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International Law - The Use of the Torture Victim Protection Act as an Enforcement Mechanism - Kadic v. Karadzic

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Case Note

INTERNATIONAL LAW—The Use of the Torture Victim Protection Act as an Enforcement Mechanism. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996).

INTRODUCTION

In March of 1992, the principal ethnic groups of Bosnia-Herzegovina signed a "Statement of Principles for New Constitutional Arrangements for Bosnia and Herzegovina."¹ The Statement defined the new state of Bosnia-Herzegovina and a sovereignty shared among the Croats, Muslims and Serbs.² A few days after the signing, the Serb leaders within Bosnia-Herzegovina refused to accept the mandates behind the Statement³ and established the unrecognized nation of "Srpska" within the territory of Bosnia-Herzegovina.⁴ Under a tripartite leadership, which included former Yugoslavian citizen Radovan Karadzic,⁵ the Bosnian-Serbs claimed the rights to certain lands and "forced" Bosnian-Muslims from those territories.⁶ Karadzic's command of the Bosnian-Serb forces brought with it a policy of "ethnic cleansing"⁷ and gross violations of human rights.⁸

One of the plaintiffs in *Kadic*, a Croat-Muslim woman, alleged a gruesome story of victimization under the ethnic cleansing policy. Serbian

1. Marc Weller, *The International Response to the Dissolution of Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 597 (1992). Individuals representing the Muslims, Croats and Serbs participated in the formation of the Statement. An European Community representative chaired the formation of the Statement. *Id.*

2. *Id.*

3. *Id.* The "self-proclaimed Serbian parliament adopted a constitution for Serb-dominated regions." *Bosnia Close to War As EC Plan Falters*, INDEPENDENT, Mar. 28, 1992, at 15.

4. *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996).

5. *Id.* In his position as President of Srpska's three-man presidency, Karadzic controlled the military. *Id.*

6. Appellants' Brief at 4, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)(No. 94-9035)[hereinafter Appellant's Brief] (on file with the *Land and Water Law Review*). See *infra* note 14.

7. "Ethnic cleansing" is a process of aggression "through which nearly all persons who, like plaintiffs, are not technically Serbian, are liquidated, forcibly expelled, or imprisoned and tortured by military forces defendant leads." Brief of Plaintiffs-Appellants at 4, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)(No. 94-9069) [hereinafter Brief of Plaintiffs-Appellants](on file with the *Land and Water Law Review*). See *infra* note 14.

8. Appellant's Brief, *supra* note 6, at 4-5.

soldiers forcibly removed her from her home and beheaded one of her twin boys as she held him. She fled with her other son, but the soldiers later captured her and sent her to a rape camp. At a minimum, the soldiers raped her ten times a day for a period of twenty-one days. After her release, she had an abortion upon finding she was pregnant from the rapes.⁹

The Croat-Muslim woman and other victims of the human rights violations perpetrated during the Bosnian civil war brought suit against Karadzic in the United States District Court for the Southern District of New York.¹⁰ The plaintiffs-appellants based subject-matter jurisdiction on the Alien Tort Claims Act (ATCA)¹¹ and the Torture Victim Protection Act (TVPA).¹² They alleged that Karadzic, as high commander, directed the Bosnian-Serb military in its "pattern of systematic human rights violations" against the Muslim and Croat people of Bosnia-Herzegovina.¹³ The plaintiffs¹⁴ included torture and summary execution in their causes of action.¹⁵

9. Brief of Plaintiffs-Appellants, *supra* note 7, at 5.

10. *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

11. Alien Tort Claims Act, 28 U.S.C. § 1350 (1993). The act reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* The Act originated in the Judiciary Act of 1789. Charles F. Marshall, *Re-framing the Alien Tort Act after Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996). "The first alien tort provision was packaged as section 9 of the first Judiciary Act of 1789." *Id.* In its early stages of government, the U.S. thought one way to avoid potential conflicts with foreign states was to have a way to properly adjudicate aliens' claims. *Id.* at 598. "The Alien Tort Act remained dormant through most of the nineteenth and early twentieth century." *Id.* at 599. Not until the 1960s did a federal court say the ATCA established jurisdiction for a violation of the law of nations. *Id.* at 600.

12. The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat.73 (1992) *printed at*, 28 U.S.C. § 1350. The TVPA follows the Alien Tort Claims Act in 28 U.S.C. § 1350. The TVPA states in section 2(a):

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.

Id.

