UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Kemal Mehinovic,
Plaintiff,

v.

Nikola Nikolac, a/k/a Nikola Vuckovic,
Defendant.

CIVIL ACTION NO. 1:98-CV-2470

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS; DECLARATION OF KEMAL MEHINOVIC AND DECLARATION OF RITA MARAN

COMES NOW the Plaintiff, and, having received Defendant's Partial Motion to Dismiss based on the two-year statute of limitations in Georgia responds as follows: none of the claims asserted in Plaintiff's complaint is barred by Georgia's two-year statute of limitations.

INTRODUCTION

Facts alleged in the plaintiff's complaint relevant to the issue of statute of limitations are as follows: Defendant Nikola Vuckovic, a.k.a. Nikola Nikolac, is a Serbian-born citizen of Yugoslavia who later moved to Bosanski Samac, Bosnia and Herzegovina. The defendant admits that he served as a soldier in the Fourth Detachment of the Bosnian Serb army under the command of Simo Zaric. Zaric has been indicted by the International Criminal Tribunal for the Former Yugoslavia at The Hague for crimes against humanity and war crimes committed in Bosanski Samac.

The plaintiff, Kemal Mehinovic, a Bosnian Muslim citizen now living in the United States, was detained and tortured by the defendant and others in Bosanski Samac during 1992.

After his transfer out of detention in Bosanski Samac, the plaintiff was sent to other concentration camps within Bosnia, and was finally released in a United Nations-sponsored exchange on October 6, 1994. Subsequent to the plaintiff's detention, torture and release in Bosnia and Herzegovina, the whereabouts of the defendant was unknown to the plaintiff, and was not readily discoverable due to the on going conflict in Bosnia-Herzegovina and the continuing occupation of Bosanski Samac by Serb authorities. The plaintiff could not file this action in the courts of Bosnia and Herzegovina during his detention or subsequent to his release; such an attempt would have been futile due to the conditions of war and the lack of a functioning judiciary in Bosnia and Herzegovina. (*See* Declaration of Professor Rita Maran, attached.) According to information and belief, the defendant arrived in the United States and settled in Georgia in 1997. Plaintiff Mehinovic learned in early 1998 that the defendant had been working in a factory in the vicinity of Atlanta, Georgia. Upon receiving this information, Plaintiff Mehinovic immediately began exploring options for holding the defendant accountable for his actions during the Serb takeover of Bosanski Samac. (*See* Complaint, Paragraph 34, and Declaration of Kemal Mehinovic, attached.)

ARGUMENT

I. NONE OF THE CLAIMS ASSERTED IN PLAINTIFF'S COMPLAINT IS TIME-BARRED

A. The Statute of Limitations Specified in the Torture Victim Protection Act Governs All of the Plaintiff's Claims.

Plaintiff's Complaint includes claims for relief under the Alien Tort Claims Act, 28 U.S.C. § 1350, the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73

(1992) (codified at 28 U.S.C. § 1350 note), and the laws of Georgia and Bosnia and Herzegovina.

As the defendant acknowledges, the Torture Victim Protection Act contains an explicit ten-year statute of limitations. TVPA, 28 U.S.C. § 1350, § 2(a). Thus, any of the plaintiff's claims brought under the TVPA clearly survive the defendant's motion. Further, the definition of torture under that Act is much broader than the defendant admits, and includes many of the acts alleged in the instant complaint. Specifically, § 3(b) of the Act defines torture at length to include:

> [A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering... whether physical 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.

