KADIC V. KARADZIC: DO PRIVATE INDIVIDUALS HAVE ENFORCEABLE RIGHTS AND OBLIGATIONS UNDER THE ALIEN TORT CLAIMS ACT?

I. INTRODUCTION

As part of a growing trend of litigating international human rights offenses in U.S. federal courts, the Court of Appeals for the Second Circuit held in *Kadic v. Karadzic*¹ that jurisdiction existed over Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of Srpska, for a civil action based on human rights violations in the former Yugoslavia.² As the commander of Bosnian-Serb military forces, Karadzic is alleged to have been responsible for a pattern of systematic human rights violations, including acts of rape, torture, extrajudicial killing, and genocide.³ In seeking punishment and compensation, the survivors of these atrocities filed suit in a federal district court, which dismissed their case for lack of subject matter jurisdiction.⁴ The Second Circuit, however, subsequently reversed the district court, holding that the Alien Tort Claims Act (ATCA)⁵ provides U.S. federal courts with jurisdiction over international human rights violations such as those allegedly perpetrated by Karadzic.⁶ Although the Second Circuit's finding of jurisdiction raises two controversial issues regarding the obligations and the rights of the individual under international law, the court was justified in holding that federal courts have jurisdiction over the claims brought against Radovan Karadzic.

Initially, the idea of a federal court claiming jurisdiction in a dispute between two alien parties based upon injuries inflicted outside of the United States may come as a surprise.⁷ The *Karadzic* court,

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1. 70 F.3d 232 (2nd. Cir. 1995).
2. *Id.* at 236.
4. *See Id.*
6. *Karadzic*, 70 F.3d at 236.
7. Chief Judge Newman even began his opinion by noting that “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.” *Karadzic*,
however, is not alone in its undertaking. Beginning with the watershed *Filartiga* decision in 1980, U.S. federal courts have begun to exercise jurisdiction over certain individuals who come within the scope of the ATCA through violations of the “law of nations.” In *Filartiga*, for example, the Second Circuit found that jurisdiction existed because the defendant had violated the law of nations by engaging in official torture. While the court held that an individual could be liable for violations of the law of nations, it also made it clear that such liability was possible only if the individual perpetrator was a “state official.” In dealing with the claim against Radovan Karadzic, however, the Second Circuit specifically recognized that the law of nations can be violated by private individuals (i.e., non-state actors). Thus, the Second Circuit’s decision in *Karadzic* seems to depart substantially from its holding in *Filartiga*, inasmuch as the court openly exercises jurisdiction over a non-state actor.

*Karadzic*, however, raises an even more remarkable issue regarding the power of the individual to enforce rights under international law. As a general rule, individuals are deemed to have no ability to enforce their rights under international law. For example, an influential opinion by a D.C. Circuit judge questioned whether the ATCA allowed private individuals to bring suit based on violations of international law, where no private right of action was provided by international law. *Karadzic*, however, did not address

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70 F.3d at 236.

9. See discussion infra text accompanying notes 57-61.
10. See *Filartiga*, 630 F.2d at 880.
11. *Id.*
12. *Karadzic*, 70 F.3d at 239. Responding to the district court, the Second Circuit declared, “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.” *Id.*
13. See infra notes 30-31 and accompanying text.
14. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 820 (D.C. Cir., 1984) (J. Bork, concurring) (“[S]ection 1350 opens the federal courts for adjudication of rights already recognized by international law' but only when among those rights is that of individuals to enforce substantive rules in municipal courts.”) (quoting *Tel-Oren*, 726 F.2d at 777 (J. Edwards concurring)).

Although the Tel-Oren court unanimously affirmed the lower court, each of the three judges (Edwards, Bork, and Robb) wrote a separate concurring opinion setting forth his different reasons for affirming. This Note refers only to the opinions of Edwards and Bork, both of which raise issues that are important to the analysis of *Karadzic*. Special attention is given to the opinion of Judge Bork, which is considered to be the more influential and perhaps the more threatening to the modern usage of the ATCA. See Anthony D’Amato, *What Does Tel-Oren
this seemingly crucial issue. Instead, the Second Circuit assumed, as in *Filartiga*, that the ATCA not only provided jurisdiction but also created a private cause of action for a violation of the law of nations. Thus, *Karadzic* is a noteworthy statement regarding the nature of the individual in international law in two respects: it specifically holds that an individual non-state actor can be bound by the obligations of international law,\(^\text{15}\) and it allows a private individual to assert her rights under the ATCA based on a violation of international law.\(^\text{16}\)

II. THE STATUS OF THE INDIVIDUAL UNDER INTERNATIONAL LAW

Historically, the status of the individual under international law has been a subject of considerable dispute.\(^\text{17}\) A consensus view finally emerged during the nineteenth century, however, with the rise of the classical theory of international law.\(^\text{18}\) One of the defining features of classical international law is its "predominately statist" nature.\(^\text{19}\) According to this view, international law deals solely with the relationships among states, without regard for either the obligations or the rights of the individual.\(^\text{20}\)

A. Individual Obligations Under International Law

The classical theory, however, has not always dominated the law of nations. Indeed, prior to the nineteenth century, many prominent legal scholars agreed that individuals were important personalities in the realm of international law.\(^\text{21}\) According to Grotius, the law of

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15. *Karadzic*, 70 F.3d at 239.
16. *Id.* at 232.
19. See *id.* (noting that the classical system "incorporates a predominantly statist view of international law").
20. See CARL A. NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW 11 (1962)(stating that under the classical theory, "states were the sole subjects of international law, whereas no direct relation between that law and individuals existed").
21. See, e.g., *Tel-Oren*, 726 F.2d at 794. *But compare* Vattel, who concluded that individuals as a class, had no place in the sphere of international law. PETER P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIIUS AND VATTEL 157-82
nations pertained not so much to the interactions among states as to the international activities of individuals. Similarly, Pufendorf characterized the law of nations as a natural law which bound states and individuals alike. Blackstone also catalogued offenses against the law of nations which were punishable when committed by private persons.

The views of these scholars are buttressed by ancient examples of individual violations of the law of nations, many of which occurred under the theory of *hostis humani generis*, a Roman phrase meaning "enemies of mankind." As a doctrine, *hostis humani generis* stood for the principle that "certain acts specified as universally reprehensible would make the perpetrator liable to capture and trial wherever he went." In practice, this doctrine reached two groups of perpetrators: pirates and slave traders. Despite its limited application, the *hostis humani generis* doctrine had profound implications for international law in that it held individuals liable, both civilly and criminally, for violations of the law of nations. Although the prominence of *hostis humani generis* faded with the rise of the classical theory in the nineteenth century, the doctrine set an important precedent through its use of international law in holding individuals liable for universally condemned acts.

