IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOSE OSCAR CHAVEZ, ANA PATRICIA CHAVEZ, HAYDEE DURAN, CECILIA SANTOS, JOSE FRANCISCO CALDERON, JANE DOE I, JANE DOE II, and JOHN DOE,	)	**No. 03-2932 M1/P**
	)	**JURY TRIAL**
Plaintiffs,	)	
v.	)	
NICOLAS CARRANZA,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S RENEWED MOTION TO DISMISS

In response to the Plaintiffs' original complaint, Defendant Nicolas Carranza filed a motion to dismiss and argued that the Plaintiffs' claims were barred by the statute of limitations, the Plaintiffs failed to exhaust allegedly adequate and available remedies in El Salvador, and certain Plaintiffs' claims were barred because they are United States citizens. See Motion of Defendant to Dismiss the

Complaint (filed Jan. 20, 2004). In response, the Plaintiffs amended their complaint as of right, under Fed. R. Civ. P. 15(a), in order to add an additional Plaintiff, John Doe, and to allege in greater detail the facts in support of an equitable tolling of the statute of limitations. See First Amended Complaint ("Amend. Compl.") (filed Feb. 23, 2004). Despite the detailed factual allegations of the First Amended Complaint, the Defendant nonetheless has renewed his motion to dismiss, which relies on the same grounds as his original motion to dismiss and fails to cite any precedent in support of his arguments. See Renewed Motion to Dismiss (filed March 9, 2004).

The Defendant's motion should be denied. First, relevant case law and legislative history provide for equitable tolling of the applicable ten-year statute of limitations. The facts alleged in the Complaint, which must be accepted as true for purposes of this motion, are more than adequate to state a claim for an equitable tolling of the statute of limitations. El Salvador was immersed in a civil war from 1981 to 1992 in which the Salvadoran military and government-sponsored death squads terrorized the civilian population. Following

the formal end of the war in 1992, the transition from overt, state-sponsored political violence to a relatively peaceful, democratic regime was slow and uneven. The Complaint alleges that this transition was not fully accomplished until the national elections held in March 1997. Accordingly, the facts alleged in the Complaint provide a basis to toll the statute of limitations until March 1997, and therefore the filing of the complaint in December 2003 was timely.

Second, the Plaintiffs have not failed to exhaust adequate and available remedies in El Salvador. In 1993, the Salvadoran legislature adopted a broad amnesty that precludes both civil and criminal liability in Salvadoran courts for the human rights abuses perpetrated against the Plaintiffs and their Decedents. Prior to 1993, for the reasons stated above, the Salvadoran courts could not provide an adequate or available remedy for the Plaintiffs' grievances.

Finally, the Defendant simply misreads the Complaint in arguing that the United States-citizen Plaintiffs have attempted to bring claims under the Alien Tort Claims Act ("ATCA"). A careful reading of the Complaint demonstrates that only the non-citizen Plaintiffs have alleged claims under the ATCA. The citizen Plaintiffs allege claims

under the Torture Victim Protection Act of 1991 ("TVPA"), which provides a cause of action for both U.S. citizens and aliens. Because the Defendant has shown no grounds on which to dismiss the Complaint, the motion should be denied.

I. STATEMENT OF THE CASE

The Plaintiffs are either current or former citizens of El Salvador whose family members were killed or who themselves were tortured by military or paramilitary groups operating under the command of Colonel Nicolas Carranza. Col. Carranza was the Vice-Minister of Defense of El Salvador from October 1979 to January 1981. In that position, he exercised command and control over members of the Armed Forces, including the three units of the Salvadoran Security Forces – the National Guard, National Police, and Treasury Police. From June 1983 until May 1984, Col. Carranza was the Director of the Treasury Police and exercised command and control over that organization. See Amend. Compl. ¶¶ 6-7.

The Security Forces were responsible for rampant human rights abuses against the civilian population in a deliberate reign of terror that was most acute during the time that the Defendant commanded these

forces from 1979 to 1981. Id. at ¶ 16. Experts estimate that 10,000 to 12,000 unarmed civilians were assassinated by the Security Forces and death squads in 1980 alone. See id. As the Vice-Minister of Defense and Director of the Treasury Police, Col. Carranza had a duty under customary international and domestic law to ensure that all persons under his command were trained in and complied with the laws of warfare and international law, including the prohibitions against torture, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment. Id. at ¶ 68. Col. Carranza also was under a duty to investigate, prevent, and punish violations of international law committed by members of the Security Forces under his command. Id.

