Suing Karadžić

Keywords: Bosnia-Herzegovina; human rights; immunity; jurisdiction; United States.

1. INTRODUCTION

On 17 June 1996, the United States Supreme Court denied a petition for certiorari[1] submitted by counsel for Radovan Karadžić, the infamous Bosnian-Serb leader indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) for various international crimes.[2] Thus, the Court let the decision of the US Court of Appeals for the Second Circuit in the companion cases of *Kadić* v. *Karadžić* and *Doe I and Doe II* v. *Karadžić*,[3] stand. The latter was a set of cases brought by Croat and Muslim citizens of Bosnia-Herzegovina in the US courts against Radovan Karadžić after he was duly served process while in New York. The cases will now proceed, however slowly, with a trial on the merits, addressing the plaintiffs' claims concerning Karadžić's responsibility for acts of genocide; war crimes; torture; summary execution; related crimes against humanity; acts of rape;[4] forced prostitution; forced impregnation; other cruel, inhumane, and degrading treatment; assault and battery; sexual and ethnic inequality; and wrongful death.[5] As remedies, the plaintiffs seek compensatory and punitive damages, attorney fees and, in one instance, injunctive

1. 64 USLW 3837 (US 1996).
2. *See, e.g.*, J.J. Paust, M.C. Bassiouni, S.A. Williams, M. Scharf, J. Gurule, & B. Zagaris, International Criminal Law: Cases and Materials 61-73 (1996).
3. 70 F.3d 232 (2d Cir. 1995).
4. For support for the proposition that rape can constitute a war crime, *see, e.g.*, Paust *et al.*, *supra* note 2, at 24, 247, 760-761, 817, 1012, 1016, 1020-1021. Concerning rape as a crime against humanity, *see, e.g., id.*, at 64-65, 708, 744, 765, 774, 830, 1031, 1034, 1076-1077, 1080. Concerning rape and genocide, *see, e.g., id.*, at 64-65, 1083, 1095.
5. *See* Kadić *v.* Karadžić, *supra* note 3, at 236-237. The court ruled that Karadžić "may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a State actor, and that he is not immune from service of process," as well as the fact that for purposes of appeal on questions of jurisdiction, the court accepts as true the allegations of plaintiffs "that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war." Of course, many of these categories of illegality are interconnected. *Id.*

Leiden Journal of International Law 10: 91-98, 1997.

relief.[6]

2. USE OF US STATUTES INCORPORATING INTERNATIONAL LAW

Although customary and treaty-based international laws provide the relevant legal standards concerning Karadžić's responsibility, treaty law is being used primarily to supplement proof of customary international law.[7] Customary law is not being used directly in these cases, but indirectly in order to demonstrate the content of law incorporated by reference in US federal statutes that provide the direct bases for plaintiffs' lawsuits. Thus, although treaties[8] and customary international law[9] have been incorporated directly in the United States to support private claims, the plaintiffs in the suits against Karadžić rest their claims on relevant statutes. Use of the statutes has the added advantage of avoiding questions concerning which treaties may or may not be 'self-executing' domestically[10] and, thus, directly operative in the United States, because the federal statutes execute any relevant non-self-executing treaties.[11]

2.1. Use of the Alien Tort Claims Act (ATCA)[12]

Two primary statutes under which the plaintiffs' sued were the ATCA and the Torture Victim Protection Act (TVPA).[13] The ATCA has been in existence in the United States since 1789 and had achieved early, precedential attention,[14] but significantly increased use of the ATCA has occurred since the landmark decision in *Filártiga* v. *Peña-Irala* in 1980.[15] The ATCA requires that the plaintiff be an alien, although the defendant

