UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Claudia Balcero Giraldo, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:09-cv-1041-RDP
	)	
Drummond Company, Inc. et al.,	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF DRUMMOND LTD'S MOTION FOR SUMMARY JUDGMENT

William H. Jeffress, Jr.
David A. Super
Sara E. Kropf
Rachel B. Cochran
Bryan H. Parr
Baker Botts L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7700
fax: (202) 639-7890

William A. Davis, III (ASB-5657-D65W)
H. Thomas Wells, III (ASB-4318-H62W)
Benjamin T. Presley (ASB-0136-I71P)
Starnes Davis Florie LLP
P.O. Box 59812
Birmingham, AL 35259
(205) 868-6000
fax: (205) 868-6099

Attorneys for Drummond Ltd.

Dated: November 21, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs claim that, "looking at *all* the evidence" in the case, they are entitled to a trial and Drummond Ltd.'s ("DLTD's") motion for summary judgment should be denied. Opp. at 2. They miss the purpose of summary judgment: to examine the *admissible* evidence of *material* facts. *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). When that evidence is examined, what becomes clear is that the specific elements necessary for ATS and TVPA claims have not been established, and DLTD's motion for summary judgment should be granted.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Disputed, mischaracterizes the evidence. Adkins was never charged with a crime in connection with his work in Nicaragua. The details of his work are classified. Ex. K, Adkins Dep. 35:4-36:18, Aug. 2, 2012. Even if true, this statement is irrelevant.

2. Disputed, mischaracterizes the evidence. The Report speaks for itself, and does not indicate that Adkins falsified financial accounts. The Independent Counsel decided not to bring criminal charges against Adkins and notes that a complete report of the investigation is classified. Ex. K, Adkins Dep. 38:7-41:1; Pls' Ex. 3. Even if true, this statement is irrelevant.

3. Disputed, mischaracterizes the evidence. Adkins reported to Mike Tracy that the Colombian government was organizing paramilitary groups under "Operacion Convivir." In 1995, Adkins was using "paramilitary" in the generic sense to mean self-defense groups or in this case Convivir groups. Pls' Ex. 4. Ex. K, Adkins Dep. 178:21-179:12. At the time of this memorandum, the AUC had not yet been formed. *Id.* at 188:11-18.

4. Disputed, mischaracterizes the evidence. Adkins reported to Mike Tracy about the Cordoba Battalion Commander's presentation on "Operacion Convivir," "an effort at organizing paramilitary groups" and Drummond's refusal to support it. Pls' Ex. 4.

5. Disputed, mischaracterizes the evidence. Adkins reported to Tracy on the status of Plan Convivir and the success of the Convivir groups and the military in reducing criminal activity in the area. Pls' Ex. 5. Adkins provided other reports to Mike Tracy, Bill Phillips and a few other individuals at DLTD and DCI. The "cowboys" described by Adkins are in fact cowboys who work on cattle ranches in the area. Ex. K, Adkins Dep. 189:12-190:15; 196:5-203:5.

6. Disputed, mischaracterizes the evidence. Carlos Castaño was the founder of the AUC, a fact that Plaintiffs did not dispute in Defendants' Statement of Undisputed Facts. Mot. for Summ. J. (Sept. 17, 2012) at 6; Ex. K, Adkins Dep. 189:9-11. The "Chepe Barrera" and "Victor Carranza" groups were not part of the

AUC; in fact Adkins' memo about these groups was written prior to the formation of the AUC. Ex. K, Adkins Dep. 187:8-189:11, Pls' Ex. 5.

7. Disputed, mischaracterizes the evidence. DLTD provided money to the military to provide security to DLTD in the area near its operations. Ex. K, Adkins Dep. 106:16-21; 211:18-214:6. Even if true, this statement is irrelevant.

8. Disputed, mischaracterizes the evidence. Adkins' memo to Tracy speaks for itself, and reflects Adkins' opinions and speculations about the "Operacion Convivir" program. Pls' Ex. 4.

9. Disputed, mischaracterizes the evidence. Mass killings are not relevant to the case. All of the killings of Plaintiffs' decedents were of targeted individuals, not aggression against an entire village or town. Third Am. Compl. ("TAC") (Sept. 29, 2011) ¶¶ 18-161. Even if true, this statement is irrelevant.

10. Disputed, mischaracterizes the evidence. Even if some disbanded Convivir members later joined the AUC, the two groups are not the same. Even if true, this statement is irrelevant.

11. DLTD does not dispute that the AUC was designated as a terrorist organization in September 2001. However, the reasons for that designation are contained in Executive Order 13224. *See* Ex. Z, Exec. Order No. 13224, 66 C.F.R. 49,079 (Sept. 23, 2001).

