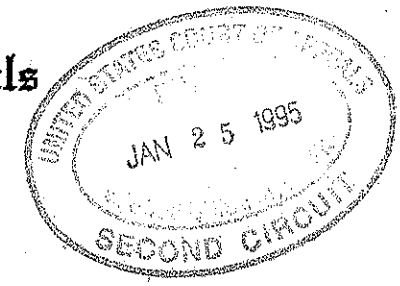
94-9035

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



JANE DOE I, on behalf of herself and all others similarly situated,

-and-

JANE DOE II, on behalf of herself, as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

RADOVAN KARADZIC,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND PROFESSORS DEBORAH ANKER, DAVID BEDERMAN, RICHARD FALK, JOAN FITZPATRICK, PAUL KAHN, CYNTHIA LICHTENSTEIN, RICHARD LILLICH, OSCAR SCHACHTER, ANNE-MARIE SLAUGHTER, AND HENRY STEINER

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STATEMENT OF INTEREST OF AMICI

The International Human Rights Law Group (Law Group) is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals.

In particular, the Law Group has appeared as amicus curiae in a number of U.S. cases applying and interpreting the Alien Tort Claims Act, 28 U.S.C. § 1350, notably Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). It is especially concerned that the caselaw developing § 1350 be consistent, coherent, and effective in implementing the international law of human rights.

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STATEMENT OF THE ISSUE

Whether a federal court may refuse to exercise jurisdiction under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, over a suit by an alien, for torts committed in violation of the law of nations by the leader of a de facto government.

SUMMARY OF ARGUMENT

Plaintiff-appellants in this case seek compensatory and punitive damages for brutal acts of genocide, war crimes and other gross human right violations committed under the "ethnic cleansing" campaign ordered by defendant-appellee Radovan Karadzic.[1] Karadzic is the self-proclaimed president of the de facto government of the Bosnian-Serb state of Srpska and leader of the Bosnian-Serb military faction.

Under the Alien Tort Claims Act, 28 U.S.C. § 1350, "the 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." 28 U.S.C. § 1350 (emphasis added). Relying on the plain language of the ATCA and other jurisdictional statutes,[2] this and other courts have consistently upheld subject

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1. For a detailed recounting of the facts, which on an appeal from a motion to dismiss must be accepted as true, see Appellants' Brief at 3-9.

2. The Torture Victim Protection Act, 28 U.S.C. § 1350, provides a private right of action against any "individual who, under actual or apparent authority, or color of law, of any foreign nation," de facto or otherwise, subjects another individual to torture or extrajudicial killing. Similarly, in Filártiga v. Peña-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980), this Court noted that subject matter jurisdiction over a claim of torture cognizable under the Alien Tort Claims Act, would also likely lie under the general federal question provision, 28 U.S.C. § 1331 (1992). The Court below denied subject matter jurisdiction under the Alien Tort Claims Act, as well as under these statutes. A 293 (References to the Joint Appendix filed herewith will be cited as

matter jurisdiction over civil actions brought by aliens for tortious injuries committed in violation of the customary international law of human rights. See, e.g., Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); In re Estate of Ferdinand E. Marcos, 25 F.3d 1467, 1474 (9th Cir. 1994) (explicitly endorsing Filártiga); Trajano v. Marcos, 978 F.2d 493, 499-501 (9th Cir. 1992), cert. denied, 113 S. Ct. 2960 (1993).[3]

Notwithstanding this governing precedent, the District Court's September 7, 1994 decision and order dismissed plaintiffs' suit against Karadzic, based upon three fundamental legal errors: (1) "that acts committed by non-state actors do not violate the law of nations;" A 289; (2) that this Court's landmark holding in Filártiga v. Peña-Irala extends only to the conduct of officials of recognized governments, A 292; and (3) that the possibility that the United States government might, at some point in the future, formally recognize Karadzic's government, declare him a head of state, and suggest absolute immunity on his behalf somehow "militates against this Court exercising jurisdiction over the instant action." A 285.

