As Jose Padilla's mother, Estela Lebron, told the Witness to Guantanamo project that Jose Padilla is the not the same person he was before he was captured and disappeared into the naval brig. Interview with Estela Lebron, Mother of Jose Padilla, in S.F., Cal. (July 8, 2011).

33. Interview with Frank Lindh, Father of John Walker Lindh, in Berkeley, Cal. (Apr. 2, 2011).

34. See, e.g., *Rasul v. Myers*, 563 F.3d 527, 528 n.1 (D.D.C. 2009) ("Since plaintiffs failed to exhaust their administrative remedies as required by the FTCA, the district court lacked jurisdiction" (citations omitted)); *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *2–5 (W.D. Wash. Dec. 8, 2011); see also *Petition Alleging Violations of the Human Rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmed Basmilah, and Bisher Al-Rawi by the United States of America with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R.*, at 4 (Nov. 14, 2011) [hereinafter *Binyam Mohamed et al. Petition*], available at <http://www.aclu.org/files/assets/111114-iachr-petition-final.pdf>.

35. HONIGSBERG, *supra* note 5, at 76.

36. HONIGSBERG, *supra* note 5, at 24; *Shafiq Rasul Video Interview*, WITNESS TO GUANTANAMO, <http://witnessstoguantanamo.com/interviews/detainees/shafiq-rasul-british-citizen/> (last visited Dec. 28, 2012).

37. See sources cited *supra* note 36; *Ruhal Ahmed Video Interview*, WITNESS TO GUANTANAMO, <http://witnessstoguantanamo.com/interviews/detainees/ruhal-ahmed-british/> (last visited Dec. 28, 2012).

to their waists, the men could not easily, if at all, raise the food to their mouths.³⁸ The men were occasionally allowed to hobble to the toilet; others wore diapers.³⁹ Some of the men asked the guards to drug them and put them into a sound sleep so they would not have to endure the pain. Often, the military accommodated them.⁴⁰

Overall, approximately 779 men were transported and held at the detention center in Guantanamo Bay.⁴¹ Most, but not all, had been arrested in Afghanistan and Pakistan and were first detained in either Kandahar or Bagram Airfields in Afghanistan.⁴² A handful of the men were arrested in Bosnia and flown directly to Guantanamo.⁴³ Two men were picked up in Gambia and flown to the dark prison in Afghanistan before being transported to Guantanamo.⁴⁴ They were held in a pitch-black underground cellar for several weeks and only permitted moments of dim light when a guard briefly shined his flashlight to check on them.⁴⁵

Afghani and Pakistani military officers ransomed the men they seized to the Americans for hundreds, likely thousands, of dollars in response to millions of ransom flyers dropped over Afghanistan.⁴⁶ People who averaged 800 dollars a year were offered great wealth to turn in an al-Qaeda or Taliban soldier. Afghans and Pakistanis sought out Arabs from other countries, seized them, and sold them to the United States. Afghans also sold tribal enemies.⁴⁷ The families of the men who were disappeared no longer heard from them.⁴⁸

While being held in Afghanistan, many of the men suffered brutal treatment amounting to torture. Some were hung by their wrists,⁴⁹ and others suffered interminable isolation and incommunicado.⁵⁰ Most were beaten regularly.⁵¹

38. *Ruhal Ahmed Video Interview*, *supra* note 37.

39. HONIGSBERG, *supra* note 5, at 185.

40. *Shafiq Rasul Video Interview*, *supra* note 36.

41. *The Guantanamo Docket*, *supra* note 8.

42. HONIGSBERG, *supra* note 5, at 86, 161.

43. Interview with Saber Lahmar, French National Guantanamo Detainee, in Bordeaux, Fr. (Aug. 5, 2010); Interview with Haj Boudella, Bosnian Guantanamo Detainee, in Sarajevo, Bosn. (Aug. 7, 2009); Interview with Mustafa Ait Idir, Bosnian Detainee at Guantanamo, in Sarajevo, Bosn. (Aug. 7, 2009).

44. Grey, *supra* note 2; Interview with Jameel El-Bamma, British Guantanamo Detainee, in London, Eng. (Aug. 2, 2011).

45. *Id.*

46. HONIGSBERG, *supra* note 5, at 78.

47. *Id.*

48. *See id.* at 77–79.

49. *Murat Kurnaz Video Interview*, WITNESS TO GUANTANAMO (Sept. 19, 2009), <http://witness Guantanamo.com/interviews/detainees/murat-kurnaz-german-national/>.

50. Grey, *supra* note 2.

51. Tom Lasseter, *Day 2: U.S. Abuse of Detainees Was Routine at Afghanistan Bases*, MCCLATCHY.COM (June 16, 2008), <http://www.mcclatchydc.com/2008/06/16/38775/day-2-us-abuse-of-detainees-was.html>; Interview with Ayub Mohamed, Uyghur Guantanamo Detainee, in Tirana, Alb. (Aug. 5, 2009).

When the planes finally landed in Guantanamo Bay, the men were transported onto a bus. At the site of the first camp, known as Camp X-Ray, the men were unceremoniously tossed off the bus, given a medical check-up and shower, and forcibly escorted to their cells in shackles.⁵² The first man who was pushed off the bus had his prosthetic leg tossed off after him.⁵³ Their cells, often described as dog kennels, were outdoor cages eight feet by eight feet in size.⁵⁴ The cells were completely exposed to the tropical sun and the elements.⁵⁵ Each cell had a toilet hole and a bucket for water. Metal pipes for urinating were added later.⁵⁶ The men remained at Camp X-Ray until more permanent housing was constructed.⁵⁷

The men, who originated from forty-eight countries,⁵⁸ often had limited contact with each other. Many were held in isolation.⁵⁹ One man was held in isolation for approximately two years;⁶⁰ another told the Witness to Guantanamo project how he “broke” after being held for one year in isolation.⁶¹ Other men were isolated not by being placed in a cell apart from others but by their inability to communicate in the *lingua franca* of the camps (i.e., Arabic or English). One man from Uzbekistan—who was an uneducated farm boy and spoke neither Arabic nor English—spent seven years in what amounted to full-time loneliness.⁶² Each morning, he would awake and observe the men in the neighboring cells as they spoke and interacted with each other.⁶³ Without the ability to learn the languages to a level sufficient to communicate, he could only watch.⁶⁴

The detainees in those early years had no contact with the outside world, except sporadically with the Red Cross.⁶⁵ However, the Red Cross

52. *Brandon Neely Video Interview*, WITNESS TO GUANTANAMO (Sept. 11, 2011), <http://witnessstoguantanamo.com/interviews/brandon-neely-prison-guard/>.

53. *Id.*

54. *Capt. Bob Buehn Video Interview*, WITNESS TO GUANTANAMO (Oct. 22, 2011), <http://witnessstoguantanamo.com/uncategorized/bob-buehn-navy-captain-ret/>.

55. HONIGSBERG, *supra* note 5, at 77.

56. *Id.*

57. *See id.*

58. *The Guantanamo Docket*, *supra* note 8.

59. *See, e.g., Feroz Ali Abbasi Video Interview*, WITNESS TO GUANTANAMO (Oct. 10, 2012), <http://witnessstoguantanamo.com/interviews/detainees/feroz-ali-abbasi-british/>; *Moazzam Begg Video Interview*, WITNESS TO GUANTANAMO (Oct. 10, 2012), <http://witnessstoguantanamo.com/interviews/detainees/moazzam-begg-british/>.

60. *Moazzam Begg Video Interview*, *supra* note 59.

61. Interview with Feroz Ali Abbasi, British Guantanamo Detainee, in London, Eng. (Aug. 7, 2010).

62. Interview with Anonymous, Former Guantanamo Detainee, in Riga, Lat. (Aug. 4, 2011).

63. *Id.*

64. *Id.*

65. *The ICRC's Work at Guantanamo Bay*, INT'L COMMITTEE OF THE RED CROSS (Nov. 30, 2004), <http://www.icrc.org/eng/resources/documents/misc/678fk8.htm>.

was limited in what it could do or say, hamstrung by the United States' requirements if it wanted to return.⁶⁶

The men in Guantanamo were held in isolation and secrecy until the Supreme Court decision in *Rasul v. Bush*⁶⁷ permitted lawyers to visit their clients starting in mid-2004⁶⁸—two-and-a-half years after the first men were brought to Guantanamo. Yet, even then, nearly two more years passed before the government agreed to release the names of the detained.⁶⁹ Overall, more than four years passed from the time the first men arrived at Guantanamo to when the government finally released their names.

B. Notice to the Families

In analyzing whether the families may claim suffering due to the disappearance of their loved ones, the courts look at when the family members first received notice of the disappearance. Part IV below addresses how federal courts consider the legal requirements of notice. This subpart II.B introduces the issue of notice in the context of disappearance into Guantanamo.

Mamdouh Habib, an Australian citizen, was brutally transported from Pakistan to Egypt, under the United States' extraordinary rendition program. He was tortured and drugged in Egypt for six months before being transported to Afghanistan and then to Guantanamo.⁷⁰ His wife told the Witness to Guantanamo project that during that time, no Australian, Egyptian, or American official told her where her husband was held, why he was being detained, whether any charges were brought against him, or whether he was treated humanely.⁷¹ The nations of Egypt, Aus-

66. *Leaked 2004 Guantanamo Manual Shows Continued ICRC Restrictions, Severe Psychological Illness, and Risk of Suicide*, CENTER FOR CONST. RTS. (Dec. 4, 2007), <http://ccrjustice.org/newsroom/press-releases/leaked-2004-guantanamo-manual-shows-continued-icrc-restrictions,-severe-psyc>.

67. 542 U.S. 466 (2004).

68. See *id.* at 485. Not all detainees had lawyers. Jackie Northam, *Q&A About Guantanamo Bay and the Detainees*, NAT'L PUB. RADIO (June 23, 2005, 12:00AM), <http://www.npr.org/templates/story/story.php?storyId=4715916>. Some detainees had lawyers because their families knew the men were in Guantanamo and could afford to hire lawyers for them. HONIGSBERG, *supra* note 5, at 83–84. Other detainees had representation from the Center for Constitutional Rights (CCR) in New York. *Id.* at 86. The CCR, in addition to having its own lawyers on staff, was also the clearinghouse for volunteer lawyers representing the detainees. *Id.* Lawyers were able to obtain names of some of the detainees through various sources, including from families who had contacted attorneys and from detainees who had been released. Interview with Clive Stafford Smith, Habeas Attorney, in Symondsburry, U.K. (Aug. 3, 2010). However, as explained in Part IV, *infra*, in 2004 the CCR still did not know the names of all the detainees in Guantanamo.

69. Andrew Selsky, *Pentagon Hands over List of All Guantánamo Bay Detainees*, SEATTLE TIMES, May 16, 2006, at A9.

70. Interview with Mamdouh Habib, Australian Guantanamo Detainee, in Sydney, Austl. (Dec. 30, 2011); *Profile: Mamdouh Habib*, BBC.CO.UK (Dec. 7, 2005), <http://news.bbc.co.uk/2/hi/asia-pacific/4214747.stm>.

71. VIVIENNE THOM, INQUIRY INTO THE ACTIONS OF AUSTRALIAN GOVERNMENT AGENCIES IN RELATION TO THE ARREST AND DETENTION OVERSEAS OF MR. MAMDOUH HABIB FROM 2001 TO 2005, at 9 (2011), <http://www.igis.gov.au/inquiries/docs/habib-inquiry.pdf>; Natalie O'Brien, *Intro-*

tralia, and the United States disclosed nothing to her during those early days. Her husband was officially disappeared, a disappearance about which she only heard through the media and had no gauge to determine whether it was true.

Terry and Beverly Hicks, parents of David Hicks, who was also an Australian citizen and detainee number 002, similarly learned everything about their son's capture and transport to Guantanamo through the media.⁷²

After 9/11, Soad Abdul Jaleel had not heard from her son for three months. She feared he was dead.⁷³ Finally, someone called to say that he had been captured. Through the Internet, she learned that he would be transferred to Guantanamo.

