No. _____

In The
Supreme Court of the United States

LILIANA MARIA CARDONA, JOHN DOE, ANGELA MARIA HENAO MONTES, ADANOLIS PARDO LORA, AIDEE MORENO VALENCIA, and ALBINIA DELGADO, *et al.*,

Petitioners,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation, and CHIQUITA FRESH NORTH AMERICA LLC, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL L. HOFFMAN
Counsel of Record
CATHERINE SWEETSER
SCHONBRUN, DESIMONE, SEPLOW, HARRIS, & HOFFMAN LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 399-7040
hoffpaul@aol.com

MARCO SIMONS
RICHARD HERZ
MICHELLE HARRISON
JONATHAN KAUFMAN
MARISSA VAHLSING
EARTHRIGHTS INTERNATIONAL
1612 K Street N.W., Suite 401
Washington, D.C. 20006
Tel: (202) 466-5188
Fax: (202) 466-5189

Counsel for Petitioners

[List Of Counsel Continued On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

AGNIESZKA M. FRYSZMAN
BENJAMIN D. BROWN
COHEN MILSTEIN
SELLERS & TOLL PLLC

JUDITH BROWN CHOMSKY
LAW OFFICES OF
JUDITH BROWN CHOMSKY

ARTURO CARRILLO
COLOMBIAN INSTITUTE
OF INTERNATIONAL LAW

JOHN DELEON
LAW OFFICES OF
CHAVEZ-DELEON

Counsel for Petitioners
John Doe I, et al.

JONATHAN C. REITER
LAW FIRM OF
JONATHAN C. REITER

RONALD S. GURALNICK
RONALD GURALNICK, P.A.

Counsel for Petitioners
Sara Matilde Moreno
Manjarres, et al.

WILLIAM J. WICHMANN
Attorney at Law

Counsel for Petitioners
Antonio Gonzalez
Carrizosa, et al.

JAMES K. GREEN
JAMES K. GREEN, P.A.

JACK SCAROLA
WILLIAM B. KING
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.

Counsel for Petitioners
Jose and Josefa Lopez
Nos. 1 through 339

TERRENCE P.
COLLINGSWORTH
ERIC J. HAGER
CONRAD & SCHERER, LLP

Counsel for Petitioners
Does 1-144 and Perezes
and Carmen Tulia
Cordoba Cuesta, et al.

SIGRID S. MCCAWLEY
STEPHEN N. ZACK
KAREN C. DYER
NICHOLAS A. GRAVANTE JR.
LEE S. WOLOSKY
MAGDA M. JIMENEZ TRAIN
BOIES, SCHILLER &
FLEXNER LLP

Counsel for Petitioners
Angela Maria
Henao Montes, et al.

QUESTION PRESENTED

The First Congress passed the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, to provide federal subject matter jurisdiction for claims by aliens suing for torts committed in violation of the laws of nations. In *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S.Ct. 1659 (2013), this Court held that to be actionable, ATS "claims" must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

The defendant is a U.S. corporation that has pled guilty to the federal crime of funding a U.S. government-designated terrorist organization that killed thousands of people in Colombia, including plaintiffs' relatives. From the United States, Defendant made its decision to fund this terrorist organization, and implemented that decision over an extended period of time.

The question presented is:

Whether law of nations violations alleged in an ATS cause of action must occur entirely within U.S. territory, as the Eleventh Circuit held in this case, or whether the ATS permits an action where a substantial nexus to the United States is present, such as U.S. nationality of the defendant and substantial relevant conduct in the United States that furthers human rights violations, as the Ninth, Fourth and Second Circuits have held.

PARTIES TO THE PROCEEDINGS

There are thousands of petitioners in these cases. Due to the volume of petitioners, they are listed under separate cover in a letter sent to the Court. The groups of petitioners who have joined in this petition are as follows:

Antonio Gonzalez Carrizosa, et al., represented by William J. Wichmann.

John Doe I, et. al, represented by Schonbrun, DeSimone, Seplow, Harris, & Hoffman LLP, Earthrights International, Cohen Milstein Sellers & Toll PLLC, Judith Brown Chomsky, Arturo Carrillo, and the Law Offices of Chavez-Deleon.

Does 1-144 and Perezes (96-795), and Carmen Tulia Cordoba Cuesta, et al., represented by Conrad & Scherer, LLP.

Jose and Josefa Lopez, et. al, represented by James K. Green and Searcy Denney Scarola Barnhart & Shipley, P.A.

Sara Matilde Moreno Manjarres, et al., represented by Jonathan C. Reiter and Ronald S. Guralnick.

Angela Maria Henao Montes, et al., represented by Boies, Schiller & Flexner LLP.

There are also plaintiffs in the cases in the multidistrict litigation proceedings who are not included in this petition. They are as follows:

Does 1-976 (from cases No. 10-80652- CIV-MARRA, No. 11-80404-CIV MARRA, and No.11-80405-CIV-MARRA). These plaintiffs are represented by Paul Wolf.

The defendants in this case are as follows:

Chiquita Brands International, Inc. and Chiquita Fresh North America LLC. They are represented by Covington and Burling LLP.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company. EarthRights International, one of petitioners' counsel, is a non-profit, non-governmental organization with no parent corporation or shareholders by any publicly traded company.

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Petitioners[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum Inc*, 133 S.Ct. 1659, 1669 (2013), this Court held that, to be actionable, an ATS claim must "touch and concern" U.S. territory sufficiently to overcome the principles underlying the presumption against extraterritoriality. The claims in *Kiobel* did not meet this test because the only connection to the United States in that case was the "mere corporate presence" of the two foreign multinational corporations as defendants. *Id.*

Since *Kiobel*, four Circuits have attempted to apply this Court's "touch and concern" test in cases that, unlike *Kiobel*, involve U.S. defendants and conduct in the United States. All four have interpreted *Kiobel* differently, *see* § II, *infra*, and under any of the other three Circuits' interpretations, Chiquita's substantial acts from the United States which abetted abuses in Colombia would meet the *Kiobel* test.

The decision below conflicts with all of the other Circuit decisions and with this Court's decision in

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[1]Petitioners include all of the plaintiffs in the consolidated actions pending in the Multidistrict Litigation below other than the plaintiffs in No. 10-80652-CIV-MARRA, No. 11-80404-CIV-MARRA, and No. 11-80405-CIV-MARRA.

Kiobel itself. It also conflicts with this Court's endorsement in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), and the line of ATS cases starting with *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1980), all of which involved international law violations occurring abroad, as did *Sosa* itself.

Petitioners' claims arise out of substantial conduct in the United States by U.S.-based Chiquita officials directed at supporting the terrorist organization responsible for murdering petitioners' family members. Chiquita's conduct was a federal crime. The United States prosecuted Chiquita under U.S. anti-terrorism laws designed to safeguard U.S. foreign policy interests. Chiquita pled guilty. Indeed, Chiquita admitted most of the U.S.-based conduct upon which petitioners' ATS claims are founded, including substantial, illegal cash payments to the death squads. Petitioners' ATS claims plainly "touch and concern" the United States sufficiently to overcome the *Kiobel* presumption.

In dismissing petitioners' claims, the Eleventh Circuit panel majority erroneously adopted an extreme interpretation of the minority view advocated by Justice Alito in his *Kiobel* concurrence in place of the majority's "touch and concern" test. Petitioners' claims would almost certainly be found to meet the "touch and concern" test applied in the Second, Fourth, and Ninth Circuits, but not in the Eleventh Circuit.

This Court should grant the petition to resolve the conflict between the Eleventh Circuit's decision

and this Court's decision in *Kiobel*, as well as the conflict between the Eleventh Circuit's decision and the decisions of every other Circuit court to have considered these issues.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at 760 F.3d 1185 (11th Cir. 2014). The court of appeals' order denying plaintiffs' timely petition for rehearing and for rehearing *en banc* (App. C) was entered October 2, 2014. The opinion of the district court (App. B) is reported at 792 F. Supp. 2d 1301 (S.D.Fla. 2011).

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on July 24, 2014. A timely petition for rehearing and for rehearing *en banc* was denied on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The 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.

STATEMENT OF THE CASE

A. Statement of Facts[2]

1. These cases are based on claims by plaintiffs that Chiquita substantially and directly supported a reign of terror committed by the Autodefensas Unidas de Colombia ("AUC"), a paramilitary organization that committed thousands of murders in the banana-growing regions of Colombia in collaboration with local military commanders. In return, the AUC helped Chiquita suppress labor activism and indigenous competition and assert control in these regions. The killings committed to advance these purposes constituted crimes against humanity and extra-judicial killings, among other violations of the law of nations.

2. Chiquita is a United States corporation. It is one of the world's largest banana producers, with operations throughout the world. During the reign of terror alleged by petitioners, Chiquita's Colombian operation was one of its most profitable enterprises. Following its prosecution under U.S. criminal law for supporting a terrorist organization (the AUC), it has since divested itself of Colombian operations.

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[2] The facts stated in this section are derived from the various amended complaints in these coordinated actions. Chiquita admitted many of the facts, in particular those relating to Chiquita's payments to the AUC, in the federal criminal proceedings in which Chiquita pled guilty to making payments that were planned and authorized from its U.S. headquarters to the AUC, which was designated a Foreign Terrorist Organization ("FTO") by our government. Pet. App 200-01.

3. The AUC, formed in 1997, was a violent paramilitary organization in Colombia that committed mass killings in Colombia's banana-growing regions during the time period covered by these actions. U.S.-based Chiquita officials met with AUC leaders in early 1997 to discuss joint action against their perceived mutual opponents in the region. At this meeting, the AUC and Chiquita agreed that Chiquita would pay the AUC to provide "security" in the banana growing-regions where the company operated. "Security" meant the violent suppression by the AUC, a foreign terrorist organization, of anyone suspected of opposing Chiquita's operations.

4. A high-level U.S. Chiquita official participated in this meeting and made the agreement with the AUC. After the agreement was approved by high-level Chiquita officials in the United States, the corporation began making regular payments from its U.S. bank accounts to the AUC,[3] though no legitimate security services were actually provided by the AUC.

5. The United States government designated the AUC as a Foreign Terrorist Organization ("FTO") on September 10, 2001. That designation was well publicized in the American media through reports from the New York Times, the Wall Street Journal, and other publications. On October 31, 2001, the United States Secretary of State

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[3] These U.S.-based payments are detailed in the Factual Proffer Chiquita made as part of its Plea Agreement in the federal criminal proceedings. Pet. App. 155-81.

designated the AUC a Specially-Designated Global Terrorist ("SDGT"), pursuant to Executive Order 13224 issued by President Bush under authority conferred on him by the International Emergency Economic Powers Act, 50 U.S.C. § 1701, *et seq*.

6. In making the SDGT designation, the Secretary of State found that the AUC had committed, or posed a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy or economy of the United States. As a result of the SDGT designation, it became a crime for any United States person, *inter alia*, to willfully engage in transactions with the AUC, without having first obtained a license or other authorization from the United States Department of the Treasury. Chiquita never applied for, nor obtained, any license from the Department of the Treasury's Office of Foreign Assets Control, but continued making its surreptitious payments to the AUC. From September 10, 2001, through February 4, 2004, Chiquita made at least fifty payments to the AUC totaling over $825,000. Chiquita took a variety of actions in the United States, as well as in Colombia, to conceal these payments and the fact that they originated from Chiquita's U.S. headquarters.

7. Chiquita's U.S.-based officials took substantial actions within U.S. territory to implement its scheme of providing substantial assistance to the AUC. Senior U.S.-based Chiquita executives, including high-ranking officers, directors, and employees, reviewed and approved these payments. Chiquita's U.S.-based officials knew that the AUC was

a violent paramilitary organization engaged in systematic and widespread killings. Chiquita knew from the beginning of its agreement with the AUC that it was supporting mass murder and that the payments would be used to further those atrocities.

8. An in-house U.S.-based attorney for Chiquita conducted an internal investigation into the payments and provided a high-level U.S.-based Chiquita officer with a memorandum detailing the investigation putting Chiquita's officers on notice of the illegality of these payments. The Audit Committee of the Board of Directors discussed the results of this internal investigation at a meeting at the company's Cincinnati headquarters in September 2000.

9. Following the SDGT designation, in an April 2002 meeting in Chiquita's Cincinnati headquarters, its Audit Committee orchestrated a new scheme for secretly paying the AUC which made it more difficult to trace the payments back to Chiquita's U.S. headquarters. Pursuant to the new *convivirs* system of payment, Chiquita's executives in Colombia would issue checks payable to an individual employee who would endorse the checks. After converting the checks to cash, another Chiquita employee would deliver the funds to the AUC.

10. U.S. citizen and resident Charles Keiser was the manager of Chiquita's Colombia operations at this time, and personally met with the leaders of the AUC and planned the *convivirs* system to hide Chiquita's payments to the AUC. Later, when the

convivir system could no longer be used, Keiser arranged for cash payments to be made to the AUC using his own accounts. Keiser regularly reported these contacts with the AUC to the Chiquita executives in Ohio supervising his activities.

11. Beginning in June 2002, Chiquita began paying the AUC in the Santa Marta region of Colombia directly, secretly, and in cash, according to new procedures established by Chiquita's senior executives. The Chiquita employee who endorsed the AUC checks maintained a private ledger of the payments that did not reflect that the AUC was the ultimate and intended recipient of the payments.

12. Chiquita knew about the AUC's designation as an FTO and SDGT specifically, and as a global security threat generally, through an Internet-based, paid, password-protected subscription service. On September 30, 2002, a Chiquita employee, from a computer within Chiquita's Cincinnati headquarters, accessed the service's "Colombia-Update page," which contained the following reporting on the AUC:

> U.S. terrorist designation. International condemnation of AUC human rights abuses culminated in 2001 with the United States State Department's decision to include the paramilitaries in its annual list of foreign terrorist organizations. This designation permits the U.S. authorities to implement a range of measures against the AUC,

> including denying AUC members U.S. entry visas; freezing AUC bank accounts in the U.S.; and barring U.S. companies from contact with the personnel accused of AUC connections.

13. On February 20, 2003, high-level U.S.-based Chiquita officials and employees spoke with outside counsel in Washington, D.C., about the United States government's designation of the AUC as an FTO and Chiquita's ongoing payments to the AUC. Outside counsel advised Chiquita that the payments were illegal under U.S. law and advised Chiquita to stop paying the AUC, either directly or indirectly, immediately. Despite being counseled otherwise, Chiquita did not stop paying the AUC.

14. On April 3, 2003, Chiquita officials reported to the full Board of Directors that Chiquita was making payments to a designated FTO or SDGT. A member of the Board objected to the payments and insisted that Chiquita consider taking immediate corrective action, including complete withdrawal from Colombia. The Board agreed to promptly disclose Chiquita's payments to the U.S. Department of Justice. But five days later, high-level U.S.-based Chiquita executives ordered that the secret payments to the AUC continue. On April 24, 2003, Justice Department officials told U.S.-based Chiquita officials that the payments had to stop. Chiquita ignored this directive and continued to make secret payments to the AUC in violation of U.S. law. Between May 12, 2003 and September 1, 2003, Chiquita made at least

nine additional cash payments to the AUC totaling approximately $140,866.

15. On March 13, 2007, the United States filed criminal charges against Chiquita in the United States District Court for the District of Columbia. On March 19, 2007, Chiquita pled guilty to Engaging in Transactions with a Specially-Designated Global Terrorist, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R 594.204. The United States District Court imposed a $25 million fine on Chiquita. Pet. App. 203.

16. The government emphasized at the September 17, 2007, sentencing hearing:

> What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. It did so knowing full well that while its farms may have been protected, and while its workers may have been protected while they literally were on those farms, Chiquita was paying money to buy the bullets that killed innocent Colombians off those farms.

Pet. App. 199.

17. Petitioners allege that Chiquita also aided and abetted the AUC by facilitating drug shipments on Chiquita ships and arms shipments through Chiquita's exclusive private port facilities in Turbo, Colombia. Colombian authorities seized more

than 1.5 tons of cocaine from Chiquita ships, valued at more than $33 million; this provided another substantial source of revenue to the AUC. Chiquita also facilitated at least five arms shipments through its port, including one from Nicaragua on a ship known as the *Otterloo*, which led to multiple criminal prosecutions in Colombia.

B. Procedural History

Family members of victims murdered by the AUC with Chiquita's support filed these actions in New York, New Jersey, the District of Columbia, and Florida, alleging, as detailed above, that Chiquita and its high-ranking executives in the United States intentionally supported and abetted the AUC's reign of terror. Petitioners assert – against the company and some of its officials – claims under the ATS, the Torture Victim Protection Act ("TVPA"), and ordinary tort claims for assault and battery, negligence, and wrongful death based on state and Colombian law.

In February 2008, the Judicial Panel on Multi-District Litigation coordinated these complaints for pre-trial purposes in the Southern District of Florida. Transfer Order, Doc. 1 (Feb. 20, 2008).[4]

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[4] Citations to "District Ct. Dkt." or "Dkt" refer to the multi-district litigation docket in the district court below, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, No. 08-01916-MD-MARRA (S.D. Fla.). The coordinated actions include Southern District of Florida case Nos. 07-60821-CIV-MARRA (operative complaint not on file in the District Ct. Dkt., but found at Dkt. 186 in No. 07-60821-CIV-MARRA), 08-80421-CIV-MARRA (operative Second Amended

Chiquita moved to dismiss all the complaints. The district court denied the motion as to the TVPA claims and most of the ATS claims, based on Petitioners' detailed allegations that the AUC committed crimes against humanity and war crimes. Opinion and Order, District Ct. Dkt. 412, at 49-50, 56 (S.D. Fla. June 3, 2011), and that Chiquita intended to assist the AUC. *Id.* at 73, 76, 77. The issue of the extraterritorial application of the ATS was not raised by Chiquita, briefed or argued by the parties, or discussed by the district court. The court initially dismissed the non-federal claims.

In October 2011, this Court granted *certiorari* in *Kiobel v. Royal Dutch Petroleum, Co.* to determine whether corporations can be sued under the ATS. This Court heard argument on this question on February 28, 2012. On March 5, 2012, this Court ordered supplemental briefing and re-argument on the question of whether and under what circumstances an ATS claim may be brought for abuses occurring on foreign soil.

On March 27, 2012, the district court ruled on plaintiffs' motion for reconsideration and reinstated Plaintiffs' non-federal claims, concluding that since diversity jurisdiction was present, the court lacked

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Complaint found at Dkt. 589), 08-80465-CIV-MARRA (operative Third Amended Complaint found at Dkt. 575), 08-80480-CIV-MARRA (operative Seventh Amended Complaint found at Dkt. 557), 08-80508-CIV-MARRA (operative Third Amended Complaint found at Dkt. 576), and 10-60573-CIV-MARRA (operative Third Amended Complaint found at Dkt. 558).

discretion to dismiss the claims. The district court found that only Colombia law, not state law, applied to these claims. Reconsideration Order, District Ct. Dkt. 516, at 4-6.

In a concurrent order (District Ct. Dkt. 518), the district court granted Chiquita's petition to certify an interlocutory appeal. The court certified ATS issues concerning the pleading requirements for state action, crimes against humanity, and war crimes, and, *sua sponte*, certified the question of whether state law may apply to the non-federal claims.

On September 27, 2012, the Eleventh Circuit granted permission to appeal. This Court heard reargument in *Kiobel* on October 1, 2012. On November 9, 2012, the Eleventh Circuit issued a stay pending this Court's decision in *Kiobel*. This Court decided *Kiobel* on April 17, 2013. *Kiobel v. Royal Dutch Petroleum, Co.*, 132 S.Ct. 472 (2013). The Eleventh Circuit lifted the stay on April 22, 2013, and briefing was completed, including briefing for the first time on the issue of extraterritoriality.

A divided Eleventh Circuit panel issued its decision on July 24, 2014. The panel majority, applying a more restrictive version of the test advocated in Justice Alito's concurring opinion, held that under *Kiobel*, the court had no jurisdiction based on the ATS because the abuses occurred outside the United States. Pet. App. 6, 10-11. Because the murders at the heart of plaintiffs' allegations took place in Colombia, the panel majority saw no reason

to apply the "touch and concern" test at all. Pet. App. 10-11.

The panel majority stated that the U.S. citizenship of an ATS defendant was irrelevant. Pet. App. 7. The majority did not address plaintiffs' allegations that significant acts of support for the AUC took place on U.S. territory. Nor did it mention the fact that Chiquita's acts were crimes under U.S. anti-terrorism laws and were found to be against U.S. national interests. Chiquita had pled guilty and admitted detailed facts regarding its U.S.-based conduct in support of the AUC. Instead, the panel majority stated: "[t]here is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force." Pet. App. 10-11. The panel majority did not consider the substantial allegations of U.S. based aiding and abetting in this analysis.

The panel did not address petitioners' cross-appeal regarding whether state law could apply to their non-federal claims. The panel majority also held that TVPA claims could not proceed against a corporation based on *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702 (2012), but left plaintiffs' TVPA claims against individual defendants intact.

Judge Martin dissented with respect to dismissal of the ATS claims. She noted that *Kiobel* allows extraterritorial claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." Pet App. 13.

(Martin, J., dissenting) (quoting *Kiobel*, 133 S. Ct. at 1669). Judge Martin analyzed the factors pertinent to whether particular ATS claims "touch and concern" the United States, including the U.S.-based conduct and whether the acts were committed by U.S. citizens. She found that petitioners met the *Kiobel* standard. Pet. App.14-18.

Petitioners filed their petition for panel rehearing and rehearing *en banc* on August 14, 2014. In response, the panel clarified that its decision did not apply to the non-corporate defendants with claims based on the TVPA or state law, because they were not before the court, but otherwise denied rehearing. Judge Martin agreed with this clarification but dissented from the September 4, 2014, Order for the reasons stated in her dissenting opinion. On October 2, 2014, the court denied the petition for rehearing *en banc*. Pet. App. 156.

This Petition is timely filed within ninety days of the Eleventh Circuit's denial of *en banc* review.

REASONS FOR GRANTING THE WRIT

The decision below rejects the majority holding in *Kiobel v. Royal Dutch Petroleum, Inc*, 133 S.Ct. 1659 (2013). Instead, it adopts an extreme interpretation of the minority view advocated in Justice Alito's concurrence, under which ATS claims are barred unless all the conduct underlying the claim occurred on U.S. territory. Pet App. 10-11; *Id.* at 1670 (Alito, J., concurring). Thus, the decision conflicts with this Court's holding that ATS claims that adequately

"touch and concern" U.S. territory may overcome the *Kiobel* presumption. *Id*. at 1669.

The Eleventh Circuit erred by ignoring Chiquita's U.S. citizenship and operations, the substantial and undisputed U.S.-based conduct at the core of petitioners' allegations and the substantial U.S. national interests involved in the claims. It did so because it erroneously applied the wrong test and thus disregarded all of the substantial connections between petitioners' claims and the United States, an analysis required by this Court's "touch and concern" test.

The effect of this error was to extinguish petitioners' international law claims for crimes against humanity and extra-judicial killings, supported directly from U.S. territory with substantial money essential to the AUC's daily operations. Chiquita's payments and material support, including facilitating shipments of thousands of machine guns and ammunition through Chiquita's private port in Turbo, Colombia, enabled the AUC to murder thousands of innocent people targeted by the AUC as potential opponents of Chiquita's operations.

Since this Court's decision in *Kiobel*, the Circuit courts have disagreed about the proper methodology for evaluating whether an ATS claim sufficiently "touches and concerns" U.S. territory to overcome the *Kiobel* presumption. Four Circuit courts have rendered substantial opinions on this issue, and all have taken different approaches. *See*, §II, *infra*.

While the tests adopted by the Second, Fourth and the Ninth Circuits differ from each other, and would likely lead to divergent results in other cases, petitioners' claims would likely displace the *Kiobel* presumption in all of these Circuits. Under any of their varying tests, Chiquita's substantial acts of aiding and abetting the AUC's murders of petitioners' family members from U.S. soil would be sufficient to displace the presumption. Only under the erroneous test adopted by the panel majority below are petitioners' ATS claims barred.

This Court did not have to elaborate its "touch and concern" test in *Kiobel* because the only connection to the United States in that case was the "mere corporate presence" of a foreign multinational corporation doing business in the United States, among many other places. *Kiobel,* 133 S.Ct. at 1669.

This case falls on the other end of the U.S. connection spectrum from *Kiobel* because it involves the direct participation of a U.S. corporation in widespread and systematic human rights violations with indisputable evidence of actions taken by Chiquita in the United States in support of these atrocities. This Court, in rejecting the claims in *Kiobel,* did not address the application of its holding where a plaintiff's ATS claims were founded on significant connections to the United States, in particular, where the U.S. government has taken a strong interest in the corporate conduct at the heart of petitioners' claims.

In *Kiobel*, at least seven members of this Court made it clear that the Court was leaving important issues about the scope of the presumption open for future decision. Justice Kennedy acknowledged that *Kiobel* left open issues which might require this Court to clarify its ruling. *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., Concurring). Justice Alito likewise observed that the "touch and concern" test "obviously leaves much unanswered." *Kiobel*, 133 S.Ct. at 1669. (Alito, J, Concurring). Justice Breyer's concurrence for four Justices noted that the Court "le[ft] for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Id.* at 1673 (Breyer, J., Concurring).

Given the conflict between the decision below and the reasoning and holding in *Kiobel*, as well as the conflicts in post-*Kiobel* cases between the Circuits, Petitioners respectfully submit that this case presents a compelling opportunity to answer at least some of the questions left open in *Kiobel*. The Circuit decisions thus far demonstrate that no consensus is likely to emerge. In light of the substantial U.S. conduct and U.S. interests involved in these cases and the categorical ruling below, this case squarely presents the question of whether the ATS includes an absolute ban on any claims in which the abuse occurred abroad, no matter what other connection the claims may have to the United States.

Indeed, the decision below would extinguish the line of ATS cases starting with *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) (involving ATS claims against foreign perpetrators who have sought safe

haven in the United States), even though this Court endorsed those cases in *Sosa*, 542 U.S. at 725, and the United States government has repeatedly stated that providing a forum for such cases is in the national interest. Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance ("U.S. Br."), *Kiobel v. Royal Dutch Petroleum, Co.*, No. 10-1491 (June 2012), at 4, 10 and 19. The narrow *Kiobel* holding did not even hint at overturning *Sosa* or *Filartiga*, yet the Eleventh Circuit's holding would wipe out this entire line of authority.

The ATS claims in these cases, which arise out of the same conduct underlying a federal criminal prosecution for supporting a terrorist group that threatens U.S. national interests, plainly "touch and concern" the United States with "sufficient force" to overcome the presumption. This Court should grant the Petition to make this, and the contours of the "touch and concern" test, clear.

I. REVIEW IS NECESSARY BECAUSE THE MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KIOBEL* AND THE ISSUE IS ONE OF NATIONAL AND INTERNATIONAL IMPORTANCE.

This Court in *Kiobel* did not purport to determine the circumstances in which claims relating to law of nations violations occurring abroad "touch and concern" the United States with sufficient force to be actionable in U.S. courts, holding only that the mere U.S. presence of a foreign multinational

corporation was insufficient. This Court certainly did not adopt the bright-line rule, applied by the panel majority below, that the law of nations violation must occur entirely within U.S. territory; the majority opinion gave no indication that it intended to overturn *Filartiga* and its progeny.

By adopting the most restrictive possible reading of Justice Alito's concurrence, the panel majority below transformed the narrow holding in *Kiobel*, which was self-consciously limited to the facts in that case, into a broad holding that would eliminate jurisdiction in a wide range of circumstances neither considered nor before the Court in *Kiobel*. The court below ignored this Court's mandate in *Kiobel* to examine ATS claims based on the particular factual context of each case.

The panel majority below found Chiquita's U.S. citizenship to be irrelevant, even though this Court said no such thing, and even though the U.S. citizenship of ATS defendants is obviously relevant to the potential harms the drafters of the ATS sought to avoid when they ensured a federal judicial forum for the adjudication of law of nations violations brought by non-citizens. This is particularly so when the U.S.-based conduct results in atrocities in a foreign country.

A U.S. corporation supporting, from the United States, the murder of thousands of foreign citizens is precisely the kind of international law violation, potentially triggering U.S. legal and political

responsibility that fits the letter and purpose of the ATS.

1. Contrary to the Eleventh Circuit's Decision the Narrow *Kiobel* Holding Did Not Eliminate All Extraterritorial ATS Claims.

The *Kiobel* holding was narrow, not a broad ruling that would have extinguished *Filartiga* and virtually every other ATS case brought since 1980. Nonetheless, the panel majority below applied the most expansive interpretation of Justice Alito's limiting principles on ATS jurisdiction, even though Justice Alito recognized that standard he proposed was "broader" than that adopted by this Court. *Kiobel*, 133 S. Ct. at 1670. (Alito, J, concurring). *Id.* at 1670.

By applying the most expansive version of the test advocated in Justice Alito's concurrence, the panel majority failed to assess critical facts relevant to this Court's "touch and concern" standard. In doing so, the panel majority below ignored the vast differences between the facts in *Kiobel* and the plethora of contacts between petitioners' ATS claims and the United States, including substantial conduct by Chiquita in the United States having a direct impact on the mass killings alleged by plaintiffs. Nothing in *Kiobel*"s narrow holding warrants such a conclusion.

Kiobel was a "foreign-cubed" case in which all the parties were foreigners and all of the events giving rise to the violations occurred outside the United

States, and the *only* connection to the United States was the "mere corporate presence" of multinational corporate defendants with headquarters and operations in many places. *Kiobel*, 133 S.Ct. at 1669. The *Kiobel* defendants did nothing whatsoever in the United States relating to the law of nations violations alleged in that case. Although the victims in this case were murdered in Colombia, Chiquita, a U.S. corporation, aided and abetted those murders largely from U.S. soil.

On any reasonable interpretation of this Court's decision in *Kiobel*, petitioners' claims in these cases would overcome the *Kiobel* presumption. *See* Pet. App. 18 (Martin, J., Dissenting) (Critically, the plaintiffs. . . have alleged that Chiquita's corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations *from their offices in the United States* with the purpose that the terrorists would use them to commit extra-judicial executions and other war crimes.") (emphasis in original).

Petitioners' claims are inextricably related to Chiquita's actions on U. S. territory. Chiquita and its U.S.-based officials directed and controlled a course of conduct from U.S. territory designed to support the mass murder of petitioners' decedents. Moreover, the U.S. government prosecuted Chiquita for violations of U.S. criminal law based on the same nucleus of facts giving rise to Petitioners' ATS claims. Indeed, the government emphasized at sentencing that Chiquita's criminal acts caused the murders petitioners complain of in these cases. Pet. App. 199. Chiquita's acts were

crimes not just because they abetted crimes against humanity, but specifically because they interfered with U.S. foreign policy. Such acts surely "touch and concern" the United States sufficiently to allow for ATS jurisdiction.

The Eleventh Circuit's application of a test more restrictive than that adopted by this Court led it to ignore all these connections to the United States. No other Circuit that has considered these issues would ignore these connections; indeed, petitioners' claims would overcome the presumption in every one of these other Circuits. *See*, §II, *infra*.

2. This Court Did Not Discount the Relevance of the U.S. Citizenship of ATS Defendants in Applying the "Touch and Concern" Test.

The Eleventh Circuit erroneously discounted the significance of Chiquita's U.S. citizenship and U.S.-based conduct in applying this Court's "touch and concern" test. The *Kiobel* Court found that foreign corporation's "mere corporate presence" in the United States was insufficient in a world where almost all multinational corporations have some presence in the United States. *Id.* at 1669; *see also Daimler AG v. Bauman*, 134 S.Ct. 746, 760-62 (2014) (limiting the scope of personal jurisdiction over foreign parent corporations for human rights violations allegedly committed by their foreign subsidiaries on foreign soil). By contrast, the Eleventh Circuit's holding that U.S. citizenship was irrelevant to the "touch and

concern" analysis ignores the significance of citizenship under international law in 1789 and today.

The *Kiobe*l Court did not address the U.S. citizenship of an ATS defendant, let alone suggest that U.S. citizenship and conduct was irrelevant. Rather, in *Kiobel*, foreign citizens were defendants and foreign governments were claiming that the assertion of ATS jurisdiction over their corporations actually violated international law. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Neither Party ("Netherlands/UK Br."), *Kiobel v. Royal Dutch Petroleum, Co.*, No 10-1491 (June 2012), at 6, 24-28. But, as those same governments recognized, no such concerns arise when the defendant is a U.S. citizen. *Id.* at 11-12. Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party ("EU Br."), *Kiobel v. Royal Dutch Petroleum Co*, No. 10-1491 (June 2012), at 11-12.

Indeed, in *Kiobel*, the United States emphasized the difference citizenship makes by pointing out that the United States may be responsible under international law for the actions of U.S. citizens abroad. U.S. Br. at 15. Accordingly, the United States argued against the bright line rule that the Eleventh Circuit adopted in this case precisely because it impairs our government's ability to fulfill our international obligations. *Id.* at 4 ("In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS.").

The Founders were well aware of the responsibilities of the new nation under the law of nations. They would have recognized the principles set forth in Emmerich de Vattel's Law of Nations, bk.2, ch 6, §76 (Joseph Chitty, trans. and ed., T & J. W. Johnson & Co. 1867) (1758) that:

> [the sovereign] ought not to suffer his subjects to molest the subjects of other states, or to do them an injury, much less to give open, audacious offense to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment; or finally, according the nature and circumstances of the case, to deliver him up to the offended state, to be there brought to justice.

This Court recognized that contemporary opinions accepted that the conduct of U.S. citizens abroad could be regulated, citing Attorney General Bradford's 1795 Opinion concerning the involvement of U.S. citizens in an attack on the British colony in Sierra Leone. *Kiobel*, 133 S.Ct. at 1167-68. This discussion underscores that *Kiobel* left the significance of U.S. citizenship in the "touch and concern" analysis open because *Kiobel* did not concern U.S. citizens in any respect. *Kiobel*, 133 S. Ct. at 1668; *see also Chowdury v. Worldtel Bangladesh Holding Ltd.*, 746 F.3d 42, 57 n.4 (2d Cir. 2014) ("The *Kiobel* Court at least implied that nationality could be relevant for determining whether a claim brought under the ATS

would 'touch and concern' the territory of the United States, as . . . 'it would reach too far' for 'mere corporate presence' to suffice to make out a claim under the circumstances in *Kiobel*.") (Pooler, J., concurring) (quoting *Kiobel*, 133 S. Ct. at 1669).

