AIDING AND ABETTING IN TORTURE: CAN THE ORCHESTRATORS OF TORTURE BE HELD LIABLE?

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"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... In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere."[1]

- George H.W. Bush

I. INTRODUCTION

Can the children of a slain banana farmer recover in U.S. Courts against the multi-million-dollar American corporation convicted of funding and providing AK-47s to a paramilitary group, listed as a Foreign Terrorist Organization, who murdered their father? Can Chinese citizens recover against the American computer-programming corporation Cisco that understood that it was enabling the Chinese government to surveil its own citizens and persecute them for their religious beliefs?

The Torture Victim's Protection Act ("TVPA") is meant to do what its title suggests, give redress to those who have been injured through torture by allowing victims of certain international law violations, or their representatives, to bring a civil action against those responsible in United States federal district court after being properly served in the United States.[2] However, it is rarely those who perform the torture directly that have claims brought against them. Those who perform the torture directly are often unknown, untraceable, are victims of torture themselves and will never be able to be served in the United States.

Many human rights advocates believe that those who enable and fund torture can and should be held accountable under the TVPA through the theory

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1. Statement on Signing the Torture Victim Protection Act of 1991, 1 Pub. Papers 437-38 (Mar. 12, 1992)

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

of aiding and abetting; however, this theory of liability has not yet been spoken to directly by the United States Supreme Court. The refusal of the court to answer this question has led to a split among federal circuit courts. This article submits that the TVPA and its companion statute, the Alien Tort Statute § 1350 (also called the Alien Tort Claims Act "ATCA") allow for, and were meant to encompass aiding and abetting liability. These intentions are seen plainly in the terms and notes of the TVPA, which contemplate claims based on indirect theories of liability.[3] This article will discuss the statutes plain language as well as the clear inferences of intent that can be drawn from the legislative histories of the respective statutes. It will begin with a brief history of the Alien Tort Statute ("ATS") and how its sister statute, the TVPA, came about, as well as an explanation for how the two work together. From there the current circuit split as to aiding and abetting liability will be discussed, and finally, the article submits the multi-factor test enumerated in *In Re Chiquita Brands* that should be used when analyzing aiding and abetting liability.

A. The History of the ATS

Enacted in 1789, the ATS is a one sentence long statute that 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." The ATS was enacted as part of the First Judiciary Act, which established and set the structure for federal courts and conferred jurisdiction.[4] For almost 200 years the ambiguous statute was essentially unused with one prominent legal scholar, Judge Henry Friendly describing it in 1975 as being a "legal Lohengrin[5]; although it has been with us since the first Judiciary Act … no one seems to know whence it came."[6]

In 1980, though, the statute took on a new life in *Filartiga v. Pena-Irala,* when the Second Circuit Court of Appeals read the statute to allow jurisdiction in an action between non-U.S. citizens for violations of customary international

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3. In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., No. 08-MD-01916-KAM, 2016 U.S. Dist. LEXIS 82741, at *1116 (S.D. Fla. June 1, 2016).

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

5. Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?,* 14 Transnat'l Law, 207 at *210 (2001) citing Jay M. Lewis Humphrey, Comment, A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789, 14 U.S.F. L. REV. 105 (1979) (citing R. Wagner, Lohengrin, The Authentic Librettos of the Wagner Operas 68 (1938)).

6. Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?,* 14 Transnat'l Law 207 at *210 (2001).

law.[7] *Filartiga* involved the kidnapping, torture, and eventual murder of a Paraguayan teen in retaliation for his father's human rights activism. The man who conducted the torture, also a Paraguayan, Americo Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay fled to the United States after a criminal case was brought against him. The victim's sister who was living in Washington D.C. on a visitor's visa at the time (she later applied for permanent political asylum) was able to serve Pena and bring the action against him. The court held that whenever an alleged torturer was found and served within the United States, jurisdiction was proper under the ATS if the action was brought by an alien for a tort involving a violation of the law of nations, in this case, official torture.[8] Each of the plaintiffs in *Filartiga* was awarded five million dollars in punitive damages and the defendant was deported. The court reasoned that this comported with Article III of the constitution because it the laws of nations have always been a part of the common law of the United States, thus, suits brought under the ATS do actually arise under the laws of the United States.[9]

After it was brought out of hibernation in *Filartiga,* the ATS was the basis for a stream of claims for human rights abuses. The decision prompted debate from legal circles, and started a firestorm of law review articles. The ability to provide recourse to the victims of some of the worst atrocities committed on humanity in American courts was a source of pride for many human rights advocates.[10] At first the claims were focused on individual persons who committed abuse on foreign lands. However, many of these cases ended up as default judgements against foreign defendants that would never be enforced.

The problem of default judgements was discussed in *Xuncax v. Gramajo,* a case involving allegations against the former defense minister of Guatemala (who at the time of the suit was attending Harvard University but refused to mount a defense to the charges) by indigenous Guatemalans for a multitude of brutal human rights abuses including torture and murder: "Answering [the] questions [before the court] has been made extraordinarily difficult because, while plaintiffs' contentions have been presented with exceptional skill by

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

8. *Id.* at *878

9. *Id.* at 855.

