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Jennifer Correale

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HUMAN RIGHTS COMMENT

THE TORTURE VICTIM PROTECTION ACT: A VITAL CONTRIBUTION TO INTERNATIONAL HUMAN RIGHTS ENFORCEMENT OR JUST A NICE GESTURE?

It has become obvious that technological idiocy, unbridled fanaticism and Realpolitik have pushed humanity, for the first time in its history, to the brink of a precipice where the mode and conditions of life are at risk. This danger may be averted only by paying unconditional respect to human dignity.¹

INTRODUCTION

Human rights refers to those rights human beings have simply because they are human beings and not because they are members of any particular nation.² Almost every nation is willing to agree, as an abstract principle, that the rights of human beings are entitled to some level of respect and protection.³

¹ Supreme Court of Argentina, Buenos Aires, Judgment of 22 June 1987. (*Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional*)(Justice Jorge Antonio Bacque, dissenting). The full opinion is published in English in *Supreme Court of Argentina, Buenos Aires*, 8 HUM. RTS. L. J., 430-71 (1987).

² INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 1 & 3 (Rhoda E. Howard & Jack Donnelly eds., 1987) [hereinafter HANDBOOK]. There is no single authoritative definition of 'human rights.' The RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 701 CMT. A (Tent. Final Draft 1986) [hereinafter RESTATEMENT] defines human rights as:

[F]reedoms, immunities, and benefits which, by widely accepted contemporary values, every human being should enjoy in the society in which the individual lives or to whose . . . jurisdiction he or she lives. By international law and agreement states have recognized many specific human rights and assumed obligations to respect them.

Id.

³ HOWARD & DONNELLY, *supra* note 2, at 2-4.

However, there exists sharp differences in world opinion as to which rights are guaranteed, as well as to whom and under what circumstances they are guaranteed. These differences have fostered a global environment which lacks effective mechanisms for human rights enforcement.⁴ Hence, while many abuses are so-called "universally-condemned," they remain widely condoned in practice.⁵ Victims of human rights abuses often find themselves without remedy because their own governments refuse to provide one and because most international tribunals will not entertain the claims of individuals.⁶ Resort to the United Nations has also proven to be largely ineffective.⁷ The only available legal option for many individuals is the court of another nation, particularly the United States.

The United States judiciary has, in some instances, provided a legal forum for human rights victims through the Alien Tort Claims Act.⁸ The ATCA gives the district court jurisdiction to hear civil actions brought by aliens for torts committed "in violation of the law of nations."⁹ However, courts tend to view the ATCA as an "old but little used section. . . no one seems to know whence it came."¹⁰

In response to the concerns prompted by a narrow construction of the ATCA, Congress has adopted the Torture Victim Protection Act of 1991¹¹ in order to alleviate some of the jurisdictional difficulties faced by foreign human rights victims. The TVPA is remarkable for the fact that, unlike the ATCA, it provides alien victims of official torture (and extrajudicial kill-

⁴ HUMAN RIGHTS IN THE WORLD COMMUNITY ISSUES AND ACTION 27 (Richard Pierre Claude & Burns H. Weston eds., 3d. ed. 1991).

⁵ *Id.*

⁶ Article 34 of the Statute of The International Court of Justice, declares: "1. Only states may be parties in cases before the Court." See Statute of International Court of Justice, art. 34, 59 Stat 10-55, T.S. No. 993 (1945).

⁷ CLAUDE & WESTON, *supra* note 4, at 22.

⁸ Alien Tort Claims Act, 28 U.S.C. § 1350 (1982) [hereinafter ATCA].

⁹ *Id.*

¹⁰ *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

¹¹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) [hereinafter TVPA] was introduced into the House of Representatives on March 4, 1987 and the Senate on March 24, 1987. The chief co-sponsors of the act were Congressmen Gus Yatron (D-Pennsylvania), Jim Leach (R-Iowa), and Peter Rodino (D-New Jersey); the lead Senate co-sponsors were Senators Arlen Specter (R-Pennsylvania) and Patrick Leahy (D-Vermont). The legislation was passed by the Senate on March 3, 1992 and signed by President Bush March 12.

ing) with a private right of action in American courts.¹² Whether the act will be successful in adjudicating the claims of human rights victims depends very much on the alleviation of its doctrinal and practical limitations. Indeed, until a case is brought under its substantive provisions, its real impact remains speculative. However, there is much support for the proposition that despite its limitations, the TVPA greatly advances America's role as an international human rights protector.¹³

This comment examines the provisions of the TVPA and its implications for adjudicating human rights violations in U.S. courts. Part I offers a brief history of international human rights law. Part II examines the provisions of the ATCA and the judicial conflict over its proper construction and over the role of customary international law in US courts. Part III examines the provisions of the TVPA and offers a comparison to those of the ATCA. Part IV discusses the positive and negative aspects of the TVPA's impact on human rights litigation in America. Part V concludes that the TVPA's enactment is both necessary and desirable.

I. HISTORY OF INTERNATIONAL HUMAN RIGHTS

The traditional view of international law, heavily laden with concepts of sovereignty, focused on states rather than individuals.¹⁴ As a result, a state's treatment of its own citizens was purely a matter of state concern.¹⁵ The governments of Iran, Paraguay, Romania, Uganda and others have ritually called upon state sovereignty to defend their unwillingness to guarantee basic human rights to their citizens.¹⁶ Thus, the state sovereignty doctrine has traditionally been a major obstacle to international human rights enforcement.¹⁷

¹² *Id.*

¹³ *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Committee on Foreign Affairs and its Subcommittee on Human Rights and International Organizations of the House of Representatives*, 100th Cong., 2nd Sess. 86, 88 n.1 (1988) (statement of Congressman Gus Yatron, chairman of the subcommittee) [hereinafter *Hearing*].

