No. 06-15851-HH

In the United States Court of Appeals for the Eleventh Circuit

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SINALTRAINAL, *et al.*,
Plaintiffs/Appellants,

v.

THE COCA-COLA COMPANY, *et al.*,
Defendants/Appellees

On Appeal from the United States District Court for the Southern District of Florida; Case Nos. 1:01-cv-03208 (lead case); 02-cv-20258; 02-cv-20259; 02-cv-20260
The Honorable Jose E. Martinez

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 Appellants Sinaltrainal, *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 war crimes and color of law determinations under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (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 war crimes and 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 killings by Colombian paramilitary groups.

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 war crimes and 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.).

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 ISSUES ADDRESSED BY *AMICI CURIAE*

Amici herein describe the legal standards that govern whether abuses committed during a civil war have a sufficient nexus to the conflict to be considered war crimes and the standards that are applicable to determine whether a nominally private party that is complicit in summary execution and torture can be held liable 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

Plaintiffs in this case allege that defendant soft-drink companies were complicit in egregious human rights abuses committed against trade unionists by Colombian paramilitaries, the United Self-Defense Forces of Colombia (AUC). Plaintiffs bring two kinds of Alien Tort Statute claims: those for torture

and summary execution, which require state action, and those for war crimes and crimes against humanity, which do not.

The district court below recognized that the plaintiffs alleged the abuses at issue were committed by a party to an ongoing civil war. *Sinaltrainal v. Coca-Cola Co.* (*"Sinaltrainal I"*), 256 F. Supp. 2d 1345, 1352 (S.D. Fla. 2003). The Court, however, held that the plaintiffs' war crimes claims could not proceed because the plaintiffs had not adequately alleged "that the alleged offenses were acts of war committed by combatants in the course of hostilities." *In re Sinaltrainal Litig.* (*"Sinaltrainal II"*), 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006); *accord Sinaltrainal I*, 256 F. Supp. 2d at 1352. *Amici* herein demonstrate that the district court applied the wrong standard in considering whether the abuses at issue constituted war crimes.

With respect to the torture and summary execution claims, the district court initially held that the plaintiffs had adequately alleged that the AUC paramilitaries that committed the abuses were acting under color of law. *Sinaltrainal I*, 256 F. Supp. 2d at 1353. In its subsequent opinion, however, the district court simply stated that it "presume[d]" the paramilitaries "to be state actors." *Sinaltrainal II*, 474 F. Supp. 2d at 1296, 1298, 1301. Nonetheless, the Court dismissed plaintiffs' claims for summary execution and torture, because it found that the plaintiffs were required to "allege that *defendants* acted under 'color of law.'" 474 F. Supp. 2d at 1290 (emphasis added); *accord Sinaltrainal I*, 256 F. Supp. 2d at 1353 (requiring that defendant "take some action under

color of law"), and that plaintiffs failed to adequately allege "the necessary relationship between the Defendants and the paramilitaries so that state action may imputed to the Defendants." 474 F. Supp. 2d at 1291.

In so doing, the district court conflated the requirement that the person who commits the abuse—in this case, AUC paramilitaries—must be a state actor, and the standards for holding a defendant who is not the immediate tortfeasor responsible for that abuse.

Amici herein show that whether a private party can be held liable for complicity in abuses committed by a state actor or persons operating under color of law is resolved by ATS *liability* standards, not *state action* standards. Moreover, assuming *arguendo* state action standards do control defendants' liability, *amici* explain the proper legal standards that should govern the analysis into whether the defendants can be held liable under plaintiffs' non–war crime ATS summary execution claims for the abuses committed by the AUC.

SUMMARY OF ARGUMENT

The district court erred in dismissing plaintiffs' war crimes claims on grounds that plaintiffs had not adequately alleged that the crimes were committed "in furtherance of war hostilities." *Sinaltrainal II*, 474 F. Supp. 2d at 1287. Neither U.S. nor international law requires such a strict showing. Instead, all that is required is a nexus between the armed conflict and the abuse at issue. To satisfy the nexus requirement under U.S. law, plaintiffs must only show that the abuse was committed "in the course of" armed

conflict. Under international law, the nexus requirement is satisfied if the abuse is "closely related" to an armed conflict, regardless of the ultimate interests or motivations of the perpetrators.

