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Kadic v. Karadzic—Rape as a Crime Against Women as a Class

Rumna Chowdhury*

"A nation is not conquered until the hearts of its women are on the ground. Then it is done, no matter how strong the weapons, or how brave the warriors."[1]

"Not since the soldiers put a long thick rifle inside me. So cold, the steel rod canceling my heart. Don't know whether they're going to fire it or shove it through my spinning brain. Six of them, monstrous doctors with black masks shoving bottles up me too. There were sticks, and the end of a broom."[2]

I. Introduction

You have just been raped. Scared, hurt, and confused, you turn to your mother, your best friend, your partner; together they help you to get the medical and emotional attention you need.

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* J.D. expected 2002, University of Minnesota. B.S. 1999, University of Wisconsin. I would like to thank Nicole Forkenbrock Lindemyer for her brilliant ideas, feedback, and friendship, without which this paper would not have come into being. For their comments on pervious drafts of this article, I would also like to thank Benjamin Felcher, Heather Redmond, Lori Romeyn Sitowski, and Kathryn Strobach. Finally, I am forever grateful to David Dinsmoor, my parents, and my family for their enduring love and support.

During the course of my research and writing of this article, I have had many interesting discussions with various acquaintances and colleagues. Most people are stunned when I tell them I have spent so much time working on a project surrounding the recognition of rape as genocide. I have heard many comments about my topic being "intense," "a downer," and "not very pleasant." To say this topic is unpleasant is an insulting understatement that can be made only by those who have the privilege of being able to turn the page and forget about such "unpleasant" matters. But much of the world does not have that privilege. I do not know a single woman with the privilege of not having to think about rape, whether dealing with its direct consequences or designing a plan to protect herself. I implore you to read the vile details of the sexual violence committed against Bosnian women. Then close this article and pick up another. Make it your business to know the horror that thousands of women live through—it is the least you can do. If you are disgusted, do not turn away, but take action on behalf of those who do not have the luxury of turning the page and returning to a violence-free life.

1. Inès Hernandez-Avila, *In Praise of Insubordination, Or, What Makes a Good Woman Go Bad?*, *in* TRANSFORMING A RAPE CULTURE 375, 375 (Emilie Buchwald et al. eds., 1993).

2. EVE ENSLER, THE VAGINA MONOLOGUES 58 (1998).

With a support network of friends and family, you are able to heal and cope, to go on with your life.[3] Now move yourself to another city, another state, another country. You have just been raped. Scared, hurt, and confused, you want to turn to your mother, but a soldier killed her two weeks ago. You try turning to your best friend, but she, too, was just raped, and the trauma from her own attack renders her helpless to support you. You turn to your partner, but he rejects you because you have betrayed him by being intimate (although not by choice) with another man.[4] You have just been raped, as have all the women around you, and yet you are completely alone, isolated from any personal support, and alienated from your entire community.

When all of a community's women are attacked, the community eventually disintegrates. The epidemic trauma and violent victimization of rape[5] go to the heart of the community and destroy its very unity. The strategic mass rape of women was a very powerful tool of war used to destroy the Bosnian people in the former Yugoslavia.[6]

Across times and cultures, violence against women has been a widespread and socially accepted phenomenon.[7] Unfortunately,

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3. This is, of course, an idealized and exceptional view of the community response to a rape survivor, which draws on many Western standards and institutions. Women in communities with increased education about sexual violence, its causes, and its impact on the victim/survivor are more likely to receive acceptance and treatment from their communities.

4. *See generally* Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 329-30 (1994) (discussing and describing various societal reactions to sexual abuse).

5. A note on terminology: the term "sexual violence" is generally used to refer to any violence motivated by gender or violence of a sexual nature; whereas, "rape" refers to the specific act of bodily penetration by a foreign object. Neither term used alone is ideal for this Note: "rape" is not defined broadly enough to encompass all of the violence discussed, and "sexual violence" is used as a euphemism for rape, making it sound like a less serious crime. Thus, both terms will be used interchangeably, to remind the reader of the broad spectrum of bodily violations being discussed (sexual violence) while retaining the horror and discomfort associated with any real discussion of those violations (rape).

6. *See* Brenda Smiley, *Rape Tore the Fabric of Bosnian Families, Society*, WOMEN'S ENEWS (Aug. 11, 2000) (summarizing the *Kadic* case and decision, including statements by psychiatrist Mladen Loncar, who testified on the lasting effects for the individual victim and the greater community, as well as the use of rape as a devastating weapon of war), *at* http://www.womensenews.com/article.cfm/dyn/aid/231/context.archive.

7. *See generally* Valerie Smith, *Split Affinities: The Case of Interracial Rape*, *in* THEORIZING FEMINISM: PARALLEL TRENDS IN THE HUMANITIES AND SOCIAL SCIENCES 155 (Anne C. Hermann & Abigail J. Stewart eds., 1994) (discussing the intersection between race and sexuality, including the rape of slave women in the United States to increase the property of their "master"); ALICE WALKER & PRATIBHA PARMAR, WARRIOR MARKS (1993) (discussing the historical and present-

many people still find such behavior not only acceptable, but also useful, in their assertions of power and control over women.[8] Over centuries of struggle, proponents of women's rights have made significant gains in the fight for the social and legal equality of women, including official condemnation of crimes against women.[9] One central aspect of this struggle is public recognition of the validity of the feminist adage, "[t]he personal is political."[10] Historically, women have been relegated to the private spheres of the home, the bedroom, and the kitchen, with the law refusing to penetrate the "veil of privacy."[11] This refusal effectively immunized actors who violated women in their socially-accepted private roles.[12]

Indeed, even as women have entered the public arena of the workplace en masse, their bodies have retained the stigma of privacy; crimes committed against women, even outside the private sphere of the home, are not considered matters of proper public concern.[13] In this way, the public/private dichotomy operates to preclude redress for crimes against women, and as such, "private" offenses are not subject to the public scrutiny of the law. Obliteration of the public/private distinction of offenses and actors is therefore essential to recognizing that violence against women is, in fact, a matter of profound public importance. The civil and criminal actions[14] against Radovan Karadzic, the

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day prevalence of female genital mutilation); ROOT OF BITTERNESS: DOCUMENTS OF THE SOCIAL HISTORY OF AMERICAN WOMEN (Nancy F. Cott et al. eds., 2d ed. 1996) [hereinafter ROOT OF BITTERNESS] (discussing various historical struggles of American women, including rape, regulation of women's bodies, slavery, health, marriage, and persecution for witchcraft).

8. *See* sources cited *supra* note 7.

9. *See generally* ROOT OF BITTERNESS, *supra* note 7 (discussing the evolution of women's rights and history).

10. GLORIA STEINEM, THE WISDOM OF WOMEN 47 (Carol Spenard LaRusso ed., 1992).

11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part II.A.

14. This Note focuses on one civil action against Karadzic. More information on the criminal actions against him is available from a variety of sources. *See generally* Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360 (1994) (outlining principles of jurisdiction and procedure of the International Tribunal for the former Yugoslavia); Paul J. Mangarella, *The Conflicts of the Former Yugoslavia in the Courts*, 14 ANTHROPOLOGY OF E. EUR. REV. 44 (1996) (discussing both the International Criminal Tribunal for the former Yugoslavia and the civil actions against Karadzic in the United States). For updates, see the United Nations website for the international criminal tribunal for the former Yugoslavia at http://www.un.org/icty/ (last visited Nov. 19, 2001).

"Heinrich Himmler" of the Balkans[15] who orchestrated the genocidal rape of thousands of Bosnian women, represent a monumental step forward in dismantling this pernicious dichotomy.

This Note focuses on the importance of *Kadic v. Karadzic*,[16] a civil action brought by survivors of genocidal rape orchestrated under Karadzic's command. In the summer of 2000, after seven years of litigation, the trial culminated in a jury verdict of $745 million in compensatory and punitive damages to the plaintiff women and children refugees of Bosnia-Herzegovina.[17] The *Kadic* decision has profound significance both in conceptualizing rape as a tool of torture and genocide within the norms of international human rights law[18] and in expanding the opportunity of genocide

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15. *See* Warren Zimmerman, *Impressions of Karadzic, in* FRONTLINE ONLINE: THE WORLD'S MOST WANTED MAN, *at* http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/radovan/impressions.html (last visited Nov. 19, 2001). Zimmerman, the last U.S. ambassador to Yugoslavia, describes Karadzic as a "man obsessed by the imagery of violence," who is mad, and "seemed to [be] a man who needed psychiatric care, a person without moral compass or restraint." *Id.*

16. 70 F.3d 232 (2d Cir. 1995) (opening the door for the jury award by reversing the dismissal for lack of subject-matter jurisdiction and remanding to district court). From the start, the *Kadic* action was an uphill battle for the plaintiffs. A series of cases provide the full procedural history. *See* Kadic v. Karadzic, 192 F.R.D. 133 (S.D.N.Y. Mar. 28, 2000) (granting *Kadic* plaintiffs' motion to decertify plaintiff class); Doe v. Karadzic, 1999 U.S. Dist. LEXIS 24 (S.D.N.Y. Jan. 7, 1999) (denying *Kadic* plaintiffs' motion to reconsider motion to certify for interlocutory appeal); Doe v. Karadzic, 182 F.R.D. 424 (S.D.N.Y. Oct. 23, 1998) (denying *Kadic* plaintiffs' motion to opt out of class); Kadic v. Karadzic, 1997 U.S. Dist. LEXIS 19130 (S.D.N.Y. Dec. 3, 1997) (affirming previous discovery orders); Doe v. Karadzic, 176 F.R.D. 458 (S.D.N.Y. Dec. 2, 1997) (granting *Doe* plaintiffs' motion to amend and certify as a class); Kadic v. Karadzic, 1997 U.S. Dist. LEXIS 1073 (S.D.N.Y. Feb. 3, 1997) (finding defendant must appear in the United States for deposition and must supplement discovery responses); Karadzic v. Kadic, 518 U.S. 1005 (June 17, 1996) (denying certiorari to decide issue of subject-matter jurisdiction); Kadic v. Karadzic, 1996 U.S. Dist. LEXIS 5291 (S.D.N.Y. Apr. 22, 1996) (finding service was proper, denying defendant motion to stay proceedings pending Supreme Court decision to grant certiorari); Kadic v. Karadzic, 74 F.3d 377 (2d Cir. Jan. 6, 1996) (denying rehearing motion by defendant to reconsider appellate court reversal of district court dismissal); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. Oct. 13, 1995) (reversing district court decision to dismiss for lack of subject-matter jurisdiction and remanding to district court); Kadic v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. Sept. 7, 1994) (dismissing action for lack of subject-matter jurisdiction); Kadic v. Karadzic, 1993 U.S. Dist. LEXIS 13428 (S.D.N.Y. Sept. 23, 1993) (granting defendant extension to prepare motion to dismiss).