The Plaintiffs bring claims under two federal statutes – the Alien Tort Claims Act ("ATCA"), codified at 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73, codified in a note to 28 U.S.C. § 1350. The ATCA was a provision in the Judiciary Act of 1789, the first statute enacted by the First Congress. It provides a civil cause of action for money damages to an alien who has suffered a tort "committed in violation of the law of

nations." 28 U.S.C. § 1350. The TVPA, signed into law by President Bush in 1992, establishes a cause of action for money damages against anyone who subjects an individual to torture or extrajudicial killing. See 28 U.S. § 1350 (note). In contrast to the ATCA, the TVPA allows both aliens and United States citizens to bring a cause of action. Four of the Plaintiffs are U.S. citizens and, therefore, bring claims only under the TVPA. The four non-citizen Plaintiffs bring claims under both the TVPA and the ATCA.

II. STATEMENT OF FACTS

A. Statute of Limitations

Throughout the 1980s, the Salvadoran Security Forces carried out a calculated program of state repression of the civilian population, which demonstrated a clear pattern and practice of arbitrary detention, torture, and extrajudicial killings. Amend. Compl. ¶ 74. During this time in El Salvador, the Catholic Archbishop was murdered while saying mass, one of the alleged authors of the crime openly campaigned for the Presidency, the judge investigating this crime was forced to leave the country, death squads operated out of the office of the President of the legislature, and the Attorney General and the most

important political opposition leaders were openly murdered by the Security Forces, working in concert with paramilitary death squads. Id. at ¶ 75. Even Salvadorans living in the United States were the victims of politically motivated violence and threats of violence. Id.

The Salvadoran judicial system was notorious for its failure to investigate serious crime; police, prosecutors and judges were unwilling to examine cases at all when the military was involved. Id. at ¶ 76. Despite the fact that all major reports of human rights violations found that government forces or government-associated death squads committed the overwhelming majority of gross and systematic human rights violations, not a single Salvadoran officer of the military or police was ever tried and convicted for these abuses in El Salvador. Id.

The country was in an open state of civil war from 1981 until 1992. On January 1, 1992, the government and Salvadoran guerrilla forces signed Peace Accords sponsored by the United Nations. Id. at ¶ 77. These Peace Accords, however, did not signal the end of political violence and reprisals because the implementation of the provisions of the accords did not start until well after this date. With impunity still in effect, visible human rights violations continued in El Salvador

throughout the early 1990s. Id. at ¶ 78. These human rights abuses were condemned by the U.N. Secretary General and the United Nations Observer Mission in El Salvador, which concluded that the persistence of summary executions, torture and illegal detentions threatened the peace agreements. Id.

In March 1994, El Salvador conducted its first elections following the signing of the Peace Accords. Id. at ¶ 79. Although this nationwide election process represented a turning point in the effort to reconstruct El Salvador, it was marred by ongoing and extraordinary political violence. Id. The resurgence of death squad murders and political assassinations, including the murders of three high-level opposition leaders and the killings of a number of lower-level political activists, injected a high level of fear into the campaign. Id. This was exacerbated by a pattern of victim selection and style of murder very reminiscent of military and Security Forces killings during the height of the war. Id. Several death squads linked to military and Security Forces claimed credit for these murders, and the lack of government investigations contributed to the sense that these activities were, at the very least, tolerated by state officials. Id. Prior to the elections, the

United Nations Mission in El Salvador analyzed 94 cases of severe human rights abuses with political motivations, showing that only one of these had resulted in arrest. Id.

The consistent reappearance of death squad activity and visible human rights violations continued throughout 1995-1996. Id. at ¶ 81. For example, at least three-dozen murders in early 1995 were attributed to the Black Shadow death squad, which also threatened to execute six judges. Id. These murders bore the markings of paramilitary organizations that operated during the war and were closely linked to military and Security Forces. Id. Contrary to the Peace Accords, a newly created civilian police force was contaminated by the inclusion of members of formerly repressive police units and Security Forces notorious for their records of abuse. In the summer of 1995, for example, members of the National Civilian Police, including a very senior officer, were arrested for being part of the Black Shadow death squad. Id.

It was not until approximately the time of national elections in March 1997 that political violence and impunity for that violence were largely eradicated. Id. at ¶ 82. The March 1997 elections marked a

decisive change in the climate of fear in El Salvador for several reasons. First, unlike previous elections, the campaign was remarkably peaceful, with little evidence of fraud. Id. Second, this was the first election in which the opposition not only won significant political posts, but also was permitted to safely occupy these posts without fear of reprisals. Id. Third, this was the first election that demonstrated the effects of significant reforms of the judiciary and police through a visible diminution of fear. Id.

