

United States, Kadic et al. v. Karadzic

[Source: ILM, vol. 34 (6), 1995, pp. 1595-1614; footnotes partially omitted.]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

S. KADIC, et al., Plaintiffs-Appellants

v.

RADOVAN KARADZIC, Defendant-Appellee

October 13, 1995

[...]

OPINION: JOHN 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 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. at 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 [...].

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”. [...] 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 and for other violations in his 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. [...]

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. [...]

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” [...].

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, of any foreign nation”, Torture Victim Act at 2(a). [...]

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

[...]

Judge Leisure accepted Karadzic's contention that "acts committed by non-state actors do not violate the law of nations," [...]

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. [...]

2. Specific Application of 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.

(a) Genocide [...]

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.

(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 United States, In re Yamashita]. 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.

After the Second World War, the law of war was codified in the four Geneva Conventions, [...] which have been ratified by more than 180 nations, including the United States [...]. Common article 3, which is substantially identical in each of the four Conventions, applies to “armed conflicts not of an international character” and binds “each Party to the conflict ... to apply, as a minimum, the following provisions”: [here parts of Article 3 common are quoted] 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.

[Footnote No. 8 reads: Appellants also maintain that the forces under Karadzic’s command are bound by [...] Protocol II [...], which has been signed but not ratified by the United States [...]. 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.” [...]. [Protocol II] 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 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]

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 liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nüremberg after World War II [...]. The District Court has jurisdiction pursuant to the Alien Tort Act over appellants’ claims of war crimes and other violations of international humanitarian law.

(c) Torture and summary execution

[...] 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 or 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. [...] 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.

(a) Definition of a state in international law

[...] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. [...] 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.

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.

(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. at 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. [...] 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. [...] 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. [...]

Conclusion

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

Discussion

1.
 - a. Who can violate IHL? Only a State? Also a non-State party to a non-international armed conflict? Also an individual acting for a State or for a non-State party to a non-international armed conflict? Also an individual acting in a non-international armed conflict, but not for a State or non-State party to that conflict? (Hague Convention IV, Art.3; GC I-IV, Art. 3; GC I-IV, Arts 51/52/131/148 and Arts 49/50/129/146 respectively; P I, Arts 1(1), 75(2), 86 and 91; P II, Arts 4-6)
 - b. Does the Court consider that "Srpska" is a State? Does it need to prove this to affirm that "Srpska" has obligations (and rights) under IHL?
2. How does the Court qualify the conflict in Bosnia and Herzegovina? Is Protocol II only applicable if its "requirements (...) have ripened into universally accepted norms of international law" (fn. 8) or is it sufficient that the former Yugoslavia and Bosnia and Herzegovina were party to Protocol II?
3. Is a violation of Art. 3 common to the Conventions a violation of the law of nations under the Alien Tort Act? Is it a war crime?
4.
 - a. Has each State Party an obligation under IHL to adopt legislation offering a civil cause of action to a victim against the individual who violated that provision? Even if the violation has no connection with that State Party? Does such legislation conform to IHL? (Hague Convention IV, Art.3; GC I-IV, Arts 51/52/131/148 respectively; P I, Art. 91)
 - b. Has each State Party an obligation under IHL to adopt legislation giving its penal courts jurisdiction over the individual who violated IHL, if that violation is qualified as a grave breach by IHL? Even if the violation has no connection with that State Party? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1))