IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
- Alexandria Division -

IN RE: XE (BLACKWATER) ALIEN TORT CLAIMS ACT LITIGATION	**Case No. 1:09-cv-615** **Case No. 1:09-cv-616** **Case No. 1:09-cv-617** **Case No. 1:09-cv-618** **Case No. 1:09-cv-645** **(consolidated for pretrial purposes) (TSE/IDD)**

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM AND IRAQI LEGAL OPINIONS REGARDING THE LACK OF AN ALTERNATIVE FORUM IN IRAQ

During the August 28, 2009, hearing, the Court asked the parties for supplemental briefing on whether the Iraqi courts exist as an alternative forum. Plaintiffs hereby submit the Declaration of Dr. Sabah Al Bawiis. Dr. Sabah Al Bawiis serves as the head of the legal and constitutional studies department, which is a governmental unit formed from the Iraqi council of ministers, the Iraqi parliament, and the Iraqi ministry of interior. Dr. Sabah Al Bawiis serves as a member of the team responsible for reviewing and amending Iraqi law governing the foreign security firms operating in Iraq.

Dr. Sabah Al Bawiis explains in his opinion (attached as Exhibit A) that the Iraqi courts are not able to exercise jurisdiction over American contractors. The Iraqi courts interpret the

Coalition Authority Order No. 17 as remaining in force and effect for private foreign security companies operating in Iraq. Dr. Sabah Al Bawiis explains that only the United States has the power to waive the immunity in its role as the "sending party."

Dr. Sabah Al Bawii's department has drafted legislation that is intended to remedy the Iraqi courts lack of jurisdiction over foreign security firms. That draft legislation is attached as Exhibit B. This draft legislation has not yet been submitted to the Iraqi parliament. Thus, at present, as explained by Dr. Sabah Al Bawiis, Iraqi courts remain closed to lawsuits such as the instant one. In sum, Plaintiffs respectfully submit that Iraq does not exist as an alternative forum, which prevents dismissal based on the *forum non conveniens* doctrine.[1]

Plaintiffs also respectfully submit courtesy copies of two authorities relevant to the determination of the Plaintiffs' claims asserted under the Alien Tort Statute: (1) the United States' Statement of Interest in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (attached as Exhibit C), and (2) *Trial of Bruno Tesch and Two Others* ("*Zyklon B*"), *in* 1 *Law Reports of Trials of War Criminals* 93-103 (1947) (attached as Exhibit D). The Statement of Interest is helpful in further illuminating the Court of Appeals' reasoning in *Kadic v. Karadzic*. The *Tesch* case was cited by counsel during the hearing as factually analogous to the present action.

/s/

Susan L. Burke (VA Bar #27769)
William F. Gould (VA Bar #67002)
Counsel for Plaintiffs
BURKE O'NEIL LLC
1000 Potomac Street, Suite 150

[1] Defendants admitted and agreed in their briefing and during the August 28, 2009, hearing that that Iraq does not exist as an alternative forum. See Defendants' Mot. to Dismiss at 32-33; see Transcript at 68-69.

Washington, DC 20007
202.445.1409
Fax 202.232.5514
sburke@burkeoneil.com

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2009, I caused a copy of Plaintiffs' Supplemental Memorandum And Iraqi Legal Opinions Regarding The Lack Of An Alternative Forum In Iraq to be emailed to the following:

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/s/ Susan L. Burke
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Exhibit A

Q / Do the Iraqi courts hear litigations brought up against private foreign security companies operating in Iraq?

Iraqi courts don't examine litigations brought up against private foreign security companies operating in Iraq, as these companies are not subject to the Iraqi judiciary, pursuant to the provisions of the Coalition Authority's Order No. 17, issued on June 27, 2004, in particular its fifth section which points out to the relinquishment of immunity and jurisdiction. Paragraph "1" of said section implies that immunity is not established to the persons it pertains to, which means that it pertains to the multinational forces, the Provisional Coalition Authority, the cadre of the foreign liaison delegation, the international consultants and contracting parties, in the capacity they enjoy in accordance with the decisions of the international Security Council.

As long as the fifth section guarantees the manner for relinquishing the immunity by the contracting parties mentioned in its third paragraph, this is a categorical proof that the basis is that the contractors are immune against the Iraq jurisdiction unless they relinquish this immunity and therefore become subject to the Iraqi judiciary. The third paragraph implies that the relinquishment of immunity by the contractors is done by a request turned over to the sending country to relinquish the immunity in a matter related to a specific disposition for which the relinquishment of the immunity is required, and that the relinquishment be explicit and in writing. As long as the case is under study and the sending country did not request the relinquishment of immunity, the case is beyond the framework of the Iraqi jurisdiction and remains within the jurisdiction of the countries to which the suspects belong.

/signed/
Dr. Sabah Juma'a Al Bawi
Head of the Legal Studies
and Constitutional Drafting Department

س/ هل تنظر المحاكم العراقية في الدعاوي المرفوعة ضد الشركات الأمنية الأجنبية الخاصة العاملة في العراق؟

إن المحاكم العراقية لا تنظر في الدعاوي المرفوعة ضد الشركات الأمنية الأجنبية الخاصة العاملة في العراق كون تلك الشركات لا تخضع للقضاء العراقي استناداً إلى أحكام أمر سلطة الائتلاف رقم ١٧ الصادر في ٢٧ حزيران ٢٠٠٤، لاسيما القسم الخامس منه،والذي يُشير إلى التنازل عن الحصانة والاختصاص القضائي، وتشير الفقرة "١" من القسم المذكور إن الحصانة أمر غير مقرر للأفراد الذين تتعلق بهم أي إنها تتعلق بالقوات المتعددة الجنسيات وسلطة الائتلاف المؤقتة وملاك بعثة الارتباط الأجنبية والمستشارين الدوليين والمتعاقدين بصفتهم التي يتمتعون بها و فقاً لقرارات مجلس الأمن الدولي.

وطالما إن القسم الخامس تضمن كيفية التنازل عن الحصانة من المتعاقدين في الفقرة الثالثة منه فان هذا دليل قطعي على إن الأصل هو أن يكون المتعاقدون محصنين من الاختصاص القضائي العراقي والاستثناء أن يتنازلوا عن تلك الحصانة ويخضعون بالتالي للقضاء العراقي، وتشير الفقرة الثالثة إلى أن التنازل عن الحصانة عن المتعاقدين يكون بطلب يُحال إلى الدولة المُرسلة للتنازل عن الحصانة في أمر يتعلق بتصرف معين يُراد التخلي عن الحصانة منه وان يكون التنازل واضحاً وتحريرياً وطالما إن القضية محل الدراسة لم يجري الطلب فيها من الدولة المُرسلة أن تتنازل عن الحصانة فان القضية تخرج من نطاق الاختصاص القضائي العراقي وتبقى داخلة في الاختصاص القضائي لدول المتهمين.