6. *Id.*, at 237. *See also* note 36, *infra.*
7. *Id.*, at 238, n. 1.
8. *See, e.g.*, J.J. Paust, International Law as Law of the United States 54-56, 58-59, 67-68, 70-74, 98-99, 143-46, 264-68, *passim* (1996).
9. *See, e.g., id.*, at 5-8, 32-50, 144-46, 264-68, *passim.*
10. On 'self' and 'non-self-executing' treaties in the US, *see, e.g., id.*, at 51-79, *passim.*
11. *See, e.g., id.*, at 207, 282, 371-372.
12. 28 USC § 1350.
13. Pub. Law No. 102-256, 106 Stat. 73 (1992), codified at 28 USC § 1350 (Supp. V 1993).
14. *See* Bolchos *v.* Darrel, 3 F. Cas. 810 (DSC 1795) (No. 1,607); 1 Op. Att'y Gen. 57, 58-59 (1795). *See also* Paust, *supra* note 8, at 207; J.J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Houston Journal of International Law 81, 84-85 (1981).
15. 630 F.2d 876 (2d Cir. 1980).

can be a US[16] or foreign[17] perpetrator of a private[18] or public[19] character. It provides that an alien can sue for what we term a "tort" or "wrong"[20] "in violation of the law of nations or a treaty of the United States."[21] Thus, the ATCA incorporates any relevant customary and treaty-based international law by reference.[22] With respect to the ATCA, the Second Circuit followed what is now a long line of decisions recognizing that the Statute is more than a jurisdictional statute, in that it also creates a cause of action concerning violations of international law.[23]

2.2. Use of the TVPA

In partial contrast, the TVPA allows US or alien plaintiffs to sue, but merely for "torture" or "extrajudicial killing," as defined in the statute. International law is not directly tied to the definitions, but the preamble to

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16. *See, e.g.*, Bolchos *v.* Darrel, *supra* note 14; 26 Op. Att'y Gen. 250 (1907); 1 Op. Att'y Gen. 57 (1795).
17. *See, e.g.*, Abebe-Jira *v.* Negewo, 72 F.3d 844 (11th Cir. 1996); Kadić *v.* Karadžić, *supra* note 3, at 243-245; Hilao *v.* Estate of Marcos (*In re* Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467 (9th Cir. 1994); Amerada Hess Shipping Corp. *v.* Argentine Republic, 830 F.2d 421 (2d Cir. 1987); Filártiga *v.* Peña-Irala, *supra* note 15; Mushikiwabo *v.* Barayagwiza, US Dist. Lexis 4409 (SDNY 1996); Xuncax *v.* Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paul *v.* Avril, 812 F. Supp. 207 (SD Fla. 1993); Forti *v.* Suarez-Mason, 672 F. Supp. 1531 (ND Cal. 1987); Adra *v.* Clift, 195 F. Supp. 857, 865 (D. Md. 1961).
18. *See, e.g.*, Mushikiwabo *v.* Barayagwiza, *supra* note 17; Kadić *v.* Karadžić, *supra* note 3, at 237-243; Adra *v.* Clift, *supra* note 17; cases and opinions cited at note 16, *supra*. *See also* Argentine Republic *v.* Amerada Hess Shipping Corp., 488 US 428, at 438 (1989) (Rehnquist, C.J.); Linder *v.* Portocarrero, 963 F.2d 332, at 336-337 (11th Cir. 1992) (The Contras); Klinghoffer *v.* SNC Achille Lauro, 937 F.2d 44 (2d Cir. 1991) (The PLO); Sanchez-Espinoza *v.* Reagan, 770 F.2d 202, at 206 (DC Cir. 1985) (Scalia, J., dictum).
19. *See, e.g.*, cases cited at note 17, *supra*.
20. *See* Kadić *v.* Karadžić, supra note 3, at 238; Filártiga *v.* Peña-Irala, 577 F. Supp. 860, at 862 (EDNY 1984); Paust, *supra* note 8, at 207-208, 283-284; Paust, *supra* note 14, at 83-86, 91.
21. 28 USC § 1350.
22. On incorporation by reference, *see also* Paust, *supra* note 8, at 5, 33, n. 36; Filártiga *v.* Peña-Irala, *supra* note 15, at 880.
23. *See, e.g.*, Abebe-Jira *v.* Negewo, *supra* note 17, at 847-48; Hilao *v.* Estate of Marcos, *supra* note 17, at 1474-1475; Amerada Hess Shipping Corp. *v.* Argentine Republic, *supra* note 17, at 424-25; Tel-Oren *v.* Libyan Arab Republic, 726 F.2d 774, at 777-780 (DC Cir. 1984) (Edwards, J., concurring); Filártiga *v.* Peña-Irala, *supra* note 15, at 880-882, 884-885, 887; Xuncax *v.* Gramajo, *supra* note 17, at 179; Paul *v.* Avril, *supra* note 17, at 212; Forti *v.* Suarez-Mason, *supra* note 17, at 1539-1540; Guinto *v.* Marcos, 654 F. Supp. 276, at 279-280 (SD Cal. 1986); Handel *v.* Artukovic, 601 F. Supp. 1421, at 1426-1427 (CD Cal. 1985); 26 Op. Att'y Gen. 250, 252-253 (1907); 1 Op. Att'y Gen. 57, 58 (1795); Paust, *supra* note 8, at 206-207, 281-282, *passim*. *See also* Kadić *v.* Karadžić, *supra* note 3, at 236, 238. *But see* Tel-Oren *v.* Libyan Arab Republic, *supra*, at 798 (Bork, J., concurring).

