Terrorism as a Violation of the Law of Nations After Kadic v. Karadzic

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The Alien Tort Claims Act (ATCA) gives aliens a jurisdictional basis for bringing tort claims in federal courts. The ATCA provides aliens with an independent right to bring a civil action in federal courts when a tort has been committed but there is no traditional nexus between the actors, the tort and the forum state. This statute was rarely utilized to bring a tort claim in federal courts, however, the ATCA has taken on new significance as a mechanism for redressing international human rights violations.

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1 Judiciary Act of 1789, ch. 20 § 9, 1 Stat. 73, 77, (codified at 28 U.S.C. § 1350 (1996)).

2 Id. The statute states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id.

3 See id. (providing exclusive jurisdiction required for federal courts to hear claims); see also Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 786 (1988) (explaining that state’s power to exert authority over legal matters which take place beyond its borders depends on international law’s jurisdictional principles). See generally U.S. Const. art. VI, cl. 2. (implicitly providing for jurisdiction over limited scope of international offenses); Jeffrey M. Blum & Ralph G. Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. Int’l L.J. 785, 786 (1981) (noting that jurisdiction is obtainable if particular acts are contrary to interests of international community); William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”, 19 Hastings Int’l L. & Comp. L. Rev. 221, 234 (1996) (stating that at time Constitution was established law of nations was believed to be part of common law, and therefore jurisdiction over violations of law of nations could be asserted like other common law claims).

4 See Bolchos v. Darrell, 3 F. Cas. 810, 810-811 (D.S.C. 1795) (No. 1607) (finding jurisdiction in cases of maritime seizure of slaves for first time); Adra v. Clift, 195 F. Supp. 857, 862-863 (D. Md. 1961) (utilizing ATCA for second time in 182 years in finding that court had jurisdiction to handle case which involved child custody); see also Kenneth C. Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute, 18 N.Y.U. J. Int’l L. & Pol. 1, 35, 49 (1985) (noting that in Bolchos, court allowed jurisdiction because defendant violated treaty with France whereas in Clift, court allowed jurisdiction because unlawful taking of children is a tort and altering of passport is violative of law of nations). See generally Dodge, supra note 3, at 221 (pointing out discrepancy between majority’s position and that of Judge Bork’s).

5 See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The trend of the ATCA being used to redress human rights violations began with this landmark case. Id. The court ruled that deliberate torture violated universally accepted norms of human rights. Id.; Blum & Steinhardt, supra note 2, at 53. The effect of this decision was to allow other claimants to bring actions in federal court seeking redress for injuries from similar human rights violations. Id.; see, e.g., Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992). In Trajano the Ninth Circuit affirmed the extension of jurisdiction over a suit brought after a brutal murder by the Philippine government. Id. But see Michele Brandt, Doe v. Karadzic: Redressing Non-Site Acts of Gender-Specific Abuse Under the Alien Tort Statute, 79 Minn. L. Rev.
Despite the emergence of the ATCA as a means of compensating victims of international human rights violations, there is a great deal of uncertainty and reluctance to extend its reach to tortious acts committed by terrorists. This position is supported by a dubious belief that international terrorism is not a violation of the law of nations, the body of law which regulates nations in relation to one another.

The recent decision of the Second Circuit in *Kadic v. Karadzic* may be used as a means of changing this position as war crimes, in their essence, are similar in nature to terrorism and the torts found therein. Extending the analysis of the *Kadic* decision, which held that war crimes violated the law of nations, terrorism


7 See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984). *Tel-Oren* is the only case attempting to use the ATCA to acquire jurisdiction over alleged terrorists. *Id.* While concurring in the result, three judges strongly disagreed over the reasons for denying jurisdiction. *Id.; see also* 14 CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE 285, 286 (1996 Supp.). There remains a great deal of uncertainty regarding the applicability of the ATCA to terrorism. *Id.;* Joseph P. Dellapenna, *Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward*, 79 AM. SOC'Y. INT'L L. PROC. 361, 367, 370 (1985). Several scholars have criticized the opinions as uninformed about the history and potential application of the ATCA. *Id.*

8 See *Tel-Oren*, 726 F.2d at 788 (Edwards, C.J., concurring) (stating that there was no jurisdiction under ATCA because international terrorism was not comparable to other offenses used to invoke Act); 14 WRIGHT ET AL., supra note 7, at 286 (noting that there was great deal of uncertainty on part of D.C. circuit court judges on whether law of nations should include terrorism). *See generally* Virginia A. Melvin, Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211, 220 (1985) (observing that Judge Edwards was willing to expose facts in that case to law of nations analysis).


11 *Id.* at 242-243. The court broadened the class of activities that could be brought under the ATCA. *Id.* The court relied on *In re Yamashita*, 327 U.S. 1, 14 (1946), which recognized that similar atrocities violated the law of war, and on the many conventions which codified the law of war. *Id.; see also* Charles F. Marshall, *Reframing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996). It remains to be seen whether the *Kadic* decision will open the door to new claims. *Id.;* Jordan J. Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (R. Falk ed., 1976). For war crimes, questions existed as to a basis for jurisdiction. *Id.* This lack of consensus should not preclude the prosecution of those guilty of violating international norms. *Id.*
is a violation of the law of nations because of the severity of the offense and the universal condemnation it engenders.\textsuperscript{12}

This Note asserts that if terrorism is comparable to war crimes under law of nation's analysis, its victims should be able to assert jurisdiction under the ATCA. Part I charts the origins and development of the ATCA and discusses the evolving definition of the law of nations and the defendants who violate it. Part II examines similarities present between international acts of violence which will trigger the use of the ATCA and the nature of acts that constitute terrorism. Evidence will be presented indicating that terrorism is comparable to war crimes and that there is a sufficient foundation to consider terrorism a law of nations violation. Part III discusses the problems still faced in establishing terrorism as a law of nations violation. It has been argued that consistent definitions and consistent condemnation are needed in order to ensure that those hurt by terrorist attacks are made whole. This Note concludes that terrorism should be included under the jurisdictional grant of the ATCA because there is ample evidence to support its status as a violation of the law of nations.

I. Development of the Concept of the Law of Nations and Its Application to the ATCA

The origins and purpose of the ATCA have long taxed the minds of the legal community.\textsuperscript{13} Judge Friendly's oft cited remark that it is a "legal Lohengrin... no one seems to know whence it came" expresses this uncertainty.\textsuperscript{14} Without definitive legislative intent,

\textsuperscript{12} See Kadic, 70 F.3d at 241 (noting that "evolving standards of international law govern who is within the [ATCA's] jurisdictional grant") (quoting Amerada Hess v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987)).

\textsuperscript{13} See Dodge, supra note 3, at 223-25 (arguing that law of nations should be interpreted not as it was at time of ATCA's passage but as evolving doctrine); Alfred P. Rubin, Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken, 79 AM. J. INT'L L. 105, 106 (1985) (reasoning that ATCA should be applied to actions involving great universals of natural law, and not to acts that are universally condemned but not violations of natural law); see also Joseph Modeste Sweeney, A Tort Only in Violation of the Law of Nations, 18 HASTINGS INT'L & COMP. L. REV. 445, 481-83 (1995) (placing of word "only" in statute has been key to this interpretation).

\textsuperscript{14} See IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). Judge Friendly noted that despite the lengthy existence of the ATCA, interpreting it has led to a great deal of confusion. Id.; see also Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963). The court here gives another definition of the law of nations. Id.; Randall, supra note 3, at 11. Randall suggested that the origins and purposes of the statute can be pieced together from historical and legislative sources even though no formal history exists. Id. But see Anthony D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 AM.
one must examine the language in the ATCA to determine its application. The ATCA provides a mechanism for aliens to sue for acts in violation of the law of nations, but the definition of this type of tort and the identity of the tortfeasor continue to be debated. The debate focuses primarily on defining violations of the law of nations.

The concept of natural law was important in the development of the law of nations. William Blackstone interpreted the law of nations to cover violations of safe-conducts, infringement of the rights of ambassadors and piracy. Traditionally, the clearest example of a violation of the law of nations was the act of piracy because the pirate was condemned as an enemy of all mankind.

