IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 94-9035, 94-9069

JANE DOE I, *et al.* and S. KADIC, *et al.*,
Plaintiffs-Appellants,

v.

RADOVAN KARADZIC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

By letter of June 30, 1995, the Court afforded the Attorney General an opportunity to present the views of the United States regarding these appeals, and we are now doing so.

As explained below, we believe that the Court should first reject the argument by defendant/appellee Radovan Karadzic that he was immune from suit and service of process while he was in the United States. There is also no merit to the suggestion by the district court that the justiciability of these cases is in doubt because of the theoretical possibility that Karadzic might some day be recognized by the Executive Branch as a head of state. And, contrary to Karadzic's argument, dismissal of these cases at this stage under the "political question" doctrine is not warranted.

We also believe that the district court erred in ruling that plaintiffs cannot pursue these cases under the Alien Tort Statute (28 U.S.C. § 1350) because Karadzic is not a "state actor." We take this Court's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) as the law of this Circuit and the starting point for the necessary analysis. That ruling requires a rigorous analysis of a range of factors in order to determine whether an action can be pursued under the Alien Tort Statute for a violation of the law of nations.

We do not believe that the law of this Circuit on the Alien Tort Statute -- looking to modern conceptions of customary international law -- establishes that only state actors can be subject to suit under that statute. In our view, the Court should vacate the judgment of dismissal, and the district court should on remand be required to analyze the various claims made in the complaint to see if they meet the standards enunciated in *Filartiga*.

STATEMENT OF THE UNITED STATES

I. Immunity and Justiciability

A. In his brief on appeal, Karadzic argues that he is immune from this suit and service of process during his trips to the United States. As this Court is aware, in a March 24, 1993 letter to counsel for some of the plaintiffs, Michael J. Habib, the Director of the Office of Eastern European Affairs at the Department of State, explained that "Mr. Karadzic's status during his recent visits to the United States has been solely as an

'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States" (JA 108).[1] This remains the position of the United States.

B. The district court correctly noted that Karadzic is not entitled to head-of-state immunity. The Executive Branch does not acknowledge Karadzic as the head of any state.[2] However, the court went on to comment that plaintiffs could turn out to be seeking merely an advisory opinion if the Executive were later to declare Karadzic a head of state. JA 199-201. The district court concluded that "[t]his consideration, while not dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action." *Id.* at 201.

This speculation by the district judge was inappropriate. In cases such as these, the courts should assess circumstances as they are.

C. Karadzic argues in his brief on appeal that this case should be dismissed under the political question doctrine. Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.

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[1] "JA __" citations refer to pages in the Joint Appendix filed in this Court in No. 94-9069.

[2] The United States has not recognized "the Republic of Srpska" as a state, and does not treat that entity as one that satisfies the criteria for statehood.

II. The Law of Nations

We take as our starting point this Court's ruling in *Filartiga*, which is the law of this Circuit concerning the Alien Tort Statute. There, this Court construed that statute "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." 630 F.2d at 887.

The Court held that an alien may pursue an action under the Alien Tort Statute, even for transitory tort claims between individuals, when a federal court has personal jurisdiction and the claim involves a violation of universally recognized norms of international law, and hence "the law of nations." *Id.* at 880. In addition, the Court instructed that international law is to be interpreted "as it has evolved and exists among the nations of the world today." *Id.* at 881.

In *Filartiga*, the Court examined allegations of torture committed by a high ranking Paraguayan police official. The Court looked to see if condemnation of this conduct commands "the general assent of civilized nations," and determined that "limitations on a state's power to torture persons held in its custody" meet that test. *Id.* at 881.

Because *Filartiga* involved a defendant who was a police official of a State at the time of the alleged tort, this Court did not consider the conduct of non-state actors or issues of international law governing genocide, crimes against humanity, or torture committed as a war crime.

The district court here found that the cases at bar cannot proceed under the Alien Tort Statute because the allegations exceed the scope of *Filartiga* insofar as they involve claims of responsibility for genocide, war crimes, torture, and other acts carried out by a person who is not a state actor. The court concluded that "acts committed by non-state actors do not violate the law of nations." JA 205.

