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Cover Page Footnote

J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., B.J., 2009, The University of Missouri. The author wishes to thank Professor Geoffrey Watson for his guidance and expertise. The author also wishes to thank her family and friends for their love and support.

THE TORTURE VICTIM PROTECTION ACT: A MEANS TO CORPORATE LIABILITY FOR AIDING AND ABETTING TORTURE

Jessica Grunberg⁺

Exposure to mustard gas can cause the skin to burn and blister.¹ As the poison travels into the body, it also attacks the eyes, respiratory functions, and digestion—often making it painful or impossible to see or breathe.² Saddam Hussein’s regime used mustard gas to attack Kurdish cities in 1988, killing and injuring thousands of people.³ In one of several assaults authorized by Hussein, those exposed to the poison “reported symptoms including difficulty breathing, watery eyes, vomiting, fainting, chemical burns, and blindness immediately after the attacks, as well as ongoing physical and psychological disabilities.”⁴

The mustard gas used in attacks against the Kurds required the ingredient thiodiglycol (TDG), a chemical manufactured by the Baltimore-based company Alcolac, Inc. (Alcolac).⁵ Victims later sued Alcolac under the Torture Victim Protection Act of 1991 (TVPA), which provides civil remedies against any “individual” who engages in torture or extrajudicial killing.⁶ Although Alcolac allegedly supplied TDG to Iraq in violation of the TVPA,⁷

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1. *Facts About Sulfur Mustard*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.bt.cdc.gov/agent/sulfurmustard/basic/facts.asp> (last updated Mar. 12, 2003).

2. *Id.*

3. *Aziz v. Republic of Iraq*, No. MJG-09-869, 2010 U.S. Dist LEXIS 143164, at *4 (D. Md. June 9, 2010), *aff’d* No. 10-1908, 2011 U.S. App. LEXIS 19227 (4th Cir. Sept. 19, 2011). Hussein’s attack on the Kurdish village Halabja is considered the worst attack of his deadly campaign—the use of mustard gas killed 5000 people “and left 65,000 others with severe skin and respiratory diseases, abnormal rates of cancer and birth defects, and a devastated environment.” *Mustard Gas*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/iraq/mustard-gas/p9551> (May 28, 2008). This incursion was one of the approximately 280 chemical attacks carried out against the Kurdish people under Hussein’s regime. *Id.*

4. *Aziz*, 2010 U.S. Dist LEXIS 143164, at *4–5.

5. *Id.* at *4. Alcolac was a subsidiary corporation of the British conglomerate Rio Tinto Zinc. *Id.* at *3.

6. *Id.* at *5; *see* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 note (2006)).

7. *Aziz*, 2010 U.S. Dist LEXIS 143164, at *3–4. According to the plaintiffs, the Iraqi government solicited various companies for chemical warfare components, but most declined to supply the ingredients. *Id.* at *2–3. Alcolac, however, “manufactured and sold more than one million pounds of TDG” to a corporation that shipped the chemical to Europe before it ultimately

the United States District Court for the District of Maryland dismissed the victims' complaint against the company, and held that corporations are not subject to liability under the TVPA because they do not qualify as "individuals."⁸ The Fourth Circuit subsequently affirmed this interpretation, and noted that expanding the term "individuals" to include corporations would require a "schizophrenic construction of the TVPA."⁹ The Second, Ninth, and District of Columbia Circuits have reached similar conclusions using this interpretation;¹⁰ however, the Eleventh Circuit has found corporations liable for TVPA violations under the rationale that "individual" means "people"—a group that generally includes corporate actors.¹¹

This Comment examines the dichotomous positions federal courts have taken when deciding whether to allow proceedings against a corporation under the TVPA. First, this Comment discusses the legislation and case law that gave rise to the TVPA. Next, this Comment introduces the current circuit split and analyzes different courts' use of statutory language, congressional intent, and the significance of the TVPA in conjunction with previous legislation. Lastly, this Comment argues that the goals of the TVPA can only be met if corporations are held accountable for acts of torture. Corporate liability under the TVPA provides victims with a wider avenue of recovery, heightens corporate accountability, and accomplishes the TVPA's goal of deterring acts of killing and torture.

I. THE (ANTI) TORTUOUS ROAD: PROHIBITIONS ON TORTURE

A. *The Alien Tort Claims Act: A Prologue to the TVPA*

Under the Alien Tort Claims Act (ATCA), "[t]he 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."¹² Legislative

shipped the chemical to Iraq. *Id.* The plaintiffs included "victims, or family members of decedent victims, of mustard gas attacks in which the Saddam Hussein regime in Iraq used TDG supplied by Alcolac." *Id.* at *5.

8. *Id.* at *8–10, 16.

9. *Id.* at *9, 11 ("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.").

10. See, e.g., *Doe v. Exxon Mobil Corp.*, No. 09-7125, 2011 U.S. Dist LEXIS 13934, at *136–37 (D.C. Cir. July 8, 2011); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 323–24 (2d. Cir. 2007) (Korman, J., concurring in part and dissenting in part) (citations omitted), *aff'd sub nom. by an equally divided court* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008); see also *infra* Part II.A–B.

11. See *infra* Part II.C.

12. 28 U.S.C. § 1350 (2006); see also Christopher W. Haffke, Comment, *The Torture Victim Protection Act: More Symbol than Substance*, 43 EMORY L.J. 1467, 1472 (1994) ("To fall within the jurisdictional requirements of § 1350, three elements must be unequivocally established. First, an alien must bring the claim. Second, the claim must be for a tort. Third, the claimed tort must either violate a United States treaty or the law of nations.").

history containing direct discussion of the Act's purpose is scarce;¹³ however, scholars have attempted to ascertain its meaning from accounts of the Continental Congress, historical underpinnings of the Constitution and the first Judiciary Act, and the founders' intent.¹⁴ Yet, despite the volume of work examined in efforts to uncover the Act's origins, "definitive proof of the intended purpose and scope of the [ATCA] is impossible."¹⁵ Nonetheless, the statute "was a direct response to what the founders understood to be the nation's *duty* to propagate and enforce those international law rules that directly regulated individual conduct."¹⁶

13. Haffke, *supra* note 12, at 1471; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004) (noting the "poverty of drafting history" for the ATCA, also known as the Alien Torture Statute (ATS)); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." (citation omitted)), *abrogated by Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); 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, 203 (1994) (noting that the limited legislative history gives "no direct evidence of congressional intent").

14. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 463 (1989); *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 11 (1985) (acknowledging the absence of specific history documenting the Judiciary Act of 1789, which initially introduced the ATCA, but reasoning that "when pieced together" other sources, such as the Constitutional Convention and the drafters' intentions, "adequately indicate the statute's origins and purposes"). The Supreme Court has also gleaned the ATCA's purpose in a piecemeal fashion. According to the Court, the Continental Congress became frustrated by its inability to punish violations of the law of nations, and urged states to provide relief for such transgressions. *Sosa*, 542 U.S. at 716–17. The framers, recognizing Congress's powerlessness, provided the Supreme Court with original jurisdiction over cases involving ambassadors. *Id.* at 717; *see* U.S. CONST. art. III, § 2, cl. 1. Provisions of the Judiciary Act, including the ATCA, solidified jurisdiction over aliens. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789); *Sosa*, 542 U.S. at 717.

15. Burley, *supra* note 14, at 463. Professor Anna-Marie Burley criticizes various theories intended to elucidate the ATCA. She argues that the "denial of justice theory," which posits that Congress designed the ATCA to provide aliens with access to federal courts to avoid international conflicts, is not supported by the text of the Act. *Id.* at 465–69. Burley also finds the theory that the Congress created the ATCA to be an "Ambassador Protection Plan" inadequate, and argues that although the drafters of the Constitution and the First Judiciary Act intended to protect foreign ambassadors, such a rationale does not fully explain the ATCA's purpose. *Id.* at 469–71.

16. *Id.* at 475 (citation omitted); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (reasoning that transgressions of the law of nations "can rarely be the object of the criminal law of any particular state. . . . But where the individuals of any state violate this general law, it is then the interest as well as the duty of the government, under which they live, to animadvert upon them with a becoming severity that the peace of the world may be maintained"). Burley notes that in a 1781 resolution Congress implored the states to provide redress for violations of the law of nations. Burley, *supra* note 14, at 476 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1136–37 (Gaillard Hunt ed., 1912)).

1. *Determining the Law of Nations*

The ATCA imposes tort liability for violations of treaties or the law of nations.¹⁷ The law of nations, commonly referred to as customary international law (CIL),¹⁸ includes “principles and rules that states feel themselves bound to observe, and do commonly observe.”¹⁹ According to the Supreme Court, sources such as judicial determinations and national customs should be used to determine what constitutes binding international law.²⁰ Courts have also looked to treaties and conventions between nations to make this determination.²¹

Although lawsuits for violations of international law provoke questions regarding enforcement and jurisdiction,²² the Nuremberg trials “proved that international law is real and its norms are binding.”²³ The Supreme Court affirmed this notion in *The Paquete Habana*, in which it found the seizure of an enemy’s fishing vessel in wartime unlawful.²⁴ The Court stated that such a seizure violated a “settled rule of international law,” which was also part of the

17. 28 U.S.C. § 1350. ATCA claims usually arise under the law of nations rather than treaties because courts only recognize treaties that are ratified or self-executing to create specific causes of action. Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321 & n.3 (2008). A self-executing treaty does not require implementing legislation. See *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008) (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled by United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833)); *Cook v. United States*, 288 U.S. 102, 119 (1933).

18. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997).

19. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (per curiam) (citing 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 1 (2d rev. ed. 1945)).

20. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820) (explaining that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law”).

21. See *Aquamar S.A. v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (identifying the variety of sources from which international law may be derived); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 257 (2d Cir. 2003) (stating that provisions included in widely ratified and implemented treaties provide evidence of international legal customs).

22. Bradley & Goldsmith, *supra* note 18, at 832.

23. Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT’L & COMP. L. 253, 265 (2001); see also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304, 307 (2008) (observing that since the Nuremberg trials there has been little doubt that international criminal law may be used to hold accomplices liable). Furthermore, national courts now recognize international law as imposing civil liability on corporations that aid and abet international criminal-law violations. *Id.* at 325.