13. *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

14. Two groups of plaintiffs-appellants brought their cases before the Second Circuit Court of Appeals. Jane Doe I and II submitted their case in the Appellant's Brief. S. Kadic submitted her case in the Brief of Plaintiffs-Appellants. *See supra* notes 6 and 7.

15. *Kadic*, 70 F.3d at 237. The plaintiffs' causes of action also included genocide, forced prostitution and impregnation, rape, assault and battery, and ethnic inequality. *Id.*

In their respective briefs, the plaintiffs allege extreme cases of torture and summary execution. *See supra* note 9 and accompanying text. Bosnian-Serb soldiers allegedly gang raped and slashed the breasts of plaintiff Jane Doe I during her imprisonment at a concentration camp. Appellant's Brief, *supra* note 6, at 6-7. Plaintiff Jane Doe II was allegedly forced to watch as soldiers raped her mother. After the rape, the soldiers murdered the plaintiff's mother. *Id.*

The United States District Court for the Southern District of New York granted Karadzic's motion to dismiss for lack of subject-matter jurisdiction.¹⁶ The court also rejected the use of the TVPA as a basis for plaintiffs' cause of action.¹⁷ The court concluded that Karadzic was a private actor, and that his actions did not meet the TVPA requirement of government involvement in the acts of torture or extrajudicial killing.¹⁸

The United States Court of Appeals for the Second Circuit reversed the district court's decision and remanded the case for further proceedings.¹⁹ The appellate court found the district court did have subject-matter jurisdiction, and that the TVPA could apply to the plaintiffs' claims.²⁰ The Supreme Court of the United States denied the petition for writ of certiorari without a written opinion.²¹

This case note looks at the appellate court's decision to allow the use of the TVPA in an era filled with human rights enforcement problems. It will discuss briefly the evolution and enforcement of human rights, as well as the history of the TVPA's enactment. The case note will focus on cases that have applied or criticized the application of United States' Acts to victims of torture and summary execution by foreign governments. It will give the appellate court's reasoning behind its decision and then analyze the importance of the decision to national and foreign tort claimants. In conclusion, it will advocate for the TVPA's increased use in cases dealing with human rights violations by foreign governments.

BACKGROUND

Human Rights and the Prohibition Against Torture and Summary Execution

Nations openly disagree about the scope of human rights. Since World War II, however, the notion that individuals, as members of a society, have certain liberties and immunities has come to the forefront of international thinking.²² International declarations, conventions and customary norms accept freedom from torture as a right

16. *Doe v. Karadzic*, 866 F. Supp. 734, 744 (S.D.N.Y. 1994).

17. *Id.* at 742.

18. *Id.* The court said that "Karadzic does not act with the authority of any foreign nation. [T]he TVPA clearly was enacted to redress acts of torture by governments or government officials." *Id.* See *supra* note 12.

19. *Kadic*, 70 F.3d at 251.

20. *Id.* at 246, 251. The court said that "the Torture Victim Protection Act also appears to provide a remedy for their allegations of official torture." *Id.* at 246.

21. *Karadzic v. Kadic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

22. Louis Henkin, *Human Rights*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 886, 886 (Rudolf Bernhardt et al. eds., 1995).

basic to all individuals.

The "Universal Declaration of Human Rights" (Universal Declaration), adopted by the United Nation's General Assembly in 1948, contains the generally accepted principles of modern human rights.²³ Article five of the Universal Declaration provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²⁴ The United Nation's "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (the CAT),²⁵ to which eighty-two countries are parties,²⁶ also calls for the prohibition of torture.²⁷ The preamble to the CAT re-states article five of the Declaration.²⁸ The "American Convention on Human Rights" contains a provision for the right to humane treatment which encompasses freedom from torture.²⁹ International customary norms also include the right to be free from torture.³⁰

International Enforcement Agencies

Conventions and agencies designed to enforce the prohibition against torture utilize different enforcement mechanisms and techniques. Under article four of the CAT, member states must make torture an offense under their criminal law.³¹ The CAT also uses a reporting mechanism which involves the submission of reports by member states to a committee established by the CAT.³² In the report, the member state must detail the measures the state has taken to comply

23. *Id.* at 888. Other organizations and documents which have shaped the modern version of human rights include the International Labor Organization, the League of Nations Covenant, and treaties prohibiting slavery. *Id.* at 887.

24. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), reprinted in 1 UNITED NATIONS, HUMAN RIGHTS - A COMPILATION OF INTERNATIONAL INSTRUMENTS 1 (1993).

25. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984 Y.B.U.N. 813, U.N. Doc. A/39/708 [hereinafter *Convention Against Torture*].

26. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 22 (Supp. 1995).

27. *Convention Against Torture*, supra note 25, at 814.

28. *Id.*

29. *American Convention on Human Rights*, Nov. 22, 1969, article 5, 9 I.L.M. 673, 676 (1970).

30. The court in *Filartiga v. Pena-Irala* stated: "[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." 630 F.2d 876, 880 (2d Cir. 1980)(emphasis added). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(d)(1986). ("A state violates international law if, as a matter of state policy it practices, encourages, or condones . . . torture.").

31. *Convention Against Torture*, supra note 25, at article 4.

32. *Id.* at article 19.

with the CAT.³³ The committee reviews the report and may return it with comments. The committee may also publish the report at the General Assembly of the United Nations.³⁴

Certain agencies use the general promotion of human rights as an enforcement mechanism. The United Nations established the Economic and Social Counsel (ECOSOC) "to make recommendations for the purpose of 'promoting respect for, and the observance of, human rights and fundamental freedom for all.'"³⁵ In turn, ECOSOC established the Commission on Human Rights which assists in drafting more specific human rights conventions and has a role in the reporting system used to monitor human rights in member states.³⁶ ECOSOC and the Commission on Human Rights use the reporting procedure in a manner similar to the CAT's. After receipt of the reports, the Commission may scrutinize and publicize the report for the purpose of encouraging members to observe human rights.³⁷

Enforcement Problems

Even with the presence of human rights declarations, conventions and customary norms, enforcement and implementation of human rights remain a problem.³⁸ The Universal Declaration contains generally accepted principles of human rights, but it cannot legally bind states.³⁹ The reporting mechanism used by human rights conventions requests reports from member states only. Unrecognized states and other non-members remain unaffected by the reporting mechanism and are unlikely to comply with a convention's provisions.⁴⁰

Enforcement problems also prevail under customary international law. In the implementation of international law, individual victims of human rights face obstacles in acting on their own behalf. "The usual forces for implementing international law-'reciprocal, horizontal enforcement' by the 'victim' State-hardly operate in respect of human rights since ordinarily there is no victim State, and usually no State is

33. *Id.*

34. *Id.*

35. 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE 983, 988 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

36. *Id.* at 1005-06.

37. *Id.* at 1006.

38. Henkin, *supra* note 22, at 892.

39. OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 35, at 1001-02.

40. "Hundreds of thousands of people in the past 10 years have been killed by the political authorities in their countries." AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS 5 (1983).

prepared to identify with or champion individual victims."⁴¹

United States Laws and International Human Rights

Two United States Acts enable individual victims of human rights violations to seek redress. The ATCA⁴² and the TVPA⁴³ assist victims of international human rights violations by providing both a federal cause of action and a jurisdictional base for victims' claims.⁴⁴ The ATCA grants jurisdiction over a civil action brought by an alien for a tort committed in violation of the law of nations.⁴⁵ The TVPA imposes liability upon individuals acting under the color of law who subject a person to torture or summary execution.⁴⁶ Despite the need for laws that address human rights violations, the ATCA and TVPA have not escaped criticism. Two circuit court decisions from the 1980s highlight the opposing views concerning the ATCA's jurisdictional grant.

A. Alien Tort Claims Act

In *Filartiga v. Peña-Irala*, the Second Circuit Court of Appeals heard a case brought by a Paraguayan father and daughter on behalf of their deceased relative.⁴⁷ The father alleged that an official in the Paraguayan government tortured and murdered his son.⁴⁸ The court of appeals found the ATCA provided jurisdiction even though the Act's history included few examples of its use as a jurisdictional base.⁴⁹ In concluding that the ATCA provided a jurisdictional base, the court said "[t]his is undeniably an action by an alien, for a tort only, committed in violation of the law of nations."⁵⁰

41. Henkin, *supra* note 22, at 892.

42. Alien Tort Claims Act, *supra* note 11.

43. Torture Victim Protection Act, *supra* note 12.

44. Alien Tort Claims Act, *supra* note 11; Torture Victim Protection Act, *supra* note 12.

45. Alien Tort Claims Act, *supra* note 11.

46. Torture Victim Protection Act, *supra* note 12.

47. 630 F.2d 876, 877 (2d Cir. 1980).

48. *Id.*

49. *Id.* at 887. The court wrote that "[a]lthough the Alien Tort Statute has rarely been the basis for jurisdiction during its long history, there can be little doubt that this action is properly brought in federal court." *Id.* One commentator noted *Filartiga* "breathed new life into the Alien Tort Act with its expansive holding." Marshall, *supra* note 11, at 601. "Despite the historical evidence strongly suggesting that Congress intended to use the [ATCA] as a tool to prevent foreign affairs controversies, the court focused less on the underlying intent of the statute and more on whether there was 'a tort committed in violation of the law of nations.'" *Id.* at 602.