17. *See* John Sullivan, *American Justice Tackles Rights Abuses Abroad*, N.Y. TIMES, Sept. 3, 2000, at 4.

18. The criminal component of this action, which is in the form of indictments by the International Criminal Tribunal for the former Yugoslavia against several former Bosnian-Serb political and military leaders, including Radovan Karadzic, has been noted as "the first United Nations trial ever to focus exclusively on sexual

victims to sue for damages under the United States Alien Tort Claims Act (ATCA).[19] This Note discusses not only the expansion of the ATCA to apply to non-state actors,[20] but also the significance of the *Kadic* action within the greater arena of women's international human rights. Specifically, this Note demonstrates how *Kadic* signifies that violence against women can no longer be dismissed as a private offense against an individual woman, but rather must be acknowledged as a crime against women as a class—one with enormous public consequences.

Part II of this Note outlines the ways in which society has attempted to justify the blatant disregard for issues significant to women by relegating those issues to the private realm, thereby making them improper subjects for societal or governmental scrutiny.[21] This section illustrates the dwindling strength of the distinction between public and private and the subsequent benefit to the enforcement of women's international human rights.[22] Part III lays out developments in U.S. international law that allowed federal courts to exercise jurisdiction over Karadzic, a foreign

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violence against women, including gang rape and the use of women as sexual slaves as part of a war strategy." Marlise Simons, *Tribunal Gains Steam as It Tries Balkan Horrors*, N.Y. TIMES, Apr. 10, 2000, at A1. Systematic sexual abuse of women during times of conflict has traditionally been ignored. *See generally* Chinkin, *supra* note 4 (discussing and describing various societal reactions to sexual abuse); Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601 (1998) (discussing the prevalence of rape and sexual slavery during times of armed conflict and tactics available to eliminate such violence).

19. 28 U.S.C. § 1350 (1994); *see also* Lawrence Newman & Michael Burrows, *International Litigation: The Alien Tort Claims Act*, N.Y. L.J., Dec. 29, 1995, at 3 (asserting that the Second Circuit is the first contemporary court to approve subject-matter jurisdiction for a non-state actor under the ATCA). *See generally* Alan F. Enslen, Filartiga's *Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997) (discussing the expansion of the ATCA, which has taken place as a result of the Kadic decision). "The Kadic decision significantly expands the scope of the ATCA because it extends the reach of the statute to include certain tortious acts committed by non-state actors." *Id.* at 696. Enslen analyzes in great depth the impact of the 1995 appellate court decision that subject-matter jurisdiction was proper under the ATCA and its potential meaning to future ATCA litigation. *See id.* at 695-735.

20. A non-state actor is a private individual whose actions are not tied to a particular state. *See Kadic*, 70 F.3d at 239-40, 245. A state actor, on the other hand, is an individual whose conduct could be tied to a sovereign entity. *See id.* at 244. Somewhere between the two is a colorable state actor, who is an individual acting in conjunction with a state or with a state's significant assistance. *See id.* at 245.

21. *See infra* notes 29-103 and accompanying text.

22. *See infra* notes 29-103 and accompanying text.

citizen.[23] Karadzic claimed that he could not be held accountable for his actions under the ATCA because he was not acting as an official state actor.[24] The Second Circuit, determining the far-reaching effects of "private" actions into the public arena, found that this defense no longer exists and that jurisdiction over Karadzic was proper.[25] Part IV further discusses the public effects of "private" actions by "private" citizens, detailing the atrocities orchestrated by Karadzic in the former Yugoslavia.[26] This Part also analyzes the civil actions against Karadzic and their effect on ATCA jurisprudence.[27] Part V concludes that the civil actions against Radovan Karadzic are a significant step forward in breaking down the public/private dichotomy, which in turn profoundly impacts the concept of women's human rights.[28]

II. The Role of the Public/Private Dichotomy in Women's Rights

A. *How the Dichotomy Operates to Justify Acceptance of Violence Against Women*

Feminist theorists assert that the public/private dichotomy works to oppress women by relegating them to the private sphere, outside the realm of traditional law.[29] The Cult of True Womanhood[30] is one feminist theory explaining the evolution of the public/private dichotomy.[31] Upon industrialization and mass

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23. *See infra* notes 104-134 and accompanying text.

24. *See infra* notes 104-134 and accompanying text.

25. *See infra* notes 104-134 and accompanying text.

26. *See infra* notes 135-198 and accompanying text.

27. *See infra* notes 135-198 and accompanying text.

28. *See infra* notes 199-200 and accompanying text.

29. *See generally* Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-state Actors, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93 (Dorinda G. Dallmeyer ed., 1993) (opining that parties should be held accountable for both public and "private" violence against women); Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 117 (Dorinda G. Dallmeyer ed., 1993) (discussing the development of human rights as the development of only men's rights); Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed., 1993) (critiquing the public/private dichotomy in international law).

30. Also commonly referred to as the "Cult of Domesticity" or the "Cult of the Lady."

31. For an in-depth discussion of the Cult of True Womanhood, see BARBARA WELTER, *The Cult of True Womanhood 1820-1860, in* DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY 21 (1976).

movement from rural to metropolitan areas, many men entered the workforce outside the home, leaving women in the private, domestic sphere.[32] This was a change from the traditional notion of men's work, which was within the homestead and alongside women.[33] As the difference in the division of labor became more pronounced, the work of women in the private sphere became devalued.[34]

The cardinal values that society used to judge a woman as a True Woman were piety, purity, submissiveness, and domesticity.[35] The ability of a woman to complete her work unseen and in silence became an asset, an extension of the value of submissiveness, because it boosted the ego of the male breadwinner.[36] Valuing women who fit into the Cult of True Womanhood led to a dichotomy between the "True Woman," who stayed in the private realm, and other, inferior women, who appeared publicly. A woman's proper place in society was as a mother, daughter, sister, or wife.[37] Any woman assuming an alternate role, such as working outside the home, was considered neither a real woman nor a True Woman, because she presented herself in public and worked publicly, like a man.[38] A woman working in the public realm was essentially a prostitute, trading her Womanhood for money.

The negative attitude towards women in the public sphere prompted mistreatment and discrimination against them.[39] Present-day examples of this oppression manifest themselves in the form of violence against women who take on roles in the public sphere.[40] Domestic violence, rape, and sexual harassment are all societal means of communicating to women that they do not belong in the public realm and that a woman's proper place is within the

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32. *See* BARBARA ROGERS, THE DOMESTICATION OF WOMEN: DISCRIMINATION IN DEVELOPING SOCIETIES 22 (1979).

33. *See* Laurel Thatcher Ulrich, *"A Friendly Neighbor": Social Dimensions of Daily Work in Northern Colonial New England*, *in* WOMEN AND POWER IN AMERICAN HISTORY 37, 39 (Kathryn Kish Sklar & Thomas Dublin eds., 1991).

34. *See* ROGERS, *supra* note 32, at 14.

35. *See* WELTER, *supra* note 31, at 21.

36. *See id.* at 29.

37. *See id.* at 21.

38. *See id.*

39. *See* ROGERS, *supra* note 32, at 24-26.

40. *See generally* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (asserting that sexual harassment in the workplace is a tool used by men to express their disdain of women in the workforce and to attempt to send women back to their homes).

home.[41]

The situation became such that the only proper ways for a True Woman to present herself in the public realm were either at a man's side or as an advocate for a traditionally acceptable cause.[42] It is ironic that women in the political arena often advocate for the rights of others rather than participate in campaigns to enhance their own rights.[43] Until recently, women remained absent from the most obviously "public" fields of politics, law, and government.[44] The remnant effects of the Cult of True Womanhood include the continuing attitude that a woman's proper place is in the private sphere. The scope of traditional law must expand to the "private" sphere, where most violence against women is perpetrated. This is the only way to erase the public/private distinction and end violence against women.

B. *Exclusion of Women From the Development of International Human Rights Laws and Standards*

Women have been, and still are, systematically excluded from public discourse on laws and humanitarian standards. This exclusion led to the absence of women's voices and experiences in the creation of what essentially became standards for the rights of men. Originally, human rights standards did not include prohibitions against sexual violence, arguably because the majority of human rights standards and laws were created by men, to whom sexual violence was not a major concern.[45]

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41. *See id.*

42. A traditionally acceptable cause was generally one from which the woman herself did not directly benefit. *See* SHEILA TOBIAS, FACES OF FEMINISM: AN ACTIVIST'S REFLECTIONS ON THE WOMEN'S MOVEMENT 11 (1997) (citing examples of movements in which women have been involved, including temperance and anti-slavery).

43. *See id.* Women such as Mary Wollstonecraft, Frances Wright, and Harriet Martineau were condemned for their controversial politics forwarding the rights of women and met a strong backlash from True Women. *See* WELTER, *supra* note 31, at 40.

44. *See* Virginia Sapiro, *Feminist Studies and Political Science—And Vice Versa*, *in* FEMINISMS IN THE ACADEMY 291, 294-97 (Donna C. Stanton & Abigail J. Stewart eds., 1995).