¹⁴ P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 11-12 (1983).

¹⁵ *Id.* at 11.

¹⁶ CLAUDE & WESTON, *supra* note 4, at 3.

¹⁷ CLAUDE & WESTON, *supra* note 4, at 3.

Human rights did not become an important international concern until World War II, with the rise and fall of Nazi Germany and world outrage over its atrocities.¹⁸ An earlier reverence for the state sovereignty doctrine that "discouraged outside efforts to intervene on behalf of populations victimized by even the most cruel and tyrannical of rulers"¹⁹ was replaced with the view that sovereignty must yield to human rights limitations. With the close of World War II and the landmark *Nuremberg trials*,²⁰ 'individuals' became legitimate subjects of global concern and the modern view of international human rights was born.

Since its formation in 1945, the United Nations has played a pivotal role in defining and enumerating basic human rights. The U.N. Charter begins by reaffirming a "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small."²¹ The Charter states as one of its purposes: "to achieve international cooperation. . . in promoting and encouraging respect for human rights. . . ."²² The Charter, as a treaty, is binding upon Member States.²³

However, the vague and general terms of the Charter's human rights clauses have given rise to disagreement over the

¹⁸ J. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS 10-13 (1984).

¹⁹ MARVIN S. SOROOS, BEYOND SOVEREIGNTY 230 (1987). Classical international law also recognized humanitarian intervention as an exception to a state's sovereignty regarding its conduct toward its own nationals. The doctrine was invoked to justify intervention when a state's treatment of its own citizens horrified the international community. I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 340-42 (1960).

²⁰ CLAUDE & WESTON, *supra* note 4, at 46-47. In 1945, Nazi leaders captured as criminals of war were convicted not only for violations of war customs but for "crimes against humanity." These included persecution of civilians for political, racial or religious reasons. These convictions were justified whether or not they were committed in accordance with the domestic law of the country where perpetrated. The law of Germany, however authoritative, constituted no defense to the charges. Thus, *Nuremberg* represents a recognition that individuals, as much as states, are to be responsible members of the international community. CLAUDE & WESTON, *supra* note 4, at 46-47.

²¹ U.N. CHARTER Preamble.

²² *Id.*

²³ U.N. CHARTER art. 2, para. 2 states: "All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."

extent of obligations the Charter imposes.²⁴ Some authorities have argued that states, in becoming parties to the U.N. Charter, accept no more than minimal obligations toward human rights.²⁵ These governments look not only to the vague terms of the human rights clauses but to Article 2(7) which states that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."²⁶

Other nations insist that the Charter's human rights provisions, as part of a legally binding treaty, invoke a pledge of positive action on behalf of every Member State.²⁷ These states rely upon the enumeration of specific human rights in subsequent instruments, such as the Universal Declaration of Human Rights.²⁸ The Universal Declaration is proof that human rights, having been elevated to the level of international concern, are no longer matters essentially within the domestic jurisdiction of each state and therefore, are outside the scope of Article 2(7).²⁹

The aforementioned Universal Declaration is an enumeration of 'human rights' referred to in the U.N. Charter.³⁰ Although it has no legal binding effect,³¹ it is generally recognized by both domestic and international tribunals as defining standards of international human rights. There is ample support for the view that reliance on its provisions in a number of states elevates the Universal Declaration to the status of cus-

²⁴ CLAUDE & WESTON, *supra* note 4, at 21.

²⁵ CLAUDE & WESTON, *supra* note 4, at 21.

²⁶ U.N. CHARTER art. 2, para. 7.

²⁷ CLAUDE & WESTON, *supra* note 4, at 21.

²⁸ G.A. Res. 217, U.N. Doc. A/810 (1948). The preamble of the Universal Declaration of Human Rights [hereinafter Universal Declaration] states:

The General Assembly [p]roclaims this . . . Declaration . . . as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

²⁹ CLAUDE & WESTON, *supra* note 4, at 21.

³⁰ *Supra* note 28 and accompanying text.

³¹ CLAUDE & WESTON, *supra* note 4, at 22-23.

tomary international law³² and is, as such, binding upon all nations.

Notwithstanding the provisions of the Charter and Universal Declaration, disagreement over the extent of obligations imposed by these instruments has created a global environment which provides minimal recourse to victims of human rights violations.³³ This is evidenced by the fact that although many states have signed onto the Charter, Universal Declaration, European Convention for the Protection of Human Rights and Fundamental Freedoms³⁴ and other international agreements,³⁵

³² The definition of customary international law comprises two distinct elements: (1) general practice; and (2) its acceptance as law. LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 37 (2d. ed. 1987) [hereinafter HENKIN]. According to the RESTATEMENT, *supra* note 2, reporter's note 1 & 2:

There is some readiness to find that the practice of states, perhaps under constitutional, political or moral impetus, is practiced with a sense of international legal obligation creating a customary international law of human rights, even though many states sometimes violate these rights. . . . Practice accepted as building customary human rights law includes: virtual universal adherence to the U.N. Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles. . . ; the adoption of human rights principles by states in regional organizations. . . ; general support by states for U.N. Resolutions. . . ; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions. . . in national constitutions or laws; [and] invocation of human rights principles in national policy, in diplomatic practice. . . and other adverse state reactions to violations by other states.

³³ CLAUDE & WESTON, *supra* note 4.

³⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

³⁵ Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), December 16, 1970, 860 U.N.T.S. 105; Convention on the High Seas (Geneva Convention on the Law of the Seas), April 29, 1958, 450 U.N.T.S. 11; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, September 7, 1956, 266 U.N.T.S. 3; ILO Convention (No. 105, 25 Jun 1957) Concerning the Abolition of Forced Labour, 320 U.N.T.S. 291; Convention (with Final Protocol), Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, March 21, 1950, 96 U.N.T.S. 271; Geneva Convention (with Final Act and Resolutions of the Diplomatic Conference of Geneva). Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31; Geneva Convention (with Annexes. Protection of Civilians in Time of War, August

more than one-third of the world's governments have tolerated torture and other abuses in our times.³⁶

Moreover, the failure of individual governments to adequately enforce human rights does not normally provoke U.N. action.³⁷ "[T]he UN organs responsible for the promotion of human rights suffer from most of the same disabilities that afflict the United Nations as a whole, in particular the absence of a supranational authority and the presence of divisive power politics."³⁸ Therefore, U.N. action in defense of human rights is not normally expected to be swift or effective.

The absence of an international criminal court³⁹ and the inability of victims to be remedied by their own courts or the United Nations has left these individuals, all too often, with the question 'where do we go from here?' The answer may very well be found in a United States district court.

II. ALIEN TORT CLAIMS ACT

A. *Provisions of the ATCA*

The Alien Tort Claims Act was enacted by the First Congress in section nine of the Judiciary Act of 1789.⁴⁰ The statute provides: "[t]he district court shall have original jurisdiction of a civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴¹ The language of the statute is noticeably vague, providing little guidance as to what behavior constitutes a "violation of the law of nations."⁴² Legislative history is also very limited. There is simply no direct evidence of congressional intent.⁴³

12, 1949, 75 U.N.T.S. 287; Convention. Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

³⁶ CLAUDE & WESTON, *supra* note 4.

³⁷ CLAUDE & WESTON, *supra* note 4, at 3.

³⁸ CLAUDE & WESTON, *supra* note 4, at 22.

³⁹ See Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223 (1992).

⁴⁰ Act of September 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

⁴¹ ATCA, *supra* note 8.

⁴² ATCA, *supra* note 8.

⁴³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring), (where Judge Bork noted that the Senate debates on the Judiciary Act of 1789 were not recorded and the House debates did not mention the ATCA), *cert. denied*, 470 U.S. 1003 (1985).

It is an established principle that the law of nations has been incorporated into United States federal common law. This principle was first articulated in the Supreme Court case, the *Paquete Habana*,⁴⁴ which contains Justice Gray's famous comment: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."⁴⁵

Two issues then become critical: (1) whether a particular right has achieved the status of customary international law so that its breach violates the law of nations,⁴⁶ and (2) whether the law of nations requirement of the ATCA should be construed as it was understood in 1789 or as it has evolved, reflecting changes in custom over the past two centuries.⁴⁷ Disagreement over these issues has produced two distinct and contrasting judicial interpretations: Judge Kaufman's broad view of the law of nations requirement articulated in the landmark human rights case *Filartiga v. Pena-Irala*⁴⁸ and the narrow, restrictive view proposed by Judge Bork in *Tel-Oren v. Libyan Arab Republic*.⁴⁹

B. *The Filartiga Opinion*

Dr. Filartiga and his daughter, both Paraguayan citizens, brought a wrongful death action in the United States District Court for the Eastern District of New York against Pena-Irala, also a citizen of Paraguay.⁵⁰ The Filartigas alleged that the defendant, in his capacity as Inspector-General of the police in

⁴⁴ 175 U.S. 677 (1900). In the *Paquete Habana*, the Cuban owners of fishing vessels seized by United States officials during the Spanish-American War argued that customary international law exempted coastal fishermen from capture as prizes of war. The court, in agreeing with the fishermen, held, where there are no treaties or controlling executive or legislative acts, as in the present case, resort must be had to the customs and usages of civilized nations. At this time it was an established rule of international law, recognized by the United States, France, Britain, Holland, Japan and many others, that unarmed coastal fishing vessels were exempt from capture as prizes of war. Thus, the United States was in violation of customary international law and, as such, must honor the release of the fishermen and their vessels. *Id.* at 700.

⁴⁵ *Id.* at 700.

⁴⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴⁷ *Id.* at 877-888.

⁴⁸ See *Filartiga*, 630 F.2d 876.

⁴⁹ *Tel-Oren*, 726 F.2d at 799.

⁵⁰ *Filartiga*, 630 F.2d at 878.

Paraguay, tortured Dr. Filartiga's seventeen year-old son to death in retaliation for the doctor's political activities.⁵¹ Jurisdiction was claimed under the ATCA.⁵² The district court dismissed the case, however, construing the ATCA narrowly so as to exclude a state's treatment of its own citizens from review.⁵³

The Second Circuit, following the *Paquete Habana* line of reasoning⁵⁴, reversed and held: "deliberate torture perpetuated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process within our borders, the ATCA provides jurisdiction."⁵⁵ Judge Kaufman referred to the reliance of many states on the provisions of the U.N. Charter and the Universal Declaration as evidence that the prohibition of torture had reached the status of customary international law.⁵⁶ He also found that torture is prohibited, either expressly or implicitly, by the constitutions of over fifty-five nations, including Paraguay.⁵⁷ Thus, the court concluded, freedom from torture is a universally-recognized right and is, as such, part of the law of nations.⁵⁸

The *Filartiga* opinion is important for several reasons: (1) it gives individuals a private right of action to enforce human rights under the ATCA,⁵⁹ (2) it recognizes torture as universally condemned and hence, a violation of the law of nations,⁶⁰ and (3) it proffers a broad construction of the ATCA so as to include contemporary universally-recognized rights and those which will ripen into custom at some point in the future.⁶¹

Filartiga inspired hope that the ATCA would be an effective tool for bringing human rights violators to justice in Ameri-

⁵¹ *Id.*

⁵² *Id.* at 880.

⁵³ *Id.*

⁵⁴ *Paquete Habana*, 175 U.S. at 700.

