

Case No. 12-14898-B

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.
ALIEN TORT STATUTE LITIGATION

On Appeal from the United States District Court
for the Southern District of Florida
No. 08-md-01916
(Nos. 07-60821, 08-80421, 08-80465, 08-80480, 08-80508,
10-60573, 10-80652, 11-80404, 11-80405)
(The Honorable Kenneth A. Marra)

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**AMENDED CERTIFICATE OF INTERESTED PERSONS &
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellants, Chiquita Brands International, Inc. and Chiquita Fresh North America LLC, certifies that no publicly held corporation owns 10% or more of its stock. Counsel also certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations (noted with its stock symbol if publicly listed) that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to Appellants, are as follows:

1. The individual plaintiffs are listed in the Complaints as filed in the Southern District of Florida in Case Nos. 07-60821-CIV-MARRA, 08-80421-CIV-MARRA [added], 08-80465-CIV-MARRA, 08-80480-CIV-MARRA, 08-80508-CIV-MARRA, 10-60573-CIV-MARRA, 10-80652-CIV-MARRA [added], 11-80404-CIV-MARRA [added], and 11-80405-CIV-MARRA [added] respectively.
2. Additional interested parties are:

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Agrícola Santa Marta Limitada

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Alsama, Ltd.

American Produce Company

Americana de Exportación S.A.

Anacar LDC

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B C Systems, Inc.

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Bienes Del Rio, S.A.

BlackRock, Inc. (NYSE: BLK)

Blue Fish Holdings Establishment

Bocas Fruit Co. L.L.C.

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CB Containers, Inc.

Centro Global de Procesamiento Chiquita, S.R.L.

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Chiquita (Canada) Inc.

~~Chiquita (Scotland) Limited~~ [removed]

Chiquita (Shanghai) Enterprise Management Consulting Co., Ltd.

Chiquita Banana Company B.V.

Chiquita Brands International Foundation

Chiquita Brands International Sàrl

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Chiquita Compagnie des Bananes

~~Chiquita Cyprus Holding Limited~~ [removed]

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Chiquita Deutschland GmbH

Chiquita Food Innovation B.V.

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Chiquita Fresh B.V.B.A.

Chiquita Fresh España, S.A.

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Chiquita Fruit Bar (Belgium) BVBA

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Chiquita Italia, S.p.A.

Chiquita Logistic Services El Salvador Ltda.

Chiquita Logistic Services Guatemala, Limitada

Chiquita Logistic Services Honduras, S.de RL

Chiquita Melon Packers, Inc.

Chiquita Mexico, S. de R.L. de C.V.

Chiquita Nature and Community Foundation

Chiquita Nordic Oy

Chiquita Norway As

Chiquita Poland Spolka Z ograniczona odpowiedzialnoscia

Chiquita Portugal Venda E Comercializaçao De Fruta, Unipessoal

Lda

Chiquita Relief Fund - We Care

Chiquita Shared Services

Chiquita Singapore Pte. Ltd.

Chiquita Slovakia, S.r.o.

Chiquita Sweden AB

Chiquita Tropical Fruit Company B.V.

Chiquita UK Limited

ChiquitaStore.com L.L.C.

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The Vanguard Group [added]

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would be helpful to the disposition of this appeal. This case presents complex and novel questions concerning the scope and pleading standards of the Alien Tort Statute, 28 U.S.C. § 1350, and oral argument would help the Court evaluate these questions.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). On March 27, 2012, the district court certified for interlocutory review a series of orders denying motions to dismiss filed by Defendants Chiquita Brands International, Inc. and Chiquita Fresh North America LLC (together, “Chiquita”). Doc. 518, 522.¹ On April 6, 2012, Chiquita timely petitioned this Court for permission to appeal. On September 27, 2012, the Court granted the petition.

Plaintiffs allege subject-matter jurisdiction over their claims for violations of the law of nations under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and over their claims for violations of the Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C. § 1350 note, under 28 U.S.C. § 1331.² For the reasons stated in this brief, the ATS does not confer jurisdiction over the ATS claims.

STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction over plaintiffs’ ATS claims, which are predicated on alleged acts of violence by Colombians against Colombians in Colombia, given that the ATS does not apply to violations occurring in the territory of a foreign sovereign.

¹ References to the district court record (“Doc.”) are to the multi-district litigation docket, No. 08-md-01916, unless otherwise noted.

² The Alien Tort Statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

2. Whether a plaintiff sufficiently pleads the “state action” element of an international law violation under the ATS where the complaint contains no factual allegations to establish government involvement in the specific incident of torture or killing for which that plaintiff seeks relief.

3. Whether a plaintiff can state claims for war crimes and crimes against humanity under the ATS without pleading facts showing that the specific incident of torture or killing for which that plaintiff seeks relief was committed in the “course of hostilities” or as part of a “widespread or systematic attack.”

4. Whether every victim of the Colombian civil conflict can state a claim for secondary liability against Chiquita without alleging facts that support a reasonable inference that Chiquita acted with the purpose of promoting the particular act of violence for which that person seeks relief.

5. Whether the TVPA claims against Chiquita must be dismissed because the statute imposes liability only on individuals, as the Supreme Court recently held in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

INTRODUCTION

This litigation is premised on the theory that Chiquita may be held liable under the ATS for any act of violence committed by either right-wing paramilitary or left-wing guerrilla groups during Colombia’s decades-long civil conflict. Plaintiffs, more than 4,000 Colombian nationals, do not allege that Chiquita

committed any of the killings or acts of violence at issue. Instead, they claim that Chiquita may be held liable for the alleged acts of the Colombian armed groups under a theory of “material support of terrorism” or, alternatively, under various theories of secondary liability.

The district court dismissed plaintiffs’ material support claim, but held that each of them had pled cognizable ATS claims against Chiquita based on secondary liability for extrajudicial killing, torture, war crimes, and crimes against humanity. In permitting these claims to proceed, the district court did not require any plaintiff to plead facts linking the alleged international law violations to the specific killing or act of torture for which that plaintiff seeks relief. Nor did the district court require any plaintiff to plead facts showing that Chiquita knew of the particular international law violations at issue. Instead, the Court concluded that, because the complaints aggregated thousands of individual claims, the elements of these claims could be pled in the aggregate as to every act of violence allegedly committed by both right- and left-wing private armed groups in Colombia.

The consequences of this ruling would be drastic even if limited to the plaintiffs whose claims are the subject of this appeal—claims that, as the district court acknowledged, seek billions of dollars in damages and will involve extraordinary discovery costs. But the consequences of this ruling are much greater. Under the district court’s decision, any person who asserts a claim

purportedly on behalf of a victim of armed groups in Colombia—and there are estimated to be substantially more than 10,000 such victims—automatically states a cause of action sufficient to withstand a motion to dismiss. Indeed, since the district court issued its decision, more than 600 additional Colombian nationals have filed carbon-copy claims against Chiquita.

The district court’s approach cannot be squared with this Court’s decisions, which hold that a plaintiff can state an ATS claim only by pleading facts showing an international law violation in connection with the specific tort of which the plaintiff complains. *See, e.g., Mamani v. Berzain*, 654 F.3d 1148, 1155 & n.8 (11th Cir. 2011). Moreover, this Court has repeatedly cautioned that courts must be particularly careful not to go beyond these parameters in light of the serious foreign policy consequences that may result. *Id.* at 1152. This case demonstrates that the Court’s concern is well founded. In holding that plaintiffs had adequately pled “state action”—a necessary element of many of their claims—the court relied on the conclusory allegation that the sitting President of Colombia, Juan Manuel Santos, collaborated with Colombian paramilitary groups in killing thousands of his country’s citizens. As a result, plaintiffs’ counsel will likely seek discovery of President Santos and other Colombian government officials regarding more than 4,000 murders in that country, despite the lack of a single allegation that either

President Santos or any other Colombian official was aware of, let alone involved in, any of them.

Although plaintiffs' claims thus can be dismissed for failure to state an international law violation that would establish jurisdiction under the ATS, the Court need not reach that issue given the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). In *Kiobel*, the Court applied the presumption against extraterritoriality to hold that the ATS does not reach international law violations that occur on foreign soil. Because plaintiffs' ATS claims are predicated on international law violations committed against Colombians in Colombia by Colombians (allegedly in concert with the Colombian government), the presumption against extraterritoriality precludes the district court from exercising jurisdiction over those claims.

The district court's decision should be reversed.

STATEMENT OF THE CASE

The Supreme Court has held that "the ATS is a jurisdictional statute creating no new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 124 S. Ct. 2739, 2761 (2004). Although federal courts have discretion to recognize a "very limited set" of federal common-law causes of action under the ATS, a norm of international law is actionable under the statute only if it is "specific, universal, and obligatory." *Id.* at 720, 732, 124 S. Ct. at 2759, 2765-66. As the Supreme Court

has made clear, recognizing a cause of action under the ATS “should be undertaken, if at all, with great caution.” *Id.* at 727-28, 124 S. Ct. at 2763. The need for caution is particularly great when a suit “would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” *Id.* at 727, 124 S. Ct. at 2763. Given the need for “vigilant doorkeeping” in ATS suits, this Court has repeatedly held that a plaintiff can state an ATS claim only by pleading facts to establish a violation of international law in connection with the specific tort for which the plaintiff seeks relief. *See, e.g., Mamani*, 654 F.3d at 1155 & n.8; *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

Noting the foreign policy concerns created by ATS suits, the Supreme Court recently applied the presumption against extraterritoriality to hold that the ATS does not confer jurisdiction for claims “seeking relief for violations of the law of nations occurring outside the United States.” *Kiobel*, 133 S. Ct. 1669. As a result, a federal court has jurisdiction under the ATS only for claims that “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.” *Id.* at 1669 (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883-88 (2010)).

