The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?

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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


[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. Hence, while many abuses are so-called “universally-condemned,” they remain widely condoned in practice. 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. Resort to the United Nations has also proven to be largely ineffective. 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. The ATCA gives the district court jurisdiction to hear civil actions brought by aliens for torts committed “in violation of the law of nations.” However, courts tend to view the ATCA as an “old but little used section...no one seems to know whence it came.”

In response to the concerns prompted by a narrow construction of the ATCA, Congress has adopted the Torture Victim Protection Act of 1991 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-

5 Id.
6 Article 34 of the Statute of The International Court of Justice, declares: “I. 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.
9 Id.
10 IIT 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{14} As a result, a state's treatment of its own citizens was purely a matter of state concern.\textsuperscript{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.\textsuperscript{16} Thus, the state sovereignty doctrine has traditionally been a major obstacle to international human rights enforcement.\textsuperscript{17}

\textsuperscript{12} Id.
\textsuperscript{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].
\textsuperscript{14} P. Sieghart, The International Law of Human Rights 11-12 (1983).
\textsuperscript{15} Id. at 11.
\textsuperscript{16} Claude & Weston, supra note 4, at 3.
\textsuperscript{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. 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" 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, '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." The Charter states as one of its purposes: "to achieve international cooperation... in promoting and encouraging respect for human rights..." The Charter, as a treaty, is binding upon Member States.

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

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. BROWNLEE, 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 perpetuated. 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. Some authorities have argued that states, in becoming parties to the U.N. Charter, accept no more than minimal obligations toward human rights. 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.”

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. These states rely upon the enumeration of specific human rights in subsequent instruments, such as the Universal Declaration of Human Rights. 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).

The aforementioned Universal Declaration is an enumeration of ‘human rights’ referred to in the U.N. Charter. Although it has no legal binding effect, 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-

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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.
   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.
omary international law 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. 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 Freedoms and other international agreements,

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32 The definition of customary international law comprises two distinct elements: (1) general practice; and (2) its acceptance as law. LOUIS HENKEN, RICHARD CRAWFORD FUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 37 (2d. ed. 1987) [hereinafter HENKEN]. 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.


more than one-third of the world’s governments have tolerated torture and other abuses in our times.\textsuperscript{36}  

Moreover, the failure of individual governments to adequately enforce human rights does not normally provoke U.N. action.\textsuperscript{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."\textsuperscript{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 court\textsuperscript{39} 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.\textsuperscript{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.”\textsuperscript{41}  The language of the statute is noticeably vague, providing little guidance as to what behavior constitutes a “violation of the law of nations.”\textsuperscript{42}  Legislative history is also very limited. There is simply no direct evidence of congressional intent.\textsuperscript{43}


\textsuperscript{36}  CLAUDE & WESTON, supra note 4.

\textsuperscript{37}  CLAUDE & WESTON, supra note 4, at 3.

\textsuperscript{38}  CLAUDE & WESTON, supra note 4, at 22.


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

\textsuperscript{41}  ATCA, supra note 8.

\textsuperscript{42}  ATCA, supra note 8.

\textsuperscript{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*, 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."  

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, 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. 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* and the narrow, restrictive view proposed by Judge Bork in *Tel-Oren v. Libyan Arab Republic*.

**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. The Filartigas alleged that the defendant, in his capacity as Inspector-General of the police in

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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.\textsuperscript{51} Jurisdiction was claimed under the ATCA.\textsuperscript{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.\textsuperscript{53}

The Second Circuit, following the \textit{Paquete Habana} line of reasoning\textsuperscript{54}, 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."\textsuperscript{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.\textsuperscript{56} He also found that torture is prohibited, either expressly or implicitly, by the constitutions of over fifty-five nations, including Paraguay.\textsuperscript{57} Thus, the court concluded, freedom from torture is a universally-recognized right and is, as such, part of the law of nations.\textsuperscript{58}

The \textit{Filartiga} opinion is important for several reasons: (1) it gives individuals a private right of action to enforce human rights under the ATCA,\textsuperscript{59} (2) it recognizes torture as universally condemned and hence, a violation of the law of nations,\textsuperscript{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.\textsuperscript{61}

