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DANGERS OF RIGHTEOUSNESS: UNINTENDED CONSEQUENCES OF *KADIC v. KARADZIC*

*David S. Bloch**

I. INTRODUCTION

Enacted in 1789, the Alien Tort Claims Act (ATCA)¹ provides the chief means by which a foreigner may recover in United States federal courts for torture or other violations of international “human rights” norms. It provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”² Though subject to many exceptions, ATCA has been a useful tool in ensuring justice for injured aliens. ATCA suits can also further international human rights policies via the U.S. courts. In addition, the legislative grant of jurisdiction over certain classes of international criminals serves to bolster

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1. 28 U.S.C. § 1350 (1996). An interesting exchange regarding the original purpose of the Alien Tort Claims Act, inspired in part by the *Karadzic* litigation, may be found in Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 447 (1995) (contending that the ATCA originally referred only to certain forms of piracy, particularly the unlawful boarding of ships suspected of aiding the enemy in times of war) and 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) (contending that the drafters of the ATCA in the First Congress did not express a desire to limit it to one class of torts, and that broad language should be broadly construed). In court, Professor Dodge seems to have won the day: Chief Judge Newman denied a petition for rehearing based on Professor Sweeney’s article. *See Kadac v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh’g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 2524 (1996).

2. 28 U.S.C. § 1350 (1996).

the international legal order and, in some cases, to shift a given proposition toward the status of *opinio juris*.³

A number of federal courts have applied the ATCA. Recent litigation indicates that it creates a private right of action.⁴ However, by its language, the statute only pertains to (1) alien litigants (2) wronged in tort (3) in violation of the law of nations or of U.S. treaty law.⁵ These requirements carry with them jurisdictional and substantive limitations. ATCA does not, for instance, provide an alternative basis on which States or their leaders may claim sovereign immunity.⁶ Also, ATCA may only be invoked by a non-American.⁷ Finally, the fact that the tort at issue must violate the law of nations limits the applicability of ATCA to those actors who are subject to international law.

The Second Circuit's decision in *Kadic v. Karadzic*⁸ eliminates the requirement that the defendant in an ATCA suit must be in some way subject to international law. The *Karadzic* decision⁹ permits an ATCA suit against an individual who, though the leader of an international entity, did not act on behalf of a sovereign State and therefore cannot properly be thought of as subject to the dictates of the law of nations. The Second Circuit's well-intentioned decision has the beneficial effect of bringing to bear the weight of the U.S. legal system against a man

3. The Torture Victim Protection Act of 1991 is a striking example of how jurisdictional legislation can further the development of international law. The Act restates the American belief that torture is unlawful in international law and provides for lawsuits over torture under the ATCA—none of which is remarkable by itself. However, the Torture Victim Protection Act does not have any effect on the substantive or procedural laws of the United States—by all accounts, it merely reaffirms *Filartiga's* interpretation of the Alien Tort Claims Act. As such, it is best viewed as a political statement regarding a contested question of international law (reinforcing the international consensus that State torture is prohibited), rather than as a clarification or modification of court jurisdiction. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note) (1996); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

4. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (in dicta); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

5. See *Filartiga v. Pena-Irala*, 630 F.2d at 887.

6. Immunity for States or heads of state is governed by the Foreign Sovereign Immunities Act of 1979, 28 U.S.C. §§ 1330, 1603-11 (1996).

7. "Alien" is defined as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3) (1996).

8. 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (1996).

9. In the body of the text, I often refer to the Second Circuit's decision as *Karadzic* rather than *Kadic* to associate the case's doctrine with the personality who gave rise to the initial lawsuit; it is often referred to as *Kadic* in footnotes to distinguish it more readily from *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1995). I refer to the district court's opinion in the matter as *Doe*, after the first named plaintiff in the action.

suspected of serious war crimes. However, it opens a Pandora's box of international law problems. The unintended consequences of the *Karadzic* decision are serious enough to warrant its reversal.

