No. 07-14090-D

In the United States Court of Appeals for the Eleventh Circuit

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JUAN AQUAS ROMERO, *et al.*,
Plaintiffs/Appellants,

v.

DRUMMOND COMPANY, INC., *et al.*,
Defendants/Appellees

On Appeal from the United States District Court for the Northern District of Alabama; Case Nos. 7:03-cv-00575-KOB; 7:04-cv-00242-KOB; 7:02-cv-00665-KOB; 7:03-cv-01788-KOB; 7:04-cv-00241-KOB
The Honorable Karon O. Bowdre

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ORGANIZATIONS* IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, Amici hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons submitted by Plaintiffs-Appellants Romero, *et. al.*, and adding the following:

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *amici curiae* submit their Corporate Disclosure Statement as follows: None of the incorporated *amici curiae* has a parent corporation nor a publicly held corporation that owns 10% or more of its stock.

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici have substantial organizational interest in the issues addressed in our brief. Moreover, these issues fall within *amici*'s areas of expertise. EarthRights International (ERI) is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is or has been counsel in several lawsuits dealing with claims involving color of law determinations under the ATS and TVPA, including *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.). Most relevant to this appeal is *Doe v. Chiquita Brands International, Inc.*, No. 07-CV-03406 (D.N.J.), in which ERI represents plaintiffs alleging violations, including extrajudicial killing, perpetrated by paramilitary groups acting under color of Colombian law.

The Colombian Institute for International Law (CIIL) is a non-profit human rights organization based in Washington, DC, that focuses on the development of human rights in Colombia. Along with ERI, CIIL is co-counsel in the case of *Doe v. Chiquita Brands International*, No. 07-CV-03406 (D.N.J.), involving claims of extrajudicial killings by Colombian paramilitary groups.

The Robert F. Kennedy Memorial Center for Human Rights (RFK Center) is a non-profit human rights organization based in Washington, D.C., that engages in long-term partnerships with human rights defenders to initiate

and support sustainable social justice movements. The RFK Center works closely with its Colombian partners concerned with the relationship between U.S. corporations and Colombian paramilitary groups and the increasing violence in Colombia. In particular, the RFK Center has taken efforts advocating for accountability for those responsible for plotting Operation Dragon. Former Colombia military Col. Julian Villate, implicated in the Operation Dragon plot to assassinate 1998 RFK Human Rights Laureate Berenice Celeyta and 174 other Colombian activists, is Chief of Operations for Drummond Coal in Colombia.

The George Washington University Law School International Human Rights Clinic is a human rights teaching clinic based at the George Washington University Law School in Washington, DC. The Clinic specializes in litigating human rights cases before U.S. courts and international tribunals, primarily in the Inter-American system. Currently, the Clinic is involved in research for several ATS and TVPA cases involving questions of state action, including *Doe v. Chiquita Brands International*, No. 07-CV-03406 (D.N.J.) and *Bowoto v. Chevron Texaco Corp.*, No. 99-CV-2506 (N.D. Cal.).

Finally, the Center for International Policy is a non-profit human rights organization based in Washington, DC, that provides information and analysis regarding the military, government, and security situation in Colombia. The Center has extensive experience and expertise regarding security and demilitarization in Colombia; much of this work has centered on paramilitary

groups and their relationship with the Colombian government.

Amici therefore have an interest in ensuring that the courts apply the correct body of law to decide color of law questions under the ATS and TVPA, particularly with respect to accountability for paramilitary violence in Colombia.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

Amici herein describe the legal standards that are applicable to determine whether a nominally private party that commits a summary execution was acting as a state actor for purposes of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note.

INTRODUCTION

The district court below granted summary judgment dismissing plaintiffs' summary execution claims under the Torture Victim Protection Act. In the Court's order, its consideration of this issue, in its entirety, consisted solely of the statement: "The court finds that Plaintiffs have failed to put forward sufficient evidence to satisfy the state action requirement of the TVPA." The court's written order undertook no analysis of the standards that govern such an inquiry, nor did it attempt to apply the law to the facts in the record.[1]

[1] While brief written decisions can sometimes be explained with the aid of more substantial oral statements, in this case even the oral explanation given by the court is extraordinarily brief and sheds little light on the court's reasoning. REII339 at 64:22–65:21 (Transcript of Feb. 27, 2007, hearing).

