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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

United States of America

1. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(*a*) Adbi Hosh Askir (Plaintiff) vs. United Nations, Hon. Boutros Boutros Ghali, Joseph E. Connor, Brown & Root Services Corp. and "Doe" Corporations (Defendants) Judgement No. 95 Civ. 11008 (JGK) of 29 July 1996[1]

Action to recover damages relating to the alleged unauthorized and unlawful possession of plaintiff's property – Restrictive or obsolete immunity – Question of exception to the immunity afforded by the Convention on the Privileges and Immunities of the United Nations – Allegations of malfeasance do not strip the United Nations of its immunity – Issue of United Nations intervening in civil wars.

This is an action to recover in excess of $190 million in damages relating to the alleged unauthorized and unlawful possession of the plaintiff's property in Mogadishu, Somalia, during military and humanitarian operations of the United Nations there beginning in or about April 1992. The plaintiff's property is a compound encompassing approximately 1 million square metres containing and office complex, a hotel, recreational facilities, restaurants and other facilities. The compound was allegedly occupied and used as a military logistics and supply base by the United Nations and its agents, Brown & Root Services Corp. ("Brown & Root"), and the Doe Corporation defendants. The plaintiff alleges that the United Nations wrongfully and without proper authorization occupied approximately one quarter of the compound over that period of time is approximately $190 million, one quarter of which he alleges is allocable to the United Nations. The plaintiff asserts claims against the Secretary-General of the United Nations, Boutros Boutros-Ghali and the Under-Secretary-General for Administration and Management, Joseph E. Connor, (the "United Nations Defendants"), in their official and individual capacities, claiming lost rental value, (count 1); gross negligence in failing to ensure payments to the plaintiff, (count 2); and violations of the New York Human Rights Law, Executive Law § 296, arising out of the failure to pay the plaintiff based on his race and national origin, (count 3). In addition to his claim for compensatory damages of $193,779,447, the plaintiff also seeks exemplary damages of $750 million and prejudgment interest 18% per year compounded daily, and attorney's fees and costs.

This action is based on diversity jurisdiction pursuant to *28 U.S.C. § 1332*(a)(2). The plaintiff is a citizen of the Republic of Somalia. Boutros-Ghali is a citizen of Egypt, Connor is a citizen of either New York, New Jersey or Connecticut, and Brown & Root is incorporated in Delaware and has its principal place of business in Texas. At a hearing held on 18 July 1996, the Court raised the issue of whether the inclusion of aliens as both plaintiff and defendant served to destroy diversity. See, e.g., *International Shipping Co., S.A. v. Hydra Offshore, Inc., 875 F.2d 388, 391-92* (2d Cir.) cert. Denied, *493 U.S. 1003, 107 L. Ed. 2d 558, 110 S. Ct. 563 (1989), Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980),* cert. denied, *449 U.S. 1080, 66 L. Ed. 2d 804, 101 S. Ct. 863 (1981).* In response, and on consent of defendant Brown & Root, the plaintiff has dropped defendant Boutros-Ghali as a defendant in the present case, thus remedying any jurisdictional defect. n1

n1 Although the plaintiff and Brown & Root submitted the stipulation based on Fed. R. Civ. p. 21, in this circuit the proper approach is to amend the pleadings pursuant to Fed. R. civ. p. 15(a). *See In re Joint E. and S. D.sts. Asbestos Litig., 124 F.R.D. 538, 541-42* (S. & E.D.N.Y. 1989) (citing *Kerr v. Compagnie De Ultramar, 250 F.2d 860, 864 (2d Cir. 1958)*), aff'd sub nom. *Johnson v. Celotex Corp., 899 F.2d 1281* (2d Cir.), cert. Denied, *498 U.S. 920, 112 L.Ed. 2d 250, 111 S. Ct. 297 (1990)*; but see *Safeco Ins. Co. of America v. City of White House, 36 F.3d 540, 546 (6th Cir. 1994)* (refusing to follow Kerr as an "aberration" and noting no difference between application of rule 15(*a*) and rule 21 for curing diversity defect). Therefore, the Court construes the stipulation between the parties as a stipulation to amend pursuant to rule 15(*a*) to remove Boutros-Ghali as a party. The stipulation will be so ordered and the Complaint is deemed so amended. Regardless of the procedural device used, however, it is apparent that Boutros-Ghali should be dropped as a defendant. His presence is not necessary in the present suit and, as reflected by the agreement of the parties, dropping him as a party will not prejudice the remaining parties.

The United Nations Defendants have not been served with the summons and complaint. Legal counsel for the United Nations has submitted papers, however, asserting absolute immunity of the United Nations and the United Nations Defendants and requesting the Court dismiss the Complaint sua sponte. At the Court's request, the Untied States, while not a party in the present case, has submitted papers in support of the United Nations Defendants' suggestion of dismissal. N2 The plaintiff opposes dismissal of the United Nations Defendants and seeks an order permitting the United States Marshal Service to serve the United Defendants.

n2 The United States has not filed a formal Statement of Interest pursuant to *28 U.S.C. § 517.*

After considering the submissions, and after listening to oral argument oat the hearing 18 July 1996, the Court dismisses the Complaint sua sponte as to the remaining United Nations Defendant, Connor, for lack of subject matter jurisdiction pursuant to Fed. R. Civ. p. 12(b)(1) because Connor is immune from this suit. n3

n3 The plaintiff asserts claims against Connor in both his official and individual capacities. The plaintiff acknowledges that the claims against Connor in his official capacity may be treated as an action against the United Nations itself. With respect to the claims against Connor in his individual capacity, none of Connor's alleged actions are outside of the scope of his official duties, however, notwithstanding the plaintiff's bare allegation to the contrary. The plaintiff does nothing more than allege that "the United Nations had no authority or power under the Charter of the United Nations to go into Somalia in the first place." (Letter from Leroy Wilson, Jr. to Hon. John G. Koeltl, dated 13 June 1996, p. 5; see Compl. P 10.) The mere allegation that the United Nations did not possess the authority to undertake its missions in Somalia does not make whatever actions Connor may have taken to carry out those missions any less a part of his official function. In any event, the immunities provided to Connor under article 5, §18 of the United Nations Convention are applicable here and would afford him protection in his individual capacity, as described infra. See *Donald v. Orfila, 252 U.S. App. D.C. 134, 788 F.2d 36, 37 (D.C. Cir. 1986).*

Article 2 of the Convention on the Privilege and Immunities of the United Nations ("United Nations Convention"), 13 February 1946, 21 U.S.T. 1418, T.I.A.S. 6900, acceded to by the United States in 1970, provides, in relevant part:

> The United Nations, its property and assets wherever located any by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."