II. KADIC V. KARADZIC

Dr. Radovan Karadzic, past President of the ruling triumvirate of the Bosnian Serb entity known as the Srbska Republic and a combatant in the cause of Serbian ethnic independence since the collapse of communist Yugoslavia, has entered the United States on several occasions as the guest of either the United Nations or the U.S. Department of State.¹⁰ In 1993, the two groups of plaintiffs¹¹ in the consolidated suit of *Kadic v. Karadzic* served Karadzic with the necessary summons to institute a lawsuit alleging various acts of rape, torture and genocide (more generally, "ethnic cleansing") committed at his order or by underlings for whom he was responsible.¹²

The suit, filed in the Southern District of New York, alleged jurisdiction principally under the Alien Tort Claims Act.¹³ The plaintiffs also claimed jurisdiction under the Torture Victim Protection Act, federal question jurisdiction under 18 U.S.C. § 1331 and supplementary jurisdiction over several state-law claims pursuant to 18 U.S.C. § 1367.¹⁴ Karadzic advanced two contradictory theories in the hopes of defeating jurisdiction: (1) that the Srbska Republic is a State for purposes of international law, and (2) that it is not.¹⁵

It is settled American law that a foreign head of state cannot be sued in U.S. court.¹⁶ The Foreign Sovereign Immunities Act of 1979

10. See *Kadic*, 70 F.3d at 237.

11. The *Doe* plaintiffs consist of Jane Doe I, on behalf of herself and all others similarly situated, and Jane Doe II, on behalf of herself and as administratrix of her deceased mother's estate. The *Kadic* plaintiffs consist of Ms. S. Kadic and her infant sons Benjamin and Ognjen, along with the Internationalna Inicijativa Zena Bosne I Hercegovine "Biser" and Zene Bosne I Hercegovine.

12. *Kadic*, 70 F.3d at 236-37. It is safe to say that Dr. Karadzic's activities would sound in tort, were jurisdiction available. A compelling and lengthy discussion of the atrocities committed by the Bosnian Serbs in the former Yugoslavia appears in Michele Brandt, Comment, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1413-14, 1416-21 (1995).

13. See *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1995).

14. See *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995). In personam jurisdiction over foreign States and their instrumentalities is conferred by 28 U.S.C. § 1330, limited by the exceptions in §§ 1602-08.

15. See *Kadic*, 70 F.3d at 239.

16. See *Doe*, 866 F. Supp. at 738 n. 7 (S.D.N.Y. 1995); see Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2) (1996). The Foreign Sovereign Immunities Act is the definitive statement of the United States government in the area of jurisdiction over foreign States; in a conflict, the Foreign Sovereign Immunities Act will trump the Alien Tort Claims Act. *E.g.*, *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989); see *In re Estate of*

(FSIA) indicates that "Subject to existing international agreements to which the United States is a party [on October 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States."¹⁷ FSIA's blanket immunity "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."¹⁸ To assert immunity, an agency or instrumentality of a foreign State may be any entity "which is a separate legal person, corporate or otherwise."¹⁹ This language encompasses natural persons acting as acknowledged political agents of a State; certainly, a President qualifies. If the Srbska Republic were a State in the eyes of American law, the case against Karadzic could not go forward.²⁰ As President of the Srbska Republic, Karadzic would be entitled to personal head-of-state immunity.²¹

If the Srbska Republic were not a State, Karadzic would still escape jurisdiction. Arguing in the alternative, Karadzic contended that the Srbska Republic does not exist as an international person, having not been recognized or otherwise accorded the prerogatives of Statehood by the international community or by the U.S. As such, Karadzic leads a private organization, the actions of which are not the appropriate subject of international law.²² Lacking direction from or authority

Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) (holding that FSIA supersedes ATCA in suits against individuals acting in their "official capacity" on behalf of a foreign government).

17. 28 U.S.C. § 1604.

18. 28 U.S.C. § 1603(a).

