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The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act

Ekaterina Apostolova*

I.

INTRODUCTION

The Torture Victim Protection Act (“TVPA”) and the ATS share much in common. They serve similar purposes and the TVPA was enacted as a note to the ATS. Claims under the ATS and the TVPA are often filed in conjunction with each other. Nonetheless, federal courts have struggled for almost two decades to discern the proper connection between the two statutes. Congress has offered little guidance and the Supreme Court has not yet been asked to reflect on the proper relationship between the two statutes.

Part II of this Article, compares the ATS and the TVPA in terms of their respective forms and summarizes the legislative history of the TVPA. Part III outlines the two approaches which the federal courts have developed to define the relationship between the ATS and the TVPA. The majority rule states that the TVPA does not preclude causes of action under the ATS and that each statute provides a distinct cause of action for claims of torture and extrajudicial killing. At the same time, federal courts have found that the ATS and the TVPA inform one another in some respects but not in others. Courts have imported certain provisions from the more detailed TVPA into the ATS, thus making the two statutes not fully independent. The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. Part IV contains the concluding remarks.

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II.
TEXT AND LEGISLATIVE HISTORY

The TVPA stands in contrast to the ATS in terms of its detailed provisions and extensive legislative history. The TVPA was enacted in 1992, more than two hundred years after the ATS and was included in the United States Code as a note to the ATS. It provides a cause of action for both United States nationals and aliens for extrajudicial killing and for torture, stating in relevant part that:

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.¹

Thus, in contrast to the ATS, the TVPA is not jurisdictional in nature, but rather creates a substantive cause of action. Moreover, the TVPA defines its cause of action with further details. Section 3 contains an in depth definition of extrajudicial killing and torture.² The TVPA also contains an exhaustion of remedies provision, requiring that the claimant exhausts all “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”³ The House Report explains the need for this requirement, which “ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred.”⁴ This also “avoids[s] exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.”⁵ Additionally, the TVPA subjects claims to a ten-year statute of limitations so that the courts “will not have to hear stale claims.”⁶

Thus, in terms of form, the TVPA and the ATS differ greatly.⁷ While the ATS is short and ambiguous in nature, the TVPA provides more guidance. While the ATS does not provide definitions for what constitutes “law of nations” or a “tort. . . committed in violation” of that law, the TVPA contains a detailed definition of extrajudicial killing and torture. Unlike the TVPA, the ATS does not contain an express exhaustion of remedies requirement or a statute of limitations provision. The table below summarizes the main differences

1. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)) [hereinafter TVPA].

2. *Id.* § 3.

3. *Id.* § 2(b).

4. H.R. REP. NO. 102-367, at 5 (1991).

5. *Id.* at 6.

6. H.R. REP. NO. 102-367, at 4; *see* TVPA § 2(c).

7. Philip Mariani, *Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U.P.A. L. REV. 1383, 1385 (2008).

between the two statutes.

ATS	TVPA
Jurisdictional	Substantive
Definitions not detailed	Detailed definitions
No exhaustion of remedies requirement	Exhaustion of remedies requirement
No statute of limitations	10 year statute of limitations
Largely unknown legislative history	Detailed legislative history

As shown in the table, unlike the ATS's legislative history, which is largely unknown,⁸ the TVPA possesses an extensive record of codification. Specifically, the House and Senate Reports list three main purposes for the TVPA. First, the House Report clarifies that the need for the TVPA lies in providing a clear grant by Congress for a private right of action for torture, whose availability under the ATS Judge Bork questioned in *Tel-Oren v. Libyan Arab Republic*.⁹ Judge Bork reasoned that the principle of separation of powers required a clear grant by Congress if courts were to consider cases that might affect U.S. foreign policies. The TVPA provides such a grant. Second, the TVPA provides a remedy not only for aliens but also for U.S. citizens who may have been tortured abroad. Its purpose is to "enhance the remedy already available under [the ATS] . . . [by] extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad."¹⁰ Third, the Senate Report states that the purpose of the TVPA consists in "carry[ing] out the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."¹¹ The U.S. ratified this Convention in 1990.¹²

Regrettably, the House and Senate Reports do not expressly clarify the relationship between the TVPA and the ATS. Indirectly, however, the legislative history provides some guidance as to the interaction between the ATS and the TVPA. The fact that the TVPA was codified as a note to the ATS implies that they are intended to interact closely. The legislative history states that the ATS "has other important uses and should not be replaced."¹³ Both the Senate Report and the House Report state that ATS "claims based on torture or

8. The Supreme Court stated that there is "poverty of drafting history" of the ATS which makes it "fair to say that a consensus understanding of what Congress intended has proven elusive." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-19 (2004).