A. Course of the Proceedings and Disposition Below

Plaintiffs, more than 4,000 Colombian nationals, are family members of Colombians who were allegedly tortured and killed by left-wing guerrilla and right-wing paramilitary groups in Colombia. Doc. 412:2, 91; 513:1; 514:1 518:4-5. Plaintiffs have sued Chiquita, claiming that it is liable for the alleged violent acts of these Colombian groups under the ATS, the TVPA, Colombian law, and various U.S. state tort laws. Doc. 412:2, 91; 513:1-2; 514:1-2. Chiquita moved to dismiss the complaints, and the district court granted the motions in part and denied them in part. Doc. 412; 477; 513; 514. The district court certified its orders for interlocutory appeal, Doc. 518, 522, and this Court granted the parties' petitions for permission to appeal.

B. Statement of Facts

1. Background

Chiquita is a U.S. corporation and a producer, marketer, and distributor of bananas. Doc. 412:8. Until 2004, Chiquita's former Colombian subsidiary, C.I. Bananos de Exportación, S.A. ("Banadex"), owned and operated banana farms in Urabá and Santa Marta, two remote regions of Colombia that were dominated for many years by armed groups notorious for violence, extortion, and drug trafficking. Doc. 287:¶¶ 395, 407-09, 432, 437; Doc. 394:¶ 1363.

Before 1997, Urabá and Santa Marta were controlled by the Revolutionary Armed Forces of Colombia (“FARC”) and other left-wing guerrilla groups engaged in armed conflict with the Colombian government. Doc. 412:3-4; 439:¶¶ 458-60; 449:Ex. 1 ¶ 20; 285:¶ 25. From approximately 1989 to 1997, Banadex was forced to make payments to these groups. Doc. 439:¶¶ 458-64; 449:Ex. 1, ¶ 20; *Does 1-254 v. Chiquita Brands Int’l, Inc.*, No. 9:11-cv-80405, Doc. 3:¶¶ 296-98.

In or about 1997, the left-wing guerrilla groups lost control of these regions to private right-wing paramilitaries associated with an umbrella group known as the Autodefensas Unidas de Colombia (the United Self-Defense Forces of Colombia, or “AUC”). Doc. 287:¶ 466; 412:3-4. Around the same time, Banadex’s General Manager was summoned to a meeting with the then-leader of the AUC, Carlos Castaño, and told by Castaño that Banadex must begin making payments to the AUC. Doc. 449:¶ 1042; 449:Ex. 1 ¶ 21. As the U.S. Department of Justice would later acknowledge, “Castaño sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property.” Doc. 449:Ex. 1 ¶ 21.

Confronted with this threat, Chiquita was forced to begin making payments to the AUC in 1997. *Id.*; Doc. 449:¶ 1042. When the payments began, they were legal under U.S. law, but that changed on September 10, 2001, when the U.S.

Secretary of State designated the AUC as a foreign terrorist organization. Doc. 449:¶ 1026; 449:Ex. 1 ¶ 5. As a result of this designation, it became illegal under U.S. law to make payments to the AUC. Doc. 449:¶ 1026; 449:Ex. 1 ¶ 5.

In February 2003, a Chiquita employee discovered that the AUC had been designated a foreign terrorist organization. Doc. 449:¶ 1078; 449:Ex. 1 ¶ 55. After consulting with counsel, Chiquita promptly and voluntarily disclosed the payments to the U.S. Department of Justice. Doc. 449:¶¶ 1078, 1085; 449: Ex. 1 ¶¶ 55, 62. Justice Department officials told Chiquita that the “payments to the AUC were illegal and could not continue,” but at the same time “acknowledged that the issue of continued payments was complicated.” Doc. 449:¶ 1085; 449:Ex. 1 ¶ 62. Unable to stop the payments without risking violent retaliation, Chiquita sold Banadex in 2004. Doc. 449:¶ 1023; 449:Ex. 1 ¶ 2.

In March 2007, Chiquita pled guilty in the U.S. District Court for the District of Columbia to a single count of “Engaging in Transactions with a Specially-Designated Global Terrorist” without first obtaining a license from the U.S. Office of Foreign Asset Control, in violation of the International Emergency Economic Powers Act, 50 U.S.C. § 1705(b). Doc. 111:Ex. 2 at 1; 449:¶ 1127; 449:Ex.1 at 18. In connection with Chiquita’s guilty plea and sentence, DOJ acknowledged that Banadex’s payments were made in response to threats of

violence and that Chiquita did not support the goals or ideologies of the AUC.

Doc. 111:Ex. 2 at 13-14.

2. Procedural History

In June 2007, a few months after Chiquita's plea, plaintiffs began filing lawsuits against Chiquita asserting claims under the ATS, the TVPA, and the tort laws of several U.S. states and Colombia. A total of nine ATS lawsuits, brought on behalf of more than 4,000 individual plaintiffs, have been transferred by the Judicial Panel on Multidistrict Litigation to the U.S. District Court for the Southern District of Florida for coordinated pretrial proceedings. Only one of the nine suits was filed as a putative class action. Doc. 285. The other suits aggregate claims by thousands of individual plaintiffs, each seeking separate relief for a specific death or injury that they, or a relative, suffered.

a) Plaintiffs' Amendment of Their Complaints In Response to Chiquita's Motion to Dismiss

In July 2008, Chiquita moved to dismiss the complaints. Doc. 93. Chiquita argued that the core legal theory underlying plaintiffs' ATS claims—that Chiquita committed a primary violation of international law by providing material support to Colombian terrorists—was not cognizable under the ATS because the theory is not supported by a specific, universal, and obligatory norm of international law as required under *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). Doc. 93:15-33. Chiquita also argued that plaintiffs' alternative theories—which sought to

impose secondary liability on Chiquita for the alleged international law violations committed by the Colombian paramilitary and guerrilla groups—also failed because they do not plead facts supporting the elements of those claims. *Id.* at 37-66.

In response to Chiquita’s motion to dismiss, most plaintiffs amended their complaints—presumably setting forth the very best allegations that they could to remedy the specific deficiencies identified in Chiquita’s motion. But even as amended, plaintiffs’ complaints provide few factual allegations to support their claims. Most of the plaintiffs and alleged victims are identified only by pseudonyms. *See, e.g.*, Doc. 284:¶¶ 5-16, 18-53, 57-121A, 251-833; *Does 1-976 v. Chiquita Brands Int’l, Inc.*, No. 9:10-cv-80652, Doc. 3:¶¶ 14-989. Their individual claims are set forth in long strings of short, largely verbatim paragraphs that typically assert only that each victim “was killed,” “was disappeared,” or “was injured” on a particular date “by the AUC,” “by the FARC,” by some other named group, or (even more vaguely) by unnamed “paramilitaries” or “guerrillas.” *See, e.g.*, Doc. 287:¶¶ 23-393; *Does 1-254*, Doc. 3:¶¶ 14-267; *Does 1-677 v. Chiquita Brands Int’l, Inc.*, No. 9:11-cv-80404, Doc. 3:¶¶ 25-701.

The amended complaints also do not allege that Chiquita had any direct involvement in, or even knowledge of, any of the alleged acts of violence. Instead, the complaints attempt to tie Chiquita to the violence by asserting, as to each

victim, that the paramilitary and guerrilla groups who allegedly injured the victims “received support from Chiquita.” *See, e.g.*, Doc. 287:¶¶ 23-195; *Does 1-254*, Doc. 3:¶¶ 14-267. Even in the complaints that identify victims by name or provide some other cursory facts regarding the circumstances of the alleged deaths or injuries, there are no allegations linking Chiquita to any of the incidents aside from conclusory assertions that the crimes were committed, for example, “by the AUC” and that Chiquita is responsible for the crimes based on its “support of the AUC.” *See, e.g.*, Doc. 284:¶¶ 251-833.

b) The District Court’s Denial In Relevant Part of Chiquita’s Motions to Dismiss

In orders dated June 3, 2011, September 6, 2011, and March 27, 2012, the district court granted Chiquita’s motions to dismiss in part and denied them in part. Doc. 412; 477; 513; 514; 516.

ATS Claims. The district court dismissed plaintiffs’ ATS claims based on terrorism and material support to terrorist organizations. Doc. 412:15-33; 477:2; 513:5. Relying on numerous decisions that have refused to recognize such claims, the district court held that these terrorism-based claims are not cognizable under the ATS because they are “not based on a sufficiently accepted, established, or defined norm of customary international law to constitute a violation of the law of nations.” Doc. 412:31.

Having dismissed the only claims alleging that Chiquita directly violated international law, the district court then considered whether plaintiffs had sufficiently pled claims seeking to hold Chiquita indirectly liable under international law for primary violations allegedly committed by the Colombian paramilitary and guerrilla groups. Doc. 412:57-83; 477:1-2, 4; 513:5-7; 514:4-6. As the district court recognized, a plaintiff can state a claim under the ATS based on an indirect liability theory only if that plaintiff sufficiently alleges that: (1) the Colombian armed groups violated international law; and (2) Chiquita can be liable for those violations. Doc. 412:67. After considering both of these issues, the district court denied the motion to dismiss as to every one of the more than 4,000 plaintiffs. Doc. 412:95; 477:3; 513:8; 514:6.