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

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 880.
\textsuperscript{53} Id.
\textsuperscript{54} \textit{Paquete Habana}, 175 U.S. at 700.
\textsuperscript{55} \textit{Filartiga}, 630 F.2d at 878.
\textsuperscript{56} Id. at 881-884.
\textsuperscript{57} Id. at 884.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 878.
\textsuperscript{60} Id. at 881-884.
\textsuperscript{61} Id. at 885.
can courts. However, this hope would soon be diminished in the aftermath of the D.C. Circuit's decision in \textit{Tel-Oren v. Libyan Arab Republic}.\textsuperscript{63}

C. Tel-Oren v. Libyan Arab Republic

In \textit{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.\textsuperscript{64} The district court dismissed the case, refusing to extend jurisdiction under the ATCA.\textsuperscript{65}

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

It is one thing for a case like the \textit{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.\textsuperscript{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.\textsuperscript{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-

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\item \textit{Tel-Oren}, 726 F.2d at 812.
\item \textit{Id.} at 776.
\item \textit{Id.}
\item \textit{Id.} at 798-816 (Bork, J., concurring).
\item \textit{Id.} at 813.
\item \textit{Id.} at 816.
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cording 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." 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.

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.

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. It is no small wonder that the judiciary has normally been reluctant to hear ATCA claims. 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."

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.
74 Tel-Oren, 726 F.2d at 812.
fringing upon US foreign policy.\textsuperscript{76} In order for the mandate of the \textit{Paquete Habana} ("international law is part of our law")\textsuperscript{76} to have any significant effect, the \textit{Filartiga} approach to adjudicating human rights law must be given a congressional stamp of approval. The TVPA accomplishes this very principle.\textsuperscript{77}

III. \textbf{THE TORTURE VICTIM PROTECTION ACT}

A. \textit{Purpose}

The TVPA of 1991 is intended to ensure that alien victims of official torture do not encounter \textit{Tel-Oren} type obstacles when bringing suit in a U.S. court.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{82} By expressly providing two causes of action, torture

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\item \textsuperscript{76} \textit{See Tel-Oren}, 726 F.2d at 799.
\item \textit{Paquete Habana}, 175 U.S. at 700.
\item TVPA, \textit{supra} note 11; \textit{Hearing, supra} note 13.
\item TVPA, \textit{supra} note 11, Statement of Purpose.
\item U.N. \textit{Charter, supra} note 23.
\item TVPA, \textit{supra} note 11, § 2(a)(1).
\item According to Alice Henkin, Chair, Committee on International Human Rights, Association of the Bar of the City of New York: \textit{Hearing, supra} note 13, at 1.
\item \ldots 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. \ldots This act gets at those specific acts of torture and
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and extrajudicial killing.\textsuperscript{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.\textsuperscript{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 remedied 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.\textsuperscript{85}

In essence, the TVPA gives congressional endorsement to the \textit{Filartiga} approach of exercising jurisdiction to provide a remedy to foreign victims of torture.\textsuperscript{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].... \textsuperscript{87}

The statements of Alice Henkin and others\textsuperscript{88} clearly express that preservation of the ATCA is necessary and desirable.

\textsuperscript{83} TVPA, supra note 11, § 2.
\textsuperscript{84} See \textit{Tel-Oren}, 726 F.2d at 799.
\textsuperscript{85} \textit{Hearing, supra} note 13, at 71, statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights.
\textsuperscript{86} \textit{Hearing, supra} note 13 at 71.
\textsuperscript{87} \textit{Hearing, supra} note 13, at 71, statement of Alice Henkin.
\textsuperscript{88} \textit{Hearing, supra} note 13, at 2-28."Claims 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, 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.' The Supreme Court has held that US federal common law incorporates international law thereby allowing Congress to confer jurisdiction in cases involving foreign plaintiffs and defendants.

In addition to Article III, Article I, section 8 authorizes Congress "to define and punish . . . Offenses against the Law of Nations." 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.

Moreover, international law itself provides each state with the discretion to remedy violations of international law in their own courts if they so choose. 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." Torture is clearly such an offense.

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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.


