

COMMENT

Time Is Not on Your Side: Establishing a Consistent Statute of Limitations for the Alien Tort Claims Act

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I. INTRODUCTION

In October 1942, Nazi troops abducted seventeen-year old Elsa Iwanowa, from Rostov, Russia, and transported her to Germany with approximately 2,000 other adolescents.¹ Ford Werke, the German subsidiary of Ford Motor Corporation (Ford), purchased Iwanowa and many of the others as slave laborers for their Cologne, Germany truck manufacturing plant.² There, she was crammed with the others into a locked wooden hut, without heat, bedding, running water, or sewage facilities.³ Ford Werke manufactured approximately sixty percent of the three-ton tracked vehicles the German army used during World War II.⁴

Slave labor was an essential part of the German war effort, with an estimated seven million men, women, and children forced to work

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1. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 433 (D.N.J. 1999).
2. *Id.*
3. *Id.* at 434.
4. *Id.* at 432.

under unbearable conditions for such corporations as BMW,⁵ Daimler-Benz,⁶ General Motors' Opel Division,⁷ and Ford Werke.⁸ The Nazis took their slave laborers from the captive populations, concentration camp inmates, and prisoners of war.⁹ From 1942 to 1945, Ford Werke overseers forced Iwanowa and the other slave laborers to perform heavy labor at the plant without pay, building motor blocks for the German military trucks.¹⁰ At times, the overseers beat the laborers with rubber truncheons if they failed to meet production quotas.¹¹

In 1998, fifty-three years after the War's end, Iwanowa became the first plaintiff in a class action suit filed against Ford and Ford Werke, accusing them of complicity with the Nazi government and of willing participation in the Reich's forced labor program.¹² The suit named Ford because it owned a majority of Ford Werke's outstanding shares during World War II.¹³ Iwanowa sought compensation for the reasonable value of her services, restitution, and damages for the pain and suffering caused by the inhuman working conditions.¹⁴ She partially based her claim on the Alien Tort Claims Act (ATCA),¹⁵ asserting that the law granted the court subject matter jurisdiction

5. MICHAEL BERENBAUM, *THE WORLD MUST KNOW: THE HISTORY OF THE HOLOCAUST AS TOLD IN THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM* 130-31 (1993).

6. *Id.*

7. REINHOLD BILLSTEIN ET AL., *WORKING FOR THE ENEMY: FORD, GENERAL MOTORS, AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR* 73 (2000).

8. *Id.* at 90.

9. *Iwanowa*, 67 F. Supp. 2d at 432.

10. *Id.* at 434

11. *Id.*

12. BILLSTEIN ET AL., *supra* note 7, at 239.

13. *Iwanowa*, 67 F. Supp. 2d at 433.

14. *Id.* at 434.

15. 28 U.S.C. § 1350 (2000). The full text of the ATCA states: "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." The "law of nations" is usually interpreted to include acts such as genocide; slavery; murder and summary executions; the "disappearance" of individuals; torture or other similar cruel, inhuman, or degrading treatment; prolonged arbitrary detention; widespread racial discrimination; or gross violation of internationally recognized human rights. See generally Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute* (28 U.S.C.S. § 1350), *Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, §§ 13-31 (2002) for further discussion of acts that may constitute a basis for a suit under "the law of nations." See generally *id.* §§ 32-37 for discussion of treaties that may provide a basis for suit under "treaty of the United States."

over her tort claims under customary international law, thereby allowing her, as an alien, to sue a U.S. corporation in a U.S. court.¹⁶

The first U.S. Congress originally passed the ATCA as part of the Judiciary Act of 1789.¹⁷ Congress' intent was to provide a federal forum for foreign plaintiffs to recover damages for torts that violated international law or a U.S. treaty.¹⁸ The founders desired that the foreign affairs remain within the federal government's jurisdiction,¹⁹ and the newly created federal courts, rather than state courts, retained original jurisdiction over matters relating to foreign affairs.²⁰ The impetus for passage of the ATCA arose in the late 1700's, when several incidents involving torts against foreign dignitaries occurred while they were conducting their official business on U.S. soil.²¹ The Continental Congress found it could not exercise jurisdiction over the tortfeasors in those cases.²² Based on adverse foreign reaction to the earlier incidents, the Continental Congress recognized that uncompensated torts against foreign dignitaries might deeply offend foreign nations, possibly leading to war.²³ In planning the new federal government, John Jay was concerned about the consequences of leaving the foreign affairs of the new United States to a "variety of independent courts and judges appointed by different and independent governments."²⁴

To remedy this serious situation, in 1789 the U.S. Congress passed the ATCA to allow aliens to bring tort claims based on treaties and international law in the newly created federal courts without regard to the amount in controversy.²⁵ For nearly 200 years after its

16. *Iwanowa*, 67 F. Supp. 2d at 439. "The ATCA grants district courts subject matter jurisdiction to entertain 'suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.'" *Id.*

17. The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2000)).

18. *Id.*

19. William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986), reprinted in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 119, 141 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

20. *Id.* at 142-43.

21. *Id.* at 139-41.

22. *Id.*

23. 21 J. CONT'L CONG. 1136, available at <http://memory.loc.gov/ammem/amlaw/lwjc.html> (last visited July 22, 2003) ("That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries recommitting by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.").

24. THE FEDERALIST NO. 3 (John Jay) (Emory University School of Law 1996), available at <http://www.law.emory.edu/FEDERAL/federalist/feder3.html> (last visited March 19, 2003).

25. Casto, *supra* note 19, at 143-44.

passage, the ATCA was rarely used.²⁶ It was not until 1980, in *Filartiga v. Peña-Irala*,²⁷ that the ATCA was successfully used to establish that the law “opens federal courts to civil suits by aliens for torts committed in violation of customary international law, even when the case involves acts perpetrated in another country by a non-U.S. citizen.”²⁸ In this landmark case, Paraguayan citizens successfully used the ATCA to recover damages in federal court from a former Paraguayan official for acts of official torture that had occurred in Paraguay.²⁹

Since *Filartiga*, aliens have repeatedly used the ATCA to recover damages for internationally recognized torts such as official torture, prolonged arbitrary detention, and summary execution.³⁰ Benefits of such uses of the ATCA accrue not only to the foreign citizens gaining a forum for their grievances, but also to the United States, which can visibly demonstrate its goal of furthering human rights worldwide.³¹

[T]he United States itself has a real interest in seeing to it that nationals of other countries are not the victims of terrorism or genocide perpetrated by their own governments or by other entities in foreign lands The interest that a country has in its nationals is expanded, under the law of human rights, to include an interest in non-nationals, especially where basic human rights are threatened.³²

Returning to the *Iwanowa* case, that court agreed with *Iwanowa*'s allegations that Ford had engaged in slave trading under The Nuremberg Tribunals,³³ and that U.S. courts had repeatedly held that

26. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 n.17 (D. Mass 1995).

27. 630 F.2d 876 (2d Cir. 1980). The *Filartigas* brought this action in the Eastern District of New York against Americo Norberto Peña-Irala (Peña), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. In 1976, Joelito was kidnapped and tortured to death by Peña, Inspector General of Police in Asuncion, Paraguay. The plaintiffs claim that these acts were in retaliation for the political activities of Dr. Filartiga, who had opposed the government of Paraguayan President Alfredo Stroessner. When Dr. Filartiga attempted to institute a criminal action in Paraguay against Peña and the police for the murder of his son, Dr. Filartiga's attorney was arrested, threatened with death, and has since allegedly been disbarred without just cause. *Id.* at 878.

28. Richard Herz, *Litigating Environmental Abuses Under ATCA: A Practical Assessment*, 40 VA. J. INT'L L. 545, 549 (2000).

29. See *id.* at 552.

30. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987).

31. See Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985), reprinted in *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY*, *supra* note 19, at 106.

32. *Id.*

33. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999) (“The Nuremberg Tribunals held that the enslavement and deportation of civilian populations during World War II constituted a crime against humanity in violation of customary international law.”).

“deportation to slave labor” violates the law of nations.³⁴ Nevertheless, the court dismissed her claims against Ford, finding that the applicable limitations period had run.³⁵ Although the tort occurred fifty-three years before Iwanowa brought the action, the court’s ruling stood even though the ATCA has no express or implied statute of limitations.³⁶

The explanation for this seeming anomaly lies in the well-established doctrine that when a federal statute contains no limitations period of its own, federal courts must look to analogous state or federal law in order to borrow a statute of limitations.³⁷ At times, courts apply the limitations periods of analogous federal statutes, and at other times they apply the limitations period of the law of the state in which the court is located.³⁸ If the tort occurred outside the United States, the court may even examine the limitations period of the foreign country where the act occurred.³⁹ District courts, forced to choose from a variety of state, federal, and foreign limitations periods, therefore face the very type of situation that the ATCA was originally designed to prevent: a variety of independent courts and judges, appointed by different governments, inconsistently applying the law.⁴⁰

In 1991, the Congress passed the Torture Victim Protection Act (TVPA),⁴¹ which provides a fixed ten-year statute of limitations.⁴² Many courts are now analogizing ATCA claims to the TVPA and

34. *Id.*

35. *Id.* at 466–68.

36. See *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d, 1160, 1179 (N.D. Cal. 2001) [hereinafter *Japanese Forced Labor*]. There is no language in the ATCA whatsoever regarding the period in which an action can be brought. See *supra* note 15 for the full text of the ATCA.

37. *Nat’l Coalition Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 359 (C.D. Cal. 1997) [hereinafter *Unocal II*].

38. See *id.*; *Iwanowa*, 67 F. Supp. 2d at 462.

39. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548–49 (N.D. Cal. 1987); *Xuncax v. Gramajo*, 886 F. Supp. 162, 192 (D. Mass 1995).

40. *Xuncax*, 886 F. Supp. at 182 n.23.

41. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2000)).