د.صباح جمعة الباوي

رئيس قسم الدراسات القانونية والصياغة الدستورية

Exhibit B

IN THE NAME OF ALLAH, MOST GRACIOUS, MOST MERCIFUL

/Official emblem/

214

/Arabic, Kurdish and English read:/
REPUBLIC OF IRAQ
General Secretariat for the Council of Ministers

/Illegible official oval seal/
346
2/21/2008

DRAFT LAW TO SUBJECT

THE NON-IRAQI SECURITY COMPANIES

TO THE PROVISIONS

OF THE IRAQI LAW

/Handwriting reads:/
To the office
To distribute it to
Messrs. members of the Security Committee,
so they would record fast their remarks
/signed/
2/24

IN THE NAME OF GOD, THE ALMIGHTY

/Arabic and English read:/
Republic of Iraq
Ministers Council
Ministry of State for Council
of Representatives Affairs
Office of the Minister

/Rectangular seal reads:/
Iraqi Parliament
No.: MR/166
Date: 2/14/2008
Speaker Office's Incoming

No.: 4K/160/518
Date: 2/11/2008

To His Excellency the Speaker of the Parliament,

Re.: Draft of a (Law to Apply the Iraqi Law to the Private Security Companies) and the (Law of Private Security Companies)

/Oval seal reads:/
Republic of Iraq
Ministers Council
Ministry of State for Council of
Representatives Affairs
Outgoing

Excellency,

In reference to the letter of the General Secretariat for the Council of Ministers No. Sh.Z. 10/1/31/2703, dated 2/6/2008, we turn over to your honorable council, a copy of two draft laws (Law to Apply the Iraqi Law to the Private Security Companies) and the (Law of Private Security Companies), proposed by the Council of Ministers during its regular seventh meeting held on 2/5/2008.

Kindly submit the two draft laws to the Parliament to enact them in accordance with the stipulation of Article (61/First) of the Constitution, and notify us of the date of their submission to enable the government to express its opinion.

Please accept our consideration,

Attachments:
All fundamentals

/signed/
Dr. Safa' Eldine Mohamed Al-Safi
Minister of State for Council of Representatives Affairs

/Handwriting reads:/
1) To the Security and Defense Committee
2) /ill./

Copy to:

- To His Excellency the First Deputy of the Speaker of the Parliament… Kindly be informed and accept our consideration.
- To His Excellency the Second Deputy of the Speaker of the Parliament… Kindly be informed and accept our consideration.
- To the General Secretariat for the Council of Ministers… In reference to your above letter, kindly be informed and accept our consideration.
- To the Directorate for the Follow-up of Committees Affairs… For follow-up.

/Oval seal reads:/
Council of Ministers
Dr. Safa' Eldine Mohamed Al-Safi
Minister of State for Council of Representatives Affairs

Ali 2/10/08

/Handwriting reads:/
346.02

IN THE NAME OF ALLAH, MOST GRACIOUS, MOST MERCIFUL

/Official emblem/

/Arabic, Kurdish and English read:/
REPUBLIC OF IRAQ
General Secretariat for the Council of Ministers

No. Sh.Z. 10/1/31/2703
Date: 2/6/2008

/Rectangular seal reads:/
Republic of Iraq
Ministers Council
Ministry of State for Council of
Representatives Affairs
Incoming
No.: 4K/160/582
Date: 2/7/2008

Office of the Minister of State for Council of Representatives Affairs
Re.: Draft of a (Law to Apply the Iraqi Law to the Private Security Companies) and the (Law of Private Security Companies)

In reference to our letter No. Sh. Z./10/1/11/18230, dated 11/5/2007 (herewith attached), we turn over to you, the two draft laws (Law to Apply the Iraqi Law to the Private Security Companies) and the (Law of Private Security Companies), examined by the State Council in accordance with its letter No. 54, dated 1/15/2008, which the Council of Ministers proposed their enactment during its seventh regular meeting, held on 2/5/2008, pursuant to the provisions of Articles (60/First paragraph) and (80/Second paragraph) of the Constitution.

Kindly submit the said two draft laws to the honorable Iraqi Parliament to do what it deems necessary in accordance with the provisions of Article (61/First paragraph) of the Constitution and notify us of the measures you will take… Please accept our consideration.

- **Attachments:** -
  - Voting Form
  - Attendance Sheet
  - All fundamentals

/signed/
Ali Mohsen Ismail
Acting General Secretary of the Council of Ministers

In the Name of the People
Presidency Council

Pursuant to what the Parliament acknowledged and what the Presidency Council approved and in accordance with the provisions of the (First) Item of Article (61) and the (Third) Item of Article (73) of the Constitution, the following law was issued:

No. ( ) for the year 2008
Law
to Apply the Iraqi Law to the Private Security Companies

Article – 1 – First – A – The Iraqi law applies to the private security companies, their employees and contractors, operating in Iraq.

B– The private security company means the Iraqi company or branch of the foreign company carrying out a work consisting of providing security protection services to whoever requests them from the natural and juristic persons.

Second – The memo of the (dissolved) Temporary Coalition Authority No. (17) for the year 2004 (requirements to register private security companies) applies to the private security companies operating in the Republic of Iraq.

Third – The regulation No. (5) for the year 1989, of the branches, and offices of foreign companies and economic institutions, applies to the foreign security branches operating in Iraq in a way that does not contradict the provisions of this law.

Article – 2 – First – A – The order of the (dissolved) Temporary Coalition Authority No. (17) for the year 2003 (Status of the Coalition and the foreign liaison delegations, their employees and contractors working with them) does not apply to the private security companies, their employees and contracting parties.

B– Section (2) (Relations with the judicial authorities) of Memo No.(3) for the year 2003 (Penal measures) of the (dissolved) Temporary Coalition Authority does not apply to the private security companies, their employees and contracting parties.

جمهورية العراق
الأمانة العامة لمجلس الوزراء

بسم الله الرحمن الرحيم

كۆماری عیراق
ئەمینداریە تی گشتی ئە نجومە نی وە زیران
REPUBLIC OF IRAQ
General Secretariat for the Council of Ministers

مشروع قانون
إخضاع الشركات الأمنية غير العراقية والمتعاقدين معها لأحكام القانون العراقي

بسمه تعالى

جمهورية العراق
مجلس الوزراء
وزارة الدولة لشؤون مجلس النواب
مكتب الوزير

Republic of Iraq
Ministers Council
Ministry of State for council of representatives Affairs

مجلس النواب العراقي
العدد م د/ ١٦٦
التاريخ ١٢/٢/٢٠٠٨
وارد مكتب الرئيس

العدد : ٥١٨/١٦٠/٦٤
التاريخ : ٢٠٠٨/٢/١٩

إلى/ السيد رئيس مجلس النواب المحترم

م/ مشروعا (قانون سريان القانون العراقي على الشركات الأمنية الخاصة) و (قانون الشركات الأمنية الخاصة)

تحية طيبة

إشارة الى كتاب الأمانة العامة لمجلس الوزراء ذي العدد ش.ز /١٠/١/٣١/٢٧٠٣ في ٢٠٠٨/٢/٦ نحيل الى مجلسكم الموقر نسخة من مشروعي (قانون سريان القانون العراقي على الشركات الأمنية الخاصة) و (قانون الشركات الأمنية الخاصة) ،والذي اقترحه مجلس الوزراء بجلسته الاعتيادية السابعة والمنعقدة في ٢٠٠٨/٢/٥ .