10. *See* Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1472 (2014) ("Under *Filartiga* a private right to sue for damages, in cases alleging violations of international norms of human rights, became an established and rather prideful feature of American justice.").

exceedingly competent counsel, defendant has offered no defense." The court also remarked that "extended consideration [was] necessary to explore - without adversarial assistance - the potential defenses available."[11] Gramajo eventually graduated from Harvard, moved back to Guatemala and continued his refusal to cooperate with the courts.[12]

In the two decades after *Filartiga,* though most of the plaintiffs in ATS litigation were unable to recover by way of damages, human rights advocates still saw vindication as as being worth the expense of litigation.[13] *Filartiga* also gave support to international scholars who advocated the use of American domestic courts to incorporate international law into American law.[14]

Eventually though, claims for damages, sometimes even punitive, were brought against multinational corporations alleged to have committed human rights abuses.[15] During this time, the ATS was used to create a sort of universal civil jurisdiction for victims of serious international law violations, even if the crimes occurred wholly outside of the United States.[16] Aside from some unpredictability with regard to the scope of violations covered and much debate within academic circles, a relatively consistent precedent was set after other federal courts began to adopt the Second Circuits holding and reasoning as a framework for their own ATS analyses.[17] In the same year of the *Filartiga* decision, the American Law Institute even published a "tentative" draft of its Restatement (Third) of U.S. Foreign Relations Law that endorsed the Second Circuits decision regarding the domestic status of the law of nations.[18]

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11. Edward A. Amley, Jr., *Comment, Sue and Be Recognized: Collecting 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2192 (1998) (citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 169 (D.Mass.1995)).

12. Historic Case at a Glance: *Xuncax v. Gramajo and Ortiz v. Gramajo*, THE CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/xuncax-v-gramajo-and-ortiz-v-gramajo

13. Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel,* 64 DUKE L.J. 1023, 1051 (2015).

14. *Id*.

15. *Id.* at 1026.

16. Id.

17. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 156 U. PA. L. REV. 1383 at *1390 (2008).

18. Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel,* 64 DUKE L.J. 1023, 1050 (2015).

For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* the court held that the ATS provided subject matter jurisdiction for a foreign cubed (cases in which there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil.)[19] In that case the plaintiffs, who were residents of South Sudan, sued a Canadian oil company for working with the Sudanese government during a conflict in the country to remove the local population from areas around oil fields.[20] The plaintiffs alleged that the actions became an ethnic cleansing and genocide done at the hands of the government as part of an agreement with the oil company. The South Sudanese plaintiffs claimed that the defendants collaborated to commit human rights abuses including extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement. The mutually beneficial relationship would provide security for the oil fields for Talisman Energy and much needed capital for the Sudanese government to continue the conflict; what was described as a jihad aimed at the Islamization of the majority non-Muslim southern portion of the country. While it was dismissed on other grounds, the Southern District of New York held that the exercise of personal jurisdiction over the Canadian company was proper.[21]

Similarly, in *Hilao v. Marcos,* the court reasoned that a broad construction of the "arising under" aspect of Article III of the United States Constitution was the correct reading, and found jurisdiction to be proper in the case even though it was foreign cubed.[22] *Hilao* involved the torture and/or disappearance of tens of thousands of people on orders from the President of the Philippines, Ferdinand Marcos. The President eventually fled to the United States and the suit was commenced after he was served. The court said: "a suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture prohibited by the law of nations, is within the jurisdictional grant of § 1350."[23]

Another famous foreign cubed case that was brought under the ATS is *Kadic v. Karadzic*, which stems from the Bosnian war that raged from 1992 through 1995. During that time, Radovan Karadžić, sometimes referred to as "the

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19. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 at *306 (S.D.N.Y. 2003).

20. *Id.*

21. *Id.*

22. Hilao v. Marcos (In re Estate of Marcos), 25 F.3d 1467, 1473 at *1474 (9th Cir. 1994).

23. *Id.*

butcher of Bosnia[24]" the defendant in the case, served as president of the self-proclaimed Bosnian-Serb Republika Srpska.[25] In his time as president, he is alleged to have directly and through command committed atrocities against humankind including ethnic cleansing, rape, forced prostitution, forced impregnation, torture and genocide.[26] After being served in Manhattan while on invitation from the UN in 1993, the case began its path to the 2nd Circuit Court of Appeals.[27] Karadžić argued that service of process was insufficient because he was visiting on invitation from the UN. The court disagreed because he was not served while he was in the well-defined confines of UN Headquarters when he was served, and because he was not a designated representative of any member of the United Nations.[28] The Second Circuit found that jurisdiction was proper and that Karadžić could be held liable both in his personal and official capacities.[29] [30] This Second Circuit decision expanded the ATS in holding that State action is not always required for a violation of the law of nations, which lead to the inclusion of suits against multinational corporations for breaches of customary international law with respect to both human rights and environmental protection.[31]

However, almost 25 years after *Filartiga,* the court sharply limited the availability of the ATS to international human rights litigation in federal courts. The court stated that, "the door is still ajar" to such litigation, though "subject to vigilant doorkeeping."[32] In *Sosa v. Alvarez-Machain*, the court took a

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24. Tim Hume, Tiffany Ap & Milena Veselinovic, *Radovan Karadzic Found Guilty of Genocide, Sentenced to 40 Years,* CNN, (March 24, 2016) http://www.cnn.com/2016/03/24/europe/karadzic-war-crimes-verdict/.

25. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

26. Id at 236-37.

27. *1994-96 Survey of International Law in the Second Circuit*, 23 SYRACUSE J. INT'L L. & COM. 129, 151 (1997).

28. *Id.*

29. Kadic v. Karadzic, 70 F.3d 232 at *236 (2d Cir. 1995)

30. Karadžić went into hiding in 1996 and was not found until 12 years later. In March of 2016 he was found guilty of genocide and sentenced to 40 years in prison after a long trial in the UN ad hoc International Criminal Tribunal for the Former Yugoslavia. (Tim Hume, Tiffany Ap & Milena Veselinovic, *Radovan Karadzic Found Guilty of Genocide, Sentenced to 40 Years,* CNN, (March 24, 2016) http://www.cnn.com/2016/03/24/europe/karadzic-war-crimes-verdict/).

31. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 589 (2002).

32. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) ("Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should

comprehensive look at the scant legislative history available for the ATS to determine whether it was meant to be simply jurisdictional in nature or to provide a cause of action. The case involved the abduction of a Mexican national by another Mexican national on orders from the United States Drug Enforcement Agency.[33] After looking at the little evidence they had, the court determined that when the ATS was enacted, it was intended to grant federal courts jurisdiction over common law claims for a particular set of international law violations, namely offenses against ambassadors, violation of safe conducts, and piracy. The court reasoned that the intent of Congress when enacting the statute is not inconsistent with it affording jurisdiction over comparable violations of modern international law.[34] In a concurrence, Justice Breyer advised lower courts to take international comity into account when deciding to whether to hear cases and to take practical consequences into consideration.[35]

The ATS took another hit with regards to scope of liability in *Kiobel v. Royal Dutch Petro. Co*. In *Kiobel*, Nigerian nationals sued Dutch, British, and Nigerian corporations under the ATS alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in suppressing demonstrations against the environmental effects of their operations in Nigeria.[36] The plaintiffs alleged that the police, aided by the corporations, killed, beat, and arrested residents as well as destroyed property. The case was dismissed and the Supreme Court ruled that an old cannon of statutory construction, the presumption of extraterritoriality, applied to ATS and therefore cases brought under it must "touch and concern" the United States for jurisdiction to be proper.[37] This effectively prohibited foreign cubed cases from being brought under the ATS.

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be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.")

33. *Id.* at 697.

34. *Id.* at n.19, ("Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after Erie, see supra, at 726, 729-730, 159 L. Ed. 2d, at 750, 751-752, as a more expansive common law power related to 28 U.S.C. § 1331 [28 USCS § 1331] might not be.").

35. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004).

36. Kiobel v. Royal Dutch Petro. Co., 133 U.S. 1659, 1662 (2013).

37. *Id.* at 1664-73.

However, the Court did leave open a window for a variety of human-rights litigation under the ATS, and various concurring opinions, especially one from Justice Breyer, suggest that the universal-jurisdiction for those who are "hostis humani generis," or an enemy of all mankind, is not a moot notion.[38] Only concurring with the result and rejecting the presumption against extraterritoriality Justice Breyer an alternate analysis: "jurisdiction should lie under the ATS whenever "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, **or** (3) the defendant's conduct substantially and adversely affects an important American national interest."[39] Breyer went on to explain that an important national interest "includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[40]

B. Enactment of the TVPA

After *Filartiga* breathed new life into the ATS, courts spent almost 10 years wrestling with the interpretation of the 200-year-old statute with minimal case law to help. Some judges questioned whether the ATS granted a cause of action for torture without an express grant from Congress.[41] Some believed that the ATS should operate strictly as a jurisdictional basis and not as giving rise to a right to sue, and thought that treating the ATS as giving rise to a cause of action was an imposition by the judicial branch onto the toes of the legislative branch.[42] Others believed that the ATS did operate as giving right to sue, that it provided both a forum and a cause of action, and required only a showing that the defendant's actions operated as violating the law of nations.[43]

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38. *Id*. at 1671.

39. Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel,* 64 DUKE L.J. 1023, 1064 (2015) (citing *Kiobel v. Royal Dutch Petro. Co*., 133 U.S. 1659 (2013)).

40. *Id.*

41. Joshua J. Baumann, Case Comment, *Mohamad v. Palestinian Authority 132 S. Ct. 1702 (2012)*, 39 OHIO N.U.L. REV. 627, 629 (2013).

42. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 156 U. PA. L. REV. 1383 (2008) (citing Judge Bork in Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (1984) ("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.").

43. *Id.* (citing Judge Edwards in Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (1984) "the Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under [the ATS]; rather, the Second

A great example of this confusion is a case out of the DC Circuit Court of Appeals, *Tel-Oren v. Libyan Arab Republic. Tel-Oren* was brought by the families of Israeli citizens who were killed in an attack on a civilian bus against the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[44] The interpretations of the ATS were so inconsistent that a per curium decision was handed down with three different concurring opinions which were in conflict with each other on a number of issues.[45]

To resolve some of the confusion, in 1991 Congress passed the Torture Victim Protection Act ("TVPA") codified as a note to the ATS and provided an explicit basis for liability for official torture or extrajudicial killings committed in violation of the law of nations.[46] President George H.W. Bush signed it into law in 1992. Unlike the ATS, the TVPA is long and detailed, and it provides a broader grant of jurisdiction because it allows United States citizens, as well as noncitizens, to bring claims. The TVPA allows:

> [A]n individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects an individual to: (1) torture will, in a civil action, be liable for damages to that individual; or (2) extrajudicial killing will, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[47]

The term extrajudicial killing is defined as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples."[48] Extrajudicial killing does not include executions carried out under

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Circuit required only a showing that the defendant's actions violated the substantive law of nations.")).

44. Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (1984).

45. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 156 U. PA. L. REV. 1383 (2008) (citing Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (1984)).

46. 28 U.S.C.S. § 1350.

47. James L. Buchwalter, *Construction and Application of Torture Victim Protection Act of 1991*, 28 U.S.C.A. § 1350 note, 199 A.L.R. Fed. 389 (2005).