⁵⁵ *Filartiga*, 630 F.2d at 878.

⁵⁶ *Id.* at 881-884.

⁵⁷ *Id.* at 884.

⁵⁸ *Id.*

⁵⁹ *Id.* at 878.

⁶⁰ *Id.* at 881-884.

⁶¹ *Id.* at 885.

can courts.⁶² However, this hope would soon be diminished in the aftermath of the D.C. Circuit's decision in *Tel-Oren v. Libyan Arab Republic*.⁶³

C. *Tel-Oren v. Libyan Arab Republic*

In *Tel-Oren*, representatives of twenty-nine persons who died in a terrorist attack in Israel filed an ATCA claim in the District Court for the District of Columbia against Libya, the Palestinian Liberation Organization and others allegedly responsible.⁶⁴ The district court dismissed the case, refusing to extend jurisdiction under the ATCA.⁶⁵

The D.C. Circuit affirmed the dismissal in three concurring opinions, the most notable written by Judge Bork.⁶⁶ Judge Bork flatly rejected the *Paquete Habana* and *Filartiga* approach to interpreting the law of nations requirement of the ATCA:

It is one thing for a case like the *Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation at which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture so that our courts may sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter raises prospects of judicial interference with foreign affairs that the former does not.⁶⁷

Judge Bork believed the framers of the ATCA could not have intended to infringe upon the sovereignty of other countries so that the law of nations requirement of the ATCA must be narrowly construed to include only those human rights considered universally binding in 1789.⁶⁸

Furthermore, even if the court had concluded that the law of nations incorporated all the modern rules of international law the case would still be dismissed for lack of jurisdiction. Ac-

⁶² Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L. J. 53 (1981).

⁶³ *Tel-Oren*, 726 F.2d at 812.

⁶⁴ *Id.* at 776.

⁶⁵ *Id.*

⁶⁶ *Id.* at 798-816 (Bork, J., concurring).

⁶⁷ *Id.* at 813.

⁶⁸ *Id.* at 816.

according to Judge Bork, "[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."⁶⁹ He went on to argue:

Neither the law of nations nor any of the relevant treaties provides a cause of action appellants may assert in courts of the United States. . . . We should not, in an area such as this, infer a cause of action not explicitly given. In reaching this conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid interference with the political branches' conduct of foreign relations.⁷⁰

Thus, the ATCA essentially a jurisdictional statute could not provide the plaintiffs with a private right of action in the absence of a congressional mandate.⁷¹

D. Congressional Action Becomes Necessary

According to the decision in *Tel-Oren*, ATCA actions may implicate matters of foreign relations, meaning matters which are exclusively within the constitutional domain of the legislative and executive branches of government.⁷² It is no small wonder that the judiciary has normally been reluctant to hear ATCA claims.⁷³ As Judge Bork noted, "[a] statute whose original meaning is hidden from us and yet, which, if its words are read inconsistently with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection."⁷⁴

As a result of the conflict over the ATCA's proper construction, Congressional action became necessary to clarify how courts could acquire jurisdiction under the ATCA without in-

⁶⁹ *Id.* at 801.

⁷⁰ *Id.* at 799.

⁷¹ In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1952) (cited in Judge Bork's concurring opinion in *Tel-Oren*), the Supreme Court held: "The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions."

⁷² See *Tel-Oren*, 726 F.2d at 799.

⁷³ The ATCA has been invoked successfully on only four occasions in the past two centuries: *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795).

⁷⁴ *Tel-Oren*, 726 F.2d at 812.

fringing upon US foreign policy.⁷⁵ In order for the mandate of the *Paquete Habana* ("international law is part of our law")⁷⁶ to have any significant effect, the *Filartiga* approach to adjudicating human rights law must be given a congressional stamp of approval. The TVPA accomplishes this very principle.⁷⁷

III. THE TORTURE VICTIM PROTECTION ACT

A. Purpose

The TVPA of 1991 is intended to ensure that alien victims of official torture do not encounter *Tel-Oren* type obstacles when bringing suit in a U.S. court.⁷⁸ The act mandates that courts apply the provisions of the U.N. Charter and other international human rights agreements in deciding the merits of a TVPA action.⁷⁹ In doing so, Congress upholds the view that the U.N. Charter as a treaty and the Universal Declaration of Human Rights as customary international law are binding upon the United States.⁸⁰ Thus, the need to ascertain whether certain treaty provisions or customs are incorporated into U.S. law is removed from the judiciary. The TVPA itself ensures that freedom from torture is a universally recognized right directly enforceable against individuals in American courts.⁸¹

Views articulated during the TVPA hearings make it clear that Judge Bork's reservations regarding the proper construction of the ATCA provided the impetus for the TVPA's enactment.⁸² By expressly providing two causes of action, torture

⁷⁵ See *Tel-Oren*, 726 F.2d at 799.

⁷⁶ *Paquete Habana*, 175 U.S. at 700.

⁷⁷ TVPA, *supra* note 11; *Hearing*, *supra* note 13.

⁷⁸ The TVPA amends the United Nations Participation Act of 1945, 22 U.S.C. §§ 287-287e (1982).

⁷⁹ TVPA, *supra* note 11, Statement of Purpose.

⁸⁰ U.N. CHARTER, *supra* note 23.

⁸¹ TVPA, *supra* note 11, § 2(a)(1).

⁸² According to Alice Henkin, Chair, Committee on International Human Rights, Association of the Bar of the City of New York: *Hearing*, *supra* note 13, at 1.