Though Attorney General Bradford might well have agreed that "foreign-cubed" cases like *Kiobel* were not actionable under the ATS, the historical evidence is much clearer that Bradford believed that the ATS was available for British citizens to seek redress when U.S. citizens violated the law of nations and treaties of the United States, even where those actions were entirely extraterritorial.[5]

There is no doubt about the authority of U.S. courts, or other branches of the U.S. government, to assert jurisdiction over the extraterritorial acts of U.S. citizens, and, in particular, extraterritorial acts committed by U.S. citizens that violated the law of nations. *See*, *e.g.*, *Blackmer v. United States*, 284 U.S. 421, 436 (1932) ("By virtue of the obligations of citizenship, the United States retained its authority over [the defendant], and he was bound by its laws made applicable to him in a foreign country."); *see also The Appollon*, 22 U.S. 362, 370 (1824) (national laws can extend extraterritorially to govern the conduct of

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[5] See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 454 (2011); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 Am. J. Int'l L. 509, 521-22 (2012).

a nation's own citizens); *United States v. Bowman*, 260 U.S. 94, 98 (1922) ("[S]ome offenses" are such that to limit their locus to the strictly territorial jurisdiction would be to greatly to . . . leave open a large immunity for frauds as easily committed on the high seas and in foreign countries as at home . . . .). Such violations would have been prominent in the concerns of the Founding generation.

The United States may be responsible for the actions of U.S. citizens whether their actions take place on U.S. or foreign soil. Indeed, the United States stressed in *Kiobel* that it was in U.S. national interests to maintain jurisdiction under the ATS over extraterritorial human rights violations where individual perpetrators have obtained "safe haven" on U.S. territory. U.S. Br. at 19-20; *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), cited with approval in *Sosa*, 542 U.S. at 725.

Here, a U.S. corporation has provided substantial support, including arms shipments, to a terrorist organization that has murdered thousands of people. This is precisely the kind of situation the founders would have been concerned with in enacting the ATS.

Whatever considerations may suggest declining to apply the ATS to foreign corporations, such considerations have no application when U.S. courts apply the law of nations to U.S. citizens alleged to have violated universally recognized human rights norms.

The Eleventh Circuit erred by finding that U.S. citizenship, particularly when accompanied by substantial U.S.-based conduct, is irrelevant to the "touch and concern' analysis.

3. This Court Applied the Principles Underlying the Statutory Presumption Against Extraterritoriality in *Kiobel*, Not the "Focus" Test.

The decision below erroneously equates the *Kiobel* holding with the presumption against extraterritoriality applied to federal statutes, which, unlike the ATS, apply U.S. substantive law to regulate conduct outside U.S. territory. Pet. App.7-8. But *Kiobel* did not adopt the "focus" test from *Morrison v. National Australian Bank, Ltd.*, 130 S. Ct. 2869 (2010). *Kiobel*, 133 S.Ct. at 1664. Instead, it adopted the "touch and concern" test. *Id*. at 1669.

This Court made clear that the *Kiobel* presumption was based on the "principles underlying" the statutory presumption, not of the statutory presumption itself. *Kiobel,* 133 S.Ct. at 1665. Thus, tests created for the application of the presumption to regulatory statutes cannot simply be applied to ATS claims without recognizing the very different nature of the claims at issue.

As this Court held in *Sosa*, 542 U.S. at 714, 724, the ATS is a jurisdictional statute providing for the enforcement, not of a statutory cause of action, but of federal common law claims based on universal

customary international law norms. The modern statutory presumption against extraterritoriality, as this Court recognized cannot be applied to the ATS. *Kiobel*, 133 S. Ct. at 1664 ("We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad . . . The ATS, on the other hand, is strictly jurisdictional."). Unlike modern regulatory statutes, the Founders understood, and it remains true today, that customary international law norms were and are universal, extraterritorial and applicable in every legal system. The Eleventh Circuit's application of the "focus" test to the ATS was plainly wrong. Pet. App. 10-11.

Indeed, the Eleventh Circuit's application of the "focus" test was in conflict with *Morrison* itself, as it did not examine the conduct the ATS was concerned with. There is no question that international law prohibits aiding and abetting conduct for the serious violations alleged in these cases, as well as the direct actions of the primary actors. Thus, because Chiquita completed violations of the law of nations by aiding and abetting war crimes and other atrocities *from U.S. soil*, the actions that are the focus of the ATS occurred on U.S. territory and the presumption against extraterritoriality should have been displaced, even under *Morrison*.

The First Congress was concerned with providing a federal forum for claims by aliens for violations of the law of nations. One of those violations was piracy, which was by definition extraterritorial. *Kiobel*, 133 S. Ct. at 1666.

Similarly, the Framers understood that when persons inside the United States abet law of nations violations committed abroad, the ATS provides liability. For example, Talbot "armed and equipped" Ballard's vessel "within the jurisdiction of the United States, and thus aided in making him an illegal cruizer." *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 157 (1795). The district court recognized that Jansen could bring an ATS suit against Talbot for assisting Ballard to capture Jansen's ship near Cuba. *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356 (D.S.C. 1794) (No. 7,216). Based on his conduct in the U.S., the Supreme Court likewise held Talbot liable under international law. Notably, the violation here was *not* piracy.

Thus, any analysis of the "focus" of the ATS cannot be limited to geography alone, as the Eleventh Circuit held, but must consider the objectives the First Congress had in providing a federal forum for law of nations violations brought by non-citizens. If a U.S. citizen committed an act of piracy, or assassinated a diplomat on foreign soil, claims arising out of such extraterritorial violations of the law of nations would unquestionably be within the "focus" of the ATS. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490 (1986).

The *Kiobel* Court emphasized that the new presumption pertained to possible interference with U.S. foreign policy and related considerations. Though this Court did not explain how such considerations applied under the "touch and concern"

test, the court below made no attempt to address these considerations. In this case, there are no foreign policy considerations preventing the assertion of jurisdiction over petitioners' claims.

There is nothing in the record to suggest that either the United States or Colombia have ever contended that jurisdiction over these claims in U.S. courts is inappropriate in any way. Given Chiquita's admitted illegal conduct in supporting a foreign terrorist organization that was acting against U.S. foreign policy interests, as defined by the Executive Branch, and the fact that, as the government noted in *Kiobel*, barring claims like those alleged here would conflict with our international obligations and interests, the principles underlying the presumption strongly favor jurisdiction.

4. This Court Required the Application of the "Touch and Concern" Test Based on an Examination of the U.S. Connections to the ATS Claim.

The *Kiobel* Court held that the ATS "claims" in a case must be analyzed to determine whether they "touch and concern" U.S. territory with sufficient force to overcome the presumption. 133 S. Ct. at 1669. Thus, *Kiobel* requires that courts consider all of the connections between the ATS claims at issue and the United States.

In *Kiobel*, the fact that the case was a "foreign-cubed" case based on the "mere presence" of foreign

multinational corporations required application of the presumption to such claims. *Id.* But this Court went on to hold that in other contexts, substantial connections to the United States could "touch and concern" the United States with sufficient force to overcome the presumption. *Id.*

Nonetheless, the Eleventh Circuit applied the presumption against extraterritoriality to all ATS claims regardless of their connections to the United States, or U.S. interests in regulating the conduct at issue, thus, rendering the ATS inapplicable to *any* ATS claim where the underlying atrocity occurred outside U.S. territory. Pet. App. 10-11.

Because of the Eleventh Circuit's fundamental error in failing to follow the *Kiobel* majority opinion's requirement of examining the connections between the ATS claims at issue and the United States, the panel majority below simply ignored the wealth of evidence connecting Chiquita's conduct to U.S. territory.

Nor did the Eleventh Circuit consider the substantive nature of petitioners' claims. Petitioners are claiming, *inter alia*, that Chiquita financed and supported crimes against humanity in Colombia on a massive scale involving thousands of extra-judicial killings. If ever there was a customary international law violation subject to universal jurisdiction and an obligation on home states to act it is crimes against humanity. Moreover, there can hardly be an argument that these claims do not sufficiently touch and concern the United States given that the United

States prosecuted Chiquita for supporting U.S. government-designated terrorists and thus undermining our foreign policy.

The issue of whether the ATS is available to redress atrocities that U.S. citizens have aided and abetted from U.S. territory is an issue of fundamental national and international importance. This is reason enough to grant the Petition.

II. REVIEW IS NECESSARY BECAUSE THE CIRCUIT COURTS ARE SPLIT OVER THE APPLICATION OF *KIOBEL'S* "TOUCH AND CONCERN" TEST.

Four Circuits have rendered substantial opinions on the application of *Kiobel*'s "touch and concern" test in cases where the basis for jurisdiction was more than the "mere corporate presence" of a foreign multinational in the United States, as was the case in *Kiobel* itself. These decisions adopt at least three differing approaches. All three approaches, except for the decision below, would permit the ATS claims in these actions to displace the *Kiobel* presumption.

In the Second, Fourth and Ninth Circuits ATS claims with substantial U.S. connections, even where some acts take place outside the United States, will overcome the *Kiobel* presumption; only the Eleventh Circuit would categorically bar the claims in these

cases.[6] Based on this clear conflict, there is an urgent need for this Court to clarify the elements of the "touch and concern" test and the methodology lower courts should employ in applying the new test.

The Second Circuit was the first to interpret *Kiobel*. It expressed the view that *Kiobel* bars claims where defendants committed *no* acts on U.S. territory. *Balintulo v. Daimler AG*, 727 F.3d 174, 189-92 (2d Cir. 2013); *see also Chowdury v. World Bangladesh Holding Ltd*, 746 F.3d 42, 49 (2d Cir. 2013).

Originally, the Second Circuit noted that this Court "had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States" and concluded that "[t]he Court did not adopt Justice Alito's broader reasoning, but it did not reject it either; the majority simply left open any questions regarding the permissible reach of causes of action under the ATS when *some* domestic activity is involved in the case." *Balintulo*, 727 F.3d at 191, and n.26 (internal quotation omitted, italics in original).

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[6] Two months after the decision below, the Eleventh Circuit decided *Baloco v. Drummond Co.*, 767 F. 3d 1229, 1236 (11th Cir. 2014), another case involving the application of *Kiobel* to a U.S. corporation. The *Baloco* panel assumed, without deciding, that U.S.-based decision-making might be relevant to the "touch and concern" analysis, but found that the plaintiffs' evidence and allegations of U.S.-based conduct were insufficient. *Id.*

However, despite its previous insistence that this Court did not adopt the test advanced by Justice Alito's concurrence, subsequently, the Second Circuit, in fact, followed Justice Alito's approach, finding that only the locus of the conduct matters. *Mastafa v. Chevron Corp.,* 770 F. 3d 170,185 (2d Cir. 2014). Critically, however, the Second Circuit rejected the Eleventh Circuit's restrictive interpretation of Justice Alito's proposed test. While the Eleventh Circuit held that the underlying violation itself (e.g. torture) must occur entirely on U.S. territory, the Second Circuit held instead that the "relevant conduct" also incudes "aiding and abetting another's violation." *Id*. at 185-86.[7]

That is exactly the situation here: the district court found that plaintiffs had adequately alleged that Chiquita engaged, from the United States, in conduct constituting aiding and abetting a variety of serious international law violations. Thus, under the Second Circuit's interpretation of *Kiobel* petitioners' claims would be actionable in U.S. courts. But the Eleventh Circuit dismissed plaintiffs' claims here without even considering the fact that Chiquita aided and abetted the AUC directly from the United States, a fact that the Second Circuit found sufficient to displace the presumption. *Id.* at 186.

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[7] *Mastafa* erroneously rejected the relevance of an ATS defendant's U.S. citizenship. *Id.* at 188-89. *See* §I, *supra.* As shown below, it is in conflict with the analysis employed in the Fourth and Ninth Circuits in this respect.

Petitioners' claims would also overcome the *Kiobel* presumption in the Fourth Circuit. In *Al-Shimari v. CACI Premier Technology, Inc.*, 758 F. 3d 516, 528 (4th Cir. 2014), the Circuit interpreted *Kiobel* as requiring a fact-based analysis of all aspects of the claim. *Id.* at 528. The *Al-Shimari* court noted that this "Court broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action in addition to the conduct at issue." *Id.* at 527 (quoting *Kiobel*, 133 S. Ct. at 1669).

Thus, unlike the Eleventh and Second Circuits, the Fourth Circuit recognizes the significance of U.S. citizens' involvement in law of nations violations. Again, unlike the Eleventh and Second Circuits, the Fourth Circuit rejects the *Morrison* "focus" test as controlling under this Court's "touch and concern" test. *Al Shimari*, 758 F. 3d at 529. The decision also recognizes that the analysis should focus on the connections between the ATS claims and the United States from every relevant perspective. If the connections are non-existent, as in *Kiobel* itself, the presumption is not displaced. However, when the connections are numerous and significant, as they are in these actions against Chiquita, the *Kiobel* presumption is displaced and the claims can proceed in federal court. Chiquita's U.S.-based conduct is at least as substantial as the U.S.-based conduct found to displace the *Kiobel* presumption in *Al Shimari*.

The Ninth Circuit, like the Fourth Circuit, rejected the defendants' arguments that *Morrison*'s "focus" test controls. *Doe v. Nestle USA, Inc*, 766 F. 3d 1013, 1028 (9th Cir. 2014). The *Nestle* court stated that "*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test." *Id*. In *Nestle*, the child slave labor physically occurred in the Ivory Coast but the *Nestle* Court did not find that fact determinative under the "touch and concern" test. *Id*.

This, of course, conflicts with the holdings in the Second and Eleventh Circuit,[8] which essentially adopted conflicting variants of the *Morrison* "focus" test for ATS claims. Pet. App. 10-11; *Mastafa*, 770 F. 3d at 183-85.

The Ninth Circuit did not expound on the substantive content of the "touch and concern" test in *Nestle*, preferring to remand the case for further proceedings on these issues in the district court. 766 F. 3d at 1028-29. More recently, in *Mujica v. AirScan*, *Inc*., 771 F. 3d 580 (9th Cir. 2014), the Ninth Circuit held that the *Kiobel* presumption could not be overcome simply because an ATS defendant was a U.S. citizen without more. *Id*. at 594. But, unlike the Second and Eleventh Circuits the Ninth Circuit held that "[w]e do not contend that [U.S. citizenship] is

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[8] The Eleventh Circuit reiterated its reliance on *Morrison's* "focus" test in *Baloco*, 767 F. 3d at 1238.

irrelevent to the *Kiobel* inquiry, we merely hold that it is not dispositive of that inquiry." *Id.*

A divided panel dismissed the ATS claims because the plaintiffs' pre-*Kiobel* pleadings did not allege U.S.-based conduct. *Id.* at 593. However, the *Mujica* decision rejects the Eleventh Circuit's holding that only U.S.-based conduct is relevant in the *Kiobel* analysis. *Id.* at 591. ("[T]he Court [in *Kiobel*] didn't hold that plaintiffs may never bring ATS claims based on extraterritorial conduct. . . . ").

Thus, the Ninth Circuit has left open the possibility that aiding and abetting conduct in the United States, such as the planning, cover-up, cash support and arms smuggling alleged in these cases, could sufficiently "touch and concern" the United States to overcome the presumption. The analytical framework applied by the Ninth Circuit is in conflict with that applied by the Eleventh Circuit.

Petitioners' ATS claims in these actions could proceed in federal courts in Los Angeles, Richmond or New York, but not in Miami. These divergences in the basic meaning of a statute are particularly untenable given that the ATS was enacted in part to ensure uniform treatment of international law cases in federal courts. *Filartiga*, 630 F. 2d at 886-87.

Review by this Court is necessary to eliminate the uncertainty created by these conflicts for both ATS defendants and victims of human rights violations seeking redress in U.S. courts. There should be only one "touch and concern" standard and only one

methodology for analyzing the connections between particular ATS claims and the United States to determine if these connections are sufficient to displace the *Kiobel* presumption. Only this Court can provide that standard and the uniform methodology needed in ATS cases.

CONCLUSION

For all these reasons, this Court should grant the Petition.

Dated: December 30, 2014

Respectfully Submitted,

Paul L. Hoffman
Counsel of Record
Catherine Sweetser
Schonbrun, DeSimone, Seplow, Harris, & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: 310-396-0731
Fax: 310-399-7040
hoffpaul@aol.com

Marco Simons
Richard Herz
Michelle Harrison
Jonathan Kaufman
Marissa Vahlsing
EarthRights International

1612 K Street NW #401
Washington, DC 20006
Tel: 202-466-5188

Agnieszka M. Fryszman
Benjamin D. Brown
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave., N.W.,
West Tower, Suite 500
Washington, D.C. 20005-3964
Tel: 202-408-4600
Fax: 202-408-4634

Judith Brown Chomsky
Law Offices of Judith Brown Chomsky
Post Office Box 29726
Elkins Park, PA 19027
Tel: 215-782-8367
Fax: 215-782-8368

Arturo Carrillo
Colombian Institute of International Law
5425 Connecticut Ave., N.W., #219
Washington, D.C. 20015
Tel: 202-994-5794

John DeLeon
Law Offices of Chavez-DeLeon
5975 Sunset Drive, Suite 605
South Miami, FL 33143
Tel: 305-740-5347
Fax: 305-740-5348

Counsel for John Doe I Plaintiffs - original docket number: 9:08-cv-80421-KAM

———

James K. Green, FL Bar No. 229466
James K. Green, P.A.
Esperanté, Suite 1650
222 Lakeview Ave.
West Palm Beach, FL 33401
Tel: 561-659-2029
Fax: 561-655-1357

Jack Scarola, FL Bar No. 169440
William King, FL Bar No. 181773
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
P.O. Drawer 3626
West Palm Beach, FL 33402
Tel: 561-686-6300
Fax: 561-478-0754

Counsel for Plaintiffs Jose and Josefa Lopez Nos. 1 through 116 -Original docket number: 9:08-cv-80508-KAM

Jonathan C. Reiter
Law Firm of Jonathan C. Reiter
350 Fifth Avenue, Suite 2811
New York, NY 10118
Tel: 212-736-0979
Fax: 212-268-5297

Ronald S. Guralnick,
FL Bar No. 111476
Ronald Guralnick, P.A.
Bank of America Tower
at International Place
100 S.E. 2d Street, Suite 3300
Miami, FL 33131
Tel: 305-373-0066
Fax: 305-373-1387

Counsel for Plaintiffs Juan/Juana Does 1-888 (previous caption), now captioned as SaraMatilde Moreno Manjarres et al. v. Chiquita Brands International, Inc., Case No. 9:08-cv-80480, (Southern District of New York) (main MDL docket: 08-01916-MD-Marra/Johnson)

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Terrence P. Collingsworth
Conrad & Scherer, LLP
1156 15th St. NW, Suite 502
Washington, D.C. 20005
Tel: 202-543-4001
Fax: 866-803-1125

Eric J. Hager
Conrad & Scherer, LLP
Avenida República de El Salvador
500 e Irlanda
Edificio Siglo XXI, PH Oficina W
Quito, Ecuador
Tel: 954-462-5500 ext. 461
Fax: 866-803-1125

Counsel for DOES (1-144), PEREZES (1-95), PEREZES (96-795), and Carmen Tulia Cordoba Cuesta et al. Original docket number: 9:08-cv-80465-KAM 1:07-cv-01048 (RJL)

———

William J. Wichmann
William J. Wichmann, Attorney at Law
888 S.E. 3rd Avenue, Suite 400
Fort Lauderdale, FL 33316
Tel: 954-522-8999
Fax: 954-449-6332

Counsel for Plaintiffs Antonio Gonzalez Carrizosa, et. al. -Original docket number: 1:07-cv-60821-KAM

———

Sigrid S. McCawley
Boies, Schiller & Flexner LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, FL 33301
Tel: 954-356-0011
Fax: 954-356-0022

Stephen N. Zack
Boies, Schiller & Flexner LLP
100 S.E. Second St., Suite 2800
Miami, FL 33131
Tel: (305) 539-8400
Fax: (305) 539-1307

Karen C. Dyer
Boies, Schiller & Flexner LLP
121 South Orange Ave., Suite 840
Orlando, FL 32801
Tel: (407) 425-7118
Fax: (407) 425-7047

Nicholas A. Gravante Jr.
Lee S. Wolosky
Magda M. Jimenez Train
Boies, Schiller & Flexner LLP
575 Lexington Ave., 7th Floor
New York, NY 10022
Tel: 212-446-2300
Fax: 212-446-2350

Counsel for Plaintiffs Angela Maria Henao Montes, et al.-Original docket number 1:10-cv-60573-KAM

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14898

D.C. Docket No. 0:08-md-01916-KAM

LILIANA MARIA CARDONA,
JOHN DOE,
ANGELA MARIA HENAO MONTES, et al.,

Plaintiffs – Appellees – Cross Appellants,

ADANOLIS PARDO LORA,
AIDEE MORENO VALENCIA,
ALBINIA DELGADO, et al.,

Plaintiffs – Appellees,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC,
a Delaware corporation,

Defendants – Appellants – Cross Appellees.

App. 2

Appeals from the United States District Court
For the Southern District of Florida

(July 24, 2014)

Before MARTIN, FAY, and SENTELLE*, Circuit Judges.

SENTELLE, Circuit Judge:

Over four thousand Colombians brought actions against Appellant Chiquita Brands International, Inc., and Chiquita Fresh North LLC (collectively, "Chiquita"), alleging claims involving torture, personal injury, and death under the Torture Victims Protection Act and the Alien Tort Statute. The district court in a series of orders denied motions to dismiss. Concluding that there were controlling questions of law that could be efficiently decided before further litigation, the district court certified those questions to us. On interlocutory review, we determine that the complaints do not state claims within the jurisdiction of the United States courts, and we reverse the denials of motions to dismiss and remand the matter for the entry of judgments of dismissal.

The Litigation

Because our ultimate disposition is not dependent on specificity of fact, we will only briefly

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

review the history of the case. The plaintiffs filed lawsuits alleging liability on the part of Chiquita for engaging in concert of action with paramilitary forces in Colombia, including acts that plaintiffs alleged to constitute torture and to have resulted in personal injury and death. Plaintiffs asserted that the courts of the United States had jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the Torture Victims Protection Act, 28 U.S.C. § 1350 note ("TVPA"). After all the cases came under the control of one district judge, motions practice proceeded.

Appellant Chiquita filed motions to dismiss. The district court in several opinions considered those motions and other questions and ultimately denied the motions to dismiss. However, the court granted defendants' motion for certification of certain controlling questions for interlocutory review under 28 U.S.C. § 1292(b). Pursuant to the authority of that certification, Chiquita timely petitioned this court for permission to appeal. On September 27, 2012, we granted that petition.

The questions certified for review are as follows:

> 1. Whether the "state action" element of claims for extrajudicial killing and torture brought under the ATS and TVPA requires Plaintiffs to plead facts establishing government involvement in the specific torture and killings alleged in Plaintiff's complaints.

> 2. Whether Plaintiffs, in alleging secondary liability for claims for war crimes, must plead facts showing a nexus between the Colombian civil war and the specific torture and killings for which Plaintiffs seek redress.
>
> 3. Whether Plaintiffs have adequately pled a claim for crimes against humanity, the elements of which have not been defined by any federal court of appeals.
>
> 4. Whether the civil tort laws of Florida, New Jersey, Ohio, and the District of Columbia apply to the extraterritorial conduct of Colombian paramilitaries against Colombian civilians that occurred inside Colombia as part of Colombia's civil war.

Because we conclude that neither this court nor the district court has jurisdiction over the action, we ultimately will not answer those specific questions, but will dispose of the case for the reasons and in the manner set forth below.

Disposition

Although we accepted the interlocutory appeal for the review of specified questions, we are not limited to the address of those specific issues. "[T]he appellate court may address any issue fairly included within the certified order because 'it is the

order that is appealable, and not the controlling question identified by the district court.'" *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199, 205 (1996) (emphasis in original) (quoting 9 J. Moore and B. Ward, Moore's Federal Practice § 110.25[1] at 300 (2d ed. 1995)). More fundamentally, no matter how a case comes before us, the court has the authority and the duty to determine its own jurisdiction. *See, e.g., United States v. Shipp,* 203 U.S. 563, 573 (1906).

As we noted above, plaintiffs asserted jurisdiction in the district court under the Torture Victims Protection Act and the Alien Tort Statute. Subsequent to the district court's denial of the motions to dismiss and to its certification order of March 2012, the TVPA claims have become undeniably unviable. On April 18, 2012, barely three weeks after the entry of the certification order, the Supreme Court announced its decision in *Mohamad v. Palestinian Authority,* ____ U.S. ____, 132 S.Ct. 1702 (2012). In *Mohamad,* a unanimous Court held that the TVPA "authorizes liability solely against natural persons." ____ U.S. at ____, 132 S.Ct. at 1708. The defendant-appellants are Chiquita Brands International, Inc., and Chiquita Fresh North America, LLC. Neither is a natural person. The claims under the TVPA must be dismissed.

Unfortunately for the plaintiff-appellees, the Supreme Court has also acted with respect to the ATS during the pendency of this appeal. In *Kiobel v. Royal Dutch Petroleum Co.,* ____ U.S. ____, 133 S.Ct. 1659 (2013), the High Court considered a case

in some ways parallel to the one before us. The *Kiobel* plaintiffs sued a corporate defendant under the ATS, alleging the cooperation of the corporation with the government of Nigeria in the commission of torts allegedly within the compass of that statute. The statute provides that "the 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. The *Kiobel* plaintiffs alleged acts committed by Nigeria and the corporate defendant "in violation of the law of nations" in the territory of Nigeria. *Kiobel,* 133 S.Ct. at 1663. Similarly, plaintiff-appellants in this case alleged acts by Chiquita in conjunction with paramilitary actors within the territory of Colombia.

In *Kiobel,* the Supreme Court reviewed the history of the ATS, and we see no reason to rehash it here. We can dispose of the claims that are before us simply by applying the conclusion of the *Kiobel* Court:

> We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. "[T]here is no clear indication of extraterritoriality here," and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

____ U.S. at ____, 133 S.Ct. at 1669 (quoting *Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010)).

The Court noted in *Kiobel* that "all the relevant conduct took place outside the United States." *Id.* All the relevant conduct in our case took place outside the United States. The Court further noted that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* Plaintiff-appellants attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations. Corporate defendants in *Kiobel* were not United States corporations, but were present in the United States. The Supreme Court declared that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.* The distinction between the corporations does not lead us to any indication of a congressional intent to make the statute apply to extraterritorial torts. As the Supreme Court said in *Kiobel,* "[i]f Congress were to determine otherwise, a statute more specific than the ATS would be required." *Id.* There is no other statute. There is no jurisdiction.

Before concluding, we pause to respond briefly to the thoughtful comments of our dissenting colleague. The short answer to her concerns is expressed in the application of *Kiobel* to the facts of this case. Any tort here, whether styled as torture or under some other theory, occurred outside the territorial jurisdiction of the United

States. The ATS contains nothing to rebut the presumption against extraterritoriality. We further observe that to apply the ATS to the allegations before us would be inconsistent with the Supreme Court's earlier holding in *Sosa v. Alvarez–Machain,* 542 U.S. 692 (2004). *Sosa* makes it clear beyond cavil that the ATS created no causes of action but is purely jurisdictional. "[A]t the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* at 712. It is not nearly so clear, as our dissenting colleague believes, that acts described as "torture" come within the jurisdiction created by the statute over "a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

As recognized by the *Sosa* Court, "[i]n the years of the early Republic, this law of nations comprised two principal elements:" (1) "the general norms governing the behavior of national states with each other" (executive and legislative in nature), and (2) "judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor" (which are, according to Blackstone, mercantile questions arising from the customary practices of international traders and admiralty). 542 U.S. at 714–15. Additionally, the *Sosa* Court noted that "[t]here was . . . a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships" (Blackstone mentioned three in specific: "violation of safe

conducts, infringement of the rights of ambassadors, and piracy"). *Id.* at 714–15 (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)).

Nothing in the complaint before us falls within Blackstone's three categories. It is true that a majority of the Supreme Court recognized the possibility that a court might recognize a cause of action outside the law of nations as it existed at the time of the enactment of the ATS, but the Court emphasized "that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727. Therefore, the Court found itself "reluctant to infer . . . a private cause of action where the statute does not supply one expressly." *Id.* Even aside from the presumption against extraterritoriality—not overcome by the allegations before us—*Sosa* counsels against recognizing a tort not previously recognized as within ATS jurisdiction.

It is true, as our colleague declares, that at least one circuit in a case decided long before the Supreme Court spoke in *Sosa* or *Kiobel* did conclude that extraterritorial torture fell within the law-of-nations category of the ATS. *Filartiga v. Pena–Irala,* 630 F.2d 876 (2d Cir. 1980); *see also Al Shimari v. CACI Premier Tech., Inc.,* 2014 WL 2922840 (4th Cir. June 30, 2014). However, this is by no means a unanimous conclusion of the circuits. In *Saleh v. Titan Corp.,* 580 F.3d 1 (D.C. Cir. 2010), the District of Columbia Circuit rejected the claim that acts of abuse and torture inflicted upon Iraqi national detainees by private

government contractors working for the United States military in Iraq violated settled norms of international law and thus were actionable under the ATS.

The *Saleh* court noted that "[a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." *Id.* at 15. *Saleh*, unlike *Filartiga,* came after the Supreme Court's pronouncements in *Sosa.* That same circuit reached a similar conclusion in *Ali v. Rumsfeld,* 649 F.3d 762 (D.C. Cir. 2011). Even before the *Sosa* decision, in *Sanchez–Espinoza v. Reagan,* 770 F.2d 202 (D.C. Cir. 1985), that court held that actions taken by executive officials, in their private capacity, supporting forces bearing arms against the government of Nicaragua did not violate any treaty or "customary international law" so as to confer original jurisdiction of a suit under the ATS. *Id.* at 206.

Again, we reiterate that the ATS does not apply extraterritorially. The torture, if the allegations are taken as true, occurred outside the territorial jurisdiction of the United States. As we emphasized above, to the extent the possibility of an exception to the presumption against extraterritoriality exists, the *Kiobel* Court made it clear that such exception could occur only, if at all, "where the claims touch and concern . . . the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel,* ____ U.S. at ____, 133 S.Ct. at 1669. There is no allegation that any torture occurred on U.S.

territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force.

Finally, we consider our colleague's humane observation that "the United States would fail to meet the expectations of the international community were we to allow U.S. citizens to travel to foreign shores and commit violations of the laws of nations with impunity." Even assuming the correctness of the assumption that the present complaint states violations of the law of nations, the dissent's observation is not relevant to our determination in this case. Certainly, it may state desirable goals of foreign policy. But the determination of foreign policy goals and the means to achieve them is not for us. "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 302 (1918). This principle is most germane to the question of whether we should create a cause of action within the ATS jurisdiction against the caution of *Sosa.* In *Sosa,* the Supreme Court expressly stated, "a private right of action is better left to legislative judgment in the great majority of cases." 542 U.S. at 727. While this observation was prompted by generally applicable concerns with reference to the legislative function, the Supreme Court went on to note the particular applicability to the area in which we now act. "[T]he potential implications for the foreign relations of the United

States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." *Id.*

The *Sosa* Court further cautioned against judicial creation of such causes of action, observing "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728. The *Sosa* Court also recognized that the Torture Victim Protection Act, *supra,* provides a basis for "federal claims of torture and extrajudicial killing," but as we observed above, that legislation does not extend to the complaints before us. *See id.* The noble goals expressed in our dissenting colleague's observation should perhaps guide the foreign policy of the United States, but that is not for us to say. Certainly, noble goals cannot expand the jurisdiction of the court granted by statute.

As we observed above, there is no other statute. There is no jurisdiction.

Conclusion

For the reasons set forth above, we reverse the orders denying the motions to dismiss and remand this case for dismissal.

MARTIN, Circuit Judge, dissenting:

I respectfully dissent. Last year, in Kiobel v. Royal Dutch Petroleum Co., ____ U.S. ____, 133 S.Ct. 1659 (2013), the Supreme Court gave its most recent guidance in the ongoing struggle to define the contours of the Alien Tort Statute (ATS).[1] In that case, the Supreme Court applied the presumption against extraterritoriality to the ATS claims presented. Id. at 1669. The presumption against extraterritorial application is a canon of statutory interpretation, teaching that a statute which gives no clear indication that it applies extraterritorially, does not. Id. at 1664. Significantly however, the Kiobel court left the door open to the extraterritorial application of the ATS for claims made under the statute which "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." Id. at 1669.

The Kiobel opinion offers little assistance about what kinds of domestic connections would be necessary to overcome the presumption against extraterritoriality. But I see this case as one which does just that, for at least two reasons. First, the primary defendant in this case is Chiquita Brands International (Chiquita), a corporation headquartered and incorporated within the territory of the United States. Second, these plaintiffs are not seeking to hold Chiquita liable for conduct that took place on foreign soil. Rather, they

[1] The Alien Tort Statute was "[p]assed as a part of the Judiciary Act of 1789." Kiobel, 133 S. Ct. at 1663.

allege that Chiquita participated in a campaign of torture and murder in Colombia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States.[2] For these reasons, I believe that we have jurisdiction to consider the plaintiffs' claims.

I.

First, the plaintiffs' claims "touch and concern" the territory of the United States because they allege violations of international law by an American national. Quite different from Kiobel, the plaintiffs in this case do not rely on Chiquita's "mere corporate presence" in the United States to justify ATS jurisdiction. Id. Chiquita is incorporated in New Jersey and headquartered in Ohio. Principles of international law as well as historical materials tell us why this is a crucial difference and is ultimately dispositive of the case we consider here. Indeed, I am persuaded that the ATS was intended to provide a remedy for extraterritorial violations of the law of nations like those alleged to have been committed here by United States nationals like Chiquita.