48. *Id.*

the authority of a foreign nation that do not violate international law.[49] Torture is defined as:

> [A]ny act directed against an individual in the offender's custody or physical control by which severe pain or suffering (other than pain or suffering arising only from, inherent in, or incidental to lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining information or a confession from that individual or a third person, punishing that individual for an act that the individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind."[50]

Additionally, the act provides a definition for "pain or suffering":

> "Pain or suffering" under the Torture Victim Protection Act refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[51]

Unlike the ATS[52], the TVPA includes an exhaustion of remedies requirement.[53] The exhaustion of remedies requirement is an affirmative defense, with the burden of proof on the defendant giving the plaintiff the opportunity to rebut by showing that the local remedies were "ineffective,

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49. *Id*. at 2a.

50. *Id.*

51. 28 U.S.C.A. § 1350 note, § 3(b)(2) ("court shall decline to hear a claim if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

52. *See* Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005) citing Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Abiola v. Abubakar, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132-1135 (C.D. Cal. 2002).

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

unobtainable, unduly prolonged, inadequate, or obviously futile.[54] The TVPA also includes a 10-year-statute of limitations that has been held to be tolled until the Defendant is the United States and personal jurisdiction can be obtained.[55] In contrast to the ATS, the TVPA provides a federal cause of action to aliens and U.S. Citizens for certain claims of torture and extrajudicial killings, but contains no jurisdictional grant.[56]

The TVPA was passed partially in response to the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, which the United States ratified in 1990.[57] The UN Convention is an international human rights treaty that requires states to take measures to prevent torture within their borders and territories and forbids states to extradite people to any country where there is reason to believe they will be tortured, to date it has been signed by 83 countries.[58] In a letter to the senate seeking ratification of the convention, President Reagan wrote: "[r]atification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today."[59] Because the United States made it clear in its materials attached to the convention that it was not intended to be self-executing[60], Congress passed the TVPA to remain in accordance with the convention.[61] According to its legislative history, the TVPA was created to further the goals of the UN

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54. *Id*. (quoting S.Rep. No. 102-249, at 9-10).

55. Jean v. Dorelien, 431 F.3d 776, 780 (11th Cir. 2005) (citing S. Rep. No. 102-249, at 7 and at 11 ("only defendants over which a court in the United States has personal jurisdiction may be sued") and ("The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available.)

56. James L. Buchwalter, *Construction and Application of Torture Victim Protection Act of 1991*, 28 U.S.C.A. § 1350 note, 199 A.L.R. Fed. 389 at *2a (2005).

57. *Id.*

58. Richard P. Shafer, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385 (2003).

59. Jessica Grunberg, *The Torture Victim Protection Act: A Means to Corporate Liability for Aiding and Abetting Torture,* 61 CATH. U.L. REV. 235 at *261 (2011).

60. Richard P. Shafer, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385 at *2 (2003).

61. James L. Buchwalter, *Construction and Application of Torture Victim Protection Act of 1991*, 28 U.S.C.A. § 1350 note, 199 A.L.R. Fed. 389 at *2a (2005).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by "making sure that torturers and death squads will no longer have a safe haven in the United States."[62] The TVPA further addressed the goals of the convention by providing the means for victims of torture to find civil redress.[63]

C. The TVPA in Action

In *Chavez v. Carranza* the families and victims of extrajudicial killing and torture brought claims under the TVPA against El Salvador's former Vice-Minister of Defense and Public Security, Colonel Nicolas Carranza, who exercised control over the security forces who committed crimes against humanity.[64] The defendant lived in a number of different states, became a naturalized citizen, and was eventually served in Memphis, Tennessee.[65] He was alleged to have "exercised command responsibility over, conspired with, or aided and abetted subordinates in the Security Forces of El Salvador, or persons or groups acting in coordination with the Security Forces or under their control, to commit acts of extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading treatment or punishment, and to cover up these abuses."[66] The district court found that jurisdiction was proper under the TVPA for the plaintiffs who were American citizens and that it was also proper for the El Salvadorians under the ATS and a trial ensued with Carranza eventually being found liable and each of the plaintiffs being awarded $500,000 in compensatory damages and $1 million in punitive damages.[67] The Sixth Circuit affirmed in 2009.[68] In another instance of the difficulty of collecting on judgements against individuals, in 2016 over 10 years after the initial trial, a motion to renew judgement was filed and granted where it was asserted that "[d]espite Plaintiffs' sustained and diligent efforts to execute on the Judgment, only $441.03 has

62. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 156 U. PA. L. REV. 1383 at *1392 (citing (2008). S. Rep. No. 102-249, at 3 (1991).

63. *Id.* (citing H.R. Rep. No. 102-367, at 3 (1991), (reprinted in 1992 U.S.C.C.A.N. 84, 85-86).

64. Chavez v. Carranza, 407 F. Supp. 2d 925 (W.D. Tenn. 2004).

65. *Id.*

66. Chavez v. Carranza, 407 F. Supp. 2d 925 at *927 (W.D. Tenn. 2004).

67. *Id.*

68. Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009).

been collected to date from Defendant."[69] The group who brought the suit, the Center for Justice and Accountability says that they have successfully garnished one of Carranza's bank accounts.[70]

However, in 2012, in the same way that *Kiobel* sharply limited liability under the ATS, in *Mohamad v. Palestinian Auth.* the Supreme Court limited liability under the TVPA to natural persons as opposed to juridical ones.[71] That case arose after the widow and sons of a Palestinian man, Azzam Rahim, born and raised on the West Bank who later became a naturalized U.S. citizen brought suit against the Palestinian Authority and the Palestinian Liberation Organization after he was kidnapped and killed by Palestinian Authority Intelligence officers.[72] The term "individual" was not defined under the act, so the court defined it.[73] The Court looked to the dictionary to determine the plain meaning and decided that the term "individual" could only mean human beings as opposed to juridical ones.[74] Even while determining that as read in the TVPA the term "individual" meant only natural persons, the court did note that Congress possesses the power to define the word individual to include corporations, but before that can be assumed, there must be some indication that it meant to do so.[75] Though he agreed with the courts judgement because the "legislative history of the statute makes up for whatever interpretive inadequacies remain after considering language alone," Justice Breyer noted that the word "individual" is open to "multiple interpretations, permitting it, linguistically speaking, to include natural persons, corporations and other entities."[76] Although the *Mohamad* case dealt with organizations, it appears

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69. Chavez v. Carranza, No. 2:03-cv-02932-JPM-tmp, 2016 U.S. Dist. LEXIS 18114, at *4 (W.D. Tenn. Feb. 16, 2016).

