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Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict

By
William Aceves†

International law in the modern era has traditionally focused on the rights and obligations of states. Indeed, positivist legal theory viewed international law as solely regulating the behavior of states, and individuals were not subject to this law. The nature of international law underwent a fundamental transfor-

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1. Jeremy Bentham coined the term “international law” in 1789 to replace the term “law of nations.” JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (Burns and Hart, eds. 1970). While Bentham indicated that he was merely providing a new label to an old term, his subsequent description of the scope of international law suggests otherwise. See MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 227-235 (2nd ed. 1993). According to Janis, Bentham “assumed that international law was exclusively about the rights and obligations of states inter se and never about the rights and obligations of individuals.” Id. at 230-231. However, this interpretation of international law was contrary to the earlier view of the law of nations which defined itself as “that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.” WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 66 (1st ed. 1765-1769).

2. See, e.g., J.L. BRIERLY, THE LAW OF NATIONS 1 (6th ed. 1963); LASSA OPPENHEIM, 1 INTERNATIONAL LAW 636, 639 (8th ed. 1955). According to Philip Jessup, the primacy of states in international law occurs because “the world is today organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative.” PHILIP JESSUP, A MODERN LAW OF NATIONS 17 (1948). Similarly, Michael Akehurst noted that “[i]n the nineteenth century states were the only legal persons in international law; international law regarded individuals in much the same way as municipal law regards animals.” MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 70 (1987). In contrast, some commentators have stated that international law traditionally recognized individuals. For example, Ian Brownlie suggests that “[s]ince the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals.” IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 561 (4th ed. 1990). Similarly, Edwin Dickinson indicated that “[t]he Law of Nations in the eighteenth century embraced a good deal more than the body of practice and agreement which came later to be called public international law. . . The universal law was law for individuals, no less than for states. As such, it was concerned somewhat indiscriminately with matters between individuals, between individuals and states, and between states.” Edwin Dickinson,
mation following the Second World War. The atrocities committed during the war led to the transformation of international humanitarian law and the recognition of the rights and obligations of individuals. The Nuremberg trials definitively established that individuals could be held accountable for violations of international law. As the Nuremberg War Crimes Tribunal noted “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” As a result, numerous international agreements now codify the respective rights and obligations of individuals.

Despite international recognition of the rights and obligations of individuals, U.S. courts have been reluctant to extend this development to American jurisprudence. Recognizing the rights and obligations of individuals would also establish a concomitant obligation on the government to protect these rights and enforce these obligations. In the United States, extensive recognition of rights and obligations of individuals poses a unique problem because of the Alien Tort Claims Act (“ATCA”), which provides that “[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The Alien Tort Claims Act was enacted as part of the Judiciary Act of 1789. It remained relatively unused, however, for almost 200 years until the Second Circuit examined its application in Filartiga v. Pena-Irala. In the Filartiga case, the Second Circuit held that the Alien Tort Claims Act provides federal court jurisdiction “whenever an alleged torturer is found and served with process by an alien within our borders.” Since then, the ATCA has been used increasingly by victims of human rights abuses. Courts have generally recog-


10. Id. at 877
nized the application of the Alien Tort Claims Act to state actors that violate international law. It was unclear, however, whether the ATCA applied to non-state actors who violate international law. In a recent case, the Second Circuit examined the application of the Alien Tort Claims Act with respect to human rights violations committed by private individuals during the Yugoslav conflict.

In *Doe v. Karadzic*, Bosnian refugees brought two separate actions in a U.S. district court against Radovan Karadzic, the leader of the Bosnian Serbs, for human rights violations committed by forces under his command and control in the former Yugoslav republic of Bosnia-Herzegovina. Karadzic was charged with several egregious human rights violations including genocide, war crimes and crimes against humanity. Jurisdiction was based primarily on the Alien Tort Claims Act. In a controversial ruling, the district court dismissed both actions for lack of subject-matter jurisdiction. The district court held that acts committed by non-state actors do not violate the law of nations. In *Kadic v. Karadzic*, the Court of Appeals for the Second Circuit reversed the lower court ruling, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."

The *Karadzic* litigation is significant because it examines several issues concerning international law and its application in the United States. Can non-state actors violate international law? Do genocide, war crimes, torture and summary execution require state conduct to be considered violations of international law? Does the Alien Tort Claims Act apply to the actions of non-state actors who violate international law? On a more fundamental level, the *Karadzic* litigation is significant because it upholds the status of the Alien Tort

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12. Id. at 736.
13. Id. at 735-737.
14. Id.
15. Id. at 744.

Claims Act and its unique role in the American legal system. Perhaps more than any other federal statute, the Alien Tort Claims Act affirms the law of nations in U.S. courts and the commitment of the United States to protect human rights.

This article examines the Karadzic litigation and the implications of the Second Circuit's recent decision. Section I provides a history of the Yugoslav conflict, which provides the basis for the lawsuits in the Karadzic litigation. Section II then reviews the complaints filed against Karadzic in U.S. district court. Section III analyzes the decision of the district court in Doe v. Karadzic. Section IV reviews the decision of the Second Circuit in Kadic v. Karadzic. Finally, Section V analyzes the implications of the Karadzic litigation.

I.

THE YUGOSLAV CONFLICT

The Balkans have a long and troubled history. In many respects, the present Yugoslav crisis can be traced to the legendary battle of Kosovo in 1389, where the Orthodox Christian Serbs were defeated by the Muslims of the Ottoman Empire. Kosovo ushered in 500 years of Muslim rule. It was also at Kosovo where the Serbs began their long struggle for nationhood.

With the decline of the Ottoman Empire in the late 19th century, the Serbs increased their struggle for independence. During this period of ethnic and political unrest, a Serbian nationalist assassinated Archduke Franz Ferdinand in Sarajevo in June 1914, an act which precipitated the outbreak of World War I. In 1918, the modern state of Yugoslavia was established. By 1945, six republics were recognized as forming the Yugoslav republic: Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia and Montenegro. Throughout the Cold War, the ethnic divisions in Yugoslavia were held in check by the strength of the

18. See generally, Sabina Ramet, Balkan History Haunts Peace Plan, SEATTLE TIMES, Sept. 17, 1995, at B5; Elizabeth Neuffer, Vows of Revenge Veil Bosnian Peace Process, BOSTON GLOBE, Nov. 17, 1995, at 1; Walter Russell Mead, West Can't Quell Balkan Hatreds, Resentment in Region Is Centuries Old, ATLANTA J. & CONST., Aug. 16, 1992, at D2; FRED SINGLETON, A SHORT HISTORY OF THE YUGOSLAV PEOPLES (1985). But see, V.P. Gagnon, Jr., Serbia's Road to War, 5 J. DEMOCRACY 117, 118-119 (1994). According to Gagnon, "[t]he conventional wisdom about Yugoslavia's ordeal is that democratization was impossible because of the supposedly ancient ethnic hatreds that burst forth as soon as communist rule ended and that doomed the region to nightmarish violence. Ethnic conflict is thus taken as natural and inevitable, and all analyses flow from that 'fact.' Yet arguments focusing on ancient hatreds as the main cause of the conflict are highly misleading." Gagnon refers to the work of Donald Horowitz who argued that "[h]istory can be a weapon, and tradition can fuel ethnic conflict, but a current conflict cannot generally be explained by simply calling it a revived form of an earlier conflict." DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT 99 (1985). Thus, Gagnon suggests that while ethnic tensions may have existed, they were not "fated to lead to the awful bloodshed" that occurred in the former Yugoslavia. Gagnon, supra, at 119.


22. Yugoslavia also contained two autonomous regions: Kosovo and Vojvodina.
Yugoslav leader Marshal Tito and the power of communism. The death of Tito in 1980 and the collapse of communism in Eastern Europe during 1989 and 1990 led to the eventual disintegration of Yugoslavia.

On June 25, 1991, the Yugoslav republics of Croatia and Slovenia declared their independence from Yugoslavia despite repeated threats by the Yugoslav government that such action would lead to war. On June 27, 1991, the armed forces of the Yugoslav federal army attacked Slovenian military forces in order to prevent the secession. Hostilities broke out in Croatia in July. Despite repeated calls by the European Union and other members of the international community for the cessation of hostilities, the conflict gradually expanded. On September 25, 1991, the Security Council adopted a resolution expressing deep concern about the fighting in Yugoslavia and its consequences for the countries in the region. It stated “that the continuation of this situation constitutes a threat to international peace and security.” The resolution supported an immediate cease-fire and negotiations between the parties. It also provided that “all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.”

