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Maria T. Vullo

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# Prosecuting Genocide

Maria T. Vullo\*

The arrest of Slobodan Milosevic and his eventual trial before the International Criminal Tribunal for the Former Yugoslavia ("ICTY") certainly is a good thing for humankind. So too is the recent conviction of Bosnian Serb General Radislav Krstic for committing genocide in Srebrenica. But we cannot accept these few events as the full response to what happened in Bosnia-Herzegovina. No efforts to prosecute a few "soldiers" will be truly meaningful until the international community calls what happened genocide and compensates the many victims of the genocide for the injuries caused by the despicable Serbian policy of "ethnic cleansing."

I had the great privilege of representing women survivors of the genocide in Bosnia-Herzegovina. With my co-counsel, Professor Catharine A. MacKinnon, we prosecuted claims of sexual assault and other human rights abuses under the Alien Tort Claims Act<sup>1</sup> and the Torture Victim Protection Act<sup>2</sup> ("TVPA") against Radovan Karadzic, the once self-proclaimed leader of the Republic of Srpska. In August 2000, our clients courageously testified in a federal courtroom in New York and held Karadzic civilly responsible for their injuries. Now Karadzic must also be brought to the ICTY for his long-awaited criminal trial on genocide charges.

## I. BACKGROUND: THE *KADIC V KARADŽIĆ* LAWSUIT

In 1993, with the assistance of the United States District Court and the Secret Service, Radovan Karadzic was served personally in New York with a summons and complaint, charging him with crimes against humanity and genocide under the Alien

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\* Partner, Paul, Weiss, Rifkind, Wharton & Garrison. This piece is dedicated to the courageous women who spoke out about sexual assault and genocide in Bosnia-Herzegovina and whom I am proud to call my clients. My heartfelt thanks to Professor Catharine A. MacKinnon, whose determination made this case happen and with whom I was privileged to litigate the case through pretrial proceedings and trial. I also could not have done this case without my two wonderful colleagues at the firm, Liza Velazquez and Eric Block, and the support of my partners.

1. 28 USC § 1350 (1994) (codifying the Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73, 77 (1789)) (The Alien Tort Claims Act was passed in 1789 by the very first US Congress).
2. Torture Victim Protection Act, Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC § 1350 note (1994).

Tort Claims Act and the TVPA. Karadzic quickly retained counsel, who vigorously represented him throughout the case.<sup>3</sup> Karadzic unsuccessfully challenged the lawsuit on jurisdictional grounds. In 1995, the Second Circuit Court of Appeals ruled in favor of our clients, holding that a United States District Court had both subject matter and personal jurisdiction, that no other jurisdiction was practically available to try our clients' claims, and that Karadzic was properly served with process while in New York. The US Supreme Court declined to hear Karadzic's case.<sup>4</sup>

Upon remand from the Second Circuit, we promptly commenced discovery proceedings. After months during which Karadzic provided only self-serving and legally inadequate discovery responses, and failed to attend his deposition, the court issued an order compelling Karadzic to respond fully to our written discovery requests and directing Karadzic to apply for the authorizations necessary to enter the United States for his deposition. Just days before the deadline set by the court for Karadzic to comply with its order, Karadzic and his counsel wrote separate letters to the court announcing Karadzic's "carefully considered" decision that he would no longer participate in the proceedings. Like Milosevic, Karadzic—in his own words and by his own hand in a letter to the court—defiantly refused to accept the authority of a legitimate court to hear his victims' claims.

Thus, we moved for entry of a default on liability, as a sanction for Karadzic's willful and longstanding non-compliance with his discovery obligations. On June 13, 2000, the court granted our motion in its entirety. The court's entry of default conclusively established the truth of the facts pleaded in our complaint, the sufficiency of such facts to merit relief, that Karadzic caused our clients' injuries, and that Karadzic is fully liable to our clients on each of their claims.<sup>5</sup> Given Karadzic's default, we were not required to present a single shred of evidence showing that Karadzic was legally responsible for our clients' injuries. We could have foregone a live trial entirely and simply submitted documentary evidence of our clients' damages to the court. But that option would have given Karadzic the benefit of his own defiance.