42. The TVPA was passed to implement the Torture Convention and to supplement the ATCA. The TVPA differs in four fundamental respects from the ATCA. First, while the TVPA applies only to cases involving torture and extrajudicial killing, the ATCA is much broader in scope, including “any tort” in violation of the law of nations. Second, any individual can sue under the TVPA, but only an alien can sue under ATCA. Third, the TVPA has an express state action requirement, where the defendant must be acting under the actual or apparent authority or under color of a foreign nation’s law; the ATCA has no such limitation. Finally, the TVPA has an express ten-year statute of limitations, while the ATCA has no express limitations period. See Harold Hongju Koh, *Congressional Protection of International Human Rights and the United States Courts*, in *Judicial Conference, Second Judicial Circuit of the United States*, Selected Document, 170 F.R.D. 201, 288–89 (June 13-16, 1996).

consistently borrowing its ten-year limitations period.⁴³ Other courts that have considered the limitations period applicable to ATCA claims since the passage of the TVPA have left unresolved the question of whether the TVPA provides the closest federal analogy.⁴⁴

This Comment argues that inconsistent application of limitations periods to ATCA claims does not provide sufficient and certain notice to potential parties to allow them to bring a timely claim, thereby potentially denying them an opportunity to receive a fair hearing in federal courts. While many courts have used the TVPA to apply a ten-year limitations period to ATCA claims, this practice is by no means universal. Therefore, absent a U.S. Supreme Court ruling to provide consistent guidance on the applicable ATCA limitations period, Congress should amend the statute to provide a specific ten-year limitations period for most torts. Because both international and U.S. laws provide that murder committed as part of the crime of genocide has no statute of limitations,⁴⁵ ATCA claims arising from genocidal acts should also be free of any limitations period. In addition, the amended ATCA should expressly provide that equitable tolling principles and the discovery rule apply, so that there is no leeway for courts to interpret the law to limit application of those doctrines.

Following these introductory remarks, Part II provides general background on statute of limitations jurisprudence and related concepts, such as borrowing statutes, the doctrines of repose and laches, equitable tolling, and the discovery rule. Part II also examines the application of limitations law in federal courts. Part III reviews the history and progression of application of limitations law to the ATCA, focusing on the inconsistency of the limitations periods in representative ATCA claims. Part IV examines arguments for and against amending the ATCA to include a fixed limitations period, and evaluates several proposed alternatives for Congress to consider when amending the ATCA. Part IV also presents the key elements that the amended ATCA should contain. Part V presents conclusions about the appropriate limitations period for Congress to adopt.

II. BACKGROUND ON LIMITATIONS LAW

Before discussing how the courts apply the statute of limitations to ATCA cases, it is important to review the rationale for having

43. See *Unocal II*, 176 F.R.D. at 359.

44. *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2001).

45. See, e.g., Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045, (e) (codified at 18 U.S.C. § 1091(e) (2000)).

limitations periods in the first place. Because there are several types of limitations periods, this Part provides basic background information to aid the reader in understanding the sometimes-difficult contortions that the law takes in applying a limitations period to ATCA claims. Section A generally explains statute of limitations law, including the related concepts of statutes of repose and the doctrine of laches. Running of the statute of limitations is usually presented as an affirmative defense to tort claims. Therefore, Section B examines the plaintiff's typical responses to defense claims that the limitations period has run, including waiver, equitable principles of tolling and estoppel, and the discovery rule. Because claimants can only file ATCA claims in federal court, Section C reviews how federal courts typically handle statute of limitations issues when a statute contains no express limitations period.

A. *Statutes of Limitations and Comparable Doctrines*

1. Statutes of Limitations

Running of the statute of limitations is an important defense used in tort litigation to bar judicial action by expiration of an allotted time within which an action must be brought from accrual of the cause of action.⁴⁶ By successfully asserting the running of a statute of limitations, defendants are relieved of the obligation to defend against a claim for which evidence has been lost, memories have faded, and important witnesses are no longer available.⁴⁷ Statutes of limitations protect defendants "against claims brought after a period of time which was sufficient for a person of ordinary diligence to have brought an action."⁴⁸ They provide repose to defendants and protect them against "plaintiffs who may assert fraudulent claims at a time when the true facts can no longer be proved."⁴⁹ Statutes of limitations also preserve scarce judicial resources by allowing the courts to dismiss invalid claims, insuring that "stale claims" will not have to be heard.⁵⁰

46. See 1 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 1.1, at 4, 8 (1991); 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 5:25, at 868 (1983) ("It would be difficult, indeed, to over-emphasize the practical significance and importance of the statute of limitations in tort litigation.")

47. 1 CORMAN, *supra* note 46, § 1.1, at 11–12.

48. 1 SPEISER ET AL., *supra* note 46, § 5:25, at 869–70.

49. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 591 (1996).

50. H.R. REP. NO. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88.

The requirement of a limitations period for civil suits induces plaintiffs not to neglect valid claims and to provide notice to the defendant.⁵¹ The courts presume that if plaintiffs do not attempt to seek relief after a reasonable period, there is no valid claim.⁵² In summary, statutes of limitations impose some finality on the litigation⁵³ and “promote justice by preventing surprises through the revival of claims that have been allowed to slumber.”⁵⁴

All statutes of limitations have one aspect in common: the time for filing suit does not commence until the plaintiff's cause of action accrues, that is, “when all requisite elements of a cause of action have occurred.”⁵⁵ The typical statutory period for unintentional tort claims in most states is between two and four years from the date of injury.⁵⁶ The operation of statutes of limitations for criminal prosecution does not differ fundamentally from civil limitations statutes.⁵⁷ Under certain circumstances, courts are statutorily required to look beyond the borders of their jurisdiction in order to “borrow” foreign limitations periods.

2. Borrowing Statutes

A “borrowing statute” provides that the limitations period from another jurisdiction be applied to the case at hand in the forum state. Such borrowing statutes may prevent bringing an otherwise valid suit in the forum state if the same suit would have been barred in the state where the cause of action arose (the locus).⁵⁸ For example, if a tort occurs in the locus, and suit is timely brought in the forum, the forum court may examine the applicable statute of limitations in the state where the cause of action arose (*lex loci*).⁵⁹ If the limitations period is shorter in the locus than in the forum, the forum may apply the shorter period to bar the claim.⁶⁰ Some borrowing statutes present an even harsher reverse effect, such as where a claim that is not time barred by the *lex loci*, but time barred by the forum, may still be time

51. 1 CORMAN, *supra* note 46, § 1.1, at 13.

52. 1 *id.*

53. See JEAN M. EGGEN, TOXIC TORTS IN A NUTSHELL 168 (1995).

54. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944).

55. Frank E. Kulbaski III, *Statutes of Repose and the Post-Sale Duty to Warn: Time for a New Interpretation*, 32 CONN. L. REV. 1027, 1029 (2000).

56. See EGGEN, *supra* note 53, at 169.

57. See 1 CORMAN, *supra* note 46, § 1.6, at 114–15.

58. ADOLPH J. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS § 2.01, at 34 (1987).

59. *Id.* at 35.

60. *Id.*

barred.⁶¹ Other borrowing statutes require that the court investigate the statutes of limitations of both the forum and locus, with the result that a claim is time barred if either state's limitations period has expired.⁶² A statutory exception is often implemented to mitigate this very harsh rule, providing that a cause of action not be barred in the forum if the cause of action is in favor of a citizen or resident of the forum.⁶³

Where a forum does not have a formal borrowing statute, the forum may still borrow from the foreign state when the forum applies the foreign state's law under conflict of law principles.⁶⁴ The forum may decide to bar a foreign cause of action based on its evaluation of three factors: first, whether the forum's statute of limitations bars the "right" to sue as opposed to barring the "remedy"; second, whether the forum holds that the statute of limitations is a procedural as opposed to a substantive rule; and third, on the effects of applicable prior judicial decisions.⁶⁵

3. Statutes of Repose and Doctrine of Laches

Statutes of limitations are sometimes confused with two related doctrines that also act to time bar a suit: statutes of repose and laches. Statutes of repose set a fixed period within which a plaintiff must file suit.⁶⁶ Whereas statutes of limitations usually begin to run from the time a cause of action accrues, statutes of repose may commence and run before the cause of action accrues.⁶⁷ Expiration of the repose period creates an absolute bar to untimely litigation, subject only to legislative exceptions.⁶⁸ Statutes of repose affect the availability of an underlying right to bring an action and extinguish that right after a specified time measured from a specific event, even if this event occurs before the cause of action accrues.⁶⁹

Statutes of repose generally supplement or override the discovery rule.⁷⁰ Repose statutes may begin to run from the time of the

61. *Id.*

62. *Id.*

63. *Id.* § 2.06, at 39–40.

64. *Id.* § 2.03, at 37.

65. *Id.*

66. Kulbaski, *supra* note 55, at 1031.

67. LEVY, *supra* note 58, § 3.01, at 76.

68. *Id.*

69. *See id.*

70. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 167 (5th ed. 1984). Under the discovery rule, the limitations period does not begin until the plaintiff knew or should have known enough facts to enable initiation of a suit. *Id.*

defendant's act.⁷¹ For example, when a product is released to market, the statute of repose may begin to run on the day the product is sold.⁷² If a user of the product is subsequently harmed because of latent product defects, the victim's cause of action may be barred if the repose period has expired before a claim is discovered or even exists.⁷³ This may be so even though the statute of limitations for a particular cause of action has barely begun to run.⁷⁴

Laches is an equitable doctrine that may also act to time bar a suit. Laches serves as an affirmative defense that denies relief to a plaintiff who unreasonably or inexcusably delays asserting a claim, causing prejudice to the defendant.⁷⁵ Such a situation might occur even within the statute of limitations period, as when a plaintiff holds off filing an otherwise valid claim until he learns that the defendant has destroyed her own exculpatory evidence.

B. Assertions Against Running of the Limitations Period

Affirmative assertions against claims that the limitations period has run include waiver, equitable estoppel, equitable tolling, and the discovery rule. This Section describes the operation of each of these concepts in more detail.

1. Waiver

Waiver occurs where the defendant has abandoned, renounced, repudiated, or surrendered a privilege or right to use the affirmative defense of running of the limitations period by failure to plead, express agreement not to assert, or conduct that estops the defendant from interposing it.⁷⁶ For example, Swiss banks faced with an ATCA lawsuit by slave labor victims of World War II and fearing discovery relating to the banks' concealment of various accounts, expressly waived the statute of limitations as a defense in order to avoid discovery that might have disclosed damaging information.⁷⁷

2. Equitable Estoppel and Equitable Tolling

The doctrines of equitable estoppel and equitable tolling are often confused. Equitable estoppel precludes a party from taking

71. *Id.* at 168.

