

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF FLORIDA

4 Case No. 99-8364 Civ-Hurley/Lynch

5 JUAN ROMAGOZA ARCE,)
6 NERIS GONZALEZ, and CARLOS)
7 MAURICIO)
8 Plaintiffs,)
9 v.)
10 JOSE GUILLERMO GARCIA, an individual,)
11 CARLOS EUGENIO VIDES CASANOVA,)
12 an individual, and DOES 1 through 50,)
13 inclusive,)
14 Defendants.)
_____)

15 **PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**
16 **FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE**
17 **GRANTED/COMMAND RESPONSIBILITY; AND MOTION FOR JUDGMENT**
18 **ON THE PLEADINGS/COMMAND RESPONSIBILITY (DOCKET ENTRY ## 160, 161)**

19 **I. INTRODUCTION**

20 Defendants’ time-barred attack on Plaintiffs’ pleadings boils down to the contention that as
21 staff or civilian officers, Defendants cannot be liable under the Alien Tort Claims Act (“ATCA”), 28
22 U.S.C. § 1350, or the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, unless
23 Plaintiffs allege that Defendants directly participated in, ordered, or ratified the specific human rights
24 violations committed against Plaintiffs. (Defendants’ Motion to Dismiss at 10.¹) However, even if
25 defendants were correct in their interpretation of the law (which they are not), Plaintiffs have more

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27 ¹ Defendants filed the above-captioned motions separately, but they are identical in every
28 respect save the title. Thus, for purposes of this opposition, Plaintiffs refer to Defendants’ filings as
the “Motion.”

1 than adequately alleged in their Complaint that Defendants directly participated in, ordered, ratified,
2 instigated, permitted, encouraged, or covered-up the alleged human right violations. These
3 un rebutted allegations must be accepted as true for purposes of this Motion. Defendants' Motion
4 must therefore be denied.

5 Moreover, Defendants' interpretation of the ATCA and TVPA is dead wrong. Domestic and
6 international law hold that under the ATCA and the TVPA, a staff or civilian officer may be found
7 liable for human rights violations committed by subordinates, if he or she knew about those
8 violations but failed to use his or her power to prevent them or to punish offenders. This too is
9 adequately pled in the Complaint. Thus, the pleadings more than amply state an ATCA and TVPA
10 claim, and Defendants' untimely attack fails both procedurally and substantively. This Court should
11 reject the Motion in its entirety.

12 **II. BACKGROUND**

13 This is a civil action for compensatory and punitive damages for torts committed in violation
14 of international and domestic law. Plaintiffs, refugees from El Salvador now living in the United
15 States, instituted this action under the Alien Tort Claims Act and the Torture Victim Protection Act
16 against Defendants Jose Guillermo Garcia, Minister of Defense and Public Security of El Salvador
17 from approximately October 1979 to April 1983, and Carlos Eugenio Vides Casanova,
18 Director-General of the National Guard of El Salvador from approximately October 1979 to
19 April 1983, and subsequently Minister of Defense and Public Security of El Salvador from 1983 to
20 1989. Plaintiffs allege that under the doctrine of command responsibility, Defendants are responsible
21 for the harms inflicted on them by members of the Salvadoran Military and/or Security Forces.

22 Plaintiffs originally filed this suit on May 11, 1999. Plaintiffs subsequently filed a Second
23 Amended Complaint ("Complaint") on February 17, 2000, which remains the operative Complaint.
24 Defendants answered the Second Amended Complaint on April 10, 2000. Defendants filed an
25 Amended Answer to the Complaint on October 18, 2001, without leave of court or consent from
26 plaintiffs, in direct violation of Federal Rule of Civil Procedure ("FRCP" or "Rule") 15(a).

27 On February 23, 2000, this Court issued a Scheduling Order setting trial for May 7, 2001, and
28 requiring that all substantive pretrial motions be filed 90 days before the May 7 trial date. That

1 deadline passed on February 6, 2001. On June 27, 2001, the Court reset the trial date in this case *sua*
2 *sponte* for January 2, 2002. The Court did not extend the deadline for filing substantive pretrial
3 motions, and Defendants have not sought any such extension. Defendants filed the instant pretrial
4 motions between October 19 and October 26, 2001, well over eight months after the deadline to file
5 substantive pretrial motions expired and after they answered the Complaint.