19. 28 U.S.C. § 1603(b)(1).

20. There are several exceptions to the Foreign Sovereign Immunities Act: waiver (28 U.S.C. § 1605 (a)(1)), actions based on commercial activity in the United States (28 U.S.C. § 1605(a)(2)), certain actions regarding real property in the United States (28 U.S.C. §§ 1605(a)(3)-(4)), tortious conduct in the United States (28 U.S.C. § 1605(a)(5)), actions to enforce arbitration clauses in contracts governed by United States law (28 U.S.C. § 1605(a)(6) (1996)), certain suits in admiralty (28 U.S.C. §§ 1605(b)-(d)), and in counterclaims to suits brought by a foreign State (28 U.S.C. § 1607). None applies here.

21. See *Doe v. Karadzic*, 866 F. Supp 734, 737-38 (S.D.N.Y. 1995); see *Lafontant v. Aristide*, 844 F.Supp. 128, 131 (E.D.N.Y. 1994) (discussing "absolute" head-of-state immunity).

22. See *Doe*, 866 F. Supp. at 739-40; see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) (the "traditional view of international law is that it establishes substantive principles for determining whether one country had wronged another"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 n. 22 (D.C. Cir. 1984) ("Classical international law was predominantly statist. The law of nations traditionally was defined as 'the body of rules and principles of action which are binding upon civilized states in their relations with one another'" (Edwards, J., concurring) (emphasis and citations omitted); *id.* at 805-06 ("international law imposes duties only on states and on their agents or officials") (Bork., J., concurring); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir. 1988) ("The standards by which nations regulate their dealings with one another *inter se* constitute the 'law of nations'. These standards include the rules of conduct which govern the affairs of this nation, acting in its national capacity, in relationships with other nations") (citations omitted).

of a State instrumentality, Dr. Karadzic's orders could only be viewed as the words and acts of a private citizen—and thus could not form the basis of jurisdiction under the ATCA.²³ The support for this position is voluminous and was, until the *Karadzic* decision, not seriously in question.²⁴

District Judge Peter K. Leisure accepted the contention that the Srbska Republic was not a State for purposes of U.S. law and therefore dismissed the action for lack of jurisdiction.²⁵ In addition to terminating ATCA jurisdiction, the conclusion that the Srbska Republic is not a State mandated the dismissal of the Torture Victim Protection Act claim, since § 2(a) of that Act requires conduct “under actual or apparent authority, or color of law, of any foreign nation.”²⁶ With the two major bases of jurisdiction eliminated, Judge Leisure did not find a valid federal question at issue, and declined to extend supplemental jurisdiction:

Since private acts of individuals do not violate the laws of nations, even assuming *arguendo*, that this Court were willing to attempt to find an implied cause of action, which it is not, this Court is doubtful that one could be implied as to the defendant because the acts attributed to [Karadzic] were performed in a private capacity. Accordingly, those allegedly harmed by the acts of defendant cannot assert an implied right of action arising from the law of nations and § 1331.²⁷

On appeal, the Second Circuit reversed and remanded for a trial on the merits, in the process altering its rulings in *Filartiga*²⁸ and *Klinghoffer*,²⁹ and creating serious, if unintended, consequences for

23. See *Doe*, 866 F. Supp. at 739-40.

24. See *Carmichael v. United Technologies Corp.* 835 F.2d at 113-14. (“the Alien Tort Statute does not confer subject matter jurisdiction over private parties who conspire in or aid and abet, official acts of torture”) (in dicta); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (“We are aware of no treaty that purports to make the activities at issue here [torture] unlawful when conducted by private individuals. As for the law of nations—so-called ‘customary international law,’ arising from ‘the customs and usages of civilized nations,’—we conclude that this also does not reach private, non-state conduct of this sort”) (citations omitted); *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1462 (S.D.Fla. 1990) (“The contras are private individuals whose actions simply do not represent state action”); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1541 (N.D.Cal. 1987) (“Of course, purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding torture practiced by non-state actors”); *Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) (28 U.S.C. § 1350 deals with relationships between nations, not individuals).