. . . the earlier statute [ATCA] does not speak specifically about torture and extrajudicial killing. It speaks about a tort committed in violation of the law of nations. It is hard to know exactly what the legislators had in mind in 1789 when referring to a tort committed in violation of the law of nations and the problems that result from interpreting that language, have caused some of the confusion. . . . This act gets at those specific acts of torture and

and extrajudicial killing,⁸³ the TVPA satisfies Judge Bork's primary objection to using the ATCA; that a cause of action could not be found in or inferred from the ATCA without infringing upon the domain of the political branches.⁸⁴

When asked about the primary purpose of the TVPA, Michael Posner of the Lawyer's Committee for Human Rights responded:

This is really an effort to clarify, to make sure that every federal court in the United States understands explicitly that the acts of torture and extrajudicial killing can be remed[ied] in the United States, that there is a private right of action. And that, the U.S. Congress. . . has gone on record. . . in support of this kind of judicial relief.⁸⁵

In essence, the TVPA gives congressional endorsement to the *Filartiga* approach of exercising jurisdiction to provide a remedy to foreign victims of torture.⁸⁶

While the TVPA is intended to reinforce and clarify the role of human rights law in American courts, it is not intended to supplant the ATCA. According to Alice Henkin, Chair of the Committee on International Human Rights:

The reason for preserving section 1350, even in the presence of this new legislation is for the future and any emerging consensus on what is a violation of the law of nations. For example, the possibility that forced disappearances [may] at some point have the same level of universal condemnation. . . . So, I do not think they [TVPA and ATCA] are exclusive of each other. . . there is need to preserve [both]. . . .⁸⁷

The statements of Alice Henkin and others⁸⁸ clearly express that preservation of the ATCA is necessary and desirable.

extrajudicial killing which are now universally recognized as violations of the law of nations.

⁸³ TVPA, *supra* note 11, § 2.

⁸⁴ See *Tel-Oren*, 726 F.2d at 799.

⁸⁵ *Hearing*, *supra* note 13, at 71, statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights.

⁸⁶ *Hearing*, *supra* note 13 at 71.

⁸⁷ *Hearing*, *supra* note 13, at 71, statement of Alice Henkin.

⁸⁸ *Hearing*, *supra* note 13, at 2-28. "[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary inter-

Given the congressional intent of the TVPA,⁸⁹ an argument can be made that the TVPA does more than merely 'preserve' the ATCA. Indeed, the TVPA may breathe new life into the rarely-used ATCA. This point will be discussed fully in Section IV.

B. Congress' Ability to Enact the TVPA

Congress' power to grant our federal courts jurisdiction to hear TVPA claims is supported by both the U.S. Constitution and international law. Article III of the Constitution gives the federal judiciary the power to hear cases 'arising under' the 'laws of the United States.'⁹⁰ The Supreme Court has held that US federal common law incorporates international law⁹¹ thereby allowing Congress to confer jurisdiction in cases involving foreign plaintiffs and defendants.⁹²

In addition to Article III, Article I, section 8 authorizes Congress "to define and punish. . . Offenses against the Law of Nations."⁹³ The Supreme Court has interpreted this clause as granting Congress the power to make laws which incorporate those international rules that are intended to govern individuals.⁹⁴

Moreover, international law itself provides each state with the discretion to remedy violations of international law in their own courts if they so choose.⁹⁵ According to the doctrine of universal jurisdiction, set forth by section 404 of the Restatement of the Foreign Relations Law of the United States a "state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern. . . ."⁹⁶ Torture is clearly such an offense.

national law." *Hearing, supra* note 13, at 36-37, (prepared statement of the Association of the N.Y.C. Bar).

⁸⁹ See *Hearing, supra* note 13, at 71.

⁹⁰ Article III, section II of the Constitution provides in part: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority. . . ." U.S. CONST. art. III § 2, cl.1.

⁹¹ See *Paquete Habana*, 175 U.S. 677.

⁹² *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 481 (1983).

⁹³ U.S. CONST. art. I, § 8, cl. 10.

⁹⁴ *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).

⁹⁵ See HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 222 (1972); HENKIN, *supra* note 32, at 140-162.

⁹⁶ RESTATEMENT, *supra* note 2, § 404.

C. *The Provisions of the TVPA and a Comparison to the ATCA*

While the ATCA is essentially a jurisdictional statute,⁹⁷ the TVPA provides both jurisdiction to the district court at 28 U.S.C. section 1367 and a private right of action to victims of torture and extrajudicial killing under its substantive provisions.⁹⁸ Section 2(a) of the TVPA states:

...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.⁹⁹

Unlike the ATCA, which does not specify a class of defendants,¹⁰⁰ the TVPA noticeably limits the class to foreign "individual[s] [acting] under actual or apparent authority or color of law. . . ."¹⁰¹ By immunizing foreign nations from suit, the risk that the United States will offend the sovereignty of other countries is minimized.

The phrase "actual or apparent authority," as it appears in section 2(a), seems to suggest that the actor have some type of agency relationship with the state.¹⁰² The TVPA is not meant to override the Foreign Sovereign Immunities Act of 1976¹⁰³ which renders foreign governments and their agencies largely immune from human rights suits in America. Thus, TVPA defendants may argue that as 'agents' of the foreign nation they are barred from liability via the FSIA.

An FSIA defense in this context is unlikely to prevail. For an individual to gain immunity under the FSIA through the establishment of an agency relationship, the state must 'admit

⁹⁷ ATCA, *supra* note 8.

⁹⁸ TVPA, *supra* note 11.

⁹⁹ TVPA, *supra* note 11.

¹⁰⁰ ATCA, *supra* note 8.

¹⁰¹ TVPA, *supra* note 11, § 2(a).

¹⁰² Committee on International Human Rights, The Association of the Bar of the City of New York: Torture Victim Protection Act 12 n.24 (1987).

