**NO. 13-7147**
**(ORAL ARGUMENT IS NOT YET SCHEDULED)**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Han Kim and Yong Seok Kim
*Plaintiffs-Appellants*

v.

Democratic People's Republic of Korea
*Defendant-Appellee*

On Appeal from the United States District Court
for the District of Columbia

# MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF APPELLANTS

June 3, 2014

*Of Counsel*

Gabor Rona
Ignacio Mujica
Human Rights First
333 Seventh Avenue, 13th Floor
New York, New York 10001

Niji Jain
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Robert P. LoBue
*Counsel of Record*
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

Human Rights First ("HRF") hereby moves for leave to participate as amicus curiae in this matter in support of the Plaintiffs-Appellants Han Kim and Yong Seok Kim. HRF respectfully requests permission to file the accompanying brief, attached to this motion as Exhibit A.

Plaintiffs-Appellants consented to the filing of this amicus brief. However, the Defendant-Appellee, the Democratic People's Republic of Korea, made no appearance in the trial court, and the clerk entered default. The Defendant-Appellee has not made an appearance in this Court. As a result, HRF has been unable to obtain consent from Defendant-Appellee.

Pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29, HRF hereby states (1) its interest in filing an amicus curiae brief; (2) why the filing of its brief is desirable and why the matters asserted are relevant to the disposition of the case; and (3) why the brief is not duplicative and its filing is timely.

## I. Interest of Amicus Curiae

Human Rights First (HRF) is a non-profit, nonpartisan international human rights organization. HRF has advocated for the respect of human rights and for the adoption of accountability measures for their violations. In particular, HRF has a long-standing interest in protecting against torture and supported the adoption of

the Torture Victim Protection Act. HRF also has particular expertise in international human rights law.

This case raises the question of what evidentiary standards and analyses should govern actions under the terrorism exceptions to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605A. The Court's decision in this case likely will have a profound effect on the effectiveness of such remedies, not only for the present case, but for future cases concerning enforced disappearance. It is in the interest of Human Rights First that these actions provide effective redress in such cases.

## II. The filing of the accompanying brief is desirable and the matter asserted is relevant to the disposition of the case

This case presents unusual facts concerning the enforced disappearance of an individual. This phenomenon is characterized by a lack of direct evidence regarding the fate of the victim after his abduction.

Human Rights First seeks leave to file an amicus brief to assist the Court in understanding the particular evidentiary complexities posed by cases of enforced disappearances, and to highlight how these have been addressed by international tribunals with extensive experience with such cases. International human rights tribunals have adopted several evidentiary standards that allow them to address these complexities while preserving the effectiveness of legal remedies.

III. Human Rights First's brief is not duplicative of the party's brief and its filing is timely

The accompanying brief is based on HRF's extensive expertise in international human rights law and will provide the Court with an important perspective on legal issues that the party's brief does not address, as required by Circuit Rule 29(a).

This motion to file an *amicus* brief is timely, in accordance to Circuit Rule 29(c) and Fed. R. App. Proc. 29(e), because Appellant filed its brief on May 29, 2014, less than 7 days ago.

For the foregoing reasons, Human Rights First respectfully requests this Court grant leave to file the accompanying brief.

Respectfully Submitted,

*/s/ Robert P. LoBue*
Robert P. LoBue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Counsel for Human Rights First*

Dated: June 3, 2014

# EXHIBIT A

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# BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF APPELLANTS

June 3, 2014

*Of Counsel*

Gabor Rona
Ignacio Mujica
Human Rights First
333 Seventh Avenue, 13th Floor
New York, New York 10001

Niji Jain
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Robert P. LoBue
*Counsel of Record*
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

### A. Parties And *Amici*

All parties, intervenors, and amici appearing in this Court are listed in the Brief for the Appellant. Pursuant to Rule 26.1, amicus curiae certifies that none of the entities filing this brief are corporate entities.

### B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

### C. Related Cases

Counsel is unaware of any cases related to this appeal except for those listed in the Brief for the Appellant.

### D. Relevant Statutes and Regulations

Counsel is unaware of statutes or regulations related to this appeal except for those listed in the Brief for the Appellant.