B. Individual Rights Under International Law

Whereas the existence of individual obligations under international law is open to debate, there is a substantial consensus that international law does not allow the assertion of individual rights. As one commentator concludes, "the right of individuals to proceed before international bodies is almost non-existent today in international law practice." This is a proposition on which nearly all commen-

(1960).
23. *Id.*
27. Blum & Steinhardt, *supra* note 18, at 60.
28. *Id.* at 61.
29. The *hostis humani generis* doctrine was especially prominent at the end of the eighteenth century, contemporaneous with the creation of the ATCA. *See id.* at 60; 28 U.S.C. § 1350.
tators agree. Still, despite scholarly agreement that the individual has no general claim to rights under international law, individuals have often asserted rights based on international law by using the ATCA.

C. The Individual Under the ATCA

Although private suits based on international law have hardly been the historical norm, such suits are explicitly allowed by the text of the ATCA itself:

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.

As this language indicates, the ATCA grants jurisdiction to federal courts only if: (1) the action is brought by an alien, (2) the suit is for a "tort only," and (3) there has been a violation of the "law of nations" or a "treaty of the United States." To be precise about the mechanism of the statute, it is the violation of international law (i.e., the "law of nations" or a "treaty of the United States") that triggers the ATCA, which in turn provides federal district courts with jurisdiction.

Some difficulty has arisen, however, in construing the meaning of "a tort only, committed in violation of the law of nations." The main issue is whether the ATCA actually creates a cause of action or merely provides jurisdiction for a cause of action that already exists.

31. See NORGAARD, supra note 20, at 98 ("the individual has not universally been made a subject of rights under international law with respect to fundamental human rights"); W. PAUL GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 185 (the individual has yet to achieve a locus standi equal to that possessed by states). But cf. Jordan J. Faust, On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts, 10 MICH. J. INT'L L. 543, 611-28 (1989).
33. See id.
35. See Humphrey, supra note 17, at 110 (explaining the confusion over the use of the term "tort" in the ATCA).
36. See id. One problem in resolving this issue is that clear authority for both points of view exists. On one hand, a 1907 Opinion of the Attorney General interpreted the ATCA as providing both jurisdiction and a cause of action. 26 Op. Att'y Gen. 250, 252-53 (1907). On the other hand, the Second Circuit held in 1976 that the ATCA did not create a cause of action, at least where the suit was based upon the violation of a treaty. Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976).
One reason for this confusion about the ATCA is the lack of information surrounding its original purpose. Although the ATCA has the distinction of being part of the First Judiciary Act of 1789, it has virtually no recorded legislative history. To counter this lack of legislative history, legal scholars have examined the ideological climate surrounding the creation of the ATCA in order to extrapolate its underlying rationale.

Several scholars have concluded that Congress' rationale in establishing the ATCA was to avoid crises in foreign relations by providing a forum for aliens to obtain redress for civil wrongs caused by a violation of international law. At the time of the passage of the ATCA, Congress was concerned that the United States government might be held accountable by foreign governments for civil wrongs committed against their citizens by citizens of the United States. Because lack of a forum might have been perceived as a denial of justice and an affront to the sovereignty of the foreign nation, Congress probably enacted the ATCA to provide a forum in which the injured alien could seek relief, thereby avoiding an international conflict.

In addition to explaining the existence of the ATCA, this rationale also explains why ATCA cases have often recognized that individuals should be considered subjects of international law. For example, in order to successfully deter foreign relations conflicts, the ATCA was often used to resolve disputes between the citizens of foreign countries and the citizens of the United States. As one commentator notes, these disputes sometimes involved "a private wrong by one person to an individual alien." In order for jurisdiction to exist under the ATCA in such disputes, the courts had to recognize two principles: first, that the law of nations or a treaty of the United States could be violated, and the ATCA triggered, by "one

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This issue is analyzed in detail by Judge Bork in *Tel-Oren*. See *Tel-Oren*, 726 F.2d at 798-823.

37. Because of the nebulous origin and purpose of the ATCA, it has been dubbed a "legal Lohengrin," named after a mysterious character in a Wagner opera. See, e.g., *IIT v. Vancap*, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

38. Harvey, *supra* note 34, at 342 n.7 and accompanying text.

39. *Id.* at 342.

40. See Humphrey, *supra* note 17, at 113; Harvey, *supra* note 34, at 343, 344.

41. Harvey, *supra* note 34, at 343.

42. Humphrey, *supra* note 17, at 113.

43. See *id*.

44. *Id.* (emphasis added).
person;" second, that such a violation could be the basis of a suit by an "individual alien." As the judicial history of the ATCA demonstrates, courts construing the ATCA have frequently recognized both of these principles, thereby acknowledging that individuals have both obligations and rights under international law.

1. Individual Obligations in ATCA Cases. Both early and modern ATCA cases have recognized that the law of nations imposes binding obligations upon individuals. Whether these obligations extend to individuals who are non-state actors, however, remains a point of dispute. In fact, some of the holdings of modern ATCA cases have tried to limit individual liability to situations where an individual qualifies as a state actor.

Early cases involving the ATCA are scarce. In fact, prior to the twentieth century, there were only two reported decisions involving the ATCA. Only one of these decisions, Bolchos v. Darrell, held that jurisdiction existed under the ATCA. In Bolchos, a Spanish ship containing slaves was captured and taken to an American port. Although the slaves were the "property" of a Spanish citizen, they had been mortgaged to a British subject. Darrell, the agent of the British subject, seized and sold the slaves in the United States, and was subsequently sued by Bolchos, another party who claimed ownership of the slaves. Using the ATCA to provide jurisdiction, the court held that Darrell, a private individual, had violated rights that were guaranteed to Bolchos by a treaty of the United States. This holding demonstrated that the Bolchos court recognized not only that individual obligations existed under the law of nations, but also that those obligations were enforceable under the ATCA.

After these early cases, the ATCA lay dormant for over a hundred years, until the modern-era of ATCA jurisprudence began in the twentieth century. One of the first modern cases, Abdul-Rahman Omar Adra v. Clift, held that the ATCA provided jurisdic-

46. See Bolchos, 3 F. Cas. 810; Moxon v. The Brigantine Fanny, 17 F. Cas. 942 (D. Pa. 1793).
47. 3 F. Cas. 810.
48. Id. at 810.
49. The reasons for this period of disuse are unclear. One commentator has explained the lack of early ATCA cases as a result of political controversy that followed the enactment of the Judiciary Act of 1789. See Humphrey, supra note 17, at 119.
tion where the law of nations had been violated by a private individual. 51 Adra was somewhat unusual in that it involved a domestic relations dispute. 52 The Lebanese Ambassador to Iran sought to obtain custody of his daughter from his ex-wife and her American husband. 53 The ambassador argued that jurisdiction should lie under the ATCA because his ex-wife had falsified a passport in violation of the law of nations. 54 The court accepted this argument and held that the ex-wife, a private individual, had violated the law of nations. 55

Whereas Adra only implied that an individual could violate the law of nations, another court expressly stated that the ATCA could be triggered where the law of nations had been violated by an individual. In Lopes v. Reederei Richard Schroder, the court declared that a plaintiff would be entitled to jurisdiction under the ATCA only upon a showing of the following:

[I]nter alia, at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se. 56

In promulgating this definition, the court must have believed that ATCA jurisdiction could be invoked where the law of nations had been violated by an individual.