برجاء عرض مشروعي القانون على مجلس النواب لتشريعهما وفقاً لنص المادة (٦١/أولاً) من الدستور وإعلامنا موعد عرضه ليتسنى للحكومة إبداء وجهة نظرها

مع التقدير

المرفقات:
- الأوليات كافة.

د.صفاء الدين محمد الصافي
وزير الدولة لشؤون مجلس النواب

مجلس الوزراء
الدكتور
صفاء الدين محمد الصافي
وزير الدولة لشؤون مجلس النواب

نسخة منه إلى:
- السيد النائب الأول لرئيس مجلس النواب المحترم ... للتفضل بالاطلاع مع التقدير.
- السيد النائب الثاني لرئيس مجلس النواب المحترم ... للتفضل بالاطلاع مع التقدير.
- الأمانة العامة لمجلس الوزراء ... إشارة إلى كتابكم أعلاه للعلم مع التقدير.
- مديرية متابعة شؤون اللجان ... للمتابعة

على ١٠/ ٢/٠٨

بسم الله الرحمن الرحيم

جمهورية العراق
الأمانة العامة لمجلس الوزراء

كۆماری عیراق
ئەمینداریە تی گشتی ئەنجومەنی وەزیران
REPUBLIC OF IRAQ
General Secretariat for the Council of Ministers

جمهورية العراق
مجلس الوزراء
وزارة الدولة لشؤون مجلس النواب
العدد ع د/ ١٦٠) ٥٨٢ الوارد
التاريخ ٧ / ٢ / ٢٠٠٨

العدد : ش.ز/١٠/١/٣١/ ٢٧٠٢
التاريخ : /٢/٢٠٠٨

مكتب السيد وزير الدولة لشؤون مجلس النواب

م / مشروعا (قانون سريان القانون العراقي على الشركات الأمنية الخاصة) و (قانون الشركات الأمنية الخاصة)

إلحاقاً بكتابنا ذي العدد ش.ز/١٠/١/١١/١٨٢٣٠ والمؤرخ في ٢٠٠٧/١١/٥ (المرفق طياً) .

نُحيل إليكم مشروعي (قانون سريان القانون العراقي على الشركات الأمنية الخاصة ، وقانون الشركات الأمنية الخاصة) والمُدققين من قبل مجلس شورى الدولة بموجب كتابه ذي العدد ٥٤ والمؤرخ في ٢٠٠٨/١/١٥ واللذين إقترح مجلس الوزراء تشريعهما بجلسته الإعتيادية السابعة المُنعقدة بتأريخ ٢٠٠٨/٢/٥ إستناداً إلى أحكام المادتين (٦٠ / الفقرة أولاً) و (٨٠ / الفقرة ثانياً) من الدستور.

نرجو عرض مشروعي القانونين المذكورين على مجلس النُّواب العراقي المُوقّر لإتخاذ ما يراه مُناسباً وفقاً لأحكام المادة (٦١ / الفقرة أولاً) من الدستور وإعلامنا إجراءآتكم ... مع التقدير .

- المرفقات : -
- إستمارة التصويت .
- إستمارة الحضور .
- الأوليات كافة .

علي محسن إسماعيل
الأمين العام لمجلس الوزراء وكالة
٢٠٠٨/٢/٦

بأسم الشعب

مجلس الرئاسة

بناء" على ما اقره مجلس النواب وصادق علية مجلس الرئاسة واستنادا" الى احكام البند (اولا") من المادة (٦١) والبند (ثالثا") من المادة (٧٣) من الدستور .

صدر القانون الاتي :

رقم ( ) لسنة ٢٠٠٨

قانون

سريان القانون العراقي على الشركات الامنية الخاصة

المادة ــ ١ ــ اولا ــ أ ــ يسري القانون العراقي على الشركات الامنيــة الخاصة والعاملين فيها والمتعاقدين معها ، التي تعمل في جمهورية العراق .

ب ــ يقصد بالشركة الامنية الخاصة هي الشركة العراقية او فرع الشركة الاجنبية التي تقوم بعمل يتمثل بتقديم خدمات الحماية الامنية لمن يطلبها من الاشخاص الطبيعية والمعنوية .

ثانيا ــ تسري مذكرة سلطة الائتلاف المؤقتة (المنحلة) رقــم (١٧) لسنة ٢٠٠٤ (متطلبات التسجيل للشركات الامنية الخاصــة) على الشركات الامنيــة الخاصة التي تعمل في جمهورية العراق .

ثالــثا ــ يســري نظــام فروع ومكاتب الشركات والمؤسسات الاقتصادية الاجنبية رقم (٥) لسنة ١٩٨٩ على فروع الشركات الامنية الاجنبية العاملة في العراق بما لايتعارض مع احكام هذا القانون .

المادة ــ ٢ ــ اولا ــ أ ــ لايسري امر سلطة الائتلاف المؤقتة (المنحلة) رقــم (١٧) لسنــة ٢٠٠٣ (وضــع الائتلاف وبعثات الارتباط الاجنبية وموظفــيها والمقاولين العاملين معهما) على الشركات الامنية الخاصة والعاملين فيها والمتعاقدين معها .

ب ــ لايســري القسم (٢) (علاقة السلطات القضائية) من مذكرة ســلطة الائــتلاف المؤقتة (المنحلة) رقــم (٣) لسنة ٢٠٠٣ (الاجراءات الجزائية) على الشركات الامنية الخاصة والعاملين فيها والمتعاقدين معها .

Exhibit C

CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST–8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

3. THE CASE FOR THE PROSECUTION

The prosecuting Counsel, in his opening address, stated that Dr. Bruno Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories. In the first place, it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps. Secondly, it provided, where required, expert technicians to carry out these gassing operations. Lastly, Dr. Tesch and Dr. Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The predominant importance of these gassing operations in war-time lay in their value in the extermination of lice.

The chief gas involved was Zyklon B, a highly dangerous poison gas, 99 per cent. of which was prussic acid. The gas was manufactured by another firm. Tesch and Stabenow had the exclusive agency for the supply of the gas east of the River Elbe, but the Zyklon B itself went directly from the manufacturers to the customer.