Throughout the early stages of the conflict, the Security Council issued repeated calls for the cessation of hostilities. On February 21, 1992, the Security Council established the United Nations Protection Force (“UNPROFOR”). The Security Council authorized its deployment on April 7, 1992. The mission of UNPROFOR was to deploy peacekeepers in areas des-
ignated as United Nations Protected Areas. Originally, UNPROFOR was sent to three areas: Eastern Slavonia, Western Slavonia and Krajina. Its mission gradually expanded as the situation in Yugoslavia deteriorated and the conflict spread to Bosnia-Herzegovina.

In addition to hostilities in Slovenia and Croatia, tensions were increasing in the Yugoslav republic of Bosnia-Herzegovina between Bosnian Serbs, Muslims and Croats. In 1991, the Bosnian Serbs began seeking greater autonomy from the government in Bosnia-Herzegovina and closer ties to the Serbian dominated Yugoslav federal government. Under the leadership of Radovan Karadzic, the Bosnian Serbs gradually moved to gain control over large portions of territory in Bosnia-Herzegovina and distance themselves from the Bosnian government. In contrast, the Muslim and Croat population of Bosnia-Herzegovina sought independence from the Yugoslav federal government. On March 1, 1992, the republic of Bosnia-Herzegovina held a referendum on whether to seek independence from Yugoslavia. While the referendum was boycotted by the Bosnian Serbs, it was approved by a majority of the Bosnian electorate. The republic of Bosnia-Herzegovina declared independence soon thereafter. The international community formally recognized the independence of Bosnia-Herzegovina in early April. On April 7, 1992, the Bosnian Serbs declared...
their independence from Bosnia-Herzegovina and the establishment of the Republika Srpska.\textsuperscript{42} The situation deteriorated rapidly in Bosnia-Herzegovina as fighting broke out between the Bosnian Serbs, Muslims and Croats.\textsuperscript{43} The Bosnian government was hampered in its struggle against the Bosnian Serbs because of the U.N. sponsored arms embargo, which continued to apply to the states of the former Yugoslavia.\textsuperscript{44} Aided by the Serbian government, the Bosnian Serbs soon gained control over many disputed areas.\textsuperscript{45}

With the escalation of hostilities, the United Nations increased its involvement in the Yugoslav conflict.\textsuperscript{46} The Security Council adopted several resolutions urging the parties to accept a cease-fire and a mediated solution to the conflict.\textsuperscript{47} Several U.N.-brokered agreements, however, failed to stop the fighting.\textsuperscript{48} The Security Council also established “no fly zones” and designated safe

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\textsuperscript{42} Ian Traynor, \textit{Bosnia's Freedom Born in Violence}, \textit{The Guardian}, April 8, 1992, at 5.


\textsuperscript{45} Roger Cohen, \textit{Yugoslavia Role in Bosnia}, \textit{N.Y. Times}, March 22, 1992, at A6. According to Human Rights Watch, “it is well known that the government of Yugoslavia, and in particular, the government of the Republic of Serbia, have provided economic, military and political support to Bosnian Serbs fighting against the forces of Bosnia-Herzegovina. Human Rights Watch, supra note 38, at 47-48.


The Vance-Owen proposal of 1992 divided Bosnia into ten semi-autonomous provinces. Radovan Karadzic, the leader of the Bosnian Serbs, signed the plan on May 2, 1993. The plan was rejected, however, by the Serbian Assembly on May 15th. Daniel Williams, \textit{Three-Way Partition of Bosnia; Realities of War Come to Fore; Vance-Owen Plan of Multiethnic Makeup Seems to Evaporate}, \textit{Washington Post}, June 19, 1993, at A12; \textit{The Fortlorn Hope}, \textit{The Economist}, Aug. 7, 1993, at 17. The Owen-Stoltenberg proposal sought to divide Bosnia-Herzegovina into three autonomous regions, each with the right to eventually annex to a neighboring country. This plan was rejected in December 1993. Other peace proposals sought to divide Bosnia-Herzegovina into two entities. The Bosnian Serbs would control 49% of Bosnian territory while a federation of Muslims and Croats
areas throughout Bosnia-Herzegovina to prevent further attacks by the Bosnian Serbs against the non-Serb population.\textsuperscript{49} In addition, U.N. peacekeepers were sent to protect these areas and provide humanitarian assistance to the millions of refugees that had been displaced because of the conflict.\textsuperscript{50} Despite these efforts, the Bosnian Serbs continued to attack the protected areas and interfere with U.N. relief efforts.\textsuperscript{51} The city of Sarajevo, once a proud symbol of Yugoslavia's ethnic diversity, was subject to extensive bombing and sniper attacks by the Bosnian Serbs.\textsuperscript{52} In addition, U.N. peacekeepers were taken hostage by the Bosnian Serbs to prevent military reprisals by NATO aircraft.\textsuperscript{53}

Throughout the conflict, numerous allegations of human rights violations were made against the Bosnian Serbs.\textsuperscript{54} Reports indicated that the Bosnian Serbs were conducting a massive campaign of genocide against the non-Serb population. These reports cited numerous atrocities, including mass executions, torture and rape of military prisoners and the civilian population. By the summer of 1992, it was evident that the Bosnian Serbs were conducting a campaign of ethnic cleansing, seeking to eliminate all traces of the non-Serb population from Bosnia-Herzegovina.\textsuperscript{55}

The Security Council remained seized of the situation and persisted in attempts to have the Bosnian Serbs comply with international norms and legal obligations. On July 13, 1992, the Security Council adopted a resolution which reaffirmed the obligation of all parties to comply with international humanitarian


\textsuperscript{53} Joel Brand and Juliana Mojsilovic, Serbs Take Hostages After Airstrike, WASH. POST., May 27, 1995, at A1; Roger Cohen, A High Risk Road, With No Return Trip; Raids Counterproductive, INT'L HERALD TRIB., May 27, 1995, at 1.


law and, in particular, the 1949 Geneva Conventions. The resolution provided "that persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are individually responsible in respect of such breaches." On August 13, 1992, the Security Council reiterated its concern at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia-Herzegovina, "including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." This resolution condemned "any violations of international humanitarian law, including those involved in the practice of ethnic cleansing." It added that "all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia-Herzegovina, immediately cease and desist from all breaches of international humanitarian law." The resolution also requested that states and international organizations begin gathering information relating to the violations of international humanitarian law being committed in the territory of the former Yugoslavia.

On October 6, 1992, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to investigate alleged human rights abuses. The Commission was to provide "the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia." The Commission issued an interim report in February 1993 which concluded that grave breaches and other violations of international humanitarian law had been committed including ethnic cleansing, willful killing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrest. Following

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59. Id.
60. Id.
61. Id.
the submission of the Commission’s interim report, the Security Council adopted a resolution on February 22, 1993 reiterating its alarm at the widespread violations of international humanitarian law. It provided “that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” The resolution also requested the Secretary-General to submit a report on the establishment of an international tribunal. The Secretary-General submitted its report to the Security Council on May 3, 1993. The report examined the organization and procedures for the proposed International Tribunal and also contained a draft Statute of the International Tribunal.

On May 25, 1993, the Security Council adopted a resolution to formally establish an international tribunal “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia.” The tribunal will have “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” Specifically, the Tribunal shall have the power to prosecute persons who committed or ordered others to commit grave breaches of the 1949 Geneva Conventions, the laws of war, genocide and crimes against humanity. The Tribunal affirms the principle of individual responsibility by providing that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” shall be individually responsible for the crime. To date, several individuals, including Bosnian Serb military and political leaders, have been indicted by the War Crimes Tribunal. Despite the es-

68. Id.

70. 32 I.L.M. supra note 67 at 1170. The Statute of the International Tribunal recognizes that international humanitarian law consists of both conventional law and customary law. Id.
71. The Tribunal cannot try defendants in absentia. It can impose life imprisonment on defendants who are convicted but it cannot impose a death sentence.
establishment of the Tribunal, human rights violations continued in Bosnia-Herzegovina.\textsuperscript{73}

In the summer of 1995, several events played a pivotal role in changing the nature of the Yugoslav conflict. In July 1995, the Bosnian Serbs overran the U.N. designated safe areas of Srebrenica and Zepa.\textsuperscript{74} Several thousand Muslim men were allegedly massacred in Srebrenica by the Bosnian Serbs.\textsuperscript{75} On August 28, 1995, a mortar attack in Sarajevo killed at least 37 people, resulting in further international condemnation.\textsuperscript{76} These atrocities led to significant air strikes by NATO aircraft against Bosnian Serb forces throughout Bosnia-Herzegovina.\textsuperscript{77} At the same time, Croatian and Bosnian forces made significant military advances against the Bosnian Serbs.\textsuperscript{78} The rapidly changing nature of the Yugoslav conflict led to a cease-fire on October 12, 1995 and a new round of peace negotiations.\textsuperscript{79}

In November 1995, the leaders of Bosnia-Herzegovina, Croatia and Yugoslavia (Serbia and Montenegro) began negotiations in Dayton, Ohio under U.S. auspices.\textsuperscript{80} On November 21, 1995, the warring sides reached an accord to end

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\textsuperscript{73} Security Council Res. 1019 (Nov. 10, 1995); Security Council Res. 941 (Sept. 26, 1994).