Despite its long history, the ATCA only came to the forefront in 1980, when it emerged as a tool for bringing human rights violations to federal court in Filartiga v. Pena-Irala. 57 In Filartiga, citizens of Paraguay sued a former Paraguayan police official for the torture, and subsequent death, of their son and brother. 58 The Second Circuit defined the threshold issue in the case as "whether the conduct alleged violates the law of nations." 59 After consulting with recognized

51. Id. at 859, 865.
52. Federal courts usually decline jurisdiction in cases involving domestic relations. Id. at 865.
53. See id. at 860-62.
54. Id. at 864-65. The court found a violation of the law of nations because the falsification wronged the Lebanese Republic, which according to the court, "is entitled to control the issuance of passports to its nationals." Id. at 865.
55. Id. at 864-65.
57. 630 F.2d 876.
58. Id. at 878.
59. Id. at 880.
sources of international law, the court concluded that the police official's alleged conduct did violate the law of nations, but only because customary international law prohibited torture by an official state actor.60

The court's holding had several important consequences for the status of the individual under the law of nations. First, it supported the general principle that individual obligations under the law of nations were recognized for the purposes of ATCA cases. Second, the holding highlighted the distinction between the two types of "individuals" recognized by international law: the individual state actor, and the individual non-state actor. Under Filartiga, an individual could violate the international law prohibition on torture only as an official state actor.61

Filartiga's state-actor requirement was then applied in another important ATCA case, Tel-Oren v. Lybian Arab Republic.62 In the first part of the opinion, Judge Edwards recognized the Filartiga rule but declined to extend it to individual non-state actors, on the grounds that there was not yet enough international consensus to establish torture by non-state actors as a violation of international law.63 Elsewhere in the opinion, however, Edwards asserts the broader proposition that non-state actors cannot violate international law, regardless of the substantive offense: "I do not believe that the law of nations, as currently developed and construed, holds individuals responsible for most private acts."64 Writing in a separate opinion, Judge Bork echoed this characterization of the individual non-state actor under the law of nations: "[I]nternational law imposes duties only on states and on their agents or officials."65 Although these propositions seem strange in light of earlier ATCA cases involving individual non-state actors,66 some courts, including the district court that originally dismissed Karadzic,67 have perceived them as a new trend in modern ATCA cases.68

60. Id. at 878, 884-85.
61. Id.
62. 726 F.2d at 791-93. In contrast with the result in Filartiga, Tel-Oren held that there was no violation of the law of nations because the defendant was a non-state actor. See id. at 795.
63. Id.
64. Id. at 780 n.4.
65. Id. at 805-06.
66. See supra notes 45-56 and accompanying text.
67. 866 F. Supp. 734.
68. For example, the Ninth Circuit held that "only individuals who have acted under official authority or under color of such authority may violate international law." In re Estate of Ferdin-
2. Individual Rights in ATCA Cases. In the same way that many ATCA cases have recognized that individuals have obligations under international law, most ATCA cases have also recognized that international law can give rise to individual substantive rights. Although individual rights were not directly addressed in the early ATCA cases, this issue has become a significant point of contention in several modern ATCA decisions.

The very first of the early ATCA cases was *Moxon v. The Brigantine Fanny.* In *Moxon,* British citizens sued for restitution and damages under the ATCA when their ship was captured by the French and taken to the port of Philadelphia. Though the suit was dismissed on the grounds that there was no violation of the law of nations or a treaty of the United States, there was apparently no dispute over the right of the British owners, as private individuals, to bring the suit. Two years later, the right of individuals to bring suit under the ATCA for violations of international law was reaffirmed in *Bolchos v. Darrell.* In this case, the court sustained jurisdiction under the ATCA, and like the *Moxon* court, it never questioned the ability of a private individual plaintiff to bring suit based on international law.

Despite these historical examples, the use of the ATCA to enforce substantive rights based on the law of nations became one of the central points of dispute in *Tel-Oren.* In this landmark ATCA case, Judge Bork set forth his view that even where a defendant has admittedly violated the law of nations, the ATCA creates no private right of action for an individual plaintiff where none had existed previously in the law of nations. Although far from universally accepted, Judge Bork's view regarding the scope of the ATCA has been endorsed by other courts that have recently construed the
statute.\textsuperscript{76}

On the other hand, many modern courts have allowed individual plaintiffs to sue under the ATCA either by assuming or by explicitly recognizing that the ATCA provides individuals with a private right of action.\textsuperscript{77} Despite the obvious importance of the question of the existence of a right of action, this issue often goes unaddressed, as was the case in \textit{Karadzic}:\textsuperscript{78}

\section*{III. \textit{KADIC v. KARADZIC}}

While \textit{Karadzic} may be controversial for its treatment of the individual under international law, its gruesome facts demonstrate the dire need for individual accountability under international law in certain circumstances. \textit{Karadzic} involves two actions brought by plaintiffs S. Kadic and Jane Doe, on behalf of themselves and others who alleged that they were victims of atrocious human rights violations in the former Yugoslavia.\textsuperscript{79} Kadic and Doe alleged that the defendant subjected them and others in the former Yugoslavia to the following treatment: "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death."\textsuperscript{80} The plaintiffs claimed that Karadzic, as the ultimate commander of the Bosnian-Serb military forces, was responsible for all of these injuries that were inflicted by his forces.\textsuperscript{81}

These claims were rejected by the district court, which dismissed both actions for lack of subject matter jurisdiction.\textsuperscript{82} Specifically, the court concluded that "acts committed by non-state actors do not violate the law of nations."\textsuperscript{83} Because the court characterized

\textsuperscript{76} See, e.g., \textit{Jones v. Petty Ray Geophysical Geosource, Inc.}, 722 F. Supp. 343, 348 (N.D. Ohio 1989) ("Somewhere in the law of nations or in the treaties of the United States, the plaintiff must discern and plead a cause of action that, if proved, would permit this Court to grant relief").

\textsuperscript{77} See \textit{Filartiga}, 630 F.2d 876 (finding jurisdiction without addressing right of action); \textit{Paul v. Avril}, 812 F. Supp. 207 (S.D. Fla. 1993) (finding both jurisdiction and right of action); \textit{Forti v. Suarez-Mason}, 672 F. Supp. 1531 (N.D. Cal. 1987) (finding a consensus that the ATCA provides not only jurisdiction but also a right of action).

