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2. Torture Victim Protection Act

Enacted in 1992, the Torture Victim Protection Act of 1991,⁵⁷ Pub. L. No. 102-256, 106 Stat. 73, is codified at note following 28 U.S.C. § 1350 (2006); that is, in a note immediately following the codification of the Alien Tort Statute. In contrast with that latter statute – which, as discussed *supra* § III.E.1, refers broadly to “a tort ... committed in violation of the law of nations or a treaty of the United States” – the Torture Victim Protection Act provides a civil remedy for just two international law torts. Those two torts, which are defined below, are:

- Torture
- Extrajudicial killing

A congressional report described the Torture Victim Protection Act as a means to “enhance the remedy already available under” the Alien Tort Statute, in that the Act extends a civil remedy to U.S. citizens who have suffered either torture or extrajudicial killing under the color of law of a foreign state. S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). In its judgment in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004), the Supreme Court characterized the Torture Victim Protection Act as “supplementing,” but not replacing, the Alien Tort Statute.

In establishing the civil action, the Torture Victim Protection Act states as follows:

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.

Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350.

⁵⁷ Among practitioners in the field, the Torture Victim Protection Act of 1991 typically is referred to as the TVPA. With the exception of direct quotations, this *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusing this statute with a subsequently enacted statute to which practitioners in another field often give the self-same acronym; that is, the Trafficking Victims Protection Act of 2000, codified as amended at 22 U.S.C. §§ 7101 *et seq.* (2006), and described *infra* § III.E.3.

To date, only four judgments of the Supreme Court mention the Torture Victim Protection Act, and only one offers any extended analysis.⁵⁸ That judgment is:

- *Mohamad v. Palestinian Auth.* ___ U.S. ___, 132 S. Ct. 1702 (2012)

This section discusses that decision, which interpreted the statutory term “individual,” and further treats other aspects of Torture Victim Protection Act litigation by reference to select lower court opinions. *Caveat*: Many decisions in the latter group were issued before the Supreme Court’s rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as the meaning of “individual.”

a. Overview of Torture Victim Protection Act Litigation

The following elements constitute a proper claim for civil damages under the Torture Victim Protection Act:

1. Proper plaintiff; that is, in the case of:
 - a. torture, an individual victim
 - b. extrajudicial killing, a legal representative or person entitled to sue for the wrongful death of a victim.
2. The victim suffered “torture” or “extrajudicial killing” within the meaning of the Act.
3. Proper defendant; that is, defendant is “[a]n individual” who acted “under actual or apparent authority, or under color of law,” of a “foreign nation.”
4. Defendant subjected the victim to torture or extrajudicial killing.

i. Overview of Defenses

In seeking to dismiss a Torture Victim Protection Act suit, defendants regularly argue that the court lacks subject-matter jurisdiction on the ground that the plaintiff has failed sufficiently to allege that one or more of the above elements is present. Decisions analyzing such claims are discussed below.

Additional defenses commonly raised in Torture Victim Protection Act cases include many of those detailed *supra* § III.E.1.c. with regard to the Alien Tort Statute. Discussions of overlapping defenses – immunities, political question, *forum non conveniens*, and comity – will not be repeated here. Rather, this section examines only those defenses that have merited distinct treatment in litigation brought pursuant to this Act. The section also adds consideration of a

⁵⁸ The other three decisions are *Kiobel v. Royal Dutch Petroleum Co.*, ___ U.S. ___, ___, 133 S. Ct. 1659, 1665 (2013) (referring to the Act as point of comparison in discussion of scope of Alien Tort Statute); *Samantar v. Yousuf*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-38 (2004) (ruling against plaintiff based on interpretation of the Alien Tort Statute).

defense unique to this two-decades-old Act, that of nonretroactivity. Thus treated below, within the specific context of the Torture Victim Protection Act, are:

- Nonretroactivity
- Act of state
- Exhaustion of local remedies
- Time bar

i.1. Extraterritoriality Not a Defense

As detailed *supra* § III.E.1.c.i, in 2013 a majority of the Supreme Court held that “a canon of statutory interpretation known as the presumption against extraterritorial application” pertained to the Alien Tort Statute, the text of which contains no “clear indication of extraterritoriality.” *Kiobel v. Royal Dutch Petroleum Co.*, ___ U.S. ___, ___, ___, 133 S. Ct. 1659, 1664, 1665 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, ___, 130 U.S. 2869, 2883 (2010)).