United Nation Convention, art. 2, § 2, 21 U.S.T., p. 1422. See *Boimah v. United Nations General Assembly, 664 F. Supp. 69, 71 (E.D.NY.Y. 1987)*["Under the United Nations.] Convention the United Nations' immunity is absolute, subject only to the Organization's express waiver of immunity in this case by the United Nations. With respect to officials of the United Nations, immunity is provided under article 5, which provides, in relevant part:

Officials of the United Nations shall: (*a*) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity...United Nations Convention, art. 5, § '8, 21 U.S.T. p. 1432.

The plaintiff offers three arguments against dismissal based on immunity:

A.

First, with respect to the United Nations Convention, the plaintiff argues that the immunity afforded under article 2 is coextensive with the immunity provided to international organizations under the International Organizations Immunities Act ("IOIA"), *22 U.S.C. § 288a.* n4 The plaintiff argues that the IOIA affords the United Nations the same immunity provided to foreign Governments under the Foreign Sovereign Immunities Act ("FSIA"), *28 U.S.C. § 1602* et seq. The plaintiff takes the position that FSIA, and therefore for the purpose of the United Nations lOIA, provide only restrictive immunity. The Supreme Court recently explained the distinction between restrictive and absolute immunity:

Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a State is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gesitionis)....[A] State engages in commercial activity under the restrictive theory when it exercises "'only those powers that can also be exercised by private citizens,'" as distinct form those ";powers peculiar to sovereigns.'" Put differently, a foreign State engages in commercial activity for purposes of the restrictive theory only when it acts "in a manner of a private player within" the market. *Saudi Arabia v. Nelson, 507 U.S. 349, 359-60, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993)* (citations omitted). The plaintiff argues that this action arises from the commercial activities of the United Nations, namely the leasing and occupation of property, and therefore falls outside the bounds of restrictive immunity.

N4 The United Nations was designated an international organization by President Truman in 1946. See Ex. Ord. No. 9698, *11 Fed. Reg. 1809* (February 9, 1946).

It is necessary to decide, first, whether the restrictive immunity doctrine of FSIA applies to the United Nations through IOIA, or second, whether that restrictive immunity would trump the otherwise absolute immunity afforded by the United Nations Convention itself. Neither of these questions is necessary to determine because even if the more limited restrictive immunity doctrine applied, the claims in the present case do not arise out of commercial activity by the United Nations. Compare *Tuck v. Pan American Health Org., 215 U.S. App. D.C. 201, 668 F.2d 547, 550 (D.C. Cir. [*372] 1981)* (declining to decide whether international organization governed by IOIA was granted restrictive or absolute immunity by virtue of FSIA because activity was not commercial); *Broadbent v. Organization of American States, 202 U.S. App. D.C. 27, 628 F.2d 27, 32-33 (D.C. Cir. 1980)* (same).

The scope of restrictive immunity is determined by the nature of the activity rather than its motivation or purpose. See *Saudia Arabia, 507 U.S. at 360; Broadbent, 628 F.2d at 33; Friedar v. Government of Israel, 614 F. Supp. 395, 399 (S.D.N.Y. 1985)*. In the present case, the plaintiff complains that his property was seized and occupied by the United Nations as part of its military operation, even one directed at ensuring the delivery of humanitarian relief, is not an endeavor commonly associated with private citizens indeed, military operations are a distinctive province of sovereigns and Governments. The occupation of property during such an operation to house troops, store an distribute supplies and ordinance, or manage the logistics and planning and parcel of such an operation. The United Nations mission in Somalia provided "a military force to enable relief agencies to deliver food and other supplies to the Somali people." (Comp. P 11.) This is not a case of the United Nations arranging for one of its official to lease a residential apartment in a foreign State and providing head, hot water, and electricity—this is a case of an armed military occupation in a country where the Government had been overthrown and no administration had taken its place. (Comp. P 8.) Indeed, the perimeter of the compound in Mogadishu was secured with "sandbags, landmines, barbed wire and other anti-personnel

weapons." (Compl. P 22.) There is no doubt that the operation of a military logistics and supply base was not commercial activity of the sort contemplated under the restrictive immunity doctrine. See *Saudia Arabia, 507 U.S. at 361* ("[A] foreign State's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature."); *Friedar, 614 F. Supp. at 399* (acts relating to recruiting for armed forces and determining veterans benefits were "purely governmental").

Accordingly, even if the immunity available to the United Nations and its officials is only restrictive immunity, the immunity still applies because the nature of the acts complained of by the plaintiff are the exercise of governmental functions rather than private commercial activity.

B.

The plaintiff's second argument is that the interpretation of the term "immunity" in the United Nations Convention itself should exclude commercial activities. The plaintiff makes this argument by pointing out that judicial decisions involving the interpretation of the scope of the United Nations Convention have related principally to employment disputes between former employees and the United Nations or its agencies. See *De Luca v. The United Nations Organization, 841 F. Supp. 531* (S.D.N.Y.), aff'd without opinion, *41 F3d 1502 (2d Cir. 1994)*, cert. Denied, *131 L. Ed 2d 310, 115 S. Ct. 1429 (1995); Klyumel v. United Nations, 1992 U.S. Dist. LEXIS 20876, No. 92 Civ. [**12] 4231, 1992 WL 447314* (S.D.N.Y. 4 December 1992) (report and recommendation by Grubin, M.J.). aff'd and adopted, *1993 U.S. Dist. LEXIS 1690, 1993 WL 42708* (S.D.N.Y. 17 February 1993); *Boimah, 664 F. Supp. 69*; see also *Shamsee v. Shamsee, 74 A.D.2d 357, 428 N.Y.S. 2d 33* (2d Dep't 1980) (appeal of contempt order against United Nations Joint Staff Pension Fund).

None of these cases limit their respective interpretations of the immunity afforded by the United Nations Convention. Indeed, in DeLuca the Court observed that the United Nations Convention contained no exceptions to its immunity provisions, obviating any need to consider whether FSIA or IOIA applied. See *De Luca, 841 F. Supp. at 533 n.1*. The United Nations Convention by its terms provides immunity from "every form of legal process," the only exception being express waiver by the United Nations itself.

In any event, even if there is an exception to the immunity provided by article 2 of the United Nations Convention based on a distinction between commercial and noncommercial activity, as explained above, the activities upon which this lawsuit is based on a distinction between commercial and noncommercial activity, as explained above, the activities upon which this lawsuit is based are not commercial.

Accordingly, the immunity provided by the United Nations Convention applies in the present case.

C.