The contention for the Prosecution was that from 1941 to 1945 Zyklon B was being supplied as a direct result of orders accepted by the accused's firm, Tesch and Stabenow. On that basis, the Zyklon B was going in vast quantities to the largest concentration camps in Germany east of the Elbe. In these same camps the S.S. Totenkopfverbände were, from 1942 to 1945, systematically exterminating human beings to an estimated total of six million, of whom four and a half million were exterminated by the use of Zyklon B in one camp alone, known as Auschwitz/Birkenau. In these concentration camps were a vast number of people from the occupied territories of Europe, including Czechs, Russians, Poles, French, Dutch and Belgians, and people from neutral countries and from the United States. The Prosecutor also claimed that over a period of time the three accused got to know of this wholesale extermination of human beings in the eastern concentration camps by the S.S. using Zyklon B gas, and that, having acquired this knowledge, they continued to arrange supplies of the gas to these customers in the S.S. in ever-increasing quantities, until in the early months of 1944 the consignment per month to Auschwitz concentration camp was nearly two tons.

The accused Weinbacher was a "Procurist"; when Tesch was absent he was fully empowered and authorised to do all acts on behalf of his principal which his principal could have done. His position was of great importance, since his principal would travel on the business of the firm for as many as 200 days in the year.

The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out. The action of the accused was in violation of Article 46 of the Hague Regulations of 1907, to which the German government and Great Britain were both parties.

4. THE EVIDENCE FOR THE PROSECUTION

Emil Sehm, a former bookkeeper and accountant employed by Tesch and Stabenow, supplied information, regarding the legitimate business activities of the firm and the positions of the three accused therein, which substantially bore out the opening statements of the Prosecutor on these points. He went on to state that in the Autumn of 1942 he saw in the files of the firm's registry one of the reports, dictated by Tesch, which gave accounts of his business journeys. In this travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.

Sehm had written down a note of these facts and taken it away with him, but had burnt it the next day on the advice of an old friend, named Wilhelm Pook, to whom he had related what he had seen.

Dr. Marx, a German Barrister practising since 1934, who was called upon to define the status of a Procurist in German law, said :

> " The procurist had the right to act in the name and on behalf of the firm. He is a man who, out of all the others mentioned in the law who have also the right to act on behalf of the firm, has most of these rights. He has the right to act on behalf of the firm and to conclude any transactions or any sort of act on behalf of the firm, and to conclude any transactions or any sort of legal proceedings in which the firm might find itself involved. One can say that anybody who has any sort of transactions with a man who holds the ' Procura ' and who is called the Procurist is in exactly the same position as if he had had that transaction with the head of the firm."

Erna Biagini, a former stenographer of the firm, who was also in charge of the registry, claimed to have read, in " approximately 1942," a travel report of Dr. Tesch which stated that Zyklon B could be used for killing human beings as well as vermin.

Anna Uenzelmann, a former stenographer of the firm, said that in about June 1942 Tesch, after he had dictated a travel report on returning from Berlin, had told her that Zyklon B was being used for gassing human beings, and had appeared to be as terrified and shocked about the matter as she was.

Karl Ruehmling, who had been a bookkeeper and assistant gassing master with the firm, said that Zyklon B was sent by the concern to the concentration camps at Auschwitz, Sachsenhausen and Neuengamme, but Auschwitz was sent the largest consignments.

Alfred Zaun, who was in charge of the firm's bookkeeping, said that, in his opinion, Auschwitz of all the concentration camps had received the most Zyklon B during the war.

Wilhelm Bahr, an ex-medical orderly at Neuengamme, described a prussic acid course which he had attended in the S.S. Hospital at Oranienburg in

1942, and which Dr. Tesch had conducted. He said that he himself had gassed two hundred Russian prisoners of war in Neuengamme in 1942, using prussic acid gas, but that it was not Dr. Tesch who had taught him the procedure which he had applied.

Perry Broad, who had been a Rottenführer in the Kommandatur of the Auschwitz camp from June 1942 until early 1945, described how persons were gassed there with Zyklon B. The people being gassed, to his knowledge, at Auschwitz and Birkenau were German deportees, Jews from Belgium, Holland, France, North Italy, Czechoslovakia and Poland, and Gypsies.

Dr. Bendel, who had been a prisoner at Auschwitz and had acted as a doctor to the inmates, said that from February 1944 to January 1945 a million people had been killed there by Zyklon B.

The remaining Prosecution witnesses were a member of a British war crimes investigation team, who identified pre-trial statements made by the accused ; Wilhelm Pook and his wife ; and five more employees of Tesch and Stabenow. The evidence of Pook and his wife supported that of Sehm to a degree, though not in every detail, but the fact that they had discussed the events of 1942 between his and their giving evidence was recognised by the Judge Advocate to be " undoubtedly unfortunate."

The Prosecution, acting in accordance with Regulation 8(i) (*a*) of the Royal Warrant, submitted to the Court a sworn affidavit in which Dr. Diels, a former high-ranking German government official, stated that it was common knowledge in 1943 in Germany that gas was being used for killing people.

Among various other documents(1) Dr. Tesch's S.S. subscription card was produced before the Court ; the Defence pointed out, however, that this did not prove that Dr. Tesch had been an active member of the S.S.

5. THE OPENING STATEMENTS OF DEFENCE COUNSEL

(i) *Counsel for Tesch*

Before calling Tesch to the witness-box, his Counsel stated that he intended to prove to the court, first, that Tesch had no knowledge of the killing of human beings by means of Zyklon B ; secondly, that Zyklon B was delivered only for normal purposes of disinfection and for medical reasons ; thirdly, that parts of gas chambers were sold only for the purpose of exterminating vermin ; fourthly, that concentration camps got the gas only in amounts which were quite normal in relation to the number of inhabitants, and only for killing vermin ; and fifthly, that instruction courses were held only according to the relevant laws and regulations, and again only for the purpose of teaching the method of exterminating vermin.

(ii) *Counsel for Weinbacher*

Dr. Stumme, defending Weinbacher, said that by the evidence which he would call, he would try to prove that Weinbacher had no knowledge of any note or report by Dr. Tesch to the effect that human beings were being killed by poison gas, and that until the capitulation of Germany he never

(1) Of the various documents admitted as evidence in the trial (including five affidavits, and the pre-trial statements by all of the accused) the Secretariat of the United Nations War Crimes Commission has only been able to examine an extract from the affidavit of Dr. Diels.

had any reason to believe that Zyklon B was being used for any other purpose than the destruction of vermin.

(iii) *Counsel for Drosihn*

Counsel for Drosihn set out to prove, by the evidence which he called, first, that Dr. Drosihn had nothing to do with the business concerning the supply of gas ; secondly, that, being on journeys for considerable periods, he had only a very scanty knowledge of the activities of the business ; thirdly, that he heard about the gassing of human beings only after the capitulation of Germany ; and fourthly, that he never carried out instruction either in concentration camps or for S.S. personnel.

6. THE EVIDENCE FOR THE DEFENCE

(i) *Dr. Tesch*

All three accused gave evidence on oath. Dr. Tesch stated that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference, or having been approached by any official or military authority on the subject, or having written in any document that human beings should be killed by prussic acid. He specifically denied that he had made the remarks referred to by Anna Uenzelmann. He had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run.

