

1995

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Recommended Citation

Brandt, Michele, "Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse under the Alien Tort Statute" (1995).
Minnesota Law Review. 1973.
<https://scholarship.law.umn.edu/mlr/1973>

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Comment

Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute

Michele Brandt

On about April 15, 1992, Bosnian-Serb soldiers decapitated K's son while she held him in her arms.¹ Bosnian-Serb Soldiers later captured K, sent her to a detention camp, and raped her ten times daily for twenty-one days.² On May 31, 1992, eight Bosnian-Serb soldiers raped a teenage prisoner (Jane Doe I) while she was imprisoned in a Bosnian-Serb concentration camp. After the ordeal, one of the soldiers slashed Jane Doe I's breasts.³ On June 28, 1992, soldiers beat an eighteen-year-old

1. K approached the entrance to her home and was accosted by four Serbian soldiers, known as "chetniks." One told her that he had come "to take one of your children so that you remember well what we chetniks know how to do." Plaintiff K's Complaint at 7, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (No. 93-Civ-1163). The soldiers attempted to forcibly remove K's son from her arms. She resisted. She heard her son scream and looked down to see his head resting on the floor in a puddle of blood. *Id.* The rest of her son's body remained cradled in her arms. K lost consciousness. *Id.* When she regained consciousness she located her living son and fled the city. *Id.*

K's first name was withheld because she feared for her safety if Bosnian-Serb soldiers discovered her identity. The additional plaintiffs in this suit included K's "twin sons and two organizations of Muslim and Croation women." *Id.* at 2.

2. *Id.* at 8. The camp functioned as a "rape/death camp for women and a camp for reproducing 'Serbian' babies through forced impregnation." *Id.* Serbian soldiers raped all the women and girls, some as young as three or four years old, on beds with bloody sheets. The soldiers often forced brothers and husbands to watch the rapes. *Id.* The raping room resembled a movie theatre; it was dark, and the bed was lit with a solitary spot light. *Id.* During the rapes, Serbian soldiers insulted K regarding her Croat and Muslim ancestry. *Id.*

3. Plaintiff Doe's Complaint, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (No. 93-Civ-1163). Jane Doe I was standing in line with a group of 15 women waiting to obtain water rations when the Bosnian-Serb soldiers approached. They separated out Jane Doe I and six of the younger women from the group and led them to a house in an adjacent field. *Id.* at 5-6. The women were forced to undress and walk in a circle while the soldiers screamed obscenities at them. After approximately 15 minutes, the soldiers began to rape the women. Jane Doe I attempted to resist and she was beaten and forcibly held

woman (Jane Doe II) while she watched Bosnian-Serb soldiers rape her mother.⁴ On September 7, 1994, these women and children, on behalf of themselves and all other victims of gross human rights abuses perpetrated by Bosnian-Serb forces,⁵ brought two related class action lawsuits in the United States against Radovan Karadzic, head of the self-proclaimed "Bosnian-Serb Republic" and leader of the Bosnian-Serb military forces.⁶ Plaintiffs personally served Karadzic in New York in February 1993. Plaintiffs alleged multiple tortious acts in violation of international treaties, covenants, agreements, customary international law, and state law.⁷ Both actions, *Doe v. Karadzic* and *K v. Karadzic* (hereinafter collectively referred to as "*Karadzic*"), asserted jurisdiction pursuant to the Alien Tort

down. She fainted. Another soldier was raping her when she regained consciousness. *Id.* at 6.

Jane Doe I was returned to the camp after a Bosnian-Serb whom she had known previously intervened on her behalf. The other young women remained behind; two never returned. *Id.* at 6.

Plaintiff Jane Doe I filed her complaint anonymously because she feared for her safety if her identity was discovered. *Id.* at 3. As of February 11, 1993, Jane Doe I was living as a refugee in Zagreb, Croatia. *Id.*

4. *Id.* at 3, 6. After the soldiers raped Jane Doe II's mother, they took her mother down the hallway and the children heard their mother scream. The soldiers returned with a bloody knife and threatened to rape Jane Doe II. Her brother thwarted the attack, and Jane Doe II escaped by hiding under a balcony. *Id.* at 6.

Plaintiff Jane Doe II also filed her complaint against Karadzic anonymously out of fear for her safety. *Id.* at 3.

5. Jane Doe I brought suit "on behalf of herself and all others similarly situated." *Karadzic*, 866 F. Supp. at 734. Jane Doe II brought suit "on behalf of herself as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated." *Id.* According to Jane Doe I and Jane Doe II, members of the class action consisted of "women and men who suffered rape, summary execution, other torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces . . . between April 1992 and the present." Plaintiff Doe's Complaint at 4, *Karadzic* (No. 93-Civ-1163). The Center for Constitutional Rights, the International League for Human Rights, and the International Women's Human Rights Clinic of the City University of New York (CUNY) Law School submitted the action on behalf of plaintiffs Doe I and Doe II. *Id.* at 11. K brought suit "on her own behalf and on behalf of her infant sons B. and O." *Karadzic*, 866 F. Supp. at 734. K's action was also brought on behalf of survivors of mass rape, forcible impregnation, prostitution, genocidal torture, and discrimination. *Id.* at 835-36. Catherine MacKinnon and the Legal Defense and Education Fund submitted K's action.

Both the Doe plaintiffs and K plaintiffs "claim that they and others similarly situated are the victims of a genocidal campaign." *Karadzic*, 866 F. Supp. at 736.

6. *Karadzic*, 866 F. Supp. at 735.

7. Doe plaintiffs sought compensatory and punitive damages. K plaintiffs also sought injunctive relief. *Id.*

Statute, a federal statute that grants federal district courts original jurisdiction for violations of international law committed by aliens, even outside the country.⁸ The United States District Court for the Southern District of New York dismissed the lawsuit for lack of subject matter jurisdiction.⁹ The court held that an action brought against a non-state actor—as it found Karadzic to be¹⁰—for violations of customary international law did not lie within the jurisdictional scope of the Alien Tort Statute.¹¹

The *Karadzic* case raises the question whether the Alien Tort Statute provides a cause of action against a non-state actor for gender-specific abuses and other human rights violations that forces allegedly under his command and control committed during an armed conflict. The issue is novel; no court has yet confirmed that the Alien Tort Statute imposes individual liability upon leaders or members of organized, armed groups that violate either United States treaties or customary international law. A decision that non-state actors can be held responsible in United States courts for gender-specific and other abuses under international law would strongly condemn such atrocities.¹²

This Comment asserts that the *Karadzic* court erred by refusing to acknowledge, pursuant to the Alien Tort Statute, that certain treaties and customary international norms reach non-state conduct. In so doing, the court failed to address directly many of the plaintiffs' allegations, including those of gender-specific abuses. Part I provides a background to the Bosnian armed conflict, summarizes the reports of egregious human rights abuses perpetrated by the Bosnian-Serb forces, and outlines the framework for adjudication of such claims under the Alien Tort Statute. Part II examines the holding and reasoning of the federal district court of New York in *Karadzic*. Part III critiques the district court's decision and proposes an appropriate analy-

8. 28 U.S.C. § 1350 (1988). Plaintiffs also claimed jurisdiction under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1988)); federal question jurisdiction; and the principles of supplemental jurisdiction. 866 F. Supp. at 735. Although the court could have granted subject matter jurisdiction pursuant to each of these claims, this Comment focuses exclusively on the Alien Tort Statute.

9. 866 F. Supp. at 736.

10. *Id.* at 741.

11. *Id.*

12. A number of the human rights violations alleged in *Karadzic* were gender specific. See *infra* notes 91, 100, 162 and accompanying text (discussing gender-specific abuses). A complete discussion of whether international law covers gender specific abuses, however, is beyond the scope of this Comment.

sis of international instruments that the *Karadzic* court failed to address. This Comment concludes that the Alien Tort Statute encompasses the acts of ethnic cleansing, including gender-specific abuses, that should be imputed to Karadzic as head of the Bosnian-Serb Republic and armed forces.

I. REDRESSING HUMAN RIGHTS ABUSES ARISING OUT OF THE BOSNIAN ARMED CONFLICT IN U.S. COURTS

A. THE ARMED CONFLICT IN BOSNIA-HERCEGOVINA

In 1991, the former Yugoslavia¹³ began to disintegrate.¹⁴ Members of the coalition government of Bosnia-Herzegovina ("Bosnia")¹⁵ disagreed about whether to remain a constituent republic of Yugoslavia or to secede.¹⁶ In a February 1992 referendum, Bosnia's citizens voted in favor of independence.¹⁷

13. The former Yugoslavia was a federation comprising six constituent republics: Slovenia, Croatia, Macedonia, Montenegro, Serbia, and Bosnia-Herzegovina. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 22 (1992).

14. For a discussion of the history leading up to the ethnic conflicts in Yugoslavia, see ALEX N. DRAGNICH, SERBS AND CROATS: THE STRUGGLE IN YUGOSLAVIA (1992).

In June 1991, after Serbia blocked a proposal by Croatia and Slovenia to restructure Yugoslavia as a loose federation of republics, Croatia and Slovenia declared independence. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (2d ed. forthcoming) (draft of chapter 22 at 72, on file with author). Fighting broke out between the Yugoslav army (JNA) and the Slovenian national guard. Although the JNA withdrew from Slovenia pursuant to a ceasefire, Yugoslavia sent additional JNA troops to Croatia to back Croatian-Serb units attempting to establish Serbian-controlled enclaves within Croatia. HELSINKI WATCH, *supra* note 13, at 30. The fighting quickly spread to the borders of Bosnia-Herzegovina. In early 1992, the United Nations brokered a ceasefire in Croatia. By April 27, 1992, however, the republics of Bosnia-Herzegovina, Croatia, and Macedonia had already formally declared their independence. *Id.* The remaining republics of Serbia and Montenegro declared themselves the new Federal Republic of Yugoslavia. *Id.*

15. The Bosnian government was initially a coalition consisting of the Muslim Party of Democratic Action (SDA), the Croatia Democratic Union (HDC), and the Serbian Democratic Party (SDS), representing, as of 1992, a population totalling 4.35 million. This population was 43.7% Slavic Muslims, 31.3% Serbs, and 17.3% Croats. HELSINKI WATCH, *supra* note 13, at 19. The Bosnian Parliament included representatives from seven different parties, both national and non-national in nature. *Implementation of the Helsinki Accords, Hearing before the Comm. on Security and Cooperation in Europe*, 103d Cong., 1st Sess. 11 (1993) (statement of the Honorable Haris Silajdzic, Foreign Minister of Bosnia-Herzegovina).

