

THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

MANUEL GUDIEL GARCIA, *et al.*

Plaintiffs,

v.

Civil Action No. 1:11-cv-527-RBW

KATHLEEN SEBELIUS, *et al.*

Defendants.

**THE UNITED STATES' MOTION TO DISMISS
AND MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to Fed. R. Civ. P. 12(b)(1), the United States respectfully moves this Court for dismissal of the claims against it. In support of this motion, the Court is referred to the memorandum immediately following.

Date: January 9, 2012

Respectfully submitted,

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This lawsuit arises out of a deeply troubling chapter in our nation’s history, studies of sexually transmitted diseases (STDs) conducted by United States Public Health Service (PHS) employees in Guatemala between 1946 and 1948 without informed consent. First Amended Complaint (FAC) ¶ 2; Ex. 1 (“*Ethically Impossible*”: *STD Research in Guatemala from 1946 to 1948*, Presidential Commission for the Study of Bioethical Issues, Sept. 2011 (Comm. Rpt.), p. 2).¹ As a result of these unethical studies, a terrible wrong has occurred. The United States is committed to taking appropriate steps to address that wrong. For reasons set forth below, however, this lawsuit is not the proper vehicle – and this Court is not the proper forum – through which the consequences of this shameful conduct may be resolved.

FACTS²

The studies giving rise to this lawsuit “encompassed research on three STDs – syphilis, gonorrhea, and chancroid – and involved the intentional exposure to STDs of 1,308 research subjects from three populations: prisoners, soldiers, and psychiatric patients.” Comm. Rpt. at p. 6. Researchers also “conducted diagnostic testing” that “did not involve intentional exposure to infection” on “5,128 subjects including soldiers, prisoners, psychiatric patients, children, leprosy patients, and Air Force personnel at the

¹ “In ruling on a Rule 12(b)(6) motion to dismiss, the Court may consider ‘any documents either attached to or incorporated in the complaint ... without converting the motion to dismiss into one for summary judgment.’” *Earle v. Holder*, Civ. No. 10-0422, 2011 WL 4526039, *1 n.2 (D.D.C. Sept. 30, 2011) (quoting *Baker v. Henderson*, 150 Supp. 2d 13, 15 (D.D.C. 2001)). Plaintiffs’ complaint incorporates several excerpts from the Presidential Commission’s report as well as general discussion of the Commission’s findings and recommendations. *See, e.g.*, FAC ¶¶ 6-12.

² For the limited purposes of ruling on a motion to dismiss for failure to state a claim, courts “accept[] as true” all “factual matter” set out in a complaint. *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)).

U.S. base in Guatemala.” *Id.* at pp. 2, 6. This diagnostic testing “continued through 1953.” *Id.* at p. 6. Although “local authorities in Guatemala [had] made their institutions available to the U.S. researchers,” and these experiments were carried out with the “cooperation” of “Guatemalan health authorities and government officials,” “there is no evidence that consent was sought or obtained from the individual subjects who were the subjects of the research.” *Id.* at pp. 92, 106.

Dr. John Cutler, who is now deceased, was a senior PHS surgeon and the director of STD research in Guatemala. *Id.* at p. 112. Other former U.S. officials were also involved, including the chief of PHS’s Venereal Disease Division and the Surgeon General. *Id.* at pp. 112-15. However, it is undisputed that the defendants named in this lawsuit played no role in the experiments. *Id.* These high-ranking public health officials, including the current Secretary of Health and Human Services and the current Surgeon General, took office decades later. *Id.*; see FAC ¶¶ 36-43.

When the Guatemalan research became public in late 2010, “the U.S. government registered . . . outrage.” Comm. Rpt. at p. 2. “Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services . . . and Hillary Rodham Clinton, Secretary of the Department of State, immediately issued a joint apology to the government of Guatemala and the survivors and descendants of those affected.” *Id.* President Obama personally “telephoned President Álvaro Colom of Guatemala to extend an apology to the people of Guatemala.” *Id.* He also directed his Presidential Commission on the Study of Bioethical Issues to “oversee a thorough fact-finding investigation into the specifics of the Guatemala research.” *Id.* at p. 3 (internal citation and quotation omitted). The Commission issued an over 200-page report based on “more than 125,000 pages of

original records,” “tens of thousands of pages of relevant archival records,” and “more than 550 published sources.” *Id.* at p. 5.