The plaintiff's third and final argument is based on the allegedly wrongful nature of the acts of the United Nations and Connor. The plaintiff argues that the United Nations did not have the authority to adopt the resolutions passed in connection with the peacekeeping operations in Somalia. The plaintiff also alleges that Connor was not authorized to refuse to pay the plaintiff rent for the use of the compound or to refuse to pay him because of racial animus or bias based on the plaintiff's national origin. The plaintiff also makes allegations of fiscal improprieties relating to the operation of the United Nations generally and the operation in Somalia in particular, attributing the mismanagement to defendant Connor. (Comp. P 46-50)

The plaintiff's allegations of malfeasance do not serve to strip the United Nations or Connor of their immunities afforded under the United Nations Convention. See *De Luca, 841 F. Supp. at 535* (defendant remained immune under IOIA notwithstanding allegations of illegality and wrongdoing); *Tuck, 668 F.2d at 550 n. 7* (IOIA immunity still applied notwithstanding allegations of race discrimination); *Donald v. Orfila, 252 U.S. App. D.C. 134, 788 F.2d 36, 37 (D.C. Cir. [**14] 1986)* (allegations of improper motive did not strip individual of immunity under IOIA).

The allegation that the United Nations did not properly adopt its own resolutions authorizing its actions in Somalia is equally unavailing. The plaintiff has done nothing more than offer conclusory allegations that the missions in Somalia were beyond United Nations authority because they were interventions in civil wards. This allegation stands in direct contradiction to a series of duly adopted United Nations Security Counsel resolutions, including resolutions 794 (3 December 1992) and 814 26 March 1993), each adopted pursuant to Chapter VII of the United Nations Charter of the United Nations.

Accordingly, the plaintiff's allegations of misconduct by Connor and lack of authority by the United Nations do not overcome Connor's assertion of immunity in the present case.

Conclusion

For the reasons explained in this Opinion, the Court dismisses sua sponte the claims against defendant Connor in his official and individual capacities pursuant to Fed. R. Civ. p. 12(b)(i) for lace of subject, matter jurisdiction because, as described above, Connor is immune from being sued in the present action.

(*b*) S. Kadic, on her own behalf and on behalf of her infant sons Benjamin and Ognjen, Internationalna Iniciativa Zena Bosne I Hercegovine "Biser", and Zene Bosne I Hercegovine (Plaintiff-Appellants) vs. Radovan Karadvzic (Defendant0Appelee). Jane Doe I, on behalf of herself and all others similarly situated; and Jane Doe II, on behalf of herself and as administratix of the estate of her deceased mother, and on behalf of all others similarly situated, Plaintiffs-Appellants. Judgements Nos. 1541, 1544, Dockets 94-9035, 94-9069.

Jurisdiction of domestic courts in cases of violation of international law – Genocide and war crimes – Definition of a State in international law – Privileges and immunities of the United Nations

Two groups of victims from Bosnia and Herzegovina brought actions against the self proclaimed president of the unrecognized Bosnian-Serb entity under, inter alia, the Alien Tort Claims Act for violations of international law. The United States District Court for the Southern District of New York, Peter K. Leisure, J., 866 F. Supp. 734, dismissed actions for lack of subject matter jurisdiction and plaintiffs appealed. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) plaintiffs sufficiently alleged violations of customary international law and law of war for purposes of Alien Tort Claims Act; (2) plaintiffs sufficiently alleged that unrecognized Bosnian-Serb entity of "Srpeak" was a "State," and that defendant acted under color of law for purposes of international law violations requiring official action; (3) defendant was not immune from personal service of process while invitee of United Nations; (4) actions were not precluded by political question doctrine; and (5) defense under act of state doctrine was waived.

Reversed and remanded.

1. *Federal Courts — 192.10, 243*

The Alien Tort Claims Act confers federal subject-matter jurisdiction when an alien sues for tort committed in violation of the law of nations, i.e., international law; here is no federal subject-matter jurisdiction under the Alien Tort Claims Act unless complaint adequately pleads violation of law of nations or treaty of United States. 28 U.S.C.A. §1350.

2. *International law — 1*

Federal courts ascertaining content of the law of nations, for purposes of action brought under Alien Tort Claims Act, must interpret international law not as it was when Act was enacted, but as it has evolved and exists among nations of world today. 28 U.S.C.A. § 1350.

3. *International law — 2*

In action brought under Alien Tort Claims Act, federal courts find norms of contemporary international law by consulting works of jurists writing professedly on public law, by general usage and practice of nations, or by judicial decisions recognizing and enforcing that law. 28 U.S.C.A. § 1350.

4. *Criminal law — 45.50*

International law — 1, 10.11

Slaves — 2

War and national emergency — 11

Law of nations, as understood in modern era for purposes of action brought under Alien Tort Claims Act, does not confine its reach to State action, in that certain forms of conduct violate law of nations whether undertaken by those acting under auspices of state or only as private individuals, such as piracy, slave trade, and war crimes. 28 U.S.C.A. § 1350; Restatement (Third) of the Foreign Relations § 404; note preceding § 201.

5. *International law — 1, 10.11*

Acts of genocide violate law of nations, or customary international law, regardless of whether offenders acted as individuals or as members of organizations. 18 U.S.C.A. § 1091.

6. *International law — 10.11*

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly stated violation of international law norm proscribing genocide, regardless of whether person acted under color of law, for purposes of action brought under Alien Tort Claims Act. 18 U.S.C.A. § 1091; 28 U.S.C.A. § 1350.

7. *War and national emergency — 11*

Acts of murder, rape, torture, and arbitrary detention of civilians, committed in course of hostilities, are "war crimes" in violation of international law of war.

See publication Words and Phrases for other judicial constructions and definitions.

8. *War and national emergency — 11*

International law of war imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for prevention of war crimes.

9. *Treaties — 8*

War and national emergency — 11

Under law of war as codified in Geneva Conventions, all "parties" to conflict, including insurgent military groups, are obliged to adhere to most fundamental requirements of law of war.

10. *War and national emergency — 11*

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture against noncombatants in Bosnian civil war clearly stated "war crimes" in violation of most fundamental norms of international law of war, for purposes of action brought under Alien Tort Claims Act. 28 U.S.C.A. § 1350.

See publication Words and Phrases for other judicial constructions and definitions.

11. *International law — 1*

War and national emergency — 11

Torture Victim Act codifies universally accepted norm of international law prohibiting official torture and extends it to cover summary execution; however, torture and summary execution, when not perpetrated in course of genocide or war crimes, are proscribed only when committed by state officials or under color of law. Torture Victim Protection Act of 1991, §§ 2(a), 3(a), 28 U.S.C.A. § 1350 note.

12. *International law — 3, 4*

Under international law, a "state" is entity that has defined territory and permanent population, that is under control of its own government, and that engages in, or has capacity to engage in, formal relations with other such entities; recognition by other states is not required. Restatement (Third) of Foreign Relations §§ 201, 202 comment.

See publication Words and Phrases for other judicial constructions and definitions.

13. *International law — 8*

Any government, however violent and wrongful in its origin, must be considered "de facto government" if it is in full and actual exercise of sovereignty over territory and people large enough for nation. Restatement (Third) of Foreign Relations § 201.

See publication Words and Phrases for other judicial constructions and definitions.

