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GENOCIDAL RAPE IN BOSNIA: REDRESS IN UNITED STATES COURTS UNDER THE ALIEN TORT CLAIMS ACT

Yolanda S. Wu*

INTRODUCTION

Stories of rape as a tool of ethnic cleansing¹ in war-torn Bosnia-Herzegovina have been widely documented.² According to Helsinki Watch investigators,

[s]oldiers attacking villages have raped women and girls in their homes, in front of family members and in the village square. Women have been arrested and raped during interro-

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1. Ethnic cleansing is the Serbian policy of removing or liquidating all non-Serbs from the territory that was Yugoslavia. Although rapes by Muslims and Croats have also been reported, only Serbs have used rape as a weapon of war and as a government-announced tool to achieve ethnic cleansing. 1 HELSINKI WATCH, HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 10 (1992) [hereinafter HELSINKI WATCH I]. Helsinki Watch is one regional division of Human Rights Watch, a U.S.-based, independent, non-governmental organization that conducts regular, systematic investigations of human rights abuses. See also Paul Lewis, *Rape Was Weapon of Serbs*, U.N. Says, N.Y. TIMES, Oct. 20, 1993, at A1, A6 (United Nations War Crimes Commission, which has collected reports of 3000 rape cases and identified 800 of those victims by name, reports that "although Serbian, Croatian and Muslim soldiers and the police have all committed rape, the largest number of alleged perpetrators were Serbs."). Notably, international organizations have begun to document human rights abuses by Bosnian Croat and Muslim troops. See, e.g., *Bosnia-Herzegovina: Abuses by Bosnian Croat and Muslim Forces in Central and Southwestern Bosnia-Herzegovina*, 5 HELSINKI WATCH, Issue 18, Sept. 1993.

2. See, e.g., *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*, U.N. ESCOR, 49th Sess., Annex, Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993); AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES (1993) [hereinafter RAPE AND SEXUAL ABUSE]; HELSINKI WATCH I, *supra* note 1; 2 HELSINKI WATCH, HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA (1993) [hereinafter HELSINKI WATCH II]; *Abuses Continue in the Former Yugoslavia: Serbia, Montenegro and Bosnia-Herzegovina*, 5 HELSINKI WATCH, Issue 11, July 1993.

gation. In some villages and towns, women and girls have been gathered together and taken to holding centers — often schools or community sports halls — where they are raped, gang-raped and abused repeatedly, sometimes for days or even weeks at a time. . . . Whether a woman is raped by soldiers in her home or is held in a house with other women and raped over and over again, she is raped with a political purpose — to intimidate, humiliate and degrade her and others affected by her suffering.³

As early as August 1992, the United States media reported the existence of detention camps in which women were held and systematically raped as part of ethnic cleansing.⁴ The international exposure led to the closure of some detention camps,⁵ but reportedly has not prevented the Serbs from opening new ones and continuing to commit atrocities against women.⁶

In addition, human rights observers have not found any evidence that soldiers have been held accountable for raping women and girls. Helsinki Watch reports that Serbian soldiers rape women and children “without regard for witnesses, and, on occasion, identify themselves to their victims. These are not the actions of men who fear retribution.”⁷ Amnesty International similarly found that “perpetrators frequently act with impunity.”⁸ These observations raise the troubling question: how can the rapists be brought to justice?

This Recent Development discusses one response to this question taken by two teams of feminist lawyers in the United States — civil litigation under the Alien Tort Claims Act, a little-used federal statute that grants “[t]he district courts . . . original jurisdiction of any civil action by an alien for tort only, commit-

3. HELSINKI WATCH II, *supra* note 2, at 21.

4. See, e.g., Roy Gutman, *Bosnia Rape Horror*, NEWSDAY, Aug. 9, 1992, at 5; Roy Gutman, *Serbs' Rape of Muslim Women in Bosnia Seen as Tactic of War*, HOUS. CHRON., Aug. 23, 1992, at A1; *Red Cross Plans Visit to Serb Camps This Week*, L.A. TIMES, Aug. 10, 1992, at A18; *Serb Leaders Seek to Counter Charges of Abuses in Camps*, CHRISTIAN SCI. MONITOR, Aug. 11, 1992, at 5; Scott Shepard, *Bush Says World Must Have Access to Bosnia Camps*, ATLANTA J. & CONST., Aug. 7, 1992, at A3.