Prior to March 1997, given the circumstances enumerated above, victims of abuses perpetrated by the Salvadoran Security Forces or associated paramilitary death squads could not have been expected to pursue a cause of action in the United States against former commanders of the Security Forces because of the reasonable fear of reprisals against themselves or members of their family still residing in El Salvador. Id. at ¶ 73. Throughout the time period alleged in the Complaint and up to the present, each of the Plaintiffs either lived in El Salvador or had immediate family (parents, children, or siblings) living in El Salvador. Id. Furthermore, until March 1997, it would not have been possible to safely conduct investigation and discovery in El

Salvador in support of a cause of action in the United States seeking to hold former commanders of the Security Forces responsible for human rights abuses. Id.

B. Absence of Remedies in El Salvador

In March 1993, the Salvadoran legislature adopted a broad and unconditional amnesty for any individual implicated in "political offenses." Id. at ¶ 83. The amnesty law foreclosed both civil and criminal liability for all individuals who had participated in any way in the commission of political crimes, common crimes related to political crimes, or common crimes committed before January 1, 1992. Id. This law precludes all liability under Salvadoran law for those responsible for the abuses perpetrated against the Plaintiffs and their Decedents. Prior to March 1993, because of the pervasive political violence in El Salvador (see Amend. Compl. ¶¶ 73-82), it would have been impossible to seek judicial remedies in Salvadoran courts, with even minimal guarantees of safety, for violations of human rights abuses. Id. at ¶ 83. Accordingly, there were and are no adequate and available remedies for Plaintiffs to exhaust in El Salvador.

III. ARGUMENT

A. The Plaintiffs' Complaint was timely filed because the

extraordinary circumstance of political violence in El Salvador justifies an equitable tolling of the limitations period.

Dismissal of a complaint because it is barred by the applicable statute of limitations is proper only "when the statement of the claim affirmatively shows that the plaintiff can prove no set of facts that would entitle him to relief." Duncan v. Leeds, 742 F.2d 989, 991 (6th Cir. 1984) (quoting Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975)) (emphasis in original). The complaint must be liberally construed in determining whether the complaint is time-barred. Duncan, 742 F.2d at 991. The Sixth Circuit has held that the dismissal of a complaint as time-barred is improper, absent an evidentiary hearing, where the complaint "allege[s] facts that might toll [the] statute of limitations." Id. (citing Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977)).

The Plaintiffs' claims are governed by a ten-year statute of limitations. See TVPA, Sec. 2(c), codified at 28 U.S.C. § 1350 (note). Although the TVPA limitations period does not expressly apply to the ATCA, every court to consider the question after the passage of the TVPA has concluded that the TVPA's limitations period should also apply to the ATCA, given the closely similar goals and remedial

mechanisms of the two statutes. See Papa v. United States, 281 F.3d 1004, 1011-12 & n.33 (9th Cir. 2002) (holding that "the realities of litigating claims brought under the ATCA, and the federal interest in providing a remedy, also point towards adopting a uniform – and a generous – statute of limitations"); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1363 (S.D. Fla. 2001); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1194-97 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 192 (D. Mass. 1995).

There is no Sixth Circuit precedent that governs the equitable tolling of the statute of limitations under the TVPA and ATCA. Other jurisdictions have addressed this question, however, and held that equitable tolling should be applied "where extraordinary circumstances outside plaintiffs' control make it impossible for plaintiff to timely assert his claim." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). See also id. at 1550 (denying motion to dismiss claims as time-barred, in part, because of conditions in Argentina in which "members of the judiciary neglected to apply laws granting relief out of fear of becoming the next victim of the 'dirty war'); In re: World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1181

(N.D. Cal. 2001); Estate of Cabello, 157 F. Supp. 2d at 1368; Doe v. Unocal Corp., 963 F. Supp. 880, 897 (C.D. Cal. 1997).[1] This case law finds support in the legislative history of the TVPA, which expressly encourages courts to apply equitable tolling to the ten-year limitations period. See Japanese Forced Labor, 164 F. Supp. 2d at 1181 (citing cases); Estate of Cabello, 157 F. Supp. 2d at 1368. By liberally applying the equitable tolling doctrine to claims by victims of human rights violations, the federal courts have created a flexible and expansive doctrine that "promote[s] the policy of providing a forum for claims of violations of internationally recognized human rights." Forti, 672 F. Supp. at 1548.

