USING THE AMERICAN COURTS TO PROSECUTE INTERNATIONAL CRIMES AGAINST WOMEN: JANE DOE V. RADOVAN KARADZIC AND S. KADIC V. RADOVAN KARADZIC

I. INTRODUCTION

Rape has been used as a "weapon of war" throughout the ages by armies which often consider rape a legitimate "perk" of battle.[1] However, the systemized rape of "an estimated 20,000 to 50,000 Bosnian Muslim women during the armed conflict which has accompanied the disintegration of the former Yugoslavia . . . [is] tantamount to one of the most egregious orchestrated human rights violations against women in this century."[2]

Only in the last century has the international community begun to formulate agreements regarding acceptable conduct during wartime. Many hoped that the war crime trials at the Nuremberg Tribunal and the Tokyo War Crimes Trials would set a precedent, thus creating a system that could enforce the rules set out by the various conventions and human rights agreements.[3] Unfortunately, this has not happened, and the establishment of international tribunals has not become the norm. In February 1993, the "United Nations Security Council voted to establish an international tribunal to prosecute abuses committed in the former Yugoslavia."[4] Effective prosecution in this forum has met with many obstacles, especially because the violations involve human rights abuses against women. These obstacles include "prejudice faced by women who report rape and other gender violence[,] . . . difficulties of proof[,] . . . [and] the fact that many of the judges have no experience with the prosecution of sex crimes . . . ."[5] International War Crimes Tribunal prosecution has been stalled due to political considerations, by the possibility of a negotiated settlement, and most crucially by "the unwillingness of the United Nations to pro-

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1 *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 31-113 (1975) (discussion of rape in war).

2 Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 199-200 (1994).

3 Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143, 147-48 (1994).

4 *Id.* at 148.

5 *Id.* at 149.

ceed with war crimes trials *in absentia*, or to effect international arrest."[6]

There are, however, proposals offered as alternatives to the international tribunal to bring the perpetrators of the war crimes in the former Yugoslavia to justice. These include using the Bosnian court system, using the courts of other states (under the Convention Against Torture), using the International Court of Justice, or the establishment of a permanent international criminal court, among others.[7] One of the more accessible routes to prosecution of the perpetrators of these crimes is use of the Alien Tort Claims Act ("ATCA").[8] The use of this act is evidenced in *Jane Doe v. Radovan Karadzic and S. Kadic v. Radovan Karadzic.*[9]

The *Karadzic* cases are two separate cases that have been heard together against Radovan Karadzic, President of the self-proclaimed Serbian Republic of Bosnia-Herzegovina and leader of the Bosnian-Serb forces. *Doe* is a class action brought on behalf of the plaintiff and other victims of the "genocide, war crimes, summary execution, wrongful death, torture, cruel, inhuman or degrading treatment, assault and battery, rape and intentional infliction of emotional harm"[10] committed in Bosnia. *Kadic* brings suit on behalf of herself, her sons, her close family and two Bosnian women's organizations.[11] Plaintiffs in both cases assert that they were victims of rape, forced pregnancy, enforced prostitution, torture, extrajudicial killing, and other violations of international law, domestic law and the law of nations.[12] Plaintiffs allege that Karadzic, in his official capacity and together with the Serbian regime, designed, ordered, implemented and directed a program of

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6 Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267 (1994). Another crucial barrier to prosecution of rape was the fact that rape and sexual assault were not recognized separately as crimes of war. Only on June 27, 1996 did the International Criminal Tribunal in The Hague recognize rape as an independent war crime. *See* Marlise Simons, *U.N. Court, for First Time, Defines Rape as War Crime*, N.Y. TIMES, June 28, 1996, at A1, A10.

7 Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT'L L. & POL'Y 317, 323-34 (1994).

8 Alien Tort Claims Act, 28 U.S.C. § 1350 (1988). The Act, entitled "Alien's action for tort" states: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

9 866 F. Supp. 734 (S.D.N.Y. 1994) (dismissed); *rev'd*, 70 F.3d 232 (2d Cir. 1995); *reh'g denied*, 74 F.3d 377 (2d Cir. 1996); *cert. denied*, __ U.S. __, 116 S. Ct. 2524 (1996).

10 *Karadzic*, 866 F. Supp. at 736.

11 *Id.* at 734. Though the Kadic case is not a class action, it includes as plaintiffs two Bosnian women's organizations that, in effect, include countless other women in the complaint.

12 *Id.* at 736-37.

genocide for the systematic violation of the plaintiffs' human rights.[13]

While it may seem unusual that victims of crimes in Bosnia are seeking redress through the American judicial system, plaintiffs rely upon two United States statutes which confer jurisdiction. First, the Alien Tort Claims Act grants the United States federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[14] Second, the Torture Victim Protection Act ("TVPA") expressly grants victims of "torture" or "extrajudicial killing" a right to sue under U.S. law.[15]

The cases were dismissed by the district court primarily for lack of subject matter jurisdiction "on the grounds that the statutes governed only acts of 'official torture' committed by foreign officials or heads of state."[16] On appeal to the Second Circuit Court of Appeals, the cases were reversed and remanded. The Second Circuit "recognized the important principle that the venerable Alien Tort Act . . . validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations."[17] Karadzic appealed the Second Circuit decision to the U.S. Supreme Court, and on June 17, 1996, the Court determined that it would not grant certiorari.

This Case Comment will examine and evaluate the newly-articulated scope of the Alien Tort Claims Act through an in-depth analysis of the *Karadzic* opinions, from the district court through the Supreme Court. Part II of this Comment introduces the Bosnian conflict and the origins of the *Karadzic* cases. Part III explores the facts and circumstances specific to the *Karadzic* cases. Part IV evaluates ATCA in the context of two landmark cases: *Filartiga* and *Tel-Oren.* Part V examines the TVPA and its potential use in interpreting ATCA. Part VI analyzes the *Karadzic* decisions in depth, from the lower court decision to the reversal in the Second Circuit

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13 *Id.* at 736.