50. *Filartiga*, 630 F.2d at 887. Earlier in the case, the court established that "torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Id.* at 880. See *supra* note 11.

In *Tel-Oren v. Libyan Arab Republic*,⁵¹ the D.C. Court of Appeals took a restrictive view of the ATCA's use as a jurisdictional base. In *Tel-Oren*, survivors and representatives of persons murdered in Israel during a bus attack brought an action against the Palestine Liberation Organization and other defendants.⁵² The plaintiffs based subject-matter jurisdiction partially on the ATCA.⁵³ A panel of three judges affirmed the lower court's decision to dismiss for lack of subject-matter jurisdiction.⁵⁴ Each judge wrote a separate concurrence outlining his reasons for affirming the dismissal. Judge Edwards agreed with *Ffartiga's* legal principles,⁵⁵ but concluded that the ATCA could not "cover torture by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term 'law of nations.'" ⁵⁶ Judge Bork concluded that the ATCA should not provide subject-matter jurisdiction unless Congress or international human rights law explicitly grants a cause of action.⁵⁷ He disagreed with Judge Edwards's contention and *Ffartiga's* assumption that "Congress' grant of jurisdiction [in the ATCA] also created a cause of action."⁵⁸

B. The Torture Victim Protection Act

Congress did explicitly grant a private right of action when it enacted the TVPA.⁵⁹ Recognizing the lack of enforcement mechanisms against violators of human rights, Congress noted that while cases like *Ffartiga* hold that torture is an international violation of human rights, nations still torture and summarily execute their citizens.⁶⁰ The TVPA addresses this problem by granting aliens and United States citizens a cause of action when they are victims of torture or extrajudicial killing.⁶¹

51. 726 F.2d 774 (D.C. Cir. 1984), cert. denied 470 U.S. 1003 (1985).

52. *Id.* at 775.

53. *Id.*

54. *Id.*

55. *Id.* at 766.

56. *Id.* at 795.

57. *Id.* at 799, 800. "I am guided chiefly by the separation of powers principles, which caution courts to avoid potential interference with the political branch's conduct of foreign relations." *Id.* at 799.

58. *Id.* at 801.

59. TORTURE VICTIM PROTECTION ACT OF 1991, H.R. REP. NO. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

60. *Id.* at 85. The House Report points out that those states that commonly violate the principles of international law are the least likely to follow laws prohibiting those violations. *Id.*

61. *Id.* at 86.

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the judiciary act of 1789 (The Alien Tort Claims Act), which permits federal district courts to hear claims by aliens for torts committed "in violation of the law of nations."

Id. The TVPA defines torture in section 3(b)1. Torture is:

[A]ny act, directed against an individual in the offender's custody or physical control, by which

Upon and after its enactment, the TVPA met with its share of critics, including then President Bush. The President noted that the TVPA could create tensions in international relations as well as place a burden on United States judicial resources.⁶² Others have echoed Bush's concerns while adding their own. Criticism that the United States overstepped its bounds in the international arena with the TVPA is also a complaint.⁶³

The TVPA does not allow unchecked access to U. S. courts. The TVPA only imposes liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation."⁶⁴ The TVPA also requires exhaustion of local remedies and commencement of the action within ten years of the cause of action.⁶⁵ Some diplomatic immunities also place limitations on the TVPA.⁶⁶

Only two appellate court decisions prior to *Kadic* discussed the TVPA. In *Hilao v. Estate of Marcos*, the court held that "the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer fundamental rights upon all people vis-a-vis their own governments.'"⁶⁷ The court relied on the TVPA to confirm its reading of the ATCA.⁶⁸ In *Trajano v. Marcos*, the court also mentioned the TVPA but

severe pain or suffering, . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual for an act that individual or a third person, or for any reason based on discrimination of any kind.

Id. Extrajudicial killing is defined in section 3(a): "[E]xtrajudicial killing' means a deliberate killing not authorized by a previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*

62. Statement by President George Bush Upon Signing H.R. 2092, 1992 U.S.C.C.A.N. 91. The President said that "[t]here is thus a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries . . . which have nothing to do with the United States and which offer little prospect of successful recovery." *Id.*

63. Yoav Gery, Note, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L. L. & ECON. 597, 598 (1993).

64. Torture Victim Protection Act, *supra* note 12, at 28 U.S.C. § 1350 section 2(a).

65. *Id.* § 2(b)(c). The exhaustion of local remedies section reads: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* at 2(b). The statute of limitations section reads: "No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose." *Id.* § 2(c).