In light of these standards, the facts alleged in the Complaint are more than sufficient to toll the statute of limitations. During Col. Carranza's tenure as the Vice-Minister of Defense, for example, the Attorney General of El Salvador was murdered in his home by a death squad, six prominent leaders of the political opposition to the ruling junta were tortured and murdered, and the Catholic Archbishop of El Salvador, Oscar Romero, was murdered while saying mass. Amend. Compl. ¶ 75. In 1980 alone, 10,000 to 12,000 unarmed civilians were

assassinated by the Salvadoran Security Forces and death squads. Id. at ¶ 16. El Salvador was in a state of outright civil war throughout the 1980s and early 1990s in which the Salvadoran Security Forces carried out a calculated program of state repression of the civilian population. Id. at ¶ 74. The war itself did not formally end until the signing of a Peace Agreement in 1992. Id. at ¶ 77. The formal end of the war, however, did not bring about the end of widespread political violence. As alleged in the Complaint, state-sanctioned political violence continued for several years after the signing of the Peace Accords. Paramilitary and military forces responsible for human rights abuses during the war continued to perpetrate these acts with impunity. See id. at ¶¶ 77-82.

All of the Plaintiffs have either themselves lived in El Salvador or had immediate family living in El Salvador from 1979 to the present. Id. at ¶ 73. As long as state-sanctioned political violence was prevalent in El Salvador, no reasonable person who had suffered human rights violations would have confronted those responsible for those violations, even in the courts of the United States, because of the risk of reprisals against themselves or their family members in El

Salvador. Likewise, even if there were no family members present in El Salvador, it would have been unreasonable to expect the Plaintiffs and Plaintiffs' counsel to perform investigation and discovery in El Salvador in support of an action filed in the United States until political violence in El Salvador subsided.

Bringing about the end of state-sanctioned political violence was a slow and uneven process. It would be impossible to pinpoint the exact moment when political violence was effectively eradicated in El Salvador, and therefore it is necessary to make reference to particular milestones in order to establish a date for the tolling of the limitations period. The complaint alleges that the applicable milestone is the democratic elections held in March 1997. Id. at ¶ 82. These elections, unlike previous elections, were fair and peaceful. Opposition candidates won significant political posts, which they were actually allowed to occupy. The March 1997 elections also were the first ones held after significant reforms of the judiciary and police. See id.

These facts demonstrate that El Salvador suffered under pervasive political violence from at least the time of the events alleged in the Complaint until March 1997. This violence and the reasonable

prospect of reprisals prohibited the Plaintiffs from filing or conducting discovery on their claims under the ATCA and TVPA until approximately March 1997. Accordingly, the running of the statute of limitations ought to be tolled until that date. Because the original complaint was filed on December 10, 2003, less than ten years after the date for equitable tolling, the statute of limitations does not bar the Plaintiffs' claims.[2]

B. The Plaintiffs have no adequate and available remedies in El Salvador.

The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA, Sec. 2(b), codified at 28 U.S.C. § 1350 (note). This exhaustion requirement "was not intended to create a prohibitively stringent condition precedent to recovery under the statute." Xuncax, 886 F. Supp. at 178. In fact, Congress' intended operation of the exhaustion requirement is set forth in remarkable clarity in the TVPA's legislative history:

> [T]orture victims bring suits in the United States against their alleged torturers only as a last resort. . . .

> Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.
>
> More specifically, . . . the interpretation of § 2(b) should be informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that claimant did not use. . . . The ultimate burden of proof and persuasion on the issue of exhaustion of remedies . . . lies with the defendant.

Hilao v. Estate of Marcos, 103 F.3d 767, 778 n.5 (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 9-10).

Because nonexhaustion of remedies is an affirmative defense on which the Defendant has the burden of proof and persuasion, it is not the proper subject of a motion to dismiss, particularly when the

Plaintiffs' Complaint alleges that they have no adequate and available remedies. See Amend. Compl. ¶ 83. In March 1993, the Salvadoran legislature adopted a broad and unconditional amnesty law that forecloses the Plaintiffs from seeking criminal or civil relief in the courts of El Salvador. Id. Prior to March 1993, as demonstrated in Section III (A) of this memorandum and paragraphs 73 to 82 of the Complaint, state-sanctioned political violence made it unreasonable for any victim of human rights abuses to attempt to hold the perpetrators responsible in the courts of El Salvador because of the legitimate fear of violent reprisals.