70. *Campaign of Violence Against Salvadoran Civilians*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, "CJA and pro bono co-counsel continue to pursue collection of the $6 million judgment against Carranza. To date, we have successfully garnished one of Carranza's bank accounts." http://cja.org/what-we-do/litigation/chavez-v-carranza/.

71. Joshua J. Baumann, Case Comment, *Mohamad v. Palestinian Authority 132 S. Ct. 1702 (2012)*, 39 OHIO N.U.L. REV. 627 (2013).

72. Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

73. Id.

74. Joshua J. Baumann, Case Comment, *Mohamad v. Palestinian Authority 132 S. Ct. 1702 (2012)*, 39 OHIO N.U.L. REV. 627 (2013).

75. *Id.* at 663.

76. Mohamad v. Palestinian Auth., 566 U.S. 449, 461, 132 S. Ct. 1702, 1711 (2012) (Breyer, J concurring).

that the Supreme Court intended its reasoning to apply to TVPA suits against corporations as well; less than a week after *Mohamad* they denied cert in a case bringing TVPA claims against a corporate defendant in *Bowoto v. Chevron Corp*.,[77] which involved the death and injury of protestors on one of the oil giant's platforms.[78]

D. The ATS and the TVPA are Separate and Distinct, but Not Fully Independent

Though the TVPA is in stark contrast with the ATS with regards to detail and length, there is still confusion as to how the ATS and the TVPA should or should not be read together. Congress seemed to understand the overlap of coverage from the ATS and the TVPA, but none of the legislative history for the TVPA spoke directly to the issue.[79] The fact that the TVPA was codified as a note to the ATS allows one to make the inference that they are meant to interact.[80]

Despite the confusion, generally Federal Courts have treated the TVPA as being supplemental to the ATS even though some arguments have been made that the TVPA should preclude a cause of action under the ATS.[81] This means that as a general practice and as the majority rule, an ATS claim is separate and distinct from a TVPA claim and can be brought separately in the same case, as can be seen in *Kadic v. Karadzic* and *Chavez v. Carranza* cited above, though many of the causes of action will be overlapping.[82]

Because the TVPA is so much more detailed than the ATS, courts have begun to try to read the some of the terms and requirements of the TVPA into the ATS analysis.[83] For example, in *Sosa v. Alvarez-Machain,* the court stated in dicta that an exhaustion of remedies requirement, like the one in the TVPA

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77. *Addressing Corporate Liability Under The TVPA ATS,* LAW360, (May 14, 2012, 1:38 PM EDT) https://www.law360.com/articles/339460/addressing-corporate-liability-under-the-tvpa-ats.

78. Bowoto v. Chevron Corp., 621 F.3d 1116, 1120 (9th Cir. 2010).

79. S. Rep. No. 102-249, at 3 (1991); see also H.R. Rep. No. 102-367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85-86.

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

81. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 156 U. PA. L. REV. at *1386 (2008).

82. *Id.*

83. *Id*.

might be used as an affirmative defense in a certain type of ATS cases.[84] Courts generally import the statute of limitations portion and the equitable tolling portion of the TVPA into ATS analysis, and generally will use the definitions of torture and extrajudicial killing included in the TVPA.[85]

II. DOES TVP ALLOW FOR AIDING AND ABETTING LIABILITY?

As is obvious by the discussion above, many parts of both the ATS and the TVPA are incredibly ambiguous and begging to be fleshed out by the Supreme Court or Congress. Many of the ambiguities and the failure of the Supreme Court or Congress to provide guidance have resulted in splits among the federal circuit courts. One main example of a split when it comes to the TVPA is whether or not secondary liability can be sustained on a theory of aiding and abetting.[86] After *Kiobel* limited the ATS to application only to natural persons, and *Mohamad v. Palestinian Authority* did the same for the TPVA, the next big question is about indirect liability. To human rights advocates it is imperative that aiding and abetting liability be upheld in the context of TVPA claims. This example of contention in interpretation is very important because most of the high-profile cases brought under the ATS and/or the TVPA involve liability for aiding and abetting. The significance of this issue becomes clear when thinking about the logistics of suing a poorly organized, illegal paramilitary group as opposed to the Western corporation officers who have been funding them to do the dirty work.

When it comes to the ATS, most courts have allowed for liability under an aiding and abetting theory, though there is a circuit split as to what standard should be used- purpose or knowledge.[87] Courts have upheld aiding and abetting liability by pointing both to common law conceptions of indirect liability as well as international law conceptions of the theory.[88] While general

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84. Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 652 (2010) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 124 U.S. 2739 (2004) (n21)).

85. *Id.* at 650.

86. *Compare* Doe v. Cisco Sys., 66 F. Supp. 3d 1239 (N.D. Cal. 2014) *with* In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., at *391 (S.D. Fla. June 1, 2016).

87. *The Alien Tort Statute: Comments on Current Issues: C. Theories of Liability for Non-State Actors: To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604* ("It seems settled that aiding and abetting is actionable under the ATS and that international law provides the source for a cause of action.")