14 Alien Tort Claims Act, 28 U.S.C. § 1350 (1980).

15 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)). The Act in section 2 states:

> Establishment of a civil action. (a) Liability - 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. 28 U.S.C. § 1350(2).

16 Bill Alden, *Jurisdiction Found for Bosnian Crimes - Alien Tort Act Interpreted to Permit Claim*, N.Y. L.J., Oct. 16, 1995, at A1.

17 *Karadzic*, 70 F.3d at 236.

Court of Appeals to the Supreme Court's rejection of certiorari in order to illustrate the ways in which ATCA and TVPA were used. Part VII concludes by supporting the Second Circuit's decision as the correct interpretation of ATCA and TVPA, and supporting the Supreme Court's rejection of certiorari. Overall, this Comment evaluates the future implications the *Karadzic* cases may have on using the American courts to prosecute international human rights abuses against women and explores whether *Karadzic* has established any precedents in this area.

II. BACKGROUND: THE BOSNIAN CONFLICT

In 1991, the former Yugoslavia began its disintegration into what is today Croatia, Serbia, Montenegro, Slovenia and Bosnia. Serbia and Montenegro together created a "new Yugoslav state, the Federal Republic of Yugoslavia, which holds a yet uncertain international status."[18] Croatia and Slovenia were internationally recognized on May 22, 1992, when they were each granted membership in the United Nations.[19]

Bosnia remains the most problematic of the republics to come out of the former Yugoslavia, primarily because of the ethnic contours of its population. Bosnia is "43.7% Slavic Muslims, 31.3% Serbs, and 17.3% Croats."[20] In March 1992, Bosnia's citizens voted in favor of independence, and the republic "was internationally recognized as an independent nation on April 7, 1992."[21] Immediately following this vote, Radovan Karadzic "proclaimed a 'Serbian Republic of Bosnia-Herzegovina' independent of Bosnia, declared himself President, and claimed two-thirds of Bosnia's territory on behalf of the new 'Republic.' "[22] Violence between the ethnic factions of Bosnia escalated over the next few months, and on June

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18 Krass, *supra* note 7, at 319 (1994). The General Assembly did not allow the Federal Republic of Yugoslavia to automatically occupy the seat of the former Yugoslavia in the United Nations. *See also id.* at 319 n.11 (citing John M. Gosho, *U.N. Declares Yugoslav Seat to be Vacant*, WASH. POST, Sept. 23, 1992, at A27).

19 Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 82-83 (1994).

20 Michele Brandt, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1416 n.15 (1995) (citing HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 22 (1992)).

21 Pratt & Fletcher, *supra* note 19, at 83 (1994) (citing AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: GROSS ABUSES OF HUMAN RIGHTS (1992)).

22 Brandt, *supra* note 20. (citing HELSINKI WATCH at 22). The Serbian Republic of Bosnia-Herzegovina is also referred to throughout the court opinions and the parties' briefs, as Republika Srpska.

20, 1992, the Bosnian government officially declared itself in a state of war.[23]

Though acts of brutality and gross human rights abuses have been carried out by all sides fighting in Bosnia, "the Serb military and paramilitary forces, as the principal aggressors, have been widely acknowledged to be responsible for the overwhelming number of documented violations."[24] The Serbs, in attempting to "create a homogeneous 'Greater Serbia' . . . [have employed] rape, summary executions, torture, and other egregious human rights violations to 'ethnically cleanse' hundreds of thousands of non-Serb residents from areas of strategic importance."[25]

"Mass rape and other gender-specific abuses are an integral part of the Bosnian Serb ethnic cleansing campaign."[26] Bosnian Serb forces:

> have established 'rape camps' . . . . Rape survivors are often subjected to forced pregnancy and forced maternity. According to rape victims, Serb military and political commanders at a minimum condoned, if not ordered, gender specific assaults . . . . [A]t the first Bosnian war crimes trial, . . . [o]ne Serbian soldier testified that local orders to rape Muslim girls and women came [directly] from Radovan Karadzic.[27]

III. *KARADZIC*: FACTS AND BACKGROUND

Plaintiffs in *Karadzic* are Croat and Muslim citizens of Bosnia-Herzegovina. Their assertions, which the court accepted as true for purposes of analyzing the jurisdictional issues, state that Karadzic, in his official capacity as President of the self-proclaimed "Bosnian-Serb Republic" and leader of the Bosnian-Serb military forces, ordered and directed multiple tortious acts against plaintiffs, discussed *infra.*

S. Kadic's son was decapitated while she held him in her arms after Serbian soldiers ("Chetnicks") came to her door.[28] She escaped with her other son, only to be captured later by Bosnian-Serb soldiers who sent her to a detention camp.[29] There, she was raped ten times daily for twenty-one days, until she became preg-

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23 Pratt & Fletcher, *supra* note 19, at 84.

24 *Id.*

25 Brandt, *supra* note 20, at 1419-20 nn.31-37.

26 *Id.*

27 *Id.* at 1420-21 nn.41-47.