Piracy was singled out as a law of nations violation, but this did not mean that early courts limited their interpretation of the law of nations to specific acts; rather there was recognition of the dynamic nature of this concept. In determining whether a given activity violated the law of nations, early courts evaluated the na-

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J. INT'L L. 62, 62 (1988). D'Amato believes that the significance of the ATCA is better understood in light of the history of the era in which it was enacted. Id. See 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (Welsby ed. 1854). Natural reason established by consent of all the civilized inhabitants of the world constituted the law of nations. Id.; see also United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass 1822) (No. 15,551), overruled on other grounds, 23 U.S. (10 Wheat.) 66 (1825). In La Jeune Eugenie, Justice Story stated that "every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations." Id. See generally Dodge, supra note 3, at 225-26. It is certain that natural law has the strongest impact on the law of nations. Id. See 4 BLACKSTONE, supra note 15, at 68. The list was not meant to be exhaustive, rather these were the most significant offenses of the time in which Blackstone wrote. Id.; Dodge, supra note 3, at 226. Blackstone has been understood to believe individuals could violate the law of nations since the three principle offenses were likely accomplished by individuals. Id.

See United States v. Smith, 18 U.S. (1 Wheat.) 153, 156 (1820). The Supreme Court found that the nature of piracy made pirates hostes humani generis, or, enemies of all mankind. Id. The Court recognized that all nations are united in their fight against them for their mutual defense and safety. Id.; see also Harmony v. United States, 43 U.S. 210, 229 (1844). The Court here found that piracy was a violation of the law of nations. Id.; Bolchos v. Darrel, 3 F. Cas. 810, 811 (D.S.C. 1795) (No. 1607). The court in Bolchos found that despite acts of piracy taking place on land, the court could properly have jurisdiction in this civil matter under the ATCA because piracy was a violation of the law of nations. Id. See generally Randall, supra note 3, at 788. The jurisdictional principle of universality allows for extraterritorial jurisdiction over pirates and slave traders. Id. The notion behind this jurisdictional principle is that the seriousness of these offenses necessitates the prosecution of such offenders in any venue. Id.

See The Paquette Habana, 175 U.S. 677, 699 (1900). The Supreme Court noted that international law is part of the United States' law under certain circumstances and it must be defined from the customs and usages of the nations if no treaty or statute exists. Id.; see also Hilton v. Guyot, 159 U.S. 113, 163 (1895). When statutes and treaties do not offer a guide, it is the duty of the judiciary to say what the law is. Id.; Dodge, supra note 3, at 232. The significance of this is that positive legislation need not be established to make crimes
ture of the offense and the extent of its international condemnation. When there was general agreement among jurists and commentators that an activity had received international condemnation, the activity would be considered a violation of the law of nations and treated accordingly.

This analysis has remained valid today with only limited disagreement. It was argued by those attempting to limit its application that the law of nations, as expressed in the ATCA, should be read in light of the violations envisioned at the time of the ATCA's passage. This view has received minimal support, however, and the traditional view of the concept's dynamic meaning has gained general acceptance.

or torts a violation of the law of nation. Id. This is so because both were cognizable at common law. Id.

See The Paquette Habana, 175 U.S. at 699-700. The Court went to a variety of sources to determine how actions could violate the law of nations. Id. The Court did not merely look to treaties but relied on the work of many legal scholars from around the world to make their determination. Id. This approach suggests that courts would evaluate other offenses in the same manner without being wed to a finite list of offenses. Id.; Smith, 18 U.S. at 160-161. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law." Id.; see also Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). This approach was applied in Filartiga when the court noted the law of nations would be defined as it has evolved and exists in the present rather than at the time of the Judiciary Act. Id. See generally Debra A. Harvey, Comment, The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?, 21 J. MARSHALL L. REV. 341, 345 (1988). The courts have undergone significant pains in evaluating cases to determine if the specific acts violate the law of nations. Id.

See The Paquette Habana, 175 U.S. at 699. The judicial approach of relying on international scholars to define the law of nations is preferable because these important issues should be left only to those who, by years of analysis, can give a proper framework for the courts to apply. Id.; see also First National City Bank v. Banco Nacional De Cuba, 406 U.S. 759, 762 (1972). This opinion stated that The Paquette Habana approach demonstrated the general rule by which courts apply rules chosen from various sources of law. Id. But see Rubin, supra note 13, at 106. There has been strong argument that The Paquette Habana decision should be limited to its specific factual context. Id.

See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 815-816 (D.C. Cir. 1984) (Bork, J., concurring). Judge Bork, in refusing to apply law of nations analysis, asserted that the intention of the statute was to limit the jurisdiction available under the ATCA to safe-conducts, infringement of ambassadors' rights, piracy and others that could be shown to violate the law of nations in 1789. Id. Since there was no violation of a treaty the court based its decision on the single issue of whether the offense rose to the level of a violation of the law of nations. Id. In holding that the terrorist attack on civilians did not violate the law of nations, the court distinguished the offense from that litigated in Filartiga. Id.; Filartiga, 630 F.2d at 884. In Filartiga, the court asserted jurisdiction over a Paraguayan police officer for acts of torture which it held to be violative of the law of nations. Id. But see Rubin, supra note 13, at 107-08. Rubin shares the concern of the concept of universal jurisdiction. Id.

See Tel-Oren, 726 F.2d at 798. In his concurring opinion, Judge Bork argued that jurisdiction can only be asserted over the three offenses which the drafters of the ATCA envisioned in 1789. Id.

See Dodge, supra note 3, at 223 (noting cases since Judge Bork's concurrence that have departed from this static concept); Randall, supra note 3, at 789 (analyzing expansion
The dynamic nature of this definition does have limitations; most notably that a violation of the law of nations must be an offense with sufficient severity to make the international community collectively condemn it.\(^{24}\) The concept usually is applicable to such crimes as murder, torture or false imprisonment.\(^{25}\) Offenses such as property takings or breaches of fiduciary duties are not recognized as offenses in violation of the law of nations because such acts do not rise to a sufficient level of international condemnation.\(^{26}\) While the eighth commandment's "thou shall not steal" is recognized from country to country as a general prohibition, it is not a law of nations violation because it is not severe enough to trigger universal jurisdiction.\(^{27}\)

The ATCA was successfully invoked twice between its enactment in 1789 and 1979. In 1980, however, the landmark holding in Filartiga v. Pena-Irala brought renewed attention to this rarely utilized statute. The Second Circuit ruled that deliberate torture at the hands of one with color of official authority, regardless of the nationality of the parties, violated the international law of human rights. The court held that the ATCA could be used to acquire jurisdiction if the alleged torturer is served within the United States. This decision's primary significance is in the extension of the law of nations to encompass violations of human rights. The court looked to international agreements regarding


29 630 F.2d 876 (2d Cir. 1980).

30 Id. at 880. The case marked the first time the statute was invoked to compensate torture victims who suffered these abuses at the hands of an established government. Id. The appellant in Filartiga was a self-described opponent of the long standing government in Paraguay. Id. He alleged that his son was tortured and killed by Pena, who was the Inspector General of Police in Asuncion, Paraguay as a direct result of his political opposition. Id.; see also Ralph G. Steinhardt, Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 YALE J. INT'L L. 65, 66 (1995). The Filartiga decision has opened the door for other actions brought against tortious governments. Id.; Karen E. Holt, Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal Oddity?, 20 GA. J. INT'L & COMP. L. 543, 545 (1990). The court determined that torture was covered under the jurisdictional basis offered by the ATCA. Id.

31 See Filartiga, 630 F. Supp. at 878 (noting that torture was within jurisdictional reach of ATCA).

32 See id. The court acknowledged the district court's hesitancy in exercising jurisdiction because of recent cases which noted in dicta that the law of nations was to be narrowly construed. Id. at 880; see also Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir. 1976). The Second Circuit in Dreyfus construed the ATCA narrowly, finding that the law of nations cannot govern a state's treatment of its own citizens. Id. But see Steinhardt, supra note 30, at 77. Steinhardt argues that, in light of human rights treaties, the holding in Dreyfus was an anachronism. Id.; but see also Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 325 n.16 (1981). After Filartiga, the Second Circuit limited the Dreyfus holding to commercial relations. Id. It also reaffirmed its holding in Filartiga that physical torture violates the law of nations. Id.; ITT, 519 F.2d at 1001. The court asserted the need to narrowly construe the law of nations. Id.

