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## Kadic v. Karadzic: Whose International Law

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# Recent Developments

## *Kadic v. Karadzic: Whose International Law?*

AMY E. ECKERT

### I. INTRODUCTION

Since the decision of the Second Circuit Court of Appeals in *Filartiga v. Peña-Irala*,<sup>1</sup> a number of foreign plaintiffs have pursued their tort claims in American federal courts under the the Alien Tort Claims Act (ATCA). The ATCA allows the district courts to exercise “original jurisdiction of any civil action by any alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> Although the ATCA dates back to the Judiciary Act of 1789, it was largely ignored prior to the *Filartiga* decision. ATCA jurisdiction had been sustained in only two cases prior to *Filartiga*.<sup>3</sup> In addition to the rarity of cases in which courts sustained ATCA jurisdiction, the denial of ATCA jurisdiction in several other claims “created the impression that the law of nations . . . could not be violated when the victim was a national of the acting state.”<sup>4</sup> After the *Filartiga* decision, use of the ATCA to gain access to federal courts increased dramatically.

While Judge John O. Newman, writing for the Court of Appeals, noted that “[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of

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1. 630 F.2d 876 (2d Cir. 1980).

2. 28 U.S.C. § 1350 (1993).

3. Jurisdiction was sustained in *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795)(The District Court accepted jurisdiction for a claim that slaves belonging to a Spanish subject but seized on board a British ship should be returned) and *Adra v. Clift*, 195 F.Supp. 857 (D.Md. 1961)(The District Court exercised jurisdiction over a child custody claim between a Lebanese national and an Iraqi national).

4. Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 55 (1981).

the insurgent Bosnian-Serb forces in a United States District Court in Manhattan,<sup>5</sup> *Kadic v. Karadzic* represents just the latest link in a chain of tort claims against aliens litigated in the U.S. Since the comparative flood of ATCA litigation after the *Filartiga* opinion,<sup>6</sup> many aspects of this statute have received significant attention from legal scholars as well as litigants. The scholarly debates over the ATCA center largely around the origins and purpose of the statute<sup>7</sup> and its application to violations by private individuals as opposed to state actors.<sup>8</sup> The Second Circuit Court of Appeals' recent decision in *Kadic v. Karadzic* brings to the forefront yet another question about ATCA claims, that being *which* international legal obligations apply when determining whether or not a violation of international law has taken place.

*Kadic v. Karadzic* involves appeals by two groups of plaintiffs who have suffered human rights violations in the course of the conflict in the former Yugoslavia. These plaintiffs sued Karadzic for the human rights violations, including genocide, rape and torture.<sup>9</sup> In their appellate briefs, both the plaintiffs and defendant alternately alleged that Karadzic acted as a private individual and as President of Srpska, the Bosnian Serb entity which declared its independence from Bosnia-Herzegovina.<sup>10</sup> The Court of Appeals found that Srpska meets the requirements of statehood under international law, in spite of a lack of recognition from other states.<sup>11</sup> However, the Court failed to consider the implications of Srpska's statehood for the determination of Srpska's obligations under international law, as well as any violations of these obligations. Principles of state succession and customary international law can potentially create significant differences in the obligations which bind the United States and those which bind Srpska.

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5. 70 F.3d 232, 236 (2d Cir. 1995).

6. As noted above, prior to the *Filartiga* decision, courts had sustained ATCA jurisdiction in only two cases. Since *Filartiga*, a number of foreign tort claimants have alleged ATCA jurisdiction in U.S. courts, particularly in claims of human rights violations. One of the most notable of these is *In re Estate of Marcos Human Rights Litigation*, 910 F.Supp 1460 (D. Haw. 1995).

7. See Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); and Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

8. See John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law* 21 VAND. J. TRANSNAT'L L. 47 (1988).

9. 70 F.3d at 237

10. 70 F.3d at 239

11. 70 F.3d at 243. While recognition undeniably carries important political and legal consequences, a lack of recognition does not defeat the unrecognized state's existence or permit non-recognizing states to treat the entity as anything but a state. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979) 23-24.

These differences raise the important question of which standard appropriately determines the "violation of international law" required for jurisdiction under the ATCA: the standard according to American obligations or Srpskan obligations. Applying the American standard may hold Srpska to obligations set forth in treaties to which Srpska is not a party. The effect of this would be to create new obligations instead of enforcing pre-existing obligations.