The district court's conclusion is incorrect. Customary international law does not bind exclusively state actors. Depending upon the violation alleged, acts committed by non-state actors may indeed violate international law.

A. Contrary to the district court's conclusion, conduct by non-state actors may in some circumstances violate customary international law.

Plaintiffs have alleged, among other things, that Karadzic engaged in genocide, war crimes, and crimes against humanity in violation of customary international law. They have thus pled claims under international humanitarian law, which governs the conduct of belligerent parties during armed conflicts.[3] As

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[3] By contrast, international human rights law principally governs peacetime situations not covered by international humanitarian law. As a general matter, human rights law is considered to impose obligations exclusively on states and state actors. See *Restatement (Third) of the Foreign Relations Law of the United States*, §701, Rptrs. Note 2 (1987); *id.* at §702, comment b. Thus, in *Filartiga*, the plaintiff, a Paraguayan citizen, charged a Paraguayan police official with violating customary human rights law prohibiting torture. However, when the perpetrators of human rights violations are, as here, in control of territory and exercise authorities of a governmental character, they may be held accountable under international law

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explained below, non-state actors may be responsible for violations of international humanitarian law, depending upon the character of the particular claim.

In May 1993, the UN Secretary-General issued a report pursuant to Security Council Resolution 808 (1993), explaining that this resolution provided for establishment of an international tribunal for the purpose of "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (May 3, 1993), at 5.[4]

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[3](...continued)
even though the regime on whose behalf they act is not recognized and does not satisfy the requirements for independent statehood. Whether conduct by quasi-governmental actors is actionable under the Torture Victim Protection Act (28 U.S.C. § 1350 note) is a separate question of statutory construction that we do not address here.

[4] In light of United Nations actions, in 1994, the President issued Executive Order No. 12934 (59 Fed. Reg. 54117) imposing sanctions on the Bosnian Serb forces and authorities. This order blocks all property and interests in property of the Bosnian Serb military and paramilitary forces and authorities. The Department of the Treasury published a list of individuals identified as members of the Bosnian Serb military forces and authorities, and Karadzic appears on this list. See 60 Fed. Reg. 34144 (1995).

The applicable Treasury Department regulations block all property and interests in property of Karadzic if such property is in, or hereafter comes within, the United States or the possession or control of a U.S. person, including overseas branches of U.S. entities. Transactions in blocked property are prohibited unless they are first licensed by the Treasury Department Office of Foreign Assets Control, and any unlicensed judgment or judicial process with respect to such property is
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The Secretary-General's report discusses specifically the issue of individual responsibility, and concludes: "An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. The Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations." *Id.* at 14. The Statute of the Tribunal specifically affirms that any person involved in the planning, instigation, or commission of such violations "shall be individually responsible for the crime."[5]

Pursuant to his authority under this Security Council resolution, the Prosecutor before the International Tribunal signed, on July 24, 1995, indictments against Karadzic and other Bosnian Serb leaders for acts of genocide and war crimes, among other violations of international humanitarian law.[6]

The United States has officially asserted to this International Tribunal that "[t]he relevant law and precedents

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[4](...continued)
null and void. See 31 C.F.R. § 585.202(e). No such license has been issued here. This rule does not divest the district court of jurisdiction, but does block enforcement of a judgment. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 (1981); *Itek Corp.* v. *First National Bank of Boston*, 704 F.2d 1, 8-10 (1st Cir. 1983).

[5] See Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 7, ¶ 1.

[6] See *The Prosecutor of the Tribunal* against *Radovan Karadzic, Ratko Mladic* (July 25, 1995), Indictment in The International Criminal Tribunal for the Former Yugoslavia.

for the offenses in question here -- genocide, war crimes and crimes against humanity -- clearly contemplate international * * * action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals."[7]

The International Tribunal recently adopted the position advocated by the United States. In its ruling in *Prosecutor* v. *Tadic*, No. IT-94-1-T (Aug. 10, 1995) at 18 -- involving a different member of the Bosnian Serb administration -- the International Tribunal refused to dismiss various charges, noting that the crimes it has been called upon to try "are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law * * *." This body further explained (*id.* at 25) that "violations of laws or customs of war are a part of customary international law * * * regardless of whether the conflict is international or national. * * * [V]iolations of these prohibitions can be enforced against individuals."