14. *International law — 1, 4*

Customary international law of human rights, such as proscription of official torture, applies without distinction between recognized and unrecognized states. Restatement (Third) of Foreign Relations §§ 207, 702.

15. *International law — 3*

Plaintiff classes of Bosnian victims, who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that entity called, sufficiently alleged that entity called "Srpska" satisfied criteria to be considered a "state" for purposes of establishing international law violations requiring state action; Srpska was alleged to control defined territory, to control populations within its power, to have entered into agreements with other governments, and to have had president, legislature, and its own currency. 28 U.S.C.A. § 1350; Restatement (Third) of Foreign Relations §§ 201, 207, 702.

16. *International law — 10.11*

Plaintiff classes of Bosnian victims who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that defendant acted under color of law, for purposes of establishing international law violations which required official action, by alleging that defendant acted in concert with officials of former Yugoslavian state of Serbia. 28 U.S.C.A. § 1350.

17. *Federal Courts — 192.10*

"Color of law" jurisprudence of 1983 is relevant guide to whether defendant has engaged in international law violations requiring "official action" for purposes of jurisdiction under Alien Tort Claims Act. 28 U.S.C.A. § 1350; 42 U.S.C.A. § 1983.

18. *Civil rights — 198(4)*

Private individual acts under "color of law," within meaning of § 1983, when he acts together with state officials or with significant state aid. 42 U.S.C.A. § 1983.

19. *International law — 10.11*

In construing terms "actual or apparent authority" and "color of law" under Torture Victim Protection Act, courts are to look to principles of agency law and to jurisprudence under 42 U.S.C.A. 1983, respectively. Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note; 42 U.S.C.A. § 1983.

20. *Federal courts — 192.10*

Though Torture Victim Protection Act creates cause of action for official torture, that statute, unlike Alien Tort Act, is not itself jurisdictional statute. 28 U.S.C.A. § 1331; Torture Victim Protection Act of 1991, § 1 et. seq., 28 U.S.C.A. § 1350 note.

21. *Federal courts — 192.10*

Torture Victim Protection Act permitted plaintiff classes of Bosnian victims to pursue their claims of official torture against self-proclaimed leader of unrecognized Bosnian-Serb entity under jurisdiction conferred by Alien Tort Claims Act and also under general federal question jurisdiction statute. 28 U.S.C.A. § 1331, 1350; Torture Victim Protection Act of 1991, § 1 et. seq., 28 U.S.C.A. § 1350 note.

22. *Federal civil procedure — 415.1*

Treaties — 8

Neither United Nations Headquarters Agreement nor federal common law provided defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," immunity from service of process while in judicial district as "invitee" of United Nations. 22 U.S.C.A. § 287 note; Restatement (Third) of Foreign Relations § 469 note.

23. *Constitutional law — 69*

Mere possibility that defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," might be some future date be recognized by United States as head of state of friendly nation and might thereby acquire head-of state immunity did not transform claims of plaintiff Bosnian victims under Alien Tort Claims Act and Torture Victim Protection Act into nonjusticiable request for advisory opinion. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

24. *Constitutional law — 68(1)*

Not every case "touching foreign relations" is nonjusticiable as political question, and judges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in context of human rights; preferable approach is to weigh carefully relevant considerations on case-by-case basis.

25. *Constitutional law — 68(1)*

A "nonjusticiable political question" would ordinarily involve one or more of following factors: textually demonstrable constitutional commitment of issue to coordinate political department; lack of judicially discoverable and manageable standards for resolving it; or impossibility of deciding without initial policy determination of kid clearly for nonjudicial discretion; impossibility of deciding without initial policy determination of kind clearly for nonjudicial discretion; impossibility of court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to political decision already made; or potentiality of embarrassment from multifarious pronouncements of various departments on one question.

See publication Words and Phrases for other judicial constructions and definitions.

26. *Constitutional law — 68(1)*

Actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act were not nonjusticiable political questions; officials of United States expressly disclaimed any concern that political question doctrine should be invoked to prevent litigation of subject lawsuits. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

27. *Federal Courts — 616*

Act of state doctrine was not asserted in district court, and was therefore not before court on appeal, in actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

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Beth Stephens, New York City (Matthew J. Chachére, Jennifer Green, Peter Weiss, Michael Retner, Jules Lobel, Center for Constitutional Rights, New York City; Rhonda Copelon, Celina Romany, International Women's Human Rights Clinic, Flushing, NY; Judith Levin, International League of Human Rights, New York City; Harold Hongju Koh, Ronald C. Slye, Swati Agrawal, Bruce Brown, Charlotte Burrows, Carl Goldfarb, Linda Keller, Jon Levitsky, Daniyal Mueenuddin, Steve Parker, Maxwell S. Peltz, Amy Valley, Wendy Weiser, Allard K. Lowenstein International Human Rights Clinic, New Haven, CT., the brief), for plaintiffs-appellants, Jane Doe I and Jane Doe II.

Catharine A. MacKinnon, Ann Arbor, MI (Martha F. Davis, Deborah A. Ellis, Yolanda S. Wu, NOW Legal Defense and Education Fund, New York City, on the brief), for plaintiffs-appellants Kadic, Internationalna Iniciativa Zena Bosne I Hercegovine, and Zena Bosne I Hercegovine.

Ramsey Clark, New York City (Lawrence W. Schilling, New York City, on the brief), for defendant-appellee.

Drew S. Days, III, Solicitor General, and Conrad K. Harper, Legal Adviser, Department of State, Washington, DC, submitted a Statement of Interest of the U.S.; Frank W. Hunger, Asst. Atty. Gen., and Douglas Letter, Appellate Litigation Counsel, on the brief.

Karen Honeycut, Vladeck, Waldman, Elias & Englehard, New York, NY, submitted a brief for amici curiae Law Professors Frederick M. Abbott, et al.

Nancy Kelly, Women Refugee Project, Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, Cambridge, Mass., submitted a brief for amici curiae Alliances – an African Women's Network, et al.

Juan E. Mendez, Joanne Mariner, Washington, DC; Professor Ralph G. Steinhardt, George Washington University School of Law, Washington, DC; Paul L. Hoffman, Santa Monica, CA; Professor Joan Fitzpatrick, University of Washington School of Law, Seattle, WA, submitted a brief for amicus curiae Human Rights Watch.

Stephen M. Schneebaum, Washington, DC, submitted a brief for amici curiae The International Human Rights Law Group, et al.

Before: NEWMAN, Chief Judge, FEINBERG and WALKER, Circuit Judges.

JON O. NEWMAN, Chief Judge:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune form service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska." Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994) ("*Doe*"). For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background

The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadzic, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadzic possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a

pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command. The complaints allege that Karadzic acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

The two groups of plaintiffs asserts causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney's fees, and, in one of the cases, injunctive relief. Plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991 ("Torture Victim Act"), Pub.L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (Supp. V 1993), the general federal-question jurisdictional statute, 28 U.S.C. § 1331 (1988), and principles of supplemental jurisdiction, 28 U.S.C. § 1367 (Supp. V 1993).