A Kuwaiti father, Khalid Al-Odah, received a phone call from a Kuwaiti citizen whom he did not know.⁷⁴ The citizen told Khalid that that his son had been seized by the Afghans and then turned over to the Americans.⁷⁵ (Subsequently, the man who had phoned Khalid with the story was also kidnapped and transported to Guantanamo.⁷⁶) Until he heard from the officials in Kuwait that his son was in Guantanamo, all Khalid knew was that his son had been kidnapped.⁷⁷ When the Witness to Guantanamo project interviewed Khalid in 2011, Khalid's story spoke less to the son's disappearance and more to the family's loss. Stories like this one best express why families experience torture or CID when their children are kidnapped and disappeared. As of this writing, Khalid's son, Fawzi, has been incarcerated in Guantanamo for over ten years without charges.⁷⁸ During the 2011 interview, Khalid's father spoke about the emotional effects on his family of his son's interminable incarceration in Guantanamo. Khalid said that sometimes he awakes in the middle of the night and finds that his wife is not in bed with him. He now knows where she goes. She goes to their son's room to sleep in his bed.⁷⁹

ducing Mrs. Habib, Private Eye, SMH.COM.AU (May 29, 2011), <http://www.smh.com.au/nsw/introducing-mrs-habib-private-eye-20110528-1f9h4.html>; Interview with Maha Habib, Wife of Mamdouh Habib, in Sydney Austl. (Jan. 5, 2012).

72. *David Hicks Timeline*, THEAGE.COM.AU, <http://www.theage.com.au/multimedia/hicks/hicks.html> (last visited Nov. 2, 2012); Interview with Terry Hicks & Beverly Hicks, parents of David Hicks, in Adelaide, Austl., (Jan. 2, 2012).

73. Jennifer Fenton, *Kuwaiti Families in Legal Limbo at Guantanamo*, AL-JAZEERA.COM (Dec. 29, 2011), <http://www.aljazeera.com/indepth/features/2011/12/201112298544422981.html>. Subsequently, the nation of Kuwait confirmed that her son was held in Guantanamo.

74. Interview with Khalid Al-Odah, Father of Detainee, in Kuwait City, Kuwait (Jan. 3, 2011).

75. *Id.*

76. *Id.*

77. *Id.*

78. *The Guantanamo Trials*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo> (last visited Dec. 28, 2012).

79. Interview with Khalid Al-Odah, *supra* note 74.

Because the government classified the list of names of the detainees held in Guantanamo, outsiders could only gather information about the people detained in the prison through one of four avenues.

First, the U.S. government would reveal names of certain nationals to the governments of their countries. When the government of the detainees was so informed, the government would often, but not always, inform the families of the detainees that their sons, fathers, and husbands were in Guantanamo.⁸⁰

Second, detainee information would be revealed when a man was released from Guantanamo. For example, if the released man knew the names of others held, he might notify the families directly or inform his lawyer, who could then pass on the information to the families.⁸¹

Third, someone who had been present but not taken when another man was captured and detained by the Americans might inform the family of the man detained if he knew the man and his family.⁸²

Fourth, the Red Cross would sometimes contact family members.⁸³ Although the Red Cross collected postcards from the detainees to be presumably delivered to their families, the United States often refused to grant the Red Cross permission to take the cards outside the facility.⁸⁴ In addition, the mail was heavily censored and often completely redacted except for the word “dear” in the opening salutation and the name in the signature line.⁸⁵ Consequently, family members learned little, if anything, from the Red Cross to confirm their worries that their son, husband, or spouse was incarcerated in Guantanamo Bay.⁸⁶

C. Is There an Obligation for States to Notify Families?

In times of war, the Geneva Conventions require that notice to families and next of kin occur within one week or less. Article 70 of the Third Convention on Prisoners of War requires that “[i]mmediately upon capture, or not more than a week after arrival at a camp, . . . every prisoner of war shall be entitled to write direct to his family, . . . informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any man-

80. For example, the Kuwaiti families were informed this way.

81. Interview with Clive Stafford Smith, Habeas Attorney, in Symondsburry, U.K. (Aug. 3, 2010).

82. See *supra* text accompanying note 74.

83. Interview with Terry Hicks & Beverly Hicks, *supra* note 72.

84. MURAT KURNAZ, FIVE YEARS OF MY LIFE, AN INNOCENT MAN IN GUANTANAMO 68 (2007).

85. *Bisher al Rawi Video Interview*, WITNESS TO GUANTANAMO, <http://witnessstoguantanamo.com/interviews/detainees/bisher-al-rawi-england/> (last visited Dec. 28, 2012).

86. Interview with Terry Hicks & Beverly Hicks, *supra* note 72.

ner.”⁸⁷ In addition, civilians in the territory of a party to the conflict “shall be enabled to give news of a strictly personal nature to members of their families.”⁸⁸ Unfortunately, these provisions are not applicable here because on February 7, 2002, President Bush declared that the Geneva Conventions’ notice requirements do not apply to Guantanamo detainees.⁸⁹

Although the Supreme Court in *Hamdan v. Rumsfeld*⁹⁰ held that common article 3 of the Geneva Conventions applies to the men detained in Guantanamo, notice to families still does not appear in the common articles. Protocol I to the Geneva Conventions also emphasizes the “right of families to know the fate of their relatives.”⁹¹ However, the United States is not a signatory to the protocols.

Additionally, article 17 of the Convention for the Protection of All Persons from Enforced Disappearance provides that states guarantee a detainee the right to “communicate with and be visited by his or her family, counsel or any other person of his or her choice.”⁹² Article 18 allows family members and other interested persons access to information related to the whereabouts of the detainee.⁹³ Restrictions may be placed on article 18 under “exceptional” circumstances and where “strictly necessary,”⁹⁴ but under no circumstances may a state violate article 17. Unfortunately, unless enforced disappearance is deemed a customary international law, these notification rights are not available to people in American custody because the United States is not a state party to this Convention.

The Inter-American Convention on Forced Disappearance of Persons requires states to establish and maintain up-to-date registries of de-

87. Geneva Convention Relative to the Treatment of Prisoners of War art. 70, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

88. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 25, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

89. Memorandum from President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff, on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

90. 548 U.S. 557 (2006).

91. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 32, June 8, 1977, 1125 U.N.T.S. 3.

92. Enforced Disappearance Convention, *supra* note 12, at art. 17(d) (“Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.”).

93. *Id.* at art. 18(d) (“The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer . . .”).

94. *Id.* at art. 20(1).

tainees available to relatives and other interested persons.⁹⁵ But, here too, this Convention does not apply to the United States because it has not ratified the treaty.

Notice is important for measuring the statute of limitations⁹⁶ when pursuing cases against the U.S. Government. Under federal law, discussed below in Part IV, the statute of limitations can be either two years or ten years, depending on whether the claim is brought under the ATS (ten years) or the FTCA (two years). Even applying the ten-year period, it is unlikely a family member could file a claim, considering it has been more than a decade since Guantanamo opened. Consequently, to the extent that their claims will have lapsed under American law, this Article will nevertheless be helpful to prospective litigants. That is, if the United States again disappears alleged terrorists or others allegedly engaged in hostilities against the United States,⁹⁷ the families who suffer torture or CID can look to this Article for assistance in finding a forum. Whether detainees are disappeared into Guantanamo, detention sites in the United States, or detention sites outside U.S. borders, this Article will assist the litigants in finding a forum to hear and redress their claims.

Additionally at issue is whether the four types of informal notices recounted above can amount to constructive notice. If so, is constructive notice to the families sufficient, or is official notice to the families by the U.S. government required before the statute of limitations begins to run?⁹⁸

III. DECISIONS AND U.S. ACCOUNTABILITY UNDER INTERNATIONAL LAW

A. *Decisions Under International Law*

Following this brief background, we now turn to the law on how parents, wives, and children were victims of torture or cruel, inhuman,

95. Inter-American Convention on Forced Disappearance of Persons art. XI, June 9, 1994, O.A.S.T.S. No. A-60, 33 I.L.M. 1429 (“The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.”).

96. See *infra* Part IV.

97. See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2012). The Act permits the detention of “covered persons,” including (1) “[a] person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks”; or (2) “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalitions partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” It is not clear whether Section 1021 specifically covers U.S. citizens or lawful resident aliens. An amendment to the Act reads, “Nothing in this section shall be construed to affect existing law or authority relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” S. 1867, 112th Cong. § 1031 (2011).

98. See *supra* Part IV.D.1 for more details regarding this statute of limitations issue.

and degrading treatment when their sons, husbands, and fathers were disappeared into Guantanamo.

The first case to acknowledge the “anguish and stress” suffered by a mother when her daughter disappeared was in Uruguay.⁹⁹ In 1983, a young woman who was held by Uruguayan military forces in front of the Venezuelan embassy tried to break away by jumping over a fence into the embassy yard.¹⁰⁰ Military personnel chased after her and removed her while embassy officials watched.¹⁰¹ The young woman was subsequently taken to the police station, where she was allegedly tortured and killed.¹⁰² When her mother, Maria del Carmen Almeida de Quinteros, contacted the state about her missing daughter, Uruguay did not admit or deny that she was in detention.¹⁰³

Her mother then submitted a complaint under the individual complaints mechanism to the HRC alleging violations of article 7 of the ICCPR for both her and her daughter.¹⁰⁴ The Committee recognized “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts.”¹⁰⁵ The Committee concluded that the mother “has the right to know what has happened to her daughter,” and “[i]n these respects, she too is a victim of the violations of the Covenant [ICCPR] suffered by her daughter in particular, of [a]rticle 7.”¹⁰⁶

Years passed before anyone seemed to notice the 1983 Uruguayan decision. In fact, not until January 1998, fifteen years after *Quinteros v. Uruguay*,¹⁰⁷ did the Inter-American Court find a violation of family members’ rights due to the disappearance of their loved ones. In *Blake v. Guatemala*,¹⁰⁸ journalist Nicholas Blake and photographer Griffith Davis, both U.S. citizens residing in Guatemala, arrived in the village of El Llano in March 1985.¹⁰⁹ After being questioned by the commander of the civil self-defense patrol, Blake and Davis were taken on orders from the military garrison to a place known as *Los Compamentos*, where they were killed and buried.¹¹⁰ The men remained disappeared until their remains were discovered in 1992.¹¹¹

99. U.N. Human Rights Comm., *supra* note 6, ¶ 14.

100. *Id.* at ¶ 1.2.

101. *Id.*

102. *Id.* at ¶ 1.5.

103. *Id.* at ¶ 1.7.

104. *Id.* at ¶ 10.8.

105. *Id.* at ¶ 14.

106. *Id.*

107. U.N. Human Rights Comm., *supra* note 6.

108. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).

109. *Id.* at ¶ 52(a).

110. *Id.*

111. *Id.* at ¶ 52(b).

Between 1985 and 1992, Blake's relatives made a number of journeys to Guatemala, meeting with U.S. Embassy officials and Guatemalan civilian and military authorities, including the president of Guatemala, in an effort to discover Blake's whereabouts.¹¹² Throughout this time, according to the Inter-American Court decision, although "the Army was aware of the deaths shortly after they occurred,"¹¹³ "[t]he State concealed Mr. Nicholas Blake's whereabouts and hindered his family's investigation" by concealing facts, lying, claiming he was seized by guerillas, concealing his remains, and otherwise stonewalling the investigation.¹¹⁴ The court concluded, "[T]he State of Guatemala violated, to the detriment of the relatives of Mr. Nicholas Chapman Blake, the right to humane treatment enshrined in Article 5 of the American Convention on Human Rights."¹¹⁵

A few months later, in *Kurt v. Turkey*,¹¹⁶ a mother witnessed Turkish security forces seizing her son, Uzeyir; she saw that he was surrounded by approximately ten soldiers and five guards and appeared badly beaten. That was the last time this mother saw her son.¹¹⁷ Several days later, she went to the public prosecutor to ask about Uzeyir's whereabouts.¹¹⁸ That same day, she received a response from someone in local headquarters saying that her son had been kidnapped by the PKK, the Kurdish Workers' Party, and not by the State.¹¹⁹ The mother continued to pursue her son's disappearance by applying to the National Security Court and again to the public prosecutor.¹²⁰ As time passed, State authorities pressured her to withdraw the application she filed on behalf of her missing son.¹²¹ She then filed an application with the European Court.¹²²

The European Court ruled in favor of Uzeyir's mother.¹²³ Because the Turkish Government did not assist her but in fact misled her, the Government's contention regarding Uzeyir's kidnapping by the PKK had

112. *Id.* at ¶ 52(d).

113. *Id.* at ¶ 52(o).

114. *Id.*

115. *Id.* at § XVIII, ¶ 2. Subsection 2 of article 5 reads, "No one should be subjected to torture or cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Organization of American States, American Convention on Human Rights art. 5, ¶ 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

116. 1998-III Eur. Ct. H.R. ¶ 15.

117. *Id.*

118. *Id.* at ¶ 16.

119. *Id.*

120. *Id.* at ¶ 17.

121. *Id.* at ¶ 19.

122. *Id.* at ¶ 20.

