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Suing the Aiders and Abettors of Torture: Reviving the Torture Victim Protection Act, by Ryan Plasencia here.

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Note

Suing the Aiders and Abettors of Torture: Reviving the Torture Victim Protection Act

*Ryan Plasencia**

INTRODUCTION

Despite the practice's widespread and unambiguous international condemnation, Amnesty International estimates that at least eighty-one states currently utilize torture.[1] State governments perpetrate these regimes of violence and terror, using a culture of fear to establish some strategic advantage or achieve some desired end.[2] In a large number of cases, however, an outside entity—a political party, multinational corporation, or other organization—is benefiting from or even helping to facilitate the government's horrific acts.[3] This Note

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1. *Torture*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/human-rights-issues/torture [https://perma.cc/NL88-QHYH] ("Despite the clear prohibitions against torture, Amnesty International estimates that at least 81 countries currently practice torture." (citing Amnesty International)); *see Torture*, HUM. RTS. WATCH (2012), https://www.hrw.org/topic/torture [https://perma.cc/XFF4-JT4L] ("The prohibition against torture is a bedrock principle of international law. Torture . . . is banned at all times, in all places, including in times of war. No national emergency, however dire, ever justifies its use.").

2. *See Torture*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/torture [https://perma.cc/36QQ-6AT6].

3. *See, e.g.*, Doe v. Drummond Co., 782 F.3d 576, 580 (11th Cir. 2015) ("Plaintiffs allege that the AUC, acting at the behest and on behalf of [Drummond Company], committed a series of international law violations, including extrajudicial killings, war crimes, and crimes against humanity, against Plaintiffs' family members in Colombia."); Bowoto v. Chevron Corp., 621 F.3d 1116, 1121–22 (9th Cir. 2010) (alleging that Chevron had facilitated the Nigerian military's violent crackdown on oil platform protestors); Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005) (alleging that defendant corporations provided assistance to the Colombian government's bombing of civilians); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1349 (S.D. Fla. 2003) (alleging that Coca-Cola had facilitated the murder of a union organizer by a paramilitary group at their Colombian bottling plant); Beanal v. Freeport-

seeks to ensure such facilitation is subject to proper civil accountability.

Victims of this cruelty rarely achieve justice through their domestic court systems.[4] States that sink to the level of torture are seldom states that provide honest and expedient judicial institutions its victims can access.[5] Indeed, "[a] state that practices torture and summary execution is not one that adheres to the rule of law."[6] Accordingly, a victim of torture is often forced to look beyond the borders of their oppressor if they wish to find some fashion of redress.[7]

Some victims of torture have turned to the United States in their search for justice. To facilitate this search, in 1992 President George H.W. Bush signed the Torture Victim Protection Act (TVPA or Act), creating a private cause of action for victims of torture, as well as extrajudicial execution,[8] committed abroad.[9] As its title suggests, the broad purpose of the TVPA was to combat the scourge of state-sponsored torture around the globe—an act considered a violation of *jus cogens* norms in international law.[10] In signing the TVPA, President Bush

McMoRan, Inc., 969 F. Supp. 362, 369 (E.D. La. 1997) (alleging that Indonesian mining company committed human rights abuses against indigenous population in the course of its business).

4. *See, e.g.*, *No Justice for Torture Victims in Kazakhstan*, AMNESTY INT'L (Mar. 3, 2016, 12:49 PM), https://www.amnesty.org/en/latest/news/2016/03/kazakhstan-torture-impunity [https://perma.cc/MX3Q-Q9CL] ("The Kazakh system for investigating police abuses is so riddled with loop-holes and the protection of vested interests that torturers are able to act with virtual impunity. As long as this continues, the torture will not be effectively tackled, and countless victims will continue to suffer each year.").

5. *See* S. REP. NO. 102-249, at 3 (1991).

6. *Id.*

7. *See, e.g.*, *Litigation*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation [https://perma.cc/2LKK-MCYP] ("CJA exposes the world's fugitive war criminals and human rights abusers and holds them accountable for the suffering they have inflicted upon those in society who seek justice.").

8. This Note uses the phrases "extrajudicial execution," "extrajudicial killing," "summary execution," and "summary killing" interchangeably. *See generally Summary Execution*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/human-rights-issues/summary-execution [https://perma.cc/8TMN-ZY4U] ("Summary execution or extrajudicial killing is a tactic used to terrorize a population and enforce compliance. In nearly all jurisdictions, summary execution is illegal as an arbitrary deprivation of the right to life.").

9. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

10. "*Jus cogens* . . . is a latin [sic] phrase that literally means 'compelling law.' It designates norms from which no derogation is permitted." Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo

affirmed this purpose, saying, "The United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur."[11]

But today, the TVPA is a shell of its former ambition. While the TVPA's legislative history was always clear as to sovereign immunity under the Act,[12] in 2012 the Supreme Court held that non-sovereign organizations, such as corporations, could also not be held liable under the Act.[13] The Court held that the Act's references to "individuals" referred solely to "natural persons."[14]

While this decision was problematic for TVPA plaintiffs for a number of reasons, this Note will comment on two specific problems it caused. First, the Supreme Court's interpretation of the TVPA caused what this Note will call the "practical problem."[15] The practical problem is simple: if only "natural persons" can face liability under the TVPA, plaintiffs can only bring suits alleging direct liability against those who actually committed their torture, rather than an entity for which they were working.[16] But, by the nature of the act, torturers are almost always anonymous, untraceable, low-level personnel within a government.[17] Thus, the practical problem is one of identification.

-9780199796953/obo-9780199796953-0124.xml [https://perma.cc/EE7H-VR2K] (Nov. 7, 2017).

11. George Bush, *Statement on Signing the Torture Victim Protection Act of 1991*, in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH 437, 437 (1993). Of course, sadly, the United States has had its own reckoning with state-sponsored torture. *See Torture*, CTR. FOR JUST. & ACCOUNTABILITY, *supra* note 1 ("The United States has been widely condemned for torture committed at Abu Ghraib and Guantánamo after 9/11, including acts of waterboarding, rectal feeding, and mock executions."); *see also* Camille Squires, *Torture, Rape, and Kidnapping at the Border: A New Report Lays Bare the Horror of Trump's Asylum Plan*, MOTHER JONES (Jan. 23, 2020), https://www.motherjones.com/politics/2020/01/migrant-protection-protocols-remain-in-mexico-trump [https://perma.cc/8HKK-W9AM]. These appalling abuses, and efforts to rectify them, are beyond the scope of this Note, however.

12. *See* S. REP. NO. 102-249, at 7 (1991) ("The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances.").

13. *See* Mohamad v. Palestinian Auth., 566 U.S. 449, 451–52 (2012).

14. *Id.* at 453–54 ("The ordinary meaning of ['individual'], fortified by its statutory context, persuades us that the Act authorizes suit against natural persons alone.").

15. *See infra* Part II.A.

16. *See Mohamad*, 566 U.S. at 456–60.

17. *See* Brief of Dr. Juan Romagoza Arce et al. as Amici Curiae Supporting Petitioners, *Mohamad*, 566 U.S. 449 (No. 10-1491) [hereinafter Romagoza Arce Brief].

That said, even if a plaintiff is able to identify their torturer, they then face what this Note will call the "jurisdictional problem."[18] While the TVPA provides plaintiffs a cause of action and U.S. federal courts have subject matter jurisdiction via the federal question doctrine, constitutional due process and the Federal Rules of Civil Procedure still dictate the requirements for establishing personal jurisdiction over a defendant.[19] Gaining personal jurisdiction over a foreign torturer is often a pipe dream. The chance of serving a low-level torturer traveling to the United States is slim to none, and in the vast majority of cases, no sufficient contacts will exist to establish personal jurisdiction either.[20] Thus, even the identifiable torturer will often never be subject to a TVPA suit.

This Note argues that these limitations have left the TVPA toothless to serve its original purpose: to create a *viable* action for civil redress against those who subjected a victim to heinous human rights abuses.[21] Part I of this Note will describe the TVPA and document its rise and fall as a means to combat human rights abuses abroad over the last thirty years. It will finish by addressing the state of the TVPA after the 2012 *Mohamad v. Palestinian Authority* Supreme Court decision.[22] Part II will further flesh out two challenges faced by potential TVPA plaintiffs after *Mohamad*, the practical and jurisdictional problems. And finally, Part III will identify a judicial solution that aims to respect the Supreme Court's interpretation while restoring *some* value to the Act. This Note will suggest that courts should allow for a robust use of aiding and abetting claims, specifically against corporate actors—executives, employees, and agents—in order to address the dichotomy between the TVPA's stated goals and the current state of its ability to achieve redress for plaintiffs. Allowing broad recourse to plaintiffs to assert aiding and abetting claims against those who order, direct, facilitate, conspire to commit, and benefit from torture or summary execution would help breathe new life into the TVPA.

18. *See infra* Part II.B; *see also* Michael J. Stephan, Note, *Persecution Restitution: Removing the Jurisdictional Roadblocks to Torture Victim Protection Act Claims*, 84 BROOK. L. REV. 1355, 1357 (2019).

19. *See* FED. R. CIV. P. 4.

20. *See, e.g.*, Stephan, *supra* note 18, at 1373–75 (giving an example of the jurisdictional problem).

21. *See* S. REP. NO. 102-249, at 3 (1991).

22. *Mohamad*, 566 U.S. 449.

I. THE HISTORY AND PURPOSE OF THE TORTURE VICTIM PROTECTION ACT

This Part documents the TVPA's evolving status in U.S. law over the past thirty years. Section A discusses early human rights litigation in the United States, which helps contextualize the eventual enactment of the TVPA. Then, Sections B and C detail the legislative history and text of the TVPA, respectively. Finally, Section D introduces the initial judicial interpretations and the seminal Supreme Court case regarding the TVPA, *Mohamad v. Palestinian Authority*.[23]

A. HUMAN RIGHTS LITIGATION IN THE UNITED STATES: A LEAD-UP TO THE TVPA

In the United States, the twentieth century's burgeoning focus on human rights litigation was highlighted by the "revitaliz[ation]" of the Alien Tort Statute (ATS) as an avenue for civil redress for victims of human rights violations around the world.[24] Vague in language, this founding-era statute[25] simply reads, "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*."[26] The statute sat dormant for nearly two centuries before being invoked by plaintiffs in the 1980 case *Filartiga v. Peña-Irala*.[27]

1. *Filartiga*: A Novel Use of the ATS

Filartiga involved the kidnapping, torture, and death of a seventeen-year-old Paraguayan, Joel Filartiga, the son of a political opponent to Paraguay's president, Alfredo Stroessner.[28] The Filartiga family alleged that their son had been subject to these brutal acts by the inspector general of the Asunción police, Americo Peña-Irala.[29] When Peña-Irala moved to the United States in 1978, the Filartiga family brought suit against him in the Eastern District of New York, claiming

23. *Id.*

24. *See* 28 U.S.C. § 1350; STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 2 (2018).

25. The ATS was enacted as a part of the Judiciary Act of 1789. Rachael E. Schwartz, *"And Tomorrow?" The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMPAR. L. 271, 276 (1994).

26. 28 U.S.C. § 1350 (emphasis added).

27. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

28. Schwartz, *supra* note 25.

29. *Filartiga*, 630 F.2d at 878–80.

that the ATS gave U.S. courts jurisdiction over tort claims that violate "the law of nations."[30]

In a relative surprise,[31] the Second Circuit approved this novel use of the ATS, saying that Congress could constitutionally pass statutes that "vest the federal courts with jurisdiction over suits which allege that the law of nations has been violated because the law of nations 'became a part of the common law of the United States upon the adoption of the Constitution.'"[32] On remand, the Filartigas were awarded over $10 million.[33] The decision of the Second Circuit marked the birth of the modern ATS.

2. *Filartiga*'s Reception and Rebuke: *Tel-Oren v. Libyan Arab Republic*

However, not all U.S. courts and judges viewed the ATS in the same manner as the Second Circuit. Just four years later, in *Tel-Oren v. Libyan Arab Republic*,[34] the D.C. Circuit cast doubt on the viability of the ATS to revolutionize human rights litigation in the United States. In *Tel-Oren* the court threw out a suit brought under the ATS by victims and the survivors of those killed in a 1978 civilian bus attack in Israel, blamed on the Palestinian Liberation Organization and its

30. 28 U.S.C. § 1350. The Filartiga family claimed that the acts alleged against Peña-Irala violated a number of international treaties and declarations, as well as customary international law. These sources of law included "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents, and practices constituting the customary international law of human rights and the law of nations." Schwartz, *supra* note 25 (quoting *Filartiga*, 630 F.2d at 879).

31. The case was initially dismissed by the Eastern District of New York for lack of subject matter jurisdiction. *Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Peña-Irala*, INT'L CRIMES DATABASE, http://www.internationalcrimesdatabase.org/Case/995/Filartiga-v-Pe%C3%B1a-Irala [https://perma.cc/RZB4-9V4P]; *see also* Harrison Smith, *Joel Filártiga, Paraguayan Doctor Who Battled Stroessner Dictatorship, Dies at 86*, WASH. POST (July 9, 2019, 10:53 PM), https://www.washingtonpost.com/local/obituaries/joel-filartiga-paraguayan-doctor-who-battled-stroessner-dictatorship-dies-at-86/2019/07/09/a58cce5a-a253-11e9-b732-41a79c2551bf_story.html [https://perma.cc/E852-79CF] ("'A lot of colleagues thought we were slightly insane,' Weiss recalled in a phone interview. 'There really had never been a case with these facts.'").

32. Schwartz, *supra* note 25, at 277 (quoting *Filartiga*, 630 F.2d at 886).

33. *Filártiga v. Peña-Irala*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala [https://perma.cc/NG6W-KLDS] (Jan. 3, 2019).

34. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

allies. The fractured *Tel-Oren* opinion[35] most notably included a Judge Robert Bork concurrence, which aggressively critiqued the decision previously reached by the Second Circuit in *Filartiga*.[36] In short, Judge Bork contended that the ATS merely provided a jurisdictional grant to plaintiffs, but no cause of action could be inferred from the statute.[37] In other words, plaintiffs would usually need to find a separate cause of action explicitly granted in domestic or international law to be able to invoke the ATS and access a U.S. court. Simply "violat[ing] the law of nations," as written in the statute,[38] did not automatically create a cause of action.[39]

The predictable backlash to *Filartiga* left doubt regarding the viability of the ATS to facilitate human rights litigation in the United States. This doubt motivated congressional action.

B. THE PURPOSE OF THE TVPA

The passage of the TVPA was in direct response to the view Judge Bork expressed in *Tel-Oren*. Namely, the Act explicitly codifies a cause of action for certain human rights violations committed abroad (torture and extrajudicial killing),[40] something Judge Bork claimed the ATS did not do.[41]

35. The decision included three separate concurrences. *Id.* at 775 (Edwards, J., concurring), 789 (Bork, J., concurring), 823 (Robb, J., concurring).

36. *Id.* at 798–823 (Bork, J., concurring).

37. Matthew H. Murray, Note, *The Torture Victim Protection Act: Legislation To Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673, 691 (1987). In making this determination, Judge Bork said separation of powers principles commanded federal courts to tread lightly in matters relating to international affairs in order to respect both the executive and legislative branches. *See id.* Bork argued that a narrow judicial construction of the ATS—specifically, that an express grant of Congress was required to hear suits that could affect foreign relations—was thus mandated by separation of powers principles. *See id.*; S. REP. NO. 102-249, at 5 (1991).

38. 28 U.S.C. § 1350.

39. Murray, *supra* note 37, at 692 ("In Judge Bork's view, the *Filartiga* court's premise that international law itself provides a right to a private remedy is false."). Bork wrote that a cause of action could not be inferred from treaties the United States was a party to and that customary international law only provided a cause of action for acts that violated the law of nations at the time the ATS became law: "1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy." *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring); *see also* Virginia A. Melvin, Case Comment, Tel-Oren v. Libyan Arab Republic*: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211, 218–19, 221–25 (1985) (analyzing Judge Bork's concurrence).

40. 28 U.S.C. § 1350 note; *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring).

41. *Tel-Oren*, 726 F.2d at 801 ("[T]he Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop,

Although Congress passed the Act in 1991, nearly eight years after Bork's provocative concurrence, Senator Arlen Specter introduced the first version of the bill in 1986, just two years after Bork wrote.[42] The TVPA Senate report explicitly remarked on Judge Bork's judicial construction of the ATS, saying that the TVPA provided the express grant of a cause of action Bork claimed was needed to bring a suit under the ATS[43]: "Judge Robert H. Bork questioned the existence of a private right of action under the [ATS], reasoning that separation of powers principles required an explicit grant by Congress of a private right of action for lawsuits which affect foreign relations. The TVPA would provide such a grant . . . ."[44] Congress clarified, for every federal court in the country, that acts of torture and extrajudicial killing committed abroad had a civil cause of action in U.S. courts, regardless of a court's precedent or view on the scope of the ATS.[45]

The *Tel-Oren* decision, however, was not the only motivating factor in the enactment of the TVPA. In 1988, just four years prior to the enactment of the TVPA, the United States had signed the United Nations' "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Convention Against Torture, CAT,

it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

42. S. 2528, 99th Cong. (1986). When the bill finally passed five years later, Specter was joined by fourteen Senate cosponsors. S. REP. NO. 102-249, at 3 ("This legislation is now cosponsored by Senators Leahy, Kennedy, Kohn, Heflin, Adams, Akaka, Bryan, D'Amato, Inouye, Jeffords, Kerry, McCain, Wellstone, and Wirth.").

43. Interestingly, the TVPA's Senate report was a rebuke of Judge Bork's judicial construction of the ATS, saying "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350." S. REP. NO. 102-249, at 5. And the House report on TVPA commented, "[The ATS] should remain intact to permit suits based on other norms that already existed or may ripen in the future into rules of customary international law." H.R. REP. NO. 102-367, at 4 (1991); *see also* Brief for Center for Justice & Accountability & Human Rights First as Amici Curiae Supporting Respondents at 4, Nestlé USA, Inc. v. Doe, Nos. 19-416, 19-453 (Oct. 21, 2020) [hereinafter CJA Brief] ("Congress intended the TVPA to supplement, not supplant, the remedies available under the ATS.").

44. S. REP. NO. 102-249, at 4–5.

45. *See* Jennifer Correale, Comment, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L L. REV. 197, 209 (1994) (citing *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Hum. Rts. & Int'l Orgs. of the H. Comm. on Foreign Affs.*, 100th Cong. 71 (1988) (statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights)).

or Convention).[46] In the TVPA's legislative history, Congress referenced its obligations under the Convention Against Torture.[47]

The CAT required state parties to enact various pieces of domestic legislation in order to fulfill their obligations under the treaty.[48] For example, the CAT mandates that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[49] While this provision did not explicitly require states to create private rights of action for claims regarding acts committed *abroad*,[50] the Senate report indicates Congress viewed enacting the TVPA as a part of fulfilling U.S. CAT obligations.[51] For example, the report says the TVPA "will carry out the intent of the [CAT], which . . . obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts."[52]

Additionally, Congress suggested that allowing foreigners to sue for acts committed abroad was a practical necessity to achieving the goals of the Convention, reasoning that "[j]udicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent."[53] And further, that "[a] state that practices torture and summary execution is not one that adheres to the rule of law."[54] Thus, if a CAT signatory hypocritically made a common practice of torture, the TVPA would be "designed to

46. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

47. S. REP. NO. 102-249, at 3.

48. Article 4 mandated domestic criminal penalties for torturers, Article 10 mandated education on the CAT for law enforcement and military personnel, and Article 13 mandated protection for complainants and witnesses of torture. CAT, *supra* note 46, S. TREATY DOC. NO. 100-20 at 20, 22, 1465 U.N.T.S. at 114–17.

49. *Id.* S. TREATY DOC. NO. 100-20 at 13, 1465 U.N.T.S. at 116.

50. *See* Schwartz, *supra* note 25, at 286 ("The [CAT] does not appear to demand a law, such as the TVPA, that provides a private cause of action in the United States entitling plaintiffs to obtain compensation for injuries inflicted in other countries.").

51. S. REP. NO. 102-249, at 3–4; *see also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, 74 (1992) ("An Act To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."). *But see* S. REP. NO. 102-249, at 13 (explaining the minority view that the TVPA "is in tension with the [CAT]").

52. S. REP. NO. 102-249, at 3.

53. *Id.* at 3–4.

54. *Id.* at 3.

respond to this situation by providing a civil cause of action in United States courts for torture committed" in that country.[55]

Nothing about the TVPA's legislative history suggests the Act was meant to be a toothless gesture. The Act was passed with legitimate goals in mind. Chief among these was (1) denying "safe haven" to torturers hoping to "hide out" in the United States,[56] (2) signaling the United States' support of victims of human rights abuses around the world,[57] and (3) addressing confusion regarding the ATS's ability to provide those victims a forum for redress,[58] by providing a "private right of action in American courts" to victims of torture and extrajudicial killing.[59] Commentators called these ambitions "remarkable"[60] and "a serious commitment to human rights around the world and to the dream that all human beings may one day live free from torture."[61]

C. THE TEXT OF THE TVPA

The Torture Victim Protection Act is codified as a "note" to the ATS: 28 U.S.C. § 1350.[62] The Act's section 2 contains the core provision of the TVPA.[63] Specifically, section 2 creates the private right of action for torture victims—or the representatives of victims of extrajudicial killings.[64] The scope of liability created by section 2 has been the subject of controversy over the life of the TVPA.[65]

Section 2 grants both foreigners and U.S. citizens standing to sue under the TVPA for torture and extrajudicial killing committed

55. *Id.* at 3–4.

56. *Id.* at 3.

57. *Id.* ("[U]niversal principles provide little comfort, however, to the thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people.").

58. *Id.* at 4–5.

59. Correale, *supra* note 45, at 199.

60. *Id.* at 198.

61. *Id.* at 220.

62. 28 U.S.C. § 1350 note.

63. Section 1 merely titles the Act. Section 3, on the other hand, defines "torture" and "extrajudicial killing" for TVPA purposes. *Id.* These definitions are pulled from well-established definitions in international law. *See* CAT, *supra* note 46, S. TREATY DOC. NO. 100-20 at 19, 1465 U.N.T.S. at 113; Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

64. 28 U.S.C. § 1350 note § 2.

