UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-8364 Civ-Hurley/Lynch

JUAN ROMAGOZA ARCE, NERIS GONZALEZ, and CARLOS MAURICIO

Plaintiffs,

v.

JOSE GUILLERMO GARCIA, an individual, CARLOS EUGENIO VIDES CASANOVA, an individual, and DOES 1 through 50, inclusive,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS/SUBJECT MATTER JURISDICTION/CUSTOMARY INTERNATIONAL LAW AND NON-SELF EXECUTING AND/OR UNINCORPORATED TREATIES; MOTION TO DISMISS/FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED/CUSTOMARY INTERNATIONAL LAW AND NON-SELF EXECUTING AND/OR UNINCORPORATED TREATIES; AND MOTION FOR JUDGMENT ON THE PLEADINGS/FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED/CUSTOMARY INTERNATIONAL LAW AND NON-SELF EXECUTING AND/OR UNINCORPORATED TREATIES (DOCKET ENTRY ## 138, 140, 144)

> "[T]he Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830.

I. INTRODUCTION

Defendants have submitted an editorial comment on the role and function of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, not a serious motion based on legal precedent.[1] Despite its

[1] The above-captioned three motions apparently were filed within the space of four days (October 19-23, 2001), but as far as plaintiffs are able to discern, the motions to dismiss for "subject

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length, defendants' out-of-time attack on plaintiffs' ATCA claims boils down to two contentions, both of which are demonstrably wrong as a matter of law.

First, defendants assert that in order to sustain a claim under the ATCA, plaintiffs must point to a treaty or provision of customary international law that is self-executing, or to domestic enabling legislation for non-self-executing norms. This is simply not the law. As numerous courts — including the Eleventh Circuit — have recognized, the ATCA creates a cause of action and thus permits suit for a tort committed "in violation of the law of nations," irrespective of whether the asserted customary international law norm is self-executing or the subject of enabling U.S. legislation.

Second, defendants suggest that the Torture Victim Protection Act ("TVPA"), 28 U.S.C. 1350 note, superseded the ATCA with respect to claims for torture and extrajudicial killing, thereby limiting the causes of action available to plaintiffs in this case. However, both the legislative history of the TVPA and case law establish that the TVPA augmented, without limiting, the ATCA.

Defendants' motion fails both procedurally and substantively. This Court should reject it in its entirety.

II. ARGUMENT

A. Defendants' Motion Should Be Stricken and/or Summarily Denied As Untimely

Defendants' motion is untimely. The deadline for filing substantive pretrial motions came and went on February 6, 2001. *See* Order dated February 23, 2000. Defendants filed their motion over eight months after the cut-off date, and in direct contravention of this Court's Scheduling Order. Defendants offer no good cause for the delay, nor did they file for leave to amend the trial schedule.[2]

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matter jurisdiction" and for "failure to state a claim" are identical in every respect save the title, and the motion for "judgment on the pleadings" is also indistinguishable. For purposes of this opposition, plaintiffs refer to defendants' filings as the "motion."

[2] Assuming *arguendo* that the filing of defendants' motion may be construed as a motion to amend the pre-trial schedule, defendants fail to show cause why the schedule could not "reasonably be met despite the diligence of the party seeking the extension." Federal Rule of Civil Procedure ("Rule") 16(b) (commentary to the 1983 amendment).

Accordingly, the instant motion should be summarily denied. *Sea-Land Servs., Inc. v. D.I.C., Inc.*, 102 F.R.D. 252, 253-54 (S.D. Tex. 1984) (dismissing as untimely Rule 12(c) motion filed nearly seven months after cut-off for filing motions had passed).

B. Defendants' Motion to Dismiss is Barred by Rule 12(b)

The Federal Rules of Civil Procedure provide that a defendant may not bring a Rule 12(b) motion after answering the Complaint. *See* Rule 12(b) (motion asserting defenses enumerated in Rule 12(b) "shall be made before pleading if a further pleading is permitted"). Here, defendants answered the Second Amended Complaint on April 10, 2000, and filed an Amended Answer on October 18, 2001. Even if the Court were to consider the October 18, 2001 Amended Answer as the operative pleading (which it should not, since the purported Answer was filed without leave of court or plaintiffs' consent), defendants have filed their motion too late. Therefore, defendants' 12(b) motion is barred as a matter of law.

C. The ATCA Creates a Cause of Action, and Does Not Require that Plaintiffs Show a Self-Executing Treaty or Customary International Law Norm, or Domestic Enabling Legislation

The substance of defendants' motion is based on a fundamental misunderstanding of the ATCA.[3] Drawing on self-styled revisionist academic commentary, defendants assert that "[s]uits predicated upon alleged violations of customary international law or non-self executing treaties not implemented by domestic legislation do not 'arise under' federal law for Article III purposes and therefore federal courts cannot constitutionally exercise jurisdiction." Defendants' Motion at 3-4.[4]

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[3] In addition to creating a cause of action (see below), the ATCA confers federal subject matter jurisdiction "when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law)." *Kadic v. Karadzic*, 70 F. 3d 232, 238 (2d Cir. 1995). *See also Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir. 1996) (ATCA "has a substantive as well as a jurisdictional component").

