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Torture, Inc.: Corporate Liability under the Torture Victim Protection Act

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Torture, Inc.: Corporate Liability under the Torture Victim Protection Act

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I. INTRODUCTION

Each year hundreds of men, women, and children face physical abuse, forced labor, sexual assault, rape, murder, and psychological abuse, each act of which constitutes torture—in their own countries and even in their own homes.¹ These people are not tortured for political dissidence or by oppressive governments, rather, they are tortured by entities very familiar to Americans, such as Del Monte, Coca-Cola, Levi Straus, Gap, Pfizer, JP Morgan Chase, Daimler-Benz, Ford, General Motors, Fujitsu, IBM, Shell,

1. See Elliot Schrage, *Judging Corporate Accountability in a Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153 (2003).

Exxon Mobile, and the list could go on.² The people who suffer torture by their hands are often unable to pursue justice for the acts committed against them because, rather than the perpetrator being a single human being, the force behind the victims' abuse is a corporation.

Torture is generally defined as any act directed against an individual by which severe pain or suffering, whether physical or mental, is intentionally inflicted for obtaining information, intimidation, or coercion.³ Torture by corporations may seem nonsensical, but corporations can be proponents of and responsible for torture in several different capacities. Corporations and governments may be in an official relationship, which often results in the victims being shut out of the local courts by the government to protect the corporation. One example of this type of relationship is a government that provides forced labor for corporations to conduct their business, such as the relationship between Adidas and China by which prison inmates were forced to work for Adidas and beaten and poked with needles if they failed to comply.⁴

Other times, corporations are simply providing enough revenue to the country that the government chooses to look the other way and acknowledges the "costs" of doing business, namely the torture and abuse of their citizens, which is more common in countries that have extraction industries and need the corporations to use their technology to mine and provide profit.⁵ Corporations are able to use their economic power and influence in a way that gives the government no incentive to regulate their behavior.⁶ This type of relationship occurred in Nigeria between the Nigerian government and the oil companies Royal Dutch Petroleum and Shell, both of which extract oil in Nigeria.⁷ Shell appropriated land for new oil pipelines without adequate compensation for the Nigerian citizens, and the Nigerians began protesting and holding demonstrations.⁸ Shell and Royal Dutch then allegedly provided weapons, vehicles, money, and logistical support to military forces to attack local villages in order to suppress the protests, which culminated in the torture and rape of citizens and the deaths of many leaders.⁹

2. *Id.* at 159-60.

3. *See* Torture Victim Protection Act of 1991 § 3(b)(1), 28 U.S.C. § 1350 (2006); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 19, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

4. *See, e.g.*, Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 18 (D.D.C. 2000).

5. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 92 (2002).

6. *See* Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report*, BRIEF, Summer 2009, at 45.

7. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000).

8. *Id.*

9. *Id.* at 92-93.

Corporations may also use government-provided security forces to protect their investments. This is perhaps the most common situation and an example occurred in Colombia, where a Colombian paramilitary group bombed an entire town to protect the Occidental Petroleum Corporation's pipeline.¹⁰ In failing to regulate corporate behavior through judicial accountability, governments are essentially giving a green light to corporations to employ torture.

Torture victims often suffer from prolonged or reoccurring pain from injuries, severe "anxiety, depression, irritability, paranoia, guilt, suspiciousness, sexual dysfunction, loss of concentration, confusion, insomnia, nightmares, impaired memory, and memory loss."¹¹ Congress recognized the destructive consequences of torture, and in response to the epidemic of torture, passed the Torture Victim Protection Act (TVPA), which provided a civil cause of action that could be brought in American courts for torture committed abroad.¹² This legislation made it possible for victims to bring over fifty successful suits against their torturers and achieve justice through the American court system.¹³ In 2009, the Eleventh Circuit was the first circuit to interpret the word "individual" in the TVPA as applicable to corporations.¹⁴ Other circuits, however, have interpreted the TVPA as applicable only to physical individuals and not to corporations, which is inconsistent with the Eleventh Circuit's holding and the TVPA.¹⁵

The position that the term "individual" does not apply to corporations, taken by some circuits, leaves a dangerous gap in the legal accountability for corporations. Since many host countries are unable or unwilling to regulate corporate behavior, and courts in "home countries" such as the United States interpret statutes as not applicable to corporations, corporations are left with the ability to act free from the rule of law. This Comment focuses on the split between courts in the Eleventh Circuit and Fifth, Ninth, and D.C. Circuits, and argues that "individual" should be interpreted as applying to corporations under the TVPA based on legislative history, case law, and policy. Part II provides the history and elements of the Torture Victim Protection Act and a basic introduction to corporations and their potential liability. Part III introduces the disagreement in the courts about the inter-

10. See *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), *aff'd*, 564 F.3d 1190 (9th Cir. 2009).

11. Canadian Ctr. for Victims of Torture, *The After Effects of Torture*, Nov. 2009, www.ccvvt.org/effects_torture.html (last visited Sept. 26, 2010).

12. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

13. BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 76 (Martinus Nijhoff Publishers, 2d ed. 2008).

14. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009).

15. See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005), *aff'd*, 564 F.3d 1190 (9th Cir. 2009); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 18 (D.D.C. 2000).

pretation of “individual.” Part IV discusses why the Torture Victim Protection Act should be applied to corporations by looking at its legislative history, case law, and the policy implications created by failing to include corporations within the scope of “individual.”

II. BACKGROUND

A. HISTORY OF THE TORTURE VICTIM PROTECTION ACT

The Torture Victim Protection Act was first introduced in Congress in 1986 and was passed into law in March of 1992.¹⁶ The statute was passed by an overwhelming majority in both houses and reflected America’s commitment to protecting human rights around the world by providing a forum for victims of torture and extrajudicial killings to bring their cases.¹⁷ As Congress noted, “Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent.”¹⁸ Based on this reasoning, Congress passed the TVPA to provide a clear civil cause of action in American courts for torture.¹⁹ The commitment to the policy ideal of protecting human rights was coupled with the holding of *Filártiga v. Pena-Irala*, which utilized the Alien Tort Claims Act (ATCA) to provide compensation for the family of a boy who was tortured to death by a Paraguayan police officer.²⁰

Filártiga was the first case to apply the Alien Tort Claims Act, a part of the Judiciary Act of 1789,²¹ to human rights violations that occurred outside of the United States.²² This case, and its revival of the Alien Tort Claims Act, are fundamental to understanding the context in which the TVPA was passed. In *Filártiga*, a seventeen-year-old boy, Joelito Filártiga, was tortured and killed in Paraguay by a Paraguayan police officer. After being charged with murder in Paraguay, the officer fled to the United States.²³ Joelito’s family came to the United States to try to hold the police

16. 28 U.S.C. § 1350.

17. STEPHENS, *supra* note 13, at 77.

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

19. *See id.*

20. *Filártiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980).

21. The original act stated that the courts would have jurisdiction “of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350). The Alien Tort Claims Act now states, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

22. *See Filártiga*, 630 F.2d 876.

23. *Id.* at 878-79.

officer accountable for Joelito's death.²⁴ The only way the family could successfully bring an action for a tort that occurred outside of the country and did not involve an American was through the Alien Tort Claims Act by alleging a violation of the laws of nations.²⁵ Torture had been recognized as a violation of the laws of nations and was therefore actionable under the ATCA.²⁶ In finding for the Filártiga family, the court held that "deliberate 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. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."²⁷

Shortly after *Filártiga* was decided, Congress codified the case's holding by introducing the Torture Victim Protection Act in 1986 and enacting it in 1992.²⁸ In the legislative history of the TVPA, Congress explicitly endorsed the holding of *Filártiga* and bases much of the TVPA on it.²⁹ *Filártiga* held that "official torture is now prohibited by the law of nations[.]"³⁰ and Congress referred to this holding when determining that prohibiting an action without providing a method of remedy is useless to the victims of torture.³¹ In *Filártiga*, the plaintiffs first attempted to hold the defendant responsible under Paraguayan law but after they were unable to do so, came to the United States to hold him accountable.³² Congress took this into account when they required that in order to use the TVPA a plaintiff must have exhausted remedies in the state where the torture occurred.³³ The parallels between the use of the ATCA in *Filártiga* and the language of the TVPA demonstrate the interconnectedness of the two statutes and Congress's intent to make it easier for victims of torture to achieve civil redress by providing an unambiguous statutory remedy.³⁴

24. *Id.* at 878.

25. *See id.* at 880.

26. *Id.* at 878.

27. *Filártiga*, 630 F.2d at 878.

28. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992); STEPHENS, *supra* note 13, at 77.

29. *See* H.R. REP. NO. 102-367, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

30. *Filártiga*, 630 F.2d at 884.

31. H.R. REP. NO. 102-367, at 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

32. 630 F.2d at 878-79.

33. 28 U.S.C. § 1350.