6 **III. ARGUMENT**

7 **A. Defendants' Motion Should Be Denied As Untimely**

8 Defendants' Motion is untimely. The deadline for filing substantive pretrial motions came
9 and went on February 6, 2001. (*See* Order dated February 23, 2000.) Defendants filed their Motion
10 over eight months after the cut-off date, in direct contravention of this Court's Scheduling Order.
11 Defendants offer no good cause for the delay, nor did they file for leave to amend the trial schedule.²
12 Accordingly, the instant Motion should be denied summarily. *Sea-Land Servs., Inc. v. D.I.C., Inc.*,
13 102 F.R.D. 252, 253-54 (S.D. Tex. 1984) (dismissing as untimely Rule 12(c) motion filed nearly
14 seven months after cut-off date for filing motions had passed).³

15 **B. Defendants Are Not Entitled To Judgment On The Pleadings**

16 **1. The Standard Under FRCP 12(c)**

17 Judgment on the pleadings is a drastic remedy that deprives the litigants of a full trial on the
18 merits of the contested issue. Therefore, Defendants have the high burden of demonstrating that they
19 meet the standard under FRCP 12(c). To prevail, Defendants must "clearly establish that no material
20 issue of fact remains unresolved and that [they are] entitled to judgment as a matter of law."

21
22 ² Assuming *arguendo* that the filing of Defendants' motion may be construed as a motion to
23 amend the pre-trial schedule, Defendants fail to show cause why the schedule could not "reasonably
24 be met despite the diligence of the party seeking the extension." FRCP 16(b) (commentary to the
1983 amendment).

25 ³ To the extent Defendants' Motion may be considered a motion under Rule 12(b), it is barred
26 as a matter of law because Defendants answered the Complaint on April 10, 2000, and filed an
27 Amended Answer on October 18, 2001. *Brisk v. City of Miami Beach*, 709 F. Supp. 1146, 1147
28 (S.D. Fla. 1989) (once defendants file their Answer it becomes procedurally impossible for the Court
to rule on motions to dismiss); *Paul v. McGhee*, 577 F. Supp. 460, 462 (E.D. Tenn. 1983) (motions to
dismiss filed after the answer is filed are moot).

1 *Thunderwave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1564 (S.D. Fla. 1997). For purposes of this
2 Motion, all the allegations in Plaintiffs’ Second Amended Complaint filed on February 17, 2000,
3 must be accepted as true. *Bryan Ashley Int’l, Inc. v. Shelby Williams Indus., Inc.*, 932 F. Supp. 290,
4 291 (S.D. Fla. 1996) (under Rule 12(c), “the district court must view the facts presented in the
5 pleadings, and all inferences drawn thereof, in the light most favorable to the non-moving party.”).
6 Federal district courts have applied a “fairly restrictive standard in ruling on motions for judgment on
7 the pleadings.” *Id.* (citing 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
8 PROCEDURE (“WRIGHT & MILLER”) § 1368 (1990)). Defendants’ Motion must be denied unless it
9 appears “*beyond doubt*” that Plaintiffs can prove no set of facts in support of their claims that would
10 entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957) (emphasis added). Thus,
11 Defendants’ Motion must be defeated if there are *any* allegations in the Complaint that, if proved,
12 would permit recovery. *Cannon v. Clark*, 1994 U.S. Dist. LEXIS 9770, at *2 (S.D. Fla. June 17,
13 1994) (citing WRIGHT & MILLER § 1368).

14 **2. Plaintiffs Have More than Adequately Pled Their Claims in the**
15 **Complaint**

16 Contrary to Defendants’ suggestion, Plaintiffs have more than adequately pled their claims
17 under the ATCA and the TVPA . Federal pleading requirements are extremely liberal. Plaintiffs
18 need not prove evidentiary facts or set forth a complete and convincing picture of the alleged
19 wrongdoing: “[A] complaint is not required to allege all, *or any*, of the facts logically entailed by the
20 claim....” *Bennett v. Schmidt* 153 F.3d 516, 518 (7th Cir. 1998) (emphasis in original; internal quotes
21 omitted) (the statement “I was turned down for a job because of my race” was sufficient to state an
22 employment discrimination claim). Rule 8(a)(2) provides that a complaint need only “contain a short
23 and plain statement of the claim showing that the pleader is entitled to relief.” The Eleventh Circuit
24 has liberally construed Rule 8: “A complaint need not specify in detail the precise theory giving rise
25 to recovery. All that is required is that defendant be on notice as to the claim being asserted against
26 him and the grounds on which it rests.” *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 964 n.2
27 (11th Cir. 1997) (quoting *Sams v. United Food & Comm’l Workers Int’l Union*, 866 F.2d 1380, 1384
28 (11th Cir. 1989)). For these reasons, there is a “powerful presumption against rejecting pleadings for

1 failure to state a claim.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Kaiser*
2 *Aluminum & Chem. Sales, Inc., v. Avondale Shipyards Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)
3 (finding that a motion to dismiss for failure to state a claim is “viewed with disfavor and is rarely
4 granted”).