The district court also held that plaintiffs' Alien Tort Statute claims for summary execution could proceed, because plaintiffs produced sufficient evidence "to create a genuine issue of material fact as to whether Defendants' alleged participation in the murders of the union leaders might fall within the war crimes exception to the state action requirement of the AT[S]."[2] Apparently then, the court only permitted the ATS claims for summary execution to proceed to the extent the plaintiffs were able to prove that the summary executions at issue constituted war crimes, but did not allow them to proceed as ordinary summary execution claims under the ATS, which would require state action, but not any nexus to war.

Given the lack of legal and factual analysis in the record concerning the state action issue, *amici* cannot form and do not express any opinion as to whether the district court reached the proper result. *Amici* herein, however, explain the proper legal standards that should govern the analysis into whether the United Self-Defense Forces of Colombia (AUC), the paramilitaries that committed the murders at issue, were acting under color of state law, and thus met the state action requirement of plaintiffs' TVPA claims and of their non–war crime ATS summary execution claims.

SUMMARY OF ARGUMENT

In order to determine whether a nominally private party that has

[2] The district court held that plaintiffs could proceed with those claims under a theory that the defendants had aided and abetted the alleged war crimes.

committed a summary execution has acted under "color of law" for the purposes of the Alien Tort Statute and the Torture Victim Protection Act, the court must look to federal common law. In addition to the body of law on state action already well developed under the ATS and TVPA, courts may also look to civil rights jurisprudence under 42 U.S.C. § 1983 for guidance. In addition, courts may consult international law, although the absence of an international law rule would not preclude a court from finding the relevant rule under federal common law.

Numerous ATS and TVPA cases have found the requisite state action, in cases where state officials provide financial and logistical support to paramilitary groups, *see Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); and where state officials are involving in supporting and cooperating in the commission of abuses, *see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

Under ATS and TVPA jurisprudence, as well as state action standards under section 1983 and customary international law, there are at least four ways relevant to this case that a private party acts under color of law for purposes of the ATS and TVPA.

First, a private party is a state actor for the purposes of the ATS and TVPA where the party was a willful participant in joint activity with the state or

its agents, or has acted together or in concert with, or has obtained significant aid from, state officials. This includes instances where state officials either aid and abet or conspire with the perpetrator. Looking to section 1983 jurisprudence, courts applying this test under the ATS and TVPA have found that "[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Kadic*, 70 F.3d at 245.

Second, a private party is a state actor for purposes of the ATS and TVPA when the party has a significant nexus or symbiotic relationship with the state. The focus of this test, which has been applied under section 1983 and ATS and TVPA jurisprudence, is that party's general relationship with the state or state officials, not simply state officials' involvement in the specific human rights abuses at issue.

Third, a private party is a state actor for purposes of the ATS and TVPA where the party, under agency principles, acted under actual or apparent authority of the state or state officials. Actual authority occurs where the agent has reason to believe that it has the power to act on behalf of the principle. Apparent authority focuses on the beliefs of third parties.

Fourth, a private party is a state actor for purposes of the ATS and TVPA where the party acts at the instigation, or with the consent or acquiescence of, a public official or other person acting in an official capacity. Under customary international law, liability is accorded in a number of circumstances, including

when a state fails to act. The general principle has also been accepted in U.S. law, in the TVPA and relevant jurisprudence.