25. See *Doe*, 866 F. Supp. at 744.

26. *Id.* at 741-43; 28 U.S.C. § 1350 note (1996).

27. *Doe*, 866 F. Supp. at 743.

28. *Filartiga* held that official acts of torture violate international law. *Filartiga v. Penarala*, 630 F.2d 876, 884-85 (2d Cir. 1980).

29. *Klinghoffer v. S. N. C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991). *Klinghoffer* held that

American and international law.

III. THE DANGERS OF RIGHTEOUSNESS

In his opinion for the Southern District of New York in the *Doe* case, Judge Leisure held:

[T]he acts alleged in the instant action, while grossly repugnant, cannot be remedied through 28 U.S.C. § 1350 [ATCA]. The current Bosnian-Serb warring military faction does not constitute a recognized state . . . [and] the members of Karadzic's faction do not act under the color of any recognized state law.³⁰

In deciding that the Srbska Republic was not a State, Judge Leisure relied upon the Second Circuit's definition of Statehood:

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." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991) (quotations, brackets and citation omitted). The current Bosnia-Serb entity fails to meet this definition.³¹

This definition, in turn, restates the traditional understanding of the prerequisites of Statehood in the international arena.³² The Second Circuit's decision in *Karadzic* rewrites this definition in a way wholly at variance with accepted international law: armed non-State entities, acting on foreign soil against non-Americans, are now subject to U.S. tort jurisdiction.

Reversing Judge Leisure, the Second Circuit indicated that it was less sanguine about the notion of letting a perpetrator of genocide go free. The Appellate Court's sentiments are quite understandable, given the plight of the plaintiffs:

On about April 15, 1992, Bosnian-Serb soldiers decapitated K's son while she held him in her arms. Bosnian-Serb Soldiers [sic] later captured K, sent her to a detention camp, and raped her ten times daily for twenty-one days.

the Palestine Liberation Organization is not a sovereign State for purposes of the Foreign Sovereign Immunities Act. Chairman Arafat's PLO of 1991 controlled territory in Lebanon and Israel, represented a permanent Palestinian population via a functioning governmental leadership structure, and certainly had the power to engage in formal relations (as witnessed in the current Israeli-PLO accords). Arafat's PLO is difficult to distinguish from President Karadzic's Srbska Republic of 1996. However, it should be noted that *Klinghoffer* did not implicate the ATCA because the plaintiffs were American.

30. *Doe*, 866 F.Supp. at 740-41.

31. *Id.* at 741 n. 12.

32. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities"); LOUIS HENKIN ET AL., INTERNATIONAL LAW 243-56 (3d ed. 1993).

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. On June 28, 1992, soldiers beat an eighteen-year-old woman (Jane Doe II) while she watched Bosnian-Serb soldiers rape her mother.³³

Several jurisdictional theories have been advanced to cover such conduct, but none have succeeded. At least one commentator, denouncing Judge Leisure's decision to dismiss the suit prior to the Second Circuit's reversal, suggests that jurisdiction should be available because the Srbska Republic has acquiesced to (and thus is subject to) Article 3 of the Geneva Conventions, the provisions of which have in any event passed into customary international law.³⁴ This contention rests on two propositions, both shaky. First, while the Bosnian-Serb "government" has declared its allegiance to the Geneva Conventions, its lack of recognized sovereign capacity undercuts its ability to make such claims. Second, that the Geneva Conventions (or aspects of them) are customary international law still begs the question of whether international law of this sort acts on non-sovereign entities. In short, it is not clear that the Srbska Republic can assent to be bound by an international agreement, or that it would be bound by the dictates of the Geneva Convention in particular.