5 Plaintiffs’ Second Amended Complaint (the operative pleading), alleges, *inter alia*, the
6 following:

7 Defendants Garcia and Vides Casanova acted *in concert* with and
8 exercised command responsibility over other members of the
9 Salvadoran Military and Security Forces *to plan, carry out and cover*
10 *up the abduction and torture of the Plaintiffs*. Further, Defendants
11 failed to prevent or punish the violations of international law
12 committed by their subordinates.

13 (*Id.* ¶ 3 (emphasis added).)

14 As Minister of Defense, Defendant Garcia was a member of the
15 Salvadoran Military High Command and exercised overall command
16 responsibility for the operations of the Salvadoran Armed Forces
17 consisting of the “Military Forces” (Infantry, Navy, Air Force and
18 Cavalry) and the “Security Forces” (National Guard, National Police
19 and Treasury Police).

20 (*Id.* ¶ 10.)

21 From approximately October 1979 through April 1983, Defendant
22 Vides Casanova was the Director-General of the National Guard for the
23 Republic of El Salvador. As Director-General of the National Guard,
24 Defendant Vides Casanova was a member of the Salvadoran Military
25 High Command and exercised direct command responsibility over the
26 operations of the Salvadoran National Guard. Upon the retirement of
27 Defendant Garcia, Defendant Vides Casanova was promoted to the
28 position of El Salvador’s Minister of Defense.

(*Id.* ¶ 11.)

During Plaintiff Romagoza Arce’s detention, Defendant Vides
Casanova was physically present on two occasions. The first occasion
was in late December 1980 or early January 1981, approximately four
or five days prior to Plaintiff Romagoza Arce’s release.

(*Id.* ¶ 20.)

Defendant Vides Casanova was also physically present during Plaintiff
Romagoza Arce’s release on or about January 5, 1981.

(*Id.* ¶ 22.)

The acts of abduction, detention and torture inflicted upon Plaintiffs
Juan Romagoza Arce, Neris Gonzales, Carlos Mauricio, and Jorge

1 Montes were part of a pattern and practice of systematic human rights
2 violations committed in El Salvador from 1979 to 1983, for which
3 Defendants Garcia and Vides Casanova—acting as Ministers of
Defense and, in the case of Defendant Vides Casanova, Director-
General of the National Guard—bear personal responsibility.

4 (*Id.* ¶ 49.)

5 At all relevant times, the Minister of Defense stood at the pinnacle of
6 the Salvadoran Military High Command. The military was divided into
7 distinct forces: the Military Forces (Infantry, Navy, Air Force and
8 Cavalry) and the Security Forces (the National Guard, the National
Police and the Treasury Police). Each force was represented on the
9 Salvadoran Military High Command by its respective Director-General.
The ultimate decision-making power and final responsibility for any
military operation rested with the Salvadoran Military High Command.

10 (*Id.* ¶ 50.)

11 As members of the Salvadoran Military High Command, Defendants
12 Garcia and Vides Casanova had a duty—under customary international
13 law, multilateral treaties and Salvadoran law—to ensure the protection
14 of noncombatants present in El Salvador during military operations; to
15 prevent violations of international law by the Military and Security
16 Forces; and to ensure that all persons under their command were
17 trained in, and complied with, the laws of land warfare and
international law, including the international law prohibitions against
torture, crimes against humanity, arbitrary detention, and cruel,
inhuman and degrading treatment or punishment. Further, the
Defendants were under a duty to investigate, prevent and punish
violations of international law committed by members of the Military
and Security Forces under their command.

18 (*Id.* ¶ 51.)

19 At all relevant times, Defendants Garcia and Vides Casanova knew or
20 reasonably should have known of the pattern and practice of gross
21 human rights abuses perpetrated by subordinates under their respective
22 commands, including the abuses directed against the Plaintiffs.
23 Defendants Garcia and Vides Casanova failed or refused to take action
to prevent or punish such violations of international law, thus
materially contributing to the uncontrolled violence committed by
members of the Salvadoran Military and Security Forces against
noncombatants.

24 (*Id.* ¶ 52.)