16. HELSINKI WATCH, *supra* note 13, at 32.

17. *Id.* Muslim and Croat voters, associated with the SDA and HDC respectively, overwhelmingly supported independence. *Id.* at 19. Expressing its

Radovan Karadzic, self-proclaimed president of the Serbian Democratic Party SDS, warned that if the Muslim and Croat parties demanded independence from the republic of Yugoslavia, an ethnic war would be inevitable.¹⁸

After the international community recognized Bosnia as an independent state on April 6, 1992,¹⁹ sporadic ethnic violence escalated into a full-scale armed conflict between the Bosnian Serbs and the Bosnian Muslims and Croats.²⁰ Karadzic immediately proclaimed a "Serbian Republic of Bosnia-Herzegovina"²¹ independent of Bosnia, declared himself president,²² and claimed two-thirds of Bosnia's territory on behalf of the new "Republic."²³

desire that Bosnia remain part of Yugoslavia, the Serbian Democratic Party (SDS) boycotted the referendum and declared the results invalid. *Id.*

18. ROY GUTMAN, WITNESS TO GENOCIDE 12-13 (1993). Karadzic added "that the ethnic conflict in the republic would make Northern Ireland look like 'a seaside holiday.'" *Id.*

19. HELSINKI WATCH, *supra* note 13, at 30.

20. *Id.* Reports suggest that the long simmering conflict erupted on April 6, 1992, following events at a mass demonstration:

The demonstrators were protesting Serbia's role in Bosnian Politics. There were rumors of Bosnia gaining independence, and then members of Mr. Karadzic's Serbian Democratic Party . . . opened fire on the crowd . . . The crowd stormed the hotel, and Mr. Karadzic and his main followers fled . . . That evening Serbian heavy guns opened up on the city from the hills, beginning the siege of Sarajevo.

Alan C. Laifer, *Never Again? The "Concentration Camps" in Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses*, 2 NEW EUR. L. REV. 159, 192 n.4 (1994) (quoting John F. Burns, *Bosnians in Besieged Sarajevo Look Back on Year of Horror*, N.Y. TIMES, Apr. 6, 1993, at A1, A14). For additional information on the background to the Bosnian armed conflict, see AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: GROSS ABUSES OF HUMAN RIGHTS (1992).

21. The Bosnian-Serb entity is not officially recognized as a state by the community of nations. The United Nations, the European Community, and the United States have refused to recognize the self-proclaimed Bosnian-Serb entity. *Doe v. Karadzic*, 866 F. Supp. 734, 736 (S.D.N.Y. 1994). Arguably, however, the Bosnian-Serb Republic qualifies as a "state" under international law and therefore acquires the duties and obligations that accompany such status. To qualify as a state the Bosnian-Serb entity must meet the following established international legal criteria: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to engage in formal relations with other states. I RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987); *see also* Convention on the Rights and Duties of States, art. 1, 49 Stat. 3097, 3100 (1933) (listing criteria for an entity to achieve international legal recognition as a state).

22. The so-called Bosnian-Serb Republic has also formed a parliament which, among other things, has considered the endorsement of peace plans (e.g., the 1993 Vance-Owen peace plan) that Karadzic submitted to it. *See* HELSINKI INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, ANNUAL REPORT OF ACTIVITIES 1992, at 14 (1993) [hereinafter HELSINKI REPORT].

23. HELSINKI WATCH, *supra* note 13, at 30.

From its inception, Bosnia's ethnic conflict was international in scope. Bosnian Serb and Bosnian Croat forces were respectively supported by troops and material from the reconstituted Yugoslavia²⁴ and the Croatian Republic.²⁵ Since June 1992, Bosnian Serb forces have fought Bosnian government forces and Croatian troops partnered in an uneasy military alliance.²⁶ On June 20, 1992, Bosnia's president formally declared that the country was in a state of war.²⁷

24. After Bosnia-Herzegovina fell into armed conflict, the Yugoslav Army (JNA) joined forces with Bosnian-Serb paramilitary units. HELSINKI WATCH, *supra* note 13, at 9. Under pressure from the United Nations Security Council, which imposed economic sanctions on Yugoslavia, HELSINKI REPORT, *supra* note 22, at 67, the JNA ostensibly withdrew from Bosnia on May 19, 1992. HELSINKI WATCH, *supra* note 13, at 9. Yugoslav soldiers and officers, however, stayed behind to aid their Bosnian-Serb comrades. On the same day as the JNA's formal withdrawal, Karadzic announced the creation of a Bosnian-Serb army to solidify Serbian-controlled territory. *Id.* at 35-36. Reports estimate that the already formidable Bosnian-Serb forces under Karadzic's control were enlarged by at least 30,000 soldiers, who remained in Bosnia after the JNA withdrew and represented an estimated two-thirds of total Bosnian-Serb forces. *Id.* at 30.

In addition to military forces, the Yugoslav government provided economic and political support to the Bosnian-Serb army. *Id.* at 10. According to observers, "Serbian paramilitary groups conduct military operations in conjunction with, in the presence of, or with the knowledge of JNA forces and commanders." *Id.* at 38.

Moreover, the Serbian President of Yugoslavia, Slobodan Milosevic, has had a great influence over Karadzic. After Karadzic agreed to submit a peace plan before the Pale Serb parliament, reporters noted that Milosevic had "successfully browbeaten Karadzic, his long-time nationalist acolyte, into accepting the peace deal." Blaine Harden, *Bosnian Serb Leader Agrees to Peace Plan*, WASH. POST, Jan. 13, 1993, at A15.

Evidence of a more direct relationship between the Yugoslavian government and the Bosnian-Serb leadership may exist. A recent defector from the Yugoslavian Secret Police turned over documents indicating that Yugoslavian authorities were explicitly directing the ethnic cleansing campaign carried out by the Bosnian-Serbs. One document, addressed to Karadzic, if genuine, would represent evidence that Yugoslavia considered Karadzic the leader of the Bosnian-Serbs holding command and control authority over both the armed forces and de facto governmental structures. Such a document might also be proof that Karadzic was aware of the ethnic cleansing campaign being carried out by forces under his control and acted in concert with Yugoslavia. See Roger Cohen, *Serb Defector Offers Evidence on War Crimes*, N.Y. TIMES, Apr. 13, 1995, at A1. The chief prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter War Crimes Tribunal] has named Karadzic as a suspected war criminal. Roger Cohen, *Bosnian Serb Denies All at a War Crimes Tribunal*, N.Y. TIMES, Apr. 27, 1995, at A3.

25. The Bosnian-Croats have received direct military support from neighboring Croatia. HELSINKI REPORT, *supra* note 22, at 13.

26. HELSINKI WATCH, *supra* note 13, at 33.

27. *Id.* at 31.

B. "ETHNIC CLEANSING"²⁸ AND GENDER-SPECIFIC ABUSES²⁹

Bosnian Serb leader Karadzic has stated that "[i]t is impossible for Serbs to live together with other peoples in a unitary state."³⁰ Consistent with his position, the Yugoslav army (JNA) and Bosnian-Serb troops have tried to unite Serbian-controlled areas in the former Yugoslavian republics to create a homogenous "Greater Serbia."³¹ To attain this goal, they employ rape,³² summary executions,³³ torture, and other egregious

28. "[E]thnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area." *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex, at 33, U.N. Doc. S/1994/674/Annex (1994). U.N. experts assert that parties to the Bosnian armed conflict have engaged in "ethnic cleansing":

On the basis of the information gathered, examined and analyzed, the Commission [of Experts] has concluded that grave breaches of the Geneva Conventions and other violations of international humanitarian law have been committed in the territory of the former Yugoslavia on a large scale, and were particularly brutal and ferocious in their execution. The practice of so-called "ethnic cleansing" and rape and sexual assault, in particular, have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy, which may also be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators.

Boutros Boutros-Ghali, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, U.N. Doc. S/1994/674 (1994).

29. Although this Comment looks at violence against women, its legal analysis applies equally to the sexual assault of men. Reports indicate that Bosnian-Serb forces have castrated some men or forced men to perform acts of sexual violence on one another. INTERNATIONAL HUMAN RIGHTS LAW GROUP, NO JUSTICE, NO PEACE: ACCOUNTABILITY FOR RAPE AND GENDER-BASED VIOLENCE IN THE FORMER YUGOSLAVIA 4 (1993) [hereinafter NO JUSTICE, NO PEACE].

30. HELSINKI WATCH, *supra* note 13, at 46. Karadzic has expressed fear of persecution of a Serbian minority in a unified Bosnian state. *Id.* He has also publicly voiced his belief that only Serbians should populate his republic:

Responding to the question of how he envisions the status of minorities in the Serbian Republic, Radovan Karadzic readily answers that his Republic will not have such problems as 95 percent of the population will be of Serbian origin. Keeping in mind the explicit intermingling of ethnic groups before the conflicts, and the predominant domination of non-Serb populations in areas which have been now claimed by the Greater Serbian ideologues, it becomes clear that such a statement represents either a lie or an accidental confession to the policy of ethnic cleansing carried out by the Serbs.

CROATIAN INFORMATION CENTER, GENOCIDE: ETHNIC CLEANSING IN NORTHWESTERN BOSNIA 107 (1993).

31. HELSINKI WATCH, *supra* note 13, at 47. For a discussion of the "Territorialization of the 'Greater Serbian' Idea," see CROATIAN INFORMATION CENTER, *supra* note 30, at 11-17.