72. *Id.*

73. *Id.*

74. LEVY, *supra* note 58, § 6.22, at 241.

75. 1 CORMAN, *supra* note 46, § 3.3.2, at 183.

76. 1 *id.* at 175–76.

77. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 806 n.29 (2002).

advantage of a predicament into which the party's own conduct has placed his adversary.⁷⁸ For example, a plaintiff may claim equitable estoppel when she reasonably relied on defendant's fraudulent concealment of a cause of action.⁷⁹ On the other hand, equitable tolling acts to stop the statute of limitations from running after the accrual date has already passed.⁸⁰

Equitable estoppel and equitable tolling are sometimes used interchangeably by the courts.⁸¹ The two doctrines can be distinguished by careful examination of the facts of an ATCA case, *Cabello v. Fernández*.⁸² Following the 1973 coup d'état against Chilean President Salvador Allende, a "caravan of death" comprised of military officers engaged in widespread extrajudicial killing, torture, and abuse of individuals.⁸³ The squad selected thirteen prisoners, including Aldo Cabello, for execution.⁸⁴ They murdered Cabello by use of a *corvo*, a "short, curved knife . . . designed to inflict wounds that . . . cause a slow and painful death."⁸⁵ The Chilean military deliberately concealed his burial location from plaintiffs, and caused confusion by the issuance of three different death certificates between 1973 and 1991.⁸⁶

When an ATCA complaint was filed by Cabello's survivors in 1990 against one of the officers, the defendant argued the limitations period had already run because equitable tolling of the limitations period applied only for a short period after the plaintiffs had obtained, or by due diligence could have obtained, the information necessary to file the lawsuit.⁸⁷ The court disagreed, citing Judge Posner, who had clarified that equitable tolling applies where a plaintiff, through no fault of a defendant, has been unable to obtain information necessary to decide whether his injury is due to the defendant's wrongdoing.⁸⁸ Equitable estoppel, on the other hand, applies where a defendant conceals evidence or takes other active steps to prevent the plaintiff from suing in time (i.e., the defendant's act estops the accrual of the

78. KEETON ET AL., *supra* note 70, § 105, at 733.

79. LEVY, *supra* note 58, § 6.38, at 254.

80. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 467 (D.N.J. 1999).

81. *Cabello v. Fernández*, 205 F. Supp. 2d 1325, 1330 n.4 (S.D. Fla. 2002).

82. 205 F. Supp. 2d 1325 (S.D. Fla. 2002).

83. *Id.* at 1326–27.

84. *Id.*

85. *Id.*

86. *Id.* at 1330.

87. *Id.*

88. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cited in Cabello*, 205 F. Supp. 2d at 1330–31.

limitations period altogether).⁸⁹ In *Cabello*, the facts supported application of equitable estoppel, as the Chilean government's concealment of both the decedent's burial location and the actual cause of death prevented plaintiffs from bringing their wrongful death action until 1990.⁹⁰ Rather than tolling the limitations period from the time of the tort itself, as the defendant requested, the court deemed 1990 to be the actual date of accrual of the claim and therefore the start of the limitations period.⁹¹

3. The Discovery Rule

The discovery rule is another doctrine that affects the operation of a limitations period. Whereas the limitations period for a tort generally accrues on the date that the defendant commits the tortious act, as a practical matter a claim cannot fairly accrue if the plaintiff is not yet aware that an injury even exists.⁹² The discovery rule operates to hold off the start of the limitations period until the date the plaintiff knew or should have known certain facts that would enable him to file suit.⁹³

For example, New York State's discovery rule provides that the three-year personal injury limitations period begins to run at the time of discovery of the injury or when the injury should have been discovered through the exercise of reasonable diligence.⁹⁴ Ultimately, if the plaintiff has not discovered the cause of an injury within five years after discovering that the injury exists, the claim will be time barred.⁹⁵ As another example, the discovery rule applies in all state and federal cases based on property damage or personal injury resulting from hazardous substance contamination.⁹⁶

In ATCA cases of "disappearances,"⁹⁷ the survivors may not know with certainty that the victim has even died, so it is reasonable

89. *Cabello*, 205 F. Supp. 2d at 1330-31, 1330 n.4.

90. *Id.* at 1331.

91. *Id.*

92. MacAyeal, *supra* note 49, at 599.

93. LEVY, *supra* note 58, § 5.06, at 186.

94. N.Y. CIV. PRAC. L. & R. 214-c(2).

95. *Id.* 214-c(4).

96. MacAyeal, *supra* note 49, at 605.

97. "Disappearance" is a term that was initially used to describe the uncertain fate of those who were tortured and killed at Chilean interrogation centers:

[T]he vast majority of the 912 reported cases of disappearance in Chile occurred between 1973 and 1976 under the military government and concerned political opponents of the military dictatorship, from different social strata, most of them activists in the Chilean leftist parties. Those responsible for the disappearances were members of the army, air force, the carabineers and persons acting with the acquiescence of the Chilean authorities.

for the court not to allow the start of the limitations period until it is discovered that a death has in fact occurred. In some wrongful death claims, where the death occurred in secret, the actual tortfeasor's identity may not be known with enough certainty to file suit. In those situations, the discovery rule operates to commence the running of the limitations period on the day when the plaintiff becomes aware, or should have become aware, of both the fact of the victim's death and the identity of the defendant.⁹⁸

C. Statutes of Limitations in Federal Courts

The general rule regarding statutes of limitations in federal diversity of citizenship cases is that the court applies the statutory period determined by the state law where the claim is filed.⁹⁹ While a civil action begins on the day it is filed,¹⁰⁰ expiration of the statute of limitations is an affirmative defense that relies on factual issues not raised in the complaint.¹⁰¹ Federal courts may raise a statute of limitations defense *sua sponte* at the threshold of a suit when dismissal would not unfairly prejudice either party.¹⁰² The application of a statute of limitations is a question of law for the court to decide, not the jury.¹⁰³

The U.S. Supreme Court has held that when adjudicating statute of limitations problems, federal courts should generally apply the state law where the district court is located, unless federal law provides a closer analogy and better serves federal interests.¹⁰⁴

[W]e decline to follow a state limitations period only when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake

Working Group on Enforced or Involuntary Disappearances, U.N. Commission on Human Rights, *Chile, Thematic Reports, Mechanisms of the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/43, available at <http://www.hri.ca/fortherecord1998/vol14/chiletr.htm> (last visited July 22, 2003). "The disappeared" has now taken on the general meaning of "people who have been killed by a government or army, usually for political reasons, and whose bodies have not been found." Cambridge Advanced Learners Dictionary (Cambridge University Press 2003), available at <http://dictionary.cambridge.org/define.asp?key=22042&dict=CALD> (last visited Sept. 1, 2003).

98. See LEVY, *supra* note 58, § 8.12, at 333–34.

99. 1 SPEISER ET AL., *supra* note 46, § 5:25, at 871.

100. FED. R. CIV. P. 3. "A civil action is commenced by filing a complaint with the court." *Id.*

101. FED. R. CIV. P. 8(c). "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . ." *Id.*

102. Piño v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

103. Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996).

104. North Star Steel Co. v. Thomas, 515 U.S. 29, 35 (1995).

and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.¹⁰⁵

In general, if a federal statute provides a cause of action without specifying a limitations period, federal courts will first look to borrow the limitations period of an analogous statute from the state where the court is located.¹⁰⁶ If a cause of action arises in a foreign country, and by the laws of that country the action cannot be maintained because of lapse of time, then an action cannot be maintained against a defendant in the forum state.¹⁰⁷ However, in an exception to that rule, the cause of action will not be time barred if it is in favor of the forum state's citizen or resident.¹⁰⁸

If a federal civil rights statute does not provide a limitations period, 42 U.S.C. § 1988 directs the courts to borrow one from the most analogous state statute.¹⁰⁹ The state's limitations period, however, must not "frustrate or interfere with the implementation of national policies . . . or be at odds with the purpose or operation of federal substantive law."¹¹⁰ In order to determine whether to apply a federal or state limitations period, courts must examine the closest applicable and analogous statutes under both federal and state law.¹¹¹ The difficulty in determining which state or federal limitations period is most analogous can lead to problems for both courts and parties.¹¹² One commentator has asserted justly deserved criticism of the borrowing doctrines, claiming that "borrowing has led to confusion,

105. *Id.* (citations and internal quotation marks omitted).

106. *See, e.g.,* *Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985) (state limitations period for personal injury claims applicable to 42 U.S.C. § 1983 claims).

107. LEVY, *supra* note 58, § 2.05, at 38.

108. *Id.* § 2.06, at 39.

109. *Manliguez v. Joseph*, No. 01-CV-7574, 2002 WL 1913936, at *5 (E.D.N.Y. Aug. 20, 2002). 42 U.S.C. § 1988(a) provides as follows:

The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause

110. *North Star Steel*, 515 U.S. at 34.

111. *Forti*, 672 F. Supp. at 1547 ("[W]here a rule from elsewhere in federal law provides a closer analogy than available state statutes . . . a federal limitations period may better bridge the gap.").

112. Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454, 455 (1993).

lack of uniformity, inequitable administration of federal rights, unfair surprise to litigants, and unnecessary waste of judicial time and resources."¹¹³

There have been recent suggestions to apply the ATCA to torts resulting from foreign environmental damage caused by construction and natural resource extraction projects.¹¹⁴ An examination of current federal environmental statutes reveals that the Clean Air Act,¹¹⁵ the Federal Water Pollution Control Act (Clean Water Act),¹¹⁶ the Resource Conservation and Recovery Act (RCRA),¹¹⁷ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹⁸ lack statutes of limitations for the express rights of action for civil penalties.¹¹⁹ Many courts have found that citizen suits brought under these statutes are governed by a general five-year statute of limitations.¹²⁰

There are some circumstances in federal law under which no limitations period may be asserted. When hearing a claim bound neither by a specific statute of limitations nor by any generally applicable statute of limitations, some courts have held that claims brought by the United States are not time barred at all.¹²¹ In addition, there are no statutes of limitations for federal criminal capital offenses or for fugitives from justice.¹²² Similarly, there is no limitations period in prosecutions for murder committed in conjunction with the crime of genocide.¹²³ Because no statute of limitations exists for genocidal murder, plaintiffs may be able to litigate civil tort claims based on the

113. *Id.*

114. See generally Richard Herz, *Litigating Environmental Abuses Under ATCA: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

115. 42 U.S.C. §§ 7401–7671 (1995).