\textsuperscript{78} See \textit{Karadzic}, 70 F.3d 232.

\textsuperscript{79} \textit{Id.} at 236-37.

\textsuperscript{80} \textit{Id.} at 237.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Karadzic}, 866 F. Supp. at 735-36.

\textsuperscript{83} \textit{Id.} at 739.
Karadzic as a non-state actor, there could be no violation of the law of nations and therefore no jurisdiction under the ATCA.

The Second Circuit, however, reversed the district court, finding that subject matter jurisdiction did exist under the ATCA. According to the Second Circuit, the only disputed issue before the court was whether the plaintiffs had pleaded a violation of the law of nations by the defendant. Assuming that the defendant qualified as a non-state actor, the court found that the allegations of genocide and war crimes, if shown to be true, constituted violations of the law of nations.

In reversing the district court, the Second Circuit specifically held that non-state actors were capable of violating international law. In so doing, the court cited a number of historical examples of international law violations by non-state actors and concluded that, in the modern era of the law of nations, state action was not strictly required in order to find a violation.

In evaluating whether defendant Karadzic had violated the law of nations in the present case, the court turned to those sources of the law of nations referred to in Filartiga. According to Filartiga, norms of contemporary international law are defined 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.

Looking to these sources of the law of nations, the court found that private individuals could violate the law of nations through the commission of either genocide or war crimes.

As to the issue of whether the law of nations provided private individuals with substantive rights, however, the Second Circuit remained surprisingly silent. In fact, no part of Karadzic addresses

84. Id. at 741 ("[T]his court finds that members of Karadzic's faction do not act under the color of any recognized state law.").
85. Karadzic, 70 F.3d at 236.
86. Id. at 238.
87. Id. at 241-43.
88. Id. at 239.
89. Id.
90. Id. at 238.
91. Filartiga, 630 F.2d at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).
92. Karadzic, 70 F.3d at 240. "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." (quoting the introductory note to Pt. II of RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986)).
whether Kadic and Doe, as private individuals, may bring claims under the ATCA based on a violation of the law of nations. Instead, the court discusses the ATCA's "law of nations" clause solely as a jurisdictional requirement: "There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations ..." By choosing not to discuss the issue of individual rights under the law of nations, the Second Circuit failed to address a crucial issue in modern ATCA jurisprudence.

IV. ANALYSIS

A. Individual Obligations in Karadzic

Although the Second Circuit's finding of jurisdiction over Radovan Karadzic may be regarded as controversial, the court's decision is well-supported by the standards of contemporary international law. In particular, contemporary international law supports two important conclusions of the court: (1) individuals may have obligations under international law, and (2) international law prohibitions regarding genocide and war crimes currently extend to individual non-state actors.

In evaluating whether the law of nations imposes obligations on individuals, the court correctly looked to the history of both the law of nations and the ATCA. In examining the history of the law of nations, the Karadzic court discovered that individual non-state actors could be liable for the ancient offenses of piracy and slave trade. Historically, these two offenses were prosecuted under the doctrine of *hostis humani generis*. This doctrine allowed for the prosecution of "universally reprehensible" offenses, without regard to the nationality of an individual defendant, often resulting in liability for the individual non-state actor. Thus, in referring to the *hostis humani generis* offenses of piracy and slave trade, Karadzic correctly found

93. *Karadzic*, 70 F.3d. at 238 (emphasis added).
94. See id. at 239-40.
95. Id. at 240.
96. See supra notes 25-29 and accompanying text.
97. Blum & Steinhardt, supra note 18, at 61. According to the Supreme Court, "every individual becomes punishable whatever may be his national character" under the *hostis humani generis* doctrine. Id. (quoting United States v. Pirates, 18 U.S. (5 Wheat.) 184, 193 (1820)).
precedent for non-state actor liability under the law of nations.

The Karadzic court also noted that precedent for non-state actor liability exists under the ATCA. In particular, the court cited the early cases of Bolchos and Adra as examples of cases in which violations of the law of nations by private individuals gave rise to jurisdiction under the ATCA. In both cases, the defendants were non-state actors; the defendant in Bolchos was an agent of a private British citizen who seized and sold a cargo of slaves, and the defendant in Adra was the ex-wife of a Lebanese ambassador. In citing these ATCA cases, the court found further precedent for its conclusion that individual non-state actors have obligations under the law of nations.

The court’s second conclusion—that international prohibitions on genocide and war crimes extend to individual non-state actors—is also supported by considerable authority. Such support derives from the rules of customary international law, a recognized source for determinations regarding the content of the law of nations. The rules of customary international law initially developed as non-binding standards, which gained force over time through the “general usage and practice of nations.” Eventually, these standards ripened into binding customary international law, when they began to reflect a strong consensus on the part of the international community.

In evaluating the status of the non-state actor under customary international law, however, one key tenet must be held in mind: customary international law defines not only what substantive standards bind the international community, but also who can be bound by such standards. In Filartiga, for example, the court held that customary international law prohibits torture but only when such torture is perpetrated under the color of official state authority.

99. See Karadzic, 70 F.3d at 240.
100. See supra text accompanying notes 47-48.
101. See supra text accompanying notes 50-55.
102. See Blum & Steinhardt, supra note 18, at 58, 72-75.
103. United States v. Smith, 18 U.S. at 160-61; see also The Paquete Habana, 175 U.S. 677, 700 (1899).
104. See Filartiga, 670 F.2d at 881.
105. See Amerada Hess Shipping v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) (stating that customary international law dictates who falls within the jurisdictional grant of the ATCA); Filartiga, 630 F.2d at 884 (restricting the customary international law prohibition on torture only to states and state actors); Tel-Oren, 726 F.2d at 791-95 (recognizing the customary international law prohibition on torture by state actors but declining to extend it to non-state actors).
106. Filartiga, 630 F.2d at 877.
In articulating this limitation, the court concluded that it was customary international law that defined which parties could be held responsible for acts of torture. For example, the Filartiga court cited a U.N. declaration restricting the definition of torture to suffering that is "intentionally inflicted by or at the instigation of a public official."^107

Likewise, Tel-Oren recognized that the prohibition on torture in Filartiga reflected an international consensus that only states and state actors could be liable for torture.^108 Specifically, Judge Edwards looked to customary international law to determine whether the prohibition should apply to individual non-state actors:

The question therefore arises whether to stretch Filartiga's reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law.... I do not believe the consensus on non-official torture warrants an extension of Filartiga.^109

Although Judge Edwards declined to hold individual non-state actors responsible for acts of torture, he did so because he believed that the consensus of the international community prohibiting some forms of torture did not include a consensus that individual non-state actors should be subject to the prohibition.^110 Even though Judge Edwards and the court in Filartiga reached different conclusions regarding jurisdiction, they did so on the basis of the same principle: customary international law defines the substantive rule of law as well as who may be bound by that rule.