123. *Id.* at ¶ 134.

no basis in fact.¹²⁴ The *Kurt* court found that her rights under article 3 of the European Convention were violated.¹²⁵

A year later, in *Çakici v. Turkey*,¹²⁶ the European Court heard another case regarding a disappeared loved one. In *Çakici*, a man filed the application on his and his brother's behalf.¹²⁷ Ahmet Çakici was detained by village guards and security forces, beaten, tortured with electric shocks, and ultimately killed.¹²⁸ The authorities claimed that he was killed in a clash between the PKK, of which he was a member, and the security forces.¹²⁹ The court concluded, however, that Ahmet died following his apprehension and detention by security forces.¹³⁰ His family was not informed of his death.¹³¹ When his father and brother made inquiries as to Ahmet's death, the public prosecutor acted half-heartedly.¹³² The *Çakici* court stated that *Kurt* did not establish "any general principle that a family member of a 'disappeared person' is thereby the victim of treatment contrary to Article 3."¹³³ Rather, the *Çakici* court held that whether a family member is such a victim will depend on the "existence of special factors which gives the suffering of the applicant a dimension and character distinct from emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation."¹³⁴ The relevant factors introduced in *Çakici* included (1) the proximity of the family tie, such as a parent-child bond; (2) the particular circumstances of the relationship; (3) the extent to which the family member witnessed the events; (4) the involvement of the family member in the attempts to obtain information about the disappeared person; and (5) the way in which the authorities responded to the inquiries.¹³⁵ The court emphasized that "the essence of such a violation does not so much lie in the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct."¹³⁶

Applying the factors, the court concluded that Ahmet's brother did not meet the required criteria.¹³⁷ He was not present when the security

124. *Id.* at ¶ 87.

125. *Id.* at ¶ 73. Article 5 reads, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Organization of American States, American Convention on Human Rights art. 3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

126. 1999-IV Eur. Ct. H.R. 583.

127. *Id.* at ¶ 8.

128. *Id.* at ¶¶ 14-17.

129. *Id.* at ¶ 20.

130. *Id.* at ¶ 85.

131. *Id.* at ¶ 17.

132. *Id.* at ¶ 53.

133. *Id.* at ¶ 98.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at ¶ 99.

forces took his brother.¹³⁸ In addition, although Ahmet's brother made inquiries with the authorities, he "did not bear the brunt of this task" because "his father [took] the initiative in presenting the petition . . . to the . . . National Security Court."¹³⁹ The court also stated that in addition to the five factors, it could not find any aggravating or special features.¹⁴⁰ Consequently, the court found no violation of article 3 in relation to Ahmet's brother.¹⁴¹

Subsequent decisions by judicial bodies throughout the world often applied the five factors suggested in *Çakici*.¹⁴² Nevertheless, courts varied on how much emphasis to give each factor. A majority of the courts focused on the same two factors as did *Çakici*—how much the family member pursued the state in attempting to obtain information of their loved one's disappearance as well as the reaction of the state officials to the requests for investigations.¹⁴³ However, in at least five cases, the court recognized the bond between the disappeared and the family member.¹⁴⁴

A review of thirty-five international cases addressing the disappearance of a family member, including *Çakici*, demonstrates that in nearly one-half (or sixteen) of the cases, the forum found a violation of torture or CID, even though the applicant was not present. In one of the cases, the judge addressed the issue of presence, stating that the applicant's absence was not determinative.¹⁴⁵ In thirteen other cases, the applicant was present at the time of disappearance, and a violation was found.¹⁴⁶ However, only six of the cases cited the applicant's presence as a fac-

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See, e.g.*, *Timurtaş v. Turkey*, Eur. Ct. H.R. ¶¶ 95–96 (2000); *Bámaca Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 162–163, 165–166 (Nov. 25, 2000).

143. *See, e.g.*, *İpek v. Turkey*, Eur. Ct. H.R. ¶ 183 (2004); *Osmanoğlu v. Turkey*, Eur. Ct. H.R. ¶ 98 (2008); *Gekhayeva & Others v. Russia*, Eur. Ct. H.R. ¶ 120 (2008).

144. *Çakici v. Turkey*, Eur. Ct. H.R. ¶ 99 (1999); *Timurtaş*, Eur. Ct. H.R. ¶ 96; *Bazorkina v. Russia*, Eur. Ct. H.R. ¶¶ 140–142 (2006); *Imakayeva v. Russia*, Eur. Ct. H.R. ¶ 164 (2007); *Osmanoğlu*, Eur. Ct. H.R. ¶ 94.

145. *Timurtaş*, Eur. Ct. H.R. ¶ 96.

146. *See, e.g.*, *Kurt v. Turkey*, 1998-III Eur. Ct. H.R. ¶ 134 (1998); *Orhan v. Turkey*, Eur. Ct. H.R. ¶¶ 359–360 (2002); *Imakayeva*, Eur. Ct. H.R. ¶ 165, 167; *Osmanoğlu*, Eur. Ct. H.R. ¶¶ 97–99; *İpek*, Eur. Ct. H.R. ¶¶ 182–183; *Bazorkina*, Eur. Ct. H.R. ¶¶ 140–142; *Khadzhaliyev & Others v. Russia*, Eur. Ct. H.R. ¶ 99 (2008); *Gekhayeva & Others v. Russia*, App. No. 1755/04, Eur. Ct. H.R. ¶ 120 (2008); *Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 115 (Mar. 1, 2005); U.N. Human Rights Comm., *Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶ 2.1, U.N. Doc. CCPR/C/78/D/950/2000 (July 31, 2003) [hereinafter U.N. Human Rights Comm., *Views* (July 31, 2003)]; U.N. Human Rights Comm., *Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶¶ 2.1, 9.7, 10, U.N. Doc. CCPR/C/91/D/1422/2005 (Nov. 13, 2007); U.N. Human Rights Comm., *Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶¶ 2.1, 9.7, 10, U.N. Doc. CCPR/C/86/992/2001 (Apr. 24, 2006); U.N. Human Rights Comm., *Views*, ¶¶ 2.1, 2.2, 7.7, 8, U.N. Doc. CCPR/C/90/D/1328/2004 (Aug. 16, 2007).

tor.¹⁴⁷ In five other cases, including *Çakici*, the applicant was not present, and the forum found no violation.¹⁴⁸ Nevertheless, only three of the five cited absence as a factor.¹⁴⁹ In the final case, the applicant was present, and there was no violation.¹⁵⁰

When announcing their decisions, the judicial bodies generally cited the specific charter or human rights document provision that the state had violated in its treatment of family members, rather than citing the particular harm.¹⁵¹ Because the provisions mention torture and CID together in the same clause,¹⁵² it remains unclear whether the judicial bodies ruled that the family member suffered torture, CID, or both.

At present, there is no firm definition of “family members,” leaving it up to the forum to determine whether to include people other than parents, spouses, and children in considering the “family tie.” The Inter-American Court, however, will recognize brothers, sisters, life partners, and others who have a special tie to the victim.¹⁵³ The Declaration on the Protection of all Persons from Enforced Disappearance notes, “Any act of enforced ‘disappearance’ places the persons subjected thereto outside

147. *Kurt*, Eur. Ct. H.R. ¶ 133; *Orhan*, Eur. Ct. H.R. ¶ 359; *Imakayeva*, Eur. Ct. H.R. ¶ 165; *Osmanoğlu*, Eur. Ct. H.R. ¶ 97; *İpek*, Eur. Ct. H.R., ¶ 182; *Bazorkina*, Eur. Ct. H.R., ¶ 140.

148. *Tahsin Acar v. Turkey*, Eur. Ct. H.R. ¶ 239 (2004); *Şeker v. Turkey*, App. No. 52390/99, Eur. Ct. H.R. ¶ 83 (2006). In both cases, the Court based its conclusion on the fact that the applicant had not sufficiently proven that authorities were involved in abduction and that the authorities’ response to victim’s inquiries were not inhuman or degrading. *See also* *Unković v. Federation of Bosnia and Herzegovina*, Case No. CH/99/2150, Human Rights Chamber for Bosnia and Herzegovina, ¶ 93 (May 10, 2002) (noting that the essential characteristic of the violation is the attitude of the authorities in response to the reported disappearance and that in this case, albeit after numerous delays, the authorities did eventually investigate, discover the fate of the victims, and prosecute the perpetrators); *Nesibe Haran v. Turkey*, Eur. Ct. H.R., ¶¶ 82–84 (2005) (examining a multiplicity of factors, but no one factor was determinative).

149. The two cases that did not cite absence were *Şeker* and *Tahsin*. In *Unković*, the court stated that absence was not determinative; instead it identified the reasons stated *supra* as the critical factor. *Unković*, Case No. CH/99/2150, ¶ 93. In *Nesibe*, the court did not weight the factors. *Nesibe*, App. No. 28299/95, Eur. Ct. H.R. ¶ 83; *see also Çakici*, Eur. Ct. H.R. 583, ¶ 98 (1999).

150. *Tekdağ v. Turkey*, Eur. Ct. H.R. ¶ 86 (2004) (noting that it was not established that the state was responsible for the abduction, nor was the authorities’ tone or content of replies inhuman or degrading).

151. *See, e.g.*, U.N. Human Rights Comm., *Views*, (July 31, 2003), ¶ 9.5; *Bámaca Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 166 (Nov. 25, 2000); *Khadzhialiyev & Others*, Eur. Ct. H.R. ¶ 122.

152. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI) art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; Organization of American States, American Convention on Human Rights art. 3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

153. *Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 175 (Aug. 12, 2008) (as to permanent companion); *Juan Humberto Sanchez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 103 (June 7, 2003) (as to siblings, companion, and stepparents).

the protection of the law and inflicts severe suffering on them and their families.”¹⁵⁴

In the 2008 case of *Heliodoro Portugal v. Panama*,¹⁵⁵ the Inter-American Court added two additional factors to those from *Çakici* that a court should consider: “[T]he context of a ‘system that prevents free access to justice’ and . . . the constant uncertainty in which the next of kin live as a result of not knowing the victim’s whereabouts.”¹⁵⁶ In a recent Inter-American Court decision, the court ruled that the suffering of the victim’s relatives need not be proved but will be presumed.¹⁵⁷

The message from the international oversight judicial bodies has been universally clear for nearly three decades: When people are disappeared by the state, the family members themselves experience torture or CID. In recognition, international tribunals provide forums to hear the claims of victims’ families on their own behalf when their loved ones disappear.

B. U.S. Accountability Under International Law

The United States has made itself unavailable in international forums that would have jurisdiction to hear individual cases against it by either declaring that the United States is not party to a particular treaty or by not accepting the jurisdiction of the court or oversight body, even where it is party to the corresponding treaty. The United States is not a party to the American Convention on Human Rights. Consequently, it does not accept jurisdiction of the Inter-American Court.¹⁵⁸ The United States also does not recognize the competence of the Human Rights Committee, a body that interprets the ICCPR, to hear individual complaints.¹⁵⁹ Nor does it recognize the competence of the committees of several other treaties that may have been violated, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Protection of All Persons Against Enforced Disappearance. Furthermore, the United States terminated its acceptance of the jurisdiction of the International Court of Justice (ICJ), where only a state rather than an individual may bring a

154. Enforced Disappearance Convention, *supra* note 12, art. 2. *But see* CENTRAL INTELLIGENCE AGENCY, *supra* note 1, *passim* (explaining and authorizing techniques that indicate that the United States is not a party to the Convention).

155. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186 (Aug. 12, 2008).

156. *Id.* at ¶ 163.

157. Radilla-Pacheco v. Mexico, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 162 (Nov. 23, 2009).

158. Because the United States has not ratified the American Convention on Human Rights, it cannot be brought before the Inter-American Court. Consequently, it is only answerable to the Inter-American Commission of Human Rights, as an OAS organ. However, the Inter-American Commission has no enforcement powers.

159. The United States is not a party to the Optional Protocol to the ICCPR, which empowers the HRC to receive and consider complaints from individuals.

claim.¹⁶⁰ For example, if Kuwait wanted to sue the United States on behalf of one or more of its citizens, it could not pursue the claim against the United States in the ICJ.

The Human Rights Council, a United Nations body, is tasked with monitoring human rights generally and may have jurisdiction over the United States. However, the Council usually only addresses major human rights violations and complaints that represent a consistent pattern of gross violations. Certainly, an argument can be made that detentions in Guantanamo qualify under this standard and that a complaint could be filed in the Council under the “1503 procedure.”¹⁶¹ However, these proceedings are confidential.¹⁶²

Even more surprising, the United States will not subject itself to the jurisdiction of these various oversight bodies even though all the bodies described, except for the Inter-American Court and the ICJ, do not have any enforcement mechanisms; they only issue nonbinding recommendations.¹⁶³ The Inter-American Court and the ICJ only have limited enforcement mechanisms, which are essentially political actions that tie into universal shaming. The Inter-American Court can make recommendations to the OAS if the state does not comply with the judgment.¹⁶⁴ Parties to a dispute in the ICJ have recourse to the United Nations Security Council when the losing party does not adhere to the judgment,¹⁶⁵ but this recourse does not necessarily compel compliance.

