

No. - 11-88 JUL 15 2011

IN THE **OFFICE OF THE CLERK**
Supreme Court of the United States

ASID MOHAMAD, individually and
for the Estate of AZZAM RAHIM;
SHAHID MOHAMAD; SAID MOHAMAD;
SHAHED AZZAM RAHIM; MASHHUD RAHIM;
MOHAMAD RAHIM; ASIA RAHIM,

Petitioners,

v.

JIBRIL RAJOUB; AMIN AL-HINDI; TAWFIK TIRAWI;
PALESTINIAN AUTHORITY, also known as
PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY;
PALESTINE LIBERATION ORGANIZATION,

Respondents.

*On Petition for a Writ of Certiorari to the
United States District Court for the District of Columbia*

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2011

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QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim were plaintiffs in the district court and appellants in the court of appeals.

Respondents The Palestinian Authority and The Palestine Liberation Organization were defendants in the district court and appellees in the court of appeals.

Jibril Rajoub, Amin Al-Hindi and Tawfik Tirawi were defendants in the district court but the action against them was dismissed by the district court.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI..	1
OPINIONS BELOW	2
STATEMENT OF JURISDICTION.....	2
STATUTORY PROVISION INVOLVED.....	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	8
I. The Decision of the Court Below Directly Conflicts with a Decision of the Eleventh Circuit	8
II. The Court of Appeal’s Decision Is a Matter of Substantial Importance	9
III. The Decision Is Incorrect.....	10
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases	<i>Page(s)</i>
<i>Beanal v. Freeport-McMoRan, Inc.</i> , 969 F.Supp. 362, 382 (E.D.La. 1997)	11
<i>Clinton v. New York</i> , 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)	6, 12, 13
<i>Doe v. Exxon Mobil Corp.</i> , ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011)	7, 13
<i>Estate of Rodriguez v. Drummond Co., Inc.</i> , 256 F.Supp.2d 1250 (N.D.Ala. 2003)	13
<i>Flomo v. Firestone Nat. Rubber Co., LLC</i> , ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011)	7, 13
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2nd Cir. 1995)	7, 9, 13
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 621 F.3d 111 (2nd Cir. 2010)	7
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 642 F.3d 379 (2nd Cir. 2011)	7
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , No. 10-1491	7, 10
<i>NCGUB v. Unocal</i> , 176 F.R.D. 329 (C.D.Ca. 1997)	12
<i>Romero v. Drummond Co.</i> , 552 F.3d 1303, 1315 (11th Cir. 2008)	8

<i>Sinaltrainal v. Coca-Cola Co.</i> , 256 F.Supp.2d 1345 (S.D.Fla. 2003), <i>aff'd</i> 578 F.3d 1252 (11th Cir. 2009) ...	6, 8, 10, 13
<i>Wiwa</i> , 2002 WL 319887	12

Federal Statutes

Alien Tort Statute (“ATS”), 28 U.S.C. § 1350	6, 7, 8, 10, 13
H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86	7, 13
S.Rep. No. 249, 102nd Cong., 1st Sess. (1991)	12
Torture Victim Protection Act, 28 U.S.C. § 1350 note	<i>passim</i>
Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a)	6
28 U.S.C. § 1254(1)	2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The court of appeals' opinion (App. A, *infra*, 1a-13a) is published at 634 F.3d 604 (D.C. Cir. 2011). The district court's opinion (App. B, *infra*, 14a-21a) is published at 664 F.Supp.2d 20 (D.D.C. 2009).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on March 18, 2011, App., *infra*, 1a. On June 17 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 15, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute relevant to this case is the Torture Victim Protection Act, 28 U.S.C. § 1350 note, which provides as follows:

Section 1. Short Title.

This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"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.

“Sec. 3. Definitions.

“(a) Extrajudicial killing.—For the purposes of this Act, the term ‘extrajudicial killing’ means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

“(b) Torture.—For the purposes of this Act—

“(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 aris-

ing only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

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

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

“(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

“(C) the threat of imminent death; or

“(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

STATEMENT OF THE CASE

This case is a civil action for damages arising from the torture and murder of United States citizen Azzam Rahim by officers of Respondents Palestinian Authority ("PA") and Palestine Liberation Organization ("PLO").