34. *See* H.R. REP. NO. 102-367, at 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

B. ELEMENTS OF THE TORTURE VICTIM PROTECTION ACT

The Torture Victim Protection Act states the requirements necessary to prove a violation under the Act.³⁵ A potential plaintiff must prove that the defendant acted under actual or apparent authority or color of law of any foreign nation and subjected the plaintiff to torture or extrajudicial killing.³⁶ The TVPA authorizes anyone who has been subjected to torture or any person who may be a claimant in an action for wrongful death to sue under the Act.³⁷ Courts have varied in whether or not to allow the legal representative of a decedent to sue for torture, as well as extrajudicial killing, with some courts allowing it.³⁸

Although the statute seems to clearly state the necessary elements to bring a claim under it,³⁹ several issues have arisen in its application. The first, and the subject of this Comment, is the interpretation of “individual” and whether it applies to corporate entities. There is also the question of complicity liability, which courts have uniformly held is applicable under the TVPA based on its legislative history. Complicity liability includes “persons who ordered, abetted, or assisted” in the violation as well as those “with higher authority who authorized, tolerated, or knowingly ignored [violations].”⁴⁰ Complicity liability is relevant to the interpretation of “indi-

35. 28 U.S.C. § 1350.

36. 28 U.S.C. § 1350 states the liability to be:

SEC. 2. ESTABLISHMENT OF CIVIL ACTION

(a) LIABILITY.—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.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Id.

37. *Id.*

38. See *Cabello v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1334-35 (S.D. Fla. 2002) (holding that the TVPA does not stipulate that only a torture victim has standing to bring claim) *But see* *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1268 (N.D. Ala. 2003) (stating that an association cannot sue for a death under TVPA since the association was neither the legal representative nor a claimant in a wrongful death action).

39. 28 U.S.C. § 1350.

40. See S. REP. NO. 102-249, at 8-9 (1991).

vidual” because if Congress had not allowed for complicity liability, it would be more difficult to bring a suit against a corporation.⁴¹

The third issue stems from the requirement that actual or apparent authority or color of law of any foreign nation is shown. Color of law can be shown through the hiring of state police forces to provide security, a foreign official authorizing or directing abuses, or a government providing forced labor to corporations.⁴² The color of law requirement brings questions about foreign state immunity and the Foreign State Immunity Act; however, this issue is not addressed in this Comment.⁴³ The TVPA also excludes the American government from being the state providing the “color of law” necessary by requiring “color of law, of any foreign nation.”⁴⁴ This may have been to address political concerns by President George H.W. Bush that the TVPA would be used against the United States military.⁴⁵

Procedurally, the plaintiff must show that he or she has exhausted available remedies in the place where the conduct occurred and that the action was commenced within ten years after it arose.⁴⁶ It is not difficult to prove the exhaustion of remedies because the legislative history provides that if a suit is filed in the United States it should be “virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred . . . [and] courts should approach cases . . . with this assumption.”⁴⁷ Failure to exhaust remedies is an affirmative defense, and the defendant bears the burden of proving it.⁴⁸ Since it is very difficult to prove that there are “adequate and available” remedies where the abuse occurred, and courts look to the legislative history, “failure to exhaust remedies” is seldom successfully pled as an affirmative defense.⁴⁹ Furthermore, the remedies must be adequate, not just available, which is also difficult to prove. To this date, no case has been dismissed on the grounds of existing adequate remedies where the abuse occurred.⁵⁰

41. *Id.*

42. *See, e.g., Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

43. *See* STEPHENS, *supra* note 13, at 365, for a discussion of the Foreign Sovereignty Immunity Act.

44. 28 U.S.C. § 1350.

45. STEPHENS, *supra* note 13, at 79.

46. *Id.*

47. S. REP. NO. 102-249, at 9-10 (1991).

48. STEPHENS, *supra* note 13, at 403.

49. *See, e.g., Collett v. Socialist Peoples’ Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 243 (D.D.C. 2005).

50. *See Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005) (“[T]o the extent that there is any doubt . . . both Congress and international tribunals have mandated that . . . doubts [concerning exhaustion are to] be resolved in favor of the plaintiffs.”).

If the plaintiff is able to prove each of these elements, he or she is entitled to damages under the Act.⁵¹ The TVPA states that an individual found liable “shall in a civil action, be liable for damages,” without specifically stating which damages are applicable or giving a definition of damages.⁵² In light of this, standard tort damage principles are applied under the TVPA in order to determine applicable damages.⁵³ The plaintiffs, therefore, can collect compensatory damages for all documented harms.⁵⁴ Compensatory damages are a factual matter that must be briefed and proven to the court in a way that demonstrates the harm suffered by the victims.⁵⁵

Beyond compensatory damages, plaintiffs can also collect punitive damages.⁵⁶ Courts have applied punitive damages to TVPA cases for two main reasons.⁵⁷ First, the legislative history of the Act indicates strong reliance and approval of *Filártiga* in which punitive damages were awarded.⁵⁸ Second, the legislative history discusses the TVPA, not just as not a tool to compensate victims, but also as a tool to eradicate torture altogether in which punitive damages serve as a deterrent of the “heinous behavior” of torture.⁵⁹ For these reasons, courts have consistently awarded punitive damages when applicable for TVPA claims.

Substantively, in order to use the TVPA and receive damages under the Act, a potential plaintiff must be able to allege torture or extrajudicial killing. The Torture Victim Protection Act explicitly provides courts with the definition of torture and extrajudicial killing as intended by the Act.⁶⁰ The definition of torture adopted by Congress is identical to the definition found in the Convention Against Torture,⁶¹ namely:

[A]ny act, directed against an individual . . . by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as

51. 28 U.S.C. § 1350(2)(a)(1) (2006).

52. *Id.*

53. STEPHENS, *supra* note 13, at 526.

54. See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 234-37 (2006).

55. STEPHENS, *supra* note 13, at 526.

56. *See id.*

57. *See id.*

58. *Xuncax v. Gramajo*, 886 F. Supp. 162, 199-200 (D. Mass. 1995).

59. *Id.* at 199-200. Although *Gramajo* explicated the justification of punitive damages, it failed to award them under the TVPA because the TVPA was being retroactively applied to a situation that had occurred prior to its passage. The court discussed that retroactively imposing punitive damages may raise constitutional concerns. *Id.* at 200.

60. 28 U.S.C. § 1350(3)(b)(1) (2006).

61. Compare S. REP. NO. 102-249, at 2 (1991), with Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

obtaining from that individual or a third person information
 or a confession, punishing that individual . . . intimidating
 or coercing . . . or for any reason based on discrimination
⁶²

Through this definition, Congress has recognized that, in modern society, torture can take place through a variety of means and for a variety of reasons. Examples of conduct that courts have found sufficient to meet the definition of torture include the following: electrocution in the genital area,⁶³ threats of death to family members,⁶⁴ enslaving populations to work,⁶⁵ physical beatings and assault,⁶⁶ rape and sexual assault,⁶⁷ use of violence to relocate villages,⁶⁸ being stuck with needles and then denied medical care,⁶⁹ the use of electrical prods,⁷⁰ and bombing an entire town in order to protect pipelines.⁷¹ This is not an exhaustive list of all conduct that could possibly constitute torture but rather an overview of some of the more common allegations.

C. THEORIES OF LIABILITY UNDER THE TORTURE VICTIM PROTECTION ACT

In order to discuss corporate liability under the Torture Victim Protection Act, it is helpful to review what types of liability are provided for under the TVPA. It is not only possible to hold those who directly carried out the torturous acts liable, but also those who partnered with those actors.⁷² The TVPA uses several theories of liability in order to achieve its goal of deterring torture,⁷³ including the standard tort theories of joint venture and agency.⁷⁴ Liability extends to superiors who bear responsibility for the actions of their subordinates: “anyone with higher authority who authorized,

62. 28 U.S.C. § 1350(3)(b)(1) (2006).
 63. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996).
 64. *Id.*
 65. *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (9th Cir. 2001).
 66. *Id.*
 67. *Id.*
 68. *Id.*
 69. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 18 (D.C. Cir. 2000), *aff'd*, 35 Fed. App'x. 1 (D.C. Cir. 2002).
 70. *Id.*
 71. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005).
 72. *See* 28 U.S.C. § 1350 (2006).
 73. STEPHENS, *supra* note 13, at 313.
 74. *Id.* at 276-78.

tolerated, or knowingly ignored those acts;”⁷⁵ and “persons who ordered, abetted, or assisted in [the violation].”⁷⁶

The joint theory of liability is most often used against defendants who enter into an agreement with a government in order to extract resources.⁷⁷ “[C]ourts will find [liability under a theory of] joint liability where the parties: (1) intended to form a joint venture; (2) share a common interest in the subject matter of the venture; (3) share the profits and losses of the venture; and (4) have joint control or the joint right of control over the venture.”⁷⁸ It is easy to see how this type of liability, which is allowed under the TVPA, would be applicable to a corporate-government relationship.

Defendants can also be held liable under an agency theory of liability.⁷⁹ In order to prove an agency relationship, the plaintiff would need to show that there was a manifestation by the principal that the agent could act for him, the agent accepted the undertaking, and that both parties understood the principal was in control.⁸⁰ Again, this theory of liability is very relevant in the corporate context. If a corporation gives a government security force permission to do “whatever necessary” to secure an area, such as an oil line or mine, and that security force, an agent of the corporation, engages in torture or extrajudicial killing, the corporation can be liable for those actions.