66. Robert F. Drinan & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605, 620 (1993) ("The TVPA 'is not intended to override traditional diplomatic immunities.' Therefore, it cannot be used against foreign officials visiting the United States as representatives of their nation.").

67. 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980)).

68. *Hilao*, 25 F.3d at 1475. "Our reading of the plain text of s1350 is confirmed by the Tor-

did not apply it because the district court made its decision before the Act's enactment.⁶⁹ *Kadic* was the first appellate case in which the TVPA provided a cause of action. The decision to allow the use of the TVPA is a significant step in improving human rights enforcement in light of the limitations of current enforcement mechanisms.

PRINCIPAL CASE

The court in *Kadic* held that the district court did have subject-matter jurisdiction and remanded the case for further proceedings.⁷⁰ The court decided that "Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor."⁷¹ Since the TVPA contains a state action requirement, it applies to the latter part of the court's decision.⁷² In reaching its decision, the court decided the plaintiffs were entitled to prove Karadzic was a state actor and examined the TVPA requirements Karadzic had to meet to be liable under the Act.

The district court held that Karadzic did not act in concert with a foreign nation and therefore failed to meet the requirements of the TVPA.⁷³ The appellate court disagreed.⁷⁴ In reaching its conclusion, the court first turned to the established definition of a state under international law.⁷⁵ The definition reads: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."⁷⁶

ture Victim Protection Act of 1991." *Id.*

69. 978 F.2d 493, 503 (9th Cir. 1992).

70. *Kadic v. Karadzic*, 70 F.3d 232, 251 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996). The appeal to the Second Circuit came after the United States District Court for the Southern District of New York dismissed the plaintiffs' suits for lack of subject-matter jurisdiction. *See supra* note 16 and accompanying text.

71. *Kadic*, 70 F.3d at 236.

72. Torture Victim Protection Act, *supra* note 12.

73. *Doe v. Karadzic*, 866 F. Supp 734, 742 (S.D.N.Y. 1994). "On its face, the TVPA requires a plaintiff's claim for relief to be based on actions taken under the color of law of any foreign nation." *Id.* The court maintained that the Bosnian-Serb warring military faction was not a recognized state. *Id.*

74. *Kadic*, 70 F.3d at 244-45.

75. *Id.* at 244.

76. *Id.* The court cites several sources for this definition, including the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1986). The comments to § 201 state that "[a]n entity may satisfy the territorial requirement for statehood *even if its boundaries have not been finally settled.*" *Id.* at cmt. b. (emphasis added).

The Second Circuit found Srpska “readily appear[ed] to satisfy the criteria for a state in all aspects of international law.”⁷⁷ The court looked to Srpska’s control of a defined territory, its control of a population, and its agreements with other governments.⁷⁸

The court also focused on the status of unrecognized states and concluded that recognition of a state made no difference when it came to the application of human rights principles.⁷⁹ The court reasoned that “[i]t would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights violations—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.”⁸⁰ After establishing that Srpska could satisfy the state action requirement,⁸¹ and that state recognition was irrelevant, the court addressed the other requirements of the TVPA.

The court focused on liability after stating the general provisions of the TVPA.⁸² TVPA liability applies only to those acting “under actual or apparent authority, or color of law, of any foreign nation.”⁸³ The court searched the TVPA’s legislative history and found that “the plaintiff must

77. *Kadic*, 70 F.3d at 245.

78. *Id.* While Srpska appeared to satisfy the “state action” requirement, the court noted that “the state action concept, where applicable for some violations like ‘official’ torture, requires merely the semblance of official authority.” *Id.* The court reasoned a lower standard was appropriate because the inquiry “is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.” *Id.*

79. *Id.* at 244. The court relied on RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 207 and 702 (1986). Section 207 reads:

A state is responsible for any violation of its obligations under international law resulting from action or inaction by (a) the government of the state, (b) the government or authorities of any political subdivision of the state, or (c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.

Id. Section 702 reads: “A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (d) torture or other cruel, inhuman or degrading treatment or punishment.” *Id.*

80. *Kadic*, 70 F.3d at 245.