65. *See infra* Part I.D.

abroad.[66] Section 2 is broken into three parts. Two of these parts are procedural, establishing a requirement to exhaust domestic remedies[67] and a ten-year statute of limitations.[68] The third part of section 2 establishes the scope of liability under the Act.[69]

In relevant part, the liability provision of section 2 reads:

> 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 . . . .[70]

There are two terms that define the scope of liability under the TVPA: the word "individual" and the phrase "under actual or apparent authority, or color of law."[71] The word "individual" defines *who* may be sued under the Act. In other words, what "entity" may a plaintiff file a claim against? Conversely, the "authority or color of law" requirement establishes *when* the TVPA applies to a situation. That is, what context is required for actions to fall within the TVPA's orbit? These statutory terms are discussed in detail below.

1. "Individual"

The use of the word "individual" has confused the scope of liability under the TVPA over the life of the Act. Originally drafted as "person," the word was changed to "individual" by a 1991 amendment to the bill.[72] The Senate report comments, "The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill . . . only individuals may be sued."[73] However, the Senate report makes no mention of non-state entities'—such as multinational corporations—liability under the TVPA.[74]

66. 28 U.S.C. § 1350 note § 2. In contrast, the ATS only grants standing to foreigners. Robert F. Drinan & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605, 611 n.45 (1993).

67. 28 U.S.C. § 1350 note § 2(b).

68. *Id.* § 2(c).

69. *Id.* § 2(a).

70. *Id.* (emphasis added).

71. *Id.*

72. Brad Emmons, *Tortured Language: Individuals, Corporate Liability, and the Torture Victim Protection Act*, 96 MINN. L. REV. 675, 685–86 (2011).

73. S. REP. NO. 102-249, at 7 (1991).

74. *Id.*

2. "Actual or apparent authority, or color of law, of any foreign nation"

The "authority or color of law" requirement limits the scope of liability to "those . . . act[ing] in accordance with government sanction."[75] Thus, the TVPA does not apply to "purely private criminal acts by individuals or nongovernmental organizations."[76] However, the phrase "actual or apparent authority, or color of law" is broader than it may first appear.[77] For example, the TVPA's Senate report indicates this phrase includes acts taken with some form of implicit sanction or aid by the state, regardless of official, explicit state policy.[78] These acts can be carried out or ordered by government officials or conducted by private persons who are acting under some sort of approval by the government or within a "symbiotic" relationship between the private individual(s) and the government.[79] In totality, the TVPA was drafted so that there must be some connection between a foreign government's implicit or explicit policy and those who undertook the acts in question. However, the Senate report instructs courts to use civil rights law and agency theory "in order to give the fullest coverage possible" under the Act.[80]

* * *

In sum, the text of TVPA creates an explicit private right of action for suits by torture victims (and the representatives of victims of extrajudicial killings) against the individuals responsible for these actions. In order for the TVPA to apply, the acts must have been carried out with some implicit or explicit approval by the state or by a state official acting in their official capacity. And when defining what constitutes the forbidden acts, the Act turns to well accepted international law to make these determinations.

The following Section considers a question courts struggled with from the TVPA's inception. How does the TVPA use the word "individual," and how do different definitions impact its scope?

D. "INDIVIDUAL" AND JUDICIAL INTERPRETATION OF THE EARLY TVPA

The federal courts did not have a universal view of the TVPA upon its passing. Confusion surrounding the meaning of "individual"

75. Drinan & Kuo, *supra* note 66, at 611.
76. S. REP. NO. 102-249, at 8.
77. 28 U.S.C. § 1350 note § 2(a).
78. S. REP. NO. 102-249, at 8. Indeed, no state has an official policy of torture.
79. *See, e.g.*, Romero v. Drummond Co., 552 F.3d 1303, 1317 (11th Cir. 2008).
80. S. REP. NO. 102-249, at 8.

quickly resulted in a circuit split. While the legislative history of the TVPA clearly ruled out suits against "foreign states or their entities,"[81] it was silent on suits against non-state entities such as multinational corporations that may have played a major role in orchestrating, conducting, or funding certain acts of torture.[82] Out of this silence, two competing views formed.

On one side of the split were courts that read "individual" broadly. This was the view of the Eleventh Circuit. From TVPA's inception, courts in the Eleventh Circuit consistently espoused the view that non-state organizations, such as corporations like Coca Cola[83] and Del Monte Produce,[84] could be sued under the TVPA as "individuals."[85] However, the majority of courts, including the Fourth,[86] Ninth,[87] and D.C. Circuits[88] as well as district courts in the Fifth Circuit,[89] took the "narrow" view of the argument, believing that non-state organizations could not be held liable under the TVPA. The split between the two

81. *Id.*

82. *See infra* Part III.A.

83. Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003) ("The [Senate] Report does not mention any exemption for private corporations, and courts have held corporations liable for violations of international law under the related [ATS].").

84. Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005).

85. *See, e.g.*, Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008) ("Under the law of this Circuit, the Torture Act allows suits against corporate defendants. We held that . . . in *Aldana v. Del Monte Fresh Produce, Inc.*, and we are bound by that precedent." (citing *Aldana*, 416 F.3d 1242)); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (following the reasoning set forth in *Sinaltrainal* and finding that the plaintiff union can assert a TVPA claim against the corporate defendants). *See generally* Brief for Former Senator Arlen Specter et al. as Amici Curiae Supporting Petitioner, Mohamad v. Palestinian Auth., 566 U.S. 449 (2012) (No. 10-1491) (detailing the TVPA sponsor's view that the Act did not prohibit the liability of non-state organizations); Emmons, *supra* note 72, at 692–93 (explaining how the *Sinaltrainal* court analyzed the word "individual").

86. Aziz v. Alcolac, Inc., 658 F.3d 388, 392 (4th Cir. 2011) ("We hold that the TVPA admits of no ambiguity and Congress's intent to exclude corporations from liability under the TVPA is readily ascertainable from a plain-text reading.").

87. Bowoto v. Chevron Corp., 621 F.3d 1116, 1126 (9th Cir. 2010) ("We . . . hold that the plain language of the TVPA does not allow for suits against a corporation."); Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) ("The Court holds that corporations are not 'individuals' under the TVPA based on its reading of the plain language of the statute.").

88. Mohamad v. Rajoub, 634 F.3d 604, 608 (D.C. Cir. 2011) ("The Congress used the word 'individual' to denote only natural persons.").

89. *See, e.g.*, Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 382 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999) ("A finding that the TVPA does not apply to corporations is not at odds with congressional intent.").

constructions of "individual" lasted for nearly fifteen years. Hanging in the balance was the overall viability of the TVPA.

In 2012, the Supreme Court finally weighed in on the issue in *Mohamad v. Palestinian Authority*.[90] *Mohamad* was brought by the relatives of Azzam Rahim, a U.S. citizen who was allegedly arrested, imprisoned, tortured, and killed by Palestinian Authority intelligence officers while visiting the West Bank in 1995.[91] Among other things, the plaintiffs alleged violations of the TVPA.[92] The case was brought only against the Palestinian Authority and the Palestinian Liberation Organization. The plaintiffs argued (1) that the PLO was not afforded sovereign immunity from the TVPA due to its non-state status in the eyes of the United States,[93] and (2) that the word "individual" as used in the TVPA allowed for suits against "non-state organizations,"[94] rather than solely "natural persons"—the Eleventh Circuit's view.

In a short and unanimous decision, however, the Court found the TVPA's plain language to be clear: "[T]he Act authorizes liability solely against natural persons."[95] The Court declared that the colloquial and dictionary definitions were united in the view that an "individual" was a natural person: "We say 'the individual went to the store,' 'the individual left the room,' and 'the individual took the car,'" the Court remarked, "each time referring unmistakably to a natural person."[96] While the Court conceded that "the word 'individual' [does not] invariably mean 'natural person' when used in a statute," it said its precedent required some indication that Congress intended this result.[97] The Court found the TVPA showed no such intention.[98]

At the end of its *Mohamad* decision, the Court noted what the ruling meant for future TVPA plaintiffs.[99] The Court commented on the

90. Mohamad v. Palestinian Auth., 566 U.S. 449 (2012).

91. *Id.* at 452. The U.S. State Department had confirmed Rahim died in the custody of the Palestinian Authority. *Id.*

92. *Id.*

93. And thus, the PLO was a "non-state-organization." *Id.* at 453.

94. *Id.*

95. *Id.* at 456. Justice Breyer concurred in the judgment saying, "[T]he word 'individual' is open to multiple interpretations" but "[t]he legislative history of the statute . . . makes up for . . . inadequacies . . . after considering language alone." *Id.* at 461 (Breyer, J., concurring).

96. *Id.* at 454 (majority opinion) ("As a noun, 'individual' ordinarily means '[a] human being, a person.'" (citing 7 OXFORD ENGLISH DICTIONARY 880 (2d ed. 1989))).

97. *Id.* at 455; *see also, e.g.*, Clinton v. New York, 524 U.S. 417, 429 (1998) (holding that the statute in question required "individual" to be broadly construed because the result would otherwise be "absurd").

98. *Mohamad*, 566 U.S. at 455.

99. *Id.* at 460–61.

challenge of identifying the "men and women who subject victims to torture," let alone establishing personal jurisdiction over them.[100] These challenges were easier to solve under a regime where organizations and corporations could be subject to the TVPA. The Court simply opined, however, that while creating a "toothless" statute was not the intent of Congress, the plain language of the TVPA could not be overcome.[101]

* * *

As Part II discusses, the Supreme Court's concerns about the TVPA's future effectiveness were well founded.

II. THE TOOTHLESS-NESS OF THE CURRENT TVPA

Regardless of Congress's original intent, after *Mohamad*, the TVPA has indeed become nearly toothless.[102] While never meant to be a judgment juggernaut, the limit of the TVPA's scope to solely natural persons has intensified the already uphill battle fought by TVPA plaintiffs.

This Part fleshes out and analyzes two major problems TVPA plaintiffs face after the *Mohamad* decision. First, what this Note calls the "practical problem"—the struggle victims of torture, or the representatives of victims of summary execution, face in simply identifying the "natural person(s)" responsible for their suffering, as opposed to identifying an entity that individual was working for or in concert with.[103] Second, this Note describes how a successful identification may nevertheless do little to bring a defendant inside of a courtroom.[104] This is referred to as the "jurisdictional problem"—the challenge of establishing personal jurisdiction over a natural person who may never step foot in or have any sort of sufficient minimum contacts with a U.S. venue.

The sum of these problems is clear. While the number of persons culpable for these atrocities has gone unchanged, the subset of those

100. *Id.* ("Victims may be unable to identify the men and women who subjected them to torture, all the while knowing the organization for whom they work. Personal jurisdiction may be more easily established over corporate than human beings.").

101. *Id.* ("[N]o legislation pursues its purposes at all costs." (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam))).