Even if some of the plaintiff's claims do not fall within the TVPA's broad definition of torture, the court has jurisdiction over these claims pursuant to the Alien Tort Claims Act (ATCA). The ATCA, enacted in 1789 as part of the Federal Judiciary Act, is silent as to its period of prescription. In addition, neither the U.S. Supreme Court nor the Eleventh Circuit have ruled on the question of the correct limitations period for claims under the Alien Tort Claims Act, either prior or subsequent to passage of the TVPA. The Supreme Court has ruled, however, that in such situations, the federal courts are to "borrow" the most suitable statute or other rule of timeliness from some other source. In general, this "other source" will be state law. *Wilson v. Garcia*, 471 U.S. 261 (1985). However, the Court has also

emphasized that in some situations, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983); *North Star Steel v. Thomas*, 515 U.S. 29 (1995).

In *DelCostello*, the Court noted that the "policies and requirements of the underlying cause of action" may dictate that a timeliness rule drawn from elsewhere in federal law should be applied. *DelCostello* at 159 n.13. In that case, the Court held that the federal unfair labor practices statute provided the best analogy to the statute under which the case was brought, finding it dispositive that there was a "substantial overlap" of rights protected by the two statutes, and a "close similarity of the considerations relevant to the choice of a limitations period." *Id.* at 170. The Court concluded by cautioning that federal courts should not automatically eschew use of state law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* at 170-171.

In the present case, the "practicalities of litigation" involved grave violations of international law. The plaintiff was detained and tortured over a period of two and a half years in Bosnian Serb detention facilities, during which time it was impossible for him to pursue legal remedies against the defendant. Upon his release, he searched for the whereabouts of his family, fled to Croatia, and later obtained permission to immigrate to the United States. When his safe haven in this country was shattered by the news of the defendant's presence in the U.S., the plaintiff had to locate the appropriate forum in which

to pursue his claim, obtain counsel, and confirm the identify of the person observed working in the Atlanta area.

Congress has recently manifested its concern regarding the importance of the federal policies at stake in the present matter -- first, by approving the passage of the TVPA in 1992, and later with the ratification of the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (G.A. res. 39/46, 39 U.N. Doc., GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)(ratified by the United States on Nov. 20, 1994, Treaty Doc. 100-20).

Given these two recent acts of Congress demonstrating the desire for the victims of egregious human rights violations to be able to pursue their claims in U.S. courts, and the "practicalities" involved in pursuing redress for such violations, the court should in this case "borrow" the statute of limitations from the most analogous federal statute, the TVPA. As the court emphasized in *Filartiga v. Pena-Irala*, 577 F.Supp. 860 (1984), "[t]he international law prohibiting torture established the standard and referred to the national states the task of enforcing it. By enacting Section 1350 Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law." *Id.* at 863.

Since the TVPA was enacted, only two district courts have ruled on the question of the applicable statute of limitations in ACTA cases; both have concluded that the TVPA's

prescription period should be borrowed for claims under the ATCA. See *Cabiri v. Assassie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1998).

In *Xuncax*, the court did not have to rule on the applicable statute of limitations because the defendant had defaulted and thus waived any statute of limitations defense. The court nonetheless determined that plaintiff's claims would have survived such an affirmative defense if either state law or the most analogous federal law was applied, noting that where the defendant is a non-resident, the statute of limitations does not begin to run until the defendant comes into the forum. Further, the court found that the TVPA provides the most analogous federal statute for the purposes of determining the applicable statute of limitations in ATCA cases. *Xuncax, supra.* Using similar reasoning, the court in *Cabiri* ruled:

> The alleged acts of Assassie-Gyimah, if presumed to be true, violated a fundamental principle of the law of nations: the human right to be free from torture. The defendant cannot complain that he had no notice that torture was not a lawful act. Moreover, any expectation that he might have had that he would not be held accountable for the brutal acts alleged is rightly disrupted. Accordingly, the Court holds that the Torture Act, which provides a ten-year statute of limitations, applies... to plaintiff's claims. Defendant's motion to dismiss the claims as time-barred, therefore, is denied.

Id. at 1196-1197. *See also Chevron Oil Co. v. Huson*, 404 U.S. 97, 104, 92 S.Ct. 349, 30 L. Ed. 2d 296 (1971) (federal statutes of limitation should be borrowed where "the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations").