33 See e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir.) (holding that ATCA provides federal forum to hear international law disputes), cert. denied, 117 S. Ct. 96 (1996); Kadic v. Karadzic, 70 F.3d 252, 256 (2d Cir. 1995) (ruling that international human rights violations even if not perpetrated under color of authority is still violative of law of nations), cert. denied, 116 S. Ct. 2524 (1996). See generally Blum & Steinhardt, supra note 3, at 215 (analyzing effects this case will have on future international human rights law);
conduct violative of human rights and the scholarship of the international community condemning acts of torture in coming to the determination that torture was a violation of the law of nations. The view taken recognized the dynamic nature of the concept of the law of nations and the need to extend the law of nations to condemn acts of torture. Filartiga was followed by a series of decisions that found that the violation of human rights was indeed a violation of the law of nations. Among these decisions were suits against the estate of Ferdinand Marcos for his regime's practices in the Philippines, and also actions against agents of the Guatemalan, Argentinean and Ethiopian governments.

Holt, supra note 30, at 554 (suggesting that Filartiga holding was narrowed by Tel-Oren and other cases).

34 See Filartiga, 630 F.2d at 882-883. The court took particular note of The Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. No. 34, at 91, U.N. Doc. A/1034 (1975) which notes in Article 2 that any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Id. at 883; see also United States v. Smith, 18 U.S. 153, 163 (1820). The court described piracy as a crime against the universal laws of society and pirates as the enemies of mankind. Id. See generally M.G. Keladharan Nayar, Human Rights: United Nations And United States Foreign Policy, 19 HARV. INT'L L.J. 813, 816 n.18 (1978). The Dual Conventions concerning international human rights were adopted unanimously, showing the universal condemnation of acts of torture. Id.


36 See Abebe-Jira, 72 F.3d at 848 (holding that ATCA establishes federal forum that may remedy violations of customary international law); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Ca. 1987) (stating that international consensus condemning activities based on universal norms justified court's exercise of jurisdiction over international tort claim).

37 See Hileo v. Marcos, 25 F.3d 1467, 1473 (9th Cir. 1993) (holding that wrongful death at hands of military intelligence under Marcos' regime constituted violation of law of nations).


39 See Forti, 672 F. Supp. at 1540-41 (finding that official torture, prolonged arbitrary detention and summary execution in Argentina were actionable under law of nations analysis).
B. Congressional Response: A Codification of the Principle Espoused in Filartiga

In response to Filartiga and the subsequent cases extending the concept of the law of nations to include violations of human rights, Congress enacted The Torture Victim Protection Act (TVPA). The TVPA established a cause of action for victims of torture or summary execution at the hands of individuals acting under color of authority of any foreign nation. Since its enactment, several victims of human rights violations have successfully acquired jurisdiction in the United States federal courts.

40 See Abebe-Jira, 72 F.3d at 847 (granting jurisdiction for tortious acts committed by Ethiopian government).


An individual who, under actual or apparent authority, or color of law, of any foreign nation... (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id. § 3. In defining its terms, the statute notes that:

"Extrajudicial killing" means a deliberated killing not authorized by a precious judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"Torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id.

43 See Alvarez-Machain v. United States, 96 F.3d 1246, 1253 (9th Cir. 1996) (reversing lower court ruling that TVPA claims were barred because application of statute to events taking place prior to its enactment would have retroactive effect); Abebe-Jira, 72 F.3d at 848 (stating that TVPA provides federal courts jurisdiction for torts committed against aliens in violation of law of nations); Xuncax, 886 F. Supp. at 179 (granting jurisdiction in federal court and private right to sue to nine Guatemalan citizens for tortious violations of international law).
The legislative history of the TVPA emphasized that it was necessary to provide concrete enforcement measures because the mere recognition of universal condemnation provided no comfort to victims of torture and summary executions around the world.\textsuperscript{44} Congress endorsed the dynamic nature of the law of nations by allowing suits based on other norms of customary international law to continue being brought under the ATCA.\textsuperscript{45} It could therefore be argued that the passage of the TVPA gives further force to the argument allowing for the expansion of the ATCA to new offenses as they arise.

While Congress provided additional support for the use of the ATCA through the passage of the TVPA, it also perpetuated an existing barrier to a successful claim.\textsuperscript{46} The TVPA limited actions to state actors or those acting under color of authority.\textsuperscript{47} By so

\textsuperscript{44} H.R. REP. NO. 102-367, at 3 (1992), reprinted in 1991 U.S.C.C.A.N. 84, 85. Although torture is universally condemned, this condemnation provides scant comfort to its victims. Id.; S. REP. No. 102-249, at 7 (1991). The thrust of the statute is enforcement and obligates adoption of measures to “ensure that torturers are held legally accountable for their acts.” Id. By making torturers legally accountable, this legislation will ensure that “torturers and death squads” will not “have a safe haven in the United States.” Id.

\textsuperscript{45} See H.R. REP. No. 102-367 at 3, reprinted in 1991 U.S.C.C.A.N. at 86. Claims based on torture or summary executions are not exhaustive of the list of actions covered under § 1350 of the ATCA. Id.; see also Pryor, supra note 41, at 1014. The intent of the TVPA is to “reinforce and clarify, not supplant, the ATCA.” Id. Preservation of the ATCA is for any future “emerging international consensus of what is a violation of the law of nations.” Id. at 1014-15.

\textsuperscript{46} See H.R. REP. NO. 102-367, at 5, reprinted in 1991 U.S.C.C.A.N. at 87. It is noted that “the bill does not attempt to deal with torture or killing by purely private groups.” Id. Some government involvement is needed in order to establish a claim under the Torture Victim Protection Act. Id.; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781-93 (D.C. Cir. 1984) (Edwards, J., concurring). The Tel-Oren court makes a crucial distinction between the facts therein and the facts of Filartiga. Id. In Tel-Oren, the defendants were members of the PLO, not a formal government entity and therefore did not act under color of state authority. Id. The court expressed strong doubts that law of nations violations could be committed by non-state actors. Id. See generally Hersch Lauterpacht, The Subject of the Law of Nations, 63 L.Q. Rev. 438, 444, 445 (1947). The text deals with the international obligations of insurgents as an example that persons and not merely states are subjected to international obligations, consistent with international law. Id.

\textsuperscript{47} See Torture Victim Protection Act, § 2, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)). It is stated that liability is limited to state actors or those acting under color of authority. Id.; H.R. REP. No. 102-367, at 4, reprinted in 1993 U.S.C.C.A.N. at 85, 87. The legislative intent was to fashion a definition of a state actor the way it was done for domestic tort cases for persons acting under actual or apparent authority of a government agency. Id. See generally 42 U.S.C. § 1983 (1995). This provision is used when there is an issue as to whether a state actor is involved in conduct for which a civil remedy may be available. Id. This statute states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
doing, Congress omitted a large group of defendants because individuals have the capacity to perpetrate human rights violations as effectively as state actors.\textsuperscript{48} Indeed many significant human rights violations are undertaken by individuals without formal state sponsorship.\textsuperscript{49} Further complicating this matter is the difficulty in ascertaining precisely where state sponsorship exists in many modern day conflicts.\textsuperscript{50} The TVPA therefore allows an entire class of offenders to escape responsibility merely because of the status of the perpetrator, in effect allowing individuals to do what a state could not.

C. The ATCA's Exclusion of Non-State Actors Is Inconsistent With the Principles of Universal Jurisdiction

Jurisprudence excluding individual liability in international law is contrary to the principle of universal jurisdiction, which enables a court to hear a case regardless of its origin or the nationality of the parties.\textsuperscript{51} The premise of universal jurisdiction is that

\textit{Id.}

\textsuperscript{48} See generally Kenneth C. Randall, Further Inquiries into the Alien Tort Statute and a Recommendation, 18 N.Y.U. J. INT'L L. & POL. 473, 538 (1986). Both state and non-state actors, including everyone from individuals to state officials, for certain offenses may have jurisdiction acquired over them consistent with both federal and international law. \textit{Id.} The ATCA will serve as an independent jurisdictional vehicle more often in suits against non-state actors, given the existence of the Foreign Sovereign Immunities Act of 1976 and the Federal Tort Claims Act which regulate the permissibility of jurisdiction over foreign states and the United States, respectively. \textit{Id.}

\textsuperscript{49} See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir.) (noting that defendant in case was responsible for acts of genocide, war crimes and crimes against humanity and did not need to be state actor by other foreign states for purposes of ATCA), cert. denied, 116 S. Ct. 2524 (1996). \textit{See generally} Barbara M. Yarnold, Doctrinal Basis for the International Criminalization Process, 8 TEMP. INT'L & COMP. L.J. 85, 107-10 (1994) (describing international crimes committed by individuals as containing element of international necessity and policy motivated); Kunstle, \textit{supra} note 41, at 331 (analyzing decision in \textit{Kadic} as it relates to obligations of individuals under international law).