102. *See, e.g.*, Fracesco Seatzu, *Speculating on the Future of the Torture Victim Protection Act (TVPA) after* Mohamad *and* Kiobel, 8 INTER-AM. & EUR. HUM. RTS. J. 23, 26 (2016) ("Some public international and human rights lawyers have claimed that *Mohamad* and *Kiobel* lead to the end of transnational civil litigations on human rights breaches before U.S. courts.").

103. *See infra* Part II.A.

104. *See infra* Part II.B.

who are actually realistic TVPA defendants has been shrunken to a tiny few.

A. THE "PRACTICAL PROBLEM": IDENTIFYING A TORTURER

The practical problem is a simple one. Those who commit crimes, especially one as heinous as torture or summary execution, will go to great lengths to conceal their identities. From the petty thief to the computer hacker, the vast majority of criminals work to maintain their anonymity. But in the case of torture or summary execution, it is especially easy for a perpetrator to remain a nameless and faceless terrorizer to their victim.[105]

The modus operandi of a torturer is one of confusion and power. The torturer has complete control over the victim, who is virtually powerless to effect any change in the situation or cogently understand what is happening. "That is of course by design. Those who perpetrate these types of atrocities often purposefully do so in circumstances that deny the victims the ability to identify them."[106] For example, a torturer may "blindfold their victims or otherwise deprive them of their senses; take them to undisclosed locations in the dark of night; [or] rotate turns among those perpetrating the abuse."[107] Torturers take great lengths to conceal their personal identities, to confuse and disorient a victim, and to perform their acts in the shadows, away from public scrutiny.[108]

However, torturers do not work alone.[109] Their acts "are designed, orchestrated, financed, and supported by states, organizations, corporations, and other non-natural persons."[110] These entities are usually far more recognizable to the torture victim than the perpetrators themselves. For example, "[t]he perpetrators may announce that they are acting on behalf of a known group or organization; they may wear uniforms, insignia or logos identifying their association with a particular group; or the victims may be held in a location

105. Romagoza Arce Brief, *supra* note 17, at 5 ("As a practical matter, victims often cannot identify the natural persons who personally and directly perpetrated the human rights crimes against them or their loved ones.").

106. *Id.*

107. *Id.* at 5–6.

108. *See id.* at 6–7 (describing the experience of amicus curiae Santos Moran who was kidnapped, blindfolded, and tortured by masked individuals in an undisclosed location).

109. *See* CJA Brief, *supra* note 43, at 17 ("Perpetrators of gross human rights abuses do not act in a vacuum – their actions are made possible through the assistance and support of numerous others.").

110. Romagoza Arce Brief, *supra* note 17, at 2; *see infra* Part III.A.

controlled by a particular group or entity."[111] So while a victim may not know who actually caused their suffering, they may be aware who it was committed on behalf of.[112]

As the Center for Justice and Accountability put it, *Mohamad* created an "artificial and unjust divide among human rights victims"—that being a divide between those who could identify the natural persons causing their suffering and those who could only identify the entity those natural persons were acting on behalf of.[113] In many cases of torture or summary execution, a victim simply cannot identify the individual(s) who carried out the crimes and thus falls on the wrong side of this arbitrary divide.

B. THE "JURISDICTIONAL PROBLEM": ESTABLISHING PERSONAL JURISDICTION OVER A TORTURER

Even if a plaintiff is successful in identifying their torturer, they may be nevertheless powerless to bring the perpetrator inside of a courtroom. *Mohamad* took an already difficult proposition—establishing personal jurisdiction over orchestrators of foreign torture—and exacerbated it.[114] While the ability of TVPA plaintiffs to establish the subject matter jurisdiction of U.S. federal courts has never faced intense scrutiny,[115] plaintiffs must still adhere to the requirements of U.S. civil procedure and constitutional due process in order to establish personal jurisdiction over a specific defendant.[116]

In order to establish personal jurisdiction, plaintiffs must do one of three things. First, the plaintiff can establish a court's "general" jurisdiction over the defendant by establishing that the defendant's contacts with the forum sufficiently render the defendant "at home"

111. Romagoza Arce Brief, *supra* note 17, at 5.

112. *Id.* at 5–7 (describing the experience of Moran, who did not know the identity of her torturers, but recognized their distinctive khaki uniforms as belonging to the Salvadorian National Police).

113. *Id.*

114. Mohamad v. Palestinian Auth., 566 U.S. 449 (2012); *see* Romagoza Arce Brief, *supra* note 17, at 12 ("[M]ost perpetrators of human rights crimes never come to, or have any connection with, the United States, thus remaining completely beyond the reach of U.S. courts.").

115. The vast majority of courts that have addressed the issue have argued that subject matter jurisdiction for TVPA claims is conferred by the general federal question jurisdiction statute. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) ("The [TVPA] permits the appellants to pursue their claims of official torture under the jurisdiction conferred by . . . the general federal question jurisdiction of section 1331.").

116. *See* S. REP. NO. 102-249, at 7 (1991); U.S. CONST. amend. V.

there.[117] If a court is able to establish general personal jurisdiction over a defendant, the court may "hear any claim against that defendant," regardless of the claim's factual relation to the jurisdiction in question.[118]

Second, the plaintiff may establish a court's personal jurisdiction over the defendant by serving them while they are within the forum in question, regardless of that defendant's relation to the forum.[119]

Finally, the plaintiff can establish a court's "specific" jurisdiction over the defendant by establishing that the acts in question have some sufficient connection to the forum.[120] That is, that "the defendant could anticipate being haled into court in the forum" based on a claim such as the one at issue.[121] Even pre-*Mohamad*, however, specific jurisdiction was only of limited use to TVPA plaintiffs. This is simply due to the nature of a TVPA claim. In the large majority of TVPA cases, claims are made by foreigners, against foreigners, for acts taken in foreign lands. Thus, there are not any sufficient minimum contacts between the defendant and the forum to establish specific personal jurisdiction.

However, *Mohamad* was indeed a blow to TVPA plaintiffs' ability to establish personal jurisdiction over defendants through general jurisdiction or service of process. As the Center for Justice and Accountability said in its amicus brief,

> [M]ost perpetrators of human rights crimes never come to, or have any connection with, the United States, thus remaining completely beyond the reach of U.S. courts. . . .
>
> By contrast, organizations and corporations often choose to do business in the United States. In so doing, they can subject themselves to the jurisdiction of U.S. courts.[122]

117. General jurisdiction is commonly found using "domicile" or "continuous and systematic contacts" tests. *See* Milliken v. Meyer, 311 U.S. 457, 464 (1940); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

118. Stephan, *supra* note 18, at 1368.

119. *See* Burnham v. Superior Ct., 495 U.S. 604, 610–11 (1990) ("[E]ach State [has] the power to hale before its courts any individual who [can] be found within its borders . . . by properly serving him with process . . . no matter how fleeting his visit.").

120. This is commonly known as the "minimum contacts" test. Stephan, *supra* note 18, at 1370; Stephen E. Arthur, *The International Shoe Case—Minimum Contacts*, *in* 21 INDIANA PRACTICE SERIES, CIVIL TRIAL PRACTICE § 4.7 (2d ed. 2020) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

121. Stephan, *supra* note 18, at 1370.

122. Romagoza Arce Brief, *supra* note 17, at 12.

As for general jurisdiction, prior to *Mohamad*, in cases where liability could factually be tied to a *non-natural* person,[123] it was often easier to show a defendant was "at home" in the United States. For example, as a hub for global commerce, multinational corporations often have substantial contacts with, or even corporate offices in, the United States. These contacts could be substantial enough to lead courts to "conclude[] that the defendant[] had sufficient ties with the United States to establish personal jurisdiction."[124] Post-*Mohamad*, however, when TVPA suits may only be brought against natural persons, general personal jurisdiction is far more difficult to find. Such jurisdiction requires that *the torturer themselves* is "at home" in the United States. From a practical standpoint, it is unlikely that a torturer, acting on behalf or in concert with a foreign government, would ever make their domicile in the United States.[125] At the broadest level, it is simply rare for a person to move to a foreign country and establish domicile there. Additionally, persons linked to abusive regimes may be legally unable to establish such domicile in the United States.[126]

In the end, TVPA plaintiffs are left nearly exclusively with in-forum service as the sole means to establish personal jurisdiction. In fact, in-forum service commenced the vast majority of TVPA cases that discuss personal jurisdiction.[127] It is true that in a pre-*Mohamad* world, when organizations could be sued under the TVPA, the reliance on in-forum service was also heavy. However, *Mohamad* made in-forum service much more difficult.

123. This was of course, however, subject to the interpretation of jurisdiction in question.

124. *Id.* at 12–13 (citing Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 98–99 (2d Cir. 2000)).

125. *See* Stephan, *supra* note 18, at 1369 ("In the TVPA context, it is unlikely that a plaintiff will ever be able to rely on general jurisdiction via the domicile method because torturers who conduct their illegal activities outside of the United States are unlikely to move to the United States and establish a domicile there."). *But see* Chavez v. Carranza, 407 F. Supp. 2d 925, 927 (W.D. Tenn. 2004) ("Defendant has resided in the United States since 1984, and is currently a resident of Memphis, Tennessee.").

126. *See* Romagoza Arce Brief, *supra* note 17, at 12 ("According to government officials, since fiscal year 2004, Immigration and Customs Enforcement has removed over 400 human rights violators, and is currently pursuing over 1,900 leads and removal cases involving individuals suspected of engaging in human rights crimes from approximately 95 countries." (citing *Human Rights Violators and War Crimes Unit*, U.S. IMMIGR. & CUSTOMS ENF'T, http://www.ice.gov/human-rights-violators [https://perma.cc/JC2V-YEPS] (Dec. 11, 2020))).

127. *See, e.g.*, Doe v. Constant, 354 F. App'x 543, 546 (2d Cir. 2009); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 265 (S.D.N.Y. 2002); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1193 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995).

Previously, the officers of an organization that was engaged in TVPA-related abuses were open to in-forum service, which could thus bind the organization itself.[128] Thus, even a corporation which was not "at home" in the United States could be subject to a TVPA suit if one of its officers traveled to the United States for business or pleasure. After *Mohamad* ended organizational liability under the Act, this is no longer the case. Today, only very specific individuals may be served to assert direct liability. Most commonly, the torturers themselves must travel to the United States.[129] The logical conclusion is that successfully completing personal service against a possible defendant is far more difficult than it previously was. In many cases this person is likely a low-level and unimportant individual with very little reason to come to the United States,[130] not to mention the fact that it is difficult to track the movements of unrecognizable henchmen and be prepared to serve them in what could be a short window of time.[131]

In totality, *Mohamad* made the difficult task of establishing personal jurisdiction in a TVPA case that much more difficult. While a specific personal jurisdiction "minimum contact" rationale was already an unlikely and difficult method in establishing jurisdiction, *Mohamad* almost completely removed the possibility of using a general personal jurisdiction "at home" rationale. And while in-forum service was, and remains, the dominant method of establishing personal jurisdiction over these claims, *Mohamad* made it a more difficult task to complete by ending the ability to gain personal jurisdiction over an organization through its officers. In short, even if a torturer is identifiable, they will likely never see the inside of a U.S. courtroom.