25 Defendants Garcia and Vides Casanova are liable for the acts of
26 arbitrary detention; torture; cruel, inhuman or degrading treatment; and
27 crimes against humanity alleged herein *because the individuals who*
28 *committed the atrocities were the subordinates, representatives, co-*
conspirators and/or agents of Defendants Garcia and Vides Casanova.
The Salvadoran Security and Military Forces acted under Defendants
Garcia and Vides Casanova's direct or implicit instructions, authority
and control and within the scope of authority granted to them and

1 *overseen by the High Command and the Government of El Salvador.*
2 *Defendants Vides Casanova and Garcia—instead of acting to punish*
3 *or prevent such abuses—ordered, instigated, permitted, encouraged,*
4 *authorized, covered up, and ratified the commission of gross human*
5 *rights violations by the Military and Security Forces under their*
6 *respective commands.*

7 (*Id.* ¶ 53 (emphasis added).)

8 Plaintiffs’ unrebutted allegations must be accepted as true for purposes of this Motion. These
9 allegations are more than sufficient to support a claim under the ATCA and the TVPA, even under
10 Defendants’ interpretation of the law, because they directly allege (and assert facts to support the
11 allegations) that Defendants ordered, instigated, ratified, covered up, permitted, encouraged,
12 authorized, and failed to prevent gross human right violations by forces under their command,
13 including those committed against plaintiffs. Therefore Defendants’ Motion must be denied.
14 *Thunderwave, Inc.*, 954 F. Supp. at 1564; *Bennett*, 153 F. 3d at 518; *Evans*, 131 F.3d at 964 n.2
15 (when the allegations give defendants plain notice of the claims, it is for the finder of fact to
16 determine the veracity of the allegations).

17 **C. Defendants Are Responsible For The Abuses Committed By Their**
18 **Subordinates Under The Doctrine Of Command Responsibility**

19 Although the Court need not resolve the issue to decide this Motion, Defendants’ contention
20 that public ministers and staff officers may not, as a matter of law, be held liable under the doctrine of
21 command responsibility unless they directly authorize, approve, direct, or ratify human rights
22 violations profoundly misstates well established domestic and international law.

23 United States courts have universally recognized that international law permits imposition of
24 liability against civilian authorities and military staff officers. Indeed, if Defendants’ analysis were
25 correct, numerous ATCA precedents would have been decided differently. In *Hilao v. Estate of*
26 *Marcos*, 103 F.3d 767, 776-79 (9th Cir. 1996), the court — relying on a variety of international
27 authorities, ATCA case law, and the legislative history of the TVPA — upheld jury instructions on
28 command responsibility in a case against former Philippine President Ferdinand Marcos for human
29 rights violations occurring during his rule. These instructions permitted Marcos to be held liable if he

1 *knew* of torture and other abuses by the Philippine military “and failed to use his power to prevent it.”
2 *Id.* at 776. Evidence of Marcos’ direct participation in the abuses was not required.

3 Similarly, in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), the court held that
4 former Guatemalan Minister of Defense Hector Gramajo could be held liable for abuses committed
5 by Guatemalan military forces under the command responsibility doctrine. Contrary to defendants’
6 assertions (Motion at 9-10), the *Gramajo* court did not rely exclusively on Defendant’s direct
7 involvement in military operations in imposing liability on him. While the court found Gramajo
8 directly liable for giving orders that resulted in human rights abuses, it “also [found] that Gramajo
9 may be held liable for the acts of members of the military forces under his command.” *Id.* at 171. As
10 the court noted:

11 In this case, plaintiffs have convincingly demonstrated that, at a
12 minimum, Gramajo was aware of and supported widespread acts of
13 brutality committed by personnel under his command resulting in
thousands of civilian deaths. (Citations omitted). Gramajo refused to
act to prevent such atrocities.

14 *Id.* at 172-73.

15 This court and others have similarly permitted claims against political leaders or staff officers
16 for acts by military forces under their authority. *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994)
17 (holding Haitian ruler liable for abuses by subordinate soldiers and officers); *see also Kadic v.*
18 *Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995) (permitting claims against president of self-proclaimed
19 Bosnian-Serb republic for acts of torture and summary execution by troops under defendant’s
20 command); *Doe v. Lumintang*, Civ. No. 00-674 (D.D.C. 2001), “Findings of Fact and Conclusions of
21 Law” (dated September 13, 2001) at 22-23 (noting that Indonesian army staff officer could be held
22 liable under command responsibility doctrine because Plaintiffs’ ATCA claims “are based on torts
23 committed under Defendant’s direction, authority and auspices, although not directly by Defendant
24 himself”).⁴

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26
27 ⁴ This unpublished document is attached as Exhibit A to the Appendix of Authorities in
Support of Plaintiffs’ Opposition to Defendants’ Motion (“Appendix”), submitted herewith.