This principle is central to the reasoning of Karadzic. As applied in Karadzic, the principle dictates that international prohibitions on genocide and war crimes apply to individual non-state actors only if customary international law is found to include a specific consensus that such individuals can be liable.^111 Determining whether such a consensus is part of customary international law is, however, a complicated process. Because customary international law is defined only by consensus, there exists a strict requirement that such consen-

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^107. Id. at 883 (emphasis added).
^108. See Tel-Oren, 726 F.2d at 792-95.
^109. Id. at 792, 795 (emphasis added).
^110. See id. at 795.
^111. See Karadzic, 70 F.3d at 241.
sus be extremely strong.\textsuperscript{112} In particular, ATCA cases have interpreted this requirement to mean that binding customary international law may only be comprised of "universal, definable, and obligatory international norms."\textsuperscript{113} In order to identify such norms, courts have repeatedly looked to the recognized sources of international law, which include the following: (1) international conventions, (2) the usage of nations, (3) judicial decisions, and (4) the works of qualified commentators.\textsuperscript{114} By looking to several of these sources, the \textit{Karadzic} court concluded that individual non-state actors could be held liable for genocide and war crimes under customary international law.\textsuperscript{115}

In holding that individual non-state actors could be held liable for genocide, the court looked primarily to one particular international convention, the Genocide Convention, as a source of international law.\textsuperscript{116} Specifically, the court noted that the Genocide Convention provides that "[p]ersons committing genocide . . . shall be punished, \textit{whether they are constitutionally responsible rulers, public officials or private individuals}."\textsuperscript{117} Because this language comes from an operative international convention, the court considered it to be an especially strong statement of international law.\textsuperscript{118} Such a conclusion is supported by several factors. First, international conventions codify international norms, making judicial decisions based on those norms more feasible and appropriate.\textsuperscript{119} Second, international conventions are recognized as statements that accurately reflect the consensus of

\textsuperscript{112} See Filartiga, 670 F.2d at 881.
\textsuperscript{113} Forti, 672 F. Supp at 1540.
\textsuperscript{114} See United States v. Smith, 18 U.S. at 160-61; Filartiga, 630 F.2d at 881 (quoting The Statute of the International Court of Justice, arts. 38, 59, June 26, 1945, 59 Stat. 1055, 1060 (1945)).
\textsuperscript{115} See Karadzic, 70 F.3d at 241-43.
\textsuperscript{116} Id. at 241-42. Although this discussion focuses on the Genocide Convention, the court cited other evidence that non-state actors could be liable for genocide. In particular, the court quoted from two United Nations General Assembly resolutions declaring that individuals could be held responsible for the crime of genocide. \textit{Id.} at 241.
\textsuperscript{118} See \textit{id.} at 241 (noting that the Genocide Convention provides a specific articulation of the prohibition of genocide in international law).
\textsuperscript{119} See Tel-Oren, 726 F.2d at 792 ("[t]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .") (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963)).
the international community. In Filartiga, for example, the court characterized a U.N. declaration as "an authoritative statement of the international community." In this way, the Genocide Convention supports the court's conclusion that non-state actors may be liable for genocide under customary international law.

Customary international law also provides support for the court's conclusion that private individuals can be liable under the law of nations for committing war crimes. Again, customary international law governs not only what acts are punishable as war crimes, but, more importantly in this case, who can be held accountable under international law for such acts. In addressing this issue, the Karadzic court looked to the Geneva Conventions of 1949 as the relevant source of customary international law. Specifically, the court focused on common article 3, which governs "armed conflict[s] not of an international character" and binds "each Party to the conflict . . . ."

Although common article 3 does not explicitly mention individuals, the court correctly concluded that private individuals may be "parties to the conflict" under customary international law.

An analysis of common article 3 reveals that the court's conclusion is correct for three reasons. First, the court accurately cited the Nuremberg Trials after World War II as a starting point for recognizing individual liability under international law. The judgment of the Nuremberg Tribunal included a statement recognizing the existence of the individual in the plane of international law:

120. See Filartiga, 630 F.2d at 883.
121. Id. (quoting E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)).
122. Note that the Genocide Convention is not directly binding as a treaty, but indirectly binding because it is evidence of a norm of customary international law. In making this distinction, the court is careful to state that it is determining whether the defendant violated "well-established, universally recognized norms of international law." See Karadzic, 70 F.3d at 236. The court is using the Genocide Convention not as a direct source of law but as a source of evidence that proves a customary norm of international law. For a more detailed discussion on this distinction, see generally Joan Hartman, Enforcement of International Human Rights Law in State and Federal Courts, 7 WHITTIER L. REV. 741, 747-751 (1985).

Of course, not all treaties are codifications of customary norms. In fact, some treaties may be codifications of emerging rules that cut against established norms. In this case, however, the court cites other sources of international law, which show that the Genocide Convention does indeed reflect the prevailing norm. See supra note 116.
123. See Karadzic, 70 F.3d at 241; see also supra note 105 and accompanying text.
124. See Karadzic, 70 F.3d at 242-43.
125. Id. at 243. (quoting common article 3).
126. See id.
127. See id.
By explicitly recognizing individual liability for war crimes, this judgment indicated that future international law relating to war crimes, such as common article 3, would also recognize individual liability.

Second, the court's conclusion is supported by the language of common article 3. According to its text, common article 3 applies to "armed conflicts not of an international character." In other words, common article 3 applies to internal conflicts—that is, to conflicts where at least one of the "parties to the conflict" is almost certainly a non-state actor, such as a belligerent in armed conflict against a state. Because individual leaders are often held accountable for war crimes committed by their subordinates, individual non-state actors could easily fall within the scope of common article 3.

Finally, the court's conclusion is supported by several authoritative sources of international law. For example, the U.S. government noted in its Army Field Manual that individual non-state actors could be liable for crimes under international law:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

According to all these sources of customary international law, common article 3 applies to parties which are purely private individuals. For this reason, the Karadzic court correctly cited common article 3 as strong evidence that individual non-state actors may be held responsi-

128. Blum & Steinhardt, supra note 18, at 68 (emphasis added) (quoting the Judgment of the International Military Tribunal, 22 Trial of the Major War Criminals Before the International Military Tribunal, Proceedings 411, 465-66 (1948)).

129. Note that as part of the Geneva Conventions, common article 3 was first adopted in 1949, just shortly after the judgment of the Nuremburg Tribunal was handed down in 1948. See supra text accompanying note 124.


132. LAND WARFARE, supra note 131, § 498, at 178; see also Paust, supra note 131, at 167 (discussing individual liability under the laws of armed conflict for complicitous conduct).
ble for war crimes under customary international law.