## II. BACKGROUND

### A. *The District Court's Dismissal*

In *Kadic v. Karadzic*, the two groups of Bosnian plaintiffs appealed from dismissals in District Court.<sup>12</sup> In District Court, Judge Peter K. Leisure dismissed both claims for lack of subject-matter jurisdiction.<sup>13</sup> In their complaints, the plaintiffs alleged genocide, rape, forced prostitution and impregnation, torture, and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.<sup>14</sup> Plaintiffs asserted subject-matter jurisdiction for these claims under the ATCA as well as the Torture Victim Protection Act (the Torture Victim Act) and 28 U.S.C. § 1331.<sup>15</sup> The Court had personal jurisdiction over Karadzic through personal service while he was present in the Southern District of New York. In each claim, Karadzic was served personally with a summons and complaint while he was present in Manhattan on invitation from the United Nations.<sup>16</sup> In District Court, Karadzic moved for dismissal on four grounds: (1) insufficient service of process, (2) lack of personal jurisdiction, (3) lack of subject-matter jurisdiction, and (4) nonjusticiability of the plaintiffs' claims.<sup>17</sup>

Without addressing the other issues raised, the District Court Judge dismissed the case for lack of subject-matter jurisdiction.<sup>18</sup> Judge Leisure alluded to the question of justiciability, by noting that the Executive Branch could recognize Karadzic as the head of state of a friendly nation, thereby entitling Karadzic to head of state immunity and transforming the plaintiffs' claims against Karadzic into a request for an advisory opinion.<sup>19</sup> This potential, while not dispositive of the jurisdictional issues, weighed against the exercise of jurisdiction by the District Court in his opinion.<sup>20</sup>

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12. 70 F.3d at 236.

13. *Id.*

14. 70 F.3d at 237

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Noting this possible problem, Judge Leisure turned to the question of subject-matter jurisdiction. Asserting that non-state actors could not violate international law, and that the Bosnian Serb entity, "Srpska," was not a recognized state, Judge Leisure held that the ATCA could not provide subject-matter jurisdiction because Karadzic, as a private actor, could not violate international law.<sup>21</sup> Similarly, because Srpska was not a state, Karadzic could not have acted "under the color of law" of a foreign nation as required by the Torture Victim Act.<sup>22</sup> Judge Leisure's view that no state action was involved, along with a belief that express Congressional authorization was necessary to create a cause of action, led the District Judge to reject the Section 1331 argument as well.<sup>23</sup> The District Court's opinion did not address the plaintiffs' alternative argument that Karadzic acted in concert with Yugoslavia, a recognized state.

### B. *The Court of Appeals Reverses*

On appeal, the U.S. Court of Appeals reversed the District Court's dismissal of the plaintiffs' claims and remanded the cases for proceedings on the merits of the case.<sup>24</sup> In preparation for the appeal, the parties had briefed the issues of subject-matter jurisdiction, the basis of the dismissal, as well as personal jurisdiction and justiciability.<sup>25</sup> Karadzic asked the Court of Appeals to affirm the District Court's dismissal on any of these three grounds.<sup>26</sup> While the District Court had dismissed the complaints on subject-matter jurisdiction alone, the Court of Appeals addressed each of these three issues.

#### 1. Subject-Matter Jurisdiction

The Court commenced its review by reconsidering the question of subject-matter jurisdiction, which constituted the basis of the District Court's dismissal. This review included an examination of three potential bases for subject-matter jurisdiction: the Torture Victim Act, Section 1331 and the ATCA. The Court of Appeals held that the Torture Victim Act created a cause of action but could not alone confer subject-matter jurisdiction.<sup>27</sup> To assert this cause of action, the plaintiffs must base subject-matter jurisdiction in the ATCA or Section 1331.<sup>28</sup> While the Court also addressed Section 1331 jurisdiction, it pointed out that the issue of specific Congressional authorization of the plaintiffs' cause of action was moot in this case because the causes of

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21. *Id.*

22. 70 F.3d at 238.

23. *Id.*

24. 70 F.3d at 251.

25. 70 F.3d at 238.

26. *Id.*

27. 70 F.3d at 246.