The presumption does not hold with regard to the Torture Victim Protection Act. By its terms the Act authorizes civil suits for torture or extrajudicial killings in an extraterritorial context; that is, only when the defendant is someone who acted “under actual or apparent authority, or color of any *foreign nation*” Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (emphasis added). Justice Anthony M. Kennedy recognized this when he wrote in his separate opinion in *Kiobel*:

Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act

___ U.S. at ___, 133 S. Ct. at 1669 (Kennedy, J., concurring).

b. Elements of a Torture Victim Protection Act Claim

Discussed below are challenges respecting the requisite elements of a Torture Victim Protection Act claim – elements listed *supra* § III.E.2.a.

i. Proper Plaintiff

Plaintiffs in a lawsuit pursuant to this Act must be the human victim or the legal representative of that victim, as detailed below.

i.1. Human Victim

The Torture Victim Protection Act, § 2, note following 28 U.S.C. § 1350, authorizes a civil suit when an “individual” is subjected to torture or extrajudicial killing. In *Mohamad v. Palestinian Auth.*, ___ U.S. ___, ___, 132 S. Ct. 1702, 1707-08 (2012), the Court held that an “individual” is a natural person – a human being. Although the precise holding pertained to the

status of the defendant “individual,” Justice Sonia Sotomayor wrote in her opinion for a unanimous Court:⁵⁹

Only a natural person can be a victim of torture or extrajudicial killing.

Id. Clearly, a natural person is a proper plaintiff under the Act.

i.2. Victim’s Legal Representative / Wrongful-Death Claimant

If the individual victim is deceased, the Act further authorizes a suit by “the individual’s legal representative, or” by “any person who may be a claimant in an action for wrongful death.” Torture Victim Protection Act, § 2(a)(2), note following 28 U.S.C. § 1350.

In *Mohamad*, the Court wrote that the term “person” has “a broader meaning in the law than ‘individual,’ and frequently includes nonnatural persons.” __ U.S. at __, 132 S. Ct. at 1708 (citations omitted). It concluded that “Congress’ use of the broader term evidences an intent to accommodate that possibility”; that is, the possibility that “estates, or other nonnatural persons, in fact may be claimants in a wrongful-death action.” *Id.* at __ n.3, 132 S. Ct. at 1708 n.3.

A year before the Supreme Court issued its decision in *Mohamad*, the U.S. Court of Appeals for the Eleventh Circuit looked to the law of the forum state to determine whether plaintiffs at bar – children who alleged their fathers had been subjected to extrajudicial killings – were proper wrongful-death claimants. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347-50 (11th Cir. 2011). It did so based on a finding of Congress’s intent that it made after consulting legislative history. *Id.* at 1348-49 (quoting H.R. Rep. No. 102-367 (I), at 4, 1992 U.S.C.C.A.N at 87 (1991); S. Rep. No. 249, 102d Cong., 1st Sess., at 7 (1991)).

i.3. Any Nationality

The Torture Victim Protection Act contains no limitation on the nationality of the plaintiff. Therefore – in contrast with the Alien Tort Statute, 28 U.S.C. § 1350 (2006), which is confined by its terms to noncitizens – the Torture Victim Protection Act permits suits by all natural persons, U.S. citizens and noncitizens alike.

i.4. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims

If other requirements are met, torture or extrajudicial killing – the two actionable Torture Victim Protection Act torts – may be alleged in an Alien Tort Statute suit. Lower courts have split on whether alien plaintiffs alleging torture or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

⁵⁹ Justice Antonin Scalia joined all of Sotomayor’s opinion for the Court, save for a different section, which discussed legislative history. *See id.* at 1702. Justice Stephen G. Breyer concurred, writing, after his own discussion of legislative history: “I join the Court’s judgment and opinion.” *Id.* at 1711 (Breyer, J., concurring).