32. See *infra* note 40 and accompanying text (documenting Bosnian-Serb program of rape).

human rights violations³⁴ to "ethnically cleanse" hundreds of thousands of non-Serb residents³⁵ from areas of strategic importance.³⁶

Mass rape and other gender-specific abuses are an integral part of the Bosnian Serb ethnic cleansing campaign.³⁷ Furthermore, Bosnian-Serb forces act with impunity.³⁸ Helsinki Watch has noted that "[t]he public nature of the abuses, and the frequency with which they take place indicate that individual [Serbian] soldiers and military units do not anticipate disciplinary action by their superiors."³⁹ Indeed, countless sources report that the practice of mass rape by Serb soldiers is not merely a private act, but is carried out under orders to facilitate "ethnic cleansing."⁴⁰ Bosnian Serb forces have established "rape camps" in detention centers, schools, and prisons⁴¹ where they repeat-

33. HELSINKI WATCH, *supra* note 13, at 50 ("[C]ivilians are being summarily executed as part of an 'ethnic cleansing' campaign."). Reports indicate that Bosnian-Serb forces have conducted mass executions of whole non-Serb village populations to "cleanse" areas. *Id.* at 63.

34. Other violations of human rights include forced displacement, genocide, and cruel and inhuman or degrading treatment. *Id.* at 63 (finding that "ethnic cleansing" involves the forcible displacement of non-Serbs); II HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 10-13, 42-84, 220-22, 258-68, 382-390 (1993).

35. NO JUSTICE, NO PEACE, *supra* note 29, at 1.

36. *Id.* Recognizing this fact, the United Nations Commission on Human Rights condemned the systematic killing, torture, rapes, forced displacement, and other violence associated with ethnic cleansing for which the Serb leadership and military forces in Bosnia and Yugoslavia are responsible. HELSINKI REPORT, *supra* note 22, at 67-68.

37. See *infra* note 40 and accompanying text. Ethnic cleansing has produced an estimated 30,000 to 50,000 Bosnian rape victims. See, e.g., Tom Post et al., *Crimes of War: A Pattern of Rape in Bosnia*, NEWSWEEK, Jan. 4, 1993, at 32.

38. GUTMAN, *supra* note 18, at 157-163. To date, no reports have indicated that Serb leaders have held accountable any member of their forces for human rights abuses. II HELSINKI WATCH, *supra* note 34, at 8-9.

39. II HELSINKI WATCH, *supra* note 34, at 8.

40. See, e.g., *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*, Annex, at 20-21, U.N. Doc. A/48/92-S/25341/Annex (1993); *European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to EC Foreign Ministers*, Annex 1, at 6, U.N. Doc. S/25240/Annex (1993); GUTMAN, *supra* note 18, at 164; Judith Gardam, *Gender and Non-Combatant Immunity*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 345 (1993); 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 (1994); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424-27 (1993).

41. International observers report:

edly rape women.⁴² Rape survivors are often subjected to forced pregnancy and forced maternity.⁴³ Serb captors deliberately detain pregnant women past the period for obtaining legal abortions.⁴⁴

According to rape victims, Serb military and political commanders at a minimum condoned, if not ordered, gender-specific assaults.⁴⁵ Evidence presented at the first Bosnian war crimes trial corroborates these testimonials.⁴⁶ One Serbian soldier testified that local orders to rape Muslim girls and women came from the head of the Bosnian Serb armed forces, Radovan Karadzic.⁴⁷

C. ADJUDICATION OF HUMAN RIGHTS VIOLATIONS COMMITTED DURING THE BOSNIAN ARMED CONFLICT UNDER THE ALIEN TORT STATUTE

1. The Alien Tort Statute: A Cause of Action for Human Rights Abuses

The Alien Tort Statute is an avenue available to the Bosnian victims of mass rape and other abuses to ensure that those responsible for such acts are held accountable.⁴⁸ The Alien Tort

In southeastern Bosnia, Serbian forces use rape as one of many methods of torturing and humiliating women. Many women and their families are forcibly expelled from their villages . . . and they are either placed in designated detention facilities or interned in villages The women are sexually mistreated during their detention, and many are gang-raped on one or more occasions.

II HELSINKI WATCH, *supra* note 34, at 242.

42. A Muslim woman raped by Bosnian-Serb soldiers at an outdoor stadium testified that she counted 29 assailants before losing consciousness. GUTMAN, *supra* note 18, at 166.

43. See Danise Aydelott, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT'L L. REV. 585, 599 (1993); Kohn, *supra* note 40, at 199; Yolanda S. Wu, *Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L.J. 101, 103 (1993).

44. See Post et al., *supra* note 37, at 32. Their purpose is clear. Serbian rapists intend to force Muslim and Croat women to bear Serbian children. Numerous rape accounts indicate that Serb perpetrators taunted their victims with words to the effect, "Now you'll have a Serb baby." NO JUSTICE, NO PEACE, *supra* note 29, at 3.

45. Roy Gutman, *Rape Camp: Evidence Serb Leaders in Bosnia OK'd Attacks*, N.Y. NEWSDAY, Apr. 19, 1993, at 5.

46. *Serb on Trial Describes Crimes in Chilling Detail*, L.A. TIMES, Mar. 14, 1993, at A7.

47. *Id.*

48. Another avenue was created pursuant to chapter VII of the United Nations Charter. The Security Council established a War Crimes Tribunal. The Security Council created the tribunal after it determined that rampant viola-

Statute⁴⁹ permits an alien⁵⁰ to bring a civil action in the United States District Courts for torts committed in violation of a United States treaty or of the law of nations.⁵¹ Courts construe the term "law of nations" under the Alien Tort Statute as referring to customary international law.⁵²

Originally a provision of the 1789 Judiciary Act, the Alien Tort Statute languished for nearly 200 years in relative obscurity.⁵³ In 1980,⁵⁴ the Second Circuit Court of Appeals revived the statute in *Filartiga v. Pena-Irala*,⁵⁵ a landmark decision that established a unique, albeit limited,⁵⁶ avenue for vindicat-

tions of humanitarian law in Bosnia constituted a threat to international peace. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 (1994) (citing *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704/Annex (May 3, 1993), reprinted in 32 I.L.M. 1159, 1192). Article 5 of the statute of the tribunal gives it authority to prosecute crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." *Id.* at 86. Significantly, the statute provides that rape can constitute a crime against humanity. *Id.* at 84. To date, however, no prosecutions have resulted from the War Crimes Tribunal, even though 21 indictments have been filed against Serbs for genocide, war crimes, and crimes against humanity. Richard Meares, *U.N. Judge Wants Chief Culprits of War Crimes*, REUTER NEWswire, Mar. 13, 1995.

49. 28 U.S.C. § 1350 (1988).

50. An "alien" is defined under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3)(e) (1988), as "any person not a citizen or national of the United States."

51. 28 U.S.C. § 1350. The "law of nations" encompasses both treaty law and customary international law. See *infra* part I.C.1.b.

52. See *infra* part I.C.1.b. This Comment will refer to "law of nations" and "customary international law" interchangeably.

53. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.21 (2d Cir. 1980).

54. Lawyers in the 1980s became increasingly aware of and interested in protecting human rights. Consequently, numerous lawyers gained knowledge of international law and the Alien Tort Statute, leading to a resurgence in the use of the statute. NEWMAN & WEISSBRODT, *supra* note 14, at 8; Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491, 492 (1993).

55. 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, two Paraguayan plaintiffs brought suit against a Paraguayan police officer for the murder and torture of a close family member in Paraguay. The plaintiffs obtained personal jurisdiction over the officer while he was visiting the United States illegally. *Id.* at 878-79.

56. Several procedural obstacles restrict access to alien tort actions: personal jurisdiction, foreign sovereign immunity, act of state doctrine, head of state immunity, diplomatic immunity, and the political question doctrine. For a discussion of the barriers to claims grounded in immunities, see generally Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177 (1994); Frederic L. Kirgis, Jr., Editorial Comment, *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58 (1988) (providing an approach to aid adjudication of the acts of state doctrine); Jerrold L. Mallory, Note, *Resolving the Confusion Over Head of State Immunity*:

ing violations of human rights. According to *Filartiga*, federal courts have jurisdiction over Alien Tort Statute claims only if international law proscribes the tortious conduct at issue.⁵⁷ This proscription may exist in either prong of the Alien Tort Statute—a United States treaty or the law of nations.

a. *The Treaty Law Prong of the Alien Tort Statute*

The United States Constitution expressly refers to treaties as part of domestic law: "All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁵⁸ The term "treaty" refers to "bind-

The Defined Right of Kings, 86 COLUM. L. REV. 169 (1986) (defining head of state immunity and offering a better defined standard).

57. NEWMAN & WEISSBRODT, *supra* note 14, at 14. Most courts have followed *Filartiga* in finding that the Alien Tort Statute grants both jurisdiction and a cause of action for torts cognizable in international law. For opinions holding that a plaintiff need not establish an independent cause of action when pleading a tort in violation of the "law of nations," see *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 498 (9th Cir. 1992) (stating that claim must only include a tort and a violation of international law) and *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) (holding that proposed tort must be characterized by universal consensus in the international community). *But see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) (stating that a cause of action cannot be implied from a grant of jurisdiction), *cert. denied*, 470 U.S. 1003 (1985); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

For statements holding that "a right of action can be located in international law itself for certain egregious customary international law violations," see NEWMAN & WEISSBRODT, *supra* note 14, at 29.

58. U.S. CONST. art. VI, § 2. Although a treaty ratified by the U.S. represents the supreme law of the land, it is enforceable in U.S. courts only if it is self-executing or if Congress enacts enabling legislation. FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 579 (1990). Some commentators assert that:

self-execution is irrelevant to . . . jurisdiction [under the Alien Tort Statute] As with other jurisdictional showings, such as amount-in-controversy and substantial federal question, plaintiffs need only make a colorable claim that the relevant treaty has been violated, as a prerequisite for the consideration of a tort. The cause of action under [the Alien Tort Statute] is "for a tort only," and not strictly speaking for a violation of the treaty provisions. Whether a treaty is self-executing is thus a distinct set of problems from whether it imposes a legal obligation or not . . . which is the only relevant issue for determining whether . . . jurisdiction will lie.

Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 99 n.198 (1981) (citations omitted); see also Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 627-28, 638-43 (1989) (asserting that the Alien Tort Statute serves an "executing" function for treaties).

ing agreements between subjects of international law that are governed by international law."⁵⁹ For a treaty violation to be actionable under the Alien Tort Statute, the United States must be a party to the instrument.⁶⁰

b. *The Law of Nations Prong of the Alien Tort Statute*

The law of nations derives from a variety of sources, including customary international law.⁶¹ Customary international law consists of norms reflecting the general practices that States follow due to a sense of legal obligation.⁶² These norms require no agreement or treaty to be binding upon all nations.⁶³ Consistent state practice, generally defined as "widespread acceptance" of a norm, is evidence of the ripening of a norm into customary international law.⁶⁴ Widely accepted treaties, such as the Ge-

59. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 386 (2d ed. 1987).

60. The United States becomes a party to a treaty by ratification or by accession. NEWMAN & WEISSBRODT, *supra* note 58, at 400. "Accession" is "[t]he absolute or conditional acceptance by one or several nations of a treaty already concluded between other sovereignties." BLACK'S LAW DICTIONARY 13 (5th ed. 1979).

61. The Statute of the International Court of Justice defines the law of nations as the following:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

U.N. CHARTER art. 38.

62. NEWMAN & WEISSBRODT, *supra* note 58, at 594. Customary international law is established from the "general and consistent practice of states." See I RESTATEMENT, *supra* note 21, § 102. In determining what constitutes customary international law, courts refer to the works of jurists, usage of nations, and judicial opinions. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). For a plaintiff to establish a customary norm, it must be "universal, definable, and obligatory," however, the "plaintiff need not establish unanimity among nations." *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). Nonetheless, "[a]n international tort which appears and disappears as one travels around the world is clearly lacking in that level of common understanding necessary to create universal consensus." *Id.* at 712.

63. I RESTATEMENT, *supra* note 21, § 102.

64. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5-6 (4th ed. 1990) (quoting *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 1974 I.C.J. 3).

neva Conventions⁶⁵ and the Genocide Convention,⁶⁶ may also indicate the creation of customary international law.⁶⁷

The United States Supreme Court has stated that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented."⁶⁸ Customary international law is constantly evolving.⁶⁹ Hence, United States courts must continuously evaluate whether a given norm has risen to the status of customary international law.⁷⁰

As established in *Filartiga*,⁷¹ a violation of a norm of customary international law is actionable under the Alien Tort Statute.⁷² Thus, because the United States had not yet ratified a treaty prohibiting torture, the court in *Filartiga* looked to whether torture violated the "law of nations."⁷³ The *Filartiga* court held that official acts of torture, regardless of where committed, violate customary international law.⁷⁴ Subsequently, a United States district court found that prolonged arbitrary de-

65. For a discussion of the acceptance of Geneva Conventions as part of customary international law, see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25204 (1993), reprinted in 32 I.L.M. ¶ 35 [hereinafter *Secretary-General's Report*]. The Geneva Conventions are nearly universally accepted by the nations of the world. Indeed, more states are signatories to the Geneva Convention than the United Nations Charter. Theodor Meron, *The Geneva Convention as Customary Law*, 81 AM. J. INT'L L. 348, 348 n.2 (1987).

66. See *Secretary-General's Report*, *supra* note 65, ¶ 35 (indicating that the Genocide Convention has become customary international law); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1129 (1982); I RESTATEMENT, *supra* note 21, § 702 cmt. d & reporters' cmt. 3.

67. D'Amato, *supra* note 66, at 1127-29. In the human rights arena, wide acceptance of international treaties, declarations, resolutions, and other instruments arguably has become a more significant indicator of the development of customary international law than the general practice of states. NEWMAN & WEISSBRODT, *supra* note 58, at 595.

68. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

69. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 99 (1989) (noting that the list of norms rising to the status of customary international law should be regarded as "open ended").

70. NEWMAN & WEISSBRODT, *supra* note 58, at 595.

71. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

72. *Id.* at 884-85, 887.

73. *Id.* at 884-85.

74. *Id.*

tentions, disappearances, and summary executions also violate customary international law.⁷⁵

2. International Law Germane to the Bosnian Armed Conflict

The human rights abuses perpetrated during the Bosnian armed conflict unquestionably violate the four Geneva Conventions⁷⁶ and the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").⁷⁷ Each of these instruments is widely regarded as having risen to the status of customary international law.⁷⁸ Hence, torts committed in contravention of these instruments are cognizable as violations of both customary international law and a United States treaty under the Alien Tort Statute.

75. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (holding that acts of torture, summary execution, disappearances, and prolonged arbitrary detention are universally prohibited).

76. Geneva Conventions of 12 August 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3 [hereinafter Geneva Conventions]. The following four multilateral agreements comprise the Geneva Conventions: Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The United States is a party to the Geneva Conventions. See NEWMAN & WEISSBRODT, *supra* note 58, at 401 (listing many human rights treaties to which the United States is a party).

77. Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The United States is a party to the Convention. See NEWMAN & WEISSBRODT, *supra* note 58, at 402.

The International Covenant on Civil and Political Rights ("ICCPR"), adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), is also actionable under the Alien Tort Statute. Most importantly, Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* art. 7. The discussion in the text of the issues addressed by the treaties, however, mirror a discussion of the ICCPR. Although the ICCPR is a significant international instrument and recently ratified by the United States, a discussion of this Convention is beyond the scope of this Comment.

78. See *supra* notes 65-66 and accompanying text.

a. *The Geneva Conventions*

The Geneva Conventions are major components of the body of humanitarian law,⁷⁹ providing for humane treatment of non-combatants in wartime.⁸⁰ The degree of protection such persons receive varies depending on whether the armed conflict⁸¹ is international⁸² or non-international (internal).⁸³ The Geneva

79. International humanitarian law has existed for over a century and has developed separately from human rights law. For a history of humanitarian law, see JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1985). Unlike humanitarian law, human rights law guarantees fundamental liberties during periods of peace and conflict. Humanitarian law and human rights law are closely related, and many of the prohibitions entrenched in humanitarian law are reflected in core principles of human rights law.

80. *Id.* at 61-68; NEWMAN & WEISSBRODT, *supra* note 58, at 688.

81. At least one commentator has refined the international-internal distinction for purposes of humanitarian law into four categories of conflicts: 1) An international armed conflict or occupation; 2) A war of national liberation or self-determination; 3) A non-international conflict under Common Article 3; and 4) A non-international conflict under Additional Protocol II. David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situation of Armed Conflict*, 21 *VAND. J. TRANSNAT'L L.* 313, 338-340 (1988). To analyze the Bosnian conflict under the Alien Tort Statute, this Comment limits its discussion to the first and third types of conflicts.

82. The International Committee of the Red Cross (ICRC) commentary on the Geneva Conventions defines an international armed conflict as any "difference arising between two States and leading to the intervention of armed forces . . . even if one of the Parties denies the existence of the state of war." *COMMENTARY ON THE GENEVA CONVENTION OF 12 AUGUST 1949*, at 34 (Jean S. Pictet ed., 1952) [hereinafter *ICRC COMMENTARY*].

83. Internal armed conflicts are governed by Common Article 3. The "authoritative ICRC commentary mentions a number of nonobligatory but convenient criteria" for the determination of whether a non-international disturbance is an internal armed conflict governed by Common Article 3. Weissbrodt, *supra* note 81, at 339. These criteria include:

- (1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory. (c) That the armed forces act under the direction of the organized civil

Conventions apply in their entirety if an armed conflict is international. Conflicts that are internal trigger fewer safeguards for protected persons.⁸⁴ Article 3, which is common to each of the four Geneva Conventions,⁸⁵ sets forth the minimum protections applicable to internal conflicts.⁸⁶

The Bosnian conflict has internal⁸⁷ elements, but is covered by the full panoply of protections available in international⁸⁸ armed conflicts. The parties to the conflict, including the Bosnian-Serbs, assented to adhere to the rules of war applicable to an international armed conflict under an Agreement made on May 22, 1992 ("Agreement").⁸⁹ The text of the Geneva Conven-

authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

ICRC COMMENTARY, *supra* note 82, at 49-50.

84. ICRC COMMENTARY, *supra* note 82, at 49.

85. This Comment will refer to Article 3 as "Common Article 3."

86. See *infra* note 95 (outlining the protections encompassed in Common Article 3).

87. U.N. Security Council resolutions confirm that a state of armed conflict exists in Bosnia. U.N. SCOR, 47th Sess., 3137th mtg. at 1, U.N.S.C. Res. 787 (1992), reprinted in 1995 U.N.Y.B. 375; U.N. SCOR, 47th Sess., 3106th mtg. at 1, U.N.S.C. Res. 771 (1992), reprinted in 1995 U.N.Y.B. 366. See also Meron, *supra* note 48, at 81 (commenting that while the conflict is largely international, it has concurrent internal characteristics).

88. The *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Grave Breaches of the Geneva Conventions and other Violations of International Humanitarian Law in the Former Yugoslavia*, U.N. Doc. S/25274 (Feb. 10, 1993) [hereinafter *Interim Report*] found that "the law applicable in international armed conflict should be applied to the entirety of the armed conflicts in the territory of the former Yugoslavia." *Interim Report, supra*, ¶ 14. See also James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 647 (1993) ("[T]he conflict is clearly international: three nations have fought, primarily in the territory of two of them (thus far), with a number of fronts and partisan or proxy groups participating on behalf of each. . . . [I]t should not matter that some combatants are citizens of the same nation-state."); Meron, *supra* note 48, at 81 ("[T]he unacknowledged, but clear, intervention in the Bosnian Conflict by Belgrade on behalf of the Serbs, and against the Government of Bosnia-Herzegovina, could transform the conflict from internal to international, even under the classic principles of international law."); Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1993) (arguing that various factors, such as the conflict's status as a "belligerency," outside intervention by neighboring nations, and various U.N. resolutions, have internationalized the Bosnia-Herzegovina armed conflict).

89. See Agreement Signed on May 22, 1992, by Representatives of the Presidency of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action and the Croatia Community, U.N. Doc. A/Conf.157/PC/60/Add.4, ¶ 37 (1993), cited in O'Brien, *supra* note 88, at 647 & n.33. See also S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. at 1, U.N. Doc.

tions encourages warring factions to establish such agreements in order to promote more extensive protections for victims of internal conflicts.⁹⁰ As a result, the full breadth of the Geneva Conventions apply, including provisions explicitly proscribing gender-specific abuses⁹¹ and violations constituting "grave breaches."⁹²

The Geneva Conventions define the class of people it protects as "those who . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they *are not nationals*."⁹³ Although it is unclear whether Bosnian-Muslims and Croats are the same nationality as Bosnian-Serbs, the Geneva Conventions would probably apply in their entirety to Bosnian-Serb offenses committed against Bosnian-Muslims and

S/RES/771 (1992) (noting that the parties to the conflict are bound to comply with humanitarian norms during an armed conflict); Laurel E. Fletcher & Kathleen M. Pratt, *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, 93-94 (1994) ("[A]ll parties to the conflict have expressly agreed to abide by all provisions of [the Geneva Conventions].").