the TVPA expressed a purpose "[t]o carry out obligations of the United States under the UN Charter and other international agreements pertaining to the protection of human rights by establishing a civil action" for covered infractions, thus demonstrating the relevance of international human rights law for interpretive purposes and an executing role for the legislation concerning any non-self-executing human rights treaties and the UN Charter.[24] Unlike the ATCA, the TVPA reaches only those perpetrators who act "under actual or apparent authority, or color of law, of any foreign nation."[25] The court in *Karadžić* recognized correctly that "apparent authority" and "color" are less than actual, official state authority or status.[26] The court also noted that even the category of "official" torture may likely require "merely the semblance of official authority" or the circumstance where one is "purporting to wield official power" even if "statehood in all its formal aspects" does not exist.[27] Further, "[a] private individual acts under color [...] when he acts together with state officials or with significant state aid."[28] Thus, the court recognized, plaintiffs "are entitled to prove their allegations that Karadžić acted under color of the law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid."[29] What the court did not mention was the fact that the word 'nation' is a term of art and is not the same as the word 'state'.[30] The express reach of the TVPA is therefore broader than even the court's language suggests. Moreover, the torture proscribed under human rights law is not limited to state actors, and can reach various private perpetrators.[31]

When identifying the content of international law incorporated by a federal statute, US courts must identify and clarify modern content as

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24. *See, e.g.*, Paust, *supra* note 8, at 372, 385; T.M. Franck & M.J. Glennon, Foreign Relations Law and National Security 166-167 (1993) (reproducing legislative history contained in Senate Report No. 249, 102d Cong., 1st Sess. 3 (1991)). When Congress implements international law, it need not refer to such law or to the fact of implementation. *See, e.g.*, United States *v.* Arjona, 120 US 479, at 488 (1887).
25. TVPA, *supra* note 13, Section 2(a).
26. *Supra* note 3, at 244-245. *See also* Mushikiwabo *v.* Barayagwiza, *supra* note 17.
27. *Supra* note 3, at 245.
28. *Id. See also* Mushikiwabo *v.* Barayagwiza, *supra* note 17.
29. *Supra* note 3, at 245.
30. *See, e.g.*, J. Brierly, The Law of Nations 118-119, 5th ed. (1955); Paust, *supra* note 8, at 11-12.
31. *See, e.g.*, J.J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harvard Human Rights Journal 51, 60-61 (1992), otherwise cited by the court in Kadić *v.* Karadžić, *supra* note 3, at 239.

opposed to a meaning extant at the time of enactment.[32] Indeed, more generally, US courts are to construe federal legislation consistently with international law,[33] and the judiciary has the competence and responsibility to identify and clarify international law in cases properly before the courts.[34] With respect to remedies, if not expressly restricted by statute,[35] our courts can utilize the entire panoply of remedies generally available domestically and internationally, including injunctive relief, compensatory damages, punitive damages, and other types of relief.[36]