81. *Id.* The court also looked at the appellant’s alternate claim that Karadzic acted in concert with a foreign state. *Id.* at 245. The court mentioned that 42 U.S.C. § 1983 would guide the inquiry of whether Karadzic acted under the color of law of Yugoslavia. *Id.* The guiding principle is that “[a] private individual acts under the color of law within the meaning of section 1983 when he acts together with state officials or with significant aid.” *Id.* The court decided that the appellants could try to prove Karadzic acted under the color of law of Yugoslavia. *Id.* “Appellants . . . sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed.” *Id.*

82. *Id.* at 245. The court explained what the TVPA covered as well as the Act’s limitations. See *supra* notes 12 and 65.

83. Torture Victim Protection Act, *supra* note 12, § 2(a).

establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by private groups.'⁸⁴ The court directed any interpretation of "actual or apparent authority" and "color of law" to fall under the 42 U.S.C. § 1983 principles.⁸⁵

The court focused attention on sections of the TVPA that limit its use. The TVPA also "requires that a plaintiff exhaust adequate and available local remedies [2(b)], imposes a ten-year statute of limitations [2(c)], and defines the terms 'extrajudicial killing' and 'torture.'⁸⁶ The court concluded with a reminder that the Act "creates a cause of action for official torture" but does not provide jurisdiction.⁸⁷ "The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act."⁸⁸

ANALYSIS

The nature of human rights violations and the existing enforcement problems underline why the Second Circuit Court of Appeal's decision to allow the use of the TVPA is of great importance. If individuals acting with actual or apparent governmental authority torture or summarily execute people, those victims or their relatives now have a well-defined means of redress against the perpetrator of the violence. The decision is even more laudable because the court respectfully considered international principles in its decision to use a United States law that affects foreign

84. *Kadic*, 70 F.3d at 245 (quoting H.R. Rep. No. 367, 102d Cong. 2d Sess., at 5 (1991)).

85. *Id.* Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

86. *Kadic*, 70 F.3d at 245. *See supra* note 65.

87. *Kadic*, 70 F.3d at 246.

88. *Id.* The court in *Kadic* declined to state whether 28 U.S.C. § 1331 would provide jurisdiction:

Since th[e] [ATCA] appears to provide a remedy for the appellant's allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filartiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.

Id.

parties. The extent to which the *Kadic* court used and defined the TVPA represents a major step forward in addressing the difficulties encountered in the enforcement provisions for human rights violations.⁸⁹

Enforcement Problems and the Court's Response

Laws that attempt to affect all nations will fail at some level because of the difficulties of enforcing such laws. The nations of the world answer to their respective laws and people, not one controlling force. "Under international law, human rights are not adequately enforced, primarily because there is no supranational authority to compel the judicial settlement of disputes between individuals and their states."⁹⁰ While the United Nations has made progress in establishing human rights conventions,⁹¹ not every state respects conventions' principles. The United States government recognized the inadequacies of the enforcement system. The House Report on the TVPA focused on how "international standards forbidding torture and summary executions are honored in the breach."⁹² The court addresses these problems in *Kadic* by enforcing the TVPA.⁹³

By discussing what states the TVPA affects, the court gives guidance on how to categorize established states like Yugoslavia that splinter into warring factions. Such a situation is likely to leave plaintiffs with no way to adjudicate their tort claims. "Due to war, occupation, and the likelihood of reprisals, it is impossible to adjudicate these torts—which violate international law, laws of the United States and the State of New York, Bosnia-Herzegovina, and present and former Yugoslavia—where they were committed."⁹⁴ The court addresses this problem by including those splintered states into the category of states affected by the TVPA. The court's understanding of a "state" includes de facto governments and unrecognized states.⁹⁵

89. The *Kadic* decision is also significant because "United States courts generally manifest a deep reluctance to embrace international human rights law and to use it as an effective tool to redress abuses." Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 27-28 (1992).

90. Matthew H. Murray, Note, *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, 677 (1987).

91. Convention Against Torture, *supra* note 25.

92. TORTURE VICTIM PROTECTION ACT OF 1991, H.R. REP. NO. 102-367, at 84 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85.

93. The TVPA does not have a state party membership requirement as do some of the human rights conventions. See *supra* note 12.

94. Brief of Plaintiffs-Appellants, *supra* note 7, at 5.

95. *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir 1995), cert. denied, 116 S. Ct. 2524 (1996). See *supra* notes 79-81 and accompanying text.