On March 20, 1993, the government of Bosnia-Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the International Court of Justice. The application alleged that Yugoslavia was in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. On April 8, 1993, the ICJ issued a series of provisional orders. It ruled that Yugoslavia should immediately take all measures within its power to prevent the commission of the crime of genocide. It also ruled that Yugoslavia should ensure that any military or paramilitary units which be directed or supported by it do not commit any acts of genocide. Finally, it ruled that both Yugoslavia and Bosnia-Herzegovina should not take any action which may aggravate or extend the existing dispute. Order on Request for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) reprinted in 32 I.L.M. 888 (1993). The government of Bosnia-Herzegovina requested additional provisional measures from the International Court of Justice on July 27, 1993. On September 13, 1993, the International Court of Justice reaffirmed the provisional measures of its earlier order. Order on Further Requests for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) reprinted in 32 I.L.M. 1599 (1993).


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The agreement established a single Bosnian state, composed of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Federation of Bosnia and Herzegovina controls 51% of the territory, and the Republika Srpska controls the remaining 49%. Under the terms of the agreement, a central government will be elected through democratic elections held under international supervision. Individuals charged with war crimes will be unable to hold public office. Refugees are allowed to return to their homes and the freedom of movement will be guaranteed for all Bosnians. An Implementation Force (IFOR) was established to enforce the agreement. The Implementation Force consists primarily of military personnel from NATO countries, although personnel from several non-NATO countries also participate. Several international organizations, including the United Nations, the Red Cross, the European Union and the Organization for Security and Cooperation in Europe are responsible for rebuilding the war-torn country. The General Framework Agreement was signed by the parties on December 14, 1995 in Paris. Implementation of the agreement began immediately.

The consequences of the Yugoslav conflict are significant. Over 200,000 people, mostly civilians, died in the conflict. Millions more became refugees. Along with the rows of gravestones that mark the Bosnian landscape, the memories of war, for both young and old, will linger long after the fighting ends.

II. THE COMPLAINTS

On February 11, 1993, Jane Doe I and Jane Doe II, on behalf of themselves and the members of their respective classes, filed a complaint against Radovan Karadzic for human rights violations committed by forces under his command.


and control in Bosnia-Herzegovina.88 The complaint was filed in the U.S. district court for the Southern District of New York.89 Federal jurisdiction was claimed under several federal statutes including the Alien Tort Claims Act, the Torture Victim Protection Act ("TVPA") and the federal question statute.90 According to the complaint, Karadzic had command authority over the Bosnian Serb military forces and bears legal responsibility for the crimes committed by his troops.91 Specifically, Karadzic was charged with having ordered and directed the following torts committed in violation of the law of nations: genocide, war crimes and crimes against humanity, summary execution, torture, cruel, inhuman or degrading treatment, wrongful death, assault and battery, and intentional infliction of emotional harm.92 The complaint sought compensatory and punitive damages.93 Karadzic was served with the Doe complaint on February 11, 1993 while visiting the United States as an invitee of the United Nations.94

88. Complaint, Doe v. Karadzic, (S.D.N.Y. 1993) (No. 93 Civ. 0878 PKL). Jane Doe alleged that she was raped, beaten and stabbed by Bosnian-Serb soldiers while in a detention camp. Jane Doe II stated that Bosnian-Serb soldiers raped and murdered her mother. Both women filed their complaint anonymously out of fear for their safety if their identity were revealed. They filed the action on their own behalf and as representatives of all others similarly situated. The complaint states that "[t]he class consists of all women and men who suffered rape, summary execution, other torture, or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of defendant between April 1992 and the present." Id. at 4.

89. Id.

90. Id. at 2.

91. Id. at 1, 3. The complaint also alleged that Karadzic had received the support of the Yugoslav government and military. Id. at 3.

92. The complaint stated that the causes of action arise under, among others, under the following laws agreements, resolutions and treaties:


93. Id.

94. However, Karadzic has argued that he was not properly served with the Doe complaint. Doe, 866 F. Supp. at 736-737. According to the account provided by the district court:

On February 11, 1993, the same day the Doe Complaint was filed, Jonathan Soroko attempted to effect service on Karadzic in the lobby of Karadzic's hotel, the Hotel Inter-Continental, 111 East 48th Street, New York, New York. At the time, Karadzic was surrounded by a security detachment led by Special Agent R.A. Diebler, a Special Agent of the Diplomatic Security Service of the United States Department of State. When Soroko attempted to serve Karadzic, Diebler's security team executed a procedure designed to cover and evacuate Karadzic, forming a ring around Karadzic and rushing him into the elevator. The record contains conflicting affidavits regarding the attempted service. Soroko contends that he was no more than two feet from defendant, while Diebler contends that "the man could not have gotten any closer to Dr. Karadzic than 6-8 feet at the most." It is not disputed, however, that during the attempted service, Soroko called out words declaring that defendant was served. Diebler asserts that prior to leaving the United States, Karadzic had no knowledge that Soroko was attempting to serve him with process.

Id. at 737 (citations omitted).
On March 2, 1993, a similar complaint was filed against Karadzic by S. Kadic, on her own behalf and on behalf of her children, and by two women’s organizations, Internacionalna Iniciativa Zena Bosne i Hercegovine “Biser” and Zene Bosne i Hercegovine.95 Federal jurisdiction was also claimed under the Alien Tort Claims Act, the Torture Victim Protection Act and the federal question statute.96 According to the complaint, Karadzic was President of the Serbian Republic of Bosnia-Herzegovina and commander of the Bosnian Serb military.97 Karadzic was charged with having ordered and directed the following actions: genocide, rape, enforced prostitution, forced pregnancy, torture, wrongful death and extrajudicial killing, and sex and ethnic inequality.98 The complaint sought injunctive relief as well as compensatory and punitive damages.99 Karadzic was served with the Kadic complaint on March 5, 1993, while visiting the United States as a United Nations invitee.100

95. Complaint, Kadic v. Karadzic, (S.D.N.Y. 1993) (No. 93 Civ. 1163) (PKL). Kadic is a Croatian Muslim citizen of Bosnia-Herzegovina. Kadic alleged that she was forcibly ejected from her home and that one of her children was decapitated by a Serbian soldier as she held him in her arms. She was subsequently interned in a Serbian detention camp where she was repeatedly raped by Serbian soldiers. Internacionalna Iniciativa Zena Bosne i Hercegovine “Biser” is a women’s organization formed to assist victims of the war in Bosnia-Herzegovina. Similarly, Zene Bosne i Hercegovine is an organization that coordinates relief efforts on behalf of victims of the war in Bosnia-Herzegovina. Id. at 4-5.

96. Id. at 2.

97. Id. at 1. The complaint also alleged that Karadzic had received the support of the Yugoslav government. Id. at 1-2.

98. The complaint stated that the causes of action arise, among others under the following laws, agreements, resolutions and treaties:


Complaint, Kadic v. Karadzic, supra note 95, at 3.

99. Unlike the Doe complaint, the Kadic complaint requested injunctive relief, “to wit, that Defendant Karadzic be enjoined from ordering, or from permitting to occur under his command, any genocidal acts of "ethnic cleansing," including wrongful death and extrajudicial killing, rape, other forms of torture, forced pregnancy, forced prostitution, forced relocation and detention, and other acts of sex and ethnic discrimination directed against the Muslim and Croatian women and children of Bosnia-Herzegovina.” Id. at 19.