28. *Id.*

action asserted by the plaintiffs were statutorily authorized by the ATCA and the Torture Victim Act.<sup>29</sup> The Court of Appeals chose to rest subject-matter jurisdiction on the ATCA.<sup>30</sup>

The ATCA endows the District Courts with original jurisdiction over aliens' tort claims if the tort is also a violation of international law or a treaty of the United States.<sup>31</sup> Because subject-matter jurisdiction under the ATCA depends upon a violation of international law, the Court of Appeals noted that "this statute requires a more searching review of the merits than is required under the more flexible 'arising under' standard of section 1331."<sup>32</sup> Before conducting a searching review of the merits of the plaintiffs' claims, the Court first addressed the threshold issue of whether non-state actors can commit violations of international law. The Court of Appeals rejected the District Court's view that only states could violate international law, stating that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."<sup>33</sup> In support of this position, the Court cited piracy as an early example of individual conduct that violated international law, and slave trading and war crimes as more contemporary examples.<sup>34</sup> Moreover, the two pre-Filartiga ATCA cases in which jurisdiction was sustained, *Adra v. Clift* and *Bolchos v. Darrell*, dealt with conduct by private individuals.<sup>35</sup>

To bolster his claim that the District Court lacked subject matter jurisdiction, Karadzic contended that because the Torture Victim Act requires state action, this requirement also attaches to any claim under the ATCA.<sup>36</sup> The Court rejected this argument as well. Relying on the legislative history behind the Torture Victim Act, the Court stated that Congress' enactment of the Torture Victim Act left the scope of the ATCA undiminished.<sup>37</sup> Congress intended the Torture Victim Act to codify the *Filatriga* decision in light of attacks on it, primarily from Judge Bork in his concurring opinion in the *Tel-Oren* case.<sup>38</sup> Recognizing that the scope of torts under international law extended beyond torture and summary execution, Congress intentionally left the ATCA intact to address those additional torts, as well as potential future torts which may result from continually-evolving rules of customary

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29. *Id.*

30. *Id.*

31. 28 U.S.C. §1350 (1988).

32. 30 F.3d 232 at 238.

33. 30 F.3d 232 at 239.

34. *Id.*

35. 70 F.3d at 240.

36. 70 F.3d at 241.

37. 70 F.3d at 241.

38. *Tel-Oren v. Libyan Arab Republic*, 760 F.2d 774, 233 U.S. App. D.C. 384 (1984).

international law.<sup>39</sup>

Having disposed of these objections by the defense and established subject matter jurisdiction, the Court proceeded to conduct its searching review of the violations alleged by the plaintiffs. For purposes of this review, the court grouped the plaintiffs' claims into three broad categories: genocide, war crimes, and torture. Citing its previous decision in *Amerada Hess*, the Court noted the need to examine "evolving standards of international law" to determine the scope of subject-matter jurisdiction under the ATCA.<sup>40</sup> Bearing in mind this consideration, the Court continued by analyzing the substantive law prohibiting the three categories of violations alleged by the plaintiffs.

Looking first to the allegations of genocide, the Court noted that after the Second World War, the prohibition against genocide quickly gained acceptance by states.<sup>41</sup> As evidence of this prohibition, the Court cited the Convention on the Prevention and Punishment of the Crime of Genocide<sup>42</sup> and the Genocide Convention Implementation Act of 1987.<sup>43</sup> Both the Genocide Convention and the Genocide Convention Implementation Act prohibit genocide regardless of whether the persons committing the genocidal acts are state officials or private individuals.<sup>44</sup> Because of this prohibition against genocide, the Court of Appeals held that the District Court has subject matter jurisdiction over the claims of genocide.<sup>45</sup>

Similarly, the laws of war, as codified after World War II in the Geneva Conventions, prohibit violations by private individuals.<sup>46</sup> Common Article 3, which is contained in all four Geneva Conventions, sets forth some of the key prohibitions of violence against non-combatants. These types of crimes are the ones which the plaintiffs claim that Karadzic and his troops committed. Consequently, the Court of Appeals found that the District Court also has jurisdiction over the plaintiffs' claims of war crimes.<sup>47</sup>

While acts of genocide and war crimes are prohibited regardless of who commits them, prohibitions of torture apply only to those acting "under color of law."<sup>48</sup> In support of the prohibition on official torture,

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39. 70 F.3d at 241.

40. *Id.*, citing *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 2d Cir. 1987). rev'd on other grounds, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).

