



Nestlé & Cargill v. Doe Series: Holding the Aiders and Abettors of Atrocity to Account

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Since its enactment in 1992, the Torture Victim Protection Act (TVPA) has been a vital companion to the Alien Tort Statute (ATS) in creating opportunities for victims of human rights abuses to seek justice in U.S. courts. As a supplement to the ATS, the TVPA codified Congress' condemnation of torture and extrajudicial killing, and for the first time, made it possible for U.S. citizens to bring suit for these two breaches of the law of nations. At the Center for Justice and Accountability (CJA), we've used these complementary statutes to seek accountability for some of the most serious human rights abuses. (See [here](#), [here](#), and [here](#) for some examples).

As Chris Moxley's [preview](#) of Nestlé and Cargill sets out, the two questions posed by the petitioners to the Court relate to the presumption against extraterritoriality and whether the ATS provides for corporate liability. But in their *amici* briefs in support of the petitioners, the [Acting Solicitor General](#) and the [Cato Institute](#) go a step further, asking the Court to consider whether the ATS permits aiding and abetting liability; the Cato Institute's arguments are summarized [here](#). Among their claims is that the TVPA does not provide for aiding and abetting liability, and as a result, neither should the ATS.

CJA and Human Rights First [submitted a brief](#) in support of the respondents on the availability of aiding and abetting liability under the TVPA and the critical importance of aiding and abetting liability in combatting impunity for acts of atrocity. Human Rights First played a significant role in promoting the adoption of the TVPA, and CJA has represented survivor-plaintiffs in numerous lawsuits filed in federal courts under the ATS and the TVPA. Our brief draws on that collective experience, and our key arguments are summarized below.

Aiding and Abetting Liability Under the TVPA

In enacting the TVPA, Congress intended to codify some of the causes of action that could be brought under the ATS in 1991. That aiding and abetting liability is available under the TVPA is clear from its legislative history and from the language of the statute itself. By its express terms, the TVPA extends liability not just to individuals who personally commit the act of torture, but to anyone who "subjects" another to torture. The TVPA reflects the legislature's view of the causes of action permitted under the ATS at the time of the TVPA's passage, including claims against those who aid and abet violations of the law of nations.

The Acting Solicitor General and the Cato Institute assert – without any justification – that the TVPA does not provide for aiding and abetting liability, but that is simply incorrect. At the time of the TVPA's enactment, the availability of aiding and abetting liability for violations of the law of nations was clearly established, as *amici* international law scholars, former diplomats, and practitioners describe in their [brief](#) in support of respondents. Against this backdrop, Congress would have considered secondary liability an essential component of the causes of action for

torture and extrajudicial killing already available under the ATS, and ultimately codified by the TVPA. And, indeed, the Senate Report accompanying the TVPA makes clear that the statute was intended to encompass “lawsuits against persons who ordered, abetted, or assisted in the torture.” S. Rep. No. 102-249 at 8 (Section IV.E. Scope of liability).

In the decades following the TVPA’s enactment, courts have consistently interpreted the statute to allow for liability extending beyond the direct perpetrator. The Supreme Court in *Mohamad v. Palestinian Authority* noted that “the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing.” Just this year, the Eleventh Circuit in *Mamani v. Sánchez Bustamante* affirmed what many other Courts of Appeal have previously established: that the TVPA contemplates recovery based on theories of indirect liability, including aiding and abetting, conspiracy, agency, and command responsibility. (See [here](#) and [here](#) for other examples.) As the district court in *Yousuf v. Samantar* observed, “virtually every court to address the issue has recognized secondary liability for violations of international law since the founding of the Republic.”

Aiding and Abetting Liability Ensures All Perpetrators Are Held Accountable

The consistent judicial and legislative recognition of secondary liability for violations of international law – especially violations of core international norms – is not a coincidence. It reflects a basic recognition of the reality of the conduct at issue. Human rights violations are rarely, if ever, the single act of one individual. Instead, they occur because of actions and choices made by a variety of actors. Aiding and abetting liability ensures accountability for all conduct contributing to an atrocity.

At CJA, we have seen again and again the importance of such forms of liability in our cases. In 1999, CJA and the family members of Winston Cabello brought a case against Armando Fernández-Larios, a member of a notorious Pinochet-era military death squad known as the “Caravan of Death”. This death squad travelled city to city, dragging political prisoners from jail and executing them. As part of the Caravan of Death, Fernández-Larios participated in the torture and extrajudicial killings of political prisoners across Chile. Many years later, when he was sued under the ATS and the TVPA, it was the court’s finding of indirect liability that fully ensured Fernández-Larios would be held accountable for his actions.

Fernández-Larios had argued that he should escape liability because while it was indisputable that Winston Cabello was a victim of the Caravan of Death, there was no direct evidence that Fernández-Larios wielded the knife that ultimately took Cabello’s life. While the court did conclude that there was circumstantial evidence to support a jury verdict on direct liability, the court focused on the “overwhelming substantial evidence” supporting the theory of indirect liability, including aiding and abetting liability. Regardless of whether Fernández-Larios was the one who dealt the killing blow to Cabello, Fernández-Larios had “engaged in affirmative acts that contributed to Cabello’s death,” such as assisting his commanding officer in obtaining information on and selecting the prisoners to be slated for execution. This is the vital contribution of aiding and abetting liability: to hold accountable those who by their complicity make such atrocities possible.

In another case, the family of Archbishop Oscar Romero of El Salvador brought claims under the ATS and TVPA against Alvaro Rafael Saravia for his role in Romero’s assassination in 1980. Archbishop Romero, a champion of the people and an outspoken critic of violent paramilitaries,

was brutally gunned down while celebrating mass. His death shook the populace, feeding the political tension and conflict that ultimately resulted in eleven years of civil war. In 2018, Romero was canonized to sainthood by the Roman Catholic Church.

Saravia played a key role in planning the killing, arranging many of the details of the assassination, including setting up the assassin's transportation and providing him his payment after the completion of his task. Even though Saravia did not pull the trigger – nor was he even at the scene of the killing – the court found sufficient basis for liability, including aiding and abetting liability.

Atrocity does not take place in a vacuum. And a transnational slave trade could not exist without aiders and abettors – the network actors who profit and benefit from the system of forced labor at the heart of the allegations in *Nestlé* and *Cargill*. A failure to recognize the culpability of aiders and abettors is a failure to acknowledge the complex nature of atrocity. Aiding and abetting liability ensures that individuals and corporations who significantly contribute to human rights abuses can be held to account.