It's About Time: Enforcing Human Rights through Equitable Tolling

E. Rebecca Ballard

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It's About Time: 
Enforcing Human Rights Through Equitable Tolling

There's a sunny little country south of Mexico
Where the winds are gentle and the waters flow
But breezes aren't the only things that blow in El Salvador . . .
Just like Poland is 'protected' by her Russian friends
The junta is 'assisted' by Americans
And if 60 million dollars seems too much to spend in El Salvador.

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I. A Sunny Little Country South of Mexico

Near the start of Ronald Reagan's first term as president, 1,000
deaths occurred in El Salvador at the hands of military guerrillas.2

When Reagan entered office in January of 1981, the Salvadoran

1 This article is dedicated to my father, Bruce Wilson Ballard. I am grateful for his tremendous assistance, for without him this note would never have been written.

1 NOEL PAUL STOOKEY & JIM WALLIS, El Salvador, on NO EASY WALK TO FREEDOM (Neworld Media Music 1986) (as sung by Peter, Paul and Mary).

President Jose Napoleon Duarte called on him to bring democracy to El Salvador. Viewing the guerillas as Marxist and Duarte as a moderate and a proponent of democracy, the United States enthusiastically responded to Duarte’s call for support by sending military advisors, millions of dollars in military aid, and general economic assistance. The monetary aid provided went to support the Salvadoran junta, a military dictatorship controlled by Duarte. Although Democrats in Congress, human rights activists, and Catholic bishops were critical of the United States’ involvement with Duarte’s Salvadoran junta and with what they believed to be “death squads,” Reagan continued to increase aid to El Salvador throughout the early 1980’s.

Despite reports of massacres at the hands of the U.S.-supported Salvadoran Government, the Reagan administration pressed for more aid. Support of the junta was a major focus of American foreign policy during the first few years of the Reagan Administration. Since that time, the fact that the Salvadoran government was engaging in brutal human rights violations has become apparent. Additionally, it is now known that under the Reagan administration, the United States gave $1 million a day to “a repressive and often brutal Salvadoran government whose thugs and death squads killed thousands of people.” In total, the United

3 Id.


5 Riding, supra note 4 at A2.


7 Charles Mohr, Aid to Salvador Expected to Continue, N.Y. TIMES, Jan. 28, 1982, at A12. “Despite reports of a large-scale massacre of civilians by Government troops in El Salvador, President Reagan is still expected to certify that the Salvadoran security forces are making a ‘concerted and significant effort’ to respect human rights.” Id. While the State Department opposed human rights abuses, corroboration of these potential abuses were difficult. Id.

8 See Philip Taubman, House Panel Approves El Salvador Aid, N.Y. TIMES, Aug. 9, 1984, at A3 (“President Reagan made El Salvador a focus of American foreign policy.”).

9 Kevin Sullivan & Mary Jordan, In Central America, Reagan Remains a Polarizing Figure, WASH. POST, June 10, 2004, at A8.
States offered more than $4 billion in economic and military aid to the junta during El Salvador's civil war.\textsuperscript{10}

The torture experienced by victims in El Salvador was extreme. Catholic Church worker Neris Gonzalez was eight months pregnant when she was abducted.\textsuperscript{11} Gonzalez was beaten, raped multiple times, and placed in a vehicle with dead bodies.\textsuperscript{12} Her unborn son barely survived the encounter and he died two months after his birth from injuries sustained through the torture of his mother.\textsuperscript{13} It was many years after her son's death that Gonzales finally found justice in the Eleventh Circuit Court of Appeals case \textit{Arce v. Gonzales}.\textsuperscript{14} Ironically, justice was provided by the courts of a country that funded her torturers, in a case that would ultimately make it easier for torture claims like hers to be brought in the future.

Between 1979 and 1983, El Salvador's junta abducted and tortured Gonzales and fellow Salvadorans Juan Romagoza Arce and Carlos Mauricio.\textsuperscript{15} These three former Salvadoran citizens, now United States residents, brought a claim under the Alien Tort Claims Act (ATCA) and Tort Victims Protection Act (TVPA)\textsuperscript{16} in the Southern District of Florida on February 28, 2000 against two Salvadoran military officials, Jose Guillermo Garcia and Carlos Eugenio Vides-Casanova.\textsuperscript{17} The jury found for the plaintiffs and ordered a verdict of $54,600,000, holding the defendants liable for the acts of torture under the vicarious liability doctrine of command responsibility.\textsuperscript{18} The defendants appealed to the Eleventh Circuit.\textsuperscript{19}

On February 28, 2005, the Eleventh Circuit barred the victims'}
claims under their interpretation of the tolling the statute of limitations for the ATCA and TVPA.\textsuperscript{20} On August 25, 2005, the same court, on its own motion, vacated its earlier opinion.\textsuperscript{21} The Eleventh Circuit reinstated the district court’s damages award of $54,600,000 on January 4, 2006.\textsuperscript{22} The court vacated its previous opinion as a result of its understanding of the equitable tolling of a statute.\textsuperscript{23} Equitable tolling determines when a statute will start and stop running and may extend the amount of time during which a torture victim can bring a claim.\textsuperscript{24} The vacated opinion (\textit{Arce I}) contains a harsher interpretation of equitable tolling, stating that a more lenient version of equitable tolling would cause an erosion of the integrity of the United States courts.\textsuperscript{25} Yet, in its second opinion (\textit{Arce II}), the Eleventh Circuit used the very lenient standard rejected in the first opinion (\textit{Arce I}). In addition to the immediate effect of reinstating the verdict of a rather large damage award, \textit{Arce II} will prospectively make it easier to bring similar claims under the ATCA and TVPA in the future by allowing the tolling of statutes for many more years than allowed under the vacated opinion’s standard.