41. *Id.*

42. 78 U.N.T.S. 277, entered into force Jan. 12, 1951, for the United States February 23, 1989.

43. 18 U.S.C. § 1091 (1988).

44. 70 F.3d at 241.

45. 70 F.3d at 242.

46. 70 F.3d at 243.

47. *Id.*

48. *Id.*

the Court cited the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,<sup>49</sup> the Torture Victim Act,<sup>50</sup> and the *Filartiga* decision.<sup>51</sup> The court noted, however, that many of the acts of torture alleged by the plaintiffs could be subsumed under the other categories of violations, genocide and war crimes, provided that the plaintiffs could prove that the acts were committed as part of a genocidal campaign or in the course of an armed conflict.<sup>52</sup> For purposes of determining jurisdiction, the Court of Appeals found it sufficient "to hold . . . that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadzic to the extent that he is shown to be a state actor."<sup>53</sup>

Because Karadzic's status as a state actor would determine jurisdiction over the plaintiffs' torture claims, the Court of Appeals turned its attention to the question of whether or not Srpska constitutes a state under international law. The Court cited the Restatement's definition of a state as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."<sup>54</sup> This definition also reflects that found in the Montevideo Convention on the Rights and Duties of States.<sup>55</sup> The Restatement definition does not require that a state receive diplomatic recognition from other states.<sup>56</sup> The Court observes that while recognized states "enjoy certain privileges and immunities relevant to judicial proceedings, but an unrecognized state is not a juridical nullity."<sup>57</sup>

Applying the standard for statehood to Srpska, the Court noted that "Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other gov-

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49. Dec. 10, 1984, U.N.G.A. Res. 39/46 Annex, 39 U.N. GAOR, Supp. (No. 51) 197, reprinted in I.L.M. 1027 (1984).

50. Pub.L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note (Supp. V 1993).

51. 630 F.2d 876 (2d Cir. 1980).

52. 70 F.3d at 244

53. *Id.*

54. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS §201, cited with approval in *Id.*

55. Article 1 of the Convention on the Rights and Duties of States provides that: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Dec. 26, 1933, 49 State. 3097, 165 L.N.T.S. 19.

56. RESTATEMENT (THIRD) § 202 cmt. b. *See also* Convention of the Rights and Duties of States, art. 3, which states that the existence of a state is independent of recognition by other states.

57. 70 F.3d at 244.



ernments. It has a president, a legislature, and its own currency."<sup>58</sup> In the Court's view, these circumstances satisfied the requirements for statehood.<sup>59</sup> The Court also noted that the standard for statehood could be relaxed for purposes of fulfilling a "state action" requirement for violations such as official torture. The relevant inquiry in such cases is "whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."<sup>60</sup> The "semblance of official authority" can suffice for purposes of determining state action. Acting in concert with a recognized state, such as Yugoslavia, can also satisfy the requirement that an individual act "color of law."<sup>61</sup>

## 2. Personal Jurisdiction

Having satisfied the subject matter jurisdictional issues, the Court of Appeals turned its attention to the sufficiency of service of process and personal jurisdiction. Both the plaintiffs and Karadzic acknowledge that process servers personally served Karadzic while he was physically present in the Southern District of New York as an invitee of the United Nations.<sup>62</sup> Such personal service of process is authorized under Fed.R.Civ.P. 4(e)(2), and complies with the requirements of the Due Process clause.<sup>63</sup>

As a defense to this personal service, Karadzic claimed that he was immune from service under the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations ("Headquarters Agreement") and federal common law. Karadzic also asserted that the possibility of his recognition as the head of state of a friendly country, which would entitle him to immunity, should prohibit the exercise of personal jurisdiction over him.

While the Headquarters Agreement does provide some immunity from suit, this immunity is very narrowly defined. One constraint on immunity is geographical. Within the well-defined U.N. headquarters district, service of process requires the consent of the Secretary-General.<sup>64</sup> However, Karadzic was not within the headquarters district, as defined by the Headquarters Agreement, when he was served in either the Doe or Karadzic action.<sup>65</sup> A second limitation entitles representatives of U.N. member states to the same immunities as other diplo-

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58. 70 F.3d at 245.

59. *Id.*

60. *Id.*

61. *Id.*

62. 70 F.3d at 246.

63. 70 F.3d at 247.