3. UNIVERSAL JURISDICTION

Concerning the competence of US courts with respect to violations of customary international law covered expressly or indirectly by the ATCA or the TVPA, readers will recognize that jurisdiction under international law is clearly permissible under the universal principle, which allows jurisdictional competence in the United States (or any state) to prescribe legislation such as the ATCA and the TVPA to address violations of customary international law.[37] Moreover, enforcement jurisdiction in the United

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32. *See, e.g.,* Kadić *v.* Karadžić, *supra* note 3, at 238, citing Filártiga *v.* Peña-Irala, *supra* note 15, at 881, and Amerada Hess Shipping Corp. *v.* Argentine Republic, *supra* note 17, at 424-425; Tel-Oren *v.* Libyan Arab Republic, *supra* note 23, at 777 (Edwards, J.); Xuncax *v.* Gramajo, *supra* note 17, at 179, n. 18; Forti *v.* Suarez-Mason, *supra* note 17, at 1539.

33. *See, e.g.,* Restatement of the Foreign Relations Law of the United States, 3d ed. (1987), Section 114 & reporters' n. 2; Paust, *supra* note 8, at 34, 83, 99, 105, 107-108, 310; Paust *et al., supra* note 2, at 190.

34. *See, e.g.,* Paust, *supra* note 8, at 3-9, 19-29, 81, 87, 93, 100, 103, 107-109, 137-138, 140, 148-150, 161-163, 181, 191-193, 197, 200, 228, 244, 267-268, 279, 297, 309-310, *passim.*

35. *See, e.g.,* 18 USC § 2333 (civil remedies for US plaintiffs injured by acts of "international terrorism" include court costs and attorney fees, but punitive damages are restricted to recovery of only "threefold the damages").

36. *See, e.g.,* Paust, *supra* note 8, at 198-203, 212, 271-272, 292; Abebe-Jira *v.* Negewo, *supra* note 17, at 848; Kadić *v.* Karadžić, *supra* note 3, at 236, 240; Filártiga *v.* Peña-Irala, *supra* note 15, at 887; Mushikiwabo *v.* Barayagwiza, *supra* note 17; Xuncax *v.* Gramajo, *supra* note 17, at 179-183; Filártiga *v.* Peña-Irala, *supra* note 20, at 863-867; Paust *et al., supra* note 2, at 13, 53, 73, 102, 249-251, 801, 1021-1022, 1119-1120, 1239; T. Golden, *Argentina Settles Lawsuit by a Victim of Torture,* New York Times, 14 September 1996, at 6; J.J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking,* 31 Virginia Journal of International Law 351, 360-371, 378-379 (1991).

37. *See, e.g.,* Paust, *supra* note 8, at 392-393, 402-407, 410; *See* Restatement of the Foreign Relations Law of the United States, *supra* note 33, Section 404; Kadić *v.* Karadžić, *supra* note 3, at 236, 240 & n. 4; Xuncax *v.* Gramajo, *supra* note 17, at 183, n. 25; Paust, *supra* note 36, at 371-374. Of course, US courts are in effect enforcing international law, not merely US statutes.

States is permissible, at least once the defendant comes to the United States.[38] Universal jurisdiction over violations of international law also pertains, of course, even though there is no nexus with the forum (i.e., even though the parties are all foreign nationals and all conduct takes place abroad).[39] This is true whether or not the violations implicate customary or treaty-based international law. It should be noted, however, that although jurisdictional competence is universal with respect to violations of customary international law, if treaty proscriptions are not also customary, they are binding merely upon treaty signatories and their nationals (or possibly also aliens with a significant nexus to a signatory)[40] and the consensually based universal jurisdictional competence sometimes expressed in such treaties (which others call "universal by treaty"[41]) can only rightly reach such nationals and aliens.[42]

In this case, the plaintiffs' claims rest primarily on customary international rights and proscriptions over which there is universal jurisdiction.[43] Indeed, the claims recognizably implicate customary international law.[44] Further, virtually all relevant treaties had been ratified by the former Yugoslavia and reach persons like Karadžić.[45]

4. NON-IMMUNITY

In this case, Karadžić came to New York, where he was served process in a manner consistent with US domestic and international law, despite his

38. Concerning US enforcement powers outside the US, *e.g.*, to capture persons like Karadžić, *see also* Paust *et al.*, *supra* note 2, at 79, 489, 495.