This Note will examine equitable tolling under the ATCA and TVPA and explain the role of \textit{Arce v. Garcia} in this area of jurisprudence. This case is important for many reasons. \textit{Arce v. Garcia} will make it easier for future torture allegations to be brought by torture victims. This rare example of a federal appeals

\textsuperscript{20} \textit{Arce I}, 400 F.3d 1351.
\textsuperscript{21} \textit{Arce II}, 434 F.3d at 1256.
\textsuperscript{22} Id.
\textsuperscript{23} See id.
\textsuperscript{24} The Eleventh Circuit defines equitable tolling as a “doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances.” \textit{Ellis v. Gen. Motors Acceptance Corp.}, 160 F.3d 703, 706 (11th Cir. 1998).
\textsuperscript{25} See \textit{Arce I}, 400 F.3d at 1351. In its vacated opinion, the Eleventh Circuit stated that “[a] lenient approach toward equitable tolling would mean that United States courts would hear claims dating back decades, if not centuries . . . Congress surely did not intend to permit such ‘trial-by-excavation, at least not absent extraordinary circumstances.’” \textit{Id.} \textit{But see Arce II}, 434 F.3d at 1265 (“[t]he remedial scheme conceived by the TVPA and ATCA would fail if courts allowed the clock to run on potentially meritorious claims while the regime responsible for the heinous acts . . . remains in power.”).
court vacating its own opinion presents an opportunity for the United States to bring about greater global justice by providing a forum in which torture victims can seek redress. Part II provides the appropriate statutory and background law. Part III introduces the facts of *Arce v. Garcia*, the procedural history of the case, and the holdings of the vacated and substituted opinions. Part IV offers an analysis of case law used under both *Arce I* and *Arce II* regarding equitable tolling and highlights how the substituted opinion is in accordance with precedent. Part IV also provides an analysis of the reasoning used in each Eleventh Circuit opinion and addresses some of the future policy implications of *Arce v. Garcia*. Finally, Part V concludes by examining how *Arce II* promotes greater justice in light of the United States’ involvement with the Salvadoran military junta.

II. Equitable Tolling under the Alien Tort Claims Act

A. Alien Tort Claims Act

In 1789 the United States Congress passed the Alien Tort Claims Act (ATCA). By enacting the ATCA, Congress intended to provide a forum for foreign plaintiffs claiming damages for torts that violated either international law or United States treaties. "For nearly 200 years after its passage, the ATCA was rarely used." However, in 1980, the Second Circuit held that the ATCA "opens federal courts to civil suits by aliens for torts committed in violation of customary international law, even when the case involves acts perpetrated in another country by a non-U.S. citizen."

Today the ATCA is used for international tort claims such as torture, detention, and execution. While the ATCA does not provide a substantive cause of action, it gives a jurisdictional basis

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27 *Id.*

28 *Id.*

29 See *Id.* at 194 (quoting Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 549 (2000)).

30 *Id.*
for international law claims.\textsuperscript{31} To achieve such a jurisdictional basis, plaintiffs must allege that they are aliens suing for a tort committed in violation of the law of nations or a treaty of the United States.\textsuperscript{32}

The ATCA does not have an express statute of limitations.\textsuperscript{33} When a federal statute has no limitations period, the courts must derive a statute of limitations by looking at similar state law, federal law, and even the law of the locale in which the tortuous act occurred if it took place in a foreign country.\textsuperscript{34} Courts have used this analysis for the ATCA and in doing so have applied the ten year statute of limitations for the Tort Victims Protection Act to the ATCA.\textsuperscript{35}

\textbf{B. Tort Victims Protection Act}

In the Torture Victims Protection Act of 1991 (TVPA), Congress established a civil cause of action by providing that:

any 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 . . . . No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.\textsuperscript{36}

Although "official torture is prohibited by the law of nations,"\textsuperscript{37} the continued toleration of or engagement in torture by many of the world's governments concerned the United States Congress.\textsuperscript{38} Congress believed that there was an obligation to provide civil redress for victims of torture, but saw that, in reality, judicial

\begin{itemize}
  \item \textsuperscript{31} Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1144 (E.D.Cal. 2004).
  \item \textsuperscript{32} Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1129 (C.D. Cal. 2002).
  \item \textsuperscript{33} Chawes, \textit{supra} note 26, at 195.
  \item \textsuperscript{34} \textit{Id}.
  \item \textsuperscript{35} \textit{Id}.
  \item \textsuperscript{36} 28 U.S.C.A. § 1350 (2006).
  \item \textsuperscript{37} Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2nd Cir. 1980).
\end{itemize}
protections were often ineffective in countries where abuses were most common.\textsuperscript{39} Currently, there is a debate among judges regarding whether the ATCA provides a private right of action,\textsuperscript{40} but even if it does, the ATCA provides a remedy only for aliens and not for U.S. citizens tortured abroad.\textsuperscript{41} Congress thus enacted the TVPA to ensure a remedy for the lack of judicial redress in other countries.\textsuperscript{42}