The only international body that can presently hear a case against the United States is the Inter-American Commission.¹⁶⁶ The Inter-American Commission can only issue an unenforceable decision or non-

160. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 10 (Nov. 26, 1984). On October 9, 1985, the United States terminated its 1946 declaration agreeing to submit to compulsory jurisdiction of the ICJ, in response to a case brought by Nicaragua against the United States for supporting the contras in their objective to overthrow the government of Nicaragua. *Id.* at ¶ 12.

161. *Complaint Procedure*, U.N. HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Complaint.aspx> (last visited Dec. 30, 2012).

162. *Id.*

163. See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), ¶ 10.

164. Statute of the Inter-American Court on Human Rights art. 30, Oct. 31, 1979, O.A.S. Res. 448 (IX-0/79), reprinted in 19 I.L.M. 634 (“The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court’s ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the inter-American system of human rights, insofar as they concern the work of the Court.”).

165. *How the Court Works*, INT’L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Dec. 29, 2012) (“A State which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment.”).

166. See generally ORG. OF AM. STATES: INTER-AM. COMM’N H.R., <http://www.oas.org/en/iachr/default.asp> (last visited Feb. 22, 2012).

binding recommendation.¹⁶⁷ However, a decision against the United States, even if not enforced and even if not for money damages, could nevertheless be a powerful statement of the United States' accountability.¹⁶⁸

If family members were able to bring the United States into one of the international forums that have jurisdiction to hear their case alleging torture or CID committed by the United States, the United States would be held accountable. Three decades of international law decisions and rulings stand behind the parents and family members of those we have disappeared. We Americans can only watch in shame as our nation continues to promote itself as the bastion of human rights, while it zealously and methodically shields itself from any accountability both on the international stage and at home.

IV. PURSUING TORT CLAIMS IN U.S. COURTS

A. Overview

In what only can be termed as a magnanimous gesture to human rights, the United States invites foreign nationals to pursue civil litigation against their alleged foreign national torturers in U.S. federal courts. However, that generosity takes a surprising turn as soon as the foreign national victim seeks to bring the action against U.S. personnel, rather than against foreign national perpetrators. In situations where U.S. employees or officials are accused of being the alleged torturers, the United States launches procedural and substantive roadblocks to ensure that the claims do not succeed or even progress much beyond the filing stage. These hurdles include procedural issues related to questions of jurisdiction, statutes of limitations, and the exhaustion of remedies, as well as substantive issues related to the definition of "torture," whether the injury occurred in a foreign land, and to what extent CID is recognized as a universal norm by U.S. courts.

Federal courts that open their doors to foreign nationals who sue other foreign nationals as their alleged torturers but not to foreign nationals who sue their alleged torturers when they are American nationals could face another challenge in the years ahead. When the completely innocent parents, wives, and children of the men who were disappeared

167. See *Mandate and Functions of the Commission*, ORG. OF AM. STATES: INTER-AM. COMM'N H.R., <http://www.oas.org/en/iachr/mandate/functions.asp> (last visited Feb. 22, 2012) ("(1) Receives, analyzes and investigates individual petitions in which violations of human rights are alleged to have been committed either by a Member State of the OAS that has ratified the American Convention or by one that has not. . . . (6) Recommends to the OAS Member States the measures they should take the better to protect human rights in the countries of the hemisphere. . . . (8) Presents cases to the Inter-American Court and appears before the Court during the processing and consideration of cases. (9) Requests advisory opinions of the Inter-American Court, pursuant to Article 64 of the American Convention.")

168. See discussion *infra* Part V regarding possibly filing a claim in the Inter-American Commission.

into Guantanamo sue for the torture and CID that they independently suffered, how will the courts respond? Given the current state of the law, access to justice does not look promising. The following analysis explains the state of the law in sufficient detail for the family members and their attorneys to both assess the lay of the land and begin to strategize how to proceed. The following analysis does not pretend to provide a complete review of all the complexities one finds when analyzing the abstruse legal arena where one brings claims against the United States for human rights violations. Such analysis is left for a treatise or for the attorneys' own research, depending on how they choose to pursue their cases.

B. Filing Under the Alien Tort Statute

Foreign nationals who want to pursue claims in American courts for human rights violations that occurred in foreign nations may file their claims under the ATS, a statute that has been interpreted as jurisdictional and not substantive in scope.¹⁶⁹

Through the ATS,¹⁷⁰ also known as the Alien Tort Claims Act (ATCA),¹⁷¹ the United States has asserted broad, perhaps even universal, jurisdiction over violations of accepted international human rights norms occurring outside U.S. territory and recognized by international law.¹⁷² However, the substantive laws within the ATS are not identified as violations of constitutional law or of a U.S. statute.

The First Congress enacted the ATS in 1789.¹⁷³ It was designed to establish original district court jurisdiction over all cases where a foreign national sues for a tort committed in violation of the "law of nations."¹⁷⁴ The term "law of nations" is now understood as international law.¹⁷⁵ Under the act, the plaintiff must be a foreign national, whereas the defend-

169. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–13 (2004).

170. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

171. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587 (2002).

172. See *Sosa*, 542 U.S. at 751–52 (Breyer J., concurring). However, in spring 2012 the Supreme Court, after hearing arguments in *Kiobel v. Royal Dutch Petroleum*, raised the question of whether the ATS actually applied to international law violations occurring outside United States territory. Kali Borkoski, *Kiobel v. Royal Dutch Petroleum: What's at Stake, and for Whom?*, SCOTUSBLOG (Sept. 30, 2012, 9:36 PM), <http://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/>. The Court asked the parties to brief the issue and be prepared to argue it in the Court's fall 2012 Term. *Id.*

173. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2006)).

174. *Id.* ("[The federal district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.").

175. *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980).

ant may be a foreign national or a U.S. citizen.¹⁷⁶ The defendant must be present in the United States to be served.¹⁷⁷

Until 1980, the law was largely ignored. Then, in a surprising decision from the Second Circuit, *Filartiga v. Pena-Irala*,¹⁷⁸ the court breathed new life into the ATS. It held that prohibition against torture was a universally accepted norm of international law, and consequently, a foreign national could sue his alleged torturer under the ATS.¹⁷⁹ The court wrote that the “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, the Alien Tort Statute provides federal jurisdiction.”¹⁸⁰ The court added that the “constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.”¹⁸¹

The *Filartiga* decision recognized that international law evolves over time and is not a stationary concept. Consequently, “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”¹⁸² In reviewing such treaties and documents as the Universal Declaration of Human Rights General Assembly Resolution 217, the United Nations Charter, the Charter of the OAS, the Declaration on the Protection of All Persons from Being Subjected to Torture General Assembly Resolution 3452; article 5 of the American Convention on Human Rights, the ICCPR, and article 3 of the European Convention, the court concluded that the prohibition of torture is universally recognized.¹⁸³ Accordingly, a claim based on torture must be permitted to proceed under the ATS.¹⁸⁴ The *Filartiga* court concluded by noting that the ATS does not “grant[] . . . new rights to aliens, but . . . open[s] the federal courts for adjudication of the rights already recognized by international law.”¹⁸⁵

Nearly twenty-five years later, the Supreme Court in *Sosa v. Alvarez-Machain*¹⁸⁶ reinforced *Filartiga*’s analysis. The *Sosa* Court recognized that when a foreign national files an ATS claim, “courts should require any claim based on the present-day law of nations to rest on a

176. See 28 U.S.C. § 1350 (2006).

177. FED. R. CIV. P. 4(f) (service on individuals that reside in a foreign country); FED. R. CIV. P. 4(k) (territorial limits of service).

178. 630 F.2d 876 (2d Cir. 1980).

179. *Id.* at 880.

180. *Id.* at 878.

181. *Id.* at 885.

182. *Id.* at 881.

183. *Id.* at 883–84.

184. See *id.*

185. *Id.* at 887.

186. 542 U.S. 692 (2004).

norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹⁸⁷

Although torture is recognized as a universal norm, there may be a definitional problem with the universal recognition of torture as a prohibited crime when applied to the parents, wives, and children of men who were disappeared into Guantanamo. The definition that the United States subscribes to in its statutes implementing the CAT is different from the one that is universally recognized.¹⁸⁸ That is, the United States does not recognize in its law that a third party can be tortured.¹⁸⁹ In other words, the victim must be in custody of the torturer. Under this restrictive definition designed by the United States, the family members of a detainee would not be considered victims of torture.

However, an argument can be made that the definition of torture under the U.S. Code and the TVPA, is not applicable to violations implicating universal norms. In fact, a federal court has ruled that the domestic definition of torture does not apply when the courts are addressing torture as a universally recognized violation of international law.¹⁹⁰ The court noted that separate and distinct claims for torture could be brought under both the TVPA,¹⁹¹ which relies on domestic law for its definitions, and the ATS, which looks to international law for its standards of universally accepted norms.¹⁹² Thus, according to the court, it will look “to the [CAT] when deciding what constitutes torture according to the law of nations.”¹⁹³

Under this court’s analysis, when families file an ATS claim, internationally accepted norms apply, and the definition of torture as found in CAT would be the standard definition. The definition of “torture” pursuant to CAT is not restricted to an individual in custody; it includes third parties.¹⁹⁴ Under CAT’s interpretation, the United States would not be able to avoid the application of an ATS claim by the families of disappeared detainees by relying on the custody requirement under the domes-

187. *Id.* at 725.

188. *See* 18 U.S.C. § 2340 (2006); *see also* 28 U.S.C. § 1350 (2006).

189. *See* 18 U.S.C. § 2340(1) (2006) (“[T]orture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”); 28 U.S.C. § 1350 (2006) (“[T]he term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control”).

190. *See* *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1251 (11th Cir. 2005), *reh’g denied*, 452 F.3d 1284 (11th Cir. 2006); *see also* *Doe v. Nestle*, 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010) (holding that international law applies in defining universal norms under the ATS).

191. *See infra* Part IV.B.2. Note that under the claims advocated by this Article, the TVPA is not at all helpful.

192. *Aldana*, 416 F.3d at 1250.

193. *Id.* at 1251.

194. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

tic definition of “torture.” However, there is another hurdle. CAT requires that the torture be intentionally inflicted.¹⁹⁵ Consequently, the families may have to argue that the court should not adopt the CAT definition either. Rather, the court should recognize torture as a universal norm that is more broadly defined.

Since *Filartiga*, federal courts have ruled that CID is also now internationally recognized as a universal norm of prohibited conduct and is definable under *Sosa*’s required specificity.¹⁹⁶ One of the clearest expressions of CID as a prohibited universal norm was articulated by circuit Judge Barkett in the denial for rehearing in *Aldana v. Del Monte Fresh Produce, N.A.*¹⁹⁷ Although a dissenting opinion, her reasoning has been adopted and followed by several courts outside the Eleventh Circuit, which appears to be the only circuit that does not recognize CID as an international prohibited norm.¹⁹⁸ Judge Barkett accused the majority of ignoring the Supreme Court’s mandate in *Sosa* that ATS claims “must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.”¹⁹⁹ Reviewing the recognized sources of international law, identified as a requirement in *Sosa*, Judge Barkett pointed to the “treaties, judicial decisions, the practice of governments, and the opinions of international law scholars.”²⁰⁰ She wrote, “[I]t is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment, which is therefore actionable under the ATCA.”²⁰¹

Federal courts have defined CID or punishment “as acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which fall short of torture.”²⁰² “‘The principle difference between torture and [CID] is the intensity of the suffering inflicted.’ The prevailing view in the caselaw is that ‘cruel, inhuman and degrading treatment’ generally constitutes an actionable international law norm under *Sosa*.”²⁰³

195. *Id.*

196. *See, e.g.*, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004).

197. 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting).

198. *See, e.g.*, *Sarei v. Rio Tinto*, 650 F. Supp. 2d 1004, 1028–29 (9th Cir. 2009); *Bowoto*, 557 F. Supp. 2d at 1093 (noting in 2008 that the Eleventh Circuit was the only circuit that had addressed this issue and adopting the reasoning from Judge Barkett’s dissent in *Aldana*); *see also Aldana*, 452 F.3d at 1286–87 (Judge Barkett noting that there are district courts in other circuits that have recognized CID).

199. *Aldana*, 452 F.3d at 1284–85 (Barkett, J., dissenting) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004)) (internal quotation marks omitted).

200. *Id.* at 1285.