In denying the motion to dismiss, however, the district court did *not* hold that each plaintiff had adequately pled his or her ATS claims. To the contrary, the court acknowledged that many of the plaintiffs provided only “brief, undetailed allegations” to support their claims. Doc. 412:6 n.4. But, considering it “impractical” to require each plaintiff to provide sufficient allegations, the court analyzed the allegations of only a handful of plaintiffs, which the court “assume[d] . . . [were] representative of all Plaintiffs’ claims.” *Id.* at 6 & n.4. The court determined that, so long as these “representative” plaintiffs had adequately pled their claims, it would allow the claims of each and every individual plaintiff to

proceed. *Id.* at 6. The court cited no authority to support this “representative” approach to pleading.

Turning to the allegations of the “representative” plaintiffs, the district court held that they had stated claims for primary violations of international law based on allegations that the AUC had committed torture, extrajudicial killings, war crimes, and crimes against humanity. *Id.* at 45, 49-50, 56. The court held that plaintiffs had adequately pled the state-action element of their claims for torture and extrajudicial killing by alleging “a symbiotic relationship between the Colombian government and the AUC with respect to the AUC’s campaign of torture and killing of civilians in the banana-growing regions.” *Id.* at 38. Even as to the so-called “representative” plaintiffs, the district court expressly rejected Chiquita’s argument that the state-action element requires allegations of a connection between the government and the particular alleged violations of international law for which those plaintiffs sought relief. *Id.*

The court also held that the allegations were sufficient to state claims for “war crimes” and “crimes against humanity,” which the court concluded had no state-action requirement. *Id.* at 46, 49-52, 56. The court correctly held that the alleged killings were actionable as war crimes only if plaintiffs could show that “the AUC committed the alleged violence *because of*, and not merely during, the civil war in Colombia.” *Id.* at 47 (emphasis in original). Yet the court decided that

this causal nexus was satisfied by conclusory allegations that plaintiffs' decedents were victims of an alleged AUC strategy to target civilians. *Id.* at 47-50. The court did not require any plaintiff to allege facts demonstrating a nexus between the particular killing for which he sought relief and the civil war in Colombia.

Similarly, for the crimes against humanity claims, the district court held that plaintiffs must establish that each killing or act of torture was "committed as part of a widespread or systematic attack against a civilian population." *Id.* at 51. The court concluded that this element was satisfied notwithstanding the absence of any allegations linking the deaths or injuries to such an attack. Instead, the court determined that all plaintiffs sufficiently alleged crimes against humanity based on the conclusory allegation that their relatives were victims of a general "campaign conducted against civilians by the AUC" or the left-wing guerrilla groups. *Id.* at 52-56; Doc. 477:3; 513:6; 514:5.

Finally, the district court held that plaintiffs had sufficiently pled that Chiquita is secondarily liable for these international law violations under theories of aiding-and-abetting and conspiracy. Doc. 412:79, 81; 477:2-3; 513:5-7; 514:5-6. The court recognized that, to state these claims, plaintiffs must allege that Chiquita acted in concert with the paramilitary or guerrilla groups for the purpose of committing the alleged violations of international law. Doc. 412:67. But in holding that all plaintiffs had done so, the court accepted as true the entirely

conclusory (and inherently implausible) allegations that Chiquita shared with *both competing sides* of Colombia's long-running internal strife an intention to torture and kill thousands of Colombian civilians. *Id.* at 73-76; Doc. 514:5.

Non-ATS Claims. The district court further ruled that, because plaintiffs had adequately pled ATS claims for extrajudicial killing and torture, their TVPA claims based on the same theories were also sufficiently pled. Doc. 412:84-86. In so doing, the court rejected Chiquita's argument that the TVPA imposes liability only on individuals, not corporations. *Id.* at 85. The court dismissed plaintiffs' state law claims because those "claims are premised on acts by Colombian paramilitaries against Colombian civilians that occurred inside Colombia as part of Colombia's civil war." *Id.* at 87; *see also id.* at 89 (claims are "based on wholly foreign conduct by foreign tortfeasors against foreign victims"). Although the court initially dismissed the Colombian-law claims, the court later reinstated them. Doc. 516:4-6.³

FARC-Related Claims. Finally, the court addressed the allegations of the plaintiffs whose relatives were allegedly killed by the FARC. Doc. 412:91-94.

³ Chiquita has filed a motion to dismiss the claims for *forum non conveniens*, which is pending in the district court. *See Ford v. Brown*, 319 F.3d 1302 (11th Cir. 2003) (reversing denial of *forum non conveniens* motion as an abuse of discretion where primary tort was committed in a foreign country, because "the vast majority of evidence" necessarily is located there).

Because there are no allegations of a “symbiotic relationship” between the FARC and the Colombian government, plaintiffs conceded that they could not assert ATS claims based on extrajudicial killing or torture. *Id.* at 91. Likewise, because there are no allegations of a meeting between the FARC and Chiquita, plaintiffs also conceded that they could not allege a conspiracy to support secondary liability. *Id.* The court initially dismissed all claims brought by these plaintiffs on the ground that they had not adequately pled any secondary liability theory. *Id.* at 94. After certain plaintiffs amended their complaint, however, the court denied Chiquita’s motion to dismiss these claims and held that the complaints adequately alleged that Chiquita aided and abetted the FARC in committing war crimes and crimes against humanity. Doc. 514:4-6; 513:6-7.

c) Certification for Interlocutory Appeal

On March 27, 2012, the district court granted Chiquita’s motion to certify its orders for interlocutory appeal. Doc. 518:4-11. In granting the motion, the court noted that these cases are “far from ordinary” and that “families of over 4,000 individuals [are] seeking billions of dollars in damages for killings and acts of torture that occurred on foreign soil.” *Id.* at 4-5. The court also recognized that “[t]he cost of discovery associated with investigating these claims will be nothing less than extraordinary.” *Id.* at 5. Consequently, the court concluded that “[i]t

would be irresponsible for [it] to ignore the possibility of reversal on appeal, especially given the incredible cost of permitting this matter to move forward.” *Id.*

On September 27, 2012, this Court granted Chiquita’s petition for permission to appeal. On November 9, 2012, this Court stayed briefing of the appeal pending the Supreme Court’s decision in *Kiobel*. On April 22, 2013, following the Supreme Court’s decision in *Kiobel*, this Court lifted the stay.

C. Standard of Review

The district court’s denial of Chiquita’s motion to dismiss is reviewed *de novo*. See, e.g., *Sinaltrainal*, 578 F.3d at 1260.

SUMMARY OF ARGUMENT

I. Plaintiffs’ remaining ATS claims should be dismissed because they fail to displace the presumption against extraterritoriality. Plaintiffs’ claims are predicated on alleged primary violations of the law of nations that have no connection to the United States. Instead, they involve allegations that Colombian guerrilla and paramilitary groups tortured and killed Colombians in Colombia—in the case of the paramilitaries, with the alleged participation of the Colombian government. Plaintiffs’ allegations supporting secondary liability theories also do not displace the presumption, because they allege exclusively foreign conduct to establish necessary elements of those theories and because secondary liability was not the “focus” of Congress’s concern in enacting the ATS. As the decisions of

this Court and the Supreme Court make clear, the limited domestic conduct at issue—Chiquita’s decision to direct its Colombian subsidiary to make payments in Colombia to Colombian armed groups—does not displace the presumption against extraterritoriality.

II. Plaintiffs’ claims should be dismissed because they fail to plead the elements required to state a claim under the ATS. The district court correctly noted that the majority of plaintiffs had provided only “brief, undetailed allegations.” But the court erred in permitting these claims to proceed on the ground that other plaintiffs—whom the court labeled “representative” of all plaintiffs—had provided more detailed allegations. The court should have required each plaintiff to satisfy the applicable pleading standards for his or her claim and should have dismissed the claims of those plaintiffs who failed to do so. In any event, even the “representative” plaintiffs failed to state a claim.

A. Plaintiffs have not sufficiently pled primary violations of the law of nations. The extrajudicial killing, torture, and crimes against humanity claims fail because plaintiffs have not alleged facts to establish the requisite “state action.” This Court’s prior decisions have made clear that allegations of a general relationship between the Colombian government and paramilitary groups are insufficient to plead state action. Instead, the allegations must link the government to the particular act of violence for which a plaintiff seeks relief. Plaintiffs failed

to plead such facts. Indeed, no plaintiff asserts facts to show that any Colombian government official was even aware of the particular violation of international law for which that plaintiff seeks relief. The court also erred in holding that state action was not required for crimes against humanity claims because there is not a specific, universal, and obligatory norm of international law that extends the offense of crimes against humanity to private individuals.

The war crimes and crimes against humanity claims fail because plaintiffs did not plead facts linking the killing or act of torture for which that plaintiff seeks relief to the commission of a war crime or a crime against humanity. The district court correctly recognized that, to state a war crimes claim, plaintiffs must do more than simply allege that the paramilitary or guerrilla groups committed the violence *during* the armed conflict; they must allege facts to show that the alleged acts were committed *because of* the conflict. Moreover, to state a crimes against humanity claim, plaintiffs must allege facts to show that the alleged torture or killing was part of a “widespread or systematic attack.” The court erred in applying these standards because no plaintiff pleaded facts showing that the act of violence for which he seeks relief was committed in the course of hostilities or as part of a systematic or widespread attack.

B. Even if plaintiffs had adequately pled primary violations of international law by Colombian armed groups, their claims would still fail because they have

not sufficiently pled Chiquita's secondary liability for those violations. For Chiquita to be held liable for aiding and abetting or conspiracy, plaintiffs must prove that it acted with the purpose of supporting the violence of both competing factions in the Colombian civil conflict. Plaintiffs do not allege a single fact that links Chiquita to any of the acts of violence at issue, much less that suggests Chiquita wanted the violence to happen. The district court erred in permitting the claims to proceed based on the same sort of conclusory allegations of intent that the Supreme Court ruled insufficient in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).