116. 33 U.S.C. §§ 1251–1387 (2001).

117. 42 U.S.C. §§ 6901–6992 (1995).

118. *Id.* §§ 9601–9675.

119. MacAyeal, *supra* note 49, at 593.

120. *Id.* at 593 n.25.

121. *Id.* at 594 n.27.

122. 1 CORMAN, *supra* note 46, § 1.6, at 117–18.

123. Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091 (2000)), states in pertinent part:

(a) Basic Offense.—Whoever, in time of peace or in time of war . . . and with the specific intent to destroy, in whole or in substantial part a national, ethnic, racial, or religious group as such (1) kills members of that group . . . shall be punished . . .

(e) Non-Applicability of Certain Limitations.— . . . [I]n the case of an offense under subsection (a)(1), an indictment may be found, or an information instituted, at any time without limitation.

crime of genocide even if the acts occurred so long ago that other claims are no longer viable.¹²⁴

Under federal law, equitable tolling is available where the defendant's wrongful conduct prevents the plaintiff from asserting his or her claim, or where extraordinary circumstances outside the plaintiff's control make it impossible to assert the claim in a timely manner.¹²⁵ The U.S. Supreme Court in *Rotella v. Wood*¹²⁶ discussed the application of equitable tolling to federal statutes when Justice Souter noted, "[W]e do not unsettle the understanding that Federal statutes of limitations are generally subject to equitable principles of tolling"¹²⁷

For example, in an ATCA claim against the estate of former Philippine President Ferdinand Marcos, the Ninth Circuit applied equitable tolling because of the extraordinary circumstances outside the plaintiffs' control, which resulted in fear of intimidation and reprisal.¹²⁸ ATCA claims for injury from torture, disappearance, and summary execution were tolled until the date that Marcos had left office.¹²⁹ Similarly, plaintiff's claims may toll as long as the oppressive military government remains in power if he can show that he is unable to obtain access to judicial review in the foreign country.¹³⁰

III. STATUTES OF LIMITATIONS APPLIED TO ATCA CLAIMS

To date, the U.S. Supreme Court has not reviewed any lower court ruling relating to the proper limitations period for the ATCA.¹³¹ Since the ATCA contains no explicit statute of limitations, federal courts have used four different options for setting a limitations period. First, they may borrow from the closest analogous federal statute; second, they may borrow from the forum state's statute of limitations; third, they may apply the limitations period of international law; or fourth, they may apply the law of the foreign country where the act

124. See Herz, *supra* note 28, at 609 n.365. This reference points out one case, *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985), where the court found a clear distinction between setting the length of criminal versus civil statutes of limitations (with the court holding that civil limitations periods for genocidal torts under international law should be shorter than criminal limitations periods, *id.* at 1430-31). But the public policy issues involved in prevention of genocide are so overwhelming that setting no limitations period for both civil and criminal cases makes much more sense than applying a very short civil limitations period.

125. *Unocal II*, 176 F.R.D. 329, 360 (C.C. Cal. 1997).

126. 528 U.S. 549 (2000) (limiting tolling of RICO statute of limitations).

127. *Id.* at 559.

128. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996).

129. *Id.*

130. See *Unocal II*, 176 F.R.D. at 360.

131. See *id.* at 359.

occurred.¹³² If a court “views [ATCA] as providing a right of action or as opening the federal courts to claims based on international law as part of federal common law, the court will most likely ‘borrow’ from the most analogous federal or state statute.”¹³³ However, “[i]f the court views an ATCA claim as a transitory tort which is in federal court pursuant to a jurisdictional grant, but is defined by international, state, or foreign law, it will apply the statute of limitations established by that body of law.”¹³⁴ Tolling provisions of the state where the federal court is located are generally also borrowed in determining how tolling rules are to be applied under ATCA claims.¹³⁵

This Part provides examples of the various ways that courts have applied statute of limitations law to specific ATCA claims. Section A describes how the courts determined ATCA limitations periods before Congress passed the TVPA in 1991.¹³⁶ Over time, it is apparent that more courts are analogizing to the TVPA and applying its ten-year limitations period. Section B details how the TVPA added to ATCA jurisprudence, and Section C describes how ATCA statute of limitations law has been influenced by the TVPA since its passage. Analogizing the ATCA to the TVPA has not been universally adopted, and this policy is subject to change if higher courts overturn the earlier decisions.

A. *The ATCA Before the Torture Victim Protection Act*

Not all ATCA claims have been successful. In some of these failures, the statute of limitations had long since passed before the plaintiffs got to court. For example, *Tel-Oren v. Libyan Arab Republic*¹³⁷ was brought several years after a vicious attack by Palestinian terrorists on an Israeli bus. Survivors and personal representatives of the deceased brought an ATCA claim against the terrorists and their supporters in the Federal District Court for the District of Columbia.¹³⁸ Examining District of Columbia law in order to apply a statute of limitations, the court decided the alleged acts were intentional torts, subject to a one-year limitations period, rather than

132. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 148 (1996).

133. *Id.*

134. *Id.*

135. *Papa v. United States*, 281 F.3d 1004, 1012 n.31 (9th Cir. 2002).

136. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2000)).

137. 517 F. Supp. 542 (D.D.C. 1981), *aff'd* 726 F.2d 774 (D.C. Cir. 1984).

138. *Id.* at 544.

unintentional torts, which had a three-year limitations period.¹³⁹ The court found that application of the one-year limitations period would not suppress federal policies and values underlying international law.¹⁴⁰ The suit was ultimately dismissed because the statute of limitations had run and there was a lack of federal question jurisdiction.¹⁴¹

Determining the limitations period before the TVPA was passed in 1991 was an exercise fraught with complications. *Forti v. Suarez-Mason*¹⁴² is a good example of the complexity the courts faced in determining a suitable limitations period before the TVPA. In this case, Argentinean police and military officials acting under Argentinean General Suarez-Mason's command severely violated the human rights of the two plaintiffs in 1977. In one act, the officials seized plaintiff Alfredo Forti, along with his mother and four brothers, and held them in a detention center without charges being filed.¹⁴³ The five sons were released after a short time, but their mother was never released, and remains missing despite extensive efforts to find her.¹⁴⁴ In the other act, sixteen-year old plaintiff Debora Benchoam and her older brother were both abducted from their Buenos Aires home in July 1977 by plainclothes military authorities.¹⁴⁵ The brother's severely disfigured body was returned to the family the next day.¹⁴⁶ During her first week in detention, Debora Benchoam was kept blindfolded with her hands handcuffed behind her back, provided neither food nor clothing, while a guard attempted to rape her.¹⁴⁷ After a month of being held incommunicado, she was sent without charge to a prison for over four years; it was only after numerous domestic and international human rights appeals were made that she was released from prison and admitted to the United States as a refugee.¹⁴⁸

In 1984, the regime changed in Argentina, and Suarez-Mason fled to the United States.¹⁴⁹ He was arrested in California in January 1987 at the request of the Republic of Argentina. While he was in custody awaiting an extradition hearing, plaintiffs served their

139. *Id.* at 550-51.

140. *Id.*

141. *Id.* at 551.

142. 672 F. Supp. 1531 (N.D. Cal. 1987).

143. *Id.* at 1537.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1536.

complaint alleging torture; prolonged arbitrary detention without trial; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; causing the disappearance of individuals; murder and summary execution; wrongful death; and a survival action.¹⁵⁰

The court found the claims were not time barred.¹⁵¹ It first examined the Jones Act¹⁵² as an analogous federal statute that, like the ATCA, does not have a limitations provision.¹⁵³ Although Jones Act claims are governed by the limitations period of the Federal Employers' Liability Act,¹⁵⁴ the court held the Jones Act was not as applicable to this ATCA claim as was the underlying state tort law.¹⁵⁵ The court noted that the federal statute most analogous to the ATCA was the Civil Rights Act of 1871,¹⁵⁶ but since that Act also does not contain an express limitations period, the statute of limitations period would have to be borrowed from underlying state tort law.¹⁵⁷

The court further reasoned that the applicable statute of limitations should not be borrowed from Argentina's law.¹⁵⁸ The court implied that applying the limitation periods of foreign nations would not promote the public policy of providing a forum for redress of violations of internationally recognized human rights, as foreign nations may not have a similar interest in promoting human rights.¹⁵⁹ Therefore, because federal law did not provide an appropriate limitations period and adopting a foreign limitations period would not promote public policy, the court applied California's one-year statute

150. *Id.* at 1538.

151. *Id.* at 1551.

152. 46 U.S.C. app. § 688.

153. *Forti*, 672 F. Supp. at 1548. The Jones Act is analogous because it provides federal court access to non-U.S. citizens, the same class of plaintiffs that are served by the ATCA. The Jones Act (46 U.S.C. app. § 688(a)) states:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

154. 45 U.S.C. § 56 (1986). "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued. . . ." *Id.*

155. *Forti*, 672 F. Supp. at 1548.

156. 42 U.S.C. § 1983 (1994).

157. *Forti*, 672 F. Supp. at 1548.

158. *Id.* at 1549.

159. *See id.* at 1548-49.

of limitations for personal injury actions.¹⁶⁰ Since the alleged acts occurred in 1977 (and continued until 1981 in the case of defendant Benchoam), and the action was brought in 1987, the claims would all have been time barred under California's statute of limitation, unless the principle of equitable tolling could be applied.¹⁶¹ The court held the limitations period was indeed tolled from 1977 to 1984 because of plaintiffs' likely inability to gain effective access to Argentine courts during that period.¹⁶² The military government in power at that time would have effectively prevented bringing a successful suit.¹⁶³ The court also held that the period when the defendant was "in hiding" from 1984 to 1987 was also tolled.¹⁶⁴ Because plaintiffs raised issues of equitable tolling from 1977 to 1987, the court held the ATCA claim was not time barred.¹⁶⁵

As the foregoing example illustrates, ATCA statute of limitations jurisprudence was in a rather confusing state of affairs before 1991. In that year, however, passage of the TVPA provided a foundation upon which courts could find a near-perfect analogous law from which to borrow for resolving ATCA statute of limitations questions.