201. *Id.*

202. *Doe v. Nestle*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010) (quoting *Sarei*, 650 F. Supp. 2d at 1029) (internal quotation marks omitted).

203. *Id.* (quoting *Sarei*, 650 F. Supp. 2d at 1029).

Judge Barkett also noted that the requirement under *Sosa*—the gauging against the current state of international law—was also met: “U.S. law and international policy makes abstention from cruel, inhuman, or degrading treatment or punishment an expectation of all states and reinforces such abstention as an explicit global norm.”²⁰⁴ Judge Barkett forcefully supported her position by citing to numerous courts that have concluded that CID is a norm of customary international law.²⁰⁵

To the extent that someone may argue that the problem with recognizing CID as a norm of customary international law is not in recognizing the claim but in agreeing on its definition—because CID is not clearly defined on its edges—Judge Barkett would respond that *Sosa* does not require categorical specificity. That is, *Sosa* “does not require defining every possible instance of cruel, inhuman, or degrading treatment or punishment, but rather compels a determination of whether the facts alleged in a particular situation sit within the universal prohibition against” CID.²⁰⁶ Thus, “the central question is whether the ‘specific conduct at issue’ fits within that core norm.”²⁰⁷

Because the international courts have recognized for nearly thirty years that families whose loved ones are disappeared suffer torture or CID²⁰⁸ and, as explained above, domestic law looks to universal norms when considering an international cause of action, it would be difficult for an American court to deny that the families suffered CID even if the court chose not to find that the families suffered torture. The United States may argue that families’ suffering was no more than a violation of the domestic tort of intentional infliction of emotional distress. However, the pain of having a loved one kidnapped and disappeared into Guantanamo certainly rises above the domestic understanding of intentional infliction of emotional distress. What the families suffered when their loved ones were disappeared amounts to the universal norm of CID. Even under the restrictive definition of CID that was designed by the United States in its reservations to CAT and describes CID as that prohibited by the Fifth, Eighth, or Fourteenth Amendment to the Constitution,²⁰⁹ the families would still have suffered CID.²¹⁰

204. *Aldana*, 452 F.3d at 1286 (Barkett, J., dissenting).

205. *Id.* at 1287 (citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995)).

206. *Id.* 1288.

207. *Nestle*, 748 F. Supp. 2d at 1077 (quoting *Sarei*, 650 F. Supp. 2d at 1028–29).

208. *See supra* Part I.

209. U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

In addition to the issues regarding torture and CID, families face numerous other hurdles before they can succeed in domestic courts on ATS claims. First, the Government will move to restyle the ATS claims to ones that must be brought under the FTCA. The Government's position will be that the ATS does not provide a remedy for the families because the Government has not waived its immunity under the ATS. Once the claims are restyled as FTCA claims, the Government can more easily challenge the claims and convince the court to dismiss the families' claims altogether, leaving the plaintiffs without a remedy.

1. Alien Tort Statute: A Jurisdictional Provision

As noted earlier, the Supreme Court in *Sosa* interpreted the ATS as merely conferring jurisdiction (instead of creating a cause of action).²¹¹ Although the ATS is only jurisdictional, it is "intended to specifically create liability, not to limit it."²¹² Quoting *Sosa*, a treatise states that "positive law [such as the ATS] was frequently relied upon to reinforce and give standard expression to the 'brooding omnipresence' of the common law."²¹³ Further, "the ATS codifies Congress'[s] intent to provide redress for violations of the law of nations[, and] Congress has created a statutory liability by reference to another body of law—i.e., the 'law of nations.'"²¹⁴ However, in deference to the United States as sovereign and maker of the laws, as well as fearing the possibility of providing any right or remedy to unsympathetic defendants, federal courts have not adopted this reasoning of the treatise in deciding cases involving the United States as party defendant.

2. Alien Tort Statute Paired with Substantive Law

Litigators have often paired the ATS with the substantive law of the TVPA, perhaps in order to stay within the aegis of the ATS. Although it would seem by its title that the Torture Victims Protection Act would be the perfect vehicle for the plaintiffs, in fact it is not at all helpful, and any claim relying on the TVPA will likely be dismissed.

The TVPA provides, "An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual

210. See *Aldana*, 452 F.3d at 1288 (Barkett, J., dissenting) (noting United States courts' acknowledgement that CID, even under the United States' definition, constitutes a violation of international law).

211. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

212. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN THE U.S. COURTS 288 (2d ed. 2008).

213. *Id.* (alterations in original) (quoting *Sosa*, 542 U.S. at 722) (internal quotation marks omitted).

214. *Id.*

to torture shall, in a civil action, be liable for damages to that individual.”²¹⁵ The TVPA defines “torture” as

any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.²¹⁶

Based on the factors described in the previous paragraph, the families of former detainees who were disappeared into Guantanamo are unlikely to meet the requirements of the TVPA. The Act requires that claims be brought against individuals acting “under actual or apparent authority, or color of law, of any foreign nation.”²¹⁷ A district court explained that at the time of the signing of the Act, “the ‘under foreign color of law’ requirement was understood to serve as an important limitation of the Act that would preclude its application to United States operations abroad.”²¹⁸ After citing President George H.W. Bush’s signing statement to the TVPA, the court concluded, “the plain language of the TVPA limits liability to those acting under color of law of a foreign nation.”²¹⁹

In two cases involving high-level cabinet positions, Secretary of State Henry Kissinger²²⁰ and Attorney General John Ashcroft²²¹ were separately sued under the TVPA. Although both cases were decided against the plaintiffs’ TVPA claims, the courts did not explicitly rule out the possibility that U.S. officials were not immune under the Act.²²² However, in another case, CIA agents working in Guatemala were determined to be under color of U.S. law and not under color of Guatemalan law even if they acted in concert or conspired with foreign officials.²²³

Thus, the Act would seemingly not apply to the family members of former detainees who were disappeared into Guantanamo. The family members were not tortured under color of law of a foreign nation: the United States was the wrongdoer that disappeared the detainees. The

215. Torture Victim Protection Act of 1991 § 2(a)(1), Pub. L. No.102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

216. *Id.* at § 3(b)(1).

217. *Id.* at § 2(a); see also STEPHENS ET AL., *supra* note 212, at 75.

218. *Harbury v. Hayden*, 444 F. Supp. 2d 19, 41 (D.D.C. 2006).

219. *Id.*

220. *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004).

221. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

222. *Id.* at 266.

223. *Harbury*, 444 F. Supp. 2d at 41–42.

United States took over the custody of the detainees, flew them from Afghanistan to Guantanamo, and continued to detain them in Guantanamo. Of course, if family members can somehow show that a foreign nation directed the Americans to disappear their loved ones, there is an argument that the TVPA should apply.²²⁴ There is also the problem as to whether the family members suffered torture or only CID. If a court decides that the parents, wives, and children only suffered CID and not torture, the TVPA would not apply. The Act speaks exclusively to torture.²²⁵

Furthermore, as two recent cases confirm, the language of the statute requires that the victim be in the offender's custody. In one case, the court included "in offender's custody" as an element of torture in its analysis.²²⁶ In a second case, the court determined that because the defendants had never kidnapped or imprisoned the victims and therefore never had physical or custodial control over them, the definition of "torture" was not met.²²⁷

As noted above, there should be a difference as to what constitutes torture under domestic law compared to what constitutes torture under international law. The difference was addressed in *Aldana*, where the Eleventh Circuit noted that two different and distinct claims for torture could be brought under both the TVPA and the ATS. Thus, under the ATS, the definition of "torture" as found in CAT would be the standard rather than the definition under the TVPA. Finally, as with the FTCA, the TVPA also requires an exhaustion of remedies.²²⁸

C. The Westfall Act and Filing Under the Federal Tort Claims Act

The FTCA was enacted to address claims made by plaintiffs who wished to sue the U.S. Government.²²⁹ Under the Act, the United States waives its sovereign immunity in certain circumstances.²³⁰ The waiver applies to claims seeking monetary damages for the negligent and

224. See *Arar*, 414 F. Supp. 2d at 266; see also *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858 (D.C. Cir. 2010).

225. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2012)).

226. *Doe v. Qi*, 349 F. Supp. 2d 1258, 1314 (N.D. Cal. 2004).

227. *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 74 (D.D.C. 2010); see also *Escarria-Montano v. United States*, 797 F. Supp. 2d 21, 25 n.4 (D.D.C. 2011) (citing another example where "the facts do not establish that plaintiff was 'in defendant[']s custody or physical control' when he was injured" (alterations in original) (quoting *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 226 (D.D.C. 2007))).

228. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 § 2(b) (codified at 28 U.S.C. § 1350 note (2006)) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). Although there is a requirement of exhaustion of remedies, the requirement would not be applicable here because the United States could not be sued under the TVPA in the first place, as described above. See *Harbury*, 444 F. Supp. 2d at 41.

229. STEPHENS ET AL., *supra* note 212, at 283.

230. *Id.*

wrongful acts of federal employees acting within the scope of their offices or employment.²³¹ However, as explained below, the FTCA has become a major component in the U.S. arsenal designed to impede claims for torture and CID brought against U.S. officials and employees.

Under the Westfall Act,²³² when a foreign national sues individual federal employees in the United States under the ATS, the Attorney General can certify that the employees were acting within the scope of their offices or employment, and the United States then becomes the party defendant, substituting itself for the defendant employees.²³³ All government immunities may then be asserted.²³⁴

1. Exceptions to the Westfall Act

There are several exceptions to the Westfall Act that would block the restyling of an ATS claim into an FTCA claim. First, the Westfall Act and the FTCA do not apply to the acts of independent contractors.²³⁵ The government actor must be a federal employee.²³⁶ The district court in *Sosa* affirmed that independent contractors would not be treated as government employees.²³⁷ Consequently, the Government could not substitute itself as party defendant for an employee who was an independent contractor.

As such, family members of detainees should try to learn whether contractors participated in the disappearance of their loved ones. The involvement of government-hired contractors is not unlikely, given that the CIA,²³⁸ the Department of Defense (DoD),²³⁹ and potentially other administrative agencies were probably involved in hiring contractors. These agencies may have employed contractors in conducting their businesses in Afghanistan and in transferring the men to Guantanamo. If, for example, Blackwater or Xe contractors were involved in the disappear-

231. *Id.* Suits for violations of the Constitution or a federal statute that provide explicit causes of action are exempted. *See infra* Part IV.C.1.

232. Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679 (2006)). In pertinent part it reads, "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." § 2679(d)(1).

233. *Id.* at § 2679(d)(1)–(2). Of course, if plaintiffs sue the Government directly in an ATS claim, rather than filing against United States officials or employees, the lawsuit is also restyled as an FTCA claim.

234. *See* STEPHENS ET AL., *supra* note 212, at 283.

235. *See id.* at 291.

236. § 2679(b)(1).

237. STEPHENS ET AL., *supra* note 212, at 291 n.46 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004)).

238. *Reprieve's Renditions Inc. Investigation*, REPRIEVE.ORG, <http://reprieve.org.uk/investigations/rendition/> (last visited Dec. 28, 2012).

239. *See* MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 1 (2011).

ance of persons into Guantanamo, the family members could maintain their actions against the contractor defendants under ATS claims, and the cases would not be restyled as FTCA actions.

An act conducted outside the scope of employment presents a second exception to the Westfall Act.²⁴⁰ However, federal courts have defined “scope of employment” very broadly.²⁴¹ For example, such despicable behavior as torture has been considered to be within the scope of employment. In *Rasul v. Myers*,²⁴² where former detainees brought claims for the torture and mistreatment they suffered while in Guantanamo, the D.C. Circuit folded the alleged torture by military interrogators into the definition of “scope of employment.”²⁴³ Thus, even when the government employee is accused of committing torture, if the Attorney General certifies that the acts are within the scope of employment, the defendant employee is substituted out. This is so even though legislative history of the Westfall Act indicates that Congress did not intend to apply the act to employees who had committed “egregious torts.”²⁴⁴ A recognized treatise suggests that counsel “argue that there can be no substitution [under the Westfall Act] when the alleged misconduct is a human rights violation.”²⁴⁵ In support, the treatise relies on *The Charming Betsy* case, in which the Supreme Court said, “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁴⁶

Two other exceptions to the Westfall Act bar substitution by the government, thereby preventing the claim from being reclassified as an FTCA claim.²⁴⁷ However, these exceptions provide little assistance to the families of the Guantanamo disappeared. In civil actions brought under a violation of the U.S. Constitution or a federal statute, the Attorney General is barred from substituting the United States as a party defendant.²⁴⁸ The Geneva Conventions, to which the United States and every nation in the world are parties, are an example of statutes that can arguably bar removal under the Westfall Act. However, federal courts have ruled that the Conventions do not fall within one of the statutory exceptions to the

240. § 2679(b)(1).