The District Court's decision misconstrues governing judicial precedents and well-settled principles of international law. Left unreversed, it would create a dangerous loophole through which human

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"A [page number]."). Because appellant's brief fully addresses the applicability of these statutes, amici do not discuss them, except to note that the District Court's dismissal under these statutes was also based on the mistaken understanding that "'the law of nations provides no substantive right to be free from the private acts of individuals.'" A 298 (citation omitted).

3. See also Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538 (N.D. Cal. 1987); 694 F. Supp. 707, 709 (N.D. Cal. 1988); Quiros de Rapaport v. Suarez-Mason, No. C-87-2266-JPV (N.D. Cal. Apr. 11, 1989) (in ATCA suit for deaths of their husbands, plaintiffs awarded compensatory and punitive damages); Martinez-Baca v. Suarez-Mason, No. C-87-2057-SC (N.D. Cal. Apr. 22, 1988) (suit under ATCA for prolonged arbitrary detention, torture, and cruel, inhuman or degrading treatment).

rights violators may wriggle to escape civil liability for their atrocities. The Court's reasoning would create a blanket immunity for certain human rights violators. Under the District Court's bizarre logic, a political leader may commit the most horrendous atrocities in the name of establishing a state, escape accountability by characterizing his acts as "purely private," and then, upon winning de jure recognition for his government, reverse field and claim continuing immunity as a head of state.

International law does not compel such "heads, I win; tails, you lose" logic. This brief addresses three important issues of international law raised by the lower court's opinion. First, that non-state actors can and do commit acts that violate international law. International law has long recognized that certain acts, such as genocide, mass rape, and war crimes, are illegitimate means for maintaining or seeking state power. No individual may use such criminal acts to achieve political objectives, regardless of whether he is a "private actor," the head of an unrecognized de facto government, or a recognized head of state. Under well-settled principles of international law, embodied in United States Supreme Court rulings and international treaties to which the United States is a party, a federal court may hold an individual responsible for these gross human rights violations, in whatever capacity he may commit them.

Second, Filártiga v. Peña-Irala and its progeny plainly reach the conduct of officials of unrecognized governments. Defendant Karadzic is not just another private individual. By his own declaration, he is the leader of a military government and a de facto regime that seeks de jure recognition. International law does not require that an entity be universally and formally recognized as a government or state in order to be held responsible for its acts. The District Court's

opinion confuses the political act of recognition, which one government may grant to another, with the legal responsibility of international tortfeasors, which Congress, through the ATCA, has charged the federal courts to determine.

Third, the United States government's refusal to recognize Karadzic's government or to suggest immunity on his behalf militates for, not against, the District Court's exercise of jurisdiction. The United States Government has historically withheld legal recognition from de facto states, governments, and factional leaders in order to deny them a benefit. The District Court's decision would have the perverse effect of rewarding the very individuals whom the political branches have refused to recognize, by immunizing them from civil liability for their lawless actions.

ARGUMENT

I. NON-STATE ACTORS MAY BE HELD LIABLE FOR CERTAIN GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL LAW

The District Court's decision rests upon the categorical, but erroneous, conclusion "that acts committed by non-state actors do not violate the law of nations." Order at 12 (A 289). That conclusion is inaccurate, not just historically, but with particular respect to genocide and war crimes, the specific international law violations asserted here.

Blackstone's Commentaries describe the "law of nations" not as a law solely among nation-states, but as "a system of rules . . . established by universal consent among the civilized inhabitants of the world. . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each." 4 W.

Blackstone, Commentaries *66 (emphasis added). From its inception, the law of nations has recognized pirates, the paradigmatic non-state actors, as committing an international "crime of a settled and determinate nature." United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820). Pirates have been treated as "hostis humani generis ("enemies of mankind") in part because they act "without ... any pretence of public authority." United States v. Brig Malek Adhel, 43 U.S. 210, 232; 11 L. Ed. 239, 248; 2 How. 210 (1844) (emphasis added). Similarly, slave trading has long been forbidden by both customary and conventional international law, although it is an act usually engaged in by non-state actors. See, e.g., Restatement (Third) of Foreign Relations Law § 702(b), cmt. e & reporter's note 4; Slavery Convention of 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (1929). Like pirates, slave traders have been deemed peculiarly subject to international law because of their tendency to escape the law of any particular nation.