In addition to the standard concepts of tort liability, Congress authorized three other forms of liability: aiding and abetting, higher authority, and command responsibility.⁸¹ Aiding and abetting liability, although not explicitly acknowledged in the statute, is inferred from the legislative history.⁸² The TVPA provides liability for those who “subject” another to torture.⁸³ “Subjected” has been analyzed to mean “to cause someone ‘to undergo the action of something specified . . .’”⁸⁴ Therefore, courts have held that “individuals who ‘cause someone to undergo’ torture or extrajudicial

75. S. REP. NO. 102-249, at 9 (1991).

76. *Id.* at 8; *see also* Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996) (holding that aiding and abetting liability was proper under the TVPA); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

77. STEPHENS, *supra* note 13, at 278.

78. *Id.* (citing W. KEETON, PROSSER AND KEETON ON TORTS § 72, at 518 (5th ed. 1984)); *Mujica*, 381 F. Supp. 2d at 1164.

79. *See id.* at 276.

80. STEPHENS, *supra* note 13, at 276.

81. S. REP. NO. 102-249, at 8-9 (1991).

82. STEPHENS, *supra* note 13, at 271.

83. *Id.*

84. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386(KWM), 2002 U.S. Dist. LEXIS 3293, at *50 (S.D.N.Y. Feb. 22, 2002) (quoting the definition of “subject” in RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1999)), *rev’d sub nom.*, *Kiobel v. Millson*, 592 F.3d 78 (2d Cir. 2010).

killing, as well as those who actually carry out the deed, could be held liable under the TVPA.”⁸⁵ Under this theory of liability, a corporation who caused someone to be tortured could be held liable.

Higher authority and command responsibility liability are similar concepts of liability recognized by the TVPA. In order to prove these types of liability, a plaintiff must show that there was a superior-subordinate relationship between the commander and perpetrator, the commander knew or should have known that the subordinates had committed or were going to commit the acts, and that the commander failed to prevent or punish the acts.⁸⁶ Although the wording of the requirements seems to apply only to military leaders, courts have held that command responsibility applies to civilian and military leaders alike, focusing “not [on] the civilian status of the accused, but of the degree of authority . . . exercised over . . . subordinates.”⁸⁷

D. CORPORATIONS

In order to understand the reasoning behind courts’ decisions on whether to apply the Torture Victim Protection Act to corporations, it is necessary to briefly examine what constitutes a corporation. A corporation is defined as “[a]n entity (usu[ally] a business) having authority under law to act as a single person distinct from the shareholders who own it”⁸⁸ To become a corporation in the United States, a business first must apply in the state where it would like to be incorporated. States require filing of articles of incorporation, proof of bylaws governing the corporation, and may also require out-of-state corporations to register in their state before conducting business in the state.⁸⁹ By completing this process, a corporation is submitting itself to the jurisdiction of the particular state and the United States. The law treats a corporation as a legal “person” who has standing to sue and to be sued under the law, distinct from its shareholders or owners.⁹⁰

Corporations brought as defendants in human rights cases, such as cases brought under the Torture Victim Protection Act, tend to be multinational or transnational corporations (MNC). A multinational corporation or transnational corporation is defined as an enterprise

85. *Id.*

86. *Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002).

87. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1331 (N.D. Cal. 2004) (bringing suit against the mayor and governor) (quoting *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment (May 21, 1999)).

88. BLACK’S LAW DICTIONARY 391 (9th ed. 2009).

89. *See* CORNELL UNIV. LAW SCH. LEGAL INFO. INST., *Corporations*, <http://topics.law.cornell.edu/wex/corporations> (last visited Jan. 09, 2010).

90. *See* 1 U.S.C. § 1 (2006).

[c]omprising in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.⁹¹

An MNC usually has its factories in developing countries and then has a centralized head office in its home country where it coordinates global management.⁹²

A corporation is more difficult to regulate because, although at one time it resided in and did business in the country where it was incorporated, today, a corporation can be found conducting business simultaneously throughout the world.⁹³ Multinational companies have as much, and sometimes more, power, influence, and money, as the governments in the state in which they reside, but do not have the public law responsibilities of statehood.⁹⁴ Many multinational corporations have budgets exceeding those of the countries in which they are dwelling, which can put the corporation in a position of power over the government, which often leaves the citizens unprotected since the host governments are eager to please the corporation.⁹⁵ It is within this context that we begin to analyze whether or not corporations are regulated under the Torture Victim Protection Act and what bearing that may have upon corporate behavior.

III. THE CIRCUIT SPLIT

A. THE ELEVENTH CIRCUIT

Since 2003, district courts in the Eleventh Circuit have consistently held that “individual” in the Torture Victim Protection Act encompasses corporations as potential defendants.⁹⁶ The Eleventh Circuit followed its

91. U.N. ESCOR, Code of Conduct on Transnational Corporations, 11th Sess., Provisional Agenda Item 2, at 4, U.N. Doc. E/1988/39/Add.1 (Feb. 1, 1988).

92. *Id.*

93. Binnie, *supra* note 6.

94. *See id.*

95. *Id.*

96. *In re Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *aff'd in part, rev'd in part*, 578 F.3d 1252 (11th Cir. 2009); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

district courts when it initially affirmed this holding in 2005.⁹⁷ The interpretation of “individual” was first presented to a district court in the Eleventh Circuit when it considered *Sinaltrainal v. Coca-Cola Co.*, in which a paramilitary unit working for a Coca-Cola bottling company in Columbia murdered a plant worker, Isidro Gil, for union activities.⁹⁸ The paramilitary group then threatened the rest of the workers with death if they did not resign from the union.⁹⁹ The union and the estate of Isidro Gil brought suit against Coca-Cola and the bottling company through the Torture Victim Protection Act.¹⁰⁰ Coca-Cola argued that it could not be held liable under the TVPA because the TVPA did not apply to corporations.¹⁰¹ The *Sinaltrainal* court rejected this argument and instead relied upon the legislative history of the Act, which did not reveal a desire to exempt corporations from liability.¹⁰² The court also looked at the word “individual” in other areas of the law and found it was interpreted as applicable to corporations.¹⁰³ The court then examined the relationship between the TVPA and the ATCA and found that because the ATCA had been interpreted as applying to corporations, and Congress based the TVPA on the ATCA, it was reasonable to conclude that the TVPA was also meant to apply to corporations.¹⁰⁴

This holding was followed by *Estate of Rodriguez v. Drummond Co.*, in which the district court held Drummond Mining Company liable as an individual under the TVPA.¹⁰⁵ In this case, the two leaders of the union at the mining company were murdered by Colombian paramilitaries employed by Drummond Mining Company after the paramilitaries told the workers that they were there to “settle a dispute [the workers] had with Drummond.”¹⁰⁶ Following their deaths, a third worker assumed leadership of the union and was removed from a bus on his way home from work and killed by paramilitaries. All three men were involved in negotiations between the union and Drummond.¹⁰⁷ The court relied upon the reasoning in *Sinaltrain-*

97. *Aldana*, 416 F.3d 1242; *see also* *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

98. *Sinaltrainal*, 256 F. Supp. 2d at 1350.

99. *Id.* at 1350.

100. *Id.* at 1349.

101. *Id.* at 1358.

102. *Id.*

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

104. *Id.* at 1359.

105. *In re Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

106. *Rodriguez*, 256 F. Supp. 2d at 1254.

107. *Id.*

al and held that the TVPA was applicable to Drummond as a corporation for having a symbiotic relationship with the paramilitaries.¹⁰⁸

The Eleventh Circuit affirmed the *Rodriquez* court's holding in the companion case, *Romero v. Drummond*.¹⁰⁹ *Romero* arose out of the same facts as *Rodriquez*, and the Eleventh Circuit affirmed the district court's interpretation of the Torture Victim Protection Act presented in *Rodriquez*.¹¹⁰ The court held that "[u]nder the law of this Circuit, the Torture Act allows suits against corporate defendants."¹¹¹

In *Aldana v. Del Monte*, union leaders at Del Monte were kidnapped in Guatemala at gunpoint by a security force employed by Del Monte and then hooded and told they were going to be killed.¹¹² The security force members threatened to cut off the leaders' genitals, threatened to burn them alive, took their photos and told them that they wanted a clear photo of the men before they killed them, physically assaulted them, and hit them with guns.¹¹³ The court vacated an earlier motion to dismiss for failure to state a claim and affirmed the prior decisions of the district courts to hold corporate defendants liable under the TVPA.¹¹⁴ In doing so, the court applied the Torture Victim Protection Act to Del Monte as a corporate defendant.¹¹⁵ The Eleventh Circuit's holding was appealed to the Supreme Court of the United States, but certiorari was denied.¹¹⁶

B. THE FIFTH, NINTH, AND D.C. CIRCUITS

The Fifth, Ninth, and D.C. Circuits have held that the word "individual" in the Torture Victim Protection Act does not apply to corporations as potential defendants.¹¹⁷ The first case to hold that the TVPA was not applicable to corporations was *Beanal v. Freeport-McMoRan*, in which a tribal leader from West Papua sued the Freeport-McMoRan mining company for human rights abuses, including torture.¹¹⁸ The mining company employed

108. *Id.* at 1266-67.