88. *See generally* Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 Ariz. L. Rev. 805 (2005).

rule remains that the ATS encompasses aiding and abetting liability, lower courts disagree as to what standard must be met to prove the *mens rea* for aiding and abetting.[89] Some courts have required a specific intent or purposeful standard that must be met to prove liability; others only require a knowledge standard.[90]

In 2005 Senator Dianne Feinstein introduced a bill into the Senate that would have answered the aiding and abetting question with regards to the TVPA and greatly reduced the ability of human rights advocates and victims to find recourse against those who have enabled their torture and/or the extrajudicial killing of a family member.[91] The bill would have required those who are bringing a claim under either the ATS or the TVPA to have acted directly and with specific intent.[92] Business groups lauded the amendment and its sponsor Senator Feinstein, but after much criticism from the human rights community and labor groups Senator Feinstein withdrew the amendment.[93]

One of the initial questions regarding indirect liability is whether non-state actors can violate the law of nations. This question is closely related to the question of aiding and abetting liability and should be answered first. *Kadic v. Karadzic* answered the question of whether the law of nations can be violated by a non-state actor in the affirmative and most courts follow this standard.[94] In answering this question, the *Kadic* court said: "We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations

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89. Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the mens rea standard for corporate aiding and abetting is knowledge*, 10 NW. U. J. INT'L HUM. RTS. 119.

90. Kurtis A. Kemper, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350) -- Tort in Violation of Law of Nations or Treaty of United States*, 64 A.L.R. Fed. 2d 417 ("With respect to claims under the ATS for aiding and abetting a violation of the law of nations, the courts have disagreed about the proper standard for determining liability; some courts have imposed a specific intent or purpose standard for assessing the defendant's conduct but others have found a knowledge standard appropriate.").

91. Anthony J. Sebok, *Senator Feinstein's Now-Withdrawn Statute Limiting Non-Citizens' Tort Claims: How Would It Have Affected Abu-Ghraib-Related Civil Suits and Other Similar Civil Actions?,* FindLaw, (Oct. 31, 2005) http://writ.news.findlaw.com/sebok/20051031.html.

92. S. 1874, 109th Cong. (2005).

93. Anthony J. Sebok, *Senator Feinstein's Now-Withdrawn Statute Limiting Non-Citizens' Tort Claims: How Would It Have Affected Abu-Ghraib-Related Civil Suits and Other Similar Civil Actions?,* FINDLAW, (Oct. 31, 2005) http://writ.news.findlaw.com/sebok/20051031.html.

94. William Paul Simmons, *Liability of Secondary Actors under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juarez,* 10 YALE H.R. & DEV. L.J. 88 (2007) at *106.

whether undertaken by those acting under the auspices of a state or only as private individuals."[95]

A. The Second & Ninth Circuit Approach: The TVPA Does Not Allow for Aiding and Abetting Liability

Recently in *Doe v. Cisco Sys*., the Northern District of California followed precedent from the Ninth Circuit and ruled that the TVPA does not allow for aiding and abetting liability.[96] The *Cisco* court relied on *Bowoto v. Chevron Corp* in which the court dismisses the concept of aiding and abetting liability for corporate defendants in just a single paragraph, stating:

> It [the TVPA] limits liability to "[a]n individual" who subjects another to torture. *See* 28 U.S.C. § 1350, note § 2(a). Even assuming the TVPA permits some form of vicarious liability, the text limits such liability to individuals, meaning in this statute, natural persons. The language of the statute thus does not permit corporate liability under any theory.[97]

The court went on: "Had Congress intended for the court to interpret the term 'individual' so broadly as to include corporations, it would have included some evidence of this intent in the legislative history." It is difficult to understand how the *Bowoto* court came to the conclusion that the TVPA does not support theories of vicarious liability after pouring over the legislative history of the TVPA, including the Senate report, but failed to notice the following sentence: "The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture."[98] Giving the court the benefit of the doubt, though, it did focus mainly on the legislative history of the TVPA as limiting liability to individuals as opposed to corporations, but did not really provide any substantive analysis as to aiding and abetting liability.[99]

In a Second Circuit case, *Sikhs for Justice v. Nath*, the court says that the text of the TVPA is silent as to aiding and abetting and that not every silence is pregnant.[100] The plaintiffs alleged that the defendant, Kamal Nath by and

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95. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

96. Doe v. Cisco Sys., 66 F. Supp. 3d 1239 (N.D. Cal. 2014).

97. Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010) (citing 28 U.S.C. § 1350, note § 2(a)).

98. S. Rep. No. 102-249, at 8.

99. Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010).

100. Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 618 (S.D.N.Y. 2012).

through the ruling political party in India at the time, INC, committed various human rights violations, including acts of genocide, gang rape, torture, summary executions, and extra-judicial killings against non-U.S. resident Sikhs. Both Nath himself and the INC had significant ties to the United States, particularly New York State. The court reasoned that silence in the text of the TVPA should not be interpreted as granting and authorizing liability because if Congress intended to impose aiding and abetting liability it would have used the words aid and abet in the statutory text.[101] This logic is flawed because the drafters made it clear that the use of the word "individual" was not inadvertent and was used to prohibit claims against foreign states.[102] If the court wanted to prohibit indirect liability it would have made a note of it, just as it did regarding claims against foreign states.[103]

B. The Eleventh & Second Circuit Approach: The TVPA Does Allow for Aiding and Abetting Liability

More recently the Southern District of Florida held that *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig*., held that aiding and abetting liability is implicit within the TVPA, stating: "[T]heories of secondary liability under domestic law are available to support TVPA claims, with federal common law supplying the relevant standards."[104] The court also discussed alternate theories of indirect liability like agency and conspiracy, and explains that they are available as avenues for liability under the TVPA.[105]

The United States Court of Appeals for the Eleventh Circuit has a history of being a hospitable forum for human rights advocates looking for redress. In one of the first cases in which indirect liability was found under the TVPA, *Arce v. Garcia*, the plaintiffs were awarded a 54.6 million-dollar verdict including punitive and compensatory damages by a South Florida jury.[106] The jury awarded this sum even after hearing testimony from the two defendants who

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101. *Id.*

102. *See* S. Rep. No. 102-249, at 8.