9. H.R. REP. NO. 102-367, at 4; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

10. H.R. REP. NO. 102-367, at 4.

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

12. Convention against Torture, *entered into force*, June 26, 1987, 1465 U.N.T.S. 85, *signatories available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

13. *Id.* at 4-5; H.R. REP. NO. 102-367, at 3.

summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.”¹⁴ Courts in different Circuits diverge in their reading of the legislative history—some courts have cited it in support of the proposition that the TVPA and the ATS provide two separate claims for torture and extrajudicial killing while other courts have interpreted it as weakening this proposition.

The above description of the TVPA and the table illustrate that while the TVPA and the ATS differ in form, they serve a similar purpose. Moreover, often TVPA and ATS claims are filed in conjunction with each other.¹⁵ However, the issue of how exactly the two statutes interact still remains ambiguous. Does the TVPA supplement or limit claims under the ATS? Since both the ATS and the TVPA are silent on this issue and the Supreme Court has offered no clear guidance, a discussion of the relevant federal cases analyzing the relationship between the two statutes is necessary. Section III discusses these two interpretations of the interaction between the ATS and the TVPA.

III.

THE RELATIONSHIP BETWEEN THE TVPA AND THE ATS

Courts have found two ways in which the TVPA and the ATS interact with each other. First, courts have argued that the TVPA replaces torture and extrajudicial killing claims under the ATS. A second interpretation holds that the TVPA and the ATS offer distinct claims for torture and extrajudicial killing, with the TVPA informing the ATS in certain ways.

A. The TVPA Replaces Torture and Extrajudicial Killing Claims Under the ATS

The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. The Seventh Circuit endorsed this view. In *Enahoro v. Abubakar*, the Seventh Circuit held that all torture and extrajudicial killing claims should be brought under the TVPA and plaintiffs must comply with all requirements of this statute. Thus, it found that the two statutes do not provide “two bases for relief against torture and extrajudicial killing.”¹⁶

In *Enahoro*, plaintiffs brought a suit against a general of the military junta in Nigeria for atrocities committed from 1993 to 1999.¹⁷ Plaintiffs only brought claims under the ATS and did not make a simultaneous claim under the TVPA.

14. S. REP. NO. 102-249, at 5; *see also* H.R. REP. NO. 102-367, at 4.

15. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 76 (2008).

16. *Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005).

17. *Id.* at 879.

The district court, following precedents from other circuits, held that plaintiffs did not need to plead their case under the TVPA, implying that the two statutes offer two separate bases for relief.¹⁸ The Seventh Circuit disagreed with this proposition and overturned the decision of the district court.

The Seventh Circuit declared that unless the TVPA “occup[ied] the field” for torture claims, it would be “meaningless.”¹⁹ The court further stated that “[n]o one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law.”²⁰ The court discussed the limitations the TVPA imposes in requiring exhausting the remedies in the jurisdiction where the conduct occurred and bringing the claim within ten years. The court also found support for its interpretation of the relationship between the ATS and the TVPA in the legislative history of the TVPA and in *Sosa v. Alvarez-Machain*. The Seventh Circuit interpreted the House and Senate Reports stating that the ATS should “remain intact” to mean that “the enactment of the Torture Victim Protection Act did not signal that torture and killing are the *only* claims which can be brought under the Alien Tort Statute.”²¹ Other claims can still be brought under the ATS. The majority also interpreted *Sosa* as confirming the preclusive effect of the TVPA. The court argued that since the Supreme Court directed courts to exercise “great caution” and require “vigilant doorkeeping” in finding what claims are allowed under the ATS and since the court also stated that “a clear mandate” for suits for torture and extrajudicial killing exists under the TVPA, the *Sosa* Court would not approve of utilizing the ATS for torture claims.²² The Seventh Circuit then remanded the case to the district court because plaintiffs had to plead under the TVPA.

There are two main advantages to the Seventh Circuit interpretation of the relationship between the ATS and the TVPA. First, this interpretation clarifies the relationship between the two statutes in a very straightforward way.²³ By submitting that the TVPA “occup[ies] the field” of claims for torture and extrajudicial killing, it becomes clear that all restrictions contained in the TVPA, such as exhaustion of remedies and the statute of limitations, always apply. This simplifies the position taken in other circuits, which allows for claims to be brought under both of the statutes but which reads certain conditions from the TVPA into the ATS in an ambiguous way.²⁴ Second, requiring all claims for torture and extrajudicial killing to be submitted under the TVPA ensures

18. *Id.* at 884.