24. 175 U.S. 677, 714 (1900).

United States' federal, general common law because "[i]nternational law is part of our law."²⁵

2. Reconciling Customary International Law and the Erie Doctrine

Almost four decades after *Paquete Habana*, the Supreme Court decided *Erie Railroad v. Tompkins*, which rejected the concept of federal general common law and held that federal courts could not impose substantive federal common law on states when deciding cases under diversity jurisdiction.²⁶ Because the *Paquete Habana* opinion had used the concept of federal common law to support its domestic application of CIL,²⁷ some scholars condemned the post-*Erie* application of CIL in federal courts absent implementing legislation.²⁸ These attacks on a "non-problem" rely on an inappropriate extension of *Erie*.²⁹ The *Erie* decision, rooted in state tort law, has no bearing on international law.³⁰ Federal courts retain the power to establish federal common law for international matters pertaining to foreign relations.³¹ Therefore, circuit courts have continued to find CIL applicable as part of federal common law post-*Erie*.³²

25. *Id.* at 694, 700. The court added a caveat, noting that international customs must be ascertained in the absence of a treaty, statute, or judicial decision. *Id.* at 700.

26. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Tompkins sued the New York-based railroad company in New York federal court for injuries sustained while walking alongside a section of railroad tracks in Pennsylvania. *Id.* at 69. The railroad company argued that under Pennsylvania common law, Tompkins was a trespasser and the railroad was only liable for injuries resulting from wanton or willful negligence. *Id.* at 70. The Second Circuit affirmed the trial court's decision to hold the railroad liable based on federal general common law. *See Tompkins v. Erie R.R.*, 90 F.2d 603, 604, 606 (2d Cir. 1937), *rev'd*, 304 U.S. 64 (1938). The Supreme Court reversed, and held that the court should have applied state law, therefore overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had authorized federal courts to make common law for cases sitting in diversity. *Erie*, 304 U.S. at 79–80.

27. *See Paquete Habana*, 175 U.S. at 700.

28. Bradley & Goldsmith, *supra* note 18, at 853, 870 ("[T]he suggestion that federal courts can apply CIL in the absence of any domestic authorization cannot survive *Erie*" (footnote omitted)). Critics also question the use of CIL based on principles of federalism. *See id.* at 862; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 44 (arguing that the doctrine of separation of powers is not violated by the application of CIL).

29. *See* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827–28 (1998) (attacking Professor Curtis Bradley and Professor Jack Goldsmith's thesis). Then-Professor Harold Koh argues that the *Erie* decision was not intended to discharge "federal courts from their traditional role in construing customary international law norms" and that Bradley and Goldsmith are "utterly mistaken" in their position. *Id.* at 1821, 1831.

30. *See id.* at 1831.

31. *Id.* at 1831–35.

32. *See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 499, 502 (9th Cir. 1993) (citing *Paquete Habana*, 175 U.S. at 700) (noting that acts of torture are actionable under the ATCA as violations of customary international law).

Courts need not necessarily address the issue of CIL applicability when adjudicating lawsuits involving alleged ATCA and TVPA violations because both acts specifically allow lawsuits for violations of certain international-law customs.³³ However, under the ATCA, courts must still ascertain what constitutes a violation of the law of nations.

3. *Revival of the Alien Tort Claims Act*

In the 170 years following the enactment of the ACTA, in only one instance did a court find jurisdiction under the Act to hear a case.³⁴ As a result, courts did not have the opportunity to decide which actions violated the law of nations until the late twentieth century.³⁵ Courts' hesitancy to entertain ATCA lawsuits stemmed from concerns about possible foreign-relations repercussions³⁶ because, as the name of the Act indicates, only aliens could bring suit under the ATCA.³⁷

a. *Filartiga v. Pena-Irala: A Broad Interpretation of the ATCA*

When the Second Circuit decided *Filartiga v. Pena-Irala* in 1980,³⁸ claims for alleged human-rights violations arose with greater frequency.³⁹ In *Filartiga*, family members of Joelito Filartiga brought a wrongful-death suit against Americo Norberto Pena-Irala, the former inspector general of police in

33. See Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); Torture Victim Protection Act of 1991, Pub. L. No. 102-356, § 2(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 note (2006)); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (noting the TVPA provides “a clear mandate” for claims of torture and extrajudicial killing); Charles W. Brower II, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of Sosa v. Alvarez-Machain*, 26 WHITTIER L. REV. 929, 941–42 (2005) (“[T]he statutory text of the [ATCA], while primarily a jurisdictional grant, provides a legitimate grant of authority for the federal courts to determine substantive causes of action in the narrow field of ‘violations of the law of nations.’” (citing *Sosa*, 542 U.S. at 723)).

34. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 254 (2d Cir. 2009) (citing *Sosa*, 542 U.S. at 712).

35. See also *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 650 (S.D. Tex. 2010) (noting that in the two centuries following the enactment of the ATCA, the Act was “rarely [utilized] before being ‘discovered’ around 1980 and increasingly relied upon in the last few decades”).

36. See *Correale*, *supra* note 13, at 207 (“ATCA actions may implicate matters of foreign relations, meaning matters which are exclusively within the constitutional domain of the legislative and executive branches of government.” (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799 (D.C. Cir. 1984))).

37. *Id.* at 198 (citing 28 U.S.C. § 1350).

38. 630 F.2d 876 (2d Cir. 1980).

39. See *Haffke*, *supra* note 12, at 1472 (“It was not until the landmark decision *Filartiga v. Pena-Irala* that a court was willing to find the requisite international legal violation, thereby exercising its jurisdiction extraterritorially.”); see also Joel H. Samuels, *How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 AM. U. L. REV. 1231, 1250 (2010) (calling *Filartiga* “[t]he case that revived the ATS as a mechanism to prosecute human rights violations”).

Asuncion, Paraguay.⁴⁰ The family alleged that Pena-Irala had kidnapped seventeen-year-old Filartiga and tortured him to death in retaliation for the political leanings of his father.⁴¹ Filartiga's sister said she was taken to see her brother's tortured body at Pena-Irala's home, where the defendant told her, "[h]ere you have . . . what you deserve."⁴²

The Filartigas brought suit in the United States District Court for the Eastern District of New York, which subsequently dismissed the complaint for lack of subject-matter jurisdiction.⁴³ Reversing this dismissal, the Second Circuit held that torture violates the law of nations and, therefore, the court had jurisdiction to hear Filartiga's claim under the ATCA.⁴⁴ The court noted that the "universal condemnation of torture" exhibited by international customs and treaties justified its recognition as a punishable transgression under the law of nations.⁴⁵ The court also reasoned that globally, citizens expected governments to uphold their basic human rights.⁴⁶

40. *Filartiga*, 630 F.2d at 878.

41. *Id.* The victim's father, Joel Filartiga, opposed then-President Alfredo Stroessner. *Id.* During Stroessner's thirty-five-year presidency, Paraguay experienced an "uninterrupted period of repression" and "became a haven for Nazi war criminals, deposed dictators and smugglers." Adam Bernstein, *Alfredo Stroessner: Paraguayan Dictator*, WASH. POST, Aug. 17, 2006, at B5. Individuals who protested under President Stroessner's dictatorship were tortured. *Id.* Carlos Levi Refinelli, leader of an opposing party, claims he was tortured six times during President Stroessner's rule. Diana Jean Schemo, *Gen. Alfredo Stroessner, Ruled Paraguay Through Fear for 35 Years, Dies in Exile at 93*, N.Y. TIMES, Aug. 17, 2006, at B7. He told the *New York Times* that "[m]ost of the time, I did not know what they wanted . . . [b]ut when they put the needles under your fingernails, you tell them anything. You denounce everybody . . ." *Id.*

42. *Filartiga*, 630 F.2d at 878. Filartiga's father attempted to pursue criminal action against Pena-Irala in Paraguay, resulting only in the arrest of Filartiga's attorney and a suspicious confession from a man who lived with Pena-Irala. *Id.* Hugo Duarte confessed to killing Filartiga in a crime of passion after finding the deceased with his wife; however, he was never convicted. *Id.* The Filartigas, however, argued that Joelito's body showed wounds consistent with torture. *Id.*

43. *Id.*

44. *Id.* ("[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."). The court noted that the district judge "felt constrained" by prior circuit decisions, which favored a narrow construction of the "law of nations"; therefore, the judge dismissed the matter despite strong indications that torture violates customary international law. *Id.* at 880.

45. *Id.*; see, e.g., U.N. Charter art. 55–56 (requiring members to "pledge themselves to take joint and separate action" to achieve equal rights, including a "universal respect for, and observance of, human rights and fundamental freedoms"); International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

46. *Filartiga*, 630 F.2d at 884 (indicating that more than fifty-five countries had constitutions prohibiting torture).

b. Torture: A Cause of Action Under the ATCA?

Although the number of ATCA actions increased after *Filartiga*, the court's decision to include torture as an actionable violation of the law of nations under the ATCA sparked disagreement.⁴⁷ In *Tel-Oren v. Libyan Arab Republic*, Israeli citizens sued various defendants, including the Palestine Liberation Organization (PLO), for injuries and deaths caused by the PLO's seizure of a civilian bus in Israel.⁴⁸ The plaintiffs alleged that the PLO's crimes violated the law of nations and asserted jurisdiction under the ATCA, among other statutes.⁴⁹ Although the District of Columbia Circuit affirmed the lower court's dismissal of the action in a per curiam decision, the judges each filed a separate concurring opinion outlining their different rationales.⁵⁰

Judge T. Harry Edwards argued that despite the momentum in international law "toward a more expansive allocation of rights and obligations to entities other than states," torture should not be a recognizable cause of action against non-state actors under the ATCA.⁵¹ Emphasizing the "extremely narrow scope" of ATCA jurisdiction under *Filartiga*, he argued that the PLO's acts of torture did not give rise to federal jurisdiction because the organization did

47. See *id.* at 878. The ATCA is primarily considered a jurisdiction-granting statute; however, courts recognize that violations of the laws of nations are actionable under the ATCA. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (recognizing that although the ATCA is jurisdictional in nature, the ATCA allows actions "for [a] modest number of international law violations" as determined by "norm[s] of international character accepted by the civilized world"); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (noting the ATCA allows claims for violations of the law of nations but that it does not supply an independent cause of action); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1246 (11th Cir. 2005) (reasoning that relief under the ATCA requires international-law violations) (citation omitted).