100. The complaint was filed on March 2, 1993. After several attempts of service proved unsuccessful, a district court granted a motion for leave to effect service upon defendant by alternative means. On March 5, 1993, a copy of the summons and complaint was delivered to a member of the Diplomatic Security Service of the Department of State, who personally served Karadzic. Kadic, 866 F. Supp. at 737.
On May 10, 1993, Karadzic filed a motion to dismiss both actions. The motion was filed "pursuant to Fed. R. Civ. P. 12(b)(1), (2), (4), (5) & (6) on grounds of lack of subject matter and personal jurisdiction, insufficiency of process and service of process and nonjusticiability of plaintiffs' claims." Specifically, Karadzic argued that service of process upon a U.N. invitee violated the U.N. Headquarters Agreement. He also alleged that service of process violated "well established judicially developed principles designed to protect and prevent interference" with U.N. peacekeeping functions. Finally, he argued that service of process was unreasonable and violated due process of law because of his transitory presence in New York.

III.

DOE v. KARADZIC: THE DISTRICT COURT'S RULING

On September 7, 1994, the district court granted Karadzic's motion to dismiss. As a preliminary matter, the district court indicated that Karadzic's status as a potential head of state militated against the exercise of jurisdiction. According to the court, "[w]ere the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction. This consideration, while not dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action."

The district court then proceeded to examine whether it had subject matter jurisdiction. While this issue was not raised by Karadzic, the court indicated that it could raise the issue *sua sponte*. Specifically, the district court examined the three jurisdictional claims asserted by the plaintiffs: (A) the Alien Tort Claims Act; (B) the Torture Victim Protection Act; and (C) the federal question statute.

101. Defendant's Notice of Motion to Dismiss Action Before Answer, Doe v. Karadzic, (No. 93 CIV 878).
102. *Id.* at 1-2.
103. Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe, (No. 93 CIV 878), at 2.
104. In addition, Karadzic alleged that he was not properly served with the Doe complaint. Affidavit of Ramsey Clark Attached to Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe, (No. 93 CIV 878), at 12.
106. *Id.* Indeed, in the Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Karadzic indicated that "[t]he questions of subject matter jurisdiction and the justiciability of plaintiffs' claims that this case presents involve difficult and complex factual and legal inquiries, as for example, into the status of defendant's government as a state under international law, the application of head of government immunity and the act of state doctrine. Although defendant believes these jurisdictional issues should be resolved on motion before answer, if they need to be reached, thorough briefing and consideration of these issues seems premature and inadvisable now in view of the strength of defendant's claim to dismissal for lack of personal jurisdiction, and insufficiency of process and service of process." Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe v. Karadzic, *supra* note 103, at 11.
A. Alien Tort Claims Act

As indicated, the Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\(^\text{107}\) The district court examined whether the Alien Tort Claims Act provided jurisdiction and "whether the actions of defendant, alleged herein, constitute an actionable violation of the law of nations under the statute."\(^\text{108}\)

The district court began its analysis by noting that the Second Circuit "has found that only conduct which rises to the level of an 'international common law tort' by violating universally accepted standards of human rights is within the law of nations, and thus within the subject-matter jurisdiction of the Act."\(^\text{109}\) The court recognized that international law applied primarily to conduct between states.\(^\text{110}\)

It then examined the Second Circuit's earlier decision in *Filartiga v. Pena-Irala*, one of the first cases to address the Alien Tort Claims Act. In *Filartiga*, the plaintiffs brought an action pursuant to the ATCA against a former Paraguayan official for acts of torture. The plaintiffs alleged that official torture violated the law of nations. The district court dismissed the action on jurisdictional grounds, holding that the term "law of nations," as employed in Section 1350, excludes "that law which governs a state's treatment of its own citizens."\(^\text{111}\) On appeal, the Second Circuit examined whether official torture is prohibited by the law of nations. The court concluded that "[i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we 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."\(^\text{112}\) This violation occurs regardless of the nationality of the parties.\(^\text{113}\) The Second Circuit then noted that the law of nations has always been part of the federal common law.\(^\text{114}\) "The law of nations forms an integral part of the


\(^{108}\) Doe, 866 F.Supp. at 738.

\(^{109}\) Id. at 738-739.

\(^{110}\) See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964) ("traditional view of international law [was] that it established substantive principles for determining whether one country had wronged another.").

\(^{111}\) Filartiga, 630 F.2d at 880. The district court had referred to a recent opinion by the Second Circuit which commented in dictum that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." Dreyfus v. von Finck, 534 F.2d 24, 31 (1976). See also, ITT v. Vencap, Ltd., 519 F.2d at passim.

\(^{112}\) Filartiga, 630 F.2d at 880. The Second Circuit examined several sources of international law including the U.N. Charter, several General Assembly resolutions, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

\(^{113}\) Id. at 877. The Court indicated that "the dictum in Dreyfus v. von Finck... to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law." Id. at 884.

\(^{114}\) Id. at 885.
common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution."\(^{115}\) This provides the constitutional basis for the Alien Tort Claims Act.\(^{116}\) Thus, the Second Circuit held that "whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."\(^{117}\)

The district court in Doe also examined Tel-Oren v. Libyan Arab Republic,\(^{118}\) a decision by the Court of Appeals for the District of Columbia. In Tel-Oren, survivors and representatives of individuals murdered in a terrorist attack by members of the Palestine Liberation Organization ("PLO") filed an action for compensatory and punitive damages in federal court. Jurisdiction was claimed under four separate statutes including the Alien Tort Claims Act. The district court dismissed the action for lack of subject-matter jurisdiction and as barred by the statute of limitations.\(^ {119}\) In a per curiam decision, the District of Columbia Circuit panel affirmed the dismissal of the action although the three judge panel wrote separate concurring opinions. In his concurring opinion, Judge Edwards noted that the law of nations does not impose the same responsibility or liability on non-state actors as it does on states and persons acting under color of state law.\(^ {120}\) Since the PLO was not a recognized state and did not act under color of any recognized state law, the case was distinguishable from Filartiga, where the Paraguayan official acted under color of law. Judge Edwards stated that he was unwilling to "venture out of the conformable realm of established international law — within which Filartiga firmly sat — in which states are the actors."\(^ {121}\) According to Judge Edwards, the degree of codification and consensus on the liability of non-state actors for violations of international law is "simply too slight."\(^ {122}\)

In the Doe case, the district court argued that both Filartiga and Tel-Oren reinforce the conclusion that "acts committed by non-state actors do not violate the law of nations."\(^ {123}\) The district court cited several other cases which also indicated that the Alien Tort Claims Act does not cover the conduct of non-state actors.\(^ {124}\) Indeed, the district court indicated that courts have only found causes of action under the Alien Tort Claims Act when "state actors violated the law of

\(^{115}\) Id. at 886.

\(^{116}\) Id.

\(^{117}\) Id. at 877.

\(^{118}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).


\(^{120}\) Tel-Oren, 726 F.2d at 776. In their concurring opinions, Judge Bork held that the Alien Tort Claims Act does not provide a cause of action, and Judge Robb held that the political question doctrine barred adjudication of the claim.

\(^{121}\) Id. at 792.

\(^{122}\) Id.

\(^{123}\) Doe, 866 F. Supp. at 739.

nations."\textsuperscript{125} In *Sanchez-Espinoza v. Reagan,*\textsuperscript{126} Nicaraguan citizens brought suit, under several causes of action including the Alien Tort Claims Act, for damages arising out of U.S. support of the Nicaraguan Contras. The district court dismissed the action primarily on the basis of the political question doctrine. The Court of Appeals for the District of Columbia affirmed the dismissal, although it chose not to follow the lower court's use of the political question doctrine.\textsuperscript{127} Writing for the Court, then Judge Scalia acknowledged the relevance of the state actor requirement for purposes of actions brought under the Alien Tort Claims Act. Judge Scalia stated "[w]e are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations — so called 'customary international law,' arising from 'the customs and usages of civilized nations,' — we conclude that this also does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic.*"\textsuperscript{128} Thus, the Court of Appeals dismissed the claim brought pursuant to the Alien Tort Claims Act.

Having concluded that only state actors violate the law of nations, the district court then examined the legal status of the Bosnian Serbs and the Republika Srpska. It concluded that the Bosnian-Serbs did not constitute a recognized state.\textsuperscript{129} "The current Bosnian-Serb warring military faction does not constitute a recognized state any more than did the PLO, as it existed at the time that the District of Columbia Circuit decided *Tel-Oren,* or than did the Nicaraguan Contras at the time Justice Scalia decided *Sanchez-Espinoza.*"\textsuperscript{130} Indeed, the Bosnian-Serbs had not even reached the level of political organization or international recognition achieved by the PLO at the time of the *Tel-Oren* decision.\textsuperscript{131} Thus, the court concluded that Karadzic's faction was not acting under the color of any recognized state law.\textsuperscript{132} The district court held that since the Bosnian Serbs were not acting under the color of any recognized state, the actions of Karadzic could not be remedied through the Alien Tort Claims Act. In addition, the court refused to extend the Alien Tort Claims Act to redress acts of torture committed by private individuals.\textsuperscript{133}

\textsuperscript{125} Doe, 866 F. Supp. at 740. See also, In Re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).