103. *See id.*

104. In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., No. 08-MD-01916-KAM, 2016 U.S. Dist. LEXIS 82741, at *391 (S.D. Fla. June 1, 2016) (relying on Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

105. Id citing Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

106. Beth Van Schaack, *Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act,* Human Rights Brief 10, no. 1 (2002): 2-5, 31.

fully contested the allegations that they were responsible under a command theory for the gruesome acts of torture against the plaintiffs, Salvadorian citizens who later gained political asylum in the United States.[107] One of the defendants was the Director of the Salvadoran National Guard, the other, General Jose Guillermo Garcia, was the Minister of Defense at the time of the disappearance, killing, and torture of over 75,000 civilians during the Salvadoran Civil War.[108]

However, even within the circuits that have determined that aiding and abetting liability should be allowed, there is still discord with regards to whether domestic or international law standards of indirect liability should be used. For example, in *Doe v. Drummond*, the 11th Circuit Court of Appeals uses a "knowing and substantial assistance" standard to establish aiding and abetting liability under the TVPA.[109] The same circuit uses command responsibility, an international legal doctrine codified in the Geneva Convention used most prominently in the Nuremburg and Tokyo proceedings after WWII, in *Arce*.[110] Use of the doctrine of command responsibility is also found domestically in United States Military proceedings.[111]

The Second Circuit took a different approach entirely and requires that a defendant act "purposefully" rather than with just knowledge alone in *Presbyterian Church of Sudan v. Talisman Energy, Inc*., where they state that the standard is:

> [P]urpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, . . . no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.[112]

In re Chiquita relied on the 11th circuit case, *Doe v. Drummond Co*., in allowing liability for aiding and abetting. In *Drummond*, the court rejected the notion that theories of liability found in international law should be used and

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107. *Id.*

108. Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006).

109. Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

110. Beth Van Schaack, *Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act,* Human Rights Brief 10, no. 1 (2002): 2-5, 31.

111. *Id.*

112. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

instead relied on theories of indirect liability found in federal common law.[113] In *Drummond*, the court presents a comprehensive, highly persuasive argument for the use of theories of indirect liability that can be found in federal common law:[114]

> International law does not determine the United States Court of Appeals for the Eleventh Circuit's interpretation of the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C.S. § 1350 note. The TVPA and claims brought thereunder are governed by its language, its legislative history, and general principles of domestic law. Indeed, on the rare occasions when the Eleventh Circuit looks to general principles of international law for guidance as to what a theory of liability or statutory definition requires, the court does so only because the TVPA itself implicitly or explicitly incorporated those principles from international law. In other places, the legislative history instead directs the court to domestic law; the court is told to apply principles of liability under U.S. civil rights laws, in particular 42 U.S.C.S. § 1983, in construing under color of law as well as interpretations of actual or apparent authority derived from agency theory in order to give the fullest coverage possible.

The court points specifically at the legislative history of the TVPA noting that it calls for the use of domestic law with regards to agency theory when determining whether there was actual or apparent authority.[115]

C. The Legislative History Makes it Clear that Aiding and Abetting Liability was Intended to be Part of the TVPA

Unlike its counterpart, the ATS, the TVPA is accompanied with an extensive legislative history. The legislative history, in particular the Senate Report makes it very clear that the authors intended the act to encompass indirect liability. For example:

> The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or

113. Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

114. *Id.*

115. *Id.*

> persons who actually committed those acts–anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.[116]

It is almost bewildering to think courts that claim to have spent ample time examining the legislative history of the TVPA have either failed to notice this section of the Senate Report or simply have disregarded it in the interest of powerful corporations. The legislative history gives a very strong indication that the TVPA was meant to codify the *Filártiga* decision and expand the cause of action to American Citizens.[117]

The court in *Sikhs for Justice* dismissed the plaintiff's argument that there "is no indication that Congress intended to preclude this form of liability under the TVPA," retorting with "neither is there any affirmative intention in the statute."[118] The court guesses at the legislative intent behind the TVPA through a one sentence analysis of what the court did not say, when they simply could have looked to the Senate Report to find what the legislators did say and what the real intent was.

Opinions on the merits of looking to legislative history are not consistently held amongst jurists, but a 2012 survey of 137 congressional staffers from both parties, both chambers of Congress, and spanning multiple committees found legislative history to be the most important tool of both drafting and interpretation to the staffers, after actual statutory text.[119] This was overwhelmingly true for both Democrat and Republican respondents with 92% saying legislative history is useful for courts.[120] Textualist like the late Supreme Court Justice Antonin Scalia argue that legislative history is not a good tool for the interpretation of an ambiguous statute because of the practical realities of how statutes are drafted. However, the same survey found that "many of the assumptions on which this critique relies are unfounded."[121]

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116. S. REP. 102-249, 9.

117. Beth Van Schaack, *Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act,* Human Rights Brief 10, no. 1 (2002): 2-5, 31.

118. Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 618 (S.D.N.Y. 2012).

