

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JANE / JOHN DOES 1-144,**

**Plaintiffs,**

**v.**

**CHIQUITA BRANDS INTERNATIONAL, INC.,  
and DAVID DOES 1-10,**

**Defendants.**

**No. 1:07-cv-01048-PLF**

**DEFENDANT'S MOTION TO DISMISS COMPLAINT**

Defendant Chiquita Brands International, Inc. hereby submits this motion to dismiss plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs, a group of Colombian nationals, seek to hold Chiquita responsible for the deaths of 173 Colombian nationals who were allegedly killed by left-wing guerillas and right-wing paramilitary groups in Colombia during a span of nearly 30 years. They assert claims under the 200 year-old Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, and District of Columbia tort law. The principal basis upon which plaintiffs allege that Chiquita should be adjudged liable for these deaths is that Chiquita's former Colombian subsidiary was forced to make extortion payments to the groups when they controlled the remote areas of Colombia in which Chiquita operated.

For the reasons stated in the accompanying memorandum in support of this motion, the claims asserted in the Complaint are deficient as a matter of law. Plaintiffs' ATS

and TVPA claims — which attempt through wholly conclusory and contradictory allegations to (a) transform murders by private armed groups into state-sanctioned executions or other purported international law violations, and then (b) make Chiquita into an accessory to these crimes solely because it provided a small fraction of the massive funds these organizations obtained through extortion, drug trafficking, kidnapping, and their other nefarious activities — do not come close to stating a cognizable claim over which the Court has jurisdiction. Plaintiffs' state law claims also fail because D.C. law does not apply to the conduct at issue here, and plaintiffs have not stated viable claims under D.C. law in any event. Chiquita therefore respectfully requests that the Court dismiss plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Counsel for Chiquita requests a hearing on this motion.

Respectfully submitted,

/s/ Eric H. Holder, Jr.

Eric H. Holder, Jr. (D.C. Bar No. 303115)  
John E. Hall (D.C. Bar No. 415364)  
James M. Garland (D.C. Bar No. 475509)  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401  
Telephone: (202) 662-6000  
Facsimile: (202) 662-6291

*Attorneys for Defendant  
Chiquita Brands International, Inc.*

Dated: December 10, 2007

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**v.**

**No. 1:07-cv-01048-PLF**

**CHIQUITA BRANDS INTERNATIONAL, INC.,  
and DAVID DOES 1-10.**

**Defendants.**

**DEFENDANT'S MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT**

Eric H. Holder, Jr. (D.C. Bar No. 303115)  
John E. Hall (D.C. Bar No. 415364)  
James M. Garland (D.C. Bar No. 475509)  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 662-5372 (telephone)  
(202) 778-5372 (facsimile)  
[eholder@cov.com](mailto:eholder@cov.com)

*Attorneys for Defendant Chiquita Brands  
International, Inc.*

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## INTRODUCTION

Asserting claims under the 200 year-old Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, and District of Columbia tort law, plaintiffs in this action seek to hold an American corporation, Chiquita Brands International, Inc. (“Chiquita”), responsible for the deaths of 173 Colombian citizens who were allegedly killed by left-wing guerillas and right-wing paramilitary groups in Colombia during a span of nearly 30 years. The principal basis upon which it is alleged that Chiquita should be adjudged liable for these deaths is that Chiquita’s Colombian subsidiary was forced to make extortion payments to the groups when they controlled the remote areas of Colombia in which Chiquita operated. Plaintiffs also assert that Chiquita assisted one of the groups in obtaining weapons, although the very documents upon which plaintiffs rely to make this false and incendiary allegation flatly contradict it. There is no allegation that anyone from Chiquita or its subsidiary participated in, facilitated, or even knew about any of the murders alleged in the Complaint.