THIS LAWSUIT

This lawsuit is brought to redress harms allegedly suffered by Guatemalans as a result of the PHS experiments in Guatemala.³ Though not all alleged victims are named plaintiffs,⁴ those allegedly injured include:

1. **Manuel Gudiel Garcia**, “a soldier ... between 1948 and 1950.” FAC ¶ 19. The Complaint alleges that U.S. researchers “inoculated” Garcia with multiple unspecified “venereal diseases” “over the course of 18 months.” *Id.* Garcia is now deceased.⁵ *Id.*
2. **Celso Ramirez Reyes**, “a member of the Guatemalan military between 1948 and 1950.” *Id.* ¶ 20. According to the Complaint, Reyes “was inoculated with venereal diseases ... during six months of that service and suffered many diseases.” *Id.* Upon leaving the military, Reyes allegedly suffered from “sores, poor sight, gonorrhea, and ... letharg[y].” *Id.* Reyes is now deceased. *Id.*⁶

³ Plaintiffs assert that they “bring this action individually” and as a “class action” on behalf of “[a]ll individuals who were subjected to non-consensual human medical experimentation in Guatemala ... or were themselves infected to be used as vehicles for infecting the test subjects ... and all children, domestic partners, and spouses of the test subjects who suffered serious, negative health conditions as a result of Defendants’ non-consensual human medical experimentation.” FAC ¶ 28. Defendants reserve the right to oppose certification of such a class but will not address the issue unless and until Plaintiffs properly move for certification.

⁴ The complaint recites a number of allegations regarding injuries not personally suffered by the named plaintiffs. With respect to those allegations, plaintiffs have no standing to pursue relief. *See Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010) (“one cannot have standing in federal court by asserting an injury to someone else”).

⁵ Garcia’s “surviving child and legal heir,” Mateo Gudiel Pinto, sues on his behalf. FAC ¶ 19.

⁶ Reyes’ “surviving children and legal heirs,” Gonzalo Ramirez Tista, Victoria Ramirez Tista, and Celso Ramirez Tista, sue on his behalf. FAC ¶ 20.

3. **Victoria Ramirez Tista**, the daughter and “second child” of Celso Ramirez Reyes and “has suffered many health problems since she was born, including losing her vision at age 15.” *Id.*
4. **Gonzalo Ramirez Tista**, “the daughter of Celso Reyes’s oldest child.” *Id.* ¶ 20. She “has canker sores on her head which have caused her to lose her hair.” *Id.*
5. **Frederico Ramos Mesa**, “a soldier from 1948 through 1950 in the Guatemalan air force.” *Id.* ¶ 21. He was allegedly “inoculated with venereal diseases ... every 15 days” “[o]ver a course of approximately 6 months during his service.” *Id.* He reports that “these inoculations gave him uncomfortable feelings in the genital area along with secretions and hives” and caused him to “stay in bed for one to three days, due to pain and fatigue.” *Id.* Mesa continued to experience “genital secretions,” “difficulty urinating,” “pain in his bones,” “headaches,” and “fatigue” after leaving the military. *Id.*
6. **Odilia Ramos Ruano**,⁷ the “youngest” of Mesa’s “three children.” *Id.* She “was born with cankers on her head, which caused total hair loss.” *Id.*
7. **Oscar Perez Ruiz**,⁸ who “was abandoned at a young age and lived on the streets.” *Id.* ¶ 21. The Complaint alleges that “[i]n approximately 1960, Oscar was picked up by unknown persons ... and inoculated with syphilis.” *Id.* “In 1980, Oscar had a blood test and learned he had syphilis.” *Id.* He was successfully treated with penicillin. *Id.*
8. **Marta Cesarea Perez Ruiz**, the wife of Oscar Perez, who married him “years” after he was allegedly “inoculated with syphilis.” *Id.* She also tested positive for syphilis in 1980 and was successfully treated with penicillin. *Id.* According to the complaint, Marta experienced a stillbirth before her syphilis diagnosis. *Id.*
9. An unnamed **daughter of Oscar and Marta Ruiz**, born on or before November 10, 1984, who “has been severely disabled her entire life.” *See id.* (as of November 10, 2011, daughter was “now 27 years old”).⁹
10. **Victor Manuel Tecu Florian**, “a soldier ... from 1969 through 1971.” *Id.* ¶ 23. He alleges that he “received injections ... every 15 days” of his “18 months of service” and “thus contracted syphilis.” *Id.* He was “ultimately cured” but “is unable to walk properly to this day.” *Id.*

⁷ Ruano is not a named plaintiff.