109. *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

110. *See id.*

111. *Id.* at 1315. Before this case had worked its way up to the appellate level, however, *Aldana v. Del Monte* had been decided and applied "individual" to corporations. 416 F.3d 1242 (11th Cir. 2005).

112. 416 F.3d 1242 (11th Cir. 2005).

113. *Id.* at 1260-61.

114. *Id.*

115. *Id.* at 1265.

116. 549 U.S. 1032 (2006) (denying certiorari).

117. *See, e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), *remanded by*, 564 F.3d 1190 (9th Cir. 2009); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000), *aff'd*, 35 Fed. App'x. 1 (D.C. Cir. 2002); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

118. *Beanal*, 969 F. Supp. at 368-69.

security forces who were accused of: kicking villagers with military boots; beating them with fists, sticks, rifle butts, and stones; starving them; making the villagers stand with heavy weights on their heads; shackling their thumbs, wrists, and legs; forcing victims to stand in containers up to their knees in water filled with human feces; and detaining indigenous people while taping their eyes shut, tying their thumbs, and beating them.¹¹⁹ Although the court acknowledged that the behavior constituted torture, it held that the TVPA did not provide a remedy against a corporation.¹²⁰

The Fifth Circuit held in *Beanal* that the plaintiffs had failed to state a claim under the TVPA because “individual” could not be applied to corporations.¹²¹ In coming to this conclusion, the court relied on the plain meaning rule, which states that absent any contrary definition, a court must assume that Congress meant the ordinary, contemporary meaning of the words in the statute.¹²² The court determined that the word “individual” did not apply to corporations in its ordinary usage and therefore did not apply to corporations in the context of the TVPA.¹²³ The court also noted that although Congress did not have the clear intent to exclude corporations, it was not entirely inconsistent with the legislative history to decide not to apply the Act to corporations.¹²⁴

The Ninth Circuit adopted the position of the Fifth Circuit when it considered *Mujica v. Occidental Petroleum Corp.*, in which Columbian citizens brought suit against Occidental Petroleum Company and its security force for a bombing that occurred in a village along one of the company’s pipelines.¹²⁵ Concerned about security along the pipeline, security forces dropped cluster bombs on the town of Santo Domingo and then shot at civilians who tried to escape.¹²⁶ Seventeen civilians, including six children, were killed, and twenty-five more were seriously wounded.¹²⁷

The Ninth Circuit, however, expanded upon the Fifth Circuit’s reasoning when it determined that the TVPA could not be applied to corporations in *Mujica*.¹²⁸ The court’s discussion went beyond the plain meaning rule and decided that because a corporation could not be tortured, it would be inconsistent to find that a corporation could be a torturer.¹²⁹ The court rea-

119. *Id.* at 369.

120. *Id.* at 382.

121. *Id.*

122. *Id.*

123. *Beanal*, 969 F. Supp. at 382.

124. *Id.*

125. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005), *aff’d*, 564 F.3d 1190 (9th Cir. 2009).

126. *Id.* at 1168.

127. *Id.*

128. *See id.*

129. *Id.* at 1176.

soned that the TVPA also uses the word individual when it describes torture as being against an individual and corporations cannot be tortured.¹³⁰ The word “individual” must therefore exclude corporations at each place in the Act in order to be consistent and avoid “absurd result[s].”¹³¹ This interpretation was upheld by the D.C. Circuit without any further explanation.¹³²

C. THE SECOND CIRCUIT

The Second Circuit has not taken a clear position on the interpretation of “individual” in the TVPA, although it has been confronted with the issue. In *Khulumani v. National Bank Ltd.*, the court held that the plaintiffs had failed to sufficiently plead facts to connect the defendant corporation with the government in order to meet the requirement of acting under the color of law.¹³³ The court spent time explicating aiding and abetting liability under the TVPA but found insufficient facts to support aiding and abetting liability and did not proceed to the interpretation of “individual.”¹³⁴

Prior to this decision, district courts in the Second Circuit had held that only individuals, and not corporations, could be sued under the TVPA.¹³⁵ The Second Circuit did not cite to or rely upon the holding of any district court cases in making its determination in *Khulumani*.¹³⁶ Although the Second Circuit has not explicitly recognized that corporations fall under the TVPA, it is reasonable to infer that by discussing the merits of the claim, it has, at least for the moment, left the door open for claims to be brought against corporations as long as liability can be sufficiently plead. It is important to note, however, that as of September 2010, the Second Circuit has held that corporations are not liable under the Alien Torts Claim Act.¹³⁷

130. *Mujica*, 381 F. Supp. 2d at 1176.

131. *Id.*

132. *See Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1085 (N.D. Cal. 2008) (holding corporations could not be sued under the TVPA after Nigerian citizens sued Chevron for torture and killings on an oil platform when villagers protested); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005) (holding that “individual” did not apply to corporations because of the plain meaning rule when plaintiffs sued Mobil for torture, sexual violence, extrajudicial killing, and genocide in conjunction with building a new pipeline in Indonesia).

133. *See Khulumani v. Nat. Bank Ltd.*, 504 F.3d 254, 317 (2d Cir. 2007).

134. *Id.* at 318.

135. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008).

136. *See Khulumani*, 504 F.3d 254.

137. *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800, 06-4876, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).

IV. THE TORTURE VICTIM PROTECTION ACT IS PROPERLY INTERPRETED TO INCLUDE CORPORATIONS

The Torture Victim Protection Act should be interpreted as applicable to corporations as potential defendants. The Eleventh Circuit properly interpreted the TVPA as such, and its interpretation should be followed by the other circuits.¹³⁸ Applying the TVPA to corporations is supported by the legislative history of the statute, case precedent, and policy goals.¹³⁹

A. LEGISLATIVE HISTORY

The Torture Victim Protection Act should be interpreted to include corporations as potential defendants in order to be consistent with the legislative history of the statute.¹⁴⁰ Although the legislative history never explicitly discusses corporations, it provides insight into the intent of the legislators and should be properly viewed as persuasive evidence in determining the proper interpretation.¹⁴¹ The legislative history, including reports from both the House of Representatives and the Senate, states a desire to establish a clear and modern basis for a cause of action for torture, a goal of deterring future actions by creating judicial protection, and did not exclude corporations from liability.¹⁴² These three elements provide the basis to include corporations within the scope of the TVPA.

1. *Clear and Modern Basis*

Congress passed the Torture Victim Protection Act in order to establish a clear and modern basis for bringing a cause of action for torture in the United States.¹⁴³ Before the creation of the TVPA, the only basis for bringing a civil suit in the United States against foreign defendants was through the Alien Torts Claim Act, originally passed in 1789.¹⁴⁴ The Senate wanted to ensure that the ATCA could not be interpreted in such a way that would take away plaintiffs' ability to sue and seek compensation and therefore passed the TVPA to clarify the United States' position against torture and

138. See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009).

139. See *In re Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); Ramasastry, *supra* note 5.

140. H.R. REP. NO. 102-367 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84; S. REP. NO. 102-249 (1991).

141. See, e.g., *Steadman v. SEC*, 450 U.S. 91 (1981) (discussing the use of legislative history as persuasive material for interpreting statutory law).

142. See S. REP. NO. 102-249; H.R. REP. NO. 102-367.

143. See H.R. REP. NO. 102-367, at 87.

144. *Id.*; S. REP. NO. 102-249, at 4.

extrajudicial killing.¹⁴⁵ In desiring to create a modern basis for a claim against torture, Congress looked to the destructive effects of torture as a motivation for wanting to eradicate it.¹⁴⁶ Senator Kennedy expanded, saying that “[t]here are few actions so dehumanizing as torture. Victims bear the physical and psychological scars of their experience for life.”¹⁴⁷

Congress acknowledged that although virtually all governments have outlawed torture, in modern society, torture many times does not occur by direct government participation, but “many of the world’s governments [indirectly] engage in or tolerate torture of their citizens.”¹⁴⁸ The type of torture that is “tolerated” by governments is often for the benefit of corporations operating in those countries.¹⁴⁹ As governments compete against one another to have corporations reside in their states, and thus to receive the economic benefits that the corporations can bring, governments have little incentive to regulate corporations’ behavior in their country.¹⁵⁰

By recognizing the need for a modern statute that allows claims for torture committed by nongovernment actors, or indirectly by governments, Congress recognized the changing world of torture and corruption.¹⁵¹ If corporations were exempt from this modern action against torture, this type of modern torture that Congress sought to prevent would not be deterred. Congress was aware that the torture they were trying to eradicate was not always officially sanctioned by governments but rather tolerated by or sometimes clandestinely engaged in by governments.¹⁵² Corporations can engage in torture by funding government activities, such as security forces; partnering with repressive governments in order to get access to natural resources; or simply by taking advantage of the governments’ policies without directly participating, such as being supplied forced labor.¹⁵³

The Senate report also states that the TVPA was passed to make the same remedies that were available to foreigners under the ATCA available to citizens through the TVPA. Congress stated in the legislative history that “while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.”¹⁵⁴ Given that aliens can bring suits against corpora-

145. *Id.*

146. *See id.*

147. S. REP. NO. 102-249, at 3 (*quoting Torture Victim Protection Act: Hearing before the Subcomm. On Foreign Relations (Jun 22, 1990) (statement of Sen. Kennedy, Member, S. Comm. On Foreign Relations)*).