B. *The Torture Victim Protection Act*

*Filartiga*¹⁶⁶ prompted Congress to pass the TVPA in order to mitigate the effects of torture on its victims.¹⁶⁷ Unlike the ATCA, the TVPA provides an express ten-year statute of limitations.¹⁶⁸ This period was selected because it "insures that the Federal Courts will not have to hear stale claims."¹⁶⁹ The U.S. Senate report on the TVPA cited examples of situations where equitable tolling should be applied to TVPA claims.¹⁷⁰ These situations include the period when the defendant had immunity, concealed his whereabouts, or was absent from the United States or any jurisdiction in which such a suit could have been filed, or during the period when the plaintiff was

160. *Id.* at 1549.

161. *Id.*

162. *Id.* at 1549-50.

163. *Id.* at 1550.

164. *Id.*

165. *Id.* at 1550-51.

166. 630 F.2d at 884-85 (holding that official torture is prohibited by the law of nations).

167. Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 109 (2001).

168. 28 U.S.C. § 1350 note (2000). The TVPA § 2(c) states in pertinent part, "No action shall be maintained . . . unless it is commenced within 10 years after the cause of action arose."

169. H. R. REP. NO. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

170. S. REP. NO. 102-249, at 11 (1991).

imprisoned, incapacitated, or unable to discover the identity of the offender.¹⁷¹

The TVPA does not supercede the ATCA, as the Senate report expressly stated that the ATCA “has other important uses and should not be replaced.”¹⁷² The House of Representatives report on the TVPA noted that claims “based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATCA]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”¹⁷³ Courts have since interpreted the TVPA as expanding, rather than limiting, the provisions of the ATCA.¹⁷⁴

C. ATCA Claims Since Passage of the TVPA

Although the Supreme Court has not decided the question of the correct limitations period for ATCA claims, it is now well established in several lower courts that the ten-year TVPA statute of limitations applies to ATCA claims.¹⁷⁵ Federal courts apply the TVPA limitations period to ATCA claims because such “claims require careful examination of the international obligations of the United States and often entail preparation that would be stymied by requiring imposition of the time restrictions of state tort actions.”¹⁷⁶

Application of a borrowed limitations period for ATCA suits has sometimes worked in favor of plaintiffs; however, at other times it has worked against them. For example, in *Xuncax v. Gramajo*¹⁷⁷ the limitations period worked to the plaintiff’s benefit. Guatemalan natives, forced to flee their country as a direct result of torture, arbitrary detention, and being forced to watch as their family members were tortured to death or summarily executed, recovered compensatory and punitive damages against Guatemala’s former Minister of Defense.¹⁷⁸ All of the plaintiffs asserted that they suffered from severe psychological disorders and disturbances due to the brutal nature of the traumas inflicted on them.¹⁷⁹ Under international,

171. *Id.*

172. *Id.* at 4.

173. H. R. REP. NO. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

174. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194–97 (S.D.N.Y. 1996).

175. *Manliguez v. Joseph*, No. 01-CV-7574, 2002 WL 1913936, at *6 (E.D.N.Y. Aug. 20, 2002). *See, e.g., Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002); *Cabiri*, 921 F. Supp. at 1195–96.

176. *Manliguez*, 2002 WL 1913936, at *6.

177. 886 F. Supp. 162 (D. Mass. 1995).

178. *Id.* at 169.

179. *Id.*

federal, and municipal tort laws, their claims were found not time barred after the court examined the statutes of limitations of state law, state borrowing statutes, Guatemalan law, and the TVPA.¹⁸⁰

Xuncax left open the question of whether the limitations period of Massachusetts or the TVPA would apply. The court initially applied the three-year Massachusetts statute of limitations for personal injury, and the Massachusetts borrowing statute for nonresidents.¹⁸¹ However, an exception to the Massachusetts borrowing rule states a cause of action is limited by laws of the resident's country (in this case Guatemala, which allowed plaintiffs twenty years to bring a suit).¹⁸² Because the plaintiffs brought suit within three years of the date that the defendant entered the state, the court found the action was timely under Massachusetts law.¹⁸³ Analogizing to federal statutes with an express limitations period, the court found plaintiffs' claims were also timely under the TVPA, with its ten-year limitations period.¹⁸⁴ Thus, *Xuncax* declined to identify the proper test for determining a statute of limitations, further illustrating the uncertainty in ATCA statute of limitations jurisprudence.

The passage of the TVPA raised an interesting question regarding retroactive application of the limitations period to cases in which the tort occurred before passage of the TVPA. In *Cabiri v. Assasie-Gyimah*,¹⁸⁵ the court applied the TVPA's ten-year limitations period to an ATCA claim despite the fact that the claim had accrued prior to the passage of the TVPA.¹⁸⁶ *Cabiri*, an alien from the Republic of Ghana, accused the Ghanaian Deputy Chief of National Security with subjecting him to ongoing physical and mental abuse during interrogation, including beatings, electric shocks, and threatening his life when his answers were not satisfactory.¹⁸⁷ Even though the alleged events took place prior to the enactment of the TVPA, the court found that the retroactive application of the limitations period of the TVPA was entirely proper in this case, because the defendant had fair notice that torture was not a lawful act.¹⁸⁸

180. *Id.* at 192–93.

181. MASS. GEN. LAWS ch. 260, § 9 (1982) (limitations period does not begin to run until the defendant enters the state).

182. *Xuncax*, 886 F. Supp. at 192.

183. *Id.*

184. *Id.* at 192–93.

185. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

186. *Id.* at 1194–96.

187. *Id.* at 1191.

188. *Id.* at 1195–96.

Not all courts in the post-TVPA period applied the TVPA statute of limitations to ATCA claims. In some cases, the court declined to impose the TVPA limitations period, instead holding that equitable tolling operated to keep the limitations period from running. For example, in *Hilao v. Estate of Marcos*,¹⁸⁹ the court declined to decide whether the TVPA limitations period applied to an ATCA claim.¹⁹⁰ In 1991, the district court certified the case as a class action, defining the class as all Philippine civilian citizens who were tortured, summarily executed, or “disappeared” by Philippine military or paramilitary groups between 1972 and 1986; the class also included the survivors of deceased class members.¹⁹¹ The court discussed applying the various statute of limitations possibilities open to it, including the limitations period provided by state law, Philippine law, and the TVPA.¹⁹² The court declined to find which statute of limitations was appropriate, since equitable tolling principles applied.¹⁹³

*Doe v. Unocal Corp.*¹⁹⁴ is another good example of this principle. Burmese plaintiffs alleged that Unocal had violated international law while constructing an oil pipeline in Burma, when it used the local military, intelligence, and police forces, to intimidate and relocate whole villages, enslave farmers, kill family members, commit assault, rape, torture, and steal homes and property.¹⁹⁵ While plaintiffs argued that the TVPA provided the closest federal analogy, defendants contended that the complaint did not support equitable tolling for the alleged claims.¹⁹⁶ The court, in declining to decide whether the TVPA limitations period applied, held that plaintiffs’ claims tolled as long as the Burmese military government remained in power and plaintiffs were unable to obtain access to judicial review.¹⁹⁷

On the other hand, in *Japanese Forced Labor*,¹⁹⁸ equitable tolling did not to apply to Korean and Chinese survivors of the brutal Japanese slave labor camps during World War II.¹⁹⁹ Since the claim

189. *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

190. *Id.* at 773.

191. *Id.* at 771.

192. *Id.* at 773.

193. *Id.*

194. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed on other grounds*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff’d* 248 F.3d 915 (9th Cir. 2001).

195. *Id.* at 883.

196. *Id.* at 897.

197. *Id.*

198. 164 F. Supp. 2d 1160 (N.D. Cal. 2001)

199. *Id.* at 1181–82. During World War II, to alleviate an acute labor shortage, Japan forced thousands of prisoners to work under horrendous conditions in mining, munitions, construction, and other tasks in aid of the Japanese war effort. See Sean D. Murphy,

was filed in California, the federal court examined California personal injury law (*e.g.*, false imprisonment), and found such tort actions have a one-year statute of limitations.²⁰⁰ Searching for the closest federal statute was relatively easy for the court, given the similarity between forced labor and torture.²⁰¹ It concluded that the TVPA was the closest federal statute to the ATCA in this case.²⁰² Since the Korean and Chinese plaintiffs were aware of their injuries by 1945 at the latest, and these cases were initiated in 1999 and 2000, the court held the claims were well outside the ten-year limitations period and, as plaintiffs provided no reasons for tolling the limitations period, the claims were dismissed as time barred.²⁰³

As the courts became more familiar with the TVPA, the limitations period of that statute was applied more frequently. In *Papa v. United States*,²⁰⁴ an Immigration and Naturalization Service (INS) detainee killed Mauricio Papa, a Brazilian citizen, while he was in INS custody after illegally entering the United States in 1991.²⁰⁵ The court summarized the reasons for applying the TVPA's statute of limitations to the survivors' ATCA claim, rather than that of the state in which the claim was filed.

The TVPA, like the ATCA, 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. The provisions of the TVPA were added to the ATCA, further indicating the close relationship between the two statutes. All these factors point towards borrowing the TVPA's statute of limitations for the ATCA. In addition, the realities of litigating claims brought under the ATCA, 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, like

Contemporary Practice of the United States Relating to International Law, 95 AM J. INT'L L. 132, 139–40 (2001). Several lawsuits were filed in California courts on behalf of these prisoners, but most were removed to federal court and consolidated into a single action. *Id.* at 140. The defendants included Mitsubishi Corporation, Mitsui and Company, and Nippon Steel Corporation. *Id.*

200. *Japanese Forced Labor*, 164 F. Supp. 2d. at 1180.

201. *Id.*

202. *Id.*

203. *Id.* at 1181–82.

204. 281 F.3d 1004 (9th Cir. 2002).