\textbf{C. Equitable Tolling}

Statues of limitations protect defendants from claims where an ordinary person through due diligence should have already filed the claim.\textsuperscript{43} This spares defendants from being forced to litigate claims when evidence has decreased or become less reliable over time, memories are years or even decades old, and witnesses are unavailable at the time of trial.\textsuperscript{44} This protection lessens the number of fraudulent\textsuperscript{45} and stale claims\textsuperscript{46} that go to trial, and aims to increase the percentage of claims litigated which are valid.\textsuperscript{47}

Assuming a ten-year statute of limitations,\textsuperscript{48} both the ATCA and TVPA could allow claims older than ten years to be heard under the doctrine of equitable tolling. As “equitable tolling is appropriate when a movant untimely files because of extraordinary

\textsuperscript{39} \textit{Id.} at 85.

\textsuperscript{40} \textit{See} Filartiga, 630 F.2d at 876 (stating that ATCA provides a substantive and subject matter basis for claims of torture). \textit{But see} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Judge Bork, concurring) (questioning the existence of a private right of action under the ATCA.)

\textsuperscript{41} S. REP. No. 102-249, at 5 (1991).

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textsc{Stuart M. Speiser et al., The American Law of Tort} § 5.25, at 869-70 (1983).

\textsuperscript{44} \textsc{1 Calvin W. Corman, Limitation of Actions} § 1.1 (1991).

\textsuperscript{45} \textsc{James R. MacAyeeal, The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Death Penalty Claims,} 15 VA. ENVTL. L.J. 589, 591 (1996).


\textsuperscript{47} \textsc{Corman, supra note 44}.

\textsuperscript{48} \textit{See} Chawes, \textit{supra} note 26, at 196. While the TVPA has an enumerated ten-year statute, the time period of the ATCA statute of limitations is uncertain. Many courts have applied a 10-year statute of limitations, but not all. Chawes argues Congress should amend the ATCA to provide an express 10-year statute of limitations. \textit{Id.}
circumstances that are both beyond his control and unavoidable even with diligence," the plaintiff bears the burden of showing that the circumstances are so extraordinary as to warrant equitable tolling. Some examples of circumstances where equitable tolling is appropriate include: a claimant receiving inadequate notice, a pending motion for appointment of counsel, or the court leading the plaintiff to believe he has done all that is required. The most common circumstance occurs when the defendant’s misconduct was a contributing factor in the plaintiff’s failure to meet a filing deadline. Equitable tolling is to be used sparingly; without affirmative misconduct on the part of the defendant, the courts are far less likely to excuse late filings. One decision from the Northern District of California suggests that equitable tolling should be available only when the defendant’s wrongful conduct prevents the plaintiff from asserting a claim or when circumstances outside the plaintiff’s control make timely assertion of the claim impossible.

Statutory intent can shed light on the appropriateness of equitable tolling of a particular statute under certain fact patterns. The ATCA and TVPA provide some international human rights protections, without which many causes of action for serious human rights abuses would not be heard. The Senate Report for the TVPA proclaims:

[)]he legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles in calculating the period with a view toward giving justice to plaintiff’s rights. Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising

49 Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999).
50 Justice v. United States, 6 F.3d 1474, 1479 (11th Cir. 1993).
53 Id.
55 See Arce II, 434 F.3d at 1261.
56 Id.
from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.57

It is evident from this passage that Congress intended to toll the statute of limitations for the TVPA when the defendants are outside the reach of either United States courts or other legal systems where claims of human rights violations could be fairly litigated.58

III. Introducing Arce v. Garcia

A. Facts of the Case

The three plaintiffs in Arce v. Garcia all have claims resulting from acts of torture occurring at the hands of the Salvadoran junta.59 Prior to their torture, all three of the plaintiffs were working to improve the lives of others in El Salvador.

Juan Romagoza Arce was a physician in El Salvador.60 He was never involved in politics, but organized health campaigns in northern El Salvador where there was a great need for medical attention by the peasants.61 Although he carried no gun and was only trying to provide medical care, Arce was kidnapped on December 12, the feast day of the Virgin of Guadalupe.62 While captive, he was shot, hung from sharp ropes, electrically shocked, and beaten from 1980 until January 5, 1981.63 He arrived in the

58 See Arce II, 434 F.3d at 1262.
59 Arce I, 430 F.3d 1340, 1342 (11th Cir. 2005).
61 Id.
62 Id.
63 Arce I, 400 F.3d at 1343; Arce II, 434 F.3d at 1257.
United States in 1983.64

Neris Gonzalez was a Catholic Church lay worker in El Salvador who arrived in the United States in 1997.65 In El Salvador, Gonzalez worked as a health educator in a small village where there were no doctors and pressed government officials for health care and education reforms.66 She taught people how to read and count, and for this Gonzalez was abducted by the Salvadoran junta on December 26, 1979.67 For approximately two weeks she was burned, stuck with needles, asphyxiated, repeatedly raped, electrically shocked, beaten, forced to drink blood from an open wound, and forced to have a bed frame balanced on her stomach while pregnant.68