*/s/ Robert P. LoBue*
Robert P. LoBue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Counsel for Human Rights First*

Dated: June 3, 2014

## CERTIFICATE OF COMPLIANCE WITH RULE 29

### A. Permission to File

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b), amicus curiae files a motion for leave to file this amicus brief herewith.

### B. Authorship and Funding

Pursuant to Fed. R. App. P. 29(c)(5), amicus curiae certifies that this brief was authored by amicus and counsel listed on the front cover. No party or party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person but amicus and its counsel contributed money that was intended to fund preparing or submitting this brief.

### C. Not Practical to Join in Single Brief

Pursuant to Circuit Rule 29(d), amicus curiae certifies that it is unaware of any other amicus briefs to be filed in this appeal, and therefore it is not practicable to join other amici.

*/s/ Robert P. LoBue*
Robert P. LoBue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Counsel for Human Rights First*

Dated: June 3, 2014

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**



**INTERNATIONAL TRIBUNAL AND TREATY BODY CASES**

**Inter-American Court of Human Rights**



*Authorities upon which we chiefly rely are marked with asterisks.

**European Court of Human Rights**



**United Nations Human Rights Committee**



**STATUTES**



**OTHER AUTHORITIES**

## GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| DPRK: | Democratic People's Republic of Korea |
| ECHR: | European Court of Human Rights |
| FSIA: | Foreign Sovereign Immunities Act |
| HRF: | Human Rights First |
| IACtHR: | Inter-American Court of Human Rights |
| ICCPR: | International Covenant on Civil and Political Rights |
| OAS: | Organization of American States |
| TVPA: | Torture Victim Protection Act |
| UNHRC: | United Nations Human Rights Committee |

## INTEREST OF AMICUS CURIAE

Human Rights First ("HRF") is a non-profit, nonpartisan international human rights organization based in New York and Washington, D.C. Since 1978, HRF has worked to protect and promote fundamental human rights. HRF promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

HRF, which was then known as the Lawyers Committee for Human Rights, played an important role in promoting the adoption of the Torture Victim Protection Act ("TVPA"). It gave testimony supporting the TVPA before the House Committee on Foreign Affairs in 1988 and the Senate Committee on the Judiciary in 1990.

HRF has advocated domestically against the use of torture. It has published a number of reports related to the prohibition of the use of torture, including *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*. It has also supported the issuing of Executive Order 13491, banning the use of torture on individuals in U.S. custody in the context of their interrogation. More recently, HRF has advocated for the release of the Senate Intelligence Committee report on torture as an important step towards accountability.

Given Human Rights First's experience and perspective in this important area of law, it is well situated to assist the Court in understanding the evidentiary difficulties presented in enforced disappearance cases and presenting alternative approaches adopted by international human rights tribunals experienced with these issues.

## SUMMARY OF ARGUMENT

This case concerns the enforced disappearance of Reverend Kim Dong Shik. Reverend Kim was abducted by officials of North Korea, followed by his alleged torture and extrajudicial killing. When a person is forcibly disappeared, direct evidence of his torture and execution is, by definition, almost always unavailable, even though indirect evidence may be overwhelming.

In order to preserve the effectiveness of remedies, international courts and treaty bodies – i.e. committees of independent experts that monitor the implementation of certain human rights treaties – have adopted particular standards to address the evidentiary complexities of cases of enforced disappearance, including permitting a plaintiff to rely on evidence of a pattern and practice of similar abuses in other cases of enforced disappearance. Additionally, these bodies have relied on circumstantial evidence to draw reasonable inferences as to the fate of a victim of enforced disappearance. Finally, some international bodies have shifted the burden of production to the State to come forward with evidence to disprove plaintiffs' well-founded allegations, in situations where the State controls all the means to produce direct evidence as to the fate of the victim, i.e., when the victim was in State custody and was never heard from again.

The evidentiary standards of these international courts and treaty bodies are consistent with domestic jurisprudence in situations where plaintiffs experience

similar evidentiary challenges. This Court should adopt the just and practical evidentiary standards akin to those employed by the international tribunals and treaty bodies in cases of forced disappearance. The Court should remand the case to the district court for further proceedings in light of this evidentiary standard.