In holding that individual non-state actors could be liable under the ATCA for genocide and war crimes committed in violation of the law of nations, Karadzic seems to have expanded the reach of the ATCA as earlier outlined in Filartiga. Karadzic, however, might be read not as an extension, but rather as an application, of Filartiga. The court in Filartiga held that individual state actors could be liable for torture under the ATCA because customary international law included a consensus regarding who could be liable for torture: states and official state actors. This principle is the same as the one applied in Karadzic, specifically that customary international law defines not only what substantive standards bind the international community, but also who can be bound by such standards. Because customary international law includes a consensus that individual non-state actors can be held responsible for genocide and war crimes, the Karadzic court correctly held that the defendant, as a private individual, may have violated the law of nations, thereby triggering jurisdiction under the ATCA.

B. Individual Rights in Karadzic

In holding that the law of nations imposes obligations on private individuals, Karadzic is supported by substantial historical and modern authority. Karadzic stands on much less stable ground, however, in its assumption that private individuals can enforce rights under the ATCA that are based on violations of the law of nations. As discussed above, the weight of authority indicates that the law of nations does not confer substantive rights upon individuals.

Despite this authority, it is a separate question whether individuals are provided with a private right of action by the ATCA. On this point, the history of the ATCA is mixed. Although early ATCA cases like Moxon and Bolchos never questioned the ability of private individuals to sue under the ATCA, some modern ATCA cases, most notably Tel-Oren, have addressed this issue and concluded that the ATCA does not create a private right of action for individual plaintiffs.

133. See Karadzic, 70 F.3d at 241.
134. See supra text accompanying notes 30-31.
135. See supra text accompanying notes 69-73.
136. See supra note 76 and accompanying text; see also Jones, 722 F. Supp at 348 (section 1350 merely serves as an entrance into the federal courts and in no way provides a cause of action to any plaintiff); Dreyfus, 534 F.2d at 28 ("Section 1350 ... [does] not create a cause of action for a
In *Tel-Oren*, Judge Bork raised an argument with the potential for undermining the ATCA as a tool for litigating human rights violations. In short, Judge Bork argued that individual plaintiffs cannot sue for human rights violations because neither the law of nations nor the ATCA provides individuals with a private right of action. Judge Bork’s reasoning may be summarized in five steps. First, Judge Bork recognizes a distinction between jurisdiction and cause of action. Second, he argues that no plaintiff can sustain a claim based on international law without an express or implied cause of action. Third, he notes that international law, whether based on treaties or on the law of nations, generally does not supply individual plaintiffs with a cause of action. Fourth, he argues that no cause of action is expressly provided in the ATCA, and neither should one be implied. Finally, Judge Bork concludes that without a cause of action, individual plaintiffs are rendered unable to sue for human rights violations under the ATCA.

If this argument is left unaddressed, there are several reasons why it may successfully be used to undermine the effect of the result in *Karadzic*. First, the cause of action issue is likely to attract the attention of the Supreme Court because it reflects a significant split between the circuits. In *Karadzic*, the Second Circuit allows the ATCA to be used expansively without addressing the cause of action issue. On the other hand, *Tel-Oren*, decided by the D.C. Circuit, allows the ATCA to be used by private individuals only in the rarest of circumstances. Second, Judge Bork’s view of the ATCA, if unchallenged, may be preferred by the Supreme Court because it is consistent with the Court’s current presumption against implying

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137. See supra text accompanying note 75. One commentator openly acknowledges that Judge Bork’s “cause of action” rationale poses a “serious barrier” to litigation of international human rights violations in federal courts. Hartman, supra note 122, at 749.

138. *Tel-Oren*, 726 F.2d at 799, 801.

139. See id. at 799-801.

140. See id. at 801 (“it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.”).

141. Id. at 816 (“International law today does not provide plaintiffs with a cause of action.”).

142. Id. at 801 (“[A]ppellants have not been granted a cause of action by federal statute. . . .”)

143. Id. at 822 (“[I]t is improper for judges to infer a private cause of action not explicitly granted.”).

144. Id. at 801.


146. *Tel-Oren*, 726 F.2d 774.
causes of action under federal statutes in the absence of clear congressional intent.\textsuperscript{147}

Despite the potential impact of Judge Bork's \textit{Tel-Oren} argument, the court in \textit{Karadzic} never addressed the cause of action issue. Should the issue be taken up by the Supreme Court, this omission could undermine both the \textit{Karadzic} decision and the future of the ATCA. This danger, however, could have been avoided. Indeed, several arguments, which might have been identified in \textit{Karadzic}, are available to refute the conclusion reached by Judge Bork in \textit{Tel-Oren}.\textsuperscript{148} In particular, the implication of a private right of action in the ATCA might be justified by two key factors: the intent of Congress in 1789 and the intent of Congress today.

1. \textit{Implication is Justified by the Intent of Congress in 1789.} In determining whether a cause of action should be implied under a federal statute, courts have always considered congressional intent to be a significant factor.\textsuperscript{149} In recent years, congressional intent seems to have gained greater significance among the courts.\textsuperscript{150} In determining congressional intent, the Supreme Court routinely looks to several specific factors, including consideration of the class of plaintiffs who were the intended beneficiaries of the statute.\textsuperscript{151} In evaluating the original intent of the Congress of 1789 in this case, the key question is whether the Congress intended for private individuals to be among the class of plaintiffs benefitted by the ATCA.

Despite the lack of available legislative history, the class of plaintiffs that Congress intended to benefit from the ATCA can be

\textsuperscript{147} See Sanchez-Espinoza v. Reagan, 770 F.2d 202 (1985) (stating that the judiciary should not imply a remedy that Congress did not intend to provide); National Ass'n of Counties v. Baker 842 F.2d 369 (1988) (holding that a right to recover under a federal statute is not to be implied in the absence of clear congressional intent).

\textsuperscript{148} Only a critique of the fourth step in Judge Bork's analysis, that no private right of action should be implied in the ATCA, will be discussed in detail here. Another commentator has suggested that the first step in Bork's argument, his assumption that the modern distinction between jurisdiction and cause of action should apply to the ATCA, is also open to attack. See D'Amato, supra note 14, at 94-105.


\textsuperscript{151} See Daily, 464 U.S. 523. Whereas legislative history is usually the most helpful factor in evaluating legislative intent, the legislative history of the ATCA is completely unavailable. See, e.g., \textit{Tel-Oren}, 726 F.2d at 812 ("The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly.".)
best identified by looking at the early ATCA cases. As discussed above, the plaintiffs in two of the earliest ATCA cases, *Moxon* and *Bolchos*, were unquestionably private individuals. Because both of these cases were litigated within six years of Congress' enactment of the ATCA, they provide strong evidence that Congress intended that the ATCA be used to the benefit of private individuals.