This statement is not unprecedented. The Nuremberg Trials included indictments for war crimes and crimes against humanity

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[7] See Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal* v. *Dusan Tadic*, No. IT-94-I-T, at 20.

by a number of German industrialists and financiers for actions taken before and during World War II. These were "trials involving business men for crimes committed as such, irrespective of official connections * * *. In these proceedings the Defence denied that such private individuals, having no official functions, could be found guilty of crimes under international law, while the Prosecution successfully claimed that they could be held so guilty." United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV Digest of Laws and Cases (London 1949), at 59.

In rejecting a position similar to the district court's conclusion here, the Nuremberg U.S. Military Tribunal explained:

> [T]he accused were not officially connected with the Nazi Government, but were private citizens engaged as business men in the heavy industry of Germany. * * *
>
> It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. * * * The application of international law to individuals is no novelty.

Id. at 59-60, *quoting In re Flick and Others*, U.S. Milit. Trib. Nuremberg 1947, 14 Int'l L. Rep. 266. Accord H. Levie, *Terrorism in War -- The Law of War Crimes* (1995) at 433-34 (noting that many of the accused before both the Nuremberg Tribunal and the International Military Tribunal for the Far East were civilians).

It could be argued that these examples are distinguishable from the cases now before this Court because they involved private individuals who were at least acting under regimes established by existing, recognized states -- Germany and Japan.

However, United States history provides a precedent that is relevant here, concerning treatment of a person acting for a non-recognized belligerent regime, the Confederate States of America.

At the conclusion of the American Civil War, the Executive Branch tried and convicted for crimes "in violation of the laws and customs of war" Henry Wirz, the Confederate commandant of the Andersonville prison camp. See *Trial of Henry Wirz*, H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. 3-5 (1867). The U.S. prosecutor in that case asserted that Wirz had violated "The Law of Nations" despite the fact that Wirz had not served any recognized or legitimate state. *Id.* at 762-64.

Thus, the United States Government has previously applied the law of nations to a non-state actor who was serving as an official in a belligerent regime during a civil war.

In addition, Article 4 of the Genocide Convention specifically states that "persons committing genocide * * * shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals." *The Convention on the Preservation and Punishment of the Crime of Genocide*, art. 4, 78 U.N.T.S. 277. And, as the briefs of the parties in these appeals and the *amici* International Human Rights Law Group further show, the various Geneva Conventions of 1949, which set minimally acceptable standards of conduct for armed conflicts, even internal ones, apply to all parties to an armed conflict, whether or not they are states. These conventions are thus reflective of customary international law.

Accordingly, it has been established for many years that non-state actors are responsible for violations of international law under certain circumstances.

B. Given its own wording and history, it is clear that the Alien Tort Statute may encompass violations of customary international law committed by non-state actors.

The language of the Alien Tort Statute gives no indication that it is limited to torts committed only by state officials; the statute grants district courts "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." 28 U.S.C. § 1350.

At the time the Alien Tort Statute was enacted in 1789 by the First Congress, the "law of nations" was acknowledged to cover principally three types of tortious conduct: piracy, attacks against ambassadors, and interference with safe conduct for foreigners. See 4 W. Blackstone, *Commentaries* *68, 72. That Congress swiftly prohibited these actions in the Act of April 30, 1790, §§ 8-12, 25-28 (1 Stat. 113-15, 117-18). See current 18 U.S.C. §§ 112, 1651-61.

Thus, the Alien Tort Statute was considered to govern, in some circumstances, private individuals who acted without color of any state authority, such as pirates.[8] In *United States* v.

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[8] Pirates have been treated as enemies of mankind because they act "without * * * any pretence of public authority." *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844). See *United States* v. *Smith*, 27 F. Cas. 1134, 1135 (continued...)