64. *Id.*

65. *Id.*

mats.<sup>66</sup> This limitation does not apply to Karadzic either, because he is not a designated representative of any member state.<sup>67</sup> Karadzic raised a third argument under the Headquarters Agreement. Based on the prohibition on federal, state, and local U.S. authorities from impeding the transit of U.N. invitees to or from the headquarters district,<sup>68</sup> Karadzic argued that allowing service of process on a U.N. invitee constituted a burden of the type prohibited by the Headquarters Agreement.<sup>69</sup> The Court rejected Karadzic's argument, stating that acceptance of Karadzic's claim would create a new immunity not intended by the Headquarters Agreement.<sup>70</sup> The language of the Headquarters Agreement does not support the extension of immunity Karadzic sought, nor did it fall within the intention of the parties to the Agreement.<sup>71</sup>

Aside from the arguments he raised under the Headquarters Agreement, Karadzic claimed immunity from service under federal common law. Drawing an analogy from the immunity that those on government service in Washington, D.C., or those appearing for purposes of litigation enjoy, Karadzic contended that he should enjoy similar immunity by virtue of his status as a U.N. invitee.<sup>72</sup> The Court rejected Karadzic's claim of immunity under federal common law, claiming that to do so would extend the immunities set forth in the Headquarters Agreement and create a new immunity not intended by the United States or the United Nations.<sup>73</sup>

Finally, Karadzic raised as a defense the possibility that in the future, he may be recognized as a friendly head of state entitled to immunity.<sup>74</sup> While this argument held great weight with the District Court, the Court of Appeals felt that to create such an immunity would be inappropriate in light of the Executive Branch's failure to grant Karadzic this recognition.<sup>75</sup>

### 3. Justiciability

Karadzic challenged the appropriateness of the Court's exercising its jurisdiction on the grounds of justiciability.<sup>76</sup> Specifically, Karadzic raised challenges under the political question and act of state doctrines. Turning first to the political question issue, the court noted that

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. 70 F.3d at 248.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

the political question and the act of state doctrine both touch on the issue of this case.<sup>77</sup> While recognizing the potential of judicial action to impact foreign policy, the Court rejected an absolute position that every case "touching foreign relations" could not be adjudicated.<sup>78</sup> Rather, the Court advocated examining each case individually, taking into consideration judicial authority to act under §1350 and balancing against that the political branches' primacy in setting foreign policy.<sup>79</sup>

Karadzic alleged that the present question represents a nonjusticiable political question, but the Court disagreed.<sup>80</sup> Citing the Supreme Court's decision in *Baker v. Carr*,<sup>81</sup> the Court of Appeals listed six factors which could render an issue nonjusticiable:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>82</sup>

While one or more of these factors could compromise the justiciability of an issue, the Court found none of these factors present in *Kadic v. Karadzic*. With regard to the first three *Baker* factors, the Court noted that the adjudication of tort claims was constitutionally assigned to the Judiciary, making a conflict in that respect impossible.<sup>83</sup> Moreover, "universally recognized norms of international law" could provide discoverable and manageable standards for adjudicating ATCA cases.<sup>84</sup> As for the last three *Baker* factors, the Court stated that these applied only to cases where "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."<sup>85</sup>

Karadzic also challenged the justiciability of this case because of the act of state doctrine. The Court acknowledged that the act of state doctrine, which restricts American courts' ability to judge the acts of a

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77. 70 F.3d at 249.

78. *Id.*

79. *Id.*

80. *Id.*

81. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

82. 70 F.3d at 249, citing *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710.

83. 70 F.3d at 249.

84. *Id.*

85. 70 F.3d at 249.

foreign government within its own territory, can apply to some cases that arise under §1350.<sup>86</sup> While the act of state doctrine does limit courts' capacity to exercise jurisdiction in some cases, it does not apply to acts which are "taken in violation of a nation's fundamental law and wholly unratified by that nation's government."<sup>87</sup>

After rejecting both the political question and the act of state doctrine as barriers to the justiciability of *Kadic v. Karadzic*, the Court derived comfort from reassurances the plaintiffs had received from the Department of State after the commencement of their action.<sup>88</sup> In response to the plaintiffs' inquiry, the State Department replied that "Karadzic was not immune from suit as an invitee of the United Nations."<sup>89</sup> The Court also sought and received reassurances from the Attorney General.<sup>90</sup> The Solicitor General and the Legal Adviser to the State Department expressly denied the existence of a "political question" in the present case.<sup>91</sup> This denial by the Executive Branch fortified the Court of Appeals' view "that adjudication may properly proceed."<sup>92</sup>

