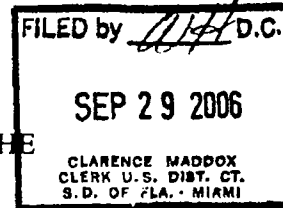


UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division



CLOSED
CIVIL
CASE

Case Number: 01-3208-CIV-MARTINEZ-BANDSTRA

IN RE SINALTRAINAL LITIGATION,

**CONSOLIDATED OMNIBUS ORDER DISMISSING THE CASES FOR
LACK OF SUBJECT MATTER JURISDICTION**

I. INTRODUCTION

In 1980 the Second Circuit's *Filartiga v. Pena-Irala* decision held that official torture is prohibited under the law of nations, which ushered in a new era of litigation under the Alien Tort Claims Act¹ ("ATCA"). 630 F.2d 876 (2d. Cir. 1980). Since then, a number of individuals who directly engaged in violent human rights abuses, especially torture and extrajudicial killing, have been found liable. Within the last decade, a significant number of cases have been filed that allege that major United States corporate entities are vicariously liable for human rights abuses abroad under the ATCA or the Torture Victim Protections Act ("TVPA").² Due to the more abstract and diffuse nature of the corporate entities involved, this task is necessarily more difficult. In order to prove his or her case, a plaintiff must connect actions and actors on the ground to subsidiary corporate entities, and in turn show the vicarious liability of the United States corporations. Furthermore, it is difficult to demonstrate a relationship between corporate entities and the state actions that are a requirement for most ATCA torts. As a result, it has been noted in oral argument before the Supreme Court that "in the corporate realm, there has not been a

¹ 28 U.S.C. § 1350.

² 18 U.S.C. § 1350, note, § 2(a).

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judgment yet against a corporation in an alien tort statute case."³

Although the Eleventh Circuit has recently considered a case that involved violence against trade unionists in Guatemala, the facts alleged in the four consolidated cases before this Court are unprecedented. The instant cases allege that paramilitary actors, whose actions should be imputed to the Republic of Colombia through "color of law" analysis, have used violence and threats of violence to systematically intimidate members of Colombia's largest food and beverage trade union, Sindicato Nacional de Trabajadores de la Industria de Alimentos ("Sinaltrainal"). Furthermore, the cases allege that the acts of violence and intimidation by the paramilitaries were done at the direction of, or with the cooperation of, managers that worked at soft drink bottling plants in Colombia. The complaints further allege that these plant managers were working within the scope of their duties at their respective bottling plants, which are foreign affiliates of United States corporations. In other words, Plaintiffs allege that the Defendants hired or conspired with paramilitaries (or local officials in one of the cases) to "rid" four Colombian bottling plants of the Sinaltrainal union, and that the Colombian government endorses or tacitly condones this activity.

These four cases present difficult legal questions that have not been squarely addressed by the Eleventh Circuit about how to properly evaluate subject matter jurisdiction in the ATCA context. Furthermore, these cases rely on legal theories which are untested in any federal court.⁴

³ Comment of Paul L. Hoffman, Esq. made during oral argument before the United States Supreme Court. United States Supreme Court Official Transcript of Oral Argument on March 30, 2004.

⁴ As is discussed *infra*, the *Gil*, *Leal*, and *Galvis* actions rely on a novel theory that "color of law" can be imputed from complicity between state entities to paramilitaries, and in turn from paramilitaries to the Defendants in this case. See discussion in Section IV(B)(3) of this order, *infra*.

While the general requirements of notice pleading are well established, some of the seminal decisions involving the Alien Tort Claim Act indicate that federal courts must engage in "a more searching preliminary review of the merits," and that pleading "merely a colorable violation of the law of nations" is not a sufficient basis for jurisdiction. However, federal appellate courts have not squarely defined the proper task of a district court in evaluating subject matter jurisdiction under the ATCA, particularly in the context of cases involving theories of indirect liability that rely on attenuated connections between the individuals who physically committed torts, state entities, and multiple layers of corporate entities. Thus, this Court faces a difficult task in determining whether the instant complaints' harrowing allegations of violence and abuse, coupled with murky allegations regarding the relationships between the violent actors, state entities, and corporate entities, sufficiently plead a violation of the law of nations to afford this Court subject matter jurisdiction. Indeed, if the complaints merely allege torts and crimes of a local nature, as opposed to torts in violation of the law of nations, then this Court lacks subject matter jurisdiction.