ARGUMENT

Certain human rights abuses, like genocide and war crimes, violate international law even if they are committed by purely private actors; others, like torture and summary execution, require state action before international law is implicated. *Kadic v. Karadzic*, 70 F.3d 232, 239–44 (2d Cir. 1995). Thus, ATS claimants challenging those latter violations must show that the abuse involved state action of some sort. Likewise, Congress, in enshrining causes of action for torture and summary execution in the Torture Victim Protection Act, also retained the state action requirement. *Id.* at 245 (under the TVPA, a plaintiff "must establish some governmental involvement" (quoting H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991))). Thus, the TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority, or color of law, of any foreign nation." Pub. L. No. 102-256, 106 Stat. 73 § 2(a) (1992) (codified at 28 U.S.C. § 1350 note).

The perpetrator of a human rights violation, however, need not be a state official for the state action requirement of the ATS or the TVPA to be met. Under ATS and TVPA jurisprudence, as well as customary international law and the state action standards applied in domestic civil rights cases under 42 U.S.C. § 1983, private parties that commit abuses are considered state actors under a variety of circumstances in which the state or its officials was somehow

involved in the abuse.

I. Courts look to federal common law to determine the scope of liability.

As an initial matter, *amici* address the question of which body of law the court should look to in assessing whether a private party who commits a summary execution is a state actor. In general, ordinary federal common law rules apply to liability questions under the ATS and TVPA, including secondary and accessory liability standards, and international law may inform the federal common law analysis. With respect to the precise question *amici* address, a more specific form of federal common law—that developed under section 1983 civil rights jurisprudence—should apply, both because it is the most directly relevant and because Congress specifically directed courts to section 1983 in passing the TVPA.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court ruled that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. *Id.* at 724. Under the ATS "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability." *Id.* The Court described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. Thus, courts look to international law to determine whether there has been a violation

that would afford jurisdiction, while federal common law governs questions of secondary and accessory responsibility.[3] The standard approach to federal claims also suggests that federal common law should be used to decide these questions. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286–87 (2d Cir. 2007) (Hall, J., concurring).

The primary source to consult in developing ATS liability rules is preexisting federal principles, as informed by traditional common law rules where necessary as well as by international law. The ATS is "highly remedial," *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987), and liability rules adopted under it must reflect the universal condemnation of the underlying violations. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

Due to the unique nature of ATS claims as federal common law claims incorporating international law, it may also be appropriate to consider international law principles. International law, however, may contain gaps that

[3] Prior to *Sosa*, several other courts also suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering possibility that "[t]ort principles from federal common law" are appropriately applied to determine liability in ATS cases); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where, "under ordinary principles of tort law [the defendant] would be liable").

make it inappropriate as the primary source of rules of liability. Certainly, though, if a rule is found in international law as well as established federal law or general common law principles, there can be little argument against its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729. Conversely, however, *Sosa*'s holding that an ATS claim sounds in federal common law refutes any contention that a liability theory or state action rule must be recognized in international law in order to be actionable. Any gaps in international law principles should not bar the imposition of federal common law rules. Indeed, international law, being chiefly concerned with disputes among states or the criminal responsibility of individuals, may have had little occasion to formulate appropriate rules for the kind of civil tort liability established by Congress in the ATS. *See Khulumani*, 504 F.3d at 286–87 (Hall, J., concurring).[4]

In light of *Sosa*'s conclusion that ATS claims are federal common law claims to enforce international law norms, ATS liability standards should generally be determined according to ordinary federal common law tort

[4] This issue has arisen twice in the Ninth Circuit, but has not yet yielded any precedential decisions there. In *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), Judge Reinhardt's concurrence favored federal common law, *see id.* at 969 (Reinhardt, J., concurring); the panel majority opinion was vacated upon grant of en banc review, *see* 395 F.3d 978 (9th Cir. 2003), but no en banc decision ever issued due to the settlement of the case, *see* 403 F.3d 708 (9th Cir. 2005). In *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), also now vacated pending en banc review, the panel majority relied on both international and domestic sources, referring specifically to "federal common law." *Id.* at 1202–03.

principles. Thus, Judge Hall's recent concurrence in *Khulumani* looked to section 876 of the Restatement of Torts in determining whether a private party could be held liable for aiding and abetting human rights violations. 504 F.3d at 287–89 (Hall, J., concurring).