28 Plaintiff K's Complaint at 7, Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).

29 *Id.*

nant.[30] During the rapes, Serbian soldiers verbally assaulted her regarding her Croat and Muslim ancestry and yelled that the women were to produce "Chetnick" babies.[31] S. Kadic's action was brought "on her own behalf and on behalf of her infant sons B. and O., Internationala Inciciative Zena Bosne I Hercegovine 'Biser,' and Zene Bosne I Hercegovine"[32] and "on behalf of survivors of mass rape, forcible impregnation, prostitution, genocidal torture, and discrimination."[33]

Jane Doe I, a teenage prisoner in a Bosnian-Serb concentration camp, was raped until she fainted. When she regained consciousness, another soldier was raping her. After the ordeal, a soldier slashed her breasts.[34] Jane Doe I brought suit "on behalf of herself and all others similarly situated."[35]

Jane Doe II, eighteen years old, was beaten by Bosnian-Serb soldiers while her mother was raped.[36] The soldiers then took Jane Doe II's mother down a hallway and her children heard her scream.[37] The soldiers returned with a bloody knife and threatened to rape Jane Doe II.[38] She escaped.[39] Her suit is brought "on behalf of herself as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated."[40]

IV. The Alien Tort Claims Act: *Filartiga* and *Tel-Oren*

Enacted in 1789, the Alien Tort Claims Act ("ATCA") grants the United States federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[41] Though ATCA was rarely used as a basis for jurisdiction in human rights abuse cases, in 1980, the Second Circuit reiterated its significance in the now-famous *Filartiga v. Penna-Irala*[42] case. In *Filartiga*, Dr. Joel Filartiga, an outspoken opponent of the Paraguayan government, alleged that his son, Joelito Filartiga, had been kidnapped and tortured to

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30 Brandt, *supra* note 20 at 1413 n.2 (1995) (citing Plaintiff Doe's Complaint, Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994)).
31 Plaintiff K's Complaint at 9, Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).
32 *Karadzic*, 866 F. Supp. at 734.
33 Brandt, *supra* note 20, at 1414 n.5 (1995) (citing *Karadzic*, 866 F. Supp. at 736).
34 Plaintiff Doe I's Complaint, Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).
35 *Karadzic*, 866 F. Supp. at 734.
36 Brandt, *supra* note 20, at 1414 (1995) (citing Plaintiff Doe II's Complaint, Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994)).
37 *Id.* at 1414 n.4.
38 *Id.*
39 *Id.*
40 *Karadzic*, 866 F. Supp. at 734.
41 Alien Tort Claims Act, (28 U.S.C. § 1350 (1980)).
42 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

death by Pena-Irala, the Inspector General of the Police in Ascuncion, a Paraguayan official.[43]

The assertion of official torture, kidnapping and murder was not a violation of a United States treaty, so the Second Circuit had to determine the "threshold question on the jurisdictional issue [of] whether the conduct alleged violate[d] the law of nations."[44] The Second Circuit looked to the U.S. Supreme Court, which stated that the law of nations "may be ascertained by consulting the works of jurists . . . or by the general usage and practice of nations . . . ."[45] Another Supreme Court case held that an international standard could ripen into "a settled rule of international law [by] the general assent of civilized nations."[46] The Second Circuit in *Filartiga* took this statement to mean that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[47] Thus, kidnapping, torture and murder carried out by a state official was conduct deemed by the Second Circuit to violate the law of nations. "Later decisions have permitted ATCA suits for summary execution, disappearance, prolonged arbitrary detention, and cruel, inhuman or degrading treatment."[48]

Plaintiffs bringing suit under ATCA can sue for compensatory and punitive damages, as well as for injunctive relief.[49] If the plaintiff wins, money can be collected only if the defendant has bank accounts or other assets in the United States. In the *Karadzic* case, the chances of the plaintiffs actually collecting any monetary damages are slim, but "[t]he thrust behind the lawsuits is public recognition [and] [t]he plaintiffs feel it is important to receive a judgment that vindicates them in the public eye."[50]

Only four years after the *Filartiga* decision, which seemed to establish the relatively wide scope of ATCA, the D.C. Circuit Court of Appeals grappled again with similar issues in an ATCA suit, but with a drastically different conclusion. In *Tel-Oren v. Libyan Arab*

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43 *Id.* at 878.

44 *Id.* at 880.

45 *Id.* (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

46 *Id.* at 881 (citing The Paquete Habana, 175 U.S. 677, 694 (1900)).

47 *Id.* at 881.

48 Stephens, *supra* note 3, at 151 n.29 (1994).

49 A recent case awarded five plaintiffs a total of more than $100,000,000 in punitive and compensatory damages as a result of mass torture and murder which occurred during the Hutu attempt to wipe out the Tutsi minority in Rwanda. *See* Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

50 Hope V. Sanborn, *Ruling Could Lead to More Human Rights Cases; Court Permits Lawsuit Against Bosnian Serb*, A.B.A. J., Dec., 1995, at 30 (quoting Beth Stephens, Staff Attorney with the New York-based Center for Constitutional Rights, which represents plaintiffs).

Republic, plaintiffs were "representatives of persons murdered in an armed attack on a civilian bus in Israel in March 1978."[51] The victims were tortured, shot, wounded and murdered.[52] The primary defendant in the case was the Palestine Liberation Organization ("PLO") and the plaintiff's primary assertion, based on *Filartiga*, was that the attack violated the law of nations and thus was actionable under ATCA.[53] The three separate opinions by Judge Edwards, Judge Bork, and Senior Judge Robb reopened many questions previously thought settled by *Filartiga* by (1) excluding "non-state" actors from ATCA's jurisdiction; (2) using an outdated interpretation of what violates the law of nations; and (3) asserting non-justiciability due to the allegedly sensitive political nature of the questions involved. *Tel-Oren* thereby effectively narrowed the scope of the Alien Tort Claims Act.[54] This narrowed scope unnecessarily restricts the enforcement of the law of nations by limiting who may be held accountable for international law violations and who has a cause of action under international law. Most importantly, the *Tel-Oren* decision can be interpreted as sharply reducing the United States' role in enforcement of international law by limiting the United States' jurisdiction over these types of cases.

Judge Edwards appeared to limit ATCA's application to state actors when he stated, "I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law . . . . I am therefore not prepared to extend *Filartiga*'s construction . . . to encompass this case."[55] Judge Bork sharply confined the scope of ATCA when he stated that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[56] In addition,

> [b]ecause torture was not considered a violation of the law of nations when the First Judiciary Act was passed in 1789, Section 1350 could not be considered recognition that a private cause of action for torture existed. Thus, Judge Bork effectively froze the meaning of the term 'violation of the law of nations' at its 1789 scope.[57]

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51 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984).
52 *Id.* at 776.
53 *Id.*
54 *Id.* at 775, 798, 823 (Robb, J., concurring).
55 *Id.* at 776.
56 *Id.* at 801 (Bork, J., concurring).
57 Rachael E. Schwartz, *"And Tomorrow?" The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 280 (1994).