From the beginning of the Republic, it has been recognized that federal courts may redress international law wrongs committed by these non-state actors. In Article I of the United States Constitution, the Framers expressly bestowed upon Congress legislative powers to define and punish "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Art. I, § 8, cl. 10. Almost immediately, Congress exercised that power by enacting as part of the First Judiciary Act the Alien Tort Claims Act, which gave the district courts "jurisdiction of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1988)).[4]

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4. Less than a year later, Congress passed the first statute specifically criminalizing piracy. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113.

Thus, in Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985), Judge (now Justice) Scalia stated that the ATCA "may conceivably have been meant to cover only private, non-governmental acts." Far from refusing to adjudicate piracy cases for lack of state action, the Supreme Court early on heard a series of them. See generally White, The Marshall Court and International Law: The Piracy Cases, 83 Am. J. Int'l L. 727 (1989). In two pre-Filártiga cases in which the ATCA provided the primary or alternative basis for jurisdiction, the defendant was a private non-state actor. In Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795), the ATCA provided an alternative basis for federal jurisdiction over a suit by a Spanish citizen against a French citizen who had seized his ship at a time of war between Spain and France. Similarly, in Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), the ATCA provided jurisdiction over a child custody dispute in which a private individual had breached the law of nations by misusing a passport.[5] Had the Court below referred even fleetingly to these precedents, it would have found that from the beginning of the Republic, federal courts have asserted jurisdiction over private non-state actors who have committed tortious acts in violation of the law of nations.

In Filártiga v. Peña-Irala, 630 F.2d. 876 (2d Cir. 1980), this Court drew no distinction between the amenability of official and non-official actors to suit under the ATCA. Far from excluding non-state

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5. See also Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201, n.13 (9th Cir. 1975) (suggesting without deciding that § 1350 would provide jurisdiction over a suit by aliens against private adoption agencies for illegally removing children from Vietnam at the end of the Vietnam war); 26 Op. Att'y Gen. 250, 252-53 (1907) (§ 1350 would provide jurisdiction over a claim by Mexican citizens harmed by the actions of a private American irrigation company) (quoted in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 (D.C. Cir. 1984) (Edwards, J. concurring)); 1 Op. Att'y Gen. 57, 58 (1795) ("there can be no doubt" that aliens whose neutrality was violated by private American citizens are afforded a remedy under the Alien Tort Statute).

actors from ATCA liability, this Court specifically recognized that the statute subjects modern human rights violators to the same civil liability that has been traditionally directed toward such non-state actors. See id. at 890 ("for purposes of civil liability, the torturer has become --like the pirate and slave trader before him-- hostis humani generis, an enemy of all mankind")(emphasis added).

Filártiga directed that courts construing the ATCA must apply "the law of nations" not as it existed at any particular time in the past, but "as it has evolved and exists among the nations of the world today." Id. at 881 (emphasis added). As currently understood, international law holds private nonstate actors liable when they commit violations of the kind asserted here: genocide, war crimes, and crimes against humanity. See Restatement (Third) of Foreign Relations Law pt. II, Introductory Note ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.").

The Nuremberg Trials clearly established that private non-state actors can be held responsible for war crimes under international law.[6] The United States and its wartime allies indicted 43 German industrialists and financiers for committing war crimes and crimes against humanity before and during World War II.[7] These private

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6. The precedent for charging private non-state individuals with war crimes extends at least as far back as World War I. After that war, prominent Saar industrialists Hermann and Robert Roechling and several associates were convicted by a French military tribunal of violating the laws of war by plundering French property. The convictions were overturned on a technicality, and the defendants were never retried. Telford Taylor, Nuremberg Trials: War Crimes and International Law, 450 Int'l Conciliation 304 n.159 (Apr. 1949) [hereinafter Nuremberg Trials].