Remarkably, the Defendant suggests that because Plaintiff John Doe received the assistance of a lawyer and a foreign government in fleeing the country, this provides some evidence that adequate remedies were available to hold perpetrators of human rights abuses accountable in Salvadoran courts prior to 1993. Renewed Motion at p. 3. John Doe was brutally tortured by members of the Treasury Police who applied electric shocks to his body while he was hung from the ceiling by his wrists. John Doe was also beaten with a brick while being hung upside down by his feet. See Amend. Compl. ¶¶ 54-62. The fact that

John Doe was barely able to escape El Salvador alive does not suggest, much less prove, that the Salvadoran courts were available to bring the members of the Treasury Police who were responsible for these crimes to justice. In fact, John Doe's flight from El Salvador suggests exactly the opposite. There would have been no need for John Doe to flee El Salvador if the members of the Treasury Police responsible for committing such barbaric acts could have been held accountable through the Salvadoran judicial process.

The Defendant also argues that his presence in the United States since 1984 means that he could not have provoked harm to the Plaintiffs or their families in El Salvador. Renewed Motion at p. 3. This argument misses the point. It is not simply the Defendant who had an interest in exacting retribution against the Plaintiffs or their families for prosecuting a claim against him. The Defendant was part of a larger effort by the Salvadoran Security Forces to terrorize and intimidate the civilian population. Amend. Compl. ¶ 16. In fact, in their claim of crimes against humanity, Plaintiffs allege that there was an ongoing, widespread or systematic attack against the civilian population. Id. at ¶ 70. When Col. Carranza came to the United States

in 1984, his associates in the Security Forces remained in El Salvador and continued their campaign of terror and intimidation. These forces had both the incentive and practical ability to exact retribution upon anyone that attempted to hold members and former members of the Security Forces, including Col. Carranza, accountable for human rights violations. The Complaint clearly alleges that the Plaintiffs do not have adequate and available remedies available in El Salvador, and the Defendant's motion therefore should be denied.

C. The United States-citizen Plaintiffs are not making claims under the ATCA.

The Defendant argues that the Court lacks jurisdiction over the claims of the Plaintiffs who are United States citizens (Jose Oscar Chavez, Haydee Duran, Cecilia Santos, and Jose Francisco Calderon) because they are not "aliens" and therefore not entitled to bring an ATCA claim. Renewed Motion at p. 2. The Defendant simply has misread the allegations of the Complaint. The citizen Plaintiffs have brought their claims exclusively under the TVPA, not the ATCA. See Amend. Compl. ¶¶ 84-99; 125-150.

IV. CONCLUSION

For all these reasons, the Defendant's Renewed Motion to Dismiss presents no grounds for dismissal of the complaint. The motion therefore should be denied.

Dated: April ____, 2004

Respectfully submitted,

_____
_____

David R. Esquivel
Bass, Berry & Sims PLC
AmSouth Center
315 Deaderick Street,
Suite 2700
Nashville, TN
37238-3001
(615) 742-6200

Matthew J. Eisenbrandt
Center for Justice &
Accountability
870 Market Street, Suite
684
San Francisco, CA
94102
(415) 544-0444

Carolyn Patty Blum
Center for Justice &
Accountability
291 West 12th Street
New York, NY 10014

(212) 989-0012

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has this day been served upon the following counsel for the Defendant by depositing a copy thereof in the United States Mail, postage prepaid, this _____ day of April, 2004.

Robert M. Fargarson, Esq.
Neely, Green, Fargarson, Brooke & Summers
65 Union Avenue, 9th Floor
Memphis, TN 38103

Counsel for Defendant Nicolas Carranza

2463149.2

[1] The Sixth Circuit has articulated a five-factor test for considering equitable tolling claims, but these factors are directed towards, and have been applied almost exclusively in, claims alleging employment discrimination under Title VII. See, e.g., Graham-Humphreys v.

Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000). Nonetheless, the "extraordinary circumstances" standard developed in other jurisdictions for tolling under the TVPA and ATCA is consistent with the premises underlying the Sixth Circuit's equitable tolling analysis in Title VII cases. See id. at 560-61 ("[E]quitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control."); id. at 561 (holding that a limitations period should not be tolled "absent compelling equitable considerations").

[2] The Complaint recognizes that the March 1994 elections, the first elections held after the signing of the Peace Accords, were an important milestone on the road to a political peaceful climate in El Salvador. In a recent case against two other Salvadoran military leaders during this era, the U.S. District Court for the Southern District of Florida (Judge Hurley) suggested that March 1994 may be the appropriate date that the limitations period should begin to run. See Excerpts from Transcript of Testimony & Proceedings, Romagoza et al. v. Garcia et al., No. 99-8364 (Volume 9) (July 10, 2002), appeal pending, attached hereto at Tab "A." Even if March 1994 is the correct date, however, the Plaintiffs' complaint was still timely filed in December 2003.