To begin with, it is a fundamental principle of international law that every State has the

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[2] We consider a jurisdictional challenge here. Thus, at this stage of the proceeding, we accept the facts alleged in the plaintiffs' complaint as true. McElmurray v. Consolidated Gov't of Augusta-Richmond Cnty., 501 F.3d 1244, 1251 (11th Cir. 2007).

sovereign authority to regulate the conduct of its own citizens, regardless of whether that conduct occurs inside or outside of the State's territory. See Restatement (Third) of The Foreign Relations Law of the United States § 402(2) (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory."). This has been true from the beginnings of our union, and at the time the ATS was first enacted. See Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808) (observing that beyond its own territory, the laws of a country "can only affect its own subjects or citizens"); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824). ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."). In keeping with this fundamental principle, the same foreign governments who urged the Supreme Court to dismiss the claims in Kiobel also acknowledged that an ATS claim would have "a sufficiently close connection" with the United States when the violation of the law of nations was committed by a United States citizen. See Kiobel, Brief for Gov't of the Kingdom of the Netherlands et al. as Amici Curiae, 14. Indeed, the United Kingdom, the Netherlands, and Switzerland all take a similar approach, disallowing extraterritorial torts except for claims asserted against their own nationals. See id. at 18–23, 21 n. 32.

More fundamentally, the framers of the ATS gave voice to the idea that the United States had not only the authority, but also international legal obligations to provide a forum for aliens to receive

compensation for the most egregious offenses committed by Americans in other countries. Speaking on the law of nations, William Blackstone stated that "where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained." 4 William Blackstone, Commentaries on the Laws of England 68 (1769); see also Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, bk. II, ch. VI § 77 (1758) (Charles G. Fenwick trans., 1916) ("A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it."). The United States would fail to meet the expectations of the international community were we to allow U.S. citizens to travel to foreign shores and commit violations of the law of nations with impunity. See Filartiga v. Pena–Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.").[3]

[3] The majority observes that our sister circuits have not unanimously allowed ATS plaintiffs to allege causes of action for extraterritorial torture after the Supreme Court's decision in Sosa v. Alvarez–Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004). I do not read the majority opinion as casting doubt on this Court's post-Sosa jurisprudence holding that torture is a proper claim that may be brought under the ATS. See Romero v. Drummond Co., 552 F.3d 1303, 1316 (11th Cir. 2008)

That the framers of the ATS contemplated a remedy for torts committed by American citizens abroad is also supported by an opinion authored by Attorney General William Bradford in 1795. See Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795). In this opinion, Attorney General Bradford was responding to concerns about several United States citizens who "voluntarily joined, conducted, aided, and abetted a French fleet" in attacking the British Colony of Sierra Leone, as well as "plundering or destroying the property of British subjects on that coast." Id. at 58. Attorney General Bradford had "no doubt" that the victims in Sierra Leone "who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases when an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." Id. at 59.

I recognize that the Kiobel Court was not persuaded that Attorney General Bradford understood the ATS to apply to every extraterritorial violation of the law of nations, irrespective of the wrongdoer's nationality. See 133 S.Ct. at 1668. But the Bradford opinion is at least strong evidence that the ATS provides a remedy for extraterritorial violations of the laws of nations

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(explaining that claims of torture or extrajudicial killing can be brought under the ATS or the Torture Act); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1250 (11th Cir. 2005) ("Torture is actionable under the Alien Tort Act, but only if the conduct is committed in violation of the laws of nations." (quotation marks omitted)).

committed by United States citizens. Just as the British colonists in Sierra Leone could sue their American attackers in 1795 under the ATS, the Colombian plaintiffs here should be allowed to hold an American corporation liable for its participation in a campaign of torture and extrajudicial killings in Colombia.

II.

Another distinction between Kiobel and the case now before us is the plaintiffs here do not seek to hold Chiquita liable for any of its conduct on foreign soil. See id. Critically, the plaintiffs instead have alleged that Chiquita's corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations from their offices in the United States with the purpose that the terrorists would use them to commit extrajudicial killings and other war crimes.

This is not, therefore, a case where a defendant is being haled into court under the ATS exclusively for actions that took place on foreign soil. See, e.g., Kaplan v. Central Bank of Islamic Rep. of Iran, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (dismissing claims under Kiobel because "the attacks were allegedly funded by Iran, launched from Lebanon, and targeted Israel"). Neither is this a case in which plaintiffs are seeking to circumvent the Kiobel presumption by holding an American company vicariously liable for the unauthorized actions of its subsidiaries overseas. See, e.g., Balintulo v. Daimler AG, 727 F.3d 174, 192 (2d Cir.

2013) (holding that the Kiobel presumption is not displaced where an American corporation is vicariously liable for actions taken within South Africa by a South African subsidiary). Rather, the plaintiffs seek to hold Chiquita liable for violations of international law it committed within the territory of the United States.

My views are in keeping with a number of trial court and appeals court decisions, post-Kiobel, finding the "touch and concern" test satisfied when a defendant aids and abets overseas torts from within the United States. See Al Shimari v. CACI Premier Tech., Inc., 2014 WL 2922840, at *12 (4th Cir. June 30, 2014) (finding that presumption was displaced in part because CACI's managers in the United States gave tacit approval to the acts of torture, attempted to cover up the misconduct, and encouraged it); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323–24 (D.Mass.2013) (finding that the presumption was displaced because the defendant was a resident of the United States and provided assistance to an overseas campaign of persecution from the United States); Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding that a terrorist attack that (1) was plotted in part within the United States, and (2) was directed at a United States Embassy and its employees displaced the presumption); Krishanti v. Rajaratnam, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014) ("The Rajaratnam Defendants focus on the fact that all of the harm to Plaintiffs occurred in Sri Lanka. This argument would hold weight if the Plaintiffs were suing the LTTE for the actions it took in Sri Lanka. However, Plaintiffs are instead suing the

Rajaratnam Defendants for their alleged actions that occurred within the United States."); see also Du Daobin v. Cisco Sys., *Inc.*, ____ F. Supp. 2d ____, ____, 2014 WL 769095, at *9 (D.Md. Feb. 24, 2014) (observing that Kiobel may be distinguishable because (1) "Cisco is an American company"; and (2) plaintiffs alleged that Cisco's actions "took place predominantly, if not entirely, within the United States"). Like these courts, I conclude that the plaintiffs' claims here sufficiently "touch and concern" the territory of the United States because they allege that Chiquita violated international law from within the United States by offering substantial assistance to a campaign of violence abroad.

III.

In sum, I do not read Kiobel to be an impediment to providing a remedy to civilians harmed by a decades-long campaign of terror they plainly allege to have been sponsored by an American corporation. Again, these plaintiffs do not seek relief for the offenses of a foreign defendant on foreign soil. These plaintiffs seek relief in a United States court for violations of international law committed by United States citizens while on United States soil. Certainly, these extraterritorial claims "touch and concern the territory of the United States" with great force. By failing to enforce the ATS under these circumstances, I fear we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result.

For these reasons, I respectfully dissent.

Case 0:08-md-01916-KAM Document 412
Entered on FLSD Docket 06/03/2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-01916-MD-MARRA

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC. ALIEN TORT STATUTE AND SHAREHOLDER DERIVATIVE LITIGATION
_____/

This Document Relates To:

ATS ACTIONS

07-60821-CIV-MARRA
08-80421-CIV-MARRA
08-80465-CIV-MARRA
08-80480-CIV-MARRA
08-80508-CIV-MARRA
10-60573-CIV-MARRA
10-80652-CIV-MARRA
_____/

OPINION AND ORDER

THIS CAUSE is before the Court upon Defendants' Motions to Dismiss Amended Complaints. (DEs 92, 295). The motions are fully briefed and ripe for review. The Court has carefully considered the briefing, supplemental briefing, and

oral arguments, and is otherwise fully advised in the premises.[1]

Plaintiffs, citizens and residents of Colombia, are the family members of trade unionists, banana-plantation workers, political organizers, social activists, and others tortured and killed by the Autodefensas Unidas de Colombia ("AUC"), a paramilitary organization operating in Colombia. The decedents were allegedly killed by the AUC during the 1990s through 2004 in the Colombian banana-growing regions, primarily in the Uraba and Magdalena areas. Plaintiffs bring this action against Defendants Chiquita Brands International, Inc. and Chiquita Fresh North America LLC (collectively "Chiquita"), alleging claims under various federal statutes, state common laws, international customary law, and foreign law. Specifically, Plaintiffs allege claims under 28 U.S.C. § 1350—commonly known as the Alien Tort Statute ("ATS") or Alien Tort Claims Act ("ATCA")—for terrorism; material support to terrorist organizations; torture; extrajudicial killing; war crimes; crimes against humanity; cruel, inhuman, or degrading treatment; violation of the

[1] Chiquita filed its first motion to dismiss on July 11, 2008. (DE 92). After that motion was fully briefed, and after a hearing was held thereon, Plaintiffs amended their complaints. Accordingly, the Court permitted Chiquita to file a second motion to dismiss, filed on April 9, 2010 (DE 295), which was limited to the amended allegations and developments in the relevant case law. This order addresses the arguments raised by the parties in both rounds of motion-to-dismiss briefing.

rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of gross violations of human rights. Plaintiffs also allege claims under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, for torture and extrajudicial killing. Last, Plaintiffs allege claims under the laws of Florida, New Jersey, Ohio, the District of Columbia, and the foreign law of Colombia for assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent hiring, negligent per se, and loss of consortium.

FACTUAL BACKGROUND[2]

The AUC

Since the 1940s, Colombia has been engaged in a longstanding civil conflict between the government and left-wing guerrilla insurgents, such as the Revolutionary Armed Forces of

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[2] There are seven complaints before the Court, transferred here by the United States Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, for consolidated pretrial proceedings. Case Nos. 07–cv–60821, 08–cv–80421, 08–cv–80465, 08–cv–80480, 08–cv–80508, 10–cv–60573, and 10–cv–80652. The factual allegations in these complaints are essentially the same. For simplicity, the factual discussion that follows relies on and cites the allegations from the First Amended Complaint ("FAC") in *Does 1–144 and Perezes 1–95 v. Chiquita Brands International, Inc.,* No. 08–cv–80465, DE 58 (filed Mar. 1, 2010), which the Court finds representative of the other complaints.

Colombia ("FARC") and the National Liberation Army ("ELN").[3] FAC ¶¶ 407, 497–99.

In the early 1980s, Colombian drug barons, large-land owners, industrialists, and bankers, with the cooperation of the Colombian government, began to create private paramilitary units to combat the left-wing guerrilla forces. FAC ¶¶ 407–08. By the mid–1990s, the largest and most well-organized paramilitary group in Colombia was the Rural Self–Defense Group of Cordoba and Uraba (the "ACCU"). FAC ¶ 409.

The commander-in-chief of the ACCU was Carlos Castano. FAC ¶ 409. In 1994, Castano and the ACCU sponsored a summit of the paramilitary groups from across Colombia. FAC ¶ 409. This summit led to the formation of the AUC, a national federation uniting Colombia's regional paramilitaries under Castano's leadership. FAC ¶ 409.

The AUC grew rapidly in size during the late 1990s and into the twenty-first century. FAC ¶ 410. In 1997, it was comprised of roughly 4,000 combatants. FAC ¶ 410. By 2001, Castano claimed to have 11,000 members, and by 2002, AUC forces were present in nearly all regions of Colombia. FAC ¶ 410.

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[3] The factual background is drawn from the allegations in the First Amended Complaint, which the Court credits as true for purposes of these motions to dismiss. *See Instituto De Prevision Militar v. Merrill Lynch,* 546 F.3d 1340, 1342 (11th Cir. 2008).

As part of its war strategy, the AUC sought to eliminate any guerrilla sympathizer who opposed the paramilitaries' control of the territories in which the AUC operated. FAC ¶ 411. The AUC's primary method was to terrorize individuals and communities suspected of guerrilla sympathies. FAC ¶ 411. To this end, the AUC routinely engaged in death threats, summary executions, torture, rape, kidnaping, forced disappearances, looting, and large-scale attacks on civilian populations. FAC ¶ 411.

While the AUC periodically engaged in direct combat with armed guerrilla forces, the majority of its victims were civilians whom the AUC viewed as supporters of the guerrillas or whom inhabited areas in which the guerrillas operated. FAC ¶ 412. The AUC also targeted people thought to share the guerrillas' leftist ideology, such as teachers, community leaders, trade unionists, human rights activists, religious workers, and leftist politicians. FAC ¶ 413. The AUC was also known to eliminate groups it considered socially undesirable, such as indigenous persons, people with psychological problems, drug addicts, prostitutes, and petty criminals. FAC ¶ 413.

The escalation of violence between the paramilitaries and the guerrillas caused the Colombian president to issue Decree 1194 of 1989, adopted as permanent legislation in 1991, which criminalized membership in a paramilitary group or providing any support to such groups. FAC ¶

408. In 1994, however, the Colombian government created a new legal mechanism for funding and supporting paramilitaries, known as Chapter 5 of Decree 356. FAC ¶ 421. Paramilitaries could reorganize and continue operating under Chapter 5, which allowed private groups to provide for "Special Vigilance and Private Security Services." FAC ¶ 421. These private security groups, known commonly by their Spanish-language acronym "convivir," were comprised of civilians who received permission from the government for a license to provide their own security in high-risk areas. FAC ¶ 421. Convivir were permitted to use arms that were otherwise restricted to the military's use. FAC ¶ 421.

Plaintiffs allege that the convivir units were fronts for the paramilitaries from their inception. FAC ¶ 422. In the Uraba region—where Chiquita's wholly owned subsidiary, C.I. Bananos de Exportacion, S.A. ("Banadex"), operated its banana plantations—the convivir units were comprised of and led by known AUC paramilitaries. FAC ¶ 422.

The convivir units worked closely with the Colombian military, facilitating communication and collaboration between the military and the AUC. FAC ¶ 426. Plaintiffs allege that the cooperation between the AUC and convivirs on one hand, and the Colombian military and government officials on the other, was extensive. Both groups sought to defeat the left-wing guerrilla insurgency and both worked together towards that end. FAC ¶ 429. This alleged collaboration included joint

membership between the AUC and the Colombian military and security forces, the government's acquiescence to the AUC's permanent military bases and security checkpoints, the government's refusal to intervene to stop AUC attacks, intelligence sharing, arms and equipment sharing, and planning and executing joint attacks on civilian populations. FAC ¶¶ 426, 429, 433–37. Plaintiffs allege that this model of collaboration between the paramilitaries and the government was "developed and perfected" in the Uraba region, the area of Chiquita's banana operations. FAC ¶ 438.

On September 10, 2001, the U.S. government designated the AUC as a Foreign Terrorist Organization ("FTO"). FAC ¶ 473.

The Torture and Killing of Plaintiffs' Relatives

There are several thousand named plaintiffs in the seven complaints, and some complaints are filed as class actions seeking to represent larger classes. Each named plaintiff alleges that he or she is a family member of a victim who was killed or tortured by the AUC. Each plaintiff alleges that the AUC attacked his or her relative in the banana-growing regions of Colombia, during the period when Chiquita supported the AUC. While the circumstances of each attack are unique, to summarize each plaintiff's allegations would be impractical given the number of plaintiffs. Accordingly, this opinion will provide only

allegations of several representative plaintiffs.[4]

> • Juana Perez 50B is the wife and is also a legal heir of Pablo Perez 50, with whom she had a family. Pablo Perez 50, an employee of Finca Marte, a banana plantation owned or controlled by Chiquita, or which supplied Chiquita, was an active member of the trade union SINTRAINAGRO, which represented banana workers in Magdalena, including Chiquita workers . . . . On the night of October 31, 1997 or in the early morning hours of November 1, 1997, a group of heavily armed paramilitaries dressed in camouflaged uniforms stormed Pablo Perez 50's home in the village of Guacamayal, in the banana zone of Magdalena, while he was sleeping. The paramilitaries broke down the door to the

[4] While some allegations of the violence against Plaintiffs' relatives are highly detailed, the complaints also contain lists of brief, undetailed allegations. *See, e.g.,* FAC ¶ 32 ("On 2/10/1997, Peter Doe 1 was killed by the AUC, which received support from Chiquita and/or Banadex. Plaintiff John Doe 1, who was the son of Peter Doe 1, is the legal heir to Peter Doe 1 and resides in the municipio of Apartado in Antioquia, Colombia."); *see also* FAC ¶¶ 33–195 (similar allegations). Because it would be impractical for the complaints to detail each one of the thousands of alleged killings, especially the class-action complaints, at this stage in the litigation the Court will assume that the detailed allegations, quoted in the text below, are representative of all Plaintiffs' claims. Of course, as this litigation proceeds, Plaintiffs must ultimately prove sufficient facts surrounding the deaths of each victim.

home, found Pablo Perez 50 and seized him, tied him up and forced him to accompany them at gunpoint, beating him as they kidnaped him. Pablo Perez 50's corpse was found the following morning with signs of torture and two gunshots, one to the head and one to the body. In a certificate issued on November 22, 1999, Elvis Emilio Redondo Lopez, the Cienaga Municipal Representative, confirmed that Pablo Perez 50 was murdered in a massacre carried out in the context of the internal armed conflict. FAC ¶¶ 296–97.

- Juan Perez 60 is the father and legal heir of Pablo Perez 60, an employee of Finca San Antonio, a banana plantation owned or controlled by Chiquita, or which supplied Chiquita, located in Turbo, in the Uraba region of Antioquia. . . . At approximately 1:00 AM on June 17, 1999, Pablo Perez 60 was resting at his home in Apartado, Antioquia when a group of paramilitaries who had arrived in several vehicles stormed his home, kicked in his door, seized Pablo Perez 60, and beat him. The paramilitaries demanded to know where Pablo Perez 60 had weapons hidden. Finding no weapons, the paramilitaries kidnaped Pablo Perez 60 and took him to the village of Nueva Colonia . . . . There, the paramilitaries tortured Pablo Perez 60 before executing

him with several gunshots to the head and body. At the time when Pablo Perez 60 was kidnaped, tortured and murdered, the AUC was receiving substantial support from Chiquita, and the murder of Pablo Perez 60 was in furtherance of the understanding that the AUC had with Chiquita that in return for Chiquita's support, the AUC would drive the FARC and ELN guerrillas out of the banana area of Uraba, Antioquia and maintain a sufficient presence to keep the guerrillas from regaining a foothold. Further, the AUC provided Chiquita with security, labor quiescence and social stability, and ensured that trade unions were not infiltrated by leftists sympathetic to the FARC and ELN guerrillas. FAC ¶¶ 316–17.

- Juana Perez 13 is the sister and legal heir of Paula Perez 13. Paula Perez 13, an employee of the banana plantation Nabusimake, a Chiquita supplier, was raped, tortured and murdered on October 18, 2005 by AUC paramilitaries from the William Rivas Front, who were in control of the banana zone and surrounding areas of Magdalena, in furtherance of the internal armed conflict. On the evening of October 19, 2005, Paula Perez 13 was on the Nabusimake plantation, located in the town of Sevilla, Zona Bananera, in the company of a security guard when, at

> approximately 8:00 PM, a group of five armed paramilitaries entered the plantation. The security guard fled as the paramilitaries approached, leaving Paula Perez 13 alone. The paramilitaries raped Paula Perez 13, tortured her with multiple stab wounds and by burning her chest, and then killed her by slitting her throat. On March 13, 2007, the Zona Bananera Municipal Representative issued a letter confirming that Paula Perez 13 was murdered on October 18, 2005, for ideological and political reasons in the context of the internal armed conflict. FAC ¶¶ 220–21.

Chiquita's Assistance to the AUC

Chiquita, an American multinational corporation, is one of the world's largest producers and suppliers of bananas. FAC ¶ 394. As the successor to the United Fruit Company and the United Brands Company, Chiquita has been operating in the Colombian banana-growing regions, through its wholly owned subsidiary, Banadex, since the early 1960s. FAC ¶ 456. In 2003, Banadex was Chiquita's most profitable banana-producing operation in the world.[5] FAC ¶ 395.

During labor struggles in the 1980s, left-wing, anti-government guerrilla groups, including

[5] Chiquita sold Banadex in June 2004 and no longer owns a Colombian subsidiary. FAC ¶¶ 8, 396.

the FARC, became active in the banana areas of Uraba and Magdalena. FAC ¶ 458. The FARC became particularly involved in union activity. FAC ¶ 458. In the 1990s, the rise of FARC-influenced unions was accompanied by increased paramilitary violence, as groups like the AUC moved into these areas to combat the FARC's influence. FAC ¶ 459.

In or around 1995, Chiquita formed an agreement with the AUC, paying them to pacify the banana plantations and to suppress union activity. FAC ¶ 472. In return for Chiquita's support, the AUC agreed it would drive the guerrillas out of Chiquita's banana-growing areas and maintain a sufficient presence to prevent the guerrillas from returning. FAC ¶ 197. Furthermore, the AUC would provide Chiquita with security, labor quiescence, and ensure that the unions were not infiltrated by leftists sympathetic to the FARC or ELN guerrillas. FAC ¶ 197. This arrangement benefitted Chiquita, as labor unrest and strikes were minimized while profits increased. FAC ¶¶ 548–50.

Under this agreement, Chiquita paid the paramilitaries a commission based on the number of boxes Chiquita shipped each month. FAC ¶ 472. During the period 1997–2004, Chiquita paid the AUC nearly every month, making over one hundred payments totaling over $1.7 million. FAC ¶ 468.

Chiquita made payments directly to the AUC or to the AUC's convivir front organizations. FAC ¶ 470. Chiquita concealed the nature of these

payments by recording them in corporate books as payments for "security services." FAC ¶ 470.

Chiquita also made payments indirectly to the AUC by depositing payments into the accounts of Banadex executives who would then withdraw cash and hand it directly to AUC representatives. FAC ¶ 471. Chiquita concealed these payments by recording them in corporate books as income contributions. FAC ¶ 471.

These payments were reviewed and approved by Chiquita's senior company executives who knew that the AUC was a violent, illegal paramilitary group. FAC ¶ 469. In 2003, Chiquita consulted with outside counsel, a U.S.-based law firm, regarding its ongoing payments to the AUC, which was by then a designated FTO. FAC ¶¶ 473–74. Outside counsel advised Chiquita that its payments to an FTO were illegal under U.S. law and that Chiquita should immediately stop the payments. FAC ¶ 474.

On April 3, 2003, Chiquita's Board of Directors agreed to disclose its AUC payments to the U.S. Department of Justice. FAC ¶ 475. On April 8, 2003, Chiquita instructed Banadex to continue making payments to the AUC. FAC ¶ 475. On April 24, 2003, Chiquita met with Justice Department officials, who told Chiquita that the AUC payments were illegal. FAC ¶ 475. Nonetheless, Chiquita continued paying the AUC until February 2004. FAC ¶ 475.

Plaintiffs also allege that Chiquita assisted the AUC by facilitating arms shipments. For example, Plaintiffs allege that in 2001, a ship left Nicaragua carrying 3,000 AK–47 assault rifles and 5 million rounds of ammunition. FAC ¶ 478. Instead of docking in Panama, its official destination, the ship went instead to Turbo, Colombia, where Chiquita, through Banadex, operated a private port facility for transporting bananas and other cargo. FAC ¶ 479. After the ship docked in Turbo, Banadex employees unloaded the rifles and ammunition, which remained at Chiquita's facilities for two days before being loaded onto AUC vehicles. FAC ¶¶ 480–81. Some of these arms were later confiscated from AUC units operating in Uraba. FAC ¶ 486.

Chiquita's Guilty Plea and Plaintiffs' Lawsuits

On March 19, 2007, Chiquita pled guilty in the U.S. District Court for the District of Columbia to one count of violating federal anti-terrorism laws by engaging in transactions with a designated FTO. FAC ¶ 476. Chiquita's sentence included a $25 million criminal fine, the requirement to implement and maintain an effective compliance and ethics program, and five years' probation. FAC ¶ 476.

In March 2007, shortly after Chiquita's public guilty plea, Plaintiffs first learned of Chiquita's assistance to the AUC. FAC ¶ 10. On June 7, 2007, the first civil complaint was filed against Chiquita arising from its alleged support to the AUC. *Perezes (1–95) v. Chiquita Brands Int'l,*

Inc., No. 08–cv–80465 (D.D.C., filed June 7, 2007). Additional complaints followed in various judicial districts. On February 20, 2008, the Judicial Panel on Multidistrict Litigation transferred these actions to the Southern District of Florida for consolidated pretrial proceedings with the related actions already pending before this Court. (DE 1).

Chiquita now moves to dismiss the complaints for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Rule 8(a) of the Federal Rules of Civil Procedure "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to give the defendant fair notice of what the plaintiff's claim is . . . and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* (citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Sinaltrainal v. Coca–Cola Co.,* 578 F.3d 1252, 1261 (11th Cir. 2009). Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal,* 129 S.Ct. at 1950. When considering a motion to dismiss for failure to state a claim, the court must "accept[ ] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1288 (11th Cir. 2010) (internal quotation marks omitted).

A motion to dismiss under Rule 12(b)(1) may "assert either a factual attack or a facial attack to jurisdiction." *Sinaltrainal,* 578 F.3d at 1260. In a facial attack—that is, an attack on the sufficiency of the jurisdictional allegations in the complaint—the court reviews the allegations as "it does when considering a Rule 12(b)(6) motion," construing "the complaint in the light most favorable to the plaintiff and accept[ing] all well-pled facts alleged in the complaint as true." *Id.*; *see also McElmurray v. Consol. Gov't of Augusta–Richmond Cnty.,* 501 F.3d 1244, 1251 (11th Cir. 2007) (explaining that in a Rule 12(b)(1) facial challenge the plaintiff has

"safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised").

DISCUSSION

Chiquita asserts numerous grounds for dismissing the complaints, primarily for lack of subject-matter jurisdiction and failure to state a claim. The Court will first address Chiquita's arguments for dismissing the claims that arise under 28 U.S.C. § 1350, also know as the Alien Tort Statute ("ATS") or the Alien Tort Claims Act ("ATCA").

I. The Alien Tort Statute

The First Congress enacted the ATS as part of the Judiciary Act of 1789. The modern-day version of the ATS provides: "The 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. Federal subject-matter jurisdiction exists for an ATS claim "when the following three elements are satisfied: (1) an alien (2) sues for a tort (3) committed in violation of the law of nations." *Sinaltrainal,* 578 F.3d at 1261. The parties do not dispute that Plaintiffs satisfy the first two elements, so this Court's analysis focuses on the third requirement.

Under the ATS, the "law of nations" refers to the norms of customary international law. *Id.*; *Flores v. S. Peru Copper Corp.,* 343 F.3d 140, 154

(2d Cir. 2003). Conduct violates the law of nations if it contravenes "well-established, universally recognized norms of international law." *Kadic v. Karadzic,* 70 F.3d 232, 238 (2d Cir. 1995); *Sinaltrainal,* 578 F.3d at 1262 n. 11. In 1789, when Congress passed the ATS, the only recognized violations of the law of nations were "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 715 (2004). Since then, a modest number of additional causes of action have been recognized under the ATS.

In *Sosa v. Alvarez–Machain,* the Supreme Court set forth the standard for recognizing new causes of action. The Court explained that claims under the ATS are not static; new ones may be recognized if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 725; *see also Sinaltrainal,* 578 F.3d at 1263 ("[F]ederal courts have not been precluded from recognizing new claims under the law of nations as an element of the common law, even though the law of nations was originally limited to violation of safe conducts, offenses against ambassadors, and piracy."); *id.* at 1262 n. 11 (holding that jurisdiction under the ATS exists "only when a defendant's alleged conduct violates 'well-established, universally recognized norms of international law.'") (quoting *Filartiga v. Pena–Irala,* 630 F.2d 876, 888 (2d Cir.1980)). Thus, under *Sosa,* "the ATS is not only a jurisdictional statute;

the ATS also empowers federal courts to entertain 'a very limited category' of claims." *Sinaltrainal,* 578 F.3d at 1262 (quoting *Sosa,* 542 U.S. at 712).

The *Sosa* Court, however, admonished the lower federal courts to exercise "great caution" in considering new causes of action, stating that the door to recognizing new claims under the law of nations is "still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." 542 U.S. at 728, 729. *Sosa* also directed that lower courts consider the practical consequences of making new claims available to private litigants in federal courts. *Id.* at 732–33. For instance, courts must consider whether recognizing new causes of action under international law would "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. *Sosa* also noted that Congress may "shut the door to the law of nations" by "treaties or statutes that occupy the field." *Id.* at 731.

Thus, under *Sosa'* s framework, courts may recognize new ATS claims where the conduct violates an international-law norm that is sufficiently well-defined and universally accepted, i.e., comparable to the three 18th-century paradigms. *See, e.g., Sosa,* 542 U.S. at 760 (Breyer, J., concurring) ("[T]o qualify for recognition under the ATS, a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy.").

Sosa instructs that courts consider international law as it exists today, not as it was in 1789, in determining whether to recognize a new claim under the ATS. 542 U.S. at 733; *see also Filartiga,* 630 F.2d at 881 ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). The present state of customary international law is discerned from "'the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Saperstein v. Palestinian Auth.,* No. 04–20225, 2006 WL 3804718, at *4 (S.D.Fla. Dec. 22, 2006) (quoting *United States v. Smith,* 18 U.S. 153, 160–61, (1820)); *see also Almog v. Arab Bank, PLC,* 471 F. Supp. 2d 257, 271–72 (E.D.N.Y. 2007) (explaining that the sources of law from which a court discerns the current state of international law include treaties, executive or legislative acts, judicial decisions, customs and usages of civilized nations, and scholarly works and treatises).

It is against this backdrop that the Court addresses Chiquita's arguments for dismissing Plaintiffs' ATS claims.

A. Plaintiffs' Terrorism–Based Claims

Plaintiffs allege two causes of action against Chiquita based upon the AUC's alleged acts of terrorism: (1) a claim for terrorism under various indirect-liability theories, and (2) a claim for

material support to a terrorist organization under a direct-liability theory.[6] Specifically, Plaintiffs contend that the AUC committed acts of violence against Colombian civilians to coerce and intimidate those civilians into abandoning their support for the FARC. Plaintiffs allege that Chiquita is indirectly liable for terrorism because it aided and abetted, conspired with, ratified or were the principals of the AUC in committing these attacks. Plaintiffs further allege that Chiquita is directly liable for providing material support to the AUC, a terrorist organization. Jurisdiction for both terrorism claims is premised upon the ATS.

Chiquita argues that this Court lacks jurisdiction over Plaintiffs' terrorism-related claims because (1) the Anti–Terrorism Act, 18 U.S.C. § 2333 ("ATA"), limits private rights of action for terrorism to U.S. nationals and therefore forecloses recognition of a parallel and broader cause of action for foreign nationals under the ATS; (2) there is no clearly defined and universally accepted customary international law norm against terrorism, and therefore terrorism is not a cognizable claim under the ATS; and (3) that to the extent terrorism is a recognized violation of international law, Plaintiffs have failed to adequately plead the elements of

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[6] *See, e.g., Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 215–29 (filed Feb. 26, 2010). Most, but not all, of the complaints allege these two terrorism-based claims. The Court finds that the causes of action alleged in the *Does 1–11* First Amended Complaint provides a representative example of these two terrorism causes of action.

such a claim. Chiquita also contends that practical considerations and foreign-affairs concerns militate against recognizing a new international-law norm against terrorism.

1. Whether the Anti–Terrorism Act Forecloses Plaintiffs' Terrorism Based ATS Claims

Chiquita first argues that the Anti–Terrorism Act precludes Plaintiffs' ATS-based terrorism claims. The ATA provides a civil cause of action for U.S. nationals harmed by international terrorism. *See* 18 U.S.C. § 2333(a) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains . . . ."). Chiquita contends that under *Sosa,* Congress's action in passing the ATA, and declining to extend a civil action to foreign victims of terrorism, "occupies the field" of private causes of action for terrorism claims and thus precludes recognizing broader civil liability under the auspices of the ATS. *See Sosa,* 542 U.S. at 731 (holding that Congress can "shut the door" to recognizing new ATS claims through "statutes that occupy the field"). Chiquita points to several congressionally imposed limitations on ATA actions, such as the limitation to U.S. nationals, that are purportedly inconsistent with, and would be impinged upon by, Plaintiffs' proposed ATS claims. Chiquita thus concludes that the ATA

precludes Plaintiffs' attempt to bring a terrorism claim under international law.

The Court finds this argument unpersuasive. The limitations on ATA liability that Chiquita highlights as inconsistent with the ATS, e.g., its limitation to U.S. nationals, actually support the finding that the ATA does not "occupy the field" of civil terrorism claims by *non-U.S.* nationals under the ATS. In passing the ATA, Congress simply provided a statutory cause of action for U.S. nationals; there is no indication in the statute or its legislative history that Congress intended to foreclose claims by *non-U.S.* nationals arising under a different statute. Thus, the Court finds that the ATA does not expressly foreclose terrorism claims for non-U.S. nationals under the ATS.

Nor does it appear that Congress intended to repeal the ATS, as it may apply to terrorism claims, by implication. "[R]epeals by implication are not favored." *Morton v. Mancari,* 417 U.S. 535, 549 (1974) (internal quotation marks omitted). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* at 550. When the "'two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc.,* 534 U.S. 124, 143–44 (2001) (quoting *Morton,* 417 U.S. at 551). Here, there is no conflict between the ATA's provision of civil

remedies for U.S. nationals injured by acts of terrorism and the ATS's provision of civil remedies for aliens injured by violations of international-law norms. These two statutes, providing rights to two different groups of plaintiffs, are capable of coexistence. The Court therefore concludes that Plaintiffs' terrorism-based claims under the ATS are not precluded by the ATA.

2. Whether Terrorism and Providing Material Support to a Terrorist Organization Are Actionable Claims Under the ATS

Chiquita next argues that Plaintiffs' terrorism-based claims are not cognizable under the ATS because they do not meet *Sosa'* s stringent requirements for recognizing new violations of the law of nations. Specifically, Chiquita contends that there is no clearly defined and universally accepted rule of international law prohibiting terrorism or material support for terrorism and, therefore, *Sosa* prohibits this Court from recognizing such a norm.

Plaintiffs contend that while there may be disagreement regarding the definitional fringes of terrorism, this lack of universal agreement does not undermine the core prohibition against acts intended to cause death or serious injury to civilians for the purpose of intimidating a population. Plaintiffs argue that this "core norm" against terrorism is clearly established and widely accepted under customary international law. For

more than forty years, Plaintiffs argue, international treaties and domestic laws have recognized this core norm and prohibited acts of terrorism.