\textsuperscript{127} Id. at 206.

\textsuperscript{128} Id. at 206-207.

\textsuperscript{129} The district court referred to *Klinghoffer v. S.N.C. Achille Lauro* which defined "states" as "entities that have a defined and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other such entities." Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2nd Cir. 1991). It concluded that the Bosnian-Serb entity failed to meet this definition. Doe, 866 F. Supp. at 741.

\textsuperscript{130} Id.

\textsuperscript{131} As noted by the district court, the PLO was granted permanent observer status in the United Nations in 1974. Id. See also, United States v. PLO, 695 F. Supp. 1456, 1459 (S.D.N.Y. 1988).

\textsuperscript{132} Doe, 866 F. Supp. at 741.

\textsuperscript{133} Id.
B. Torture Victim Protection Act

The district court then examined whether jurisdiction could be based upon the Torture Victim Protection Act, which was designed to codify the private right of action against official torture as set forth in *Filartiga*.\(^{134}\) The TVPA was enacted in 1992 and provides a cause of action for official torture and extrajudicial killing.\(^{135}\) It provides, in pertinent part:

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.

After examining the language of the statute and its legislative history, the district court determined that the statute “only extends to actions carried out under the authority or color of law of an entity recognized by the United States as a foreign nation.”\(^{136}\) Since Karadzic was not acting within the authority of any foreign nation, the statute did not provide jurisdiction.\(^{137}\) “[F]indng that the acts attributed to defendant are those of private individuals . . . and finding that the TVPA clearly was enacted to redress acts of torture by governments or government officials, plaintiffs’ cause of action against defendant based on the TVPA cannot lie.”\(^{138}\)

C. Federal Question Statute

Finally, the district court examined whether it had jurisdiction under the federal question statute, which provides that “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”\(^{139}\) Since jurisdiction did not lie under either the Alien Tort Claims Act or the Torture Victim Protection Act, the court indicated that “the only other jurisdictional grounds for Plaintiffs to assert in this matter would be to base their claims on an implied right of action arising out of the law of nations.”\(^{140}\) The court, however, declined to find an implied right of action.

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134. *Id.*
136. Doe, 866 F. Supp. at 741. According to the House Report on the Torture Victim Protection Act, “the phrase ‘under actual or apparent authority, or color of law’ makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim. . . . The bill does not attempt to deal with torture or killing by purely private groups.” House Report No. 367, 102nd Cong., 1st Sess. 5 (1991).
137. *Id.*
138. *Id.*
140. Doe, 866 F. Supp. at 743.
arising under the law of nations. It indicated that Congress had already addressed this matter in the Alien Tort Claims Act and the Torture Victim Protection Act. In addition, the district court indicated that "the law of nations provides no substantive right to be free from the private acts of individuals." The court held that "actions based only on § 1331 without an express right of action granted by Congress, must be dismissed for lack of subject-matter jurisdiction."

Since the district court found no bases for subject matter jurisdiction, it granted Karadzic's motion to dismiss. The plaintiffs in both actions immediately appealed the district court's ruling to the Second Circuit Court of Appeals. Several human rights organizations filed amicus briefs urging the Second Circuit to reverse the district court's ruling. The U.S. government also submitted a statement of interest in the case urging reversal. The cases were argued before the Second Circuit on June 20, 1995. On October 13, 1995, the Second Circuit issued its ruling.

IV.

Kadic v. Karadzic: The Court of Appeals' Ruling

In Kadic v. Karadzic, the Second Circuit Court of Appeals reversed the district court's ruling and remanded the matters for further proceedings consistent with its opinion. The Court examined three issues: (1) subject matter jurisdiction; (2) service of process and personal jurisdiction; and (3) justiciability.

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141. Id.
142. Id.
143. Id.
144. The district court also dismissed the plaintiff's state claims for lack of subject matter jurisdiction. Id. at 744.
145. In their appeal, the plaintiffs argued that the district court erred in holding that it lacked subject matter jurisdiction. Specifically, they challenged the district court's ruling on three grounds. First, the court erred in concluding that acts committed by non-state actors do not violate the law of nations. Second, the court erred in failing to conclude that acts committed by non-state actors can violate U.S. treaty obligations. Third, the district court erred in concluding that the Serbian Republic of Bosnia-Herzegovina does not constitute a state and, therefore, that Radovan Karadzic was not acting under color of official authority.
146. Amicus briefs were filed by several organizations including the International Human Rights Law Group, Human Rights Watch as well as several international law professors.
147. Statement of Interest of the United States, Doe v. Karadzic, (2nd Cir. 1995) (No. 94-9069). The United States argued that Karadzic was not entitled to immunity either as an invitee of the United Nations or as a head of state. Similarly, the United States argued that the political question doctrine did not warrant dismissal of the complaint. Finally, the United States argued that the district court erred in concluding that acts committed by non-state actors do not violate the law of nations. In fact, "customary international law does not bind exclusively state actors. Depending on the violation alleged, acts committed by non-state actors may indeed violate international law." Id. at 5.
148. See Matthew Goldstein, Jurisdiction of Federal Court Over Bosnian Leader Argued, NY. LAW JOURNAL, June 21, 1995, at 1; When Rape is Genocide, CONN. L. TRIB., August 21, 1995, at 8.
149. Kadic, 70 F.3D at 236.
A. Subject Matter Jurisdiction

The Second Circuit's analysis of subject-matter jurisdiction addressed each of the statutory bases for jurisdiction asserted by the plaintiffs: (1) the Alien Tort Claims Act; (2) the Torture Victim Protection Act; and (3) the federal question statute.\(^1\)

1. Alien Tort Claims Act

In determining the application of the Alien Tort Claims Act, the Second Circuit examined three issues. First, it examined whether non-state actors can violate international law. Second, it examined whether the specific allegations made by the plaintiffs were violations of the law of nations when committed by non-state actors. Third, it examined whether the Bosnian-Serb entity headed by Karadzic constituted a state under international law and, alternatively, whether Karadzic was acting under the color of Yugoslav law.

a. International Law and Non-State Actors

Citing its earlier decision in *Filartiga v. Pena-Irala*, the Court identified three conditions that are required for the Alien Tort Claims Act to confer subject-matter jurisdiction: "(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e. international law)."\(^1\)

Since the first two conditions were clearly satisfied, "the only disputed issue is whether plaintiffs have pleaded violations of international law."\(^1\)

The Second Circuit challenged the contention that "the law of nations, as understood in the modern era, confines its reach to state action."\(^1\) It noted that piracy was traditionally viewed as a violation of international law even though it was committed by private individuals.\(^1\) In addition, such actions as slave

\(^{150}\) Id.

\(^{151}\) Id. at 238.

\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) Id. See also, *Filartiga*, 630 F.2d at 887-888.

\(^{155}\) Kadic, 70 F.3d at 239. The Court noted that the norms of contemporary international law may be identified by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 238 (quoting *Filartiga*, 630 F.2d at 880).

\(^{156}\) The Court cited the Supreme Court's ruling in *The Brig Malek Adhel*, where it observed that pirates were "hostis humani generis" because they acted "without . . . any pretense of public authority." *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).
trade and certain war crimes were also violations of international law even when committed by private individuals.\footnote{157} Indeed, the Restatement (Third) of the Foreign Relations Law provides that "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."\footnote{158} The Court also noted that the Executive Branch has long recognized the liability of private individuals for violations of international law and the availability of the Alien Tort Claims Act as a remedy in such matters. An early opinion by the Attorney General indicated the availability of the Alien Tort Claims Act to remedy violations by private individuals of international law.\footnote{159} The Court also referred to the Statement of Interest filed by the United States which indicated that it was the government's position that private individuals may be sued under the Alien Tort Claims Act for certain violations of international humanitarian law.