39. *See, e.g.*, Kadić *v.* Karadžić, *supra* note 3, at 236, 240 note 4; *In re* Estate of Marcos Litigation, 978 F. 2d 493, at 499-500 (9th Cir. 1992); Paul *v.* Avril, *supra* note 17, at 211-212; United States *v.* Yunis, 681 F. Supp. 896, at 900-901 (DDC 1988); Forti *v.* Suarez-Mason, *supra* note 17, at 1540, note 6; Paust, *supra* note 8, at 281, 393, 403, 407; Restatement of the Foreign Relations Law, *supra* note 33, s. 404 & comm. a.

40. *See, e.g.*, Paust, *supra* note 8, at 393, 404; Paust *et al.*, *supra* note 2, at 95, 102-103, 105, 500, 855, 1205; *cf. id.*, at 104-105 (extract from United States *v.* Yunis, *supra* note 39).

41. *See, e.g.*, note 40, *supra*.

42. *See* note 40, *supra*.

43. See note 7, *supra*.

44. *Compare* text at note 5, *supra*, notes 4-5, *supra*, and Kadić *v.* Karadžić, *supra* note 3, at 239-43 with cases cited at note 17, *supra*.

45. *See, e.g.*, J.J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 American University Journal of International Law & Policy 499, at 499-503 (1994), and references cited.

claims that he should have been immune as a visitor to the United Nations or as head of a Bosnian-Serb entity.[46] The Circuit Court in *Karadžić* also recognized that jurisdiction in US federal courts was appropriate under certain domestic rules and concepts.[47]

Karadžić had also argued, either in ignorance of history or with arrogant abandon, that private individuals were not liable for violations of international law.[48] As the Court of Appeals rightly noted, such a claim is patently erroneous, especially with respect to genocide, war crimes, and crimes against humanity.[49] As in the *Tadić* case before the ICTY, the US Court of Appeals found that violations of common Article 3 of the Geneva Conventions create war crime responsibility.[50] The *Karadžić* court also joined a common pattern of US judicial decisions recognizing that acts in violation of international law, or acts that are otherwise *ultra vires* because they are taken outside the scope of official authority or foreign law, are not acts protected from judicial inquiry. More specifically, and in terms of US judicially created doctrines, such acts do not raise non-justiciable "political questions"[51] or "acts of state,"[52] or otherwise require recognition of some

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46. *See* Kadić *v.* Karadžić, *supra* note 3, at 246-248. *See also* Mushikiwabo *v.* Barayagwiza, *supra* note 17 (nonimmunity visitor to the UN).

47. Kadić *v.* Karadžić, *supra* note 3, at 236, 246. *See also* Paust, *supra* note 8, at 5-7, 40-45, *passim*; Restatement of the Foreign Relations Law of the United States, *supra* note 33, s. 111.

48. *See* Kadić *v.* Karadžić, *supra* note 3, at 239.

49. *See id.*, at 236, 239-243, and references cited. *See also* Paust *et al.*, *supra* note 2, at 13-14, 21-26, 45-48, 101-105, 186, 191-202, 212-213, 217-220, 243-246, 255, 258-273, 986, *passim*; Paust, *supra* note 8, at 8, 264-270.

50. *See* Kadić *v.* Karadžić, *supra* note 3, at 242-43; Paust *et al.*, *supra* note 2, at 825-830, 969, 975-976, 984, 986, 991-993. The *Karadžić* decision did not seek to resolve whether the armed conflict had been international in character. Id., at 243, n. 8. In the view of this author, it was. *See* Paust, *supra* note 45, at 506-513; *see also* Paust *et al.*, *supra* note 2, at 975-976, 980, 982-984, 994.