Carlos Mauricio was a college professor at the University of El Salvador where he taught agricultural science.69 On June 13, 1983, individuals dressed in civilian clothing entered his classroom and asked him to move his car.70 When he left the classroom he was forced into an unmarked car.71 Mauricio was interrogated and beaten for approximately ten days before he came to America later in 1983.72

The two defendants in Arce were Jose Garcia and Carlos Vides-Casanova. Garcia was the minister of defense in El Salvador from 1979 to 1983. Vides-Casanova was the Director General of the El Salvadoran National Guard. He later replaced

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64 Arce II, 434 F.3d at 1256.
65 Id.
67 Arce II, 434 F.3d at 1256; see Lieblich, supra note 66, at 8.
68 Arce I, 400 F.3d at 1343.
70 Id.
71 Id.
72 Arce II, 434 F.3d at 1256. Neither the first nor second opinion specifies the exact date or month Gonzalez arrived, but they both affirm it was sometime during 1983. Id.
Garcia as minister of defense and served until resigning in 1989.  

**B. Procedural History**

On May 11, 1999, Arce and Gonzalez filed an action against Garcia and Casanova in the United States District Court in the Central District of Florida. Plaintiffs sought compensatory and punitive damages under the TVPA and used the ATCA to provide the requisite jurisdictional basis for their claim. On December 22, 1999, Mauricio joined the claim as a plaintiff. The three plaintiffs brought their claims in the district court on February 22, 2000.

On April 27, 2001, defendants filed a motion to dismiss as a result of the statute of limitations, which the district court rejected by holding the plaintiffs' claim as equitably tolled until January 16, 1992, the date restoring independence of the judiciary in El Salvador. Defendants responded to the denial of their motion by arguing that the statute of limitations for the claim had already run and thus the claim was barred. Defendants stated that they had been available for service of process since the last act of torture. The most recent act of torture claimed by the plaintiffs was over ten years old, so the defendants argued that the ten year statute of limitations had run. The court rejected the defendant's argument against equitable tolling and awarded the three plaintiffs $54.6 million in compensatory and punitive damages.

In its opinion, the district court emphasized the fear of reprisals against plaintiffs' relatives by parties aligned with the defendants and justified the delay in filing the claims on these
The defendants filed a motion for judgment as a matter of law and a motion for a new trial claiming that the plaintiffs’ claims were time-barred under the statute of limitations.\textsuperscript{84} The district court denied both of these motions.\textsuperscript{85}

On February 28, 2005, the Eleventh Circuit Court of Appeals reversed the district court’s judgment.\textsuperscript{86} The court noted the express ten year statute of limitations of the TVPA and implied a ten year statute of limitations for the ATCA.\textsuperscript{87} Congress affirmatively intended that equitable tolling would be available for the ATCA and TVPA and in \textit{Arce} I the court did take equitable tolling into consideration.\textsuperscript{88}

Equitable tolling can only occur in “extraordinary circumstances” that involve defendant misconduct.\textsuperscript{89} The court wrote that it was reviewing, \textit{de novo}, the issue of equitable tolling for statutes of limitation for claims that took place in El Salvador until the Salvadoran civil war ended.\textsuperscript{90} The Court of Appeals rejected plaintiffs’ arguments that the following circumstances would be sufficient to justify equitable tolling: the civil war and power of the Salvadoran military as an “extraordinary circumstance,” the pattern of denial by defendants of personal responsibility for human rights abuses in El Salvador, Gonzalez not arriving in the United States until 1997, and tolling of the statutes until all of the defendants obtain United States residency.\textsuperscript{91} The court also stated in dictum that allowing plaintiffs to get redress in the courts would set a “dangerous precedent” that would cause courts to hear ancient claims in trials more about the legitimacy of regimes than of the lawfulness of particular

\textsuperscript{83} See \textit{Arce} II, 434 F.3d at 1265.
\textsuperscript{84} See \textit{Arce} I, 430 F.3d at 1344.
\textsuperscript{85} See id.
\textsuperscript{86} \textit{Arce} I, 400 F.3d at 1351.
\textsuperscript{87} Id. at 1345-46.
\textsuperscript{88} Id. at 1346 (quoting S. REP. No. 102-249, at 11 (1991)) (stating that times where the plaintiff is imprisoned or otherwise incapacitated should be excluded from the statute of limitations).
\textsuperscript{89} \textit{Arce} I, 400 F.3d at 1346-47 (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)).
\textsuperscript{90} Id. at 1346-47.
\textsuperscript{91} Id. at 1348.
incidents.\footnote{Id. at 1351.}

\textbf{C. The Most Recent Holding}

On its own motion, entered on August 5, 2005, the Eleventh Circuit vacated its February 28, 2005 opinion.\footnote{Arce II, 434 F.3d at 1256.} The substituted opinion, filed on January 4, 2006, emphasized the district court’s finding that fear of reprisals against plaintiffs’ relatives by people affiliated with the defendants justified the delay of the plaintiffs in bringing their claims and that this fear of reprisals motivated the district court to equitably toll the statute of limitations.\footnote{Id. at 1265.} The Eleventh Circuit used the standard of abuse of discretion to review the district court’s decision and stressed in the second opinion that the district court’s ruling should be overturned only “when it misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous.”\footnote{Id. at 1260 (citing Minsey v. Head, 206 F.3d. 1106, 1137 n. 69 (11th Cir. 2000)).}