He did not think that deliveries to Auschwitz were very high because it was a large camp and, further, it " administered more camps in the General Government of Poland." He could not remember Dr. Drosihn ever having instructed S.S. men. Although the witness had paid subscriptions to both the S.S. and the Nazi Party, he had never been an active member of either. He thought that the passage in the travel report which Erna Biagini had read might have been a record of an answer put to him by a pupil.

Drosihn, stated Tesch, was a technical expert and was not concerned with the administration of the firm or the office. Weinbacher, however, had complete control when Tesch was away from the office.

(ii) *Karl Weinbacher*

This accused, giving evidence on oath, said that his work was, briefly, to look after the current business affairs in the absence of Dr. Tesch, seeing to the incoming and the outgoing mail, answering any queries, and confirming any orders received. He read some of Dr. Tesch's travel reports but not all, because there were too many ; in particular, he had not read any dealing with the possibility of destroying Jews with Zyklon B. Dr. Tesch had not mentioned any such possibility to him, nor had the witness heard during the war that Jews were being gassed. He had never been inside a concentration camp, nor had he received unfavourable reports during the war about such camps. He, too, stated that Drosihn had nothing to do with the business management. He could not agree that the S.S. would necessarily come to Dr. Tesch for advice on the extermination of human beings with Zyklon B, since, although Dr. Tesch was an expert on the use of the gas, there were plenty of books available on prussic acid.

(iii) *Dr. Drosihn*

Drosihn claimed that his part in the activities of the firm consisted in collaborating on scientific issues, being in charge of the gassing, for instance, of ships in Hamburg docks, and examining delousing chambers to see whether they were working correctly. He spent about 150 to 200 days a year in travelling on business. He had been to check the working of the delousing chambers in Sachsenhausen and Ravensbruck and had been to Neuengamme ; but had neither been to Auschwitz, nor given instructions to the S.S. in any place. He knew nothing of the size of consignments of gas to Auschwitz. Contrary to Tesch's evidence, the witness claimed to have reported to him once that he had seen happening in the camps things that were contrary to human dignity.

(iv) *The Remaining Defence Witnesses*

Nine other witnesses called by the Defence did not add very substantially to the evidence before the Court. The subjects covered by their remarks included the character of Dr. Tesch, and the extent of general knowledge in Germany concerning the killing of Jews. *Inter alia*, they were called to prove that Zyklon B was widely used for the legitimate purpose of killing vermin. These witnesses were two Medical Officers from Hamburg, a doctor and two chemists employed by the German Hygiene Institute, a retired professor of the same institute, the Manager of the Disinfection Institute of Hamburg, a stenotypist formally employed by Tesch and Stabenow, and Dr. Stumme, one of the Defence Counsel, who gave evidence regarding the German law regarding State secrets.

7. THE CLOSING ADDRESSES OF THE DEFENCE COUNSEL

(i) *Counsel for Tesch*

In his closing address, Dr. Zippel, dealing with the point of law involved, submitted that, since the charge was not one of destroying human life but only of supplying the means of doing so, such action would only be contrary to the laws and usages of war if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was no war crime.(2)

Turning to the facts, Counsel claimed that while supplies of Zyklon B to the S.S. were large, it was the duty of the S.S. to see that the state of health in the eastern provinces was kept at a high level, and it was concerned not only with the Wehrmacht itself, but also with the state of health of those parts of the eastern provinces whose population was repatriated to Germany before the entry of Germany into war with Russia. Supplies were not too great to have been used wholly for legitimate purposes. Since 1944 the S.S. had had unlimited permission to use the gas for the destruction of vermin and the prevention of epidemics. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose.

(2) The English translation of Dr. Zippel's speech subsequently contains the following passage : " I have two duties to perform. The first would be to try to prove that Tesch supplied this gas not knowing for what purposes it might be used. My second duty is that, even if he knew something about it, still the laws of this procedure would not suffice to find him guilty."

Counsel then questioned whether the Zyklon B used at Auschwitz for killing human beings had been supplied by Tesch and Stabenow. The fact that Auschwitz was situated in the district for which the firm were the agents could not be decisive, for other firms were able to supply that district, especially since during the war the boundaries of the districts were not so much respected as before. Further, the S.S. had been active all over the occupied territories during the war and had had various means of securing the gas. So many people were killed by gassing in Auschwitz that the S.S. must necessarily have used sources other than Tesch and Stabenow.

Counsel observed that the witnesses who were called to prove that Dr. Tesch knew about the unlawful use of his gas had given different versions as to how he must or should have known about such use. He proceeded also to throw doubts on the reliability of Sehm, for instance, in view of a statement of his, denied by many other witnesses, that the files of the firm in which he had found the travel report were kept under lock and key. Miss Biagini had denied that she saw anything in this report about a conference with the High Command of the Wehrmacht or any propositions made by Dr. Tesch to this authority. None of the typists who could have typed the travel report in question knew of it or of any rumour in the office regarding it. Under the existing war-time regulations of secrecy, it seemed impossible that a man as careful as Tesch should have dictated a report on an interview with the High Command on such a secret matter, placed the report where anyone in the office could read it, as was the case with all travel reports, and then discussed the facts with his employees. Dr. Tesch had been shown to be a fair and honest man, and his concentration on his work explained why he had not heard any rumour which may have circulated Germany concerning the gassing of human beings. Regarding the large supplies of gas to Auschwitz in particular, Counsel submitted that Dr. Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon was not as important to the firm as were its gassing activities. Furthermore, Dr. Tesch had regarded Auschwitz as a transit camp needing therefore unusually frequent delousing. Counsel concluded that Dr. Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme.

(ii) *Counsel for Weinbacher*

In his closing address, Dr. Stumme submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. Not one of the witnesses could say really that Weinbacher had any knowledge of a travel report or any observation of Dr. Tesch that human beings had been killed by Zyklon B, or that Dr. Tesch had conversations with Weinbacher on such a subject. Nor had the trial shown that Weinbacher should have had reasonable suspicion, or grounds for suspicion, that Zyklon B had been used for the killing of human beings. Even if Dr. Tesch had written such a travel report as the one alleged, Weinbacher need not have read it, because he was a busy man, and witnesses had shown that many of the travel reports were filed and read by no one. Even Sehm claimed to have come across the particular report by accident, and Miss Biagini because she had to file it. He repeated Dr. Zippel's argument that Dr. Tesch would not write a State secret in a

document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest,

due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : "Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? "

In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. "But the Prosecution," said the Judge Advocate, "ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.
Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that "among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

The British claim to jurisdiction over the case could be based primarily on the fact that by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany have assumed supreme authority therein. They have, therefore, become the local sovereigns in Germany. There is vested, then, in the United Kingdom authorities, administering the British Zone of Germany, the right to try German nationals for crimes of any kind wherever committed. The claim to jurisdiction is the stronger if, as in the present case, the criminal activities of the accused have been committed in the British Zone of Germany, by German residents of this Zone, although, of course, the crimes to which the accused were alleged to be accessories had their effect outside Germany, in Auschwitz, Poland.