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005). Such courts look to a statement in the legislative history, to the effect that Congress intended the *Torture Victim Protection Act* to

enhance the remedy already available under section 1350 in an important respect: 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.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

ii. Conduct Alleged

In contrast with the Alien Tort Statute, which provides the basis for an array of international law torts, so long as they satisfy the standards detailed *supra* § III.E.1, the Torture Victim Protection Act authorizes recovery for two torts only:

- Torture
- Extrajudicial killing

The elements of each are set forth below.

ii.1. Torture

After establishing “torture” as one of two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(b)(1), note following 28 U.S.C. § 1350, states:

[T]he term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind

This definition “borrows extensively from” that in Article 1 of the 1984 Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, a treaty to which the United States is a party.⁶⁰ See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002); see also S. Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991). Indeed, the Torture Victim Protection Act operates as U.S. implementing legislation with respect to certain aspects of the Convention. See *United States v. Belfast*, 611 F.3d 783, 807-09 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011).

ii.2. Extrajudicial Killing

After establishing “extrajudicial killing” as the other of the two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(a), note following 28 U.S.C. § 1350, defines extrajudicial killing as a:

[D]eliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

The same section proceeds to exclude from the definition “any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.” *Id.*

According to the legislative history, Congress adopted this definition in accordance with the ban on extrajudicial killing contained in the 1949 Geneva Conventions on the laws of customs of war, treaties to which the United States and all member states of the United Nations belong. See S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(A) & n.7 (1991).⁶¹

⁶⁰ Article 1 of that treaty defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Dec. 17, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.*

⁶¹ This section of the Senate Report cites the Geneva Convention (No. 1) for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.N.T.S. 3114, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument> (last visited Dec. 17, 2013). In pertinent part, subsection (d) of Article 3 of that treaty forbids

the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

iii. Proper Defendant

As quoted in full *supra* § III.E.2, the Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant be “[a]n individual” who acted “under actual or apparent authority, or color of law, of any foreign nation.” Each aspect of this definition is discussed in turn below.

iii.1. “Individual”: Natural Person Only

The defendant must be a natural person; that is, a human being. This was made clear in *Mohamad v. Palestinian Auth.*, __ U.S. __, __, 132 S. Ct. 1702, 1705 (2012), in which the Supreme Court unanimously held “that the term ‘individual’ as used in the Act encompasses only natural persons.”

The Court in *Mohamad* thus rejected the Torture Victim Protection Act suit at bar, which had been brought against an organization. It extended its reasoning to all “nonnatural” persons – sometimes also referred to as “artificial” or “juridical” persons – naming as examples corporations, partnerships, associations, firms, societies, and related entities. *See id.* at 1707.

iii.1.a. Foreign States

As an artificial person, a foreign state cannot be a defendant: it falls outside the statutory term “individual” as construed by the Supreme Court in *Mohamad v. Palestinian Auth.*, __ U.S. __, 132 S. Ct. 1702 (2012). Even if this were not the case, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (2006), discussed *supra* §§ II.B, III.E.1.c.ii.a., typically would preclude such a suit. *See Mohamad*, __ U.S. at __, 132 S. Ct. at 1706; S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

iii.2. Actual or Apparent Authority or Color of Law

The Supreme Court recently wrote:

[T]he Act does not impose liability on perpetrators who act without authority or color of law of a foreign state.

Mohamad v. Palestinian Auth., __ U.S. __, 132 S. Ct. 1702, 1710 (2012) (citing H.R. Rep. No. 102-367 (I), at 5, and S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991), each of which specified that the legislation was not intended to cover “purely private” acts). This statement

This provision is known as Common Article 3 because it is repeated verbatim in the other three 1949 Geneva Conventions on the laws and customs of war, which concern: in No. 2, the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; in No. 3, the Treatment of Prisoners of War; and No. 4, the Protection of Civilian Persons in Time of War. Each of these four treaties is universally accepted; that is, all 195 U.N. member states have joined the treaty regime. *See generally* Int’l Comm. Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols*, <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited Dec. 17, 2013) (presenting links to each treaty that report 195 states parties).

tracks the explicit statutory requirement that the defendant acted “under actual or apparent authority, or color of law,” of a “foreign nation.” Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006).