Some might object to this conclusion, arguing that these cases actually flouted congressional intent. Such an objection, however, ignores the fact that Congress did not change the ATCA in reaction to *Moxon* and *Bolchos*, which clearly involved individual plaintiffs. Given this lack of congressional reaction, one must conclude that Congress permitted, and may have intended, that the ATCA be used to the benefit of individual plaintiffs.

Such a conclusion might be challenged from a different angle on grounds supplied by Judge Bork in his *Tel-Oren* opinion. While arguing against the existence of a private right of action in international law, Judge Bork acknowledges that an exception was created in *The Paquete Habana* where the Supreme Court assumed the existence of a private right of action. Judge Bork distinguishes this exception, however, by explaining that *The Paquete Habana* involved a special category of international law—prize jurisdiction under maritime law—which was unique in its recognition of a private right of action for an individual plaintiff. Applying Judge Bork's explanation to *Moxon* and *Bolchos*, one might further argue that Congress viewed these cases merely as applications of this special category of maritime law prize jurisdiction.

This argument assumes, however, that the Congress of the 1790's was concerned with the existence of a cause of action. The notion of "causes of action," however, surfaced only in 1848, more than fifty

152. *See supra* text accompanying notes 69-73.
153. *See supra* text accompanying notes 38, 45-46.
154. The ATCA has been changed only in phraseology and not in substance. *See* 28 U.S.C. § 1350.
155. *See supra* text accompanying notes 69-73.
156. 175 U.S. 677.
157. *See* *Tel-Oren*, 726 F.2d at 816 n.24.
158. *See* *Id.*
159. As in *The Paquete Habana*, both *Moxon* and *Bolchus* involved the capture of a ship or the seizure of its cargo. *See supra* text accompanying notes 47-48, 69-71.
160. The steps of the argument might be as follows: (1) Congress requires that a cause of action exist in all cases, (2) international law does not generally provide individuals with a cause of action, and (3) Congress, in this case, has recognized that an individual does have a cause of action because of the maritime prize jurisdiction exception.
years after the early ATCA cases.\textsuperscript{161} Therefore, in evaluating \textit{Moxon} and \textit{Bolchus}, Congress would have been utterly unaware of the need for a "cause of action," as the term is understood today.

Because Judge Bork's \textit{Tel-Oren} argument rests on the modern notion of a cause of action, it has no bearing on the intent of Congress in 1789. Moreover, the issue is not whether Congress intended the ATCA to create a private cause of action, but, rather, whether Congress intended the ATCA to benefit a class of plaintiffs that included private individuals.\textsuperscript{162} According to the early ATCA cases, the Congress of 1789 did allow the ATCA to be used for the benefit of private individual plaintiffs.

2. Implication is Justified by the Intent of Congress Today. In addition to the intent of Congress at the time of the passage of the ATCA in 1789, the intent of the modern Congress should also be considered in attempting to imply a private right of action under the ATCA. Although the modern Congress' view of the ATCA may differ greatly from that of the 1789 Congress, it remains relevant in construing the ATCA because of the Supreme Court's preference that decisions regarding implied rights of action be made not by the courts but by Congress.\textsuperscript{163} Although Congress has issued no direct statements regarding this particular issue, congressional intent may be inferred from the reaction of Congress to modern cases in which private individuals have brought suit under the ATCA.

As discussed above, the modern era of the ATCA began in earnest with the Second Circuit's decision in \textit{Filartiga}.\textsuperscript{164} The court in \textit{Filartiga}, however, never discussed the existence of a private right of action.\textsuperscript{165} Instead, the court allowed Dolly and Joel Filartiga to sue as individual plaintiffs, apparently assuming that a private right of action was implied in the ATCA.\textsuperscript{166} Following \textit{Filartiga}, several ATCA cases, including \textit{Karadzic}, took the same approach and

\textsuperscript{161} D'Amato, \textit{supra} note 14, at 95. Apparently, the phrase "cause of action" became a term of art in 1848 as part of the legal reform that abolished the distinction between law and equity. \textit{See id.}

\textsuperscript{162} \textit{See supra} text accompanying note 151.

\textsuperscript{163} \textit{See supra} note 150 and accompanying text.

\textsuperscript{164} \textit{See supra} text accompanying note 57.

\textsuperscript{165} \textit{See Filartiga}, 630 F.2d 876.

\textsuperscript{166} \textit{See Id.} at 880. Obviously, the Filartiga court would be aware of the established principle that international law provides no private right of action for individuals. \textit{See supra} note 141 and accompanying text. Because the court allowed the suit to go forward, it must have assumed that if a private right of action was needed, such a right was implied in the ATCA.
assumed without discussion that a private right of action is implied in the ATCA.\footnote{167}

In the wake of \textit{Filartiga} and its progeny, congressional reaction has indicated nothing but approval for private suits under the ATCA. In fact, instead of restricting the scope of the ATCA by excluding private plaintiffs, Congress affirmed, and perhaps even expanded the availability of private use of the ATCA by codifying \textit{Filartiga} and extending its protection to U.S. citizens under the Torture Victim Protection Act (TVPA).\footnote{168} In the TVPA, Congress reinforced \textit{Filartiga}'s holding by imposing civil liability on state actors who engage in torture or extrajudicial killing.\footnote{169} Moreover, Congress clearly established that such actions could be brought by private individuals: "An individual who . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual."\footnote{170}

In addition to the language of the TVPA, the legislative history of the act illustrates that Congress expressly intended to provide a private right of action for individuals. First, the House Report notes Judge Bork's criticism of \textit{Filartiga}, and then explicitly states that the TVPA was enacted to quell such criticism and ensure the availability of a private right of action for official torture:

\begin{quote}
The \textit{Filartiga} case met with general approval. At least one Federal judge, however, questioned whether section 1350 [the ATCA] can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action [citing Tel-Oren] . . . . The TVPA would provide such a grant . . . .\footnote{171}
\end{quote}

Besides responding to Judge Bork's criticism, the TVPA's legislative

\footnote{167. See Forti v. Suarez-Mason, 672 F.Supp 1531, 1539 (N.D. Cal. 1987) ("There appears to be a growing consensus that [section] 1350 provides a cause of action for certain 'international common law torts'"); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (Noting that a majority of courts have held that "[section] 1350 grants both a federal private cause of action as well as a federal forum in which to assert the claim"); \textit{In re Estate of Ferdinand Marcos, Human Rights Litigation}, 25 F.3d 1467, 1474 (9th Cir. 1994) ("Section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action") (quoting \textit{Tel-Oren}, 726 F.2d at 779 (Edwards, J., concurring)); Paul v. Avril, 812 F.Supp. 207, 211 (S.D. Fla. 1993).