Smith, 18 U.S. (5 Wheat.) 153 (1820), the Supreme Court made clear that piracy -- which by definition is engaged in by non-state actors -- violates the law of nations, and that individuals will be held accountable for it. And, in *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795), the court relied upon the Alien Tort Statute as a ground for jurisdiction in an action involving a plea for restitution following the seizure and sale of slaves who had been taken aboard a Spanish prize vessel by a French national. The Alien Tort Statute was viewed as applicable, even though private citizens were apparently involved in the seizure and sale. See also *Respublica* v. *DeLongchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. Oyer & Terminer 1784) (individual held liable for violating the "law of nations" through assault on foreign consul).

The contemporary understanding that the Alien Tort Statute was not limited to conduct by state actors is confirmed by an opinion of Attorney General Bradford in 1795. The opinion addressed a situation in which American citizens trading off Sierra Leone were alleged to have joined a French fleet in attacking and plundering British property on that coast. The British Governor of the colony complained because the United States was neutral in the ongoing Franco-British war.

After discussing the availability of criminal prosecution, the Attorney General stated that "there can be no doubt that the

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[8](...continued)
(C.C.E.D.Pa. 1861) (defining piracy as "depredation on or near the sea without authority from any prince or state").

company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States." *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Attorney General Bradford plainly understood the Alien Tort statute to cover the individual Americans involved, regardless of their private capacity. See also *Abduction and Restitution of Slaves*, 1 Op. Att'y Gen. 29, 30 (1792) (apparent reference by Attorney General Randolph to a possible civil action under the Alien Tort Statute where the defendant had committed piracy by stealing slaves from a French colony).

Thus, when Congress passed the Alien Tort Statute in 1789, it understood that the term "law of nations" covered non-state conduct in some circumstances.

C. In determining that non-state actors cannot be found to violate international law, the district court relied upon the D.C. Circuit's opinion in *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985), where that court upheld dismissal of claims against U.S. Government officials and others made under the Alien Tort Statute. The plaintiffs there contended that these officials were responsible for violations of international law committed by the "Contras" fighting to overthrow the government of Nicaragua. The D.C. Circuit stated cursorily that the law of nations does not reach "private, non-state conduct of

this sort," relying solely upon the concurring opinion of Judge Edwards in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 790-96 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

In *Tel-Oren*, Judge Edwards engaged in a lengthy analysis of the development of the Alien Tort Statute, and stated his unwillingness to find, absent direction from the Supreme Court, that terrorist actions by PLO operatives in Israel had violated the law of nations within the meaning of that statute. 726 F.2d at 795.

Whether or not the D.C. Circuit ruling in *Sanchez-Espinoza* and Judge Edwards' opinion in *Tel-Oren* were correct under the specific facts and violations alleged in those cases, the allegations of genocide, war crimes, and crimes against humanity pled here are of a substantially different nature. For the reasons detailed above, the law of nations can indeed be violated by non-state acts of genocide, war crimes, and crimes against humanity.

In sum, the district court erred in dismissing all of plaintiffs' claims on the ground that Karadzic is not a state actor and therefore is not subject to the law of nations governing such conduct. The judgment of dismissal should be reversed and the case remanded for further proceedings, including determining whether the claims based on violations of customary international law governing genocide, war crimes, and crimes against humanity alleged by plaintiffs are otherwise properly cognizable in a suit brought under the Alien Tort Statute.

On remand, the district court must look to the various factors discussed in *Filartiga* that, in the view of this Court, made torture by a Paraguayan police official actionable under the Alien Tort Statute. As a threshold matter, the *Filartiga* Court made clear that the principle of international law alleged to be violated must be "universally proclaimed." 830 F.2d at 890. The Court viewed this as a rigorous test: "the requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Id.* at 881.

In addition, the district court should consider whether domestic law proscribes the treatment alleged, and whether the international law in question regulates the treatment of individuals with the aim of their protection. Suits could not be based on other norms with other objects in view, such as the rules governing use of force by States, or law of the sea, or ocean dumping. See generally *Filartiga*, 830 F.2d at 884-89.