The unprecedented theories asserted in this Complaint, which seek to hold Chiquita liable in tort for murders of which the company had no knowledge and in which it was not involved, are legally untenable. Plaintiffs’ ATS and TVPA claims — which attempt through wholly conclusory and contradictory allegations to (a) transform murders by private armed groups into state-sanctioned executions or other purported international law violations, and then (b) make Chiquita into an accessory to these crimes solely because it provided a small fraction of the massive funds these organizations were able to obtain through extortion of individuals and businesses like Chiquita, drug trafficking, kidnapping, and their other nefarious activities — do not come close to stating a cognizable claim over which the Court has jurisdiction. Plaintiffs’

state law claims fail, as well, because the laws of the District of Columbia do not apply to the conduct at issue here, and even if they did, plaintiffs have not stated viable claims under those laws.

### **BACKGROUND**

With respect to Chiquita, the Complaint is based almost exclusively upon a federal criminal Information charging Chiquita with a single-count violation of the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1705(b). That statute prohibits a United States person from engaging in transactions with a foreign organization or individual determined by the U.S. Secretary of State to be a “Specially Designated Global Terrorist” (“SDGT”) without having first obtained a license from the U.S. Department of Treasury’s Office of Foreign Assets Control (“OFAC”). The Information charging Chiquita with this offense was filed with the U.S. District Court for the District of Columbia on March 13, 2007, and Chiquita entered its plea of guilty on March 19, 2007.<sup>1</sup> The instant Complaint was filed on June 7, 2007, less than three months after Chiquita’s plea.

As set forth in the Information and alleged in the Complaint, Chiquita is headquartered in Cincinnati, Ohio, and is a producer, marketer, and distributor of bananas; until 2004, Chiquita’s former Colombian subsidiary, C.I. Bananos de Exportación, S.A. (“Banadex”),

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<sup>1</sup> Plaintiffs allege that “Defendants have pled guilty in the pending criminal case, 07-CR-0555 [sic] (RCL)” (Compl. ¶ 229), and allegations regarding Chiquita’s conduct are derived almost entirely, sometimes verbatim, from the Information filed in that case. A copy of the Information filed in *United States v. Chiquita Brands International, Inc.*, No. 07-CR-055 (D.D.C. Mar. 13, 2007) is attached hereto as Exhibit A to the Declaration of John E. Hall (“Hall Decl.”). In deciding a motion to dismiss, the Court may consider “documents attached as exhibits or *incorporated by reference in the complaint*, and matters about which the Court may take judicial notice.” *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (emphasis added). “A court may take judicial notice of public records from other proceedings.” *Banks v. Gonzales*, 496 F. Supp. 2d 146, 148 (D.D.C. 2007) (citing *Covad Commc’n Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005)).

owned and operated banana farms in two remote regions of Colombia known as Urabá and Santa Marta. (Compl. ¶ 184; Information ¶¶ 1-2.) From approximately 1989 to 1997, when left-wing guerilla groups known as the Revolutionary Armed Forces of Colombia (“FARC”) and the Ejército de Liberación Nacional (“EPL” or “ELN”) controlled Urabá and Santa Marta, Chiquita paid money to these groups. (Compl. ¶ 207; Information ¶ 20.)

In or about 1997, the Autodefensas Unidas de Colombia (the United Self-Defense Forces of Colombia or “AUC”), an organization of loosely-affiliated, right-wing paramilitaries in Colombia, took control of these regions from the guerilla groups. (Information ¶ 21.) At this time, Banadex’s General Manager was summoned to a meeting with the then-leader of the AUC, Carlos Castaño, and told by Castaño that Banadex must begin making payments to the AUC. (*Id.*) Castaño instructed Banadex to make the payments through a “convivir,” a type of private security company used by the AUC as a front to collect money from businesses. (*Id.*) As plaintiffs acknowledge in their Complaint, the AUC was “a violent, right-wing paramilitary organization” whose activities “include[d] assassinating union leaders and suspected guerilla supporters, drug trafficking, kidnapping, and indiscriminate murdering of civilians.” (Compl. ¶ 215.) In the meeting with Banadex, Castaño “sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property.” (Information ¶ 21.)