Indeed, our clients felt strongly that any victory achieved by virtue of a private exchange of court papers was wholly insufficient, given Karadzic's clear, direct, and unmitigated responsibility for their injuries. A legal victory without a trial and full demonstration of Karadzic's guilt could not do justice to our clients' rights, and would only have left unanswered questions. Our clients believed that a public jury trial—in

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3. Karadzic's legal counsel were Ramsey Clark and Lawrence Schilling.

4. *Kadic v Karadžić*, 70 F3d 232 (2d Cir 1995), cert denied, 518 US 1005 (1996).

5. Where "the court determines that defendant is in default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." *Chen v Jenna Lane, Inc*, 30 F Supp 2d 622, 623 (SDNY 1998) (internal citation omitted). See also *Bambu Sales, Inc v Ozak Trading, Inc*, 58 F3d 849, 854 (2d Cir 1995); *Trans World Airlines, Inc v Hughes*, 449 F2d 51, 69 (2d Cir 1971).

which proof of Karadzic's legal responsibility for the genocidal atrocities in Bosnia-Herzegovina was openly aired before the world—would bring some measure of peace.

So, even without Karadzic's live testimony and documents, we set out to link Karadzic to the perpetrators who had raped and tortured our clients. And we did so, through the detailed testimony of our clients and other key material and expert witnesses, as well as video footage of Karadzic himself.

## II. THE TRIAL

Trial commenced on July 31, 2000. Jury selection took the better part of a day, and we seated nine jurors. Our clients traveled from far away places to attend the trial and testify on behalf of themselves and their family members who were the innocent victims of Karadzic's genocide. They were assisted by interpreters both inside and outside the courtroom, and displayed tremendous determination throughout the month they spent with us in New York. It certainly was not easy to prepare our clients for the kind of testimony they would present. What happened to these women is beyond the comprehension of ordinary thought. The natural human reaction to hearing our clients' testimony was to hope that what they said did not actually happen. But it *did* happen—and it is imperative that the world know the true facts no matter how horrific they might be. Listening to the testimony of these women, eight years after the events in question, was difficult enough. I can only imagine how they must have experienced it personally. It was their inalienable right to testify about the indefensible acts committed upon them.

Our clients testified to the graphic details of the attacks upon them and the statements made by their persecutors in the course of this torture. Although our clients had been injured in different locations and in different ways, a common universe of details emerged that linked all of the perpetrators to Karadzic—proving, beyond a shadow of a doubt, that the horrors that each plaintiff had endured were all part of Karadzic's genocidal policies.

The statements of the soldiers who had lined our clients up on the highways outside their homes to forcibly march them to camps, who detained them in holding cells and prison vans, and who physically, sexually, and mentally assaulted them in camps were fully admissible as statements of Karadzic's agents. Using principles of command responsibility, we argued that all of these statements were admissible as admissions by a party-opponent under Federal Rule of Evidence 801(d)(2)(D). The out-of-court statements of these perpetrators concerned matters directly within the scope of the military and political authority granted to them by Karadzic, and the statements clearly were made during the existence of that agency relationship. The court agreed with our position and admitted the statements. Those statements linked Karadzic directly to the events that led to our clients' injuries.

We also presented testimony of several fact witnesses, including Ed Vuillamy, a journalist who interviewed Karadzic and visited the Omarska concentration camp

where several of our clients were held. We presented the powerful live testimony of medical experts who spoke about the trauma of concentration camp survivors and sexual assault victims, as well as the testimony of Professor M. Cherif Bassiouni, who was the Chairperson of the United Nations study on genocide in the former Yugoslavia.<sup>6</sup> All of this evidence both linked Karadzic to his victims and demonstrated the extent and lasting nature of the plaintiffs' injuries.