\textsuperscript{50} See \textit{Kadic}, 70 F.3d at 244-45 (analyzing guidelines for defining states in determining whether there was state involvement in action or if actors were acting in concert with state); \textit{see also} Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987) (defining state as “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other such entities”); \textit{id.} § 202 cmt.b (1987) (explaining that “an entity that satisfies the requirements of section 201 is a state whether or not its statehood is formally recognized by other states”). \textit{See generally} Yarnold, \textit{supra} note 49, at 109-110 (categorizing international offenses as state-sponsored crimes, crimes that are conducted with state acquiescence, crimes committed by public officials on behalf of state, or with explicit state authorization, crimes that can only be committed by states or have been committed by states in past, and crimes conducted by individuals acting in their own capacity, without any state involvement).

\textsuperscript{51} See Mark Gibney, The Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez - Mason and Lessons for the World Community, 24 CASE W. RES. J. INT'L L. 165, 185 (1992) (noting universal jurisdiction can exist when inter-
certain offenses affect not simply the victims, but all nations.\textsuperscript{52} The offenses initially covered under the law of nations suggest that the ATCA should extend to individuals.\textsuperscript{53} It has been generally understood, however, that aliens could only bring actions against state actors under the ATCA for a tort in violation of the law of nations.\textsuperscript{54} As a result, a jurisprudence has developed suggesting that a non-state actor is immune from accountability for torts under the ATCA because, it was argued, only nations could violate international law.\textsuperscript{55} Thus, it could be argued that the scope of national law imposes liability for violations of human rights on individual rather than state so there is no need to impose domestic standards and policies; Randall, supra note 3, at 785-86 (describing universality principle of jurisdiction as providing all states jurisdiction when offense is recognized as universal concern); Jean-Marie Simon, The Alien Tort Claims Act: Justice or Show Trials?, 11 B.U. Int'l L.J. 1, 44-45 (1993) (explaining that universal jurisdiction permits any state to prosecute certain offenses without regard to actor's nationality).


\textsuperscript{53} See United Nations Convention On The High Seas, April 29, 1958, art. 15, 13 U.S.T. 2312, 2317 (defining acts of piracy as ones "for private ends by the crew or the passengers of a private ship"); see also The Malek Adhel, 43 U.S. (1 How.) 210, 232 (1844) (describing act of piracy as "aggression unauthorized by the law of nations"); United States v. Smith, 18 U.S. (1 Wheat.) 153, 161 (1820) (noting that common law recognizes piracy as offense against all nations); United States v. Furlong, 18 U.S. (1 Wheat.) 184, 196-97 (1820) (distinguishing murder and piracy by stating that former is punishable only in jurisdiction in which it was committed while piracy is offense within jurisdiction of all nations). See generally Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 774 (D.C. Cir. 1984) (Edwards, C.J., concurring) (stating that law of nations does not impose "the same responsibility or liability on non-state actors"); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Ca. 1987) (noting lack of consensus in international community regarding law of nations violations and liability of non-state actors).

\textsuperscript{54} See Tel-Oren, 726 F.2d at 791 (Edwards, C.J., concurring) (finding plaintiff's claims unenforceable because terrorism by non-state actors did not violate law of nations); 14 Wright et al., supra note 7, at 287 (noting overall reluctance by courts to extend jurisdiction to non-state actors under ATCA). \textit{But see} Xuncax v. Gramajo, 886 F. Supp 162, 180 (D. Mass. 1995) (stating that statute only requires commission of "tort" which violated international law or treaty of United States).

\textsuperscript{55} \textit{But see} John M. Rogers, The Alien Tort Statute and How Individuals 'Violate' International Law, 21 Vand. J. Transnat'l L. 47, 50-51 (1988) (arguing that individuals cannot violate international law notwithstanding fact that pirates can be punished due to congressional action); Rubin, supra note 13, at 106 (asserting that jurisdiction under ATCA was not meant to be conferred on private parties). See generally Ralph G. Steinhardt, Fulfilling
of the ATCA has expanded to include more activities but the class of defendants who are subject to the courts jurisdiction under it has narrowed.

Several courts were apprehensive in extending the ATCA to cover non-state actors, but none had been forced to decide a case based on this issue.\textsuperscript{56} Rather, these courts resolved the cases on other grounds.\textsuperscript{57} For example, in \textit{Forti v. Suarez-Mason}\textsuperscript{58} the court noted that because of a lack of international consensus on torture committed by private actors, the law of nations would not be applicable to such defendants.\textsuperscript{59} Despite this overall apprehension, until recently, this was an unsettled area of the law.\textsuperscript{60}

\textbf{D. Kadic v. Karadzic and the Necessary Expansion of the ATCA’s Law of Nation Analysis}

The limitation of the ATCA’s application solely to state actors or those acting under color of authority was re-evaluated in the Second Circuit’s opinion in \textit{Kadic v. Karadzic}.\textsuperscript{61} The success of the plaintiff’s case appeared to depend on whether it was proven that

\textit{the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 YALE J. INT’L L. 65, 79 (1995) (discussing stream of cases where court was unwilling to apply ATCA to establish jurisdiction over non-state actors in violation of law of nations).}

\textsuperscript{56} \textit{See De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1396 (5th Cir. 1985) (noting that nations, not individuals, are traditional subjects and concerns of international law); Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1975) (asserting that only relations between sovereign states are within international law); IT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (asserting that international law only applies to states).}

\textsuperscript{57} \textit{See Tel-Oren, 726 F.2d at 792 (Edwards, C.J., concurring) (noting lack of consensus for private actor responsibility under law of nations and therefore no jurisdiction); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (state sponsored torture violated law of nations); Forti, 672 F. Supp. at 1541 (allegation of torture committed at hands of police).}

\textsuperscript{58} \textit{672 F. Supp. 1531 (N.D. Cal. 1987).}

\textsuperscript{59} \textit{Id. at 1541 (noting that law of nations only applies to states).}

\textsuperscript{60} \textit{See Sanchez-Espinosa v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (dismissing plaintiffs’ claims and noting that “customary international law” does not reach private, non-state conduct); Tel-Oren, 726 F.2d at 795 (Edwards, C.J., concurring) (stating that “[w]hile I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court. . .”).}

\textsuperscript{61} \textit{70 F.3d 232 (2d Cir. 1996). See Lawrence W. Newman & Michael Burrows, The Alien Tort Claims Act, N.Y.L.J., Dec. 29, 1995, at 3 (noting Kadic was first case to declare that there was jurisdiction under ATCA where defendant was non-state actor); Hope Samborn, Ruling Could Lead To More Human Rights Torts Cases; Court Permits Lawsuit Against Bosnian Serb, 81 A.B.A. J. 30, 30 (1995) (noting that human rights activists claimed Kadic decision as major victory); see also Martin Flumerbaum & Brad S. Karp, War Crimes Jurisdiction, N.Y.L.J., Oct. 25, 1995, at 3 (noting decision is in accord with President’s position of allowing claims brought by foreign victims of crimes against humanity).}
defendants were state actors. The *Kadic* court was faced with persuasive authority insisting that only state actors could commit torts in violation of the law of nations. The *Kadic* court, however, changed the established jurisprudence in this area, declaring that private tortfeasors could also violate international law. The court held that jurisdiction could be acquired over a non-state actor under the ATCA when there was sufficient international accord that the torts alleged were in violation of the law of nations. It was noted that the identity of the perpetrators of terror campaigns were not relevant when these campaigns were classified as war crimes.

The next issue this court faced was whether the alleged conduct violated the law of nations. The plaintiff's causes of action included wrongful death, summary execution, rape, torture, assault and battery. The court utilized the universal condemnation of

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62 See *Kadic*, 70 F.3d at 244-45. In its analysis of what constituted a state actor, the court found that Srpska satisfies the criteria for a state under international law. *Id.* Some of the criteria cited are that the entity has a defined territory and population which was controlled by its own government, entering into agreements with other governments, having a president, a legislature, and its own currency. *Id.; see also* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991). In using criteria similar to that used in *Kadic*, the *Klinghoffer* court found that the P.L.O. did not fit the definition of a state. *Id.* They arrived at this conclusion because they found the P.L.O. had no defined territory, that it was not under the control of its own government and it did not have the capacity to enter into formal relations with other nations. *Id.* See *generally* Restatement (Third) of the Foreign Relations of the United States §§ 201, 202 (1987). These sections give criteria to determine the existence of a state and the recognition and acceptance of a state. *Id.*

63 See De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1396 (5th Cir. 1985) (stating that traditional subjects of international law are nations); Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976) (noting that international law applies to sovereign states); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (finding that international law applies only to states); Linder v. Portocarrero, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990) (stating that torture by non-state actor was not international law violation), rev'd on other grounds., 963 F.2d 332 (11th Cir. 1992).