Finally, Judge Robb restricted ATCA in his opinion which "declined jurisdiction on the grounds that the court was presented with a non-justiciable political question."[58] His reasons for his finding of non-justiciability were, among others, because he felt that "[t]his case involves questions that touch on sensitive matters of diplomacy that uniquely demand a single voiced statement of policy by the Government"[59] and that "[t]he possible consequences of judicial action in this area are injurious to the national interest."[60] Ironically, "it appears that anyone adopting Judge Robb's reasoning will feel compelled to find virtually every human rights case under Section 1350 [ATCA], non-justiciable."[61]

Based on Judges Edwards', Bork's, and Robb's opinions in *Tel-Oren*, the Second Circuit was faced with some difficult questions in determining the applicability of ATCA to the *Karadzic* action. Allegations of rape, forced pregnancy, enforced prostitution, torture and extrajudicial killing would likely be considered violations of the law of nations under *Filartiga*, but not under Judge Bork's narrow definition of a violation of the law of nations (only crimes listed when the First Judiciary Act was passed in 1789).[62] This is problematic because *Filartiga* considered *official* torture (acts "of torture committed by a state official"[63]) as violating the law of nations, yet left open the question of a private individual's liability. *Tel-Oren* clearly cut off the possibility of a non-state actor's liability under ATCA as expressed in Judge Edwards' decision, where he denied jurisdiction because the PLO was not a "state actor."

The *Karadzic* decision forced the Second Circuit to reconsider whether Karadzic is a state actor and whether Srpska is more of a state than Palestine was at the time of the *Tel-Oren* ruling. *Filartiga* would certainly have allowed justiciability of an international human rights case, whereas *Tel-Oren* might not, due to political considerations. Is a case involving Bosnia non-justiciable due to political considerations? These unsettled issues relating to ATCA faced the court when it decided *Karadzic*, and are addressed in this Comment.

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58 *Id.* at 281.

59 *Tel-Oren*, 726 F.2d at 824 (Robb, J., concurring).

60 *Id.* at 826.

61 Schwartz, *supra* note 57, at 282 n.59.

62 *Tel-Oren*, 726 F.2d at 812-13.

63 *Filartiga*, 630 F.2d at 880.

V. THE TORTURE VICTIM PROTECTION ACT

In 1991, the U.S. Congress passed the Torture Victim Protection Act which provides that "an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture . . . or . . . extrajudicial killing shall, in a civil action, be liable for damages to that individual . . . ."[64] The Act "authorizes suits against individuals . . . who engage in or, under certain circumstances, permit their subordinates to engage in torture or extrajudicial killing in foreign countries and then come into the United States. In most cases, sovereign immunity will not apply. . . ."[65]

According to most legal scholars, the TVPA was enacted in reaction to the extreme narrowing of ATCA as interpreted in *Tel-Oren.* "Apparently somebody in Congress was listening when Judge Bork said that Congress had never made clear its desire that the federal courts hear cases alleging torture carried out under authority of a foreign government."[66] Though the scope of the TVPA is relatively narrow, it essentially nullifies the limitations *Tel-Oren* put on ATCA and annuls Judge Edwards' assertion that liability cannot be imposed on non-state actors. The TVPA, while not directly amending or replacing ATCA, uses language that *expands* the scope of ATCA to include individual state actors. Thus the TVPA helps place the *Karadzic* case, in which Radovan Karadzic acted as a public figure and a "state actor," within federal jurisdiction.

According to the legislative history of the TVPA, the language "under actual or apparent authority, or color of law, of any foreign nation,"[67] was intended to clarify "that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim, [and that the statute] does not attempt to deal with torture or killing by purely private groups."[68] Additionally, the TVPA does not confer independent jurisdiction in federal courts. It instead permits the plaintiffs "to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act. . . ."[69] Thus, the TVPA should be considered an extension and clarification of ATCA, one which will make it easier to apply ATCA to the facts of *Karadzic.*

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64 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

65 Schwartz, *supra* note 57, at 275.

66 *Id.* at 283.

67 Torture Victim Protection Act of 1991, § 2(a), 106 Stat. 73.

68 *Karadzic,* 70 F.3d at 245 (citing H.R. REP. No. 367, 102d Cong., 2d Sess. 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87).

69 *Id.* at 246.

VI. *KARADZIC*: FROM THE UNITED STATES DISTRICT COURT, S.D.N.Y., TO A REVERSAL IN THE SECOND CIRCUIT COURT OF APPEALS, TO THE SUPREME COURT'S DENIAL OF CERTIORARI

The District Court for the Southern District of New York dismissed the original *Karadzic* action for lack of subject matter jurisdiction.[70] First, the court held that, under the Alien Tort Claims Act, "acts committed by non-state actors do not violate the law of nations."[71] Second, the court held that under the Torture Victim Protection Act, an act which specifically provides a private cause of action against an individual acting "under actual or apparent authority or color of law, of any foreign nation,"[72] was to extend only "to actions carried out under the authority or color of law of *an entity recognized by the United States as a foreign nation.*"[73] Third, the court denied that plaintiffs had "an implied right of action arising out of the law of nations . . . in view of the fact that Congress [ ] addressed the matter and created two express causes of action in the form of the Alien Tort Claim[s] Act and the TVPA . . . ."[74] Finally, the district court asserted that the case was non-justiciable because, though not dispositive, the fact that Karadzic might later be granted head-of-state immunity if the State Department were to recognize Bosnia-Herzegovina "militates against the court exercising jurisdiction over the instant action."[75]

The Second Circuit Court of Appeals rejected the reasoning of the district court, reversing and remanding the case. First, the Second Circuit found that it had jurisdiction under ATCA, and directly reversed the holding of the district court. The Second Circuit held 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."[76] Second, the Second Circuit found that the TVPA permits claims of official torture to be brought "under the jurisdiction conferred by the Alien Tort Act. . ."[77] thereby eliminating the need for an in-depth analysis into the TVPA. Third, the court of appeals declined to rule "definitively on whether any causes of action not specifically authorized by

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70 *Karadzic*, 866 F. Supp. at 740. It is interesting to note that the district court focused only on the claims of torture, not of genocide.