The defendant cites *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987), amended in part, 694 F. Supp. 707 (N.D. Cal. 1989), decided prior to the passage of the

TVPA in 1992, in support of his proposition that the court should borrow from Georgia law to determine the applicable statute of limitations. In *Forti I*, however, the court recognized that a statute of limitations prescribed by federal law may be applicable to accommodate federal policies and the practicalities of litigation. The court concluded that at the time, §1983 (for which federal courts are to apply the law of the forum state) provided the best federal analogy at the time. The court ultimately rejected defendant's statute of limitations defense by applying equitable tolling principles, however, holding that the defendant had "failed to demonstrate that the plaintiff's claims are untimely." *Forti I* at 1547.

While (as *Forti I* discussed) the most nearly analogous statute prior to the passage of the TVPA may have been §1983 or the forum state's general personal injury statute, subsequent to its passage, the TVPA is now clearly the most closely analogous statute (and is even codified at the same location as the ATCA (at 28 U.S.C. § 1350). Its ten-year statute of limitations should be borrowed for this case.

B. Claims Involving Grave International Crimes Are Not Time-Barred.

The claims enumerated in the present complaint stem from an extended pattern of abuse inflicted on this plaintiff by the defendant. This abuse involved acts constituting genocide; war crimes/crimes against humanity; torture; cruel, inhuman and degrading treatment; arbitrary detention; assault and battery; false imprisonment and false arrest; and intentional infliction of emotional distress. Under international law, claims of this nature are never time-barred.

The non-applicability of statutes of limitation to grave international law offenses constitutes an emerging norm of customary international law. It has been enshrined in two

international conventions. See the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (U.N. Non-Applicability Convention); *European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*, opened for signature Jan. 25, 1974, reprinted in 13 I.L.M. 540 (1974) (European Convention). Although the United States has not signed the former Convention, Bosnia and Herzegovina has, along with almost fifty other nations. These instruments provide that statutes of limitation shall not apply to genocide, crimes against humanity and war crimes as they are defined in the relevant international instruments regardless of when such crimes were committed. *See* Article 1, *U.N. Non-Applicability Convention*; Article 1, *European Convention*. They also commit states party to adopt legislation or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of these offenses. Where such limits already exist within domestic law, states parties are obliged to abolish them. See Article 4, *U.N. Non-Applicability Convention*.

The French *Court of Cassation* has held that the principle of non-applicability of statutes of limitation to crimes against humanity constitutes a rule of customary international law. See *Barbie*, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.). Likewise, the Hungarian Constitutional Court has recently ruled that the *Convention on theNon-Applicability of Statutes of Limitation* allows for the prosecution of grave international crimes that occurred during the 1956 uprising in that country. See Krisztina Morvai,

Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court, E. EUROP. CONST. REV., Fall 1993-1994, at 32.

C. Equitable Tolling Principles Apply to Plaintiff's Claims

Even if the court were to find that the TVPA is not the proper source for a period of limitations in this matter, or that the norm of non-prescriptability under international law is not controlling, principles of equitable tolling under state, federal and international law still apply to defeat the defendant's motion. Equitable tolling doctrines are read "into every statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 85 S.Ct. 582 (1946); *Branch v. G. Bernd Co.*, 955 F.2d 1574 (11th Cir. 1992). This is so even when a court borrows a limitations period from another statute to apply to another claim. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 85 S. Ct. 1050 (1965) (applying equitable doctrines to toll the limitations period on a FELA claim); *Holmberg*, 327 U.S. 392 (holding that equitable tolling is appropriate whether the court borrows a limitations period from state or federal law); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (statute of limitations or policy of repose, designed to protect defendants, is frequently outweighed where the interests of justice require vindication of the plaintiff's rights). In fact, these principles for equitable tolling have been applied in numerous circumstances.