⁸ Oscar himself is also not a named Plaintiff, but rather discussed in the paragraph about his wife. It is not clear whether Oscar is still living.

⁹ This alleged victim is also not a named plaintiff.

11. **Marta Lidia Orellana Guerra**, a resident of “the Rafael Ayau orphanage” during unspecified years. *Id.* at ¶ 24. She alleges that when she was nine years old, doctors “took her blood, performed a minor procedure on her arm, and ... began a series of injections” that were “initially ... placed in [her] arm, but later given directly into her spine.” *Id.* She reports that she “has suffered various ailments in the decades following the injections,” but that she “believes that the physical impacts [*sic*] of the experiments may have subsided in her old age.” *Id.*

The Complaint alludes to “additional people [who] have come forward” since “realizing that they or their loved ones were likely among the victims.” *Id.* ¶ 25. However, it does not name or otherwise identify anyone else harmed directly or indirectly by the experiments.

The named Plaintiffs¹⁰ assert claims under the Alien Tort Statute (ATS) for “Medical Experimentation on Non-Consenting Human Subjects,” *id.* ¶¶ 133-140 (First Claim for Relief), and for “Cruel, Inhuman, or Degrading Treatment,” *id.* ¶¶ 141-147 (Second Claim for Relief). They also bring a Fifth Amendment substantive due process claim, *id.* ¶¶ 148-156 (Third Claim for Relief), and a claim under the Eighth Amendment for “Cruel and Unusual Punishment,” *id.* ¶¶ 157-165 (Fourth Claim for Relief). Plaintiffs seek judgment in their favor, *id.* ¶ 166(a); a “declar[ation] that Defendants have violated Plaintiffs’ human rights and the laws of the District of Columbia and the United States,” *id.* ¶ 166(b); and “compensatory and punitive damages,” *id.* ¶ 166(c).

Defendants are eight *current* federal office-holders. They include: Secretary of Health and Human Services Kathleen Sebelius; Assistant Secretary for Health Howard Koh; Surgeon General Regina M. Benjamin; CDC Director Thomas Frieden; CDC

¹⁰ “Mateo Gudiel Pinto as heir of Manuel Gudiel Garcia; Gonzalo Ramirez Tista, Victoria Ramirez Tista, and Celso Ramirez Tista as heirs of Celso Ramirez Reyes; Frederico Ramos Mesa; Marta Cesarea Perez Ruiz; Victor Manuel Tecu Florian; [and] Marta Lidia Orellana Guerra.”

Director of Office of Infectious Diseases Rima Khabbaz; CDC Director of National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention Kevin Fenton; CDC Director of Division of STD Prevention Gail Bolan; and NIH Director of the National Cancer Institute Harold Varmus.¹¹ Though Plaintiffs distinguish between these defendants and those actually “directly responsible for the unlawful actions alleged,” *id.* ¶ 44,¹² they have nonetheless sued the current office-holders in their individual capacities, citing undefined “principles of successor liability.” *Id.* ¶ 45.

SUMMARY OF THE ARGUMENT

Plaintiffs’ claims based on alleged violations of customary international law are properly construed as claims against the United States under the Federal Tort Claims Act (FTCA).¹³ As such, they must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The FTCA’s limited waiver of sovereign immunity excepts claims based on harms suffered in a foreign country and claims brought by plaintiffs who have failed to exhaust their administrative remedies.

¹¹ Plaintiffs have also named Dr. Mirta Roses Periago, the Director of the Pan-American Health Organization. She is not a federal employee and not represented by the undersigned Department of Justice counsel, but the Department understands that counsel for Dr. Roses Periago intends to assert immunity on her behalf under the International Organizations Immunities Act, 22 U.S.C. § 288.