III. Finally, the district court erred in holding that plaintiffs had sufficiently pled violations of the TVPA. As the Supreme Court recently held, the TVPA "authorizes liability solely against natural persons." *Mohamad*, 132 S. Ct. at 1708. Because Chiquita is not a natural person, the TVPA claims should be dismissed.

ARGUMENT

I. The Presumption Against Extraterritoriality Requires Dismissal of Plaintiffs' ATS Claims.

As the district court recognized, plaintiffs' remaining ATS claims "are premised on acts by Colombian paramilitaries against Colombian civilians that occurred inside Colombia as part of Colombia's civil war." Doc. 412:87. Because federal courts lack jurisdiction to decide ATS claims based on "conduct occurring

in the territory of a foreign sovereign,” *Kiobel*, 133 S. Ct. at 1664, 1668-69, plaintiffs’ ATS claims should be dismissed.⁴

1. In *Kiobel*, the Supreme Court held that the ATS must be interpreted in light of the usual “presumption that United States law governs domestically but does not rule the world.” *Id.* at 1664 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454, 127 S. Ct. 1746, 1758 (2007)). The Court concluded that Congress enacted the ATS to ensure that federal courts have jurisdiction to decide claims involving international law violations that occur within the United States, but that there is “no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.” *Id.* at 1667. Because nothing in the statutory text, history, or purpose rebuts the presumption against extraterritoriality, the ATS does not confer jurisdiction for claims “seeking relief for violations of the law of nations occurring outside the United States.” *Id.* at 1669.

Under *Kiobel*, a federal court has jurisdiction under the ATS only for claims that “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.” *Id.* (citing

⁴ Although the district court did not address this issue, this Court must consider it to ensure that there is federal subject-matter jurisdiction. *See Kiobel*, 133 S. Ct. at 1664 (noting that the ATS is “strictly jurisdictional” (quotation marks omitted)); *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001).

Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883-88 (2010)). To displace the presumption, an ATS plaintiff must do more than simply allege that some conduct took place in the United States. As the Supreme Court has explained, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” *Morrison*, 130 S. Ct. at 2884. Accordingly, to determine whether a particular claim is barred, a court must determine whether the conduct that was “the ‘focus’ of congressional concern” took place in the United States. *Id.*; *see also Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring) (discussing *Morrison*).

2. Plaintiffs do not allege sufficient domestic conduct to displace the presumption against extraterritoriality. The only domestic conduct in this case involves the decision made by Chiquita executives to direct Banadex, its Colombian subsidiary, to make payments in Colombia to Colombian armed groups. Doc. 449:¶¶ 1043, 1049, 1084; 449, Ex. 1:¶¶ 22, 26, 61. Plaintiffs alleged that this conduct violated established norms of international law, but the district court correctly held that this sort of terrorism-support claim is not cognizable under the ATS. Doc. 412:31. Given that Chiquita’s domestic conduct is not directly actionable under the ATS, plaintiffs can rely on that conduct to displace the

presumption of extraterritoriality only insofar as it supports a theory of indirect liability that would make Chiquita liable for the international law violations committed by Colombian paramilitary or guerrilla groups.

Plaintiffs' secondary-liability claims are predicated on primary violations of international law by Colombian armed groups occurring entirely outside of the United States. Plaintiffs' allegations that these Colombian groups violated international law do not involve any domestic conduct, but are instead based on alleged acts of torture and killings of Colombians by Colombians in Colombia during the Colombian conflict. Doc. 412:6; 514:1-2. Moreover, because many of plaintiffs' claims require proof of "state action," they must also prove that the Colombian government took part in killing its own citizens. Doc. 412:36-45. Plaintiffs intend to prove that the Colombian government and the AUC jointly planned and carried out attacks against Colombian citizens by attempting to show that Colombian officials, including the current and former presidents, aided and abetted the AUC's attacks on Colombians. *Id.* at 39-43. As a result, these primary violations of international law have no connection to the United States.

In addition, plaintiffs allege exclusively foreign conduct to establish other elements of their claims for secondary liability. For example, the district court relied heavily on allegations of a meeting in 1996 or 1997 involving one or more Banadex employees and the AUC leader, Carlos Castaño. *Id.* at 71-72, 75, 80.

These allegations are relevant, in the district court's view, because they could show both that Chiquita acted with the *mens rea* required for secondary liability, and that Chiquita and the AUC made an agreement to violate international law, as required to prove conspiracy. *Id.* at 76, 80. But none of the complaints alleges that this meeting took place in the United States, and some of them expressly acknowledge that it took place in Colombia. *See, e.g., Does 1-976*, Doc. 3:¶ 1092; *Does 1-677*, Doc. 3:¶ 803.

Similarly, the district court relied entirely on conduct occurring in Colombia to hold that plaintiffs had sufficiently alleged that Chiquita provided “substantial assistance” to the AUC, an element necessary to establish aiding-and-abetting liability. Doc. 412:77-79. The court relied on allegations that Chiquita facilitated arms shipments to the AUC, but this alleged conduct—for which Colombian officials cleared Chiquita of any wrongdoing—had no connection to the United States because the arms were allegedly shipped from Nicaragua to Colombia. *Id.* at 78 n.89; Doc. 287:¶ 477. The court also relied on Banadex's payments to the AUC, Doc. 412:78, but plaintiffs do not allege that the payments were made in the United States. Nor could they given their reliance on Chiquita's plea, which shows that the payments were made in Colombia. Doc. 449:¶¶ 1044, 1046; 449:Ex.1, ¶¶ 23, 25; *see also* Dep't of Justice Press Release, *available at* http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html (describing

Chiquita's plea as illustrating that payments to terrorist organizations are illegal under U.S. criminal law "*even when those acts occur outside of the United States*" (emphasis added)).

Given these allegations, Chiquita's limited conduct in the United States does not displace the presumption against extraterritoriality. In applying this presumption, a court must look to the conduct that was the "focus" of congressional concern." *Morrison*, 130 S. Ct. at 2884. As the statutory text makes clear, Congress's focus in enacting the ATS was on "tort[s] . . . committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As this Court has recognized, the issue of whether an ATS tort was committed is distinct from the subordinate issues of who may be held liable for that tort. *See, e.g., Mamani*, 654 F.3d at 1154 ("before we decide who can be held responsible for a tort, we must look to see if an ATS tort has been pleaded at all"). Because Congress's focus was on the "tort"—and not on issues relating to secondary liability for those torts—the relevant conduct for extraterritoriality purposes is the tortious conduct underlying the primary violations of international law, and that conduct occurred in Colombia. *See Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring) ("only conduct that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations can be said to have been 'the "focus" of congressional concern'" (quoting *Morrison*, 130 S. Ct. at 2884)).

In any event, plaintiffs' claims would be barred even if secondary liability theories were part of Congress's "focus" in enacting the ATS. Indeed, both the Supreme Court and this Court have held that claims based on more domestic conduct than alleged here fail to displace the presumption against extraterritoriality. In *Morrison*, plaintiffs asserted claims based on deceptive conduct and statements made in the United States in connection with securities transactions occurring abroad. 130 S. Ct. at 2883-84, 2888. Because deception was a necessary element of their claims, the domestic activity was an indispensable part of plaintiffs' allegations. The Supreme Court nevertheless held that the claims were barred because Congress's focus was on the transaction, not the deception, and the transaction did not occur in the United States. *Id.*; see also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 246-47, 111 S. Ct. 1227, 1229 (1991) (because Title VII does not apply extraterritorially, it does not "regulate the employment practices of United States employers who employ United States citizens abroad").

This Court reached the same result in *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999). In *Nieman*, the Court held that the presumption against extraterritoriality barred a claim based on a franchise agreement between a Florida corporation and a citizen of Argentina. *Id.* at 1128, 1129 & n.4. Even though the Florida company had signed the franchise agreement

in Florida, the claim was barred because the U.S. company had “negotiated with Argentine citizens, in Argentina, concerning an Argentine franchise system.” *Id.* at 1129 & n.4. As a result, although the alleged domestic conduct was necessary to establish plaintiff’s claim—there would have been no claim but for the contract—the presumption against extraterritoriality barred the claim. *Id.*; *cf. Ford v. Brown*, 319 F.3d 1302, 1308-10 (11th Cir. 2003) (district court abused its discretion in not dismissing claims based on doctrine of *forum non conveniens* where underlying torts were committed abroad, notwithstanding allegations of a conspiracy involving U.S. residents).⁵

Chiquita’s domestic conduct in this case “touches and concerns” the United States to a considerably lesser extent than the domestic conduct deemed insufficient in *Morrison* and *Nieman*. In those cases, the law at issue would not have been violated but for the domestic conduct, and yet the domestic conduct was still insufficient to displace the presumption against extraterritoriality. Here, plaintiffs’ claims are predicated on completed violations of international law that

⁵ Other courts of appeals have also held that the presumption against extraterritoriality was not displaced even though the alleged domestic conduct was necessary to establish plaintiff’s claim. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010) (dismissing RICO claims where predicate acts were allegedly committed in the United States because these “slim contacts with the United States . . . are insufficient to support extraterritorial application of the RICO statute”).

are based entirely on foreign conduct—and the limited domestic conduct is insufficient to establish secondary liability. Given that the domestic conduct was insufficient to displace the presumption against extraterritoriality in *Morrison* and *Nieman*, the domestic conduct is necessarily insufficient here as well.

In short, plaintiffs’ remaining ATS claims should be dismissed because they are based on international law violations occurring on foreign soil, including allegations that a foreign head of state is complicit in more than 4,000 murders of his country’s citizens within his country’s borders. *See* Doc. 412:89 (describing plaintiffs’ claims as “based on wholly foreign conduct by foreign tortfeasors against foreign victims”). These are precisely the type of claims that the presumption against extraterritoriality is designed to keep out of U.S. courts. *See Kiobel*, 133 S. Ct. at 1664 (noting that “the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS”).