71 *Id.* at 739.

72 Torture Victim Protection Act of 1991, § 2(a), 106 Stat. 73.

73 *Karadzic*, 866 F. Supp. at 741 (emphasis added).

74 *Id.* at 743.

75 *Id.* at 738.

76 *Karadzic*, 70 F.3d at 239.

77 *Id.* at 246.

statute may be implied by international law standards. . ."[78] but again, was relying on its finding of jurisdiction under ATCA, thereby eliminating the need for an in-depth analysis of alternate bases for jurisdiction. Finally, on the issue of justiciability, the court disregarded the reasoning of *Tel-Oren* and urged that we remember that "[n]ot every case 'touching on foreign relations' is non justiciable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights."[79]

The Second Circuit has taken an important step in its reversal of the lower court's decision in *Karadzic.* This decision, together with additional later decisions involving ATCA and TVPA, resolves the dispute over the interpretation of ATCA and TVPA. Additionally, the Supreme Court's recent refusal to grant certiorari in this case should be taken as an indication of the definitively-established scope of the Alien Tort Claims Act and the Torture Victim Protection Act.[80]

The state of the law regarding jurisdiction over state actors/non-state actors has also been clarified. The Second Circuit in the *Karadzic* action returned to the standards of *Filartiga* and held that ATCA confers jurisdiction for actions undertaken by non-state actors. The Supreme Court confirmed this reading of ATCA by refusing to examine and interpret these issues yet again.[81]

The TVPA was enacted seemingly as a legislative response to the *Tel-Oren* decision, but its potential for expanding the scope of the ATCA has now been established. Additionally, in *Tel-Oren,* one reason jurisdiction was denied was because the PLO was not a "state." The district court in *Karadzic* declined jurisdiction because Republika Srpska was not a "state." Both Palestine and Srpska are now in the process of being given international recognition, and perhaps the courts were too quick to dismiss on grounds of statehood. The TVPA should be used as a tool to confer jurisdiction in cases where the definitions of "state actor" and the meaning of what is a "state" is not clear enough to be covered under ATCA. That is why the language of the TVPA says "under *apparent* authority, or *color* of law of any foreign nation" and not under authority or

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78 *Id.*

79 *Id.* at 249 (citing Baker v. Carr, 369 U.S. 186, 211 (1962); Lamont v. Woods, 948 F.2d 825, 831-32 (2d Cir. 1991)).

80 *Karadzic,* __ U.S. __, 116 S. Ct. 2524 (1996), *cert. denied.*

81 *Id.*

law of any foreign nation. The Supreme Court's rejection of certiorari in the *Karadzic* case confirms this reading of the TVPA.[82]

Documented gross human rights abuses against women are often not dealt with in the countries in which they are perpetrated.[83] "If a government actually seeks to hold human rights abusers accountable, those responsible frequently seek refuge in another country—often, the United States."[84] ATCA and TVPA may be read to provide victims of human rights abuses, in this case specifically abuses against women, with the opportunity to sue the perpetrators of these crimes in a United States federal court.

The *Karadzic* ruling "is the first time any court has ruled that genocide and war crimes are covered by [ATCA]. It is a very significant ruling."[85] The U.S. government endorsed this interpretation of ATCA and TVPA by filing an amicus brief with the Second Circuit, supporting the right of the two women to sue Karadzic in the United States, and advocating the "remarkable development in United States law in recent years . . . [which uses] American courts to enforce international human rights standards."[86] The Supreme Court's rejection of certiorari unquestionably establishes the United States courts as accepted fora for prosecution of war crimes and eliminates the question of political justiciability each time a case of this sort arises involving international human rights.

A. Under ATCA, Acts Committed by Non-state Actors Violate the Law of Nations

ATCA was mistakenly interpreted by the Southern District of New York as only applying to "state actors." The Second Circuit was correct in allowing jurisdiction based on ATCA for the following reasons, which will be discussed in more detail *infra*: (1) ATCA is not limited to "state actors." Historically, it was often applied to non-state actors, and it was never intended to be limited to "state actors." (2) Karadzic calls himself *President* of the Bosnian Serb Republic, and claims he is a head of state. Therefore, he should not be allowed to avoid jurisdiction under ATCA by claiming his actions are those of a private non-state actor.

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82 *Id.*

83 Stephens, *supra* note 3, at 143.

84 *Id.*

85 Alden, *supra* note 16, at A4, col. 6 (citing Beth Stephens, lead attorney for the plaintiffs).

86 Neil A. Lewis, *U.S. Backs War-Crimes Lawsuit Against Bosnian Serb Leader*, N.Y. TIMES, Sept. 26, 1995, at A4.

The district court interpreted ATCA narrowly when determining whether it had jurisdiction over Karadzic. It looked to the language of ATCA which grants jurisdiction over "an alien for a tort only, committed *in violation of the law of nations or a treaty of the United States.*"[87] The court stated that, since the plaintiffs did not assert that their claim arose under a treaty,[88] it looked to the language "in violation of the law of nations" and concluded that this meant violations of "universally accepted standards of human rights [ ] within the law of nations."[89] The court, rather than exploring whether the crimes committed against the plaintiffs violated "universally accepted standards of human rights," then looked to the second half of the sentence, "within the law of nations."