Although Karadzic chose to absent himself from the proceedings, we refused to allow the jury to forget his presence. During my opening statement, I placed a photograph of Karadzic on the defendant's chair in the courtroom, which remained there throughout the trial. And the evidence of his guilt filled the courtroom. At every step, Karadzic's counsel was given the opportunity to present evidence, but on his client's orders, he declined.

Karadzic was both the President of the Serbian Democratic Party and the President of the Republic of Srpska—and, thus, the leader of the Serbian forces who committed the brutalities upon our clients. He sought to accomplish his goal of "ethnic cleansing" by taking over all military and civilian police forces and by ordering those forces to locate all non-Serbs living in Bosnia-Herzegovina and then to expel them from their homeland. Karadzic established concentration camps for the torture and elimination of non-Serbs. With respect to women in particular, Karadzic's commanders, soldiers, guards, and policemen carried out brutal and systematic rapes and other forms of mental and physical torture. The effort to eliminate non-Serbian men and rape non-Serbian women in order to propagate the Serbian race was genocide.

In 1992, for example, when journalists were asking questions about the Omarska concentration camp, Karadzic promised them that they would go to Omarska and see it for themselves. But what they did not know at the time—and what Karadzic did not tell them—was that before the journalists arrived, the camp was cleaned up and the women who were there were suddenly moved to a different camp. Karadzic ordered their removal because he knew that if the world learned that women were being held there, no one could possibly believe his propaganda that these were not concentration camps but were merely "collection centers" for prisoners of war. The internees were not prisoners of war—they were neither in the military nor fighting anyone. And Karadzic's statements about Omarska, and his subordinates' actions in carrying out his plan to remove the women from Omarska, prove beyond any doubt that he ordered their rapes in the first place. Under the doctrine of command responsibility, Radovan Karadzic was directly responsible for every Serbian soldier who committed those acts.

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6. See Security Council Res No 780, UN Doc S/Res/780 (1992).

Certainly, the idea that a military or political leader has the responsibility to protect the civilian population from violations of international law committed by his subordinates is not a new concept. In the landmark case of *In re Yamashita*,<sup>7</sup> a commander of the Japanese armed forces in the Philippine Islands during World War II was held legally responsible for atrocities committed by troops under his command pursuant to the doctrine of command responsibility. In *Yamashita*, the US Supreme Court held that a military commander had “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”<sup>8</sup> Karadzic, as the head of the Serbian Democratic Party, the self-proclaimed President of the Republic of Srpska, and official leader of the Republic’s military forces, had this very same duty.

Moreover, in enacting the TPVA in 1992—now a part of the Alien Tort Claims Act—Congress expressly endorsed the application of the command responsibility doctrine to claims of international law violations brought by non-US nationals. As the Senate Committee Report accompanying the passage of the Act explained:

[A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

Since the enactment of the TVPA, courts around the country have rightly utilized the command responsibility doctrine to hold senior political and military officials liable for international law violations committed by their subordinates.<sup>10</sup>

Most significantly, the evidence we introduced at trial showed that this was genocide—one orchestrated by a group of people led by Radovan Karadzic who did not want any other ethnic group to remain in their country. And this genocide was carried out by rape, torture, summary execution, beatings, and humiliation. Karadzic sought to ensure that Bosnian Croats and Muslims would have no home to which they could return, no family with whom to take comfort, and no political, social, or military organizations to support and protect them if they somehow were to survive his brutality. What Radovan Karadzic tried to do to his victims was to strip them of

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7. 327 US 1 (1946).

8. *Id.* at 16.