To interpret this provision, courts employ analysis similar to that in Alien Tort Statute suits involving torts that require state action. By this analysis, described *supra* § III.E.1.b.iii.3.b, courts draw from general principles of agency law and from the jurisprudence interpreting a federal civil rights statute, 42 U.S.C. § 1983 (2006). *See, e.g., Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

If the defendant is not an agent of a foreign nation-state, courts may require a showing that the defendant was in a symbiotic relationship with a state actor. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009). Proof of state action does not require proof of widespread government misconduct; the actions of a single official are sufficient. *Romero*, 552 F.3d at 1317.

iv. Defendant Subjected Victim to Torture or Extrajudicial Killing

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant “subject[ed]” the victim to torture or extrajudicial killing.

The legislative history provides that the Torture Victim Protection Act allows suits “against persons who ordered, abetted, or assisted in the torture.” S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(E) (1991). The Senate Report states in the same section that “anyone with higher authority who authorized, tolerated or knowingly ignored” the commission of actionable torts “is liable for them.”

Referring to such provisions, courts have concluded that Congress intended the Torture Victim Protection Act to extend to forms of responsibility such as ordering, aiding and abetting, command responsibility, and conspiracy. *See Chavez v. Carranza*, 559 F.3d 486, 498-99 (6th Cir.), *cert. denied*, 558 U.S. 822 (2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.2d 1283, 1286 (11th Cir. 2002); With explicit reference to the Sixth Circuit’s decision in *Chavez*, the Supreme Court wrote in *Mohamad v. Palestinian Auth.*, ___ U.S. at ___, 132 S. Ct. 1702, 1709 (2012):

[T]he TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing.

c. Defenses

In general, many of the same defenses commonly raised in Alien Tort Statute litigation, and detailed *supra* § III.E.1.b.iii.3., are applicable to cases brought under the Torture Victim Protection Act. This section examines only those defenses that have merited distinct treatment within the specific context of the Torture Victim Protection Act:

- Nonretroactivity

- Act of state
- Exhaustion of local remedies
- Time bar

Each of these defenses is discussed in turn below.

i. Nonretroactivity

The Torture Victim Protection Act took effect on March 12, 1992. Occasionally, plaintiffs have filed suit under the Act for conduct occurring before that date. Courts have ruled that the Act does not have impermissible retroactive effect, for the reason that it neither creates new liabilities nor impairs rights. *E.g.*, *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153-54 (11th Cir. 2005) (applying general nonretroactivity analysis established in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

ii. Act of State

On the act of state doctrine in general, see *supra* § II.B.2; on the application of the doctrine to Alien Tort Statute litigation, see *supra* § III.E.1.c.iii.

With particular respect to the Torture Victim Protection Act, the legislative history suggests that the act of state doctrine cannot prevent liability with respect to allegations of torture committed by former government officials. The legislative report generated in connection with this statute provides:

[T]he committee does not intend the ‘act of state’ doctrine to provide a shield from lawsuit for former officials. ... Since the doctrine applies only to ‘public’ acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

iii. Exhaustion of Local Remedies

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly requires that plaintiffs exhaust local remedies before pursuing suit in U.S. courts. The Act thus provides:

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.

Torture Victim Protection Act, § 2(b), note following 28 U.S.C. § 1350 (2006). *See Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

A challenge under this portion of the statute constitutes an affirmative defense. Therefore, the defendant bears the “substantial” burden of proof that plaintiff has not exhausted available local remedies. Doubts are to be resolved in the favor of the plaintiff; moreover, the plaintiff

need not pursue a local remedy if such pursuit would be futile or would subject the plaintiff to a risk of reprisal. *See Jean v. Dorelien*, 431 F.3d 776, 781-83 (11th Cir. 2005).

iv. Explicit Time Bar

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly sets forth a limitations period:

No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Torture Victim Protection Act, § 2(c), note following 28 U.S.C. § 1350 (2006).

This limitations period is subject to equitable tolling. *See Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)); *see also Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005).

d. Damages and Other Remedies

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006), makes clear that an individual found to have committed torture or extrajudicial killing “shall, in a civil action, be liable for damages.” This has been held to include both compensatory and punitive damages. *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005).

Many judgments have been entered under this statute, but damages have been collected in few cases. In its 2012 judgment in *Mohamad v. Palestinian Authority*, the Supreme Court wrote:

[W]e are told that only two TVPA plaintiffs have been able to recover successfully against a natural person – one only after the defendant won the state lottery.

__ U.S. __, __, 132 S. Ct. 1702, 1710 (citing *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005)).