205. *Id.* at 1008.

the TVPA, was designed to protect will tend to preclude filings in United States courts within a short time.²⁰⁶

Returning to our discussion of the *Iwanowa* case,²⁰⁷ the court held that Iwanowa's ATCA claims were time barred because two applicable post-World War II treaties governing reparations²⁰⁸ had not prevented Iwanowa from bringing timely forced labor claims against Ford.²⁰⁹ Iwanowa argued that the statute of limitations equitably tolled from the end of the War until 1998 by Ford's affirmative misstatements denying that it had gained any economic advantages from Ford Werke's use of forced labor.²¹⁰ In granting Ford's motion to dismiss, however, the court held that no allegations of misrepresentation or concealment in Iwanowa's original complaint, therefore barring her theory of equitable tolling.²¹¹ In short, Iwanowa could have sued Ford under the ATCA at any time after the War ended, but having failed to do so, her claim against Ford was time barred.²¹²

On the other hand, the court held Iwanowa's international law claims against Ford Werke were not time barred under the doctrine of equitable tolling.²¹³ The Paris Reparations Treaty²¹⁴ tolled the statute of limitations on War-related claims against Ford Werke from 1946 until 1953, when it was replaced by the London Debt Agreement,²¹⁵ which tolled the limitations period on such claims until 1991.²¹⁶ Because ATCA has no set statute of limitations, the court then applied the TVPA's ten-year limitations period.²¹⁷ By filing her suit on March 5, 1998, Iwanowa's claims against Ford Werke were held to be timely.²¹⁸ Nevertheless, the court granted Ford's motion to dismiss

206. *Id.* at 1012 (internal citations omitted).

207. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

208. See Agreement on Reparations from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 [hereinafter Paris Reparations Treaty]; Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3 [hereinafter London Debt Agreement].

209. *Iwanowa*, 67 F. Supp. 2d at 466-68.

210. *Id.*

211. *Id.* at 468.

212. Russell A Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law Statute of Limitations and Its Place in the Increasingly Futile Effort to Obtain Compensations from American Courts*, 23 WHITTIER L. REV. 121, 130 (2001).

213. *Iwanowa*, 67 F. Supp. 2d at 466.

214. See Paris Reparations Treaty, *supra* note 208.

215. See London Debt Agreement, *supra* note 208.

216. *Iwanowa*, 67 F. Supp. 2d at 466.

217. *Id.* at 462.

218. *Id.* at 466.

on other substantive grounds.²¹⁹ Because of the intense pressure directed at German and Austrian companies and Swiss banks by *Iwanowa* and related litigation, a fund to compensate slave laborers has been established; payments totaling \$2.85 billion have been made to the claimants as of November 2002.²²⁰

In an interesting development that may foreshadow a possible future direction for ATCA litigation, some federal courts have recognized that the ATCA may be applicable to international environmental torts.²²¹ In addition, international law may be moving in the direction of recognition of environmental rights.²²² Because some types of environmental degradation may take many years to show observable harm,²²³ it is probable that at least some of the harmful effects of an environmental tortfeasor's acts would not be discoverable until many years after the act has occurred. Unless equitable tolling or discovery rules apply, some types of environmental degradation actions with long periods before the degree of harm is apparent could be time barred.

If, as proposed by this Comment, Congress amends the ATCA to provide a fixed limitations period, it would be equally important to expressly provide that equitable tolling principles and the discovery rule apply.

IV. AMENDING THE ATCA TO INCLUDE A STATUTE OF LIMITATIONS

Before proposing an amendment to the ATCA, it is necessary to examine and evaluate the efficacy of adopting some of proposed statutory schemes for dealing with previous statute of limitations problems. Even if the Supreme Court were to settle the matter

219. *Id.* at 491. The claims against Ford Werke for violations of international law were not granted because the London Debt Agreement contemplated that individual claims against German companies would be pursued by way of government-to-government negotiations, not private litigation. *Id.*

220. See Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 23-24 (2002); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 799 (2002).

221. See, e.g., *Beanal v. Freeport-McMoRAN, Inc.*, 969 F. Supp. 362, 383 (E.D. La. 1997), *aff'd* 197 F.3d 161 (5th Cir. 1999) (alleging mining operations had harmed the surrounding environment; dismissed because environmental treaties cited by plaintiff were insufficient sources of international law to support an ATCA claim); *Aguinda v. Texaco, Inc.* 142 F. Supp. 2d 534 (S.D. N.Y. 2001) (alleging oil company improperly disposed of waste and had pipeline leaks, resulting in environmental damage; dismissed on grounds of improper jurisdiction).

222. See Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565, 602 (1998).

223. See generally *id.* at 579-81.

judicially, Congress should amend the ATCA to add a clear statute of limitations provision to remove any future uncertainty about what limit should apply. This Part discusses the various elements of this thesis. Section A examines the arguments against having Congress set a fixed limitations period for the ATCA, and Section B provides arguments in favor of amending the statute. Section C examines and evaluates some of the alternatives for setting an ATCA statute of limitations, while Section D provides a summary of the elements the proposed amendment should contain.

A. Arguments Against Amending the ATCA

There are several reasons that could be offered to maintain the status quo and not amend the ATCA to add an express limitations period. First, while state tort statutes of limitations may vary, they are still relatively uniform and easily ascertainable.²²⁴ Nevertheless, while U.S. courts may be familiar with borrowing and analogizing from other statutes, international plaintiffs might be confused by the uncertain statute of limitations, thereby missing an opportunity to file otherwise valid claims.

Second, since Congress passed the TVPA in 1992, many courts have adopted the ten-year limitations period for ATCA claims, thus negating the need for an amendment. However, borrowing the TVPA limitations period has not been adopted by all courts or approved by the U.S. Supreme Court. Further, as judicial common law, analogizing to the TVPA may not stand the test of time.

Third, opening up the law for amendment could provide some potential parties with the impetus to kill it completely. There is currently an effort underway to exclude overseas U.S. corporate activity from the ATCA.²²⁵ By opening up ATCA in order to amend it for a fixed statute of limitations, Congressional opponents of ATCA corporate liability would likely use the opportunity to gut the law, given the strongly pro-business bent of the current Congress.

The Chamber of Commerce, the National Foreign Trade Council, the National Association of Manufacturers and others have the [ATCA] on their "tort reform" agendas

"I think there's enough there to show this statute can make a lot of mischief in the wrong hands," said Paul Kamenar, senior

224. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987).

225. See Marcia Coyle, *9th Circuit Spurs U.S. over Alien Tort Claims*, *The National Law Journal News*, June 9, 2003, at <http://www.nlj.com/news/060903claims.shtml> (last visited July 2, 2003).

executive counsel of the Washington Legal Foundation. "It represents a larger problem with activist courts trying to take a statute from 1789 never intended to be used against multinational corporations."²²⁶

This attack on the ATCA is essentially political, rather than strictly legal, and represents an insufficient reason to avoid examining the statute of limitations problems addressed in this Comment. Making the ATCA more accessible might lead some plaintiffs to unfairly target U.S. firms as defendants simply by their presence in countries at the time when human rights abuses had occurred.²²⁷ However, without evidence of complicity by the U.S. corporation with the alleged abuses, the claim could not be filed without risking sanctions.

Finally, some might argue that if the ATCA were made easier to understand and use, many more claims might be brought, possibly overwhelming federal courts. The solution to such a concern should be to examine the level of support given to the federal court system, rather than using an uncertain limitations period to keep court calendars unclogged.

B. Arguments Supporting Amendment of the ATCA

There are much stronger reasons why the ATCA should be amended in order to clear up the current uncertainty. First, state tort laws and their generally short limitations periods for filing personal injury claims do not generally account for the horrendous nature of many tort claims brought under the ATCA. Second, the nature of the tort itself can cause plaintiffs such extreme fear and humiliation that they are effectively deterred from filing claims for redress for extremely long periods. Third, torts committed outside the United States present serious barriers to effectively filing ATCA claims. Fourth, federal courts are burdened when they have to spend precious judicial resources in determining the appropriate limitations period for each case. Fifth, because it takes a long time for many types of environmental damage to become apparent, these types of ATCA claims may require a longer limitations period. Finally, because the United States is seen by much of the world as a last resort fighting injustice, ATCA should be restructured so that victims of human

226. *Id.*

227. See John E. Howard, *The "Alien Tort Claims Act": Is Our Litigation-Run-Amok Going Global?*, at <http://www.usaengage.org/news/2002/sep/jhowardoped.html> (last visited March 19, 2003).

rights abuses have a forum to hear their claims. This Section addresses these reasons for amending the ATCA in detail.

1. State Tort Limitations Periods Do Not Adequately Address These Types of Torts

Foreign torts litigated under the ATCA are often much more severe than any anticipated by the states when they passed their own statute of limitations laws. For example, in *Kadic v. Karadzic*,²²⁸ the claims included torts committed under genocide, war crimes, crimes against humanity, torture, summary execution, forced prostitution, and forced pregnancy.²²⁹ The *Xuncax* court, when examining the severity of the human rights abuses that it was reviewing, questioned “the appropriateness of using a municipal wrongful death statute to address summary executions or ‘disappearances.’”²³⁰ It is unlikely that most states had ever considered these types of acts in formulating their relatively short limitations period for personal injury actions.

The current state statutory limitations periods for personal injury torts, generally ranging from one to four years, are inappropriate for a person who has been subjected to physically damaging torture or slave labor. In *Xuncax*, the judge stated that torture and disappearances were unfamiliar concepts in municipal law, which is “ill-tailored for cases grounded on violations of the law of nations.”²³¹ Under these circumstances, it does not serve the cause of justice to allow the tortfeasors any repose by setting a short limitations period.

2. Many ATCA Claimants Are Reluctant or Unable to File Timely Claims

Individuals who are tortured, raped, or forced to watch as family members are executed are often forever psychologically scarred. The effects of such treatment are as much designed to create a deep sense of fear, humiliation, and self-hatred, as they are to extract information from or hurt the victims. Few potential plaintiffs could be expected to recover enough physically or mentally in the short period of a few years to be able to file a claim. For example, some of the *Xuncax* plaintiffs who were tortured or forced to watch as their family members were tortured to death or summarily executed claimed to

228. 70 F.3d 232 (2d Cir. 1995).

229. *Id.* at 236–37.

230. *Xuncax v. Gramajo*, 886 F. Supp. 162, 183, n.24 (D. Mass. 1995).

231. *Id.* at 192.

suffer from subsequent severe psychological disorders and disturbances.²³²

There are numerous recorded instances where victims of severe abuse will rarely speak to anyone else about what they have endured or witnessed. For example, in a situation that did not lead to an ATCA claim, one young girl who was arrested and tortured by Nicaraguan authorities during the Sandinista revolt in 1976 provided a chilling account of why such individuals will not readily speak about their experiences, let alone file suit.