* * *

The consequences of the practical and jurisdictional problems go as follows: while torture and extrajudicial killing remain widespread practices, the pool of realistic, TVPA-accessible defendants remains far below the actual number of culpable parties. Plaintiffs are often left with the frustrating reality of not being able to identify their actual

128. *Serving Court Papers on a Business*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/small-claims-book/chapter11-5.html [https://perma.cc/3YNH-DLS7].

129. Or a direct superior who ordered or allowed the torture. *See* Steve Vladeck, *MBS and the Torture Victims Protection Act—His Travel to the United States May No Longer Be an Option*, JUST SEC. (Oct. 12, 2018), https://www.justsecurity.org/61111/mbs-torture-victims-protection-act-1991 [https://perma.cc/M82F-4CED] (describing that Saudi Crown Prince Mohammad bin Salman could be served with a TVPA suit during a U.S. visit after the Jamal Khashoggi killing).

130. Romagoza Arce Brief, *supra* note 17.

131. *Id.*

attacker or having no legal authority to hale the attacker into court. The question becomes, in order to achieve some modicum of redress for potential TVPA plaintiffs, by what means could the pool of accessible defendants be expanded to better match the spiderweb of parties culpable in these heinous acts?

III. RESTORING SOME EFFICACY TO THE TVPA: AIDING AND ABETTING CLAIMS AGAINST THE EMPLOYEES AND AGENTS OF MULTINATIONAL CORPORATIONS

This Note argues for broad recourse to secondary liability claims to expand the TVPA-accessible defendant pool, specifically, using the aiding and abetting theory to hold liable corporate executives, employees, and agents who encourage, fund, facilitate, and approve acts of torture and killing conducted under the color of law abroad.[132] Part III first comments on the efficacy of these domestic secondary liability claims in addressing the practical and jurisdictional problems of the TVPA. Section A defines aiding and abetting liability in the civil law context and highlights cases of international torture and killings where involvement by key corporate actors was pivotal to their accomplishment. Section B then demonstrates that the use of aiding and abetting liability would be consistent with the text, legislative history, and relevant Supreme Court precedent. Finally, Section C acknowledges the difficult questions that would remain even in the face of judicial acceptance of aiding and abetting liability under the TVPA.

A. AIDING AND ABETTING LIABILITY: THE FEDERAL COMMON LAW DEFINED AND RELEVANT EXAMPLES ADDRESSED

An aiding and abetting secondary liability claim made via the TVPA would focus on actors who engage or make explicit agreements with those who commit heinous acts abroad. Those who would assist such acts vary, but as this Note posits, multinational corporate interests have been repeat offenders in facilitating, funding, and supporting torture or killing when it was economically advantageous.

Corporations are nothing more than an amalgamation of individuals. Every corporate decision must be undertaken or approved by a corporate executive, employee, or agent, including unsavory ones. Individual aiding and abetting liability could hold such individuals liable for violent business decisions.

132. *See* CJA Brief, *supra* note 43, at 17 ("Aiding and abetting liability ensures that participants in atrocity crimes are held accountable and condemns all conduct that significantly contributes to such events.").

"[T]he principle underlying [aiding and abetting] is deceptively simple: helping someone commit a wrong is wrong."[133] The Second Restatement of Torts is often referred to as the "federal common law" on the issue of civil aiding and abetting.[134] Under this federal common law, civil aiding and abetting liability is defined as liability "[f]or harm resulting to a third person from the tortious conduct of another[.] [O]ne is subject to [such] liability if he . . . *knows* that the other's conduct constitutes a breach of duty and gives *substantial assistance* or encouragement to the other so to conduct himself . . . ."[135] Thus, federal aiding and abetting requires a mens rea of knowledge and an *actus reus* of "substantial assistance." While courts may implement their own tests for defining "substantial assistance," "ultimately . . . 'the question of liability is a normative one,' concerning 'whether a person is sufficiently involved in the primary wrong . . . such that it is appropriate to hold him or her liable for the primary wrong of the primary wrongdoer.'"[136]

There are a number of examples of corporate conduct in which substantial assistance was knowingly given to facilitate human rights abuses. A common form of corporation-involved human rights abuses has been committed in relation to resource extraction practices or labor disputes. These disputes pit large corporations against local populations protesting labor practices, environmental concerns, or other related issues. The general through line of each allegation is that the corporation, hoping to maintain revenues, directs, funds, or somehow encourages a foreign government body, such as a military or police unit,[137] to undertake a campaign of terror in order to put down the protests or organizing.

Sometimes, as in the case of *Mujica v. Occidental Petroleum*,[138] facilitation of torture and killing can take multiple forms. In *Mujica*,

133. Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255, 259 (2019).

134. *See, e.g.*, *id.* at 263 n.53; *see also* Doe v. Drummond Co., 782 F.3d 576, 608 (11th Cir. 2015).

135. RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979) (emphasis added).

136. Swan, *supra* note 133, at 257 (quoting JOACHIM DIETRICH & PAULINE RIDGE, ACCESSORIES IN PRIVATE LAW 4 (2016)). Factors in answering this question include: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at time of tort, his relation to the other [tortfeasor] and his state of mind." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 876). In the context of a TVPA case, one court has likened "substantial assistance" to "active participation" in the acts leading to the suit. *See* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005).

137. Or a foreign government-adjacent body, such as a paramilitary.

138. Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

employees of Occidental Petroleum, a California-based fossil fuels corporation,[139] allegedly worked "in concert" with the Colombian Air Force (CAF) by knowingly "provid[ing] significant financial support, supplies, intelligence, logistical support, and other substantial assistance"[140] to the CAF. In return, Occidental received protection of its "oil production facility and pipeline" in Cano Limon, Colombia.[141] This partnership resulted in a 1998 "indiscriminate" cluster bombing of local villages by the CAF.[142] Corporate employees and Colombian military officials allegedly used Occidental conferences to plan the bombing, Occidental provided aerial surveillance of the bombing, and identifiable employees of Occidental's security service[143] directed the CAF helicopters during the bombing.[144]

Similarly, in *Bowoto v. Chevron*, Chevron agents, working in concert with Nigerian military and police and "with the knowledge, direction and approval of Chevron management both in Nigeria and in California," allegedly requested and funded the torture and killing of environmental protesters of Chevron's operations in the Niger Delta.[145] To carry out multiple "terror campaigns," Chevron employees allegedly met regularly with military and police forces to plan and coordinate.[146] Chevron employees also allegedly provided funding, transportation, attack helicopters, intelligence information, and actual manpower to oversee the attacks.[147]

And in *Cardona v. Chiquita* it was alleged that Chiquita, a producer and distributor of agricultural products, paid and armed multiple Colombian paramilitary groups through a secret slush fund.[148] These funds were allegedly distributed in order to conduct "the systematic intimidation and murder of individuals living in the banana growing regions near the Gulf of Uraba and in the banana zone of Magdalena in

139. Complaint at 4, *Mujica*, 381 F. Supp. 2d 1164 (No. CV 03-2860).

140. *Id.* at 14.

141. *Id.* at 2.

142. *Id.* at 6–12. The defendants claimed that the bombing was done to protect Occidental's pipeline from left-wing insurgents. *Id.* at 9.

143. The three employees were named "Joe Orta, Charley Denny, and Dan McClintock." *Id.* at 8.

144. *Id.* at 2–3, 7–8.

145. Complaint ¶ 82, Bowoto v. Chevron Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (No. C 99-2506 SI).

146. *Id.* ¶ 99(d).

147. *Id.* ¶ 82.

148. Third Amended Complaint ¶ 4, *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (No. 08-01916).

Colombia."[149] The plaintiffs produced evidence that prior CEOs, a member of Chiquita's board of directors, and multiple other high ranking executives helped review, approve, and organize the payments to these violent groups.[150] The result was the killing and torture of thousands of left-wing "union leaders, and others voicing opposition to the paramilitaries' violent control over these regions" or anyone simply with the misfortune of "residing in the path of Defendants' paramilitary forces."[151]

* * *

Of course, many acts of torture and extrajudicial killings around the world have no corporate involvement. However, many stomach-turning allegations indeed involve corporate facilitation, including actions by *readily identifiable corporate executives and employees*. Aiding and abetting claims would, in part, act as a remedy to the general practical and jurisdictional problems by expanding the pool of realistic defendants to corporate executives and employees who may be far more recognizable than the average torturer and have many more U.S. contacts.

In each of these examples, multinational corporations and their actors facilitated the torture and extrajudicial killing of local individuals who were perceived as threats to a revenue stream. Plaintiffs, with the help of attorneys and investigators, ostensibly reviewed corporate records and other available information to identify the corporate actors directly involved.[152] With regards to the aforementioned "practical problem," these examples make clear that the discrete and identifiable participation of employees, executives, or agents are often discernable for litigants. Certainly, these higher-profile actors are more visible than the henchmen who carry out the acts.

As for the jurisdictional problem, many corporations or organizations that conduct business in or are headquartered in the United States and are alleged to have assisted or benefited from foreign torture or summary execution may have personnel at their U.S. locations who took part in coordinating with and aiding the torturers or killers. This, of course, leaves them open to personal jurisdiction through domicile or in-forum service of a secondary liability claim under the TVPA. Additionally, "aiding and abetting executives" who do not live

149. *Id.* ¶ 3.

150. *Id.* ¶ 2048.

151. *Id.* ¶ 4.

152. *See* Complaint, *supra* note 139; Complaint, *supra* note 145; Third Amended Complaint, *supra* note 148.

in the United States are far more likely to travel here on business, vacation, or otherwise than their torturing henchmen.

To hold accountable those who make these torturous acts possible, claims of aiding and abetting liability against corporate actors could prove useful. These claims could hold accountable the "approving" CEO, the "directing" board member, the "funding" operations executive, or the "coordinating" security director.

B. JUDICIAL HOSTILITY TO AIDING AND ABETTING LIABILITY: A MISINTERPRETATION OF THE TVPA AND SUPREME COURT PRECEDENT

While secondary liability claims such as aiding and abetting could buoy the post-*Mohamad* TVPA, courts have been hesitant to recognize these claims or are inconsistent in their application. Aiding and abetting *criminal culpability* is deeply rooted in criminal codes around the world, but aiding and abetting *civil liability* has been infrequently used in U.S. litigation, often only in niche areas such as business torts, and yes, human rights litigation.[153] The lack of established usage for civil aiding and abetting claims has led to widely varying judicial acceptance and application of the doctrine, including in TVPA cases.[154]

As this Section notes, whether or not the Act properly allows for aiding and abetting liability has been a subject of debate in the courts. Generally, there are two layers of examination when analyzing the validity of aiding and abetting liability under the TVPA. First, a court must determine whether the TVPA should be interpreted using principles of international or domestic law. As this Section details, even though the TVPA relates to the general sphere of *international* human rights, as a formal matter, the Act is properly interpreted as a standard *domestic* statute, no different than any one of thousands of laws enacted by Congress.

Next, a court must then analyze the Act's text and history, Supreme Court precedent, and general principles of American law to determine the applicability of aiding and abetting under the TVPA. Counter to the position taken by various courts, these factors strongly suggest that the TVPA incorporates aiding and abetting secondary liability.

153. *See, e.g.*, *supra* note 152.

154. *See* Swan, *supra* note 133, at 258 (noting the lack of "doctrinal coherence" for civil aiding and abetting liability).