## ARGUMENT

### I. INTERNATIONAL BODIES EXPERIENCED IN ADJUDICATING ENFORCED DISAPPEARANCE CASES PROVIDE PERSUASIVE AUTHORITY ON JUST AND PRACTICAL EVIDENTIARY STANDARDS FOR THESE CASES

Congress enacted terrorism exceptions to the Foreign Sovereign Immunity Act[1] to provide citizens with an effective tool to seek redress against States that sponsor terrorism, including for acts of torture and extrajudicial killing.[2] As this Circuit has noted, "[i]n enacting this provision, Congress sought to create a judicial forum for compensating victims of terrorism, and in doing so to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future."[3]

---

[1] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

[2] U.S. House. Comprehensive Antiterrorism Act of 1995, Report together with dissenting views to accompany H.R. 1710. (House Report 104-383) Text from: U.S. Government Printing Office. pp. 62-63. (The terrorism exception "will give American citizens an important economic and financial weapon against these outlaw states.")

[3] Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 88-89 (D.C. Cir. 2002). The FSIA was further amended in 2008 to specifically provide for money damages, including punitive damages, and to permit a foreign state's property to be attached during the pendency of the litigation and executed to satisfy a judgment against the state. 28 U.S.C. §§ 1605A, 1610. This additional amendment further reflects Congress's intent to ensure that victims of torture and their families were able to obtain just remedies.

The Congressional Committee specifically named North Korea as one of a small handful of actors that had spurred the addition of this exception to sovereign immunity.[4] This case concerns Reverend Kim Dong Shik, evidence of whose abduction and disappearance by officials of North Korea in 2000 was acknowledged by the court below.[5]

An enforced disappearance is the deprivation of freedom with direct intervention of state officials, coupled with the refusal to acknowledge the detention and reveal the fate or whereabouts of the victim. When the State refuses to participate in litigation, individuals seeking redress on behalf of victims have no ability to access direct evidence regarding the State's treatment of the victim. The district court recognized the problem this posed for the plaintiffs in this case but rejected plaintiffs' attempt to rely on circumstantial evidence of Reverend Kim's treatment, noting that "[u]nfortunately for plaintiffs, no D.C. Circuit opinion

[4] H.R. Rep. No. 104-383, at 62-63 (1995).

[5] Han Kim v. Democratic People's Republic of Korea, 950 F. Supp. 2d 29, 41 (D.D.C. 2013) ("The South Korean court decision and the expert evidence reflect that Reverend Kim was abducted at the behest of DPRK security forces, not in accordance with any legitimate judicial or other process, due to Kim's religious work and assistance to North Korean refugees.").

appears to allow such circumstances to lessen the plaintiffs' exacting burden of proof."[6]

This extremely demanding approach towards the use of reasonable inferences and evidence of a pattern or practice of abuses permits uncooperative States effectively to immunize themselves, thwarting the intent of Congress in adopting the FSIA terrorism exceptions.

In light of the purpose of the terrorism exceptions to the FSIA, this Court should address the inherent evidentiary difficulties encountered by plaintiffs in enforced disappearance cases by adopting evidentiary practices similar to those of the international tribunals and treaty bodies discussed below.

### A. In The Inter-American Court of Human Rights, evidence of a pattern or practice is used to prove enforced disappearance, torture and killing by the State.

The American Convention on Human Rights was adopted by the Organization of American States ("OAS")[7] in 1969 and entered into force in 1978.[8]

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[6] Han Kim v. Democratic People's Republic of Korea, 950 F.Supp.2d 29, 42 (D.D.C. 2013) ("DPRK's failure to respond to the complaint or to respond to any of the congressional inquiries regarding Reverend Kim's fate, in part, obscures the precise details of Reverend Kim's treatment following his abduction by DPRK agents. Moreover, the widely feared nature of DPRK repression appears to force those individuals who may know details about Reverend Kim's whereabouts and treatment to convey such information sparingly and anonymously.").