With respect to plaintiffs' claims that require state action, the district court correctly held in *Sinaltrainal I*, and assumed in *Sinaltrainal II*, that nominally private perpetrators of abuse such as the AUC paramilitaries could be found to be acting under color of law. Numerous cases have found paramilitaries and similar groups to be state actors where they receive support or cooperation from state officials. Under ATS and TVPA jurisprudence, as well as customary international law and the state action standards applied in civil rights cases under 42 U.S.C. § 1983, private parties that commit abuses are considered state actors if: 1) they have a symbiotic relationship with the state; 2) they participate in joint activity with, or obtain significant aid from, state agents; 3) an agency relationship exists; or 4) they act at the instigation, or with the consent or acquiescence of, persons acting in an official capacity.

However, the district court erred in its state action analysis when it concluded that plaintiffs were required to show that the *defendants* acted under color of law. Where plaintiffs sue persons alleged to be complicit in international law violations, the proper question is whether ATS *liability* standards have been met. Even if the violation in question requires state action, that requirement is met so long as the perpetrator is a state actor. ATS law applies longstanding common law principles of liability, and under both those

principles and international law, accessory or secondary liability may be found even where the defendant lacks the capacity to commit the underlying offense. Thus, the district court's finding (or assumption) that the AUC acted under color of law precluded dismissal on state action grounds.

Even if it were proper to assess the defendants' conduct according to state action standards, the district court erred in applying those standards. The district court narrowly focused on conspiracy, without considering whether plaintiffs adequately alleged that defendants aided and abetted a state actor or whether a state actor served as its agent. Each of these theories is both a viable theory of liability under the ATS and a method of establishing state action.

ARGUMENT

Certain human rights abuses, like war crimes and crimes against humanity, 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 TVPA, 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.

Moreover, if the perpetrator of the abuse is a state actor, the state action requirement is met. Thus, where plaintiffs sue persons alleged to be complicit in abuses committed by a state actor, the proper question is not whether the defendant was a state actor, but rather whether ATS complicity *liability* standards have been met.

I. State action is not required for war crimes, which includes murder and torture committed in the course of an armed conflict regardless of the interests that benefited from these crimes, and does not require that the abuses further the armed conflict.

The district court correctly concluded that murder and torture constituting war crimes are "universal" offenses that "do not require a showing of state action." *Sinaltrainal II*, 474 F. Supp. 2d at 1287. The district court appears to have applied the wrong standard, however, to determine what constitutes a war crime. Although war crimes undoubtedly require a nexus between the abuses

and armed conflict, the district court applied an incorrect nexus requirement when it found that acts could not be war crimes if they were committed in furtherance of corporate business interests "rather than *in furtherance* of war hostilities." *Id.* at 1287 (emphasis added). In requiring that the alleged acts be committed "in furtherance" of armed conflict, and in rejecting acts committed for other purposes, the court misapplied both U.S. and international law of war crimes.

Neither U.S. nor international law requires that a war crime be committed in furtherance of an armed conflict; similarly neither prohibits a war crimes finding if the act was committed in furtherance of business interests. A war crime may be committed for reasons other than furthering the conflict.

U.S. law does not imply that an act must be committed "in furtherance" of an armed conflict in order to be considered a war crime. The statutory definition of the nexus requirement is that the abuse be "committed in the context of and in association with an armed conflict." 18 U.S.C. § 2441(c)(3). U.S. courts have interpreted this to mean that an act must only be committed "in the course" of an armed conflict. *Kadic*, 70 F.3d at 244 (holding that war crimes requires "that each of the alleged torts were committed in the course of an armed conflict"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 671 (S.D.N.Y 2006) (same).