9. The Torture Victim Protection Act of 1991, S Rep No 102-249, 102d Cong, 1st Sess 9 (1991).

10. See *Hilao v Estate of Marcos*, 103 F3d 767, 776–78 (9th Cir 1996) (former Philippine president Ferdinand Marcos held liable for human rights abuses committed by military personnel under his command); *Paul v Avril*, 901 F Supp 330, 335 (SD Fla 1994) (former military ruler of Haiti “bears personal responsibility for a systematic pattern of egregious human rights abuses in Haiti during his military rule”); *Xuncax v Gramajo*, 886 F Supp 162, 172 (D Mass 1995) (plaintiffs successfully demonstrated that Hector Gramajo, formerly Guatemala’s Minister of Defense, “was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths”).

their ethnicity, their nationality, their religion, their equality, and their identity. In so doing, Karadzic presumed that by raping the women in Bosnia, these women would have no recourse for what was so wrongfully done to them in the event they had the courage to speak out. He was wrong.

### III. THE VERDICT AND THE FUTURE

The very first United States Congress, when it passed the Alien Tort Claims Act over two hundred years ago, correctly decided that America should not be a safe haven for individuals such as Radovan Karadzic who commit heinous acts and in doing so deprive their victims of all forms of legal redress in their own homeland. Thus, on August 10, 2000, a jury held Radovan Karadzic civilly responsible for taking our clients out of their homes, for sending them to Serbian-run places of torture, for looting and destroying their homes, for humiliating and destroying their identities by rape and other forms of sexual torture, and for making it impossible for them to return home. These acts are genocide, and the jury so found. Karadzic's actions were based on hatred and prejudice, and it is the very opposite values that lie at the core of a society that respects the human rights and dignity of all people—a society that our clients simply want back for them and for future generations.

Of course, money cannot give these women their lives back—and it cannot bring back their loved ones, their good memories, or their identities. But our clients had the absolute right to seek full compensation for their injuries—despite the fact that money damages do not constitute a complete or adequate remedy for the harm they have suffered. These women were once lawyers and judges, dentists and store owners. They once had their entire families together in one location, where they lived happy, ordinary lives. They once had their religious observances, in a town that tolerated diversity of religion and ethnicity. They once were able to sleep at night, throughout the night, to dream of the future, for themselves and their children. Yet even though they lost so much, they did not lose the ability or courage to speak out.

Certainly, Radovan Karadzic did not succeed in silencing these women. In that courtroom, our clients maintained their composure, they maintained their integrity, they maintained their equality, and they maintained their self-respect. Our clients pursued this lawsuit because of their faith in the ability of ordinary jurors to conclude that Radovan Karadzic was responsible for their injuries and must be held accountable in some significant way. They were absolutely right.

Make no mistake about it, no one believes that any amount of money—even a fully collectible \$745 million judgment—could ever compensate these women for what was done to them. But our clients were given the opportunity to exercise their right to tell their stories, albeit in painful detail, in a courtroom where the legal process is respected—at least by everyone other than the absent Radovan Karadzic. To have not spoken out in this lawsuit would have been to re-inflict the injuries upon these women over and over again. I refused to be a part of the silence.

Those who criticize the Alien Tort Claims Act fail to recognize that providing a forum for the legal redress of injuries is a fundamental human right. In the *Kadic v Karadzic* case, this most basic of human rights was respected when a jury of ordinary citizens was given the power to hold Karadzic responsible for human rights abuses and to send a message to the world that we cannot allow this *ever* to happen again—*anywhere* in the world. The jury has spoken—eloquently so—and justice thereby has been served.

But the world is far from done with this horrific episode of history. While the \$745 million civil verdict and injunction against Karadzic truly are significant victories, we cannot allow Radovan Karadzic—and his many “soldiers” who participated in this genocide—to escape criminal justice any longer. Like Slobodan Milosevic, Radovan Karadzic—and everyone else responsible for this genocide—must be arrested and brought to a criminal trial immediately. And when Karadzic is again brought to justice, I will again watch in awe as my clients testify at his trial.