[7] The OAS is a body of North and South American nations that was formed at the end of World War II. Charter of the Organization of American States, Apr. 30, 1948, O.A.S.T.S. No. 1, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter].

To date, more than twenty nations have ratified or adhered to the Convention.[9] The Convention established the Inter-American Court of Human Rights (IACtHR) to safeguard the human rights enshrined in that international instrument.[10] The court can order monetary or non-monetary reparations.[11]

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[8] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

[9] *See* Organization of American States, Department of International Law, Signatories and Ratifications of the American Convention on Human Rights, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

[10] American Convention, *supra* note 8. The court has contentious and advisory jurisdiction over the American Convention. Before a case concerning an individual complaint may be adjudicated by the IACtHR, the Inter-American Commission of Human Rights must rule on the admissibility of a claim in a citizen's complaint. If admissible, the Commission will issue a report on the merits and provide recommendations to the State to assist the parties in negotiating a friendly settlement. If the State Party fails to abide by these recommendations, or if the Commission decides the case is of particular legal interest, the case can be referred to the court.

[11] American Convention, *supra* note 8, Art. 63. In addition to ratifying the Convention, a State Party must voluntarily submit to the court's jurisdiction for it to be competent to hear a case involving that State. Id., Art. 62. The United States has ratified the Charter of the Organization of American States and therefore is a member of the Organization of American States. The United States has signed but not ratified the American Convention on Human Rights and therefore is not subject to the court's jurisdiction. Nonetheless, as a member of the Organization of American States, the United States may participate in advisory proceedings before the IACtHR and has done so in the past. United States v. Nai Fook Li, 206 F.3d 56, 64 n.4 (1st Cir. 2000); *see, e.g.*, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999); American Convention, *supra* note 8, Art. 64.1.

The Inter-American Court of Human Rights has dealt extensively with cases concerning enforced disappearance.[12] In its first such case, *Velásquez Rodríguez v. Honduras*, it became apparent to the court that claims related to enforced disappearance were complicated by the lack of direct evidence of the fate of the victim after abduction.[13] In more recent cases the IACtHR has recognized that when State agents detain the victim, it is the State that controls all means of producing evidence as to the fate of that person:

> "[E]ven though the burden of proof of the facts on which the argument is based corresponds to the claimant, in the proceedings on violations of human rights the State's defense cannot fall upon the claimant's impossibility to provide evidence when it is the State who has control of the means to clarify the facts occurred within its territory. Below, we will examine the evidence that takes into consideration this extreme and that, without detriment to

[12] "[T]he jurisprudence of the Court has been a precursor to the consolidation of a comprehensive perspective of the seriousness and the continued or permanent nature of the concept of enforced disappearance of persons … [E]nforced disappearance constitutes a multi-offensive violation to various rights protected by the American Convention that places the victims in a state of complete defenselessness, giving rise to other related infringements, becoming particularly serious when carried out as part of a systematic pattern or practice or tolerated by the State." Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 103 (Nov. 24, 2010).

[13] Velásquez Rodríguez v. Honduras. Merits. Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 124 (July 29, 1988).

> it, is capable of creating the conviction of the truth of the facts argued."[14]

To establish the facts in such cases, the IACtHR applies a two prong test, looking to evidence of a pattern or practice of similar acts at the hands of the State and to circumstantial evidence that can connect the victim to that pattern:

> "Due to the nature of the phenomenon and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven."[15]

According to this test, the court may conclude that a person suffered enforced disappearance if plaintiffs can (1) show the existence of a pattern or practice of enforced disappearance perpetrated, sponsored or tolerated by the defendant state; and (2) link a particular victim to that pattern.

Furthermore, the IACtHR will allow plaintiffs to carry its burden by using circumstantial evidence and inferences. The court has determined that in enforced disappearance cases, "[c]ircumstantial evidence, indicia, and presumptions may be

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[14] Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 119 (Nov. 23, 2009).

[15] Bámaca Velásquez v. Guatemala. Merits, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 130 (Nov. 25, 2000).

considered, so long as they lead to conclusions consistent with the facts."[16] The IACtHR has acknowledged that circumstantial evidence is "especially important" in cases of enforced disappearance because "this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim."[17] Once a prima facie case is established by such evidence, it will fall on the State to come forward with evidence to disprove these inferences.