The customary international law of war crimes, codified in Common Articles 2 and 3 of the Geneva Conventions, *see, e.g.*, Convention Relative to

the Treatment of Prisoners of War, Geneva Convention No. III, arts. 2 &3, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (1949),[1] and Article 8 of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9,[2] prohibits murder and torture in the context of any armed conflict, including one "not of an international character." The contours of this requirement have been further clarified by the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the new International Criminal Court (ICC). In order for an act to be considered a war crime, a two part test must be met: 1) "that an armed conflict existed at all relevant times in the territory of the [State]" and 2) "that the acts … were committed *within the context* of that armed conflict." *Prosecutor v. Tadic*, No. IT-94-1-T, Appeal Judgment ¶ 560 (ICTY May 7, 1997) (emphasis added).[3]

It is well settled that the nexus requirement is met if the act at issue is "closely related" to the armed conflict. *Prosecutor v. Dyilo*, Pre-Trial Chamber Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06 ¶ 287 (ICC Jan. 29, 2007); *Prosecutor v. Kordic*, IT-95-14/2-T, Trial Judgment ¶ 32 (ICTY Feb. 26, 2001);[4] *Prosecutor v. Blaskic*, IT-95-14 Trial Judgment ¶ 69

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[1] *Available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[2] *Available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

[3] *Available at* http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf.

[4] *Available at* http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf.

(ICTY Mar. 3, 2000);[5] *Prosecutor v. Rutaganda*, ICTR-96-3, Trial Judgment ¶ 104 (ICTR Dec. 6, 1999).[6] Further, the conflict must play a "substantial role" in the "perpetrator's decision" or "ability to commit the crime." *Dyilo*, ICC-01/04-01/06 ¶ 287; *see also Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A Appeal Judgment ¶¶ 58-59 (ICTY June 12, 2002).[7]

Critically, however, the act does not have to be committed "in furtherance" of an armed conflict to meet the test for a war crime. An act may be considered a war crime even if it is committed outside the geographic proximity of the battle and even if it is committed for a reason other than furthering the armed conflict. *Dyilo*, ICC-01/04-01/06 ¶ 287 ("[t]he armed conflict need not be considered the ultimate reason for the conduct"); *Prosecutor v. Delalic*, IT-96-21-T, Trial Judgment ¶ 195 (ICTY, Nov. 16, 1998) (it is not necessary that a crime "be in actual furtherance of a policy" of a party to the conflict).[8] In *Kunarac*, the ICTY concluded that "[t]he armed conflict need not have been causal to the commission of the crime" and found that rape, torture, and other offenses committed "in the aftermath of the fighting"

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[5] *Available at* http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf.

[6] *Available at* http://69.94.11.53/default.htm.

[7] *Available at* http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf. *See also* Official Journal of the International Criminal Court, *Elements of Crimes* at 33-37 (Sep. 9, 2002) (sufficient if the act "took place in the context of and was associated with an armed conflict"), *available at* http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf.

[8] *Available at* http://www.un.org/icty/celebici/trialc2/judgement/index.htm.

constituted war crimes when they were "made possible by the armed conflict" and the conflict "offered blanket impunity to the perpetrators." IT-96-23 & IT-96-23/1-A ¶¶ 58-59, 568. The court further held that the "closely related" requirement was satisfied if the commission of the act in question "[took] advantage of the situation created by the fighting." *Id.* Similarly, in *Rutaganda*, the ICTR held a private actor liable for war crimes where the actor participated in and directed killings perpetrated by government and militia soldiers. The court found the necessary nexus to the ongoing armed conflict because of the participation of the private actor and his de facto authority over the militia. ICTR-96-3-A ¶¶ 577 & 579.

Thus, U.S. courts, the ICC, the ICTY, and the ICTR have all found that the nexus requirement for war crimes is satisfied if an abuse is committed in the course of or is closely related to an armed conflict; none has required that an abuse be committed in furtherance of an armed conflict to constitute war crimes. International jurisprudence has also made clear that the ultimate motivation for a crime is immaterial; so long as the crime meets the armed conflict and nexus requirements, it is a war crime and private actors may be held liable. The district court misconstrued the law of war crimes under U.S. and international law when it required that plaintiffs show the abuses were committed "in furtherance of war hostilities." *Sinaltrainal II*, 474 F. Supp. 2d at 1287.