It was such a shock . . . I couldn't even cry. I went blank. They asked me questions and beat me. I saw other prisoners being tortured. When I was in the patrol car my sister managed to tell me to say I didn't know anything. As soon as we got to the Security office they separated us and forced hoods over our heads. Later they stuck me in the cold room. I heard moans and realized I was there with two half-naked comrades who were covered with blood. . . . My experience at the jail affected me for a long time. I was afraid when I saw comrades or when I saw guards.²³³

Sometimes the victims feel that because they did not resist enough, the treatment they had received was their own fault, resulting in a sense of humiliation, with a consequent reluctance to see the tortfeasors as the ones who are actually at fault. Primo Levi, the noted chronicler of life and death in the German concentration camps, eloquently expressed the deep shame felt by newly arriving Russian prisoners, destined for slave labor or worse:

They did not greet us, nor smile; they seemed oppressed, not only by pity but also by a confused restraint which sealed their mouths, and kept their eyes fastened on the funeral scene. It was the same shame which we knew so well, which submerged us after the selections, and every time we had to witness or undergo an outrage . . . the shame which the just man experiences when confronted by a crime committed by another, and he feels remorse because of its existence, because of its having been irrevocably introduced into the world of existing things, and because his will has proven nonexistent or feeble and was incapable of putting up a good defense.²³⁴

232. *See id.* at 169.

233. MARGARET RANDALL, SANDINO'S DAUGHTERS: TESTIMONIES OF NICARAGUAN WOMEN IN STRUGGLE 192 (Linda Yanz ed., 1981).

234. PRIMO LEVI, THE DROWNED AND THE SAVED 72-73 (Raymond Rosenthal trans., Summit Books 1988) (1986).

In short, many human rights abuse victims suffer so profoundly that they are robbed of their normal human desire to redress the wrongs that have been visited upon them. They are left only with an emotional void, unable to relive the horror they have endured and consequently, unable to file suit for damages.

In a related type of abuse situation, that of children who are sexually abused, their trauma is often accompanied by a repression of the memory of their abuse.²³⁵ These victims often do not realize the extent of their psychological injuries until they are fully-grown and seek psychological treatment for other disorders or upset.²³⁶ Therefore, the majority of states with statutes of limitations for criminal prosecutions have adopted a specific extension of the time limit for filing civil actions based on child sexual abuse.²³⁷ Other states allow a common law extension of the statute of limitations based on the discovery doctrine.²³⁸

It is entirely possible that even the ten-year TVPA limitations period frequently borrowed in ATCA cases may not be long enough for some victims of human rights abuse to be willing to talk about what they have endured, let alone to get up the courage to initiate a lawsuit against their former tormentors.

3. The Complexity of ATCA Claims Prevents Timely Filing

The very fact that most modern ATCA claims occur overseas to foreign citizens means that they will have serious difficulties in bringing timely claims. While the normal rules of notice inherent in the U.S. legal system imply that a reasonably intelligent person can learn the applicable limitations period, ATCA plaintiffs, aliens by definition, cannot reasonably be expected to understand the complex rules governing ATCA limitations. Foreign attorneys, whom the victims might be expected to seek initially for advice, would be similarly hampered by the difficulty in understanding these rules. Added to these barriers are the current visa and immigration difficulties inherent in even gaining entry into the United States, a precondition to effectively pressing their claims. Therefore, it may be close to impossible for an alien, unable to speak or read English, unfamiliar with the confusing ATCA limitations jurisprudence,

235. See National Centers for the Victims of Crime, *Extensions of the Criminal & Civil Statutes of Limitations in Child Sexual Abuse Cases*, available at <http://dev.ncvc.org/gethelp/statutesoflimitations/#2> (last visited June 26, 2003).

236. See *id.*

237. See *id.*

238. See *id.*

fearful of reprisals, and humiliated and physically weak from her treatment, to be able to file a claim within a relatively short period.

There may also be very difficult evidentiary problems in bringing an ATCA claim. Foreign witnesses are not readily obtainable, and if found, are often reluctant to speak out on the plaintiffs' behalf, fearing their own "disappearance."²³⁹ Physical and documentary evidence will likely reside primarily in the foreign country, often under the very control of those with no interest in seeing a claim succeed. Such evidence may be especially difficult to obtain when a plaintiff attempts to prove international violations were inflicted by persons operating under the defendant's command.²⁴⁰

4. Courts Are Burdened by the Need to Determine the Appropriate Limitations Period

When courts have to borrow and apply the appropriate limitations period, there is likely some difficulty and attendant waste of judicial resources.²⁴¹ An amendment fixing the statutory period would ease the burden on federal courts to research and apply analogous statutes. At least one commentator has suggested that since the First Congress had a much narrower understanding of the ATCA than is being applied today, courts "should await additional legislative direction before allowing the [ATCA] to be expanded any further."²⁴²

Courts should also be provided with an express statute of limitations so that they do not have to incur the burden of taking a position on long-distant past events. Asking a court to decide such claims means that it is unlikely the judges would have as much familiarity with the issue as a contemporaneous court would have had. For example, in *Iwanowa*, it is improbable that the 1999 court deciding the case had the same perspective on the traumatic events of World War II that a 1949 court would have had.

239. See Juan E. Mendez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 *HAMLIN L. REV.* 507, 543 (1990).

240. See Joan Fitzpatrick, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 247, 258 (Hurst Hannum ed., 3d ed. 1999); see also *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987). In *Forti*, the plaintiff alleged that although the defendant's individual acts were committed by military and police officials, these individuals were all agents, employees, or representatives of the defendant "acting pursuant to a 'policy, pattern and practice' of the First Army Corps under defendant's command" and that defendant "'authorized, approved, directed and ratified' the acts" listed in the complaint). *Id.*

241. See Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 *NEB. L. REV.* 454, 455 (1993).

242. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *VA. J. INT'L L.* 587, 647 (2002).

5. Environmental Damage May Take a Long Time to Become Apparent

Because it often takes substantial time for the full extent of environmental harm to be demonstrated,²⁴³ ATCA claims involving environmental damage may require a longer limitations period than that required for personal injury torts. While the discovery rule would be useful in allowing future claims to be made long after the actual event, there are still many environmental and human health effects that only become apparent long after the initial harm is discovered. For example, if a mining project filled a river with contaminants, a potential claim would accrue as soon as dying fish were discovered. If health effects to the humans eating the fish took a long time to become apparent, that future harm might become non-litigable if the initial claim has to be filed within a relatively short period after discovery of the initial harm.

While environmental damage claims have not to date been generally recognized as an internationally recognized tort,²⁴⁴ it is reasonable to expect that someday they will be so recognized.²⁴⁵ If that were to occur, it would be critical to have a longer limitations period fixed by statute. In addition, courts may be reluctant to analogize ATCA environmental damage claims to the TVPA, which only covers damages relating to torture and summary execution.²⁴⁶

6. The United States Has a Long Tradition of Preventing Unjust Treatment Abroad

The United States is often looked upon in the world as a last resort for righting injustices and wrongs committed by brutal, dictatorial regimes. Use of the ATCA and the TVPA by foreign victims “provides a voice for victims of human rights atrocities and a forum to hear their claims.”²⁴⁷ To the degree that there are limitations

243. See Herz, *supra* note 28, at 609.

244. Beanal v. Freeport-McMoRAN, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997), *aff'd* 197 F.3d 161 (5th Cir. 1999).

245. See Herz, *supra* note 28, at 549.

246. 28 U.S.C. § 1350 note (2000). The TVPA states in pertinent part:

§ 2. Establishment of civil action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

247. William J. Aceves, *Affirming the Law of Nations in U.S. Courts: An Overview of Transnational Law Litigation*, 49-JUN FED. LAW. 33, 38 (2002).

to this type of litigation, the U.S. Congress should develop mechanisms to ensure that future efforts to obtain justice from international torts are uniformly successful.

For the above reasons, Congress should amend the ATCA to provide sufficient time for potential plaintiffs to overcome their substantial physical, psychological, and evidentiary barriers and file a claim in a federal court. It could even be argued that the ATCA should be amended because the current situation is also unfair to some defendants, who have little certainty as to when they may achieve repose from potential claims. The next question, however, is somewhat more difficult to answer, namely how long should the amended statute of limitations be?

C. Alternatives for Setting a Statute of Limitations

Deciding on a “one size fits all” limitations period is quite difficult, because it is not possible to anticipate the wide variety of claims that could be brought under the ATCA. However, it would be better to set a fixed period, even if it is too short to cover adequately every situation that comes up, than to have no certain period at all. This raises the thorny question of what statutory period to recommend to Congress. Over the years, there have been several solutions proposed or implemented for solving this type of problem under similar circumstances. First, Congress could apply an express statute of limitations to all federal laws that do not have one expressly attached. Second, it could extend the TVPA ten-year period to all ATCA claims. Third, it could fix a future date for each tort by which all claims must be filed. Fourth, it could add a provision requiring application of the applicable foreign or international limitations period. Last, Congress could clarify the current uncertainty by clearly stating that ATCA does not have any statute of limitations at all. This Section addresses each alternative in detail.

1. Apply an Express Statute of Limitations to All Federal Statutes Without One

In 1990, recognizing the difficulties created by not having statutes of limitations incorporated into many of its laws, Congress passed the Judicial Improvements Act (JIA).²⁴⁸ This Act provided a default four-year limitations period for all post-1990 Federal statutes

248. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 1658 (2000)).

without an express statute of limitations.²⁴⁹ Because the ATCA is a pre-1990 statute, the JIA does not apply to ATCA claims. One commentator has suggested that federal courts could simply borrow the JIA's four-year limitations period and use it as the limitations period for any claim brought under a pre-1990 statute that does not have a stated period.²⁵⁰

Congress could amend the JIA to make it expressly apply to pre-1990 statutes without an express limitations period. This solution is unlikely to occur, however, as Congress, in passing the JIA, has already considered and essentially rejected such a blanket retroactive application.

[R]etroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.²⁵¹

The "settled expectations" of claimants involved only with ATCA litigation would perhaps be subject to less variation in statutes of limitations than the House discussed as it considered applying the JIA to all pre-1990 legislation. Therefore, Congress could more readily amend the JIA to apply to ATCA alone or could amend the ATCA to apply the JIA's limitations period.²⁵² While these approaches would provide a fixed period that was longer than that of many state personal injury statutes of limitations, four years would probably still be too short for initiation of many complex ATCA claims, and is far shorter than the TVPA ten-year limitations period.