64 See *Kadic*, 70 F.3d at 244. The court held "the alleged atrocities are actionable under the Alien Tort Claims Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes. . ." *Id.* But see *Tel-Oren*, 726 F.2d at 792 (Edwards, J., concurring). The court noted that international harmony does not exist from finding private individual liability for international law violations. *Id.; Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987). Normally purely private torture will not implicate the law of nations. *Id.*

65 See *Kadic*, 70 F.3d at 244 (holding that "alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes").

66 See *id.* at 243 (declaring that when fundamental norms are violated, identity of perpetrators are irrelevant).

67 *Id.* at 238 (analyzing international law to determine if alleged offenses applied).

68 See *id.* at 236-237. Croat and Muslim citizens alleged that they were victims of atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb troops as part of a campaign of genocide. *Id.*
war crimes in finding that there was a violation of the law of nations and that these victims could acquire jurisdiction over the defendants under the ATCA.69 Although war crimes have been internationally condemned since World War II, this was the first instance in which courts used the ATCA as a jurisdictional basis to allow parties to seek compensation from alleged tortfeasors for torts committed in the commission of war crimes.70 The significance of classifying war crimes as a violation of the law of nations is that the court gave effect to prevailing international norms regarding the manner in which people may conduct themselves during times of war.71

E. The Traditional Analysis Was Used to Determine that War Crimes Violated the Law of Nations

The critical difference between legitimate acts of war and war crimes is in the means undertaken to achieve political goals.72 While it is appropriate according to international norms to attack military targets, it is inappropriate to target civilians.73 Accepta-

69 Id. at 241. The court discussed the numerous international agreements since World War II declaring that war crimes were internationally condemned. Id. See Yamashita v. Styer, 327 U.S. 1, 37 (1946). The Supreme Court found that war crimes violated the law of nations, noting that military commanders should be responsible for their troops' actions. Id. See generally Marshall, supra note 11, at 608-12. The author notes the effect of Kadic and the substantial impact on the ATCA. Id.

70 See G.A. Res. 96(I), 1 U.N. GAOR 188-189, U.N. Doc. A/64/Add.1 (1946). This was a declaration by the General Assembly of the United Nations that genocide constituted a violation of international law. Id.; Kadic, 70 F.3d at 244. The court held that there was a cause of action under the ATCA, since the alleged atrocities were war crimes. Id.; see also Marshall, supra note 11, at 608. Although not the first to allow jurisdiction in international human rights cases, the author asserts that the Kadic court was the first to extend that jurisdiction to include non-state actors for certain law of nations violations. Id.


72 See ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 165 (1996). The author notes that in war, humanitarian treatment means that illicit methods of combat may not be used even if the cause fought for is legitimate. Id.; Michael Howard, Temperamenta Belli: Can War be Controlled?, in JUST WAR THEORY 23 (1992). The author asserts that war crimes are illegitimate even though they may have potentially legitimate causes. Id.; see also Louis Rene Beres, On Assassination as Anticipatory Self-Defense: The Case of Israel, 20 HOFSTRA L. REV. 321, 327 (1991). The author states that there is wide condemnation to kill or severely wound opponents in an armed conflict. Id. See generally Hague Convention (No. IV) Respecting The Laws And Customs Of War On Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention]. This agreement specifies standards for war on land. Id.

73 See Major Ariane L. DeSaussure, USAF, The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview, 37 A.F. L. REV. 41, 64 (1994) (asserting that Iraq violated law of nations during Persian Gulf War by commingling citizens with soldiers); see
ble means of carrying out war focus on the targeting of military targets while the war criminal targets civilians, a practice illicitting international condemnation.\textsuperscript{74}

In an expression of international condemnation of war crimes the international community has ratified the Geneva Convention IV on the Protection of Victims of War,\textsuperscript{75} The Convention on the Prevention and Punishment of the Crime of Genocide,\textsuperscript{76} The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{77} and The 1987 European Convention on the Prevention of Torture and Inhumane or Degrading


\textsuperscript{74} \textit{See} M. Cherif Bassiouni, \textit{An International Control Scheme for the Prosecution of International Terrorism: An Introduction, in Legal Aspects of International Terrorism} 485 (A. Evans & J. Murphy eds., 1978) (noting condemnation of war crimes and in particular targeting civilians); \textit{see also} Kadic, 70 F.3d at 241 (pointing out international condemnation of war crimes). \textit{See generally} Randall, \textit{supra} note 48, at 516 (discussing proposed amendment to ATCA noting in particular that “war crimes against civilians or prisoners of war, which are international acts of murdering persons, mistreating persons or destroying persons . . . where such acts are not justified by military necessity” would create specific cause of action for this offense).

\textsuperscript{75} Geneva Convention Relative To The Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287, 288 \textit{[hereinafter Geneva Convention].} Article III mandates the protection of civilians during time of war and notes that civilians “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.” \textit{Id.} \textit{See} Meron, \textit{supra} note 71, at 556. The International Criminal Tribunal for the former Yugoslavia has established that the conflict there was an international one, subject to the provisions of the Geneva Convention. \textit{Id.}

\textsuperscript{76} \textit{See} Convention on the Prevention And Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, Annex, U.N. GAOR, Res. 260A III (1948) \textit{[hereinafter Convention on Genocide].} The annex notes that genocide is a crime in violation of international law “contrary to the spirit and aims of the United Nations and condemned by the civilized world.” \textit{Id.} The agreement also provides that the identity of the perpetrator of these acts is irrelevant, stating that “persons committing genocide or any of the acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” \textit{Id.} art. IV.

Treatment or Punishment. These agreements illustrate the sentiment that the civilized world condemns the actions of war criminals under any circumstance.

Defining war crimes can often be difficult. Gender-based offenses, including rape, were common in the conflict in the former Yugoslavia. Although these offenses have never been prosecuted

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78 See The 1987 European Convention on the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, Council of Europe Doc. H(87)4, reprinted in 27 I.L.M. 1152, 1154 (1988) [hereinafter 1987 European Convention]. To ensure against inhumane treatment, a committee was established with the power to conduct visits. Id.; see also Suzanne M. Bernard, An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners, 25 RUTGERS L.J. 759, 784 (1994). The author notes that this treaty established a committee to visit other member states to ensure that torture was not occurring. Id.

79 See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7342 (1968). This agreement states that there will be no statute of limitations for crimes against humanity. Id. art. I; Geneva Convention, supra note 78, art. 146. This treaty established that any contracting party has an obligation to search for persons alleged to have committed acts prohibited under the agreement. Id.; see also CHADWICK, supra note 72, at 187-88. The author points out that despite the different nature of their legal systems the Allied powers after World War II were able to agree on a system to prosecute war criminals. Id.

80 See 1945 LONDON CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. VI. Offenses considered war crimes were listed as:

- murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. art. VI; see also Judith Hippler Bello & Irwin Cotler, International Decisions Canada - War Crimes - Crimes Against Humanity - Criminal Law - Constitutional Validity - Jurisdiction - Actus Reus - Mens Rea - Defenses - Alternative Remedies - Canadian Charter of Rights and Freedoms, 90 AM. J. INT'L L. 460, 464 (1996). The uncertain nature of war crimes and crimes against humanity deprived the accused of fair notice of the consequences of committing such inchoate and unclear international offenses. Id. The "vagueness" and "uncertainty" of these offenses made it difficult to determine who to punish. Id.; Leila Sadat Wexler, The Interpretation of the Nuremberg Principles By the French Court of Cassation: From Tovvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT'L L. 289, 307 (1994). The author explains that the court acknowledged "that crimes against humanity were different than war crimes, the Tribunal lumped the two together for the most part, leaving behind it a precedent whose scope and meaning were uncertain." Id.