The Senate's TVPA Report (S. Rep. No. 249, 102d Cong., 1st Sess. (1991)), Section G, speaks loudly regarding the congressional intent related to

the application of tolling principles in cases involving torture and other human rights violations:

> The legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles in calculating this period with a view toward giving justice to plaintiff's rights.[1] Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following[2]: The statute of limitation should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated.[3] It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.[4]
> However, the explicit reference in this legislation to principles of equitable tolling is in no way intended to suggest that such principles do not apply in other statutes adopted by Congress which do not explicitly contain equitable tolling clauses.

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[1] *See Burnett v. New York Cent. R.R.* 380 U.S. 428 (1965) (justice of plaintiff's rights usually outweighs protection of defendant in considering equitable tolling).

[2] *See generally Anderson v. Wisconsin Gas Co.* 619 F. Supp. 635 (E.D. Wis., 1985) (discussing factors that give rise to equitable tolling).

[3] *Boag v. Chief of Police*, 669 F.2d 587 (9th Cir., 1982) (plaintiff's imprisonment suspends running of time limit), cert. denied, 459 U.S. 849 (1982); *Brown v. Bigger*, 622 F.2d 1025 (10th Cir., 1980) (same); *Origet v. Washtenaw County*, 549 F. Supp. 792 (E.D. Mich., 1982)(infancy).

[4] *Cerbone v. International Ladies' Garment Workers Union*, 768 F.2d 45 (Cir. 1985) (fraudulent concealment tolled time limitation).

Indeed, while the defendant cited *Forti I, supra*, 672 F. Supp. 1531, for the proposition that the ATCA statute of limitations should be borrowed from 42 U.S.C. §1983, which in turn borrows from state law, he conveniently omitted the lengthy discussion of equitable tolling principles which followed. (In addition, the applicability of state law in §1350 cases should be distinguished from its applicability in §1983 cases, in that Congress specifically enacted 42 U.S.C. §1988 to instruct courts to apply state law in §1983 cases. That is not the case with regard to the ATCA; the TVPA is as close as Congress has come to expressing its intent in that regard.)

Moreover, as noted above, although the *Forti I* court discussed the application of state statutes of limitations under §1983, it ultimately applied equitable tolling principles to reject the defendant's statute of limitations defense in that case, which involved a complaint for torture and wrongful death filed in April 1987 for acts committed beginning in 1977.

In reaching that holding, the *Forti I* court analyzed in detail the federal equitable tolling doctrine:

> Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim.

672 F. Supp. at 1549.

In *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) and *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal. 1997), ATCA cases decided subsequent to

passage of the TVPA, both courts declined to state which statute of limitations applied, holding that the suits were timely under any of the proposed statutes when equitable principles were applied. In *Hilao*, the court noted that both the TVPA and §1983 provide for equitable tolling: the former for periods in which (1) the defendant is absent from the jurisdiction, (2) the defendant is immune from lawsuits, and (3) the plaintiff is imprisoned or incapacitated; and the latter for cases in which (1) a defendant's wrongful conduct or (2) extraordinary circumstances outside a plaintiff's control prevented a plaintiff from timely asserting a claim. *Hilao* at 773. The court held that all actions against Marcos were tolled under the extraordinary circumstances present in the Philippines—namely, Marcos' immunity from suit while in office, the fear of reprisals on the part of potential plaintiffs, and the lack of an impartial local forum. *Id.*

In *Doe v. Unocal*, the court similarly found that plaintiffs sufficiently demonstrated the impossibility of obtaining relief in Burma, because of the threat of reprisals and the lack of a functioning judiciary there, and that therefore their claims should be tolled as long as the reigning military government remained in power. *Doe v. Unocal*, 963 F. Supp. at 896-7 (citing *Hilao, supra*). In a related but separate case heard by the same judge, *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997), the court determined that the plaintiff's claims were equitably tolled as a result of extraordinary circumstances outside his control that made it impossible for him to assert his

claims in Burma (including his being a refugee in Thailand). *Id.* at 359-360.