5. For example, in Serb-controlled northwestern Bosnia, the Omarska and Keraterm detention centers were closed in late August 1992, and the Trnopolje and Manjaca centers were closed in November and December 1992, respectively. HELSINKI WATCH II, *supra* note 2, at 33.

6. Former detainees interviewed by Helsinki Watch have identified areas where they believe the Serbs are now operating “secret camps.” Helsinki Watch has not been able to confirm or refute the existence of such camps. *Id.* at 34 n.18.

7. *Id.* at 22.

8. RAPE AND SEXUAL ABUSE, *supra* note 2, at 4.

ted in violation of the law of nations or a treaty of the United States."⁹ In analyzing the two lawsuits filed in New York earlier this year,¹⁰ this Recent Development focuses on the plaintiffs' arguments for applying the Alien Tort Claims Act to the prohibition of genocidal torts perpetrated against women,¹¹ including genocidal rape, forced pregnancy, and forced prostitution. If accepted, the plaintiffs' arguments will add weight to the claim that rape is a human rights violation.

I. OTHER REMEDIES FOR WAR CRIMES

Before discussing *Doe* and *Kadic* in more detail, it is helpful to place the cases in context by briefly reviewing other approaches to seeking redress for the Bosnian rape victims. As discussed below, these routes each entail potential obstacles. Certainly, no single approach can stand alone as an adequate solution. *Doe* and *Kadic* are part of a larger effort to address the atrocities that have been, and continue to be, committed against the women in Bosnia-Herzegovina. This section outlines three other approaches that make up this effort.

In May 1993, the United Nations Security Council passed a resolution establishing a war crimes tribunal to prosecute crimes

9. 28 U.S.C.A. § 1350 (West Supp. 1993). The Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992), is also codified at § 1350. It provides federal jurisdiction for a civil action in damages against "an individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing." *Id.* The Torture Victim Protection Act thus provides alternate grounds for jurisdiction when rape is characterized as torture. Notably, the two cases discussed in this Recent Development are among the first to be brought since the enactment of the Torture Victim Protection Act. Therefore, they do not raise any retroactivity problems. This Recent Development focuses on application of the Alien Tort Claims Act to focus on recognizing violence against women as a human rights violation, rather than as part of an established category such as torture.

10. *Doe v. Karadzic*, No. 93-Civ-0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993); *Kadic v. Karadzic*, No. 93-Civ-1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993).

11. As discussed *infra* Part II, the *Kadic* complaint focuses on crimes against women, while the *Doe* complaint seeks redress for crimes against women and men. Beth Stephens, an attorney for the plaintiffs in *Doe* explains: "We were most concerned about the rapes because, historically, the abuse of women in war has never been adequately addressed, but we also felt that we couldn't refuse to represent the man who was killed because he refused to rape his neighbor, and couldn't refuse the other victims." C. Carr, *Battle Scars: Feminism and Nationalism Clash in the Balkans*, VILLAGE VOICE, July 13, 1993, at 25, 26. This difference between the two cases is not relevant to this Recent Development, as the plaintiffs in both cases seek redress for crimes against women.