A number of district courts have struggled with this dilemma, and some, with great reluctance, have acquiesced to a finding that subject matter jurisdiction exists and that the case should proceed.⁵ Although the principles of notice pleading are enshrined in the Federal Rules of Civil Procedure and a body of interpretive case law, it is equally well established that federal courts are courts of limited jurisdiction. Furthermore, language in the Supreme Court's recent ATCA decision suggests a need for "judicial caution" in implementing the jurisdiction of the

⁵ See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (expressing "deep reservations" to its finding that the plaintiff had stated a claim and about the suitability of the forum").

ATCA. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Demonstrating indirect liability for human rights abuses on the part of corporate entities is an inherently difficult task, and there is a risk that too high a pleading standard will prevent the discovery necessary to unearth involvement in the misdeeds that Congress hoped to remedy through the ATCA and the TVPA. However, there is also a risk that vague, conclusory, and attenuated allegations will allow individuals (and often the interest groups that finance or otherwise support their litigation) to engage in unwarranted international "fishing expeditions" against corporate entities and to abuse the judicial process in order to pursue political agendas.⁶

The district court's proper role in balancing these competing concerns has not been well defined. However, a number of cases suggest that a district court's task of recognizing violations of customary international law must be informed by the nature of the factual allegations before it. This Court does not purport to articulate a precise standard of pleading that is necessary to survive the "searching review of the merits" to ensure that a sufficiently colorable violation of the law of nations has been pled. After wrestling with the allegations of the instant cases, this Court concludes that the Plaintiffs' allegations in the instant cases are too conclusory, too vague, and too attenuated to adequately plead a violation of the law of nations to support subject matter

⁶ Defendants characterize Plaintiffs' litigation as "part of their ongoing political campaign against 'globalization' and Plan Colombia," and argue that "Plaintiffs' aim is to force the Defendants, two U.S. corporations, one U.S. resident, and some of their foreign affiliates, to police the countries where they do business." (D.E. No. 54 at 2). Defendants also note that Plaintiffs' "chief advocate," the International Labor Rights Fund has recently filed a number of ATCA cases with very similar complaints. (D.E. No. 54 at 39). This Court notes that the International Labor Rights Fund also represented the plaintiffs in the *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003) *aff'd in part and rev'd in part* 416 F.3d 1242 (11th Cir. 2006) *reh'ing en banc denied*, 452 F.3d 1284 (2006), a case which is referred to throughout this Order. This Court also notes that Defendants have filed several motions for sanctions. These motions for sanctions are still under advisement.

jurisdiction.

This Court first provides a brief overview of the basic facts and procedural history of the cases before it. Next, it discusses the body of case law discussing the level of appropriate review for determining whether a violation of the law of nations has been plead. It then evaluates the adequacy of the pleadings in the instant cases and finds that Plaintiffs have not sufficiently alleged a colorable violation of the law of nations for this Court to properly exercise subject matter jurisdiction in these cases. Finally, it discusses other pending issues in the cases, including improper and futile attempts amend the complaints.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The four cases before this Court, which are factually related, have been administratively consolidated for pretrial purposes. (D.E. No. 151) in Case No. 01-CIV-3208 (consolidating case for pretrial purposes only and designating Case No. 01-CIV-3208 as the lead case). All of the cases involve violence and threats of violence against trade unionists in Colombia who have been employed in the soft drink beverage bottling industry and are members of Sinaltrainal ("Sinaltrainal" or "union").⁷ Defendants are corporate entities, as well as one individual, that are involved in the soft drink bottling industry, more specifically in the business of bottling and distributing Coca-Cola products. The general gravamen of the Complaints is that the defendant corporations and individuals are vicariously liable, through theories of conspiracy, aiding and abetting, or joint action, for the violent actions of paramilitary members – whose actions should be imputed to the Republic of Columbia– in an attempt to intimidate union members and squelch

⁷ Any reference to "Sinaltrainal" or "union," unless otherwise noted, refers to the respective local union for each of the four bottling plants.

union activity.