Respondents' liability for the torture and murder of Mr. Rahim is indisputable. As our own Department of State has confirmed:

In September [1995] detainee Azzam Rahim . . . an American citizen, died in the custody of PA intelligence officers in Jericho. Members of his family reported that bruises and cuts were visible on his head and face after his death. Results of an autopsy, conducted on Rahim after he had been interred for several weeks, showed that Rahim had broken ribs and appeared to have no heart damage, but the report said it was not possible to determine the cause of death. Three intelligence officers were sentenced for their role in the case. Two were sentenced to 1-year terms and one for 7 years.

JA A86.¹

Indeed, Respondents have never disputed their liability for the torture and murder of Azzam Rahim.

¹ JA refers to the Joint Appendix submitted in the court of appeals.

Accordingly, the Petitioners, who are the widow, children and estate of decedent Azzam Rahim, filed suit against the Respondents under the Torture Victim Protection Act (“TVPA”) 28 U.S.C. § 1350 note § 2(a), which provides 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.

28 U.S.C. § 1350 note § 2(a).

Though TVPA § 2(a) refers to an action against “[a]n individual,” district courts in the Eleventh Circuit and the Eleventh Circuit itself have explicitly held that a TVPA action may be brought against organizational defendants (such as the instant Respondents). *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff’d* 578 F.3d 1252 (11th Cir. 2009) (citing *Clinton v. New York*, 524 U.S. 417, 428, n.13 (1998) for the holding that the term “individual” is synonymous with “person.”).

Moreover, the TVPA is codified as part of the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and

“Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens.” *Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals have held that an ATS action may be brought against an organizational defendant. See *Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011); *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

While a split panel of the Second Circuit has held that the ATS does not permit actions against organizational defendants, see *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), numerous judges on the Second Circuit have concluded that the *Kiobel* “panel majority opinion is very likely incorrect.” *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 at *1 (2nd Cir. 2011).

Moreover, the panel majority decision in *Kiobel* is currently the subject of a petition for certiorari in this Court. See *Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

Thus, in light of the express precedents holding that organizational defendants may be sued under the TVPA, as well as the case law holding that organizational defendants may also be sued under the ATS – holdings which should apply equally to the TVPA given the fact that Congress intended

the TVPA to extend the ATS cause of action to plaintiffs who are U.S. citizens – the Petitioners’ action against the Respondents is well founded, notwithstanding the fact that the Respondents are not natural persons.

However, the district court and the court of appeals disagreed, and dismissed the Petitioners’ action against the Respondents on the grounds that the TVPA permits actions against natural persons only – expressly rejecting the contrary holding of the Eleventh Circuit. *See* App. A, *infra*, at 1a-11a.²

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below Directly Conflicts with a Decision of the Eleventh Circuit

As noted *supra*, and as the court of appeals expressly noted in its decision dismissing Petitioners’ action, the Eleventh Circuit has explicitly held that a TVPA action may be brought against an organizational defendant. *See Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1359 (S.D.Fla. 2003) (holding corporation may be sued under TVPA), *aff’d in relevant part*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA “allows suits against corporate defendants”).

² The Petitioners also asserted a cause of action under customary international law, as a part of federal common law, which was also dismissed. Petitioners do not seek review of the dismissal of that cause of action.

Thus, the decision of the court of appeals knowingly created a clear conflict between the circuits.

Petitioners respectfully submit that this circuit conflict, which will generate different and so inequitable results depending on the venue of the TVPA action, as well as inevitable forum-shopping, should not be permitted to stand. The ability of a plaintiff to obtain redress for torture or murder in U.S. courts should not depend on whether the torturer or murderer happens to be subject to personal jurisdiction in the courts in the Eleventh Circuit. Also, the specter of forum-shopping and attempts at forum-shopping is particularly strong here, considering that the statute at issue is not merely procedural but creates a cause of action.

Therefore, the instant Petition should be granted in order to settle this circuit split.

II. The Court of Appeal's Decision Is a Matter of Substantial Importance

There is no question that the TVPA is a remedial statute. *See e.g., Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing legislative history demonstrating that "Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens."

But the decision of the court of appeals directly undermines the remedial effect of the TVPA, severely restricting the types of defendants against which an American citizen can obtain relief.