48. 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam). According to the plaintiffs, thirteen PLO terrorists seized the bus while on a "barbaric rampage" of a main highway in Israel. *Id.* at 776 (Edwards, J., concurring). Taking passengers hostage from various automobiles, the PLO terrorists injured, tortured, and murdered them. *Id.* The attack resulted in thirty-four deaths, including twelve children, and eighty-seven injuries. *Id.* In addition to the PLO, the plaintiffs' lawsuit also named as defendants the Libyan Arab Republic, (alleging that it trained and financed the terrorist attack), the Palestine Information Office (as an agent of the PLO), and the National Association of Arab Americans (alleging they helped finance and plan the attack, along with the PLO). *Id.* at 799–800 (Bork, J., concurring).

49. *Id.* at 775 (per curiam). The plaintiffs claimed jurisdiction under four federal statutes for "multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law." *Id.* In addition to ATCA jurisdiction, the plaintiffs claimed diversity jurisdiction under 28 U.S.C. § 1332, federal-question jurisdiction under 28 U.S.C. § 1331, and jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611. *Id.*

50. *Id.* Acknowledging the lack of clarity surrounding the ACTA and variation among the judges' legal rationales, Judge Robert Bork commented that "it is impossible to say even what the law of this circuit is. Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable." *Id.* at 823 (Bork, J., concurring).

51. *Id.* at 795 (Edwards, J., concurring).

“not act under color of any recognized state’s law.”⁵² Nonetheless, Judge Edwards acknowledged that violations committed by official state actors in contravention of the law of nations could give rise to ATCA claims.⁵³

Judge Robert Bork disagreed with this assessment, and declined to recognize any cause of action under the ATCA.⁵⁴ He stated that the ATCA only confers jurisdiction, and rejected the Second Circuit’s approach in *Filartiga* because it undermined the established limitations on jurisdiction in federal court.⁵⁵ Instead, Judge Bork’s interpretation would have required the creation of an explicit cause of action to hear ATCA claims—something that could be effectuated through a self-executing treaty.⁵⁶

c. The Supreme Court Approves Filartiga and Narrows the Use of the ATCA

In *Sosa v. Alvarez-Machain*, the Supreme Court favorably relied on *Filartiga*, but it ultimately limited application of the ATCA.⁵⁷ Alvarez-Machain, a Mexican physician, sued for false arrest and violation of the law of

52. *Id.* at 781, 791. Judge Edwards noted that the PLO had never been a recognized state or actor thereof, which distinguished the terrorist group from the official in *Filartiga* who, under color of state law, allegedly committed torture. *Id.* at 791. Because the PLO’s lack of state affiliation prevented it from committing “official torture,” it could not be held liable under the ATCA. *Id.* In Judge Edwards’s opinion, expanding *Filartiga* to include unofficial torture “would require this court to venture out of the comfortable realm of established international law—within which *Filartiga* firmly sat—in which states are the actors.” *Id.* at 792. Judge Bork’s concurrence noted the “general rule that international law imposes duties only on states and on their agents or officials,” and stated that subjecting the PLO to liability “would establish a new principle of international law.” *Id.* at 805–06 (Bork, J., concurring); see also Justin Lu, Note, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT’L L. 531, 537 (1997) (noting the agreement between the concurrences of Judge Edward and Bork on the ATCA’s state-action requirement).

53. *Tel-Oren*, 726 F.2d at 792–93 (Edwards, J., concurring). Judge Edwards also rejected terrorism as an actionable ATCA violation. *Id.* at 795. By examining current international standards, he determined that countries were too divided on the “legitimacy of such aggression” to consider terrorist attacks violations of the law of nations. *Id.* He argued that terrorism, although repugnant, does not necessarily constitute a violation of the law of nations. *Id.* at 796.

54. *Id.* at 811 (Bork, J., concurring) (reasoning the ATCA does not provide an express or implied cause of action because it simply provides jurisdiction over a class of cases).

55. *Id.* at 811–12. Judge Bork called the appellant’s construction of the ATCA “too sweeping” because it would “authorize tort suits for the vindication of any international legal right” and conflict with limits on federal-court jurisdiction. *Id.*

56. *Id.* at 816. Under Judge Bork’s construction, the ATCA’s “current function would be quite modest unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms.” *Id.*; see also Anthony D’Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT’L L. 92, 97 (1985) (“[U]nder Judge Bork’s view, most of the rules of international law are similar to a non-self-executing treaty; they have no impact upon individuals.”). In a third concurring opinion, Judge Roger Robb affirmed dismissal of the case based on the political-question doctrine. *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring).

57. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–44 (2004).

nations under the ATCA.⁵⁸ DEA officials suspected that Alvarez-Machain had intentionally prolonged the life of a DEA agent captured in Mexico to extend his torture.⁵⁹ After the Mexican government refused to assist in Alvarez-Machain's arrest, the DEA secured help from a group of Mexican nationals, including petitioner Jose Francisco Sosa.⁶⁰ This group seized Alvarez-Machain from his home in Mexico, detained him overnight in a motel, and then flew him to Texas where federal officers arrested him.⁶¹

Although the Supreme Court in *Sosa* agreed that district courts could entertain private causes of action for violations of the law of nations,⁶² the Court rejected Alvarez-Machain's claim and limited the reach of the ATCA.⁶³ It noted that courts should only recognize claims for violations of international legal customs that are as definite as those accepted at the time of the ATCA's enactment.⁶⁴ Alvarez-Machain's claim did not fit within this paradigm.⁶⁵ The Court reasoned that Congress intended the Act to invoke jurisdiction for a "relatively modest set of actions," and cautioned courts against expanding the ATCA to include new causes of action.⁶⁶

58. *Id.* at 698. The claim for false arrest was raised under the FTCA, 28 U.S.C. § 1346(b)(1), which abrogates federal sovereign immunity for certain personal injury suits caused by the government. *Id.* Alvarez-Machain was arrested (and later acquitted) for the torture and murder of a DEA agent working in Mexico. *Id.* at 697–98.

59. *Id.* at 697. DEA agent Enrique Camarena-Salazar was captured in Mexico in 1985, where he was tortured and interrogated for two days in Guadalajara before he was killed. *Id.*

60. *Id.* at 698.

61. *Id.*

62. *Id.* at 712, 729.

63. *Id.* at 724–25, 732.

64. *Id.* at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."). Such offenses include "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. Under this formulation, the court noted that *Filartiga* properly allowed jurisdiction under the ACA because the Second Circuit had likened torture to piracy. *Id.* at 732; see also Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 566 (2003) ("The ATCA applies only to violations of the law of nations, which the federal courts have interpreted narrowly to cover only genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity.").

65. See *Sosa*, 542 U.S. at 733, 738.

66. *Id.* at 720, 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."); see also Erin Talati, Comment, *An Open Door to Ending Exploitation: Accountability for Violations of Informed Consent Under the Alien Tort Statute*, 155 U. PA. L. REV. 231, 252–53 (2006) (noting that although *Sosa* did not expressly limit ATCA violations to those existing in 1789, the only acts that would be recognized were those that reached "the degree of international concern" that existed at the time of the founding).

In the Supreme Court's view, a potential cause of action under the ATCA should be analyzed according to current constructions and ideals of international law (rather than only those in existence when the law was passed), and such norms must be accepted with the same veracity as those recognized in 1789.⁶⁷ Therefore, the Second Circuit in *Filartiga* appropriately likened torture to piracy—a violation recognized during the ATCA's enactment—by assessing the constitutions, agreements, and conventions between nations that existed at the time of the decision.⁶⁸ As norms under international law continue to evolve, this test requires courts to continually reassess what constitutes the law of nations, rather than relying on examples from previously adjudicated violations.⁶⁹

4. Corporate Liability Under the ATCA

a. The Unocal Decision

Plaintiffs who rely on a theory of human-rights violations and successfully prove that their suit involves a violation of the law of nations may attack corporate actors if the opportunity arises.⁷⁰ Such actions gained strong precedent beginning in the 1990s, when ATCA claims against corporations sharply increased.⁷¹ Previously, ATCA claims typically had targeted *state*

67. See *Sosa*, 542 U.S. at 725; *Filartiga v. Pena-Irala*, 630 F.2d 876, 881, 884 (2d Cir. 1980) (noting that at the time of the decision, torture was prohibited by the constitutions of many nations).

68. See *supra* notes 44–46, 64 and accompanying text.

69. See *supra* notes 20–21 and accompanying text. Regarding the exercise of judicial power over international norms, *Sosa* expressed that “the door is still ajar subject to vigilant doorkeeping.” *Sosa*, 542 U.S. at 729; see also Nelson P. Miller, Steven W. Fitschen & William Wagner, *Federal Courts Enforcing Customary International Law: The Salutary Effect of Sosa v. Alvarez-Machain on the Institutional Legitimacy of the Judiciary*, 3 REGENT J. INT'L L. 1, 3 (2005) (observing that the *Sosa* opinion narrows the scope of what may constitute a cause of action under CIL).

70. See Christine G. Rolph & Mark A. Miller, *Client Alert: The Steady Rise of Alien Tort Claims Act Lawsuits and the Effects on US Companies*, LATHAM & WATKINS (Sept. 7, 2010), http://www.lw.com/upload/pubContent_pdf/pub3703_1.pdf.