In contrast to the district court's interpretation of Filartiga and Tel-Oren, the Second Circuit ruled that these decisions do not support the contention that the actions of non-state actors do not violate the law of nations.\footnote{160} Filartiga involved allegations of torture committed by a public official. "We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in Filartiga purports to preclude such a result."\footnote{161} Similarly, Judge Edwards' concurring opinion in Tel-Oren was limited to the specific allegation of torture. He did not suggest a similar result for other human rights violations. Indeed, Judge Edwards acknowledged that there exists a "handful of crimes to which the law of nations attributes individual responsibility," including piracy and slave-trading.\footnote{162}

Finally, the Second Circuit stated that the scope of the Alien Tort Claims Act remains undiminished by the enactment of the Torture Victim Protection Act. According to the Court, the TVPA merely codifies the cause of action recognized by the Filartiga decision and extends its application to U.S. citizens.\footnote{163} Indeed, the Court also referred to the legislative history of the TVPA which recognized the limited nature of the TVPA and the expansive scope of the Alien Tort Claims Act.\footnote{164}

\footnote{157} See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (1992).
\footnote{159} See Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).
\footnote{160} Kadid, 70 F.3d at 240-241.
\footnote{161} Id. at 240.
\footnote{162} Id. (quoting, Tel-Oren, 726 F.2d at 795).
\footnote{163} Id. at 241.
\footnote{164} Id. According to a congressional report, "[c]laims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Claims Act]. 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 international law." H.R. Rep. No. 367, 102nd Cong., 2nd Sess., at 4 (1991).
Thus, the Second Circuit concluded that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." 165

b. Plaintiff's Specific Allegations

The Second Circuit then examined whether the specific allegations made by the plaintiffs were violations of the law of nations when committed by non-state actors. The Court recognized that "evolving standards of international law govern who is within the [Alien Tort Claims Act's] jurisdictional grant." 166 It placed these allegations into three categories: (a) genocide; (b) war crimes; and (c) torture and summary execution.

1. Genocide

The Court first examined the status of genocide in international law. On several occasions, the U.N. General Assembly has declared that genocide is a violation of international law regardless of whether committed by state or non-state actors. 167 Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide provides that "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." 168 The Court also noted that the Genocide Convention Implementation Act of 1987 criminalizes the crime of genocide without regard to whether the offender is acting under color of law. 169 The Court concluded that the proscription against genocide under international law has applied equally to state and non-state actors. 170

The complaint against Karadzic alleged that he "personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats." 171 Since this clearly states a violation of the international norm against genocide, the Court held that subject-matter jurisdiction existed over these claims.

2. War Crimes

The Court then examined the status of war crimes in international law. 172 The Court noted that acts such as murder, rape, torture and arbitrary detention of

165. Kadic, 70 F.3d at 239.
166. Id. at 241. (quoting Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2nd Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989)).
170. Kadic, 70 F.2d at 242.
171. Id.
172. The Court considered acts of murder, rape, torture and arbitrary detention of civilians to be war crimes. Id. at 242-243.
civilians “have long been recognized in international law as violations of the
laws of war.”173 Indeed, “[t]he liability of private individuals for committing
war crimes has been recognized since World War I and was confirmed at Nu-
remberg after World War II.”174 Following World War II, these prohibitions
were codified in the four Geneva Conventions.175 Common Article 3, which
appears in each of the Geneva Conventions, applies specifically to armed con-
flicts that are not of an international nature. It provides that “persons taking no
active part in the hostilities . . . shall in all circumstances be treated humanely,
without any adverse distinction.”176 The Court indicated that “under the law of
war as codified in the Geneva Conventions, all ‘parties’ to a conflict — which
includes insurgent military groups — are obliged to adhere to these most funda-
mental requirements of the law of war.”177 Thus, the Court concluded that pri-
vate individuals could be held liable for war crimes.

According to the Court, “[t]he offenses alleged by the appellants, if proved,
would violate the most fundamental norms of the law of war embodied in Com-
mon Article 3, which binds parties to internal conflicts regardless of whether
they are recognized nations or roving hordes of insurgents.”178 Since these of-
fenses are clearly war crimes, the Court held that subject-matter jurisdiction ex-
isted over these claims.

3. Torture and Summary Execution

The Court next examined whether non-state actors could be held accounta-
ble for torture and summary execution.179 The Court recognized that official
torture is prohibited by international law. Both the Filartiga opinion and the
Torture Victim Protection Act attest to the universal prohibition against official
torture. However, the Court could not identify an international prohibition
against torture when committed by non-state actors. For example, the (Conven-
tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) defines torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Similarly, the Torture Victim Protection Act only imposes liability for acts of torture committed by individuals acting "under actual or apparent authority, or color of law, of any foreign nation." Thus, torture and summary execution are proscribed by international law only when committed by state officials. The Court noted, however, that torture and summary execution may be encompassed within the claims of genocide and war crimes.180

c. State Action and the Bosnian Serbs

Finally, the Second Circuit examined the plaintiff's contention that they were entitled to prove that the Bosnian Serb entity of Republika Srpska "satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia."181

According to the Court, the definition of a state is well established in international law. The Restatement (Third) of the Foreign Relation Law provides that "[u]nder 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."182 As the Court recognized, formal recognition is not a condition of statehood. Indeed, international humanitarian law applies to states regardless of their status as recognized or unrecognized states. "It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor — sometimes due to human rights abuses — 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."183 In addition, the Court suggested that the state actor requirement merely requires a semblance of official authority. "The inquiry, after all, 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."184

Alternatively, the Court recognized that the plaintiffs were entitled to prove that Karadzic was acting under color of law in cooperation with the former Yu-

180. The Court indicated that "at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes." Id. at 244.

181. Id.

182. Restatement (Third) of the Foreign Relations Law of the United States, § 201. See also, Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d at 47; National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2nd Cir. 1988).

183. Kadic, 70 F.3d at 245.

184. Id.
goslovania. 185 The Court referred to the "color of law" jurisprudence of 42 U.S.C. § 1983 as a relevant guide to determine "whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." 186 Section 1983 recognizes that an individual acts under color of law when he acts in cooperation with state officials or with significant state aid. 187 Thus, the plaintiffs were entitled to prove that "Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid." 188

2. Torture Victim Protection Act

The Second Circuit indicated that the Torture Victim Protection Act is not a jurisdictional statute. Rather, it provides a cause of action for official torture. 189 Thus, the TVPA permitted the plaintiffs "to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of § 1331." 190

3. Federal Question Statute

Finally, the Second Circuit examined whether the general federal question statute provides "an independent basis for subject matter jurisdiction over all claims alleging violations of international law." 191 The plaintiffs argued that since federal common law incorporates the law of nations, "causes of action for violations of international law 'arise under' the laws of the United States for purposes of jurisdiction under § 1331." 192 The Court recognized the uncertainty surrounding federal question jurisdiction regarding violations of international law. In Tel-Oren, Judge Edwards indicated that § 1331 did not provide subject matter-jurisdiction for violations of international law unless the plaintiff could identify an express or implied remedy under the law of nations. However, some courts have upheld jurisdiction under § 1331 for violations of international law. 193 In Filartiga, while the Second Circuit recognized the possibility of ju-

186. Kadic, 70 F.3d at 245. See also, Suarez-Mason, 672 F. Supp. at 1546.
188. Kadic, 70 F.3d at 245.
189. Indeed, the plaintiffs made this assertion in their appellate brief. "The TVPA is not a jurisdictional statute, but provides a substantive federal claim. Federal jurisdiction is accordingly based upon 28 U.S.C. Section 1331 for actions 'arising under' the laws of the United States." Brief of Plaintiff Appellants, Kadic, supra note 185, at 10-11.
191. Kadic, Kadic, 70 F.3d at 246.
192. Id.
193. See, e.g., Suarez-Mason, 672 F. Supp. at 1544.

https://scholarship.law.berkeley.edu/bjil/vol14/iss1/3
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risdiction under § 1331, it rested jurisdiction solely on the Alien Tort Claims Act.

Since jurisdiction had already been found under the Alien Tort Claims Act, the Second Circuit refrained from ruling 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 § 1331 jurisdiction."194

B. Service of Process and Personal Jurisdiction

Karadzic argued that he was immune from service because of his status as an invitee of the United Nations. Specifically, he argued that the U.N. Headquarters Agreement and federal common law immunity rendered him immune from service.