These cases were originally filed in a single action before the Honorable Paul C. Huck. After Defendants jointly filed a motion to dismiss on the basis of subject matter and personal jurisdiction (D.E. No. 35), which was fully briefed (D.E. Nos. 38 and 43), the Plaintiffs were given leave file an amended complaint in the original action (D.E. No. 48) and to file three new actions.⁸ Thus, the original suit became the four separate actions currently before the Court. In the instance of two of the resulting suits, the *Gil* and *Leal* actions, amended complaints were filed, which represented a third version of the allegations in those cases.⁹ The Defendants jointly filed a second consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. No. 54 in Case No. 01-CIV-3208-MARTINEZ), which was filed in all four cases and is fully briefed.¹⁰ See

⁸ The three new complaints were assigned Case No. 02-20258-CIV-MARTINEZ, Case No. 02-20259-CIV-MARTINEZ, and 02-20260-CIV-MARTINEZ.

⁹ The Court notes that at that juncture, the Plaintiffs had the benefit of amendment after full briefing regarding the jurisdictional issues in the cases before filing the operative Complaints.

¹⁰ Essentially, the issues raised in this Order relate to the pending Motion for Clarification (D.E. No. 168). That Motion seeks clarification of this Court's Order on subject matter jurisdiction dated March 28, 2003 (D.E. No. 103), which addressed the Defendants' joint consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. No. 53). This Court notes that the briefing related to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction was extensive. The parties were given leave to exceed the Southern District of Florida's standard page limits. (D.E. No. 52).

Defendant Panamco Colombia did not formally join in the motion to dismiss for lack of subject matter. Panamco Colombia did join in a motion to dismiss for lack of personal jurisdiction. (D.E. No. 55). However, the parties do not dispute that Panamco Colombia is a subsidiary of Panamco. In addition, Panamco Colombia is represented by the same counsel as Panamco and Panamerican, which are all related companies.

By virtue of the fact that this Court's subject matter jurisdiction as to Panamco (which is alleged to be vicariously liable for the actions of Panamco Colombia) turns on this Court's subject matter jurisdiction as to Panamco Colombia, and pursuant to Federal Rule of Civil Procedure 12(h)(3), this Court finds that it is appropriate to consider the subject matter jurisdiction of the Court as to Panamco Colombia.

(Case No. 01-CIV-3208-MARTINEZ D.E. Nos. 57 and 63). An extensive four-hour session of oral argument was held before then-presiding Judge Huck. Shortly thereafter, the Sinaltrainal actions were randomly reassigned to this Court by the Clerk of the Southern District of Florida for administrative reasons. (D.E. No. 91).

On March 28, 2003 this Court issued an order which *inter alia*, dismissed the claims against the Coca-Cola defendants in all of the instant lawsuits for lack of subject matter jurisdiction, as well as the claims pursuant to RICO. *See generally* (D.E. No. 103). This Court denied reconsideration of that order and also denied a motion to certify the order as a final judgment.¹¹

Subsequently, this Court has held several extensive hearings, one of which included witness testimony, regarding issues of personal jurisdiction, the appropriateness of granting leave to amend several of the complaints, and the issue of sanctions relating to the reassertion of claims that had already been dismissed. However, this Court's subject matter jurisdiction is still a contested and unresolved issue.¹²

While the factual allegations of the cases are familiar to the parties, this Court provides a brief overview of the basic factual allegations underlying the four Sinaltrainal actions. All four of the complaints allege claims against companies that bottle Coca-Cola brand soft drinks. In the *Gil* case, the local bottler is Bebidas y Alimentos de Uraba, S.A. ("Bebidas"), which is allegedly owned and controlled by Defendant Richard Kirby, who resides in the Southern District of

¹¹ This Court emphasizes that the findings in this Order do not modify its ultimate conclusions with regard to subject matter jurisdiction over the Coca-Cola Defendants (i.e. The Coca-Cola Company and Coca-Cola de Colombia, S.A.) or the RICO claims.