Coinciding with the uncertainty of a state's status during a political collapse is the uncertainty of the status of the state's leaders. Karadzic had the multiple identities of "the self-styled 'President of the Republic of Srpska'; . . . an agent of the Milosevic regime governing Serbia and Montenegro; or as an Abimael Guzman-style ruthless insurgent leader."⁹⁶ Karadzic created additional confusion about his position when he claimed the title of Srpskan President but then alleged that he was a private actor and not a state actor.⁹⁷ The court responded to this problem by concluding individual actors in a non-traditional state can be liable so long as they are connected to the government.⁹⁸

Another important effect of the court's decision to use the TVPA is that victims may take action against responsible parties before the resolution of the conflict in which the torture occurred. "[T]he ATCA and TVPA have become tools not only for the revelation of past atrocities and compensation of victims, but as a means to confront and deter a continuing pattern of international torts."⁹⁹ If the conflicts happen to last for several years, the victim will not have to wait until its resolution before using the TVPA.

Appropriateness of the Decision: World Police and United States Courts

Trying international figures in United States courts for human rights violations invites criticism. Nations can argue that the United States is acting both as a global police force and as a global court. "It is clear that when a federal court seeks to regulate the activities of foreign citizens or governments which occur in foreign states, it is almost certain that such actions will provoke resentment and possibly retaliation from the foreign state."¹⁰⁰ The court attempts to circumvent this criticism by using international law in combination with United States law. In allowing use of the TVPA, the court promotes internationally recognized prohibitions against torture and summary execution.¹⁰¹

The international policy of the United Nations undoubtedly influenced the court's decision. The United Nations has voiced its concern about the "frequency and magnitude of violations of fundamental human

96. Joan Fitzpatrick, *Panel III: War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 433, 442 (1995).

97. *Kadic*, 70 F.3d at 239.

98. *Id.* at 244-45.

99. Fitzpatrick, *supra* note 96, at 440.

100. Marshall, *supra* note 11, at 614.

101. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d. Cir. 1980). The court said "official torture is now prohibited by the law of nations." *Id.*

rights in different countries and regions.”¹⁰² The court also followed the legislative intent of Congress by addressing this international concern.¹⁰³ The court’s awareness of the problems associated with a United States law affecting foreign parties is also highlighted by its emphasis on the TVPA’s limitations.¹⁰⁴

Plaintiffs wishing to use the TVPA must satisfy the procedural requirements for bringing a case to a federal court. In *Kadic*, the plaintiffs met the procedural requirements. The *Kadic* court concluded that the appellants could find subject-matter jurisdiction for their claims under the ATCA.¹⁰⁵ Plaintiffs satisfied the personal jurisdiction and service of process requirements when Karadzic was served while in the United States.¹⁰⁶

Questions That Remain

While the *Kadic* decision succeeds in promoting the TVPA, because of the case facts, it does not answer all questions regarding the application of the Act. The court does not discuss the potential redress the TVPA offers United States citizens because the plaintiffs-appellants were aliens.¹⁰⁷ The facts of the case also give a limited perspective on the restrictions a plaintiff faces in using the TVPA. The plaintiffs successfully served Karadzic because he entered the United States. Service of foreign defendants is possible as evidenced by both Karadzic’s and other defendant’s movement into the United

102. 1 ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 258 (Kumiko Matsuura et al. eds., 1988).

103. TORTURE VICTIM PROTECTION ACT OF 1991, H.R. REP. NO. 102-367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85.

104. The TVPA requires exhaustion of all local remedies. See *supra* note 65 and accompanying text. The limitations of the TVPA assure that cases coming into a U. S. court under the Act have nowhere else to go.

105. *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d. Cir. 1995), cert. denied 116 S. Ct. 2524 (1996).

106. *Id.* at 237. In 1993, Karadzic came to the United States three times as a United Nations invitee. *Id.* Plaintiffs alleged he was served on two of those occasions. *Id.* “Fed.R.Civ.P 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.” *Id.* at 247. The court determined Karadzic was not immune from service because “invitees are not immune from legal service while in the United States at locations outside the [United Nations] Headquarters District.” *Id.* Karadzic argued the suits were nonjusticiable political questions. *Id.* at 249. The court said, “[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions.” *Id.*

107. H.R. REP. No. 102-367 at 86. “[The] TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.” *Id.* *Kadic* followed an earlier district court case that dealt with a national who was a victim of torture by a foreign government. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

States,¹⁰⁸ but their entrance is not assured. Plaintiffs must satisfy procedural requirements before they can use the TVPA. The court also did not delve into immunity issues because it decided Karadzic did not have immunity from service of process.¹⁰⁹ Therefore, the court simply had no need to address the limitations the Foreign Sovereign Immunities Act [FSIA] places on the TVPA.¹¹⁰

Another question that arises from this case is how to enforce judgment. The court did not comment on "how the United States intends to enforce any judgment obtained by plaintiffs in this matter."¹¹¹ The publicity of the case may help curb human rights abuses, but it is not certain to help the plaintiffs collect judgment. If the district court issues a judgment against Karadzic, it is unlikely he will comply with that judgment. Whether the plaintiffs can enforce a judgment through attachment or other means is an open question. Future legislation and litigation may offer answers.