In *Velásquez Rodríguez*, Manferdo Velásquez Rodríguez was kidnapped in Honduras by unknown individuals and never seen again. The court found that the evidence established that there was a pattern of similar disappearances at the relevant time in Honduras, where victims were abducted, interrogated, tortured, and later summarily executed and their bodies secretly disposed of. In particular, the court found that (a) during the period from 1981 to 1984, 100-150 persons disappeared from Honduras; (b) "[t]hose disappearances followed a similar pattern, beginning with the kidnapping of the victims by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises…"; (c) it was well known in Honduras that these kidnappings were done by State officials or their agents; and (d) the "disappearances were carried out in a systematic manner. At the same time, the Honduran authorities refused to acknowledge these detentions. The

[16] Velásquez Rodríguez v. Honduras, *supra* note 13, ¶ 130.

[17] Id.

circumstances of Velásquez Rodríguez's disappearance fit this pattern.[18] The Honduran State failed to put forward evidence to the contrary.[19] Accordingly, the court concluded that he was in fact the victim of enforced disappearance and declared a violation of the rights to liberty, humane treatment, and life.

In relation to the right to life, the court held that the context in which his disappearance took place and the time elapsed since he was last seen alive were sufficient to conclude that he had been killed.[20] Evidence presented to the court indicated that victims of the pattern of disappearance existing in Honduras at the relevant time were subject to extrajudicial killing. The court connected the particular case of Manfredo Velásquez Rodríguez to the general pattern existing in Honduras at the time and, based on the time he was last seen alive, drew a reasonable inference as to his fate.

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[18] Id. ¶ 147, d. ("The kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts deemed proved in paragraphs a-d.")

[19] Id. ¶ 137. ("Since the Government only offered some documentary evidence in support of its preliminary objections, but none on the merits, the Court must reach its decision without the valuable assistance of a more active participation by Honduras, which might otherwise have resulted in a more adequate presentation of its case.").

[20] Id. ¶ 188. ("The context in which the disappearance of Manfredo Velásquez occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed.").

When considering allegations that Velásquez Rodríguez was subject to torture and cruel and inhuman treatment, the court stated that:

> "[A]lthough it has not been directly shown that Manfredo Velásquez was physically tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1 (1) to ensure the rights under Article 5 (1) and 5 (2) of the Convention."[21]

The IACtHR has employed this reasoning in several subsequent cases of enforced disappearance, consistently holding States liable for violations of the rights to liberty, humane treatment, and life.[22]

### B. In The European Court of Human Rights, once a *prima facie* case of State involvement in a disappearance is shown, the State must produce evidence to the contrary and the victim may be presumed dead based on the time elapsed and the context of the disappearance

The European Court of Human Rights (ECHR) was established by the European Convention on Human Rights in 1959.[23] The jurisdiction of the ECHR

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[21] Id. ¶ 187. Article 1 of the American Convention of Human Rights imposes the obligation to, inter alia, "respect the rights and freedoms recognized herein." Article 5 subsection 1 establishes the "right to have his physical, mental, and moral integrity respected." Subsection 2 provides, inter alia, the right to be free from "torture or [] cruel, inhuman, or degrading punishment or treatment."

[22] See Castillo Páez v. Peru. Merits. Inter-Am. Ct. H.R. (ser. C) No. 34 (Nov. 3, 1997); Caballero Delgado and Santana v. Colombia. Merits. Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995); Godínez Cruz v. Honduras. Merits. Inter-Am. Ct. H.R. (ser. C) No. 5 (Jan. 20, 1989).

has been recognized by all 47 member states of the Council of Europe.[24] The court exercises both contentious jurisdiction (litigated cases) and advisory jurisdiction over the European Convention on Human Rights.[25]

To confront evidentiary challenges in enforced disappearance cases, the ECHR requires plaintiffs to establish a *prima facie* case showing involvement of State officials in the kidnapping of the victim. Once this standard is met, the burden of producing evidence to the contrary falls on the State. According to the ECHR, the State will bear the burden "of providing a plausible explanation for injuries and deaths occurring to persons in custody," noting that the "burden is intrinsically linked to … the specificity of the facts of the case." [26]

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[23] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[24] See Council of Europe, Treaty Office, Simplified Chart of signatures and ratifications, available at: http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG

[25] See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Arts. 32-34.