90. The Geneva Conventions encourage warring factions to establish such agreements.

91. The U.S. Department of State has pronounced that "the legal basis for prosecuting troops for rape is well established under the Geneva Conventions." Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Sen. Arlen Specter (Jan. 27, 1993), *reprinted in* NEWMAN & WEISSRODT, *supra* note 14, at 74. The Geneva Convention Relative to the Protection of Civilian Persons in Times of War provides that women are to be "especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention IV, *supra* note 76, art. 27. In addition, the Geneva Convention Relative to the Treatment of Prisoners of War requires that women "be treated with all the regard due to their sex." Geneva Convention I, *supra* note 76, art. 14.

92. The Geneva Conventions define "grave breaches" as the following acts:

1. willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health;
2. extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
3. compelling a prisoner of war to serve in the forces of the hostile power, or willfully depriving him of the rights of fair and regular trial prescribed by the Convention;
4. the unlawful deportation or transfer or unlawful confinement of a civilian; and
5. taking civilians as hostages.

Geneva Conventions, *supra* note 76, art. 50.

The Geneva Conventions do not explicitly list rape among the "grave breach" provisions; however, the authoritative commentary of the International Committee of the Red Cross has stated that rape constitutes a "grave breach." See Meron, *supra* note 40, at 426-27.

93. Geneva Conventions, *supra* note 76, art. 4 (emphasis added).

Croats.⁹⁴ Should a court conclude otherwise, victims who are not protected persons under the Geneva Conventions governing international conflicts may seek civil redress pursuant only to Common Article 3.

b. *Common Article 3 of the Geneva Conventions*

Common Article 3⁹⁵ requires each party to the conflict to provide humane treatment to all "persons taking no active part in the hostilities," regardless of nationality.⁹⁶ Significantly, Common Article 3 imposes obligations on any party to a non-

94. Fletcher & Pratt, *supra* note 89, at 96-97.

The ICRC commentary states that the Geneva Conventions do not apply to nationals of an occupying power because a Convention should not "interfere in a State's relationship with its own nationals." ICRC COMMENTARY, *supra* note 82, at 46. This line of reasoning is not applicable to the Bosnian-Muslim and Croat victims of Bosnian-Serb aggression. Concluding that Bosnian-Muslims and Croats are protected persons under Article IV will not interfere in a "State's relationship with its own nationals." The Bosnian-Serb Republic is not a recognized state, and the victims of its acts of ethnic cleansing are not "its own nationals." Accordingly, Article IV should cover the victims of Bosnian-Serb abuses, namely, the Bosnian-Muslims and Croats.

Other scholars have suggested that, in the context of the Bosnian conflict, the court should define nationality as synonymous with ethnicity. See II HELSINKI WATCH, *supra* note 34, at 396 n.6. The war in the former Yugoslavia is divided along ethnic lines. To conclude that Bosnian-Serbs and Bosnian-Muslims or Croats are the same nationality ignores the inherent nature of the conflict.

95. Common Article 3 provides in part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

...

The parties should further endeavour to bring into force, by means of special agreements, all or part of the other provisions shall not affect the legal status of the Parties to the conflict.

Geneva Conventions, *supra* note 76, art. 3.

96. *Id.*

international armed conflict, not merely on governments.⁹⁷ Hence, because Common Article 3 explicitly proscribes the non-state action of organized armed groups, such parties should be liable for violations of Common Article 3 under the Alien Tort Statute.⁹⁸

Pursuant to Common Article 3, all armed factions must prohibit murder, cruel treatment, torture, outrages upon personal dignity, and humiliating and degrading treatment.⁹⁹ Commentators widely agree that gender-specific abuses, such as rape, forced impregnation, forced maternity, and forced prostitution, are covered by the latter four categories of abuses.¹⁰⁰

97. Professor Meron asserts that the application of Common Article 3 to warring factions in an internal conflict "should no longer be viewed as a legal aberration. . . . [I]n contemporary international law, international agreements grant direct rights or confer obligations on individuals and groups with increasing frequency." MERON, *supra* note 65, at 39-40. See also Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) ("[C]ommon article 3 . . . applies also to those who are parties to a conflict but who lack the status of state actors or those acting under color of the state.").

98. See *supra* notes 57, 97 and accompanying text.

99. Geneva Conventions, *supra* note 76, art. 3. Rape and other gender-specific abuses are not explicitly covered under Common Article 3. Professor MacKinnon observes that:

When it comes to women, at least to civilian casualties, the complacency that surrounds peacetime extends to war, however the laws read. And the more a conflict can be framed as within a state, as a civil war, as social, as domestic, the less human rights are recognized as being violated . . . and the less likely international human rights will be found to be violated, no matter what was done.

Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 64 (1993).

100. No court has yet determined if gender-specific abuses are covered under Common Article 3. Numerous international commentators, however, assert that such abuses should be sanctioned pursuant to Common Article 3. Professor Meron has stated:

The ICRC declared that the grave breach of "wilfully causing great suffering or serious injury to body or health" (Article 147 of the fourth Geneva Convention) covers rape. *If so, surely rape — in certain circumstances — can also rise to the level of such other grave breaches as torture or inhuman treatment.* Moreover, the massive and systematic practice of rape and its use as a "national" instrument of "ethnic cleansing" qualify it to be defined and prosecuted as a crime against humanity.

Meron, *supra* note 40, at 426-27 (emphasis added). Additionally, the International Human Rights Law Group notes that "[r]ape . . . violates the prohibition of 'torture and other, cruel, inhuman, or degrading treatment or punishment.'" NO JUSTICE, NO PEACE, *supra* note 29, at 52; see Deborah Blatt, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. REV. L. & SOC. CHANGE 821 (1992); Fletcher & Pratt, *supra* note 89, at 97 ("Even if the conflict were deemed non-international in nature, rape and other forms of gender-based violence indispu-

c. *The Genocide Convention*

The United Nations drafted the Genocide Convention in 1948.¹⁰¹ The Genocide Convention defines the crime of genocide as certain acts that are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."¹⁰² Mass rapes and other gender-specific abuses, at least to the extent that they are carried out to further the Bosnian-Serb "ethnic cleansing" campaign and are calculated to destroy Bosnian-Muslims, thus constitute acts of genocide.¹⁰³ Furthermore, any party to the crime is fully liable,¹⁰⁴ including state and non-state actors. Because of the recent escalation of aggression between ethnic groups, the Genocide Convention has become increasingly salient. A United States court, however, has never heard a claim under the Alien Tort Statute alleging acts of genocide.

3. Liability Under the Alien Tort Statute

Although, on its face, the Alien Tort Statute appears to permit suits against both government and individual defendants, immunities grounded in federal statutory law, federal common law, and customary international law bar suit against selected defendants.¹⁰⁵ For instance, governmental immunity is nearly assured under the Foreign Sovereign Immunities Act FSIA.¹⁰⁶ Consequently, plaintiffs largely invoke the Alien Tort Statute against individual defendants.¹⁰⁷

tably constitute serious violations of the non-derogable minimum protections set forth in Common Article 3."). Nevertheless, whether Common Article 3 prohibits gender-specific abuses is beyond the scope of this Comment.

101. See *supra* note 77. Although the United States signed this instrument that same year, it was not until 1986 that the Senate gave its advice and consent for its ratification. NEWMAN & WEISSBRODT, *supra* note 58, at 402.

102. Genocide Conventions, *supra* note 77, art II. Article II stipulates what acts constitute "genocide":

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id.

103. See, e.g., NO JUSTICE, NO PEACE, *supra* note 29, at 6 & n.23; Fletcher & Pratt, *supra* note 89, at 99; Kohn, *supra* note 40, at 202.

104. See *supra* note 103 and accompanying text.

105. See *supra* note 56 (listing immunities).

106. See *supra* note 56 (describing the FSIA).

107. Two categories of individuals are liable under the statute: state and non-state actors. State actors enjoy certain immunities, such as head of state

a. *Individual Liability*

Individual liability for violations of international law garnered significant recognition following the Nuremberg trials.¹⁰⁸ International instruments developed during the post-World War II era, such as the Geneva Conventions and the Genocide Convention, codify the Nuremberg principle of individual liability as to both state and non-state actors.¹⁰⁹

Numerous plaintiffs since the *Filartiga* plaintiffs¹¹⁰ have successfully invoked the Alien Tort Statute against individual defendants acting under color of law or state authority.¹¹¹ To date, however, only one modern case has found a private individual liable under the Alien Tort Statute.¹¹² Other courts have questioned whether certain tortious non-state conduct is actionable under the Alien Tort Statute. For example, the court in

immunity, act of state immunity, diplomatic immunity, and according to some authorities, officials acting as agents or instrumentalities of foreign nations under the Foreign Sovereign Immunities Act. Individual immunities are less extensive than governmental immunities. For a more extensive discussion of how these immunities shield individual defendants from human rights claims see NEWMAN & WEISSBRODT, *supra* note 14, at 54-66.

108. The 1945 Charter of the International Military Tribunal (IMT) enshrined the idea that individuals have rights and duties under international law. See Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/64/Add. 1, at 188 (1947). The Nuremberg Judgment provided that "crimes 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" Blum & Steinhardt, *supra* note 58, at 68 n.67 (citing Judgment of the International Military Tribunal).

109. See Geneva Convention IV, *supra* note 76, art. 146 (stating parties have an obligation to search out persons who have allegedly committed, or ordered to be committed, any grave breaches of the Convention); Genocide Convention, *supra* note 77, art. IV (providing that persons committing genocide "shall be punished whether they are constitutionally responsible rulers, public officials, or private individual"); Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, *opened for signature* Feb. 4, 1985, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES./39/46 [hereinafter Torture Convention] (prohibiting acts of torture perpetrated by a "public official or other person acting in an official capacity" or "by any person" whose acts "constitute complicity or participation in torture").