Neither the Supreme Court nor the Eleventh Circuit has addressed whether terrorism constitutes a cognizable claim under the ATS. A fractured panel of the D.C. Circuit has addressed this issue, albeit before the Supreme Court's decision in *Sosa*. In *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984), survivors and representatives of victims murdered in an armed attack on civilian busses in Israel sued several governmental and private entities under the ATS for violations of the law of nations. *Id.* at 775. The "PLO terrorists" seized two civilian buses, a taxi, a passing car and took 121 men, women, and children hostage. *Id.* at 776 (Edwards, J., concurring). The terrorists tortured, shot, wounded, and murdered many of the civilian hostages. *Id.* Before the Israeli police stopped the massacre, twenty-two adults and twelve children were killed, and seventy-three adults and fourteen children were seriously injured. *Id.*

A three-judge panel of the D.C. Circuit unanimously dismissed the lawsuit, with three concurring opinions. Judge Edwards's opinion "consider[ed] whether terrorism is itself a law of nations violation." *Id.* at 795. He found that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or

consensus."[7] *Id.* Accordingly, Judge Edwards concluded that, "[g]iven such disharmony, I cannot conclude that the law of nations . . . outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system." *Id.* at 796.

Judge Bork's opinion agreed, noting that "appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus . . . ." *Id.* at 806 (Bork, J., concurring). Judge Bork continued, "Some aspects of terrorism have been the subject of several international conventions, ... But no consensus has developed on how properly to define 'terrorism' generally." *Id.* at 806–07. "As a consequence," Judge Bork concluded, "international law and the rules of warfare as they now exist are inadequate to cope with this new mode of conflict." *Id.* at 807 (internal quotation marks omitted).

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[7] In support of his finding, Judge Edwards referenced United Nations resolutions, which he explained demonstrate that some states view politically motivated terrorism as legitimate acts of aggression and therefore immune from condemnation. As an example, Judge Edwards cited a resolution entitled "Basic principles of the legal status of combatants struggling against colonial and alien domination and racist regimes," G.A. Res. 3103, 28 U.N. GAOR at 512, U.N. Doc. A/9102 (1973), which declared, "The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law." *Id.* at 795.

More recently, two district courts within this judicial district addressed this issue, both holding that terrorism is not a recognized violation of the law of nations. In *Saperstein v. Palestinian Authority,* No. 04–20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006), survivors of an Israeli citizen murdered by a terrorist attack in Israel sued the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO") under the ATS. *Id.* at *3. On February 18, 2002, a Palestinian terrorist—recruited, trained, funded, and armed by the PA and PLO—murdered the plaintiffs' relative, a civilian, by spraying her car with bullets from an AK–47. *Id.* The Plaintiffs sued the PA and PLO under the ATS for violations of the law of nations, alleging that the defendants sponsored terrorist acts against Jewish civilians and provided support to terrorist entities. *Id.* at *2–3. After a thorough analysis of the *Sosa* framework for recognizing ATS claims under international law, and a discussion of the leading ATS cases at that time, the court concluded that the plaintiffs' terrorism claims were not violations of the law of nations. The court first found that Plaintiffs' allegations of terrorism did not "fit the categories of conduct that prior courts have found constitute a violation of the law of nations." *Id.* at *7. Then, finding that the conduct in *Tel–Oren* was "substantially similar to the conduct in the present case," the court adopted Judge Edwards's conclusion that it is "abundantly clear that politically motivated terrorism has not reached the status of a violation of the law of nations." *Id.* ("[I]f the conduct of the Defendants is

construed as terrorism, then Plaintiffs have not alleged a violation of the law of nations.").

In *Barboza v. Drummond Co.,* No. 06–61527, Slip op., DE 39 (S.D. Fla. July 17, 2007), the court reached the same conclusion, based on allegations similar to those here. There, family members of a Colombian trade unionist murdered by the AUC sued an American corporation and its Colombian subsidiary under the ATS. The plaintiffs alleged that the defendants hired the AUC to protect its Colombian facilities. *Id.* at 2. Later, the AUC surrounded the plaintiffs' relative's house, demanded he exit, and then killed him in front of his family. *Id.* at 3. The plaintiffs then sued the American companies in federal court under the ATS, asserting a claim for providing financial support to a terrorist organization. *Id.* at 18 ("Plaintiffs contend that Defendants violated a norm of customary international law by providing material support to a known terrorist organization."). The court followed the reasoning of *Tel–Oren* and *Saperstein* and rejected the plaintiffs' terrorism-based claims, holding that "claims of terrorism in general" have "'not reached the status of [a] violation of the law of nations.'" *Id.* at 22 (quoting *Saperstein,* 2006 WL 3804718, at *7); *see also id.* ("Plaintiffs have not identified any particular international convention or other recognized source of determining international law to establish a violation of the law of nations here.").[8]

[8] In following *Tel–Oren* and *Saperstein,* the *Barboza* court distinguished the district court's decision in *Almog v.*

The Court finds *Tel–Oren, Saperstein,* and *Barboza* persuasive and reaches the same conclusion regarding Plaintiffs' terrorism-based claims here. Like the plaintiffs in those cases, Plaintiffs essentially assert a "general" terrorism theory of ATS liability. That is, Plaintiffs' allegations are not limited to any specific, narrow category of conduct, such as hijacking civilian aircraft or suicide bombing civilian targets. Rather, Plaintiffs allege a broad range of alleged terrorist acts,[9] linked only by the facts that the victims are civilians and the intent is to intimidate. *See* Pls.' First Resp. at 23–24 (DE 111) ("There is a clearly defined and widely accepted prohibition in international law against acts intended to cause

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Arab Bank, PLC, 471 F.Supp.2d 257 (E.D.N.Y.2007), which held that "organized, systematic suicide bombings and other murderous attacks against innocent civilians for the purpose of intimidating a civilian population are a violation of the law of nations." *Id.* at 285. *Barboza* found that the international conventions relied upon in *Almog*—the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and Common Article 3 of the Geneva Conventions of 1949—were inapplicable to the allegations there, and that the *Almog* plaintiffs' allegations were more specific than the "claims of terrorism in general" alleged by the *Barboza* plaintiffs. *Barboza,* No. 06–61527, Slip op. at 19–22. The *Almog* decision, which this Court also finds distinguishable, is discussed in more detail below.

[9] For instance, the complaints allege acts of kidnaping, rape, physical and psychological torture, disappearances, and individual and mass murders. *See, e.g., Valencia v. Chiquita Brands Int'l, Inc.,* No. 08–cv–80508, DE 283, Second Am. Compl. ¶¶ 131, 351–53, 532–38 (filed Feb. 26, 2010).

death or serious bodily injury to a civilian when the purpose of such an act, by its nature or context, is to intimidate a population."). Plaintiffs thus attempt to group this broad, ill-defined class of conduct under the umbrella of "terrorism," or material support thereof, and create a cause of action against it under the ATS. Given that Plaintiffs' generalized terrorism claims are similar to those rejected in *Tel–Oren, Saperstein,* and *Barboza,* this Court will follow those decisions and reject Plaintiffs' attempt to categorize these broad claims as violations of the law of nations. *See Amergi v. Palestinian Auth.,* 611 F.3d 1350, 1364 (11th Cir. 2010) ("[T]he ATS does not broadly provide for causes of action. The federal courts are empowered to open the door only to a narrow class of claims, and the tort asserted [here]—a single murder purportedly in the course of an armed conflict—is anything but narrow.") (internal quotation marks and citations omitted).

The Court first notes that disagreement among the international community regarding the definition of terrorism, which *Tel–Oren* recognized in 1984, continues today. *See, e.g., United States v. Yousef,* 327 F.3d 56, 106–08 (2d Cir. 2003) ("We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase 'state-sponsored terrorism' proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. . . . We thus conclude that the statements of Judges Edwards,

Bork, and Robb remain true today . . . ."); *Mwani v. Bin Ladin,* No. 99–125, 2006 WL 3422208, at *3 n. 2 (D.D.C. Sept. 28, 2006) ("The law is seemingly unsettled with respect to defining terrorism as a violation of the law of nations."). Such continued disharmony underscores the difference between Plaintiffs' unsettled, controversial terrorism claims and the clearly defined, universally recognized 18th-century paradigmatic international-law claims discussed in *Sosa.*

Next, the Court rejects Plaintiffs' argument that international-law sources establish a modern, well-defined, universally accepted norm against terrorism. Plaintiffs cite dozens of international treaties, United Nations resolutions and declarations, and regional conventions for this point. *See* Pls.' First Resp. at 24–25 nn. 15–19 (DE 111). Plaintiffs' argument seems to culminate with the International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/54/109 (Dec. 9, 1999) ("Financing Convention"), which Plaintiffs contend codified an existing international norm against terrorism created by decades of treaties and conventions. Article 2 of the Financing Convention provides:

> (1) Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;[10] or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the

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[10] The annex to the Financing Convention lists nine treaties:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970;
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971;
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979;
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988;
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; and
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

> hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Court finds that the Financing Convention neither codifies nor creates an international-law norm against terrorism or financing terrorism. First, the Financing Convention does not establish a *universally accepted* rule of customary international law. An international treaty "will only constitute *sufficient proof* of a norm of customary international law if an *overwhelming majority* of States have ratified the treaty." *Flores,* 414 F.3d at 256 (second emphasis added). The "evidentiary weight to be afforded to a given treaty varies greatly depending on [ ] how many, and which, States have ratified the treaty." *Id.* The more States that ratify a treaty, and the greater influence of those States in international affairs, the greater the treaty's evidentiary value towards establishing an international-law norm. *Id.* at 257. Importantly, the inquiry into whether a treaty establishes a rule of international law is limited to the period of the events giving rise to the alleged injuries. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.,* 517 F.3d 104, 123 (2d Cir. 2008) (stating that ATS claims must rest on a rule of international law "that was universally accepted at the time of the events giving rise to the injuries alleged"); *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254, 325 (2d Cir. 2007) (Korman, J.,

concurring in part and dissenting in part) (explaining that under international law "conduct may be punished only on the basis of a norm that came into force *prior* to when the conduct occurred") (internal quotation marks omitted). In April 2002, when the Financing Convention came into force, only 26 of the 192 nations of the world, or roughly 14%, had ratified it.[11] In February 2004, when Chiquita's alleged payments to the AUC terminated, 111 States, or roughly 58% of the nations of the world, had ratified the Financing Convention.[12] These figures do not constitute the "overwhelming majority" necessary to establish a widely accepted norm of international law prohibiting financial support for terrorism at the time of Chiquita's purported wrongful acts.

Second, the norms in the Financing Convention are not *well-established*. Rather, the signatories to the Financing Convention dispute many of the rules therein, as illustrated by the many declarations and reservations, i.e., non-consents and varying interpretations,[13] appended

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[11] U.N. Treaty Collection, Int'l Convention for the Suppression of the Financing of Terrorism, Status, Apr. 20, 2011, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII–11&chapter=18&lang=en (listing dates upon which States ratified the Financing Convention).

[12] *Id.*

[13] A reservation is non-consent to particular treaty terms. Restatement (Third) of Foreign Relations Law of the United States § 313 cmt. a (1986) ("A reservation is defined in the Vienna Convention, Article 2(1)(d), as a unilateral statement

to the convention. For instance, Egypt declared that it "does not consider acts of national resistance *in all its forms,* including armed resistence against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts."[14] Egypt's declaration prompted an objection by the Czech Republic, which declared that it "considers the declaration to be incompatible with the object and purpose of the Convention."[15] Moreover, a substantial number of states declared that they are not bound to entire subject areas of the Convention. For example, Bahrain, Thailand, and Venezuela each declared that six of the nine treaties upon which the Finance Convention is based do not apply to it.[16] Similarly, Brazil, China, Guatemala, Syria, and Vietnam declared the same with regard to three of the treaties.[17] Such disagreements, non-consents, and divergent

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made by a state when signing, ratifying, accepting, approving, or acceding to an international agreement, whereby it purports to exclude or modify the legal effect of certain provisions of that agreement in their application to that state."). A declaration is a State's own interpretation of particular treaty terms, which may conflict with another State's understanding of the treaty. *Id.*

[14] U.N. Treaty Collection, Int'l Convention for the Suppression of the Financing of Terrorism, Status, Apr. 20, 2011, *http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII–11&chapter=18&lang=en* (emphasis added).

[15] *Id.*

[16] *Id.*

[17] *Id.*

interpretations of the Finance Convention demonstrate that the prohibitions of the convention are disputed and not well-established.

Plaintiffs' briefing also provides several footnotes that string cite dozens of other international treaties, United Nations resolutions and declarations, and regional conventions that Plaintiffs contend prohibit specific acts of terrorism. *See* Pls.' First Resp. at 24–25 nn. 15–19 (DE 111). Plaintiffs do not discuss any of these sources, but contend that they created the international norm against terrorism that the Financing Convention ultimately "codified." Because the Court finds that the Financing Convention did not codify an international norm against terrorism, and because Plaintiffs provide no discussion regarding how these string-cited sources establish an international norm, the Court does not individually address these many treaties, resolutions, and conventions. The Court notes generally, however, that many of these sources address norms not applicable to the allegations here.[18] The Court further notes that many of these

[18] *See, e.g.,* Convention of Offenses and Certain Other Acts Committed On Board Aircraft, 20 U.S.T. 2941, 1969 WL 97848 (Sept. 14, 1963); Convention for Suppression of Unlawful Acts against Safety of Civil Aviation, 24 U.S.T. 565, 1973 WL 151803 (Sept. 23, 1971); Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T.1975, 1977 WL 181657 (Dec. 14, 1973); Convention on the Physical Protection of Nuclear Material, 18 I.L.M. 1419 (Mar. 3, 1980); Protocol for the Suppression of Unlawful Acts Against the

sources address the subject of terrorism, if at all, only at a high level of abstraction and do not provide any definition of terrorism.[19] Thus, like the Financing Convention, these additional sources also fail to provide a well-defined, universally accepted norm of international law against terrorism or material support thereof.

Plaintiffs next argue that "nearly every state has incorporated the international prohibition against terrorism in its domestic laws." Pls.' First Resp. at 25 (DE 111). The United States, Plaintiffs highlight, enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified at 18 U.S.C. § 2338B), and the USA Patriot Act in 2001, Pub. L. No. 107–56, 115 Stat. 272, as prohibitions against terrorism. Under *Sosa,* however, a norm of international law sufficient to create a claim under the ATS must be drawn from international, not

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Safety of Fixed Platforms Located on the Continental Shelf, 1678 U.N.T.S. 304, 27 I.L.M. 685 (Mar. 10, 1988).

[19] *See, e.g.,* Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 I.L.M. 721 (Mar. 1, 1991); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Jan. 12, 1998); Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 27 U.S.T. 3949, 1976 WL 166939 (Feb. 2, 1971); *see also Flores,* 414 F.3d at 252 ("[I]t is impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles.").

domestic, laws *See Sosa,* 542 U.S. at 732 & n.20, 124 S.Ct. 2739 (observing that "whether a norm is sufficiently definite to support a cause of action" under the ATS involves a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued"); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 259 (2d Cir. 2009) ("*Sosa* and our precedents send us to international law to find the standard for accessorial liability."); *Khulumani,* 504 F.3d at 269 (Katzmann, J., concurring) ("We have repeatedly emphasized that the scope of the ATCA's jurisdictional grant should be determined by reference to international law."); *Abecassis v. Wyatt,* 704 F. Supp. 2d 623, 654 (S.D. Tex. 2010) ("*Sosa* establishes international law as the touchstone of the ATS analysis."); *Doe v. Drummond Co.,* No. 09–1041, DE 43, Slip op. at 20 n.21 (N.D. Ala. Apr. 30, 2010) ("*Drummond II*") ("*Sosa* supports the broader principle that the scope of liability for ATS violations should be derived from international law"). Reliance on domestic laws, even those of the United States, cannot support recognition of an international norm under the ATS. *See Flores,* 414 F.3d at 249 ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law . . . . [F]or example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the ATCA as a violation of customary international law . . . .");

Filartiga, 630 F.2d at 888 ("[T]he mere fact that every nation's municipal law may prohibit theft does not incorporate the Eighth Commandment, 'Thou Shalt not steal' [into] the law of nations. It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]."") (alterations in original) (internal quotation marks omitted); *Barboza,* No. 06–61527, DE 39, Slip op. at 18 (rejecting the plaintiffs' reliance on the ATA, AEDPA, and USA Patriot Act as evidence of an international-law norm against financing terrorism).

Finally, Plaintiffs urge this Court to follow the district court's decision in *Almog v. Arab Bank, PLC,* 471 F. Supp. 2d 257 (E.D.N.Y. 2007), which Plaintiffs contend supports their claim that terrorism is actionable under the ATS. There, survivors of Israeli citizens killed by Palestinian suicide bombers sued a Jordanian bank alleged to have provided financial services that facilitated Palestinian groups' terrorist attacks. The district court held that "organized, systematic suicide bombings and other murderous attacks against innocent civilians for the purpose of intimidating a civilian population are a violation of the law of nations." *Id.* at 285.

To the extent that *Almog* can be read as holding that terrorism, or material support thereof,

constitutes a violation of the law of nations, the Court respectfully disagrees with that conclusion for the reasons discussed above. In recognizing an international norm against suicide bombing and other attacks on civilians, the *Almog* court relied largely on the Financing Convention and the International Convention for the Suppression of Terrorist Bombings. *See Almog,* 471 F. Supp. 2d at 276–78. As discussed above, this Court finds that the Financing Convention fails to establish a universally recognized, well-settled norm of customary international law. Moreover, and as noted above, the Bombing Convention addresses terrorism at a highly abstract level and does not provide any definition of the subject. The Court thus disagrees with *Almog'* s conclusion that these conventions support an international norm, under *Sosa'* s stringent requirements, prohibiting terrorism.

Almog is also distinguishable in that the court there did not recognize an ATS claim for terrorism in general, as Plaintiffs here urge upon this Court. Rather, *Almog* rested its holding on the specific allegations before it, which the court described as suicide bombings and assassinations of civilians. *See id.* at 264 (listing representative allegations from Almog's amended complaint). Indeed, the court explained that its holding was limited to the specific factual allegations before it, and not based upon a cause of action for "terrorism" generally. *See id.* at 280 ("[T]here is no need to resolve any definitional disputes as to the scope of the word 'terrorism,' for the Conventions

expressing the international norm provide their own specific descriptions of the conduct condemned. Although the Conventions refer to such acts as 'terrorism,' the pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled.").

For the foregoing reasons, the Court concludes that Plaintiffs' terrorism-based claims are not actionable under the ATS. Like *Tel–Oren, Saperstein,* and *Barboza,* and mindful of *Sosa'* s mandate that courts exercise great caution in recognizing new ATS claims, this Court finds that a claim for terrorism in general, or material support thereof, is not based on a sufficiently accepted, established, or defined norm of customary international law to constitute a violation of the law of nations. Accordingly, the Court lacks subject-matter jurisdiction under the ATS over Plaintiffs' terrorism-based claims and those claims are dismissed.[20]

3. Practical Consequences

Chiquita also contends that *Sosa'* s directive that courts consider the "practical consequences," such as foreign-policy implications, of recognizing

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[20] Because the Court dismisses Plaintiffs' terrorism-based claims for lack of subject-matter jurisdiction, the Court does not address Chiquita's additional arguments for dismissal, i.e., that any prohibition against terrorism under international law is limited to criminal, not civil, liability, and that Plaintiffs' have failed to plead the requisite elements of their terrorism-based claims.

new ATS claims precludes this Court from recognizing Plaintiffs' terrorism-based claims. While the Court need not address this issue given the dismissal of Plaintiffs' terrorism-based claims, the Court will briefly address it here because Chiquita weaves this theme throughout its briefing, arguing that the Court should decline to exercise jurisdiction over *all* of Plaintiffs' claims because this action will touch on foreign-policy and political issues.

The Court finds nothing extraordinary about Plaintiffs' claims, such that the potential for adverse foreign-policy consequences balances against adjudication on the merits. Many courts have adjudicated ATS claims based on allegations involving significant foreign-relations issues, some involving allegations nearly identical to those here. *See, e.g., Drummond II,* No. 09–1041, Slip op. (addressing ATS claims arising out of AUC's alleged violence in the course of the Colombian civil war); *Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242 (11th Cir. 2005) (holding that the plaintiffs sufficiently pleaded ATS claims against a U.S. company that allegedly hired private Guatemalan security forces to torture labor unionists); *Kadic,* 70 F.3d 232 (addressing ATS claims arising out of the Bosnian genocide); *Almog,* 471 F. Supp. 2d 257 (addressing ATS claims arising out of suicide bombings by Palestinian terrorist organizations in Israel). There is no indication that those cases "imping[ed] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa,* 542 U.S. at 727. Adjudicating

Plaintiffs' claims is similarly unlikely to risk unwarranted judicial interference with the political branches' foreign policy vis-a-vis Colombia. Indeed, unlike other ATS cases addressing significant foreign-policy issues, neither the U.S. nor Colombian governments have voiced any concern regarding this Court's jurisdiction over Plaintiffs' claims. *See, e.g., In re South African Apartheid Litig.,* 617 F. Supp. 2d 228, 276–77 (S.D.N.Y. 2009) (adjudicating ATS claims arising from U.S. companies' business practices with the Apartheid-era government of South Africa despite a statement of interest from the U.S. State Department stating that "continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States" and that continued litigation "will compromise a valuable foreign policy tool"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* No. 01–9882, 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005) (upholding ATS claims despite the "United States Government [having] submitted a Statement of Interest . . . expressing concerns regarding the impact of this litigation on this Nation's foreign affairs"). This Court will not decline to exercise jurisdiction over Plaintiffs' ATS claims solely because the allegations touch on issues concerning Colombian officials and the Colombian civil war. *See Amergi,* 611 F.3d at 1365 ("There can be little doubt that the ATS permits federal courts to assert jurisdiction over hot-button matters of international law."); *Khulumani,* 504 F.3d at 263 ("[N]ot every case touching foreign relations is nonjusticiable and judges should not

reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.") (internal quotation marks omitted); *Kadic,* 70 F.3d at 249 ("Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. The doctrine is one of 'political questions,' not one of 'political cases.'") (internal quotation marks omitted).

The Court also rejects as a basis for dismissal Chiquita's argument that hearing Plaintiffs' claims would give rise to thousands of new ATS claims stemming from its alleged support to the AUC, resulting in unmanageable litigation. The Federal Rules of Civil Procedure provide adequate procedures for managing large, complicated lawsuits, including class actions involving thousands of plaintiffs. Moreover, Chiquita's position risks rewarding offenders who commit large-scale, as opposed to individual, international torts. Under Chiquita's argument, an offender who commits a small number of international-law violations would be subject to ATS claims in federal court, while an offender who commits thousands of offenses, thereby making any lawsuit more complex, could escape liability. The Court refuses to adopt such a rule.

B. Plaintiffs' Additional ATS Claims

As a threshold matter, the Court rejects Chiquita's suggestion that the Court's ruling on

Plaintiffs' terrorism-related claims disposes of Plaintiffs' remaining ATS claims. Chiquita argues that all of Plaintiffs' ATS causes of action are really just material-support-for-terrorism claims that Plaintiffs attempt to "shoehorn" into other theories of ATS violations, such as war crimes, crimes against humanity, torture, and extrajudicial killing. The Court disagrees with this assessment of Plaintiffs' claims. The complaints allege multiple, distinct non-terrorism causes of action—claims that federal courts have recognized as independent, valid ATS claims—and the Court will analyze Plaintiffs' claims as such. The Court now turns to Chiquita's specific arguments directed at Plaintiffs' ATS claims.

Chiquita first argues that Plaintiffs' ATS claims for (1) cruel, inhuman, or degrading treatment, (2) violation of the rights to life, liberty and security of person and peaceful assembly and association, and (3) consistent pattern of human-rights violations are not recognized violations of the law of nations. The Court agrees. First, while asserting these causes of action in their complaints, Plaintiffs' briefing ignores entirely Chiquita's arguments for dismissing these claims and provides no authority recognizing these causes of action under the ATS. Without any authority recognizing these claims, the Court cannot conclude that they are sufficiently established or universally recognized under international law to satisfy *Sosa*'s requirements for recognizing new ATS claims. Additionally, other courts have expressly rejected these types of claims under the ATS. *See, e.g.,*

Aldana, 416 F.3d at 1247 ("We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment."); *Villeda Aldana v. Fresh Del Monte Produce, Inc.,* 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) ("[T]his Court cannot let this claim proceed as Plaintiffs have not established the existence of [a] customary international law 'right to associate and organize.'"), *rev'd in part on other grounds,* 416 F.3d 1242 (11th Cir. 2005); *Kiobel v. Royal Dutch Petroleum Co.,* 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006) (dismissing the plaintiffs' claim for violations of the "rights to life, liberty, security and association" because there "is no particular or universal understanding of the civil and political rights covered by Plaintiffs' claim, and thus, pursuant to *Sosa,* these 'rights' are not actionable under the ATS.") (internal quotation marks omitted), *rev'd in part on other grounds,* 621 F.3d 111 (2d Cir. 2010); *Sarei v. Rio Tinto PLC,* 221 F. Supp. 2d 1116, 1162 n.190 (C.D. Cal. 2002) ("[P]laintiffs have not demonstrated that prohibitions against cruel, inhuman, and degrading treatment (other than torture) and gross violations of human rights constitute established norms of customary international law."), *rev'd in part on other grounds,* 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, rev'd in part, and vacated in part en banc,* 487 F.3d 1193 (9th Cir. 2007). Having provided no authority recognizing these claims under international law, the Court follows the many cases holding that these causes of action are not cognizable under the ATS.

The Court now turns to Plaintiffs' remaining ATS claims: torture, extrajudicial killing, war crimes, and crimes against humanity. Chiquita's first argument concerns whether Plaintiffs sufficiently allege that the AUC committed these four offenses.

1. Primary Violations of International Law By the AUC

Chiquita argues that Plaintiffs' remaining ATS claims fail because the complaints do not allege primary violations of international law by the AUC and, therefore, there are no offenses for which it can be found secondarily liable. Specifically, Chiquita argues that (1) Plaintiffs do not plead the requisite state action with respect to the AUC's alleged offenses, and therefore fail to plead a necessary element for the torture and extrajudicial killing claims; (2) Plaintiffs do not sufficiently allege that the alleged torture and killing were war crimes; and (3) Plaintiffs do not sufficiently allege that the alleged torture and killing were crimes against humanity.

a. State–Action Requirement for Torture and Extrajudicial–Killing Claims

Torture and extrajudicial killings are recognized violations of the law of nations under the ATS. *See, e.g., Sinaltrainal,* 578 F.3d at 1265 n.15; *Romero v. Drummond Co.,* 552 F.3d 1303,

1316 (11th Cir. 2008); *Kadic,* 70 F.3d at 234. For ATS purposes, the Eleventh Circuit has adopted the definition of torture set forth by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, U.N. Doc. A/39/51 (1984). This convention defines torture as the intentional infliction of severe pain or suffering, whether physical or mental, on a person for the purposes of obtaining information or a confession, punishment, intimidation or coercion, or discrimination. *Aldana,* 416 F.3d at 1252. The Eleventh Circuit has not specifically addressed the elements of an extrajudicial-killing claim under the ATS. Under the analogous TVPA, however, the Eleventh Circuit explains that extrajudicial-killing is defined as a deliberate killing not previously authorized by a regularly constituted court affording recognized judicial guarantees. *Sinaltrainal,* 578 F.3d 1252 (citing 28 U.S.C. § 1350 note § 3(a)).

As with most ATS claims, torture and extrajudicial killing are cognizable only when committed by state actors or under color of law. *See, e.g., Sinaltrainal,* 578 F.3d at 1265; *Aldana,* 416 F.3d at 1247; *Kadic,* 70 F.3d at 234. To plead state action for ATS purposes, the Eleventh Circuit "demand[s] allegations of a symbiotic relationship" between the private actor and the government. *Sinaltrainal,* 578 F.3d at 1266; *see also Romero,* 552 F.3d at 1317 (adopting same symbiotic-relationship standard in the context of torture and extrajudicial-killings claims under the TVPA). Under this symbiotic-relationship standard,

Plaintiffs must assert "more than allegations of a general, joint-relationship between the government and the alleged state actor." *Drummond II,* No. 09–1041, DE 43, Slip op. at 8. Allegations of "Colombia's mere 'registration and toleration of private security forces does not transform those forces' acts into state acts.'" *Sinaltrainal,* 578 F.3d at 1266 (quoting *Aldana,* 416 F.3d at 1248). Rather, Plaintiffs must allege a close relationship between the government and the AUC that " 'involves the torture or killing alleged in the complaint to satisfy the requirement of state action.'" *Id.* (quoting *Romero,* 552 F.3d at 1317); *see also Romero,* 552 F.3d at 1317 ("[P]roof of a general relationship is not enough. The relationship must involve the subject of the complaint.").[21]

Chiquita contends that Plaintiffs have not adequately pleaded the state-action requirement for these claims. The complaints, Chiquita argues, rely upon generalized allegations of collusion between Colombian authorities and the paramilitaries that are similar to those found insufficient in *Sinaltrainal.* Chiquita concedes that the complaints allege that the "Colombian government helped create, promote and finance paramilitaries, was complicit in paramilitary

[21] Based on these Eleventh Circuit precedents recognizing the symbiotic-relationship standard for state action, the Court rejects Chiquita's argument, advanced in its first motion to dismiss, that there is no clearly defined and widely accepted standard under the law of nations for extending liability reserved for state actors to private entities acting under color of law.

operations, participated in certain paramilitary massacres, and delegated certain government functions to the paramilitaries." Second Mot. at 24 (DE 295). Chiquita concludes, however, that these allegations fail because they do not assert any "government involvement in any of the more than one thousand violent acts at issue here," and therefore fail to plead the requisite government involvement in the "'murder and torture alleged in the complaints.'" *Id.* (quoting *Sinaltrainal,* 578 F.3d at 1266).

As an initial matter, the Court disagrees with Chiquita's argument that to plead state action Plaintiffs must allege government involvement in the specific torture and killings of Plaintiffs' specific relatives. While the symbiotic relationship must involve "the torture or killing alleged in the complaint," *Romero,* 552 F.3d at 1317, the "Eleventh Circuit has approved a district court exercising this standard by inquiring whether 'the symbiotic relationship between the paramilitaries and the Colombian military had anything to do with the conduct at issue.'" *Drummond II,* No. 09–1041, DE 43, Slip op. at 11 (quoting *Romero,* 552 F.3d at 1317). Here, the conduct at issue is the AUC's torture and killing of thousands of civilians in Colombia's banana-growing regions, torture and killing which allegedly harmed or killed Plaintiffs' relatives. This Court finds that to plead state action at the motion-to-dismiss stage, Plaintiffs must allege 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, not specific government involvement with each individual act of torture and killing of Plaintiffs' relatives. Such allegations suffice to show a "relationship [that] involve[s] the subject of the complaint." *Romero,* 552 F.3d at 1317; *see also Drummond II,* No. 09–1041, DE 43, Slip op. at 12–13 (finding that the plaintiffs sufficiently alleged a symbiotic relationship with respect to the killings alleged in the complaint based on allegations that the defendant paid the AUC with the intent to assist the AUC's war crimes and with the knowledge that the AUC would direct its war efforts in the areas in which the plaintiffs' decedents lived.).

Turning to Plaintiffs' allegations, the Court finds that the complaints allege facts regarding a direct, symbiotic relationship between the Colombian government and the AUC that involves the AUC's torture and killing of civilians in the banana-growing regions of Uraba and Magdalena. For example, the complaints allege:

- [D]espite the official criminalization of the paramilitaries, they became a central component of the government's strategy to win the civil war. At all times relevant to this complaint, the AUC and other paramilitary groups in fact collaborated closely with the Colombian government and were used by the government to oppose anti-government guerrilla groups like the FARC.[22]

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[22] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 27 (filed Feb. 26, 2010).

- As part of the Colombian government's strategy for defeating the left-wing insurgency, senior officials in the Colombian civilian government and the Colombian security forces collaborated with the AUC and assisted the paramilitaries in orchestrating attacks on civilian populations, extra-judicial killings, murders, disappearances, forced displacements, threats and intimidation against persons including Plaintiffs.[23]

- As a result of this interdependence, longstanding and pervasive ties have existed between the paramilitaries and official Colombian security forces from the beginning. In the 1980s, paramilitaries were partially organized and armed by the Colombian military and participated in the campaigns of the official armed forces against guerrilla insurgents. Paramilitary forces included active-duty and retired army and police personnel among their members. . . . Cooperation with paramilitaries has been demonstrated in half of Colombia's eighteen brigade-level Army units, spread across all of the Army's regional divisions. Such cooperation is so pervasive that the paramilitaries are referred to by many in Colombia as the "Sixth Division"—a reference to their close integration with the five official

[23] *Id.* ¶ 45.

divisions of the Colombian Army.[24]

- Senior officers in the Colombian military, including but not limited to former Military Forces Commanders Major General Manuel Bonett, General Harold Bedoya, Vice Admiral Rodrigo Quinones, Gen. Jaime Uscategui; Gen. Rito Alejo Del Rio, General Mario Montoya, Colonel Danilo Gonzalez, Major Walter Fratinni and Defense Minister Juan Manuel Santos, collaborated with, facilitated, and/or aided and abetted the AUC in the commission of various attacks on civilian populations, extrajudicial killings and other atrocities . . . .[25]

- Boundaries between the AUC and the military at times were amorphous, as some paramilitary members were former police or army members, while some active-duty military members moonlighted as paramilitary members and became thoroughly integrated into these groups. Paramilitary leaders noted that Colombian security forces in Uraba allowed members of the AUC to serve as proxies in their pursuit of guerrilla forces, largely due to the military's operative incapacity to defeat the guerrillas on its own.[26]

- Colombian security forces in Uraba—with the

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[24] *Id.* ¶ 48.

[25] *Id.* ¶ 49.

[26] *Id.* ¶ 50.

knowledge and collaboration of high–level officials in the national government—have willfully failed to prevent or interrupt the crimes of the AUC, actively conspired with them, and coordinated activities with them. Documented examples in Uraba include:

. . .

- Failing to carry out arrest warrants for paramilitary leaders, who move about the country freely;

. . .