[26] Aslakhanova and Others v. Russia, Eur. Ct. H.R., App. Nos. 2944/06, 8300/07, 50184/07, 332/08, 42509/10 (2012), par. 97. (Internal references removed).

In addition, the ECHR has employed inferences and adopted a presumption of death based on the context in which the disappearance took place in order to establish that the victim's right to life was violated.

In the ECHR, plaintiffs must establish a *prima facie* case showing that State officials perpetrated the kidnapping of the victim.[27] In turn, if the State fails to disclose relevant information within its control, the ECHR will draw inferences as to the fate of the victim:

> "According to the Court's settled case-law, it is for the applicant to make a *prima facie* case and to adduce appropriate evidence. If, in response to such allegations made by the applicants, the Government then fail [sic] to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn."[28]

The ECHR adopted this standard "[bearing] in mind the difficulties associated with obtaining the evidence and the fact that, often, little evidence could be submitted by the applicants in support of their applications."[29]

The ECHR has taken this reasoning one step further, and in cases where the kidnapping took place in a life-threatening context and a long time has elapsed since the victim was last seen alive, the court will presume the person is dead:

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[27] Id. ¶ 98. (Internal references removed)

[28] Id. ¶ 97. (Internal references removed)

[29] Id. ¶ 99. (Internal references removed)

> "Even where the State's responsibility for the unacknowledged arrest was established, the fate of the missing person often remained unknown. The Court has on numerous occasions made findings of fact to the effect that a missing person could be presumed dead. Generally, this finding has been reached in response to claims made by the respondent Government that the person was still alive or has not been shown to have died at the hands of State agents. The presumption of death is not automatic and is only reached on examination of the circumstances of the case, in which the lapse of time since the person was seen alive or heard from is a relevant element."[30]

Accordingly, the ECHR infers the person has died on the basis of contextual information. This approach is consistent with the ECHR's position on the type of evidence required to satisfy its standard of proof: according to the court, "[s]uch proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[31]

In sum, the ECHR recognizes the logic and necessity of the use of inferences, presumptions, and shifts in the burden of production of evidence because the State controls the means to produce evidence as to the fate of a person in its custody.

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[30] Id. ¶ 100. (Internal references removed)

[31] Id. ¶ 95. (Internal references removed)

### C. In the United Nations Human Rights Committee, a complaint regarding enforced disappearance may prevail if it is based on credible evidence and the State fails to come forward with evidence to the contrary

The United Nations Human Rights Committee (UNHRC or the Committee) is a body of experts charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR). The UNHRC examines reports submitted by State parties on the implementation of the Covenant.[32] The Committee can also examine individual complaints concerning violations of the ICCPR, pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights.[33] In these proceedings, the complainant is referred to as the "author of the communication" or the "author."

The UNHRC has also dealt with several enforced disappearance cases, confronting challenges similar to those faced by the IACtHR and the ECHR: a scarcity of direct evidence coupled with the unwillingness of States to participate in the proceedings or produce evidence as to the fate of the victims. The UNHRC has dealt with these challenges by allowing a complaint to prevail if it is based on credible evidence and the State fails to come forward with evidence to the

[32] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, art. 40.

[33] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, art. 1.

contrary. Additionally, the Committee has accepted the use of circumstantial evidence and inferences to establish a violation of the ICCPR.