7. See United States v. Friedrich Flick, Case No. 5, in Nuremberg Trials at 303 (indictment of steel magnate and five principal associates); United States v. Alfred Krupp von Bohlen und Halbach, Case No. 10, in Nuremberg Trials at 307 (indictment of private industrialist and eleven top aides); United States v. Carl Krauch, Case No. 6, in Nuremberg Trials at 313 (indictment of 24 Directors and officers of I.G. Farben-Industrie A.G.);

individuals were charged with such crimes as forced deportation of concentration camp inmates and prisoners of war to toil under inhumane conditions and enslavement, and mistreatment of prisoners of war, deportees and concentration camp inmates. Nuremberg Trials at 305-06, 310-11, 317-19. The Nuremberg Tribunal resoundingly rejected the argument that private individuals acting in their private capacity could not be indicted for war crimes or crimes against humanity:

> International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong, and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty.

In re Flick, U.S. Mil. Trib., Nuremberg 1947, 14 Int'l L. Rep. 266, cited in Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 29 nn.34, 35, 37 (1992) (citing cases).[8]

Nor, after Nuremberg, is there any dispute that "private" non-state actors can be held responsible for acts of genocide under international law. The prohibition against the crime of genocide is not simply customary international law (i.e. law that is created by the custom and practice of states) but jus cogens (i.e. a rule of customary law that binds all humanity and states regardless of their acquiescence). See, e.g., In re Barcelona Traction Light & Power Co.

United States v. Ernst Weizaecker, Case No. 11, in Nuremberg Trials at 319, 331 (indictment ofprominent ministers, including Karl Rasche, chairman of the Dresden Bank, for his actions as a private banker).

8. Similarly, the tribunal established by the UN Security Council to address the international criminal aspects of the Bosnian conflict has jurisdiction over "persons" committing grave breaches of the Geneva Conventions of 1949 (Article 2), "persons" violating the laws or customs of war (Article 3), and "persons" responsible for committing crimes against humanity (Article 5), without regard to their office or position. Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, Annex.

(Belgium v. Spain) (2d Phase), 1970 I.C.J. Reports 3, 32 (Feb. 5, 1970) (identifying genocide as a jus cogens norm). Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, which codified customary international law, to which the United States is a party, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, entered into force for United States Feb. 23, 1989 (hereinafter "Genocide Convention"), specifically states that "persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals." (emphasis added)[9]

Finally, private non-state actors may be held responsible under international humanitarian law for crimes committed in the course of an armed conflict. Common Article 3 of the Geneva Conventions of 1949 creates a minimal standard of conduct that applies to all parties to an armed conflict, whether or not they are a state.[10] By its terms, Common Article 3

> imposes obligations not only upon the Contracting Parties [i.e. states] but also upon 'each party to the conflict.' To that extent the Convention, in keeping with other developments in

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9. The Genocide Convention has been directly incorporated into U.S. law by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988). The implementing legislation similarly draws no distinction between private citizens and public officials who have committed genocide. See 18 U.S.C. § 1091(a) (specifying that "Whoever[,] ... with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such[,]" performs certain acts is responsible for genocide) (emphasis added).

10. Common Article 3 is found in all four of the Geneva Conventions of 1949, and governs internal armed conflicts. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

modern International Law, treats persons and entities other than states as subjects of international rights and duties.

2 Oppenheim, International Law: A Treatise, 211 n.3 (H. Lauterpacht ed., 7th ed. 1952) (emphasis added).[11] In addition, Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts), 16 I.L.M. 1442 (1977) (hereinafter "Protocol II")[12] explicitly applies to private non-state actors in an armed conflict--such as the Bosnian-Serb army under defendant's command--which are "organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Id., art. 1.