- Failing to intervene to stop ongoing attacks on civilian populations occurring over a period of days;

- Sharing intelligence, including the names of suspect guerrilla collaborators;

- Sharing vehicles, including army trucks used to transport paramilitary fighters;

- Supplying weapons and munitions;

- Providing special military training;

. . .

- Providing support with helicopters and medical aid;

- Communicating via radio, cellular telephones, and beepers;

- Sharing members, including active-duty soldiers serving in paramilitary units and paramilitary commanders lodging on military bases; and

- Planning and carrying out joint operations.[27]

- It was in Uraba that a model of collaboration between the paramilitaries, the business sector, and the government was developed and perfected. An alliance was formed between politicians, active military units, multinational companies, businessmen, and paramilitaries in order to impose a regime of terror and consolidate the dominance of the AUC, which would wrest control of the countryside back from the leftist guerrillas. The first paramilitary groups to operate in Uraba in a systematic and continuous manner received special training from the Colombian military.[28]

- When the government or the military was not able to legally arrest or attack civilians, they would delegate the task to the AUC or to *convivir* associated with the paramilitaries to act on their behalf. These targets included suspected guerrilla sympathizers, including teachers, community leaders, trade unionists, human rights defenders, religious workers,

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[27] *Id.* ¶ 51.

[28] *Id.* ¶ 53.

and leftist politicians, as well as people with no known or suspected ties to the guerrillas but who were killed to terrify and dominate the civilian population. According to both H.H. and Raúl Hasbún, the military gave the AUC lists of people to kill when they felt impotent to fight the guerrillas themselves legally and constitutionally, or when they could not arrest and try them for any crime.[29]

- The AUC in Uraba consistently ran joint operations with the military. The 17th Brigade of the Colombian Army, located in the Uraba region, and the 4th Brigade, sister unit to the 17th Brigade in the Medellin region, were especially active in their support of and involvement in paramilitary activities, up to and including engaging in joint operations. For example, the Elmer Cardenas Bloc of the AUC regularly received logistical support and transportation from the 17th Brigade and other units of the Colombian army and conducted joint operations with the 17th Brigade. General Rito Alejo del Rio Rojas, the commander of the 17th Brigade from 1995 to 1997 who was responsible for military operations in Uraba, was notorious for his collaboration and collusion with paramilitaries in the region.[30]

- General del Rio was finally arrested in 2008 . .

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[29] *Id.* ¶ 54.

[30] *Id.* ¶¶ 56–57.

. . He is accused of conspiracy to murders committed by paramilitaries in Uraba during his time as 17th Brigade Commander. H.H. has testified that he twice witnessed del Rio meeting with the founder and national commander of the AUC, Carlos Castano.[31]

- AUC paramilitaries could enter and leave the 17th Brigade's headquarters at will, with the knowledge and permission of General del Rio. In one instance, H.H. discovered that a criminal whom the AUC sought was being held at the Brigade headquarters; he and others from the AUC went to the 17th Brigade, picked up the prisoner, transported him to the port at Turbo using a military van, and murdered him.[32]

- General del Rio's role in promoting and supporting paramilitarism was not merely the work of a single rogue military officer; rather it was part of the Colombian government's strategy to fight the guerrillas.[33]

- Colombian security forces and paramilitary groups shared intelligence. Paramilitary groups were used to gather intelligence about leftist guerillas and their sympathizers and supporters in the regions where they operated. The paramilitary groups communicated their

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[31] *Id.* ¶ 58.

[32] *Id.* ¶ 59.

[33] *Id.* ¶ 60.

intelligence to military intelligence units and to the DAS. Military intelligence and DAS units reciprocated by sharing intelligence information with the paramilitary groups, including but not limited to lists of individuals the Colombian government suspected of being leftist guerillas, sympathizers, or supporters. Colombian security forces often directed the AUC to kill or torture the individuals identified on these lists.[34]

- On February 19, 2000, the AUC selectively assassinated five banana workers in the "peace community" of San Jose de Apartado, in Uraba; reports indicated that members of the 17th Brigade were direct participants in the attack.[35]

- This model of collaboration between the paramilitaries, the companies, and the government was so successful in Uraba that Raul Hasbun explained it to Jorge 40, commander of the AUC in the Magdalena region, so he could implement it there. Thereafter, the model spread to many other regions of Colombia.[36]

- Although paramilitarism had been declared

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[34] *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶ 311 (filed Apr. 14, 2010).

[35] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 64 (filed Feb. 26, 2010).

[36] *Id.* ¶ 66.

> illegal in Colombia, the Colombian government still needed the paramilitaries to assist in the armed conflict against the guerillas; Decree 356 of 1994 was therefore enacted as a new legal mechanism to provide cover and a legitimate avenue of funding for the AUC. . . . These security groups [were] known commonly by their Spanish-language acronym "CONVIVIR." . . . The *convivir* units in Uraba were fronts from the AUC from their inception. . . . The 17th Brigade of the Colombian Armed Forces, which was infamous for its close collaboration with the paramilitaries in Uraba, was given the authority to select members of the *convivir* in Uraba.[37]

- Alvaro Uribe . . . was governor of Antioquia [the department in which Uraba is located] at the time of the creation of the *convivir*. Uribe authorized the funding, arming, and funneling of information to the *convivir,* thereby facilitating the sharing of such funds, arms, and information with the AUC. Uribe expected the *convivir* groups to fight the guerrillas-both alongside the military and on their own . . . .[38]

- In October 1997, the Army's Fourth Brigade and the AUC participated in an offensive in the village of El Aro, in the department of Antioquia. . . . [T]he military and AUC leaders

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[37] *Id.* ¶¶ 37–38.

[38] *Id.* ¶ 39.

> planned the offensive over the course of several months. As the offensive began, the Colombian Army established a perimeter to prevent entry into or escape from the village while the AUC was inside. The Army maintained the perimeter for five days. During that time, the AUC executed at least eleven people, forcibly disappeared more than thirty other people, burned forty-seven of the sixty-eight houses, looted stores, and destroyed water pipelines. At least one victim was tied to a tree and tortured by having his eyes gouged out and his testicles cut off. After the massacre, the AUC forced most of the residents to leave the area. Several members of the Army and local police were charged with participating in the massacre.[39]

The Court finds that these allegations do more than assert generalized allegations of collusion between Colombian authorities and the AUC. These allegations provide detailed facts of the government's role in creating, financing, promoting, and collaborating with the AUC in the common objective of fighting the leftist guerrillas. This cooperation involves joint membership, intelligence sharing, and the government's role in training and arming the AUC. The complaints then link this close relationship to the campaign of torture and killing in the banana-growing regions—i.e., the subject of the complaints—including allegations

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[39] *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶ 330(b) (filed Apr. 14, 2010).

that the government and the AUC jointly planned and carried out specific attacks against civilian villages in Uraba. This is more than a "formulaic recitation" of a symbiotic relationship between the AUC and the Colombian government. *Sinaltrainal,* 578 F.3d at 1266. Plaintiffs have alleged ample facts supporting the requisite state-action elements.

These detailed facts distinguish the allegations here from those found insufficient in *Sinaltrainal,* upon which Chiquita principally relies in its second motion to dismiss. There, the plaintiffs' conclusorily alleged that the paramilitaries were "permitted to exist," were "assisted by the Colombian government," that the government "tolerate[d] the paramilitaries, allow[ed] them to operate, and often cooperate[d], protect[ed] and/or work[ed] in concert with them." 578 F.3d at 1266. The plaintiffs also made "the naked allegation the paramilitaries were in a symbiotic relationship with the Colombian government." *Id.* The Eleventh Circuit found that (1) the "conclusory allegation that the paramilitary security forces acted under color of law is not entitled to be assumed true and is insufficient to allege state-sponsored action," and (2) that the allegations that the Colombian government "tolerated and permitted the paramilitary forces to exist are insufficient to plead the paramilitary forces were state actors." *Id.* Here, by contrast, Plaintiffs allege many facts supporting their allegations of a symbiotic relationship, and those allegations are therefore not conclusory. *See id.*

("The plaintiffs' 'formulaic recitation' that the paramilitary forces were in a symbiotic relationship and were assisted by the Colombian government, *absent any factual allegations to support this legal conclusion,* is insufficient to state an allegation of state action that is plausible on its face.") (emphasis added). Moreover, Plaintiffs' do not merely allege that the government "tolerated and permitted" the AUC's activity; the complaints allege the government's active participation in the AUC's activity. Thus, unlike *Sinaltrainal,* where there was "no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints," *id.,* Plaintiffs here provide detailed allegations of the government's close cooperation with the AUC regarding the torture and killing alleged in the complaint.

Chiquita also argues, in its first motion to dismiss, that the complaints allege that Colombian law currently prohibits assisting paramilitaries and that the Colombian government is currently investigating and prosecuting officials for ties to the AUC. Chiquita contends that these facts are inconsistent with the notion that the AUC was acting under color of law. This argument is unavailing. First, the government's *current* investigations and prosecutions are not relevant to its alleged *past* relationship with the AUC. Second, that government officials are currently being investigated and prosecuted for ties to the AUC is not inconsistent with, and indeed may support, Plaintiffs' allegations that a symbiotic relationship

existed between the government and the AUC during the time of the alleged offenses.

The Court thus concludes that the complaints sufficiently allege that the AUC acted under color of law when it committed the offenses alleged in the complaints. Accordingly, Plaintiffs' torture and extrajudicial-killings claims will not be dismissed for failure to plead state action.[40]

b. War Crimes.

War crimes are recognized violations of the law of nations under the ATS. *See, e.g., Sinaltrainal,* 578 F.3d at 1266–67; *Talisman,* 582 F.3d at 256; *Kadic,* 70 F.3d at 242–43. Such a claim is cognizable under the ATS if Plaintiffs can establish (1) there was an armed conflict, (2) the AUC was a party to the conflict, (3) Plaintiffs' relatives were not active participants in the conflict, and (4) Plaintiffs' relatives were tortured or killed in the course of hostilities. *See Kadic,* 70 F.3d at 243 (applying the war crimes definition from Common Article 3 of the Geneva Convention); *see also Talisman,* 582 F.3d at 257 (adopting *Kadic*'s war crimes standard); *In re Sinaltrainal Litig.,* 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006) (same); *Drummond II,* No. 09–1041, DE 43, Slip op.

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[40] Because the Court finds that the complaints adequately allege state action under the symbiotic-relationship standard set forth in *Sinaltrainal,* the Court does not address Plaintiffs' additional arguments that they sufficiently plead state action under other color-of-law theories.

at 14 (same). Unlike claims for torture and extrajudicial killing, a claim for war crimes does not require state action. *See Sinaltrainal,* 578 F.3d at 1267 (holding that the "war crimes exception dispenses with the state action requirement."); *id.* ("Some acts, such as 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.").

Chiquita argues that it cannot be secondarily liable because Plaintiffs fail to plead that the AUC committed a primary violation of international law. The parties agree that the civil war in Colombia between the Colombian government and the guerrilla organizations was an armed conflict and that the AUC was a party to that conflict. Thus, the controlling issue here is the third element of a war crimes claim: whether the AUC committed its alleged violence "in the course of hostilities." Case law does not provide any clear definition of this requirement. In *Sinaltrainal,* the Eleventh Circuit clarified that this "in the course of" element requires that the crimes be committed "because of the ongoing civil war." 578 F.3d at 1267. This requires more than merely alleging that the offenses occurred "during" an armed conflict. *Id.*; *see also In re XE Servs. Alien Tort Litig.,* 665 F. Supp. 2d 569, 585 (E.D. Va. 2009) ("[A] more substantial relationship must exist between the armed conflict and the alleged conduct than the mere fact that the conduct occurred while an armed conflict was ongoing."). Plaintiffs must allege a

nexus between the AUC's alleged violence and the Colombian civil war. *See, e.g., In re XE Servs.,* 665 F. Supp. 2d at 585 ("[P]laintiffs must allege a nexus to the armed conflict in order to state a valid claim for war crimes under the ATS. . . . [P]laintiffs must allege that the conduct constituting war crimes occurred in the context of and in association with an ongoing armed conflict."); *Drummond II,* No. 09–1041, DE 43, Slip op. at 15 ("The initial question then is whether the murders alleged . . . occurred 'because of' or 'in the course of' the civil unrest in Colombia.").

The Court finds that Plaintiffs here have sufficiently alleged that the AUC committed the alleged violence *because of,* and not merely during, the civil war in Colombia. For instance, the complaints allege:

- All of the Plaintiffs' decedents were merely innocent civilians executed in the course of the conflict between the AUC and the FARC. . . . They were not merely incidental victims during a time of war; rather they were victims of the AUC's war strategies and goals.[41]

- [T]o undermine communities' and individuals' support for the guerillas, the AUC . . . adopted a strategy of terrorism, routinely engaging in death threats, extrajudicial killings, attacks on

[41] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶¶ 509–10 (filed Mar. 1, 2010).

civilian populations, torture, rape, kidnaping, forced disappearances, and looting. While the AUC periodically engaged in direct combat with armed guerrilla forces, the vast majority of its victims were civilians. The AUC claimed that it was justified in targeting civilians with no known ties to guerrillas because guerrilla groups required the logistical support of local towns in order to operate in the region. Carlos Castaño, the AUC leader, described this strategy as "quitarle agua al pez" (draining the water to catch the fish), as the AUC sought to intimidate and coerce civilians to prevent them from providing support to guerrillas.[42]

- The AUC and other paramilitaries were parties to this armed conflict that engaged in combat with guerrilla armies on behalf of the government; they committed the abuses against Plaintiffs and decedents as part of their prosecution of this conflict.[43]

- Decedents were not killed simply against the background of war; rather, the use of criminal violence and intimidation against civilians was part of the war strategy against the FARC agreed on by the AUC and the Colombian Government . . . . The AUC used extremely violent means to take back areas held by the FARC and employed tactics of violence and

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[42] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 30–31 (filed Feb. 26, 2010).

[43] *Id.* ¶ 165.

terror to target civilians regardless of whether they were participants in the civil war, with the intention of discouraging civilians from supporting the leftist guerrillas. . . . Decedents were all members of particular social groups that were particularly targeted by the AUC as part of its war strategy. . . .[44]

- The extreme brutality practiced by the AUC that earned it the terrorist moniker by the U.S. Department of State was from the outset a planned strategy to effectively confront and defeat the FARC.[45]

- Plaintiffs' decedents . . . were victims of the campaign conducted against civilians by the AUC in an effort to discourage support of the FARC.[46]

- [T]he AUC pursued a scorched earth policy of first driving the FARC out and then brutally murdering and torturing people who lived in these areas and were assumed by the AUC to be sympathetic to the FARC.[47]

- The [AUC] intentionally and deliberately engaged in extra-judicial killings, massacres, rapes, kidnapings, forced disappearances, and

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[44] *Id.* ¶¶ 202–05.

[45] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶ 493 (filed Mar. 1, 2010).

[46] *Id.* ¶ 503.

[47] *Id.* ¶ 507.

forced displacements as a war strategy to ensure that civilians would never again join or support guerilla groups or causes.[48]

- Jane Doe 4 . . . was a civic and social activist. As a community activist, she was a member of one of the groups targeted by the AUC and the Colombian state in their war against the FARC and perceived FARC sympathizers. In 2004, AUC paramilitaries came to Jane Doe 4's house and executed her in the presence of her family.[49]

- Pablo Perez 4 was murdered on September 9, 2004, by AUC paramilitaries . . . in furtherance of the internal armed conflict. On September 9, 2004, Pablo Perez 4 was at a birthday party in the town of Guacamayal, in Zona Bananera, Magdalena, when two armed paramilitaries suddenly arrived on a motorcycle. The two paramilitaries approached Pablo Perez 4, and one of them pulled out a gun and shot the victim.[50]

- [I]n the early morning hours of November 1, 1997, a group of heavily armed paramilitaries dressed in camouflaged uniforms stormed

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[48] *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶ 295 (filed Apr. 14, 2010).

[49] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 146–47 (filed Feb. 26, 2010).

[50] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶ 202 (filed Mar. 1, 2010).

> Pablo Perez 50's home in the village of Guacamayal, in the banana zone of Magdalena, while he was sleeping. The paramilitaries broke down the door to the home, found Pablo Perez 50 and seized him, tied him up and forced him to accompany them at gunpoint, beating him as they kidnaped him. Pablo Perez 50's corpse was found the following morning with signs of torture and two gunshots, one to the head and one to the body. In a certificate issued on November 22, 1999, Elvis Emilio Redondo Lopez, the Cienaga Municipal Representative, confirmed that Pablo Perez 50 was murdered in a massacre carried out in the context of the internal armed conflict.[51]

- Pablo Perez 60 was kidnaped, tortured and murdered on June 17, 1999 by AUC paramilitaries . . . in furtherance of the internal armed conflict. At approximately 1:00 AM on June 17, 1999, Pablo Perez 60 was resting at his home in Apartado, Antioquia when a group of paramilitaries who had arrived in several vehicles stormed his home, kicked in his door, seized Pablo Perez 60, and beat him. The paramilitaries demanded to know where Pablo Perez 60 had weapons hidden. Finding no weapons, the paramilitaries kidnaped Pablo Perez 60 and took him to the village of Nueva Colonia. . . . There, the paramilitaries tortured Pablo Perez

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[51] *Id.* ¶ ¶ 296–97.

60 before executing him with several gunshots to the head and body.[52]

These allegations state that the AUC intended to torture and kill Plaintiffs' relatives for the purpose of furthering its military objectives in defeating its guerrilla enemies in the Colombian civil war, i.e., these crimes were committed *because* of the war. Furthermore, these allegations provide factual support linking the AUC's killing and torture, carried out in furtherance of its war against the FARC, to the Plaintiffs' relatives. These factual contentions sufficiently allege that the unrest in Colombia did not merely "provide[ ] the background for the unfortunate events hat unfolded," but that the "civil war . . . precipitate[d] the violence that befell plaintiffs."[53] *Sinaltrainal,* 578 F.3d at 1267.

c. Crimes Against Humanity

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[52] *Id.* ¶ 316.

[53] Chiquita notes that some complaints include allegations of offenses that were committed to settle personal grievances. Second Reply at 10–11 & n.7 (DE 333). While there are several stray allegations of victims killed in part for personal reasons, *e.g., Valencia v. Chiquita Brands Int'l, Inc.,* No. 08–cv–80508, DE 283, Second Am. Compl. ¶¶ 265–70 (filed Feb. 26, 2010), the complaints overwhelmingly assert allegations of crimes carried out in furtherance of the war. The Court notes, however, that any plaintiff whose relative was in fact killed solely for personal reasons cannot satisfy the elements of a war crimes claim under the ATS.

Chiquita first argues that a claim for crimes against humanity is not cognizable under the ATS. Chiquita contends that "under *Sosa*'s cautious approach," crimes against humanity is too ambiguous a norm to satisfy *Sosa*'s definiteness requirement for recognizing violations of the law of nations. First Mot. at 65 n.60 (DE 93); Second Mot. at 27 n.28 (DE 295). Chiquita does not cite any case law for this argument. Based on Eleventh Circuit, and other circuit, case law recognizing crimes against humanity as an actionable claim under the ATS, the Court rejects Chiquita's argument. *See Cabello,* 402 F.3d at 1161; *see also Sosa,* 542 U.S. at 762, (Breyer, J., concurring) ("Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes.") (internal citation omitted); *Talisman,* 582 F.3d at 256 ("Plaintiffs assert that Talisman aided and abetted (and conspired with) the Government in the commission of three violations of international law: genocide, war crimes, and crimes against humanity. All three torts may be asserted under the ATS."); *Sarei,* 487 F.3d at 1202 ("Plaintiffs here have alleged several claims asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination."); *Kadic,* 70 F.3d at 236 ("[W]e hold that subject-matter jurisdiction exists, [and] that Karadzic may be

found liable for genocide, war crimes, and crimes against humanity . . . ."); *Flores,* 414 F.3d at 244 n.18 ("Customary international law rules proscribing crimes against humanity . . . have been enforceable against individuals since World War II.").

Next, Chiquita argues that Plaintiffs have not sufficiently alleged that the AUC committed crimes against humanity. Crimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape or other inhumane acts committed as part of a widespread or systematic attack against a civilian population. *See, e.g., Cabello,* 402 F.3d at 1161; *Aldana,* 416 F.3d at 1247; *Talisman,* 582 F.3d at 257; *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006). A "widespread attack is one conducted on a large scale against many people, while a systematic attack is an organized effort to engage in violence." *Talisman,* 453 F. Supp. 2d at 670. Crimes against humanity require "proof of numerous attacks." *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 226 F.R.D. 456, 479 n.24 (S.D.N.Y. 2005).

Chiquita contends that crimes against humanity is not an exception to the state-action requirement, and that Plaintiffs' failed to adequately plead state action. The Court rejects the former part of this argument and therefore need not address the latter. While it is true that the Eleventh Circuit has never directly held that crimes against humanity are an exception to the

ATS's state-action requirement, it has never been presented with that issue. Courts that have addressed this issue hold that crimes-against-humanity claims under the ATS do not require state action. *See, e.g., Kadic,* 70 F.3d at 236 ("The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action . . . . [W]e hold that subject-matter jurisdiction exists [and] that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity . . . ."); *Drummond II,* No. 09–1041, DE 43, Slip op. at 17 (ruling that a claim for crimes against humanity does not require state-action allegations). Even if state action were required to state a claim for crimes against humanity, as discussed above Plaintiffs have sufficiently alleged that the AUC acted under color of law in attacking the civilian populations of the Uraba and Magdalena regions.

Chiquita next argues that Plaintiffs' allegations of crimes against humanity are conclusory and failed plead facts tying the alleged killings and injuries to a "widespread or systematic attack." Thus, Chiquita contends, Plaintiffs' allegations fail to meet *Iqbal*'s pleading requirements. *See Iqbal,* 129 S.Ct. at 1951 (explaining that conclusory allegations, devoid of factual support, are not entitled to the presumption

of truth on a motion to dismiss). The Court disagrees and finds that the complaints sufficiently allege facts of both widespread and systematic attacks by the AUC against civilians.

Although the Eleventh Circuit has not defined "widespread or systematic" attacks, several district courts have provided persuasive analyses on this requirement. The concept of "widespread" action has been defined as "'massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'" *Bowoto v. Chevron Crop.,* [*sic*] 2007 WL 2349343, No. 99–2506, at *3 (N.D. Cal. Aug. 14, 2007) (quoting *Prosecutor v. Akayesu,* Judgment, No. ICTR–96–4–T § 6.4. (Sept. 2, 1998)); *see also Talisman,* 453 F. Supp. 2d at 670 ("A widespread attack is one conducted on a large scale against many people."); *Drummond II,* No. 09–1041, DE 43, Slip op. at 17 (same). The term "systematic" refers to the "organized nature of the acts of violence and the improbability of their random occurrence." *Bowoto,* 2007 WL 2349343, at *3 (quoting *Prosecutor v. Blaskic,* No. IT–95–14–A, ¶ 101 (ICTY Appeals Chamber, July 29, 2004)). It "requires a high degree of orchestration and methodical planning." *Id.* (internal quotation marks omitted). The "widespread or systematic" requirement is disjunctive, not cumulative. *Id.*; *Drummond II,* No. 09–1041, DE 43, Slip op. at 17.

Here, Plaintiffs' allegations include:

- The conduct alleged in this complaint includes

willful killing, torture, and arbitrary arrest and detention, constituting 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.[54]

- [T]o undermine communities' and individuals' support for the guerillas, the AUC . . . adopted a strategy of terrorism, routinely engaging in death threats, extrajudicial killings, attacks on civilian populations, torture, rape, kidnaping, forced disappearances, and looting. While the AUC periodically engaged in direct combat with armed guerrilla forces, the vast majority of its victims were civilians.[55]

- The AUC, using tactics of terror on civilians living in and around areas that had been under FARC control, assumed that these innocents were sympathetic to the FARC and systematically murdered thousands of them. . . . The AUC killed thousands of civilians in Uraba and Magdalena. Their war strategy involved targeting civilians in towns near guerrilla groups in order to intimidate the population from providing any support to the guerrillas.[56]

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[54] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶ 566 (filed Mar. 1, 2010).

[55] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 30–31 (filed Feb. 26, 2010).

[56] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶¶ 567–68 (filed Mar. 1, 2010).

- Plaintiffs' decedents were not killed because they or anyone related to them had taken part in the hostilities in any way. Rather, they were victims of the campaign conducted against civilians by the AUC in an effort to discourage support of the FARC. The AUC, using tactics of terror on civilians living in and around areas that had been under FARC control, assumed that these innocents were sympathetic to the FARC and systematically murdered thousands of them.[57]

- The entire method of operation of the AUC was to direct their violence in a targeted way upon the civilian residents of towns where the FARC had a foothold. According to the U.S. Department of State, "paramilitary groups took the offensive against the guerillas, often perpetrating targeted killings, massacres, and forced displacements of the guerrillas' perceived or alleged civilian support base. . . . Throughout the country, paramilitary groups killed, tortured and threatened civilians suspected of sympathizing with guerillas in an orchestrated campaign to terrorize them into fleeing their homes, thereby depriving guerillas of civilian support."[58]

- At 1:00 AM on May 17, 2001, approximately 50 heavily armed paramilitaries, some

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[57] *Id.* ¶ 503.

[58] *Id.* ¶¶ 570–71 (internal quotation marks omitted).

wearing AUC uniforms, surrounded Pablo Perez 1's home, broke down the door, and proceeded to savagely beat members of his family. The paramilitaries attempted to rape Juana Perez 1, the petitioner, but were ordered to stop by an unidentified paramilitary leader. After an hour had passed, the paramilitaries took Pablo Perez 1 prisoner, taking him away with at least 10 other victims they had captured that night elsewhere. Pablo Perez 1 was never found.[59]

- The paramilitaries broke down the door to the home, found Pablo Perez 50 and seized him, tied him up and forced him to accompany them at gunpoint, beating him as they kidnaped him. Pablo Perez 50's corpse was found the following morning with signs of torture and two gunshots, one to the head and one to the body. In a certificate issued on November 22, 1999, Elvis Emilio Redondo Lopez, the Cienaga Municipal Representative, confirmed that Pablo Perez 50 was murdered in a massacre carried out in the context of the internal armed conflict.[60]

- In October 1997, members of the Army's 4th Brigade established a perimeter around the village of El Aro, in Antioquia. While the Army prevented entry and escape, members of the AUC entered the village and over a period of

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[59] *Id.* ¶ 196.

[60] *Id.* ¶¶ 296–97.

> five days executed at least eleven people, burned most of the houses, looted stores, and destroyed pipes that fed the homes potable water. Upon leaving the village, the paramilitaries forcibly disappeared over thirty more people and compelled most of the residents to flee.[61]

The allegations include the killing, torture, or disappearances of thousands of specific individuals, which establishes that the action was "widespread." The allegations also discuss the planning and organization that occurred before and during the attacks, which establishes that the action was "systematic." Additionally, the complaints provide detailed facts regarding the AUC's attacks, including the manner of attack, specific perpetrators, specific victims, locations, motivations underlying the attacks, and in many cases specific dates. Such detailed allegations, tying the victims' injuries to the AUC's attacks, are not conclusory.

These allegations are distinguishable from *Aldana,* upon which Chiquita relies, where the Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' crimes-against-humanity claims. There, the Eleventh Circuit first reasoned that "such crimes were not expressly plead in the complaint." 416 F.3d at 1247. Second, the court found that the requirement of a "widespread or

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[61] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 63 (filed Feb. 26, 2010).

systematic attack against civilian populations" was not alleged "in the complaint, but instead in Plaintiffs' appellate brief." *Id.* (internal quotation marks omitted). And third, the court found that the plaintiffs' "reliance—found exclusively in the appellate brief—on alleged systematic and widespread efforts against organized labor in Guatemala is too tenuous." *Id.* Here, by contrast, Plaintiffs' complaints provide detailed allegations of crimes against humanity that are sufficient to plead this cause of action. Moreover, Plaintiffs do not merely plead widespread and systematic "efforts" against a general class, such as "organized labor," but instead specifically allege widespread and systematic killing, torture, and disappearances against Plaintiffs' relatives. The three factors upon which *Aldana* relied are thus not present here.

Last, the Court notes that there is nothing inconsistent with Plaintiffs' allegations that, on the one hand, the AUC tortured and killed as part of their military campaign against the FARC and, on the other hand, intentionally attacked non-combatant civilians. The complaints allege that the AUC attacked civilians as a means of depriving the FARC of a civilian support base.[62] The civilians

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[62] *See, e.g., Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 30–31 (filed Feb. 26, 2010) ("[T]o undermine communities' and individuals' support for the guerillas, the AUC . . . adopted a strategy of terrorism, routinely engaging in death threats, extrajudicial killings, attacks on civilian populations, torture, rape, kidnaping, forced disappearances, and looting. . . . The AUC claimed that it was justified in targeting civilians with no known ties to guerrillas because guerrilla groups required the logistical

were targeted *as civilians,* not as participants in the civil war.

The Court finds that Plaintiffs have alleged detailed facts supporting the requisite elements of their crimes-against-humanity claims. As such, they have sufficiently alleged a primary crimes-against-humanity violation by the AUC.

2. Chiquita's Secondary Liability for the AUC's Offenses

While the complaints sufficiently allege international-law violations against the AUC, Chiquita's liability must rest on a well-pled theory of indirect liability.[63] The Court thus turns to whether the complaints adequately plead Chiquita's secondary liability. The Court must (1) determine whether Plaintiffs' various secondary-liability theories are recognized in the ATS context, and, if so, (2) determine the appropriate standards for these theories, and (3) assess whether the complaints allege sufficient facts to support these indirect-liability theories.

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support of local towns in order to operate in the region. Carlos Castano, the AUC leader, described this strategy as 'quitarle agua al pez' (draining the water to catch the fish), as the AUC sought to intimidate and coerce civilians to prevent them from providing support to guerrillas.").

[63] Aside from the claim for providing material support to a terrorist organization, there are no allegations that Chiquita directly engaged in the offenses alleged in the complaints.

a. Secondary Liability Under the Law of Nations

Chiquita first argues that Plaintiffs' indirect-liability theories are not recognized under international law. Plaintiffs' first theory for Chiquita's liability is that Chiquita's support to the AUC renders it liable for aiding and abetting the AUC's unlawful acts. While acknowledging that the Eleventh Circuit recognized aiding and abetting liability under the ATS in *Cabello v. Fernandez–Larios,* 402 F.3d 1148 (11th Cir. 2005) and *Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242 (11th Cir. 2005), Chiquita argues that these precedents do not support the broad aiding and abetting theory advanced by Plaintiffs here. The Eleventh Circuit, Chiquita argues, recognizes aiding and abetting liability under the ATS only for *specific* assistance in the commission of a *specific* tort. Chiquita contends that here, by contrast, Plaintiffs take the position that Chiquita's payments to the AUC for "any reason" render it liable for "any violent act committed by any member of the AUC . . . for any reason." First Mot. at 40 (DE 93). The Court disagrees with Chiquita's readings of both Eleventh Circuit precedent and Plaintiffs' allegations.

First, the Court does not interpret the Eleventh Circuit case law on this issue as imposing Chiquita's proposed limitation on aiding and abetting liability. In *Cabello,* the plaintiffs alleged that the defendant, a Chilean military officer in a unit responsible for killing political opponents,

assisted in killing the plaintiffs' relative, Mr. Cabello. 402 F.3d at 1152. The complaint alleged that the defendant and five other officers arrived at a military garrison and instructed local officers to provide them with prisoners' files from which the squad selected thirteen prisoners, including Mr. Cabello, for execution. *Id.* The complaint alleged that the squad then drove the prisoners ten minutes outside the garrison, ordered them out of the truck, and executed them. *Id.* Based on the defendant's involvement in locating and selecting the prisoners and his presence at the executions, the plaintiffs brought claims against him under the ATS and TVPA. With respect to the plaintiffs' indirect theories of liability, the court held that "by their terms, the ATCA and TVPA are not limited to claims of direct liability. The courts that have addressed the issue have held that the ATCA reaches conspiracies and accomplice liability." *Id.* at 1157.

In *Aldana,* the plaintiffs, Guatemalan labor unionists, alleged that the defendant, an American banana company operating in Guatemala, hired a private security force to quell union activity. 416 F.3d at 1245. The plaintiffs alleged that the defendant's agents met with the security force to plan "violent action against the Plaintiffs and other [union] leaders." *Id.* The security force arrived at the union's headquarters, held the plaintiffs hostage, and threatened to kill them. *Id.* The plaintiffs were then taken to a radio station to announce that their labor dispute was over and that they were resigning. *Id.* The plaintiffs were

released after eight hours and told that they would be killed if they did not leave Guatemala. *Id.* Based on these allegations, the plaintiffs sued the American company for violations of the ATS and TVPA under aiding and abetting and conspiracy theories of liability. In holding that the complaint adequately alleged torture claims based on secondary liability, the court reaffirmed the holding in *Cabello* that the "Alien Tort Act 'reaches conspiracies and accomplice liability.'" *Id.* at 1248 (quoting *Cabello* 402 F.3d at 1157).

Cabello and *Aldana* thus establish that aiding and abetting, or accomplice liability, is a recognized theory of indirect liability under the ATS. While these cases involve assistance by the defendants that is arguably more direct than that alleged here—for instance, the defendant in *Cabello* was personally present during the alleged unlawful acts—the Eleventh Circuit's holding in each case was not based on this direct assistance. Rather, *Aldana* and *Cabello* broadly held that conspiracy and accomplice liability are recognized theories for secondary liability under the ATS. Neither the specific holdings nor the underlying reasoning of these decisions discussed Chiquita's proposed specific-versus-general assistance distinction. Chiquita's argument seems to go more towards whether Plaintiffs have sufficiently pled facts supporting indirect liability, a subject addressed below, and not whether such a theory is recognized under the ATS.

In any event, as discussed in detail below,

Plaintiffs' amended allegations are not as far-reaching as Chiquita's original characterization. That is, Plaintiffs' amended allegations are based on payments made for *specific* purposes that render it liable only for *specific* violent acts committed for *specific* reasons. Thus, even accepting Chiquita's position that *Cabello* and *Aldana* recognize only indirect liability for specific assistance in the commission of a specific tort, Plaintiffs' amended allegations meet that standard.