¹² See FAC ¶ 36 (Sebelius); *id.* ¶ 37 (Koh); *id.* ¶ 38 (Benjamin); *id.* ¶ 39 (Frieden); *id.* ¶ 40 (Khabbaz); *id.* ¶ 41 (Fenton); *id.* ¶ 42 (Bolan); and *id.* ¶ 43 (Varmus).

¹³ See *In re Iraq and Afghanistan Detainees*, 479 F. Supp. 2d 85, 111 (D.D.C. 2007) *aff’d*, 649 F.3d 762 (D.C. Cir. 2011) (“[T]here are two exceptions that preclude [the *Westfall Act*’s] application ...: (1) a *Bivens* action ...; or (2) an action under a federal statute that authorizes recovery against a Government employee. These are the only two exceptions to the *Westfall Act* and the Supreme Court has indicated that it would be error to infer others.”) (*italics added*); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 10 (D.D.C. 2004) (“The *Westfall Act* ... is explicit in allowing an exception only for ‘a violation of a statute of the United States [or] a violation of the Constitution of the United States,’ not federal common law or international law.”) (*italics added*).

ARGUMENT

In addition to constitutional tort claims, *see* First Amended Complaint (FAC) ¶¶ 148-56 (Fifth Amendment) and ¶¶ 157-65 (Eighth Amendment), Plaintiffs’ complaint asserts two claims for alleged violations of the “law of nations” or “customary international law,” *see id.* ¶¶ 133-40 (“violation of prohibition against medical experimentation on non-consenting human subjects) and ¶¶ 141-47 (“violation of prohibition against cruel, inhuman, or degrading treatment”).¹⁴ As to those claims, the United States has filed a scope-of-employment certification for each of the individual federal defendants. *See* Ex. 1 to *The United States’ Motion for Substitution on Counts 1 and 2 and Memorandum of Points and Authorities*. “Upon the Attorney General’s certification, the tort suit automatically converts to an FTCA ‘action against the United States’ in federal court; the Government becomes the sole party defendant; and the FTCA’s requirements, exceptions, and defenses apply to the suit.” *Harbury v. Hayden*, 522 F.3d 413, 416 (D.C. Cir. 2008) (citing 28 U.S.C. § 2679(d)(1)).¹⁵

¹⁴ To the extent Plaintiffs’ complaint suggests they intend to sue directly under the international treaties they cite, such claims would not be viable. *See Macharia v. United States*, 238 F. Supp. 2d 13, 29 (D.D.C. 2002) (“There is no ... waiver [of sovereign immunity] related to claims brought pursuant to the [International Covenant on Civil and Political Rights].”).

¹⁵ Even though Plaintiffs style these as claims brought under the ATS, in reality they arise under international law and can be pursued against the United States only via the FTCA. *See Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 886 (D.C. Cir. 1992) (*per curiam*) (affirming dismissal of ATS claims because the ATS contains no independent waiver of sovereign immunity and the claims fell within the discretionary function exception to the FTCA’s waiver of sovereign immunity); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (“The Alien Tort Statute itself is not a waiver of sovereign immunity.”); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (“In the absence of specific language in the treaty waiving the sovereign immunity of the United States, [it] must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom.”).

The resulting FTCA claims must be dismissed pursuant to Rule 12(b)(1) because no applicable waiver of sovereign immunity exists. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 474 (1994) (plaintiff may not sue the United States absent an express waiver of sovereign immunity); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”). Specifically, Plaintiffs’ claims fall within the foreign country exception to the FTCA’s limited waiver of sovereign immunity, and Plaintiffs have failed to exhaust their administrative remedies.

I. The foreign country exception bars Plaintiffs’ claims.

The FTCA grants federal district courts jurisdiction over claims arising out of any “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where ... a private person, would be liable ... in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). In doing so, it waives “the sovereign immunity of the United States from suits in tort, and *with certain specific exceptions*, ... render[s] the Government liable in tort as a private individual would be under like circumstances.” *Richards v. United States*, 369 U.S. 1, 6 (1962) (emphasis added). “If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case.” *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1156 (D.D.C. 1991), *aff’d*, 957 F.2d 886 (D.C. Cir. 1992).