1. The TVPA Should Be Interpreted Based on Domestic Principles of U.S. Law

In the context of international human rights litigation, a court analyzing the viability of an aiding and abetting claim must first choose whether general principles of international or domestic law inform its examination. In cases involving the TVPA, many courts have—as this Note posits, incorrectly—chosen to analyze the TVPA using principles of international law.

Courts that analyze the TVPA as a question of international law often inappropriately conflate Alien Tort Statute analysis with TVPA analysis. However, TVPA analysis contains fundamentally different considerations as compared to the ATS. On the one hand, ATS analysis *properly* evokes international law because, as the Supreme Court held in *Sosa v. Alvarez-Machain*, the ATS "is a jurisdictional statute creating no new causes of action,"[155] and the ATS only provides for civil liability for acts taken "*in violation of the law of nations*."[156] In other words, the ATS provides civil liability in the United States for certain violations of *international* law. Thus, "international law is crucial to the ATS analysis."[157] When defining secondary theories of liability under the ATS, it is appropriate and necessary to look to international law.[158]

The TVPA is fundamentally different, both in structure and in substance, from the ATS. While the TVPA's contextual history is necessarily linked to the ATS,[159] the TVPA is not dependent on international law to define violations of the Act. Like any other "standard" federal statutory scheme, "the TVPA sets forth the prohibited behavior within the Act itself."[160] Additionally, the text of the TVPA does not in any way invoke international law as the ATS does. The TVPA is rather a simple federal civil cause of action like any number of other federal statutes that are interpreted using general principles of domestic law.[161]

155. Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004).

156. 28 U.S.C. § 1350 (emphasis added).

157. Doe v. Drummond Co., 782 F.3d 576, 606 n.41 (11th Cir. 2015).

158. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009) ("[T]his Court has repeatedly emphasized that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law. . . . [W]hile domestic law might provide guidance on whether to recognize a violation of international norms, it cannot render conduct actionable under the ATS.").

159. *See supra* Parts I.A–B.

160. *Doe*, 782 F.3d at 606 n.41.

161. *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 125 (2013) (Kennedy, J., concurring) ("[TVPA] cases will be determined in the future according to the detailed statutory scheme Congress has enacted."). A good example of ATS-TVPA conflation

Of course, beyond a statute's text, persuasive legislative history could dictate the use of international law principles in certain instances[162]—for example, the TVPA's Senate report directly and clearly approves the use of "command responsibility," a doctrine of international law, to find secondary liability in TVPA claims.[163] However, the legislative history has no analogous mention of aiding and abetting and international law. Even while approving "lawsuits against persons who . . . abetted, or assisted in the torture,"[164] the TVPA's legislative history makes no explicit mention of aiding and abetting and international law principles.

In short, within the context of a standard statutory scheme, where both text and legislative history are silent on whether domestic or international law should be used to interpret the Act, it is most natural that "the TVPA should be interpreted through . . . general principles of domestic law,"[165] rather than looking to international law interpretations.

2. Supreme Court Precedent, the TVPA's Legislative History, and Principles of U.S. Tort Law Support Aiding and Abetting Liability Under the TVPA

Assuming that the issue of secondary liability ought to be decided as a question of U.S. federal common law, the next question is whether the existence of secondary liability can be implied from the statutory text. Here, courts skeptical of aiding and abetting claims point to

took place in a Northern District of Alabama case. There the court cited a Second Circuit case, *Presbyterian Church of Sudan*, 582 F.3d at 258, to support is conclusion that aiding and abetting claims under the TVPA were controlled by international law. The only problem? *Presbyterian Church of Sudan* only involved an ATS claim, and not a TVPA claim. Giraldo v. Drummond Co., No. 09-CV-1041, 2013 WL 3873938, at *5 (N.D. Ala. July 25, 2013).

162. *Doe*, 782 F.3d at 606 ("[W]hen we *do* look to general principles of international law for guidance . . . we do so *only* because the TVPA itself implicitly or explicitly incorporated those principles from international law.").

163. S. REP. NO. 102-249, at 9 (1991) ("Under international law, responsibility for torture . . . extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized . . . those acts is liable for them."). In short, "command responsibility" is the concept that commanders are responsible for the actions of their subordinates. *Id.* This involves a litigant showing three elements: "(a) the commander had a superior-subordinate relationship with the troops that committed the human rights abuses; (b) the commander knew, or should have known, that these troops were committing such offenses; and (c) the commander failed to prevent or repress the abuses." *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 719–21 (2002).

164. S. REP. NO. 102-249, at 8.

165. *Doe*, 782 F.3d at 607.

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., a "watershed" 1994 Supreme Court decision on the issue of implied secondary liability in the face of a "silent" statute.[166] As this Subsection makes clear, however, courts' reading of *Central Bank* has exceeded the scope of the Supreme Court's holding in that case, causing many to misapply *Central Bank*'s precedent. Additionally, some courts have inappropriately ignored the TVPA's legislative history as well as later Supreme Court precedent on civil secondary liability.[167] After analyzing *Central Bank*, this Subsection reviews the larger picture, showing that aiding and abetting liability properly attaches to the TVPA and complies with the *Mohamad* decision.

a. Central Bank

The complainants in *Central Bank* were purchasers of 2.1 million dollars' worth of debt bonds, which quickly became worthless after the Colorado Springs-Stetson Hills Public Building Authority, which issued the bonds, defaulted.[168] The bond holders alleged that the Authority committed securities fraud under the Securities Act of 1934 and that the Central Bank of Denver aided and abetted this fraud as the appraiser and indenture trustee of the bond issues.[169] However, in a 5-4 decision, the Supreme Court held that aiding and abetting liability was inconsistent with the Securities Act of 1934, and thus Central Bank could not be held liable for facilitating the fraud.[170]

The Court based its analysis on the plain language of § 10(b), the section of the Securities Act that provided for the claim at issue.[171] Section 10(b) was silent on aiding and abetting liability, and the Court refused to infer congressional approval of such liability.[172] "Congress knew how to impose aiding and abetting liability when it chose to do so. . . . If . . . Congress intended to impose aiding and abetting liability . . . it would have used the words 'aid' and 'abet' in the statutory text. But it did not."[173] However, conspicuously, the Supreme Court stopped short of holding that civil aiding and abetting liability was only applicable if explicitly provided for in a statute. Instead, the Court

166. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994); Swan, *supra* note 133, at 261, 268.

167. *See infra* Parts III.B.2.b–c.

168. *Cent. Bank of Denver*, 511 U.S. at 167–68.

169. *Id.*

170. *Id.* at 191.

171. *Id.* at 168.

172. *Id.* at 191.

173. *Id.* at 176–77.

seemed to cabin the holding of *Central Bank* within the facts of the case itself—finding the text and history of the provision at issue insufficient to support aiding and abetting liability.[174] As for a future interpretive principle, the Court only went as far as to say that silence did not create a "general presumption that the plaintiff may also sue aiders and abettors."[175] Presumably, however, a silent statute may clear this lack of presumption in certain circumstances.

b. Expansive View of Central Bank *in TVPA Cases*

To find aiding and abetting liability prohibited under the TVPA, a number of courts have cited the Supreme Court's opinion in *Central Bank*. Predominantly, these courts have correctly noted that *Central Bank* did not create a requirement of explicit statutory approval for secondary liability to properly attach under an act.[176] However, these courts have found the TVPA providing insufficient congressional intent to get over *Central Bank*'s rule that "there is no general presumption that the plaintiff may also sue aiders and abettors."[177] In other words, these courts have said there is no presumption of aiding and abetting liability under *Central Bank*, and the TVPA's history and context do not overcome that lack of presumption.

Most notably, the Southern District of New York (S.D.N.Y.), often venue to human rights litigation, has recently read *Central Bank* to preclude such liability.[178] For example, in *Mastafa v. Chevron Corp.*, the court said the "TVPA does not permit aiding-and-abetting liability. . . . The plaintiffs argue that . . . such a theory of liability should be presumed. However, the Supreme Court has adopted a default rule that is

174. For example, the Court pointed out that a civil securities fraud claim was not a "usual" tort claim and that the Securities Act of 1934 had explicitly mentioned aiding and abetting liability in other sections, showing specific congressional consideration of the issue in that particular act. *Id.* at 194. Likewise, the Court's conclusion of its *Central Bank* opinion speaks strictly to the facts of the case. *See id.* at 191 ("Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).").

175. *Id.* at 182.

176. *But see* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 689 (7th Cir. 2008) (en banc) ("[S]tatutory silence on the subject of secondary liability means there is none.").

177. Mastafa v. Chevron Corp., 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010) (quoting *Cent. Bank of Denver*, 511 U.S. at 182).

178. *Id.*; *see also* Sikhs for Just. v. Nath, 893 F. Supp. 2d 598, 618 (S.D.N.Y. 2012) ("Additionally, some courts have . . . found that the TVPA does not permit liability for aiding and abetting."); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004) ("[T]his Court finds that creating aider and abettor liability . . . [is] precluded by *Central Bank*.").

exactly opposite to the plaintiffs' suggestion."[179] In the 2012 case *Sikhs for Justice v. Nath*, the S.D.N.Y. seemed to reaffirm this position: "The text of the TVPA is silent as to aiding and abetting, and such silence should not be interpreted as granting and authorizing that liability."[180]

Additionally, the Second Circuit has cast doubt on secondary liability claims under the TVPA. In a footnote in 2014's *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, the Second Circuit called aiding and abetting liability "an 'ancient criminal law doctrine' that is generally presumed not to apply in civil suits."[181] In other proceedings, both the Ninth[182] and District of Columbia[183] Circuits also cast doubt on the applicability of aiding and abetting liability to the TVPA, without ultimately answering the question.[184]

179. *Mastafa*, 759 F. Supp. 2d at 300.

180. *Sikhs for Just.*, 893 F. Supp. 2d at 618. However, because *Sikhs for Justice* was brought after *Mohamad* and was a suit against an organization, the court threw out the TVPA claim without ultimately and finally addressing the overall viability of aiding and abetting under the TVPA.

181. Chowdhury v. Worldtel Bangl. Holding, Ltd.,746 F.3d 42, 53 n.10 (2d Cir. 2014) (citing *Cent. Bank of Denver*, 511 U.S. at 181–82). The Second Circuit did not have to ultimately answer the question of TVPA and aiding and abetting liability. *See id.* ("The District Court dismissed the aiding-and-abetting claim against Khan, and therefore we need not address whether the TVPA recognizes that theory of liability . . . .").

182. Bowoto v. Chevron Corp., 621 F.3d 1116, 1128 (9th Cir. 2010) (saying the TVPA did not "contemplate [corporate aiding and abetting] liability," but stopping short of precluding aiding and abetting liability against natural persons). However, the Northern District of California decided that "[i]n light of the Ninth Circuit's wording in [*Bowoto*] . . . this Court finds that the Ninth Circuit intended that claims for vicarious liability, including aiding and abetting, cannot be brought under the TVPA." Doe I v. Cisco Sys., Inc., 66 F. Supp. 3d 1239, 1247 (N.D. Cal. 2014).