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

149. *See Binnie, supra note 6.*

150. *Id.*

151. *See S. REP. NO. 102-249, at 3.*

152. *Id.*

153. Ramasastry, *supra note 5, at 93.*

154. S. REP. NO. 102-249, at 5.

tions under the ATCA, it would be foolish to prohibit U.S. citizens from recovering against corporations under the TVPA when the statute was passed to give U.S. citizens equal remedy.

The new modern basis for bringing a suit stated that a purpose of the TVPA was to permit suits against those who ordered, abetted, or assisted in torture.¹⁵⁵ Holding corporations responsible for their participation in torture, whether through direct participation or by ordering, abetting, or assisting in torture, recognizes the modern means through which torture is occurring and fulfills one of the Act's goals of creating a modern basis to recover from and prevent such torture.¹⁵⁶

2. *Judicial Protection and Deterrence*

By creating a modern basis for bringing a torture claim and thus increasing the judicial protection available for those who are the victims of flagrant human rights abuses—specifically torture and extrajudicial killing—Congress has taken a substantial step towards achieving its goal of deterring torture.¹⁵⁷ Congress recognized that “[j]udicial protection[s] against flagrant human rights violations [are] often least effective in those countries where such abuses are most prevalent.”¹⁵⁸ Congress passed the Torture Victim Protection Act in response to this phenomenon.¹⁵⁹ Congress also noted, “A state that practices torture and summary execution is not one that adheres to the rule of law.”¹⁶⁰ A state's failure to adhere to the rule of law (or exercise the rule of law over a corporation) is called a “governance gap,” and this is precisely the gap that Congress was trying to fill.¹⁶¹ Multi-national corporations are not being held accountable in the states where they are incorporated for their behavior abroad, nor are they being held accountable in the states where they operate, due to the governance gaps and the States' inability to adhere to the rule of law.¹⁶²

In providing judicial protection to citizens of other states whose governments are failing to provide them protection, Congress was attempting to fill a large gap in the enforcement of the universal consensus that the rule of law condemns torture.¹⁶³ These countries where human rights violations are able to occur are the same countries where governance gaps allow corpora-

155. *Id.* at 8.

156. *See* Ramasastry, *supra* note 5, at 93.

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

158. *Id.*

159. *See id.*

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

161. *See* Binnie, *supra* note 6.

162. *See id.*

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

tions to mistreat the population without fear of retribution from the host country.¹⁶⁴ If corporations were to be exempt from liability for torture and extrajudicial killing under the TVPA, the TVPA would fail to provide the judicial protection for victims that Congress explicitly sought to protect.¹⁶⁵ Beyond the failure to provide judicial protection for victims of torture, failing to apply the TVPA to corporations also does nothing to deter future torture.

The goal of judicial protection and compensation is not only to try to make the injured party whole, but also to hold the offending party accountable for the harm, which will in turn deter potential future offenders.¹⁶⁶ If those who are ordering, abetting, or assisting in torture are not held accountable, and the victims are then not provided with judicial protection or compensation, there will be no deterrent effect on the acts of future offenders. This outcome is not consistent with Congress's purpose in passing the TVPA, which was to provide judicial protection to victims of torture.¹⁶⁷ As Congress itself stated, "These universal [prohibitions of torture] provide little comfort, however, to the thousands of victims of torture and summary executions around the world."¹⁶⁸ By interpreting the TVPA to exclude corporations, the TVPA itself would provide little comfort to the thousands of victims of torture at the hands of corporations around the world and would be inconsistent with providing judicial protection to victims of torture.

3. *Corporations are not Excluded in the Act*

Beyond the explicit statements made in the legislative history that provide insight into why corporations should be included as potential defendants,¹⁶⁹ nowhere in the legislative history or the text of the Act itself is it ever stated that corporations are to be excluded.¹⁷⁰ The legislative history does speak at length about why the word "individual" was chosen.¹⁷¹ The legislative history explicitly states that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states . . . cannot be sued under this bill under any circumstances."¹⁷² This definition was written to exclude foreign states from being sued, but not to exclude corporations. The legisla-

164. Binnie, *supra* note 6.

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

166. See 3 MARK P. ROBINSON & SHARON J. ARKIN, LITIGATING TORTS CASES §28:22 (2009).

167. See S. REP. NO. 102-249, at 3.

168. *Id.*

169. See *id.* at 8.

170. See *Id.*; 28 U.S.C. § 1350 (1992).

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

172. See *id.*

tive history also discusses excluding the American military, again explicitly delineating those who are to be excluded. This demonstrates that Congress was perfectly capable of stating who was to be excluded from the Act and did so in its discussion of foreign states, but did not exempt corporations.¹⁷³ Congress also stated that it was creating an “unambiguous” cause of action,¹⁷⁴ one which specifically excluded those actors who were to be excluded and did not exclude those who were not to be excluded.¹⁷⁵

In refusing to explicitly exclude corporations, Congress used terms in the Act that implicitly include corporations.¹⁷⁶ For example, the law is to create a cause of action against anyone who “subjects any individual to torture or extrajudicial killing.”¹⁷⁷ Corporations are capable of “subjecting” an individual to torture, as seen in *Unocal*, when a corporation employed Myanmar military forces to forcibly obtain property and then guard that property for a new oil pipeline.¹⁷⁸ The Myanmar military used physical assault, rape, and torture in carrying out their job, which the corporation knew about as emails were presented in which corporate officers discussed the best way to avoid bad publicity in conjunction with the military’s behavior.¹⁷⁹ The aiding and abetting liability provided in the legislative history of the Act makes it possible to see how a corporation, such as Unocal, could be found to be within the scope of the TVPA.¹⁸⁰ Furthermore, while not using the word “individual” in the statute and legislative history, Congress chose words that encompass corporations, such as “torturers,” “human rights oppressors,” and “human rights violators.”¹⁸¹ This wording shows no intent or attempt to exclude corporations from liability.

Since Congress did not explicitly exclude corporations in the legislative history or the Act, it is helpful to look at the case in the legislative history that Congress was explicitly relying on in drafting the statute, *Filártiga v. Pena-Irala*.¹⁸² The decision in *Filártiga* came down in 1980 and held that torture violated the laws of nations.¹⁸³ Following the *Filártiga* decision but before the enactment of the TVPA in 1991, several cases were brought un-

173. *Id.*; see also *Sinaltrainal*, 256 F. Supp. 2d at 1359 (holding that if Congress had wanted to exempt corporations, then it would have done so explicitly).

174. S. REP. NO. 102-249, at 4.

175. See *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003).

176. See 28 U.S.C. § 1350 (1992).

177. 28 U.S.C. § 1350 (1992).

178. See *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

179. *Unocal*, 395 F.3d at 939.

180. S. REP. NO. 102-249, at 8 (1991).

181. See S. REP. NO. 102-249; 135 CONG. REC. 6,423 (1989).

182. See S. REP. NO. 102-249; see also *Filártiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

183. *Filártiga*, 630 F.2d at 878.

der the Alien Tort Claims Act against corporations.¹⁸⁴ It is reasonable to conclude that Congress would have examined the precedent that *Filártiga*, a case they relied upon to make new law, had set before passing a new law. If in examining *Filártiga*'s progeny, Congress had been dissatisfied with its application to corporations, it would have explicitly created an exception, like it did for foreign states. It did not create such exception.

The legislative history of the Torture Victim Protection Act was properly considered and interpreted when the Eleventh Circuit determined that the TVPA can be applied to corporations.¹⁸⁵ The legislative history demonstrates Congress's intent to create a modern basis for bringing suit, provides a source of judicial protection and deterrence, and its purposefulness in not excluding corporations from the Act.¹⁸⁶ Each of these three goals supports including corporations within the scope of "individuals."

B. CASE PRECEDENT

Case precedent is relevant in two ways when considering the proper interpretation of the Torture Victim Protection Act. First, cases interpreting laws in other contexts regarding "individual" can provide clarification of the proper interpretation of "individual" in the TVPA. Further, cases interpreting the Alien Tort Claims Act, both before and after the TVPA passed, provide insight into the TVPA because it was written to codify the holding of an ATCA case.

1. Cases Interpreting "Individual"

Case law that is not progeny of *Filártiga* or interpreting the Torture Victim Protection Act is helpful to determine the proper definition of the word "individual." Courts have relied upon case law to interpret "individual" to include corporations and to exclude corporations. Courts throughout American jurisprudence have interpreted "individual" in varying ways with respect to corporations.¹⁸⁷ As a result, the word "individual" itself is not determinative of whether corporations are within the scope of the TVPA. It should, though, be very persuasive that the Supreme Court has held "indi-

184. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Tex. 1989).

185. See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009).

186. See H.R. REP. NO. 102-367 (1991); S. REP. NO. 102-249.

187. See, e.g., *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (holding that "individual" is applicable to corporations); *In re Goodman*, 991 F.2d 613, 619 (Cal. 1993) (holding that "individual" cannot encompass corporations).

vidual” as applicable to corporations in other areas of the law.¹⁸⁸ The argument of this Comment, therefore, does not apply a new definition to “individual,” but rather takes the definition from instances in other areas of the law and applies it to the TVPA.