45. *See* Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 11, 13 (Julie Peters & Andrea Wolper eds., 1995) (arguing that many of the experiences of women were not considered human rights violations because men formulated the concept of international human rights, using definitions based only upon those acts men feared); *see also* Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 610-11 (1997) (noting that excluding women from participation in the creation of international human rights law resulted in a

Feminist arguments that international law and human rights theories do not protect women's needs because they are not truly universal generally take two forms.[46] Advocates of the first approach argue that "because international law excludes from its scope the private, or domestic, sphere–presumably the space in which women operate–it cannot include them."[47] In order to protect the particular legal claims made exclusively or chiefly by women, the world community must reconceptualize international law to include the private sphere.[48] Advocates of the second approach argue that international law *intentionally* uses the public/private divide to conveniently avoid addressing issues of specific concern to women.[49] These advocates also charge that states do not hesitate to arbitrarily enter the private realm to regulate private family matters and to end "private" violence that takes the form of cannibalism or slavery; yet, they refuse to enter that same realm to protect women from "private" gender-based violence.[50]

The distinction between the two approaches is important because the second theory charges that the exclusion of women is intentional.[51] Recognizing this intentional exclusion is essential if international law is to remedy its lack of protection for women. Only by such recognition will the international community be able to adequately address the use of sexual violence against women by armed forces during times of conflict.

C. *Recognizing Rape as a "Public" Crime Against Women*

Feminist scholars have long recognized sexual violence as a tool used by men to manipulate and control women through fear.[52]

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general dismissal of gender-based abuses from public condemnation).

46. *See* Engle, *supra* note 29, at 143; *see also* Andrew Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalization,* 12 AUSTL. Y.B. INT'L L. 205 (1992) (discussing similar discourse regarding the public/private distinction).

47. Engle, *supra* note 29, at 143.

48. *See id.* at 143-44.

49. *See id.* at 143.

50. *See id.* at 144.

51. *See generally* Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law,* 12 AUSTL. Y.B. INT'L L. 190 (1992). Charlesworth maintains that "the division into public and private spheres is not a simple, monolithic construction," *id.* at 191, while also arguing that "[t]he operation of the public/private distinction in international law is one reason why gender has not been an issue in international law," *id.* at 203.

52. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL (1975) (discussing the history of rape). Domestic violence and sexual harassment of women in the workforce are also recognized as abuses against women with the purpose of keeping

In fact, some assert that rape, identified by psychologists as "the most intrusive of traumatic events,"[53] itself constitutes a war against women.[54] Internationally, there is a long history of rape and violent sexual abuse of women during times of armed conflict.[55] From the founding of the city of Rome[56] to the Gulf War,[57] history is replete with examples of such violence.[58]

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women "in their place." *See generally* MACKINNON, *supra* note 40 (asserting that sexual harassment in the workplace is a tool used by men to express their disdain of women in the workforce and to attempt to send women back to their homes).

53. UNICEF, *Sexual Violence as a Weapon of War, in* THE STATE OF THE WORLD'S CHILDREN (1996), http://www.unicef.org/sowc96pk/sexviol.htm (last visited Nov. 19, 2001).

54. Andrea Dworkin, asserting that rape is a war against women, declared to an audience of 500 men:

> I want one day of respite, one day off, one day in which no new bodies are piled up, one day in which no new agony is added to the old, and I am asking you to give it to me. And how could I ask you for less—it is so little. And how could you offer me less: it is so little. Even in wars, there are days of truce. Go and organize a truce. Stop your side for one day. I want a twenty-four-hour truce during which there is no rape.

Andrea Dworkin, *I Want a Twenty-Four-Hour Truce, in* TRANSFORMING A RAPE CULTURE 13, 21 (Emilie Buchwald et al. eds., 1993).

55. *See generally* BROWNMILLER, *supra* note 52 (discussing sexual violence against women in various historical conflicts, from the American Revolution to the Vietnam War); MIDDLE EAST WATCH, HUMAN RIGHTS WATCH, A VICTORY TURNED SOUR, HUMAN RIGHTS IN KUWAIT SINCE LIBERATION (1991) (discussing the rape of 5000 Kuwaiti women by Iraqi soldiers during the August 1990 invasion of Kuwait); AFRICA WATCH, HUMAN RIGHTS WATCH, RWANDA, TALKING PEACE AND WAGING WAR: HUMAN RIGHTS SINCE THE OCTOBER 1990 INVASION (1992) (discussing the rape of Rwandan women during the Rwandan civil war); ASIA WATCH, HUMAN RIGHTS WATCH, HUMAN RIGHTS CRIMES IN KASHMIR: A PATTERN OF IMPUNITY (1993) (discussing incidences of rape and murder by Indian soldiers against women in Kashmir); AMERICAS WATCH AND THE WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT (1992) (discussing the systematic rape and murder of women in Peru by men on both sides of the conflict); Mark Huband, *'Where There Are Any Little Girls They Should Be Raped,'* THE GUARDIAN, May 21, 1993, at 12 (discussing the rape and ethnic violence committed against Liberian women during civil war); Robert McCrum, *Mass Resistance*, THE GUARDIAN WEEKEND, Feb. 19, 1994, at 24 (discussing violence against the women of East Timor since the occupation by Indonesia).

56. *See* Donna Macnamara et al., *History of Sexual Violence, in* INTERACTIVETHEATRE.ORG, *at* http://www.interactivetheatre.org/resc/history.html (last visited Nov. 19, 2001).

57. *See* MIDDLE EAST WATCH, *supra* note 55.

58. However, it is only recently that such violence is acknowledged as a weapon of war. The use of sexual violence against women as a weapon of war has been recognized not just in the case of Bosnia, but also in East Timor, *see* Seth Mydans, *Sexual Violence as Tool of War: Pattern Emerging in East Timor*, N.Y. TIMES, Mar. 1, 2001, at A1 ("Investigators say it has become clear that the crimes of the Indonesian military and the local militias it commanded . . . include not only massacres, widespread destruction and mass deportations but also rape and sexual slavery on a wide and possibly systematic scale.") and Sierra Leone, *see* HUMAN RIGHTS WATCH, SEXUAL VIOLENCE WITHIN THE SIERRA LEONE CONFLICT (2001)

The repercussions of rape for an individual woman may last far beyond the actual attack or attacks, often affecting her for the rest of her life.[59] Beyond the physical pain and degradation, fear remains long after an attack.[60] For those who survive an attack, there is the risk of sexually transmitted diseases and infections, infertility, and pregnancy,[61] in addition to other physical and psychological disorders.[62] Pregnancy poses a particular problem because it forces women to face the possibility that they may bear their attacker's child.[63] People from the woman's own community may see her child as proof of her immoral behavior and, in the case of rape committed by enemy forces, collaboration with that enemy.[64] Abortion is often not an option because of scarce medical resources or strict religious teachings.[65] In some communities, infertility, disease, and loss of virginity leave women unmarriageable.[66] Many women commit suicide because they are unable to bear the trauma and shame associated with their attack.[67]

The effects of rape likewise reach beyond the individual woman attacked and undermine the well-being and security of her family and community.[68] In addition to the basic medical care needed following a violent attack, a woman facing disease or pregnancy will require additional medical attention, which may place a strain on an already ailing community.[69] Psychological trauma may move beyond the individual to affect spouses, parents,

("Throughout the nine year Sierra Leonean conflict there has been widespread and systematic sexual violence against women and girls including individual and gang rape, sexual assault with objects such as firewood, umbrellas and sticks, and sexual slavery."), *at* http://www.hrw.org/backgrounder/africa/sl-bck0226.htm. For additional examples, see *supra* note 55.

59. *See* Chinkin, *supra* note 4, at 329.

60. *See id.*

61. *See id.* at 330.

62. *See id.* at 330 n.26 (citing M. Belic & V. Kesic, *Interim Report*, CENTRE FOR WOMEN WAR VICTIMS (1993) ("In our work, in addition to psychological disturbances, depression . . . we have noticed many psychosomatic and secondary syndromes and illness. All sorts of tumors, bronchitis, epileptic attacks, anorexia, and similar illnesses seem to occur more often than would be normal.")).

63. *See id.* at 330.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.* at 329; *see also* Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993) (discussing "spirit injury" to individuals and communities within the former Yugoslavia).

69. *See* Chinkin, *supra* note 4, at 330.

and children.[70] Oftentimes, "[t]he harm inflicted . . . on a woman by a rapist is an attack on her family and culture, as in many societies women are viewed as repositories of a community's cultural and spiritual values."[71] A traumatized individual may not be able to fulfill her obligations to her family or community, resulting in a gradual halting of everyday activities.[72] Shame that often leads to suicide or exile (whether forced by the community or voluntary) leaves children without mothers and leaves the community in a more advanced state of trauma: such a community has to face not only the attack of its women, but their absence as well.[73] To compound this devastation, the fear that a woman feels after an attack spreads to other women in the community who were not personally attacked but who are aware that they may be the next target.[74]

The effects of sexual violence on both individual women and on their communities are not an incidental byproduct of the violence of war. On the contrary, the effects of sexual violence are precisely the purpose for the violence, because it causes widespread fear and trauma. Sexual violence is used not only to control and manipulate individual women, but also to exert power over entire communities, as was the case in the former Yugoslavia.[75] Law professor Christine Chinkin writes:

> [R]ape in war is not merely a matter of chance, of women victims being in the wrong place at the wrong time. Nor is it a question of sex. It is rather a question of power and control which is structured by male soldiers' notions of their masculine privilege, by the strength of the military's lines of command and by class and ethnic inequalities among women.[76]

Sexual violence during times of armed conflict forwards the goal of having power and control over individual women as well as entire communities. Recognition of the widespread community effects of violence against women is crucial to disassembling the public/private dichotomy. Because the effects of sexual violence are not simply private, the crime is also not simply private, and therefore deserves public attention.