The Eleventh Circuit emphasized the importance of statutes of limitation in \textit{Arce II}. According to the Eleventh Circuit, statutes of limitation are promulgated primarily for fairness to the defendants because the right to be free from stale claims prevails over the right to prosecute in cases where the plaintiff has “slept on his rights.”\footnote{Arce II, 434 F.3d at 1261 (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 324, 348-49 (1944)).} Equitable tolling halts a statute of limitations in situations the court considers unfair or when circumstances are beyond the control of the plaintiff and unavoidable with diligence;\footnote{Id. at 1261 (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)).} in the instant case fairness to the plaintiff would be compromised if the statute were not tolled. In \textit{Arce II}, the Eleventh Circuit emphasized the legislative intent to allow for statutory tolling upon the creation of the TVPA.\footnote{Id. at 1262 (citing S. REP. NO. 102-249, at 10-11, (1991)).} A non-exhaustive list of equitable tolling under the TVPA includes when the defendant was absent from the United States or a similar jurisdiction, when the plaintiff is imprisoned or incapacitated, or when the plaintiff is unavailable to discover the identify of the offender. \textit{Id.}
cited case law to provide examples of instances where, without equitable tolling, "fair administration of justice" would be impossible.\textsuperscript{99}

\textit{Arce II} also mentioned the Salvadoran civil war and further noted that friends of victims who came forward to testify took a serious risk.\textsuperscript{100} In light of this, the court found the district court's finding of fact "heavily supported by the record," and with these findings of fact concluded the tolling of the statute of limitations was well within the district court's discretion.\textsuperscript{101} The legislative intent of the statute is to toll the claims until the defendants are clearly within reach of United States courts, making both Arce's and Gonzalez's claims timely, as they were filed less than ten years after Casanova's resignation.\textsuperscript{102} Mauricio's claim was not within this time frame, but the court stated the district court had discretion to toll this claim until the end of the civil war in 1992.\textsuperscript{103} The Eleventh Circuit saw the plaintiffs' fear of reprisals from those affiliated with the defendants as legitimate and as the kind of extraordinary circumstance that should not cause the statute of limitations to run against a likely meritorious claim of torture.\textsuperscript{104} If the statute ran out, many of those who were tortured would never come forward to have their story heard.\textsuperscript{105}

IV. How \textit{Arce v. Garcia} Will Save Lives

A. Legal Analysis

The Eleventh Circuit issued its first opinion in \textit{Arce v. Garcia} on February 28, 2005. This opinion provided that the ATCA should have the same statute of limitations as the TVPA because of the many similarities between the two statutes.\textsuperscript{106} It stated that

\textsuperscript{99} Id. (citing Cabello v. Fernandez-Larios, 402 F.3d 1148, 1155 (11th Cir. 2005); Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987)).

\textsuperscript{100} \textit{Arce II}, 434 F.3d at 1265.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 1264.

\textsuperscript{103} Id. at 1265.

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} The purpose of both federal statutes is to protect human rights by using civil
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equitable tolling is only appropriate in "extraordinary circumstances" that are without the fault and outside the control of the plaintiff. The plaintiff has the burden of showing that equitable tolling is warranted because "equitable tolling is an exception to the rule of the statute of limitations, not the rule itself." The plaintiff has the burden of showing that equitable tolling is warranted because "equitable tolling is an exception to the rule of the statute of limitations, not the rule itself." The court viewed the unrest in El Salvador as irrelevant because most of the plaintiffs and both of the defendants came to the United States in the 1980s. The court also did not view the cases cited by the plaintiffs as binding on the Eleventh Circuit. It did not find the defendants' denial of personal responsibility for the abuses sufficient to "rise to the level of misconduct usually required for equitable tolling" because there was no affirmative misconduct. The court did not believe the defendants could have hindered the plaintiffs from accessing evidence. It saw the unavailability of the Salvadoran courts to hear these claims as irrelevant. The court did not regard Hilao v. Estate of Marcos as standing "for the monolithic proposition that the defendant's absence [from the jurisdiction of the United States] is alone sufficient to require tolling." The Eleventh Circuit concluded by stating that:

"After dismissing each of the plaintiffs' arguments for equitable tolling, we conclude by noting the dangerous precedent that this case could set if those arguments were accepted. From a United

suits. Arce I, 400 F.3d at 1346.

107 Id. at 1347.

108 Id.

109 Id. at 1351.

110 Id. at 1348.

111 These cases include Rosner v. United States, 231 F.Supp. 2d 1202 (S.D. Fla. 2002), Cabello Barrueto v. Fernandez Larios, 205 F.Supp. 2d 1325, 1331 (S.D. Fla. 2002), and Hilao v. Estate of Marcos, 103 F.3d 767, 767 (9th Cir. 1996). There is further discussion of some of the relevant case law in Part B of this section.