Here, plaintiffs have alleged that: "This proceeding could not have been previously filed in the United States as the whereabouts of the defendant was unconfirmed (until mid-1998), and it could not have been filed in Bosnia and Herzegovina because there is no functioning, nationwide judiciary in Bosnia and Herzegovina. Any attempt to bring suit against the defendant in Bosnia-Herzegovina prior to the plaintiff's departure from the area would have been futile." (Complaint, Paragraph 43) Should the Court desire, the plaintiff can present additional evidence on this issue.

Furthermore, Georgia law contains exceptions to the application of the statute of limitations which are similar to federal provisions regarding equitable tolling of state claims. (Similar state law provisions were available in *Forti I*. 672 F. Supp. at 1551 n.13, which found that "[n]either are plaintiff's pendent state law claims time-barred on the face of the Complaint because California law applies equitable tolling principles similar to those discussed herein.") In Georgia, the running of the statute of limitations for personal injuries is tolled during any period in which service upon the defendant is "impossible" because the defendant is absent from the state and cannot be reached under Georgia's long-arm statute. Ga. Code Ann. §9-3-94; *Railey v. State Farm & Co. Ins. Co.*, 129 Ga. App. 875, 201 S.E.2d 628)(1973); *Smith v. Griggs et al*, 164 Ga. App. 15, 296 S.E.2d 87 (1982);

Long v. Merino et al, 212 Ga. App. 113, 441 S.E.2d 475 (1994). This exception to the statute of limitations has been broadly interpreted in other jurisdictions to toll the statute of limitations against defendants who have never been in the state, to operate in favor of both resident and non-resident plaintiffs, and to cover causes of action accruing in foreign jurisdictions. *See, e.g., Cvecich v. Giardino*, 37 Cal. App. 2d 394, 99 P.2d 573 (1940). Any claims which might be interpreted as pendent Georgia claims are therefore also protected by Georgia's equitable tolling rules.

Accordingly, the sole fact that some of the acts alleged appear to have occurred outside the statute of limitations is not enough to support a dismissal pursuant to Rule 12(b)(6). Instead, dismissal should be granted "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute had been tolled." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993)(quoted in Schwarzer, Tashima, & Wagstaffe, Federal Civil Procedure Before Trial, at Paragraph 9:214.1). Therefore, at this stage of the proceedings, this Court should not dismiss any of plaintiff's claims on statute of limitations grounds.

CONCLUSION

For all of the above reasons, the Defendant's Partial Motion to Dismiss should be denied. If the court believes any additional allegations should be added to the complaint related to equitable estoppel or discovery, however, the plaintiff requests leave of court to amend his complaint accordingly.

Respectfully submitted,

Gerry Weber (by express permission by SR)

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Dated: October 16, 1998

DECLARATION OF PROFESSOR RITA MARAN

I, Professor Rita Maran, hereby declare under penalty of perjury:

1. I teach international human rights law at The University of California, Berkeley, and have studied the conflict in Bosnia and Herzegovina since it broke out in that region in 1992. In 1997, I served in Bosnia and Herzegovina as a Human Rights Analyst for the Human Rights Mission of the Organization for Security and Cooperation in Europe (OSCE). In 1998, I rejoined the OSCE in Bosnia and Herzegovina as an Election Supervisor for the national elections held in September.

2. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Peace Accords) provided for the continuity of Bosnia and Herzegovina as a single state with two constituent entities: the Federation of Bosnia and Herzegovina (the Federation) and the Republika Srpska (the Serb Republic). Bosanski Samac is located within the Serb Republic. The Dayton Peace Accords established a limited federal government (with control over foreign policy, foreign trade, monetary policy, etc.) and more extensive entity governments. It assigned the maintenance of civilian law enforcement agencies and defense to the two entities.