241. STEPHENS ET AL., *supra* note 212, at 291.

242. 512 F.3d 644 (D.C. Cir. 2008).

243. *Id.* at 658–59.

244. STEPHENS ET AL., *supra* note 212, at 291; *see also* *Harbury v. Hayden*, 444 F. Supp. 2d 19, 33–34 (D.D.C. 2006) (examining the issue of egregious torts as a bar to substitution in detail, and concluding that the reading of the statute will cover despicable behavior when perpetuated “for the purpose of serving the master”).

245. STEPHENS ET AL., *supra* note 212, at 291–97 (providing a forceful analysis of this issue).

246. *Id.* at 296 (quoting *Murray v. Schooner Charming Betsy* (The Charming Betsy Case), 6 U.S. (2 Cranch) 64, 118 (1804)) (internal quotations marks omitted).

247. 28 U.S.C. § 2679(b)(2) (2006).

248. *Id.* As noted, *supra* Part IV.B.1, although the ATS is a federal statute, because *Sosa* and subsequent cases have described the ATS as jurisdictional only and not substantive, filing an ATS claim does not bar the Government from substituting itself and restyling the claim as an FTCA claim.

Westfall Act.²⁴⁹ Also, one might argue that a claim under the TVPA, a federal statute, would impede the Westfall Act from taking effect. For reasons described, this claim would also likely fail.²⁵⁰

2. Failure of the FTCA Claim to Provide a Remedy

Although filing an FTCA claim may appear promising, once families are drawn into FTCA claims, problems escalate. First, the FTCA is not available against the United States when the tort occurred outside the United States.²⁵¹ As the statute describes, the lawsuit cannot proceed against the United States for any claim “arising in a foreign country.”²⁵² This provision applies even when the planning and direction for the decisions related to the tort were undertaken in the United States.²⁵³ Courts inquire as to the location of the alleged offense and not the location of its planning. In *Sosa*, the Supreme Court ruled that although the planning was in the United States, because the victim was kidnapped in Mexico, the FTCA would not apply.²⁵⁴ The Court rejected the Ninth Circuit’s adoption of the “headquarters doctrine,” noting that the planning and direction of the victim’s kidnapping was coordinated and determined from within the United States. The fact that the United States and California “served as command central for the operation carried out in Mexico” did not sway the Supreme Court.²⁵⁵ The location of the actual injury determined the place of the tort.²⁵⁶ As the Justices saw it, because the kidnapping occurred in Mexico, the statutory harm or injury also occurred in Mexico.²⁵⁷

Thus, there is a problem with the “location” of Guantanamo. The Supreme Court, in *Rasul v. Bush* and *Boumediene v. Bush*,²⁵⁸ held that Guantanamo is within the jurisdictional territory of the United States for purposes of providing habeas rights to the detainees.²⁵⁹ Yet, when the case relates to government accountability for claims of torture and CID, district courts have ruled that Guantanamo is a “foreign country” and not part of the United States.²⁶⁰ A court has ruled that Cuba holds de jure,

249. See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 769 (D.C. Cir. 2011) (affirming the lower district court’s ruling); *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *9 (W.D. Wash. Dec. 8, 2011).

250. See *supra* Part IV.B.2 for a discussion of the TVPA.

251. 28 U.S.C. § 2680(k) (2006).

252. *Id.*

253. STEPHENS ET AL., *supra* note 212, at 298.

254. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702, 712 (2004).

255. *Id.* at 702 (quoting *Sosa v. Alvarez-Machain*, 331 F.3d 604, 639 (9th Cir. 2003)) (internal quotation mark omitted).

256. *Id.* at 700 (quoting *Sosa*, 331 F.3d at 639).

257. *Id.* at 700–01.

258. 553 U.S. 723 (2008).

259. *Id.* at 771; *Rasul v. Bush*, 542 U.S. 466, 480–81 (2004).

260. *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *11 (W.D. Wash. Dec. 8, 2011).

rather than de facto, sovereignty over the area.²⁶¹ This ruling flies in the face of logic and American law.

The district court has seemingly decided to disregard the Supreme Court's acknowledgements in both cases that Guantanamo is de facto U.S. territory. Pursuant to its one-sided "lease agreement" with the nation of Cuba, the United States has the right to hold on to the territory and maintain absolute control over the area for as long as it chooses.²⁶² The lease provides that "the United States shall exercise complete jurisdiction and control over and within" Guantanamo Bay.²⁶³

In a decision that mirrors the general attitude of the federal courts not to provide redress to alleged terrorists, one court wrote, "Since Cuba is a foreign country regardless of whether the United States has de facto sovereignty and regardless of whether Guantanamo detainees have access to constitutional rights, the foreign country exception applies."²⁶⁴ One would think that because habeas rights are constitutionally more significant than rights to pursue actions in tort, if habeas were granted to people in this de facto controlled territory, so would access to pursue remedies for tortious acts. That is, access to federal courts for purposes of pursuing civil actions based on prohibitions of torture or CID that are recognized by international law and rise to the level of universally accepted norms should similarly be available, as are habeas rights.

In addition, the district courts have ignored not only the spirit and law of the *Rasul v. Bush* and *Boumediene* Supreme Court rulings but also the fact that federal law fully applies to Guantanamo Bay, Cuba. For example, after the Cuban iguana crosses the border from Cuba into Guantanamo, it is protected by the Endangered Species Act.²⁶⁵ Nonetheless, people who were disappeared into Guantanamo, as well as their parents, wives, and children, have no rights or remedies under federal law. Only Cuban iguanas enjoy such rights. Accordingly, because the torture and CID of family members of the detainees did not occur in the United States but rather occurred either in Guantanamo as the location of the disappearance or in the country where the family members were living when their loved ones were disappeared, a lawsuit brought by the family members would be barred under the *Sosa* ruling.

An additional exception to the FTCA for combatant activities during time of war would seemingly bar family members' lawsuits. However, Professor Beth Stephens and her co-authors in *International Human Rights Litigation in the U.S. Courts* maintain that "egregious human

261. *Id.*

262. Agreement for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418. The lease agreement does not specify the duration of the lease.

263. *Id.* at art. III.

264. *Hamad*, 2011 WL 6130413, at *11.

265. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

rights violations should not be seen as ‘arising out of combatant activities.’”²⁶⁶ Interestingly, although the “combatant activities” exception could be a major obstruction to pursuing claims against the United States, there is little in the literature addressing this exception.²⁶⁷ Instead, the courts have tossed out the claims based on other hurdles mentioned in this Article.

3. Reconciling the ATS and the FTCA

The FTCA should not be used for substitution of parties where the ATS provides jurisdiction.²⁶⁸ In a fascinating, vigorous, and robust dissent to the majority opinion dismissing ATS claims brought by plaintiffs allegedly tortured in Iraq and Afghanistan, D.C. Circuit Senior Judge Harry Edwards wrote in 2011 that the appeals court should have allowed the ATS claims to go forward against the state actors and not be barred by the introduction of the Westfall Act.²⁶⁹ Because the ATS incorporates the law of nations, Judge Edwards reasoned that the ATS is a statute that fits the Westfall Act exception.²⁷⁰

Judge Edwards criticized the direction in which the federal courts are moving in granting immunity to U.S. officials when claims are brought under the ATS for violations of the universal norm of torture. Twice in his dissent, he stressed that “[i]t is ironic that, under the majority’s approach, *United States officials* who torture a foreign national in a foreign country are not subject to suit in an action brought under [the ATS], whereas *foreign officials* who commit official torture in a foreign country may be sued under [the ATS].”²⁷¹ Edwards drove his point home by emphasizing how the United States has consistently and repeatedly condemned the use of torture on the international stage and that consequently, Congress could not have intended the ironic result that now confronts us.²⁷²

4. Filing Only for Declaratory Relief: A Possible Remedy

Under the Westfall Act, the Government can intervene and substitute itself as defendant for government employees when the claim is for money damages.²⁷³ In those situations, the ATS claim is restyled as an FTCA claim. However, if the family members only file for declaratory

266. STEPHENS ET AL., *supra* note 212, at 299.

267. See *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 420 (4th Cir. 2011) (stating that interrogators are immune from torture claims because of the combatant activities exception, but not addressing the human rights–combatant activities relationship).

268. See *supra* Part IV.C.

269. *Ali v. Rumsfeld*, 649 F.3d 762, 778–79, 792 (D.C. Cir. 2011) (Edwards, J. dissenting).

270. *Id.* at 792.

271. *Id.* at 779, 789.

272. *Id.* at 792–93.

273. 28 U.S.C. § 2679(d)(1) (2006).

relief, the Government seemingly could not, under the Westfall Act, substitute itself and terminate the ATS claim.

In *Ali v. Rumsfeld*,²⁷⁴ the plaintiffs, who were allegedly tortured in Iraq and Afghanistan, sought a declaratory judgment that defendants violated “the law of nations, binding treaties and the U.S. Constitution.”²⁷⁵ The district court dismissed their claims on the grounds that the “defendants no longer held their official positions . . . and therefore the plaintiffs could not show ‘that they face a real and imminent threat of being wronged again in the future’ by those defendants.”²⁷⁶ In addition, the district court noted that because the plaintiffs sued the defendants only in their individual capacities, they could not seek declaratory relief.²⁷⁷ On appeal, the D.C. Circuit dismissed the plaintiffs’ claims, which were based on the ATS and the Constitution because they “have not alleged a cognizable cause of action and therefore have no basis upon which to seek declaratory relief.”²⁷⁸ However, neither the lower court nor the appeals court addressed the specific question of whether an ATS claim seeking *only* declaratory relief would survive the Westfall Act. Plaintiffs might want to consider suing government employees in both their official capacities and as individuals *solely* for declaratory judgment, assuming the families are either not seeking or willing to forego money damages.

D. Procedural Barriers in the Federal Claims Litigation

By restyling an ATS claim as an FTCA action, the Government adds procedural blocks that further complicate the likelihood of plaintiffs prevailing on their claims for torture against the U.S. Government. To begin, as previously mentioned, the FTCA has a two-year statute of limitations.²⁷⁹ The ATS does not have a statute of limitations written into the law. However, courts have interpreted the act to have a ten-year statute of limitations, a significant difference from that in the FTCA. In addition, the FTCA imposes another procedural roadblock. Before a litigant can bring an action under the FTCA, the person must first exhaust all administrative remedies.²⁸⁰ Essentially, the parents, wives, and children of former detainees must first bring their claims to the agencies that have been

274. 649 F.3d 762 (D.C. Cir. 2011).

275. *Id.* at 766.

276. *Id.* at 769 (quoting *In re Iraq & Detainees Litig.*, 479 F. Supp. 2d 85, 118 (D.D.C. 2007)). Because plaintiffs have the right under Rule 15(a)(2) of the Federal Rules of Civil Procedure to seek leave to amend, one wonders why the plaintiffs did not substitute current government officials for those officials who had left office, such as Rumsfeld.

277. *Id.* at 769 n.9. The appeals court noted in a footnote that Rumsfeld, in fact, was sued “in both his individual and official capacities.” *Id.*

278. *Id.* at 778.

279. 28 U.S.C. § 2401(b) (2006 & Supp. V 2011).

280. 28 U.S.C. § 2675(a) (2006); *see, e.g.*, *Rasul v. Myers*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (“Since plaintiffs failed to exhaust their administrative remedies as required by the FTCA . . . the district court lacked jurisdiction . . .” (citation omitted)); *see also Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *11 (W.D. Wash. Dec. 8, 2011).

involved in holding and abusing their loved ones, such as the CIA, the National Security Agency (NSA), and the DoD, which are not likely to respond quickly, if at all. The plaintiff must then wait until the agency has denied the claim or until six months after the claim has lapsed to file under the FTCA.²⁸¹ Because the plaintiff must exhaust her administrative remedies within the two-year statute of limitation period, cases transferred from ATS claims to FTCA claims are usually dismissed for failure to exhaust administrative remedies.²⁸²

1. Application of the Statute of Limitations

This subpart addresses the question of which statute of limitations applies and whether it can be tolled. A discussion of what constitutes notice worthy of triggering the statute of limitations follows.