As far back as 1880, long before the passing of the Torture Victim Protection Act, “individual” was interpreted in contract law to apply to corporations.¹⁸⁹ The Ohio Supreme Court held that “[t]he word ‘individual’ is here used in the sense of person, and embraces artificial or corporate persons as well as natural.”¹⁹⁰ This early interpretation supports the proposition that Congress knew that “individual” could be applied to corporations, and chose the word “individual” with that knowledge.

In 1985, also prior to the passing of the Torture Victim Protection Act, the Fourth Circuit held that although Congress used the word “individual” when drafting the Bankruptcy Code, “individual” was applicable to corporations.¹⁹¹ In coming to this determination, the court looked at the legislative history and statute and found that “[a] reading of that subsection suggests no basis for such a narrow construction.”¹⁹² This construction was affirmed by several cases, including a case in the Third Circuit in 1990, prior to the passing of the TVPA.¹⁹³ The Third Circuit held that “[a]lthough Section 362(h) refers to an individual, the section has uniformly been held to be applicable to a corporate debtor.”¹⁹⁴ These cases demonstrate that “individual” can be applicable to corporations and was interpreted as such prior to the passing of the TVPA.

The Supreme Court affirmed that “individual” may include corporations when it held that “individual” is capable of having broad application, including corporations.¹⁹⁵ *United States v. Clinton* involved the interpretation of a congressional statute that used the word “individual” to grant standing to challenge the statute. The Court held that Congress intended to use “individual” in a broad sense, such as synonymous with “person,” a word that encompasses corporations.¹⁹⁶ The Court noted that “Congress undoubtedly intended the word ‘individual’ to be construed as synonymous with the word ‘person,’”¹⁹⁷ and “it is clear that Congress meant that word to

188. See *Clinton*, 524 U.S. 417.

189. *State ex rel. Am. Union Tel. Co. v. Bell Tel. Co.*, 36 Ohio St. 296, 310 (1880).

190. *Id.*

191. *In re Tel-A-Communications Consultants, Inc.*, 50 Bank. Rep. 250, 254 (Bankr. D. Conn. 1985).

192. *Id.*

193. See *In re Atl. Bus. & Cmty. Corp.*, 901 F.2d 325, 329 (3d Cir. 1990).

194. *Id.*

195. See *City of N.Y.*, 524 U.S. 417 (1998).

196. *Id.* at 428.

197. *Id.*

be construed broadly to include corporations and other entities.”¹⁹⁸ *Clinton* explicitly holds that the legislative history of an act or statute can affect the interpretation of the words therein, beyond the “plain meaning rule.”¹⁹⁹ As previously discussed, the legislative history of the TVPA supports the interpretation of “individual” as applying to corporations.²⁰⁰

Following *Clinton*, the Ninth Circuit interpreted “individual” to include corporations in the context of criminal law, because the plain meaning of “individual” does not exclude corporations in the context of the criminal code.²⁰¹ The Ninth Circuit relied upon dictionary definitions from both Webster’s Dictionary and Black’s Law Dictionary, which both state that “individual” can include artificial persons, such as corporations.²⁰² The court also examined the context in which “individual” was used and found that it must include corporations to avoid an unjust result.²⁰³ A reliance on this reasoning would lead “individual” to be interpreted as including corporations in the TVPA, both because the Fifth Circuit has held that “individual” does not explicitly exclude corporations, and because the failure to include a corporation as an “individual” would lead to an unjust result, since victims of corporate torture would not receive justice.

Most recently, the Supreme Court considered the potential difference between corporations and “individuals” in *Citizens United v. Federal Election Commission*, a case that interpreted campaign finance law.²⁰⁴ In *Citizens United*, the Supreme Court did not interpret “individual” but determined whether a campaign finance restriction law, which differentiated between “individuals” as singular human beings and “corporations,” was constitutional under the First Amendment.²⁰⁵ The Court held that “[t]he association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not ‘an individual American,’”²⁰⁶ thus rejecting the difference in treatment between an “individual” and a “corporation.” Further, the “text [of the First Amendment] offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals”²⁰⁷ The Court rejected the idea that “individual” is incompatible with

198. *Id.* at 417.

199. *Id.* at 429.

200. *See supra* Part IV.A.

201. *See United States v. Middleton*, 231 F.3d 1207, 1210-11 (9th Cir. 2000).

202. *Id.* at 1210.

203. *Id.* at 1211.

204. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 887 (2010).

205. *See id.*

206. *See id.* at 928.

207. *Id.* at 929.

“corporation.”²⁰⁸ In doing so, the Court’s interpretation did not foreclose the application of “individual” to corporations under the TVPA.

The jurisprudence on the interpretation of “individual” does not concretely support excluding or including corporations.²⁰⁹ As a result, courts are not able to confidently state that in giving “individual” its plain meaning, it does not apply to corporations.²¹⁰ If this were the case, and those circuits were indeed correct, there would not be the mixed interpretation that is found in the case law. Interpreting “individual” to include corporations is not a new concept in American jurisprudence as it has already been done in numerous other areas of the law. Since there is no clear “ordinary usage,” courts must then look to the legislative history, public policy, and other contexts surrounding the statute in order to interpret “individual” in a way that avoids unjust results.²¹¹ In the context of the Torture Victim Protection Act, this would lead courts to interpret “individual” as applicable to corporations.

2. *Cases Interpreting the Alien Tort Claims Act*

The Torture Victim Protection Act was passed to codify the holding of *Filártiga*, a case that was brought under the Alien Torts Claim Act.²¹² As such, in order to determine the scope of the TVPA, it is useful to look at federal cases which interpreted the ATCA and *Filártiga*, that were decided before the TVPA was enacted. Three years before the passing of the TVPA the Fifth Circuit decided *Carmichael v. United Technology Corp.*²¹³ In *Carmichael*, a British national brought suit in Texas against several corporations under the ATCA after being tortured and imprisoned in Saudi Arabia.²¹⁴ The court dismissed the majority of the claims due to insufficient service of process to the corporations under Texas law.²¹⁵ The Fifth Circuit then dismissed the remaining claims against the corporation because the plaintiff failed to plead sufficient facts to establish that the corporation should be held liable for torture or imprisonment under the “aiding and abetting” theory of liability.²¹⁶

208. *See id.*

209. *See, e.g.,* *Clinton v. City of N.Y.*, 524 U.S. 417 (1998); *In re Goodman*, 991 F.2d 613, 619 (9th Cir. 1993).

210. *See, e.g.,* *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005), *aff’d*, 564 F.3d 1190 (9th Cir. 2009) (holding that in applying the word “individual’s” ordinary meaning, it does not include corporations).

211. *See Clinton*, 524 U.S. 417.

212. *See Filártiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

213. *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988).

214. *Id.* at 111.

215. *Id.* at 111-12.

216. *Id.* at 114-15.

It is most important to note, however, that the Fifth Circuit did not hold that corporations were outside of the scope of liability under *Filártiga* or under the ATCA, but instead debated the merits of the claim being brought.²¹⁷ This case was decided years before the TVPA was passed and suggests that a corporation could be a potential defendant in an ATCA case that specifically alleges torture. *Carmichael*, which applied the ATCA to corporations, was part of the *Filártiga* progeny that was codified by Congress in the TVPA.²¹⁸

The Fifth Circuit was confronted with this issue again in *Jones v. Petty Ray Geophysical Geosource*, when a suit was brought to recover for an incident where rebels in Sudan killed a Texas man, Jones, in a mineral exploration operation.²¹⁹ Jones' family brought suit under the ATCA against the country of Sudan and the mining company in charge of the operation.²²⁰ In 1989, the court dismissed the claims against Sudan but allowed the claims against the corporation to proceed.²²¹ Later in the litigation—after the TVPA was passed, but not based on the TVPA—the claims against the corporation were dismissed for a failure to allege sufficient causation and lack of jurisdiction.²²² However, once again, the court implicitly held in a post-*Filártiga*, pre-TVPA case that claims of torture and extrajudicial killing were actionable against corporate defendants.²²³ These cases provide two examples of actions brought against corporations before the TVPA was passed and support the Eleventh Circuit's interpretation of the TVPA as applicable to corporations.

Given the legislative history of the TVPA, which states that Congress sought to provide the same remedies that are available to foreign citizens under the ATCA to American citizens through the TVPA,²²⁴ it is persuasive to look at Alien Tort Claim Act cases that were adjudicated after the passing of the Torture Victim Protection Act. By reviewing how those cases treated corporations, it will provide insight into what would be an appropriate reciprocal approach under the TVPA for American citizens.

In *Mujica v. Occidental Petroleum Corp.*, the Ninth Circuit dismissed the plaintiffs' claims under the TVPA against Occidental Petroleum Com-

217. *See id.* at 109.

218. *See Carmichael*, 835 F.2d at 109.

219. *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Tex. 1989).

220. *Id.* at 344.

221. *Id.* at 349.