Accepting the complaint's allegations as true, as this Court must on an appeal from a motion to dismiss, plaintiffs have clearly alleged that defendant Karadzic has committed numerous torts in violation of international law, whether or not he is deemed a state actor. As the Court below recognized, the complaint enumerates numerous "grossly repugnant" acts ordered by defendant in furtherance of the policy of "ethnic cleansing," A 292 --including summary execution, rape, torture, forced pregnancy, arbitrary detention, forcible displacement and deportation, and other atrocities committed against the Bosnian

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11. See also Military & Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14, 103-104 (Merits Judgment of June 27) (Common Article 3 applies to Nicaraguan "contras" as private non-state actors); In re of Medina, Interim Decision No. 3078, 19 I. & N. Dec. 734, 737-38 (BIA 1988) (Common Article 3 applies to government and guerrilla forces in El Salvador).

12. Both Yugoslavia and Bosnia-Herzegovina have ratified or acceded to Protocol II. See 14 Hum. Rts. L. J. 68-69 (1993).

Muslims, Complaint ¶ 17-24, A 14-16 -- which plainly qualify as genocide under the Genocide Convention.[13]

Similarly, defendant's acts, as set forth in the complaint, would violate the Geneva Conventions' provisions of international humanitarian law, which the UN Security Council has recently confirmed binds all sides in the Yugoslav conflict. S/RES/764 (13 July 1992), 31-2 I.L.M. 1465-67 (1992). Those acts violate the general mandate of Common Article 3:

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

Moreover, defendant's acts as described in the complaint, fall within the class of specific acts that Common Article 3 declares

> remain prohibited [in armed conflict] at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;

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13. Under the Genocide Convention, genocide is defined to mean . . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

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

Genocide Convention, Article II.

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(emphasis added).

Defendants' acts against civilians, as described in the complaint, would also fall within the class of actions prohibited by Protocol II against civilians and those who have ceased to take part in hostilities.[14] In sum, individuals like defendant have long been held liable under international law for gross human rights violations such as genocide, war crimes, and crimes against humanity. Where, as here, Congress has prescribed domestic civil remedies against such flagrant violations of the law of nations, a perpetrator may not escape liability simply by asserting that he is not a state actor.

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14. Protocol II forbids the following acts against civilians and noncombatants:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threates to commit any of the foregoing acts.

Protocol II, Article 4(2).

II. FILÁRTIGA AND ITS PROGENY DID NOT EXEMPT OFFICIALS OF UNRECOGNIZED GOVERNMENTS FROM CIVIL LIABILITY FOR THEIR INTERNATIONAL LAW VIOLATIONS

As discussed in Part I supra, the court need not reach the issue of whether an official of an unrecognized de facto government can be held liable for gross violations of international human rights under the Alien Tort Claims Act. It is clear, however, that such an official can be held liable for human rights violations that under current international law require some form of state action.

The Alien Tort Claims Act provides that federal 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." 28 U.S.C. § 1350. As the United States Supreme Court has observed, "The Alien Tort Statute by its terms does not distinguish among classes of defendants...." Amerada Hess Shipping Corp. v. Argentine Republic, 109 S. Ct. 683, 690 (1989). Thus, any defendant who commits a tort in violation of the law of nations falls within the statute's jurisdictional reach. Filártiga established that courts construing the ATCA must apply "the law of nations" not as it existed at any particular time in the past, but "as it has evolved and exists among the nations of the world today." Filártiga, 630 F.2d at 881 (emphasis added). In Amerada Hess, 830 F.2d 421, 425 (2d Cir. 1987), rev'd on other grounds, 109 S. Ct. 683 (1989), this Court noted that "[t]he evolving standards of international law govern who is within the [Alien Tort] statute's jurisdictional grant as clearly as they govern what conduct creates jurisdiction." As the universally recognized leader of the Bosnian Serb military government and the self-declared nation of Srspka, defendant Karadzic is not simply a private citizen. His actions are conducted under color of official authority, and with the intention of making that authority more legitimate. Under long-established understandings of international

law, defendant can be held responsible as an official of a de facto government, even for violations of international law, such as torture, that have been deemed to require state action.