112 Arce I, 400 F.3d at 1348.

113 Id. at 1349.

114 Id.

115 Id. at 1350.

116 Id. at 1351.
States perspective, there are many countries that oppress their citizens today, and many countries that have oppressed their citizens in decades and centuries past. A lenient approach toward equitable tolling would mean that United States courts would hear claims dating back decades, if not centuries. In enacting a statute of limitations for the TVPA, Congress surely did not intend to permit such trial-by-excavation, at least not absent extraordinary circumstances. Courts would wind up with cases that are based not on witnesses with personal knowledge, but instead on the generalized testimony of human-rights workers, diplomats, and assorted experts. Much of the evidence would pertain not to the particular incidents at issue, but to the illegitimacy of an overall regime. Nevertheless, the plaintiffs' failure in this case to qualify for equitable tolling is not a death knell for future claimants. Instead, it is merely a recognition that 'extraordinary circumstances' is reserved for extraordinary facts, and not for a plaintiff's failure to timely assert her rights.\footnote{Id.}

This strongly worded opinion considered tolling in this circumstance as a mechanism that would lead the court to hear a plethora of stale claims.\footnote{Id.}

The Eleventh Circuit issued a motion sua sponte on August 5, 2005 to vacate the February 28, 2005 opinion. On January 4, 2006, the court issued a new opinion, which allowed for the $54,600,000 judgment of the jury.\footnote{Arce I, 400 F.3d at 1351.} This opinion examined whether the district court had abused its discretion in equitably tolling the statute of limitations, emphasizing abuse of discretion as the standard of review.\footnote{Arce II, 434 F.3d at 1256.}

\textit{Arce} II allowed for equitable tolling. It reviewed the wording and intent of the statute to determine whether equitable tolling was appropriate, considering the policy behind the statute.\footnote{Id. at 1260.}

Analogizing the TVPA and the ATCA, the court examined the
legislative history of the TVPA, and in that history found that Congress “clearly intends that courts toll the statute of limitations so long as the defendants remain outside the reach of the United States courts...”122 The Eleventh Circuit also found that equitable tolling could be required when parties resided in the United States if a situation in their home state created circumstances in which the fair administration of justice—even through a trial in the United States courts—might be impossible.123 The court noted that, so long as an oppressive regime remains in power, these regimes have an incentive “to intimidate witnesses, to suppress evidence, and to commit additional human rights abuses against those who speak out against the regime.”124 The court cited Cabello v. Fernandez-Larios125 as an example of tolling the statute of limitations until the end of the power of a military dictatorship and Hilao as supporting the concept that a regime change may be necessary before the running of ATCA claims.126 The Arce II court viewed the situation in El Salvador as sufficient to toll the statute of limitations. The court saw the military junta during the civil war in El Salvador127 as a regime that would have “used its significant power to thwart any efforts to redress human rights violations that it perpetrated.”128 Evidence of violations would be suppressed during this time period and witnesses would have been intimidated and possibly tortured.129 The plaintiffs’ fear of harm to family members and friends remaining in El Salvador was legitimate, as “the [human rights] record of El Salvador swells with evidence regarding the brutality and oppression that the Salvadoran military visited upon the people of El Salvador” including reports of abductions, torture, and murder.130 No remedy was available in the courts of El

122 Id. at 1262.
123 Id.
124 Id.
125 Cabello v. Fernandez-Larios, 402 F. 3d 1148, 1155 (11th Cir. 2005).
126 Arce II, 434 F.3d. at 1262-63.
127 The court determined that the war ended in 1992, less than ten years before the filing of the claims by the three plaintiffs. See id. at 1263 n.22.
128 Id. at 1263.
129 Id.
130 Id. at 1263-64.
Salvador during this time, as they had "a judiciary too meek to stand against the regime." 131

The two opinions used different reasoning to arrive at their conclusions. Arce II looked to the legislative history of the TVPA. 132 It also focused on the legitimacy of reprisals by the military against the plaintiffs and their family and friends, noting that these reprisals could have occurred even when the plaintiffs resided in the United States. 133 Arce I expressed the concern that equitable tolling allowed stale claims based on generalized secondhand testimony. 134 The second opinion had a very different take on equitable tolling. It saw the remedial scheme of the TVPA and ATCA as requiring the clock to stop "while the regime responsible for heinous acts for which these statutes provide redress remains in power, frightening those who may wish to come forward from ever telling their stories." 135

B. Arce v. Garcia and Prior Case Law

When the 11th Circuit handed down the second Arce opinion they did not set the dangerous precedent alluded to in their first opinion. 136 Instead the Court of Appeals issued an opinion in line with earlier precedent. This more lenient approach is also more in line with legislative intent than the approach used in the first

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131 Id. at 1264.
132 Arce II, 434 F.3d at 1264.
133 "The court found that the plaintiffs legitimately feared reprisals from the Salvadoran military, despite the fact that the defendants resided in the United States. The military regime, in which both Garcia and Casanova had held positions of great influence, remained in power. State-sponsored acts of violence and oppression continued to ravage El Salvador. The very regime against whom the plaintiffs leveled their accusations remained intent on maintaining its power at any cost and acted with impunity to do so. Mauricio could not reasonably have expected to achieve justice until after the military regime fell from power in 1992; only then could the evidence have come to light and Mauricio have made his claims without fear of reprisal against family and friends in El Salvador." Id. at 1265.
134 See supra text accompanying note 117.
135 Id. at 1265.
136 See Arce I, 400 F.3d at 1351 (stating that a more lenient approach towards equitable tolling, such as that used in the second opinion, would cause the US courts to be flooded with ancient claims and cause "trial-by-excavation").
opinion\textsuperscript{137} and it continues the flexible tolling of the ATCA and TVPA recognized in previous cases.\textsuperscript{138}