It may, however, be useful to "borrow" analysis from section 1983 and the TVPA for some ATS questions. This is the case with respect to the question *amici* address: whether a private party that commits a violation is a state actor. For that question, section 1983 state action analysis may be the most directly analogous federal common law standard. *See Kadic*, 70 F.3d at 245 (section 1983 jurisprudence "is a relevant guide" to whether defendant engaged in state action for purposes of ATS).

Moreover, under the TVPA (and as instructed by its legislative history), courts to look to section 1983 in determining whether a perpetrator acts "under color of law." *Aldana*, 416 F.3d at 1247; *Kadic*, 70 F.3d at 245; S. Rep. No. 102-249 at 8 (1991). The state action analysis under the ATS is similar to that under the TVPA. *Tachiona*, 169 F. Supp. 2d at 316, *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003); *see also Aldana*, 416 F.3d at 1247–50 (considering state action under the ATS and the TVPA in a single analysis).

II. U.S. law recognizes that a private party that commits human rights abuses does so under color of law if the state is sufficiently involved.

U.S. courts have found routinely found that a nominally private party

may act under color of law for the purposes of the ATS, TVPA and section 1983. Three of the standards employed in making this determination that are most relevant to this case are outlined below. These include: 1) where a private party commits abuses with the participation or assistance of state officials or is a willful participant in joint action with state officials; 2) where there is a sufficient nexus or symbiotic relationship between a private party and a state; and 3) where a private party acts as an agent of a state.[5]

A. Courts applying the ATS and TVPA have recognized that the state action requirement is met where private parties commit abuses with the participation or assistance of state officials.

Numerous ATS and TVPA cases have considered whether the state action requirement was met when a private party commits human rights abuses with some involvement by the state. These cases recognize that the state action requirement does not require that the abuses be committed by government officials. In *Aldana*, this Court considered whether plaintiffs had adequately alleged that abuses committed by a private armed security force involved state action. 416 F.3d at 1245, 1247–49. The Court concluded that the state action requirement was met because of the involvement of a state official—the mayor—in the conduct at issue. *Id.* at 1249.

In *Kadic*, the Second Circuit found that defendant Radovan Karadzic, the President of the self-declared Bosnian-Serb Republic of Srpska, which was

[5] *Amici* note that there are tests for state action under U.S. law not listed herein. Included here are the three tests most relevant to this case.

allied with Yugoslavia, could be held liable for violations as a state actor. The court concluded that the plaintiffs were entitled to "prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid." 70 F.3d at 245.

Similarly, in *Mehinovic v. Vuckovic*, a member of a Bosnian Serb paramilitary unit, with arms and uniforms supplied by the Yugoslavian military, was found to be acting under color of law because the torture at issue was carried out in his official capacity as a soldier of the Republic of Srpska. Relying heavily on *Kadic*, the court found that there was sufficient evidence to show that the Republic of Srpska qualified as a state actor in part because it was supported by the Yugoslavian government. 198 F. Supp. 2d at 1346–47.

In *Saravia*, a member of a Salvadoran death squad, who was not a government official, was subject to liability for the extrajudicial killing of Archbishop Romero because he acted "under the apparent authority and color of law of the government of El Salvador" in aiding and abetting an assassination. 348 F. Supp. 2d at 1149–51. The court so held because, among other things, the death squad received financial and logistical support from the Salvadoran military, and in general, death squad operations at the time were frequently coordinated with the military. *Id.* The actions of a death squad were also considered in *Chavez v. Carranza*, 413 F.Supp. 2d 891 (W.D. Tenn. 2005), where the court held that a plaintiff would adequately prove state action if he could demonstrate that members of a death squad acted with governmental

involvement or in cooperation with the government in carrying out attacks on civilians. *Id.* at 900, 903.