93 U.S. Constr. 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 1976\(^103\) 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).
some knowledge or authorization of relevant acts.\textsuperscript{104} As a practical matter, governments are not in the habit of admitting they have an official policy of torture.\textsuperscript{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.\textsuperscript{106} The phrase is traditionally linked to actions against agents.\textsuperscript{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.\textsuperscript{108}

In addition to foreign governments, U.S. government officials are also immune from TVPA actions.\textsuperscript{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.\textsuperscript{110}

The ATCA and TVPA also differ regarding the proper class of plaintiffs. The ATCA applies to aliens exclusively\textsuperscript{111} while U.S. citizens victimized by torture in foreign countries may bring suit under the TVPA.\textsuperscript{112} Indeed, the extension of a remedy to U.S. citizens has been cited as one of the primary objectives of the TVPA.\textsuperscript{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.\textsuperscript{114} Section 3(b)(1) defines torture as:

\textsuperscript{104} Blum & Steinhardt, supra note 62, at 107.
\textsuperscript{106} TVPA, supra note 11, § 2(a).
\textsuperscript{107} Supra note 102.
\textsuperscript{109} TVPA, supra note 11, § 2(a).
\textsuperscript{110} ATCA, supra note 8.
\textsuperscript{111} ATCA, supra note 8.
\textsuperscript{112} TVPA, supra note 11, § 2(a).
\textsuperscript{113} Hearing, supra note 13, at 70 statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights.
\textsuperscript{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. . . .

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).
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.\textsuperscript{121} The exhaustion of local remedies rule also minimizes the possibility that our district courts will offend state sovereignty.\textsuperscript{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.\textsuperscript{123} However, the structure of the TVPA is such that it is less likely to come into conflict with these defenses.\textsuperscript{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."\textsuperscript{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. . . .\textsuperscript{126}

Although the TVPA has answered many of the questions raised by ATCA cases, particularly \textit{Tel-Oren},\textsuperscript{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.

\textsuperscript{121} TVPA, \textit{supra} note 11, § 2(b).
\textsuperscript{122} \textit{See}, \textit{e.g.}, \textit{TORTURE CONVENTION, supra} note 116, at art. 22(5)(b).
\textsuperscript{123} TVPA, \textit{supra} note 11; ATCA, \textit{supra} note 8.
\textsuperscript{124} TVPA, \textit{supra} note 11.
\textsuperscript{125} \textit{Hearing, supra} note 13, at 59-60 (prepared statement of the Association of the N.Y.C. Bar).
\textsuperscript{126} \textit{RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)} § 469 cmr. c. (Tent. Final Draft 1986)
\textsuperscript{127} \textit{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. 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. 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. It is possible for the TVPA to be interpreted, particularly by those justices who are inclined to exercise restraint in international affairs, 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. 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

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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:

[The]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-Manotoc 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.
136 Id.
137 Id.
138 Hearing, supra note 13.
139 Filartiga, 630 F.2d at 878.
140 Tel-Oren, 726 F.2d at 812.
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.\footnote{143 Id. at 3.}

Marcos-Manotoe did not appear and a default judgment was entered against her.\footnote{144 Id. at 2, 4.} 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.\footnote{145 Id. at 2.}

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

\ldots 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.\ldots . We therefore conclude that the district court did not err in finding jurisdiction on a violation of the jus cogens norm prohibiting official torture.\footnote{146 Id. at 20.}

Thus, Congress has spoken to ensure that the \textit{Filartiga} approach to adjudicating human rights claims under the ATCA is the correct approach, while the \textit{Tel-Oren} decision is based on outdated and unworkable perceptions of international law.\footnote{147 TVPA, \textit{supra} note 11.}

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.\footnote{148 TVPA, \textit{supra} note 11; ATCA, \textit{supra} note 8.}

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.\footnote{149 TVPA, \textit{supra} note 11; ATCA, \textit{supra} note 8.} It is ironic that although \textit{Tel-Oren} provided the impetus for the TVPA's enactment,\footnote{150 See \textit{Tel-Oren}, 726 F.2d 774; TVPA, \textit{supra} note 11.} 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.\footnote{151 TVPA, \textit{supra} note 11, §§ 2(a).} However, the TVPA, by definition...
is a condemnation of the Tel-Oren result. 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. 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. Given the congressional intent of the TVPA and the desire on the part of the United States to recognize its human rights responsibilities, 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. 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-

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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 extra-judicial killing."
157 POWER, supra note 105, at 8-10.
neously\textsuperscript{158} or the defendant must have minimum contacts with the forum.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{163} not a single penny was collected. These damage awards were never enforced by the defendant’s domestic court in Paraguay.\textsuperscript{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

\textsuperscript{158} TVPA, supra note 11.
\textsuperscript{160} TVPA, supra note 11.
\textsuperscript{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).
\textsuperscript{162} Power, supra note 105, at 8-20.
\textsuperscript{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, 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.

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

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165 TVPA, supra note 11.