12. Disputed, mischaracterizes the evidence. DLTD investigated when there was evidence, not just unfounded accusations, of wrongdoing or illegal activity. DLTD relied on the Colombian government's investigation of the union leader murders, and cooperated in every way. Ex. E, Jiménez Dep. 57:16-61:14; Ex. K, Adkins Dep. 153:6-164:9; 280:18-281:14; Ex. S, Linares Dep. 73:13-74:16.

13. Disputed, mischaracterizes the evidence. DLTD never had any evidence that Secolda was paying the paramilitaries. Ex. K, Adkins Dep. 294:2-295:5; Ex. E, Jiménez Dep. 60:5-61:14; Ex. Q, Zervos Dep. 172:19-174:5; Ex. C, Tracy Dep. 227:9-15.

14. Disputed. DLTD did not have any dealings with the AUC, either directly or through any contractor. Ex. C, Tracy Dep. 86:23-87:7; Ex. D, Drummond Dep. 54:21-56:20; Ex. K, Adkins Dep. 164:3-9.

15. Disputed, mischaracterizes the evidence. Alfredo Araujo grew up in Valledupar knowing both Jaime Blanco and Jorge 40 before they were connected with any illegal groups. Araujo has not spoken to Jorge 40 since 1988. Ex. T, Araujo Dep. 33:2-34:16. Even if true, this statement does not create a genuine issue of material fact.

16. Disputed, mischaracterizes the evidence. DLTD did increase the monitoring of its contractors. Ex. D, Drummond Dep. 190:22-191:15. Even if true, this statement is irrelevant.

17. Disputed, mischaracterizes the evidence. DLTD and DCI investigated Blanco's allegation that DLTD made payments to the AUC through artificial price increases in Blanco's contract and found it to be false. Ex. E, Jiménez Dep. 59:6-60:4. Even if true, this statement is irrelevant.

18. Disputed, mischaracterizes the evidence. Railroad security guards were hired by a security contractor, and those contractors were screened for ties to any illegal groups. Ex. S, Linares Dep. 128:21-129:6; 141:10-142:4; 176:19-181:9. Even if true, this statement is outside the relevant time frame.

19. Disputed. Many decedents lived far from Drummond's operations. *See* Plaintiffs' and Defendants' Supp. Joint Report (Apr. 6, 2012) at 20. The status of the decedents as noncombatant civilians has not been established by any evidence.

ARGUMENT

I. Plaintiffs Have Not Shown A Genuine Dispute Regarding War Crimes (First Cause of Action)

A. Plaintiffs Apply The Wrong Legal Standard For Aiding And Abetting War Crimes

Plaintiffs appear to contend that they need only offer evidence that DLTD intended its alleged assistance to the AUC to be used *to fight the FARC* in order to avoid summary judgment. But what is necessary, under the Court's aiding and abetting standard, is admissible evidence that DLTD knew and intended that its alleged support would assist in the AUC's *killing of innocent civilians* near DLTD's rail line. There is not sufficient evidence to create a genuine issue of fact

on that allegation. As a result, summary judgment should be granted in favor of DLTD on all claims.

The Court has already defined the relevant aiding and abetting standard. Mem. Op. (Apr. 30, 2010) at 20-21. DLTD challenges three of the five elements (bolded below)[1]:

> (1) the AUC violated international law;
>
> **(2) DLTD knew of the specific violation;**
>
> **(3) DLTD acted with the intent to assist that violation—that is, DLTD specifically directed its acts to assist in the specific violation;**
>
> (4) DLTD's acts had a substantial effect upon the success of the criminal venture;
>
> **(5) DLTD was aware that its acts assisted the specific violation.**

This standard requires defining the "specific violation" of international law at issue. It cannot seriously be disputed that Plaintiffs' first cause of action is for aiding and abetting the AUC's war crimes. *See* Opp. at 27 ("Drummond aided and abetted the AUC's war crimes."); TAC at p. 161 (same). For example, this specific violation can be incorporated into the intent element to require Plaintiffs to prove that "DLTD acted with the intent to assist the war crimes committed by the AUC."

[1] At times, Plaintiffs' brief suggests that DLTD has conceded that Plaintiffs have adequate evidence to prove certain elements of their case. *See, e.g.*, Opp. at 23-24, 28. To be clear, DLTD does not concede that Plaintiffs will be able to satisfy any of the elements at trial and any "concessions" are made solely for the purpose of this motion.