In any event, it is well documented that the paramilitary groups in

question regularly killed civilians "in furtherance" of their ongoing conflict with guerrilla armies. *See, e.g.*, *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (May 15, 2005) ¶ 96.33-96.35 & 96.39 (approximately 49 people identified as guerrilla supporters were tortured and murdered by paramilitaries)[9]; *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006) ¶¶ 95.30 & 95.39-95.40 (group of individuals accused of cooperating with the guerrillas was abducted and killed by paramilitaries)[10]; *Rochela Massacre v. Colombia*, Inter-Am.Ct. H.R. (ser. C) No. 163 (May 11, 2007) ¶¶ 74 & 115 (members of a commission investigating disappearances were executed by paramilitaries and their deaths framed as the work of the guerillas).[11]

In fact, the *modus operandi* of Colombian paramilitaries during the relevant time period was to target civilians with perceived guerrilla sympathies. Human rights activists and union leaders were targeted by paramilitaries—and the Colombian military itself—because of these perceived sympathies and in direct furtherance of the ongoing conflict.[12] For example, in 2006, the Inter-

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

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

[11] *Available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf.

[12] *See* Human Rights Watch, *The "Sixth Division": Military-paramilitary ties and US policy in Colombia*, at 5, 78 & app. 2 (Sep. 2001), *available at* http://www.hrw.org/reports/2001/colombia/6theng.pdf. The Inter-American Court of Human Rights has also considered direct involvement of the official

American Court considered evidence of 200 killings of "peasants and trade unionists" by paramilitaries in 1988-1990, in an area where guerrillas exercised union influence. *Pueblo Bello Massacre* ¶ 65.

II. Paramilitaries may be found to be state actors under section 1983 color of law jurisprudence or international law standards.

As the district court recognized, if the murder and torture in question did not constitute war crimes (or an offense such as crimes against humanity or genocide), then they violate international law only if the perpetrators (the AUC paramilitaries) were state actors or acted under color of law. In *Sinaltrainal I*, the district court properly looked to color of law jurisprudence under 42 U.S.C. § 1983 to answer this question, *see* 256 F. Supp. 2d at 1353; additionally, international tribunals have repeatedly found these paramilitaries to be state actors.

A. Paramilitary abuses may be committed with state action if the perpetrators have a nexus with the state, act jointly with the state or with state aid, or act as state agents.

As this Court has held, "[i]n construing [the] state action requirement [of the ATS and the TVPA], we look 'to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983.'" *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005). Under this jurisprudence, a nominally private party may be found to be acting under color of law if, *inter*

Colombian military in the disappearance of trade union leaders. *Caballero-Delgado v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995) ¶¶ 3, 14, & 34, *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_22_ing.pdf.

alia, it has a sufficient "nexus" with the state, if it acts jointly with the state, or if it acts as a state agent.

The nexus or "symbiotic relationship" test established in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) was expressly adopted by the court in *Sinaltrainal I*, 256 F. Supp. 2d at 1353 & n.6. The district court found that allegations that the AUC had a "mutually-beneficial [sic] symbiotic relationship with the Colombian government's military" were sufficient to meet the state action requirement. *See also Tachiona v. Mugabe*, 169 F. Supp. 2d 259. 315 (S.D.N.Y. 2001) (citing *Burton* test in concluding that private party acted under color of law).

An otherwise private party may also be a state actor if "he is a willful participant in joint action with the State or its agents," *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980), or if he "has acted together with or has obtained significant aid from state officials." *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982). These tests were also recognized in *Sinaltrainal I*, *see* 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."), as well as in numerous other ATS cases. *See Kadic*, 70 F.3d at 245; *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1150 (E.D. Cal. 2004); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005); *see also Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1092 (S.D. Fla. 1997) (allegation of conspiracy between private defendant and state actor "suffices to meet whatever

state action requirement the AT[S] contains.")

Finally, under "'the principles of agency law,'" *Aldana*, 416 F.3d at 1247, the state action test is also met where a private party acts as an agent of the state. These principles include agency created by both actual and apparent authority. *See* Restatement (Third) of the Law of Agency §§ 2.01, 2.03. Thus, in *Saravia*, the court found that a death squad 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. 348 F. Supp. 2d at 1149–51.

B. 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 both torture and summary execution when committed by a person acting "at the instigation" of a person "acting in an official capacity," or with such a person's "consent or acquiescence." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"), art. 1, G.A. Res. 39/46, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984);[13] Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary

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

Executions, sec. 1, ESC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. No. 1 at 52, U.N. Doc. E/1989/89 (1989).[14] 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 F.3d 1148, 1157 (11th Cir. 2005) (quoting S. Rep. No. 102-249 at 9 n.16); *see also Aldana*, 416 F.3d at 1248-49 (suggesting that state action would exist if the police made a knowing choice to ignore the ongoing commission of abuses).