71. See Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 6–7 (2004); see also Rolph & Miller, *supra* note 70, at 2 (noting that ATCA lawsuits originally arose based on state action, but the “landscape changed in the late 1990s when US companies began to feel the brunt of the ATCA”). Concern over the role of corporations in human-rights abuses “emerged in the 1990s as news stories depicting the opportunistic use of child labor, payment of low wages, and abuses in foreign factories helped reshape our attitudes about acceptable behavior for organizations.” O.C. FERRELL, JOHN FRAEDRICH & LINDA FERRELL, *BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES* 277 (7th ed. 2008); see also Nicky Black, *Business Action on Human Rights—Doing No Harm, Good Works, and Good Business in the Developing World*, in *CORPORATE CITIZENSHIP IN DEVELOPING COUNTRIES: NEW PARTNERSHIP PERSPECTIVES* 57, 61 (Esben Rahbek Pedersen & Mahad Huniche eds., 2006) (“The 1990s saw an explosion of human rights activism aimed at the private sector . . .”); *About Our Program*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/business-and-human-rights/about->

actors and agents,⁷² but *Doe v. Unocal Corp.* recognized a shift from state agents to corporations as recognized defendants.⁷³ In *Doe*, Burmese plaintiffs alleged that defendant Unocal, a California-based oil company, had used the Burmese military to enslave farmers, seize their land, and violently force entire villages to relocate to lay a pipeline.⁷⁴ The United States District Court for the Central District of California denied Unocal's motion to dismiss.⁷⁵ Determining that it had proper subject-matter jurisdiction, the court allowed

our-program/ (last visited Sept. 20, 2011) (explaining that the organization began to “explore the intersections between business and human rights in the mid-1990s”). Accordingly, the number of corporate defendants involved in ATCA lawsuits increased “with allegations that the foreign government, insurgents or other individuals inflicting the harm actually were agents of (or in a conspiracy with) the corporate defendants.” J. Russell Jackson, *Alien Tort Claims Act Cases Keep Coming*, NAT'L L.J., Sept. 14, 2009, at 32. Additionally, the expansion of jurisdiction under the ATCA allowed new causes of action to be brought against corporations, further augmenting the number of ATCA lawsuits. *Id.*

72. See Duruigbo, *supra* note 71, at 6–7. Although international law is “States-centric,” Professor Emeka Duruigbo recognizes that the “dominance of the State has been whittled down and non-state actors . . . have been accepted as subjects of international law.” *Id.* at 37. He also notes that the broadening scope of the proper subjects of international law “has not reached multinational corporations,” but he acknowledges that there is a “growing clamor for a change in this area” as a result of the increasing global influence of multinational corporations. *Id.* at 37–38.

73. *Id.* at 6–7; see *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

74. *Doe*, 963 F. Supp. at 883. Along with Unocal and several of its executives, the plaintiffs named as defendants the French corporation, Total S.A., Myanmar Oil and Gas Enterprise (MOGE), and State Law and Order Restoration Council (SLORC). *Id.* The court found that MOGE and SLORC were immune from the suit based on the Federal Sovereign Immunities Act. *Id.* at 888. The lawsuit focused on Unocal's pipeline project in a natural gas field in Burma, called the Yadana Field. Manuel Velasquez, *UNOCAL in Burma*, SANTA CLARA UNIV. (Nov. 3, 2005), <http://www.scu.edu/ethics/practicing/focusareas/business/Unocal-in-Burma.html>. The plaintiff, EarthRights International, sued on behalf of the victims and called the Yadana Pipeline Project “one of the world's most controversial natural gas development projects” because of the human-rights violations allegedly committed by the companies involved—including “forced labor, land confiscation, rape, torture, [and] murder.” *The Yadana Pipeline*, EARTHRIGHTS INT'L, <http://www.earthrights.org/campaigns/yadana-pipeline> (last visited Sept. 20, 2011); see also *What We Do*, EARTHRIGHTS INT'L, <http://www.earthrights.org/> (last visited Sept. 20, 2011) (highlighting Earth Right's representation of the Unocal plaintiffs). Various human-rights groups met with Unocal to discuss these alleged abuses, and a consultant for the company reported that “egregious human rights violations” were occurring; however, the Yadana Pipeline Project continued. Velasquez, *supra*. In a letter to the *New York Times*, Roger C. Beach, Chairman and Chief Executive of Unocal, defended the project as generating jobs and other opportunities for poor residents of Burma (now Myanmar). Roger C. Beach, Letter to the Editor, *Isolating Myanmar Would Only Cause Hardship for Its People*, N.Y. TIMES, Dec. 19, 1996, at A28 (stating that the company and its affiliates “adhered to strict standards on employment practices” and denying the use of forced labor).

75. *Doe*, 963 F. Supp. at 884.

plaintiffs to pursue their ATCA claim against the company.⁷⁶ After the Ninth Circuit's order for rehearing, Unocal settled with the plaintiffs in 2005.⁷⁷

b. ATCA Lawsuits Against Corporations

After the *Unocal* decision, “[ATCA] jurisprudence has been dominated by cases alleging human rights . . . abuses by multinational corporations.”⁷⁸ As businesses became subject to ATCA lawsuits, they attempted to challenge the Act; however, they were largely unsuccessful because prior case law clearly permitted ATCA claims for violations of the law of nations.⁷⁹ For example, in *Carmichael v. United Technologies Corp.*, the Fifth Circuit entertained a suit by a citizen of Great Britain against a Texas-based corporation for torture and imprisonment.⁸⁰ In *Sinaltrainal v. Coca-Cola Co.*, the plaintiffs alleged that the corporate defendants aided and abetted in the murder and torture of union leaders.⁸¹ Relying on prior case law, the Eleventh Circuit rejected defendant Coca-Cola's argument that corporate defendants could not be liable under the ATCA.⁸² Similarly, the Second Circuit willingly reviewed a suit by Sudanese plaintiffs against a Canadian corporation for alleged human rights violations in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*; ultimately, however, the court affirmed summary judgment in favor of the defendant corporation.⁸³

c. The Second Circuit Questions Corporate Liability

Despite such precedent, the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.* that the ATCA does not provide jurisdiction over corporations for violations of the law of nations.⁸⁴ In *Kiobel*, Nigerian plaintiffs brought suit under the ATCA, and alleged that three oil companies aided and abetted

76. *Id.* In 2003, the Ninth Circuit ordered a rehearing en banc, vacating the previous decision of that circuit. *Doe*, 395 F.3d at 978–79. In its order, the Ninth Circuit stated that the 2002 decision could not be cited as precedent. *Id.*

77. Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903, 903 n.3 (2009).

78. Duruigbo, *supra* note 71, at 7 (noting *Unocal* “opened the floodgates in this arena” by allowing federal courts to exercise jurisdiction over a multinational corporation for human rights violations).

79. Collingsworth, *supra* note 64, at 565 (noting that ATCA case law was “well reasoned, strongly supported by precedent, and nearly unanimous in holding that the ATCA does allow claims for violations of the law of nations”).

80. 835 F.2d 109, 110, 115 (5th Cir. 1988) (finding that the plaintiff failed to show a causal connection between his imprisonment and torture and the corporation's actions).

81. 578 F.3d 1252, 1258 (11th Cir. 2009).

82. *Id.* at 1263 (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008)); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1250–51 (11th Cir. 2005)).

83. 582 F.3d 244, 247–48 (2d Cir. 2009). According to plaintiffs, the defendant energy company aided and abetted and conspired with the government to commit genocide, torture, and war crimes during its oil exploration in Southern Sudan. *Id.* at 251.

84. 621 F.3d 111, 145 (2d Cir. 2010), *petition for cert. filed*, 80 U.S.L.W. 3019 (U.S. Jun. 6, 2011) (No. 10-1491).

the Nigerian government in brutally attacking and arresting Ogoni residents, as well as causing property destruction.⁸⁵ The Second Circuit dismissed the claim for lack of subject-matter jurisdiction, and justified its departure from *Presbyterian Church* by pointing out that the court in that case had simply presumed permissibility of corporate liability under the ATCA, but had not specifically ruled on the issue.⁸⁶

In *Kiobel*, the court distinguished between corporate obligations under domestic and international law, and argued that although corporations are often considered “persons” subject to liability in the United States, this national determination was “entirely irrelevant” to determining corporate liability under international-law customs.⁸⁷ According to the Second Circuit, courts have found liability of natural persons for violations of international law permissible, whereas corporate liability has consistently been rejected.⁸⁸

i. Early Reactions to Kiobel

In his concurrence, Judge Pierre Leval adamantly rejected the majority’s finding that international law does not apply to corporations.⁸⁹ He argued that the majority’s opinion serves to protect those who violate human rights if they “simply . . . tak[e] the precaution of conducting the heinous operation in the corporate form.”⁹⁰ Agreeing with Judge Leval’s concurrence, the United States District Court for the Northern District of Illinois rejected *Kiobel*’s holding in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, and held that an international banking institution could be liable for genocide under the

85. *Id.* at 123. (“Specifically, plaintiffs brought claims of aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”). The Nigerian residents brought suit against three corporate defendants: Netherland-based Royal Dutch Petroleum, British Shell Transport and Trading Company, and a Nigerian-based subsidiary of Shell. *Id.* In their opening brief, the plaintiffs stated that Shell’s oil production violated elementary environmental practices, which resulted in “catastrophic effects” in the Ogoni region and ignited local protests. Opening Brief for Plaintiffs-Appellants at 6, *Kiobel v. Royal Petroleum Co.*, 621 F.3d 111 (2d. Cir. 2010) (No. 06-4800). Plaintiff Dr. Barinem Kiobel, an executive council member for a political subdivision of Nigeria, allegedly opposed the council’s plan to use violence against the protestors to guarantee Shell’s oil extraction in the region. *Id.* at 6–7. The plaintiffs allege that Kiobel was arrested and tortured while a task force designed to “restore order” in Ogoni raided the area, “[breaking] into homes, shooting or beating anyone . . . raping . . . forcing villagers to flee and abandon their homes, and burning, destroying or looting property.” *Id.* at 9–10.

86. *Kiobel*, 621 F.3d at 124–25.

87. *Id.* at 117 n.11.

88. *Id.* at 119. *But see* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1961–62 (2010) (“Although corporate liability is frequently rejected in international criminal law because many domestic legal systems do not impose criminal liability on corporations, this reasoning does not apply in the civil context.”).