Government support and cooperation has also been found sufficient. In *Tachiona*, a Zimbabwean political party, headed by the country's President and several senior officials, committed various crimes, including torture and summary execution. The court noted that private actors can be held liable under international law "when the individual's deeds are done in concert with government officials or with their assistance, which thus may be deemed to constitute state action or conduct taken under the color of state law." 169 F. Supp. 2d at 313. The court went on to hold that the plaintiffs had alleged sufficient evidence that the political party acted under the color of state law, because the party employed government equipment and facilities, and was, at the direction of the President, under the command of the Zimbabwean Air Force. *Id.* at 315.

In *Sinaltrainal*, a Colombian labor organizer was allegedly murdered by right-wing paramilitary units for trying to organize workers at a Coca-Cola plant. The court found that the complaint was sufficient to allege that the paramilitary unit acted under color of law, because the unit was permitted to exist and openly operate by the Colombian government, which also provided support and cooperation to the paramilitary unit. 256 F. Supp. 2d at 1353.

In assessing state action, all but one of these cases looked to section 1983 jurisprudence for guidance. *See Aldana*, 416 F.3d at 1247; *Kadic*, 70 F.3d at

245; *Chavez*, 413 F. Supp. 2d at 899; *Saravia*, 348 F. Supp. 2d at 1150; *Sinaltrainal*, 256 F. Supp. 2d at 1353; *Tachiona*, 169 F. Supp. 2d at 313.[6] It is also important to note that while many of these cases involved acquiescence by the government itself, state action may be established by participation of state officials regardless of whether their actions are in accord in with official policy. *E.g.*, *Sinaltrainal*, 256 F. Supp. 3d at 1353 (finding state action adequately pled where complaint alleged aid from "officials of the Colombian government," without regard to whether it was consistent with stated governmental policy).

B. Under section 1983, a private party acts under the "color of law" if it is a willful participant in joint action with a state or its agents.

Under section 1983, an otherwise private actor may act under color of law. The statute "does not require that the [actor] be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980). In *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982), the Court found that the state action requirement is met where the defendant "has acted together with or has obtained significant aid from state officials." *Id.* at 937.

The ATS cases that have considered whether a perpetrator acted under

[6] The exception is *Mehinovic*, which relied on *Kadic* for its analysis of state action. *See* 198 F. Supp. 2d at 1346–47.

color of law have applied this joint action approach to find state action. For example, the Second Circuit has held that "[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Kadic*, 70 F.3d at 245. Numerous other ATS cases apply the "acts together with state officials" and/or "willful participant in joint action with the State or its agents" joint action formulations. *See, e.g., Saravia,* 348 F. Supp. 2d at 1150 (adopting *Kadic* standard); *Sinaltrainal*, 256 F. Supp. 2d at 1353 ("color of law" satisfied where private perpetrator "act[ed] in concert with [government] officials or with significant aid from the [] government."); *see also Chavez*, 413 F. Supp. 2d at 899.

Lugar confirms that private party's joint participation with a state official in a conspiracy is action under color of law for purposes of section 1983. 457 U.S. at 931. In *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997), the court found that the allegation of conspiracy between a private defendant and a state actor "suffices to meet whatever state action requirement the AT[S] contains." *Id.* at 1092. As apparent from the cases above, however, while conspiracy suffices to show state action under the ATS and TVPA, it is but one of several methods.

Another method to satisfy the joint action test is to show that the state aided and abetted the private party. That is the clear import of section 1983 cases, including *Lugar*, and ATS cases like *Kadic*, *Sinaltrainal* and *Saravia*, holding that the a perpetrator that acts with significant state aid is acting under

color of law. Moreover, courts applying section 1983 standards in ATS cases have asked whether state officials and private parties have "acted in concert." *Kadic*, 70 F.3d at 245; *Sinaltrainal*, 256 F. Supp. 2d at 1353; *accord NCGUB v. Unocal*, 176 F.R.D. 329, 346 (C.D. Cal. 1997). "[A]cting in concert" is a term of art that encompasses aiding and abetting liability as well as civil conspiracy liability; indeed, the section of the Restatement of Torts that discusses both aiding and abetting and conspiracy is entitled "Persons Acting in Concert." *See* Restatement (Second) of Torts § 876 ("Persons Acting in Concert").[7] Section 876 highlights the congruity between "joint action" under section 1983 and aiding and abetting under federal common law.