The same commentator also argues that jurisdiction should be found under the Genocide Convention.³⁵ However, that Convention clearly has not reached the status of *opinio juris* since its ratification by the United States in 1986. The Second Circuit's *Karadzic* decision aside, courts are, in the main, extremely reluctant to declare universal principles of international law.³⁶ Unfortunately, the Second Circuit's zeal in *Karadzic* to bring wrongdoers to justice in American court flies in the face of established international law and creates problems the court cannot possibly have contemplated.

A. *International Law*

The Second Circuit begins its decision in *Karadzic* by restating the definition it set forth in *Klinghoffer*: "Under international law, a state is an entity that has a defined territory and a permanent population, under

33. Michele Brandt, Comment, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1413-14 (1995) (footnotes omitted).

34. *Id.* at 1427-32.

35. *Id.* at 1432.

36. See, e.g., *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986) (holding that the rights of free expression and free speech are not universally recognized as the "law of nations" under the ATCA); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (holding that the principles of the Ten Commandments are not universally recognized as international law).

the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."³⁷ It then emphasizes that the definition (culled from the Restatement (Third) of the Foreign Relations Law of the United States) requires the "capacity to engage in formal relations with other such entities" but not recognition by members of the international community.³⁸ This comports with American judicial pronouncements on the subject.³⁹ Next, the Second Circuit argues that the Srbska Republic's lack of formal recognition is not a barrier to ATCA jurisdiction—on the unspoken premise that recognition is the only barrier to the Srbska Republic's capability to "engage in formal relations." At first blush, it appears that the Srbska Republic has the capability to engage in formal relations. Dr. Karadzic's very presence at the Bosnian negotiating table implies that his Republic is able to treat both with other warring factions and with recognized governments.

This begs the question, however, of whether negotiations during a civil war always connote that the rebel parties have the capacity to conduct formal relations with other States. The act of negotiation during wartime is one of necessity; the existence of conflict indicates that the parties themselves do not accept each other as sovereign, at least in the disputed territory. That the Srbska Republic can play a role in such peace discussions is entirely a result of its status as a combatant. Had the Bosnian Serbs not taken up arms, "formal relations" would be impossible, just as they will be if Karadzic's militia loses the Bosnian war. Karadzic leads an army, not a government. The capacity to engage in formal relations cannot be defined solely on the basis of an ability to raise troops and a willingness to engage in enough violence to spur peace negotiations. Were the Bosnian Serbs not at war, there would be no "relations" with the Srbska Republic—unless, of course, there was recognition by the international community of a Bosnian Serb State. Indeed, they are fighting in large measure for precisely this recognition. To say, as the Second Circuit does, that the Srbska Republic is able to conduct formal relations merely because it can compel negotiations through force of arms is nothing more than a bow to strength and aggression.

In support of its assertion that those acting on behalf of unrecognized States may be brought before an American tribunal, the Second

37. *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995).

38. *Id.*

39. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (unrecognized communist Cuban regime); *National Petrochemical Company of Iran v. M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988) (Iran under the Ayatollah Khomeini); *Salimoff & Co. v. Standard Oil of New York*, 186 N.E. 679 (1933) (Union of Soviet Socialist Republics).

Circuit cites three cases.⁴⁰ Two⁴¹ involve the recognition of actions by Confederate states during the Civil War—an area of law muddied significantly by the fact that the underlying conflict challenged the very validity of the courts that later decided the cases. The nature of the purported States involved is fundamentally different from that of any non-American entity: the Confederacy will always have a unique status in U.S. law.⁴² The third⁴³ involves a dispute over actions by the former East Germany—a nation which, while unrecognized at American law, was recognized by a significant number of States (the Soviet Bloc) whose international personhood was unquestioned. The Srbska Republic does not enjoy such recognition. None of the cases the Second Circuit cites, therefore, provide a clear justification for its ruling.