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. Thus, 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), even though such groups were illegal under Colombian

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[14] *Available at* http://www.unhchr.ch/html/menu3/b/54.htm. *See also* Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, art. 3(b) (1989), *reprinted in* OEA/Ser.L.V./11.82doc.6.rev.1 at 83 (1992) *available at* http:// http://www.oas.org/juridico/english/Treaties/a-51.html; 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.

law, when the state acted in concert, aided, knowingly failed to stop, or otherwise assisted abuses committed by the groups. In *Mapiripan Massacre*, 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. Inter-Am. Ct. H.R. (ser. C) No. 134 ¶ 118–23. Similarly, a later case, *Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006),[15] found that state responsibility for killings by the AUC arose from acts of acquiescence, collaboration, and omission on behalf of the Colombian military, including 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, 132-133. Finally, in *Pueblo Bello Massacre*, 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. Inter-Am. Ct. H.R. (ser. C) No. 140 ¶¶ 126–27, 138, 140.

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

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

practices, encourages, or condones" human rights violations, including "murder" and "torture"; 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.

III. Defendants who are complicit in violations of international law may be held liable, regardless of whether they are state actors.

A defendant who is complicit in a violation of international law, under theories such as aiding and abetting, conspiracy, or agency, may be held liable for that violation. This is the case regardless of whether the defendant is a state actor. For violations that require state action, such as torture and summary execution, the requirement is met by showing that the perpetrators—here, the AUC paramilitaries—acted under color of law; for war crimes, no state action is required regardless. The district court therefore erred in requiring the plaintiffs to show that the defendants themselves acted under color of law. *Sinaltrainal II*, 474 F. Supp. 2d at 1292-93. Nonetheless, to the extent that the defendants themselves must be shown to be acting under color of law, the same acts that establish liability will also typically establish color of law under the governing standards.

There is an ongoing debate as to the appropriate source of law for rules of

secondary and accessory liability in ATS cases. In *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), the judges of the Second Circuit split as to whether such complicity should be assessed under federal common law rules of civil liability or international law rules of criminal liability. *See id.* at 286–87 (Hall, J., concurring) (accepting federal common law as the appropriate source for aiding and abetting liability); *id.* at 277 & n.13 (Katzmann, J., concurring) (applying international criminal liability standards for aiding and abetting and declining to consider whether federal common law could also supply the rule). Although *amici* agree with Judge Hall that federal common law is the more appropriate general source, given that the ATS grants jurisdiction for courts to hear federal common law claims, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), the distinction does not matter in this context. Under both federal common law and international law, a defendant need not be a state actor in order to be held liable for its complicity in an abuse committed by a state actor.

A. The "state action" requirement is met where the direct perpetrator is a "state actor."

The district court misconstrued the ATS state action requirement when it concluded that plaintiffs were required to allege that *defendants* acted under "color of law." *Sinaltrainal II*, 474 F. Supp. 2d at 1290. Certainly, plaintiffs were required to allege that the *direct perpetrators* (the AUC paramilitaries) were state actors. And, as noted above, the district court found in *Sinaltrainal I*

that plaintiffs did so, 256 F. Supp. 2d at 1353, and assumed as much in *Sinaltrainal II*. 474 F. Supp. 2d at 1296, 1298, 1301.

However, once it is established that the abuses at issue were committed by state actors, the state action requirement is met and a violation of international law has been shown. This ends the state action inquiry, and the only remaining question is whether the defendants before the court can be held liable for the violation at issue. *See Aldana*, 416 F.3d at 1249 (allegation that mayor participated in events sufficient to allege state action under ATS); *Eastman Kodak Co.*, 978 F. Supp. at 1091 (finding it was beside the point whether state action was required because state confined plaintiff; question was whether private defendant sufficiently participated). The question of whether the defendants are liable for those acts is not a question of state action law but rather of liability principles applicable under the ATS.