89. *Kiobel*, 621 F.3d at 150 (Leval, J., concurring).

90. *Id.*

ATCA.⁹¹ The court looked to “persuasive precedent” and international humanitarian goals to determine that it had jurisdiction over the Hungarian Jews’ suit against the bank for allegedly withholding funds from Holocaust victims.⁹²

ii. The D.C. and Seventh Circuits Decline to Follow the Second Circuit

In July 2011, the D.C. and Seventh Circuits rejected the Second Circuit’s decision in *Kiobel*.⁹³ In *Flomo v. Firestone Natural Rubber Co.*, the Seventh Circuit stated that “[t]he factual premise of the majority opinion in the *Kiobel* case is incorrect,” as corporations have been held liable in the past for violating the law of nations.⁹⁴ The court also mused that even if corporations had not previously faced liability, the court could still enforce international norms by finding corporate liability.⁹⁵ In holding that the ATCA applies to corporations in *Doe v. Exxon Mobil Corp.*, the D.C. Circuit similarly found that the Second Circuit improperly focused on whether the law of nations allows individuals to sue corporate actors.⁹⁶ The D.C. Circuit viewed the legal issue as one of agency law, and found that corporations can be liable for damages under the ATCA when its agents violate international customary laws.⁹⁷

Although the Seventh and D.C. Circuits rejected *Kiobel* because they viewed it as an “outlier” case that mischaracterized the law,⁹⁸ the Second Circuit’s decision may ultimately prompt more courts—and eventually the Supreme Court—to decide whether corporations are liable under the ATCA.⁹⁹ The decision will likely continue to cause other circuits to reevaluate the presumption that corporate liability is permissible under the ATCA.¹⁰⁰

91. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, No. 10 C 1884, 2011 WL 1900340, at *1 (N.D. Ill. May 18, 2011).

92. *Id.*

93. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, No. 09-7125, 2011 U.S. App. LEXIS 13934, at *84 (D.C. Cir. July 8, 2011).

94. 643 F.3d at 1017 (discussing the dissolution of German companies that assisted the Nazi Government) (citations omitted).

95. *Id.* (“There is always a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created.”).

96. 2011 U.S. App. LEXIS 13934, at *84–85.

97. *Id.* at *85 (“[C]orporate liability is consistent with the purpose of the [ATCA].”).

98. *See Flomo*, 643 F.3d at 1017; *Doe*, 2011 U.S. App., at *84.

99. Gwendolyn Wilber Jaramillo, *Second Circuit Holds That Corporations are Not Proper Defendants Under the Alien Tort Statute*, CORP. SOC. RESP. & L. (Sept. 19, 2010), <http://www.csrandthelaw.com/2010/09/articles/litigation/alien-tort-statute/second-circuit-holds-that-corporations-are-not-proper-defendants-under-the-alien-tort-statute/> (calling the *Kiobel* decision “one of the most significant [ATCA] decision[s] in years,” but noting that the decision does not mark the end of ATCA lawsuits against corporations).

100. *See John B. Bellinger III, Will Federal Court’s Kiobel Ruling End Second Wave of Alien Tort Statute Suits?*, WASH. LEGAL FOUND. (Nov. 12, 2010), <http://www.wlf.org>

B. Codification of the Filartiga Decision: Enactment of the Torture Victim Protection Act

Concerned in part by Judge Bork's concurrence in *Tel-Oren*, Congress enacted the Torture Victim Protection Act in 1992, which essentially codified the *Filartiga* decision.¹⁰¹ The TVPA states:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.¹⁰²

This act provides clear actionable wrongs (torture and extrajudicial killings) and remedies—elements absent from the ATCA.¹⁰³

1. Explicit Definitions: Torture and Extrajudicial Killings

Unlike the ATCA, the TVPA defines torture and extrajudicial killings, thus providing clear guidelines for courts to determine if a violation of the Act has occurred.¹⁰⁴ The TVPA specifies that the extrajudicial killing must be unauthorized and deliberate.¹⁰⁵ The statute's lengthy description of torture

/publishing/publication_detail.asp?id=2213 (speculating that in the event of an appeal to the Supreme Court and a grant of certiorari, *Kiobel* will likely be upheld); Konrad L. Cailteux & Jeremy T. Grabill, *Foreign Tort Suits Under 221 Year-Old Law Ruled Out Against Corporations*, WASH. LEGAL FOUND. (Sept. 20, 2010), <http://wfllegalpulse.com/2010/09/20/foreign-tort-suits-under-221-year-old-law-ruled-out-against-business-defendants/> (discussing the unavoidable impact of the *Kiobel* decision on ATCA jurisprudence).

101. See H.R. REP. NO. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 ("Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit . . . grant by Congress The TVPA would provide such a grant, and would also enhance the remedy already available under [the ATCA]"); see also Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, in 21 CAUSES OF ACTION (SECOND) 327, 347 (2003) ("The TVPA was inspired by a plurality decision rendered by a divided panel of the D.C. Circuit in [*Tel-Oren*], particularly the concurring opinion of Judge Robert Bork, which deftly asserted that the [ATCA] provided jurisdiction only and not a cause of action." (citing H.R. REP. NO. 102-367, at 4)).

102. Torture Victim Protection Act of 1991, Pub L. No. 102-256, § 2(a), 106 Stat. 73, 73 (codified as amended at 28 U.S.C. § 1350 note (2006)).

103. *Id.* § 3.

104. *Id.*

105. *Id.* § 3(a). The TVPA defines "extrajudicial killing" as "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . . . [but not] such killing that, under international law, is lawfully carried out under the authority of a foreign nation." *Id.*

includes mental and physical suffering caused by intentionally inflicted pain, threats of death, actual or threatened application of substances designed to distort the senses, or threats that a third party will be subject to such treatment.¹⁰⁶

2. “Color of Law”: The State-Actor Requirement

To incur liability under the TVPA, individuals must have acted under “color of law.”¹⁰⁷ This stipulation essentially allows courts to impose liability on private actors if their allegedly wrongful act would otherwise be deemed a state action,¹⁰⁸ such as when private individuals act in conjunction with or are aided by state officials.¹⁰⁹ Plaintiffs must prove that the alleged torture or extrajudicial killing involved a “symbiotic relationship between a private actor and the government.”¹¹⁰ Courts have interpreted this to permit liability only

106. *Id.* § 3(b). The TVPA defines “torture” 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 or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that 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; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) 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;

(C) the threat of imminent death; or

(D) 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.

Id.

107. *Id.* § 2(a).

108. See Samuel L. David, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 801 (2003) (noting that the “Supreme Court has established that the phrase ‘under color of law’ is essentially synonymous with the ‘state action’ requirement of the Fourteenth Amendment,” and explaining that a private party may be considered a public actor if the private party “performs what would otherwise be a government function”).

109. See *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

110. *Romero v. Drummond Co.*, 552 F.3d 1303, 1317–18 (11th Cir. 2008) (holding that the plaintiffs failed to meet the state-action requirement because they did not offer evidence of state involvement in the alleged assassination and torture of union leaders). The Supreme Court utilizes various tests when determining whether state action is present. See *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1265 (N.D. Ala. 2003) (“The United States Supreme Court has articulated four alternative tests for the state action question: (1) the public function

when an actor has (1) “specific knowledge and intent to assist in the violation,” (2) actually assists in the violation, and (3) recognizes his or her role in perpetrating the unlawful act.¹¹¹

In *Romero v. Drummond Co.*, the Eleventh Circuit affirmed the district court’s dismissal of the plaintiff’s TVPA claim for failure to show a “symbiotic relationship” between the corporate defendant and the Columbian government.¹¹² The plaintiffs—representatives and affiliates of a trade union—brought suit against the company for allegedly paying paramilitary agents to torture and kill union leaders.¹¹³ However, the plaintiffs’ evidence only established a “general relationship” between the paramilitary operatives and the Columbian government, and thus failed to meet the state-actor requirement.¹¹⁴ As *Romero* demonstrates, the Eleventh Circuit requires plaintiffs pursuing a TVPA claim not only to allege facts that show torture or extrajudicial killing, but also to show a close nexus between such torture and a clear sanction by the state.¹¹⁵

3. *Effect of the Legislation on the ATCA*

Early versions of the TVPA introduced before the House and Senate during the mid-1980s revealed that the purpose of the Act was to provide a civil cause of action for both alien and domestic torture victims, including those residing

test; (2) the symbiotic relationship test; (3) the nexus test; and (4) the joint action test.”). Under the public-function test, state action may exist when a private entity exercises “powers traditionally exclusively reserved to the State.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974). Similarly, the Supreme Court has found state action to exist under the symbiotic-relationship test when a privately operated restaurant was financed by public funds and owned by an agent of the state. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723–24 (1961) (using the symbiotic-relationship test to find that the restaurant had violated the Equal Protection Clause of the Fourteenth Amendment—an amendment only applicable to *state* action—by denying service to an African American). Under the “sufficiently close nexus” test, courts examine the connections that exist between the private action and the government. *Jackson*, 419 U.S. at 351 (dismissing an action against a corporation for wrongfully terminating electrical services and holding that Pennsylvania did not have sufficient connections to the corporation’s actions for the customer to hold the state liable under the Fourteenth Amendment). Lastly, under the joint-action test, state action may arise from “a willful participant [who acts] in joint action with the State or its agents.” *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

111. Rosaleen T. O’Gara, Note, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 807 (2010) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006)).

112. 552 F.3d 1303, 1317 (11th Cir. 2008).

113. *Id.* at 1309.