C. The state action requirement is met where there is a sufficient nexus or symbiotic relationship with the state.

The state action requirement can also be satisfied under the nexus or "symbiotic relationship" test articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In *Burton*, the Court held that the relationship between a publicly owned parking authority and a restaurant engaging in racial

[7] *Accord Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580 (1982) (recognizing "[c]oncerted action liability" for those "'who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit'" (quoting *Prosser on Torts* § 46 at 292 (4th ed. 1971) and citing Restatement § 876)); *In re: Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005) (noting that courts have permitted ATS actions premised aiding and abetting and conspiracy theories and that therefore the ATS may provide "a concerted action claim of material support by alien-Plaintiffs here"); *see also NCGUB v. Unocal*, 176 F.R.D. at 346–47 (holding that "joint action" in ATS case is satisfied by willful participation as well as conspiracy).

discrimination was mutually beneficial, because the revenue from the restaurant's lease made the parking structure economically viable. *Id.* at 724.

Courts in ATS cases considering whether a perpetrator of human rights abuses acted under color of law have explicitly applied the "symbiotic relationship" test. Under this test, a private party may be found to be a state actor based on its general relationship with state officials, rather than the state's participation in the specific abuses alleged. Thus, *Sinaltrainal* held that an allegation that the AUC had a "mutually-beneficial [sic] symbiotic relationship with the Colombian government's military" sufficiently pled that the paramilitary committed the murder at issue with the assistance of the Colombian government to meet the state action requirement. 256 F. Supp. 2d at 1353 & n.6; *see also Tachiona*, 169 F. Supp. 2d at 315 (citing *Burton* test in concluding that private party acted under color of law for ATS purposes).

D. A private party is a state actor if it acts as the agent of the state.

As noted above, the TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority" of a foreign nation. Thus, Congress contemplated and this Court has held that, "[i]n construing [the TVPA's] state action requirement," courts also "look to the principles of agency law." *Aldana*, 416 F.3d at 1247 (quoting *Kadic*, 70 F.3d at 245); *see also* S. Rep. No. 102-249 at 8 (courts look to agency theory in addition to section 1983 "in order to give the fullest coverage possible");

Saravia, 348 F.Supp.2d at 1149–51 (finding that death squad member acted under apparent authority of El Salvador). Accordingly, this Court should also consider whether plaintiffs have presented sufficient evidence to proceed to trial on the question of whether the AUC was acting as the agent of the Colombian military.

An agent acts with actual authority when, at the time of the act, the agent reasonably believes, in accord with the principal's manifestation to the agent, that the principal wishes the agent to so act. Restatement (Third) of the Law of Agency § 2.01; *see also id.* § 3.01. Thus, actual authority arises not only where the principal intentionally confers authority on the agent, but also where the principal allows the agent to believe that he has authority.

Apparent authority, by contrast, focuses on the reasonable belief of the third party. It arises when a third party "reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of the Law of Agency § 2.03. Assent may be manifested "through written or spoken words or other conduct." *Id.* at § 1.03. In *Saravia*, the court found that a death quad acted under the apparent authority of El Salvador, because the squad got financial and logistical support of the Salvadorian army, included members of the Salvadorian Army and coordinated operations with the army, and benefited from a National Police cover-up of the murder, which included an attempted assassination on the judge perpetrated by the National Police. 348 F. Supp. 2d at 1149–51.

III. International law recognizes that the state action requirement is met where a private party commits an abuse "at the instigation of or with the consent or acquiescence of a state official."

International law, like U.S. law, recognizes that a perpetrator need not be a state official to commit a violation that requires state action. For example, international law prohibits not only torture and cruel, inhuman or degrading treatment when committed by government officials, but also such acts when committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51, art. 1 (1984) ("Torture Convention");[8] *see also* Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, art. 3(b) (1989),[9] *reprinted in* OEA/Ser.L.V./11.82doc.6.rev.1 at 83 (1992) (person "who at the instigation of the public servant" commits or is an accomplice to torture is guilty thereof).