The Second Circuit also holds “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.”⁴⁴ The Court cites piracy laws as an example,⁴⁵ but the modern law of nations is by no means as clear as the Second Circuit implies. Several other Circuits have come to the contrary conclusion, namely, that international law does not operate on persons acting in a wholly private capacity.⁴⁶ In fact, the Second Circuit is entirely alone. The piracy example is inapposite. Piracy is unique, for example, in that it takes place in areas where there is no state jurisdiction—the high seas.⁴⁷ Moreover, an

40. *Kadic*, 70 F.3d at 244-45.

41. See *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99 (1875), and *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1868).

42. For a discussion of the ways in which the Confederacy, and Southern law more generally, has shaped the broader American legal tradition, see JAMES W. ELY, JR. & DAVID J. BODENHAMER, *Regionalism and American Legal History: The Southern Experience*, 39 VAND. L. REV. 539 (1986).

43. *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686 (2d Cir. 1970).

44. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

45. *Id.*

46. See *Doe v. Karadzic*, 866 F. Supp. 734, 743 (S.D.N.Y. 1995); see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779-80 n. 4 (D.C. Cir. 1984) (Edwards, J., concurring) (“the law of nations provides no substantive right to be free from the private acts of individuals”); see *In Re Estate of Ferdinand E. Marcos*, 978 F.2d 493, 501, 502 (9th Cir. 1992) (“Only individuals who have acted under official authority or under color of such authority may violate international law”).

47. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 1302 (3d ed. 1993). Lack of territorial jurisdiction is a defining characteristic of international piracy. Article 100 of the Law of the Sea Convention indicates that “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, Dec. 10, 1982, art. 100, U.N. Doc. A/CONF. 62/122, reprinted in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 21 I.L.M. 1261, 1288 (1982). The international law against piracy is in the nature of an agreement between nations to forestall harm to citizens and commercial interests in areas where an

American-flagged ship is conventionally considered American territory for purposes of legal control and ownership.⁴⁸ As such, a pirate's attack on an American vessel is a tort against an American entity on, as it were, American soil. Thus, piracy against Americans is justiciable under domestic law—international law is not the sole basis of jurisdiction. Though some commentators view piracy as an “individual violation of international law,” others contend that the international law of piracy is jurisdictional in nature: it allows States to apply national laws to individuals (pirates) who would otherwise be beyond reach.⁴⁹ In any event, the international prohibition on acts of piracy is universally recognized in a way that a prohibition on civil war atrocities is not.⁵⁰ The Second Circuit is surely correct when it states that:

The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. . . . It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.⁵¹

But there is a crucial distinction between unrecognized States and non-States. Eliding this distinction raises problems that the Second Circuit likely did not foresee. Having failed to recognize that it is only the Bosnian Serbs' willingness to take up arms which permits them to enter agreements of any sort, the Second Circuit concludes, quite wrongly, that:

Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srbska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law.⁵²

The result is a reward to blackmail and a gift to terrorists—and it is neither compelled by nor consistent with international law. Indeed, rather than reflecting international law, the Second Circuit is attempting to make law. The Court argues that “evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant.”⁵³

individual State cannot patrol.

48. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 (1986).

49. See HENKIN ET AL., *supra* note 47, at 380.

50. See *Id.* at 1302 (citing Hackworth for the proposition that the illegality of piracy “has long been recognized and well settled”).

51. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

52. *Kadic*, 70 F.3d at 245.

53. *Id.* at 241.

However, the Court produces no evidence save the changed minds of the judges to justify the conclusion that international law now operates directly on individuals, as compared to the state of affairs when *Tel-Oren* was decided in 1984 or *In re Marcos* in 1992.