Chiquita also suggests that the continuing viability of aiding and abetting claims under the ATS is questionable after *Sosa*. *See* First Mot. at 40 n.34 (DE 93) (citing, for example, *Doe I v. Exxon Mobil Corp.,* 393 F. Supp. 2d 20, 24 (D.D.C. 2005), which rejected aiding and abetting claims based on *Sosa'* s admonitions that "Congress should be deferred to with respect to innovative interpretations of the Alien Tort Statute" and that courts should be "mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe" (internal quotations marks omitted)). Although *Cabello* and *Aldana* were decided after *Sosa,* Chiquita argues that these decisions failed to consider *Sosa* in their discussion of aiding and abetting liability, relying instead on pre-*Sosa* case law. Accordingly, Chiquita contends that the precedential value of these decisions is questionable.

The Court finds this argument unavailing. While *Cabello* and *Aldana* did not cite *Sosa* in their indirect-liability discussions, the Eleventh Circuit was presumably aware of the Supreme Court's leading ATS decision and presumably reached these holdings in accordance with *Sosa*'s mandates. Indeed, the court cited *Sosa* throughout the *Aldana* opinion. Furthermore, more recent decisions from the Eleventh Circuit continue to hold that aiding and abetting is a recognized theory of indirect liability under the ATS. *See Sinaltrainal,* 578 F.3d at 1258 n.5 ("The ATS permits conspiracy and accomplice liability"); *Romero,* 552 F.3d at 1315 ("[T]he law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute"); *see also Talisman,* 582 F.3d at 259 (recognizing aiding and abetting liability for ATS claims); *Talisman,* 453 F. Supp. 2d at 668 ("Aiding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the ATS."). This Court cannot second guess the analyses underlying the Eleventh Circuit's binding precedent on this point. Under the law of this Circuit, aiding and abetting liability survives the limitations that *Sosa* placed upon ATS claims.

Plaintiffs' next theory of indirect liability is conspiracy. Chiquita argues that there is no universally accepted norm of conspiracy liability under international law and, consequently, Plaintiffs' conspiracy-liability claims are not cognizable under the ATS. As *Sinaltrainal, Aldana,*

and *Cabello* make clear, however, in the Eleventh Circuit conspiracy is a recognized theory of indirect liability for ATS claims. *See Sinaltrainal,* 578 F.3d at 1258 n.5 ("The ATS permits conspiracy and accomplice liability"); *Aldana,* 416 F.3d at 1248 ("The Alien Tort Act reaches conspiracies") (internal quotation marks omitted); *Cabello,* 402 F.3d at 1157 (same).

Chiquita contends, however, that after *Cabello* and *Aldana,* the Supreme Court, in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), explained that under international law, conspiracy liability is limited to conspiracies to commit genocide or wage aggressive war, categories that are not applicable here. *See Hamdan,* 548 U.S. at 610, ("[I]nternational sources confirm that the crime charged here [conspiracy] is not a recognized violation of the law of war. . . . And the only 'conspiracy' crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war . . . ."). This Court finds that the Supreme Court's statement in *Hamdan* is not applicable here.

First, the plurality in *Hamdan* addressed conspiracy as an inchoate offense, not as a theory of accessorial liability for the commission of *other* recognized offenses. *See id.* at 566–67, (explaining that Hamdan was charged with one count for "the crime of conspiracy"). Accordingly, *Hamdan's* statement limiting conspiracy (as an inchoate crime) to genocide and waging aggressive war is

inapplicable here where Plaintiffs' assert conspiracy as a theory of indirect liability.

Second, the *Hamdan* plurality's statement limiting conspiracy to two categories was based on the "law of war," not the law of nations. *See id.* ("[I]nternational sources confirm that the crime charged here [conspiracy] is not a recognized violation of the law of war."). The law of nations is a broader body of law. *See, e.g., Application of Yamashita,* 327 U.S. 1, 7, (1946) (referring to "the Law of Nations, of which the law of war is a part"); *al-Marri v. Pucciarelli,* 534 F.3d 213, 315 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part) ("The law of war represents a distinct canon of the Law of Nations.") (internal quotation marks omitted); *Khulumani,* 504 F.3d at 270 n.6 (Katzmann, J., concurring) ("The law of war has long been recognized as a subset of international law."). Thus, in limiting criminal conspiracy liability under the law of a war, *Hamdan* did not speak to conspiracy liability under the broader law of nations.

Last, the Eleventh Circuit has recognized, in decisions both before and after *Hamdan,* that conspiracy as a theory of accessorial liability under the ATS applies to claims beyond genocide and a common plan to wage aggressive war. *See Sinaltrainal,* 578 F.3d at 1258 & n.5 (holding that a conspiracy theory of indirect liability is applicable to torture claims); *Aldana,* 416 F.3d at 1247–48 (same); *Cabello,* 402 F.3d at 1151, 1157 (holding that a conspiracy theory of indirect liability is

applicable to claims for extrajudicial killing, torture, and crimes against humanity). This Court thus holds that under the law of this Circuit, conspiracy is a recognized theory of secondary liability under the ATS.

Plaintiffs also assert an agency theory for Chiquita's secondary liability, relying on domestic agency-law principles. Chiquita argues that agency liability is not recognized under international law. Neither side provides any authority directly recognizing or rejecting agency liability under international law. This alone suggests that there is no well-established international consensus for imposing secondary liability on entities whose agents violate international law, a fact that balances against recognizing agency liability under the ATS. *See, e.g., Talisman,* 582 F.3d at 259. However, because, as discussed below, the Court finds that Plaintiffs fail to allege facts supporting their proposed agency theory, the Court does not determine whether customary international law recognizes agency as a form of secondary liability.

b. Secondary–Liability Standards

The Court turns now to consider the appropriate standards for aiding and abetting and conspiracy liability. The parties primarily dispute the *mens rea* requirement for indirect liability and from which body of law to derive that requirement. Plaintiffs argue that federal common-law standards apply for aiding and abetting and conspiracy

liability under the ATS. Plaintiffs point to *Cabello,* in which the Eleventh Circuit recognized conspiracy liability under the ATS. *Cabello*'s conspiracy ruling, in turn, relied on *Halberstam v. Welch,* 705 F.2d 472, 481 (D.C. Cir. 1983), a decision setting forth the conspiracy standard in the domestic, federal common-law context. *See Cabello,* 402 F.3d at 1159 ("For the jury to find Fernandez indirectly liable by means of conspiracy, the Cabello survivors need to prove . . . (1) two or more persons agreed to commit a wrongful act, (2) Fernandez joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.") (citing *Halberstam,* 705 F.2d at 487); *see also Halberstam,* 705 F.2d at 487 (explaining, in a domestic civil action, the federal common-law standard for conspiracy). Plaintiffs contend that "[i]n adopting the federal common law of conspiracy, the Eleventh Circuit necessarily found that federal common law governs complicity liability," and there "is no basis to conclude the court would not also adopt the federal common law of aiding and abetting." Pls.' Second Resp. at 8 (DE 321). Plaintiffs conclude that the applicable standard from *Cabello* requires only knowing substantial assistance to the primary tortfeasor.

Chiquita argues that the standards for indirect liability under the ATS must be drawn from international, not federal, law. Chiquita relies

on the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244 (2d Cir. 2009), which held that *Sosa* directs courts to international law to determine standards for secondary liability. *Id.* at 259 ("*Sosa* and our precedents send us to international law to find the standard for accessorial liability."). *Talisman* rejected the plaintiffs' argument "that aiding and abetting liability is a matter ordinarily left to the forum country," explaining that "such an expansion would violate *Sosa'* s command that we limit liability to 'violations of . . . international law . . . with . . . definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted.' Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." *Id.* (quoting *Sosa,* 542 U.S. at 732) (alterations in original). The court then held that under customary international law, "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Id.*; *see also id.* ("Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.") (emphasis in original) (citations omitted). *Talisman* thus approved the two-part test set forth in a concurring opinion in *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254 (2d. Cir. 2007): a defendant may be liable for aiding and abetting an

international-law violation of another when "the defendant (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." *Talisman,* 582 F.3d at 258 (internal quotation marks omitted). The court similarly held that a conspiracy theory of secondary liability "require[s] the same proof of *mens rea* as . . . claims for aiding and abetting." *Id.* at 260. Thus, under *Talisman,* aiding and abetting and conspiracy theories of indirect liability for ATS claims are governed by international law's purpose standard. It is this purpose standard that Chiquita argues applies here.

First, this Court agrees with *Talisman,* as well as many other courts, that under *Sosa* the appropriate standard for secondary liability under the ATS should be derived from international law. *See Talisman,* 582 F.3d at 259; *see also Sosa,* 542 U.S. at 732 & n.20 (observing that "whether a norm is sufficiently definite to support a cause of action" under the ATS involves a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued"); *Khulumani,* 504 F.3d at 268–69 (Katzmann, J., concurring) ("The district court's conclusion that its jurisdiction under the ATCA should depend on whether international law specifically recognizes liability for aiding and abetting violations of the law of nations is consistent with our prior case law. We have repeatedly emphasized that the scope of the

ATCA's jurisdictional grant should be determined by reference to international law."); *id.* at 330–31 (Korman, J., concurring in part and dissenting in part) (agreeing with Judge Katzmann's conclusion that the standard for aiding and abetting liability under the ATS must derive from international law); *Abecassis,* 704 F. Supp. 2d at 654 ("*Sosa* establishes international law as the touchstone of the ATS analysis. . . . There is no reason to believe that international law determines whether private—as well as state—actors can be sued but not whether secondary—as well as primary—actors can be sued."); *Aziz v. Republic of Iraq,* No. 09–cv–00869, DE 51, Slip op. at 11 (D. Md. June 9, 2010) (adopting *Talisman's* international-law standard for aiding and abetting liability); *Drummond II,* No. 09–1041, Slip op. at 20–21 & n.21 (applying the international-law standard for aiding and abetting liability, reasoning that "*Sosa* supports the broader principle that the scope of liability for ATS violations should be derived from international law"); *Doe v. Drummond Co.,* No. 09–1041, Slip op. at 16, DE 37 (N.D. Ala. Nov. 9, 2009) ("*Drummond I* ") ("[T]he international law standard applies to aiding and abetting claims brought under the ATS.")[64]

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[64] Although *Cabello'* s discussion of the standard for conspiracy liability cited a case applying the federal-law standard, the appropriate body of law from which that standard must derive (federal versus international) was not considered, as that was not an issue on appeal. The issues on appeal were: (1) whether the claims were barred by the statute of limitations; (2) whether the TVPA or ATS provide private causes of action; (3) whether the defendant was liable under the TVPA or ATS where he did not have any command

In any event, there is no inconsistency between the standard set forth in *Cabello,* urged by Plaintiffs, and *Talisman*'s standard, urged by Chiquita. That is, *Cabello* and *Talisman* both use a *purpose* standard for secondary liability. While *Cabello* does not use the term "purpose," its standard requires that the defendant "join[ ] the conspiracy knowing of at least one of the goals of the conspiracy and *intending to help accomplish it.*" 402 F.3d at 1159 (emphasis added). The Court finds that this intent requirement is essentially the same as *Talisman'* s purpose requirement. Contrary to Plaintiffs' position, *Cabello* requires more than mere knowledge of the principal's unlawful goals. *Cabello,* like *Talisman,* requires that the defendant act with the *intention* of accomplishing the offense. Indeed, the court in *Talisman* specifically noted that its purpose standard was effectively the same as *Cabello'* s intent standard. *See Talisman,* 582 F.3d at 260 n.11 ("[P]laintiffs would fare no better if we adopted their preferred definition of conspiracy, because that definition (derived from domestic law) also requires proof 'that . . . [the

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responsibility and did not personally participate in the alleged offenses; and (4) whether the trial court erred in certain evidentiary rulings. *Cabello,* 402 F.3d at 1151–52. Because the Eleventh Circuit has not addressed the issue of which law to apply to indirect-liability standards under the ATS, this Court will adopt the Second Circuit's approach, which it reached after thoroughly analyzing this precise issue. This Court finds the Second Circuit's analysis persuasive and, importantly, as discussed below, the Second Circuit's approach is *not inconsistent* with the standard employed by the Eleventh Circuit in *Cabello.*

defendant] joined the conspiracy *knowing of at least one of the goals of the conspiracy and intending to help accomplish it.*'") (quoting *Cabello,* 402 F.3d at 1159) (emphasis in original).

In sum, the Court holds that in order for Plaintiffs to allege that Chiquita is secondarily liable for the AUC's violations of international law, they must allege that Chiquita assisted or conspired with the AUC with the purpose or intent to facilitate the commission of the specific offenses alleged. Thus, to plead aiding and abetting liability, Plaintiffs must allege that (1) the AUC committed an international-law violation, (2) Chiquita acted with the purpose or intent to assist in that violation, and (3) Chiquita's assistance substantially contributed to the AUC's commission of the violation.[65] *See Talisman,* 582 F.3d at 258;

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[65] The district courts in *Talisman* and *Drummond II* adopted this same purpose standard, but included the additional requirement that "the defendant knew of the specific violation." Because this Court believes that acting with purpose to assist in the specific violation encompasses knowledge of that violation, the Court does not include a knowledge element in the aiding and abetting standard employed here. Moreover, the purpose standard recognized by the Second Circuit in *Talisman* and in Judge Katzmann's opinion in *Khulumani* does not incorporate a knowledge element. *See Talisman,* 582 F.3d at 258 ("'[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (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.'") (quoting *Khulumani,* 504 F.3d at 277 (Katzmann, J., concurring)).

Khulumani, 504 F.3d at 277 (Katzmann, J., concurring); *Doe v. Nestle, S.A.,* 748 F. Supp. 2d 1057, 1087–88 (C.D. Cal.2010); *Talisman,* 453 F. Supp. 2d at 668; *Drummond II,* No. 09–1041, DE 43, Slip op. at 20–21. To plead conspiracy liability, Plaintiffs must allege that (1) Chiquita and the AUC agreed to commit a recognized international-law violation, (2) Chiquita joined the agreement with the purpose or intent to facilitate the commission of the violation, and (3) the AUC committed the violation. *Cabello,* 402 F.3d at 1159; *Drummond II,* No. 09–1041, DE 43, Slip op. at 29.

Having determined the proper standards to apply to Plaintiffs' secondary-liability claims, the Court now considers whether Plaintiffs have alleged sufficient facts to support the elements of their remaining ATS claims.

c. Aiding and Abetting Liability

With respect to the first element of aiding and abetting liability, as discussed above Plaintiffs have sufficiently alleged that the AUC committed primary international-law violations for torture, extrajudicial killing, war crimes, and crimes against humanity.

With respect to the second element, the *mens rea,* Chiquita attacks the sufficiency of Plaintiffs' allegations of its intent to assist the AUC. Chiquita contends that Plaintiffs' do not allege that it acted with the specific purpose to facilitate the AUC's

commission of torture, extrajudicial killing, war crimes, and crimes against humanity. To allege the *mens rea* element for aiding and abetting liability, Plaintiffs need not allege that Chiquita specifically intended that the AUC torture or kill the specific individuals alleged in the complaint, i.e., Plaintiffs' relatives specifically. *See Drummond II,* No. 09–1041, DE 43, Slip op. at 22 n.24 ("The court can find no authority for Defendants' contention that Drummond must have known of specific *identities* of those murdered, and have ordered the deaths of those specific individuals in order to potentially be held liable for aiding and abetting extrajudicial killings. . . . Without such authority, this court must conclude that, at this time, Plaintiffs have done enough to sufficiently allege aiding and abetting based upon their factual contention that Drummond purposefully participated in murders along its rail lines.") (emphasis in original). But Plaintiffs must allege more than the mere fact that Chiquita had knowledge that the AUC would commit such offenses. Plaintiffs must allege that Chiquita paid the AUC with the specific purpose that the AUC commit the international-law offenses alleged in the complaints. This requires that the complaints allege that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana-growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives.

The Court finds that, with one exception,[66]

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[66] The Carrizosa Plaintiffs' First Amended Complaint, No. 07–60821, DE 84, (filed Feb. 26, 2010) ("FAC") fails to allege

Plaintiffs' detailed and voluminous factual allegations meet this demanding pleading standard. For instance, the complaints allege:

- Chiquita supported terrorist groups in Colombia by paying them and assisting them to obtain arms and smuggle drugs. Chiquita knew that these groups used illegal violence against civilians and intended that they employ this strategy to quell social and labor unrest in the Northeast Colombian region of Uraba and safeguard the stability and profitability of Chiquita's enterprises in Colombia.[67]

- From on or about September 10, 2001, through on or about February 4, 2004, Chiquita made 50 payments to the AUC

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sufficient facts regarding Chiquita's purpose for assisting the AUC. The complaint's only allegations relating to Chiquita's *mens rea* refer to its knowledge, not purpose, *e.g.,* FAC ¶ 88, or are entirely conclusory, *e.g.,* FAC ¶¶ 93, 96. Accordingly, the Carrizosa Plaintiffs' complaint fails to plead that Chiquita is secondarily liable for the AUC's international-law violations, and therefore fails to plead an ATS claim against Chiquita.

Because this ruling in based on a pleading deficiency, the Court will permit the Carrizosa Plaintiffs leave to amend to allege sufficient facts, if they can do so in good faith, supporting their claim that Chiquita is secondarily liable for the AUC's violations of international law. The Carrizosa Plaintiffs may file a second amended complaint, if they choose, within thirty (30) days from the date of entry of this order.

[67] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 21 (filed Feb. 26, 2010).

totaling over $825,000. . . . Chiquita's acts of assistance to the AUC were made with the intent that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. In exchange for its financial support to the AUC, Chiquita was able to operate in an environment in which labor and community opposition was suppressed. Chiquita's assistance was not given out of duress; rather it was part and parcel of the company's proactive strategy to increase profitability and suppress labor unrest by exterminating the FARC in the Uraba region.[68]

- The arrangement between Chiquita and the AUC was not one of duress; in fact, it was the banana companies that approached the AUC to initiate their relationship. Mario Iguaran, the former Attorney–General of Colombia, has charged that there was a criminal relationship between Chiquita and the AUC in which Chiquita supplied money and arms to the AUC in return for the "bloody pacification of Uraba."[69]

- As part of its deal with Chiquita, the AUC provided protection services to banana

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[68] *Id.* ¶¶ 107, 111.

[69] *Id.* ¶ 114.

plantations, dealing out reprisals against real or suspected thieves, as well as against social undesirables, suspected guerrilla sympathizers or supporters, and anyone who was suspected of opposing the AUC's activities or social program. By arming and financing the AUC, Chiquita intended to benefit from the AUC's systematic killings of civilians. After its agreement with Chiquita, the AUC understood that one goal of its campaign of terror was to prevent work stoppages in the banana plantations. . . . For example, one individual who worked in Chiquita's offices at a plantation in Uraba was present when paramilitaries arrived at the plantation and summarily executed a banana worker who had been seen as a troublemaker because his slow work held up the production line.[70]

- Chiquita joined the conspiracy knowing that the AUC intended to fight the FARC by means of illegal violence against particular classes of civilians, and intending to help accomplish that goal. . . . Chiquita sought a meeting with the paramilitaries in late 1996 or early 1997 and concluded an agreement with the AUC whereby Chiquita paid the paramilitaries for their services supporting the banana plantations. These services consisted of threatening or killing civilians, including workers who attempted to strike,

[70] *Id.* ¶¶ 115–16.

union leaders, alleged criminals, and small banana farmers who refused to sell or abandon their land.[71]

- Chiquita intended that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. In providing the AUC with money and assistance with their arms and drug trafficking, Defendants intended that the AUC obtain arms and continue their practice of killing civilians, especially those civilians who were perceived as threats to the profitability of the banana industry. The leadership of the AUC did, in fact, carry out killings of union members, social organizers and other undesirable groups, as well as civilians with no known or suspected ties to the guerrillas, knowing that Chiquita expected and intended that they do so using the arms and money provided by Chiquita.[72]

- Chiquita authorized the AUC's strategy of killing, torture, and other illegal violence against civilians in Uraba. The AUC's agreement with Chiquita involved forcing people to work using threats and illegal violence, as well as the quelling of labor and

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[71] *Id.* ¶ 124.

[72] *Id.* ¶¶ 129–30.

social unrest through the systematic terrorization of the population of Uraba.[73]

- In late 1996 or early 1997, the Banadex general manager, and another Chiquita employee from Colombia, participated in a meeting of banana growers to discuss security issues arising from leftist guerilla activity in the Santa Marta and Uraba regions. The meeting was also attended by Carlos Castano, the leader of the AUC. . . . Castano asked Chiquita to support the AUC in its War effort against the leftist guerillas in two ways. First, Castano asked Chiquita to stop making payments to the leftist guerillas. Second, Castano asked Chiquita to begin paying the AUC. Castano informed Chiquita's executives that the AUC would use money it received from Chiquita to finance Paramilitary Terrorism Tactics that would be used to drive the leftist guerillas out of the Santa Marta and Uraba banana-growing regions; protect the company, its executives, employees, and infrastructure from future attacks by leftist guerillas; and create a business and work environment that would enable Chiquita's Colombian banana-growing operations to thrive. . . . Following the Castano Meeting, Chiquita knowingly and intentionally provided practical assistance and material support to enable the AUC to use Paramilitary Terrorism

[73] *Id.* ¶ 132.

> Tactics for the purpose of [1] driving leftist guerillas out of the Santa Marta and Uraba banana regions; [2] maintaining control over the banana-growing regions; and [3] creating an environment where the company's banana-growing operations could prosper. According to information developed by the Attorney General for the Republic of Colombia, the agreement between Chiquita and the AUC constituted a "criminal relationship" to bring about the "bloody pacification" of the banana–growing regions.[74]

- According to Mangones [an AUC leader in the banana-growing region], during the period of time Chiquita made payments to the AUC, the AUC killed many civilians in the Santa Marta region as part of what the AUC "had to do in order to win" the War against the leftist guerillas. Among those killed by the AUC were some individuals targeted for assassination by Chiquita executives in Colombia.[75]

- Chiquita made the payments to the AUC for the purpose of facilitating the AUC's ability to combat the leftist guerillas and employ the Paramilitary Terrorism Tactics for which it had become notorious, including massacres,

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[74] *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶¶ 388, 391–92, 395–96 (filed Apr. 14, 2010).

[75] *Id.* ¶ 423.

extra-judicial killings, forced disappearances, torture, and forced displacements of civilians accused of being leftist guerillas and their sympathizers or supporters.[76]

- Chiquita also used the AUC to resolve complaints and problems with banana workers and labor unions. Among other things, when individual banana workers became "security problems," Chiquita notified the AUC, which responded to the company's instructions by executing the individual. According to AUC leaders, a large number of people were executed on Chiquita's instructions in the Santa Marta region.[77]

These detailed factual allegations are neither "vague" nor "conclusory." *Sinaltrainal,* 578 F.3d at 1268. This factual content—including allegations of specific instances of assistance, tied to a specific purpose to further the AUC's "killing, torture, and other illegal violence against the civilian population of Uraba"[78]—distinguishes this case from *Sinaltrainal,* where the Eleventh Circuit rejected as "vague and conclusory" the plaintiffs' allegations of conspiracy liability, which were "based on information and belief" and "fail[ed] to provide any factual content" supporting an inference of the

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[76] *Id.* ¶ 424.

[77] *Id.* ¶ 448.

[78] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 129 (filed Feb. 26, 2010).

defendant's liability for the alleged conspiracy. *Id.* The complaints here contain sufficient "'factual content that allows the court to draw the reasonable inference'" that Chiquita assisted the AUC with the intent that the AUC commit torture and killing in the banana-growing regions. *Id.* (quoting *Iqbal,* 129 S. Ct. at 1949).

The Court finds that these detailed allegations sufficiently plead that Chiquita provided assistance to the AUC for the purpose of furthering the AUC's torture and extrajudicial killing in the banana-growing regions. *See Drummond II,* No. 09–1041, DE 43, Slip op. at 23 ("Plaintiffs' allegations go beyond merely asserting that Drummond had 'knowledge that such attacks had occurred and would likely occur again.' Now they have alleged that Drummond 'urged that such attacks be made.' Accordingly, the [extrajudicial-killings claims] survive the pending motion to dismiss.") (quoting *Talisman,* 453 F. Supp. 2d at 676).[79]

Chiquita argues that even if the allegations suffice to plead torture and extrajudicial killing,

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[79] Although all Plaintiffs allege that their relatives were killed by the AUC (either expressly or implicitly by forced disappearances), only some allege torture. *Compare Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–cv–80465, DE 58, First Am. Compl. ¶ 304 (filed Mar. 1, 2010), *with id.* ¶ ¶ 220–21. The Court's holding that Plaintiffs sufficiently allege torture claims applies only to those Plaintiffs who allege torture.

Plaintiffs' claims for aiding and abetting war crimes and crimes against humanity require additional allegations of Chiquita's intent. The Court agrees, but finds that the complaints sufficiently allege the required facts regarding Chiquita's purpose. Because a primary claim for war crimes under the ATS requires that the alleged offenses be carried out in furtherance of a conflict, an aiding and abetting theory of war crimes must allege that Chiquita shared the principal's same purpose, i.e., to torture and kill as a means to defeat militarily its enemy. Based on similar allegations, the court in *Drummond II* characterized this pleading element as requiring allegations that the defendant assisted the AUC for the purpose of advancing the AUC's interests over the FARC's in the conflict. *Drummond II,* No. 09–1041, DE 43, Slip op. at 24. That is, Plaintiffs must allege that the defendant "took a side" in the conflict. *Id.* at 28. The complaints adequately allege that Chiquita assisted the AUC not only with the intent that the AUC commit torture and killings, but for the specific purpose that the AUC commit such acts in the course of its efforts to defeat the FARC:

- Chiquita's acts of assistance to the AUC were made with the intent that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. . . . Chiquita's assistance was not given out of

duress; rather it was part and parcel of the company's proactive strategy to increase profitability and suppress labor unrest by exterminating the FARC in the Uraba region.[80]

- Chiquita intended that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers.[81]

- Chiquita joined the conspiracy knowing that the AUC intended to fight the FARC by means of illegal violence against particular classes of civilians, and intending to help accomplish that goal.[82]

- The manager of Chiquita's Colombia operations, Charles Kaiser, worked with the AUC to set up the *convivir* system to get funds to the AUC to defeat the FARC.[83]

- At the Castano Meeting, and at all relevant times thereafter, Chiquita took sides with the AUC in the War against the leftist

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[80] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 111 (filed Feb. 26, 2010).

[81] *Id.* ¶ 129.

[82] *Id.* ¶ 124.

[83] *Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–cv–80465, DE 58, First Am. Compl. ¶ 534 (filed Mar. 1, 2010).

guerillas and helped to finance and assist the AUC's efforts in that War.[84]

- Chiquita made the payments to the AUC for the purpose of facilitating the AUC's ability to combat the leftist guerillas and employ the Paramilitary Terrorism Tactics for which it had become notorious, including massacres, extra-judicial killings, forced disappearances, torture, and forced displacements of civilians accused of being leftist guerillas and their sympathizers or supporters.[85]

The fact that Chiquita may not have had a military objective of its own, or that it was motivated by financial gain, is not dispositive. A "lack of motive does not negate intent to assist the underlying acts that may be war crimes." *Drummond II,* No. 09–1041, DE 43, Slip op. at 25; *see also In re XE Servs.,* 665 F. Supp. 2d at 587 ("Defendants would require that the conduct allegedly constituting a war crime be committed in direct furtherance of a 'military objective.' Under this standard, an ATS action would not lie where defendants were motivated by ideology or the prospect of financial gain, as plaintiffs allege here. Indeed under defendants' proposed rule, it is arguable that nobody who receives a paycheck would ever be liable for war crimes."). The complaints' allegations that Chiquita assisted the

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[84] *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶ 393 (filed Apr. 14, 2010).

[85] *Id.* ¶ 424.

AUC with the intent that the AUC's interests were furthered over the FARCs in the Colombian civil war sufficiently allege the *mens rea* for aiding and abetting the AUC's war crimes, irrespective of the fact that the company may have chosen the AUC's side for financial, as opposed to military, reasons.

With respect to Chiquita's secondary liability for the AUC's crimes against humanity, Plaintiffs must allege that Chiquita not only intended for the AUC to torture and kill, but that Chiquita intended for the AUC to torture and kill *civilians*. The complaints contain such allegations:

- Chiquita knew that these groups used illegal violence against civilians and intended that they employ this strategy to quell social and labor unrest in the Northeast Colombian region of Uraba and safeguard the stability and profitability of Chiquita's enterprises in Colombia.[86]

- Chiquita intended that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. In providing the AUC with money . . . Defendants intended that the AUC obtain arms and continue their practice of killing civilians,

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[86] *Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 21 (filed Feb. 26, 2010).

> especially those civilians who were perceived as threats to the profitability of the banana industry.[87]

In sum, the Court finds that Plaintiffs' allegations of Chiquita's intent to further the AUC's torture and killing of civilians in the banana-growing regions of Colombia adequately plead the *mens rea* for aiding and abetting liability, particularly in light of the fact that questions of intent are factual inquiries not appropriate for resolution on a motion to dismiss. *See, e.g., Chanel, Inc. v. Italian Activewear of Fla. Inc.,* 931 F.2d 1472, 1476 (11th Cir. 1991) ("As a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial.").[88]

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[87] *Id.* ¶ 129.

[88] Chiquita's second motion argues briefly that Chiquita's intent cannot be inferred from any actions taken by Banadex, its wholly owned Colombian subsidiary. Second Mot. at 29 (DE 295). Chiquita relies on *Talisman*—a decision based on summary judgment, not the bare pleadings—which noted, without ruling on the issue, that the "attenuation between the plaintiffs' allegations and the named defendant . . . raises knotty issues concerning control, imputation, and veil piercing . . . ." 582 F.3d at 261. *Talisman* is inapposite. There, the defendant corporation owned an "indirect subsidiary" which in turn owned a 25% share in a third entity, which allegedly assisted the Sudanese government in ATS violations. *Id.* The remaining 75% of the third entity was further divided among three more corporate entities from China, Malaysia, and Sudan. *Id.* It was upon this chain of indirect and shared ownership that the Second Circuit noted concerns regarding attenuation between the allegations and the named defendant. Such attenuation is not a concern here,

Turning to the third and final element of aiding and abetting liability, Chiquita argues that the allegations do not establish that it provided "substantial assistance" to the AUC. This argument is unavailing. "[M]erely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law." *Nestle,* 748 F. Supp. 2d at 1099 (quoting *In re South African Apartheid Litig.,* 617 F. Supp. 2d at 269). However, if the defendant "engages in additional assistance beyond financing, or engages in financing that is gratuitous or unrelated to any commercial purpose, the *actus reus* element has been satisfied." *Id.* Here, Plaintiffs allege that Chiquita facilitated arms shipments for the AUC, including AK–47 rifles and ammunition used by AUC units carrying out attacks in Uraba.[89]

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where Plaintiffs allege that Banadex is Chiquita's wholly owned subs

[89] *E.g., Does 1–144 v. Chiquita Brands Int'l, Inc.,* No. 08–80465, DE 58, First Am. Compl. ¶¶ 478–86 (filed Mar. 1, 2010)

Chiquita contends that two public reports—one from the Organization of American States and another from the Colombian Prosecutor's Office—assign responsibility for this arms shipment to persons unrelated to Chiquita and therefore contradict these gun-shipment allegations. Without addressing whether it is appropriate to consider these foreign documents in ruling on a motion to dismiss, the Court finds that the reports are not inconsistent with Plaintiffs' allegations that Chiquita was involved in facilitating arms

Moreover, Plaintiffs allege that Chiquita paid the AUC nearly every month for approximately seven years.[90] Plaintiffs allege that these payments totaled over $1.7 million.[91] According to the allegations, these payments were not for ordinary commercial purposes, but were specifically intended to assist the AUC's military campaign against the FARC.[92] The Court finds that, at the motion-to-dismiss stage, these allegations of arms shipments and large and numerous payments to

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shipments. *See, e.g.,* Permanent Council, Organization of American States, *Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia,* at 17 (Jan. 29, 2003) (DE 93, Ex. B) ("What actually occurred at Turbo remains a mystery. . . . [A]ll that is known is that the guns somehow found their way to the AUC. This would have meant that someone in Colombia . . . was ultimately responsible for the illegal importation of the arms onto Colombian soil."). Moreover, the fact that investigations by a nongovernmental organization and a foreign prosecutor may have attributed responsibility to others does not preclude Plaintiffs from proving in these U.S. court proceedings that Chiquita or Banadex also played a role. Plaintiffs' allegations of gun-running are quite serious and they will need to prove these facts as this case proceeds, but at the motion-to-dismiss stage, the Court must accept these allegations as true.

[90] *E.g., Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶ 76 (filed Apr. 14, 2010).

[91] *Id.*

[92] *E.g., Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶¶ 107–11 (filed Feb. 26, 2010).

the AUC for use in its war against the FARC adequately allege that Chiquita substantially assisted the AUC's international-law violations committed in the course of its conflict with the FARC.