British jurisdiction could further be based on either

(*a*) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed ; or

(*b*) the doctrine that the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Crime Alleged*

Article 46 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, on which the case for the Prosecution was based, provides that " Family honour and rights, individual life and private property, as well as religious convictions and worship must be respected." This Article falls under the section heading, *Military Authority over the Territory of the Hostile State*, and was intended to refer to acts committed by the occupying authorities in occupied territory. In the trial of Tesch, the acts to which the accused were allegedly accessories before the fact were committed mainly at Auschwitz, in occupied Poland.

(ii) *Civilians as war criminals*

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

Exhibit D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 94-9035, 94-9069

JANE DOE I, *et al.* and S. KADIC, *et al.*,
Plaintiffs-Appellants,

v.

RADOVAN KARADZIC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

By letter of June 30, 1995, the Court afforded the Attorney General an opportunity to present the views of the United States regarding these appeals, and we are now doing so.

As explained below, we believe that the Court should first reject the argument by defendant/appellee Radovan Karadzic that he was immune from suit and service of process while he was in the United States. There is also no merit to the suggestion by the district court that the justiciability of these cases is in doubt because of the theoretical possibility that Karadzic might some day be recognized by the Executive Branch as a head of state. And, contrary to Karadzic's argument, dismissal of these cases at this stage under the "political question" doctrine is not warranted.

We also believe that the district court erred in ruling that plaintiffs cannot pursue these cases under the Alien Tort Statute (28 U.S.C. § 1350) because Karadzic is not a "state actor." We take this Court's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) as the law of this Circuit and the starting point for the necessary analysis. That ruling requires a rigorous analysis of a range of factors in order to determine whether an action can be pursued under the Alien Tort Statute for a violation of the law of nations.

We do not believe that the law of this Circuit on the Alien Tort Statute -- looking to modern conceptions of customary international law -- establishes that only state actors can be subject to suit under that statute. In our view, the Court should vacate the judgment of dismissal, and the district court should on remand be required to analyze the various claims made in the complaint to see if they meet the standards enunciated in *Filartiga*.

STATEMENT OF THE UNITED STATES

I. Immunity and Justiciability

A. In his brief on appeal, Karadzic argues that he is immune from this suit and service of process during his trips to the United States. As this Court is aware, in a March 24, 1993 letter to counsel for some of the plaintiffs, Michael J. Habib, the Director of the Office of Eastern European Affairs at the Department of State, explained that "Mr. Karadzic's status during his recent visits to the United States has been solely as an

'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States" (JA 108).[1] This remains the position of the United States.

B. The district court correctly noted that Karadzic is not entitled to head-of-state immunity. The Executive Branch does not acknowledge Karadzic as the head of any state.[2] However, the court went on to comment that plaintiffs could turn out to be seeking merely an advisory opinion if the Executive were later to declare Karadzic a head of state. JA 199-201. The district court concluded that "[t]his consideration, while not dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action." *Id.* at 201.

This speculation by the district judge was inappropriate. In cases such as these, the courts should assess circumstances as they are.

C. Karadzic argues in his brief on appeal that this case should be dismissed under the political question doctrine. Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.

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[1] "JA __" citations refer to pages in the Joint Appendix filed in this Court in No. 94-9069.

[2] The United States has not recognized "the Republic of Srpska" as a state, and does not treat that entity as one that satisfies the criteria for statehood.

II. The Law of Nations

We take as our starting point this Court's ruling in *Filartiga*, which is the law of this Circuit concerning the Alien Tort Statute. There, this Court construed that statute "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." 630 F.2d at 887.

The Court held that an alien may pursue an action under the Alien Tort Statute, even for transitory tort claims between individuals, when a federal court has personal jurisdiction and the claim involves a violation of universally recognized norms of international law, and hence "the law of nations." *Id.* at 880. In addition, the Court instructed that international law is to be interpreted "as it has evolved and exists among the nations of the world today." *Id.* at 881.

In *Filartiga*, the Court examined allegations of torture committed by a high ranking Paraguayan police official. The Court looked to see if condemnation of this conduct commands "the general assent of civilized nations," and determined that "limitations on a state's power to torture persons held in its custody" meet that test. *Id.* at 881.

Because *Filartiga* involved a defendant who was a police official of a State at the time of the alleged tort, this Court did not consider the conduct of non-state actors or issues of international law governing genocide, crimes against humanity, or torture committed as a war crime.

The district court here found that the cases at bar cannot proceed under the Alien Tort Statute because the allegations exceed the scope of *Filartiga* insofar as they involve claims of responsibility for genocide, war crimes, torture, and other acts carried out by a person who is not a state actor. The court concluded that "acts committed by non-state actors do not violate the law of nations." JA 205.

The district court's conclusion is incorrect. Customary international law does not bind exclusively state actors. Depending upon the violation alleged, acts committed by non-state actors may indeed violate international law.

A. Contrary to the district court's conclusion, conduct by non-state actors may in some circumstances violate customary international law.

Plaintiffs have alleged, among other things, that Karadzic engaged in genocide, war crimes, and crimes against humanity in violation of customary international law. They have thus pled claims under international humanitarian law, which governs the conduct of belligerent parties during armed conflicts.[3] As

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[3] By contrast, international human rights law principally governs peacetime situations not covered by international humanitarian law. As a general matter, human rights law is considered to impose obligations exclusively on states and state actors. See *Restatement (Third) of the Foreign Relations Law of the United States*, §701, Rptrs. Note 2 (1987); *id.* at §702, comment b. Thus, in *Filartiga*, the plaintiff, a Paraguayan citizen, charged a Paraguayan police official with violating customary human rights law prohibiting torture. However, when the perpetrators of human rights violations are, as here, in control of territory and exercise authorities of a governmental character, they may be held accountable under international law

(continued...)

explained below, non-state actors may be responsible for violations of international humanitarian law, depending upon the character of the particular claim.

In May 1993, the UN Secretary-General issued a report pursuant to Security Council Resolution 808 (1993), explaining that this resolution provided for establishment of an international tribunal for the purpose of "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (May 3, 1993), at 5.[4]

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[3](...continued)
even though the regime on whose behalf they act is not recognized and does not satisfy the requirements for independent statehood. Whether conduct by quasi-governmental actors is actionable under the Torture Victim Protection Act (28 U.S.C. § 1350 note) is a separate question of statutory construction that we do not address here.

[4] In light of United Nations actions, in 1994, the President issued Executive Order No. 12934 (59 Fed. Reg. 54117) imposing sanctions on the Bosnian Serb forces and authorities. This order blocks all property and interests in property of the Bosnian Serb military and paramilitary forces and authorities. The Department of the Treasury published a list of individuals identified as members of the Bosnian Serb military forces and authorities, and Karadzic appears on this list. See 60 Fed. Reg. 34144 (1995).