committed during the war in Bosnia-Herzegovina.¹² It remains unclear, however, how the tribunal will deal with war crimes perpetrated against women. The prosecutors are likely to face immense problems of proof, due to the lack of documentation of Serbian atrocities,¹³ the insufficiency of evidence in witness reports,¹⁴ and the reluctance of rape survivors to submit to public scrutiny. Further complicating matters is the fact that the eleven tribunal judges will come from different countries and cultures, and each will need different sensitizing to the nuances of gender-based crimes. Finally, United Nations Secretary-General Boutros Boutros-Ghali's proposal for a war crimes tribunal recognizes rape and forced prostitution as crimes against humanity in the context of genocide.¹⁵ However, the tribunal's jurisdiction does not extend to crimes characterized as persecution based on gender alone.¹⁶

The International Court of Justice ("ICJ") provides another avenue of potential relief for the women in Bosnia-

12. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993). For a comprehensive analysis of the major flaws and recommendations for improvement in the Statute of the International Tribunal, see *Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal: Resource Allocation, Evidentiary Questions and Protection of Witnesses*, 5 HELSINKI WATCH, Issue 15, Aug. 1993.

13. According to M. Cherif Bassiouni, a DePaul University law professor and one of the five members of the Commission of Experts established by the Security Council to investigate violations of international humanitarian law, the perpetrators in this war "don't leave the same paper trail as [the Nazis] did in World War II Even then it took 2000 investigators a year to obtain prosecutions for 22 defendants." Catharine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, Ms., July-Aug., 1993, at 24, 29.

14. *Id.* at 26.

15. *Id.*; *Report of the Secretary-General Pursuant to ¶ 2 of the Security Council Resolution 808*, U.N. SCOR, Annex, U.N. Doc. S/25704 (1993); see also *Prosecute Now! Helsinki Watch Releases Eight Cases for War Crimes Tribunal on Former Yugoslavia*, 5 HELSINKI WATCH Issue 12, Aug. 1, 1993, at 13-14, 15-17, 20-21, 24, for summaries of four cases involving rape that are identified as strong candidates for prosecution under the Statute of the International Tribunal.

16. This jurisdictional limitation reflects the broader dilemma that international human rights law fails to take into account human rights violations primarily suffered by women. This problem received international attention recently at the World Conference on Human Rights held in Vienna, Austria, on June 14-25, 1993, when a coalition of women's groups pushed to the forefront an agenda concerning women's human rights. See *Human Rights Are for All, Christopher Tells Meeting*, ATLANTA J. & CONST., June 15, 1993, at A10; David B. Ottaway, *Women Having Their Way at Rights Conference*, WASH. POST, June 17, 1993, at A35; Alan Riding, *Women Seize Focus at Rights Forum*, N.Y. TIMES, June 16, 1993, at A3; Elizabeth L. Spaid, *Women Claim Place on Agenda at UN Human Rights Meeting*, CHRISTIAN SCI. MONITOR, June 9, 1993, at 3.

Hercegovina.¹⁷ On March 20, 1993, Bosnia-Hercegovina instituted civil proceedings in the ICJ against Serbia and Montenegro for violating the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁸ On April 8, 1993, pending a final decision, the ICJ issued provisional measures ordering Serbia and Montenegro to "take all measures within [their] powers to prevent the commission of genocide," including rape as a manifestation of genocide.¹⁹ Enforcement of ICJ judgments is left primarily to the parties as a matter of legal obligation, and the residual enforcement authority retained by the Security Council has never been invoked.²⁰ It remains to be seen whether enforcement problems will arise concerning either the provisional order of April 8, 1993, or the final ICJ judgment.

In addition to these international fora, the courts of Bosnia-Hercegovina and the domestic rape laws could provide redress for the rape survivors. In March 1993, Serbian nationalist Borislav Herak was prosecuted and tried for murder and for rape.²¹ Herak confessed to committing sixteen rapes and was sentenced to death.²² It is unclear, however, to what extent Herak was coerced to confess, and what effect the continuing war in Bosnia has had on safeguards against coerced confession in the domestic

17. The ICJ is the principal judicial organ of the United Nations. U.N. CHARTER arts. 7, 92. For a comprehensive discussion of the ICJ, see *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* (Leo Gross ed., 1976) [hereinafter *FUTURE OF THE ICJ*].

18. Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]; Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *FOREIGN AFF.*, Summer 1993, at 122, 128 n.2. The ICJ noted that the former Yugoslavia had been party to the Genocide Convention, and that the principles underlying the Genocide Convention were binding on Serbia and Montenegro even though they are not parties to the Genocide Convention. Meron, *supra*, at 131.

19. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia v. Yugoslavia*), 1993 I.C.J. — (Apr. 8), *reprinted in* 87 *AM. J. INT'L L.* 505, 519 (1993).

20. See Douglas J. Ende, Comment, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration*, 61 *WASH. L. REV.* 1145, 1147 n.15 (1986); see also Ernest L. Kerley, *Ensuring Compliance with Judgments of the International Court of Justice*, in *FUTURE OF THE ICJ*, *supra* note 17, at 276–86 (discussing the lack of precedent and practice with respect to art. 94(2) of the UN Charter, which governs enforcement of ICJ judgments).

21. John F. Burns, *Bosnia War Crime Trial Hears Serb's Confession*, *N.Y. TIMES*, Mar. 14, 1993, § 1, at 10. The Bosnian government charged Herak with genocide and war crimes, and sought the death penalty. *Id.* at 10. Rape was a crime in Yugoslavia pursuant to 11 Penal Code ch. 60, art. 179 (XI *Recueil des Lois de la RSF de Yougoslavie* 1964).

22. John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, *N.Y. TIMES*, Mar. 31, 1993, at A6.

legal system.²³ Normal legal processes will certainly remain disrupted as long as the war in Bosnia continues.²⁴

II. REDRESS IN UNITED STATES COURTS

In response to the growing frustration that war crimes perpetrated against women in Bosnia-Herzegovina are largely going unpunished, two teams of feminist lawyers in the United States have brought civil suit in United States district court.²⁵ They seek redress for the alleged human rights violations pursuant to the Alien Tort Claims Act.²⁶ Both complaints, brought earlier this year in United States District Court in the Southern District of New York, name Radovan Karadzic, the leader of the Bosnian-Serbs and self-proclaimed president of the unrecognized Republic of Srpska, as the defendant.²⁷ The lawsuits differ, however, in the relief sought and in the identity of the plaintiffs.

The February 1993 class action suit, *Doe v. Karadzic*,²⁸ brought by the Center for Constitutional Rights, the City University of New York ("CUNY") Law School, the CUNY International Women's Human Rights Clinic, and the International League for Human Rights, seeks compensatory and punitive damages "for rape and other gross human rights abuses committed by forces under the command and control" of Karadzic, and

23. *Id.*

24. "[T]he breakdown or nonfunctioning of legitimate authority and of the rule of law in many parts of Yugoslavia resulted in widespread denials of due process, particularly in those areas of Croatia and Bosnia-Herzegovina where ethnic Serbs declared local autonomy and rejected republic authority over their regions." 1992 U.S. Dept. of State, *1991 Human Rights Report: Yugoslavia*, Feb. 1992, available in LEXIS, Exec Library, Dstate File.

25. *Doe v. Karadzic*, No. 93-Civ-0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993); *Kadic v. Karadzic*, No. 43-Civ-1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993).

26. 28 U.S.C.A. § 1350 (West Supp. 1993). See *supra* note 9 for a discussion of the Torture Victim Protection Act, also codified at 28 U.S.C.A. § 1350 (West Supp. 1993).