The Headquarters Agreement Between the United Nations and the United States requires the United States to allow transit, entry and access for U.N. invitees to the Headquarters District.195 The Agreement provides that service of process may take place within the Headquarters District only with the consent of the Secretary-General.196 The Court determined, however, that Karadzic had not been served within the well-defined Headquarters District.197 The Agreement also provides that designated U.N. representatives are to be accorded the same privileges and immunities as diplomatic personnel. Again, the Court determined that Karadzic was not a designated representative of a U.N. member.198 Finally, the Agreement provides that federal, state and local officials may not impose any impediments to transit to or from the Headquarters District for U.N. invitees. The Court refused to extend the application of this provision to prohibit service of process to U.N. invitees "because it would effectively create an immunity from suit for United Nations invitees where none is provided."199

194. Kadic, 70 F.3d at 246.
196. The Headquarters District is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street. Kadic, 70 F.3d at 247.
197. Kadic, 70 F.3d at 247.
198. Id.
199. Id. See also, Klinghoffer v. SNC Achille Lauro, where the Court refused to extend the immunities of the Headquarters Agreement beyond those already provided in the text. Klinghoffer v. SNC Achille Lauro, 937 F.2d at 48.
In addition, Karadzic argued that federal common law immunity rendered him immune from service of process.200 He argued that such a rule is important because it protects the ability of the United Nations to function effectively and consult with invited guests.201 He also argued that his limited presence in New York should preclude personal jurisdiction. The Court, however, declined to create such immunity, which clearly extended beyond the terms of the Headquarters Agreement reached between the United Nations and the United States.202 Finally, the Court held that Karadzic’s possible recognition as a head-of-state should not affect the present litigation.203 In essence, it would be entirely inappropriate for the judiciary to establish immunity upon mere speculation.

For these reasons, the Court held that if Karadzic had been served with process outside of the U.N. Headquarters District, he is subject to the personal jurisdiction of the district court.204

C. Justiciability

The Court recognized that “cases of this nature might pose special questions concerning the judiciary’s proper role when adjudication might have implications in the conduct of this nation’s foreign relations.”205 It rejected, however, any attempt to invoke doctrines of justiciability in a categorical fashion. “[A] preferable approach is to weigh carefully the relevant considerations on a case-by-case basis.”206 It then examined whether the political question doctrine or the act of state doctrine should bar justiciability of the action.207

200. Kadic, 70 F.3d at 247.
201. Karadzic analogized his proposed immunity to other rules which recognize immunity from service. He referred to the government contracts exception to the District of Columbia’s long-arm statute which holds that “mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction.” Id. (quoting Rose v. Silver, 394 A.2d 1368, 1370 (D.C. 1978)). He also referred to the restriction on personal jurisdiction in those cases where an individual enters a jurisdiction for purposes of litigation or to attend court. Kadic, 70 F.3d at 248 (citing 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, SECTION 1076 (2nd ed. 1987)). Finally, Karadzic referred to the Klinghoffer decision where the Court limited the construction of New York’s long-arm statute as it applied to U.N. activities. Kadic, 70 F.3d at 248 (citing Klinghoffer, 937 F.2d at 51).
202. Id.
203. Id.
204. During the litigation, the Department of State had indicated to attorneys for the plaintiffs that Karadzic was not immune from suit as an invitee of the United Nations. The letter, written by Michael Habib, Director of the Office of Eastern European Affairs at the Department of State provided that “Mr. Karadzic’s status during his recent visits to the United States has been solely as an ‘invitee’ of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States. As a general legal principle, the United States does not accord immunities to individuals on a discretionary basis, but rather does so only as provided by a federal statute, a treaty, or customary international law.” Letter from Michael Habib, Director, Office of Eastern European Affairs, Department of State, to Beth Stephens, Center for Constitutional Rights (March 24, 1993).
205. Kadic, 70 F.3d at 248.
206. Id. at 249.
207. In addition, the Court briefly addressed the doctrine of forum non conveniens. In its Statement of Interest, the U.S. government had indicated that the forum non conveniens doctrine should
The Court indicated that "[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions." 208 The Court then reviewed the political question factors identified by the Supreme Court in Baker v. Carr. 209 It recognized that the Judicial Branch is the appropriate branch of government to examine these claims. It also recognized that international law provides judicially discoverable and manageable standards for adjudicating claims brought under the ATCA. The Court noted that its decision would not interfere with important government interests since the U.S. government had indicated that it was not opposed to the lawsuit. Finally, it recognized that while disputes involving foreign policy have the potential to raise political question issues, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 210 Thus, the Court concluded that the Karadzic litigation did not present a nonjusticiable political question.

2. Act of State Doctrine

The Court also examined whether the act of state doctrine barred adjudication. 211 It recognized that the act of state doctrine might be applicable to some cases brought under the Alien Tort Claims Act. However, the Court doubted "that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be char-
acterized as an act of state."212 In addition, the Court noted that the act of state doctrine had been previously applied in those cases which lacked unambiguous agreements regarding controlling legal principles.213 In the present case, however, there is universal agreement regarding the legal principles underlying international human rights.

For these reasons, the Court of Appeals reversed the judgment of the district court, and remanded both cases for further proceedings in accordance with its opinion.214

V. THE IMPLICATIONS OF THE KARADZIC LITIGATION

The Karadzic litigation is significant because it addresses several important issues concerning international law and the application of international legal principles in the United States.

A. International Law and Non-State Actors

Perhaps the most significant element of the Second Circuit’s opinion is its holding that non-state actors may be held liable for certain violations of international law.

This decision is certainly consistent with international law. “Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals.”215 For example, piracy has long been recognized to be a violation of international law when committed by private individuals.216 Similarly, the Nuremberg trials indicated that private individuals could be held responsible for violations of international humanitarian law.217 Countless international agreements now recog-

212. Kadic, 70 F.3d at 250.
213. Id. at 250.
215. Brownlie, supra, note 2 at 561.
216. Pirates are considered hostis humani generis (common enemies of mankind). According to the eighteenth century jurist Richard Woodeson, “piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or state.” ALFRED RUBIN, THE LAW OF PIRACY 111 (1988) quoting Woodeson. More recently, Article 101 of the United Nations Convention on the Law of the Sea defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft.” U.N. Doc. A/CONF.62/122 (1982). Indeed, both Judge Bork and Judge Edwards, in Tel-Oren v. Libyan Arab Republic, noted the non-state element of piracy. Judge Edwards cited Oppenheim for the proposition that the act of piracy makes the pirate lose the protection of his home state. Tel-Oren, 726 F.2d at 781. Similarly, Judge Bork acknowledged that piracy “could not be committed by nations.” Id. at 813.
217. During the Nuremberg trials, one military tribunal noted that:
nize both the rights and obligations of private individuals under international law. To suggest that private individuals do not violate international law, therefore, is entirely at odds with the development of international law during this century.

The decision is also consistent with domestic law and practice. As early as 1795, the Executive Branch recognized the liability of private individuals for certain violations of international law. The Statement of Interest filed by the U.S. government in Kadic affirms the position of the Executive Branch on this issue. Similarly, the opinions of the federal courts recognize the liability of private individuals for violations of international law. Neither Filartiga nor Tel-Oren support the contention that the actions of private individuals do not violate the law of nations. The facts of Filartiga were limited to acts of official torture and the Court of Appeals did not address the acts of private individuals. In Tel-Oren, however, Judge Edwards acknowledged that there exists a "handful of crimes to which the law of nations attributes individual responsibility," including piracy and slave-trading. And Judge Scalia noted in Sanchez-Espinoza that the Alien Tort Claims Act "may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of na-

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[219] See 1 Op. Att'y Gen. 57, 58 (1795); 26 Op. Att'y Gen. 250 (1907). As indicated by Judge Edwards in Tel-Oren, the opinions of the Attorney General are entitled to some deference by the courts. Tel-Oren, 726 F.2d at 780; Oloteo v. INS, 643 F.2d 679, 683 (9th Cir. 1981).

[220] "Customary international law does not bind exclusively state actors. Depending upon the violation alleged, acts committed by non-state actors may indeed violate international law." Statement of Interest of the United States, Doe, supra, note 147 at 5.

[221] In Ex Part Quirin, the Supreme Court indicated that "[f]rom the very beginning of its history this Court has recognized and applied the laws of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." Ex Part Quirin, 317 U.S. 1, 27-28 (1942). See also, Henfield's Case, 11 F.Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6,360) ("When men have formed themselves into a political society, ... they cannot, by this union, discharge themselves from any duties which they previously owed to those who form a part of the political association. ... On states as well as individuals the duties of humanity are strictly incumbent.").