The district court in the *Karadzic* action, in order to determine what was "within the law of nations," looked to the *Tel-Oren* case,[90] in which Judge Edward's concurring opinion stated, "[t]he law of nations traditionally was defined as 'the body of rules and principles of action which are binding upon *civilized states* in their relation to one another,'"[91] and 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."[92] The district court also relied upon Judge (now Justice) Scalia's statement from *Sanchez-Espinoza v. Reagan*:

> We 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.[93]

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87 Alien Tort Claims Act, 28 U.S.C. § 1350 (emphasis added).

88 The plaintiffs in fact asserted that their claims arose under numerous treaties, such as The International Covenant on Civil and Political Rights, The Genocide Convention and the Geneva Conventions (Protocol II, Common Article 3), The Covenant on Discrimination Against Women, and The Convention on the Protection of Civilians. *See* brief for Plaintiffs-Appellants at 25-35, *Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994).

89 *Karadzic*, 866 F. Supp. at 739.

90 The *Karadzic* court relied on the following cases in determining that ATCA does not reach non-state conduct, and that Karadzic was not a state actor: Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Linder v. Calero Portocarrero, 747 F. Supp. 1452 (S.D. Fla. 1990); Carmichael v. United Technologies Corp., 835 F.2d 109 (5th Cir. 1988); and Forti v. Suarez-Mason, 672 F. Supp. 1531.(N.D. Cal. 1987).

91 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 n.22 (D.C. Cir. 1984) (quoting J. BRIERLY, THE LAW OF NATIONS #1 (6th ed. 1963)).

92 *Tel-Oren*, 726 F.2d at 776.

93 *Karadzic*, 866 F. Supp. at 740 (quoting Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985)) (emphasis added).

The Second Circuit employed a much wider reading of ATCA, particularly with respect to the language requiring that commission of the crime be "in violation of the law of nations or a treaty of the United States."[94] This broader interpretation allowed ATCA to apply to Radovan Karadzic and allowed jurisdiction by the United States court system. In order to determine whether the action of an individual violates the law of nations, the Second Circuit looked back to the *Filartiga* decision which established that courts "must interpret international law. . . as it has evolved and exists among the nations of the world today."[95] The court found the "norms of contemporary international law by 'consulting the works of jurists, writing professedly on public law'; or by the general usage and practice of nations. . . ."[96] Plaintiffs' allegations, that Karadzic ordered, sanctioned, and carried out genocidal rapes, forced pregnancy, enforced prostitution, torture and murder, are well within the realm of crimes which have evolved to become clear violations of contemporary international law, certainly violating "well established, universally recognized norms of international law"[97] as required by *Filartiga.*

The Second Circuit cited additional grounds for rejecting Karadzic's assertions that, as a private individual, he cannot violate the law of nations. First, the court points to contradictory positions Karadzic takes in his brief for this case.[98] On the one hand, he asserts that he is not an official of a recognized nation,[99] but on the other hand, he repeatedly refers to himself as "President Karadzic," and explains that he "was chosen President of the newly proclaimed Bosnian Serb republic on May 13, 1992."[100] Therefore, regardless of whether *we* consider Karadzic a head of state or not, he is clearly holding *himself* out as a head of state, and should not be able to avoid prosecution by asserting otherwise.

Second, the Second Circuit held 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."[101] Examples go back as far as the early 1800s, where one of the most commonly recognized offenses against the law of nations was

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94 Alien Tort Claims Act, 28 U.S.C. § 1350 (1988).

95 *Filartiga,* 630 F.2d at 881.

96 *Karadzic,* 70 F.3d at 238 (quoting United States v. Smith, 18 U.S. (Wheat.) 153, 160-61 (1820)).

97 *Filartiga,* 630 F.2d at 888.

98 *Karadzic,* 70 F.3d at 239.

99 Brief for Appellee at 19, *Karadzic,* 70 F.3d 232 (2d Cir. 1995).

100 *Id.* at 1-5.

101 *Karadzic,* 70 F.3d at 239.

piracy—a private act.[102] The court also pointed out that slave trading and certain crimes of war were long prohibited by the law of nations.[103] Federal jurisprudence is replete with cases holding individual defendants who do not act on behalf of any recognized state liable for violating international law,[104] and two cases, *Bolchos v. Darrel*[105] and *Adra v. Clift*,[106] were specifically cited in the *Karadzic* action as examples of ATCA's application to an action by a private individual.[107] Therefore, even if Karadzic is considered a "private individual" and his actions are not found to be officially sanctioned, his conduct could still be considered a violation of the law of nations, thus subjecting him to prosecution in the United States.

Third, the Second Circuit turned to the Restatement (Third) of the Foreign Relations Law[108] of the United States to support its rejection of Karadzic's assertion that as a private individual, he cannot violate the law of nations. The Restatement (Third) states: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."[109] The Restatement differentiates between "those violations that are actionable when committed by a state. . . [and] violations of 'universal concern.'"[110] In its examples of offenses that are of "universal concern," the Restatement includes "piracy and slave trade from an earlier era and aircraft hijacking from the modern era. . . [as crimes] capable of being committed by non-state actors."[111]

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102 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (Garland Pub., 1978) (*see* Brief for Plaintiffs-Appellants at 16; *Karadzic*, 70 F.3d 232 (2d Cir. 1995)).

103 *Karadzic*, 70 F.3d at 239 (citing M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (Kluwer Academic Pub., 1992)).

104 1 Op. Att'y Gen. 57, 59 (1795) (stating that attacks by American citizens with French fleet on British colony in Africa actionable by British subjects); *Terrill v. Rankin*, 65 Ky. (2 Bush) 453 (1867) (applying law of war to actions of Confederate soldiers personally); Jordan Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351 (1991); Jordan Paust, *On Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 639-40 (1989) (stating that courts have always applied international law to entities other than formally recognized states); and Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) (stating that much international humanitarian and human rights law applies to individuals without regard to whether they acted on behalf of a public body).