110. 630 F.2d 876 (2d Cir. 1980).

111. See, e.g., Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988).

112. See Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). However, the principle of private liability for violations of customary international law extends back over 150 years in the United States. See, e.g., United States v. The Cargo of the Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (piracy); United States v. Arjona, 120 U.S. 479 (1887) (counterfeiting of foreign currency); United States v. Morris, 39 U.S. (14 Pet.) 464 (1840) (slave trading).

*Tel-Oren v. Libyan Arab Republic*¹¹³ questioned whether the Alien Tort Statute covered terrorist acts committed by non-state actors.¹¹⁴ Yet, a year later, the same court in *Sanchez-Espinoza v. Reagan*¹¹⁵ left open the possibility that the Alien Tort Statute reaches non-state action, stating that the Alien Tort Statute “may conceivably have been meant to cover only private, non-governmental acts that are contrary to a treaty or the law of nations.”¹¹⁶ Accordingly, no precedent holds that non-state actors can never be liable under the Alien Tort Statute. In appropriate cases, the Alien Tort Statute should cover the conduct of non-state actors, but only where either a governing treaty or the law of nations proscribes the alleged private tortious acts.¹¹⁷

b. *Command Responsibility*

In addition to allowing suits against the perpetrators of human rights abuses, the Alien Tort Statute permits claims against those who order or condone such violations.¹¹⁸ For ex-

113. 726 F.2d 774 (D.C. Cir. 1984), *cert denied*, 470 U.S. 1003 (1985).

114. *Id.* The court affirmed a lower court’s dismissal of an action brought by personal representatives of 29 persons murdered in a terrorist attack in Israel. *Id.* at 775. The three judges comprising the D.C. Circuit Court of Appeals panel each filed separate concurring opinions expressing widely divergent reasons for dismissal. Yet, one principle they agreed upon was that terrorist acts committed by non-state actors do not rise to the level of a violation of the law of nations under the Alien Tort Statute. *Id.*

Commentators have criticized the *Tel-Oren* decision for its holding regarding non-state actors. Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 894 (1990).

115. 770 F.2d 202 (D.C. Cir. 1985).

116. *Id.* at 206. The *Sanchez* court dismissed an action brought by Nicaraguan citizens for tortious acts perpetrated by the Nicaraguan Contra Forces. As in *Tel-Oren*, the court found no treaty outlawing the challenged acts “when committed by private individuals.” *Id.* at 206. However, Judge (now Justice) Scalia, writing for the court, held that the law of nations “does not reach private, non-state conduct of *this sort* for the reasons stated by Judge Edwards in *Tel-Oren*.” *Id.* (emphasis added). By limiting its holding to the specific acts at issue, the court left open the question whether customary international law reaches the conduct of non-state actors in other cases.

117. See *supra* note 57 and accompanying text.

118. See *Trajano v. Marcos*, 978 F.2d 493, 496 (9th Cir. 1992) (holding military intelligence director liable for acts of torture and murder perpetrated by subordinates acting under the director’s “direction” and “authority”); *Abebe-Jiri v. Negewo*, No.1:90-cv2010, slip-op. (N.D. Ga. Aug. 19, 1993) (finding official liable for acts of subordinates that he had authorized); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538 (N.D. Cal. 1988) (imputing human rights abuses of subordinate to an Argentine general who “authorized, approved, directed and ratified” the plaintiff’s disappearance and torture).

ample, the doctrine of command responsibility¹¹⁹ imposes vicarious liability on persons in a command structure for failure to prevent or punish abuses that he or she knew or should have known that subordinates were committing.¹²⁰ Hence, military or political leaders may be held civilly liable under the Alien Tort Statute for abuses committed by troops under their command or control if such acts violate either a United States treaty or the law of nations.

II. *DOE v. KARADZIC AND K v. KARADZIC*

On September 7, 1994, five Bosnian war victims, on behalf of all victims of mass rape and gross human rights abuses¹²¹ perpetrated by Bosnian-Serb forces, brought two related class actions¹²² before a United States district court.¹²³ Both suits named Radovan Karadzic, leader of Bosnian-Serb military forces and self-proclaimed president of the Bosnian-Serb Republic, as defendant.¹²⁴ Plaintiffs' causes of action were brought pursuant to the Alien Tort Statute.¹²⁵

Plaintiffs contended that Karadzic's conduct violated the Geneva Conventions, the Genocide Convention, and customary

119. Command responsibility was reaffirmed at the Nuremberg Trials. See *United States v. von Leeb*, Case No. 12 (1948), reprinted in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 512 (1950) [hereinafter NUREMBERG TRIALS]; *United States v. List*, Case No. 7 (1948), reprinted in NUREMBERG TRIALS, *supra*, at 759. The Supreme Court recognized the doctrine of command responsibility in *United States v. Yamashita*, 327 U.S. 1 (1946).

120. O'Brien, *supra* note 88, at 651-52. O'Brien noted:

Simple justice requires that individuals be prosecuted only for acts that they knew or should have known about. For persons in command positions, notice may be imputed to defendants either from evidence of regular reporting or from the existence of widespread reports that would have been known to a reasonable person. . . . The extensive media, UN and governmental reporting of atrocities in the former Yugoslavia should make it difficult for any person to plead ignorance: each defendant will be required to detail and justify his or her steps to prevent, repress or punish those responsible for violations of international humanitarian law.

Id. at 652.

121. In addition to rape, plaintiffs allege acts of forced pregnancy, forced maternity, genocide, war crimes, crimes against humanity, summary execution, torture, and cruel, inhuman, or degrading treatment. *Doe v. Karadzic*, 866 F. Supp. 734, 736 (S.D.N.Y. 1994).

122. *Id.*

123. *Id.* at 735.

124. *Id.*

125. 28 U.S.C. § 1350 (1988). Plaintiffs brought additional claims pursuant to the Torture Victim Protection Act, federal question jurisdiction, and the principles of supplemental jurisdiction. *Karadzic*, 866 F. Supp. at 735.

international law.¹²⁶ The court, however, granted Karadzic's motion to dismiss,¹²⁷ holding that plaintiffs did not contend defendant's conduct violated a treaty¹²⁸ and that "acts committed by non-state actors¹²⁹ do not violate the law of nations."¹³⁰

The court noted that the related class-action suits were based upon acts such as rape, genocide and extrajudicial killings allegedly committed by Karadzic's forces.¹³¹ Finding no jurisdiction under the Alien Tort Statute, the Court held that no tortious acts committed by non-state actors violate the "law of

126. Among others, plaintiffs cited to the following bodies of law: United Nations Charter, Universal Declaration of Human Rights, the Genocide Convention, International Covenant on Civil and Political Rights, the 1949 Geneva Conventions, and customary international law. Plaintiff Doe's Complaint, *Karadzic* (No. 93-Civ-1163).

127. The court dismissed the actions under the TVPA for lack of subject matter jurisdiction. *Karadzic*, 866 F. Supp. at 741-42. Although much of the analysis in this Comment could apply to the court's disposition of the TVPA claims, a discussion of this Act is beyond the scope of this Comment.

The courts also dismissed plaintiffs' federal question claims, finding that no implied right of action arose under the law of nations, and the law of nations provided no substantive right to be free from private acts. *Id.* at 742-43.

128. Although the plaintiffs cited a number of United States treaties that they alleged the defendant violated, the court stated that "plaintiffs do not contend that their claim arises under a treaty of the United States." *Karadzic*, 866 F. Supp. at 738. Thus, the court based its discussion solely on the second prong of the Alien Tort Statute, the law of nations.

129. *Id.* at 739. The *Karadzic* court held that the Bosnian-Serb Republic did not constitute a state under international law. *Id.* at 738. It reasoned that because the PLO, a highly organized entity enjoying diplomatic relations with several countries, did not constitute a state in *Tel-Oren*, the less stable Bosnian-Serb entity similarly fails to qualify as a state for international law purposes. *Id.* In a footnote, the court observed:

The Second Circuit has limited the definition of "state" to "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" The current Bosnia-Serb entity fails to meet this definition.

Id. (citations omitted).

130. *Id.* at 740-41 (footnote added). Prefacing its discussion of subject matter jurisdiction with a brief consideration of head-of-state immunity, the *Karadzic* court determined that the defendant did not currently enjoy absolute immunity from suit. *Id.* at 738. The court noted, however, that the Executive Branch could change Karadzic's status by officially recognizing him as a head of state. *Id.* (citing *Lafontant v. Aristide*, 844 F. Supp 128, 131 (E.D.N.Y. 1994) (holding that a "determination 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.")). According to the court, official recognition of defendant as a head of state would effectively strip the court of personal jurisdiction over the defendant and therefore "militates against . . . exercising jurisdiction over the instant action." *Id.* at 738.

131. *Id.* at 735.

nations.”¹³² The court reached this conclusion after focusing exclusively on whether “purely private” acts of torture are actionable without analyzing whether the other acts alleged could rise to the level of violations of customary international law.¹³³

The court based its holding in part on Judge Edwards’s concurring opinion in *Tel-Oren v. Libyan Arab Republic*.¹³⁴ The court quoted Judge Edwards as stating that he “decline[d] to read [the Alien Tort Statute] to cover non-state actors, absent guidance from the Supreme Court on the statute’s usage of the term ‘law of nations.’”¹³⁵ The *Karadzic* court additionally relied on the following passage from the opinion of Judge (now Justice) Scalia in *Sanchez-Espinoza v. Reagan*:

[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 usage of civilized nations,’ — we conclude that this also does not reach private, non-state conduct of this sort.¹³⁶

The *Karadzic* court construed these precedents as placing non-state conduct outside the scope of its jurisdiction. It concluded that “the acts alleged in the instant action, while grossly repugnant, cannot be remedied through [the Alien Tort Statute].”¹³⁷

III. THE APPROPRIATE ANALYSIS OF EGREGIOUS HUMAN RIGHTS ABUSES IN VIOLATION OF INTERNATIONAL LAW UNDER THE ALIEN TORT STATUTE

A court adjudicating allegations of non-state tortious acts under the Alien Tort Statute, including gender-specific abuses, should determine if a United States treaty or customary international law proscribes the conduct. Accordingly, the *Karadzic* court should have determined whether the tortious acts imputed

132. The *Karadzic* court concluded that the Alien Tort Statute does not cover the conduct of the Bosnian-Serb military forces because the acts, though morally repugnant, cannot be construed as either “official torture or state initiated.” *Id.* at 741. The court added that it “decline[d] to extend [the Alien Tort Statute] to redress acts of torture engaged in by private individuals.” *Id.*

133. *Id.*

134. *Id.* at 739-41. Additional authorities the court cited include *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), and *Linder v. Calero Portocarrero*, 747 F. Supp. 1452 (S.D. Fla. 1990), which both held that the conduct of Nicaraguan Contras did not rise to the level of state action. *Id.*

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

136. 770 F.2d at 206, quoted by *Karadzic*, 866 F. Supp. at 740.