[4] The ideological source for many of the ideas in defendants' motion is a law review article, Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 *Harv. L. Rev.* 815 (1997). This article makes no bones about rejecting the current state of the law on numerous issues. *See id.* at 816-17 (acknowledging that "[t]he proposition that customary international law ('CIL') is part of this country's post-*Erie* federal common law has become a well-entrenched component of U.S. foreign relations law," and "[d]uring the last twenty years, almost every federal court that has considered [this] modern position has endorsed it"). While a detailed analysis of Bradley and Goldsmith's scholarship lies outside the scope of this opposition, the article itself has been subjected to searching criticism by leading

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The crux of defendants' motion, in other words, is that the ATCA does not provide a federal cause of action for violations of non-self-executing international law. However, because this interpretation of the ATCA is not the law — in fact, it is the opposite of the law — defendants' motion must be denied.

In *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), the Eleventh Circuit squarely rejected the argument that defendants now make. *Abebe-Jira* involved ATCA claims brought by Ethiopian torture victims against their captor. The defendant asserted that the district court lacked jurisdiction "because the Alien Tort Claims Act neither provides a private right of action nor incorporates a right of action through reference to a treaty or federal law." 72 F.3d at 846. Carefully construing the ATCA (which permits a court to hear claims "by an alien for a tort only, committed in violation of the law of nations," 28 U.S.C. § 1350), the court held that "we read the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke section 1350." *Id*. at 847. Even more damaging to defendants' argument here, the *Abebe-Jira* court stated that "the 'committed in violation of' language of the statute suggests that Congress *did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the Alien Tort Claims Act.*" *Id*. (emphasis added). By way of confirmation, the court also found support for an ATCA cause of action in the legislative history of the TVPA. Given that upon passing the TVPA Congress was aware of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which at least implicitly permitted an ATCA cause of action, the *Abebe-Jira* court reasoned that "Congress . . . has recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law." *Id*. at 848.

The Eleventh Circuit's decision in *Abebe-Jira* is supported by many other cases. For example, in *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441 (D.N.J. 1999), the court followed

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commentators. *See, e.g.*, Harold Hongju Koh, "Commentary: Is International Law Really State Law?", 111 *Harv. L. Rev.* 1824, 1827 (1998) (stating that the Bradley/Goldsmith argument fails and observing that "under current practice, federal courts regularly incorporate norms of customary international law into federal law").

Abebe-Jira in rejecting defendants' claim that application of the ATCA was limited to those instances "in which Congress has enacted specific legislation authorizing a private right of action for such violations." Rather, "the ATCA provides both subject matter jurisdiction and a private right of action for violations of the law of nations." *Id*. at 443. The overwhelming weight of authority is in accord. *See, e.g.*, *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("We thus join the Second Circuit in concluding that the [ATCA] . . . creates a cause of action for violations of specific, universal and obligatory international human rights standards," and "nothing more than a violation of the law of nations is required to invoke section 1350"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) ("§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action"); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the [ATCA] and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action].").[5] Because it is directly contrary to this dispositive authority, defendants' motion fails.

D. Plaintiffs' ATCA Claims for Torture and Extrajudicial Killing are Not Barred by the TVPA

There is no evidence whatsoever to support defendants' claim that Congress "intended the TVPA to legislate the CIL prohibition on torture into federal law and superseded the ATCA with respect to remedies for torture and extrajudicial killing." Motion at 25-26.[6] To the contrary, the

[5] As authority for their position, defendants repeatedly cite Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984) (per curiam). What defendants fail to note is how far outside the mainstream was this opinion. As pointed out by Judge Edwards, also concurring in *Tel-Oren*, "Judge Bork's suggestion that section 1350 requires plaintiffs to allege a right to sue granted by the law of nations is seriously flawed," and "to require an express right to sue [under international law] is directly at odds with the language of the statute [*i.e.*, the ATCA]." *Id*. at 777 and 779; *see also Iwanowa*, 67 F. Supp. 2d at 440 n.20 (observing that "[c]commentators have criticized Judge Bork's opinion in *Tel-Oren* because it would, in effect, render the ATCA useless since nations (as opposed to individuals) rarely bring suit in U.S. courts for violations of customary international law," and pointing out that "Judge Bork's reasoning is flawed because it is based on the erroneous assumption that customary international law is non-self-executing"). As such, this authority is far from sufficient to sustain defendants' position.

[6] Once again, defendants' chief source of authority is the Bradley/Goldsmith law review article — but here the citation makes no sense. Footnote 356 of this article states, "By creating a

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TVPA's legislative history makes clear that this statute was intended to expand, not contract, the scope of existing remedies for torture and other international law violations. The House Report for the TVPA states:

> At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute [*i.e.*, the ATCA] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

See H. Rep. No. 367, 102d Cong., 1st Sess., pt. 1, at 4 (1991) (submitted herewith as Exhibit A to Appendix of Authority).

Case law similarly runs directly contrary to defendants' position. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000) (by passing the TVPA, "Congress expressly ratified our holding in *Filartiga* that the United States Courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and carried it significantly further"); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1251 (S.D. Fla. 1997) (TVPA was "enacted to enhance the remedies available under the ATCA"). Because the TVPA in no way precludes plaintiffs' claims under the ATCA, defendants' motion must be denied.

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federal cause of action for torture, the [TVPA] arguably provides a basis for federal question jurisdiction for suits involving torture," which does not come close to the point defendants seek to make.

III. CONCLUSION

For the reasons stated above, plaintiffs respectfully request that this Court deny defendants' motion (Docket Entry ## 138, 140, and 144) in its entirety.

Dated: November __, 2001

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to KURT R. KLAUS, Jr., Esq., Law Offices of Kurt R. Klaus, Jr., 3191 Coral Way Suite 502, Miami, FL 33145, by U.S. Mail this ___ day of November, 2001.

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