Plaintiffs' have thus sufficiently alleged aiding and abetting liability for their torture, extrajudicial-killing, war-crimes, and crimes-against-humanity ATS claims.

d. Conspiracy Liability

To plead conspiracy liability against Chiquita, Plaintiffs must allege that (1) Chiquita and the AUC agreed to commit a recognized international-law violation, (2) Chiquita joined the agreement with the purpose or intent to facilitate the commission of the violation, and (3) the AUC committed the violation. *Cabello,* 402 F.3d at 1159; *Drummond II,* No. 09–1041, DE 43, Slip op. at 29. As discussed above, the third element is satisfied here because the AUC committed primary violations of international law. With respect to the first element, Chiquita argues that Plaintiffs' factual allegations of an agreement are insufficient under *Iqbal* and *Sinaltrainal*'s pleading standards. Specifically, Chiquita cites the district court opinion in *Sinaltrainal,* 474 F. Supp. 2d at 1293–96, for its position that allegations of names, dates, locations and terms of a conspiracy are required to be pled with particularity to survive a motion to dismiss. Chiquita then contends that the complaints fail to plead facts supporting these

conspiracy elements. While the Eleventh Circuit's opinion in *Sinaltrainal* affirmed the district court's ruling that the plaintiffs' conspiracy allegations were insufficient, the Eleventh Circuit's decision was not premised on the lack of specificity in the allegations regarding these items. Rather, the court's holding was based upon the failure of the "plaintiffs' attenuated chain of conspiracy . . . to nudge their claims across the line from conceivable to plausible." *Sinaltrainal,* 578 F.3d at 1268. The court there found the conspiracy allegations insufficient because they rested on "unwarranted deductions of fact," failed to "provide any factual content," were "vague and conclusory," and failed to define "the scope of the conspiracy and its participants." *Id.*; *see also In re Chiquita Brands Int'l,* 690 F. Supp. 2d 1296, 1311 (S.D. Fla.2010). The Eleventh Circuit's opinion does not analyze the elements of a civil conspiracy claim, and there is no indication that it was retreating from or adding to *Cabello'* s articulation of the elements required to plead conspiracy under the ATS. In any event, as discussed in detail above, the allegations here are not "vague and conclusory," but instead provide facts regarding dates, attendees, and discussions of meetings between Chiquita and the AUC, as well as facts regarding the terms of the agreements reached.[93] The Court thus finds that Plaintiffs sufficiently allege an agreement between Chiquita and the AUC to commit the ATS claims alleged in

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[93] *See, e.g., Does 1–11 v. Chiquita Brands Int'l, Inc.,* No. 08–80421, DE 63, First Am. Compl. ¶ 124 (filed Feb. 26, 2010); *Montes v. Chiquita Brands Int'l, Inc.,* No. 10–60573, DE 1, Compl. ¶¶ 388–96 (filed Apr. 14, 2010).

the complaints.

Next, with respect to the intent element, Chiquita argues that the complaints fail to allege that Chiquita joined the agreement with the purpose or intent to facilitate the AUC's offenses. A conspiracy claim under the ATS requires the same *mens rea* allegations as aiding and abetting claims, i.e., a showing of purpose or intent, not merely knowledge. *Talisman,* 582 F.3d at 260; *Cabello,* 402 F.3d at 1159. Because the same standards govern both conspiracy and aiding and abetting theories of liability, and because the allegations here sufficiently allege that Chiquita acted with the purpose and intent to aid and abet the AUC's international-law violations, the Court concludes that the complaints also sufficiently allege that Chiquita conspired with the AUC with the requisite purpose and intent. *See Drummond II,* No. 09–1041, DE 43, Slip op. at 30 ("[B]ecause the same standards control on the issue of intent in the conspiracy context as apply in the area of aiding and abetting, and because Defendants have argued only that they did not have the requisite intent to meet those particular standards, the court concludes that the [ATS claims] may proceed on theories of conspiracy."). Plaintiffs have therefore adequately alleged conspiracy liability for their torture, extrajudicial-killing, war-crimes, and crimes-against-humanity ATS claims.

e. Agency Liability

Plaintiffs also assert an agency theory for

Chiquita's secondary liability. The Court rejects this ground for indirect liability under the ATS. First, Plaintiffs point to no authority recognizing agency liability under international law.[94] This alone suggests that there is no well-established international consensus for imposing secondary liability on entities whose agents violate international law. Without any authority recognizing this theory under international law, the Court cannot conclude that agency liability is

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[94] Plaintiffs' reliance on *Aldana* and *Cabello* is misplaced. Neither decision held that plaintiffs may plead an ATS case under an agency-liability theory. While the plaintiffs in *Aldana* alleged an agency relationship, the Eleventh Circuit did not address that issue and instead held only that accomplice and conspiracy were recognized theories of secondary liability. 416 F.3d at 1247–48. The *Cabello* opinion is also limited to accomplice and conspiracy liability, and in fact does not mention agency liability at all. 402 F.3d at 1157.

Plaintiffs' selective quotation from *Flores,* 414 F.3d at 251, is similarly misplaced. *Flores* quotes Article 38 of the International Court of Justice ("ICJ") Statute, which provides that the ICJ shall decide issues "in accordance with international law" and "shall apply . . . the general principles of law recognized by civilized nations" and "judicial decisions." *Id.* at 251. Plaintiffs seem to argue that this statement establishes that agency liability—a "general principle of law recognized by civilized nations," e.g., U.S. domestic law—is a recognized principle under international law. The Court disagrees. The ICJ Statute's general statement regarding the law to which that court looks cannot satisfy *Sosa'* s requirement that ATS standards be well-defined and universally accepted. Additionally, the issue of agency liability is entirely absent from the ICJ Statute, as well as from the *Flores* opinion.

sufficiently established or recognized to satisfy *Sosa*'s requirements for recognizing ATS liability.

Second, even assuming agency liability is recognized under international law, Plaintiffs' allegations do not satisfy the requisite elements of an agency relationship between Chiquita and the AUC concerning the AUC's alleged offenses. The parties agree that such a theory requires allegations that Chiquita exercised control over the AUC. *See* Pls.' Second Resp. at 13 (DE 321) ("Agency requires '(1) consent to the agency by both principal and agency; and (2) the control of the agent by the principal.'") (quoting *CFTC v. Gibraltar Monetary Corp.,* 575 F.3d 1180, 1189 (11th Cir.2009)). The complaints, however, fail to allege that the AUC acted under Chiquita's control when carrying out its campaign of torture and killing. The Court finds unavailing Plaintiffs' argument that "by trading payment for performance" Chiquita "exercised control over the AUC like any employer." Pls.' Second Resp. at 13 (DE 321). The mere fact that Chiquita paid the AUC, and allegedly shared the same goals as the AUC, falls short of alleging that Chiquita, an American corporation, controlled the military campaign of the AUC, a violent Colombian paramilitary group. There are no allegations that Chiquita directed the AUC's military strategy or tactics, directed any of the AUC's actions in the banana-growing region, or exercised any other direction over the AUC's decisions or conduct. Plaintiffs merely allege that Chiquita provided substantial support to the paramilitary group,

support that the AUC seems to have used as it deemed fit in its war with the FARC. The complaints thus fail to plead facts supporting the conclusion that Chiquita, as principal, "controlled" the AUC's violence, and Plaintiffs cannot survive a motion to dismiss based on vague and conclusory legal assertions that the AUC acted as Chiquita's "agent" or that the AUC acted under Chiquita's "control." *See Sinaltrainal,* 578 F.3d at 1268.

Last, the Court rejects Plaintiffs' alternative theory that Chiquita may be liable under agency principles for its after-the-fact ratification of the AUC's violence. Plaintiffs contend that Chiquita may be secondarily liable under this ratification theory if it "(1) knows of the unauthorized act carried out on [its] behalf and (2) affirms the act, including by failure to repudiate it." Pls.' Second Resp. at 13–14 (DE 321) (citing Restatement (Second) of Agency (1958) §§ 91 & 94). Regardless of whether Plaintiffs may plead this theory of secondary liability under domestic agency principles, the Court finds that such a theory is not cognizable under international law. Plaintiffs' proposed ratification standard requires a *mens rea* of mere knowledge and potentially no *actus reus,* as failure to act suffices. To hold that aiding and abetting and conspiracy liability under the ATS require allegations of purpose or intent and affirmative acts, but that agency liability may be established by a less-demanding knowledge-based ratification theory and no *actus reus* is inconsistent. More importantly, to permit Plaintiffs to plead an ATS claim so easily is at odds with *Sosa'* s directive

that court's exercise "great caution" before adding to the "narrow class" of recognized international-law norms. 542 U.S. at 728, 729; *see also Amergi,* 611 F.3d at 1364 ("[T]he ATS does not broadly provide for causes of action. The federal courts are empowered to open the door only 'to a narrow class' of claims.") (quoting *Aldana,* 416 F.3d at 1246–47); *id.* ("[T]he ATS cases have consistently emphasized the need for federal courts to guard carefully against the overexpansion of federal subject matter jurisdiction."). Accordingly, the Court finds that Plaintiffs cannot plead an agency theory of indirect liability under the ATS.

II. Torture Victim Protection Act

The Torture Victim Protection Act of 1991 ("TVPA") provides a cause of action for official torture and extrajudicial killing. In relevant part, the TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act of 1991 § 2(a), Pub.

L. No. 102–256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note). The TVPA defines torture as any act (1) "directed against an individual in the offender's custody or physical control," (2) that inflicts "severe pain or suffering [,] . . . whether physical or mental," (3) for the purpose of obtaining information or a confession, inflicting punishment, intimidation or coercion, or any reason based on discrimination of any kind. *Id.* § 3(b). Extrajudicial killing is defined as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* § 3(a)

Plaintiffs assert two causes of action under the TVPA, torture and extrajudicial killing. Plaintiffs' allegations of TVPA violations are based on the same operative facts underlying their ATS claims. *See Sinaltrainal,* 578 F.3d at 1269 ("It is not uncommon for plaintiffs to assert ATS and TVPA claims together," based on "the same operative facts"). Whereas a complaint that fails to sufficiently plead the elements of an ATS claim is analyzed under Rule 12(b)(1) for lack of subject-matter jurisdiction, a motion to dismiss a TVPA claim requires an inquiry under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Sinaltrainal,* 578 F.3d at 1269. To survive a motion to dismiss for failure to state a TVPA claim, "Plaintiffs must sufficiently allege (1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law and (2) the

Defendants, or their agents, conspired with [or aided and abetted] the state actors, or those acting under color of law, in carrying out the state-sponsored torture [or extrajudicial killing]." *Id.* at 1270.

Chiquita first argues that the "'plain reading of the TVPA strongly suggests that it only covers human beings, and not corporations.'" First Mot. at 68 (DE 93) (quoting *Exxon Mobil,* 393 F. Supp. 2d at 28). This limitation to individuals, Chiquita contends, bars Plaintiffs' TVPA claims against it, a corporation. Recent Eleventh Circuit precedents, however, hold that "'an individual' to whom liability may attach under the TVPA also includes a corporate defendant." *Sinaltrainal,* 578 F.3d at 1264 n.13; *see also Romero,* 552 F.3d at 1315 ("Under the law of this Circuit, the Torture Act allows suits against corporate defendants."). Thus, under the precedent of this Circuit, the Court rejects Chiquita's first basis for dismissal.

Chiquita's asserts two additional arguments: first, that Plaintiffs do not sufficiently allege that the AUC acted under color of law in committing torture and extrajudicial killing, and second, that Plaintiffs fail to plead aiding and abetting liability (i.e., *mens rea* and substantial assistance). In support of these arguments, which are identical to those advanced against Plaintiffs' torture and extrajudicial-killing claims under the ATS, Chiquita incorporates by reference its ATS arguments on these two points. For the same reasons that the Court rejected these same

arguments in the ATS context, discussed in detail above, these arguments fail against Plaintiffs' TVPA claims.[95] The Court thus finds that Plaintiffs' TVPA claims survive Chiquita's motion to dismiss.

III. State–Law Claims

Plaintiffs assert various common-law claims under the laws of Florida, New Jersey, Ohio, the District of Columbia, and in some cases the law of "any other applicable jurisdiction."[96] These claims include assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent hiring, negligence per se, and loss of consortium. The Court will dismiss these

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[95] The Court recognizes that the "TVPA differs from the ATS in certain crucial ways," *Baloco v. Drummond Co.,* No. 09-16216, Slip op. at 12 (11th Cir. May 20, 2011), and that ruling on ATS claims does not necessarily dispose of similar claims under the TVPA. Here, however, Chiquita's state-action and indirect-liability arguments are the same arguments, based on the same factual allegations and under the same legal standards, asserted against Plaintiffs' ATS claims. The Court rejected those arguments in the ATS context, finding that, with respect to state action, Plaintiffs alleged a "symbiotic relationship" between the AUC and Colombian government and that, with respect to aiding and abetting liability, Plaintiffs alleged that Chiquita possessed a purpose *mens rea* and provided substantial assistance to the AUC. These rulings, based on the same allegations and same legal standards, therefore dispose of Chiquita's identical arguments against Plaintiffs' TVPA claims

[96] *E.g., Carrizosa v. Chiquita Brands Int'l, Inc.,* No. 07–60821, DE 84, First. Am. Compl. ¶ 121 (filed Feb. 26, 2010).

claims because the civil tort laws of Florida, New Jersey, Ohio, and the District of Columbia do not apply to the extraterritorial conduct alleged here.

Under recognized principles of international law, a nation state "has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." Restatement (Third) of Foreign Relations Law of the United States § 402 (1987) ("Restatement of Foreign Relations Law"). Additionally, a nation state has jurisdiction to define and prescribe punishment for offenses "recognized by the community of nations as of universal concern . . ., even where none of the bases of jurisdiction indicated in § 402 is present." *Id.* § 404; *see also Basulto v. Cuba,* No. 02–21500, DE 39, Slip op. at 14 (S.D. Fla. Jan. 20, 2005). Similarly, the right of the several States of the United States to prescribe laws relative to such extraterritorial conduct is recognized under the same principles of international law, so long as the exercise of such jurisdiction does not violate constitutional limitations. Restatement of Foreign Relations Law § 402, Reporters' Note 5; cmt. k; *Basulto,* No. 02–21500, Slip op. at 15.

Plaintiffs' state-law claims are premised on acts by Colombian paramilitaries against Colombian civilians that occurred inside Colombia as part of Colombia's civil war. There are no allegations that this conduct had or was intended to have a substantial effect within the states of Florida, New Jersey, Ohio, or the District of

Columbia. Nor are the state-law claims alleged here—e.g., ordinary tort claims for assault and battery, negligence, wrongful death, etc.—matters of universal concern recognized by the community of nations. Accordingly, the Court holds that the civil tort laws of Florida, Ohio, New Jersey and the District of Columbia do not apply to the AUC's alleged torts against Plaintiffs' relatives. *See, e.g., Roe I v. Bridgestone Corp.,* 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (dismissing state-law claims because "[p]laintiffs have not yet articulated a viable basis for applying California law or Indiana law to the management of a Plantation in Liberia."); *Romero v. Drummond Co.,* No. 03–0575, DE 329, Slip op. at 2 (N.D. Ala. Mar. 5, 2007) ("[I]n view of Alabama's traditional refusal to apply its common law to torts where the injury occurred outside of the state, [the Court will] not apply Alabama common law to the tort claims alleged here, which occurred extraterritorially in Colombia."); *Basulto,* No. 02–21500, Slip op. at 15 (permitting a Florida citizen to assert a claim under Florida tort law where the alleged conduct had a "detrimental effect on its citizens after their return to the State").

The Montes Plaintiffs (Case No. 10–60573), who assert common-law claims under Ohio law, argue that the Ohio Revised Code expressly authorizes suits in Ohio courts by nonresident aliens. The Montes Plaintiffs point to Ohio's wrongful-death statute, which provides in relevant part:

> When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

Ohio Rev.Code. Ann. § 2125.01 (West 2011). The Montes Plaintiffs contend that under Section 2125.01 they can maintain their wrongful-death claim because "Colombia provides a right to maintain an action and recover damages for torts, including wrongful death" and "the relevant statutes of limitations have not yet expired under Colombian law." Montes Pls.' Second Resp. at 5 (DE 322). Recognizing the Montes Plaintiffs' wrongful-death claims, via Ohio's wrongful-death statute, would involve interpreting and ruling on complex and novel issues of Colombian common law—such as the elements of a Colombian wrongful-death claim and the applicable statutes of limitation—which, for the reasons discussed in the next section, this Court declines to do. That is, because the Court declines to exercise jurisdiction over Plaintiffs' Colombian-law claims, the Court will not hear those same claims under the guise of Ohio's wrongful-death statute.

Plaintiffs also contend that even if they

cannot directly assert these state-law claims, this Court can exercise supplemental jurisdiction over them based on the Court's jurisdiction under the ATS and TVPA. First, the previously stated basis for refusing to hear Plaintiffs' state-law claims is not based on a lack of subject-matter jurisdiction, but because those state laws do not cover Plaintiffs' claims. Thus, supplemental jurisdiction cannot save Plaintiffs' state-law claims.

In any event, the Court would decline to exercise supplemental jurisdiction. The "application of supplemental jurisdiction is statutorily controlled by 28 U.S.C. § 1367." *Amergi,* 611 F.3d at 1366. The statute permits the district courts to decline to exercise supplemental jurisdiction if, for example, "the claim raises a novel or complex issue of State law" or "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). This section "describes the occasions on which a federal court may exercise its *discretion* not to hear a supplemental claim or admit a supplemental party, despite the *power* of the court to hear such a claim." *Amergi,* 611 F.3d at 1366 (emphasis in original) (internal quotation marks omitted). The Court is unaware of any of these states' civil tort laws ever being applied to foreign conduct against foreign citizens in the course of a foreign war. Given the novelty and complexity of adjudicating claims under the laws of four U.S. states, and potentially *every* state,[97] based on wholly foreign conduct by

[97] *E.g., Carrizosa v. Chiquita Brands Int'l, Inc.,* No. 07–60821, DE 84, First. Am. Compl. ¶ 121 (filed Feb. 26, 2010)

foreign tortfeasors against foreign victims, even if the Court could hear these claims it would exercise its discretion under 28 U.S.C. § 1367 to decline to supplemental jurisdiction.

IV. Colombia–Law Claims

Some Plaintiffs also assert claims under the laws of Colombia. These are the same common-law claims that these Plaintiffs assert under state laws, e.g., wrongful death, but the complaints assert that these claims also are actionable under Colombian law. Even if the Court were competent to interpret and rule upon a foreign nation's common law, the novel and complex issues inherent in such in endeavor balance against exercising supplemental jurisdiction. Accordingly, under 28 U.S.C. § 1367(a) the Court will decline to exercise supplemental jurisdiction over Plaintiffs' Colombian-law claims. *See Amergi,* 611 F.3d at 1366 (affirming district court's decision not to exercise supplemental jurisdiction over foreign-law claim based on "extraordinary inconvenience and expenditure of judicial resources involved in hearing the Israeli law wrongful death claim"); *Romero,* 552 F.3d at 1318 ("The conclusion of the district court that the claim [for wrongful death under Colombian law] raised complex issues is supported by the record, and the court was well within its discretion to decline jurisdiction over that claim."); *Drummond I,*

(alleging common-law claims "under the laws of the United States, Colombia or the common law of Ohio, New Jersey, Florida or any other applicable jurisdiction.").

No. 09–1041, Slip op. at 35 (declining to exercise supplemental jurisdiction over Colombian-law claim, reasoning that the "wrongful death claim raises a novel and complex issue under the law of Colombia. Those issues are sufficiently complex that it would be impossible for this court to navigate the Colombian law requisites for a wrongful death claim.") (citing 28 U.S.C. § 1367(c)(1)).

V. FARC Claims

The Perez Plaintiffs (Case No. 08–80465) assert claims based on Chiquita's alleged payments to *both* the AUC and the FARC.[98] Of Plaintiffs' remaining claims—torture and extrajudicial killing under the TVPA and torture, extrajudicial killing, war crimes, and crimes against humanity under the ATS—the Perez Plaintiffs concede that they cannot state a claim for torture or extrajudicial killings under either the TVPA or ATS because they do not allege that the FARC, a guerrilla group that opposes the Colombian government, acted under color of law. Perez Pls.' First Resp. at 32 (DE 119, Ex. 1). The Perez Plaintiffs further concede that they cannot state a claim under a conspiracy theory of secondary liability because they do not allege any meetings or agreements between the FARC and Chiquita. Perez Pls.' First Resp. at 32 (DE 119, Ex. 1). The Court therefore addresses only whether the Perez Plaintiffs' complaint sufficiently

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[98] *Perezes (1–95) v. Chiquita Brands Int'l, Inc.,* No. 08–cv–80465, DE 58, First Am. Compl. ¶ 5 (filed Mar. 1, 2010).

alleges ATS claims against Chiquita for war crimes and crimes against humanity under an aiding and abetting theory of liability.

To plead aiding and abetting liability under the applicable international standard, Plaintiffs must allege that (1) the FARC committed an international-law violation, (2) Chiquita acted with the purpose or intent to assist in that violation, and (3) Chiquita's assistance substantially contributed to the FARC's commission of the violation. *See Talisman,* 582 F.3d at 258; *Khulumani,* 504 F.3d at 277 (Katzmann, J., concurring); *Drummond II,* No. 09–1041, DE 43, Slip op. at 20–21. The Court concludes that this complaint fails to allege sufficient facts supporting the second and third elements for aiding and abetting liability.

First, the Perez Plaintiffs fail to allege that Chiquita paid the FARC with the purpose or intent to further the FARC's violence. Plaintiffs conclusorily allege that Chiquita supported the FARC, but fail to allege Chiquita's intent, if any, in doing so.[99] The complaint thus lacks facts supporting the conclusion that Chiquita acted with the purpose, as opposed to mere knowledge, to further the FARC's violence in the banana-growing

[99] The allegations regarding the FARC's victims repeat the same language throughout: "[W]hen Pablo Perez 83 was murdered, the FARC guerrillas were receiving substantial from Chiquita. Pablo Perez 83 was one of the innocent victims of the violence that ensued when Chiquita brought and provided support to the guerrillas in the banana zone and surrounding areas of Magdalena." *Id.* ¶ 367.

regions. Indeed, the complaint itself argues that the FARC allegations meet the lesser knowledge standard, and argues only that the AUC allegations meet the purpose standard.[100]

Second, the Perez Plaintiffs' allegations regarding Chiquita's assistance to the FARC are conclusory and devoid of any factual support. Plaintiffs assert that Chiquita made payments to the FARC, but they fail to allege any facts supporting this allegation, such as when these payments were made, the size, frequency, or form of the payments, how the FARC used the funds or whether the payments were related in any way to the offenses alleged in the complaint.[101] Without

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[100] *See id.* ¶ 513 ("[T]his Court held in the related case under the ATA [that] Chiquita's payments to the FARC with knowledge of the group's record of terrorism were 'well within the mainstream of aiding and abetting liability.' In this case, Plaintiffs who allege they were killed by the FARC when it was supported by Chiquita have the exact same claim as was found sufficient in the ATA case. And those alleging Chiquita aided and abetted the AUC have an even more compelling case as Chiquita not only provided knowing and substantial assistance to the AUC, but it did so with the shared purpose of defeating the FARC in the civil conflict and pacifying the local populations with terror.").

[101] *See, e.g., id.* ¶ 5 ("Some of the Plaintiffs allege herein that their decedents were killed by the FARC during the time Chiquita was providing substantial support to that terrorist organization."); *id.* ¶ 367 ("[W]hen Pablo Perez 83 was murdered, the FARC guerrillas were receiving substantial [assistance] from Chiquita. Pablo Perez 83 was one of the innocent victims of the violence that ensued when Chiquita brought and provided support to the guerrillas in the banana zone and surrounding areas of Magdalena."); *id.* ¶ 516 ("As Chiquita admitted in its criminal case, it provided substantial

any facts regarding the amount of payments or how the FARC used that support, this Court cannot conclude that Chiquita's alleged assistance substantially contributed to the FARC's international-law violations. The Perez Plaintiffs' conclusory allegations therefore fail to state a claim against Chiquita for aiding and abetting the FARC. *See Iqbal,* 129 S.Ct. at 1951 (explaining that conclusory allegations, devoid of factual support, are not entitled to the presumption of truth on a motion to dismiss); *Sinaltrainal,* 578 F.3d at 1268 (holding that the plaintiff "must plead factual content," not "vague and conclusory" assertions, to state a claim).

The Court rejects the Perez Plaintiffs' suggestion that this Court's February 4, 2010 order in a related case—finding that the plaintiffs sufficiently alleged that Chiquita aided and abetted the FARC (DE 278)—is controlling here.[102] The Court's February 4, 2010 order applied the *domestic* aiding and abetting standard (i.e., knowledge) to the plaintiffs' claims that arose under a different statute, the Antiterrorism Act, 18 U.S.C. § 2331 *et seq*. ("ATA"). That this Court found that a different complaint sufficiently alleged, under a less-demanding standard, that Chiquita knew of the FARC's violent aims when allegedly assisting it is not relevant to whether the Perez Plaintiffs sufficiently allege, under the

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funding to the FARC until Chiquita switched sides and funded the AUC to drive the FARC out of the banana areas of Colombia.").

[102] *Id.* ¶¶ 5, 513.

international purpose standard, that Chiquita assisted the FARC with the purpose to further the FARC's violence. Similarly, the Court's finding that the ATA plaintiffs sufficiently alleged that Chiquita substantially assisted the FARC is not dispositive here. The complaints at issue there alleged detailed facts regarding the specific amounts, frequency, and duration of Chiquita's payments, the terms of Chiquita and the FARC's agreements surrounding the payments, and included the additional allegations that Chiquita supplied the FARC with weapons, ammunition, and other non-monetary supplies. The Perez Plaintiffs do not allege such facts.

Thus, because the Perez Plaintiffs' complaint fails to allege that Chiquita's payments to the FARC substantially contributed to the FARC's violence or were intended to further that violence, the Perez Plaintiffs fail to sufficiently allege, under the applicable international-law standard, that Chiquita is secondarily liable for the FARC's alleged offenses. The Perez Plaintiffs' claims based on Chiquita's alleged payments to the FARC are dismissed.[103]

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[103] Because this ruling in [*sic*] based on a pleading deficiency, the Court will permit the Perez Plaintiffs leave to amend to allege sufficient facts, if they can do so in good faith, supporting their claim that Chiquita aided and abetted the FARC's violations of international law. The Perez Plaintiffs may file a second amended complaint, if they choose, within thirty (30) days from the date of entry of this order.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Chiquita's Motions to Dismiss Amended Complaints (DEs 92, 295) are GRANTED IN PART AND DENIED IN PART. Specifically, Chiquita's motions to dismiss are GRANTED with respect to Plaintiffs' ATS claims for terrorism and material support to terrorist organizations. Chiquita's motions to dismiss are GRANTED with respect to Plaintiffs' ATS claims for cruel, inhuman, or degrading treatment; violation of the rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of gross violations of human rights. Chiquita's motions to dismiss are GRANTED with respect to Plaintiffs' state-law claims. Chiquita's motions to dismiss are GRANTED with respect to Plaintiffs' Colombia-law claims. Chiquita's motions to dismiss are GRANTED with respect to the Perez Plaintiffs' FARC-based claims.

Chiquita's motions to dismiss are DENIED with respect to Plaintiffs' ATS claims for torture, extrajudicial killing, war crimes, and crimes against humanity. Chiquita's motions to dismiss are DENIED with respect to Plaintiffs' TVPA claims for torture and extrajudicial killing.

The Carrizosa and Perez Plaintiffs are hereby granted leave to amend their complaints, consistent with the directives of this order. They may file their amended complaints, if they choose, within thirty (30) days from the date of entry of

this order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 3rd day of June, 2011.

s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

Case: 12-14898 Date Filed: 10/02/2014

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14898-BB

D.C. Docket No. 0:08-md-01916-KAM

LILIANA MARIA CARDONA,
JOHN DOE,
ANGELA MARIA HENAO MONTES, et al.,

Plaintiffs – Appellees
Cross Appellants,

ADANOLIS PARDO LORA,
AIDEE MORENO VALENCIA,
ALBINIA DELGADO, et al.,

Plaintiffs – Appellees,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC,
a Delaware corporation,

Defendants – Appellants

Cross Appellees,

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, FAY AND SENTELLE*,
Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing (ADANOLIS PARDO LORA et al.,) are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Beverly B. Martin

UNITED STATES CIRCUIT JUDGE

ORD-42

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CRIMINAL NO.: 07-055
	:	FILED
v.	:	MAR 19 2007
	:	NANCY MAYER WHITTINGTON, CLERK U.S. DISTRICT COURT
CHIQUITA BRANDS INTERNATIONAL, INC.,	:	
Defendant.	:	

Let this be filed.
Royce C. Lamberth
U.S.D.J. 03/19/07

FACTUAL PROFFER

Had this case gone to trial, the government would have proven beyond a reasonable doubt that:

Defendant Chiquita Brands International, Inc.

1. Defendant **CHIQUITA BRANDS INTERNATIONAL, INC. ("CHIQUITA")**, was a multinational corporation, incorporated in New Jersey and headquartered in Cincinnati, Ohio. Defendant **CHIQUITA** engaged in the business of producing, marketing, and distributing bananas and other fresh produce. Defendant **CHIQUITA** was one of the largest banana producers in the world

and a major supplier of bananas throughout Europe and North America, including within the District of Columbia. Defendant **CHIQUITA** reported over $2.6 billion in revenue for calendar year 2003. Defendant **CHIQUITA** had operations throughout the world, including in the Republic of Colombia.

2. C.I. Bananos de Exportación, S.A. (also known as and referred to hereinafter as "Banadex"), was defendant **CHIQUITA'S** wholly-owned Colombian subsidiary. Banadex produced bananas in the Urabá and Santa Marta regions of Colombia. By 2003, Banadex was defendant **CHIQUITA'S** most profitable banana-producing operation. In June 2004, defendant **CHIQUITA** sold Banadex.

The AUC

3. The United Self-Defense Forces of Colombia - an English translation of the Spanish name of the group, "Autodefensas Unidas de Colombia" (commonly known as and referred to hereinafter as the "AUC"), was a violent, right-wing organization in the Republic of Colombia. The AUC was formed in or about April 1997 to organize loosely-affiliated illegal paramilitary groups that had emerged in Colombia to retaliate against left-wing guerillas fighting the Colombian government. The AUC's activities varied from assassinating suspected guerilla supporters to engaging guerrilla combat units. The AUC also engaged in other illegal activities, including the kidnapping and murder of civilians.

4. Pursuant to Title 8, United States Code, Section 1189, the Secretary of State of the United States had the authority to designate a foreign organization as a Foreign Terrorist Organization ("FTO") if the organization engaged in terrorist activity threatening the national security of the United States.

5. The Secretary of State of the United States designated the AUC as an FTO, initially on September 10, 2001, and again on September 10, 2003. As a result of the FTO designation, since September 10, 2001, it has been a crime for any United States person, among other things, knowingly to provide material support and resources, including currency and monetary instruments, to the AUC.

6. The International Emergency Economic Powers Act, 50 U.S.C. § 1701, *et seq.,* conferred upon the President of the United States the authority to deal with threats to the national security, foreign policy and economy of the United States. On September 23, 2001, pursuant to this authority, President George W. Bush issued Executive Order 13224. This Executive Order prohibited, among other things, any United States person from engaging in transactions with any foreign organization or individual determined by the Secretary of State of the United States, in consultation with the Secretary of the Treasury of the United States and the Attorney General of the United States, to have committed, or posed a significant risk of committing, acts of terrorism that threaten the security of United States

nationals or the national security, foreign policy or economy of the United States (referred to hereinafter as a "Specially-Designated Global Terrorist" or "SDGT"). This prohibition included the making of any contribution of funds to or for the benefit of an SDGT, without having first obtained a license or other authorization from the United States government.

7. The Secretary of the Treasury promulgated the Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.201, *et seq.*, implementing the sanctions imposed by Executive Order 13224. The United States Department of the Treasury's Office of Foreign Assets Control ("OFAC"), located in the District of Columbia, was the entity empowered to authorize transactions with an SDGT. Such authorization, if granted, would have been in the form of a license.

8. Pursuant to Executive Order 13224, the Secretary of State of the United States, in consultation with the Secretary of the Treasury of the United States and the Attorney General of the United States, designated the AUC as a Specially-Designated Global Terrorist on October 31, 2001. As a result of the SDGT designation, since October 31, 2001, it has been a crime for any United States person, among other things, willfully to engage in transactions with the AUC, without having first obtained a license or other authorization from OFAC.

Relevant Persons

9. Individual A was a high-ranking officer of defendant **CHIQUITA.**

10. Individual B was a member of the Board of Directors of defendant **CHIQUITA** ("Board").

11. Individual C was a high-ranking officer of defendant **CHIQUITA.**

12. Individual D was a high-ranking officer of defendant **CHIQUITA.**

13. Individual E was a high-ranking officer of defendant **CHIQUITA.**

14. Individual F was a high-ranking officer of Banadex.

15. Individual G was an employee of Banadex.

16. Individual H was an employee of defendant **CHIQUITA.**

17. Individual I was an employee of defendant **CHIQUITA.**

18. Individual J was a high-ranking officer of defendant **CHIQUITA.**

Defendant Chiquita's Payments to the AUC

19. For over six years - from in or about 1997 through on or about February 4, 2004 - defendant **CHIQUITA,** through Banadex, paid money to the AUC in the two regions of Colombia where it had banana-producing operations: Urabá and Santa Marta. Defendant **CHIQUITA** paid the AUC, directly or indirectly, nearly every month. From in or about 1997 through on or about February 4, 2004, defendant **CHIQUITA** made over 100 payments to the AUC totaling over $1.7 million.

20. Defendant **CHIQUITA** had previously paid money to other terrorist organizations operating in Colombia, namely to the following violent, left-wing terrorist organizations: Revolutionary Armed Forces of Colombia-an English translation of the Spanish name of the group "Fuerzas Armadas Revolucionarias de Colombia" (commonly known as and referred to hereinafter as "the FARC"); and the National Liberation Army- an English translation of the Spanish name of the group "Ejercito de Liberación Nacional" (commonly known as and referred to hereinafter as "the ELN"). Defendant **CHIQUITA** made these earlier payments from in or about 1989 through in or about 1997, when the FARC and the ELN controlled areas where defendant **CHIQUITA** had its banana-producing operations. The FARC and the ELN were designated as FTOs in October 1997.

21. Defendant **CHIQUITA** began paying the AUC in Urabá following a meeting in or about 1997 between the then-leader of the AUC, Carlos

Castaño, and Banadex's then-General Manager. At the meeting Castaño informed the General Manager that the AUC was about to drive the FARC out of Urabá. Castaño also instructed the General Manager that defendant **CHIQUITA'S** subsidiary had to make payments to an intermediary known as a "convivir." Castaño sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property. Convivirs were private security companies licensed by the Colombian government to assist the local police and military in providing security. The AUC, however, used certain convivirs as fronts to collect money from businesses for use to support its illegal activities.

22. Defendant **CHIQUITA'S** payments to the AUC were reviewed and approved by senior executives of the corporation, to include high-ranking officers, directors, and employees. No later than in or about September 2000, defendant **CHIQUITA'S** senior executives knew that the corporation was paying the AUC and that the AUC was a violent, paramilitary organization hid by Carlos Castano. An in-house attorney for defendant **CHIQUITA** conducted an internal investigation into the payments and provided Individual C with a memorandum detailing that investigation. The results of that internal investigation were discussed at a meeting of the then-Audit Committee of the then-Board of Directors in defendant **CHIQUITA'S** Cincinnati headquarters in or about September 2000. Individual C, among others, attended this meeting.