¹⁰³ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) [hereinafter FSIA].

some knowledge or authorization of relevant acts.¹⁰⁴ As a practical matter, governments are not in the habit of admitting they have an official policy of torture.¹⁰⁵

Finally, whatever problems the judiciary will encounter maintaining jurisdiction over defendants who acted with actual or apparent authority may be resolved via the 'color of law' provision.¹⁰⁶ The phrase is traditionally linked to actions against agents.¹⁰⁷ According to leading cases interpreting 'color of law,' even when an official acts beyond the lawful scope of his authority, he is still liable if his conduct somehow relates to or flows from the state.¹⁰⁸

In addition to foreign governments, U.S. government officials are also immune from TVPA actions.¹⁰⁹ The ATCA, on the other hand, does not specify a particular class of defendants so that it remains possible for aliens to sue the United States and its officials under the ATCA.¹¹⁰

The ATCA and TVPA also differ regarding the proper class of plaintiffs. The ATCA applies to aliens exclusively¹¹¹ while U.S. citizens victimized by torture in foreign countries may bring suit under the TVPA.¹¹² Indeed, the extension of a remedy to U.S. citizens has been cited as one of the primary objectives of the TVPA.¹¹³

The TVPA makes a vital contribution to human rights by directly incorporating into U.S. law the definition of torture found in customary international law.¹¹⁴ Section 3(b)(1) defines torture as:

¹⁰⁴ Blum & Steinhardt, *supra* note 62, at 107.

¹⁰⁵ JONATHAN POWER, AMNESTY INTERNATIONAL: THE HUMAN RIGHTS STORY 8-20 (1981).

¹⁰⁶ TVPA, *supra* note 11, § 2(a).

¹⁰⁷ *Supra* note 102.

¹⁰⁸ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 171-185 (1965); *Scheuer v. Rhodes*, 416 U.S. 232, 235-38 (1974); *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 663-66 (E.D. Pa. 1978).

¹⁰⁹ TVPA, *supra* note 11, § 2(a).

¹¹⁰ ATCA, *supra* note 8.

¹¹¹ ATCA, *supra* note 8.

¹¹² TVPA, *supra* note 11, § 2(a).

¹¹³ *Hearing*, *supra* note 13, at 70 statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights.

¹¹⁴ TVPA, *supra* note 11, § 3.

. . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering. . . whether physical or mental, is intentionally inflicted. . . 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. . . .¹¹⁵

This definition is drawn from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was adopted by the U.N. General Assembly in 1984.¹¹⁶

The TVPA also provides a definition for extrajudicial killing which comports with the definition found in the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field.¹¹⁷ Under section 3(a) of the TVPA extrajudicial killing is defined as:

. . . a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court [which] afford[s] 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.¹¹⁸

By providing precise definitions for torture and extrajudicial killing, the TVPA eliminates potential judicial conflict over which principles of customary international law are applicable in cases involving these alleged acts. The ATCA, on the other hand, lacks precise terms.¹¹⁹

Finally, the TVPA incorporates the requirement of an exhaustion of local remedies under section 2(b), which is not present under the provisions of the ATCA.¹²⁰ The rule allows courts

¹¹⁵ TVPA, *supra* note 11, § 3(b)(1).

¹¹⁶ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, art. 1(1), G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/46 (1984) [hereinafter TORTURE CONVENTION].

¹¹⁷ GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

¹¹⁸ TVPA, *supra* note 11, § 3(a).

¹¹⁹ See *Tel-Oren*, 726 F.2d at 812-20.

¹²⁰ TVPA, *supra* note 11, § 2(b).

to decline jurisdiction only if the defendant demonstrated by clear and convincing evidence that adequate and available remedies could be assured where the act occurred and that the plaintiff has not exhausted these remedies.¹²¹ The exhaustion of local remedies rule also minimizes the possibility that our district courts will offend state sovereignty.¹²²

Although the TVPA and ATCA are different in many aspects, they incorporate several of the same legal defenses. For example, diplomatic immunity and the act of state doctrine are available under both statutes.¹²³ However, the structure of the TVPA is such that it is less likely to come into conflict with these defenses.¹²⁴ For instance, while the TVPA, by its terms, does not confront the act of state doctrine directly, it is of little practical significance. "Congress has directed federal courts to exercise jurisdiction. . . . When Congress directs US courts to exercise jurisdiction over specific types of cases it is in effect directing the courts not to abstain on the ground of act of state."¹²⁵ According to the Restatement:

A claim arising out of an alleged violation of . . . human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state defense since the accepted international law of human rights is both well established and contemplates external scrutiny of such acts. . . .¹²⁶

Although the TVPA has answered many of the questions raised by ATCA cases, particularly *Tel-Oren*,¹²⁷ it has left other questions unresolved. In order to ascertain the TVPA's actual impact, a discussion of its doctrinal and practical limitations is necessary.

¹²¹ TVPA, *supra* note 11, § 2(b).

¹²² See, e.g., TORTURE CONVENTION, *supra* note 116, at art. 22(5)(b).

¹²³ TVPA, *supra* note 11; ATCA, *supra* note 8.

¹²⁴ TVPA, *supra* note 11.

¹²⁵ *Hearing*, *supra* note 13, at 59-60 (prepared statement of the Association of the N.Y.C. Bar).

¹²⁶ RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 469 CMT. c. (Tent. Final Draft 1986)

¹²⁷ *Tel-Oren*, 726 F.2d at 812-20.