[222] Tel-Oren, 726 F.2d at 795.
tions—the most prominent examples being piracy and assaults upon ambassadors." 223

It is important to recognize, however, a significant limitation on the Court's decision. While it held that non-state actors can violate international law, it conditioned its ruling by noting that only certain forms of conduct violate the law of nations when perpetrated by private individuals. While the Court determined that private individuals could be held accountable for genocide and war crimes, it concluded that torture and summary execution are "proscribed by international law only when committed by state officials or under color of law." 224

Another important element of the Second Circuit's ruling in Kadic is the expansion of the definition of state actor for those violations of international law which require state conduct. The Court refused to limit the definition of state actor to de jure states—that is, states formally recognized by the United States. 225 Rather, the Court held that de facto states are also liable for violations of international law. 226 This expansion of the definition of state actor is entirely consistent with the realities of contemporary international affairs. 227 Entities may possess the formal attributes of statehood including territory, population and a formal government, and yet the United States may refuse to recognize their existence for political reasons. As the Kadic court indicated, "[i]t would be anomalous indeed if nonrecognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international norms that apply only to state actors." 228 Thus, international obligations should apply with equal rigor to de facto states. The Second Circuit recognized that the state action concept merely

223. Sanchez-Espinoza, 770 F.2d at 206.
224. Kadic, 70 F.3d at 243.
225. According to the Restatement (Third) of the Foreign Relations 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." Restatement (Third) of the Foreign Relations Law, § 201. This definition does not require formal recognition by other states as a condition for statehood.
226. The courts have generally recognized the existence of de facto states even in the absence of formal recognition by the U.S. government. Following the American Civil War, the federal courts recognized the de facto existence of the Confederate states for acts committed during the war. See Ford v. Surget, 97 U.S. 594 (1878); United States v. Insurance Companies, 89 U.S. (22 Wall.) 99 (1874); Thorington v. Smith, 75 (8 Wall.) 1 (1868). See also, Banque de France v. Equitable Trust Co. of New York 33 F.2d 202, 206 (S.D.N.Y. 1929) ("[T]he refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such a state."); Wulfson v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 375 (1923) ("Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory.").
227. While states remain the principal actors at the international level, numerous non-state actors also exist. These non-state actors include international organizations such as the United Nations and the European Union and nongovernmental organizations such as the International Red Cross and the World Bank. Janis, supra, note 1 at 187-191. See also, PHILLIP TAYLOR, NONSTATE ACTORS IN INTERNATIONAL POLITICS (1984).
228. Kadic, 70 F.3d at 245.

https://scholarship.law.berkeley.edu/bjil/vol14/iss1/3
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requires the semblance of official authority. "The inquiry, after all, 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."229

B. Alien Tort Claims Act

As the Second Court recognized in its opinion, "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."230 The Second Circuit's decision affirms the unique status of the Alien Tort Claims Act in protecting international human rights in U.S. courts.231 Its decision also expands the scope of the ATCA. As indicated, the Court held that the Alien Tort Claims Act may apply to the actions of private individuals for certain violations of international law.232 In those cases where violations of international law require state action, the Court indicated that the state action requirement should be read broadly to include de facto states, and that the state action requirement only requires the semblance of official authority. In addition, this requirement may be met when a private individual acts together with state officials or with significant state aid.233 Finally, the Court held that prudential doctrines such as the political question doctrine and the act

229. Id.
230. Id. at 236.
231. The transitory nature of the ATCA's jurisdiction is significant although not unique. According to the Second Circuit in Filartiga:

Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. . . . It is not extraordinary for a court to adjudicate a tort claim arising outside its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the lex loci delicti commissi is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.

Filartiga, 630 F.2d at 885. See also, Burnham v. Superior Court, 495 U.S. 604 (1990).

232. In its only decision examining the Alien Tort Claims Act, the Supreme Court indicated that "the Alien Tort Statute by its terms does not distinguish among classes of defendants." Argentine Republic v. Amerada Hess, 488 U.S. 428, 436 (1989). Indeed, Justice Rehnquist acknowledged that the ATCA applies to defendants "other than foreign states." Id.

In addition, several federal decisions explicitly recognize the application of the Alien Tort Claims Act to the acts of private individuals. See Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrell, 3 F. Cas. 810 (D.C.S.C. 1795). See also, Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 (9th Cir. 1975).

233. Agency law supports this expansive view. According to the Restatement (Second) of Agency, "apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency, § 27 (1958). Indeed, the House Report on the Torture Victim Protection Act indicated that the judiciary should look to agency law when seeking to determine whether an individual has acted under actual or apparent authority. House Report No. 367, 102nd Cong., 1st Sess. 6 (1991).
of state doctrine should not preclude adjudication under the Alien Tort Claims Act merely because a case arises in a politically charged context.  

C. Federal Question Jurisdiction

The Second Circuit did not resolve the issue of whether the federal question statute provides subject-matter jurisdiction regarding claims arising under the law of nations. A careful analysis of this issue, however, suggests jurisdiction should be available under the federal question statute.

International law plays an integral role in the United States legal system. As early as 1796, the Supreme Court noted in *Ware v. Hylton* that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." In *Murray v. Schooner Charming Betsy*, Chief Justice John Marshall noted that customary international law is a part of federal law. Indeed, Justice Marshall noted that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ...."

Perhaps the most recognized statement on the role of customary international law in the United States was made by the Supreme Court in the seminal case of *The Paquete Habana*. In *The Paquete Habana*, two Spanish fishing vessels were captured by U.S. warships off the coast of Cuba during the Spanish-American War. The vessels were impounded and subsequently sold as war prizes in the United States. The owners of the vessels brought suit, seeking the proceeds from the sales. The Supreme Court examined "whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain." As a preliminary matter, the Court noted that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." The Court then noted that such principles of...
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international law are binding in U.S. courts. In an oft-quoted passage, the Court stated, "[i]nternational 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. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." Since international law prohibited the capture of fishing vessels as prizes of war, the Court held that the capture was unlawful. It ordered the proceeds of the sale of the vessels and their cargo to be restored to the owner.

Since the Supreme Court's ruling in The Paquete Habana, it is well-settled that customary international law plays an integral role part of our jurisprudence. Indeed, customary international law has been characterized as federal common law. According to Louis Henkin, "[i]t is like federal common law in that both have the status of federal law for purposes of supremacy to state law. And it is like federal common law in that determinations of customary international law by the Supreme Court are law in the United States and binding on the states." Similarly, the Restatement (Third) of the Foreign Relations Law recognizes that international law is part of the "law of the United States and supreme over the law of the several States." As the Second Circuit commented in Filartiga, "[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution." Indeed, the Second Circuit acknowledged in both Filartiga and Karadzic that a violation of the law of nations might also sustain jurisdiction under the federal question statute. In both cases, however, the Second Circuit deferred from addressing the issue since an alternative and directly relevant jurisdictional grant already existed.

It is evident that international law is an integral component of the laws of the United States. Under the explicit language of the federal question statute, therefore, jurisdiction should be recognized for claims arising under the law of nations.

243. Id. at 700.
244. Id. at 714.
245. See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986).
247. Henkin, supra note 246, at 1561.
249. Filartiga, 630 F.2d at 886. The Second Circuit added that "[i]t is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case." Id.
250. But see, Tel-Oren, 726 F.2d at 778-780. In Tel-Oren, Judge Edwards argued that § 1331 did not provide jurisdiction for a violation of the law of nations unless the plaintiffs could identify a remedy granted by the law of nations or argue that such a remedy is implied.
VI. CONCLUSION

The violations of international humanitarian law perpetrated during the Yugoslav conflict have resulted in responses at both the international and domestic levels. At the international level, the United Nations has established an international tribunal for the prosecution of persons responsible for serious international human rights abuses committed in the territory of the former Yugoslavia. Several individuals, including Bosnian Serb military and political leaders, have been indicted by the War Crimes Tribunal. At the domestic level, Bosnian refugees have sought compensatory and punitive damages against Radovan Karadzic for human rights violations committed by forces under his command in Bosnia-Herzegovina. The Second Circuit’s ruling in Kadic v. Karadzic indicates that individuals, regardless of their official status, may be held liable for certain violations of international law.

It is a well-known aphorism that there is no right without a remedy. Statutes such as the Alien Tort Claims Act and the Torture Victim Protection Act provide victims of human rights abuses an opportunity to seek redress for violations of international humanitarian law. These statutes affirm the law of nations in U.S. courts and the commitment of the United States to protect human rights.

Although some have argued that the judiciary is the least dangerous branch of government, it has increasingly become a powerful instrument for the protection of human rights. Thus, while many editorials comment about the role of the United States as the world’s policeman, perhaps a more appropriate metaphor is to view the United States as the world’s courtroom.