First, allegations of enforced disappearance that are based on credible evidence may prevail, and it will fall on the State to come forward with evidence to disprove them. The Committee has repeatedly emphasized "that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information."[34]

In *Almegaryaf and Matar v. Libya*, "the State party … provided no response to the authors' allegations regarding the enforced disappearance of their fathers,"[35] and the Committee held that:

> "In cases where the authors have submitted allegations to the State party that are corroborated by credible evidence and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider authors' allegations substantiated in the absence of satisfactory evidence or

[34] Hiber Conteris v. Uruguay, Communication No. 139/1983 (17 July 1985), U.N. Doc. Supp. No. 40 (A/40/40) at 196 (1985), par. 7.2. The UNHRC has consistently held this position since its very first case on enforced disappearance. See UNHRC, Eduardo Bleier v. Uruguay, Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982), par. 13.3.

[35] Almegaryaf and Matar v. Libya, Communication No. 2006/2010 (CCPR/C/110/D/2006/2010), par. 7.2.

> explanations to the contrary presented by the State party."[36]

This allowed the Committee to declare that Libya had violated, *inter alia*, articles 6, 7, and 10 of the ICCPR in respect to the two disappeared victims.[37]

Second, in the context of cases of enforced disappearance, the Committee has accepted the use of circumstantial evidence to permit strong inferences as to the abuses endured by the victim after his abduction. In *Mojica v. Dominican Republic*, the Committee established a violation of article 7 of the ICCPR, based on evidence of threats received by the victim prior to his disappearance as well as the Committee's own experience regarding the phenomenon of enforced disappearance:

> "The circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. Nothing has been submitted to the Committee by the State party to dispel or counter this inference. Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that

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[36] Id.

[37] Id. at par. 8. Article 6 of the ICCPR establishes the right to life, and that "[t]his right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 7 establishes that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 establishes that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

> the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7."[38]

The Committee has also accepted evidence of country conditions to establish a violation to the right to be free from torture and cruel, inhuman, and degrading treatment. Significantly, in rendering its decision in *Almegaryaf and Matar v. Libya*, the Committee relied on country conditions reports produced by the United Nations Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[39] Similarly, the United Nations recently issued a detailed report citing overwhelming evidence of a pattern and practice of enforced disappearances, torture, and extrajudicial killings in North Korea.[40]

Finally, in *Taous Djebbar and Saadi Chihoub v. Algeria*, the Committee found a violation to the right to life on the basis of the context of the disappearance and the time elapsed since the victims were last seen alive:

> "[…] According to the authors, the chances of finding Djamel and Mourad Chihoub alive 15 years after their

[38] Mojica v. Dominican Republic, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), par. 5.7.

[39] Almegaryaf and Matar v. Libya, Communication No. 2006/2010 (CCPR/C/110/D/2006/2010), par. 7.5 (noting "the information on the inhuman conditions at Abu-Salim prison" documented in a report by the United Nations Special Rapporteur) (citing Report of 12 January 1999 by the Special Rapporteur on the question of torture, (E/CN.4/1999/61, para. 448).

[40] Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63 (February 7, 2014).

> disappearance are negligible, and their prolonged absence, as well as the context and circumstances of their arrest, suggest that they died in detention. The Committee notes that the State party has not provided any information to refute these allegations, and concludes that the State party has failed in its duty to guarantee the right to life of Djamel and Mourad Chihoub, in violation of article 6 of the Covenant."[41]

In sum, the Committee has declared violations to the ICCPR in cases of enforced disappearance when these claims are based on circumstantial but reliable evidence, and where the State has failed to produce evidence disproving these allegations.

## II. THE STANDARDS APPLIED BY THE INTERNATIONAL TRIBUNALS ARE CONSISTENT WITH U.S. JURISPRUDENCE

The evidentiary standards developed by the international human rights tribunals and treaty bodies for cases of enforced disappearance are harmonious with U.S. jurisprudence. Both the Supreme Court and this Circuit have recognized the importance of tailoring evidentiary standards and burdens of proof to fit the circumstances of a "very unusual, perhaps unique, situation."[42] Perhaps the best known example of this process in domestic law is the evidentiary approach used in

[41] Taous Djebbar and Saadi Chihoub v. Algeria, Communication No. 1811/2008, U.N. Doc. CCPR/C/103/D/1811/2008 (2012), par. 8.4.