Taken to its logical conclusion, the *Karadzic* decision allows foreigners to sue such non-governmental, non-sovereign entities as the United Nations and the European Union in U.S. courts for tort claims. For that matter, the same Bosnian Muslims complaining of genocide in the instant cases could raise interesting claims against NATO and other Western/European security alliances, which remained passive while *Karadzic's* "ethnic cleansing" policies were implemented. Such claims reject a fundamental premise of international law, namely, that international law imposes duties upon nations, not individuals or non-State entities. The proper subject of international law has never been entities which lack international personhood; NATO is not a member of the UN. In a way, this is the result of a notion of "due process": an entity that lacks the standing to parley in an international forum should not be held accountable to laws that it cannot, by its nature, affect. If international law is to operate on entities without international personhood, it must do so via the mediating institutions of State law, in which the offending entity at least theoretically has both a stake and an ability to affect outcomes. Moreover, entities which lack international personhood cannot "contract" with states in the international community, since they lack the requisite sovereignty to bind themselves to treaty agreements. International law is in some sense voluntary (there being no overarching government), and non-sovereign entities lack the capacity to participate in the international community.⁵⁴

B. The Law of Unintended Consequences

In addition, the *Karadzic* decision may help legitimize the Srbska regime—an unintended consequence, but one which clearly follows. The Second Circuit is walking an untenable line by holding Dr. *Karadzic* accountable for the violations of international law committed by the Srbska Republic without acknowledging the international personhood of that Republic. Every act which acknowledges *Karadzic's*

54. See *Tel-Oren*, 726 F.2d at 817 ("If it is in large part because 'the Law of Nations is primarily a law between States,' . . . that international law generally relies on an enforcement scheme in which individuals have no direct role, that reliance also reflects recognition of some other important characteristics of international law that distinguish it from municipal law. Chief among these is the limited role of law in the international realm. International law plays a much less pervasive role in the ordering of states' conduct within the international community than does municipal law in the ordering of individuals' conduct within nations. Unlike our nation, for example, the international community could not plausibly be described as governed by laws rather than men") (citations omitted) (Bork, J., concurring).

regime in the international realm strengthens his government's pretensions of legitimacy.

In like fashion, the Second Circuit's redefinition of sovereignty—even for limited purposes—strengthens the “sovereign” status of various international organizations, *e.g.*, the World Trade Organization, the European Union. Thus, this redefinition fuels the objections of nations and commentators who see membership in international organizations as a relinquishment of sovereignty.⁵⁵

The potential for mischief is nearly limitless. Unhappy Englishmen injured in “the troubles” could sue the Irish Republican Army—not a state, but also not subject to another state's sovereignty, in control of territory and recognized to the extent that Sinn Fein leader Gerry Adams is treated as a head of state in American courts. This would undermine State Department attempts to forge a peace accord between the warring Irish and British forces. More dangerously, consider a suit against the Chechen rebels by an aggrieved Russian visitor. Recognition of a Chechen State by the courts of the U.S.—even if only for the purposes of attaching liability for war crimes and vindicating the legitimate grievances of the Russian plaintiff—could have serious repercussions in the revalent Russian Duma.

Whether to antagonize men like Zhirinovskiy and Zyuganov is a decision best left to American diplomatic authorities. If the State Department loses unitary control over the instrumentalities of state recognition, its hand in international relations is weakened. The Second Circuit discusses the possibility of withholding judgment as a matter of prudence,⁵⁶ but concludes that “[n]ot every case ‘touching foreign relations’ is nonjusticiable, . . . and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.”⁵⁷ The choice of the phrase “somewhat sensitive” suggests that the Second Circuit did not, in fact, consider the long-term consequence of its decision. It is difficult, if not impossible,

55. Such objectors exist Left and Right. *See, e.g.*, James Sheehan, *Free Trade Casualties*, WASH. TIMES, July 5, 1995, at A15; Julie Kirkbride, *Tories Face Conference Coup Over Europe*, THE DAILY TELEGRAPH (LONDON), July 18, 1995, at 4 (discussing Tory factions that oppose further European (monetary) integration); Tom Diemer, *Populist Message Echoes Democratic Themes*, THE PLAIN DEALER, Feb. 25, 1996, at A16 (noting, of Patrick Buchanan, U. S. Rep. James A. Traficant (D-OH) and the Rev. Jesse Jackson: “Each vehemently opposes the international trade agreements known as NAFTA and GATT. . . . Buchanan fears the loss of U. S. sovereignty under a ‘New World Order’”).