183. Doe v. Exxon Mobil Corp., 654 F.3d 11, 58 (D.C. Cir. 2011) (stating it could not support "the inference that Congress so provided [for aiding and abetting liability] in the TVPA," and "[e]ven assuming *arguendo* that aiding and abetting liability is available under the TVPA, the court's precedent would limit such liability to natural persons").

184. A handful of other district courts also found *Central Bank* to preclude TVPA aiding and abetting liability, although on somewhat different theories. Chiefly, these courts have leaned on the TVPA requirement that the torturer or killer must have acted "under color of law" to violate the TVPA. An aider and abettor, the analysis goes, must act under color of law as well. Courts have been unclear, however, whether the "color of law" requirement precludes *all* aiding and abetting liability against corporate employees and executives, or only such liability under certain fact patterns. For example, the Western District of Washington said simply, "an aiding and abetting claim is inconsistent with the TVPA's explicit requirement that a defendant must have acted under 'color of law,'" without explaining if it was referring to the facts of that case or TVPA claims generally. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd,* 503 F.3d 974 (9th Cir. 2007). There is good reason to believe that this holding may have only applied to the facts of that case. In *Corrie*, the plaintiffs were suing Caterpillar over its *sale* of machines to Israel. Israel then used those machines in the destruction of the West Bank and Gaza Strip, rather than encouraging or facilitating

Though *Central Bank*'s text does not require aiding and abetting liability to be explicitly approved in a statute, courts have used its "general presumption" against secondary liability to throw out such claims under the TVPA, seemingly without conducting a deep analysis of the issue.[185] But as is detailed below, in light of the TVPA's legislative history and later Supreme Court precedent, courts that preclude aiding and abetting liability after a domestic law analysis are missing the whole picture.

c. TVPA Legislative History Endorses Aiding and Abetting Liability

As the Central District of California succinctly put it, "*Central Bank* stands for the proposition that 'when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is *no general presumption* that the plaintiff may also sue for aiders and abettors.'"[186] But how far does this lack of "general presumption" go? Seemingly, there is some gray area—between a statute silent on secondary liability and a statute that explicitly provides for such liability—in which certain "silent statutes" can hurdle over the "general presumption" against secondary liability.[187] But what factors contribute to such a hurdle?

Israeli torture to benefit a specific Caterpillar business interest—such as protecting a plant or supply chain. The court then held that "where a seller merely acts as a seller, he cannot be an aider and abettor." *Id.* Meanwhile, some courts have used the kitchen sink approach to preclude aiding and abetting liability from the TVPA. For example, the Southern District of Texas used multiple anti-aiding and abetting analyses citing both *Corrie* and *Mastafa*, which took different routes to get to what the Southern District of Texas believed was the same outcome: "[The TVPA] does not permit liability for aiding and abetting a primary violator." Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc., 889 F. Supp. 2d 912, 924 (S.D. Tex. 2012) (citing *Mastafa*, 759 F. Supp. 2d at 300; and then citing *Corrie*, 403 F. Supp. 2d at 1027).

185. *See, e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 58 (making the conclusory statement, "[e]ven assuming *arguendo* that aiding and abetting liability is available under the TVPA, the court's precedent would limit such liability to natural persons," without elaborating); *accord Doe I*, 66 F. Supp. 3d at 124 (stating, "[T]his Court finds that the Ninth Circuit intended that claims for vicarious liability, including aiding and abetting, cannot be brought under the TVPA," after the Ninth Circuit had only commented on *corporate* secondary liability); *Mastafa*, 759 F. Supp. 2d at 300 (citing *Central Bank* for the proposition that a silent statute cannot incorporate aiding abetting liability without reviewing the TVPA's legislative history).

186. Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1177–78 (C.D. Cal. 2005) (emphasis added) (quoting *Cent. Bank of Denver*, 511 U.S. at 182).

187. *Id.* ("[T]his proposition is different than a rule which *precludes* aiding and abetting liability *unless expressly provided* for via the language of the statute."); *see* Wiwa v. Royal Dutch Petrol. Co., No. 96 CIV. 8386, 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002) ("*Central Bank* [does not] hold[] that a statute must explicitly allow for

First and foremost, a statute's legislative history can fill the gaps and ambiguities left by its text. While the TVPA's text makes no express mention of secondary liability claims,[188] this does not mean Congress refused to manifest approval of such claims. Indeed, the *Central Bank* Court acknowledged that legislative history could be used to "impl[y] that [secondary liability is] covered by" a statute.[189] Though often left unaddressed by courts undertaking this analysis, the TVPA's legislative history in fact noddingly approves of aiding and abetting liability.[190] One need not look deeply into the TVPA's legislative history to find that the TVPA was intended to reach beyond the torturers or killers themselves.

First, the Senate report includes the sentence, "[t]he legislation is limited to lawsuits against persons who . . . *abetted or assisted* in the torture."[191] While this phrase is admittedly not *dispositive* of congressional intent, it is undoubtedly a strong starting block from which to form a pro-aiding and abetting argument. Courts that have found secondary liability inapplicable under the TVPA have seemingly "failed to notice" or ignored the phrase, while those accepting of such liability have highlighted it.[192]

secondary liability in order for a court to hold aiders and abetters [sic] or co-conspirators liable."). *But see* Note, *Central Bank and Intellectual Property*, 123 HARV. L. REV. 730, 730 (2010) ("*Central Bank* involved a securities statute. Yet its reasoning is of such breadth that courts have extracted from it a general rule: '[S]tatutory silence on the subject of secondary liability means there is none.'" (alteration in original)).

188. 28 U.S.C. § 1350 note; *see supra* Part I.C. *But see* CJA Brief, *supra* note 43, at 12–13 (arguing that the use of the word "subjects" in the TVPA's text shows explicit evidence the Act was intended to reach aiders and abettors).

189. *Cent. Bank of Denver*, 511 U.S. at 183.

190. *See* CJA Brief, *supra* note 43, at 6 ("A plain reading of the TVPA and an examination of its legislative history make clear that Congress intended the statute to encompass liability for individuals who aided and abetted torture and extrajudicial killing abroad.").

191. S. REP. NO. 102-249, at 8 (1991) (emphasis added); *see* CJA Brief, *supra* note 43, at 13 ("This extension of liability to all responsible parties reflects Congress' abhorrence of torture.").

192. Cora Lee Allen, Note, *Aiding and Abetting in Torture: Can the Orchestrators of Torture Be Held Liable?*, 44 N. KY. L. REV. 149, 163 (2017). Indeed, all found cases that reject aiding and abetting liability against individuals decline to reference the sentence. *Compare* Sikhs for Just. v. Nath, 893 F. Supp. 2d 598, 618 (S.D.N.Y. 2012), Mastafa v. Chevron Corp., 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010), *and* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007), *with* Doe v. Drummond Co., 782 F.3d 576, 607–08 (11th Cir. 2015), Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1177–78 (C.D. Cal. 2005), *and Wiwa*, 2002 WL 319887, at *15–16.

Additionally, footnote 16 in the TVPA's Senate report shows approval of secondary liability in TVPA claims.[193] The footnote, cited to affirm the Senate's assertion that "responsibility for torture . . . *extends beyond the person or persons who actually committed those acts*,"[194] references two international agreements, each of which conclude that liability extends beyond the torturer himself.[195] Those agreements are the CAT,[196] which says a person who merely "*participat[es]* in torture" must be subject to penalty,[197] and the Inter-American Convention to Prevent and Punish Torture,[198] which says that a person who "*instigates or induces* the use of torture" is guilty of a crime.[199] By citing these international agreements, which support the proposition that individuals beyond the torturer must face penalties for acts they help to facilitate, Congress further indicated its support for secondary liability under the TVPA.

Some courts analyzing the issue have indeed found the TVPA's legislative history sufficient to overcome *Central Bank*'s holding. The Eleventh Circuit, ostensibly the only appellate court to definitively answer the question, has articulated this multiple times. For example, in *Doe v. Drummond Co.* the court said,

> *[T]he legislative history endorses an expansive view of liability under the TVPA*: "[R]esponsibility for torture . . . extends beyond the person . . . who actually committed those acts . . . ." Thus, theories of liability under domestic law are available to support TVPA claims by providing a theory of tort liability when the defendant did not personally commit the underlying act.[200]

Likewise, in *Cabello v. Fernandez-Larios*, the Eleventh Circuit said, "An examination of legislative history indicates that the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation."[201]

193. S. REP. NO. 102-249, at 9 n.16.

194. *Id.* at 9 (emphasis added).

195. *Id.* at 9 n.16; *see* CJA Brief, *supra* note 43, at 14 ("[T]he existence of aiding and abetting liability and other forms of secondary liability under the law of nations had been well-established by the time of the TVPA's enactment.").

196. CAT, *supra* note 46, at art. 4.

197. *Id.*

198. Organization of American States, Inter-American Convention To Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67 (emphasis added).

199. *Id.*

200. Doe v. Drummond Co., 782 F.3d 576, 607–08 (11th Cir. 2015) (first alteration in original) (emphasis added) (citation omitted); *see also* Mamani v. Sánchez Bustamante, 968 F.3d 1216, 1220 (11th Cir. 2020) ("We have previously held that the TVPA is not restricted to claims based on direct liability and that legal representatives can recover based on theories of indirect liability, including aiding and abetting . . . .").

201. 402 F.3d 1148, 1157 (11th Cir. 2005) (citing S. REP. NO. 102-249, at 8–9 (1991)).

Outside of the Eleventh Circuit, a handful of other courts have come to a similar conclusion. In *Mujica*, the Central District of California said, "[T]he legislative history of the TVPA rather *unequivocally* states that the statute encompasses aiding and abetting theories of liability," while pointing to the Senate report's use of the phrase "ordered, *abetted, or assisted* in the torture" when defining the Act's scope.[202] Additionally the Northern District of California called aiding and abetting liability "presumably" attached to the TVPA, and the Eastern District of Virginia cited *Mohamad* as supporting aiding and abetting liability under the TVPA.[203]

Furthermore, though in later cases it has since ruled differently, an early S.D.N.Y. case to answer this question found aiding and abetting to properly attach to the TVPA in *Wiwa v. Royal Dutch Petroleum Co*.[204] There, pointing to the same Senate report language as *Mujica*, the S.D.N.Y. said,

> *Central Bank* . . . support[s] the proposition that the scope of liability under a statute should be determined based on a reading of the text of the specific statute. . . . [T]he Court finds that the language and legislative history of the TVPA supports liability for aiders and abettors of torture and extrajudicial killings.[205]

Central Bank's holding does not leave aiding and abetting claims inapplicable to all statutes silent on the issue. A silent statute is not an outright ban on such claims. On the contrary, in *Central Bank*, the Supreme Court acknowledged that congressional intent, and thus a statute's legislative history, was relevant in these determinations.[206] This Note argues that the TVPA's legislative history is quite clear on this point. A number of federal courts have agreed, finding the presumptive congressional intent to overcome *Central Bank*'s refusal to presume aiding and abetting liability in federal statutes.

202. Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164, 1174 (C.D. Cal. 2005) (emphasis added) ("Under 'Scope of liability', the Senate Judiciary Committee Report states that the 'legislation is limited to lawsuits against persons who ordered, *abetted, or assisted* in the torture.' Thus, the legislative history with respect to the TVPA indicates that the statute provides for aiding and abetting liability." (footnote omitted) (citing S. REP. NO. 102-249, at 8)).