[42] Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981). ("McDonnell itself, however, recognizes very realistically that the courts must adjust the definition of a prima facie case and the allocation of burden of proof to the differing situations that may arise in Title VII cases….") (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

Title VII employment discrimination cases. Recognizing "the difficulty a plaintiff faces in proving the motives behind an employer's actions,"[43] and pointing to the purpose of the protections afforded by the statute,[44] the U.S. Supreme Court has adopted a burden-shifting framework in Title VII cases[45] and permits plaintiffs to rely on evidence of a pattern or practice of discrimination to establish their right to relief. [46] Once the pattern or practice is established, it "supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy.[47]

The framework adopted by courts in Title VII cases is analogous to the burden-shifting approach used by the ECHR and UNHRC and the pattern or practice standard used by the IACtHR in enforced disappearance cases. While international tribunals often refer to this approach as a shifting of the "burden of

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[43] Bundy v. Jackson, 641 F.2d 934, 950 (D.C. Cir. 1981)

[44] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.")

[45] Civil Rights Act of 1964, 42 U.S.C. § 2000c et seq.

[46] International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[47] Id. at 336, 362.

proof,"[48] it would be sufficient, and perhaps more harmonious with domestic law, to adopt the approach used in Title VII cases, which hold that proof of disparate treatment or a pattern or practice are sufficient to create an inference of discrimination, thus shifting the burden of production to the defendant to justify the conduct.[49] Translating this approach to the FSIA's terrorism exception, the claimant would establish a prima facie case by demonstrating (1) a disappearance to a State in which there is shown a pattern and practice of forced disappearance, torture, and/or extrajudicial killing, and (2) a link between the victim's disappearance and the pattern or practice.[50]

## CONCLUSION

The Court should approve use in cases arising under the Foreign Sovereign Immunity Act terrorism exception of evidentiary standards akin to those applied by

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[48] ECHR, Case of Aslakhanova and Others v. Russia, (Applications Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), 18 December 2012, par. 114. ("The Government's arguments are limited to the reference to the unfinished nature of the criminal investigations […]. In any case, they are insufficient to discharge them of the burden of proof which has been shifted to them in such cases").

[49] *Accord* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981) ("The employer's burden to articulate a legitimate, nondiscriminatory reason for his action is simply the burden of going forward with the evidence.")

[50] In this case, for example, the link between Reverend Kim's disappearance and the pattern and practice of forced disappearances, torture, and extrajudicial killings is established by the proof that Reverend Kim was kidnapped by agents of North Korea. Other cases may present different fact patterns that also would support a link to the pattern or practice.

the IACtHR, ECHR, and UNHRC in cases of enforced disappearance. This case should be remanded so that the district court may reconsider the evidence presented by the plaintiffs in light of the proper evidentiary standards.

Respectfully Submitted,

*/s/ Robert P. LoBue*

Robert P. LoBue
*Counsel of Record*
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Of Counsel*

Gabor Rona
Ignacio Mujica
Human Rights First
333 Seventh Avenue, 13th Floor
New York, New York 10001

Niji Jain
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Dated: June 3, 2014

**CERTIFICATE OF COMPLIANCE**
**WITH TYPE-VOLUME LIMITATION, TYPEFACE**
**REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,138 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

*/s/ Robert P. LoBue*
Robert P. LoBue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Counsel for Human Rights First*

Dated: June 3, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system.

I certify that Plaintiffs-Appellants in the case are registered CM/ECF users and that service on them will be accomplished by the appellate CM/ECF system. The Defendant-Appellee, the Democratic People's Republic of Korea, made no appearance in the trial court, where the clerk entered default, and has also made no appearance in this Court. Accordingly, no additional copies of the foregoing brief are being served.

*/s/ Robert P. LoBue*
Robert P. LoBue
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
rplobue@pbwt.com

*Counsel for Human Rights First*

Dated: June 3, 2014

**CERTIFICATE OF SERVICE**

Robert J. Candella, pursuant to 28 U.S.C. 1746, under penalty of perjury, certifies that on the 3rd day of June, 2014, I served the accompanying motion for leave to file an amicus brief on behalf of Human Rights First in support of Appellants, along with the proposed amicus brief, upon the parties herein. Service was completed by electronic means.

/s/Robert J. Candella