### III. SRPSKA'S OBLIGATIONS UNDER INTERNATIONAL LAW

The Court's resolution of the jurisdictional issues does not resolve all of the troublesome legal questions in this case. Specifically, the Court failed to address the question of which standard of legal obligation should determine if Karadzic's conduct violated international law. The Court of Appeals cited numerous multilateral treaties but failed to address the issue of whether or not these treaties are binding upon Srpska. Srpska's status as a new state highlights the complexity of this issue, as its treaty obligations are uncertain. By imposing an improper standard, the Court of Appeals may have overstepped its authority by creating new obligations, rather than enforcing existing ones.

A vital element of state sovereignty is the state's independence from obligations that do not arise from the consent of the sovereign. Clearly, this implies that each state's obligations under international law will differ depending on which obligations the sovereign has chosen to accept. The differences in states' obligations mean that an inquiry as to whether or not a tort "in violation of the law of nations" has taken place, as required by the ATCA, will yield varying results depending on which state's obligations are considered.

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86. 70 F.3d at 250.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

In the past, plaintiffs have raised ATCA claims against established states with determined obligations under international law. *Kadic v. Karadzic* brings the issue of legal obligations to the forefront because Srpska, which the Court of Appeals found to exist as an unrecognized state, is a new state with uncertain obligations under international law. The doctrines of state succession and customary international law raise questions about the nature and extent of Srpska's obligations under international law. By applying American obligations under international law, the District Court on remand could potentially impose obligations on Srpska which it would not otherwise have, merely by virtue of its head of state's physical presence in Manhattan.

#### A. *State Succession*

The law of state succession determines which "capacities, rights, and duties of the predecessor state . . . are assumed by the successor state" upon its creation.<sup>93</sup> This body of law includes the rules that apply to treaty obligations of new states. Unfortunately, the rules on state succession and treaty obligations do not constitute a unified body of rules. Authorities are divided between the "universal succession" view, that the treaty obligations of the predecessor state continue once the new state becomes independent, and the "clean slate" view, that successor states can choose which of the predecessor state's obligations continue.

The Vienna Convention on Succession of States in Respect of Treaties<sup>94</sup> supports the former view. However, this treaty lacks sufficient ratifications and has not yet entered into force. The Vienna Convention reflects the view of "universal succession," which holds that a successor state inherits its territory from the predecessor, along with the predecessor's personality and legal relationships.<sup>95</sup> Due to widespread contrary state practice, the "universal succession" view has been replaced by the "clean slate" view of state succession, as reflected in the Restatement. According to the "clean slate" rule, the successor state "sieves what it can and repudiates what it will."<sup>96</sup>

The Restatement of the Law of Foreign Relations, in contrast to the Vienna Convention, supports the "clean slate" rule, which allows the successor state to select which of the predecessor's treaty obligations it wishes to assume. The Restatement provides that

[w]hen part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was a party, unless, expressly or by implication, it accepts

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93. RESTATEMENT (THIRD) §208.

94. U.N. Doc. A/CONF. 80/31, 72 AM. J. INT'L L. 971 (1978).

95. D.P. O'CONNELL, THE LAW OF STATE SUCCESSION (1956) 6-7.

96. *Id.* at 8.

such agreements and the other party or parties thereto agree or acquiesce.<sup>97</sup>

Boundary and territorial agreements constitute the only exception to this rule under the Restatement.<sup>98</sup>

Depending on which of these two rules is applied, Srpska may or may not be bound automatically by Bosnia-Herzegovina's treaty obligations. Assuming that the application of the Restatement's "clean slate" rule would be appropriate in an American District Court, then the extent of Srpska's treaty obligations depends upon which of Bosnia-Herzegovina's treaty obligations Srpska has chosen to accept. The issue becomes one of determining factually which treaty obligations Srpska has accepted, either implicitly or explicitly, and which acceptances have been approved by the other parties to these agreements.