The final step of the analysis is to define precisely what "war crimes" are at issue. No doubt recognizing the implausibility of holding DLTD liable for every war crime committed by the AUC throughout Colombia, Plaintiffs allege that the "primary war crime that Drummond aided and abetted was the killings of innocent civilians, including Plaintiffs' decedents." TAC ¶ 295. All of the decedents purportedly lived near DLTD's Colombian railroad line. *See, e.g.*, *id*. at ¶ 17 (decedents lived "in and around the Drummond mine and its railroad line."). This definition of the war crimes at issue mirrors the Court's description of them as "particular acts of murder along Drummond's rail lines." Mem. Op. (Apr. 30, 2010) at 22. Moreover, Plaintiffs agree that international law requires that the victims of a war crime must be noncombatants or innocent civilians.[2] Opp. at 25 ("The premise of a war crime is that a party to the conflict killed noncombatants.").

These analytic steps may be consolidated into a single usable standard:

(2) DLTD knew of the AUC's killing of innocent civilians near DLTD's rail line;

[2] Plaintiffs suggest that the phrase "innocent civilian" is somehow different from "noncombatant." Opp. at 24 n.9. But Plaintiffs' own complaint repeatedly describes the decedents as "innocent civilians," *See, e.g.*, TAC ¶ 213 ("All of the Plaintiffs' decedents were merely ***innocent civilians*** executed in the course of the conflict between the AUC and the FARC."); ¶ 227 (alleging that Drummond employee "had specific knowledge of the AUC's record of terror and its tactic of executing ***innocent civilians*** in areas of FARC influence"); ¶ 232 ("Drummond had specific knowledge that the AUC would commit war crimes, including extrajudicial killings, of ***innocent civilians***, like Plaintiffs' decedents, who lived in and around the towns Drummond required the AUC to attack and pacify."). Plaintiffs offer no explanation as to why the choice of the phrase "innocent civilian" over "noncombatant" makes any difference here. DLTD will use the terms interchangeably.

> **(3) DLTD acted with the intent to assist the AUC's killing of innocent civilians near DLTD's rail line—that is, DLTD specifically directed its acts to assist in those killings; and**
>
> **(5) DLTD was aware that its acts assisted the AUC's killing of innocent civilians near DLTD's rail line.**

Plaintiffs reject this standard because they cannot meet it. They claim that "there is no requirement that Drummond intended to kill innocent civilians when it made its alliance with the AUC war criminals against FARC." Opp. at 34. Plaintiffs do not cite any case law or explain how they reach this legal conclusion. In fact, they ignore the one ATS case from this Circuit that is directly on point. *In re Chiquita Brands Int'l Inc. Alien Tort Statute & Shareholder Deriv. Litig.*, 792 F. Supp. 2d 1301, 1331 (S.D. Fla. 2011). The court in *Chiquita* concluded that the plaintiffs had to allege facts showing that the defendant "paid the AUC with the specific purpose that the AUC commit the international-law offenses" and that Chiquita "intended for the AUC to torture and kill civilians in Colombia's banana-growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives." *Id*. at 1344-45.

Instead of embracing the standard articulated by this Court and adopted by *Chiquita*, Plaintiffs take a different tack. They contend that all they need to do is show that DLTD "shared the same purpose" as the AUC to fight the FARC. Opp. at 27-28. The "shared purpose" standard is articulated in the Court's motion to

dismiss opinion.[3] But the Court's "standard" has many more elements than "shared purpose," as explained above. Establishing that DLTD wanted the AUC to fight the FARC does not establish that DLTD knew and intended that the AUC would kill innocent civilians near its rail line.

As a practical matter, Plaintiffs' position would expand ATS liability far beyond anything allowed by a federal court. Taken to its logical end, Plaintiffs' position creates a form of strict liability such that if DLTD provided substantial assistance to the AUC and shared the AUC's general goal of defeating the FARC, DLTD is liable for ***every act committed by the AUC*** as it pursued that general goal. This ignores the plain language of the aiding and abetting standard. The standard requires the defendant's knowledge and intent to be linked to a "specific violation," not to a "specific group."

Plaintiffs cite just one case in support of the proposition that DLTD should be held liable for anything the AUC did because "a person ordinarily intends all the natural and probable consequences of an act knowingly done." Opp. at 35. (citing *United States v. Myers*, 972 F.2d 1566, 1573 (11th Cir. 1992)). This case is inapposite. First, *Myers* is a criminal case and not an ATS case. Second, the

[3] The "shared purpose" standard goes to one element of war crimes challenged by Defendants at the motion to dismiss stage. The Court articulated this standard to define what must be proven to show that a killing happened "in the course of hostilities." Mem. Op. (Apr. 30, 2010) at 24-25.

opinion does not address the intent requirement for aiding and abetting but rather the intent requirement for a substantive criminal offense. *Id*.