This Circuit has already held that the ATS encompasses aiding and abetting liability for claims for state-sponsored abuses, *Aldana*, 416 F.3d at 1247-48, and such allegations were apparently raised in this case. *See Sinaltrainal II*, 474 F. Supp. 2d at 1273 n.27. In *Khulumani*, the Second Circuit likewise held that a private actor may be held liable for aiding and abetting a human rights violation undertaken by state actors or those acting under color of law. 504 F.3d at 258 n.1, 260 (*per curiam*); *id.* at 281-82 (Katzmann, J., concurring); *id.* at 289 (Hall, J. concurring). Judges Hall and Katzmann specifically looked to liability standards (as opposed to section 1983 or other

state action principles) in conducting this analysis. *Id.* at 287-89 (Hall, J., concurring) (applying federal common law liability standards); *id.* at 270-82 (Katzmann, J., concurring) (applying international liability standards). This is because both international and domestic law "recognize[] that criminality is assessed by reference to the actions of the principal, not the aider and abettor." *Id.* at 282 (Katzmann, J., concurring).

Indeed, with respect to international law, torture is the paradigmatic violation that requires state action. International law prohibits "an act by *any person* which constitutes complicity or participation in torture." Torture Convention art. 4(1) (emphasis added). Other fundamental international human rights agreements mirror the Torture Convention in recognizing the responsibility of private actors complicit with state actors in abuses that require state action.[16] *See also Khulumani*, 504 F.3d at 273 (Katzmann, J., concurring) (citing Torture Convention, art. 4, and other agreements, including some

[16] For example, both the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948) ("UDHR") and the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1976) ("ICCPR"), protect a number of rights requiring state action, including the rights to life and security of the person, and the rights to be free from torture, cruel, inhuman or degrading treatment, and arbitrary arrest. ICCPR arts. 6, 7, 9; UDHR arts. 3, 5, 9. Both state that nothing in the respective documents implies for "any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein." ICCPR art. 5(1); UDHR art. 30. Regional human rights accords that protect rights requiring state action contain substantially similar provisions. American Convention on Human Rights, art. 29(a) (Nov. 22, 1969), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; (European) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 17, 213 U.N.T.S. 222 (1953).

reflecting violations like *apartheid* that require state action).

More generally, the district court's assumption that a defendant complicit in abuses must be a state actor conflicts with ordinary principles of accessory and vicarious liability. Under such principles, a defendant may be held liable for aiding and abetting, or agency or conspiracy, even if the defendant lacks the capacity independently to commit the underlying offense. For example, a defendant who is not a fiduciary and therefore cannot breach a fiduciary duty may nonetheless be liable for aiding and abetting such a breach of duty, or for conspiracy or for a breach by an agent. *See, e.g.*, *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 766-68 (3d Cir. 1990) (upholding a jury verdict for vicarious liability for breach of an agent's fiduciary duty, even though "there was no direct breach of fiduciary duty claim raised" against the defendant); *Kipperman v. Onex Corp.*, 2006 U.S. Dist. LEXIS 96944, *81 (N.D. Ga. Sept. 15, 2006) (noting that "claims of vicarious liability, such as claims of aiding and abetting a breach of fiduciary duty and civil conspiracy, are the proper vehicles for imputing a fiduciary's breach to a non-fiduciary"); *see also* Restatement (Second) of Torts § 876 (distinguishing between liability for breaching a duty and assisting another party in breaching that party's duty, even where the abettor has no duty to the victim).[17]

[17] The same principal applies in the criminal context. *See, e.g.*, *Standefer v. United States*, 447 U.S. 10 (1980). Even in the specific context of crimes committed under color of law, courts have held that private actors may be held liable for abetting state actors. *United States v. Farmer*, 923 F.2d 1557, 1563–

This principle has been applied in federal cases involving international law even at the time of the passage of the ATS.[18] And, courts have applied it specifically in finding that a private party can be held liable under the ATS for aiding and abetting a tort that requires state action. *Khulumani*, 504 F.3d at 281-82 (Katzmann, J., concurring); *id.* at 289 (Hall, J. concurring); *Bowoto v. Chevron Corp*., 2007 WL 2349341, *3-4 (N.D. Cal. Aug. 14, 2007) (rejecting the notion "that an aider and abettor must be of the class that can be held liable as principal violators"). Since an accomplice need not have the capacity to commit the offense, there is no reason to require an accomplice to be a state actor.