137. *Karadzic*, 866 F. Supp. at 740-41.

to Karadzic violate either of these two sources of international law. At least two international instruments, the Geneva Conventions and the Genocide Convention, should have permitted the court to exercise subject matter jurisdiction over plaintiffs' claims.

A. THE KARADZIC COURT FAILED TO ANALYZE APPLICABLE TREATIES AND TO APPLY PRECEDENT CORRECTLY

The *Karadzic* court seriously erred in two fundamental ways. First, the court failed to analyze the plaintiffs' treaty-based claims under the Alien Tort Statute.¹³⁸ According to the *Karadzic* court, the plaintiffs did not contend their claim arose under a treaty of the United States.¹³⁹ The plaintiffs, however, explicitly listed treaty-based claims in their complaint, including alleged violations of the Geneva Conventions and the Genocide Convention.¹⁴⁰ This gap in the court's analysis is inexplicable.¹⁴¹

Second, the court misconstrued precedent by holding that all tortious acts committed by non-state actors are unreachable under the "law of nations" of the Alien Tort Statute. Although the *Karadzic* court examined plaintiffs' claims based upon the law of nations, it strayed beyond the limited holding of applicable precedents to announce an unsupported, sweeping rule. In determining that the Alien Tort Statute does not cover non-state conduct, the court misquoted Judge Edwards in *Tel-Oren*. Judge Edwards stated, "[W]hile I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover *torture by* non-state actors"¹⁴² The court omitted the words "torture by" from its quotation of

138. The *Karadzic* court should have analyzed the acts imputed to Karadzic under the Geneva Conventions and the Genocide Convention. See *infra* part III.B.

139. See *supra* note 128 and accompanying text.

140. See *supra* note 126 and accompanying text.

141. Karadzic's conduct is expressly proscribed under the Geneva Conventions and the Genocide Convention. See *infra* part III.B-C.

142. 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis added), *cert. denied*, 470 U.S. 1003 (1985). The precedential authority of Judge Edward's opinion is of limited value. The opinion was one of three concurring opinions. See *supra* note 114. In addition, Judge Edwards failed to mention that at least one United States treaty, which has risen to the level of customary international law, proscribes non-state acts of torture: Common Article 3 of the Geneva Conventions. See *supra* note 97 and accompanying text (describing non-state actor's liability for acts proscribed under Common Article 3).

Judge Edwards,¹⁴³ altering his concurring opinion from its focus on acts of torture committed by non-state actors to all acts committed by non-state actors.

Furthermore, none of the precedents the court relied on held that private actors bear no obligations under international law.¹⁴⁴ Prior cases expressly left open the possibility that private acts could constitute violations of the law of nations.¹⁴⁵ Precedents the court referred to confined their holdings to the specific facts and circumstances before them, and made no attempt to shield all non-state acts from liability under the Alien Tort Statute.¹⁴⁶

The *Karadzic* court, by contrast, did not distinguish precedent from the unique facts before it. For example, the plaintiffs' in *Tel-Oren* brought a claim for non-state terrorist acts, unrecognized as violations of customary international law, that were committed during peacetime.¹⁴⁷ The *Karadzic* court, however, was presented with tortious acts prohibited by customary international law and perpetrated during an armed conflict,¹⁴⁸ and triggering the application of humanitarian law, including some, if not all, provisions of the Geneva Conventions.¹⁴⁹ Consequently, the *Karadzic* court should have found subject matter jurisdiction pursuant to the Geneva Conventions because the Conventions are currently considered customary international law¹⁵⁰ and proscribe the non-state conduct imputed to *Karadzic*.¹⁵¹

Moreover, by exclusively focusing on the plaintiffs' allegations of torture, the court overlooked the plaintiffs' allegations of genocide.¹⁵² The Genocide Convention is widely regarded to have achieved the status of customary international law and to

143. Compare text accompanying note 132 with text accompanying note 142 (illustrating the *Karadzic* court's alteration of Judge Edwards's holding in *Tel-Oren*).

144. See *supra* part I.C.3.a.

145. See *supra* text accompanying notes 115-116 (discussing *Sanchez-Espinoza v. Reagan*)

146. See *supra* part I.C.3.a.

147. See *supra* note 114.

148. See *supra* note 87 (citing U.N. Security Council resolutions confirming that a state of armed conflict exists in Bosnia).

149. See *supra* notes 79-80 and accompanying text. (explaining that the Geneva Conventions are only applicable during periods of armed conflict).

150. See *supra* note 65 (noting that the Geneva Conventions to have risen to the level of customary international law).

151. See *infra* part III.B-C (discussing case against *Karadzic*).

152. See *supra* notes 126, 131-133 and accompanying text.

reach private conduct.¹⁵³ The court, however, ignored these norms of customary international law, erroneously taking refuge behind its overly broad conclusion that non-state actors are not liable for violations of customary international law under the Alien Tort Statute.

B. PROPOSED ANALYSIS OF KARADZIC'S ALLEGED TORTIOUS ACTS PURSUANT TO THE GENEVA CONVENTIONS

The *Karadzic* court should have examined plaintiffs' allegations of Karadzic's tortious acts under the Geneva Conventions.¹⁵⁴ This Comment suggests that the court should have followed a four step inquiry to determine whether Karadzic violated the Conventions: first, which provisions of the Geneva Conventions apply to the Bosnian armed conflict? Second, have the alleged torts proscribed by the applicable provisions of the Geneva Conventions? Third, were plaintiffs within the class of persons protected by the Geneva Conventions? Finally, as head of the self-designated Bosnian-Serb Republic and armed forces, should Karadzic be individually liable for the acts imputed to him?

The first step of the inquiry would have involved an analysis of whether the Bosnian armed conflict is of an international or internal nature,¹⁵⁵ determine the level of protection plaintiffs receive under the Geneva Conventions. A court, however, could base its determination solely upon the May 22, 1992, Agreement,¹⁵⁶ under which the Serbian Democratic Party SDP agreed to be bound by the Geneva Conventions germane to international armed conflicts.¹⁵⁷

The second step of the inquiry should comprise a determination of whether the human rights abuses plaintiffs alleged are torts that violate of the Geneva Conventions. The *Karadzic* class action suits alleged acts of rape, forced pregnancy, forced prostitution, forced maternity, torture, summary execution, and cruel and inhuman or degrading treatment.¹⁵⁸ Clearly, these

153. See *supra* note 66 and accompanying text.

154. See *supra* notes 121, 126 and accompanying text (explaining that plaintiffs alleged violations of the Geneva Conventions).

155. See *supra* notes 81-86 and accompanying text (describing the internal versus international nature of an armed conflict). The conflict is widely considered to be international in scope. See *supra* note 88.

156. See *supra* note 89 and accompanying text.

157. See *supra* note 88 and accompanying text.

158. See *supra* notes 1-5 (describing specifics of plaintiffs' complaints and atrocities).

acts fit the classic definition of a "tort."¹⁵⁹ Additionally, they constitute violations of the Geneva Conventions. The Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention IV) explicitly proscribes rape and enforced prostitution.¹⁶⁰ It also implicitly covers acts of forced maternity and forced pregnancy under its prohibition of any "form of indecent assault."¹⁶¹

Moreover, according to the International Committee of the Red Cross (ICRC), rape is also proscribed under the "Grave Breaches" provisions of the Geneva Conventions.¹⁶² In addition, the Geneva Conventions explicitly state that torture, summary executions, and cruel and inhuman or degrading treatment are "grave breaches."¹⁶³ It is important to note, however, that the essence of the actions before the court¹⁶⁴ was the recognition that gender-specific abuses are worthy of the same degree of condemnation under international human rights law as other forms of violence.

The third step of the inquiry should have been whether plaintiffs are members of the class of persons protected under the Conventions. According to the Conventions, protected persons include those who are in the hands of a party "of which they are not nationals."¹⁶⁵ Yet, whether or not the Croatian and Muslim victims are considered nationals of the Bosnian-Serbs, the Bosnian-Serbs agreed to be bound by all of the provisions of the Geneva Conventions. Therefore, the Bosnian-Serbs should

159. A tort is "[a] private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages." BLACK'S LAW DICTIONARY 1335 (5th ed. 1979).

160. Geneva Convention IV provides that women are to be "especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention IV, *supra* note 76, art. 27.

161. *Id.* Gender-specific abuses are further covered by the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), which requires that women "be treated with all the regard due to their sex." Geneva Conventions, *supra* note 76, art. 14.

162. See *supra* note 92 (listing the "grave breaches" of the Geneva Conventions). In addition, the U.S. Department of State has pronounced that "the legal basis for prosecuting troops for rape is well established under the Geneva Conventions." See *supra* note 101.

163. See *supra* note 92 and accompanying text.

164. See *supra* note 5 (discussing K's action against Karadzic, which encompasses excessively gender-specific abuses). See also Wu, *supra* note 43 (discussing K's action against Karadzic and the tension between K's action and the action brought by the Doe plaintiffs).

165. Geneva Convention IV, *supra* note 76, art. 4.

be liable under the Geneva Conventions for abuses perpetrated against the Bosnian-Muslims and Croats.¹⁶⁶

The court's last line of inquiry should have been whether Karadzic may be held liable for the acts of the Bosnian-Serb forces.¹⁶⁷ The defendant, as the leader of the SDP, agreed to adhere to the legal obligations and duties set forth in the Geneva Conventions.¹⁶⁸ Therefore, the court should have assumed subject matter jurisdiction over plaintiffs' claims if they sufficiently alleged that Karadzic committed torts in violation of the Geneva Conventions.