19. *Id.* at 884-85.

20. *Id.*

21. *Id.* at 885-86 n.2.

22. *Id.* at 885-89.

23. Mariani, *supra* note 7, at 1404.

24. See *infra* Part III.3 (discussing how courts have found that the TVPA supplements the ATS).

consistent treatment of aliens and U.S. citizens.²⁵ Because the TVPA applies equally to aliens and U.S. citizens while the ATS speaks only to aliens, non-U.S. citizens can circumvent the requirements under the TVPA by bringing claims under the ATS. The Second Circuit interpretation remedies this problem.

In his dissenting opinion, however, Judge Cudahy disagreed with the majority holding. He argued that the legislative history of the TVPA shows Congress meant to expand the TVPA's reach to U.S. citizens and not restrict the application of the ATS to foreign citizens, on the grounds that the ATS applies only to aliens.²⁶ Accordingly, the TVPA is not "meaningless," as the majority asserted. Moreover, the plain text of the TVPA did not contain any implicit amendment to the ATS and since repeals by implications are disfavoured, the relationship between the TVPA and ATS should not be interpreted as preclusive.²⁷ In addressing the Seventh Circuit argument that *Sosa* supports the majority holding, Judge Cudahy noted the majority "stands *Sosa* on its head" by using it as a support.²⁸ Nothing in *Sosa* suggests the preclusive effect of the TVPA. Thus, Judge Cudahy argued that the two statutes "are meant to be complementary and mutually reinforcing."²⁹

The majority circuit courts in the U.S. have also rejected the view followed by the Seventh Circuit in *Enahoro*. They have ruled that the TVPA and the ATS can be used simultaneously for claims of torture and extrajudicial killing.

B. *The TVPA and the ATS Offer Separate Claims*

The majority view is that the TVPA and the ATS provide two distinct causes of action. Thus, claims for torture and extrajudicial killing can be brought under both the ATS and the TVPA simultaneously.

For example, the Eleventh Circuit has ruled that "[t]he TVPA creates no new liabilities nor does it impair rights. Rather, the TVPA extended the ATS, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killing in United States courts."³⁰ More expressly with reference to the torture claims, the Eleventh Circuit has ruled that "a plaintiff may bring distinct claims for torture under each statute."³¹ The Eleventh Circuit supported this interpretation of the relationship between the two statutes through an analysis of the plain meaning of the statutes, canons of statutory interpretation discouraging repeals by implication, *Sosa*, and the legislative history of the TVPA.

25. Mariani, *supra* note 7, at 1404-05.

26. *Enahoro v. Abubakar*, 408 F.3d 877, 886-88 (2005) (Cudahy, J., dissenting in part).

27. *Id.* at 887.

28. *Id.* at 889.

29. *Id.* at 888.

30. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

31. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1249-50 (11th Cir. 2005).

The Eleventh Circuit looked at the text of the statutes and concluded that since both contain two different definitions of torture, they provide separate means for recovery “as that term separately draws its meaning from each statute.”³² The ATS provides means for recovery for a “violation of the laws of nations,” which the Supreme Court stated is drawn from:

the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.³³

The TVPA, on the other hand, contains a direct and detailed definition of torture:

- (1) the 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; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration of application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.³⁴

Moreover, after further statutory interpretation through canons, the court concluded that to find that the TVPA provides the exclusive remedy for torture is to rule that the TVPA amends the ATS.³⁵ There is no such intent to amend that is apparent from the legislative history of the statute and, as noted above, “amendments by implications are disfavoured.”³⁶

32. *Id.*

33. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (citing *Paquete Habana*, 20 S.Ct. 290, 299 (1900)).

34. TVPA § 3(b).

35. *Aldana*, 416 F.3d at 1251.

36. *Id.* at 1250-51 (citing *Patel v. Quality Inn So.*, 846 F.2d 700, 704 (11th Cir. 1988)).