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70. *See id.*

71. UNICEF, *supra* note 53.

72. *See* Chinkin, *supra* note 4, at 330.

73. *See id.*; Wing & Merchan, *supra* note 68, at 24-25.

74. *See* Chinkin, *supra* note 4, at 330.

75. *See id.*

76. *Id.* at 328 (citing in part to Cynthia Enloe, *The Gendered Gulf*, *in* THE "NEW WORLD ORDER" AT HOME AND ABROAD COLLATERAL DAMAGE 93, 97 (C. Peters ed., 1992)) (internal citations omitted).

Radhika Coomaraswamy, United Nations Special Rapporteur[77] on Violence Against Women, identifies several reasons for sexual violence against women during armed conflict.[78] Coomaraswamy maintains that violence against an individual woman may be directed towards her social group because "to rape a woman is to humiliate her community."[79] The raping of women in a community is a declaration to the men of that community that they have been defeated, for they have failed at their most basic task: to ostensibly protect "their" women.[80]

Law professor Catharine MacKinnon makes the assertion that the systematic sexual violence against women during the conflict in the former Yugoslavia would not have happened unless rape was acceptable as an everyday phenomenon.[81] She notes:

> One result is that these rapes are not grasped either as a strategy in genocide or as a practice of misogyny, far less as both at once. What is happening to Bosnian and Croatian women at the hands of the Serbian forces is continuous both with this ethnic war of aggression and with the gendered war of aggression of everyday life. For most women, this is to everyday rape what the Holocaust was to everyday anti-Semitism: without the everyday, you could not have the conflagration . . . .[82]

This acceptance of everyday rape and its relegation to the "private" realm allow for the use of rape as a tool of war while maintaining the private categorization and avoidance of liability for egregious violence against women. The *Kadic* action, which held Karadzic liable for his ordered violence against women, is an example of the removal of rape from its private categorization.[83]

Rape is not a private crime against individual women; rather, it is a crime committed against women as a class. The sheer number of women who are sexually violated every year supports

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77. A special rapporteur is an expert appointed by the United Nations to investigate specific topics or situations in particular countries. *See* WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 533 (3d ed. 2001). A special rapporteur "collect[s] information on human rights violations and prepare[s] annual reports to the Commission [on Human Rights], and if requested, to the General Assembly." *Id.* at 238.

78. *See* Radhika Coomaraswamy, *Of Kali Born: Violence and the Law in Sri Lanka, in* FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 49 (Margaret Schuler ed., 1992).

79. *Id.* at 50.

80. *See* Chinkin, *supra* note 4, at 330.

81. *See* Catharine A. MacKinnon, *Comment: "Theory is not a Luxury," in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 83, 87 (Dorinda G. Dallmeyer ed., 1993).

82. *Id.*

83. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

this argument.[84] Having considered the "public" effects of "private" sexual violence, it is clear that rape is a problem that deserves much more attention than it has traditionally received.

D. International Measures Addressing Violence Against Women

The failure to prosecute sexual crimes against women during the Nuremberg trials following the Second World War reflects the world's historical tendency to overlook or intentionally ignore atrocious crimes committed against women.[85] Because rape was not considered a war crime at the time of the Second World War, military commanders who failed to prevent rape were not in violation of international law.[86] Shortly after the Second World War, feminist activists began using the women's human rights forum to propose international protections for women in times of war.[87]

The first attempts to specifically outlaw rape in international law were not made until 1949.[88] Article 27(2) of the Fourth Geneva Convention[89] states, in relevant part: "[w]omen shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[90] The broad scope of Article 27(2) is misleading, however, as women were protected only against the actions of enemy forces.[91] There was no protection against rape under this Article from a woman's own nationals or nationals of a neutral state.[92] It was not until 1977 that a comprehensive treaty prohibiting rape in all situations of armed conflict was

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84. While 20,000 to 70,000 women were raped in the former Yugoslavia, 500,000 women are raped each year in the United States. *See* ENSLER, *supra* note 2, at 54.

85. *See* Judith Gail Gardam, *The Law of Armed Conflict: A Gendered Regime?*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 171, 177-78 (Dorinda G. Dallmeyer ed., 1993).

86. *See id.*

87. *See id.*; *see also* Paul Rodgers, *International Women Are Taking Rightful Place at Peace Table*, WOMEN'S ENEWS (July 29, 2001) (chronicling recent history of women activists' responses to war), *at* http://www.womensenews.com/article.cfm/dyn/aid/158/context/cover).

88. *See* Gardam, *supra* note 85, at 178. For a more comprehensive list of international documents barring sexual assaults against women, see *infra* note 98.

89. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 27(2), 75 U.N.T.S. 287, 287.

90. *Id.*

91. *See* Gardam, *supra* note 85, at 178.

92. *See id.*

implemented.[93] The drafting of laws and standards protecting women from sexual violence was a necessary step toward including women in the international public discourse about violence and safety.

Many organizations and governments now recognize that rape may be used as an instrument of war and a method of ethnic cleansing "intended to humiliate, shame, degrade and terrify the entire ethnic group."[94] Professor MacKinnon, co-counsel for the *Kadic* plaintiffs, describes this systematic sexual violence:

> What this is—and this particularly invokes the international legal context—is rape under orders. It is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make victims wish they were dead. It is rape as an instrument of forced exile, to make you leave your home and never want to come back. It is also rape to be seen and heard by others: rape orchestrated as spectacle. It is rape to shatter a people and to drive a wedge through a community. It is the rape of misogyny liberated by xenophobia and unleashed by official command. It is rape as genocide.[95]

Rape of civilians during armed conflict has just recently been prohibited by the laws of war.[96] The United Nations has repeatedly affirmed, both explicitly and implicitly since the time of the Geneva Conventions,[97] that sexual violence against women

93. *See id.* (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 76, 1125 U.N.T.S. 3, 38-39, which expanded the protections offered by the Fourth Convention, such that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.").

94. Chinkin, *supra* note 4, at 329 (quoting Tadeusc Mazowiecki, *Report Pursuant to Commission Resolution: 1992/s-i/I of 14 August 1992: Report of Special Rapporteur of the Commission on Human Rights*, U.N. Doc. E/CN.4/1993/50 (1993)).

95. MacKinnon, *supra* note 81, at 88.

96. *See infra* note 98 and accompanying text; *supra* note 93 and accompanying text.

97. The four Geneva Conventions of 1949 were the following: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See* WEISSBRODT ET AL., *supra* note 77, at 21. These four conventions will hereinafter be referred to, respectively, as Geneva Conventions I, II, III, and IV. These conventions are "[t]he principal multilateral treaties that legislate international humanitarian law." *Id.*

during times of armed conflict and war is prohibited.[98] This international governmental recognition of the terrors of sexual violence against women is vital to the creation of a type of war-state in which civilians are not attacked and, if they are, the individual attackers and orchestrators of such attacks may be brought to justice.

While the creation of international laws and standards protecting women from sexual violence during times of conflict is a step forward, selective enforcement of those international human rights standards remains a barrier to the international eradication of violence against women.[99] Despite the large scale of rape perpetrated during war, the offenses are rarely taken seriously.[100] MacKinnon notes:

> Whether or not they [sexually violent acts against women during times of war or armed conflict] are prohibited on their face, however, these practices are nonetheless widely permitted as the liberties of their perpetrators, or excesses of passion, or spoils of victory, or products of war. Virtually nothing is done about them, within any nation or among nations. They tend to be legally rationalized, officially winked at, or in some instances even formally condoned. They are ignored.[101]

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98. Many different U.N. documents reflect the official international stance on the issue of violence against women during times of war and conflict. For examples, see WEISSBRODT ET AL., *supra* note 77, at 781-87 (citing Geneva Conventions of 1949, Conventions I-IV, *supra* note 97 (describing as prohibited acts towards people not actively involved in the hostilities: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [and] . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 4, 1125 U.N.T.S. 609, 612, listing "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175, stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, art. 6, 1249 U.N.T.S. 13, 17, stating that states agree to take measures, including enacting legislation to "suppress all forms of traffic in women and exploitation of prostitution of women"; Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., art. 2, U.N. Doc. A/48/629 (1993) defining "violence against women" generally and explicitly to include "(b) [p]hysical, sexual and psychological violence occurring within the general community, including rape [and] sexual abuse . . . ; (c) [p]hysical, sexual and psychological violence perpetrated and condoned by the state, wherever it occurs").

99. *See generally* Gardam, *supra* note 85 (discussing the gendered nature of the law of armed conflict).

100. *See id.* at 184.

101. MacKinnon, *supra* note 81, at 86.

In addition to blatant disregard for international laws protecting women during times of armed conflict, proper resources are not available for effective enforcement.[102] The international instruments dealing specifically with women are often under-resourced and have weaker implementation obligations and procedures than those dealing with the general public.[103]

Now that *de jure* protections of women from sexual violence during armed conflict are in place, those laws must be recognized and enforced. The *Kadic* civil action accomplished this ideal by holding Karadzic accountable for orchestrating genocidal rape against Bosnian women.

III. Federal Jurisdiction over International Torts: Precedents that Paved the Way for the *Kadic* Action

Kadic may seem an enigma to people unfamiliar with U.S. international law because none of the parties involved were citizens or permanent residents of the United States. Developments in U.S. law allow non-citizens to sue a non-citizen for civil damages in federal court, opening the doorway for *Kadic* and for future cases against human rights offenders.[104]

A. *The Alien Tort Claims Act*

The civil actions against Radovan Karadzic were brought pursuant to the Alien Tort Claims Act (ATCA).[105] Enacted as part of the Judiciary Act of 1789,[106] the ATCA was, until recently, rarely invoked.[107] The ATCA provides, "[t]he 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."[108]

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102. *See id.* at 89.

103. *See id.*

104. *See infra* notes 105-134 and accompanying text.