81 See 2 HELSINKI WATCH, HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 21 (1993). The report documented the gender-based crimes which occurred in the Former Yugoslavia. Id.; 1 HELSINKI WATCH, HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 10 (1992). The report chronicled the ethnic cleansing which was widely reported to be occurring in the region and detailed the heinous crimes that went on. Id.; see also Kadic v. Karadzic, 70 F.3d 232, 237 (2d Cir.), cert. denied, 116 S. Ct. 2524 (1996). The plaintiffs, as part of their complaint, claimed gender based offenses on the part of the Bosnian-Serb troops. Id.; Kathleen M. Pratt & Laurel E. Fletcher, Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, 9 BERKELEY WOMEN'S L.J. 77, 86 (1994). The U.N. High Commissioner for Refugees has confirmed that a major component of the systematic campaign of ethnic cleansing by the Bosnian-Serbs was the commission of a variety of gender based offenses including systematic rape. Id. See generally Hearing Before the Commission on Security and Cooperation in Europe, 103d Cong., 1st Sess. 2-3 (1993). The Commission took particular note of the systematic
as a war crime. The International Criminal Tribunal for the Former Yugoslavia has established that prosecution for rape will occur.\footnote{See Statute of the International Tribunal, Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution, U.N. SCOR, 48th Sess., Annex 36, at 808, U.N. Doc. S/25704 (1993). This report provided that the court had jurisdiction to prosecute persons for “murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecutions on political, racial or religious grounds.” Id. art. V.} Recognition of rape as a violation of the law of nations is important because of the heinous nature of the offense and the need to compensate those victims while expanding the law of nations to suit modern international human rights violations.\footnote{See Jennifer Green et al., Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 Hastings Women’s L.J. 171, 183 (1994) (asserting that International Tribunal must develop rules and mechanisms which make explicit application of established international law principles to violations of women’s human rights, reflect gender-specific nature of certain violations, and properly implement them to protect both the dignity and security of women everywhere); see also Arden B. Levy, International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement, 4 UCLA Women’s L.J. 255, 256-57 (1994) (arguing that rape needs to be recognized by world as crime against humanity); Berta Esperanza Hernandez-Truyol, Women’s Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform, 21 Brook. J. Int’l L. 605, 648 (1996) (pointing out that rape must be classified as violation of law of nations so that whatever context, it will receive complete condemnation).}

II. THERE IS AMPLE EVIDENCE TO CLASSIFY TERRORISM AS A VIOLATION OF THE LAW OF NATIONS

The law of nations is a constantly evolving doctrine.\footnote{See The Paquete Habana, 175 U.S. 677, 700 (1900). The Court held that the law of nations should be interpreted based upon what jurists and commentators believed it to be. Id.; Filartiga v. Pena-Irala, 630 F.2d 876, 887-89 (2d Cir. 1980). The court stated 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.” Id. But see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring). Judge Bork espoused the view that there was no concept of international human rights in 1789 and therefore there could have been no intent to include it under the jurisdictional grant of the ATCA. Id.} The ATCA, therefore, is not limited to a finite number of torts that may be brought under its jurisdictional grant.\footnote{See Filartiga, 630 F.2d at 590. The court points out that the torturer has become like the pirate and slave trader, an enemy of all mankind. Id.; see, e.g., Hilao v. Marcos, 25 F.3d 1467, 1473 (9th Cir. 1994) (holding that wrongful death at hands of military personnel under regime of Ferdinand Marcos constituted violation of law of nations); Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992) (finding plaintiff had jurisdiction under ATCA for state sponsored murder and torture); Xuncax v. Gramajo, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (stating that wrongful death within jurisdictional grant of ATCA); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) (holding ATCA applicable for state sponsored campaign of murder, torture and arbitrary detention).} Torts committed during the commission of a terrorist act may be recognized as violations of the law of nations if there is sufficient international ac-
cord condemning it and there is a general consensus among international jurists that it is a violation of the laws of nations.\(^8\)

Courts can look at several resources to determine whether or not acts associated with terrorism rise to the level of offenses considered violations of the law of nations.\(^8\) These resources include international agreements designed to combat and condemn terrorism,\(^8\) and the thousands of books that have been published about terrorism and the threat it poses.\(^8\) The common theme of these resources is that the means used by politically motivated terrorists are illegitimate and must be combated.\(^8\) International agreements have taken a variety of forms in an effort to combat specific instances of terrorism.\(^8\) They often occur in response to

\(^8\) See Restatement (Third) of Foreign Relations Law of the United States § 404 (1987). States have the jurisdiction to punish offenses such as piracy, slave trade, attacks on or hijacking of aircraft, genocide war crimes, and certain acts of terrorism as these are offenses considered by the international community as being of universal concern. Id.; see also Randall, supra note 48, at 526. The author notes the strong consensus in the international community that terrorist acts are universal offenses and should be treated as such. Id.


\(^8\) See Introduction, in Democratic Responses To International Terrorism 1 (David A. Charters ed., 1991) (noting that upwards of 5,000 books have been published on subject); AMOS LAKOS, INTERNATIONAL TERRORISM: A BIBLIOGRAPHY (1986) (listing 5,266 published books and articles on subject); ALEX P. SCHMID ET AL., POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS DATA BASES, THEORIES, AND LITERATURE 1 (1988) (citing 5831 books and articles published on terrorism).

\(^8\) See Walter Laqueur, The Age Of Terrorism 1 (1987) (noting that while terrorism has received widespread worldwide attention, very little has been accomplished in terms of understanding it); see also ALONA E. EVANS & JOHN F. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM xxiii (1978) (noting that terrorism violates vital world interests and must be combated).

\(^8\) See, e.g., Montreal Convention, supra note 88 (promoting safety concerns arising from increased terrorist attacks); Hijacking Convention, supra note 88 (responding to increased attacks on civilian aircraft); Tokyo Convention, supra note 88 (protecting persons aboard civilian aircraft).
specific acts of terror such as air piracy and aggression against internationally protected persons, evincing the condemnation of such politically motivated violence against civilians.\textsuperscript{92}

The analysis by the \textit{Kadic} court illustrates the need to provide a means of compensation for victims of war crimes.\textsuperscript{93} Because of their similar nature, it is submitted that the same means should be extended to victims of terrorism. War crimes are similar to acts of terrorism because of the illegitimacy of targets and types of violations.\textsuperscript{94} War crimes, like terrorism, can be directed at a variety of targets but the true illegitimacy of these actions is evident when victims are civilians or their property.\textsuperscript{95} Historically, acts of violence against or seizure of ambassadors are violations of the law of nations, but atrocities against civilians have received universal condemnation only since World War II.\textsuperscript{96}

\textsuperscript{92} See Convention, Internationally Protected Persons, supra note 88 (protecting, inter alia, diplomats to foster international cooperation); Montreal Convention, supra note 88 (promoting safety concerns arising from increased terrorist attacks); Hijacking Convention, supra note 88 (responding to increased attacks on civilian aircraft); Tokyo Convention, supra note 88 (protecting persons aboard civilian aircraft).

\textsuperscript{93} 70 F.3d 232, 243 (2d Cir. 1996) (analyzing past instances when war crimes received international attention). See Paust, supra note 11, at 446 (discussing war crimes perpetrated by American soldiers in Vietnam conflict); see also Kevin R. Johnson, \textit{Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Non-Citizens}, 21 \textit{Yale J. Int'l L.} 1, 20 (1996) (noting that private parties have brought suits against foreign leaders for human rights abuses); Kunstle, supra note 41, at 319 (noting that survivors of Bosnian-Serb atrocities have sought punishment and compensation by filing suit in federal district court).

\textsuperscript{94} See Report of the Ad Hoc Committee on International Terrorism, U.N. GAOR, 29th Sess., Supp. No. 28, at 1 [hereinafter \textit{Ad Hoc Committee on International Terrorism}] (noting that despite legitimacy of political goal, means chosen to achieve these goals make these acts terrorism); see also \textit{Christopher Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty} 34-59 (1991) (discussing comparison of peacetime terrorism to war crimes); \textit{Chadwick}, supra note 72, at 7 (asserting that acts of international violence or terrorism may be regarded as war crimes); Richard B. Bilder & Christopher Blakesley, \textit{Note, Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979}, 90 Am. J. Int'l L. 346, 347 (1996) (contending that terrorism during peacetime is analogous to war crimes during war).

\textsuperscript{95} See \textit{Ad Hoc Committee on International Terrorism}, supra note 94, at 1 (describing terrorist acts).