In early 1993, Karadzic was admitted to the United States on three separate occasions as an invitee of the United Nations. According to affidavits submitted by the plaintiffs, Karadzic was personally served with the summons and complaint in each action during two of these visits while he was physically present in Manhattan. Karadzic admits that he received the summons and complaint in the *Kadic* action, but disputes whether the attempt to serve him personally in the *Doe* action was effective.

In the District Court, Karadzic moved for dismissal of both actions on the grounds of insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, and nonjusticiability of plaintiffs' claims. However, Karadzic submitted a memorandum of law and supporting papers only on the issues of service of process and personal jurisdiction, while reserving the issues of subject-matter jurisdiction and non-justiciability for further briefing, if necessary. The plaintiffs submitted papers responding only to the issues raised by the defendant.

Without notice or a hearing, the District Court by-passed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. In an Opinion and Order, reported at 866 F. Supp. 734, the District Judge preliminarily noted that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadzic as the head of state of a friendly nation, *see Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (head-of-state immunity), and that this possibility could render the plaintiff's pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dispositive but believed that it "militates against this Court exercising jurisdiction." *Doe*, 866 F. Sup. at 738.

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations," *id.* at 739. Finding that "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state," *id.* at 741, and that "the members of Karadzic's faction do not act under the color of any recognized state law," id., the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *id.* at 740-41. The Court did not consider the plaintiffs' alternative claim that Karadzic acted under color of law by acting in concert with the Serbian Republic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claims under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, or any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claims that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadzic urges us to affirm on any one of these three grounds. We consider each in turn.

I. *Subject-matter jurisdiction*

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court – the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. THE ALIEN TORT ACT

1. *General Application to Appellants' Claims*

[1] The Alien Tort Act provides:

> 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 (1988). Our decision in *Filártiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)[2] 630 F.2d at 887; *see also Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428, 109 S.Ct. 683, 102 Led.2d 818 (1989). The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction that is required under the more flexible "arising under" formula of section 1331. *See Filártiga*, 630 F.2d at 887-88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

[2, 3] *Filártiga* established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881; *see also Amerada Hess*, 830 F.2d at 425. We find the norms of contemporary international law by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filártiga* , 630 F.2d at 880 (quoting *United States v. Smith* 18 U.S. (5 Wheat.) 153, 160-161, 5 L.Ed. 57 (1820)). If this inquiry discloses that the defendant's alleged conduct violates "well-established, universally recognized norms of international law," *id.* at 888, as opposed to "idiosyncratic legal rules," *id.* at 881, then federal jurisdiction exists under the Alien Tort Act.

Karadzic contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals. In making this contention, Karadzic advances the contradictory positions that he is not a state actor, see Brief for Appellee at 19, even as he asserts that he is the President of the self-proclaimed Republic of Srpska, see statement of Radovan Karadzic, May 3, 1993, submitted with Defendant's Motion to Dismiss. For their part, the Kadic appellants also take somewhat inconsistent positions in pleading defendant's role as Presidet of Srpska, Kadic Complaint ¶ 13, and also contending that "Karadzic is not an official of any government," Kadic Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n. 25.

Judge Leisure accepted Karadzic's contention that "acts committed by non-state actors do not violate the law of nations," Doe, 866 F. Supp. At 739, and considered him to be a non-state actor.[3] The Judge appears to have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture, *see, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988), without consideration of the substantial body of law, discussed below, that renders private individuals liable for some international law violations.

[4] We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196-97, 5 L.Ed. 64 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without...any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765-1769, Univ. of Chi. Ed., 1979). Later examples are prohibitions against the slave trade and certain war crimes. See M. Cheirf Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992); Jordan Paust, *The Other Side of Right; Private Duties Under Human Rights Law,* 5 Harv. Hum.Rts.J. 51 (1992).

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5-13.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) (*"Restatement (Third)"*) proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." *Restatement (Third)* pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, *Restatement (Third)* § 702[4] and a more limited category of violations of "universal concern," *id.* §[5] partially overlapping with those listed in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, *cf. id.* § 402(1)(*a*), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of "universal concern" include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. B, such as the tort actions authorized by the Alien Tort Act. Indeed, the two cases invoking the Alien Tort Act prior to *Filártiga* both applied the civil remedy to private action. *See Adra v. Clift*, 195 F. Supp. 857 (D.Md.1961); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

Karadizic disputes the application of the law of nations to any violations committed by private individuals, relying on *Filártiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S.6 1003, 105 S. Ct. 1354, 84 L.Ed.2d 377 (1985).[6] Filártiga involved an allegation of torture committed by a state official. Relying on the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture, G.A.Res. 3452, U.N. GAOR, U.N. Doc. A/1034 (1975) (hereinafter "Declaration on Torture"), as a definitive statement of norms of customary international law prohibiting states form permitting torture, we ruled that "official torture is now prohibited by eh law of nations." Filártiga, 630 F.2d at 884 (emphasis added). We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filártiga* purports to preclude such a result.

Nor did Judge Edwards in his scholarly opinion in *Tel-Oren* reject eh application of international law to any private action. On the contrary, citing piracy and slave-trading as early examples, he observed that there exists a "handful of crimes to which the law of nations attributes individual responsibility," 726 F.2d at 795. Reviewing authorities similar to those consulted in Filártiga, he merely concluded that torture—the specific violation alleged in *Tel-Oren*—was not within the limited category of violations that do not require state action.

Karadzic also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. See H.R. rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (explaining that codification of *Filártiga* was necessary in light of skepticism expressed by Judge Bork's concurring opinion in *Tel-Oren*). At the same time, Congress indicated that the Alien Tort Act "has other important uses and should not be replaced," because

> Claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

Id. The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.

2. *Specific Application of the Alien Tort Act to Appellants' Claims*

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (*a*) genocide, (*b*) war crimes and (*c*) other instances of inflicting death, torture, and degrading treatment.

[5] (*a*) *Genocide.* In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad achieved broad acceptance by the community of nations. In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are "private individuals, public officials or statement." G.A.Res. 96(I), 1 U.N.GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946). The General Assembly also affirmed the principles of Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal for punishing "'persecutions on political, racial, or religious grounds,'" regardless of whether the offenders acted "'as individuals or as members of organizations,'" *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 n. 11 (N.D. Ohio 1985) (quoting Article 6). *See* G.A. Res. 95(I), 1 U.N.GAOR, U.N.Doc. A/64/Add. 1, at 188 (1946).