¹² See discussion in note 10, *supra*.

Florida. The Plaintiffs most recent Second Amended Complaint also alleges claims against Island Capital Investments, Inc., which is allegedly the "corporate shell" or "mere instrumentality" that Kirby uses to control Bebidas. *Id.* at ¶ 16. Similarly, the *Galvis*, *Garcia*, and *Leal* suits assert claims against the local bottlers that are owned and operated by Panamco Industrial de Gaseosas, S.A. (a/k/a Panamco Colombia, S.A.) ("Panamco Colombia"). Plaintiffs allege that Panamerican Beverages, Inc. ("Panamerican") and Panamco LLC ("Panamco") are vicariously liable for the actions of Panamco Colombia by virtue of an alter ego or agency relationship.

The essence of the complaints is that each of the bottling companies in Colombia is responsible for the efforts of its agents to intimidate members of the Sinaltrainal unions at each of the respective plants involved in the suits through cooperation with the Colombian right-wing paramilitaries. As is discussed *infra*, these allegations essentially rest on the theory that members of management at each of the four plants conspired with paramilitaries, who are operating under "color of law," to intimidate union members and attempt to eliminate the union. Accordingly, Sinaltrainal is a named plaintiff in each of the four complaints.

As both parties agree, the situation in Colombia has been nothing less than tragic. The events giving rise to these claims occurred against a backdrop of civil unrest that has plagued Colombia with violence and terror for over forty years. The civil unrest in Colombia includes clashes between so called left-wing guerrilla groups and right-wing paramilitary groups, particularly the United Self-Defense Group of Columbia ("AUC"). Colombian civilians at large have suffered from numerous murders, kidnappings, and other violent acts. The Court now provides a brief overview of the more specific allegations of the four operative complaints in the

instant cases.¹³

1. The *Gil* Complaint

Plaintiffs in this action are two individuals who allegedly represent the estate of Isidro Segundo Gil,¹⁴ who is deceased, and Luis Adolfo Cardona. Plaintiffs essentially allege that union leader Isidro Segundo Gil was murdered by paramilitaries inside the Bebidas y Alimentos de Uraba ("Bebidas") bottling Plant in Carepa, Colombia. Plaintiff Luis Adolfo Cardona, who is also a union leader, allegedly witnessed the murder of Gil, and he was later detained, tortured, and threatened by paramilitaries, before escaping and being forced to live in exile.

Plaintiffs explain that in 1994 paramilitaries murdered two Bebidas workers who were members of the local Sinaltrainal union. *Gil Compl.* at ¶ 34. The paramilitary forces in Carepa began to intimidate union members, telling them to resign from the union upon "threat of physical harm." *Id.* at ¶ 35. As a result, a number of union members "began leaving town," and when the threats continued in 1995, every member of the executive board of the Sinaltrainal union had fled "in fear for their lives." *Id.*

In June of 1995, the local union elected a new executive board to replace the one that had

¹³ For the reasons discussed in Section VII, *infra*, this Court notes that the following are the operative complaints: (D.E. No. 270) in the *Gil* case, Case No. 01-3208-CIV-MARTINEZ; (D.E. No. 3) in the *Leal* case, Case No. 02-20258-CIV-MARTINEZ; and (D.E. No. 1) in the *Garcia* case, Case No. 02-20260-CIV-MARTINEZ. The Proposed Second Amended Complaint in the *Galvis* case, which was night-box filed on April 12, 2005 as an attachment to the Motion to Amend (D.E. No. 243) (filed in Case No. 01-3208-CIV-MARTINEZ after administrative consolidation), is the operative complaint to the extent that it does not add new parties. See Section VII of this Order, *infra*.