The applicable Treasury Department regulations block all property and interests in property of Karadzic if such property is in, or hereafter comes within, the United States or the possession or control of a U.S. person, including overseas branches of U.S. entities. Transactions in blocked property are prohibited unless they are first licensed by the Treasury Department Office of Foreign Assets Control, and any unlicensed judgment or judicial process with respect to such property is
(continued...)

The Secretary-General's report discusses specifically the issue of individual responsibility, and concludes: "An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. The Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations." *Id.* at 14. The Statute of the Tribunal specifically affirms that any person involved in the planning, instigation, or commission of such violations "shall be individually responsible for the crime."[5]

Pursuant to his authority under this Security Council resolution, the Prosecutor before the International Tribunal signed, on July 24, 1995, indictments against Karadzic and other Bosnian Serb leaders for acts of genocide and war crimes, among other violations of international humanitarian law.[6]

The United States has officially asserted to this International Tribunal that "[t]he relevant law and precedents

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[4](...continued)
null and void. See 31 C.F.R. § 585.202(e). No such license has been issued here. This rule does not divest the district court of jurisdiction, but does block enforcement of a judgment. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 (1981); *Itek Corp.* v. *First National Bank of Boston*, 704 F.2d 1, 8-10 (1st Cir. 1983).

[5] See Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 7, ¶ 1.

[6] See *The Prosecutor of the Tribunal* against *Radovan Karadzic, Ratko Mladic* (July 25, 1995), Indictment in The International Criminal Tribunal for the Former Yugoslavia.

for the offenses in question here -- genocide, war crimes and crimes against humanity -- clearly contemplate international * * * action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals."[7]

The International Tribunal recently adopted the position advocated by the United States. In its ruling in *Prosecutor v. Tadic*, No. IT-94-1-T (Aug. 10, 1995) at 18 -- involving a different member of the Bosnian Serb administration -- the International Tribunal refused to dismiss various charges, noting that the crimes it has been called upon to try "are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law * * *." This body further explained (*id.* at 25) that "violations of laws or customs of war are a part of customary international law * * * regardless of whether the conflict is international or national. * * * [V]iolations of these prohibitions can be enforced against individuals."

This statement is not unprecedented. The Nuremberg Trials included indictments for war crimes and crimes against humanity

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[7] See Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, No. IT-94-I-T, at 20.

by a number of German industrialists and financiers for actions taken before and during World War II. These were "trials involving business men for crimes committed as such, irrespective of official connections * * *. In these proceedings the Defence denied that such private individuals, having no official functions, could be found guilty of crimes under international law, while the Prosecution successfully claimed that they could be held so guilty." United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV Digest of Laws and Cases (London 1949), at 59.

In rejecting a position similar to the district court's conclusion here, the Nuremberg U.S. Military Tribunal explained:

> [T]he accused were not officially connected with the Nazi Government, but were private citizens engaged as business men in the heavy industry of Germany. * * *
>
> It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. * * * The application of international law to individuals is no novelty.

Id. at 59-60, *quoting In re Flick and Others*, U.S. Milit. Trib. Nuremberg 1947, 14 Int'l L. Rep. 266. Accord H. Levie, *Terrorism in War -- The Law of War Crimes* (1995) at 433-34 (noting that many of the accused before both the Nuremberg Tribunal and the International Military Tribunal for the Far East were civilians).

It could be argued that these examples are distinguishable from the cases now before this Court because they involved private individuals who were at least acting under regimes established by existing, recognized states -- Germany and Japan.

However, United States history provides a precedent that is relevant here, concerning treatment of a person acting for a non-recognized belligerent regime, the Confederate States of America.

At the conclusion of the American Civil War, the Executive Branch tried and convicted for crimes "in violation of the laws and customs of war" Henry Wirz, the Confederate commandant of the Andersonville prison camp. See *Trial of Henry Wirz*, H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. 3-5 (1867). The U.S. prosecutor in that case asserted that Wirz had violated "The Law of Nations" despite the fact that Wirz had not served any recognized or legitimate state. *Id.* at 762-64.

Thus, the United States Government has previously applied the law of nations to a non-state actor who was serving as an official in a belligerent regime during a civil war.

In addition, Article 4 of the Genocide Convention specifically states that "persons committing genocide * * * shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals." *The Convention on the Preservation and Punishment of the Crime of Genocide*, art. 4, 78 U.N.T.S. 277. And, as the briefs of the parties in these appeals and the *amici* International Human Rights Law Group further show, the various Geneva Conventions of 1949, which set minimally acceptable standards of conduct for armed conflicts, even internal ones, apply to all parties to an armed conflict, whether or not they are states. These conventions are thus reflective of customary international law.

Accordingly, it has been established for many years that non-state actors are responsible for violations of international law under certain circumstances.

B. Given its own wording and history, it is clear that the Alien Tort Statute may encompass violations of customary international law committed by non-state actors.

The language of the Alien Tort Statute gives no indication that it is limited to torts committed only by state officials; the statute grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

At the time the Alien Tort Statute was enacted in 1789 by the First Congress, the "law of nations" was acknowledged to cover principally three types of tortious conduct: piracy, attacks against ambassadors, and interference with safe conduct for foreigners. See 4 W. Blackstone, *Commentaries* *68, 72. That Congress swiftly prohibited these actions in the Act of April 30, 1790, §§ 8-12, 25-28 (1 Stat. 113-15, 117-18). See current 18 U.S.C. §§ 112, 1651-61.

Thus, the Alien Tort Statute was considered to govern, in some circumstances, private individuals who acted without color of any state authority, such as pirates.[8] In *United States* v.

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[8] Pirates have been treated as enemies of mankind because they act "without * * * any pretence of public authority." *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844). See *United States* v. *Smith*, 27 F. Cas. 1134, 1135 (continued...)

Smith, 18 U.S. (5 Wheat.) 153 (1820), the Supreme Court made clear that piracy -- which by definition is engaged in by non-state actors -- violates the law of nations, and that individuals will be held accountable for it. And, in *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795), the court relied upon the Alien Tort Statute as a ground for jurisdiction in an action involving a plea for restitution following the seizure and sale of slaves who had been taken aboard a Spanish prize vessel by a French national. The Alien Tort Statute was viewed as applicable, even though private citizens were apparently involved in the seizure and sale. See also *Respublica* v. *DeLongchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. Oyer & Terminer 1784) (individual held liable for violating the "law of nations" through assault on foreign consul).

The contemporary understanding that the Alien Tort Statute was not limited to conduct by state actors is confirmed by an opinion of Attorney General Bradford in 1795. The opinion addressed a situation in which American citizens trading off Sierra Leone were alleged to have joined a French fleet in attacking and plundering British property on that coast. The British Governor of the colony complained because the United States was neutral in the ongoing Franco-British war.

