

United States District Court, S.D. New York.

Louise MUSHIKIWABO, et al., Plaintiffs,
v.
Jean Bosco BARAYAGWIZA, Defendant.

No. 94 CIV. 3627 (JSM).

April 9, 1996.

MEMORANDUM OPINION AND ORDER

MARTIN, District Judge:

*1 Presently before the Court is a motion for a default judgment in which the plaintiffs have overwhelmingly established that the defendant has engaged in conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions.

The evidence presented by the plaintiffs establishes that the defendant, Jean Bosco Barayagwiza, was one of the political leaders in Rwanda who played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority, as well as moderate members of the Hutu majority. Each of the plaintiffs is related to individuals who died in that massacre.

Although not himself a government official, Barayagwiza was a leader of the Rwandan Hutu political party known as the Coalition pour la Defense de la Republique (the "CDR"). The CDR had its own militia which operated in conjunction with Rwandan government forces in carrying out a plan aimed at the extermination of Rwanda's Tutsi population. Barayagwiza was also the owner and a Board member of radio station RTL, which encouraged the violence against the Tutsi by broadcasting messages of hate stating that the Tutsi were "the enemy", "traitors," and "deserved to die."

The Court will not detail here all of the acts of torture and murder that were carried out according to the plan of the defendant and his coconspirators, which have been extensively documented in the affidavits submitted in support of this motion. It is enough to note that a United Nations Commission of Independent Experts concluded that "[since] 6 April 1994 an estimated 500,000 unarmed civilians have been murdered in Rwanda. That estimate may indeed err on the conservative side for ... some reliable estimates put the number of dead at close to 1 Million."

Each of the plaintiffs has submitted a declaration documenting the massacre of a number of relatives that resulted from the campaign of genocide orchestrated by the defendant and his coconspirators. For example, plaintiff Faustin Semuhungu describes how CDR militia shot down the door of his parents home, hacked his parents to death with machetes and shot two of his brothers to death. Two other brothers were summarily executed, one along with his wife and three children ages four years, two years, and two months. Plaintiff Semuhungu lost a total of thirty-eight relatives in the massacres.

The Court credits each of the plaintiff's declarations and finds that the facts set forth therein occurred as a result of the actions of the defendant and his coconspirators. Therefore, each of the plaintiffs has established a factual basis for the claims asserted against the defendant. Plaintiffs seek compensatory and punitive damages under the Alien Tort Act, 28 U.S.C. § 1350, the Torture Victim Protection Act of 1991,

Pub.L.No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C.A. § 1350 note, and the Rwandan Civil Code.

*2 In light of the recent opinion of the Second Circuit in *Kadic v. Karadzic* 70 F.3d 232 (2d Cir. 1995), there can be no doubt that this Court has jurisdiction to hear these claims and that defendant is legally liable for the damages that the plaintiffs have suffered as a result of the massacre that he orchestrated. In *Kadic*, the Second Circuit held that acts of genocide, similar to those documented here, are actionable under the Alien Tort Act (the "ATA"), whether or not committed by a state. 70 F.3d at 241-42. Although the court in *Kadic* held that "torture and summary execution -- when not perpetrated in the course of genocide or war crimes -- are proscribed by international law only when committed by state officials or under color of law," *id.* at 243, the affidavits submitted here clearly establish that the defendant's actions were part of a coordinated, genocidal effort with officials of the Rwandan government and thus defendant both acted in pursuit of genocide and under color of law. See *id.* at 245 (under § 1983 standards applicable to state action requirement of Alien Tort Act, "[a] private individual acts under color of law within the meaning of section § 1983 when he acts together with state officials or with significant state aid"). Since defendant and his coconspirators acted under color of law, their conduct is also actionable under the Torture Victim Protection Act (the "TVPA") *Id.* at 245 ("By its plain language, the [TVPA] renders liable those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation'"). [FN1] Plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Rwandan judicial system is virtually inoperative and will be unable to deal with civil claims in the near future. See TVPA § 2(b) (plaintiff must "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred"); see also *Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D.Mass. 1995). Plaintiffs have also submitted expert testimony establishing that they have claims against the defendant under the laws of Rwanda. The Court has supplemental jurisdiction over these municipal tort claims pursuant to 28 U.S.C. § 1367.

Although the defendant has not officially appeared in this action, he did send a letter claiming that he is immune from suit because he was served with the summons and complaint while in this country to attend a session of the United Nations. A similar argument was rejected by the Second Circuit in *Kadic*. 70 F.3d at 246-48. In any event, the current Government of Rwanda, in a diplomatic note dated March 17, 1995, officially waived any claim of immunity that the defendant might assert. Therefore, the defendant is subject to the personal jurisdiction of this Court.

Having found that the Court has jurisdiction over the defendant and that plaintiffs have established the causes of action alleged in the complaint, the issue remaining is the amount of damages to be awarded. This Judge has seen no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant. One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

*3 Plaintiffs' able counsel have carefully documented the lost earnings and pain and suffering damages of each of the plaintiffs' relatives and the emotional damages of each of the plaintiffs, and the Court is prepared to adopt those calculations in all but the following respects. Plaintiffs seek pain and suffering damages in the amount of \$1.5 million dollars for each relative. Since in almost all cases the actual killing took place in a brief period of time, the amount sought appears to be excessive under our traditional principles for an award of pain and suffering damages. Therefore, the award for pain and suffering damages will be calculated at \$500,000 per relative. However, each plaintiff is entitled to an award of punitive damages which the Court concludes should include an amount of \$1,000,000 per relative victim, in addition to the \$5,000,000 for each plaintiff that has been requested. Thus, although the basis for the award is not as requested, the Court concludes that it is appropriate to enter judgment against the

defendant on behalf of each plaintiff in the amounts requested. Therefore the plaintiffs are awarded judgment in the following amounts:

Louise Mushikiwabo	\$ 35,204,577
Louis Rutare	10,736,227
Rangira Beatrice Gallimore	16,746,291

Julie Mukandinda Mugemanshuro	20,215,869
Faustin Semuhungu	22,364,970

SO ORDERED.

FN1. Plaintiffs Louis Rutare and Rangira Beatrice Gallimore, who are citizens of the United States and thus cannot base their claims on the ATA, state claims under the TVPA. 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. See *Kadic* at 246 (citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D.Mass. 1995)).

1996 WL 164496, 1996 WL 164496 (S.D.N.Y.)