II. Plaintiffs Fail To Plead Cognizable Claims Under The ATS.

This case involves more than 4,000 separate plaintiffs asserting claims on behalf of more than 4,000 separate victims. Because each plaintiff seeks relief for a different killing or act of torture, the district court correctly recognized that each plaintiff “must ultimately prove sufficient facts surrounding the deaths of each victim.” Doc. 412:6 n.4. Yet the district court did not require each plaintiff to

plead facts that state a claim for relief; indeed, it acknowledged that many plaintiffs had not done so. Instead, opining that it would be “impractical for the complaints to detail each of the thousands of alleged killings,” the court allowed claims to proceed on behalf of thousands of plaintiffs whom it acknowledged had *not* pled facts sufficient to state a claim. The district court purported to justify this by “assum[ing]” that the more detailed allegations of a handful of plaintiffs were representative of the other 4,000 claims. *Id.*

The Federal Rules of Civil Procedure do not permit the district court’s novel “representative” pleading approach. To prosecute a cause of action, a plaintiff must assert facts that plausibly state a claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). The “mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.” *Sinaltrainal*, 578 F.3d at 1261 (citing *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949). The sole circumstance in which a lawsuit can proceed on a representative basis is set forth in Rule 23, which provides that one or more persons may “sue or be sued as representative parties on behalf of all members *only if*” all the requirements of Rule 23(a) are met. Fed. R. Civ. P. 23(a) (emphasis added). These rules have particular rigor in ATS cases, where this Court has admonished that “judicial restraint is demanded” and “judicial creativity is not justified.” *Mamani*, 654 F.3d at 1156-57.

Thus, rather than permitting thousands of ATS claims to proceed against Chiquita based solely on the *possibility* that plaintiffs might ultimately be in a position to prove a claim against Chiquita, the district court was required to dismiss all claims that failed to allege facts sufficient to state a cause of action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559, 127 S. Ct. 1955, 1967 (2007) (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out . . . by careful scrutiny of evidence at the summary judgment stage.” (internal quotation marks and citation omitted)).⁶

For the reasons discussed below, no plaintiff—including the so-called “representative” plaintiffs—sufficiently pled an ATS claim.

A. Plaintiffs’ Allegations That The Colombian Paramilitary And Guerrilla Groups Violated International Law Are Insufficient To State A Claim Under the ATS.

Plaintiffs’ remaining ATS claims seek to impose secondary liability on Chiquita for international law violations committed by Colombian paramilitary and guerrilla groups. The district court held that plaintiffs sufficiently pled claims based on four such violations of international law: extrajudicial killing, torture, war

⁶ This is not to say that the district judge had no choice but to issue an order specifically addressing the claims of each of the 4,000 separate plaintiffs aggregated before him. The district court could have used a variety of case management tools to winnow the claims. For example, it could have decided Chiquita’s motion with respect to a handful of illustrative claims and directed plaintiffs’ counsel to amend their complaints so as to remove claims that failed to meet the criteria identified by the court.

crimes, and crimes against humanity. Doc. 412:95. The court erred in reaching this result because plaintiffs have failed to plead any of these primary violations.

1. Plaintiffs’ Claims Of Extrajudicial Killing, Torture, And Crimes Against Humanity Fail Because No Plaintiff Has Alleged Facts Establishing State Action In Connection With The Tort For Which That Plaintiff Seeks Relief.

As this Court has explained, “ATS claims generally require allegations of state action because the law of nations are the rules of conduct that govern the affairs of a nation, acting in its national capacity, in relations with another nation.” *Sinaltrainal*, 578 F.3d at 1265. The Court has recognized only one exception to this rule: “torture and murder committed in the course of war crimes[] violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual.” *Id.*

The district court held that each plaintiff had sufficiently pled state action for every claim of extrajudicial killing and torture allegedly committed by the Colombian paramilitary groups— even though none of plaintiffs’ allegations specifically links the Colombian government to any of the more than 4,000 deaths at issue. Doc. 412:45. The court also recognized a second exception to the state-action requirement, holding that crimes against humanity claims do not require state action. Doc. 412:51-52. Both holdings were incorrect.

1. a. The district court erred in not requiring each plaintiff to allege a specific factual link between the asserted state action and the particular violations

of international law for which he or she seeks relief. According to the district court, plaintiffs needed only to allege facts that would show a “symbiotic relationship between the paramilitaries and the Colombian military [that] had anything to do with the conduct at issue.” *Id.* at 38 (citing *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1317 (11th Cir. 2008)). Characterizing the “conduct at issue” broadly as the “AUC’s campaign of torturing and killing civilians in the banana-growing regions,” the court held that no plaintiff was required to allege “specific government involvement with each individual act of torture and killing of Plaintiffs’ relatives.” Doc. 412:38.

The district court’s approach cannot be squared with this Court’s decisions, which have repeatedly held that allegations of a symbiotic relationship generally between the AUC and the Colombian government are insufficient to plead state action in connection with a particular act of violence. In *Romero*, the Court stated that the symbiotic relationship must relate to the “conduct at issue,” but it also made clear that the relevant conduct was the specific killings that were the subject of the complaint. 552 F.3d at 1317 (noting that “the conduct as issue here . . . is the killing of the union officers”). The plaintiffs in *Romero* presented extensive evidence that the AUC had a “close and regular relationship” with the Colombian government, but the Court held that this evidence was insufficient as a matter of law because it was “not evidence of state action regarding *the murders described in*

the complaint.” *Id.* (emphasis added); *see also id.* (“proof of a general relationship is not enough”). Accordingly, despite the evidence of a close relationship between the AUC and the Colombian government, the *Romero* plaintiffs failed to establish state action because they offered no evidence “that the paramilitary assassins enjoyed a symbiotic relationship with the military *for the purposes of those assassinations.*” *Id.* at 1317-18 (emphasis added).

In *Sinaltrainal*, this Court again held that plaintiffs had not sufficiently pled state action because they had not alleged facts that link the Colombian government to the specific incidents of torture and extrajudicial killings alleged in the complaint. 578 F.3d at 1266 (state action requires “allegations of a symbiotic relationship that involves *the torture or killing alleged in the complaint.*” (quoting *Romero*, 552 F.3d at 1317) (emphasis added)). In so doing, the Court concluded that allegations that the Colombian government tolerated and permitted paramilitaries to exist, and cooperated, assisted, or worked in concert with them, were insufficient because there was “no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints.” *Sinaltrainal*, 578 F.3d at 1259, 1266.

This Court’s recent decision in *Mamani* reaffirmed the requirement that a plaintiff connect the asserted state action to the particular acts of violence for which he seeks relief. 654 F.3d at 1155 n.8 (“[T]o decide whether plaintiffs have

stated a claim for extrajudicial killing against *these* defendants, we must look at the facts connecting what these defendants personally did to the particular alleged wrongs.”). The plaintiffs in *Mamani* alleged that the Bolivian Defense Minister had “accompanied military personnel in a helicopter from which shots were fired and directed them where to fire their weapons.” 654 F.3d at 1154. The Court held that this allegation was insufficient to support a claim for extrajudicial killing against the Defense Minister because it did not establish “a connection . . . between the Defense Minister’s directing of where to fire weapons and the death of plaintiffs’ decedents.” *Id.*

b. Had the district court required each plaintiff to allege a specific factual link between the asserted state action and the particular violation of international law for which that plaintiff seeks relief, all of plaintiffs’ claims would have failed. The complaints do not contain a single allegation that, if true, would establish that Colombian government officials were “involved in, much less aware of,” any of the acts of violence for which plaintiffs seek relief. *Sinaltrainal*, 578 F.3d at 1266. Instead, most of the allegations that the district court deemed sufficient are the same sort of allegations of a general relationship between the AUC and the Colombian government that this Court already held to be insufficient in *Sinaltrainal*. Compare, e.g., Doc. 412:39 (crediting allegation that “the AUC and other paramilitary groups in fact collaborated closely with the Colombian

government”), *with Sinaltrainal*, 578 F.3d at 1266 (rejecting as insufficient the allegation that the Colombian government “cooperate[d], protect[ed] and/or work[ed] in concert with” paramilitaries).

A few allegations refer to state actors, but they nevertheless fail to link the alleged state action to a particular killing for which an individual plaintiff seeks relief. For example, plaintiffs allege that, on February 19, 2000, the AUC and members of the Colombian military assassinated five banana workers in Urabá. Doc. 412:42. But no plaintiff alleges that his or her claim is brought on behalf of one of those five workers.

Other allegations give the appearance of factual detail, but those details likewise are not connected to any of the individual claims asserted in this case. For example, in deciding whether plaintiffs had adequately alleged a symbiotic relationship, the district court considered it relevant that the Colombian military allegedly failed to carry out arrest warrants for paramilitary leaders, shared intelligence and communicated with the AUC, and provided training to the AUC. Doc. 412:40. But the complaints make no attempt to link this alleged conduct to any of the acts of violence at issue. As a result, these allegations provide no support for the district court’s holding that plaintiffs have sufficiently pled state action for all of their claims. *See Mamani*, 654 F.3d at 1154.

c. By permitting plaintiffs to plead state action based on allegations of a general relationship between the AUC and the Colombian government, the district court's decision allows a jury to sit in judgment of every aspect of the Colombian government's dealings with the AUC. As is evident from the allegations relied on by the district court, plaintiffs intend to establish a "symbiotic relationship" between the AUC and Colombian government by showing that numerous senior Colombian officials—including the current president of Colombia, a key U.S. ally—collaborated with the AUC. Doc. 412:39-40.