222. The court dismissed for lack of jurisdiction because the plaintiff was an American, and the ATCA applies only to aliens. *Jones v. Petty Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992). The TVPA remedied this situation by providing relief for United States citizens. *See* 28 U.S.C. § 1350 (1992).

223. *See Jones*, 954 F.2d 1061.

224. *See* S. REP. No. 102-249, at 5 (1991).

pany for injuries and deaths caused by the bombing of an entire Colombian town along a pipeline.²²⁵ In the same decision, however, the court upheld the plaintiffs' claims against the corporation under the ATCA.²²⁶ By this logic, an American injured or killed in the bombing would not be able to file suit against the corporation because Americans can not recover under the ATCA, only the TVPA, but a Colombian injured or killed in the bombing can recover under the ATCA. This leads to absurd results, especially considering the TVPA's goal of providing the same protections to Americans that are available to foreign citizens.²²⁷

In *Wiwa v. Dutch Petroleum*,²²⁸ Nigerian plaintiffs who protested the building of a new oil pipeline were raped, beaten, and tortured.²²⁹ These actions culminated with the mock trial of Ken Wiwa and his execution at the behest of Dutch Petroleum and Shell Oil.²³⁰ The court denied the defendants' motion to dismiss and did not question whether the corporations could be sued under the ATCA.²³¹ After denying the defendants' motion to dismiss, Shell finally settled the case in exchange for the plaintiffs dismissing their claims.²³² As evident again, the application of the logic of those circuits that deem "individual" as not applying to corporations leads to absurd results. If Wiwa had been an American protesting in Nigeria, he would have been unable to recover as a plaintiff under the ATCA because it is limited to foreign plaintiffs. Yet, this American plaintiff also would not be able to recover under the TVPA because the instigator was a corporation. This result is directly opposed to congressional intent.²³³

Until September of 2010, no claim filed under the ATCA had ever been dismissed simply because the defendant was a corporation. The interplay between the ATCA and the TVPA leads to nonsensical results if "individual" does not encompass corporations under the TVPA as well.²³⁴ In

225. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005).

226. *Id.* at 1183.

227. S. REP. NO. 102-249, at 5.

228. *Wiwa v. Dutch Petroleum*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009).

229. Complaint at 2, *Wiwa v. Dutch Petroleum*, No. 96 Civ. 8386(KWM), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

230. *Id.*

231. See *Wiwa*, 626 F. Supp. 2d 377, 386-88 (discussing claims against the corporations without discussing whether corporations can be sued).

232. *Shell Settles Wiwa Case with Humanitarian Gesture*, Aug. 8, 2009, http://www.shell.com/home/content/media/news_and_media_releases/archive/2009/shell_settlement_wiwa_case_08062009.html (last visited Sept. 30, 2010).

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

234. See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings as to Plaintiffs' Claims under the Torture Victim Protection Act, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (No. C99-02506 SI), 2006 WL 1050618.

September 2010, however, the Second Circuit dismissed an ATCA claim where Royal Dutch Petroleum was named as a defendant.²³⁵ The court held that because claims under the Alien Tort Claims Act are to be determined by customary norms of international law, and customary international law does not appear to hold corporations liable as an actor, a corporation cannot be sued under the ATCA.²³⁶ This analysis, regardless of its potential accuracy or inaccuracy, is moot when applied to the TVPA because the TVPA requires “color of law.” This “color of law” requirement moves the action from a purely private corporate act, to that of a state act, which is an area unquestionably regulated by international law.²³⁷ In examining the case law, no precedent refuses to include corporations within the term “individual,” while there is substantial precedent, including cases examining the ATCA, which suggests that it should.

C. POLICY RATIONALE

“Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”²³⁸

- Edward Thurlow, 1st Baron Thurlow (18th Century)

Because there lacks domestic and international laws that specifically govern corporations, a governance gap has opened that allows corporations to act without legal accountability. The existence of this governance gap harms those in the weakest positions—citizens of developing countries.²³⁹ There are strong policy reasons for home states to encourage corporate cultures to be respectful of human rights extraterritorially. Additionally, home states have a responsibility to discourage abuses and to hold corporations accountable for human rights abuse abroad.²⁴⁰ In order for states to successfully fulfill their duty to protect against the abuse of nonstate third parties, victims need to have greater access to judicial remedies.²⁴¹ The Torture Victim Protection Act would fill this gap if properly interpreted to include corporations within its scope of liability. In doing so, the Act also would represent an attempt by a home state, the United States, to assert jurisdiction over MNCs and influence their behavior abroad.²⁴² Furthermore, the

235. *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800, 06-4876, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).

236. *See id.* at *2.

237. *See infra* Part IV.C.2.

238. JOHN POYNTER, *LITERARY EXTRACTS* 2 (1st vol. 1844).

239. *See* Binnie, *supra* note 6.

240. Sarah Altschuller & Amy Lehr, *Corporate Social Responsibility*, 43 INT’L LAW. 577, 578 (2009).

241. *Id.* at 579.

242. Ramasastry, *supra* note 5, at 92.

United States' obligation under preexisting international laws requires that the United States provide a judicial forum for victims of torture.

1. *Filling the Governance Gaps*

Corporations, and the ethical and legal dilemmas that accompany them, are not a new problem confronting society. The problem, however, has changed since communication technology has improved and corporations no longer reside entirely under the regulatory purview of one country. Because corporations now operate in multiple countries, it is unclear which country has the authority to regulate their behavior—this creates governance gaps.²⁴³ Many corporations have annual income exceeding that of the countries in which they are located, such as Exxon, BP, and Royal Dutch Shell.²⁴⁴ Corporations also own more than eighty percent of the world's financial investment, which puts them in a strong position of power.²⁴⁵ In order to address corporate abuse and fill the gaps in governance, host countries need to embrace their state duty to protect against human rights abuses committed by corporate third parties. In order to bolster this responsibility, victims need more effective access to remedies.²⁴⁶

Imposing a state duty to protect against human rights violations by third parties in host countries may seem easy; however, forcing the host countries to enforce that legislation is challenging. Many of the decisions made by a multinational corporation regarding strategy in a developing country are not made within that country, but rather are made in the boardrooms in the corporation's home country.²⁴⁷ The host government is then presented with an already formulated plan rather than being involved at the collaboration process, and is faced with a dilemma between protecting its citizens' health and welfare and acquiescing to the interests of the MNC.²⁴⁸ Often times when a host government tries to negotiate with the MNC about

243. See Binnie, *supra* note 6.

244. Rhett A. Butler, *Corporations Among Largest Global Entities*, July 2005, http://news.mongabay.com/2005/0718-worlds_largest.html (last visited February 5, 2010) (according to a 2007 update, only Exxon remains in the top thirty of global entities ranked by wealth).

245. See SOC'Y FOR APPLIED ANTHROPOLOGY, *WHO PAYS THE PRICE? THE SOCIOLOGICAL CONTEXT OF ENVIRONMENTAL CRISIS* 206 (Barbara Rose Johnston ed., Island Press 1994).

246. John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, § 23, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2005).

247. Scott Holwick, *Transnational Corporate Behavior and its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 192 (2000).

248. See *id.*

workers' rights, environmental impact, or taxes, the host government operates under the ever-present implicit threat that the MNC will seek out a more favorable country for its operation.²⁴⁹ This practice is one example of how host countries fail in attempting to regulate MNCs' behavior.

The interrelatedness of corporate desires and host governments' ability to regulate is complex, especially in extractive industries, such as mining for oil or fossil fuels.²⁵⁰ An example of this allegedly occurred in Papua New Guinea when Rio Tinto asked for government forces to protect its mining site.²⁵¹ The presence of government military forces resulted in a secessionist movement, started a civil war that lasted several years, and ended with a military blockade that cut off citizens from medical care and food.²⁵² For a poor country such as Papua New Guinea, the lucrative business of hosting a MNC often takes precedence over the protection of citizens. Although this is not the ideal situation, and typically host states should bear the primary responsibility, it is the current state of relations. As a result, reliance on host governments to protect their own citizens has not provided sufficient protection.²⁵³

A more realistic way of protecting citizens from corporate abuse is to increase the availability of judicial remedies for such abuse.²⁵⁴ "States should strengthen [their ability] to hear complaints and enforce remedies against all corporations . . ." ²⁵⁵ States have the responsibility to "address obstacles to access to justice, including for foreign plaintiffs—especially where alleged abuses reach the level of widespread and systematic human rights violations."²⁵⁶ The United States has the responsibility to provide judicial remedy for abuses that occur at the hands of corporations who are based or conduct business in the United States, and already has the appropriate legislation in place to do just that through the TVPA and ATCA.

It is in the best interest of the United States to regulate corporations that do business within its jurisdiction. As the D.C. Circuit eloquently stated, "Ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the

249. See Jennifer Green & Beth Stephens, *Human Rights Litigation and the Corporate Accountability Movement*, Sept. 2008, <http://www.reports-and-materials.org/Jennifer-Green-and-Beth-Stephens-commentary.pdf>.

250. See Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 Nw. U. J. INT'L HUM. RTS. 327, 352 (2008).

251. *Sarei v. Rio Tinto Plc.*, 221 F. Supp. 2d 1116, 1126 (C.D. Cal. 2002).