114. *Id.* at 1317 (noting that to prove state action, “[t]he relationship must involve the subject of the complaint”). The court excluded the plaintiff’s key declarations as inadmissible hearsay, and refused to allow the plaintiffs to introduce testimony from a former member of the Columbian Army because it was discovered after the district court’s decision. *Id.* at 1317–18. Considering all the admissible evidence, the court found an insufficient basis to demonstrate the government’s involvement. *Id.*

115. *Id.* at 1317.

in the United States—a category of persons formerly excluded by the ATCA.¹¹⁶ Proponents of the TVPA expected the Act “to reinforce, to support, and to strengthen” the ATCA by expanding its scope and extending redress to U.S. citizens.¹¹⁷ Moreover, proponents hoped that express language of the TVPA would complement the ATCA and eliminate concerns among those judges who questioned whether human-rights violations constituted recognized claims under the ATCA.¹¹⁸

The TVPA did not repeal or replace the ATCA in any way; therefore, plaintiffs may still bring actions alleging a violation of the law of nations under both the ATCA and the TVPA.¹¹⁹ In fact, Congress indicated that the ATCA continued to have important functions following the TVPA’s enactment, which demonstrates that Congress intended the TVPA to expand and clarify the earlier statute.¹²⁰

116. S. REP. NO. 102-249, at 2–3 (1991) (noting that the legislation, which was first introduced in 1986, was intended to protect “any” individual subjected to torture or extrajudicial killing under color of law); *see also The Torture Victim Protection Act: Hearing and Markup Before the Comm. on Foreign Affairs and its Subcomm. on Human Rights & Int’l Orgs. of the H.R. on H.R. 1417*, 100th Cong. 1 (1988) [hereinafter *TVPA Hearing and Markup*] (statement of Rep. Gus Yatron) (noting that Congressman Yatron, Chairman, Subcomm. on Human Rights and International Organizations, introduced the TVPA along with two other congressmen during the 99th Congress). This hearing introduced a bill that was “virtually identical” to the version of the TVPA eventually enacted in 1991. H.R. REP. NO. 102-367, at 5–6 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88. A version of the bill was also introduced in the 101st Congress before passage in the 102nd Congress. *See id.* During the subcommittee hearing, Michael H. Posner, executive director for the Lawyers Committee for Human Rights, noted that the Act clarifies the ATCA by expressly providing relief to U.S. citizens. *See TVPA Hearing and Markup, supra*, at 19 (statement of Michael H. Posner).

117. *TVPA Hearing and Markup, supra* note 116, at 19.

118. *Id.* at 8 (statement of Father Robert Drinan on behalf of the American Bar Association).

119. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381 (E.D. La. 1997), *aff’d* 197 F.3d 161 (5th Cir. 1999) (refusing to repeal the ATCA by implication and noting that the TVPA provides no clear intent to invalidate the ATCA, nor are the two statutes inconsistent with each other); *see also United States v. United Cont’l Tuna Corp.*, 425 U.S. 164, 168 (1976) (“It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.”); *cf. Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (stating that an act may be repealed by implication only if the two statutes “irreconcilabl[y] conflict” or the later act is “clearly intended as a substitute”).

120. *See H.R. REP. NO. 102-367*, at 4 (1991); *Beanal*, 969 F. Supp. at 380 (“Considering that the TVPA ‘enhances’ rather than shrinks the scope of remedies under [the ATCA], there is no reason to conclude that by enacting the TVPA Congress took away causes of action for torture and extrajudicial killings under [the ATCA].”); *see also Enahoro v. Abubakar*, 408 F.3d 877, 888 (7th Cir. 2005) (“The two acts . . . are not competing provisions but are meant to be complementary and mutually reinforcing (if somewhat coextensive).”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (“The TVPA . . . was intended to codify judicial decisions recognizing such a cause of action under the Alien Tort Claims Act.” (citation omitted)), *abrogated in part by Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *4 (S.D.N.Y. Feb. 28, 2002) (“[N]o court . . . since the enactment of the TVPA has held that the TVPA in any way preempts ATCA claims for torture and extrajudicial killings.”).

II. THE CIRCUIT COURTS' INTERPRETATION OF "INDIVIDUAL" UNDER THE TVPA

A. *The Name Game: Persons, Human Beings, and Individuals*

Although the TVPA helped ameliorate confusion regarding appropriate causes of action under the ATCA, the language of the TVPA raised an important new question: do corporations qualify as "individuals" subject to liability under the Act?¹²¹

The term "individual"—used to describe human beings—is sometimes distinguished from "persons," which includes both natural bodies and non-living entities.¹²² However, in *Clinton v. City of New York*, the Supreme Court held that the term "individual" may also include "persons."¹²³ *Clinton* involved challenges to the Line Item Veto Act, which granted the President authority to veto portions of a bill.¹²⁴ The jurisdictional provision of the Act allowed "individuals" to file suit.¹²⁵ The Supreme Court looked to legislative intent for guidance on how to interpret this term, and found that "individual" was not meant to exclude corporate plaintiffs or "persons."¹²⁶ Although some courts have adopted *Clinton's* reasoning and held that corporations qualify as "individuals" under the TVPA, others have continued to make distinctions between the meanings of the two terms.¹²⁷

B. *The TVPA Applies Only to Human Beings: The Second Circuit Approach*¹²⁸

In *Khulumani v. Barclay National Bank*, victims of South African apartheid sued corporations for violations of international law under the ATCA and TVPA.¹²⁹ Plaintiffs claimed that the corporate defendants had allied with the

121. See *infra* Parts II.B–C.

122. See Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1, 12 (2007).

123. 524 U.S. 417, 428 (1998) (pointing to Congress's intent for "the word 'individual' to be construed as synonymous with the word 'person'").

124. See *id.* at 421, 436–37; Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton*, 524 U.S. at 421. The Supreme Court found that the Act, which essentially allowed the president to cancel portions of a bill without presentment to both houses of Congress, was unconstitutional. *Clinton*, 524 U.S. at 421, 445–46.

125. Line Item Veto Act, § 3(a)(1); *Clinton*, 524 U.S. at 428 (permitting "any individual adversely affected" to file a claim).

126. *Clinton*, 524 U.S. at 429.

127. See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) (rejecting the characterization of corporations as "individuals").

128. The D.C. and Ninth Circuits have also followed this approach. However, the D.C. Circuit did not elaborate on its ruling and the Ninth Circuit's decision was based primarily on construing the term "individual" consistently throughout the statute. See *Doe v. Exxon Mobil Corp.*, No. 09-7125, 2011 U.S. Dist LEXIS 13934, at *136–37 (D.C. Cir. July 8, 2011); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010).

129. 504 F.3d 254, 258 (2d Cir. 2007) (per curiam), *aff'd sub nom. by an equally divided court* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

South African government to perpetuate a racially oppressive system of apartheid against black Africans.¹³⁰

The Second Circuit dismissed the TVPA claim because the plaintiffs failed to link any of the defendants to state action.¹³¹ Judge Edward R. Korman, concurring in part and dissenting in part, explained that “individual” generally means “human being”—a term that applies to natural persons and thus excludes corporations.¹³² He further reasoned that the TVPA uses the term “individual” to describe potential victims and defendants, and “only *natural persons* can be the ‘individual’ victims of acts that inflict ‘severe pain and suffering.’”¹³³ Thus, Judge Korman concluded that the term must be construed similarly in both portions of the statute, and rejected corporate liability under the TVPA.¹³⁴

Similarly, in *Beanal v. Freeport-McMoRan, Inc.*, the court dismissed an Indonesian resident’s TVPA claim against a corporation for alleged human rights violations and genocide.¹³⁵ Considering various definitions of “individual,” the court found that the term generally excludes classes and institutions, and accordingly did not include corporations.¹³⁶ The court

130. *Id.*

131. *Id.* at 260.

132. *Id.* at 324 (Korman, J., concurring in part) (quoting *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005)). The D.C. Circuit has also denied corporate liability under the TVPA, simply stating that “the plain reading of the statute strongly suggests that it only covers human beings, and not corporations.” *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005), *aff’d in part and rev’d in part*, No. 09-7125, 2011 U.S. App. LEXIS 13934 (D.C. Cir. July 8, 2011). Although the D.C. Circuit’s 2011 decision upheld the dismissal of a TVPA claim against the corporation, it acknowledged that a corporation can be liable for aiding and abetting under the ATS. *Doe*, 2011 U.S. App. LEXIS 13934, at *84.

133. *Khulumani*, 504 F.3d at 323 (Korman, J., concurring in part) (emphasis added) (quoting *In re Agent Orange*, 373 F. Supp. 2d at 56); *see also* *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) (acknowledging the TVPA’s employ of “individual” to describe both defendants and victims, and stating that “[t]he Court does not believe it would be possible for corporations to be tortured or killed. The Court also does not believe it would be possible for corporations to feel pain and suffering”); *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825, at *1–2 (E.D.N.Y. Dec. 15, 1999) (granting the defendant’s motion to dismiss the plaintiff’s TVPA claims, which alleged that the defendants collaborated with Nazi Germany to commit crimes such as torture and slave labor against the plaintiffs for several reasons, including the fact that TVPA claims are generally applied only to individual defendants).

134. *Khulumani*, 504 F.3d at 323–24 (Korman, J., concurring in part) (quoting *In re Agent Orange*, 373 F. Supp. 2d, at 56).

135. 969 F. Supp. 362, 365, 384 (E.D. La. 1997), *aff’d* 197 F.3d 161 (5th Cir. 1999). The Fifth Circuit affirmed the district court’s dismissal of the TVPA claim for pleading insufficiencies and did not reach the issue of corporate liability under the TVPA. *Beanal*, 197 F.3d at 169.