In addition to relying improperly on *Myers*, Plaintiffs also make two straw-man arguments. First, Plaintiffs claim that DLTD has taken the position that Plaintiffs must prove that DLTD had the "intent to kill specific civilians," that is, the intent to kill the specific 144 decedents here. Opp. at 34 n.18. DLTD never made this argument and Plaintiffs cite no portion of DLTD's brief to that effect.

Second, Plaintiffs claim that "DLTD contests *only* whether there is evidence of its shared purpose with the AUC." Opp. at 28. Plaintiffs cite page 27 of DLTD's brief. This page states, however, that DLTD challenges both the "intent and knowledge elements" of the aiding and abetting standard, well beyond the issue of "shared purpose." Mot. for Summ. J. at 27.

B. Killing "Suspected" FARC Members May Be Extrajudicial Killings But They Are Not War Crimes

The Court has noted that it is "questionable" whether victims who were suspected to be FARC members "would meet the definition of 'innocent civilian' for the purposes of war crimes." Mem. Op. (Apr. 30, 2010) at 14 n.16. Plaintiffs contend that if the AUC believed the victims to be FARC members, it is still a war crime because the victims ultimately turned out to be innocent civilians. DLTD's position is that if the AUC believed the victims to be FARC members, then the

killings are not war crimes because the AUC did not intentionally kill innocent civilians.

A war crime requires that the perpetrator must intentionally kill an innocent civilian (or noncombatant). Mot. for Summ. J. at 24-25 (citing Geneva Convention and domestic ATS cases). In fact, war crimes cases from international tribunals make clear that not only must the victims ***objectively*** be noncombatants but that the perpetrator must have ***subjectively*** believed they were civilians at the time of the attack. For example, in *Prosecutor v. Taylor*, relied upon heavily by Plaintiffs, the tribunal required the prosecutor to prove that "the perpetrator knew or had reason to know that the victim was not taking a direct part in the hostilities at the time of the alleged act or omission."[4] Case No. SCSL-03-01-T, Judgement, ¶ 574 (May 18, 2012) (Pls' Ex. 50).[5]

Plaintiffs conflate the two separate elements of a war crime—(1) the victim was a noncombatant, and (2) the perpetrator intentionally killed the noncombatant.

[4] Cases from this tribunal are not, of course, binding on this court. In particular, the charges against Mr. Taylor included "crimes against civilians" which is governed by Protocol II of the Geneva Convention in addition to Article 3. Protocol II applies to international conflicts but the reasoning is instructive here.

[5] *See also Prosecutor v. Strugar*, IT-01-42-A, Judgement, ¶ 270 (July 17, 2008) (Pls. Ex. 55) (holding that with respect to attacks against civilians, "the mens rea requirement is met if it has been shown that the acts of violence which constitute this crime were willfully directed against civilians, that is, either deliberately against them or through recklessness."); *Prosecutor v. Galic* IT-98-29-T, Judgement and Opinion, ¶ 55 (Dec. 5, 2003) (excerpt attached as Ex. AA) ("the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked."); *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Judgement, ¶ 328 (Feb. 26, 2001) ("prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity.") (excerpt attached as Ex. BB).

DLTD is not at this stage contesting that the decedents were noncombatants. But given that Plaintiffs claim the AUC believed the decedents to be FARC members—and not noncombatants—when the AUC killed them, then as a matter of law, these killings cannot be war crimes. Plaintiffs no doubt pleaded a war crime cause of action in the complaint because it relieves them of having to prove state action. Having accepted the benefit of this cause of action, Plaintiffs cannot disavow the burdens of proving all its elements.

As a final point, contrary to Plaintiffs' hyperbole, DLTD does not propose that innocent civilians "can be massacred if the AUC 'suspected' them of supporting the FARC." Opp. at 23. Rather, if AUC killed these noncombatants because the AUC believed them to be FARC members (though they turned out to be mistaken), then the appropriate cause of action is ***an extrajudicial killing*** and not a ***war crime***.

C. Plaintiffs' Evidence of DLTD's Intent and Knowledge Does Not Create A Genuine Issue

No admissible evidence shows that DLTD knew or intended that support of the AUC would assist in killing noncombatants near its rail line. Plaintiffs employ three strategies to hide this missing evidence. First, they rely on several witness declarations that are inadmissible hearsay and cannot be considered on this motion. Second, they reference testimony that DLTD provided substantial assistance to the AUC, even though DLTD concedes this element is in dispute. Opp. at 28-30.