1 Indeed, the United States Supreme Court in the seminal command responsibility case *In re*
2 *Yamashita*, 327 U.S. 1 (1946), found significant that defendant, in addition to being commander of
3 Japanese military forces in the Philippines, was also the military governor of the Philippines.
4 Reviewing relevant provisions of the Geneva Conventions governing the conduct of war, the Court
5 noted:

6 These provisions plainly imposed on petitioner, who at the time
7 specified was military governor of the Philippines, as well as
8 commander of the Japanese forces, an affirmative duty to take such
9 measures as were within his power and appropriate in the
10 circumstances to protect prisoners of war and the civilian population.

11 *Id.* at 16. This decision accords with and accurately reflects the well established customary
12 international law of “superior” responsibility. Relevant multilateral treaties establish that any
13 superior, whether military or civilian, may be held responsible for abuses by subordinates under his
14 authority in appropriate circumstances.⁵ The United States, in voting at the United Nations in favor
15 of the International Criminal Tribunal for the Former Yugoslavia, stated its understanding that
16 individual responsibility arises in the case of “the failure of a superior — whether political or
17 military — to take reasonable steps to prevent or punish such crimes by persons under his or her
18 authority.” U.N. SCOR, Provisional, 3217th mtg., U.N. Doc. S/PV.3217 (1993), at 16 (Appendix,
19 Ex. B).

20 Decisions by international bodies confirm that civilian authorities⁶ and chiefs of staff⁷ may be
21 held criminally responsible under these provisions. Indeed, the principal international authority upon

22 ⁵ See, e.g., Article 7(3), Statute of the International Criminal Tribunal For The Former
23 Yugoslavia (“ICTY”) (1994) (Ex. D to Appendix of Authorities to Plaintiffs’ Proposed Jury
24 Instructions on Command Responsibility, filed with this Court on April 27, 2001) (“April 27, 2001
25 Appendix”); Article 6(3), Statute of the International Criminal Tribunal for Rwanda (1994) (Ex. E to
26 April 27, 2001 Appendix); Article 28, Rome Statute of the International Criminal Court (1998) (Ex. F
27 to April 27, 2001 Appendix).

28 ⁶ See *The Case Against Hirota*, THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT,
SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL
MILITARY TRIBUNAL FOR THE FAR EAST (“TOKYO MAJOR WAR CRIMES TRIAL”) (R. John Pritchard
ed. 1998), p. 49,791 (convicting Japanese Foreign Minister of mass rape in Nanking for dereliction in
duty “in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities,

(Footnote continues on following page.)

1 which defendants rely, the “*Celibici Judgement*,” explicitly holds that “non-military” superiors may
2 be held liable for failing to prevent abuses by persons under their authority. See *Prosecutor v.*
3 *Delalic*, Judgement of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), No.
4 IT-96-21-T (Nov. 16, 1998), ¶¶ 355-78 (Appendix, Ex. C). As the ICTY held, superior
5 responsibility “extends beyond the responsibility of military commanders to also encompass political
6 leaders and other civilian superiors in positions of authority.” *Id.* ¶ 356.

7 Thus, contrary to Defendants’ sweeping assertions — which Defendants appear to have
8 cobbled together from inapplicable legal commentary — no legal bar exists to bringing military staff
9 officers to trial under the ATCA and TVPA for failing to prevent human right violations carried out
10 by their subordinates when the officers knew or should have known of the violations, but did nothing
11 to prevent them or punish the offenders. Defendants’ untimely Motion, therefore, fails.

12 **IV. CONCLUSION**

13 For the reasons stated herein, Plaintiffs respectfully request that the Court deny Defendants’
14 Motion (Docket Entry ## 160-61).

15 Dated: November __, 2001

16
17 Respectfully submitted,

18 By _____
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27 _____
28 (Footnote continued from previous page)
failing any other action open to him to bring about the same result”) (Ex. L to April 27, 2001
Appendix).

⁷ *The Case Against Muto*, TOKYO MAJOR WAR CRIMES TRIAL, pp. 49,820-21 (Chief of Staff
to military commander of Philippines) (Ex. L to April 27, 2001 Appendix).

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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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