27. The first complaint names Karadzic because: "Defendant Karadzic has command authority over the Bosnian-Serb military forces who have employed rape and other gross human rights abuses as a deliberate tactic against the Muslim women and men of Bosnia Defendant Karadzic bears legal responsibility for the crimes committed by the troops under his command." Plaintiffs' Complaint at 1, *Doe v. Karadzic*, No. 93-Civ-0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993); the second complaint names him because: "Defendant Karadzic designed, ordered, implemented and directed a program of genocide for the systematic violation of the human rights of plaintiffs." Plaintiffs' Complaint at 2, *Kadic v. Karadzic*, No. 93-Civ-1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993); see also HELSINKI WATCH I, *supra* note 1, at 8-10 (describing Karadzic's control over territory in Bosnia-Herzegovina).

28. No. 93-Civ-0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993).

damages for torture and other violations of international and United States law.²⁹ This suit was brought on behalf of plaintiffs Jane Does I and II, citizens of Bosnia-Herzegovina who are currently refugees living in Zagreb, Croatia, "on behalf of themselves and all other women and men abused by [Karadzic's] forces."³⁰ As alleged in the complaint, Jane Doe I was raped by at least eight men and had her breasts slashed, while Jane Doe II was beaten by Serbian soldiers and saw her mother gang raped.³¹ The complaint identifies the class as consisting of "all women and men who suffered rape, summary execution, other torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of defendant between April 1992 and the present."³² Although the exact size of the class is not known, the complaint estimates the class to include thousands of women and men.³³

The March 1993 lawsuit brought by University of Michigan School of Law professor Catharine A. MacKinnon and the NOW Legal Defense and Education Fund focuses specifically on crimes against women and seeks different relief. In addition to compensatory and punitive damages, the complaint in *Kadic v. Karadzic*³⁴ seeks injunctive relief "for personal injury due to genocidal acts of rape, forced pregnancy, enforced prostitution, other torture, extrajudicial killing," and other violations of international and domestic law.³⁵ The plaintiffs in this suit include a Croatian Muslim rape survivor and her twin sons — one dead, one living. According to the complaint, one of plaintiff Kadic's sons was decapitated in her arms by a Serbian soldier,³⁶ and then she was gang raped at least ten times a day during twenty-one days spent in a detention camp.³⁷ The action is also brought on behalf of two women's organizations that assist Muslim and Croatian women and children who have survived "mass rape, . . . forced pregnancy, . . . genocidal torture and discrimination."³⁸

29. Plaintiffs' Complaint at 1, 7-11, *Doe v. Karadzic*, No. 93-Civ-0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993).

30. *Id.*

31. *Id.* at 5.

32. *Id.* at 4.

33. *Id.*

34. No. 93-Civ-1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993).

35. Plaintiffs' Complaint at 1, *Kadic v. Karadzic*, No. 93-Civ-1163 (PKL) (S.D.N.Y. filed on Mar. 2, 1993).

36. *Id.* at 7.

37. *Id.* at 8.

38. *Id.* at 5.

Karadzic has retained former United States Attorney General Ramsey Clark to represent him in both suits. On May 10, 1993, Karadzic moved to dismiss both *Doe* and *Kadic* for lack of personal jurisdiction and insufficiency of process and service of process under Federal Rules of Civil Procedure 12(b)(2), (4), and (5).³⁹ The plaintiffs in both cases filed memoranda in opposition to Karadzic's motion to dismiss on August 6, 1993. Karadzic filed his replies on October 1, 1993.

This section describes the arguments that plaintiffs in *Doe* and *Kadic* make asserting that federal courts have jurisdiction over Karadzic pursuant to the Alien Tort Claims Act.⁴⁰ The plaintiffs' jurisdictional arguments hinge on the acceptance of genocidal rape as an actionable tort under § 1350. Thus, their arguments make an important contribution to the larger fight to recognize human rights violations committed particularly against women as human rights violations.⁴¹

The plaintiffs in both cases look to *Filartiga v. Pena-Irala*,⁴² the landmark case for litigation under the Alien Tort Claims Act. In that case, the Second Circuit found subject matter jurisdiction in a suit brought by a Paraguayan citizen who was a prominent critic of his government's repressive regime, against a former police inspector-general of Paraguay who had tortured the plaintiff's son to death. The *Doe* and *Kadic* plaintiffs assert that under *Filartiga*, federal courts have jurisdiction over wrongs recognized under international law. In support of this, they point to a sentence at the close of the *Filartiga* opinion: "Indeed, for pur-