\textsuperscript{96} See \textit{Von Dardel v. Union of Soviet Socialist Republics}, 623 F. Supp. 246, 260-62 (D.D.C. 1985) (condemning seizure of Swedish diplomat as violative of law of nations); see also 1987 European Convention, supra note 78 (establishing committee to conduct on site visits to ensure compliance with human rights norms); Convention Against Torture, supra note 77 (calling for cessation of torture in all countries); Convention on Genocide, supra note 76 (noting that all who commit this offense are subject to universal jurisdiction for prosecution); Geneva Convention, supra note 75 (mandating human treatment of civilians during armed conflict).
The *Kadic* decision should have indirect implications on the rule announced in *Tel-Oren v. Libyan Arab Republic*. In *Tel-Oren*, Judge Edwards found that there was no international consensus condemning terrorist activity as a violation of the law of nations. It seems unlikely that a case such as *Tel Oren* would be decided the same way given the numerous domestic initiatives in response to new forms of terrorism and several international agreements condemning terrorist activities. Judge Edwards failed to capture an opportunity for federal courts to respond to the ever increasing problem of terrorism. Doubt was also expressed as to whether non-state actors could be liable under the ATCA. Although it is often difficult to trace terrorist activity to specific nations, the ruling in *Kadic v. Karadzic* that certain offenses require no state involvement will likely render this a moot point.

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97 726 F.2d 774 (D.C. Cir. 1984) (involving survivors and representatives of persons murdered in armed attack on civilian bus in Israel bringing suit against defendants for compensatory and punitive damages for alleged violations of law of nations, treaties of United States and criminal laws of United States).

98 *Id.* at 795 (noting split among nations as to what constitutes terrorists acts by citing G.A. Res. 3103, U.N. GAOR, Supp. No. 28 at 512, U.N. Doc. A/9102 (1973) defining terrorism in terms of actions relating to "colonial and alien domination").


100 *See, e.g.*, Tokyo Convention, *supra* note 88 (protecting those aboard commercial aircraft); Hijacking Convention, *supra* note 88 (condemning increased frequency of terrorist attack of civilian aircraft); Convention, Internationally Protected Persons, *supra* note 88 (combating targeting of diplomats to engender greater international cooperation); Montreal Convention, *supra* note 88 (dealing with safety concerns relating to terrorist targeting of commercial aircraft).

101 *See United States, Department of State, Patterns of Global Terrorism: 1989* (1990). The State Department believed that from 1968-1989 there were 10,914 international terrorist incidents and the trends indicate an increase in such activity. *Id.; see also* Jeffrey Sam Ross, *The Nature of Contemporary International Terrorism*, in *Democratic Responses to International Terrorism* 17, 27 (David A. Charles ed., 1991). The author points out that there were 125 terrorist attacks in 1968 and 855 in 1988. *Id.*

102 *See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 793-794 (D.C. Cir. 1984)* (finding lack of international condemnation of terrorism).

103 *Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1996)*. The court found that Karadzic could be found liable in his private capacity for genocide, war crimes, and crimes against humanity. *Id.; see also Chadwick, supra* note 72, at 107. Instigators of terrorist violence can be individuals, a group, or a government. *Id.; Ronald D. Crelinsten, Terrorism and the Media: Problems, Solutions, and Counterproblems*, in *Democratic Responses to International Terrorism*, *supra* note 101, at 257. Terrorists include both non-state actors and state actors fighting for interests of the state. *Id.*
III. THE INTERNATIONAL COMMUNITY MUST COLLECTIVELY CONDEMN TERRORISM

While the notion that terrorism should be covered under universal jurisdiction has strong support, this position has not been broadly accepted because of the lack of a universal definition for terrorism. Terrorism is ultimately an all-encompassing term used to describe acts routinely condemned under universal law principles, yet as a whole, it is not a violation of the law of nations because nations differ as to what constitutes legitimate use of aggression. If universal jurisdiction could be established for acts of terrorism, all states would have the power to prosecute terrorists and hold the organization liable.

The need to adequately define terrorism is very important, but often difficult. For instance, under some existing definitions of

104 See Randall, supra note 48, at 527 (discussing terming of act as violation of international law); Re, supra note 87, at 1098 (discussing Supreme Court's recognition of violations of law of nations).
106 See Douglas Kash, Abductions of Terrorists in International Airspace and on the High Seas, 8 FLA. J. INT'L L. 65, 82 (1993) (finding that political nature of terrorist acts often allow interpretation as legitimate protest); see also Captain Bruce T. Smith, Assertion of Adjudicatory Jurisdiction By United States Courts Over International Terrorism Cases, 1991-Oct ARMY LAW. 13, 19 (asserting that for certain offenses like aircraft piracy and hostage taking, there is widely held belief that universal jurisdiction applies). See generally Philip B. Heymann & Ian Heath Gershengorn, Pursuing Justice, Respecting the Law, 3 CRIM. L.F. 1, 15 (1991) (noting that aircraft piracy and hostage taking are universally condemned, regardless of causes sought to be furthered).
107 See William H. Bogar, International Cooperation in the Prevention and Suppression of Terrorism, 80 AM. SOC'Y INT'L L. PROC. 386, 397-98 (1986). The author espouses using universal jurisdiction over terrorism in an effort to ensure the likelihood of an offender's prosecution. Id.; see also Eric S. Kobrick, The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes, 87 COLUM. L. REV. 1515, 1538 (1987). Here an argument is made that the ex post facto prohibition in the Constitution should not apply to crimes in which universal jurisdiction could be applied. Id. But see Ileana M. Porras, On Terrorism: Reflections on Violence and the Outlaw, 1994 UTAH L. REV. 119, 146. The danger of making terrorism a universal offense without a consistent definition is that one nation can subject a citizen of another nation to its will under a cloak of universality. Id.
108 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt.a (1987). It is noted that while there has been widespread condemnation of terrorism, international agreements to punish these offenses were not widely adhered to because of a failure to agree on an adequate definition of the offense. Id.; James C. Duncan USMC, Battling Aerial Terrorism and Compensating the Victims, 39 NAVAL L. REV. 241,
terrorism, the American Revolution, the Gulf War and the United States involvement in attempts to remove Fidel Castro from power in Cuba could all be considered terrorist acts. With this in mind, differing views on how best to define terrorism so that the terrorists may be brought to justice have emerged.

One school of thought espouses a single unambiguous standard which incorporates the principles of just means and just cause in defining terrorist activity. The thrust of this argument is that whatever form an insurgency takes, the critical elements are whether or not the activity had sufficient justification and, if so, whether the means to carry it out were legitimate. It is asserted that it would be difficult to find support in the international community for an illegitimate insurgency or even a valid one effectuated through the use of violence against innocent civilian targets.

242 (1990). The problems defining terrorism stem from disagreements over what acts constitute terrorism, the manner of identifying the involvement of foreign governments and the conflict with legitimate self-determination movements. Id. See generally George Baxter, A Skeptical Look at the Concept of Terrorism, 7 Akron L. Rev. 380, 388 (1974). The author notes that present definitions of terrorism are imprecise, ambiguous and serve no operative legal purpose. Id.


See Geneva Convention, supra note 75, art. III. This portion of the agreement imposes a just means requirement for non-state actors. Id.; Ad Hoc Committee on International Terrorism, supra note 94, at 1. Here it is noted that an insurgent group must justify their actions under international law. Id.; Margot Kidder, Unmasking Terrorism: The Fear of Fear Itself, in VIOLENCE AND TERRORISM 14 (B. Schechterman & M. Slann eds., 3d ed. 1993). This book provides definitions of terrorism by the departments of defense, justice and state, in addition to the Federal Bureau of Investigation. Id.; see also DAVID A. CHAR- TERS, DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM 14-16 (1991). It is argued here that in a definition of terrorism, it is important to explain what terrorism is not, namely guerrilla warfare. Id.; see also Elizabeth R.P. Bowen, Comment, Jurisdiction Over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence Against United States Citizens, 2 Am. U. J. Int’l L. & Pol’y 153, 174 (1987). The failure on the part of the international community to agree on one definition for terrorism is explained herein. Id.

See The Legal Meaning Of Terrorism, supra note 109, at 6 (asserting that “just cause” and “just means” can distinguish permissible from impermissible insurgencies under international law); see also Liam G.B. Murphy, A Proposal on International Legal Responses to Terrorism, 2 Touro J. Transnat’l L. 67, 79 (1991) (providing model definition of terrorism to encompass all illegitimate acts); David Turndorf, Note, The U.S. Raid on Libya: A Forceful Response to Terrorism, 14 Brook. J. Int’l L. 187, 195 (1998) (arguing that United Nations definition of terrorism does not take into account nature of act committed and reason behind it).
There are others who urge that a definition must incorporate specific terrorist acts.\textsuperscript{112} They argue that vague definitions of terrorism perpetuate the failure to mold international law to insure the effective administration of justice.\textsuperscript{113} This approach to defining terrorism seeks to include the condemned activities while also providing for any new forms of terrorism that may emerge.\textsuperscript{114} This approach provides a more rigid mechanism for enforcing claims against terrorists because it removes the ambiguities inherent in a general approach.\textsuperscript{115} It is asserted that this method of defining terrorism is important when comparing terrorism with war crimes because of the specific acts the two activities share in common. The torts of wrongful death, false imprisonment, assault and bat-

\textsuperscript{112} See Bogar, \textit{supra} note 107, at 397 (arguing for broad definitional framework encompassing specific acts of terrorism).