The court erred in allowing this sort of broad inquiry into Colombia's domestic policy because it impermissibly "imping[es] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727, 124 S. Ct. at 2763. The Supreme Court has cautioned against allowing ATS claims when doing so would require a U.S. court to sit in judgment of a foreign government's treatment of its own citizens:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.

Sosa, 542 U.S. at 727, 124 S. Ct. at 2763; *see also Kiobel*, 133 S. Ct. at 1665

(foreign policy concerns "are all the more pressing when the question is whether a

cause of action under the ATS reaches conduct within the territory of another sovereign”).

This Court’s prior decisions have recognized that the need for caution is particularly great when, as here, a court is “considering a claim that a former head of state acted unlawfully in governing his country’s own citizens.” *Mamani*, 654 F.3d at 1152. By permitting a U.S. court to review a foreign government’s treatment of its citizens only if the plaintiff alleges that state actors participated in the specific conduct that forms the basis of that plaintiff’s claim, this Court has permitted courts to pass judgment on a foreign government’s conduct in the limited circumstances in which the alleged conduct directly relates to a violation of international law. Conversely, by holding that state action can be pled based on allegations of a symbiotic relationship *generally*, the district court put itself in the position of sitting in judgment of the Colombian government *generally*, unmoored from any particular international law violation. That is fundamentally inconsistent with this Court’s precedents and the district court’s obligation to act as a “vigilant doorkeeper[.]” in ATS cases. *Mamani*, 654 F.3d at 1152.

2. Plaintiffs’ failure to plead state action also should have disposed of their crimes against humanity claims. In creating a second exception to the state-action requirement, the district court relied on an out-of-circuit, pre-*Sosa* decision that offers no analysis of whether international law requires state action for crimes

against humanity, much less an analysis demonstrating that the decision was correct in light of *Sosa*. Doc. 412:52 (citing *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d. Cir. 1994)). Rather than following *Kadic*, the district court should have held that crimes against humanity claims require state action because that it is only form of the offense that could satisfy *Sosa*'s requirements of definiteness and acceptance among civilized nations. *Sosa*, 542 U.S. at 732, 124 S. Ct. at 2765-66.

Crimes against humanity required state action when international law first recognized the offense following World War II. *See, e.g., Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008) (“The traditional conception regarding crimes against humanity was that a policy must be present and must be that of a State, as was the case in Nazi Germany.”); David Luban, *A Theory of Crimes Against Humanity*, 29 *Yale J. Int’l L.* 85, 95 (2004) (“The Nuremberg Charter presupposed that crimes against humanity were committed by agents of a state.”). Because domestic laws typically govern the acts that constitute crimes against humanity—for example, murder, rape, and torture—the state-action requirement has been described as the “indispensable link” in transforming this conduct into an international crime. M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* 20 (2011); *see also* Luban, 29 *Yale J. Int’l L.* at 96 (“[T]he nexus to state acts was deemed necessary to bring the crimes into the purview of international law.”).

In the past two decades, some international tribunals have begun expanding the offense of crimes against humanity to include certain non-state actors. *See Abagninin*, 545 F.3d at 741. But this recent expansion does not reflect a consensus among the international community—the key criterion under *Sosa*—that crimes against humanity encompasses conduct by non-state actors. *See Bassiouni, supra*, at 7-8, 13 (“The diverse formulations of CAH underscore the absence of an established consensus as to what developments have been accepted in customary international law since World War II, particularly as to the removal of the state policy element and the inclusion of nonstate actors within [crimes against humanity].”); *see also* William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. Crim. L. & Criminology 953, 960 (2008) (calling this new approach “a results-oriented political decision rather than a profound analysis of the history of the” claim). Indeed, these recent developments have proven controversial because they create the risk of extending the offense well beyond its original intent to reach purely domestic conduct. *Id.* (removing the state-action requirement “has the potential to make crimes against humanity applicable to serial killers, mafias, motorcycle gangs, and small terrorist bands. This was certainly not what was intended . . . when the category of crimes against humanity first received legal definition at the conclusion of the Second World War.”). Consistent with that fact, the only case in which this Court has allowed claims for crimes against

humanity to proceed involved a defendant who was a Chilean military officer and, thus, indisputably a state actor. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151-52 (11th Cir. 2005).

Because the expansion of crimes against humanities to non-state actors has not been widely accepted, such an expansion cannot be recognized under *Sosa*, especially since doing so “would substantially broaden . . . the kinds of circumstances from which claims may properly be brought under the ATS.” *Mamani*, 654 F.3d at 1156. Thus, plaintiffs’ claims for crimes against humanity fail for the same reason as do their claims for extrajudicial killing and torture.

2. Plaintiffs’ Allegations Are Insufficient To State Claims For War Crimes And Crimes Against Humanity.

The district court also erred in failing to require any plaintiff to plead facts linking the killing or injury for which that plaintiff seeks relief to the commission of a war crime or a crime against humanity. Absent such facts—which no plaintiff has alleged—no plaintiff has stated a claim for war crimes or crimes against humanity.

1. In *Sinaltrainal*, as here, plaintiffs claimed that their relatives were “non-combatants in a civil war” in Colombia who were “targeted for violence to further Defendants’ business interests.” 578 F.3d at 1267. Plaintiffs in *Sinaltrainal* further alleged that “the use of open violence” by the AUC “to accomplish this end occurred as a result of a raging civil war.” *Id.* This Court concluded that those

allegations were insufficient to state a claim for war crimes by the AUC. The Court explained that “[t]he Supreme Court’s reminder to exercise ‘vigilant doorkeeping’ persuades us the war crimes exception applies only to claims of non-state torture that were perpetrated in the course of hostilities,” meaning that they must be committed “because of the ongoing civil war or in the course of civil war clashes.” *Id.* The *Sinaltrainal* court noted that, “[i]f the war crimes exception to the state action requirement permitted all non-state torture claims occurring during a period of civil disorder, federal courts would be open to lawsuits occurring during any period of civil unrest in a foreign country.” *Id.*

Plaintiffs’ fundamental theory is that the alleged murders and acts of torture were carried out to further *Chiquita*’s business interests—not the war aims of the Colombian paramilitary and guerrilla groups. As in *Sinaltrainal*, plaintiffs here allege that *Chiquita* purchased “security” or “protection services” from paramilitaries, who then allegedly targeted unionists and other civilians (*e.g.*, thieves) deemed adverse to *Chiquita*’s business interests, including—generally—plaintiffs and their relatives. *See, e.g.*, Doc. 287:¶¶ 22; *Does 1-677*, Doc. 3:¶¶ 765, 806. Even accepting these speculative allegations as true, *Sinaltrainal* expressly held that allegations of paramilitary violence committed “to further Defendants’ business interests” fail to state a claim for war crimes. 578 F.3d at 1267.

The district court nevertheless sustained plaintiffs' war crimes claims based on plaintiffs' allegations that the Colombian paramilitary and guerrilla groups had "committed the alleged violence *because of*, and not merely during, the civil war in Colombia." Doc. 412:47 (emphasis in original); 477:2-3; 513:5; 514:4-5. In reaching this conclusion, however, the district court did not require any plaintiff to plead facts that, if true, would establish a nexus between the specific murder for which he or she seeks relief and the conflict in Colombia. Rather, the district court found that *Sinaltrainal's* "course of hostilities" requirement was satisfied by allegations that, as a general matter, targeting civilians was a war strategy of the left-wing guerrilla groups and their arch-enemy, the AUC, coupled with the assertion that "all of the Plaintiffs' decedents" were victims of these dual strategies. *See* Doc. 412:47-49; 477:2-3; 513:5; 514:4-5.

The district court applied a similarly broad standard in analyzing the crimes against humanity claims. As this Court has explained, to give rise to a claim of crimes against humanity under the ATS, the violence must be perpetrated "as a result of a 'widespread or systematic attack' against civilian populations."

Mamani, 654 F.3d at 1156 (quoting *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (per curiam)). Here, however, the court did not require each plaintiff to plead facts linking a particular killing to a widespread or systematic attack. Instead, it held that plaintiffs had sufficiently stated a claim

simply by alleging that all of their relatives were victims of a general “campaign conducted against civilians.” Doc. 412:52-55; 477:2-3; 513:5-6; 514:4-5.

2. The district court’s ruling cannot be squared with this Court’s decisions. *Sinaltrainal* established—specifically in the context of claims for murders committed by the AUC in Colombia—that non-state-action claims under the ATS must be narrowly construed to avoid opening federal courts to “all non-state torture claims occurring during [the] period of civil disorder.” 578 F.3d at 1267. Narrow construction is also necessary given the uncertainty surrounding the elements of both war crimes and crimes against humanity. *See* Doc. 518:8 (noting “lack of any decisional authority” with respect to “course of hostilities” element of war crimes claim); *Mamani*, 654 F.3d at 1156 (“The scope of what is, for example, widespread enough to be a crime against humanity is hard to know given the current state of the law.”)

Yet, under the district court’s approach, every victim of either side in the Colombian conflict (the right-wing paramilitaries or the left-wing guerrillas) can state a claim for both war crimes and crimes against humanity so long as they allege that paramilitary or guerrilla groups had a “war strategy” of targeting civilians or engaged in widespread or systematic attacks against a civilian population. *See, e.g.*, Doc. 412:48, 52. This permits precisely what *Sinaltrainal* sought to forbid: the opening of the courthouse doors to every victim of the

Colombian conflict. Under the district court's ruling, there is no logical limit on the number of victims of the Colombian conflict that can be joined as plaintiffs in these lawsuits, none of whom must allege any facts connecting his claim to the conduct of the civil war.