Plaintiffs plainly hope that the Court will conclude that DLTD is a bad actor and ignore the additional elements of knowledge and intent. Third, Plaintiffs include several lengthy string cites of evidence; when the cited evidence is carefully reviewed, it does not support Plaintiffs' claims.

As an initial matter, Plaintiffs cite written declarations of several witnesses who have provided testimony subject to cross-examination, including Jaime Blanco, Jose Gelvez and "El Tigre." Opp. at 14, 19, 21, 32. These declarations are inadmissible hearsay. Their trial testimony was taken under letters rogatory, and is the only testimony by these witnesses that will be admissible at trial. *See Macuba*, 193 F.3d at 1323-24 (holding that out-of-court statements may only be considered for summary judgment if they "could be 'reduced to admissible evidence at trial'" or would "be admissible at trial for some purpose"). Plaintiffs also cite declarations of two witnesses who are in prison in Colombia and have not testified, "Yuca" and Jose Peinado. Opp. at 31. These witnesses claim that the AUC conducted "cleansing campaigns" at DLTD's behest. These statements have never been tested under cross examination, and are inadmissible hearsay. *See, e.g.*, *Solutia, Inc. v. McWane, Inc.*, No. 1:03-cv-1345-PWG, 2012 WL 2031350, at *19 (N.D. Ala June 1, 2012) (slip op) (excluding as hearsay an "ex parte" sworn statement where witness died before defendants had "opportunity to cross-examine him"); *Miranda v. Sweet Dixie Melon Co.*, No. 7:06-CV-92(HL), 2009 WL

1560048 (M.D. Ga. June 1, 2009) (unreported) (observing that plaintiff's inability to procure witness for deposition supported excluding prior sworn statement given likelihood witness would not be available at trial).[6]

Plaintiffs also claim that although "there is no requirement that Drummond intended to kill innocent civilians," they nonetheless have evidence to establish this intent. Opp. at 34-35. Plaintiffs here employ the strategy of providing as many cites as possible, even though the cited evidence does not support their claim. Plaintiffs place the evidence into five categories, each of which is addressed below.

First, Plaintiffs say there is evidence that DLTD "directed the AUC to focus on areas around Drummond's rail lines, resulting in massive civilian murders." Opp. at 34. None of the evidence they cite supports this statement. For example, Plaintiffs claim that testimony from paramilitary Charris shows that "once Drummond paid the AUC, it focused on defeating FARC in areas around Drummond's rail line." Opp. at 16. The cited pages of Charris' testimony, however, say nothing about Drummond paying the AUC, nor anything about the AUC focusing on areas around Drummond's rail line as a result of any payments. Pls' Ex. 2, Charris Dep. 19:9-20:21. Plaintiffs also cite testimony from El Tigre.

[6] *Murphy v. County of Yavapai*, No. CV-04-1861-PCT-DGC, 2006 WL 2460916, at *5 (D. Ariz. Aug. 23, 2006) (not considering expert's reports and affidavits for summary judgment because it was "undisputed" that expert "will not be available to testify at trial"); *Schwendimann v. Arkwright Advanced Coating, Inc.*, No. 11-820 ADM/JSM, 2012 WL 928214, at *7 (D. Minn. Mar. 19, 2012) (refusing to consider witness statement when it was "unclear" whether the witness would be available for hearing in light of unsuccessful subpoenas).

Opp. at 16. When asked about his strategic objective, his testimony was simply that "I had strict orders from Rodrigo Tovar Pupo, alias Jorge 40, not to allow for the guerillas to have any presence whatsoever in the lower areas [of Cesar Department]." Ex. J, Esquivel (El Tigre) Dep. 51:16-52:6. Cited testimony by Samario likewise establishes nothing more than that his orders were "to keep that area safe, the areas near Drummond multinational." Ex. I, Mattos (Samario) Dep. 61:7-63:13. Nothing cited by Plaintiffs establishes that there were massive civilian killings because DLTD "directed the AUC" to focus on certain areas.

Second, Plaintiffs claim to have evidence that DLTD "was present in the area and surely witnessed the dramatic daily violence that resulted from the AUC's Drummond-supported surge." Opp. at 34. This statement is argument, not evidence. The years 1996-2006 were a time of tragic violence throughout Colombia, not just in DLTD's area of operations, but there is not the slightest evidence of anything that would indicate to DLTD that any of it was a "result" of support by DLTD.

Third, Plaintiffs claim that DLTD "knew about and directed the AUC's 'cleansing operations.'" Opp. at 34. For that remarkable statement, they cite only a declaration of Jose Peinado, who has not testified and whose hearsay declaration cannot be properly considered on this motion.