51. *See, e.g.*, Abebe-Jira *v.* Negewo, *supra* note 17, at 848; Kadić *v.* Karadžić, *supra* note 3, at 249-50; Linder *v.* Portocarrero, *supra* note 18, at 336-37; Klinghoffer *v.* SNC Achille Lauro, *supra* note 18, at 49; Paul *v.* Avril, *supra* note 17, at 212; Paust, *supra* note 8, at 100, 277-279, 287-288. *See also* Paust *et al.*, *supra* note 2, at 100, 376, 1082, 1122, 1130.

52. *See, e.g.*, Hilao *v.* Estate of Marcos, *supra* note 17, at 1470-72; Kadić *v.* Karadžić, *supra* note 3, at 250; *In re* Estate of Marcos Litigation, *supra* note 39, at 496-498, 500 (9th Cir. 1992); Filártiga *v.* Pena-Irala, *supra* note 15, at 889; Jimenez *v.* Aristeguieta, 311 F.2d 547, at 557-558 (5th Cir. 1962); Xuncax *v.* Gramajo, *supra* note 17, at 175-176; Paul *v.* Avril, *supra* note 17, at 212; Letelier *v.* Republic of Chile, 488 F. Supp. 665, at 673 (DDC 1980); Paust, *supra* note 8, at 210, 276-278; Restatement of the Foreign Relations Law of the United States, *supra* note 33, s. 443, comm. c and reporters' n. 5; Paust, *supra* note 36, at 375-376, n. 119. The TVPA necessarily obviates the use of an act of state avoidance of jurisdiction with respect to covered civil actions. The very purpose of the legislation was to guarantee a civil remedy against state actors and others covered by its language who engage in tor-

form of immunity.[53] In contrast to such domestic notions concerning non-justiciability, it is also informing that Rule 106 of the Rules of Procedure and Evidence of the ICTY contemplates domestic lawsuits and adds that a "judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury."[54]

5. CONCLUSION

In conclusion, the *Karadžić* case has already resulted in important reaffirmations of individual liability for various international crimes, including violations of related human rights.[55] The case demonstrates how individuals are subject to the jurisdiction of US courts for violations of international law, and that various claims to immunity or non-justiciability should not prevail. On remand, the trial on the merits should also involve important elucidation of the content of international criminal law and a reaffirmation of leader responsibility.[56]

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ture or extrajudicial killings and, thus, unambiguously to deny any form of immunity for covered acts. *See also* note 24 and accompanying text *supra*, the US Senate Report adding: "A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in US courts." The Report also adds more specifically that the Senate Judiciary "Committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for" individuals. Report, *id.*, at 8. Moreover, both the ATCA and the TVPA, as facially inconsistent federal statutes, should trump the merely common-law doctrine of "act of state". *See also* Restatement, *supra* note 33, s. 443 (2) and comms. d, g, j (subject to modification by act of Congress).

53. *See, e.g.*, The Santissima Trinidad, 20 US (7 Wheat.) 283, at 352-353 (1822); cases in note 52, *supra*; 9 Op. Att'y Gen. 356, at 362-363 (1859); 2 Op. Att'y Gen. 725, 726 (1835); Paust, *supra* note 8, at 205, 210-211, 276-279, 291-292; Paust *et al.*, *supra* note 2, at 14, 21-25, 46, 107-110, 1395-1396.

54. UNDoc. IT/32 (1994); also reprinted *in* Paust *et al.*, *supra* note 2, at 801-802. *See also id.*, at 806 (concerning the obligatory character of such a rule under the UN Charter). In the US, one might recognize that conviction makes the conduct tortious *per se*.

55. Concerning human rights and international crime, *see, e.g.*, Paust *et al.*, *supra* note 2, at 12, 29, 1115-1134, *passim*.

56. Concerning leader responsibility, *see, e.g.*, Paust *et al.*, *supra* note 2, at 32-61, 808, 811-812, *passim*. Complicity might be argued alternatively. *See id.*, at 21, 26-29, *passim*.

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