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989 (hereinafter "Convention on Genocide"), provides a more specific articulation of genocide in international law. The Convention, which has been ratified by more than 120 nations, including the United States, *see* U.S. Dept. of State, *Treaties in Force* 345 (1994), defines "genocide" to mean any of

the following acts committed with intent to destroy, in whole or in part, a national, ethical, 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 with the group;
(*e*) Forcibly transferring children of the group to another group.

Convention on Genocide art. II. Especially pertinent to the pending appeal, the Convention makes clear that "[p]ersons committing genocide...shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals*." Id. art. IV (emphasis added). These authorities unambiguously reflect that, from its incorporations into international law, the proscription of genocide has applied equally to state and non-state actors.

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, see id. § 1091(*a*) ("[w]hoever" commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, id. § 1091(*d*). Though Congress provided that the Genocide Convention Implementation Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding," id. § 1092, the legislative decision not to create a new private remedy is not already available under the Alien Tort Act. Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide,[7] and the two statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the Alien Tort Act by implication. See Rodriguez v. United States, 480 U.S. 522, 524, 107 S.Ct. 1391, 1392, 94 L.Ed.2d 533 (1987) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest.") (citations and internal quotation marks omitted); United States v. Cook, 922 F.2d 1026, 1034 (2d Cir.) ("mutual exclusivity" of statues is required to demonstrate Congress's "clear, affirmative intent to repeal"), cert. Denied, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

[6] Appellants' allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

[7, 8] (*b*) War crimes. Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. *See In re Yamashita*, 327 U.S. 1, 14, 66 S.Ct. 340, 347, 90 L.Ed. 499 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities. *Id.* at 15-16, 66 S.Ct. at 347-48.

[9] After the Second World War, the law of war was codified in the four Geneva Conventions,[8] which have been ratified by more than 180 nations, including the United States, *see Treaties in Force, supra.* At 398-99. Common article 3, which is substantially identical in each of the four Conventions, applies to "armed conflict[s] not of an international character" and binds "each Party to the conflict...to apply, as a minimum, the following provisions":

> Persons taking no active part in the hostilities...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.
>
> To this end, the following acts are and shall remain prohibited at any time an din 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;
> (*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (*d*) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court....

Geneva Convention I art. 3(1). Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict–which includes insurgent military groups–are obliged to adhere to these most fundamental requirements of the law of war.[9]

[10] The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The ability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, see Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts, in* 4 The Vietnam War and International Law 447 (R. Falk ed., 1976). The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

[11] (*c*) *Torture and summary execution.* In *Filártiga*, we held that *official* torture is prohibited by universally accepted norms of international law, *see* 630 F.2d at 885, and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, torture and summary execution — when not perpetrated in the course of genocide or war crimes — are proscribed by international law only when committed by state officials or under color of law. *See* Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment pt. I, art. 1, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by United States* Oct. 21, 1994, 34 I.L.M. 590, 591 (1995) (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

an official capacity"); Torture Victim Act § 2(*a*) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadzic's command and with the specific intent of destroying appellants' ethnic0religious groups. Thus, many of the alleged atrocities are already encompassed within the appellants' claims of genocide and war crimes. Of course, at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes. It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide of war crimes, and otherwise may be pursued against Karadzic to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. *The state action requirement for international law violations*

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadzic does not meet the definition of a state. *Doe*, 866 F. Supp. At 741 n. 12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

[12, 13](*a*) *Definition of a state in international law.* The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) § 201; accord *Klinghoffer*, 937 F.2d at 47; *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988); *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720, 19 L.Ed. 227 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620, 24 L.Ed. 1018 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with other states, it does not require recognition by other states. *See Restatement (Third)* § 202 cmt. B ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states"). Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfzer Inc. v. India*, 434 U.S. 308,

318-20, 98 S.Ct. 584, 590-91, 54 L.Ed.2d 563 (1978) (diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12, 84 S.Ct. 923, 929-32, 11 L.Ed.2d 804 (1964) (access to U.S. courts); *Lafontant*, 844 F. Supp. At 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03, 22 L.Ed. 816 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12, 19 L.Ed. 361 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971) (post-World War II East Germany).

[14] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. *See Restatement (Third)* §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime — sometimes due to human rights abuses — had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

[15] Appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

[16-18] (*b*) *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, F.Supp. 707 (N.D. Cal. 1988). A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753-54, 73 L.Ed.2d 482 (1982). The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

B. The Torture Victim Protection Act

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

An individual who, under actual or apparent authority, or color of aw, of any foreign nation–

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim § Act 2(a). The statute also requires that a plaintiff exhaust adequate and available local remedies, *id.* 2(b), imposes a ten-year statute of limitations, *id.* § 2(c), and defines the terms "extrajudicial killing" and "torture," § *id.* 3.

[19] By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that his language was intended to "make [] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively. *Id.*

[20, 21] Though the Torture Victim Act creates a cause of action for official torture, this statue, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331, *see Xuncax v. Gramajo*, 866 F. Sup. 162, 178 (D. Mass. 1995) , to which we now turn.

C. Section 1331

The appellants contend that section 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law. Relying on the settled proposition that federal common law incorporates international law, *see the Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, — U.S. —, 113 S. 2960, 125 L.Ed.2d 661 (1993); *Filártiga*, 630 F.2d at 886, they reason that causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under section 1331. Whether that is so is an issue of some uncertainty that need not be decided in this case.

In *Tel-Oren*, Judge Edwards expressed the view that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *Tel-Oren*, 726 F.2d at 779-80 n. 4. The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are avail-

able for international law violations. *Id.* at 778 (Edwards, J., concurring). Some district courts, however, have upheld section 1331 jurisdiction for international law violations. *See Abebe-Kiri v. Negewo*, No. 90-2010 (N.D.Ga. Aug. 20, 1993), *appeal argued*, No. 93-9133 (11th Cir. Jan. 10, 1995); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slop op. at 4-5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1544 (N.D. Cal. 1987).

We recognized the possibility of section 1331 jurisdiction in *Filártiga*, 630 F.2d at 887 n. 22, but rested jurisdiction solely on the applicable Alien Tort Act. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.

II. *Service of process and personal jurisdiction*

Appellants aver that Karadzic was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action, the affidavits detail that on February 11, 1993, process servers approached Karadzic in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose, and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadzic submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the *Kadic* action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendants' State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit stats that he received the complaint and handed it to Karadzic outside the Russian Embassy in Manhattan. Karadzic's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadzic stayed at hotels outside the "headquarters district" of the United Nations and engaged in non-United Nations-related activities such as fund-raising.

Fed.R.Civ.P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court of California*, 495 U.S. 604, 110 S. Ct. 2105, 109 L.Ed.2d 631 (1990).