Indeed, under the district court's ruling, the *very plaintiffs* whose claims were rejected in *Sinaltrainal* could assert claims against Chiquita—without alleging any concrete facts beyond those alleged in the complaint that this Court previously dismissed. And, for all Chiquita and the Court know, the *Sinaltrainal* plaintiffs may in fact be among the thousands of pseudonymously-pled claims that the district court has allowed to proceed against Chiquita.

3. No plaintiff pled the facts necessary to state claims for war crimes or crimes against humanity. Even the allegations identified by the district court as the most detailed and specific fail to allege facts showing that the acts of violence at issue were committed in the course of hostilities or as part of a systematic or widespread attack.

In permitting these claims to proceed, the district court relied primarily on allegations that provide no factual detail regarding the alleged violence for which plaintiffs seek relief. For example, the district court relied on general allegations regarding the AUC's "war strategies and goals" to sustain the war crimes claims. Doc. 412:47. Likewise, for the crimes against humanity claims, the court relied on

conclusory allegations such as “[t]he conduct alleged in this complaint . . . constitut[es] crimes against humanity in that the AUC carried out these acts 1) as part of a widespread or systematic attack 2) against a civilian population.” *Id.* at 53. Such “[f]ormulaic recitations of the elements of a claim . . . are conclusory and are entitled to no assumption of truth.” *Mamani*, 654 F.3d at 1153 (citing *Iqbal*, 556 U.S. at 681, 129 S. Ct. at 1951).

Other allegations provide some details of particular acts of violence, but they fail to link that violence to any plaintiff’s claim. For example, to sustain the crimes against humanity claims, the district court relied on allegations of an incident in October 1997 in which paramilitaries purportedly executed 11 people. Doc. 412:55. But there are no allegations that link those deaths to particular claims brought by plaintiffs.

The district court identified only five allegations that specifically link a particular victim to crimes committed by the AUC. *Id.* at 48-49, 54-55. But these allegations, too, fail to plead facts giving rise to a plausible inference that the killings were committed “because of” the armed conflict or as part of a “widespread or systematic attack.” For example, the district court credited the allegation that “Pablo Perez 4” was killed “in furtherance of the internal armed conflict.” *Id.* at 49. But the factual allegations—that Perez was attending a birthday party when paramilitaries arrived on motorcycles and shot him—provide

no support for the inference that the murder was committed “because of” the armed conflict rather than for other reasons. *Id.* Similarly, the court relied on allegations that “Pablo Perez 50” was murdered “in the context of the internal armed conflict,” *id.* at 49, 54-55, but it is entirely ambiguous whether that characterization means that he was murdered because of, or merely during, the armed conflict. *See Sinaltrainal*, 578 F.3d at 1267.

In any event, even if these few allegations regarding specific killings were sufficient, they do not justify the district court’s denial of the motion to dismiss for each of the more than 4,000 plaintiffs. Indeed, the vast majority of plaintiffs—more than 3,000 of them—plead *no facts whatsoever* about the circumstances of their relatives’ deaths or their injuries. These plaintiffs simply repeat the same formulaic allegation that a victim was “killed,” “disappeared,” or otherwise injured, and that the tortious acts were committed “by the AUC” or “by the FARC.” *See* Doc. 287:¶¶ 23-195; 449:¶¶ 31-956; 394:¶¶ 9-65, 67-113, 115-1341; *Does 1-677*, Doc. 3:¶¶ 25-701; *Does 1-976*, Doc. 3:¶¶ 14-989; *Does 1-254*, Doc. 3:¶¶ 14-267.

In fact, numerous plaintiffs allege facts that affirmatively disprove their claims, but the district court allowed these claims to proceed, too. For example, many plaintiffs alleged that the murders at issue were a result of disputes over

money,⁷ stolen property,⁸ or other personal grievances.⁹ Although the district court acknowledged that “any plaintiff whose relative was in fact killed solely for personal reasons cannot” ultimately recover under the ATS, the court still allowed these claims to proceed. Doc. 412:47, 50 n.53, 95.

Finally, the district court also erred by relying on these conclusory allegations regarding the AUC to sustain claims based on violence by left-wing guerrilla groups. Rather than analyze any of the specific guerrilla allegations, the district court simply relied on its ruling that the AUC allegations were sufficient. Doc. 513:6; 514:4-5. But allegations that the AUC committed war crimes and crimes against humanity do not support claims that the AUC’s enemies committed the same crimes. Had the district court analyzed the guerrilla allegations, the

⁷ See, e.g., Doc. 284:¶¶ 445-52 (victim killed after demanding that an AUC member pay back a loan); ¶¶ 499-502 (victim allegedly killed after asking an AUC member to pay for plates of food he had purchased); ¶¶ 507-11 (victim killed after threatening to talk to paramilitary leader about money he had loaned to paramilitaries); ¶¶ 605-08 (victim killed because he was unable to pay back paramilitary leader from whom he had borrowed money); ¶¶ 664-68 (victim killed because it “is believed that there were persons who were envious of their good financial situation”).

⁸ See, e.g., Doc. 284:¶¶ 265-71 (victim confronted AUC to take back motorcycle stolen from his sister); ¶¶ 463-68 (victim killed after witnessing and confronting farm manager who had stolen from the company); ¶¶ 759-65 (victim allegedly killed after taking an electric saw from a ranch owned by a paramilitary leader).

⁹ See, e.g., Doc. 284:¶¶ 371-74 (victim “killed for dating a girl who ran away from her home because her mother opposed the relationship”); ¶¶ 428-31 (victim told AUC commander’s wife about his mistress); ¶¶ 615-20 (victim believed to have been killed because a family member told the AUC he had raped her daughter).

claims would have failed because there are no allegations to link any act of violence to the ongoing internal conflict or a widespread or systematic attack by guerilla groups. *See e.g.*, Doc. 439:¶¶ 364-88 (repeating, for various individual claims in conclusory fashion, that the act was committed “by guerrillas who were attempting to establish control . . . in furtherance of the internal armed conflict.”).

In short, because no plaintiff alleged the facts necessary to link the killing or torture for which he seeks relief to the commission of a war crime or crime against humanity, the district court erred in not dismissing those claims.

B. Plaintiffs’ Allegations Provide No Basis For Holding Chiquita Liable For Torts Committed By The Colombian Armed Groups.

Even if they had sufficiently alleged a primary violation of international law by Colombian armed groups, plaintiffs’ claims must still be dismissed because they have not adequately pled secondary liability—aiding and abetting and conspiracy—on the part of Chiquita. The complaints do not allege a single fact that links Chiquita to any of the acts of violence at issue or suggests Chiquita wanted the killings and injuries to happen. Instead, the district court credited plaintiffs’ conclusory allegations that Chiquita acted with the purpose of supporting the acts of both competing factions in the Colombian civil conflict—the very type of *ipse dixit* assertions of intent that the Supreme Court ruled insufficient in *Iqbal*. Because no plaintiff has alleged any facts that, if true, would establish

that Chiquita acted with the purpose of facilitating the tort for which that plaintiff seeks relief, all of plaintiffs' ATS claims must be dismissed.¹⁰

1. No Plaintiff Pleads Facts Linking Chiquita To The Tort For Which That Plaintiff Seeks Relief.

The district court correctly held that, in order to state claims for secondary liability against Chiquita, allegations that Chiquita knew of the AUC's or FARC's violent nature are insufficient. *See* Doc. 412:65-67. A defendant may be liable for aiding and abetting a violation of international law under the ATS only when he “(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so *with the purpose* of facilitating the commission of *that crime*.” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) (emphasis added; citation omitted); *id.* at 259 (“[T]he *mens rea* standard for aiding and abetting liability in ATS actions is *purpose rather than knowledge alone*.” (emphasis added)). This same purpose standard applies to conspiracy liability under the ATS. *Id.* at 260 (noting that “conspiracy claims would require the same proof of *mens rea* as . . . claims for aiding and abetting” under international law). Thus, the district court correctly

¹⁰ Plaintiffs' ATS claims also fail because there are no specific, universal, and obligatory norms of international law recognizing corporate liability or theories of secondary liability. Although this Court's prior decision foreclose these arguments, Chiquita has preserved the arguments by raising them in the district court.

held that plaintiffs must allege that Chiquita assisted or conspired with the paramilitary or guerrilla groups “with the *purpose or intent* to facilitate the commission of the *specific offenses* alleged.” Doc. 412:67 (emphasis added).

But, while the district court paid lip service to this rule, the court did not in fact require any plaintiff to plead facts that, if true, would establish that Chiquita acted with the purpose of facilitating the specific international law violation for which that plaintiff sought relief. Instead, the court held that every plaintiff (together, by logical implication, with any other person who alleges that they were the victim of violence committed by either the paramilitary or guerilla groups) stated a claim against Chiquita based solely on allegations that Chiquita generally supported the goals of the right-wing paramilitaries or their enemies, the left-wing guerillas. None of the allegations on which the district court relied seeks to link Chiquita to any individual act of violence that is the subject of the complaints. *See* Doc. 412:74-75.

The district court’s approach is impossible to square with *Mamani*, in which this Court identified the nexus that a plaintiff must allege between his particular injuries and the defendant he seeks to hold liable. The *Mamani* plaintiffs alleged that the Bolivian Defense Minister had “accompanied military personnel in a helicopter from which shots were fired and directed them where to fire their weapons.” *Mamani*, 654 F.3d at 1154. Despite the specificity of this allegation,

however, this Court held that it was insufficient to state a claim for extrajudicial killing against the Defense Minister because it did not establish “a connection . . . between the Defense Minister’s directing of where to fire weapons and the death of plaintiffs’ decedents.” *Id.* Because “[h]igh levels of generality will not do,” the Court emphasized that, “to decide whether plaintiffs have stated a claim . . . against *these defendants*, we must look at the facts connecting what *these defendants* personally did to the particular alleged wrongs.” *Id.* at 1152, 1155 n.8 (emphasis added).