The court also found support in *Sosa*. The Eleventh Circuit argued that while the Supreme Court did state that the TVPA provides a “clear mandate” for recovery for torture and extrajudicial killing, it did not assert that the TVPA provided the exclusive authority.³⁷ In addition, the Supreme Court in *Sosa* ruled that “Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.”³⁸

The Second Circuit,³⁹ the Fifth Circuit,⁴⁰ the Ninth Circuit,⁴¹ and the District Court of Columbia⁴² also have declared that the TVPA does not limit the scope of the ATS. A district court in the First Circuit supported this approach.⁴³ A district court in the Sixth Circuit also analyzed claims for torture and extrajudicial killing under both the ATS and the TVPA simultaneously.⁴⁴ All these courts have suggested that claims under the ATS and TVPA are independent from each other.

The main benefit of the majority view is that it follows the well-established principles of statutory interpretation.⁴⁵ Since the plain meaning and the legislative history are ambiguous, the courts should apply canons of statutory interpretation, as the Eleventh Circuit did, and read both statutes to their fullest capability. The practical consequences pointed out in the discussion of the Seventh Circuit precedent above are an outcome of a proper analysis of the relationship between the two statutes.⁴⁶ The courts should not circumvent this relationship by utilizing legislative powers.

While the majority of courts have recognized that the ATS and the TVPA offer distinct claims for torture and extrajudicial killing, they have not found the two statutes to be fully independent from each other. In adjudicating claims under the ATS, most courts have imported provisions from the more detailed TVPA into the ATS. Following are the ways in which courts have found the TVPA supplements the ATS.

37. *Id.*

38. *Sosa*, 542 U.S. at 724-25.

39. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260-61 (2d Cir. 2007) (discussing torture claims under both the ATS and the TVPA). *See also* *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, at 4 (S.D.N.Y. Feb. 28, 2002) (stating that “the TVPA simply provides an additional basis for assertion of claims for torture and extrajudicial killing”).

40. *Beanal v. Freeport-McMahon, Inc.*, 197 F.3d 161 (5th Cir. 1999) (discussing claims under the ATS and the TVPA separately).

41. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). This reasoning was followed more recently in *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1086 (N.D. Cal. 2008) (stating that “the TVPA does not limit the scope of ATS claims for summary execution and torture”).

42. *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24-28 (D.D.C. 2005) (recognizing simultaneous claims under the TVPA and the ATS).

43. *Xuncax v. Gramajo*, 886 F. Supp. 162, 176-94 (D. Mass. 1995).

44. *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899-903 (W.D. Tenn. 2005)..

45. *Mariani*, *supra* note 7, at 1406-07.

46. *Id.* at 1418.

1. Exhaustion of Remedies

The language of the ATS does not require exhaustion of remedies while the TVPA has an explicit provision that does.⁴⁷ In *Sosa*, the Supreme Court in *dicta* suggested that exhaustion of remedies could provide a possible defense in ATS claims.⁴⁸ However, the court left the issue unresolved and noted that it would consider it in another case. Circuit courts have considered this question and have refused to apply the exhaustion of remedies requirement from the TVPA to the ATS.

In *Sarei v Rio Tinto*, the Ninth Circuit found that the exhaustion of remedies requirement should not be read into the ATS.⁴⁹ It considered the benefits of doing so, as explained in the dissenting opinion in *Enahoro*. Judge Cudahy in *Enahoro* stated that such a reading would be justified on the basis of considerations of equity and consistency since “otherwise American victims of torture would be bound by an exhaustion requirement under the TVPA and foreign plaintiffs could avoid such strictures by pleading under the [ATS].”⁵⁰

Nevertheless, the Ninth Circuit found that no Congressional intent to apply the TVPA’s exhaustion requirement to ATS claims exists. The court reasoned that since Congress included this requirement in the TVPA, “it could have amended the [ATS] to include an exhaustion requirement similar to the one contained in the TVPA.”⁵¹ It did not do so, however. Moreover, “if Congress understood that the [ATS] *already* contained an exhaustion provision, it is not clear why it would add a superfluous exhaustion provision to the TVPA.”⁵² In addition, Congress applied the exhaustion requirement in the TVPA to specific claims, torture and extrajudicial killing, which require “a caution against importing an across-the-board exhaustion requirement into [ATS] based on what Congress did in the TVPA.”⁵³ For the above reasons, the Ninth Circuit found that the exhaustion of remedies requirement from the TVPA should not be read into the ATS.

However, this case was heard *en banc* and while the majority did not impose an “absolute requirement of exhaustion,” it discussed it as a possibility under a discretionary standard. The *en banc* opinion stated that it is not necessary to consider this issue in comparison to the TVPA but rather approached exhaustion as a prudential or judicially-imposed principle.⁵⁴ Other

47. See Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 555 (2010), for a thorough treatment of exhaustion of remedies under the ATS.