105. 28 U.S.C. § 1350 (1994).

106. *See* WEISSBRODT ET AL., *supra* note 77, at 763.

107. *See* Theodore R. Posner, *Alien Tort Claims Act—Genocide—War Crimes—Violations of International Law by Nonstate Actors*, 90 AM. J. INT'L L. 658, 659 (1996).

108. 28 U.S.C. § 1350. The reasons for the ATCA's inclusion as part of the 1789 Judiciary Act are unclear. *See* Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from* In Re Marcos *Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491, 492 (1993). Congress may have intended to provide uniformity in the application of international norms by allowing federal courts jurisdiction over alien tort claims, as suggested by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Other sources have asserted that Congress may have believed that it was the responsibility of the United States, as a

The ATCA was infrequently invoked until the 1980s, when an increasing number of attorneys versed in international law, combined with growing public interest in protecting international human rights, paved the way for a revival of the statute.[109] *Filartiga v. Peña-Irala*[110] is the landmark decision that resurrected the ATCA.[111]

B. Filartiga *and the Law of Nations*

Filartiga came to the Court of Appeals for the Second Circuit on appeal by the plaintiffs after the district court dismissed their wrongful death action for lack of subject-matter jurisdiction.[112] The Filartigas alleged that Dr. Filartiga's seventeen-year-old son, Joelito, was abducted and tortured to death by Americo Norberto Peña-Irala, the Inspector General of Police in Asuncion, Paraguay, in retaliation for Dr. Filartiga's political activities opposing the Paraguayan President.[113] Upon learning that Peña-Irala was in the United States, the Filartigas filed a civil action against him in U.S. district court, seeking compensatory and punitive damages.[114]

The district court dismissed the action on jurisdictional grounds.[115] It ruled that the scope of the law of nations, as adopted by the ATCA, was too narrow to include a state's treatment of its own citizens.[116] However, the Second Circuit disagreed and found that the district court had subject-matter jurisdiction under the ATCA.[117] The court based its decision on its

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member of the world community, to provide an alien tort remedy. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475-80 (1989).

109. *See* Fitzpatrick, *supra* note 108, at 493.

110. 630 F.2d 876 (2d Cir. 1980).

111. *See* WEISSBRODT ET AL., *supra* note 77, at 764 ("The Second Circuit's decision in *Filartiga v. Peña-Irala* . . . paved the way for many subsequent suits to compensate victims for violations of international law.").

112. *Filartiga*, 630 F.2d at 876. Plaintiffs Dr. Joel Filartiga and his daughter Dolly were citizens of Paraguay at the time the action commenced, but Dolly was present in the United States under a visitor's visa and had applied for political asylum. *See id.* at 878.

113. *See id.* at 878. Plaintiffs also alleged that Dolly was forced to view the body of her murdered brother and was told, "here you have what you have been looking for for so long and what you deserve." *Id.*

114. *See id.* at 879. Dr. Filartiga also filed a criminal action in Paraguay against Peña-Irala and the Paraguayan police. *See id.* at 878.

115. *See id.* at 876. The decision to dismiss was based upon dicta in earlier decisions that construed the law of nations narrowly under 28 U.S.C. § 1350, so as to not include a foreign state's treatment of its own citizens. *See Filartiga*, 630 F.2d at 879-80.

116. *See id.* at 880.

117. *See id.*

interpretation of the law of nations, and found that torture by a state official against a country's own citizens "violate[s] established norms of the international law of human rights, and hence the law of nations."[118] Upon examination of various sources of international law and historical and contemporary prescriptions of the law of nations, the Second Circuit concluded, "official torture is now prohibited by the law of nations."[119] Before the *Filartiga* decision, the concept of state sovereignty controlled the law of nations, such that a state could not be held accountable for treatment of its own citizens.[120]

Defining the law of nations is central to the interpretation of the ATCA and what is considered torture.[121] The law of nations can be characterized in three ways: (1) international custom; (2) general principles of law recognized by civilian nations; or (3) judicial decisions and teachings of the most highly qualified publicists of the various nations.[122] Customary norms typically reflect the general practice of governments that are accepted as law.[123] The Supreme Court of the United States spoke on the evolution of the customary law of nations at the turn of the twentieth century in its decision *The Paquete Habana*,[124] where it asserted that:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[125]

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118. *Id.*

119. *Id.* at 884.

120. *Id.* at 876.

121. *See, e.g., id.* Had the Second Circuit not adopted a definition of "law of nations" different from that of the district court, there would have been no basis for reversal of the district court's dismissal. *See id.*

122. *See* WEISSBRODT ET AL., *supra* note 77, at 768 (citing Article 38 of the Statute of the International Court of Justice).

123. *See generally* Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 554-58 (1986) (explaining the evolution of customary norms from existing laws).

124. 175 U.S. 677 (1900).

125. *Id.* at 677. This section of *The Paquete Habana* opinion was also cited by the Second Circuit as support for its interpretation of the meaning of the "law of nations" in *Filartiga*. *Filartiga*, 630 F.2d at 880.

Relying on this evolutionary conception of international law, the *Filartiga* court determined, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[126]

The *Filartiga* court also held that the ATCA may grant subject-matter jurisdiction where a state's treatment of its own citizens is involved.[127] This district court decision was based upon the United Nations Charter,[128] which provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedom for all without distinctions as to race, sex, language or religion.[129]

The Second Circuit also cited the Universal Declaration of Human Rights[130] and the Declaration on the Protection of All Persons from Being Subjected to Torture[131] as support for the conclusion that "official torture is now prohibited by the law of nations," and that "the prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[132] In a bold statement to the world, the Second Circuit proclaimed:

> The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.[133]

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126. *Filartiga*, 630 F.2d at 881.

127. *See id.* at 876.

128. *See id.* at 881 (citing U.N. CHARTER). The United Nations Charter was developed in the 1940s to establish human rights as an object of international concern, as set forth in the International Bill of Human Rights. *See* WEISSBRODT ET AL., *supra* note 77, at 1-31.

129. U.N. CHARTER art. 55.

130. *See Filartiga*, 630 F.2d at 882 ("[T]he Universal Declaration of Human Rights . . . states in the plainest of terms, 'no one shall be subjected to torture.'" (quoting *Universal Declaration of Human Rights*, G.A. Res. 217A, art. 5, U.N. Doc. A/810, at 71 (1948), *available at* http://www1.umn.edu/humanrts/instree/h1dpast.htm)).

131. *See id.* 882-83 ("The Declaration expressly prohibits any state from permitting the dastardly and totally inhuman act of torture." (construing *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, art. 3, at 91, U.N. Doc. A/10034 (1975), *available at* http://www1.umn.edu/humanrts/instree/h1dpast.htm)).

132. *Id.* at 884.

133. *Id.* at 884-85.

The Second Circuit's articulation of the law of nations was crucial to its decision that the ATCA may provide subject-matter jurisdiction where plaintiffs challenge their own sovereign's actions. This extension of the ATCA was an essential step in the expansion of the protections against torture, which now include protection from organized sexual violence against women.[134]

IV. The Significance of *Kadic v. Karadzic* in the Evolution of Women's Human Rights

A. *Conflict in the Former Yugoslavia*

Before discussing the specific ATCA claims brought against Radovan Karadzic, it is necessary to provide background to Karadzic's role in the conflict. Six republics now comprise the former Yugoslavia: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.[135] In 1991, Croatia and Slovenia each declared independence.[136] The federal government of Yugoslavia, located in what is now Serbia, responded by sending troops to those areas, which sparked fighting that spread to Bosnia-Herzegovina.[137] After Bosnia-Herzegovina declared its independence at the end of 1991, armed conflict quickly spread.[138] Between 1990 and 1992, three nationalist parties in Bosnia-Herzegovina, the Muslim Party of Democratic Action (SDA), the Croatian Democratic Union (HDZ), and the Serbian Democratic Party (SDS),[139] governed in a partnership under Muslim President Alija Izetbegovic.[140] At that time, Karadzic was the leader of the SDS.[141] Disagreements between the parties as to whether Bosnia-Herzegovina should secede or remain part of Yugoslavia caused a rift between the SDS (favoring remaining part of Yugoslavia) and the HDZ and SDA (favoring independence).[142]

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134. *See supra* notes 88-98 and accompanying text.

135. *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 500 (2d ed. 1996).

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 501.

140. *See* Mark Danner, *The Horrors of a Camp Called Omarska and the Serb Strategy*, *in* FRONTLINE ONLINE: THE WORLD'S MOST WANTED MAN, *at* http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/atrocities/omarska2.html (last visited Nov. 19, 2001).

141. *See* CNN, *Transcript of Interview with Karadzic* (Nov. 28, 1995), *at* http://www.cnn.com/WORLD/Bosnia/updates/nov95/11-28/karadzic/transcript.html.

142. *See* NEWMAN & WEISSBRODT, *supra* note 135, at 501.

In January of 1992, SDS leaders created their own Serbian entity within Bosnia-Herzegovina, the Republic of Srpska, of which Karadzic declared himself president.[143] Paramilitary supporters of the SDS, under Karadzic's control, began a systematic attack of the surrounding areas of Bosnia-Herzegovina, Croatia, Serbia, and Montenegro with the specific objective of creating an ethnically pure "greater Serbia."[144] Non-Serbs in those areas were targeted for extermination.[145] One of the main tactics used to forward the Serbian genocide[146] of non-Serbs was the systematic rape and sexual torture of non-Serbian women.[147] Radovan Karadzic, as the President of Srpska, played an unquestionably decisive role in the development and realization of this plan of ethnic cleansing.[148]

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143. *See* Kadic v. Karadzic, 192 F.R.D. 133, 135 (S.D.N.Y. 2000).