After discussing the availability of criminal prosecution, the Attorney General stated that "there can be no doubt that the

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[8](...continued)
(C.C.E.D.Pa. 1861) (defining piracy as "depredation on or near the sea without authority from any prince or state").

company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States." *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Attorney General Bradford plainly understood the Alien Tort statute to cover the individual Americans involved, regardless of their private capacity. See also *Abduction and Restitution of Slaves*, 1 Op. Att'y Gen. 29, 30 (1792) (apparent reference by Attorney General Randolph to a possible civil action under the Alien Tort Statute where the defendant had committed piracy by stealing slaves from a French colony).

Thus, when Congress passed the Alien Tort Statute in 1789, it understood that the term "law of nations" covered non-state conduct in some circumstances.

C. In determining that non-state actors cannot be found to violate international law, the district court relied upon the D.C. Circuit's opinion in *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985), where that court upheld dismissal of claims against U.S. Government officials and others made under the Alien Tort Statute. The plaintiffs there contended that these officials were responsible for violations of international law committed by the "Contras" fighting to overthrow the government of Nicaragua. The D.C. Circuit stated cursorily that the law of nations does not reach "private, non-state conduct of

this sort," relying solely upon the concurring opinion of Judge Edwards in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 790-96 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

In *Tel-Oren*, Judge Edwards engaged in a lengthy analysis of the development of the Alien Tort Statute, and stated his unwillingness to find, absent direction from the Supreme Court, that terrorist actions by PLO operatives in Israel had violated the law of nations within the meaning of that statute. 726 F.2d at 795.

Whether or not the D.C. Circuit ruling in *Sanchez-Espinoza* and Judge Edwards' opinion in *Tel-Oren* were correct under the specific facts and violations alleged in those cases, the allegations of genocide, war crimes, and crimes against humanity pled here are of a substantially different nature. For the reasons detailed above, the law of nations can indeed be violated by non-state acts of genocide, war crimes, and crimes against humanity.

In sum, the district court erred in dismissing all of plaintiffs' claims on the ground that Karadzic is not a state actor and therefore is not subject to the law of nations governing such conduct. The judgment of dismissal should be reversed and the case remanded for further proceedings, including determining whether the claims based on violations of customary international law governing genocide, war crimes, and crimes against humanity alleged by plaintiffs are otherwise properly cognizable in a suit brought under the Alien Tort Statute.

On remand, the district court must look to the various factors discussed in *Filartiga* that, in the view of this Court, made torture by a Paraguayan police official actionable under the Alien Tort Statute. As a threshold matter, the *Filartiga* Court made clear that the principle of international law alleged to be violated must be "universally proclaimed." 830 F.2d at 890. The Court viewed this as a rigorous test: "the requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Id.* at 881.

In addition, the district court should consider whether domestic law proscribes the treatment alleged, and whether the international law in question regulates the treatment of individuals with the aim of their protection. Suits could not be based on other norms with other objects in view, such as the rules governing use of force by States, or law of the sea, or ocean dumping. See generally *Filartiga*, 830 F.2d at 884-89.

D. In addition to alleging the violations of customary international law noted above, the plaintiffs have also raised in their complaints allegations of violations of several international conventions. In our view, these claims are not actionable on their own under the Alien Tort Statute because these conventions are not self-executing.

Under the Alien Tort Statute, an alien may bring suit for torts "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In addition to pleading causes of action for violations of the law of nations, the

plaintiffs have claimed (JA 8) that Karadzic's conduct is independently actionable because it violated certain international conventions to which the United States is a party. These conventions do not, however, provide subject matter jurisdiction under the Alien Tort Statute because they are not self-executing.

The plaintiffs primarily rely upon (see *Kadic* Br. at 21-24) the following treaties of the United States[9]:

> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987 (Torture Convention).
>
> Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948 (Genocide Convention).
>
> The four Geneva Conventions of 1949, and in particular the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Geneva Conventions).

None of these conventions is self-executing. In the case of the Torture Convention and the Genocide Convention, both the President and Congress stated expressly that these treaties are not self-executing.[10] *Report of Senate Committee on Foreign*

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[9] The conduct alleged here does not, strictly speaking, violate these treaties since they establish only obligations with respect to States. Neither do these treaties impose any obligations on the United States that are in any way relevant to this litigation. It should also be noted, however, that, while these treaties might not constitute independent grounds for suit under the Alien Tort Statute, they are probative of the content of the law of nations.

[10] Courts should defer to the views of the Executive Branch and the Senate on whether or not a treaty is self-executing. See *Cameron Septic Tank Co.* v. *City of Knoxville*, 227 U.S. 39, 50 (continued...)

Relations on the Genocide Convention, S. Exec. Rep. 99-2, 99th Cong., 2d Sess. (1985) ("The Committee's declaration reinforces the fact that the Convention is not self-executing. In other words, no part of the Convention becomes law by itself. The Convention is effective only through legislation implementing its various provisions"); S. Exec. Rep. 101-30, 101st Cong., 2d Sess. (1990) ("The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing").

Several courts have likewise held that the Geneva Conventions, including the Geneva Convention Relative to the Protection of Civilian Persons in Time of War cited by plaintiffs, are not self-executing. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d at 809 (Bork, J., concurring) (the Geneva Conventions "expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing"); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (stating the same principle); *Handel* v. *Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). But see *United States* v. *Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (Geneva Convention on Prisoners of War is likely self executing).

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[10](...continued)
(1913) (deferring to congressional view that industrial property treaty was not self-executing); *United States* v. *Postal*, 589 F.2d 862, 881-82 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

Non self-executing treaties do not constitute a rule of law for the courts. See, *e.g.*, *Foster* v. *Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Cook* v. *United States*, 288 U.S. 102, 119 (1933); *United States* v. *Aguilar*, 871 F.2d 1436 (9th Cir. 1989) ("As the Protocol is not a self-executing treaty having the force of law, it is only helpful as a guide to Congress's statutory intent in enacting the 1980 Refugee Act"). The conventions noted above cannot, therefore, constitute independent grounds for proceeding under the Alien Tort Statute provision concerning treaties of the United States.

III. Forum Non Conveniens

This Court noted in *Filartiga*, 630 F.2d at 890, that a critical question in cases brought under the Alien Tort Statute is that of *forum non conveniens*. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Blanco* v. *Banco Indus. de Venezuela*, 997 F.2d 974, 981-84 (2d Cir. 1987) (describing nature of doctrine and its considerations). We take no position on whether dismissal on this basis would be appropriate in these cases. We do wish to stress, however, the general importance of considering the *forum non conveniens* doctrine in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here. Accordingly, on remand the district court should examine whether this doctrine might apply here.

CONCLUSION

The United States believes that the judgment of dismissal by the district court should be vacated, and this matter remanded for further appropriate proceedings in the district court.

Respectfully submitted,

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September 13, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1995, I served the foregoing Statement of Interest of the United States by causing two copies to be sent by first class mail, postage prepaid, to the following counsel:

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