¹⁴ There have been a number of legal issues raised regarding the standing of the estate of the decedent, Isidro Gil. See, e.g. (D.E. Nos. 271, 273, 288, and 289). Due to this Court's conclusion that it is without subject matter jurisdiction, these issues are now moot.

fled, and Isidro Gil was elected as a member of this new board. *Id.* at ¶ 36. In September of 1995, Richard Kirby, one of the three shareholders of Bebidas, hired Ariosto Milan Mosquera to serve as the plant manager of the Bebidas plant. After Mosquera fired a union leader, a judge found the discharge was unlawful, and Bebidas was ordered to rehire the employee. *Id.* at ¶ 37. As a result, "Mosquera began aggressively and publically threatening to destroy the union," and he conspired with local paramilitary leaders to "drive the Union out of the [Bebidas] bottling plant using threats of violence, and if required, actual violence." *Id.* at ¶ 38.

Later, on December 5, 1996 at 9:00 a.m. two paramilitaries approached Gil when he was standing in the entranceway of the Bebidas plant. *Id.* at ¶ 45. The paramilitaries asked Gil if he was in fact Gil, and he confirmed that he was. *Id.* The paramilitaries told Gil that they needed to go into the plant to talk to someone inside. *Id.* Gil complied with their request and unlocked the door. "Isidro Gil proceeded to open the door and the two paramilitaries then shot him to death inside the plant." *Id.* Later that night, the same paramilitaries started a fire that burned down the local Sinaltrainal union hall.

Plaintiff Cardona, who was working inside the plant at the time, witnessed the murder of Isidro Gil. *Id.* at ¶ 46. Shortly after the murder, the "very same paramilitaries who killed" Gil, as well as the chief of the Carepa paramilitaries, kidnapped Cardona when he was on his way to a union meeting to discuss the murder of Gil. *Id.* The paramilitary chief brought Cardona to a local bar where eight paramilitaries, including the one who "personally killed" Gil, were waiting for Cardona. Cardona was held in the custody of the paramilitaries for an hour, and he was "tortured and subjected to cruel, inhumane and degrading treatment during this time by credible threats from the paramilitaries that he and his family would be murdered." *Id.* The paramilitaries told

Cardona that they were going to take him to the "banks of the river where they would further torture and then kill him because of his activism with the union" and because he witnessed the murder of Gil.

However, Cardona "was able to escape the paramilitaries' clutches as their car pulled up to take him to the river bank." *Id.* Cardona and his family lived in hiding with the assistance of Sinaltrainal in Bogota and then in Medellin, Colombia. Cardona and his family eventually fled in exile to the United States, where they have applied for asylum. *Id.*

The *Gil* Complaint alleges the following causes of action: extrajudicial killing pursuant both to the ATCA and TVPA; cruel, inhumane and degrading treatment or punishment; and wrongful death under Florida and Colombian law.

2. The Galvis Complaint

Juan Carlos Galvis was the president of the local Sinaltrainal union in the Magdalena Medio region of Colombia. More specifically, the Panamco Colombia owned plant was in Barrancabermeja, Colombia, where intense conflicts have occurred between right-wing paramilitaries and left-wing guerillas. Galvis alleges that he has been receiving death threats from Colombia's largest paramilitary group, the AUC, for ten years. The AUC has threatened to kill him if he does not stop his union activities and leave the Union. Threats have been made to Galvis personally and to his wife over the phone, in writing, and on the walls inside the Panamco Colombia bottling plant in Barracabermeja.

On August 3, 2001, Galvis and his wife were stopped while driving their car past four armed paramilitaries, who then threatened Galvis with "physical harm, including assassination" if he did not "stop being such a loudmouth." Galvis Compl. at ¶ 69. On August 18, 2001 his name