144. NEWMAN & WEISSBRODT, *supra* note 135, at 501.

145. Karadzic and his forces primarily targeted Bosnian Muslim and Bosnian Croat people. *See* Indictment, The Prosecutor of the Tribunal against Radovan Karadzic, IT-95-5 (U.N. Int'l Crim. Trib. for the former Yugoslavia July 24, 1995), http://www.un.org/icty/indictment/english/kar-ii950724e.htm; Indictment, The Prosecutor of the Tribunal against Radovan Karadzic, IT-95-18 (U.N. Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1995), http://www.un.org/icty/indictment/english/kar-ii951116e.htm.

146. Genocide is defined as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

Rome Statute of the International Criminal Court, July 17, 1998, art. 6, 37 I.L.M. 999, 1004.

147. *See* Danner, *supra* note 140 ("Rather than being a regrettable but unavoidable concomitant of combat, rapes and mass executions and mutilations here served as an essential part of it.").

148. "'Ethnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area." *Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Final Report*, 49th Sess., at 33, U.N. Doc. S/1994/674 (1994). U.N. experts found the Bosnian government undertook a plan of "ethnic cleansing":

> On the basis of the information gathered, examined and analysed, the Commission of experts has concluded that grave breaches of the Geneva Conventions and other violations of international humanitarian law have been committed in the territory of the former Yugoslavia on a large scale, and were particularly brutal and ferocious in their execution. The practice of so-called "ethnic cleansing" and rape and sexual assault, in particular, have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy, which may also be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators.

NEWMAN & WEISSBRODT, *supra* note 135, at 501-02 n.3 (citing *Boutros Boutros-Ghali, Letter Dated 24 May 1994 from the Secretary-General to the President of the*

B. Civil Actions Against Radovan Karadzic

In 1993, two related ATCA actions were filed against Radovan Karadzic in the United States District Court for the Southern District of New York.[149] The plaintiffs in *Doe v. Karadzic,*[150] Jane Doe I and Jane Doe II, alleged multiple human rights violations by Bosnian-Serb forces.[151] Plaintiffs in *Kadic v. Karadzic*[152] were S. Kadic[153] and two women's organizations, Internacionala Iniciative Zena Bosne I Hercegovine (Biser) and Zene Bosne I Hercegovine.[154] The *Kadic* plaintiffs restricted their allegations to crimes against women, including enforced prostitution, forced pregnancy, rape, extrajudicial killing, and other torture.[155] While the *Doe* and *Kadic* actions are similar, this Note focuses on the *Kadic* action because of its significance to the enforcement of *women's* human rights standards.[156]

Security Council, 49th Sess., U.N. Doc. S/1994/674 (1994)).

149. *See* Doe v. Karadzic, No. 93 Civ. 0878 (S.D.N.Y. filed Sept. 24, 1993); Kadic v. Karadzic, No. 93 Civ. 1163 (S.D.N.Y. filed Sept. 24, 1993). Many of the proceedings for these two actions were combined, and both the courts and academics have used their names interchangeably. Thus, many of the *Kadic* citations will be to *Doe v. Karadzic*, and vice versa.

150. 866 F. Supp. 734 (No. 93 Civ. 0878) (S.D.N.Y. 1994).

151. *See* Michele Brandt, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1413-14 (1995) (citing plaintiff Does' Complaint). Brandt describes events surrounding the Doe plaintiffs' claim:

> Jane Doe I attempted to resist and she was beaten and forcibly held down. She fainted. Another soldier was raping her when she regained consciousness. . . . After the soldiers raped Jane Doe II's mother, they took her mother down the hallway and the children heard their mother scream. The soldiers returned with a bloody knife and threatened to rape Jane Doe II.

Id. at 1413-14 n.3, n.4 (quoting plaintiff Does' Complaint at 6).

152. 866 F. Supp 734 (No. 93 Civ. 1163) (S.D.N.Y. 1994).

153. S. Kadic was a plaintiff on her own behalf and on behalf of her two infant sons, Benjamin and Ongen. *See* Kadic v. Karadzic, 866 F. Supp. at 734. Kadic was forced to witness the murder of one of her sons, as alleged in the plaintiffs' claim:

> [S. Kadic] approached the entrance to her home and was accosted by four Serbian soldiers. . . . One told her that he had come "to take one of your children so that you remember well what we chetniks know how to do." The soldiers attempted to forcibly remove K's son from her arms. She resisted. She heard her son scream and looked down to see his head resting on the floor in a puddle of blood. The rest of her son's body remained cradled in her arms.

Brandt, *supra* note 151, at 1413 n.1 (quoting plaintiff Kadic's Complaint at 7).

154. *See Kadic*, 866 F. Supp. at 734.

155. *See* Yolanda S. Wu, *Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L.J. 101, 107 (1993).

156. In many ways the *Doe* and *Kadic* actions are inseparable. Many of the court proceedings for the two cases were combined, and at one time the two were joined as a class action. However, after the *Kadic* plaintiffs were granted their motion to decertify the plaintiff class, the two actions were severed and pursued

The procedural history of the *Kadic* action is long and complex.[157] Initially, the District Court for the Southern District of New York dismissed the action for lack of subject-matter jurisdiction.[158] While the district court came to the conclusion that personal jurisdiction over Karadzic was not barred by any head-of-state[159] immunity claimed by Karadzic, the decision that Karadzic was not a head-of-state was the main factor in the dismissal for lack of subject-matter jurisdiction under the ATCA and the Torture Victim Protection Act (TVPA),[160] which at the time applied only to state actors. By the district court's reasoning, it lacked subject-matter jurisdiction whether or not Karadzic was a head-of-state.

Under the Foreign Sovereign Immunities Act (FSIA),[161] foreign heads-of-state are often granted immunity from civil suit in the United States.[162] Conversely, since *Filartiga*, torts have been actionable under the ATCA only when committed under the color of state law.[163] In *Filartiga*, the Second Circuit found that "only conduct which rises to the level of an 'international common law tort' by violating universally accepted standards of human rights is within the law of nations, and thus within the subject-matter jurisdiction [of the ATCA]."[164] The district court in *Kadic*

independently. *See* Kadic v. Karadzic, 192 F.R.D. 133 (2000). While the *Kadic* action has reached resolution, the *Doe* proceedings are still taking place in the Southern District of New York.

157. For the full procedural history, see *supra* note 16.

158. *See Kadic*, 866 F. Supp. at 736. Karadzic moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), (2), (4), (5), and (6), arguing lack of subject-matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process, and nonjusticiability. *Id.*

159. The district court in this case did not recognize Karadzic as a head-of-state because the government he purported to head was not internationally recognized. *See id.* at 737-38. "Karadzic's present lack of head-of-state immunity is conditioned upon a decision of the Executive Branch not to recognize a Bosnian-Serb nation and not to acknowledge Karadzic as an official head-of-state." *Id.*

160. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)). The TVPA provides a private right of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another person to torture or extrajudicial killing. *Id.* Plaintiffs against Karadzic originally sought subject-matter jurisdiction under, *inter alia*, the TVPA. *See Kadic*, 866 F. Supp. at 738.

161. 28 U.S.C. § 1605 (1994).

162. Foreign sovereign immunity is derived from case law as well: "A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts. " Lafontant v. Aristide, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994).

163. *See Kadic*, 866 F. Supp. at 739 n.8.

164. *Id.* at 738-39 (citing Filartiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).

reaffirmed the *Filartiga* holding that to fall within the "law of nations," the tort in question must have been committed under the color of state law.[165] In explaining its reasoning, the district court cited a California district court case which held that "purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding torture practiced by non-state actors."[166] Thus, because Karadzic was not an official head-of-state, he could not violate the law of nations, and therefore could not be held to the standards of the ATCA or the TVPA. Ironically, if Karadzic was determined to be a head-of-state and subject to jurisdiction under the ATCA or the TVPA, he may have been granted immunity from personal jurisdiction under the FSIA.[167]

The Court of Appeals for the Second Circuit reversed the district court's dismissal, finding that subject-matter jurisdiction was proper under the ATCA.[168] The Second Circuit based its determination on whether plaintiffs pled a violation of the law of nations, which is the third prong needed to invoke ATCA jurisdiction.[169] The court settled on the following standard to determine if ATCA jurisdiction was proper: "If this inquiry discloses that the defendant's alleged conduct violates 'well-established, universally recognized norms of international law,'[170] as opposed to 'idiosyncratic legal rules,'[171] then federal jurisdiction exists under the Alien Tort Act."[172]

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165. *See id.* at 740-41. For a discussion of "law of nations," see *supra* Part III.B. The district court cited persuasive authorities that interpreted the ATCA as applicable to heads-of-state only. *See Kadic*, 866 F. Supp. at 739-41. The court relied on a Fifth Circuit case that held "the Alien Tort Statute does not confer subject-matter jurisdiction over private parties who conspire in or aid and abet, official acts of torture." *Id.* at 740 (quoting Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988)).

166. *Kadic*, 866 F. Supp. at 740 (quoting Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)).

167. Some examples of torts actionable under the ATCA, as listed by the district court deciding *Kadic* are, "*inter alia*, torture, slave trade, and piracy [citing *Filartiga*, 630 F.2d at 890]; genocide and cruel, inhuman or degrading treatment [citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984)]; summary execution [citing *Forti*, 672 F. Supp. at 1541-42]; wrongful death [citing Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992)]; and war crimes." *Kadic*, 866 F. Supp. at 738, n.8.

168. *See* Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).

169. *See id.* at 238. The Second Circuit stated that three conditions must be satisfied to invoke federal subject-matter jurisdiction under the ATCA: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations. *Id.*

170. *Id.* (quoting *Filartiga*, 630 F.2d at 888).

171. *Id.* (quoting *Filartiga*, 630 F.2d at 881).