Nevertheless, Karadzic maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. HEADQUARTERS AGREEMENT

[22] The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal process...may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General." *Id.* § 9(a). This provision is of no benefit to Karadzic, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* §15. This provision is also of no benefit to Karadzic, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of...persons invited to the headquarters district by the United Nations...on official business." *Id.* § 11. Karadzic maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden — exposure to suit — on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2 Cir. 1991). We therefore reject Karadzic's proposed construction of section 11, because it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.[19]

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadzic, a responsible State Department official wrote: "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." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune form legal process while in the United States at locations outside of the Headquarters District. *See In re Galvano*, [1963] U.N.Jur.Y.B. 164 (opinion of U.N. legal counsel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. FEDERAL COMMON LAW IMMUNITY

Karadzic nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadzic analogizes his proposed rule to the "government contacts exception" to the District of Columbia's

long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C. 1978); *see also Naatex Consulting Corp. v. Watt*, 722 F.2d 779, 785-87 (D.C. Cir. 1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engage in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1076 (2d ed. 1987).

Karadzic also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, Klinghoffer declined to extend the immunities of the Headquarters agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y. Civ. Prac.L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations tht guided *Klinghoffer* in its narrowing construction of the general terminology of NewYork's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

[23] Finally, we note that the mere possibility that Karadzic might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, *see Lafontant*, 844 F. Supp. At 133, would create head-of-state immunity, *but see In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future. *See Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S. Ct. 530, 532, 89 L.Ed. 729 (1945) ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy..., not to enlarge an immunity to an extent which the government...has not seen fit t orecognize.").

In sum, if appellants personally served Karadzic with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

III. *Justiciability*

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to

mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 92 S.Ct. 1808, 1813, 32 L.Ed.2d 466 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

[24] Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the "'constitutional' underpinnings' of these doctrines that influenced the concurring opinions of Judge Robb ad Judge Bork in *Tel-Oren*. Alghtough we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is nonjusticiable, *see Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 707, 7 L.Ed.2d 663 (1962); *Lamont v. Woods*, 948 F.2d 825, 831-32 (2d Cir. 1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without comprising the primacy of the political branches in foreign affairs.

Karadzic maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases."'" *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. at 710).

[25] A nonjusticiable political question would ordinarily involve one or more of the following factors:

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

Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994). With respect to the first three factors, we have noted in a similar context involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own-the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the

present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 506 U.S. 224, 227-29, 113 S.Ct. 732, 735, 122 L.Ed.2d 1 (1993).

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests. Disputes implicating foreign policy concerns have the potential to raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30, 106 S.Ct. 2860, 2865-66, 92 L.Ed.2d 166 (1986) (quoting *Baker*, 369, U.S. at 211, 82 S.Ct. at 706-07).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatineo*, 376 U.S. at 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804; *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), might be implicated in some cases arising under section 1350. However, as in *Filártiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly ungratified by that nation's government, could properly be characterized as an act of state.

[26] In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadazic, attorneys for the plaintiffs in Doe wrote to the Secretary of State to oppose reported attempts by Karadzic to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions, the Department responded with a letter indicating that Karadzic was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*.[11] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "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." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reinforces our view that adjudication may properly proceed.

[27] As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of ... unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, 84 S.Ct. at 940, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, see id. at 428-30, 84 S.Ct. at 940-41.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiff's claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.

Conclusion

The judgement of the District Court dismissing appellants' complaints for lace of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

2. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Mark Steven Corrinet (Plaintiff) vs. United Nations, Hon. Boutros Boutros-Ghali, Gillian Sorensen and Ron Ginns (Defendats). Judgement No. C-95-0426 SAW. Memorandum and Order of 10 September 1996

Complaint against the Defendants' assertion of immunity from suit and failure to waive that immunity — Issue of "commercial activity exception" to immunity claim — Question whether S-G of the United Nations had a mandatory duty to waive immunity — Question whether Defendant Ginns was acting in his official capacity when he allegedly defamed the Plaintiff.

(*a*) *Background*

Plaintiff is a collector and dealer in historic documents, who claims to own the original signature pages of the United Nations Interim Agreement. He states that he has been trying to sell these pages, and is asking approximately $3 million dollars for them. In the course of this attempt, he contacted the United Nations in 1993-1994 with the goal of having the pages authenticated.

Plaintiff alleges that Defendant Ron Ginns was appointed by Defendant Gillian Sorensen to assist her in the preparation for the fiftieth anniversary Charter Day, to occur during 1995. Plaintiff further contends that he and Defendant Ginns have had a long-standing feud. Plaintiff claims that because of this feud, Defendant Ginns defamed Plaintiff by stating that Plaintiff was a fraud, and that his documents were not authentic and were valueless. Plaintiff asserts that these statements were false and that he has been injured by them both in reputation and by being unable to sell his documents.

Defendants, the United Nations and its officials, have not filed an answer to Plaintiff's complaint. Instead, Defendants submitted a letter to the Court (to which Plaintiff objected), stating that the United Nations and its officers are immune from this suit and will not waive that immunity. Plaintiff moves for a default judgement.

(*b*) *Discussion*

Pursuant to Federal Rule of Civil Procedure 12(*b*) (6), a court may sua sponte raise a motion to dismiss for failure to state a claim upon which relief can be granted.[12] *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981); *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987) (sua sponte dismissal for failure to state a claim proper where a sufficient basis for the court's action appears from plaintiff's pleadings).

Defendants have not appeared in the present case, but assert in a statement of interest filed pursuant to 28 U.S.C. § 517 that their immunity from suit mandates dismissal pursuant to rule 12(*b*) (6) of the Federal Rules of Civil Procedure.

(i) *United Nations*

The United Nations has absolute immunity "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." United Nations Convention art. II, S 2. *See also Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (B.D.N.Y. 1987) (holding that absolute immunity of United Nations requires dismissal of complaint). The United Nations has not waived its immunity, and Plaintiff does not assert otherwise.

Plaintiff claims, however that the United Nations' immunity is lost because of the "commercial activity exception" embodied in 28 U.S.C. 1602, the Foreign Sovereign Immunities Act. Defendants, through the United States' Statement of Interest, argue that this exception does nothing to eviscerate the United Nations' independently established immunity granted by the United Nations Convention. The Court need not address this issue, however, because the transaction at issue was not commercial.[13]

Plaintiff argues that his alleged agreement with the United Nations for its eventual acquisition of his historic documents is analogous to a scenario whereby the Untied Nations would agree to purchase a piece of art from him. Plaintiff then argues that, because the latter is undeniably commercial in nature, so is the former. The "transaction" between the Plaintiff and the United Nations was not a purchase, however. The only thing that the Plaintiff was requesting from the United Nations was authentication of his documents, which was not a commercial transaction.[14] Plaintiff's intent that a third party eventually would donate these documents to the United Nations is irrelevant, and, in any event, is not a commercial transaction as far as the United Nations is concerned.