Fourth, Plaintiffs say that DLTD "sought specific executions." Opp. at 34. Much of the cited evidence relates to the union leader murders, and this Court has already held that these murders are not relevant here. Mem. Op. (Nov. 9, 2009) at 11 n.8 ("The murders at issue here are not alleged to involve union leaders or members."). For example, Plaintiffs contend the Samario deposition describes "meetings he attended . . . regarding plans for AUC to kill civilians." Opp. at 34 (citing PSMDF ¶ 7). But Plaintiffs' description conveniently leaves out the fact that these alleged meetings were about the union leaders, not the killings at issue here. Ex. I, Mattos (Samario) Dep. at 33:12-14 ("our services were sought as it had been done before for us to murder or assassinate the union leaders.") Plaintiffs also cite El Tigre's declaration that he killed five people at Mr. Araujo's direction, but El Tigre did not make that claim in his testimony and his declaration is inadmissible hearsay.

Fifth, Plaintiffs contend that DLTD "gave intelligence to the AUC that resulted in executions." Opp. at 34. In support of this statement, Plaintiffs cite an inadmissible declaration by Gelvez, who made no such claim in his testimony. *Id.* (citing PSMDF ¶ 10). The cited testimony of Gelvez merely says that the military wanted information about any "subversives" (which means guerillas) in the area. Ex. W, Gelvez Dep. 66:1-67:18; 69:16-70:9. It is hard to see how evidence that

DLTD helped the military in fighting an illegal armed group constitutes evidence that DLTD committed war crimes.

Plaintiffs also argue that DLTD must have known "of the consequences of funding the AUC." Opp. at 35. But *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 676 (S.D.N.Y. 2006), squarely rejects such an argument: "Knowledge that such attacks [on civilians] had occurred and likely would occur again simply does not provide circumstantial evidence of an intent to assist in those attacks. . . . The plaintiffs have pointed to no evidence that Talisman urged that such attacks be made."

D. Plaintiffs Have Not Shown A Genuine Dispute Over Conspiracy to Commit War Crimes

As Plaintiffs concede, the same *mens rea* requirement applies to their conspiracy claims as to aiding and abetting. For the reasons stated above, Plaintiffs do not meet this standard. In addition, Plaintiffs claim that "the evidence plainly shows that part of the conspiracy was for Drummond to fund the AUC to defeat the FARC with the certain resulting massacres of civilians." Opp. at 36. Yet they cite no evidence of an agreement to kill civilians between the AUC and DLTD, and there is none. Given that Plaintiffs must prove that DLTD and the AUC conspired to commit war crimes—to kill noncombatants near DLTD's rail line—the lack of such evidence dooms their conspiracy claims.

II. Plaintiffs Have Not Satisfied The Legal Requirements For Agency (First and Second Causes of Action)

Plaintiffs offer three responses to DLTD's arguments that their agency theories should be rejected. First, they contend that federal common law should apply, not international law. Opp. at 36-38. For the reasons stated in DLTD's opening brief, international law should apply, just as it does to the other two secondary theories of liability asserted here. Mot. for Summ. J. at 38-41.

Second, Plaintiffs claim they need not establish that the AUC was DLTD's agent before imposing a theory of ratification. Opp. at 38-39. In support of this argument, they cite *Pescia v. Auburn Ford-Lincoln Mercury Inc.*, 68 F. Supp. 2d 1269, 1282-84 (M.D. Ala. 1999), and *Birmingham News Co. v. Birmingham Printing Co.*, 96 So. 336, 340 (Ala. 1923). The Court has already held that under Alabama law, ratification requires proof of agency. Mem. Op. (Nov. 9, 2009) at 31. *Pescia* is inconsistent with the Court's holding and with the cases cited in DLTD's motion that ratification requires agency as an threshold matter. Mot. for Summ. J. at 42-43. *Birmingham News*, decided nearly 90 years ago, says that there can be ratification of "the acts of one not an actual agent" but explains that this type of ratification "requires more evidence" than ratification of an actual agent. 96 So. at 340 (Ala. 1923). Plaintiffs cannot meet this higher standard since they

have no evidence of DLTD's actual knowledge of the AUC's conduct in killing noncombatants.[7]

Third, Plaintiffs argue that the knowledge element is satisfied because the "actual knowledge" prong of the ratification standard requires only "notice or knowledge, either actual or presumed." Opp. at 39 (citing *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995)). The *Mardis* court did not hold, as Plaintiffs argue, that ratification of intentional torts (as here) uses a constructive knowledge standard. *Mardis* first analyzes the ratification standard for intentional torts. In that section, the court holds that the plaintiffs must prove "actual knowledge." *Mardis*, 669 So. 2d at 889. In the following section of the opinion about the knowledge standard for "*negligent training and supervision*," the court holds that the knowledge standard for this negligence claim is "notice or knowledge, either actual or presumed." *Id*. (emphasis added). *Mardis* does *not* hold that this constructive knowledge applies to the ratification standard for intentional torts.