It has long been clear under United States law that de facto governments and their authorities can be held responsible for their actions in the same way as de jure governments and their authorities. This issue arose repeatedly during the U.S. Civil War, when the courts repeatedly held that the Confederacy was not a recognized de jure government, but nevertheless could be held responsible as a de facto government for its actions. In such cases, the U.S. Supreme Court abandoned the fiction that those commanding the naval ships of the Confederacy were private pirates, and noted that courts had "proceeded to state that the proofs offered showed that they acted under a semblance of authority which took their case out of that class which can be properly termed ordinary piracy." Ford v. Surget, 97 U.S. (7 Otto) 594, 618 (1878) (Clifford, J. concurring) (citing Dole v. New England Merchants' Mutual Marine Insurance Co., 88 Mass. (6 Allen) 373 (1863); Planters' Bank v. Union Bank, 83 U.S. (16 Wall) 483 (1872)) (emphasis added). See also United States v. Steinmetz, 973 F.2d 212, 218-19 (3d Cir. 1992), cert. denied, 113 S. Ct. 1578 (1993) (members of Confederate navy were not pirates but officers of a de facto belligerent state).

Similarly, under international law, an entity need not be formally recognized as a government or state in order to be held responsible for its acts. The International Court of Justice has held that de facto governments can be held responsible for violations of international law. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11). In that case, the United States supported the claim that a de facto government and its officials are responsible for their acts under

international law. Letter from the Secretary of State of the United States of America to the Registrar of the International Court of Justice, 1949 I.C.J. Pleadings (Reparation for Injuries Suffered in the Service of the United Nations), 19-22 (Feb. 14, 1949).

The District Court's opinion confuses the legal concept of international responsibility--which Congress, through the ATCA, has charged the federal courts to determine--with the political act of recognition, which one government may or may not grant to another. Historically, the United States Government has withheld recognition from de facto states, governments, and factional leaders for a variety of political reasons. By withholding such recognition, however, the U.S. does not intend to, nor does it in fact, immunize such entities from international responsibility for their actions.[15]

Recognition does not create a state. It is simply a political act that may enhance or diminish a de facto state's legitimacy.[16] As articulated by the United States Supreme Court, a de facto government is one that, "however violent and wrongful in its origin, . . . [is] in the full and actual exercise of sovereignty over a territory and people large enough for a nation." Ford v. Surgent, 97 U.S. (7 Otto) 594, 620 (1878) (Clifford, J. concurring) (citations omitted); John Hervey, Legal Effects of Recognition in International Law 13 (1928) (under international law, de facto government is one that is really in

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15. See Banque de France v. Equitable Trust Co. of New York, 33 F.2d 202, 206 (S.D.N.Y. 1929) ("...the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state").

16. See Wulfsohn v. Socialist Federated Soviet Republic, 234 N.Y. 372, 375, 138 N.E. 24, 25 (1923) ("Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory. For its recognition does not create the state ....").

possession of the powers of sovereignty, even though such possession may be wrongful or precarious).

Thus, the United States did not recognize the Soviet Union until long after the 1917 Bolshevik revolution, nor did the U.S. recognize China for decades after Mao Ze-Dong came to power in 1949. By so declining, the United States in no sense absolved the de facto leaders of those states from their state responsibilities to avoid gross human rights violations under international law. In 1968, for example, the United States charged North Korea with violating the law of nations when it seized a United States naval vessel, The Pueblo, even though the U.S. had not recognized North Korea at that time. 58 Dep't St. Bull. 196-197 (1968), cited in Louis Henkin, International Law: Cases and Materials 241 n.3 (2d ed. 1987).

Far from absolving defendant Karadzic of his duties under international law, numerous Executive branch statements indicate the United States government's intent to hold Karadzic accountable for them. In December 1992, then-United States Secretary of State Lawrence S. Eagleburger stated, after describing the atrocities occurring in the former Yugoslavia:

> Finally, there is another category of fact which is beyond dispute -- namely the fact of political and command responsibility for the crimes against humanity which I have described. Leaders such as ... Radovan Karadzic .. must eventually explain whether and how they sought to ensure, as they must under international law, that their forces complied with international law.