The Geneva Conventions expressly prescribe individual liability "for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."¹⁶⁹ Although the plaintiffs did not allege that Karadzic directly perpetrated any torts, under the well-established doctrine of command responsibility, plaintiffs need not show that defendant expressly ordered or was directly involved in the tortious conduct.¹⁷⁰ To establish subject matter jurisdiction, it is enough that the plaintiffs alleged that Bosnian-Serb forces under defendant's command and control committed extensive human rights abuses.¹⁷¹ Pursuant to command responsibility, the court should have inferred that the defendant at least permitted, if not secretly ordered, his forces to commit such acts.¹⁷²

Moreover, the court could have imputed notice to the defendant that his forces committed the alleged abuses.¹⁷³ During the Bosnian conflict, the media, the United Nations, and governmental sources regularly reported the widespread atrocities that the Bosnian-Serb forces, under the defendant's command and

166. See *supra* note 94 and accompanying text (discussing the authoritative commentary of the ICRC regarding "protected persons" under the Conventions).

167. Plaintiffs allege that defendant had "command authority over the Bosnian-Serb military forces fighting against the government of Bosnia-Herzegovina, with the support of the government of Yugoslavia and its army. Acting under [Karadzic's] command and control, his forces have inflicted a campaign of gross human rights violations upon the civilian population." See *supra* note 1. These allegations are taken as true for the purposes of a motion to dismiss.

168. See *supra* note 89 and accompanying text (citing the Agreement to comply with the Geneva Conventions)

169. Geneva Convention IV, *supra* note 76, art. 146.

170. See O'Brien, *supra* note 88, at 651; part I.C.3.b. (describing the doctrine of command responsibility).

171. See *supra* note 118 (discussing the doctrine of command responsibility).

172. See O'Brien, *supra* note 88, at 652 n.57.

173. *Id.*

control, committed.¹⁷⁴ In addition, Karadzic's troops have acted with impunity, making no effort to hide their practices of ethnic cleansing.¹⁷⁵ The widespread knowledge of the Bosnian-Serb abuses and public nature of the acts have made it difficult for Karadzic to disavow knowledge of the alleged abuses.

Because Karadzic has not attempted to stop the widespread rapes or hold any of his soldiers or commanders accountable for these abuses,¹⁷⁶ it is unlikely that Karadzic will be able to offer as a defense that he took steps "to prevent, repress or punish those responsible for violations of international humanitarian law."¹⁷⁷ Accordingly, the court should have found that at least for the purposes of a motion to dismiss, plaintiffs alleged facts which, if true, could have supported the conclusion that Karadzic may be held liable for the acts imputed to him under the doctrine of command responsibility.

C. PROPOSED ANALYSIS OF KARADZIC'S ALLEGED TORTIOUS ACTS PURSUANT TO COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

The court's analysis under Common Article 3 should be similar to the analysis regarding the applicability of the Geneva Conventions to international conflicts. Again, the analysis has four steps: (1) whether Common Article 3 is applicable to the Bosnian armed conflict; (2) whether the plaintiffs are protected by Common Article 3; (3) whether plaintiff's alleged torts are proscribed by Common Article 3; and (4) whether the defendant is individually liable for the acts imputed to him.¹⁷⁸

The first and second steps of the inquiry are straightforward. Common Article 3 applies to the Bosnian conflict because it meets the definitional criteria of an armed conflict.¹⁷⁹ Fur-

174. See *supra* note 40 and accompanying text (providing examples of reports of atrocities).

175. See *supra* notes 38-42 and accompanying text (highlighting specific reports of widespread atrocities for which no Bosnian-Serb forces have been held accountable).

176. See *supra* notes 40, 119 and accompanying text (discussing Karadzic's command responsibility in light of reports of widespread abuses).

177. See *supra* note 119 (to date, Karadzic has not punished anyone for war crimes).

178. See *supra* part III.B.

179. See *supra* notes 89-90 and accompanying text (citing evidence supporting existence of an armed conflict). The ICRC Commentary sets forth a number of "nonobligatory" criteria helpful in determining if application of Common Article 3 is appropriate. See *supra* note 83. The Bosnian conflict undoubtedly meets nearly each criteri. The Bosnian-Serbs possess an organized military

thermore, Common Article 3 protects the plaintiffs because it covers all "persons taking no active part in hostilities."¹⁸⁰

Third, the court should have concluded that plaintiffs properly alleged torts committed in violation of a United States Treaty—Common Article 3 of the Geneva Conventions. Plaintiffs contended that Karadzic's forces committed acts of torture, summary execution, and cruel, inhuman and degrading treatment, all acts that Common Article 3 explicitly proscribes.¹⁸¹ Furthermore, the court should have concluded that plaintiffs' allegations of rape and other gender-specific abuses violate Common Article 3's prohibitions regarding acts of "cruel treatment," "outrages upon personal dignity, in particular humiliating and degrading treatment," and "torture."

Finally, the court should have found that Common Article 3's provisions apply not only to states or governments, but to any party of an armed conflict.¹⁸² The Bosnian-Serb forces are a party to the conflict. Common Article 3 thus reaches their non-state conduct, without conferring upon them any additional political or legal recognition.¹⁸³ Therefore, under the doctrine of command responsibility, Karadzic is individually liable for any violations his forces commit in contravention of Common Article 3.¹⁸⁴

force; Radovan Karadzic, as head of the armed forces, is responsible for its acts; the self-proclaimed Bosnian-Serb Republic controls a "determinate territory; and the Republic has the means to ensure respect for the convention. Moreover, the Bosnian government was obliged to have recourse to its military forces against the Bosnian-Serb forces in control of two-thirds of the Bosnian territory, and, by signing the Agreement of May 22, 1992, has accorded the Bosnian-Serbs with the status of belligerents for the purposes of Common Article 3. In addition, the dispute has been admitted to the agenda of the Security Council of the United Nations as being a threat to international peace. See *supra* note 48 (stating that this threat led to the Security Council's establishment of an ad hoc international criminal tribunal).

180. See *supra* note 96 and accompanying text.

181. See *supra* note 98 and accompanying text.

182. See *supra* note 97 and accompanying text.

183. See *supra* note 97 and accompanying text. Common Article 3 is meant to remove the very defense which the *Karadzic* court, in large part, rested its decision upon, namely the non-state conduct by a defendant. Common Article 3 was designed to protect all persons caught in internal conflicts from humanitarian abuses by any party to the conflict without regard to that party's legal or political status. *Id.*

184. See *supra* part I.C.3.b.

D. PROPOSED ANALYSIS OF KARADZIC'S ALLEGED TORTIOUS ACTS PURSUANT TO THE GENOCIDE CONVENTION

Plaintiffs also properly asserted jurisdiction under the Alien Tort Statute for acts of genocide.¹⁸⁵ Consistent with an analysis of Karadzic's motion to dismiss, plaintiffs' claims that the Bosnian-Serb forces, under Karadzic's command and control, ethnically cleansed areas of Bosnia with the intent to destroy the non-Serb population are presumed true.¹⁸⁶ Consequently, the court need not have established Karadzic's intent to commit genocide to have held that it had subject matter jurisdiction over plaintiffs' claims.

The court, however, should have determined whether it could have held Karadzic liable under the Genocide Convention and whether the abuses plaintiffs alleged could constitute acts of genocide pursuant to the Genocide Convention. According to Article III of the Genocide Convention, Karadzic may be directly liable for ordering or condoning acts of genocide whether he is considered a non-state or official actor.¹⁸⁷ The allegations of Bosnian-Serb acts of rape, forced pregnancy, and forced maternity fit the definition of the crime of genocide, because they cause "serious bodily or mental harm" to the Bosnian Muslims or Bosnian Croats.¹⁸⁸ In addition, the Bosnian Serb campaign of "ethnic cleansing," including gender-specific abuses, constitutes "conditions of life calculated to bring about the physical destruction" of the Muslims and Croats "in whole or in part."¹⁸⁹ Moreover, the plaintiffs' allegations of acts of Bosnian-Serb forced impregnation of Muslims and Croats to increase the birth of Serbian children "impose[s] measures intended to prevent births within the [Muslim and Croat] groups."¹⁹⁰ Accordingly, United States courts encountering this issue should confer subject matter jurisdiction over allegations of non-state acts of genocide under the Alien Tort Statute.

185. See *supra* note 125 and accompanying text.

186. See *supra* note 126 (asserting that plaintiffs' allegations of abuse should be taken as true for purposes of a motion to dismiss).

187. Genocide Convention, *supra* note 77, art. 3.

188. See *supra* notes 102-103 and accompanying text.

189. See *supra* note 104; see also part I.B (describing the Bosnian-Serb campaign of ethnic cleansing).

190. Genocide Conventions, *supra* note 77, art. 2(d).

CONCLUSION

The *Karadzic* court failed to mention, let alone assess, pivotal, yet basic, norms of international law applicable to human rights abuses perpetrated during an armed conflict. Moreover, the court erroneously concluded, by misreading and misquoting precedent, that the Alien Tort Statute does not cover non-state conduct. In so doing, the court narrowed its analysis, considering only allegations of torture. The court ignored all other claims, particularly the allegations of gender-specific abuses. The court thus mistakenly treated the distinction between official and private acts as the *sine qua non* of liability under the Alien Tort Statute. The *Karadzic* court's failure to properly analyze plaintiff's claims reflects poorly on the United States' commitment to safeguard human rights.

A proper analysis under the Alien Tort Statute should hold that non-state actors, particularly heads of armed opposition groups, are accountable for non-state tortious acts proscribed under international law. To hold otherwise is to bar legitimate claimants from bringing suit under the Alien Tort Statute against private actors for egregious violations of human rights. The reviewing court should thus conclude that both the Geneva Conventions and the Genocide Convention provide subject matter jurisdiction under the Alien Tort Statute for the acts imputed to *Karadzic*. Such a holding recognizes all war crimes and acknowledges that mass rape and other gender specific abuses violate provisions of the Geneva Conventions and may rise to the level of genocide.