23. For several years defendant **CHIQUITA** paid the AUC by check through various convivirs in both the Urabá and Santa Marta regions of Colombia. The checks were nearly always made out to the convivirs and were drawn from the Colombian bank accounts of defendant **CHIQUITA'S** subsidiary. No convivir ever provided defendant **CHIQUITA** or Banadex with any actual security services or actual security equipment in exchange for the payments, for example, security guards, security guard dogs, security patrols, security alarms, security fencing, or security training. Defendant **CHIQUITA** recorded these payments in its corporate books and records as "security payments" or payments for "security" or "security services."

24. In or about April 2002, defendant **CHIQUITA** seated a new Board of Directors and Audit Committee following defendant **CHIQUITA'S** emergence from bankruptcy.

25. Beginning in or about June 2002, defendant **CHIQUITA** began paying the AUC in the Santa Marta region of Colombia directly and in cash according to new procedures established by senior executives of defendant **CHIQUITA**. In or about March 2002, Individual C and others established new procedures regarding defendant **CHIQUITA'S** direct cash payments to the AUC. According to these new procedures:

(A) Individual F received a check that was made out to him personally and drawn from

one of the Colombian bank accounts of defendant **CHIQUITA'S** subsidiary. Individual F then endorsed the check. Either Individual F or Individual G cashed the check, and individual G hand delivered the cash directly to AUC personnel in Santa Marta.

(B) Banadex treated these direct cash payments to the AUC as payments to Individual F, recorded the withholding of the corresponding Colombian tax liability, reported the payments to Individual F as such to Colombian tax authorities, and paid Individual F's corresponding Colombian tax liability. This treatment of the payments made it appear that Individual F was being paid more money and thus increased the risk that Individual F would be a target for kidnapping or other physical harm if this became known.

(C) Individual F also maintained a private ledger of the payments, which did not reflect the ultimate and intended recipient of the payments. The private ledger only reflected the transfer of funds from Individual F to Individual G and not the direct cash payments to the AUC.

26. On or about April 23, 2002, at a meeting of the Audit Committee of the Board of Directors in defendant **CHIQUITA'S** Cincinnati headquarters, Individual C described the procedures referenced in Paragraph 25. Individual A, Individual B, and Individual E, among others, attended this meeting.

Designation of the AUC as a Foreign Terrorist Organization

27. The United States government designated the AUC as an FTO on September 10, 2001, and that designation was well-publicized in the American public media. The AUC's designation was first reported in the national press (for example, in the Wall Street Journal and the New York Times) on September 11, 2001. It was later reported in the local press in Cincinnati where defendant **CHIQUITA'S** headquarters were located—for example, in the Cincinnati Post on October 6, 2001, and in the Cincinnati Enquirer on October 17,2001. The AUC's designation was even more widely reported in the public media in Colombia, where defendant **CHIQUITA** had its substantial banana-producing operations.

28. Defendant **CHIQUITA** had information about the AUC's designation as an FTO specifically and global security threats generally through an Internet-based, password-protected subscription service that defendant **CHIQUITA** paid money to receive. On or about September 30, 2002, Individual H, from a computer within defendant **CHIQUITA'S** Cincinnati headquarters, accessed this service's "Colombia-Update page," which contained the following reporting on the AUC:

> "US terrorist designation
>
> International condemnation of AUC human rights abuses culminated in

> 2001 with the US State Department's decision to include the paramilitaries in its annual list of foreign terrorist organizations. This designation permits the US authorities to implement a range of measures against the AUC, including denying AUC members US entry visas; freezing AUC bank accounts in the US; and barring US companies from contact with the personnel accused of AUC connections."

Defendant Chiquita Continued to Pay the AUC after the AUC was Designated as an FTO.

29. From on or about September 10, 2001, through on or about February 4, 2004, defendant **CHIQUITA** made 50 payments to the AUC totaling over $825,000. Defendant **CHIQUITA** never applied for nor obtained any license from the Department of the Treasury's Office of Foreign Assets Control with respect to any of its payments to the AUC.

30. On or about September 12, 2001, Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $31,847.[1]

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[1] With respect to all statements in this Factual Proffer relating to payments by check, the "on or about" dates refer to

31. On or about November 14, 2001, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $56,292.

32. On or about December 12, 2001, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $26,644.

33. On or about February 4, 2002, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $30,079.

34. On or about March 7, 2002, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $25,977.

35. On or about March 31, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in two equal payments in amounts equivalent to $3,689 each.

36. On or about April 16, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $35,675.

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the dates on which such checks cleared the bank, not the dates on which the checks were issued or delivered.

37. On or about May 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $10,888.

38. On or about May 31, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in two equal payments in amounts equivalent to $3,595 each.

39. In or about June 2002, Individual F and Individual G began making direct cash payments to the AUC in the Santa Marta region of Colombia according to the procedures referenced in Paragraph 25.

40. On or about June 11, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in three payments in amounts equivalent to $4,764, $6,670, and $6,269, respectively.

41. On or about June 14, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $31,131.

42. On or about July 2, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $11,585.

43. On or about July 9, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,917.

44. On or about August 6, 2002, Individual F and Individual G paid the AUC in

Santa Marta in cash in an amount equivalent to $4,654.

45. On or about August 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $27,841.

46. On or about September 2, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $4,616.

47. On or about October 7, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $8,026.

48. On or about October 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $40,419.

49. On or about November 8, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,164.

50. On or about November 29, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,685.

51. On or about December 9, 2002, Individual F and Individual G paid the AUC in

Urabá by check in an amount equivalent to $47,424.

52. On or about January 21, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,954.

53. On or about January 27, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $22,336.

54. On or about February 11, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,291.

Defendant Chiquita Continued To Pay the AUC Against the Advice of Outside Counsel.

55. On or about February 20, 2003, Individual I stated to Individual C that Individual I had discovered that the AUC had been designated by the United States government as a Foreign Terrorist Organization. Shortly thereafter, Individual C and Individual I spoke with attorneys in the District of Columbia office of a national law firm ("outside counsel") about defendant **CHIQUITA'S** ongoing payments to the AUC.

56. Beginning on or about February 21, 2003, outside counsel advised defendant **CHIQUITA**, through Individual C and Individual I, that the payments were illegal under United

States law and that defendant **CHIQUITA** should immediately stop paying the AUC directly or indirectly. Among other things, outside counsel, in words and in substance, advised defendant **CHIQUITA**:

- "Must stop payments."
  (notes, dated February 21, 2003)

- "Bottom Line: CANNOT MAKE THE PAYMENT"
  "Advised NOT TO MAKE ALTERNATIVE PAYMENT through CONVIVIR"
  "General Rule: Cannot do indirectly what you cannot do directly"
  "Concluded with: CANNOT MAKE THE PAYMENT"
  (memo, dated February 26, 2003)

- "You voluntarily put yourself in this position. Duress defense can wear out through repetition. Buz [business] decision to stay in harm's way. Chiquita should leave Colombia."
  (notes, dated March 10, 2003)

- "[T]he company should not continue to make the Santa Marta payments, given the AUC's designation as a foreign terrorist organization[.]"

(memo, dated March 11, 2003)

- "[T]he company should not make the payment."
  (memo, dated March 27, 2003)

57. On or about February 27, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $17,434.

58. On or about March 27,2003, Individual F and Individual G paid the AUC in by check in an amount equivalent to $19,437.

59. On or about April 3, 2003, Individual B and Individual C first reported to the full Board of Directors of defendant **CHIQUITA** that defendant **CHIQUITA** was making payments to a designated Foreign Terrorist Organization. A member of defendant **CHIQUITA'S** Board of Directors objected to the payments and recommended that defendant **CHIQUITA** consider taking immediate corrective action, to include withdrawing from Colombia. The Board agreed to disclose promptly to the Department of Justice the fact that defendant **CHIQUITA** had been making payments to the AUC.

60. On or before April 4, 2003, according to outside counsel's notes concerning a conversation about defendant **CHIQUITA'S** payments to the AUC, Individual C said: "His and [Individual B's] opinion is just let them sue us, come after us. This is also [Individual A's] opinion."

61. On or about April 8, 2003, Individual C and Individual D met at defendant **CHIQUITA'S** headquarters in Cincinnati with Individual F, Individual G, Individual H, and Individual I. According to the contemporaneous account of this meeting, Individual C and Individual D instructed Individual F and Individual G to "continue making payments" to the AUC.

62. On or about April 24, 2003, Individual B and Individual C, along with outside counsel, met with officials of the United States Department of Justice, stated that defendant **CHIQUITA** had been making payments to the AUC for years, and represented that the payments had been made under threat of violence. Department of Justice officials told Individual B and Individual C that defendant **CHIQUITA'S** payments to the AUC were illegal and could not continue. Department of Justice officials acknowledged that the issue of continued payments was complicated.

63. On or about April 30, 2003, Individual B and Individual C told members of the Audit Committee of the Board of Directors and the outside auditors of defendant **CHIQUITA** about the meeting with Department of Justice officials on April 24, 2003. Individual B and Individual C said that the conclusion of the April 24th meeting was that there would be "no liability for past conduct" and that there had been "[n]o conclusion on continuing the payments."

64. On or about May 5, 2003, according to the contemporaneous account of this conversation, Individual I instructed Individual F and Individual J to "continue making payments" to the AUC.

65. On or about May 12, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,105.

66. On or about May 21, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $47,235.

67. On or about June 4, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,623.

68. On or about June 6, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in two payments in amounts equivalent to $6,229 and $5,764, respectively.

69. On or about July 14, 2003, Individual F .and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,139.

70. On or about July 24, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $35,136.

71. On or about August 8, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,822.

72. On or about August 25, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $12,850.

73. On or about September 1, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,963.

74. On or about September 8, 2003, outside counsel advised defendant **CHIQUITA** in writing, through Individual C and Individual I, that: "[Department of Justice] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments."

75. On or about October 6, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $18,249.

76. On or about October 6, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $9,439.

77. On or about 0ctober 24, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $30,511.

78. On or about November 5, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,937.

79. On or about December 1, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,337.

80. On or about December 2, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $30,193.

81. On or about December 4, 2003, Individual B and Individual C provided the Board of Directors additional details concerning defendant **CHIQUITA'S** payments to the AUC that had not previously been disclosed to the Board. A member of defendant **CHIQUITA'S** Board of Directors responded to this additional information by stating: "I reiterate my strong opinion - stronger now- to sell our operations in Colombia."

82. On or before December 4, 2003, defendant **CHIQUITA** created and maintained corporate books and records that did not identify the ultimate and intended recipient of the payments to the AUC in Urabá in calendar year 2003 as follows:

Reporting Period	Description of recipient	Description of payment

1st Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security services."
2nd Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security services."
3rd Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security services."

83. On or about December 16, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $24,584.

84. On or about December 22, 2003, Individual B sent an email to other Board members on the subject of defendant **CHIQUITA'S** ongoing payments to the AUC, stating, among other things: "This is not a management investigation. This is an audit committee investigation. It is an audit

committee investigation because we appear to [be] committing a felony."

85. On or about January 9, 2004, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $10,630.

86. On or about January 13, 2004, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $27,958.

87. On or about February 4, 2004, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $4,795.

Defendant Chiquita's Profits from its Colombian Banana-Producing Operations

88. According to defendant **CHIQUITA'S** records, from September 10, 2001, through in or about January 2004, defendant **CHIQUITA** earned no more than $49.4 million in profits from its Colombian banana-producing operations.

JEFFREY A. TAYLOR
United States Attorney
for the District of
Columbia
D.C. Bar No. 498610

By: s/ Jonathan M. Malis
Jonathan M. Malis
D.C. Bar No. 454548
Denise Cheung
D.C. BarNo. 451714
Assistant United States Attorneys
(202) 305-9665
Jonathan.M.Malis@usdoj.gov
Stephen Ponticiello
PA Bar No. 44119
Department of Justice
Trial Attorney
Counterterrorism Section

Dated: March 13, 2007

Defendant's Stipulation and Signature

I am the Chairman of the Board of Directors, President, and Chief Executive Officer of Chiquita Brands International, Inc. I am authorized by Chiquita Brands International, Inc., to act on its behalf in this matter.

On behalf of Chiquita Brands International, Inc., after consulting with its attorneys and pursuant to the plea agreement entered into this day with the United States, I hereby stipulate that the above statements of facts is true and accurate. I further stipulate that had the matter proceeded to trial, the United States

would have proved the same beyond a reasonable doubt.

Chiquita Brands
International, Inc.

03/12/2007 — s/ Fernando Aguirre
Date — By: Fernando Aguirre
Chairman of the Board of
Directors, President, and
Chief Executive Officer of
Chiquita Brands
International, Inc.

Attorney's Acknowledgment

I am counsel for Chiquita Brands International, Inc. I have carefully reviewed the above statement of facts with my client. To my knowledge, the decision to stipulate to these facts is an informed and voluntary one.

03-13-07 — s/ Eric H. Holder
Date — Eric H. Holder, Jr., Esq.
Counsel for Chiquita
Brands International,
Inc.

[p. 1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Government,	:	CR No. 07-55
	:	
v.	:	
	:	Washington, D.C.
CHIQUITA BRANDS INTERNATIONAL, INC.,	:	Monday, September 17, 2007
	:	
Defendant.	:	10:02 a.m.
	:	
- - - - - - - - - - - - - - - -	x	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE
ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: JONATHAN MARTIN MALIS, ESQUIRE
DENISE CHEUNG, ESQUIRE
U.S. ATTORNEY'S OFFICE
555 Fourth Street, N.W.
Washington, DC 20004
(202) 305-9665
(202) 307-6059 (fax)
(202) 307-2845

(202) 353-9415 (fax)
jonathan.m.malis@usdoj.gov
denise.cheung@usdoj.gov

STEPHEN PONTICIELLO, ESQUIRE
UNITED STATES DEPARTMENT OF JUSTICE
Counterterrorism Section
National Security Division
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
(202) 353-8782
(202) 307-0224 (fax)
Stephen.Ponticiello@usdoj.go

v

For the Defendant:

ERIC H. HOLDER, ESQUIRE
FUAD RANA, ESQUIRE
JENNY R. MOSIER, ESQUIRE
JAMES M. GARLAND, ESQUIRE
COVINGTON & BURLING
[p. 2]
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2494
(202) 662-6000/5372
(202) 778-5372 (fax)
eholder@cov.com
JAMES E. THOMPSON, ESQUIRE
GENERAL COUNSEL

CHIQUITA BRANDS
INTERNATIONAL, INC.

Court Reporter: THERESA M. SORENSEN,
CVR-CM
Official Court Reporter
U.S. Courthouse,
Room 4700-F
Washington, DC 20001

[p. 3]
PROCEEDINGS

THE DEPUTY CLERK: Criminal Case Number 07-55, United States of America versus Chiquita Brands International, Inc. Mr. Malis, Ms. Cheung, Mr. Ponticiello for the government. Mr. Holder, Mr. Garland, Mr. Rana, Ms. Mosier, Mr. Thompson for the defense. Ms. Panzer for the Probation Office.

THE COURT: Good morning, ladies and gentlemen. I take that there is no dispute over the presentence report, and we're ready to go forward to sentencing; is that correct.

MR. MALIS: That's correct, Your Honor.

MR. HOLDER: That's correct, Your Honor.

***** 3:14 – 6:4 omitted*****

[p.6] THE COURT: Okay. I'll hear the allocution, then, from the government first.

MR. MALIS: Thank you, Your Honor.

On March 19th of this year, the parties tendered to the Court the plea agreement that was reached between the United States of America and Chiquita Brands International, Inc., in the context of a lengthy criminal investigation

into payments that defendant Chiquita made to a federally-designated terrorist organization known as the AUC.

Pursuant to that agreement, defendant Chiquita agreed to plead guilty to a one-count criminal Information that charged the company with the felony of engaging in transactions with a specially-designed global terrorist. As a basis for its guilty plea, defendant Chiquita agreed to admit as true the facts set forth in the factual proffer subitted [*sic*] in support of the guilty plea. Defendant chiquita also agreed to cooperate in the on-going investigation. Pursuant to Federal Rule of Criminal Procedure 11 (c) (1) (C), the United States and defendant Chiquita agreed that, with the Court's approval, the company should be sentenced to a [p. 7] criminal fine of $25 million and corporate probation of five years.

At the plea hearing held on that day, defendant Chiquita admitted its guilt and pled guilty. The Court provisionally accepted the plea agreement at that time. The Court deferred final acceptance of the plea agreement until the date of the entencing [*sic*] hearing.

Pursuant to paragraph 8 of the plea agreement, the United States reserved its full right to allocute at sentencing. The United States wishes to allocute at this time about the conduct that defendant Chiquita has committed. The United States also wishes to address why the Court should accept the parties' plea agreement.

Turning first to the offense conduct. We are here today because defendant Chiquita, a major American multi-national corporation, has admitted to funding terrorists. This is not a corporate securities case or a corporate fraud case. This is a terrorist financing case.

For over six years, from sometime in 1997 through February 4, 2004, defendant Chiquita, through its wholly-owned Colombian subsidiary, paid money to a violent right-wing terrorist organization in the Republic of Colombia, known as the "Autodefensas Unidas de Colombia" or "AUC." The AUC was formed around April 1997 to organize loosely-affiliated illegal paramilitary groups that had [p. 8] emerged in Colombia to retaliate against left-wing guerillas fighting the Colombia government. Defendant Chiquita paid the AUC, directly or indirectly, nearly every month. From 1997 through February 4, 2004, defendant Chiquita made over 100 payments to the AUC, totaling over $1.7 million.

From around 1989 through 1997, defendant Chiquita paid money to two violent, left-wing terrorist organizations in Colombia, namely, the FARC and the ELN. The FARC and the ELN were federally-designated as foreign terrorist organizations in October 1997. There is no evidence that defendant Chiquita made any payments to the FARC or the ELN after those terrorist groups were designated as foreign terrorist organizations. Nevertheless, the FARC and the ELN were no less violent prior to their respective designations as foreign terrorist

organizations. Indeed, it was their violent conduct that led to those designations.

In total, defendant - -

THE COURT: But at the time of those payments, it would not have been illegal to make those payments to the FARC or ELN?

MR. MALIS: It would not have been illegal under the material support statute or the International Emergency Economic Power Act and the underlying regulations, that is correct, Your Honor.

In total, defendant Chiquita paid money to [p. 9] Colombia terrorists – the FARC, the ELN, and the AUC – for approximately fifteen years. These terrorist groups are responsible for an astonishing loss of life in Colombia. While their victims have primarily been Colombians, they have also included Americans.

Defendant Chiquita began paying the AUC sometime in 1997. There were numerous points in time when the company made the decision to continue to pay the AUC. We highlight here some of the significant ones.

Defendant Chiquita admitted to paying - - excuse me - - continued to pay the AUC even after the payments were brought directly to the attention of its senior executives during a board meeting held in September 2000. Defendant Chiquita continued to pay the AUC after the

United States designated the AUC as a foreign terrorist organization on September 10, 2001, and as a specially-designated global terrorist on October 30, 2001. The company, as a corporate entity, as distinct from any particular individual, had information about these federal designations in spades through the wide-spread reporting on it in the public media, both in the United States as well as in Colombia, which Chiquita had its substantial banana-producing operations.

Defendant Chiquita continued to pay the AUC even after an individual in its Cincinnati headquarters gained direct knowledge of the AUC's designation as a foreign [p. 10] terrorist organization in September 2002 through an Internet-based security information service. The company had subscribed to this service in order to receive just this sort of information about important developments in Colombia.

Defendant Chiquita continued to pya [*sic*] the AUC even after its outside counsel told the company plainly and directly, beginning in late February 2003, to stop the payments. Defendant Chiquita continued to pay the AUC after Department of Justice officials admonished the company on April 24, 2003 that the payments were illegal and could not continue. Defendant Chiquita continued to pay the AUC after the same outside counsel advised the company on September 8, 2003, that the Department of Justice had given no assurances that the company would avoid criminal charges for making the payments. Defendant Chiquita continued to pay the AUC even after one

of its directors acknowledged in an internal email, on December 22, 2003, that, quote, "we appear to be committing a felony," close quote.

By admitting to the facts in the factual proffer and pleading guilty to the crime charged in the criminal Information, Defendant Chiquita admits it committed a crime by continuing to pay the AUC after the AUC was federally designated a terrorist organization in the fall of 2001. Defendant Chiquita has accepted criminal responsibility for [p. 11] the decisions and actions of company officers, directors, and employees that led to these criminal payments. The conduct of these corporate actors is, of course, imputed to the company under law.

It is important to note, however, that not all of Defendant Chiquita's executives agreed with the company's course of action. There was dissent at the highest levels of the company about the decision to continue to pay a federally-designated foreign terrorist organization, and the decision to risk the coming of this day, Chiquita's felony conviction for funding terrorism.

To begin with, on March 10, 2003, Chiquita's outside counsel advised the company, through one of its senior officers, that Defendant Chiquita, quote, "should leave Colombia," close quote. Upon first learning of the payments at a board meeting on April 3, 2003, one director echoed outside counsel's advice. That director objected to the payments and recommended that Defendant Chiquita consider taking immediate corrective

action, to include withdrawing from Colombia. That same director later lodged an even stronger objection to the full board, saying, quote, "I reiterate my strong opinion – stronger now – to sell our operations in Colombia," close quote.

Moreover, within one month of his arrival as Defendant Chiquita's new chief executive officer, in January [p. 12] 2004, Fernando Aguirre decided that the payments had to stop. According to an internal e-mail, Mr. Aguirre stated, quote, "At the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country," close quote.

THE COURT: So that's the current management posture, consistent since 2004, it stopped, and nothing has happened since then?

MR. MALIS: That's the current chief executive officer, Your Honor.

THE COURT: That gives the Court some hope.

MR. MALIS: The United States filed a sentencing memorandum last week setting forth in greater detail the facts of this case. Defendant Chiquita filed a terse response to the government's sentencing memorandum. In it, Defendant Chiquita renewed its oft-repeated claim that the company was a victim here, a victim of extortion, and that the company only made these payments to protect its employees.

Defendant Chiquita fails to square its claimed victimhood with the facts. As a multi-national corporation, Defendant Chiquita was not forced to remain in Colombia for 15 years, all the while paying the three leading terrorist groups that were terrorizing the Colombian people. To quote the company's own outside counsel, and I quote, "You [p. 13] voluntarily put yourself in this position. The duress defense can wear out through repetition. It's a business decision to stay in harm's way. Chiquita should leave Colombia," close quote.

And it was good business for the company. Defendant Chiquita turned $49.4 million profit from its Colombia operations during the period while it was making the illegal payments to the AUC. To be clear, the time period I'm referring to is from the designation in September of 2001, through the end of January 2004. Defendant Chiquita's payments may have protected its workers while they were working on the company's profitable farms, but Defendant Chiquita's payments fueled the AUC's terrorist violence everywhere else.

We do not dispute that the company had no ideological affinity with these terrorists. Indeed, the fact that the company paid the left-wing groups, the FARC and the ELN first, and then later the right-wing group, the AUC, makes plain that this was not ideologically-driven support. But the law does not distinguish between malevolent donors and so-called benevolent donors, and that's because money is fungible.

Whatever Defendant Chiquita's claimed motivations, the company's money paid for the weapons and ammunition that the AUC used to kill innocent civilians, or it freed up [p. 14] other AUC money to do the very same thing. It just doesn't matter. Terrorism depends on a funding stream. Defendant Chiquita was a substantial funding stream for the AUC. The AUC was able to purchase a lot of weapons and ammunition with the $1.7 million that the company paid it over the years.

Defendant Chiquita suggests in its pleading that its conduct should only be examined from the moment in late February 2003 when certain of its senior executives learned that the AUC was a federally-designated foreign terrorist organization. That ignores the company's admission that it obtained information about the AUC's designation directly in September 2002 from the security information service. Moreover, by late February 2003, when Defendant Chiquita's outside counsel advised the company to stop the payments immediately in light of the AUC's designation as a foreign terrorist organization, the payments had already been reviewed and approved at the highest levels of the company for years. The fact of the initial AUC demand in 1997 and any perceived risk to the company's employees from doing business in Colombia were not new topics to Chiquita. The payments had been discussed repeatedly in Defendant Chiquita's Cincinnati headquarters, including among the new management and the new board that took over the company after it emerged

form bankruptcy in early 2002. The company [p. 15] had long since made the business judgment to remain in Colombia, to keep pay the AUC , to record the payments in the company's books and records without ever identifying that these were payments to the AUC, and not to report the payments to the pertinent United States authorities. In short, the only new information that certain executives obtained in late February 2003, was the fact that Defendant Chiquita's well-established relationship with the AUC threatened the company with a possible U.S. prosecution.

Defendant Chiquita also claims in its pleading that it sought guidance from the Department of Justice that it never received. Here also, Defendant Chiquita's pleading ignores the admitted facts. The Department of Justice told the Company's representatives on April 24, 2003 - - and here I'm quoting from the factual proffer signed by Mr. Holder and by Mr. Aguirre - - that the payments were, quote "illegal and could not continue," close quote. Whether Defendant Chiquita could conform its conduct with the law and continue to do business in Colombia, or whether Defendant Chiquita had to withdraw from Colombia was a decision for the company to make, not a decision for the Department of Justice. Defendant Chiquita received guidance from the Department of Justice. The guidance was that the company was breaking the law. It chose to ignore that guidance and continue to break the law. That's one of the reasons we are here today.

[p. 16] Defendant Chiquita seriously misjudged what it means to self disclose criminal conduct. Self-disclosure does not, in and of itself, shield a company from prosecution. The appropriate resolution of a self-disclosure case will depend on many factors, including the nature and circumstances of the reported activity and the company's efforts to correct it. But there should be no mistake about it – self-disclosure does not give the disclosing party license to continue to commit the crime, and that's what happened here.

Defendant Chiquita well understood that. The company's outside counsel made sure of it. On September 8, 2003, outside counsel advised the company in writing that it was acting at its peril and risked criminal prosecution for the continued payments. In a memorandum sent to the company, outside counsel wrote that the Department of Justice officials, quote, "have unwilling to give assurances or guarantees of non-prosecution," close quote.

One final point here about the offense conduct. The terrorism statutes do not distinguish among listed foreign terrorist organizations or specially-designated global terrorists as to their relative criminality or their relative threat to the national security interests of the United States. Our law criminalize payments to the ACU, just as they do payments to Hamas, Hizballah, and al-Qaeda. [p. 17] And, of course, it is no comfort to the victims of the AUC's violence that Defendant Chiquita paid a terrorist organization that may be

less well known that [*sic*] the others I've just named.

Turning to the plea agreement, Your Honor. Under the plea agreement, Defendant Chiquita is required to pay a $25 million criminal fine to the Court. The fine is to be paid in annual installments of $5 million plus post-judgment interest. It's our understanding that the company paid the first installment this morning.

The plea agreement also requires Defendant Chiquita to be placed on five years' probation. One of the required terms of probation is for the company to implement and maintain an effective compliance and ethics program to ensure that this criminal conduct never occurs again.

Defendant Chiquita was also required to provide cooperation to the United States in the on-going investigation into the criminal payments. The United States gave serious consideration to bringing additional charges in this case. Defendant Chiquita provided substantial cooperation post-plea in that regard. Indeed, the United States consider critical evidence and information that the company provided post-plea in making its determination not to bring additional charges in this matter. This substantial post-plea cooperation came on top of the [p. 18] company's significant pre-plea efforts to assist this investigation.

THE COURT: And I take it the company waived attorney/client privilege and did

other things that were helpful to the investigation of the individuals?

MR. MALIS: Let me answer the Court's question in this way, if I may.

THE COURT: Okay.

MR. MALIS: The plea agreement makes plain that the company waived attorney/client privilege and work product protection through the period March 2004, that is, covering the period while the company was making the payments.

THE COURT: Right.

MR. MALIS: I can address the Court and say that the company provided significant cooperation post-plea pursuant to that precise provision in the cooperation agreement.

THE COURT: And they get some credit for that.

MR. MALIS: Indeed, they do, and that's why we acknowledge that here today, and that's one of the factors that the government considered when ultimately striking this deal with the company.

Your Honor, the United States recommends that the Court accept the parties' plea agreement. Although [p. 19] important differences obviously remain between the United States and

Defendant Chiquita about how to view certain admitted facts, these differences should not deter the Court from approving the plea agreement. The company has admitted the facts in the factual proffer, and it has acknowledged that under those facts it has committed a very serious crime. We have a major American corporation admitting funding terrorism.

It is also important to note that many corporate cases end with a financial penalty, but without a criminal conviction. Many corporate cases are resolved with deferred prosecution agreements. The Court is not being asked to approve a deferred prosecution agreement. This agreement leaves the company with a criminal conviction, a very serious one, and with whatever collateral consequences that may case [*sic*].

The $25 million criminal fine represents a substantial penalty here. If accepted, it would be the largest financial penalty ever imposed under the Global terrorism sanctions regulations, the regulations at issue here.

Finally, Your Honor, this plea agreement brings to a close a lengthy criminal investigation that has lasted several years, and thoroughly probed conduct here and in Colombia. For all these reasons, the United States [p. 20] respectfully recommends that the Court approve the plea agreement and sentence Defendant Chiquita accordingly.

*****20:3 – 28:26 omitted*****

[p. 29] MR. MALIS: I am not going to respond to what I view as the ad hominine attacks on this prosecutor. I stand before the Court as a representative of the United States, and on behalf of the United States. The United States does not retract one word from its sentencing memorandum or the allocution that we provided to the Court this morning.

What I would like to simply remind counsel and the defendant, Chiquita, is that Chiquita did not make, one, or two, or three payments in response to a demand that was made in 1997. No doubt in 1977 this was a horrible situation for the company to face when the AUC said, "Pay this money or else." We don't shy away from that. That's part of the factual assertion, and the factual proffer, and in the criminal information.

What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. It did so knowing full well that while its farms may have been protected, and while its workers may have been protected while they literally were on those farms, Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms. A decision to engage in a course of conduct over years for an individual would fail to make out any duress claim or any extortion claim. For a multinational corporation with choices about where to do business in the world, which [p. 30] markets to enter, which markets to exit, as Chiquita did throughout this time period - -it made business choices about

withdrawing from Panama, for example, later purchasing farms in other countries, in other places in the world - - for this corporation to stand before the Court and say it had no choice but to be, quote, a "victim" of extortion for years while it reaped the profits of those Colombian operations, it does not stand any legitimate scrutiny. I understand that that's the company's position and it's the position the company has maintained from day one. It does not withstand any scrutiny.

Nevertheless, Your Honor, we believe that this plea agreement is in the best interest obviously of both parties or we wouldn't have a plea agreement, and we believe that the Court's acceptance of this plea agreement in entering judgment on Defendant Chiquita is the appropriate result here.

Thank you.

THE COURT: All right. Well, I will accept the parties' written plea agreement, and I will sentence Chiquita in accordance with the agreement. I agree with the parties, that the plea agreement is a fair resolution of the company's criminal culpability. It gives me some pause that no individuals are held accountable, but that's really beyond the matters that this Court can resolve. The Court [p. 31] resolves the question before it, which is the company's culpability for the crime.

Whether or not the characterization given by Mr. Holder, that it started as extortion

and remained extortion, is correct, the company admits and Mr. Holder admits it was criminal from the time that the statutes passed, and certainly the company acknowledges, once the terrorist organization went on the list in 2001 -- there's some dispute whether some people in the company knew in 2002, certainly they all knew by 2003, and they continued the payments. Clearly, the law makes the company liable criminally from that point.

I agree with Mr. Holder, that there is some risk associated with trial by jury to both sides. The risk to the company, obviously, is that I would impose, after the trial and conviction, a criminal fine of $98 million rather than $25 million. Obviously the risk to the United States is that a jury could decide that under these unique circumstances that a criminal conviction was not warranted. So as in all plea agreements, I suppose there is a compromise, and I find that the public interest supports settling this matter and putting it behind us with the company's admission that what it did was illegal. The company's cooperation in the investigation, which it clearly has done, and I have been impressed during the numerous [p. 32] chambers' conferences we've had with both Mr. Malis and Mr. Holder, in the cooperative way that this matter has proceeded to this date.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant corporation Chiquita Brands International, Incorporated, is hereby placed on probation for a period of five years. The corporation shall abide by the general conditions of

supervision adopted by the Probation Office and the following special conditions.

One, the corporation shall implement and maintain an effective compliance and ethics program that comports with the criteria set forth in U.S. Sentencing Guidelines, Section 8 (b) (2.1), including but not limited to:

A. Maintaining a permanent compliance and ethics office, and a permanent educational training program relating to federal laws governing payments to, transactions involving, and other dealings with individuals, entities, or countries designated by the United States Government as foreign terrorist organizations, specially-designated global terrorists, specially-designated narcotics traffickers, and/or countries supporting international terrorism, and any other such federally designated individuals, entities or countries.

B. Ensuring that a specific individual remains [p. 33] assigned with overall responsibility for the compliance and ethics program, and;

C. Ensuring that the specific individual reports directly to the chief executive officer and to the board of directors of Chiquita Brands International, Incorporated, no less frequently than on an annual basis on the effectiveness of the compliance and ethics program.

The second special condition is: The corporation shall provide the probation office with income tax returns, authorization for release of credit information, and any other business or financial information of which it has a control or interest.

It is ordered that the corporation pay a special assessment of $400, required to be imposed by statute, due immediately.

It is also ordered that the corporation pay a fine in the amount of $25 million on Count One. Payment of the fine shall be according to the following schedule: $5 million payable upon entry of judgment today; $5 million plus post-judgment interested computed pursuant to 18 U.S.C. Section 3612 (F) (2), payable on the anniversary date of the entry and judgment until the full judgment is satisfied.

The Probation Office Shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court.

[p. 34] The defendant has the right to appeal the sentence imposed by this Court. If the defendant chooses to appeal, the defendant must do so within 10 days after the Court enters judgment.

Anything further we need to do today, counsel?

MR. HOLDER: Nothing for the defense, Your Honor.

MR. MALIS: Nothing for the government. Thank You.

THE COURT: Thank you very much, counsel.

(Whereupon, the proceedings in the above-entitled matter were adjourned.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Theresa M. Sorensen, CVR-CM
Official Court Reporter