249. 28 U.S.C. § 1658, Time limitations on the commencement of civil actions arising under Acts of Congress. This statute states in pertinent part:

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation . . . may be brought not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.

250. Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 396 (1997).

251. *Id.* at 399 (quoting H.R. REP. NO. 101-734, at 24 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6870).

252. *See id.* at 396.

2. Apply the TVPA Limitations Period to All ATCA Claims

Many courts currently analogize the TVPA's ten-year period to ATCA claims. Congress could make this a statutory approach by amending ATCA to incorporate the TVPA limitations period. Ten years is far longer than most state personal injury limitations periods. All parties would more readily understand a fixed ten-year period, and it would appear to provide sufficient time to bring most suits for typical human rights violations. However, in particularly traumatic events (such as World War II slave labor cases) and in certain types of environmental claims (where long-term damage may not be noticed or understood within a ten-year period), ten years may be too short. In addition, this period falls far short of the current unlimited state and federal criminal statutes of limitations for murder.

3. Set Fixed Future Limitations Dates for Filing ATCA Claims

In 1991, California passed Section 354.6, a novel approach to World War II statute of limitations problems.²⁵³ This statute allows U.S. citizens and aliens to initiate state claims until December 31, 2010, for damages caused by forced labor during World War II in areas controlled by the Axis powers.²⁵⁴ However, in dismissing a claim brought under this statute by foreign slave laborers in wartime Japan, the federal court ruled the statute unconstitutional as an impermissible state interference in the exclusive foreign affairs power of the United States.²⁵⁵

The constitutional barrier the court found with the California statute would not exist if Congress were to set such fixed future dates for filing ATCA claims. Such statutes would most likely reduce the current uncertainty about the ATCA limitations period. Potential parties would more easily understand such fixed dates; and if the dates were set far enough into the future, there is an increased likelihood that claimants would have sufficient time to initiate their suits. Implementing this solution, however, would require Congress to pass legislation for every international event that had resulted or could result in tort claims. Even discussing such legislation could anger

253. CAL. CIV. PROC. CODE § 354.6.

254. *Id.* CAL. CIV. PROC. CODE § 354.6 states in pertinent part:

(b) Any Second World War slave labor victim, or . . . forced labor victim . . . may bring an action to recover compensation for labor performed . . . from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. . . . (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

255. *Japanese Forced Labor*, 164 F. Supp. 2d at 1168 (N.D. Cal. 2001).

many nations, who might view Congressional action directed at events in their countries as an unwarranted interference in their internal affairs. Such legislation could also cause bitter internal political fights over whether a given world event was serious enough to rate passage of a fixed date for initiating claims. Given these difficulties, there is a strong possibility that Congress would not fix any date at all. Furthermore, this approach would simply shift the case-by-case determination of a statute of limitations from the federal courts to Congress. In addition, the courts have not indicated that Congress intended to adopt a case-by-case approach to determine timeliness of claims under the ATCA.²⁵⁶ The California approach would therefore not remedy the current problems with ATCA limitations law. It would be much simpler and promote certainty simply to pass a single law amending the ATCA.

4. Apply Foreign or International Limitations Periods

Another solution would be for Congress to apply the limitations periods of the foreign country in which the tort occurred. Alternatively, since ATCA claims are often based on torts recognized by international law, Congress could mandate application of statutes of limitations based in international law. However, the ATCA's effectiveness would be greatly weakened if the laws of the foreign nation in which the harmful conduct occurred were allowed to govern the applicable limitations period.²⁵⁷ Foreign states could effectively prevent their own citizens from bringing claims under the ATCA. It would also be difficult for the U.S. courts to determine the effective limitations period for bringing a personal injury claim under foreign law, especially where a foreign nation's concepts of limitations of actions for tortious conduct differ from those of United States. In addition, by adopting foreign limitations periods, uniformity of application of the ATCA would certainly not be promoted.

There are no express statutes of limitations for torts committed under international law. Courts determine whether a case is time barred or not by examining the specific facts of the case.²⁵⁸ Therefore, applying international law to an ATCA claim would be little different from the current uncertain federal limitations period.

256. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987).

257. *Id.* at 1548.

258. See *id.* at 1547.

5. Clarify That the ATCA Does Not Have a Statute of Limitations

On its face, the ATCA has no statute of limitations.²⁵⁹ It is only by operation of subsequent federal court decisions and statutory restrictions that courts have read a statute of limitations into the ATCA. What would be the effect if Congress clarified the matter by declaring that the ATCA really did not have any limitations period?

The Genocide Convention contains no statute of limitations.²⁶⁰ The Convention's prohibition against genocide means that "when executions occur in fulfillment of genocidal aims, [ATCA] actions for wrongful death can be brought."²⁶¹ Without a clarifying amendment to ATCA, a court might apply the TVPA ten-year statute of limitations to a wrongful death suit derived from a genocidal act, analogizing wrongful deaths to summary executions, a specific cause of action in the TVPA. However, the enormity of genocide is on a scale far outside of those contemplated by most people when thinking of summary executions. Genocide consists not only of murdering people, but includes the targeted effort to eliminate an entire population of people.²⁶² Indeed, genocide has been termed the "crime of crimes."²⁶³ In addition, the U.S. statute implementing the Genocide Convention specifically has no limitations period for murder committed in conjunction with genocidal crimes.²⁶⁴ Therefore, any amendment relating to ATCA's limitations period should provide for a longer period for claims derived from genocidal crimes than that specified by the TVPA. This approach would avoid the problems faced by World War II slave labor litigants, such as in *Iwanowa* and *Japanese Slave Labor*, who have been denied a remedy simply because

259. 28 U.S.C. § 1350 (2000). See *supra* note 15 for full text of the ATCA.

260. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

261. Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981), reprinted in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, *supra* note 19, at 87.

262. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 154 (2000). The crime of genocide is defined under the Genocide Convention as:

[A]cts constituting the crime of genocide include (a) Killing members of the group; (b) Causing serious or bodily mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id.

263. *Id.* at 9.

264. 18 U.S.C. § 1091 (2000). See *supra* note 123 for pertinent text of the statute.

they waited too long to bring their otherwise legitimate and provable claims for genocidal acts²⁶⁵ committed against them.

Setting a clear limitations period may not be as important as determining the tolling rules applicable to such cases. "In general, statutes of limitation should not present substantial problems in suits under the TVPA or the ATCA: even when the suits concern human rights violations that occurred outside the limitations period, principles of equitable tolling will frequently toll the running of the statute."²⁶⁶

D. Congress Should Amend the ATCA to Add a Statute of Limitations

To provide a more definitive period for initiation of tort claims under the ATCA, Congress should amend that statute to add an explicit ten-year limitations period for all claims other than those derived from genocide. For claims derived from genocide, no statute of limitations should apply. In addition, either the amendment's text or the Congressional committee reports should expressly provide that equitable tolling principles and the discovery rule apply, in the same manner that the Senate felt a need to specify that those doctrines applied to the TVPA.²⁶⁷

Providing an unlimited period for filing tort claims relating to genocidal crimes seems appropriate for any proposed ATCA amendment. It would be illogical to have a short limitations period for civil suits derived from genocidal crimes, but have no limitations period for genocide itself. That is because the risk of error is greater in criminal prosecutions for genocide (with penalties of life in prison or execution) than in civil litigation (with only monetary damages), yet the limitations period for genocide, with the much higher risk of fading memories and lost witnesses, never ends. Therefore, the ATCA amendment should also contain a provision that no limitations period will apply to torts derived from criminal acts of genocide. Because Iwanowa was a child forcibly removed from her home by the Nazis, along with many other children, her case would likely fit one of the genocide definitions, namely "[f]orcibly transferring children of the group to another group."²⁶⁸ If she could show that she fit this definition, under the proposed ATCA amendment her claim would not have been time barred.

265. See SCHABAS, *supra* note 262.

266. STEPHENS & RATNER, *supra* note 132, at 147.

267. S. REP. NO. 102-249, at 11 (1991).

268. See SCHABAS, *supra* note 262.

Retroactivity is another important issue that is bound to come up if the ATCA statute of limitations is amended as suggested above. Generally, courts do not apply tort statutes of limitations retroactively where it does not appear that the legislature intended that they be so applied.²⁶⁹ However, although the TVPA does not explicitly apply retroactively, the court nevertheless applied it retroactively in *Xuncax*.²⁷⁰ The court found that retroactive application was appropriate because the TVPA could be viewed as “closing a perceived ‘jurisdictional gap.’”²⁷¹ Currently, the ten-year TVPA statute of limitations is preventing filing of ATCA suits asking for damages from the African slave trade.²⁷² If the ATCA were amended to provide for an unlimited limitations period for harms committed in conjunction with genocide, it would be desirable for Congress to consider whether retroactivity applies. A discussion about the merits of allowing retroactivity in the amended ATCA is beyond this Comment’s scope.

V. CONCLUSION

The ATCA presents a method for foreign claimants to obtain justice in U.S. courts for outrageous torts committed outside the country. To the degree that current application of uncertain statutes of limitations under the ATCA bars otherwise valid claims, foreigners attempting to apply the ATCA are unable to obtain justice in the U.S. legal system. While the current trend of applying the ten-year limitations period of the TVPA represents a good start towards affording consistency in ATCA limitations jurisprudence, this method has not been adopted by all courts, has not been ratified by the Supreme Court, and as judicial common law, may not stand the test of time.

Overall, arguments for amending the ATCA outweigh those for keeping the status quo. First, to provide a certain period for initiation of tort claims under the ATCA, Congress should amend that statute to add a ten-year limitations period. Second, the amended ATCA should expressly provide for equitable tolling principles and the discovery rule, so that claims brought long after the statutory period have a chance at validity. Finally, the statute should specifically provide for an unlimited time for bringing claims involving torts

269. See 1 SPEISER ET AL., *supra* note 46, § 5:28, at 899.

270. *Xuncax v. Gramajo*, 886 F. Supp. 162, 177 (D. Mass. 1995).

271. *Id.* at 178 n.14.

272. Ryan M. Spitzer, *The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery?* 35 VAND. J. TRANSNAT’L L. 1313, 1342 (2002).

committed as part of the crime of genocide, so that the survivors can pursue a small measure of justice for as long as it takes to bring their claims. The knowledge that the offenders could never have repose from their crimes would restrain the actions of the worst human rights violators.