IV. THE TVPA: HOW EFFECTIVE CAN IT BE?

A. *The TVPA's Doctrinal Limitations and the Necessity to Preserve Section 1350*

The fact that the TVPA was designed to codify the *Filartiga* holding and to respond to the concerns raised by Judge Bork in *Tel-Oren* has cleared up much of the confusion surrounding the proper construction of the ATCA.¹²⁸ By explicitly providing a cause of action for torture and extrajudicial killing, the TVPA goes much further than the ATCA in providing a remedy for these specific violations.¹²⁹ However, by explicitly providing a cause of action for these two precise torts Congress may have, by negative inference, excluded other human rights violations from judicial review.¹³⁰ It is possible for the TVPA to be interpreted, particularly by those justices who are inclined to exercise restraint in international affairs,¹³¹ that only when Congress has granted specific causes of action is federal jurisdiction over such claims proper.

Assuming the TVPA is interpreted as such, what will happen to those human rights claims which involve neither torture nor extrajudicial killing? As Alice Henkin has noted, a forced disappearance, although not presently a universally condemned abuse, may very well become a violation of customary international law at some point in the future.¹³² If and when this occurs, a claim for a forced disappearance will not be cognizable under the TVPA unless it is considered an act of torture within

¹²⁸ *Hearing, supra* note 13.

¹²⁹ TVPA, *supra* note 11, § 2(a).

¹³⁰ TVPA, *supra* note 11, § 2(a).

¹³¹ See generally, *Tel-Oren*, 726 F.2d at 799-801; *Montana-Dakota*, 341 U.S. 246. Judge Bork has not been alone in his wariness to extend the jurisdiction of a U.S. court into matters of international concern. In *Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) the Supreme Court stated:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government. . . . They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain or political power not subject to judicial intrusion or inquiry.

¹³² *Hearing, supra* note 13, at 71.

the meaning of section 3(b).¹³³ It is this very situation that necessitates preservation of the ATCA.¹³⁴

Critics of the TVPA have asserted that it does not preserve but rather renders the ATCA obsolete because no one would risk bringing an ATCA claim when the more precise TVPA is available.¹³⁵ Moreover, these critics assert that Congress, by codifying *Filartiga* through TVPA enactment, has circumvented the question of whether human rights abuses, other than these specific acts are enforceable in U.S. courts.¹³⁶ Therefore, these additional claims will neither be covered by the TVPA because they are not claims for torture or extrajudicial killing nor cognizable under the ATCA since they are beyond the scope of the *Filartiga* holding.¹³⁷

Fortunately, this logic is fatally flawed. By giving *Filartiga* a congressional stamp of approval,¹³⁸ Congress does more than adhere to the principle that freedom from torture is a universally recognized right. Indeed, the most important principle of *Filartiga* is that the law of nations is never static, it is constantly evolving so as to incorporate all violations of customary international law even in the absence of a specific grant of a cause of action.¹³⁹ Moreover, the TVPA is meant to address the unsatisfactory result in *Tel-Oren*, a case which did not involve torture but rather, an act of terrorism.¹⁴⁰

Support for this proposition is found in the recent Ninth Circuit case of *Trajano v. Marcos*.¹⁴¹ In *Trajano*, plaintiff, a citizen of the Philippines living in Hawaii brought suit in the Hawaii Federal District Court against exiled Phillipine President Ferdinand Marcos and his daughter Imee Marcos-Manotoe for the torture and wrongful death of plaintiff's son, Archimedes.¹⁴²

¹³³ TVPA, *supra* note 11, § 3(b).

¹³⁴ *Hearing*, *supra* note 13, at 71.

¹³⁵ See Kathryn L. Pryor, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?* 29 VA. J. INT'L L. 969 (1989).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Hearing*, *supra* note 13.

¹³⁹ *Filartiga*, 630 F.2d at 878.

¹⁴⁰ *Tel-Oren*, 726 F.2d at 812.

¹⁴¹ *In Re: Estate of Ferdinand E. Marcos Human Rights Litigation* Agapita Trajano; Archimedes Trajano v. Ferdinand E. Marcos and Imee Marcos-Manotoc, No. 91-15891, 1992 U.S. App. LEXIS 26517, (9th Cir. Oct. 19, 1992).

¹⁴² *Id.* at 1.

Marcos' former government tortured and murdered Archimedes Trajano in the Philippines on August 31, 1977 in retaliation for Trajano's political beliefs and activities.¹⁴³

Marcos-Manotoe did not appear and a default judgment was entered against her.¹⁴⁴ On appeal, she contended that the District Court lacked subject matter jurisdiction under the ATCA to adjudicate a claim of torture committed by a foreign state against its own nationals where no nexus to the United States had been established.¹⁴⁵

The Ninth Circuit affirmed the District Court's exercise of jurisdiction and held:

. . . all states believe [torture] is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. Under international law, any state that engages in official torture violates *jus cogens*. . . . We therefore conclude that the district court did not err in finding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture.¹⁴⁶

Thus, Congress has spoken to ensure that the *Filartiga* approach to adjudicating human rights claims under the ATCA is the correct approach, while the *Tel-Oren* decision is based on outdated and unworkable perceptions of international law.¹⁴⁷ As a result, the TVPA goes beyond preservation of the ATCA, it revitalizes the ATCA so that both statutes may be used to address a wide variety of abuses.¹⁴⁸

Jurisdiction under the ATCA, as opposed to the TVPA, would be proper not only where claims other than torture and extrajudicial killing are at issue but where a foreign government is made a defendant.¹⁴⁹ It is ironic that although *Tel-Oren* provided the impetus for the TVPA's enactment,¹⁵⁰ the case would also be dismissed for lack of jurisdiction if brought, instead, under the TVPA. Libya, as a foreign nation, is not a proper TVPA defendant.¹⁵¹ However, the TVPA, by definition

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 2, 4.

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.* at 20.

¹⁴⁷ TVPA, *supra* note 11.

¹⁴⁸ TVPA, *supra* note 11; ATCA, *supra* note 8.

¹⁴⁹ TVPA, *supra* note 11; ATCA, *supra* note 8.