172. *Id.*

The Second Circuit rejected the district court's assertion that a law of nations violation must involve state actors,[173] citing as analogies the international stance against piracy,[174] the slave trade,[175] and aircraft hijacking as offenses of universal concern for which non-state actors may be held culpable.[176] The court also based its decision on the Third Restatement of Foreign Relations Law of the United States, which states in relevant part: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."[177] After reviewing the relevant sources of United States and international law, the court concluded that non-state actors may be held liable for their actions under the law of nations.[178]

After the Second Circuit concluded that federal subject-matter jurisdiction existed, Karadzic contested the existence of personal jurisdiction because of insufficient service. However, because Karadzic was served in the state of New York, the Second Circuit decided that the court could exercise personal jurisdiction over him.[179] Upon deciding that subject-matter and personal jurisdiction existed,[180] the case was remanded to the district court

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173. *See id.* at 239.

174. *See id.* (citing as examples United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196-97 (1820); The Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979)).

175. *See Kadic*, 70 F.3d at 239 (citing M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (1992)); *see also* Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

176. *See Kadic*, 70 F.3d at 240.

177. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 2, introductory note (1986)).

178. *See id.* at 239.

> 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.

179. *See* Kadic v. Karadzic, 1996 U.S. Dist. LEXIS 5291, at *6 (S.D.N.Y. Apr. 22, 1996). On February 11, 1993, Jonathan Soroko attempted service on Karadzic in the lobby of his New York hotel when Karadzic was visiting the United States. *See id.* at *3. Karadzic was not immune from service as a U.N. representative because the hotel in which he was served is outside the U.N. headquarters district. *See id.* Soroko attempted to hand papers to Karadzic, but the service was intercepted by a security agent. *See id.* Karadzic quickly moved away from Soroko, at which time Soroko shouted to him, "You've been served." *Id.* at *4. Over Karadzic's objections, the district court determined that service was sufficient, given the circumstances. *See id.* at *6.

180. To summarize, the District Court for the Southern District of New York had

and set for trial.[181]

In February of 1997, Karadzic communicated to the court that he found it impossible to contest the civil claims in the United States and instructed his attorney not to participate in any further proceedings.[182] Thus, a default judgment was entered in favor of the plaintiffs with regard to liability. Damages became the only

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personal jurisdiction over Karadzic because he was served in New York City, and the Second Circuit found that service was sufficient. *See supra* note 179 and accompanying text. The district court had subject-matter jurisdiction over this civil action through the ATCA, which the Second Circuit expanded to include actions committed by private citizens. *See supra* notes 168-178 and accompanying text. Karadzic was not granted immunity from civil suit under the FSIA because the district court determined he was not a head-of-state. *See supra* note 159 and accompanying text.

Karadzic is currently using the same tactic he used with the New York federal courts to claim that The Hague lacks jurisdiction regarding his criminal indictments. *See* CNN, *Karadzic Defiant Over U.N. Court* (July 5, 2001), *at* http://www.cnn.com/2001/WORLD/europe/07/05/bosnia.tribunal/index.html.
Karadzic has long been avoiding accountability to the international community, saying:

> If you give us good evidence, we will arrest ourselves and there are many other Serbs that should not be arrested by the foreigners. We will try our own criminals . . . if there's good evidence. . . . I think the whole matter about this tribunal is a matter of political pressure. This is completely unfounded. . . . This is a discriminatory court.

CNN, *Transcript of Interview with Karadzic* (Nov. 28, 1995), *at* http://www.cnn.com/WORLD/Bosnia/updates/nov95/11-28/karadzic/transcript.html.

Slobodan Milosevic is also using the same strategy as Karadzic, refusing to recognize the jurisdiction or competence of The Hague war crimes tribunal. *See* Jim Maceda, *At The Hague, Let the Circus Begin*, MSNBC (July 3, 2001), *at* http://stacks.msnbc.com/news/595714.asp.

181. *See Kadic*, 70 F.3d at 232. Karadzic made several motions in an attempt to dismiss the actions and to avoid making a personal appearance in the United States. In November of 1995, Karadzic petitioned the Second Circuit Court of Appeals for a rehearing of its decision granting jurisdiction, but was denied. *See* Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996). Karadzic appealed the denial to the Supreme Court of the United States. Pending the Supreme Court's decision on certiorari, the Second Circuit found service was proper and that answer and discovery should not wait for the Supreme Court decision. *See* Kadic v. Karadzic, 1996 U.S. Dist. LEXIS 5291 (1996). The Supreme Court denied Karadzic's writ of certiorari. *See* Karadzic v. Kadic, 518 U.S. 1005 (2000). The district court granted the plaintiffs' motion requesting that Karadzic be ordered to be deposed in the United States and that he supplement his sparse discovery responses. *See* Kadic v. Karadzic, 1997 U.S. Dist. LEXIS 1073 (1997).

182. *See* Doe v. Karadzic, 176 F.R.D. 458, 460 (S.D.N.Y. 1997). Karadzic refused personal appearances on the grounds that he contested both personal jurisdiction and sufficiency of service. *See id.*

One reason for Karadzic's refusal to appear in the United States may be his fear of capture to face indictments by the United Nations Criminal Tribunal for the former Yugoslavia. This fear is not unfounded, as Karadzic is among the world's most wanted men. *See* FRONTLINE ONLINE: THE WORLD'S MOST WANTED MAN, *at* http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/ (last visited Nov. 19, 2001).

remaining issue for resolution at trial.[183]

C. *The Law Finally Provides Redress For Rape Survivors*

The judgment against Karadzic would be impossible if the proper legal precedents were not in place. *Filartiga* was a monumental precedent because it extended protection to a citizen from her own state's actions.[184] This finding was a significant and necessary step to eradicating the belief that a state's treatment of its own citizens is a "private" matter that concerns only that state.

The determination that the law of nations is a concept that evolves and changes with our changing times and beliefs[185] is significant given the legislative intent argument that opponents of ATCA jurisdiction may make. Opponents may argue that the ATCA framers could not have intended the ATCA to be used for the purpose of seeking civil damages against perpetrators of torture because, at the time of the ATCA's enactment, torture was not prohibited by any settled rule of international law.[186] Recognition of the need to adapt old laws to modern times is essential to breaking down the traditional distinction between actions that are public and actions that are private, and therefore outside the realm of traditional law.

The Second Circuit's holding that subject-matter jurisdiction in the *Kadic* action existed under the ATCA is a significant expansion of the scope of the ATCA.[187] Karadzic is the first non-state actor to be held accountable under the ATCA for actions committed under his "private" control. By acknowledging that a non-state "private" actor may be held responsible for individual actions that violate international law, the Second Circuit took a tremendous step forward in nullifying the distinction between public and private actions. These legal strides go hand in hand with the beliefs of society in general, which is beginning to

183. Another procedural issue the court decided was that of the genocide victims' class status. *See Doe*, 176 F.R.D. at 458 (granting Doe plaintiffs' motion for class certification, reserving the decision of whether or not members would be allowed to opt out); Kadic v. Karadzic, 182 F.R.D. 424 (1998) (denying Kadic plaintiffs' motion to opt out of the class); Kadic v. Karadzic, 1999 U.S. Dist. LEXIS 24 (1999) (denying Kadic plaintiffs' motion to reconsider); Kadic v. Karadzic, 192 F.R.D. 133 (2000) (granting Kadic plaintiffs' motion to decertify the plaintiff class, allowing the two actions to continue separately).

184. *See supra* Part III.B.

185. *See generally* The Paquete Habana, 175 U.S. 677 (1900) (discussing the necessity for evolution in international law).

186. *See supra* note 125 and accompanying text.

187. *See supra* Part IV.B.

recognize that violence is never a private matter.

D. Bridging the Gap Between Public and Private

The international and U.S. legal communities are finally catching on to what women have known for many years: rape is torture and war against women.[188] Ask any woman who has survived sexual violence about its effects and she will likely agree that rape is a vicious crime against not just a woman's body, but against her soul. A study of the after-effects of systematic rapes in Bosnia illustrates that this trauma spreads from women to their

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188. There are innumerable works by women describing the effects of rape that destroy their very being. In 1998 Eve Ensler published THE VAGINA MONOLOGUES, based on a series of candid interviews with women about their vaginas. ENSLER, *supra* note 2. Many women told Ensler stories of sexual assault. *See id.* Ensler, outraged that 20,000 to 70,000 women were being raped in the middle of Europe in 1993, spent two months in Croatia and Pakistan interviewing female Bosnian refugees. *See id.* at 54. The following piece is based on Ensler's interviews with the Bosnian women and was dedicated to them. *See id.* at 55. I include the entire piece because it is a powerful and moving representation of the torture that is rape. It is entitled "My Vagina Was My Village."

> My vagina was green, water soft pink fields, cow mooing sun resting sweet boyfriend touching lightly with soft piece of blond straw.
>
> *There is something between my legs. I do not know what it is. I do not know where it is. I do not touch. Not now. Not anymore. Not since.*
>
> My vagina was chatty, can't wait, so much, so much saying, words talking, can't quit trying, can't quit saying, oh yes, oh yes.
>
> *Not since I dream there's a dead animal sewn in down there with thick black fishing line. And the bad dead animal smell cannot be removed. And its throat is slit and it bleeds through all my summer dresses.*
>
> My vagina singing all girl songs, all goat bells ringing songs, all wild autumn field songs, vagina songs, vagina home songs.
>
> *Not since the soldiers put a long thick rifle inside me. So cold, the steel rod canceling my heart. Don't know whether they're going to fire it or shove it through my spinning brain. Six of them, monstrous doctors with black masks shoving bottles up me too. There were sticks, and the end of a broom.*
>
> My vagina swimming river water, clean spilling water over sun-baked stones over stone clit, clit stones over and over.
>
> *Not since I heard the skin tear and made lemon screeching sounds, not since a piece of my vagina came off in my hand, a part of my lip, now one side of the lip is completely gone.*
>
> My vagina. A live wet water village. My vagina my hometown.
>
> *Not since they took turns for seven days smelling like feces and smoked meat, they left their dirty sperm inside of me. I became a river of poison and pus and all the crops died, and the fish.*
>
> My vagina a live wet water village.
>
> They invaded it. Butchered it and burned it down.
>
> I do not touch now.
>
> Do not visit.
>
> I live someplace else now.
>
> I don't know where that is.