105 *Karadzic*, 70 F.3d at 240 (citing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795)(No. 1,607)).

106 *Id.* (citing Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961)).

107 *Id.*

108 *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)).

109 *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, introductory note (1987)).

110 *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 702, 404 (1987)).

111 *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 404, 402(1)(a), (2) (1987)).

These arguments, taken together, overpower the lower court's reasoning that ATCA does not apply to non-state actors. The Second Circuit found jurisdiction under ATCA applicable to Karadzic because (1) ATCA can be and has been interpreted as applying to non-state actors and, in any case, (2) Karadzic holds *himself* out to be a state actor. This alone, if we accept his statements at face value, would automatically bring Karadzic under the jurisdiction of ATCA.

B. Under International Law, the Serbian Republic of Bosnia-Herzegovina (Republika Srpska), is a "Foreign Nation" for Purposes of Jurisdiction under the TVPA

The district court held that the Torture Victim Protection Act, an act which specifically provides a private cause of action against an individual acting "under actual or apparent authority or color of law, of any foreign nation,"[112] was to extend only "to actions carried out under the authority or color of law of *an entity recognized by the United States as a foreign nation.*"[113] This narrow reading severely limits the application of the TVPA, perhaps beyond the intentions of its enactors.[114] The Second Circuit found that the TVPA permits claims of official torture to be brought "under the jurisdiction conferred by the Alien Tort Act. . . ."[115] and therefore did not undertake an in-depth analysis of this question. The appellants, however, asserted that the Republika Srpska satisfies the definition of a state for purposes of international law violations and that, in any case, Karadzic acted in collaboration with the official Serbian regime in the recognized state of Yugoslavia.[116]

Given the events of the past few months involving the Arab-Israeli peace talks and the recent international recognition of a Palestinian state, it is ironic that the leading case on this issue, and case upon which the *Karadzic* district court relied in denying jurisdiction, is *Tel-Oren*, involving the "nationhood" question of Pales-

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112 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

113 *Karadzic*, 866 F. Supp. at 741 (emphasis added).

114 H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991) ("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. Courts should look to 42 U.S.C. § 1983 in construing 'color of law' and agency law in construing 'actual or apparent authority.' The bill does not attempt to deal with torture or killing by purely private groups.").

115 *Karadzic*, 70 F.3d at 246.

116 Brief for Plaintiffs-Appellants at 37-39, *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

tine.[117] The *Karadzic* district court reasoned that if the PLO, a well-organized entity that enjoys diplomatic relations with several countries and has had permanent observer status at the United Nations since 1974,[118] was not considered a "state" in *Tel-Oren*, then the Republika Srpska certainly fails to qualify as a state. Specifically the court stated that "[t]he current Bosnian-Serb military warring 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*."[119]

This argument put forward by the district court is inconsistent with other holdings in the opinion. The court was reluctant to confer subject matter jurisdiction due to the possibility that Karadzic may soon be recognized as a head of state, which would grant him immunity from suit, yet later argued that there could be no jurisdiction over Karadzic because he is not a head of state. The court pointed out that, "[a]s the Aristide court held, the '[d]etermination of who qualifies as a head-of-state is made by the Executive Branch, it is not a factual issue to be determined by the courts'";[120] however the court immediately went ahead and decided that Republika Srpska is not a "state."

In a footnote, the court stated:

> The Second Circuit has limited the definition of "state" to "entities that have a defined [sic] 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." The current Bosnia-Serb entity fails to meet this definition.[121]

The district court jumps to a conclusion here that can easily be challenged. First, "Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreement with other governments. It has a president, a legisla-

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117 The PLO has since been recognized by the United States and by the international community as a legitimate representative of the Palestinian people and the Palestinians have begun the process of establishing an internationally recognized state in Jericho, Gaza and other West Bank towns. Elections were held and Yasser Arafat was democratically elected leader of this new entity.

118 *Karadzic*, 866 F. Supp. at 740.

119 *Id.* at 741.

120 *Id.* at 738 (citing Lafontant v. Aristide, 844 F. Supp. 128, 130 (E.D.N.Y. 1994)).

121 *Id.* at 734 n.12 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 201 (1987); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991)). Note that the court, in citing to the restatement, omitted the word "territory." The restatement in fact reads "entities that have a defined territory and a permanent population. . . ."

ture, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law."[122] Second, according the Restatement (Third) of Foreign Relations Law, there is no requirement that a state be recognized by other states in order to be defined as a state.[123] Third, "[t]he customary international law of human rights . . . applies to states without distinction between recognized and unrecognized states."[124] It would be ironic if "non-recognition 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 law norms that apply only to state actors."[125]

The Second Circuit granted jurisdiction and reversed the lower court's decision, and the Supreme Court supported the Second Circuit's interpretations of these issues in its denial of certiorari. Karadzic's actions were, in fact, interpreted as being carried out under the authority or color of state law, or under apparent authority or color of law. Srpska's self categorization as a "foreign nation" was sufficient for the purposes of the TVPA. It therefore appears that the jurisdictional scope of the TVPA has now been well tested by the courts, and a clear definition of a "foreign nation" for the purposes of the Act has been articulated, both by the appellate court and by the Supreme Court.

C. This Case is Not "Non-Justiciable" because Karadzic May, in the Future, be Granted Head-of-State Immunity if Republika Srpska is Internationally Recognized as a State

The district court considered whether this case was non-justiciable due to the political questions involved and concluded that, though not dispositive, the fact that Karadzic may one day be recognized by the Executive Branch as a head of state militates against the court exercising jurisdiction.[126] The court based its conclusion on the holding of *Lafontant v. Aristide,* which states: "[D]etermination of who qualifies as a head-of-state is made by the

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122 *Karadzic,* 70 F.3d at 245.

123 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 202 cmt. b (1987). ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states.").