3 U.S. Dep't St. Dispatch No. 52, at 924 (Dec. 28, 1992) (statement at the international conference on the former Yugoslavia, Geneva, Switzerland, December 16, 1992) (emphasis added).[17]

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17. See also the preamble to Proclamation 6749 of 25 October 1994, titled "Immigration Measures with Respect to United Nations Security Resolution 942," in which President Clinton stated that it was being made "in light of the actions of the Bosnian Serb forces and the authorities in the territory they control." (Emphasis added). This proclamation suspends immigrant and nonimmigrant entry into the United States for certain members of

III. KARADZIC MAY NOT CLAIM ANY BENEFIT FROM THE DOCTRINE OF HEAD OF STATE IMMUNITY

Under customary international law, as recognized and applied in the United States, the head of a foreign government may be granted immunity from United States judicial jurisdiction. Like foreign sovereign immunity, head-of-state immunity is premised on the idea that a state and its ruler are one for immunity purposes. Yet unlike foreign sovereign immunity, which is a matter of statutory interpretation, a United States court will arguably only recognize head-of-state immunity based upon the suggestion of the Executive branch of the United States government. See, e.g., Lafontant v. Aristide, 844 F. Supp. 128, 134-5 (E.D.N.Y. 1994) (court takes cognizance of Executive branch position concerning head of state immunity).

To date, the United States government has refused to recognize Karadzic's government or to suggest any immunity--head- of-state, diplomatic, or otherwise--on his behalf in this litigation. Logically, that refusal should have militated for, not against, the District Court's exercise of jurisdiction. Yet curiously, the District Court read into the ATCA a presumption that jurisdiction should be denied so long as the possibility remains that the U.S. government might someday recognize Karadzic's government. A 285.

This conclusion stands the Government's nonsuggestion of immunity on its head. The United States Government has historically withheld

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the Bosnian Serb state, including

> members of the authorities, including legislative authorities, in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces; officers of the Bosnian Serb military and paramilitary forces; and those acting on behalf of such authorities or forces ...

59 Fed. Reg. 54,117 (1994) (emphasis added).

legal recognition from de facto states, governments, and factional leaders in order to deny them a benefit. The District Court's reasoning has the perverse effect of rewarding the very individuals whom the political branches have refused to recognize, by immunizing them from civil responsibility for their illegal actions.

If the Executive Branch wished to confer such immunity on the defendant, it could attempt to do so simply by sending a letter to the District Court.[18] If the United States government's silence raises any presumption, it should be that United States foreign policy interests would not be adversely affected by adjudication of the case. By reading the silence the other way, the opinion below works a bizarre result: it grants de facto head of state immunity to an individual for whom such immunity has not been suggested, and who the District Court itself admits has not even been recognized by the Executive branch.

All too often, would-be rulers seize power by violence, use gross human rights abuses against their own subjects to consolidate their position, then seek to negotiate for international recognition as legitimate heads of state. History abounds with examples, Bosnia and Haiti being only the most recent. Left unreversed, the District Court's decision would create an unacceptable loophole for individuals who commit horrendous atrocities in the name of creating an independent state. Such outlaws should not be permitted to escape accountability by the sleight-of-hand of characterizing their acts as both private and worthy of a presumption of head-of-state immunity, even before they have won de jure recognition.

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18. Nor is it clear that even United States government suggestion would immunize a head of state, such as Adolf Hitler, who used his position to commit massive jus cogens violations.

CONCLUSION

For the foregoing reasons, amici respectfully suggest that this Court reverse the opinion and order of the court below and hold, following Filártiga and its progeny, that the district court has subject matter jurisdiction over this case.

Respectfully submitted,

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APPENDIX OF STATUTES AND TREATIES