The same is true of summary execution. Thus, section 1 of the U.N.'s Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res. 1989/65, annex, 1989 U.N.

[8] Available at http:// www.unhchr.ch/html/menu3/b/h_cat39.htm.

[9] Available at http:// http://www.oas.org/juridico/english/Treaties/a-51.html.

ESCOR Supp. No. 1 at 52, U.N. Doc. E/1989/89 (1989),[10] prohibits summary executions "by a public official or other person acting in an official capacity or by a person *acting at the instigation, or with the consent or acquiescence* of such person" (emphasis added).[11]

The Torture Victim Protection Act enshrines this international law principle. Section 2(a) of the TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. In passing the TVPA, Congress noted generally that the TVPA "will carry out the intent of" the Torture Convention. S. Rep. No. 102-249, at 3; *see also* H.R. Rep. No. 102-367 at 1 (noting that the TVPA responds to U.S. obligation under the Convention to provide a means of civil redress to torture victims).

The TVPA also enshrines the principle that abuses violate international law if they are authorized, tolerated, or knowingly ignored by state officials, who are also liable for those abuses. S. Rep. No. 102-249 at 9. As this court has noted, the TVPA also looks to Article 3 of the Inter-American Convention to Prevent and Punish Torture, which contemplates liability for any public servant who instigates or induces torture, or, being able to prevent it, fails to do so. *Cabello v. Fernandez-Larios*, 402

[10] Available at http://www.unhchr.ch/html/menu3/b/54.htm.

[11] *See also* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3542 (XXX), Supp. No. 34, U.N. Doc. A/10034, arts. 1, 8 (1975) (prohibiting torture committed "by or at the instigation of a public official"), *available at* http://www.unhchr.ch/html/menu3/b/h_comp38.htm.

F.3d 1148, 1157 (11th Cir. 2005) (quoting S. Rep. No. 102-249 at 9 n.16).

In *Aldana*, this Court appeared to accept that state action would exist if the police made a knowing choice to ignore the ongoing commission of abuses, but the Court found that the complaint provided no factual basis to infer that was the case. 416 F.3d at 1248–49. With respect to the mayor, who allegedly participated in the abuses, the Court found it unnecessary to rule whether or not his inaction would constitute state action. *Id.* at 1249.

Thus, under international law, instigation, consent, and/or acquiescence by the state may be inferred from failure to act, especially if that failure to act is combined with other forms of assistance. As with the state action analysis under section 1983, it makes no difference whether official state policy is contrary to the assistance provided by state officials.

The law of state responsibility may also, under some circumstances, be useful to the state action determination. While the state is not necessarily responsible for all abuses committed under color of law, those abuses for which the state is responsible necessarily must be committed with state action.[12] Thus,

[12] According to section 702 of the Restatement (Third) of the Foreign Relations Law of the United States, for example, the state is only responsible for human rights abuses practiced, encouraged, or condoned "as a matter of state policy." Commentary to this section makes clear that this is narrower than the color of law test that applies to determine whether the abuse itself violates international law (as opposed to whether the *state* can be held responsible for it). *See id.* cmt. b (contrasting the general state responsibility rules with treaty regimes that may make the state responsible for any act committed by "persons acting under color of law"). As noted above, instruments directed at summary execution and torture specifically provide that such acts violate international

the category of human rights abuses for which the state is responsible is a subset of those committed with state action.

The Inter-American Court of Human Rights has repeatedly found the Colombian state responsible for the acts of Colombian paramilitary groups, including the AUC, *after those groups were declared illegal under Colombia law*, when the state acted in concert, aided, knowingly failed to stop, or otherwise assisted abuses committed by the groups.