The ATS contains no statute of limitations provision. In *Papa v. United States*,²⁸³ the Ninth Circuit adopted the TVPA's ten-year statute of limitations.²⁸⁴ The court looked to the TVPA for guidance because the TVPA, like the ATS, "furthers the protection of human rights and helps 'carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.' Moreover, it employs a similar mechanism for carrying out these goals: civil actions."²⁸⁵ Later courts have followed this adoption.²⁸⁶

In contrast, the FTCA has a two-year statute of limitations.²⁸⁷ As discussed above, the ATS claims are nearly always restyled as FTCA claims,²⁸⁸ and it seems appropriate for the courts to recognize the spirit of the ATS, which was designed to provide a remedy for violations of universal norms under international law, including torture and CID.²⁸⁹ Consequently, after the plaintiffs' FTCA claims are dismissed for failure to exhaust their remedies, the plaintiffs should be permitted to refile their ATS claims and continue litigating their claims during the ten-year period available. This is seemingly the only option if these victims are going to have their voices heard in federal court for violations of human rights. As the Ninth Circuit wrote in *Papa*:

281. § 2675(a).

282. See, e.g., *Bancoult v. McNamara*, 445 F. 3d 427, 431 (D.C. Cir. 2006); *Rasul*, 563 F. 3d at 529 n.1; *Ali*, 649 F. 3d at 775.

283. 281 F.3d 1004 (9th Cir. 2002).

284. *Id.* at 1012.

285. *Id.* (quoting Torture Victim Protection Act of 1991 § 2(a)(1), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2006))).

286. See, e.g., *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009); *Jean v. Dorelien*, 431 F. 3d 776, 778 (11th Cir. 2005); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.C. Cir. 2003).

287. 28 U.S.C. § 2401(b) (2006 & Supp. V 2011).

288. See *supra* Part IV.C.

289. See *supra* Part IV.B.

[T]he realities of litigating claims brought under the ATCA [Alien Tort Claims Act or Alien Tort Statute], and the federal interest in providing a remedy, also point towards adopting a uniform—and a generous—statute of limitations. The nature of the violations suffered by those the ATCA [or ATS], like the TVPA, was designed to protect will tend to preclude filings in United States courts within a short time.²⁹⁰

It appears that no plaintiff has yet successfully refiled his or her claim as an ATS claim.²⁹¹

Also, one might argue that the statute of limitations, whether the two-year period under the FTCA or the ten-year period under the ATS, should be equitably tolled. Under the theory of equitable tolling, courts have tolled cases in extraordinary circumstances and in situations outside a plaintiff's control, such as fraud, misinformation, or deliberate concealment.²⁹² One could conceivably argue that the statute should be tolled because the United States concealed material facts necessary to pursue the families' claims until the detainees' names were officially released or even until the detainees were actually released.²⁹³

2. What Kind of Notice Is Necessary?

The United States has withheld detainees' identities from their families and lawyers in the conflict surrounding Guantanamo. Such a failure to comply with international norms leaves families not only with uncertainty but also without the ability to seek redress for their claims. In these instances, the statute of limitations should be tolled.

As noted in Part I, the definition of enforced disappearance can be found in the International Convention for the Protection from Enforced Disappearance.²⁹⁴ As a treaty, the Convention is considered the accepted standard for defining disappearance on the international stage, even though the United States has not signed it. The second prong of the statute reads: “[F]ollowed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”²⁹⁵ Consequently, once the detention is acknowledged—for example, by providing notice to the family—the violation ceases.

Under this definition, the State must acknowledge the concealment of the fate or whereabouts of the disappeared person. Accordingly, and pursuant to the Convention, notice through the media or through neigh-

290. *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

291. For further discussion of this argument, see *infra* Part IV.D.3.

292. *Jackson v. Astrue*, 506 F. 3d 1349, 1355 (11th Cir. 2007).

293. See, e.g., *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 652 (S.D. Tex. 2011).

294. Enforced Disappearance Convention, *supra* note 12, at art. 2.

295. *Id.*

bors or community members who observed the person being abducted would not qualify as sufficient notice. Similarly, notice from men who were in the detention center and who, upon their release, disclosed names of other inmates would also not meet the definition under the Convention. In fact, even if family members or others observed the abduction, those observations would not be sufficient to constitute notice.

Because the federal court hearing the claim would resolve the issue of notice, it is likely that federal common law, rather than the Convention, would apply in the determination of notice unless the court recognized the Convention as customary international law. Under federal law, the claim usually ripens when the plaintiff knows or has reason to know of the injury.²⁹⁶ Accordingly, the examples described above could be argued as meeting the requirement of “has reason to know.”

It is also possible that official notice requirements could be met through other channels. For example, if the U.S. government disclosed to a foreign government the names of the men it was holding in Guantanamo, and the foreign government then revealed that information to the local families, one might argue that the families received official notice. However, this government notice process may not have worked smoothly as described. Although these instances cannot be documented, there may have been situations where the United States did not want to fully inform certain governments that it did not necessarily trust, such as Pakistan, and unstable countries, such as Yemen, of the “high value” nationals that the United States was holding. In addition, because many of the men in Guantanamo were known under several names and spellings, it was not always clear which person was actually being held.²⁹⁷ Finally, even if the United States revealed the names to the foreign governments, it is not certain that the governments transferred the information to the families.²⁹⁸

To the extent the Red Cross revealed the names of people in Guantanamo to their families, disclosure could be construed as official notice. However, the Red Cross had limited access to the detainees, and it is unclear how many men the Red Cross actually met in Guantanamo. The United States may have kept certain detainees hidden from the Red Cross.

296. See, e.g., *Ellul v. Congregation of Christian Bros.*, No. 09 Civ. 10590(PAC), 2011 WL 1085325, at *4 (S.D.N.Y. Mar. 23, 2011); *Litle v. Arab Bank, PLC*, 507 F. Supp. 2d 267, 273 (E.D.N.Y. 2007).

297. See, e.g., *The Guantanamo Docket*, *supra* note 8 (identifying, for example, detainee Yunis-Abdurrahman-Shokuri with several names and spellings).

298. The United States could try to argue that all it needed to do was inform an official “Information Bureau” of the “prisoners of war” it is holding for the statute to begin running. See Third Geneva Convention, *supra* note 87, at art. 122. However, because President Bush declared on February 7, 2002, that the conventions do not apply to Guantanamo and that the men are not prisoners of war but rather “enemy combatants,” this argument would not prevail. See HONIGSBERG, *supra* note 5, at 15.

One may also receive notice by a government official acting in a nongovernmental capacity. In December 2004, Barbara Olshansky, a lawyer for the Center for Constitutional Rights in New York, wrote to the Pentagon asking for the names of all the detainees.²⁹⁹ Navy lawyer Matt Diaz, who was stationed in Guantanamo, saw her request and became concerned that the public still did not have an accurate list of everyone detained.³⁰⁰ In January 2005, he assembled and sent to Olshansky, without authorization, a classified list of the 551 men then held at Guantanamo.³⁰¹ Olshansky, believing that the list was not officially sent, forwarded the list to a local federal court.³⁰² Whether she had read it or not, one could argue that the notice was neither official nor accurate. The United States did not officially acknowledge the names of the men in Guantanamo until it released the first batch of 558 names in April 2006, followed by the release of a second batch of 201 names in May 2006.³⁰³ The names were released in response to an Associated Press Freedom of Information request filed in January 2006 and a subsequent lawsuit filed in March 2006.³⁰⁴

In the international law cases previously discussed, family members who pursued the abductions and were repeatedly met with denials or rejections by the state had stronger claims for torture or CID than family members who were not as forceful in their pursuits.³⁰⁵ Similarly, one could argue that the United States' repeated denial of its knowledge of the victims exacerbated the torture or CID suffered by the inquiring family members, causing the violation to have lasted for more than four years, until the names were officially released.³⁰⁶

3. Refiling Claims

It is not at all apparent whether foreign nationals can refile their claims as ATS actions after their FTCA suits are dismissed. In support of refiling, one might argue that the foreign nationals tried all avenues available yet still have not been given their day in court. Presumably, the ATS was designed to provide a forum for the people who have suffered torture and CID. Consequently, the families could argue that they should be permitted to return to their ATS claims and continue in their litigation for the remaining portion of the ten-year statute of limitations after their FTCA claims are dismissed. However, there is no documentation that anyone has tried to refile, perhaps because case law supports the position that the FTCA is the exclusive remedy against the United States once the

299. Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAG., Oct. 21, 2007, at 78, 78.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Pentagon Discloses Detainees' Names*, *supra* note 9.

304. *Id.*

305. *See supra* Part III.

306. *See, e.g.*, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

United States has substituted itself for the defendant officials and employees.³⁰⁷ Of course, if someone were to refile, the Government may again substitute itself under the Westfall Act and then move for Rule 11 sanctions.³⁰⁸

Plaintiffs can appeal the substitution of an employee by the Attorney General on the grounds that the employee did not act within the scope of employment.³⁰⁹ However, as discussed above,³¹⁰ the standard for scope of employment in these situations is exceptionally broad and, consequently, this appeal is also likely to fail.

Importantly, although filing claims under the ATS, TVPA, and federal question statute (addressed below) may be dismissed and replaced by the FTCA (which would then be dismissed), plaintiffs should file under all the federal statutes to preserve any claims on appeal.

E. Filing Under the Federal Question Statute

The federal question statute (§ 1331) states: “The district courts shall have jurisdiction of all civil cases arising under the Constitution, laws, or treaties of the United States.”³¹¹ The statute gives federal courts jurisdiction not only over federal statutes and treaties but also over international law because international law is incorporated into federal common law.³¹² Thus, an argument could be made that the family members should file under the federal question statute, thereby avoiding the pitfalls associated with filing an ATS claim. Filing a claim under § 1331 requires (1) determining whether § 1331 provides jurisdiction and (2) identifying a cause of action.³¹³

As to the first requirement, because § 1331 will support claims based on federal common law and international law is folded into federal common law, federal courts would have subject matter jurisdiction over claims for violations of international law.³¹⁴ As to the second requirement, *Sosa* suggested that there may be a difference between § 1331 and the ATS regarding courts exercising “their common law powers to recognize a cause of action for some international law violations.”³¹⁵ In fact, the *Sosa* court left “open the possibility” that § 1331 would recognize causes of action for international law violations.³¹⁶ However, federal district courts have not tried to distinguish § 1331 claims from ATS

307. STEPHENS ET AL., *supra* note 212, at 288–89.

308. FED. R. CIV. P. 11(c).

309. *See supra* Part IV.C.1.

310. *See supra* note 241.

311. 28 U.S.C. § 1331 (2006).

312. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980).

313. STEPHENS ET AL., *supra* note 212, at 104.

314. *Id.*

315. *Id.* at 109.

316. *Id.*

claims, and instead have cited *Sosa* to support their rulings that § 1331 “merely confers federal question jurisdiction, rather than creating any kind of cause-of-action for international law violations.”³¹⁷ In contrast, the Second Circuit in *Filartiga* noted that its reasoning might also sustain jurisdiction under the federal question provision.³¹⁸ Nevertheless, the *Filartiga* court decided to rest its decision upon the ATS.³¹⁹ Certainly, family members should consider filing their claims under the federal question statute. A sympathetic court may understand the frustration of family members in having no other viable forum or recourse to provide a remedy for their sufferings resulting from the violations of the universally accepted norms of torture and CID.

F. Derivative Claims

The United States as the party defendant in a lawsuit brought by family members for the disappearance of their loved ones would likely also raise a derivative claims defense. In *Harbury v. Hayden*,³²⁰ a U.S. citizen and widow of a Guatemalan rebel leader brought claims on behalf of herself and as administratrix of her deceased husband’s estate against U.S. agencies and individual defendants.³²¹ She sued under, *inter alia*, the ATS, FTCA, and TVPA for the torture and execution of her husband by Guatemalan forces in contract with the CIA.³²² Although she was in frequent contact with the State Department seeking information on her husband’s whereabouts, she was not informed of her husband’s death until eighteen months after he was executed.³²³ Among her numerous causes of action were claims for emotional distress based on her husband’s detention, torture, and execution.³²⁴ She also added a count for loss of consortium.³²⁵ However, she did not assert a claim that she had suffered torture, CID, or anything else because of his disappearance.³²⁶ The *Harbury* court dismissed her personal claims as derivative of the primary claims.³²⁷ That is, because all her primary claims were dismissed, her “derivative” claims must also be dismissed.³²⁸

However, the claims in the *Harbury* case and the claims made by families here are not necessarily identical or even similar. First, only a handful of the men who disappeared into Guantanamo have filed any claims, and we do not know what claims, if any, other detainees may file.

317. *Harbury v. Hayden*, 444 F. Supp. 2d 19, 38 (D.D.C. 2006).

318. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

319. *Id.*

320. 444 F. Supp. 2d 19 (D.D.C. 2006).

321. *Id.* at 23.

322. *Id.* at 24.

323. *Id.*

324. *Id.*

325. *Id.* at 43.

326. *Id.*

327. *Id.* at 44.