For example, \textit{Forti v. Suarez-Mason} dealt with Argentinean citizens residing in the United States bringing claims against a former Argentinean general for torture, murder, and prolonged arbitrary detention during Argentina’s “dirty war” of the late-1970s.\textsuperscript{139} The plaintiffs were effectively denied access to the courts out of fear for their own safety.\textsuperscript{140} \textit{Forti} applied equitable tolling to events that are beyond the plaintiff’s control and tolled the limitations period until the barriers put in place by these events were removed.\textsuperscript{141} In light of the victims’ fear for their own safety, the statute of limitations was appropriately tolled.\textsuperscript{142}

\textit{Hilao v. Marcos} litigated claims of torture, execution, and disappearance by the military and paramilitary forces under Ferdinand Marcos’ fourteen-year rule of the Philippines.\textsuperscript{143} The large amount of intimidation and fear of reprisals for speaking out during Marcos’ presidency equitably tolled any and all claims for acts of torture until Marcos’ presidency ended.\textsuperscript{144} As these were extraordinary circumstances outside the plaintiffs’ control, they resulted in the equitable tolling of the statute of limitations. Both \textit{Arce} opinions mention \textit{Hilao}. \textit{Arce} I factually distinguished \textit{Hilao} and decided not to use this Ninth Circuit approach.\textsuperscript{145} \textit{Arce} II cited \textit{Hilao} and emphasized how tolling the statute of limitations was appropriate throughout the entirety of the Marcos regime.\textsuperscript{146} The

\begin{enumerate}
\item[\textsuperscript{137}] See \textit{supra} text accompanying note 57.
\item[\textsuperscript{138}] See, \textit{e.g.}, \textit{Forti v. Suarez-Mason}, 672 F.Supp. 1531 (N.D. Cal. 1987).
\item[\textsuperscript{139}] \textit{Id.} at 1536.
\item[\textsuperscript{140}] \textit{Id.} at 1550.
\item[\textsuperscript{141}] \textit{Id.}
\item[\textsuperscript{142}] \textit{Id.}
\item[\textsuperscript{143}] \textit{Hilao v. Marcos}, 103 F.3d 767, 771 (9th Cir. 1996).
\item[\textsuperscript{144}] \textit{Id.} at 773. One other factor in this tolling was Marcos’ enacting a statute granting him complete immunity from suit during his time in office. \textit{Id.}
\item[\textsuperscript{145}] See \textit{Arce} I, 400 F.3d at 1350, n.6 (“We do not follow the Ninth Circuit’s lead because there are several factual differences between \textit{Hilao} and our case, and because the Ninth Circuit’s lenient approach toward equitable tolling softens the rigors of what constitutes extraordinary circumstances.”).
\item[\textsuperscript{146}] \textit{Arce} II, 434 F.3d at 1265 (“tolling statute of limitations under the ATCA and TVPA ‘[u]ntil the Marcos regime in the Philippines was overthrown’”).
\end{enumerate}
emphasis was not on the power of a single president, but the control of an unfavorable regime which is analogous to what happened in El Salvador and litigated in Arce.

*Doe v. Unocal* was a class action brought by plaintiffs in Burma for human rights violations perpetrated through a joint venture gas pipeline project. In *Doe*, the defendants used violence and intimidation to relocate villages, enslave farmers, and steal farmers’ property. In addition to causing the death of the plaintiff’s family members, the defendant’s actions led to rape, assault, torture, forced labor, and the loss of homes and property. This case highlights two circumstances in which federal law provides for equitable tolling to be available: “where (1) defendant’s wrongful conduct prevented plaintiff from asserting the claim; or (2) extraordinary circumstances outside the plaintiff’s control made it impossible to timely assert the claim.” The *Doe* court, basing their opinion on this framework and the Ninth Circuit’s *Hilao* decision, tolled the statute of limitations for the time the military forces remained in power. During that time the plaintiffs were unable to receive judicial review because of their fear of reprisal.

*Cabello v. Fernandez-Larios* concerned the execution of thirteen political prisoners by gunfire and stabbing in Chile. The *Cabello* court considered the Congressional intent behind the TVPA in order to determine the circumstances in which the statute of limitations should be tolled. The court determined that Congress intended to allow for equitable tolling when the defendant is absent from the jurisdiction or immune to lawsuits, or when the plaintiff is imprisoned or incapacitated. Equitable tolling is then pared down to the distinction of allowing tolling when the defendant’s conduct prevents the plaintiff from asserting the claim or when extraordinary circumstances outside the

148  *Id.*
149  *Id.* at 897.
150  *Id.*
152  *See id.* at 1367-68.
153  *Id.* at 1368, (citing S.REP. NO. 249-102, at 11 (1991)).
plaintiff's control make timely assertion of the claim impossible.\textsuperscript{154} In light of these circumstances, the statute of limitations was tolled until General Pinochet's military regime was replaced.\textsuperscript{155} While both the first and second \textit{Arce} opinions mentioned this case, the two opinions gave \textit{Cabello} slightly different treatment. \textit{Arce} I emphasized the need for affirmative misconduct for equitable tolling, such as deliberate concealment.\textsuperscript{156} \textit{Arce} II did not require affirmative misconduct; rather, the court recognized abusive government practices were a sufficient justification for statutory tolling.\textsuperscript{157} Further, the court felt the statute should be tolled until there is a regime change.\textsuperscript{158}

While all of these cases have slightly different emphases, they are all used in the first and second \textit{Arce} opinions. All allow for equitable tolling during a military regime, and the logic of the second opinion follows the precedents set by these cases more faithfully than does the first opinion.