Id. at 57-59.

communities.[189] When so many individual women face the threat of violence in their everyday lives, the threat becomes one not only to the individual, but to women as a class.[190] The actions of Serbian forces in the former Yugoslavia demonstrate the societal knowledge of this fact.

During the conflict in the former Yugoslavia in the early 1990s, Serbian forces under Karadzic's control took rape to the extreme, such that it can no longer be denied that systematic rape constitutes violence against *women as a class*. Radovan Karadzic, a psychiatrist with intricate knowledge of the devastating individual and societal effects of rape, ordered Serbian troops to use widespread rape and sexual torture as a tool of war and genocide.[191]

Rape is a crime unlike any other because of its power to shame its victims into silence. Karadzic knew that the power of rape is its ability to shame and, most importantly, to keep victims isolated from one another. The consequence of rape is to make a woman feel as if she is deviant, her experience is anomalous, and she is alone when, in fact, millions of women are raped. The private character of rape contributes to the division of women, so that they do not recognize themselves as a class and the effects of "individual" crimes are minimized. Karadzic's genocidal rape was perfectly calculated. As a psychiatrist, he knew the consequences of rape: how it destroys women, their relationships with others, and, thereby, their entire communities. This is the exact effect he intended. By targeting women through rape, Serbs were able to slowly break down communities from the inside, using the shame, isolation, and suspicion surrounding rape to "divide and conquer" community members. If there were ever an example of the use of rape as an attack against women as a class, it is the actions of the Serbs under the control of Radovan Karadzic.

Serbian military and political leaders accepted Karadzic's knowledge of the effects of sexual violence and enunciated ethnic cleansing and genocide by implementing the rape of non-Serbian women as an official policy.[192] The fact that almost one-fourth of

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189. *See supra* notes 59-74 and accompanying text.

190. To clarify, in asserting that rape is a crime against women as a class, I am not stating that when one woman is raped all women may join in a class action against the perpetrator. This is a possibility to consider in the future, but is beyond the scope of this Note.

191. *See* Smiley, *supra* note 6.

192. *See* ANDREA DWORKIN, *Free Expression in Serbian Rape/Death Camps, in* LIFE AND DEATH, 73, 73 (1997) ("Serbian military policy has mandated the systematic gang rape of Muslim and Croatian women and girls, their imprisonment

the concentration camps set up throughout Bosnia were specifically designated as rape camps illustrates this.[193]

The Serbian actions in the former Yugoslavia have received unprecedented international attention.[194] For the first time, states have taken steps to bring to justice criminals who have violated international standards barring sexual violence against women during times of armed conflict.[195] Serbian political and military leaders have been indicted by the criminal tribunal at The Hague; many are in custody, and convictions are starting to come in.[196] *Kadic v. Karadzic* is the first civil action of its kind, holding a private foreign citizen accountable for his systematic, savage crimes against women outside of the United States.[197] *Kadic v. Karadzic* has paved the way for other women to follow suit, bringing to justice people who have for too long been able to rely

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in schools, factories, motels, arenas, and concentration camps for ongoing serial rape, rape followed by murder, sexual torture, and sexual slavery."). Dworkin, an avid opponent of pornography, asserts that pornography was used to prepare Serbian forces to commit sexual violence by dehumanizing their victims. She writes:

> The pornography was war propaganda that trained an army of rapists who waited for permission to advance. An atavistic nationalism provided the trigger and defined the targets—those women, not these women. The sexuality of the men was organized into antagonism, superiority, and hatred. The lessons had been learned—not an ideology but a way of being: dehumanization of women; bigotry and aggression harnessed to destroying the body of the enemy; invasion as a male right; women as a lower life form.

Id. at 74-75.

193. *See id.* at 73.

194. *See* Gardam, *supra* note 85, at 185.

195. *See id.*

196. For updated information on indictments and prosecutions by the International Criminal Tribunal for the former Yugoslavia, see the United Nations website for the International Criminal Tribunal for the former Yugoslavia at http://www.un.org/icty/.

197. Unfortunately, it is unlikely that the *Kadic* plaintiffs will ever see a penny of their $745 million judgment. Karadzic, who has been in hiding since the end of the Yugoslav conflict, has no plans of surrendering himself to the jurisdiction of the District Court for the Southern District of New York or The Hague. *See* CNN, *Karadzic Vows 'No Surrender'* (Apr. 8, 2001), *at* http://www.cnn.com/2001/WORLD/europe/04/08/bosnia.karadzic/index.html. Karadzic, however, denies he is hiding. *See id.* "I am not in hiding at all, my people are hiding me. You can ask any Serb if he would betray Radovan Karadzic. . . . I walk around normally, go to baptism ceremonies, associate with my friends and my soldiers, I have recently been even in Sarajevo." *Id.* Many Serbians are, indeed, in full support of Karadzic. *See* CNN, *Serbs Rally for Wanted Karadzic* (July 28, 2001), *at* http://www.cnn.com/2001/WORLD/europe/07/28/yugoslavia.karadzic/index.html. Serbs recently rallying for Karadzic told reporters, "No roads will lead them to Radovan. Every Serb house shall be his hiding place and every true Serb his ally." *Id.* To many Serbs, Karadzic is a leader and a saint. *See id.*

on the private nature of their crimes to avoid accountability. No more.

This leads to the crux of the relationship between rape on the individual level and rape on the level that constitutes genocide. Without the more "private," "minor" offenses, genocidal rape could not occur.[198] Unless it was socially acceptable to torture women through various forms of sexual violence on a daily basis, whether through harassment, battery, or rape, the genocidal versions of those actions could not exist. The supposedly private nature of the individual instances creates the veil of privacy covering acts that are so obviously public–such as the many rape camps designed to extinguish non-Serbian women.

It is significant that the civil actions against Karadzic were at one time a *class action* by a *class of women*. When trying to convey the horror of crimes against women, it is often useful to analogize crimes against racial minorities. If an African-American man is lynched, society knows he was lynched because he was African-American, and it is considered a crime against *all* African-Americans, *as a class*. Why then, do we assume that a rape against a woman is an individual, "private" incident? Rape is a crime against *all* women, *as a class*. The *Kadic* civil action recognizes and tells the world that "private" violence against women is a public act of violence against women as a class, and will not be tolerated by the international community.

V. Conclusion

The *Kadic* action makes the international community face what women have known for some time:

> [W]omen have gained political consciousness about gender oppression by examining their personal lives. They have realized that what happens in the intimacy of their own homes is not exempt from the political forces that affect the rest of society. The contemporary notion that 'the personal is political' identifies and rejects the public/private distinction as a tool by which women are excluded from public participation while the daily tyrannies of men are protected from public scrutiny.[199]

Innumerable women face sexual violence. Long considered a private issue, not to be touched by the law, those women were

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198. *See supra* notes 81-82 and accompanying text.

199. Aida Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, *in* THEORIZING FEMINISM: PARALLEL TRENDS IN THE HUMANITIES AND SOCIAL SCIENCES 136, 144-45 (Anne C. Herrmann & Abigail J. Stewart eds., 1995).

offered no societal support in their quest to end the violence. Indeed, women survivors have even been denied the support of other women by the societal fragmentation of women as a class. The civil actions against Radovan Karadzic are a declaration to the world that violence against women is violence against *women as a class*, and it will not be tolerated.

While *Kadic* is a significant advance in women's human rights, much is left to be done. We must continue to break down the public/private dichotomy, so that all women have an adequate remedy, whether they are survivors of genocidal rape on the street or marital rape in the bedroom. It is a step forward for the sexual violence against women in the former Yugoslavia to receive extensive political and media attention. Citizens of the world are outraged at the atrocities committed against women in the name of war. People take notice when families are thrown into camps; when mothers watch as their children are murdered before their eyes; when fathers are forced to rape daughters or face death; when young girls are prostituted and raped with brooms, bottles, sticks, by soldier after dirty soldier; when every person in a community is suffering such a degree of trauma and loss that it cannot be ignored.

The international attention begs the question: why are people not outraged at the number of women that are raped around the world even during times of "peace"? Every year 500,000 women are raped in the United States.[200] There are more rapes in the United States during times of peace than there were during the duration of the conflict in the former Yugoslavia, and, technically, we are not at war within our own society. People draw an arbitrary line, as the law has, designating how much violence is "acceptable." The effects are the same for every woman who is raped, so what really is the difference? Both are shamed; both are devastated; both lose trust in the people around them. Both face the possibility of pregnancy, of sexually transmitted diseases and infections, of nightmares, and terrifying body- memories. On a personal level, "everyday" rape affects women just as much as genocidal rape does. On a societal level, "everyday" rape affects women just as much as genocidal rape does, but those effects are dispersed and more difficult to recognize. Serbian troops were ordered to rape to destroy communities. Who is ordering American men? The injustice of everyday rape should outrage the media and the public as much as rape during war.

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200. *See* ENSLER, *supra* note 2, at xxii.

Perhaps Karadzic's actions were only recognized because they took place in a pseudo-public realm. *Kadic* provides no new remedy for women who are raped in their homes by their partners or other family members. While *Kadic* did bring attention to the widespread use of sexual violence as a weapon of war into the public forum, it has not yet brought an understanding of rape as a tactic of social control against women. It was unacceptable to put Bosnian women in camps where they are brutally taken from their families, raped, beaten, tortured, and forced to bear their enemies' children. Every reasonable person accepts this fact. Now we must look closely at our own communities. We must ensure that *Kadic* is not seen in a vacuum: we must recognize that "everyday" rape or "non-violent" date-rapes, in which physical violence is purportedly not used but there was a simple "misunderstanding," is indeed violent and warrants the same national and international attention. The *Kadic* decision is a significant step towards the international recognition of rape, on both an individual and societal level, as a crime with broad social effects that demands immediate attention.