The Court of Appeals cited several treaties in its review of the international legal prohibitions against genocide, war crimes and torture. However, it failed to address the question of whether or not these treaties bind Srpska. This issue must be addressed on remand by the District Court. While these treaties cited by the Court of Appeals undoubtedly prohibit the torts alleged by the plaintiffs, if Srpska is not bound by these treaties, then the Court of Appeals may have imposed an obligation on a state, albeit an unrecognized one, to which that state did not consent.

#### B. *Customary International Law*

As an alternative to their treaty-based claims, the plaintiffs could raise their tort claims as violations of customary international law. Internationally recognized custom can constitute a source of law, as recognized in the Statute of the International Court of Justice.<sup>99</sup> The Restatement defines customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation."<sup>100</sup> As this definition indicates, to become a rule of international law, a custom must be followed consistently by states, but must also be supported by *opinio juris*, the view that the practice is obligatory.

Consistent with the consensual nature of international law and its limitation of obligations to those accepted by the sovereign, a state which consistently objects to and fails to follow a custom from the

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97. RESTATEMENT §210 (3).

98. RESTATEMENT §210 (4).

99. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1031, U.N.T.S. 933.

100. RESTATEMENT (THIRD) §102(2).

beginning is not bound by it, even if the custom should evolve into customary international law.<sup>101</sup> The application of this exception to Srpska would be dubious, because "when a new state comes into being and is admitted into the community of nations, it is bound by all rules of international law originating in custom."<sup>102</sup> Karadzic could argue, as a defense, that because Srpska has not been recognized by other states and thereby "admitted to the community of nations," he should not be held accountable for violating the rules generated by this community.

To the degree that human rights norms have evolved into rules of customary international law, Srpska would still be bound by the norms even though it may not be a party to the corresponding treaty. In this case, plaintiffs would have a strong argument that genocide, war crimes and official torture violate customary international law.<sup>103</sup> While Srpska is bound by norms of international law, the source of the obligation differs if it is not a party to the treaties cited by the Court of Appeals. To the extent that the treaties reflect rules of customary international law, the distinction makes no difference. If these treaties, or treaties cited in a future case, do not reflect customary international law, then the effect of a court's citing them creates, rather than enforces, an obligation under international law.

#### IV. CONCLUSION

The ATCA provides a mechanism for U.S. Federal Courts to enforce foreign states' obligations under international law which may otherwise remain unenforced. *Kadic v. Karadzic* highlights the degree to which Courts must take care to apply international law appropriately. Because the effect of state succession on treaty obligations remains unclear, due to the existence of multiple and conflicting standards, Srpska's treaty obligations are subject to argument.

Applying the Restatement's "clean slate" view, the District Court must examine whether or not Srpska has become a party to any of Bosnia-Herzegovina's treaty obligations (which would derive, in turn, from Yugoslavia's obligations) through Srpska's acceptance and the accession by the other parties. If Srpska has not accepted the treaty obligations cited by the Court as evidence of international law, the

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101. While states are bound to follow rules of customary international law, they are not bound to consent to the formation of a new rule. Should that rule eventually attain status as customary international law, the "persistent objector" will not be bound by it. Karol Wolfke, Custom in Present International Law (2d rev. ed. 1993) 66-67. For an application of this rule, see the North Sea Continental Shelf Cases (Denmark v. FRG; the Netherlands v. FRG) 1969 I.C.J. 3.

102. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW, 22.

103. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

Court must further inquire as to whether or not the treaty rules represent customary international law.

If the Court has cited treaties to which Srpska is not a party, and which does not represent customary international law, then it has applied international law inappropriately. In the present case, this issue is largely moot because prohibitions against genocide, war crimes and official torture are widely regarded as rules of customary international law. Even if Srpska has not become a party to the Geneva Conventions, the Convention on the Prevention and Punishment of the Crime of Genocide, or the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, plaintiffs have a strong argument that the standards still apply to Srpska and to Karadzic by virtue of their status as customary international law.

In future cases, the norms embodied by the treaty in question may not enjoy the status of customary international law. In such an instance, the Court would be going beyond enforcing international law by creating an obligation on a state to which the state had not given its consent. By inappropriately applying treaties to which the defendant's state may not be a party, or rules of customary international law by which the state is not bound, the Court would be creating new rights which the plaintiff would not have in the courts of his or her own country. To do so would go beyond an appropriate use of the ATCA to enforce international legal obligations and become an abuse of the courts' authority.