\textbf{C. Future Implications}

\textit{Arce} II correctly acknowledges that torture can affect not just individuals, but whole communities and even entire countries. According to the Centre for the Care of Survivors of Torture, the effects of torture can be physical, psychological, and social.\textsuperscript{159} While torture victims may bear direct physical effects,\textsuperscript{160} family,
friends, and even the broader society can be indirectly affected. The aim of torture is not just to affect the individual tortured, but "to control society through debility, dependency and dread." Arce II wisely states that even if tortured individuals are in a safe haven, so long as the oppressive regime which administered the torture is in power, justice cannot be achieved. The fear created by torture will linger until all individuals formerly living under an oppressive regime are safe, and it will only be then that justice can be sought through the judicial system. Because the effect of torture is so strong, allowing individuals to have ten years after the ending of an oppressive regime to pull their lives back together and file claims will likely lead U.S. courts to hear more claims in the future.

One result of Arce v. Garcia is that torture claims from acts perpetrated during the United States' War on Terror may be able to be heard indefinitely. The War on Terror is unlikely to end in the near future, as President Bush stated that "no matter how long it takes, no matter how difficult the task, we will fight the enemy, and lift the shadow of fear, and lead free nations to victory." Since the fight on terror has no end in sight, the ATCA may be tolled indefinitely if the courts determine the hostilities sufficient to prompt equitable tolling. Adding ten years to the end of the War on Terror provides a potentially very long window for hearing human rights claims. One ironic consequence of this is that if human rights allegations at Guantánamo Bay prove to be true, the holding of Arce v. Garcia may help to allow these claims to be heard in United States courts.

The Arce II interpretation of the ATCA is in line with

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161 Id.
162 Id.
163 Arce II, 434 F.3d at 1262.
165 Guantánamo Bay - a Human Rights Scandal, Amnesty Int'l, http://web.amnesty.org/pages/guantanamobay-index-eng (last visited Dec. 27, 2006) "Many of these detainees allege they have been subjected to torture or other cruel, inhuman [,] and degrading treatment. Three detainees have died at the camp, after apparently committing suicide. Others have gone on prolonged hunger strikes, being kept alive only through painful force feeding measures." Id.
Congress' intent that the United States should play a role in promoting greater global justice. The TVPA was enacted
to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to
the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.\textsuperscript{166}

In \textit{Arce II}, the Eleventh Circuit affirmed the role of U.S. courts in providing a forum for greater global justice. The ATCA and the TVPA work together to allow for claims to be heard once it is fruitful to bring them, and not before then, when justice in the court may result in further injustice outside of it.

\textbf{V. Conclusion}

This Note highlights the procedural history and holding of \textit{Arce v. Garcia}, including the district court opinion and the first and second Eleventh Circuit opinions. The ATCA and TVPA work together to provide both a jurisdictional and a substantive basis for claims of human rights violations in foreign countries. Like any time-barred statute, the ATCA and TVPA may be subject to equitable tolling. Earlier cases allowed for equitable tolling in the analogous factual situations of military regimes controlling foreign countries and the use of fear and intimidation to prevent claims from being filed.

The United States government supported the El Salvador military junta\textsuperscript{167} and bestowed honors upon the Salvadoran generals, the defendants in this lawsuit.\textsuperscript{168} \textit{Arce v. Garcia} makes history as one of the few post-World War II verdicts where a civilian jury held military commanders responsible for torture, and is especially noteworthy because no officers or troops were court-

\textsuperscript{166} Tort Victims Protection Act, Pub.L. No. 102-256; 106 Stat. 73.

\textsuperscript{167} Taubman, \textit{supra} note 8 (“Ronald Reagan . . . funneled $1 million a day to a repressive and often brutal Salvadoran government whose thugs and death squads killed thousands of people . . . . The United States spent more than $4 billion on economic and military aid during El Salvador's civil war, in which more than 75,000 people were killed, many of them civilians caught in the crossfire.”).

\textsuperscript{168} David Gonzalez, \textit{Torture Victims in El Salvador Are Awarded $54 Million}, N.Y. Times, July 24, 2002, at A1. Mr. Klaus, the defense attorney, drew attention to the that both generals had been honored by United States in the past. \textit{Id}. 
martialed for abuses and broad amnesty was given to junta-related acts of torture. With the ATCA and TVPA, the United States ironically has an opportunity to bring about greater global justice by providing a forum and remedies for the very atrocities it funded in foreign countries.

The holding of *Arce v. Garcia* provides an important tool for human rights activists. While a foreign country is still in turmoil victims do not have to concern themselves with judicial redress. Under *Arce*, victims then have a full ten years, without any fear of retribution against themselves or others, to commence judicial action.

**E. Rebecca Ballard**

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169 *Id.* (comments attributed to Sandra Coliver of the San Francisco-based Center for Justice and Accountability).