III. There Is No Evidence Of State Action (Second Cause of Action)

The Court defined the two-part standard for state action: evidence that (1) "the paramilitaries were in a symbiotic relationship with the Colombian

[7] Plaintiffs contest DLTD's undisputed statement number 16 that DLTD did not control the AUC by citing several paragraphs of their statement of disputed facts. These paragraphs (numbers 5-7) go to DLTD's supposed knowledge of what the AUC was doing and DLTD's supposed coordination of security with the AUC. None of the statements in those paragraphs establish the type of control necessary to prove agency. Mot. for Summ. J. at 42-44.

government" and (2) the "symbiotic relationship . . . involves the torture or killing alleged in the complaint." Mem. Op. (Apr. 30, 2010) at 8 (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009)). Here, that means that the Colombian government "not only tolerates the paramilitaries, but also encourages, supports, and relies on their existence" in connection with the civilian murders along the rail line. *Id.* at 11.

Plaintiffs claim that the "proper question" is "whether there were instances of military collaboration with the AUC related to AUC operations around the Drummond facilities." Opp. at 42. Under Plaintiffs' theory, instances of collaboration between members of the New York City police department and the Mafia in a certain crime would be sufficient to establish that the Mafia was acting under "color of law" of the United States government in committing that crime. That is flatly wrong—the proper question with regard to state action, as outlined above, is much more demanding.

First, the symbiotic relationship must relate to *murders of civilians* near DLTD's mine, port or rail line, not just to "AUC operations" around the DLTD facilities. Mem. Op. (Apr. 30, 2010) at 8. There is simply no evidence of such a relationship, nor do Plaintiffs cite to any such evidence in their statement of disputed facts. *See* Opp. at 19-22 (PSDMF ¶¶ 9-10). Plaintiffs cite Charris's testimony that the Army and the AUC would coordinate security when American

employees traveled to a nearby mine site, not that they coordinated in killings of civilians. Pls' Ex. 2, Charris Dep. 18:19-19:2. Plaintiffs also cite testimony by Samario that the military would lend arms to the AUC for its operations. *See* Ex. I, Mattos (Samario) Dep. 18-19, 65-66. The only specific incident he describes was admittedly in a town not near Drummond's mine or rail line.[8] *Id.* at 72:17-73:21; 150:2-151:5. In fact, Samario admitted that he did not coordinate activities with the Colombian military in the area of Drummond's rail line. *Id.* at 65:3-7. Plaintiffs also cite Samario's claims that he was involved in "false positive" operations where the AUC "would deliver to [the military] people or ex-members of the AUC themselves for them to be killed." Opp. at 20; Ex. I, Mattos (Samario) Dep. 67:19-70:6. That alleged scheme is not relevant to the killings here, which were supposedly perpetrated by the AUC and certainly not claimed as combat kills by the military.[9]

Second, "instances of military collaboration" with the AUC, not tied to a particular murder of any of Plaintiffs' decedents, are simply not sufficient to show

[8] Furthermore, Samario's statements are not admissible and should be stricken from the record because he refused to identify the military officers who allegedly lent arms to the AUC when asked on cross examination. *See* Mot. for Summ. J. at 31-34.

[9] The remaining evidence cited is similarly unconnected to civilian killings by the AUC. *See* Opp. at 20-22; Ex. J, Esquivel (El Tigre) Dep. 55:15-56:11 (describing AUC and military's common goal of fighting the guerilla); Pls' Ex. 30, Duarte Dep. 66-67 (general allegations about "joint operations" with the military, but no claim that they resulted in civilians being killed in the area near Drummond.) The El Tigre Declaration and the Gelvez testimony regarding Commander Melchor cited in PSDMF ¶ 9 are hearsay and should not be considered on this motion for summary judgment. *See supra* at § I(C).

state action in this case. There must, at minimum, be a showing that the military encouraged, supported, and relied on the AUC in the wrongdoing at issue.[10] Mem Op. (Apr. 30, 2010) at 11. In reality, Plaintiffs' evidence for the fact that the military was collaborating with AUC members is conveniently vague in terms of the persons involved and the specific nature of the collaboration and therefore fails to establish state action. *See* PSDMF ¶¶ 9, 10. In one of the only instances where a military member is specifically identified, Jose Gelvez claims that a Colonel Sanchez in Santa Marta told him to pass on intelligence to the AUC. Ex. W, Gelvez Dep. 66:1-67:18. This is simply insufficient in terms of pervasiveness and specificity to the wrongdoing alleged in this case.