(ii) *Other Defendants*

Plaintiff also acknowledges that insofar as Defendatn Boutros-Ghali, Defendant Sorensen and Defendant Ginns were acting at all relevant times in their official capacities, they are immune from suit. Plaintiff claims, however that an alternate theory of liability applies to Defendant Boutros-Ghali, and that Defendant Ginns was not acting in his official capacity when he allegedly defamed Plaintiff.

Plaintiff argues that Defendant Secretary-General Boutros-Ghali violated a mandatory duty to waive the United Nations Convention's grant of immunity for Plaintiff's suit. For support of this novel proposition, Plaintiff cites a section of the Convention, which reads "[t]he Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, *in his opinion*, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." United Nations Convention art, v. § 20 (emphasis added).

Plaintiff's attempt to transform this right into a mandatory duty as determined by a court is unavailing. For a court to look at the facts and find that the Secretary-General should have waived immunity would fly in the face of the express language of the Convention. The Secretary-General's opinion as to whether waiver is appropriate is the important issue, and this Court will not question the Secretary-General's opinion here. Indeed, absolute immunity would be worthless if courts were permitted to override the Secretary-General's decision as to whether that immunity should be waived.

Plaintiff also contends that Defendant Ginns was not acting in his official capacity when he allegedly defamed Plaintiff.[15] Plaintiff's complaint, however, asserts that Ginns "was at all times working within the scope and course of his status as an official with the United Nations." Complaint, p. 3, para. 16. Plaintiff cannot have it both ways.

The Court dismisses the suit in its entirety, but without prejudice as to Defendant Ginns, so that Plaintiff may refile his case as to Defendant Ginns if he chooses to pursue an individual action against him.

Accordingly, it is herby ordered that Plaintiff's complaint is dismissed as to Defendants United Nations, the Honorable Boutros Boutros-Ghali and Gillian Sorenson with prejudice, and as to Defendant Ron Ginns without prejudice. Plaintiff's motion for a default judgement is denied.

NOTES

[1] 933 F. Supp. 368, 1996 U.S. Dist. LEXIS 10943.

[2] *Filártiga* did not consider the alternative prong of the Alien Tort Act: suits by aliens for a tort committed in violation of "a treaty of the United States." See 630 F.2d at 880. As in *Filártiga*, plaintiffs in the instant cases "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law," *id.* at 880 n. 7.

[3] Two passages of the District Court's opinion arguably indicate that Judge Leisure found the pleading of a violation of the law of nations inadequate because Srpska, even if a state, is not a state "recognized" by other nations. The current Bosnian-Serb warring military faction does not constitute a recognized state...." *Doe*, 866 F. Supp at 741; "[t]he Bosnian-Serbs have achieved neither the level of organization nor the recognition that

was attained by the PLO [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)]," *id.* However, the opinion, read as a whole, makes clear that the Judge believed that Srpska is not a state and was not relying on lack of recognition by other states. *See, e.g., id.* at 741 n. 12 ("The Second Circuit has limited the definition of 'state' to 'entities that have a defined [territory] and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other entities.' *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991) (quotation, brackets and citation omitted). The current Bosnian-Serb entity fails to meet this definition.") We quote Judge Leisure's quotation from *Klinghoffer* with the word "territory," which was inadvertently omitted.

[4] Section 702 provides:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(*a*) genocide,
(*b*) slavery or slave trade,
(*c*) the murder or causing the disappearance of individuals,
(*d*) torture or other cruel, inhuman, or degrading treatment or punishment,
(*e*) prolonged arbitrary detention,
(*f*) systematic racial discrimination, or
(*g*) a consistent pattern of gross violations of internationally recognized human rights.

[5] Section 404 provides:

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, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

[6] Judge Edwards was the only member of the *Tel-Oren* panel to confront the issue whether the law of nations applies to non-state actors. Then Judge Bork, relying on separation of powers principles, concluded, in disagreement with *Filártiga*, that the Alien Tort Act did not apply to most violations of the law of nations. *Tel-Oren*, 726 F.2d at 798. Judge Robb concluded that the controversy was nonjusticiable. *Id.* at 823.

[7] The Senate Report merely repeats the language of section 1092 and does not provide any explanation of its purpose. *See* S. Rep. 333, 100th Cong., 2d Sess., at 5 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4156, 4160. The House Report explains that section 1092 "clarifies that the bill creates no new federal cause of action in civil proceedings." H.R. Rep. 566, 100th Cong., 2d Sess., at 8 (1988) (emphasis added). This explanation confirms our view that the Genocide Convention Implementation Act was not intended to abrogate civil causes of action that might be available under *existing* laws, such as the Alien Tort Act.

[8] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (hereinafter "Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

[9] Appellants also maintain that the forces under Karadzic's command are bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II"), which has been signed but not ratified by the United States, *see* International Committee of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II*, 30 I.L.M. 397 (1991). Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* art. 1. In addition, plaintiffs argue that the forces under Karadzic's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, see Geneva Convention I art 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or,

alternatively, the Bosnia-Herzegovina or, alternatively, the Bosnian–Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs.

[10] Conceivably, a narrow immunity from service of process might exist under section 11 for invitees who are in *direct* transit between an airport (or other point of entry into the United States) and the Headquarters District. Even if such a narrow immunity did exist – which we do not decide – Karadzic would not benefit from it since he was not served while traveling to or from the Headquarters District.

[11] The Habib Letter on behalf of the State Department added:

We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.

[12] Courts differ on whether notice and the opportunity for a hearing should be provided before dismissal on 12 (*b*) (6) grounds. *See Shockley*, 823 F.2d at 1073 (dismissal under Rule 12 (*b*) (6) without notice or a hearing is improper); *Smith v. Colorado Dep't of Corrections*, 23 F.3d 339, 340 (10th Cir. 1994) (sua sponte dismissal appropriate in the absence of notice and an opportunity to amend when amendment would be futile). Even in *Shockley*, however, the reviewing court declined to remind the action where notice and a hearing were not provided because it would be futile since the complaint failed as a matter of law. Accordingly, courts agree that where amendment would be futile, a district court may sua sponte dismiss with prejudice without giving the plaintiff notice or an opportunity for a hearing. In any event, while there has been no hearing in the present case, Plaintiff has had the opportunity to respond to Defendants' claims of immunity, and has done so in a 14-page document.

[13] Plaintiff's bare assertion that a commercial transaction is involved does not help him avoid dismissal. Plaintiff's complaint contains no facts indicating that the relationship between Plaintiff and the United Nations was commercial in any way.

[14] Plaintiff nowhere contends that his request that the United Nations authenticate the signature pages was a commercial transaction, and no payment of any kind was involved.

[15] To the extent that Defendant Ginns was acting in his official capacity, he is immune from suit. Designated United Nations officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". United Nations Convention art. V. § 18 (*a*). Plaintiff does not argue that Defendant Sorensen ever acted outside her official capacity. As a result, Defendant Sorensen is immune from suit.