124 *Karadzic,* 70 F.3d at 245 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 207, 702 (1987)).

125 *Id.*

126 *Karadzic,* 866 F. Supp. at 738.

Executive Branch, it is not a factual issue to be determined by the courts."[127]

In a footnote, the district court cited The New York Times, which stated that "as President of his nation, Karadzic may qualify as 'an organ of a foreign state or political subdivision thereof' under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2), and therefore be immune from suit."[128] Today, however, after the commencement of the war crimes tribunals and the tentative peace treaty creating a Bosnian Serb state in Srpska, it appears that Karadzic will not, in fact, become the leader of this entity. "The [peace] agreement says that individuals who have been indicted by the international war crimes tribunal in The Hague may not hold political office. Karadzic. . . [has] been indicted on several counts."[129] Therefore, the peace agreement "appear[s] to spell the political end for Dr. Karadzic."[130] This new development appears to eliminate the head-of-state immunity question in this case, but this resolution is too convenient and would provide no guidance for the future. The lower court should not have used justiciability as grounds for dismissing the case, regardless of the political implications involved.

The Second Circuit looked at the political question doctrine and the act of state doctrine as two issues which might be of concern to the judiciary when hearing a case involving international affairs.[131] The court concluded that "[n]ot every case 'touching foreign relations' is non-justiciable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights."[132] Although *Karadzic* arises in a politically-charged context, this fact does not necessarily create a nonjusticiable political question. The appellate court articulates the standards for nonjusticiability under the political question doctrine, and states that one or more of the following factors would ordinarily invoke immunity:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> [2] a lack of judicially discoverable and manageable standards for resolving it;

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127 Lafontant v. Aristide, 844 F. Supp. at 133.

128 *Karadzic*, 866 F. Supp. 734 n.7 (citing Robert Cohen, *Washington Might Recognize a Bosnian Serb State*, N.Y. TIMES, Mar. 13, 1994, at A10).

129 Raymond Bonner, *In Reversal, Serbs of Bosnia Accept Peace Agreement*, N.Y. TIMES, Nov. 24, 1995, at A1, A14.

130 *Id.* at A14.

131 *Karadzic*, 70 F.3d at 249.

132 *Id.*

[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
[5] an unusual need for unquestioning adherence to a political decision already made; or
[6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[133]

After laying out the standards that might invoke head-of-state immunity, the court concludes that "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion."[134]

Additional grounds upon which this conclusion not to dismiss for nonjusticiability are based on the following events. First, the U.S. government directly demonstrated its support of the women's right to sue by filing a supporting brief in this case after being asked to do so by the Second Circuit.[135] Drew S. Days, the Solicitor General, and Conrad K. Harper, a State Department legal advisor, submitted a "Statement of Interest" which "expressly disclaimed any concern that the political question doctrine should be invoked"[136] and which stated "[w]hile Dr. Karadzic is not an official of any recognized nation, he should be as liable for war crimes as were Nazi industrialists who were not government officials."[137]

Second, "the attorneys for the plaintiffs. . . wrote to the Secretary of State to oppose reported attempts by Karadzic to be granted immunity from suit. . . ."[138] The response they received strongly indicated that Karadzic was not immune and added:

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being

133 *Id.* (citing Baker v. Carr, 369 U.S. 186, 217 (1962); Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994)).
134 *Id.*
135 Lewis, *supra* note 86.
136 *Karadzic*, 70 F.3d at 250.
137 Lewis, *supra* note 86.
138 *Karadzic*, 70 F.3d at 250.

> investigated by a United Nations Commission of Experts, which was established at U.S. initiative.[139]

This case was clearly supported by the U.S. government, and did not fall under one of the categories ordinarily invoking head-of-state immunity; therefore, it appears that the issue of nonjusticiability of political questions has been clarified. ATCA and TVPA clearly open the doors of the American courts to victims of international human rights abuses, allowing the American courts to be used to enforce international human rights standards.

VII. Conclusion and Recommendation

The Second Circuit's decision in the *Karadzic* case was an important step in interpreting ATCA and TVPA, a step that was further affirmed by the Supreme Court's denial of certiorari in this case. The dispute over interpretation of these acts has ended and the scope of jurisdiction conferred by ATCA and TVPA has been clearly established.

First, the issue of jurisdiction over state actors as opposed to non-state actors is now clear. *Filartiga* held that ATCA confers jurisdiction for actions taken by non-state actors. The *Tel-Oren* court came to the opposite conclusion. The court in *Karadzic* returned to the *Filartiga* holding, a holding that the Supreme Court chose not to question.

Second, the TVPA has been given adequate consideration by the courts and should be interpreted consistently in the future. The TVPA, as asserted by the plaintiffs in *Karadzic,* expands the jurisdictional scope of ATCA. The *Karadzic* court found it had jurisdiction to hear this case, setting to rest the issue of "what is a state" for the purposes of ATCA and TVPA. In times of political change, where new states do indeed emerge (e.g., Palestine after *Tel-Oren* and possibly Srpska as a result of peace negotiations in the former Yugoslavia), this definitive interpretation of what constitutes a "state" for the purposes of ATCA and TVPA takes on new importance. Again, the Supreme Court chose not to examine this issue.

Third, ATCA and TVPA can now be used to provide victims of human rights abuses increased access to United States courts. This use of the American courts to enforce international human rights standards is an encouraging step and has been endorsed by the United States government, which filed a brief in support of the

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139 *Id.* at 250 n.10.

plaintiffs in the *Karadzic* action. The Supreme Court's rejection of certiorari in this case helps establish the United States courts as fora for prosecution of war crimes, especially gender-specific abuses. This decision signals the United States' commitment to the protection of human rights, helps acknowledge that mass rape, forced impregnation and other crimes directed specifically against women are not to be tolerated, and sends a clear signal that their perpetrators will be held accountable in the United States.

Rachel Bart