Cases where state action has been found demonstrate a much more direct, pervasive level of cooperation and support than plaintiffs have shown here. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.* 416 F.3d 1242 (11th Cir. 2005) (state action found where district mayor actively participated in private security force's armed aggression against union leaders); *Estate of Rodriquez v. Drummond*

[10] Plaintiffs again conflate and confuse Convivir groups and the AUC. There is evidence that there was some collaboration between the military and Convivir groups, but that fact is irrelevant to the state action question because Plaintiffs cannot show that the Convivir and the AUC are one and the same. Their "factual support" for the statement that "Convivirs became part of the AUC" is a statement that members of a Convivir group in Santa Marta joined the AUC. *See* Opp. at 8. Plaintiffs also cite to two other generalized reports that do no more than say that some members of disbanded Convivir groups later joined the AUC. *Id.* Plaintiffs simply have no evidence to support their claims that the Convivir groups were a "front" for the AUC, and therefore any support by the Colombian government of the Convivir should be viewed as support for the AUC. Plaintiffs have also not shown that DLTD even supported any Convivir group.

Co., Inc., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (state action present because paramilitaries who murdered the union leaders were allegedly dressed in military uniforms); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) (state action adequately alleged where the wrongful conduct occurred in a Nigerian facility with the assistance of the Nigerian government and government officials and officials also conspired to cover up the violations); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346-47 (N.D. Ga. 2002) (rev'd on other grounds) (state action where the wrongful conduct was part of an "official policy" of the state); *cf. Sinaltrainal*, 578 F.3d at 1270 (no state action in part because "there are no allegations the Colombian government was aware of, much less complicit in, the murder and torture Plaintiffs allege in their complaints").

Plaintiffs' attempts to rely on vague, generalized statements regarding cooperation between the military and the AUC are not sufficient to meet their burden to prove state action. There is simply no evidence of a symbiotic relationship involving the killings at issue in this case.

IV. Punitive Damages Are Not Permitted

The ATS is silent as to the type of damages allowed, and there is no legislative history to guide the Court. Plaintiffs primarily rely on *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), for the proposition that this Court should not engage in a choice of law analysis before deciding whether to allow Plaintiffs

to seek punitive damages. To be sure, *Abebe-Jira* held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Id*. at 848. But nothing in this case holds that a court should abdicate well-established *domestic* choice-of-law principles in its effort to fashion domestic remedies. Certainly, nothing in *Abebe-Jira* prevents the Court from applying this choice of law and preventing the use of punitive damages here.

Plaintiffs do not dispute that if a choice of law analysis is applied, Colombian law would apply, nor do they dispute that Colombian law does not allow for punitive damages. As described in more detail in DLTD's opening brief, the Court should engage in choice-of-law analysis which inexorably leads to the application of Colombian law. Plaintiffs selected this domestic forum knowing of its choice-of-law principles. They cannot now plausibly claim that these principles should be ignored simply to amplify the possible damages here.

CONCLUSION

There is no evidence creating a genuine issue of material fact in this case, and therefore DLTD's motion for summary judgment should be granted.

Dated: November 21, 2012

/s/ William H. Jeffress, Jr.
William H. Jeffress, Jr.
David A. Super
Sara E. Kropf
Rachel B. Cochran
Bryan H. Parr
Baker Botts L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-7700
fax: (202) 639-7890

/s/ William A. Davis, III
William A. Davis, III (ASB-5657-D65W)
H. Thomas Wells, III (ASB-4318-H62W)
Benjamin T. Presley (ASB-0136-I71P)
Starnes Davis Florie LLP
P.O. Box 59812
Birmingham, AL 35259
(205) 868-6000
fax: (205) 868-6099

Attorneys for Drummond Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on **November 21, 2012**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Terrence P. Collingsworth, Esq.
Christian A. Levesque, Esq.
Rachel A. Sheridan, Esq.
Conrad & Scherer, LLP
1156 15th Street NW, Suite 502
Washington, D.C. 20005

William R. Scherer, Esq.
Conrad & Scherer, LLP
633 South Federal Highway
Ft. Lauderdale, FL 33301

Eric J. Hager, Esq.
Conrad & Scherer, LLP
Avenida República de El Salvador 500 e Irlanda
Edificio Siglo XXI, PH Oficina W
Quito, Ecuador

/s/ William A. Davis, III
William A. Davis, III (ASB-5657-D65W