¹⁵⁰ See *Tel-Oren*, 726 F.2d 774; TVPA, *supra* note 11.

¹⁵¹ TVPA, *supra* note 11, § 2(a).

is a condemnation of the *Tel-Oren* result.¹⁵² If a case similar to *Tel-Oren* were brought under the ATCA today, it would most likely be decided very differently.

Cases in which the plaintiffs did not seek adequate domestic remedies before bringing suit in U.S. district court would also be proper ATCA cases since the ATCA does not require an exhaustion of local remedies.¹⁵³ This is extremely beneficial to those plaintiffs for whom seeking a local remedy is either too expensive, too time-consuming or simply too dangerous.

International consensus on what is considered an act of torture will clearly change over time, recognizing more violations than it does presently.¹⁵⁴ Given the congressional intent of the TVPA¹⁵⁵ and the desire on the part of the United States to recognize its human rights responsibilities,¹⁵⁶ it is likely that the judiciary's interpretation of the TVPA will over time reflect this changing consensus. Finally, whatever problems do occur may be alleviated by congressionally amending either the TVPA, the ATCA or both.

Practical limitations, unlike doctrinal weaknesses, is a different animal. They cannot be resolved by amending a statute or reversing a decision. Practical difficulties in law enforcement are never felt more strongly than in the international human rights arena.¹⁵⁷ Indeed, it is with an eye toward these limitations that the real impact of the TVPA can be properly ascertained.

B. *Practical Limitations of the TVPA: What Is Its Actual Impact?*

In order for the district court to obtain personal jurisdiction over a defendant under the TVPA, either the plaintiff and the defendant must be in the court's territorial jurisdiction simulta-

¹⁵² See *Tel-Oren*, 726 F.2d 774; TVPA, *supra* note 11.

¹⁵³ TVPA, *supra* note 11; ATCA, *supra* note 8.

¹⁵⁴ *Filartiga*, 630 F.2d at 878.

¹⁵⁵ *Hearing*, *supra* note 13.

¹⁵⁶ TVPA, *supra* note 11, Statement of Purpose: "[t]o 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."

¹⁵⁷ POWER, *supra* note 105, at 8-10.

neously¹⁵⁸ or the defendant must have minimum contacts with the forum.¹⁵⁹ This would require that the defendant have some contact with a particular state in the U.S. through current travel or residency. The TVPA precludes suing just any foreign official that has no contact with the United States.¹⁶⁰ Moreover, there is no provision in the TVPA that requires courts to disregard the principle of forum non conveniens, which could lead them to defer cases to the jurisdiction of another nation if it is more convenient for both the parties and the witnesses.¹⁶¹

Does the minimum contacts doctrine undermine the overall purpose of the TVPA? Even if the plaintiff and defendant are in the same forum at the same time, what is the likelihood that they will find each other? The answer to this problem is solved, in part, by looking to organizations such as Amnesty International, which tracks human rights abusers regularly so that a torturer's visit to the United States does not go unnoticed.¹⁶²

However, if the torturer is found and the case goes to trial with a judgment rendered in favor of the plaintiff, what is the likelihood that the judgment can or will be enforced? Although the plaintiffs in *Filartiga* were awarded five million dollars each,¹⁶³ not a single penny was collected. These damage awards were never enforced by the defendant's domestic court in Paraguay.¹⁶⁴

The problem of enforcing judgments abroad is clearly beyond the scope of this comment. Nevertheless, it is a legitimate question because it directly implicates how effective the TVPA can be. If a torturer cannot be forced to pay for his actions, the TVPA will serve no preventive function at all. However, the TVPA by itself cannot realistically be expected to prevent the global epidemic of torture. Indeed, its greatest attribute lies not

¹⁵⁸ TVPA, *supra* note 11.

¹⁵⁹ See *International Shoe v. Washington*, 326 U.S. 310 (1945); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

¹⁶⁰ TVPA, *supra* note 11.

¹⁶¹ TVPA, *supra* note 11; For a discussion of both the practical and policy considerations that federal courts must weigh when adjudicating a claim of forum non conveniens in a suit involving non-resident aliens, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹⁶² POWER, *supra* note 105, at 8-20.

¹⁶³ *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

¹⁶⁴ HENKIN, *supra* note 32, at 135 n.5.

in its capacity as a preventive mechanism, but in its ability to serve as a model for future legislation.

V. CONCLUSION

The Torture Victim Protection Act,¹⁶⁵ like any instrument for international human rights enforcement, will go only as far as the 'real world' allows it to. Although this legislation is by no means the end all be all of human rights enforcement, it cannot be dismissed as just a nice gesture on the part of Congress. In the view of the Lawyer's Committee, the TVPA:

...add[s] a new dimension to U.S. human rights policy by serving notice to individuals engaged in human rights violations that the United States strongly condemns such acts and will not shelter human rights violators from being accountable in appropriate proceedings. The legislation. . . encourages other nations to develop and apply meaningful domestic remedies, clearly the most effective deterrent to continued human rights abuses. . . . This country can and should become a model for other nations by extending practical remedies to victims of human rights abuses.¹⁶⁶

Perhaps the most important contribution of the TVPA is not what it can accomplish by itself, but rather what it has laid the ground work for (i.e., future legislation for the prevention of torture and other abuses on the part of other countries in the international community). This is certainly no small feat. By giving human rights victims the power to seek vindication of their rights themselves, the Torture Victim Protection Act demonstrates a serious commitment to human rights around the world and to the dream that all human beings may one day live free from torture.

Jennifer Correale

¹⁶⁵ TVPA, *supra* note 11.

¹⁶⁶ Matthew H. Murray, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT'L L. 673 (citing The Lawyers' Committee for International Human Rights, Briefing Book: The Torture Victim Protection Act of 1986, at 3 (1986)).