39. Karadzic also moved for dismissal under FED. R. CIV. P. 12(b)(1) and (6), but did not brief those claims in his opening memorandum. Karadzic's Memoranda in Support of Motion to Dismiss Before Answer in both cases focuses on personal jurisdiction over an U.N. invitee and interpretation of the Headquarters Agreement between the United Nations and the United States. Memorandum in Support of Motion to Dismiss Before Answer, *Kadic v. Karadzic*, 93-Civ-1163 (PKL) (S.D.N.Y. May 10, 1993).

40. The Alien Tort Claims Act was enacted as part of the First Judiciary Act of 1789. The Alien Tort Claims Act is codified at 28 U.S.C.A. § 1350 [hereinafter § 1350]. Before 1980, only twice had plaintiffs prevailed under § 1350. See *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (subject matter jurisdiction under § 1350 sustained in maritime seizure case); *Adra v. Clift*, 195 F. Supp. 857 (D.Md. 1961) (subject matter jurisdiction under § 1350 sustained in child custody suit involving passport fraud). The plaintiffs need to bring their action under § 1350 because "federal diversity jurisdiction does not exist when all parties to a suit are aliens." Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 53 (1981).

41. See *supra* note 16.

42. 630 F.2d 876 (2d Cir. 1980).

poses of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”⁴³ The phrase *hostis humani generis* refers to a late 18th- and early 19th-century doctrine that identified certain acts as so universally reprehensible as to make the perpetrator liable to capture and trial wherever he went.⁴⁴ The doctrine applied originally to pirates, slave traders, and other perpetrators of universally condemned acts. The plaintiffs argue that, as applied today, perpetrators of genocide are *hostis humani generis*, and that § 1350 embodies the concept that when wrongdoers violate international humanitarian law, their liability follows them everywhere. In short, genocidal torts committed by *hostis humani generis* ground exercise of jurisdiction under § 1350 wherever the perpetrator is found and served.⁴⁵

The plaintiffs in both *Doe* and *Kadic* then turn to international sources that indicate the alleged genocidal rape⁴⁶ violates

43. *Filartiga*, 630 F.2d at 890.

44. Blum & Steinhardt, *supra* note 40, at 60; *see, e.g.*, *United States v. Klinton*, 18 U.S. (5 Wheat.) 144 (1820); *United States v. Pirates*, 18 U.S. (5 Wheat.) 184 (1820).

45. The plaintiffs in both cases thus invoke the principle of universal jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1993) defines universal jurisdiction for certain human rights violations: “[A] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade . . . genocide, [and] war crimes.” *See also* Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss Before Answer at 42 n.49, *Doe v. Karadzic*, No. 93–Civ–0878 (PKL) (S.D.N.Y. filed Feb. 11, 1993) [hereinafter *Doe* Memorandum]; Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss Before Answer at 14, *Kadic v. Karadzic*, No. 93–Civ–1163 (PKL) (S.D.N.Y. filed Mar. 2, 1993) [hereinafter *Kadic* Memorandum].