48. *Sosa*, 542 U.S. at 733 n.21.

49. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007).

50. *Enahoro v. Abubakar*, 408 F.3d 877, 890 (7th Cir. 2005) (Cudahy, J., dissenting in part).

51. *Sarei*, 487 F.3d at 1217.

52. *Id.*

53. *Id.* at 1217-18.

54. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827-28 (9th Cir. 2008) (“Not only does this TVPA

courts have also avoided the discussion by finding that even if the requirement of exhaustion of local remedies was to be applied, the remedies were not adequate in the particular case.⁵⁵

In *Jean*, the Eleventh Circuit ruled that “the exhaustion requirement does not apply to the [ATS]” but did not elaborate further.⁵⁶ A district court in the Third Circuit has declared that “there is nothing in the ATS which limits its application to situations where there is no relief available under domestic law.”⁵⁷ There is no court that has imported TVPA’s exhaustion of remedies requirement into the ATS.

2. Statute of Limitations

The statute of limitations from the TVPA is applied to claims arising under the ATS in accordance with traditional principles of analogizing statutes. Since the ATS does not contain an express statute of limitations, courts apply a two-step rule in determining what the statute of limitations should be. They look to the closest state-law analogue unless there is a closer analogy in another federal law.⁵⁸ When a federal statute “clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.”⁵⁹ Courts have found that since both the ATS and the TVPA were enacted to protect human rights, both provide for a civil action to do so, and both were codified in the United States Code, they are very similar and should have the same statute of limitations.⁶⁰ The Eleventh Circuit,⁶¹ the Ninth Circuit,⁶² the Sixth Circuit,⁶³ the District of Columbia,⁶⁴ a district court in the Second Circuit⁶⁵ and a district

comparison not particularly forward the discussion, *Sosa’s* pronouncement relieves us of the need to engage in the comparison in the first place.”)

55. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003); *see also Enahoro*, 408 F.3d at 892 (Cudahy, J., dissenting in part).

56. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

57. *Jama v. INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998).

58. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989) (proclaiming the rule that “statutes of limitation are to be borrowed from state law”).

59. *DelCostello v. Int’l Bhd. Of Teamsters*, 462 U.S. 151, 172 (1983).

60. *Arce v. Garcia*, 400 F.3d 1340, 1345-46 (11th Cir. 2005).

61. *Id.* at 1346.

62. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir. 2003) (“The statute of limitations under the [ATS] is 10 years.”). This is followed by the district court in a more recent case in *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1099 (2008).

63. *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (“Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS.”).

64. *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003).

65. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *19 (S.D.N.Y. 2002).

court from the Third Circuit⁶⁶ have adopted this view.

When finding that the TVPA statute of limitations applies to the ATS, courts have also applied equitable tolling to both statutes.⁶⁷ Equitable tolling provides for adjusting the limitations period to account for, for example, the time of absence of the defendant from a jurisdiction where plaintiff can bring an action, the time when defendant had immunity from suit, or the time where plaintiff was imprisoned. The TVPA does not contain a specific reference to equitable tolling. However, the House Report states that “equitable tolling remedies may apply to preserve a claimant’s rights.”⁶⁸ The Senate Report also affirms that “[t]he statute of limitations should be tolled. . . .”⁶⁹ In light of this expressed intent by Congress, equitable tolling is applied to the TVPA and in keeping with the rule of analogizing statutes, equitable tolling is also applied to the ATS.

3. *Definition of Torture and Extrajudicial Killing*

Some courts import the definition for torture from the TVPA to the ATS. Other courts, however, look at international sources for a definition of what constitutes torture under the law of nations. The Eleventh Circuit in *Aldana v. Del Monte Fresh Produce* looked to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) to find that definition.⁷⁰ The Convention defines torture as:

any 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.⁷¹

The Eleventh Circuit recognized that in some cases the variations in the definitions contained in the TVPA and CAT might make a difference but did not find it did so in the particular case.⁷² Nevertheless, the court acknowledged that torture might be read more broadly in the TVPA since the Supreme Court has instructed courts to read the ATS narrowly but no such direction exists as to the

66. *Hereros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078, at *6-7 (D.N.J. 2006).

67. *Arce v. Garcia*, 400 F.3d 1340, 1262 (11th Cir. 2005).