252. *Id.*

253. Carlos Lopez, *Business, Human Rights, and Accountability*, Aug. 2008, <http://www.reports-and-materials.org/Carlos-Lopez-commentary.pdf>.

254. *See id.*

255. Holly J. Gregory Weil, 1694 PLI/Corp 185, 211 (Sep. 22, 2008).

256. *Id.*

behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries.”²⁵⁷ Corporations have shareholders and consumers in the United States who have the power to influence corporate behavior through economic mechanisms. However, shareholders rarely know enough about what is taking place in developing countries in order to make educated and influential decisions.²⁵⁸ By allowing victims to file suit in the United States—the location of the corporation’s base or activity, the location of the corporation’s shareholders, and the location of the corporation’s consumers—corporations can be publicly held accountable, and as a result their behavior will be influenced.²⁵⁹

Furthermore, as corporations begin to lose motions to dismiss and cases begin to go to trial, corporations will settle or victims will get damage awards. As a result, it will become more profitable for corporations to abide by human rights laws, and avoid the financial judgments or settlements, than to break the law and use forced labor or torture.²⁶⁰ “Indeed, the court of global public opinion is a most potent deterrent for corporations and individuals in the global game, enforced by the possibility of a publicity disaster brought by a (perhaps even, in the end, ineffective) tort claim for violation of international standards of avoiding harm.”²⁶¹ If the United States refuses to allow suits to be brought against corporations under the TVPA, then the economic balancing, accomplished when victims receive compensation through American courts, cannot take place, and the gap in governance over the regulation of multinational corporations will remain.

The TVPA should be interpreted to include corporations within its scope, because it would resolve the existing gap in governance regarding the regulation of MNCs and prevent future human rights abuses. Relying on regulation at the host country level is futile because corporations dominate those governments, set international and domestic political agendas, and often have a corporate structure that outlasts the government of the host country.²⁶² Furthermore, the current structure allows corporations to simply switch host countries when one host country puts pressure on the MNC to behave responsibly—this essentially leaves host countries powerless to

257. Memorandum on Motion to Dismiss Claims under the TVPA at 3, *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. Mar. 2, 2006) (No. A.01-1357) 2006 WL 516744.

258. See Stathis Banakas, *A Global Concept of Justice--Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World*, 67 LA. L. REV. 1021, 1037 (2007).

259. Lopez, *supra* note 253.

260. See Audrey Koecher, Note, *Corporate Accountability for Environmental Human Rights Abuse in Developing Nations: Making the Case for Punitive Damages under the Alien Tort Claims Act*, 17 J. TRANSNAT'L L. & POL'Y 151 (2007).

261. Banakas, *supra* note 258, at 1036.

262. Green & Stephens, *supra* note 249.

regulate MNCs.²⁶³ The most effective way to regulate right now is to increase the availability for judicial remedies in the countries where the corporations are based, such as the United States. Such a reading of the TVPA increases access to judicial remedies while advancing the intent of Congress and compliance with international law.

2. *American Obligation under International Law*

Interpreting the Torture Victim Protection Act to apply to corporations is consistent with international law that requires that victims have access to judicial remedies when their human rights are violated.²⁶⁴ Although some corporate defendants have argued that corporate abuse does not fall under international law because the abuse is a purely private act that is not currently governed by international law,²⁶⁵ this interpretation is incorrect because the TVPA requires that the act occur under the color of law.²⁶⁶ The color of law requirement moves the corporate action from a purely private action to a state one, which is governed by international law. It therefore requires the United States to provide judicial remedy as a signatory to international treaties such as the Convention Against Torture (CAT) and the International Covenant Civil and Political Rights (ICCPR).²⁶⁷

The CAT requires signatory countries to “take such measures as may be necessary to establish its jurisdiction over [such] offences”²⁶⁸ in cases where “the alleged offender”²⁶⁹ is present “in any territory under its jurisdiction.”²⁷⁰ Excluding corporations from the purview of the TVPA can leave the United States in violation of its obligations under the CAT. Limiting the construction of “individual” to singular human beings limits jurisdiction over offenses of torture—a measure that the Convention Against Torture strictly prohibits.²⁷¹

263. *See id.*

264. *See Lopez, supra* note 253.

265. Defendants' Reply in Support of Motion for Judgment on the Pleadings as to the Plaintiffs' Claims Under the Torture Victim Protection Act at 2, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (No. C99-02506 SI), 2006 WL 1050620.

266. 28 U.S.C. § 1350 (2006).

267. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 (1988); International Covenant on Civil and Political Rights, art. 14, ¶ 3(d), Mar. 23, 1976, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 (1966).

268. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, Dec. 10, 1984, 1465 U.N.T.S. 85, S. TREATY DOC. 100-20 (1988).

269. *Id.* at art. 5(b).

270. *Id.*

271. *See id.* at art. 16.

The predecessor to the CAT was the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration”), which the *Filártiga* court relied upon.²⁷² The Declaration, which was passed by the General Assembly, requires states to “take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.”²⁷³ Thus, “[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.”²⁷⁴

Both of these provisions require the United States to take action to prevent torture and to compensate victims when torture occurs. The Declaration does not specifically state how to “prevent torture” from occurring, but only requires it to be prevented. Civil suits may be the best way to prevent corporate torture because civil suits speak in corporate terms—namely, monetarily.²⁷⁵ The United States has an obligation to effectively prevent torture. If the most effective prevention is through civil suits, the U.S. should allow those suits. Suits brought under the TVPA also satisfy the dual functions that the Declaration and CAT call for: they would prevent torture through deterrence and provide compensation. In failing to enact a system of prevention that addresses and compensates torture victims by the hands of corporations, the United States is failing to meet its obligations under both the Declaration and the CAT. By using the preexisting law, such as the TVPA and CAT, the United States can fulfill its treaty obligations in regards to torture.

Finally, allowing civil suits through the federal court system will not overburden the system. The United States federal court system is very capable of adjudicating the civil suits deriving from egregious abuse of international law, such as the CAT or ICCPR, as these claims are analogous to civil deprivations in the United States.²⁷⁶ The U.S. has relied upon the federal court system to uphold its obligations under international law to provide judicial remedy and should continue to do so in the context of the CAT and the TVPA—especially considering that the CAT explicitly requires

272. *Filártiga v. Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980).

273. Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, art. 4, U.N. GAOR, 30th Sess. Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975), available at <http://www2.ohchr.org/english/law/declarationcat.htm>.

274. *Id.* at art. 11.

275. See Banakas, *supra* note 258.

276. See Brief for Human Rights Watch as Amicus Curiae Supporting Petitioners, *Doe v. Karadzic*, (S.D.N.Y. Aug. 28, 2001) No. 93-0878.

signatory parties to provide a judicial remedy.²⁷⁷ By precluding the federal court system from hearing claims of corporate abuse, the United States is failing to uphold its obligation under international law.

The Senate report accompanying the TVPA explicitly acknowledged the role of the TVPA in fulfilling American obligation under international law.²⁷⁸

This legislation will carry out the intent of the Convention Against Torture The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that—by making sure that torturers and death squads will no longer have a safe haven in the United States.²⁷⁹

The Senate recognized that the Torture Victim Protection Act fulfills a necessary role under international law. Failure to interpret the TVPA as applicable to corporations leaves a large gap in that obligation and provides the very safe haven Congress was attempting to eradicate.²⁸⁰

The Torture Victim Protection Act should be interpreted as applicable to corporations because this interpretation is consistent with legislative history and fills a dangerous governance gap in the law governing corporate atrocities. Furthermore, failure to interpret the TVPA as applicable to corporations leaves the United States in violation of its obligation under the Convention Against Torture²⁸¹ and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁸²

V. CONCLUSION

The Torture Victim Protection Act was enacted by Congress to provide comfort to the hundreds of victims who are subjected to torture around the world.²⁸³ Congress's goal is laudable; however, it is ineffective if the

277. *See id.*

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

279. *Id.*

280. *Id.*

281. *See id.*

282. Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, at 91, U.N. GAOR 30th Sess. Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975) (quoting John Ruggie, *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, ¶ 3, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008)).

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

TVPA is not applied to torture committed at the hands of corporations. The fact that cases are being filed in the United States against corporations should be the “canary in the coal mine signaling that all is not well” in the world.²⁸⁴

Encompassing corporations in the definition of “individual” in the TVPA provides the sought-after relief to victims of corporate torture. This argument is supported by the legislative history, case law, and policy implications. As Senator Kennedy stated in passing the TVPA, “we have an obligation to make our courts accessible to . . . victims *to the maximum extent* that the Constitution allows to assure that torturers feel the full weight of international law.”²⁸⁵ Interpreting the Torture Victim Protection Act any other way than to hold corporations liable for their actions abroad is to limit victims’ access to remedies and to relieve corporations of the weight of international and domestic law, and allows corporations to continue to cause destruction in the lives of workers and citizens.

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284. See Binnie, *supra* note 6.

285. S. REP. NO. 102-249, at 3 (*quoting Torture Victim Protection Act: Hearing before the Subcomm. On Foreign Relations* (Jun 22, 1990) (statement of Sen. Kennedy, Member, S. Comm. On Foreign Relations) (emphasis added)).

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