136. *Beanal*, 969 F. Supp. at 382 (defining “individual” as “a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association . . . it may, in proper cases, include a corporation.” (quoting BLACK’S LAW DICTIONARY 773 (6th ed. 1996))). Moreover, in *Jove Engineering, Inc. v. IRS*, the Eleventh Circuit rationalized that the term “individual” in the Bankruptcy Code does

reasoned that this construction of “individual” did not conflict with the legislative intent of the Act, as Congress did not address corporate liability when drafting the TVPA, but instead chose the term “individual” to ensure foreign states could not be liable under the Act.¹³⁷

C. The TVPA Holds “Persons” Liable: The Eleventh Circuit Approach

In *Estate of Rodriguez v. Drummond Co.*, the United States District Court for the Northern District of Alabama held that corporations could be liable under the TVPA,¹³⁸ and rejected the *Beanal* court’s analysis in favor of the reasons provided in *Sinaltrainal v. Coca-Cola Co.*¹³⁹ The *Rodriguez* court found that the TVPA must permit actions against corporations absent explicit exclusion by Congress.¹⁴⁰ The court cited *Sinaltrainal v. Coca-Cola Co.*,¹⁴¹ which had determined that “‘individual’ is synonymous with ‘person.’”¹⁴² Therefore, the court held that because corporations are “generally viewed the same as a person . . . it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.”¹⁴³

The Eleventh Circuit affirmed the *Rodriguez* holding that corporations could be held liable under the TVPA in *Romero v. Drummond Co.*¹⁴⁴ Subsequently in *Sinaltrainal*, while only briefly addressing the corporate question, the Eleventh Circuit relied on *Romero* to affirm to the district court’s holding.¹⁴⁵

III. APPLYING THE TVPA TO CORPORATE DEFENDANTS: A SHOWING OF CONGRESSIONAL INTENT

The Eleventh Circuit’s consideration of the ATCA and its role in framing and passing the TVPA provides a more well-reasoned analysis of the

not pertain to corporate defendants based on ordinary definitions of the term “individual.” 92 F.3d 1539, 1551 (11th Cir. 1996) (citing BLACK’S LAW DICTIONARY 773 (6th ed. 1996)).

137. *Beanal*, 969 F. Supp. at 382 (citing S. REP. NO. 102-249, at *7 (1991)).

138. 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003).

139. *See id.* at 1266–67.

140. *Id.* at 1267.

141. *See id.* at 1266–67 (citing *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *aff’d in part, vacated in part by Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)).

142. *Sinaltrainal*, 256 F. Supp. 2d at 1358–59 (quoting *Clinton v. City of New York*, 524 U.S. 417, 428 (1998)). In *Clinton*, the court equated “individual” to “person,” which broadly encompasses “‘corporations, companies, associations, firms, partnerships . . . as well as individuals.’” *Clinton*, 524 U.S. at 428 n.13 (quoting 1 U.S.C. § 1 (2006)).

143. *Sinaltrainal*, 256 F. Supp. 2d at 1359.

144. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (noting that the ATCA does not provide an exception for corporations).

145. *Sinaltrainal*, 578 F.3d 1252, 1264 n.13 (“Under the law of this Circuit, the Torture Act allows suits against corporate defendants.” (internal quotation marks omitted) (quoting *Romero*, 552 F.3d at 1315)).

congressional intent underlying the TVPA than that of the Second Circuit.¹⁴⁶ Although both courts look to the ATCA for legislative history, the Eleventh Circuit bases its decision on a more accurate understanding of the torture legislation's relationship to the earlier act.¹⁴⁷

A. Corporate Defendants Under the ATCA

The Eleventh Circuit's reasoning accurately reflects the complementary nature of the TVPA to the ATCA, and Congress's intent to expand the prior legislation using the TVPA.¹⁴⁸ As articulated by *Romero*, plaintiffs may permissibly bring a claim against corporations under the ATCA for aiding and abetting.¹⁴⁹ Because the TVPA's purpose is to expand the ATCA, corporations must also be liable under the Act.¹⁵⁰ Furthermore, at the time of the TVPA's enactment in 1991, corporate actors had already been subject to liability under the ATCA.¹⁵¹ Given Congress's awareness that corporate actors were subject to suit under the act that Congress enacted the TVPA to expand, one must conclude that if Congress had intended to exclude corporations from TVPA liability, it would have explicitly done so. Although the *Beanal* court conceded that the TVPA expands the ATCA,¹⁵² its decision effectively allowed an entire group of defendants who would be subject to claims under the ATCA to avoid liability under the TVPA.¹⁵³

B. Exclusion of Foreign States from Liability

In *Beanal*, the district court attempted to support the exclusion of corporations from liability by finding that the legislators' choice of the term "individual" "was not inadvertent," and concluding that corporations should not be liable under the plain reading of the word.¹⁵⁴ However, in its analysis, the court acknowledged that Congress chose this word to exclude foreign states

146. See *id.* at 1263–64; *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1246, 1250–52 (11th Cir. 2005).

147. See *infra* Part III.A–C.

148. See *supra* Part I.B.3.

149. *Romero*, 552 F.3d at 1315.

150. See *supra* Part I.B.3; see also *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003) (“[B]ecause corporations can be sued under the ATCA and Congress did not explicitly exclude corporations from liability under the TVPA, private corporations are subject to liability under the TVPA.”).

151. See, e.g., *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113–114, 115 (5th Cir. 1988) (assuming that the ATCA provides subject-matter jurisdiction over corporations that participate in official torture, but finding insufficient evidence of Prince Waterhouse's involvement in his incarceration and torture).

152. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

153. See *id.* (acknowledging that Congress's use and the court's interpretation of “individual” may have the effect of excluding corporations from liability unintentionally).

154. *Id.*

from liability.¹⁵⁵ This undermines the court's position because it evidences that legislators had specifically considered which parties to shield from liability, and chose not to extend any such protection to corporations.¹⁵⁶

Furthermore, with regard to the state-action requirement, one Senate report noted that the TVPA "does not cover purely private criminal acts by individuals or nongovernmental organizations."¹⁵⁷ By referencing individuals and nongovernmental organizations as parties that could be liable under the Act, the Senate report implies that an organization could be held liable under the TVPA if its actions were under "color of law."¹⁵⁸

The report also noted that "[t]he legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture."¹⁵⁹ By using "persons" interchangeably with "individuals," the report suggests that legislators did not intend to limit the scope of the Act by using the term "individual."¹⁶⁰

C. Objects of Torture

In *Khulumani*, Judge Korman noted that because the TVPA's language uses "individual" to refer to perpetrators as well as victims of torture, the term should have the same meaning in both contexts.¹⁶¹ Therefore, because only humans can be victims of torture, the court narrowly construed the term "individual" to mean "natural persons" in both parts of the statute.¹⁶²

In making this determination, Judge Korman applied the rationale from the Supreme Court's opinion in *Desert Palace, Inc. v. Costa*,¹⁶³ in which the Court reasoned that the term "demonstrates" must have the same meaning in two separate sections of a statute.¹⁶⁴ The Court stated, "[a]bsent some

155. *Id.*; 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: only individuals may be sued.").

156. See S. REP. NO. 102-249, at 7 (indicating only that the legislature did not intend to "turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever" (emphasis added)).

157. *Id.* at 8.

158. See *id.*; *supra* Part I.B.2.

159. S. REP. NO. 102-249, at 8 (emphasis added).

160. 1 U.S.C. § 1 (2006) (broadly defining "person" to include business organizations as well as individuals); see *supra* text accompanying notes 122–27.

161. *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 323–24 (2d Cir. 2007) (Korman, J., concurring), *aff'd by an equally divided court sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

162. See *supra* notes 132–34 and accompanying text.

163. See *Khulumani*, 504 F.3d at 323–24 (Korman, J., concurring); see also *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

164. *Desert Palace*, 539 U.S. at 101 (construing the statutory language under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), which makes it unlawful for an employer to discriminate based on sex).

congressional indication to the contrary, we decline to give the same term in the same act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.”¹⁶⁵

However, unlike the statute at issue in *Desert Palace*, the TVPA’s legislative record provides sufficient indication that Congress did not intend to limit the class of defendants by referring to possible plaintiffs as “individuals.”¹⁶⁶ Moreover, applying this reasoning to the TVPA ignores the obvious—although a corporation cannot feel pain, it can certainly help inflict it.¹⁶⁷ Actions taken by a corporation to aid and abet torture are no less serious than those taken by human beings, despite the fact that corporations themselves cannot be victims.

IV. CORPORATE DEFENDANTS: ESSENTIAL TO CARRY OUT OBJECTIVES OF THE TVPA

A. Bridging the ATCA Gap

In *Aldana v. Del Monte Fresh Produce, N.A.*, the Eleventh Circuit stated that “neither Congress nor the Supreme Court has urged [courts] to read the TVPA as narrowly as . . . the [ATCA] generally.”¹⁶⁸ As the *Aldana* court points out, there seems to be no reason or authority for courts to limit the scope of the TVPA beyond that of the ATCA by shielding corporations from liability under the Act.

Although most courts recognize that claims against corporations for torture may be brought under the ATCA, for liability to attach, the corporate violator must commit torture as defined by the “law of nations”—an ever-changing concept.¹⁶⁹ This restriction presents a factual hurdle to plaintiffs alleging

165. *Id.* (emphasis added).

166. *See supra* Part I.B.3; Part III.A–B.

167. *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 188 (2002) (discussing *Doe v. Unocal Corp.*, and noting “[t]here is little question that thousands of Burmese villagers were impressed to perform labor for the benefit of Unocal’s pipeline project”); Seher Khawaja, Note, *Corporate Free Market Responsibility: Addressing Rights Violations with a Fiduciary Duty Approach to Natural Resource Extractions in Weak Governance Zones*, 3 BROOK. J. CORP. FIN. & COMM. L. 185, 189–90, 194 (2008) (highlighting human-rights violations by corporations seeking natural resources and observing that the ATCA and TVPA provide some relief for some of the “egregious violations that have occurred at the hands of extractive industries”).

168. 416 F.3d 1242, 1252 (11th Cir. 2005) (per curiam).

169. *See supra* Part I.A.1 and accompanying notes. Torture, as an international violation, has been defined by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him . . . intimidating or coercing him or . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

crimes against humanity—an obstacle that the TVPA is intended to remedy.¹⁷⁰ The language of the TVPA and its explicit definition of torture and extrajudicial killing are not intended to exclude defendants such as corporations, but to expand on the human-rights violations for which plaintiffs may seek remedies.¹⁷¹

The TVPA can also be used to compensate plaintiffs for human-rights abuses if other federal appellate courts decide to follow the Second Circuit's decision in *Kiobel* and deny corporate liability under the ATCA.¹⁷² It is essential that courts permit TVPA suits against corporations so that natural persons who commit acts of torture cannot escape liability by hiding behind a corporate entity.¹⁷³

B. Detering Torture: A National Objective

As a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States has committed itself to preventing torture.¹⁷⁴ In a letter seeking the Senate's

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3946, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984).