Importance to United States Citizens and Alien Victims

A recent district court case answers how the *Kadic* decision will affect United States citizens. In *Mushikiwabo v. Barayagwiza*,¹¹² U. S. citizens and aliens brought an action against a political leader involved with the torture of Rwandan Tutsis.¹¹³ The U. S. citizens based their cause of action on the TVPA.¹¹⁴ The *Mushikiwabo* court followed *Kadic*,

108. In *Filariga*, the defendant came to the United States and stayed nine months. 630 F.2d 876, 879 (2d Cir. 1980). In a 1996 case that used the TVPA, the Ethiopian victims, "fled Ethiopia and sought exile in the United States and Canada. In 1989, Taye [a victim] encountered Negewo [the government official responsible for her torture] in an Atlanta, Georgia, hotel where they both worked." *Abebe-Jira v. Negewo* 72 F.3d 844, 846 (11th Cir. 1996).

"There are many people living in the United States who have committed some of the worst human rights atrocities the world has ever seen." Paul Hoffman, *Panel III: War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 433 (1994).

109. See *supra* note 106.

110. H.R. REP. NO. 102-367 at 88.

The TVPA is subject to the restrictions in the Foreign Sovereign Immunities Act of 1976 [FSIA]. Pursuant to the FSIA, 'a foreign state,' or an 'agency or instrumentality' thereof, shall be immune from the jurisdiction of the courts of the United States and of the States,' with certain exceptions as elsewhere provided in the FSIA, and subject to international agreements to which the United States was a party at the time of the FSIA's enactment.

Id.

111. Martin Flumenbaum & Brad S. Karp, *War Crimes Jurisdiction*, 214 N.Y.L.J. Oct. 25, 1995, at 3.

112. *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996).

113. *Id.* at *1, *3.

114. *Id.* at *3. "Although the TVPA does not itself confer jurisdiction, the Court has subject matter jurisdiction over the TVPA claims under 28 U.S.C. § 1331, the general federal question jurisdiction statute." *Id.*

saying that “[s]ince defendant and his coconspirator acted under color of law, their conduct is also actionable under the Torture Victim Protection Act.”¹¹⁵ The *Mushikiwabo* court relied on *Kadic*’s application of the TVPA and expanded that application to include United States citizens.¹¹⁶

The TVPA’s inclusion of United States citizens is relevant because many United States citizens work abroad in unstable countries or in areas with anti-American sentiments. The TVPA has the potential to assist Wyoming residents who live and work abroad in the oil, gas or mineral industries should they become victims of government sponsored torture. While the TVPA does not grant automatic redress to United States citizens, once a plaintiff satisfies procedural requirements, the TVPA offers a means of redress.

CONCLUSION

The acceptance of basic human rights in principle by many nations is not enough to end the violation of those rights. People, governments, and nations continue to violate human rights even with the advent of declarations, conventions and enforcement mechanisms. The nature of the violations, particularly those found in the *Kadic* case, are so violent and destructive that nations cannot leave victims without a remedy. Stronger enforcement methods are necessary to curb the destruction brought about by these violations.

The *Kadic* decision goes a fair distance in offering a viable enforcement solution. The case offers a realistic approach to enforcement through the TVPA. The court’s adherence to international law and the limitations of the TVPA shows respect for foreign law and the United States judicial process. The decision also considers the unstable nature of many nations and provides a warning to individuals who may attempt to hide behind a lack of statehood.

Individuals who choose to violate fundamental principles of human rights cannot be allowed to evade punishment because of insufficient and ineffective enforcement mechanisms. The *Kadic* decision will assist many victims in bringing their defendants before a United States court.

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115. *Id.* at *2. Criticism that the TVPA will allow easy abuse of the U.S. court system is thwarted in *Mushikiwabo* as in *Kadic*. The plaintiffs attempted to use local remedies, but found it impossible. *Mushikiwabo* had no immunity from the TVPA because the current Rwandan government waived his immunity claims. *Id.*

116. *Id.* at *2. “Since defendant and his coconspirators acted under color of law, their conduct is also actionable under the Torture Victim Protection Act.” (citing *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)).