46. The plaintiffs in *Kadic* rely on the Genocide Convention, *supra* note 18, to argue that the allegations constitute genocidal rape. Article II of the Genocide Convention defines genocide as:

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

Genocide Convention, *supra* note 18. The *Kadic* plaintiffs argue that the alleged wrongful death or extrajudicial killing is “killing,” that the alleged rape and forced prostitution do “serious bodily and mental harm,” and that the alleged forced pregnancy, like “measures intended to prevent births” and “forcibly transferring children,” is an impermissible attempt to control women’s reproductive process. *Kadic* Memorandum, *supra* note 45, at 13–14.

customary international law.⁴⁷ The plaintiffs in *Doe* and *Kadic* also cite leading scholarly authority that genocide "will probably furnish a basis for § 1350 jurisdiction."⁴⁸ In further support for their argument that the court has jurisdiction under § 1350, the plaintiffs in *Doe* and *Kadic* argue that rape and forced prostitution also violate customary international law.⁴⁹

Lastly, the plaintiffs in *Doe* invoke the concept of state obligation to bring *hostis humani generis* perpetrators to justice in order to bolster their argument that the Court has jurisdiction under § 1350. The plaintiffs cite numerous international instruments that reflect this obligation.⁵⁰ Similarly, they point to the related state obligation to provide redress to victims of human

That the plaintiffs in *Doe* do not explicitly characterize the alleged violations of international law as genocidal rape does not indicate disagreement with the approach in *Kadic*. Although the plaintiffs in *Doe* discuss "genocide" and "rape, sexual abuse and other torture" separately in the beginning of their memorandum, they do not distinguish between the two categories in their legal analysis. *Doe* Memorandum, *supra* note 45, at 7-10, 40-48.

47. The *Kadic* plaintiffs assert that the Nuremberg Judgment recognized genocide as a crime. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, 411, 467-68 (1950). They also assert that the Genocide Convention criminalizes genocide and provides for individual liability at Articles IV and V. *Kadic* Memorandum, *supra* note 45.

48. Blum & Steinhardt, *supra* note 40, at 90.

49. They cite: Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(e), *reprinted in* 72 AM. J. INT'L L. 457 (1978); Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 76(1), *reprinted in* 72 AM. J. INT'L L. 457 (1978); Geneva Conventions of 1949, Conventions I-IV, Aug. 12, 1949, 75 U.N.T.S. 31, 85, 135, 287. *Doe* Memorandum, *supra* note 45, at 42; *Kadic* Memorandum, *supra* note 45, at 15.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter "Torture Convention"]; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 317, U.N. GAOR, 4th Sess., U.N. Doc. A/125/Corr. 1 & 2 (1949). *Kadic* Memorandum, *supra* note 45, at 14, 16.

50. Under the Geneva Conventions, *supra* note 18, each signatory is obligated "to search for persons alleged to have committed, or to have been ordered to be committed, such grave breaches, and bring such persons, regardless of their nationality, before its own courts." Further, the Torture Victim Protection Act, *supra* note 9, applies so long as "the alleged offender is present in any territory under [a State's] jurisdiction." *Doe* Memorandum, *supra* note 45, at 42.

rights abuses.⁵¹ The *Doe* plaintiffs conclude by arguing that § 1350 represents the vehicle by which the United States meets its obligation under international law.⁵² Thus, they assert that recognition of the alleged violations of international law as an actionable tort under § 1350 would conform with the United States' obligation to bring *hostis humani generis* perpetrators such as Karadzic to justice.

CONCLUSION

The plaintiffs' arguments that federal courts have subject matter jurisdiction over Karadzic pursuant to the Alien Tort Claims Act raise an issue of first impression for United States courts. The plaintiffs' arguments also contribute to the broader campaign to establish that violations of women's rights constitute violations of international human rights. Most importantly, *Doe* and *Kadic* may provide much needed redress for the crimes committed against the women of Bosnia-Herzegovina.

51. Article 8 of the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. res. 217A (III), U.N. doc. A/810 (1948), which is considered binding international law, requires each nation to provide victims of human rights abuses effective remedies. *Doe* Memorandum, *supra* note 45, at 44.

52. Indeed, the plaintiffs point out that the legislative history of the Torture Victim Protection Act, *supra* note 9, reflects congressional recognition of U.S. obligation under international law. H.R. REP. No. 367, 102d Cong., 1st Sess. (1992). *Doe* Memorandum, *supra* note 45, at 44-45.