170. See Rachel Bart, Note, *Using the American Courts to Prosecute International Crimes Against Women: Jane Doe v. Radovan Karadzic and S. Kadic v. Radovan Karadzic*, 3 CARDOZO WOMEN'S L.J. 467, 476 (1996) (explaining that the TVPA was "enacted in reaction to the extreme narrowing" of the ATCA and is meant to negate limitations *Tel-Oren* placed on torture liability under the ATCA).

171. See H.R. REP. NO. 102-367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act) . . .").

172. See *supra* notes 84–88; Christopher Tansey, *Kiobel Decision Significantly Limits Corporate Liability for Human Rights Violations*, HUM. RTS. BRIEF (Oct. 11, 2010), <http://hrbrief.org/2010/10/kiobel-decision-significantly-limits-corporate-liability-for-human-rights-violations/> (addressing the implications of the *Kiobel* decision and observing that it "will significantly limit legal recourse available to victims of human rights abuses attributable to a corporate entity").

173. See *supra* notes 89–90 and accompanying text.

174. See G.A. Res. 3946, *supra* note 169. The Convention mandates that participating states "take effective measures to prevent torture within their borders, and forbids states to return people to their home country if there is reason to believe they will be tortured." *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GLOB. GOVERNANCE WATCH, http://www.globalgovernancewatch.org/human_rights/the-united-nations-convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment (last visited Sept. 24, 2011). But see Philippe Sands, *Forward* to THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE, at IX (David Cole ed., 2009) ("The torture has deeply damaged the reputation of the U.S., a country that has done more than any other to promote the idea of the rule of international law."); Aisha Fili, *Torture Claims Against the United States and its Effect on US Foreign Policy*, EXAMINER (Sept. 1, 2010), <http://www.examiner.com/foreign-policy-in-detroit/torture-claims-against-the-united-states-and->

advice and consent for ratification of the Convention, President Ronald 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.”¹⁷⁵

Through acts such as the TVPA, the United States continues to uphold a strong stance against torture while emphasizing the importance of human rights.¹⁷⁶ The TVPA gives “notice to individuals engaged in human rights violations that the United States strongly condemns such acts and will not shelter human rights violators from being accountable in appropriate proceedings.”¹⁷⁷ Rep. Gus Yatron, Chairman of the Subcommittee on Human Rights and International Organizations for the House of Representatives’ Committee on Foreign Affairs, noted that the TVPA ensures “in the United States, the individuals who have tortured will be held accountable, and the victims will be compensated in part for what they have endured.”¹⁷⁸

1. Accountability for Human Rights Violations

Chemical attacks, such as those giving rise to claims in *Aziz v. Republic of Iraq*, cannot be executed without components manufactured by companies such as Alcolac.¹⁷⁹ Turning a blind eye to corporations that provide terrorists with the equipment to commit heinous war crimes undermines the United States’ strict stance against terrorism.¹⁸⁰ Furthermore, holding corporations

its-effect-on-the-us-foreign-policy (discussing the United States’ war on terrorism and the allegations of torture conducted by the United States against prisoners and detainees).

175. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Message from the President of the United States, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988).

176. See *TVPA Hearing and Markup*, *supra* note 116 (statement of Father Robert Drinan on behalf of the American Bar Association).

177. Correale, *supra* note 13, at 220 (quoting Matthew H. Murray, *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, 714 (1987)).

178. *TVPA Hearing and Markup*, *supra* note 116, at 1 (statement of Rep. Gus Yatron, Chairman, Subcomm. on Human Rights and International Organizations). Although the Act “set[s] an example for other nations to follow,” it also helps solidify the “United States’ commitment to protecting torture victims, ensuring their adequate compensation, and guaranteeing that the United States does not become a sanctuary for international torturers.” Haffke, *supra* note 12, at 1479 (footnote omitted).

179. See *Aziz v. Republic of Iraq*, No. MJG-09-869, 2010 U.S. Dist LEXIS 143164, at *2–5 (D. Md. June 9, 2010), *aff’d*, No. 10-1908, 2011 U.S. App. LEXIS 19227 (4th Cir. Sept. 19, 2011).

180. See *supra* notes 173–78 and accompanying text. The Office of the Coordinator for Counterterrorism is responsible for the development and enactment of counterterrorism policies. See *Department Organization*, U.S. DEPARTMENT ST., <http://www.state.gov/r/pa/ei/rls/dos/436.htm> (last visited Sept. 24, 2011). These U.S. anti-terrorism policies have influenced other countries to recognize the crime of terrorism. see also Ambassador Philip C. Wilcox, Jr., Coordinator for Counterterrorism, Testimony to the House Comm. on Int’l Relations, in 1

liable under the TVPA will enable victims of torture to receive adequate compensation, as corporations have resources far beyond that of other individuals who may be sued under the Act.¹⁸¹

Corporate faculties also raise problems for countries attempting to curtail torture because corporations represent “powerful global actors that some states lack the resources or will to control.”¹⁸² In such cases, legislation such as the TVPA provides an additional deterrent to corporations who may otherwise violate individual human rights.¹⁸³

2. Corporations Incentivized to Avoid Liability

Fear of liability creates a strong incentive for companies to monitor their business practices,¹⁸⁴ and motivates corporations to hire workers who will minimize the company’s liabilities.¹⁸⁵ Corporate shareholders play a key role in this, as their primary concern is to protect their interest in the corporation by avoiding costly litigation or settlements.¹⁸⁶

C. Limits to Corporate Accountability

Before corporations may be held liable, there must be a certain mens rea showing. Without such a requirement, corporations would face liability for

EVOLUTION OF U.S. COUNTERTERRORISM POLICY 203, 206 (Yonah Alexander & Michael B. Kraft eds., 2008).

181. See, e.g., Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Abstract, *International Implications of the Alien Tort Statute*, 7 J. INT’L ECON. L. 245, 245 (2004) (suggesting ATCA claims against corporations escalated due to the “deep pockets” of such defendants).

182. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) (discussing the necessity for corporate responsibility for preventing human-rights violations).

183. Cf. *id.* at 533–34 (explaining how regulatory schemes and litigation can reduce the likelihood that corporations will violate human rights).

184. Cf. Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1158 (2002) (observing that vicarious liability incentivizes corporations to exact a higher level of care in hiring decisions so to avoid liability); see also Ratner, *supra* note 182, at 473 (discussing the economic rationales for holding corporations liable for the conduct of their agents).

185. Epstein, *supra* note 184, at 1158; see also Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT’L L.J. 55, 58 (2009) (“[I]f publicly-traded multinational corporations wish to maintain high profit margins and continue to reap the benefits of globalization, they must implement sound Corporate Social Responsibility (CSR) measures related to human rights . . . thereby . . . enabling corporations to avoid the costs of both ATS litigation and reputational harm.”).

186. Ratner, *supra* note 182, at 473 (observing that placing liability on corporations, rather than individuals, is more effective at determining “undesireable conduct” for a variety of reasons, but in particular “because corporate liability encourages shareholders to monitor corporate actions”).

supplying or producing any item eventually used to inflict torture.¹⁸⁷ When imposing liability under the TVPA for aiding and abetting in torture or extrajudicial killing, courts should require plaintiffs to establish that a corporate defendant had actual or constructive knowledge that its actions would result in the alleged violation.¹⁸⁸ A knowledge standard would influence corporations to exhibit a higher level of care in its transactions than would a purposeful mens rea requirement, which some courts have applied.¹⁸⁹ Under a knowledge standard, plaintiffs suing a corporation for aiding and abetting in torture under the TVPA would not need to prove that the corporation shared the mens rea of the actor, but only that the corporation knew a crime would likely occur and intentionally facilitated the act.¹⁹⁰ Instead of yielding deterrent effects, a purposeful mens rea requirement would actually provide greater protection to global corporations that expand to areas with high rates of human-rights atrocities, thereby enabling corporations to ignore the sociological impact of their businesses.¹⁹¹

VI. CONCLUSION

Corporations qualify as “individuals” under the Torture Victim Protection Act and should be held accountable for aiding and abetting in the violation of human rights. The Act’s legislative history reveals that Congress created the TVPA to expand the Alien Tort Claims Act, under which corporations were

187. See Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231, 284 (2008).

188. See *Doe v. Unocal Corp.*, 395 F.3d 932, 953 (9th Cir. 2002) (defining the mens rea requirements as “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime”), *vacated en banc*, 395 F.3d 978, (9th Cir. 2003); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 259 (S.D.N.Y. 2009) (“The vast majority of international legal materials clearly prescribe knowledge as the *mens rea* requirement for aiding and abetting.”). In *In re South African Apartheid Litigation*, apartheid victims brought suit under the ATCA for torture, exile, segregation and other injustices resulting from the African system. 617 F. Supp. 2d at 242. The court determined that customary international law required a mens rea standard of knowledge “that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations.” *Id.* at 262. But see *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (determining that the mens rea necessary for aiding and abetting under international law standards required purpose, not knowledge, allowing for greater culpability), *cert. denied*, 131 S. Ct. 79 (2010). The TVPA itself also limits liability to individuals who act “under actual or apparent authority, or color of law, of any foreign nation[.]” Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (codified as amended at 28 U.S.C. § 1350 note (2006)).

189. See *Presbyterian Church*, 582 F.3d at 259; *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010); see also Nemeroff, *supra* note 187, at 284 (discussing mens rea under the ATCA and noting that “[p]roving ‘purposeful’ conduct is difficult with regard to corporate action abroad”).

190. *Doe*, 395 F.3d at 950–51.

191. See Nemeroff, *supra* 187, at 284.

proper defendants. Therefore, excluding corporations from liability under the TVPA contradicts the Act's purpose. Furthermore, Congress chose not to explicitly bar corporate liability under the TVPA, which was enacted after lawsuits against corporations under the ATCA had commenced. Recent challenges to the ATCA's applicability to corporate defendants provide an even greater incentive to allow corporate liability under the TVPA. Without the TVPA as an avenue to hold corporations liable, courts will be unable to fulfill the legislators' intent of deterring torture and providing just compensation to victims of these heinous acts.