169. See TVPA \textit{supra} note 168, § 2.

170. \textit{Id.} § 2(a)(1) (emphasis added).

history also demonstrates congressional support for private rights of action by extending the reach of the TVPA to U.S. citizens:

[The TVPA] would also enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens . . . . 172

As used in this passage, "citizens" must have been meant to include private individuals. Because the civil remedy under the ATCA is available only to "aliens," such as the individual plaintiffs in Filartiga, 173 the expansion of this remedy under the TVPA to include "U.S. citizens" could only have been intended to cover a similar class of private plaintiffs.

Thus, as indicated by both the language and the legislative history of the TVPA, congressional reaction to Filartiga's interpretation of the ATCA was anything but hostile. On the contrary, Congress codified the individual's right of action presumed to exist in Filartiga, responded directly to Judge Bork's call for an explicit grant of a cause of action, and extended Filartiga's protection to citizens of the U.S. as private individuals. In light of this response, it would appear that implying a private right of action under the ATCA is fully supported by the intent of Congress today.

In opposition to this evidence favoring implication of a private right of action in the ATCA, some might argue that the modern Congress has consistently taken pains to ensure that individuals do not have rights of action based on international human rights treaties. 174 When ratifying such treaties, it has become regular practice for the Senate to include a special provision 175 declaring that the United

172. Id. at 86.
173. See Filartiga, 630 F.2d at 878 (noting that the plaintiffs are citizens of the Republic of Paraguay).
174. For example, in adopting legislation to implement the Genocide Convention, Congress included the following provision: "[N]or shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C.A. § 1092 (West 1993 & Supp. 1996). This implementing provision prevents private individuals from directly enforcing the Genocide Convention in U.S. courts.
175. These provisions are generally grouped into four categories: reservations, understandings, declarations, and provisos. Whereas reservations usually contradict the obligations of a treaty, the other provisions usually function only to interpret the obligations of a treaty. All of the provisions, however, are significant in interpreting the congressional intent related to ratification. See Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties, 67 CHI.-KENT L. REV. 571, 585 (1991).
States considers the substantive provisions of the treaty to be non-self-executing. If a treaty is termed non-self-executing, a private individual cannot use the treaty as a binding rule of law in U.S. courts. Hence, the congressional practice of declaring human rights treaties to be non-self-executing prevents private individuals from directly enforcing rights under such treaties.

From here, it might be argued that because Congress prevents individuals from enforcing rights under treaties, it would be inconsistent for Congress to allow individuals to enforce the same rights under the law of nations. That, however, is precisely what Congress has done. With regard to official torture, for example, Congress prohibited individual enforcement of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). In ratifying the Torture Convention, the Senate included a declaration that Articles 1 through 16 of the convention were not self-executing. By rendering the Torture Convention non-self-executing, Congress prevented private individuals from directly asserting claims for official torture under this treaty. Meanwhile, however, Congress explicitly affirmed the private individual's right to sue for official torture as a violation of the law of nations. Congress affirmed this right when it enacted the TVPA, codifying the holding of Filartiga and providing a private right of action for official torture committed in violation of the law of nations.

The above example demonstrates that congressional intent regarding treaties is not necessarily determinative of congressional intent regarding the law of nations. In fact, Congress has good reason

177. This is an application of the famous principle established in Foster v. Neilson, 27 U.S. 253 (1829), that only self-executing treaties may be relied upon for the enforcement of private rights. See also Hartman, supra note 122, at 742 (explaining that a self-executing treaty can be used as a binding rule of law, whereas a non-self-executing treaty cannot be used as a binding rule, unless Congress has adopted implementing legislation, allowing the treaty to be used as a substantive rule of law).
179. Riesenfield & Abbott, supra note 175, at 631.
180. See supra text accompanying notes 168-173.
181. See id.
to distinguish between individual rights based on treaties and individual rights based on the law of nations. On one hand, treaties are concerned with obligations between the parties to the treaty, which are by definition not individuals, but nations.\(^\text{182}\) Were individuals permitted to assert their rights based on treaties, the undesirable side-effect of interference with the obligations of the nations involved might result.\(^\text{183}\) Congress prevents such interference by explicitly declaring that all new treaties, such as the Torture Convention, are non-self-executing, and therefore unenforceable by individuals.

The law of nations, on the other hand, may be enforced by individuals without any danger of resultant interference with national obligations. Unlike treaties, the law of nations does not involve obligations that have been negotiated between specific parties.\(^\text{184}\) As a result, individual suits do not interfere with the obligations of any party, and Congress has no strong desire to prevent individual claims based on the law of nations.

In light of this distinction between treaty law and the law of nations, the behavior of Congress demonstrates consistent support for the enforcement of individual rights under the ATCA. Although Congress has prevented individuals from asserting rights based on treaties, it has done so to prevent interference with its own treaty-based obligations. Congress’ enactment of the TVPA, on the other hand, confirms that the modern Congress explicitly supports, and even encourages, ATCA claims by private individuals.

Through its reaction to ATCA cases, both in 1789 and more recently, Congress has consistently shown that it intends the ATCA to benefit private individuals as a class of plaintiffs. Because congressional intent is the key factor in determining whether to imply a right of action in the ATCA, courts, such as the Second Circuit in Karadzic, should not duck the cause of action issue raised in Tel-Oren, but should openly acknowledge that a private right of action is implied in the ATCA.

V. CONCLUSION

In holding that Radovan Karadzic, as a non-state actor, violated

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\(^{182}\) See, e.g., D’Amato, supra note 14, at 99.


\(^{184}\) See Forti, 672 F. Supp. at 1540. Instead, customary international law dictates that legal norms must be “universal, definite, and obligatory” in order to be part of the law of nations. Id.
international law, and that private individuals may bring suit under the ATCA to redress such violations, the Second Circuit seemed to be standing on controversial ground. Although the result in Karadzic may at first seem controversial, the court's reasoning is really only an illustration of previously established principles.

In acknowledging that non-state actors may be found liable under international law, Karadzic seems to extend Filartiga, which limited individual liability for official torture to state actors. Both cases, however, are based on the same principle: customary international law defines not only the substantive offense but also who may be liable for that offense. Whereas customary international law holds only state actors liable for torture, it provides that individual non-state actors may be liable for offenses such as genocide and war crimes. Because Karadzic was alleged to have perpetrated both genocide and war crimes, the court sustained jurisdiction over him as an individual non-state actor.

Likewise, in assuming that individual rights may be vindicated under the ATCA, regardless of the absence of an explicitly provided private right of action in international law, Karadzic followed an established practice in ATCA jurisprudence. Despite the historical practice of allowing ATCA suits by private individuals, the existence of a private right of action in the ATCA has remained a controversial matter. This controversy, however, could have been essentially settled by the Second Circuit. By demonstrating how congressional intent favors suits by private individuals under the ATCA, Karadzic might have openly implied a private right of action in the statute, thereby laying a more solid foundation for the vindication of individual human rights under the ATCA.

David P. Kunstle