56. *Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995). The Second Circuit's decision not to decline jurisdiction is perhaps already being felt in other politically-charged cases. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (citing *Kadic* in support of jurisdiction). It should be noted that *Abebe-Jira* involves a suit against a former underling of the Dergue military dictatorship in Ethiopia, and is well within the scope of the ATCA.

57. *Kadic*, 70 F.3d at 249 (internal citations omitted).

to entice an organization like the Palestinian Liberation Organization⁵⁸ or even the European Union to negotiate when U.S. courts are purporting to pass judgment against them in their quasi-sovereign capacity.

In fact, the *Karadzic* decision provides incentives for foreign victims to sue non-State "entities" and their leaders: money damages are available, America is a high-profile forum and no other courtrooms are open to the plaintiffs.⁵⁹ The federal court system becomes a true world court, with vast jurisdiction over private and public wrongs, backed by the prestige (and, implicitly, the coercive power) of the United States. But every adverse judgment paradoxically reinforces the defendant entity's claim to international personhood and, ultimately, Statehood. The victim thus aggrandizes his oppressor through operation of U.S. law. Certainly, this was not what the Second Circuit intended when it allowed Ms. Kadic and her infant sons to go forward in their quest to avenge Dr. Karadzic's ethnic cleansing. But this is the result and, to the extent that Ms. Kadic's victory ultimately strengthens the Srbska regime and other such entities worldwide, it is not worth the cost.⁶⁰

IV. CONCLUSION

The Second Circuit's decision in *Kadic v. Karadzic* is well-intentioned, even noble—an expression of the righteous indignation felt by Americans of all persuasions when faced with horrors on a massive scale. Nevertheless, when considered dispassionately, it is a radical departure from the settled law of nations. The American justice system is ill-suited to play a global court of equity; it lacks both the mandate and the competence to assume such a role. The newly-minted *Karadzic* doctrine muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack. Cases following it are already beginning to appear.⁶¹ The *Karadzic* decision is a danger-

58. As Judge Bork notes:

The potential for interference with foreign relations is not diminished by the PLO's apparent lack of international law status as a state. Nor does it matter whether the Executive Branch officially recognizes, or has direct dealings with, the PLO. The fact remains that the PLO bears significantly upon the foreign relations of the United States. If any indication of that role is needed, it is provided by the official "observer" status that the PLO has been accorded at the United Nations, . . . as well as by the diplomatic relations that the PLO is reported to have with some one hundred countries around the world.

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 805 (D.C. Cir. 1984).

59. See Hope Viner Samborn, *Ruling Could Lead to More Human Rights Tort Cases: Court Permits Lawsuit Against Bosnian Serbs*, 81 A.B.A. J. 30 (Dec. 1995).

60. The unthinking, single-minded, and ultimately short-sighted zeal of the litigants is perhaps not surprising, given that Ms. Kadic's attorneys in the matter included feminist Catherine MacKinnon. *Kadic*, 70 F.3d at 236.

61. The first such case appears to be *Mushikiwabo v. Barayagwiza*, which involves the

ous precedent, and should be overturned.

tribal conflict in Rwanda. *Mushikiwabo*, brought (like *Doe*) in the Southern District of New York, is a somewhat closer case: Barayagwiza's Hutu militia acted in conjunction with (and possibly at the behest of) Rwandan State officials to massacre members of the rival Tutsi tribe, including members of the plaintiffs' families. A fair argument for agency thus exists. Still, the court relied in large measure on the *Karadzic* doctrine in permitting the suit: "In *Kadic*, the Second Circuit held that acts of genocide . . . are actionable under the Alien Tort Act . . . whether or not committed by a state." *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627 (JSM), 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996). The court entered a default judgment awarding the 5 plaintiffs sums ranging from \$10.7 million to \$35.2 million, numbers surely large enough to gain international attention. *Id.* at *3.