D. In addition to alleging the violations of customary international law noted above, the plaintiffs have also raised in their complaints allegations of violations of several international conventions. In our view, these claims are not actionable on their own under the Alien Tort Statute because these conventions are not self-executing.

Under the Alien Tort Statute, an alien may bring suit for torts "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In addition to pleading causes of action for violations of the law of nations, the

plaintiffs have claimed (JA 8) that Karadzic's conduct is independently actionable because it violated certain international conventions to which the United States is a party. These conventions do not, however, provide subject matter jurisdiction under the Alien Tort Statute because they are not self-executing.

The plaintiffs primarily rely upon (see *Kadic* Br. at 21-24) the following treaties of the United States[9]:

> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987 (Torture Convention).
>
> Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948 (Genocide Convention).
>
> The four Geneva Conventions of 1949, and in particular the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Geneva Conventions).

None of these conventions is self-executing. In the case of the Torture Convention and the Genocide Convention, both the President and Congress stated expressly that these treaties are not self-executing.[10] *Report of Senate Committee on Foreign*

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[9] The conduct alleged here does not, strictly speaking, violate these treaties since they establish only obligations with respect to States. Neither do these treaties impose any obligations on the United States that are in any way relevant to this litigation. It should also be noted, however, that, while these treaties might not constitute independent grounds for suit under the Alien Tort Statute, they are probative of the content of the law of nations.

[10] Courts should defer to the views of the Executive Branch and the Senate on whether or not a treaty is self-executing. See *Cameron Septic Tank Co.* v. *City of Knoxville*, 227 U.S. 39, 50 (continued...)

Relations on the Genocide Convention, S. Exec. Rep. 99-2, 99th Cong., 2d Sess. (1985) ("The Committee's declaration reinforces the fact that the Convention is not self-executing. In other words, no part of the Convention becomes law by itself. The Convention is effective only through legislation implementing its various provisions"); S. Exec. Rep. 101-30, 101st Cong., 2d Sess. (1990) ("The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing").

Several courts have likewise held that the Geneva Conventions, including the Geneva Convention Relative to the Protection of Civilian Persons in Time of War cited by plaintiffs, are not self-executing. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d at 809 (Bork, J., concurring) (the Geneva Conventions "expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing"); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (stating the same principle); *Handel* v. *Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). But see *United States* v. *Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (Geneva Convention on Prisoners of War is likely self executing).

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[10](...continued)
(1913) (deferring to congressional view that industrial property treaty was not self-executing); *United States* v. *Postal*, 589 F.2d 862, 881-82 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

Non self-executing treaties do not constitute a rule of law for the courts. See, *e.g.*, *Foster* v. *Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Cook* v. *United States*, 288 U.S. 102, 119 (1933); *United States* v. *Aguilar*, 871 F.2d 1436 (9th Cir. 1989) ("As the Protocol is not a self-executing treaty having the force of law, it is only helpful as a guide to Congress's statutory intent in enacting the 1980 Refugee Act"). The conventions noted above cannot, therefore, constitute independent grounds for proceeding under the Alien Tort Statute provision concerning treaties of the United States.

III. Forum Non Conveniens

This Court noted in *Filartiga*, 630 F.2d at 890, that a critical question in cases brought under the Alien Tort Statute is that of *forum non conveniens*. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Blanco* v. *Banco Indus. de Venezuela*, 997 F.2d 974, 981-84 (2d Cir. 1987) (describing nature of doctrine and its considerations). We take no position on whether dismissal on this basis would be appropriate in these cases. We do wish to stress, however, the general importance of considering the *forum non conveniens* doctrine in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here. Accordingly, on remand the district court should examine whether this doctrine might apply here.

CONCLUSION

The United States believes that the judgment of dismissal by the district court should be vacated, and this matter remanded for further appropriate proceedings in the district court.

Respectfully submitted,

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September 13, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1995, I served the foregoing Statement of Interest of the United States by causing two copies to be sent by first class mail, postage prepaid, to the following counsel:

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