A remedial statute – particularly a statute intended to provide relief for the most heinous conduct imaginable – should not be radically circumscribed by the decision of a lower court; this Court, and this Court alone, should determine whether the TVPA does not permit suits against organizational defendants.

The importance of review by this Court is highlighted by the sharp circuit split over the closely-related question of whether actions under the ATS – which the TVPA was intended to mirror for the benefit of American citizens – can be brought against organizational defendants, and the prospect that this Court will resolve this split by granting certiorari in *Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

In other words, the scope of the ATS and the TVPA in respect to organizational defendants cannot and should not be examined in a vacuum, and if this Court grants certiorari in the *Kioebel* matter it should grant the instant Petition as well, and consider both cases in tandem.

III. The Decision Is Incorrect

Finally, the instant Petition should be granted because the decision of the court of appeals is incorrect. The rationale for interpreting the term “individual” as used in the TVPA as including organizational defendants was set forth in persuasive detail in *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff’d* 578 F.3d 1252 (11th Cir. 2009):

Defendant Bebidas contends that as a private corporation it is not subject to suit under the TVPA. Bebidas interprets the phrase “an individual . . . [who subjects another to torture or extrajudicial killing] shall, in a civil action, be liable for damages” as referring only to natural persons, arguing that Congress intended to hold liable only natural persons who commit torture or extrajudicial killing . . . Because a corporation is not a natural person, Bebidas reasons that the TVPA does not confer subject matter jurisdiction over a claim against a corporation. See *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 382 (E.D.La. 1997). Plaintiffs argue that by imposing liability on “individuals who subject others to torture or extrajudicial killing,” the word “individual” is equivalent to “person.” By analogy, Plaintiffs point to the fact that corporations are generally treated as persons in other areas of law, therefore, liability under the TVPA should also extend to corporations.

Defendants correctly point out that the district court in *Beanal* held that private corporations are not liable under the TVPA. *Id.* However, the *Beanal* court also stated that “[c]ongress does not appear to have had the intent to exclude private corporations from liability under the TVPA.” *Id.* The Senate Judiciary Committee Report explains that the purpose of the TVPA is to permit suits

“against persons who ordered, abetted, or assisted in torture.” S.Rep. No. 249, 102nd Cong., 1st Sess. (1991) . . . The Report does not mention any exemption for private corporations, *id.*, and courts have held corporations liable for violations of international law under the related ATCA. See generally, *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D.Ca. 1997); *Wiwa*, 2002 WL 319887 (both allowing suits against private corporations under the ATCA). Moreover, the Supreme Court in *Clinton v. New York* recently held that the term “individual” is synonymous with “person,” acknowledging that “‘person’ often has a broader meaning in the law” than in ordinary usage. *Clinton v. New York*, 524 U.S. 417, 428 and n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.

Given that the legislative history does not reveal an intent to exempt private corporations from liability, that private corporations can be sued under the ATCA, and that the term “individual” is consistently viewed in the law as including corporations, this court concludes that the TVPA claim against *Bebidas* should not be dismissed for lack of subject matter jurisdiction.

Sinaltrainal, 256 F.Supp.2d at 1358-1359 (emphasis added). See also *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266-67 (N.D.Ala. 2003) (adopting reasoning of *Sinaltrainal*).

Thus, for the reasons set forth in *Sinaltrainal*, the court of appeals erred by holding that TVPA claims are not available against organizational defendants. Cf. *Clinton v. New York*, 524 U.S. 417, 428 (1998) (holding that “individual” is synonymous with “person”).

Moreover, the decision of the court of appeals directly undermines the purpose of the TVPA, which was to extend the protections of the ATS to American citizens. “Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS], and to further extend that cause of action to plaintiffs who are U.S. citizens.” *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals – including the D.C. Circuit itself – have held that an ATS action may be brought against an organizational defendant. See *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011).

Thus, as matters currently stand in the District of Columbia, an alien can sue an organizational defendant under the ATS, but a U.S. citizen cannot

bring an action against an organizational defendant under the TVPA. This result is not only incongruous and unjust; it also conflicts directly with Congress' purpose in enacting the TVPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 15, 2011

Respectfully submitted,

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