203. Doe I v. Qi, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004); Yousuf v. Samantar, No. 1:04cv1360, 2012 WL 3730617, at *10–13 (E.D. Va. Aug. 28, 2012).

204. Wiwa v. Royal Dutch Petrol. Co., No. 96 CIV. 8386, 2002 WL 319887, at *15–16 (S.D.N.Y. Feb. 28, 2002) ("In the Committee Report, the Senate Judiciary Committee explained that the Act would permit suits 'against persons who ordered, abetted, or assisted in torture.'" (citing S. REP. NO. 102-249, at 8)).

205. *Id.*

206. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 183 (1994) (noting that the "history" of a federal statute may imply "that aiding and abetting was covered by the statutory prohibition").

d. Meyer v. Holley *and Ordinary Principles of Tort Law*

Beyond legislative history, the Supreme Court has counseled that "ordinary background . . . principles [of law]" can support an inference of congressional intent to provide for certain forms of secondary liability.[207] In other words, when Congress legislates in the context of certain fields of law, common principles of that field can support the imposition of secondary liability even in the face of a silent statute. In *Meyer v. Holley*, the Supreme Court commented on one of these fields, the field of tort law.[208]

Meyer was brought in 2003 by an interracial couple claiming discrimination in housing violating the Fair Housing Act. Though the Fair Housing Act is silent on any forms of secondary liability, the Court found certain secondary liability "well established,"[209] allowing the couple to sue the corporate broker who employed the allegedly discriminatory real estate agent under a theory of vicarious liability.[210] Its rationale for this position was simple. First, the Court noted "an action brought for compensation by a victim of housing discrimination is, in effect, a tort action."[211] And second, "the Court . . . assume[s] that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules."[212] In other words, the Court said that when Congress legislates in the field of torts, it does so understanding that *vicarious liability* is a general principle in tort law.

The TVPA is unquestionably within the realm of tort law.[213] However, most courts addressing the question of aiding and abetting liability under the TVPA have made no mention of *Meyer* in their

207. Meyer v. Holley, 537 U.S. 280, 286 (2003).

208. *Id.* at 285; *cf.* Note, *supra* note 186 ("[I]n *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, the Court endorsed secondary liability for trademark infringement without locating a basis for it in the trademark statute." (citing Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc., 456 U.S. 844 (1982))).

209. *Meyer*, 537 U.S. at 285.

210. *Id.* at 283. Vicarious liability is "a form of strict secondary liability that arises under the common law doctrine of agency." Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192, 224 (2009).

211. *Meyer*, 537 U.S. at 285.

212. *Id.* (citing Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999)).

213. Dictionary.com defines "tort" as "a wrongful act . . . that results in injury to another's person." *Tort*, DICTIONARY.COM, https://www.dictionary.com/browse/tort [https://perma.cc/EK7Q-4MLP].

analysis.[214] To this end, some commentators have argued that the Supreme Court implicitly distinguished *Meyer* from *Central Bank* by limiting its *Meyer* holding to vicarious liability, without commenting on other forms of secondary liability.[215] In other words, it held that vicarious liability is an ordinary principle in tort law, but forms of "contributory liability," such as aiding and abetting are not. This may truly be the case. Indeed, it's difficult to square the Court's unanimous holding in *Meyer* with its *Central Bank* holding without coming to the conclusion that the Court was doing implicit line drawing between vicarious liability and other forms of secondary liability.[216]

However, at least one court has cited the *Meyer* case to support the proposition that aiding and abetting is a general principle in tort law. This again was the Eleventh Circuit in *Drummond*. There, the court annunciated that, under *Meyer*, unless the TVPA's text or legislative history "disavow reliance on traditional theories of tort liability for secondary actors," aiding and abetting liability should be presumptively attached to the Act.[217] After finding no such disapproval, the court concluded that the TVPA allowed for aiding and abetting claims made against individuals under the TVPA.[218]

While the position taken in *Drummond* is ostensibly a minority one, the *Meyer* holding and its articulation of the relevance of "*ordinary* background . . . principles [of law]"[219] in finding secondary liability under a provision is worth mentioning. What's more, the four-Justice *Central Bank* dissent quoted early decisions that called "aiding and abetting theory, grounded in 'general principles of tort law.'"[220] This Note suggests that future courts may be able to leverage *Meyer*, the *Central Bank* dissent, and the Court's general emphasis on principles of law in its statutory interpretations to find further support for aiding and abetting liability under the TVPA.

214. In some ways, however, this is understandable, as the majority of claims including aiding and abetting liability have been simply thrown out because they were made against corporate entities, leaving courts no reason to conduct a deep and substantive analysis of the TVPA and aiding and abetting liability. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 58 (D.C. Cir. 2011).

215. *See, e.g.*, Note, *supra* note 185, at 731 n.12 ("[T]wo unanimous Supreme Court decisions post-*Central Bank* . . . endorsed implied vicarious liability without raising a *Central Bank* objection.").

216. For one thing, the *Meyer* case came just nine years after *Central Bank*.

217. Doe v. Drummond Co., 782 F.3d 576, 607 (11th Cir. 2015) (citing *Meyer*, 537 U.S. at 287).

218. *Id.*

219. *Meyer*, 537 U.S. at 286.

220. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (Stevens, J., dissenting).

* * *

Secondary liability claims are perfectly consistent with the TVPA. *Central Bank*'s precedent *does not* stand for the proposition that a silent statute may not provide for secondary liability. Thus, a court should not deny the use of secondary liability under the TVPA based on that case alone. The legislative history of an act may fill the gaps left by a silent statute. Indeed, the legislative history of the TVPA unambiguously shows congressional intent to allow for all forms of secondary liability claims, in a manner that likely reaches the *Central Bank* general presumption hurdle.[221] Additionally, the Court's holding in *Meyer* regarding the "ordinary" principles of tort law gives a court flexibility to make an argument that aiding and abetting liability is or has become a general principle with regard to certain torts. A court's decision to allow secondary liability under the TVPA is well supported.

e. Compliance with Mohamad

Finally, allowance for TVPA aiding and abetting liability against individuals complies with the Supreme Court's holding in *Mohamad*. *Mohamad* limited the scope of liability provided by the TVPA to the "natural person."[222] Thus, claims under the TVPA cannot be brought against organizations or other entities.[223]

However, the decision does nothing to indicate that liability under the TVPA cannot extend beyond the torturer(s) themselves. In fact, the Court did just the opposite, saying, "the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing . . . ."[224] While the use of "officer" is a clear reference to the command responsibility doctrine, nowhere in the decision did the Court indicate command responsibility was the *only* applicable form of secondary liability.[225] Indeed, when secondary liability was raised in *Mohamad* the Court said that just because the "*petitioners rightly note* that the TVPA contemplates liability against officers" it "does not follow . . . that the Act embraces liability against *non-sovereign organizations*."[226] But the Court never goes further than striking

221. *See supra* Parts III.B.2.b–c. *See generally* Mohamad v. Palestinian Auth., 566 U.S. 449, 551–57 (2012) (discussing the rationale of the implicit limitation of liability to natural persons).

222. *Mohamad*, 566 U.S. at 451; *see supra* Part I.D.

223. *See supra* Part I.D.

224. *Mohamad*, 566 U.S. at 458.

225. *See supra* note 164 (discussing "command responsibility").

226. *Id.* (emphasis added).

down the petitioners' assertion that secondary liability can be levied against organizations, and it never indicates that there is any limitation on the use of secondary liability against individuals.[227]

Whether intentional or not, the text of *Mohamad* does nothing to limit the scope of liability *individuals* can face under TVPA theories of secondary liability. This gives a lower court plenty of daylight to find aiding and abetting liability as consistent with *Mohamad*.

C. THE ATTACHMENT OF AIDING AND ABETTING LIABILITY UNDER THE TVPA IS A LIMITED SOLUTION

It is necessary to conclude by conceding that the solution proposed by this Note is a limited one. Its limitation is true with regard to the viability of the TVPA itself, and certainly with regard to the broader context of U.S. deterrence and adjudication of human rights abuses abroad.

Most directly, while aiding and abetting liability could be valuable in expanding the pool of individuals who are both TVPA-reachable and culpable for human rights abuses, it would not return the Act to its pre-*Mohamad* standing. Organizations will always be more identifiable and more easily hauled into court than individual actors in the context of human rights abuses. What's more, organizations will usually have far bigger funds to pay compensatory and punitive damages to a successful plaintiff than an individual ever would. However, outside of a legislative amendment to the TVPA, the era of organizational liability under the Act is over.

Additionally, questions will remain about the efficacy of aiding and abetting liability itself, specifically against corporate actors. Indeed, logic tells us that the majority of extrajudicial killings and acts of torture have no corporate involvement at all. And as the Eleventh Circuit commented in *Drummond*, properly pleading those that do may be difficult under "heightened federal pleading standards."[228] Thus,

227. It would not be hard to imagine the Court to have said something to the effect of: "While the TVPA considers liability beyond a torturer, this liability only extends to those in the actor's chain of command, and not to the entire world of people who may have assisted the torture." However, when addressing this issue, the Court merely says that organizations could not be liable based on a theory of secondary liability and makes no reference to secondary liability's application in totality. *Id.*

228. Doe v. Drummond Co., 782 F.3d 576, 608 n.43 (11th Cir. 2015); *see also* Roger P. Alford, *The Future of Human Rights Litigation after* Kiobel, 89 NOTRE DAME L. REV. 1749, 1756 (2014) (claiming that "pleading . . . a plausible occurrence" of corporate executive aiding and abetting "will be extraordinarily difficult in light of heightened federal pleading standards" (citing Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009); and then citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

corporate-involved torture or killings that include sufficient evidence needed to bring claims against corporate actors will be a "subset of a subset."

However, regardless of the limitations a given solution to maintain TVPA may have, it's clear that the Act is one worth saving. The lofty goals Congress articulated upon its passing, however unmet in practice, were the correct ambitions. Providing those who have suffered grave physical, mental, and emotional harm a vehicle for achieving redress is a necessary endeavor. TVPA aiding and abetting liability, specifically in the context of corporate-facilitated abuses, addresses the holes created by the practical and jurisdictional problems, closing the gap between culpable parties and TVPA-reachable defendants.

CONCLUSION

Congress had no intent to create a TVPA that was simply symbolic. But the milestone that was its enactment was permanently threatened by the Supreme Court's decision in *Mohamad*. As this Note argues, utilizing aiding and abetting liability may be able to act as a partial solution to the post-*Mohamad* toothless-ness of the Act. Aiding and abetting gives TVPA plaintiffs a more realistic chance at solving the practical and jurisdictional problems caused by *Mohamad*. These claims also would help bring the United States a step closer to ensuring there is no "safe haven in the United States" for those who effect human rights abuses.[229] The use of aiding and abetting claims is both consistent with the semi-ambiguous Supreme Court jurisprudence on the subject generally and with supportive congressional statements in the TVPA's legislative history. Such liability also respects *Mohamad*, as the Supreme Court made little reference to secondary liability claims and the TVPA, and what reference it did make indicated an appetite for such claims.

229. S. REP. NO. 102-249, at 3 (1991).