In *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005),[13] the Inter-American Court found the state responsible for acts of the AUC where the Colombian military collaborated with, failed to stop the actions of, and moved to cover up the actions of the paramilitary group. *Id.* ¶ 118–23. The Colombia military facilitated the advancement of the AUC into the region and provided communications and munitions support; the paramilitaries were also dressed in Colombia military uniforms and carrying state-monopolized weapons. *Id.* ¶¶ 96.30–96.34. Further, Colombian authorities relocated government troops from the area, leaving the population unprotected. *Id.* ¶ 96.38. After the attacks, the army attempted to hide their knowledge of events by altering orders and communications. *Id.* ¶ 96.45.

A later case, *Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (ser. C)

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law when committed under color of law, regardless of state policy.

[13] Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf.

No. 148 (July 1, 2006),[14] found that state responsibility for killings by the AUC arose from acts of acquiescence, collaboration, and omission on behalf of the Colombian military. *Id.* ¶ 132. Plaintiffs showed that the military was aware of the terrorist activities of the paramilitaries and did nothing to stop them. *Id.* ¶ 133. Acts of acquiescence, collaboration, and omission included facilitating entry into the region, failing to help the civilian population, accepting stolen cattle, and withdrawing military from the region before the attacks. *Id.* ¶¶ 125.85–125.86, 125.32. Paramilitary members were also seen wearing Colombian military clothing. *Id.* ¶ 125.58.

Finally, *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006), [15] illustrates that the state may also be held responsible largely for failure to act. There the Inter-American Court found the state responsible for the acts of paramilitary groups where it had accorded the groups a high level of impunity and did not diligently adopt the necessary measures to protect the population. *Id.* ¶¶ 126–27, 138, 140. The Colombian authorities had not adopted reasonable measures to control access to available routes in the area, did not assist in the search for the disappeared, and abstained from investigating the attacks. *Id.* ¶¶ 138, 95.42, 95.44, 95.48, 52, 55. Further, there was evidence that some paramilitary members were wearing Colombian

[14] Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf.

[15] Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.

military uniforms and that members of the military communicated with members of the paramilitary on the day of the attacks. *Id.* ¶¶ 95.32, 95.67.

International jurisprudence has similarly found that states can be responsible for the unauthorized acts of private parties when there is instigation, consent, or acquiescence by the state. For example, the International Court of Justice held that Iran was responsible for the acts of the militants who seized the U.S. Embassy in 1979, because the Iranian government had given a "seal of official government approval" to the affair. The I.C.J. reached this conclusion because, among other things, a government official issued statements encouraging the hostage-takers. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* [1980] I.C.J. Rep. 2, 29.

The above is supported by the Restatement (Third) of Foreign Relations Law (1987). While section 702 of the Restatement applies only to state responsibility and therefore does not capture every situation in which an abuse might violate international law, it does note that a state is responsible if "it practices, encourages, or condones" human rights violations, including "murder" and "torture." Tellingly, the commentary to section 702 notes that such encouragement or condoning may "may be presumed" if such abuses "have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators." *Id.* cmt. b. Even in the narrower category of the law of state responsibility, then, the state may be implicated by allowing notorious abuses to continue without efforts to stop them.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court adopt the rule that a private party acts under color of law for purposes of the ATS and the TVPA where he or she acts with the participation of state officials, with significant state aid, in a symbiotic relationship with the state, as an agent of the state, or with the consent or acquiescence of state officials.

DATED: December 20, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. R. 32 (a)(7)(C)

Juan Aquas Romero, *et. al.* v. Drummond Company Inc., *et. al.*

No. 07-14090-D

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d) and 11th Cir. R. 29-2 and 28-1(m), the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, according to Microsoft Word, the word processing program used to prepare the brief.

DATED: December 20, 2007

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CERTIFICATE OF SERVICE

I, Marco Simons, hereby certify that I am employed by EarthRights International at 1612 K Street NW, Ste. 401, Washington, DC 20006; I am over the age of eighteen and I am not a party to this action. I further declare that on December 20, 2007, I served the **BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ORGANIZATIONS** on the interested parties in this action by placing true and correct copies thereof in envelopes addressed as follows:

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

Executed on December 20, 2007, at Washington, the District of Columbia.

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Marco Simons
Declarant