At one point in its analysis, the district court framed the issue correctly, stating: "Plaintiffs must sufficiently allege facts that sufficiently demonstrate: 1) that the Defendants are vicariously liable for the paramilitaries' actions, and 2) that the paramilitaries in question were sufficiently connected to the Colombian government so that they may be said to have acted 'under color of law.'"

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64 (11th Cir. 1991); *United States v. Lynch*, 94 F. Supp. 1011, 1013 (N.D. Ga. 1950), *aff'd*, 189 F.2d 476 (5th Cir. 1951).

[18] In *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), the underlying international law violation was a U.S. citizen's capture of Dutch ships during a war between Holland and France. The U.S. citizen's acts violated U.S. neutrality. *See* 3 U.S. at 155-56 (Paterson, J. concurring). Talbot, however, argued that he was a French citizen. If so, he would have been entitled to capture a Dutch ship under the laws of war, and thus could not have been prosecuted if he had engaged in the substantive conduct himself. But the Court held that even if Talbot were a French citizen, he would still be liable for assisting an illegal capture by an American citizen. *Id.* at 176–68 (Iredell, J.); *id.* at 156–57 (Paterson, J.); *id.* at 168–69 (Cushing, J.).

Sinaltrainal II, 474 F. Supp. 2d at 1290. Yet the district court ultimately conducted the wrong analysis, applying state action principles to the acts of defendants.

B. Even if the defendants need to be state actors, the district court misapplied state action standards.

Even if the district court were correct in requiring plaintiffs to show that *defendants* acted under color of law, the district court's analysis was incomplete. Conspiracy, aiding and abetting, and agency are all viable theories of liability under the ATS, derived both from federal common law and international law. Moreover, the elements of each of these also meets the standards for showing state action. Although the district court properly considered conspiracy, finding that an adequate allegation of conspiracy would be sufficient to show liability and state action, *Sinaltrainal II*, 474 F. Supp. 2d at 1292-93, it only nominally considered agency and did not consider aiding and abetting.

1. Conspiracy, agency, and aiding and abetting are all viable theories of liability under the ATS.

As noted above, this Court has already accepted aiding and abetting as a viable theory of liability under the ATS. *Aldana*, 416 F.3d at 1247-48; *see also Cabello*, 402 F.3d at 1158. Similarly, in *Cabello*, this Court accepted conspiracy as an actionable ATS liability theory. 402 F.3d at 1158-59.

Additionally, defendants in ATS cases may be held liable on an agency theory. Ordinary federal common law incorporates agency liability principles;

such principles, which may be drawn from sources such as the Restatement on Agency, provide that corporations and others may be held liable for the acts of their agents. "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 537 U.S. 280. 285 (2003); *see also* Restatement (Third) of Agency § 2.04. The principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship. *Id.* § 7.07; *see, e.g., Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974).

Agency principles are also found in international law, primarily through their presence in "general principles of law recognized by civilized nations." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Courts in common law (and pluralistic or mixed) jurisdictions regularly acknowledge the principle that an employer may be held liable for the acts of its agent, including intentional torts. *See, e.g., Lister v. Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (holding school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (holding employer liable for arson committed by its security personnel); *Chairman, Ry. Bd. v. Das*, [2000] 2 L.R.I. 273 (India) (holding railway liable for rape by railway employees).[19] In some jurisdictions,

[19] *See also Johnson & Johnson (Ir.) Ltd. v. CP Sec. Ltd.*, [1986] I.R. 362 (H.Ct.) (Ir.); *NK v. Minister of Safety & Sec.*, 2005 (9) B.C.L.R. 835 (CC) (S.

agency principles are also enshrined in statute.[20] This is especially the case in civil law countries. *See, e.g.*, C. Civ. (Civil Code) art. 1384 (1994) (Fr.) (establishing liability for damages "caused by the act of persons for whom [one] is responsible"); § 831BGB (Civil Code) (1975) (F.R.G.); Minpō (Civil Code) art. 715 (1997) (Japan).[21]

2. Each of these theories of liability also satisfies any state action requirement.

The district court properly found that a properly alleged conspiracy would establish action under color of law. *Sinaltrainal II*, 474 F. Supp. 2d at 1292. To the extent that they were alleged by the plaintiffs, however, agency and aiding

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Afr.); *Carrington v. Attorney Gen.*, [1972] N.Z.L.R. 1106 (Auk. S. Ct.); *On v. Attorney Gen.*, [1987] H.K.L.R. 331 (C.A.) (H.K); *Bohjaraj A/L Kasinathan v. Nagarajan A/L Verappan & Annor*, [2001] 6 M.L.J. 497 (H.Ct. Temerloh) (Malay.).