Here, high levels of generality are all that plaintiffs have offered. No plaintiff alleges facts connecting Chiquita to the tort for which he seeks relief. Instead, plaintiffs allege that Chiquita is liable for every violation of international law committed by the Colombian armed groups, based on Chiquita’s purported general support of these groups, coupled with its general purpose to further their crimes. As a result, no plaintiff has stated a claim for secondary liability against Chiquita. Thus, regardless of whether plaintiffs adequately pled primary violations of international law by the Colombian armed groups, their ATS claims against Chiquita must be dismissed in their entirety.

2. Even If Allegations of General Support of the AUC or the FARC Were Sufficient, Plaintiffs Fail to Plead Any Facts Supporting A Plausible Inference That Chiquita Acted With the Purpose of Supporting These Groups' Violent Acts.

Even if no plaintiff were required to plead facts linking Chiquita to the specific tort for which that plaintiff seeks relief, plaintiffs still have failed to state claims against Chiquita. Not only are the allegations credited by the district court not specific to any tort, they are also entirely conclusory. Virtually all of the allegations on which the district court relied simply recite that Chiquita intended that the paramilitary or guerrilla groups carry out acts of violence, without identifying any alleged facts that support those conclusions.

The only *facts* on which the district court relied are (1) that Chiquita made payments to both left-wing guerrilla groups and the AUC, the latter of which followed a meeting with the group's leader, Carlos Castaño; and (2) that, at various times, narcotics and weapons were smuggled by third parties through a port operated by Banadex in a remote region of Colombia known for violence and narcotics cultivation and distribution. Doc. 412:70-79 & n.89; 513:6-7; 514:5-6.

Neither of these facts supports a plausible inference that Chiquita intended to assist in the killing or torture of thousands of Colombians. Rather, plaintiffs' *own* allegations support an "obvious alternative explanation" for the Castaño meeting and Chiquita's alleged payments. *See Iqbal*, 556 U.S. at 681-82, 129 S. Ct. at

1951-52 (holding that, because a more likely explanation for the alleged discriminatory policy existed, allegations that were merely consistent with the defendants' discriminatory conduct being purposeful did not "plausibly establish" the discriminatory purpose). As the factual proffer supporting Chiquita's plea explained, the payments to the AUC began after its leader "sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property." Doc. 449:Ex. 1 ¶ 21.¹¹

And the complaints contain no factual allegations—as opposed to bald assertions—that support plaintiffs' contrary contention that Chiquita made these payments because it endorsed the goals of the paramilitary and guerrilla groups. In fact, some plaintiffs go so far as to concede that both the left-wing guerrilla and right-wing paramilitary groups regularly "engaged in extortion." Doc. 439:¶ 407; *Carrizosa v. Chiquita Brands Int'l, Inc.*, No. 0:07-cv-60821, Doc. 118:¶ 142. Moreover, plaintiffs' allegations that Chiquita provided support both to the AUC and to the AUC's guerrilla arch-enemies, with the purpose of assisting each group's targeting of the other and its alleged supporters, is inherently implausible.

¹¹ The Court may consider the proffer because plaintiffs incorporated it into their complaints. *See, e.g.*, Doc. 449:¶ 1021; *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). The Sentencing Memorandum filed by the United States—on which plaintiffs have relied, Doc. 439:¶¶ 468, 470—also makes clear that "Chiquita [was] not accused of *supporting the goals or ideologies*" of the guerrilla or paramilitary groups. Doc.111:Ex.2 at 13-14 (emphasis added).

See, e.g., Doc. 439:¶¶ 550-51. Just as the plaintiff’s allegations in *Iqbal* supported the “obvious alternative explanation” that government officials were detaining those linked to suspected terrorists, not just Arabs or Muslims, here the plaintiffs’ allegations support the “obvious alternative explanation” that Banadex made payments to armed groups out of fear for the safety of its own employees, not because it wanted thousands of Colombians tortured or murdered.

Similarly, plaintiffs offer no well-pled facts in support of their assertion that Chiquita purposefully assisted the AUC and the FARC with arms and drug smuggling. Without more, the factual allegation that arms or drugs were smuggled successfully on Chiquita vessels or through a port operated by Banadex does not create the reasonable inference that Chiquita acquiesced in such smuggling—any more than the successful smuggling of drugs through the Port of Miami gives rise to an inference that Miami-Dade County was complicit in such conduct. *See, e.g.*, Doc. 287:¶¶ 480, 488. And plaintiffs plead no facts to support their otherwise implausible assertion that Chiquita was complicit in such activities, rather than a victim of them. *See Mamani*, 654 F.3d at 1155 (declining to credit assertions that killings were “deliberate” given that “alternative explanations . . . easily come to mind”); *Talisman*, 582 F.3d at 262-63 (refusing to infer Talisman’s purpose to further Sudan’s international-law violations from, *inter alia*, the fact that

employees of Talisman’s operating affiliate in Sudan fueled “military aircraft taking off on bombing missions”).¹²

Nor are there any other facts alleged in the complaints that would support the district court’s conclusion. Plaintiffs do not, for example, allege specific facts creating a reasonable inference that Chiquita’s payments were conditioned on the location or success of particular attacks or that Chiquita redirected AUC operations to specific areas that the group would not have otherwise targeted. To the contrary, plaintiffs specifically allege that Chiquita’s payments to paramilitaries were calculated based solely on the number of boxes of bananas that Chiquita exported. *See* Doc. 287:519; 285:¶ 80; 284:¶ 187; *Does 1-976*, Doc. 3: ¶ 1054.

Plaintiffs also fail to link Chiquita’s alleged assistance to each of the victims in either time or place. Some of the claims concern acts committed decades before Chiquita’s payments started. *See, e.g.*, Doc. 287:¶ 39 (asserting claim for death occurring in 1975). Others occurred as many as seven years after Chiquita’s payments ceased. *See, e.g.*, Doc. 394:¶ 1151 (asserting claim for forced disappearance occurring in 2011). For thousands of victims, plaintiffs’ complaints

¹² Plaintiffs misleadingly allege that a “highly-placed Chiquita employee” was “prosecuted for [his] purposeful involvement” in an arms-smuggling incident. Doc. 287:¶ 482. In fact, a formal order of the Colombian prosecutor acquitted the only individual then-employed by Banadex who was suspected of involvement in the incident. *See* Doc. 93:Ex. C at 4, 28-29; *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999) (matters of public record may be judicially noticed).

do not even identify a region where the incidents of violence occurred. *See, e.g.*, Doc. 449:¶¶ 31-956; *Does 1-976*, Doc. 3:¶¶ 14-989. Some plaintiffs allege a geographic location, but those allegations demonstrate that the violence spanned from the northeastern Colombian state of Cesar to the southwestern state of Valle del Cauca. *See, e.g.*, Doc. 394:¶¶ 237, 249-51. Thus, for the vast majority of the victims, there is no nexus between where the violence occurred and where Banadex operated.

Finally, even if plaintiffs' allegations supported a plausible inference that Chiquita generally supported the paramilitary and guerrilla groups, that would not be enough to adequately state claims of war crimes and crimes against humanity. As the district court correctly held, plaintiffs' war-crimes claims require allegations of Chiquita's intent to assist in non-combatant killings in the course of hostilities. *See* Doc. 412:74; *Sinaltrainal*, 578 F.3d at 1267. Likewise, plaintiffs crimes against humanity claims require allegations that Chiquita "intended for the AUC to torture and kill *civilians*." Doc. 412:76 (emphasis in original). But the allegations on which the district court relied to satisfy these pleading requirements were simply *ipse dixit* "statements of legal conclusions rather than true factual allegations." *Mamani*, 654 F.3d at 1153.

III. Plaintiffs' TVPA Claims Must Be Dismissed Because The TVPA Does Not Impose Liability Against Corporations.

The district court held that, because plaintiffs had adequately pled ATS claims for extrajudicial killing and torture, their TVPA claims based on the same theories were also sufficiently pled. Doc. 412:85-86. In reaching this result, the court rejected Chiquita's argument that the TVPA imposes liability only on individuals, not corporations. *Id.* at 85. After this Court granted Chiquita's petition for permission to appeal, the Supreme Court held that the TVPA "authorizes liability solely against natural persons." *Mohamad*, 132 S. Ct. at 1708. Because Chiquita is not a "natural person[]," plaintiffs' TVPA claims must be dismissed.

CONCLUSION AND RELIEF REQUESTED

The district court's orders denying in relevant part Chiquita's motions to dismiss should be reversed and the ATS and TVPA claims dismissed.

Respectfully submitted,

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May 28, 2013

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,711 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4 and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because it has been prepared using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ John E. Hall

John E. Hall

CERTIFICATE OF SERVICE

I, John E. Hall, counsel for appellants and a member of the Bar of this Court, certify that, on May 28, 2013, a copy of this Brief of Appellants Chiquita Brands International, Inc. and Chiquita Fresh North America LLC were electronically filed with the Court using CM / ECF.

I further certify that, on May 28, 2013, copies of this Brief of Appellants Chiquita Brands International, Inc. and Chiquita Fresh North America LLC were sent, by Federal Express for overnight delivery, to the Clerk of the Court and to the following counsel:

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I further certify that all parties required to be served have been served.

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May 28, 2013