328. *Id.*

Moreover, the families' causes of action are entirely independent of any causes of action that the men might have now or in the future. That is, the claims of violating the universally recognized norms of torture or CID are very different from the American law-based tort claims of personal distress and loss of consortium raised by the wife in *Harbury*.

The analysis in this Part unfortunately demonstrated how the United States—ironically and perhaps surprisingly—violates the spirit of the laws that we, as Americans, uphold: the belief in providing a remedy for grave or egregious human rights violations. Consequently, only one firm option is likely available to the family plaintiffs who want to pursue their claims under the ATS: filing for a declaratory judgment.³²⁹

V. ALTERNATIVE FORUMS FOR THE FAMILIES OF THE DISAPPEARED DETAINEES

A. Filing a Claim with the Inter-American Commission on Human Rights

Recently, two cases were filed against the United States with the Inter-American Commission. One was filed on behalf of “victims and survivors of a widespread and systematic program of forced disappearance, secret detention, and torture designed and implemented by the United States of America.”³³⁰ The other was brought by Khaled El-Masri, a German national and victim of the United States' extraordinary rendition program, where he was detained incommunicado and “inhumanely treated” in a secret CIA prison in Afghanistan for four months.³³¹ Both cases were first filed in U.S. district courts and ultimately dismissed on state secrets and national security grounds after appeals to and denial of certiorari by the Supreme Court.³³² Consequently, the plaintiffs had exhausted their local state remedies and could then progress to the Inter-American Commission.³³³

Accordingly, if the family members lose their claims in federal courts, which is likely, the Inter-American Commission may be the best, if not the only, forum to which they can turn. Although the Commission has no enforcement powers, it can issue a declaratory ruling that the United States has violated provisions in the American Declaration of the Rights and Duties of Man³³⁴ and international norms as recognized by

329. See *supra* Part IV.C.4.

330. Binyam Mohamed et al. Petition, *supra* note 34.

331. Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (Apr. 9, 2008), available at https://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf.

332. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1093 (9th Cir. 2010); El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007).

333. One of the plaintiffs in the Binyam Mohamed case, Ahmed Agiza, was not included in the Inter-American Commission petition.

334. American Declaration of the Rights and Duties of Man art. 1, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (May 2, 1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82, doc. 6 rev. 1,

the Inter-American Commission.³³⁵ A declaratory ruling by an international commission would be a significant victory for the plaintiffs. An Inter-American Commission ruling holding the U.S. Government accountable for the torture and CID of the family members would be a powerful statement by an international oversight body. Such a declaration would also provide benefits to the family members, who will hopefully find some solace in the ruling.³³⁶ The decision may also contribute to building legal authority in favor of family members whose loved ones were disappeared by the United States as well as provide evidence that may be used in subsequent cases.

Money damages for the plaintiffs are neither mandatory nor enforceable in the Inter-American Commission. However, the Commission can recommend reparations. For example, in two recent cases, the Commission recommended reparations from the United States³³⁷ and from Brazil.³³⁸ Of course, if the plaintiffs were seeking money damages, the Commission's recommendation for reparations would not necessarily hold the United States financially accountable for the torture or CID the families suffered because the Inter-American Commission is not empowered to enforce its recommendations.³³⁹ However, a President and Congress could do the right thing and publicly take responsibility for past errors and offer reparations. Additionally, the U.S. Government may want to remove the issues from the global stage and avoid an international decision that could embarrass the nation.³⁴⁰ In that scenario, the Government may offer financial compensation to the plaintiffs in exchange for their settling the lawsuits.

(1992), *available* at <http://www.oas.org/en/iachr/mandate/Basics/2.AMERICAN%20DECLARATION.pdf>.

335. "Both the Commission and the Court have established that despite having been adopted as a declaration and not as a treaty, today the American Declaration constitutes a source of international obligations for the Member States of the OAS." *The American Declaration of the Rights and Duties of Man*, INTER-AM. COMM'N H.R., http://www.cidh.org/basicos/english/Basic1.%20Intro.htm#_ftn4 (last visited Dec. 30, 2012).

336. SARA CULLINAN, REDRESS, TORTURE SURVIVORS' PERCEPTIONS OF REPARATION, PRELIMINARY SURVEY 25–26 (2001).

337. Where the court wrote in its recommendations that the United States should "[o]ffer full reparations to Jessica Lenahan and her next-of-kin considering their perspective and specific needs." *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11, § 215, ¶ 3 (July 21, 2011).

338. Where the court wrote in its recommendations that Brazil "[m]ake reparations to the family of Manoel Leal de Oliveira for the damages suffered[, s]uch reparation should be calculated in keeping with international parameters, and must be in an amount sufficient to compensate the material and moral damages suffered by the victim's family members." *Manoel Leal de Oliveira v. Brazil*, Case 12.308, Inter-Am. Comm'n H.R., Report No. 37/10, § 159, ¶ 4 (Mar. 17, 2010).

339. *See generally* Charter for the Organization of American States art. 1, Apr. 30, 1948, T.I.A.S. No. 2361.

340. Compare where Great Britain paid millions of dollars to twelve Guantanamo detainees who resided in England in order to avoid a possible costly court decision in favor of the former detainees brought against British intelligence officials for torture and rendition. *U.K. Agrees to Settle with Ex-Guantanamo Detainees*, NPR.ORG (Nov. 16, 2010), <http://www.npr.org/2010/11/16/131357467/u-k-agrees-to-settle-with-ex-guantanamo-detainees>.

In addition, international tribunals will not accept cases unless the plaintiffs have exhausted their remedies with the forum state.³⁴¹ This approach assures that the forum state has been provided the opportunity to address the issues before being subject to litigation on the international stage. However, the Commission could waive the requirement when the pursuit of such exhaustion of remedies appears fruitless.³⁴² A plaintiff could certainly argue that U.S. agencies such as the CIA, the DoD, the Department of State, and the NSA will reject claims brought by family members for the torture or CID they suffered when their loved ones were disappeared into Guantanamo. And, given the likelihood that all claims under the ATS and FTCA will be rejected, the families could also argue that they should be permitted to file directly with the Inter-American Commission and not futilely try to exhaust administrative remedies.³⁴³ Nevertheless, the Inter-American Commission would not likely allow these plaintiffs to forego exhausting their remedies against U.S. agencies before bringing their claims to the Inter-American Commission. For policy reasons, the international courts and commissions should provide the local jurisdiction an opportunity to resolve complaints and thus not be subject to international litigation and possible international reprobation.³⁴⁴

The statute of limitations—whether two years under the FTCA or ten years under the ATS—should not be a barrier to pursuing an action in the Inter-American Commission. As long as the plaintiffs file within six months after the federal courts have rejected their claims, they should meet the “timely” requirements of the Commission.³⁴⁵

B. Filing a Claim in a State that Recognizes Universal Civil Jurisdiction

Although the universal jurisdiction approach is a bit of a long shot in current jurisprudence, it should not be overlooked. The theory of universal jurisdiction has its ebbs and flows, and its supporters and detractors

341. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (recognizing the principle that exhaustion of remedies in the domestic legal system may be appropriate before asserting a claim in a foreign forum).

342. Inter-American Court of Human Rights, Rules of Procedure, art. 31, ¶ 2.

343. Petitions must be lodged within six months following notification of exhaustion of remedies. If the plaintiff argues for an exception to the requirement of exhausting remedies, the petition must be filed “within a reasonable period of time,” taking into consideration the date on which the alleged violation occurred and the circumstances of each case. *Id.*

344. The Inter-American Commission and other international bodies have waived the requirement of exhausting remedies in death penalty cases that are brought before it by United States litigants. However, the situation described in this Article is unlike the situation in death penalty cases, where it is well understood that the United States will continue to maintain and enforce the death penalty for the foreseeable future. The response of agencies and of federal courts to claims brought under the ATS, FTCA, TVPA, and § 1331 is not nearly as certain in outcome as is the outcome in challenges to death penalty cases brought in the United States.

345. *Id.*

tors.³⁴⁶ As the law evolves, legal scholars and judges will recognize the importance of moving the law forward in this direction.

Justice Breyer's concurrence in *Sosa* linked ATS litigation—which allows the United States to provide a forum for a foreign national to sue another foreign national for a tort committed in a foreign nation—with the evolving concept of universal criminal jurisdiction.³⁴⁷ He recognized that universal civil jurisdiction and civil tort recovery may accompany universal criminal jurisdiction.³⁴⁸ In essence, Justice Breyer suggested that if norms are universal for purposes of universal criminal jurisdiction, as are torture and CID, Why should they not also support a universal civil jurisdiction private cause of action? To Justice Breyer, “universal tort civil jurisdiction would be no more threatening” than universal criminal jurisdiction to the principles of international comity.³⁴⁹ “That is,” he continued, “because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. . . . Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.”³⁵⁰

Universal criminal jurisdiction is much more common and prevalent in the international community than universal civil jurisdiction.³⁵¹ However, requiring a defendant to pay money damages seems less onerous and not any more in violation of due process concerns than criminally prosecuting a defendant. Consequently, if universal criminal jurisdiction is recognized among nations, certainly nations should consider permitting civil tort actions based on universal civil jurisdiction as well.

Usually, states require domestic enabling legislation before they exercise universal criminal jurisdiction.³⁵² Presumably, enabling legislation would also be adopted by states that wish to exercise universal civil jurisdiction. However, states could arguably act even without the enabling legislation when the issues concern universal norms.³⁵³

The families could also argue that because the ATS has been recognized by the international community as an exercise of universal civil

346. See Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 144 (2006).

347. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

348. *Id.*

349. *Id.*

350. *Id.* at 762–63.

351. INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 15 (2009).

352. See BETH VAN SCHAAK & RONALD C. SYLE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 135 (2d ed. 2010) (noting that both Belgium and Spain implemented a statute to allow for universal jurisdiction).

353. Donovan & Roberts, *supra* note 346, at 144.

jurisdiction,³⁵⁴ the ATS should be made available to the plaintiffs when other avenues addressing violations of universal norms are closed in the U.S. legal system. And if U.S. courts rule that the ATS and other related federal statutes such as the FTCA and the TVPA are ultimately closed to the families of men who were disappeared into Guantanamo, other nations should have the right and perhaps even the obligation to provide a forum through universal civil jurisdiction for the family members who are victims of torture and CID.

Amicus curiae in *Sosa*, representing the European Commission before the Supreme Court, argue that one could read universal civil jurisdiction into article 14 of CAT.³⁵⁵ That article provides that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”³⁵⁶ The authors of the brief further note that although article 14

does not specify whether a state must provide an enforceable right of compensation for any victim within its territory regardless of where the torture took place or the nationality of the victim or defendant[,] . . . [s]uch a reading is consistent with the text, as it would promote the purpose of the Convention to bring torturers to justice.³⁵⁷

When plaintiffs filing ATS and FTCA claims are impeded by jurisdictional, immunity, or procedural issues such as exhaustion of remedies or statutes of limitations, they should have another forum that will actually hear the substance of their powerful cases.³⁵⁸ That is, “courts must find a way to ensure that an effective remedy is available under universal jurisdiction while respecting the right of states with traditional connections to exercise jurisdiction where they are willing and able to provide an accessible forum and effective remedy.”³⁵⁹ Consequently, if the United States is not willing and able to provide an accessible forum and effective remedy for the families, other nations must act through universal civil jurisdiction.

CONCLUSION

The United States has proven itself a formidable foe. It has eluded any accountability for its actions to the parents, wives, and children of detainees who were disappeared into Guantanamo. The United States, as

354. *Id.* at 146. However, this may change given the Supreme Court’s order to review the issue in fall 2012 Term. See Borkoski, *supra* note 172.

355. Brief of Amicus Curiae the European Comm’n in Support of Neither Party at 18, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036, at *18.

356. Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 14(1), Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

357. Donovan & Roberts, *supra* note 346, at 148.

358. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass 1995).

359. Donovan & Roberts, *supra* note 346, at 159.

of now, cannot be held to pay money damages in any international tribunal.³⁶⁰ And the Government, as sovereign, has maneuvered its way through the American judicial system equally successfully. Given the current state of the law, the United States may likely avoid being held accountable to the family members for claims for money damages in any federal court, whether under the ATS, FTCA, TVPA, or § 1331.

However, should the families successfully pursue claims for declaratory relief in federal court or in the Inter-American Commission, there will be some accountability at the end of the day. These decisions may not be monetary, but they will be noticed. Perhaps, for some of the victims, to have an international oversight body officially recognize and determine that the families were injured and wronged when their loved ones were disappeared will provide them with some peace and justice. At least they can perhaps feel that their voices have been heard, and they have not been forgotten.

360. The Inter-American Commission can recommend money damages or reparations but has no enforcement powers. *See supra* Part V.A.