68. H.R. REP. NO. 102-367, at 5 (1991).

69. S. REP. NO. 102-249, at 11 (1991).

70. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250 (11th Cir. 2005).

71. *Convention Against Torture Part I*, art.1(1) *entered into force*, June 26, 1987, 1465 U.N.T.S. 85.

72. *Aldana*, 416 F.3d at 1251-52.

TVPA. Moreover, a significant divergence between the TVPA and CAT is that the TVPA requires the victims to be “in the offender’s custody or physical control.”⁷³ This makes a difference, for example, when victims receive phone calls that cause them mental suffering; in that case they can claim torture under CAT but not under the TVPA.⁷⁴ In addition to the Eleventh Circuit, a district court in the Second Circuit also applied the CAT definition to claims of torture under the ATS.⁷⁵

As for the definition of extrajudicial killing, courts analyzing ATS claims have relied on the definition contained in the TVPA. A district court in the Sixth Circuit expressly recognized that the definition is the same.⁷⁶ Other courts have not expressly recognized that the definition from the TVPA should be applied. Nevertheless, they have done so in analyzing simultaneous ATS and TVPA claims for extrajudicial killing in that way.⁷⁷

4. *Standing to Sue*

The victims of torture and extrajudicial killing can sue for damages. However, cases exist where plaintiffs are a relative or other representative of the victim, not the victim herself. The court must then answer the question whether the relationship is legally sufficient for a claim to proceed. Courts have taken different approaches in looking for the proper law to answer this question. Some courts have followed the TVPA as “the most analogous federal statute.”⁷⁸ The TVPA provides that for an extrajudicial killing claim a legal representative of the victim or “any person who may be a claimant in an action for wrongful death” shall have standing to sue.⁷⁹ The House Report guides the courts to look at the law of the forum state in determining who may be a plaintiff in such cases.⁸⁰ However, state law sometimes directs courts to look at the foreign law to answer this question.⁸¹ Thus, in the end, there might not be any practical difference in whether the courts adopt the TVPA standard or apply foreign law to determine who has standing to sue.

73. TVPA § 3(b).

74. STEPHENS ET AL., *supra* note 15, at 143.

75. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 326 (S.D.N.Y. 2003).

76. *Chavez v. Carranza*, 559 F.3d 486, 899-900, 902-03 (6th Cir. 2009).

77. *Doe v. Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112, 1148, 1153-54 (E.D. Cal. 2004). Only recently did a district court in the Second Circuit recognize that extrajudicial killing can be pleaded under the ATS. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009) (overruling its prior decision in *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006)).

78. *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-92 (D. Mass. 1995).

79. TVPA § 2(a)(2).

80. H.R. REP. NO. 102-367, at 4 (1991).

81. STEPHENS ET AL., *supra* note 15, at 233.

Nevertheless, some courts have expressly recognized that the TVPA standard should be imported into the ATS. A district court in the Ninth Circuit has stated that “[t]he ATS does not address standing. Both parties agree, however, that the standard from the TVPA should govern plaintiffs’ standing under the ATS.”⁸² A district court in the Eleventh Circuit and a district court in the Fifth Circuit applied the same standard on standing to sue.⁸³ A district court in the First Circuit also applied the standard in the TVPA but at the same time, looked at state and Guatemalan law.⁸⁴

IV. CONCLUSION

A lack of clarity exists as to the exact relationship between the TVPA and the ATS. Courts have interpreted the interaction between the statutes in different ways. The majority view is that the TVPA and the ATS offer independent causes of action for torture and extrajudicial killing claims, with the more detailed TVPA informing the ATS in certain ways. Generally, courts import the statute of limitations from the TVPA, don’t import the exhaustion of remedies requirement from it, and sometimes read the TVPA’s definition of torture, its definition of extrajudicial killing, and its standard on standing into the ATS.

The Seventh Circuit, however, has stated that the TVPA precludes torture and extrajudicial claims from the scope of the ATS and, thus, plaintiffs should bring these causes of action only under the TVPA. The Supreme Court to date has offered no guidance as to the proper interpretation since in *Sosa* the court was not called on to reflect on the proper interaction between the two statutes directly. The law on this issue is still evolving.

82. *Bowoto v. Chevron Corp.*, 2006 WL 2455761, at *11 (N.D. Cal. 2006).

83. *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1356-58 (S.D. Fla. 2001); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 368 (E.D. La. 1997).

84. *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-92 (D. Mass. 1995).