3. By the end of 1995, however, federal government structures had not yet been implemented. The Serb Republic continued to be ruled by Bosnian Serb nationalist hard-liners lead by indicted war criminal Radovan Karadzic.

4. Despite the country's apparent unity, inter-ethnic tensions remained high in Bosnia and Herzegovina throughout the immediate postwar period. The return of refugees to their former places of residence destabilized many ethnically diverse areas. In particular in the Republic, local officials were resistant to cooperate with international human rights officials, such as those from the OSCE, who were tasked with monitoring the implementation of human rights obligations established in the Constitution of Bosnia and Herzegovina under the Dayton Peace Accords. Widespread discrimination on the basis of

ethnicity—in the areas of employment, medical benefits, housing, etc.—continue in some areas through the present.

5. The Constitution of Bosnia and Herzegovina provides for an independent judiciary, which includes the investigative division of the criminal justice system. However, as late as 1996, these provisions had not yet been implemented, and the country lacked a fully functioning judiciary. The United States Department of State reported in its yearly reports on human rights practices in Bosnia and Herzegovina for 1995 and 1996 that members of the executive branch continued to exert considerable pressure on the judicial branch despite these guarantees of independence. International observers expressed concern that political parties were "packing" the bench with party loyalists.

6. Arbitrary arrest and detention (frequently of ethnic minorities) in all parts of Bosnia and Herzegovina remain prevalent. International organizations have reported several cases that remain unresolved. Often, detainees are not released until international monitors intervene.

7. In 1996, the United States Department of State found that law enforcement bodies continued to accord preferential treatment on the basis of ethnic and religious criteria. Furthermore, it reported that judicial institutions throughout the country did not try cases involving human rights abuses, either because these institutions were either unable or unwilling to do so. National human rights ombudsmen share this assessment. The inability of the courts to pursue such cases is due in part to the fact that their dockets are clogged with property claims, such as those arising from individuals returning to their former places of residence and finding their homes occupied by members of a different ethnic group. When human rights cases have been pursued, local officials often refuse to implement court decisions. The few war crimes prosecutions that were commenced in local courts usually involved perpetrators of a different ethnicity as the predominant ethnicity.

8. International organizations monitoring trials in Bosnia and Herzegovina in 1996 and 1997 found judicial proceedings to be flawed and lacking in fair trial guarantees, particularly those cases involving politically-charged issues.

9. Cooperation with the International Criminal Tribunal for the Former Yugoslavia is a key component of the Dayton Peace Accords. Although the Federation has surrendered some indictees of Bosniak (Bosnian Muslim) ethnicity to the International Tribunal, the Serb Republic has to the present continued its policy of defiance vis-à-vis the Tribunal. At one point, Serb Republic officials announced that they would conduct war crimes trials of their own, apparently in an attempt to avoid surrendering indictees to the International Tribunal. These trials were never credibly pursued.

10. Given the aforementioned conditions in Bosnia and Herzegovina, it would have been extremely difficult, if not impossible, for Kemal Mehinovic, a Bosnian Muslim, to pursue his case against Nikola Vuckovic, a Bosnian Serb, in the courts of the Serb Republic. When Mehinovic was released from detention in October 1994, the country was in chaos. Prior to the Dayton Peace Accords, governmental structures were largely dysfunctional. In the immediate post-Dayton phase, just prior to when Mehinovic immigrated to the United States, the judicial system remained plagued by a backlogged docket, a lack of independence, and ethnic bias. Furthermore, judicial officials regularly disregarded cases involving human rights claims, especially by claimants from non-majority ethnic groups. Even if Mehinovic's case had been heard, it is unlikely any judgment obtained would have been executed against the defendant or that Mehinovic could have received a fair assessment.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Date: 7 October 1995 Rita Maran

Rita Maran

DECLARATION OF KEMAL MEHINOVIC

I, Kemal Mehinovic, hereby declare under penalty of perjury:

1. I am a 42-year-old citizen of Bosnia and Herzegovina. I currently reside in the United States.

2. I am the plaintiff in a civil suit in federal court in Atlanta for compensatory and punitive damages against Nikola Vuckovic, a/k/a Nikola Nikolac. I submit this declaration in opposition to the defendant's Partial Motion to Dismiss claims set out in my complaint against the defendant.