[20] *See, e.g.*, Hamilton, Harrison & Matthews Advocates, *Kenya*, *in* 2 *Int'l Agency & Distribution Law* [hereinafter *IADL*] § 9[2], KEN 21 (Dennis Campbell ed., 2001); Samuel Hong, *Malaysia*, *in* 2 *IADL*, *supra*, Part I (citing Contracts Act, 1950 (Act 136) § 179); Philip Sifrid A. Fortun, Mylene Marcia-Creencia, et al., *Philippines*, *in* 2 *IADL*, *supra*, Part I; The Agency Act, LSDRSG no. 1163 (1974), *quoted and translated in Laws of the Sudan*, vol. 7 (5th ed. 1981) ("The principal is jointly and separately liable with the agent for any tortious act committed by the agent[.]").

[21] *See also* C.C. (Civil Code) § 2049 (1991) (Italy) ("Masters and employers are liable for the damage cause by an unlawful act of their servants and employees in the exercise of functions to which they are assigned."); Codigo Civil (Civil Code) art. 800 (1981) (Port.) ("In the case of negligence or default of the agent, the principal is jointly and severally responsible for damages caused to third parties."); Juan Francisco Torres Landa & R. Barrera, *Mexico, in* 2 *IADL*, *supra*, § 2(6)(2), MEX 16 ("Where [an] act is in the name of the agent but within his scope of authority, the principal is ultimately liable . . . ."); Leopoldo Olavarria Campagna, *Venezuela*, *in* 2 *IADL*, *supra*, § 9[2], VEN 39; Konstantin Obolensky & Akhmed Glashev, *Russia*, *in* 2 *IADL*, *supra*, Part I § 1[1] RUSS-4 (citing Civil Code Chapter 52); William E. Butler, *Russian Law* 389–91 (2d. ed. 2003).

and abetting should have also been considered, not only as theories of liability but also as methods of establishing action under color of law.

The plaintiffs assert in their Opening Brief that they alleged that "the Defendants acted jointly *or* conspired with state sponsored paramilitaries and/or police." AOB at 48 (emphasis in original). The district court correctly found that joint action with a state actor provides a proper basis for a state action finding, and that "either a conspiracy or 'willful participation' with the state actor will satisfy the 'joint action' test.'" 474 F. Supp. 2d at 1292 (citations omitted). Nonetheless, the only kind of "joint action" the court assessed was plaintiffs' conspiracy allegations. *Id.* at 1293. This approach was too limited, because aiding and abetting also provides a sufficient basis for finding state action.

A private party that abets a state actor is a state actor; the act of aiding and abetting provides sufficient nexus to state action. Courts applying section 1983 standards in ATS cases have asked whether state actors and private parties have "acted in concert." *Kadic*, 70 F.3d at 245; *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").[22] Section 876 highlights the congruity between "joint action" under section 1983 and aiding and abetting liability under federal common law.

The district court also agreed that a state action determination can be based upon a finding that the AUC served as the agent of defendants. *Sinaltrainal II*, 474 F. Supp. 2d at 1292. Whether the district court properly applied agency standards is difficult to tell, however, because the court dismissed the agency allegations as "wholly conclusory" without significant analysis. *Id.* at 1293. While conclusions about the adequacy of the complaints to support a finding of agency are beyond the scope of this brief, *amici* do note that at least one of the complaints apparently alleged that defendants paid the paramilitaries for intimidating the plaintiffs and eradicating their union, *id.* at 1300. Because agency liability covers the acts of "agents or employees in the scope of their authority or employment," *Meyer*, 537 U.S. at 285, these allegations should be highly relevant to the agency inquiry, and may establish both liability and state action.

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[22] *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).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of plaintiffs' war crimes claims on the basis of failure to allege that the abuses were committed in furtherance of the armed conflict, and reverse the dismissal of plaintiffs' other claims on grounds that they did not adequately allege that defendants were state actors.

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Respectfully submitted,

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