A “significant limitation” on the FTCA’s waiver of sovereign immunity is its “exception for ‘[a]ny claim arising in a foreign country.’” *Sosa v. Alvarez-Machain*, 542

U.S. 692, 700 (2004) (quoting 28 U.S.C. § 2680(k)). Since the passage of the FTCA, the Supreme Court has clarified that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” *Sosa*, 542 U.S. at 712; accord *Macharia v. United States*, 334 F.3d 61, 69 (D.C. Cir. 2003). That includes suits premised on a so-called “headquarters theory,” in which conduct planned and implemented in the United States directly causes actual injuries suffered in a foreign country. *See Sosa*, 542 U.S. at 701-04 (“domestic proximate causation under the headquarters doctrine fail[s] to eliminate application of the foreign country exception”); *Harbury*, 522 F.3d at 423 (“follow[ing] the lead of *Sosa* and declin[ing] to allow ... creative pleading to water down the foreign-country exception to the FTCA”).

In this case, the complaint itself leaves no room for doubt that this exception applies. *See* FAC ¶ 2 (“This case addresses non-consensual human medical experimentation that took place in Guatemala[.]”). The Court therefore lacks jurisdiction over any of Plaintiffs’ claims against the United States. *See Harbury*, 522 F.3d at 423 (dismissing claim that federal officials conspired to torture and kill Guatemalan national because “we lack subject-matter jurisdiction ... because the FTCA applies and the claims fall within that statute’s foreign-country exception”); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 119 (D.D.C. 2010) (substituting the United States on “torture” claims brought under the ATS and dismissing the resulting FTCA claims because “claims arising [at Guantanamo] are barred by the foreign country exception”). Plaintiffs’ claims should be dismissed on that basis.

II. Because Plaintiffs fail to satisfy the administrative exhaustion requirement, this Court lacks jurisdiction.

In addition to precluding suit based on torts committed in foreign countries, the FTCA “bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.” *McNeil v. United States*, 508 U.S. 106, 113 (1993) (citing 28 U.S.C. § 2675(a)). Any “failure to exhaust administrative remedies” is a “jurisdictional” flaw. *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (internal citations omitted). As Judge Bates has explained,

The FTCA defines the terms upon which the United States may be sued for certain torts and “absent full compliance with the conditions ... placed upon its waiver, courts lack jurisdiction to entertain tort claims against it.” Hence [the] Court lacks subject matter jurisdiction over plaintiff’s FTCA claim if he failed to exhaust administrative remedies.

Sibley v. United States Supreme Court, 786 F. Supp. 2d 338, 346 (D.D.C. 2011) *reh’g en banc denied by* No. 11-5164, 2011 WL 4376121 (D.C. Cir. Aug. 3, 2011) (quoting *GAF Corp. v. United States*, 818 F.2d 901, 904 (D.C. Cir. 1987)). Where, as here, “the record is devoid ... of any suggestion’ the plaintiffs filed an administrative claim,” the court has no choice but to dismiss “for lack of subject matter jurisdiction.”¹⁶ *Ali*, 649 F.3d at 775 (quoting *Rasul v. Myers*, 512 F.3d 644, 661 (D.C. Cir. 2008)); *see Rasul v. Myers*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (“The Alien Tort Statute and Geneva Convention claims ... were premised on alleged tortious conduct within the scope of defendants’ employment. Since plaintiffs failed to exhaust their administrative remedies as required by the FTCA, the district court lacked jurisdiction[.]”); *Wasserman v. Rodacker*, 557 F.3d 635, 640 (D.C. Cir. 2009) (United States properly substituted and claims properly

¹⁶ Even if Plaintiffs had filed timely administrative claims, they would have been subject to dismissal.

dismissed because plaintiff “failed to exhaust his administrative remedies”); *Sullivan v. United States*, 21 F.3d 198, 206 (7th Cir. 1994) (“The district court proceeded appropriately under the *Westfall* Act ... when it substituted the United States as the party defendant ... and dismissed Sullivan’s [malpractice] suit without prejudice for his failure to exhaust administrative remedies.”) (italics added); *Henderson v. United States*, 785 F.2d 121, 124-25 (4th Cir. 1986) (“dismissal is mandatory when a plaintiff fails to file a claim with the proper administrative agency,” even if he chooses to style his claim as against “the individual employee rather than the government”).

CONCLUSION

For the foregoing reasons, the United States respectfully moves for dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction.

Date: January 9, 2012

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