\textsuperscript{113} See Duncan, \textit{supra} note 108, at 244. The author explains that the problem with many contemporary definitions of terrorism is that it fails to account for innovations terrorists may make. \textit{Id.}; Thomas H. Mitchell, \textit{Defining The Problem, in DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, supra note 101, at 14. It is suggested that "a definition of terrorism must take into account the constantly changing nature of tactics, targets and strategies, as well as the impact of technological innovations." \textit{Id}; Bogar, \textit{supra} note 107, at 397. The author believes in a broad definitional framework encompassing all acts of international terrorism regardless of where it takes place or who perpetrates it. \textit{Id.} It is argued that only when there is this large scale commitment can terrorism effectively be combated. \textit{Id.}


\textsuperscript{115} See 18 U.S.C. § 3077 (1996). There, terrorism is described as: an activity that involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any state or that would be a violation if committed within the jurisdiction of the United States or of any state; and appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. \textit{Id.; see also Duncan, supra note 108, at 244-45. The author argues that these types of definitions do not unambiguously state what types of acts are to be considered terrorist. \textit{Id. But see Murphy, supra note 111, at 67. Using a more general definition of terrorism will allow more acts to fall within the definition and allow them to be punished by many different countries. \textit{Id. See generally Terry Richard Kane, Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold, 12 \textsc{Yale} J. INT'L L. 294, 340 (1987). International terrorists are using more sophisticated means of attack. \textit{Id. There is an exponential increase in the terrorist threat as long as technology yields readily accessible and sophisticated weaponry. \textit{Id. A terrorist's arsenal can contain precision-guided weapons and anti-tank rockets, weapons which have the capability of destroying a commercial airliner. \textit{Id.}}
Terror are inherent in both war crimes and terrorism and should be part of the definition.\textsuperscript{116}

It is asserted that in order to account for the changing nature of terrorist activity a combination of the two approaches is needed. The definition of terrorism, it is submitted, must include the specific activities that encompass terrorist acts and bring the commission of terrorism under the law of nations. The illegitimate means of targeting civilians and the illegitimate causes of an insurgent group attempting to coerce democratic governments is primary in such a definition.

The need to adequately define terrorism for purposes of its acceptance as a tort in violation of the law of nations is essential, but there must also be a corresponding international condemnation of these activities.\textsuperscript{117} The need for the international community to combat terrorism often conflicts with the need to try to create peace between terrorist organizations and their targets.\textsuperscript{118} For instance, the American government had a strong interest in the agreement brokered by it between the Palestine Liberation Organization, one of the world's most prolific terrorist organizations,

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\item \textsuperscript{117} See R.I.K. Abeyratne, The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order, 22 TRANSPI. L.J. 449, 450 (1995). Terrorist threats to civil aviation have become a principal area of concern in the world community. Id. \textit{v.} see also Louis Rene Beres, On International Law and Nuclear Terrorism, 24 GA. J. INT'L & COMP. L. 1, 20 (1994). "Like-minded governments must create special patterns of international cooperation" against those countries which act as a base for terrorists. Id. \textit{See generally} Duncan, \textsuperscript{ supra} note 108, at 246-251. The author describes past attempts at cooperation among nations. Id.
\item \textsuperscript{118} See Kevin J. Greene, Terrorism as Impermissible Political Violence: An International Law Framework, 16 VT. L. REV. 461, 462-63 (1992) (arguing that international community's failure to decide on definition creates confusion about which groups can be considered terrorists); see also Michael N. Schmitt, State-Sponsored Assassination in International and Domestic Law, 17 YALE J. INT'L L. 609, 643 (1992) (explaining different response to terrorism according to type of terrorist act committed); David Aaron Schwartz, Note, International Terrorism and Islamic Law, 29 COLUM. J. TRANSNAT'L L. 629, 629 (1991) (noting different treatment of terrorism between Western nations and rest of world).
\end{itemize}
and Israel for political and humanitarian reasons. This cooperation with the PLO gives the impression that the United States recognizes the legitimacy of this organization's practices which gives validity to terrorism as a means of effectuating political change. So whereas agreements of this sort are helpful initially through temporary cessation of hostilities, they are not conducive to fighting terrorist activities internationally and are contrary to the goal of compensating the victims.

In addition to American policies regarding terrorists, there must be effective and consistent responses by the international community. The United States establishes economic policies partly to exert pressure on countries to offer incentives against terrorism. Other countries need to take similar steps by developing domestic laws which condemn terrorist practices. With international unity condemning terrorism, the momentum will be

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121 See Quinn v. Robinson, 783 F.2d 776, 802 (9th Cir. 1986) (declaring that United States policy differs depending on whether act was committed inside or outside of offender’s homeland); see also Richard Allan, Terrorism, Extradition and International Sanctions, 3 ALB. L.J. SCI. & TECH. 327, 335-37 (1993) (suggesting need for consistent response to terrorism among international community); Ayaz R. Shaikh, Note, A Theoretic Approach to Transnational Terrorism, 80 GEO. L.J. 2131, 2157 (1992) (pointing out need for international cooperation when nations implement counter-terrorist strategies to reinforce policies of deterrence).


established to make terrorism an activity comparable to war crimes.\textsuperscript{124} It must be understood that terrorism is at odds with democracy and it is incongruous that countries with democratic values and constitutional protections would tolerate the coercion that terrorist groups seek to assert on those democratic processes.\textsuperscript{125}

**Conclusion**

When conduct is universally condemned, the perpetrators of such conduct are subject to the principles of universal jurisdiction which allow courts to prosecute offenders regardless of the situs of the event or the nationality of the parties. All states should have jurisdiction because the perpetrator is an enemy of all mankind. International law has traditionally limited this category of offenses to the most heinous of crimes in an effort to prevent nations from subjecting their arbitrary rules on foreign nationals. The law of nations is the doctrine encompassing these violations. Courts look to the scope of the international community's collective condemnation and the work of jurists on the subject in making a determination of whether an activity violates the law of nations. Recent developments also indicate that private individuals as well as states can violate the law of nations.

The law of nations has recently been expanded to include war crimes. This inclusion is in response to international condemnation of the war criminal. With war crimes, numerous international agreements condemning war criminals existed. While war crimes are not new, the collective condemnation of them has increased to the extent that they are now universally condemned.

The District of Columbia Circuit Court had an opportunity in 1984 to extend universal jurisdiction to defendants accused of acts of terrorism in *Tel-Oren*. Three separate opinions were filed con-

\textsuperscript{124} See Von Dardel v. Union Of Soviet Socialist Republics, 623 F. Supp. 246, 265 (D.D.C. 1985). The court held that the seizure and detention of a diplomat violated the law of nations. *Id.*; Blum & Steinhardt, *supra* note 3, at 96. The basis of international agreements imposing liability on terrorists are torture, summary execution and the taking of diplomatic personnel as hostages. *Id.*

\textsuperscript{125} See Duncan, *supra* note 108, at 242. The author notes that terrorism "flies in the face of essential human rights principles by endangering the safety, property, and freedom of innocent individuals who have little or no connection with the grievance sought to be redressed." *Id.*; Jurisprudential and Definitional Clarifications, *supra* note 109, at 248-49. The author notes that fighting terrorism is within the United States' "incontrovertible norms and traditions." *Id.*
curring that the law of nations should not be extended to include terrorism. The court failed to recognize the evolving nature of the law of nations to encompass terrorism as a violation of the law of nations. It had evidence of universal condemnation, increasing amounts of attacks, and victims whose lives were shattered from a terrorist attack. Judge Edwards recognized the need for the Supreme Court to take *certiori* on the issue but it was denied. As a result, we are left with uncertainty in the federal courts as to whether terrorism is a violation of the law of nations.

In recent years, the United States has been victim to a series of acts of domestic terrorists. Now that terrorism has hit the United States with much greater frequency, a decision like the one in *Tel-Oren* might be decided differently. In the meantime, the international community must work to establish a uniform definition of terrorism to give further force to its universal condemnation of the crimes terrorists commit.

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