119. Abbe R. Gluck, Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901.

120. *Id.*

121. *Id.*

Aside from blatantly stating that the TVPA encompasses liability against those who have abetted or ordered torture, the Senate Report for the TVPA also cites to several international agreements that contemplate liability for those not directly responsible for the torture.[122] The report cites to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in particular Article 4(1), which says:

> Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in the torture.[123]

The Senate Report also discusses the Inter-American Convention to Prevent and Punish Torture, specifically Article 3:

> The following shall be held guilty of the crime of torture: (a) A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or directly commits it or who, being able to prevent it, fails to do so.[124]

In the legislative history, the drafters are careful to note that they used the term "individuals" when referring to those who can be held liable under the TVPA to preclude cases against foreign states.[125] The business community has lauded this interpretation, but do not use the same logic when discussing aiding and abetting. The fact that the drafters specifically noted that they did not want foreign states to be sued, but said nothing about precluding liability for aiding and abetting is strong evidence of their intent. If the authors wanted to preclude liability for aiding and abetting they would have made a note of it, and pointed it out when discussing the fact that the use of "individual" was not inadvertent.

III. CONCLUSION

A. What Should SCOTUS Do if Presented With This Issue?

The Supreme Court should create a bright line rule explaining the standard for indirect liability under the TVPA. The TVPA and claims brought under it should be governed by its language, its legislative history, and general principles

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122. Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) (citing S. REP. 102-249, at 8-9).

123. *Id.*

124. *Id.*

125. S. REP. NO. 102-249, (1991).

of domestic law. It makes sense for the Court to apply a consistent standard for the TVPA rather than allowing the circuits to utilize existing requirements for indirect liability, though even that would be better than the current confusion. Either way, the Supreme Court should make it clear that federal common law theories of indirect liability, including conspiratorial liability, agency, command responsibility and ratification are available to those suing under the TVPA. This furthers the goals of the TVPA to domesticate international prohibitions against torture.

Guidance as to the elements of command responsibility can be gained from looking to international law, because "legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA.]"[126] Common law theories can be supplemented by theories of indirect liability found in international law at the discretion of the court, but those international law theories should not be persuasive. For example, courts should look to principles of international law for inquiry into the exhaustion of remedies requirement because it is necessary to do so for the analysis of whether remedies have been exhausted in the country in which the alleged human rights abuse occurred.

American courts have spent hundreds of years defining standards for common law conspiracy and indirect liability; it makes sense to continue to utilize these standards in TVPA litigation. Courts should be very careful when considering theories of indirect liability derived from international norms because this can be seen as expanding liability so much as to create a new tort, which would be a huge judicial overreach.[127] However, it may be appropriate for a theory of command responsibility to be imported from international law, because it is also recognized domestically in military matters. The elements of command responsibility should be:

1. The direct perpetrators of the unlawful acts were sub-ordinates of the defendant commander;
2. The defendant commander knew (actual knowledge) or should have known (constructive knowledge) that his troops were committing, had committed, or were about to commit abuses; and

126. Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1289 at 1286 (11th Cir. 2002).

127. *See* Anna Sanders, *New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa*, 28 Berkeley J. Int'l Law. 619 at 627 (2010) (discussing the ATS, not TVPA).

3. The defendant commander failed to take steps to pre- vent or punish criminal conduct by subordinates.[128]

A *mens rea* requirement of "knowledge" should be imported into TVPA analysis. In *Chiquita*, this requirement was met by a showing that the Chiquita officers continuously approved payments to the terrorist groups knowing that the "violent deaths of thousands of civilians in the banana-growing regions of Colombia would be at least a collateral by-product of its support, if not an intended result."[129] The argument that the Chiquita officers had knowledge is furthered by the benefits they received from the targeted terrorization of those sympathetic with labor movements.

The *actus reus* element of aiding and abetting should be "sufficient acts of substantial assistance." The plaintiffs in *Chiquita* satisfied this by showing that each of the individual defendants made affirmative decisions to implement, continue and conceal support for the terrorist organization with knowledge that the funding would go towards the human rights abuses and murders of civilians.[130] The decision making from within the United States directing substantial amounts of money and material support to the terrorist organization to continue an increasingly intensifying terror campaign satisfied the *actus reus* element of aiding and abetting liability.[131]

The goals in mind during the creation of the TVPA cannot be met unless it allows for aiding and abetting liability. Support for the allowance of aiding and abetting liability for ATS claims and by extension TVPA claims is bi-partisan. The Administrations of Presidents Carter, Clinton, and George H.W. Bush have all voiced support for litigation under the ATS, even in instances involving corporate aiding and abetting liability.[132] The support from the executive branch is strengthened by the support from Congress, which is seen in the notes to the TVPA. Fears that our court systems will be inundated with people bringing ATS or TVPA cases are unfounded, even with indirect liability available to potential plaintiffs, it will still be very difficult to get past the pleadings stage.

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128. Beth Van Schaack, *Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act,* Human Rights Brief 10, no. 1 (2002): 2-5, 31.

129. In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., No. 08-MD-01916-KAM, 2016 U.S. Dist. LEXIS 82741, at *391 (S.D. Fla. June 1, 2016).

130. *Id.* at *1119.

131. *Id.*

132. Nilay Vora, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARV. INT'L L.J. 195 at *221 (2009).

After coming to the maddening conclusion that corporations are people when it comes to making political contributions, but not when it comes to being held accountable for the rape, murder, and torture of thousands native population who hindered profits by simply existing; the court would render the TVPA as essentially useless if indirect liability is unavailable. The legislative history to the TVPA has made it clear that this was not the intention of the authors.[133] The *Chiquita* Case is an excellent example of why aiding and abetting liability is necessary to the function of the TVPA. The fact that the officers continued to fund the terrorist organization even after being warned both by in house and outside council as well as the Justice Department because profits literally took priority over human life make it clear how complicit they were in the torture and murder of thousands.

133. S. REP. NO. 102-256, (1991).