3. In mid-May 1992, I was detained, tortured and otherwise abused by Defendant Vuckovic at the police headquarters (SUP) in Bosanski Samac, Bosnia and Herzegovina. In mid-July, I was transferred to the Bosanski Samac Territorial Defense warehouse (TO) where I was again subjected to abuse by the defendant. I last saw the defendant in November 1992 when I was transferred to the Batkovic concentration camp in Bijeljina.

4. I was finally released from detention by the Serbs in Bosnia and Herzegovina in October 1994. After I was reunited with my family, we fled to Croatia and sought refugee status in the United States.

5. In July 1995, I arrived in the United States. I settled in Salt Lake City, Utah, where I was able to obtain employment as a maintenance supervisor for a local real estate developer.

6. In January 1998, I received a telephone call from a friend of mine from Bosanski Samac who had also fled Bosnia and Herzegovina and who had resettled outside of Atlanta, Georgia. This friend told me that Nikola Vuckovic, a/k/a Nikola Nikolac, had recently arrived in the Atlanta area and had been seen working in a factory in Tucker, Georgia.

7. Upon learning that the defendant Vuckovic was also in the United States, I began having nightmares. I was angered by the thought of the defendant living with impunity for what he had done to me and others. I immediately took steps to investigate whether the defendant could be held legally accountable for his actions against me (and others like me) in Bosnia and Herzegovina. Upon inquiry, I was referred for help to The Center for Justice & Accountability (CJA) in San Francisco.

8. In mid-1998, through counsel at CJA, I contacted the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia established by the United Nations at The Hague, The Netherlands. Shortly thereafter, I was informed that the Prosecutor did not intend to proceed against the defendant, although there was an international indictment pending against his superiors in Bosanski Samac, Simo Zaric and Steven Todorovic. At that time, it became clear that in order to pursue justice in this case, I would have to pursue a civil suit in the United States.

9. In May of 1998, I authorized CJA to begin an investigation related to the defendant, with an eye toward bringing a civil suit against him. CJA hired a private investigator in the Atlanta area to locate the defendant for service of process. The investigator also obtained photographs of the man who had been observed working in the factory in Tucker, so that I could independently confirm his identity.

10. CJA sent me those photographs by overnight mail through U.P.S. on June 26, 1998. Upon receipt of the photos, I confirmed that the man in the photographs was the same man who had detained and tortured me in Bosanski Samac, who I had known by the name Nikola.

11. My attorneys then drafted the complaint at issue, which was filed in the Federal District Court for the Northern District of Georgia on August 26,1998. I received word later that day that the defendant had been served with a copy of the complaint while working at the factory in Tucker where he had first been observed after his arrival in the United States.

12. Due to the on-going occupation of Bosanski Samac by the Serbs, I could not pursue this lawsuit against the defendant in my homeland. I have diligently pursued this case upon learning that the defendant had moved to the Atlanta area and was within the jurisdiction of the United States courts.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: 10/8/98

Kemal Mehinovic

Kemal Mehinovic

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KEMAL MEHINOVIC, Plaintiff, v. NIKOLA VUCKOVIC, a/k/a NIKOLA NIKOLAC, Defendant.	)	Civil Action No. 1:98-CV-2470

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Memorandum of Points and Authorities in Opposition to Defendant's Partial Motion to Dismiss and Declarations of Kemal Mehinovic and Rita Maran have been served on all parties by overnight mail via Federal Express addressed to the following:

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This the 10 day of October, 1998.

By: Susan Shawn Roberts
Susan Shawn Roberts
California Bar No. 127823

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