As Castaño demanded, beginning in late 1997, Chiquita was forced to begin making semi-monthly payments to the AUC. (*Id.*) On October 31, 2001, the AUC was designated a SDGT by the Secretary of State, thus prohibiting any U.S. person from engaging in transactions with the AUC without first obtaining a license or other authorization from OFAC. (Information ¶ 8.) On or about February 20, 2003, a Chiquita employee discovered that the AUC

had been designated a foreign terrorist organization by the U.S. government. (*Id.* ¶ 55.) Almost immediately thereafter, Chiquita consulted its outside counsel who advised the company that the payments had become illegal following the AUC's designation. (*Id.* ¶ 56.) In April 2003, following a report to Chiquita's Board of Directors, the Board directed that the payments be promptly disclosed to the Department of Justice. (*Id.* ¶ 59.)

On or about April 24, 2003, representatives of Chiquita and its counsel met with officials of the Justice Department and voluntarily disclosed the payments. (*Id.* ¶ 62.) The Justice Department officials told Chiquita that "the payments were illegal and could not continue," while at the same time acknowledging "that the issue of continued payments was complicated." (*Id.*) The precise content of the communications between Chiquita and the Justice Department in the April 24th meeting and thereafter, including in particular the question of how Chiquita should resolve the dilemma created by the AUC's threats of violence against Chiquita's employees if the payments were discontinued, is a subject of dispute; however, this dispute is immaterial to the present motion. In 2004, Chiquita sold its Colombian operations and discontinued the payments. (*Id.* ¶ 2.) On March 19, 2007, Chiquita entered its plea of guilty to the Information charging the violation of IEEPA. While many of Chiquita's payments to the AUC were made before the AUC was designated a SDGT, from the time of the Castaño meeting in 1997 to Chiquita's departure from Colombia in 2004, Chiquita made approximately 100 payments to the AUC totaling \$1.7 million. (*Id.* ¶ 19.)

Except for the facts taken from the Information, the Complaint contains only one additional set of allegations regarding supposed wrongful conduct by Chiquita. Relying on a report from the Colombian chief federal prosecutor's office ("Prosecutor Report") and a report of the Organization of American States ("OAS Report"), plaintiffs allege that, in November 2001,

“a Banadex ship” was used to smuggle weapons into Colombia for the AUC, and that “Giovanny Hurtado Torres, Banadex’s legal representative, [was] convicted in Colombia over the arms-smuggling scheme.” (Compl. ¶ 224-25.)<sup>2</sup> However, the very reports on which plaintiffs rely and incorporate by reference into the Complaint to support these allegations flatly contradict them.<sup>3</sup> First, the OAS Report makes clear that the ship involved in the November 2001 incident was owned by a Panamanian company — not Chiquita or Banadex. (See OAS Report at 12 (describing the Otterloo ship as “owned by Panamanian-based Trafalgar Maritime Inc.”) (attached as Exhibit B to Hall Decl.)) Second, the Prosecutor Report explicitly exonerates Giovanny Hurtado Torres from any alleged criminal activity in connection with the November 2001 incident and states that the prosecutor’s office closed its investigation against him. (See Prosecutor Report at 28-29 (“With regard to Mr. YOVANNY HURTADO TORRES, we note that his conduct is . . . free of any guilt . . . . [T]he activities of Mr. HURTADO TORRES should be regarded as not characterizing this offence, since they did not come within the punishable

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<sup>2</sup> See 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 12 (Jan. 6, 2003), available at [http://www.scm.oas.org/doc\\_public/ENGLISH/HIST\\_03/CP10739E06.DOC](http://www.scm.oas.org/doc_public/ENGLISH/HIST_03/CP10739E06.DOC) (attached as Exhibit B to Hall Decl.) (“OAS Report”); Report of the Colombian Prosecutor’s Office, Prosecutor Delegated Before the Criminal Courts, Special Circuit, National Unit Against Terrorism, Office 18, File No. 59.516, dated July 23, 2004 (attached as Exhibit C to Hall Decl., with English translation and Affidavit of Accuracy) (“Prosecutor Report”).

<sup>3</sup> The Court may properly consider the Prosecutor Report and OAS Report, which are referred to and relied upon in the Complaint, for purposes of a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6). “[I]n deciding a 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside the complaint in an effort to determine whether the court has jurisdiction in this case.” *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 195 (D.D.C. 2002); see also *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (“In 12(b)(1) proceedings, it has been long accepted that the judiciary may make ‘appropriate inquiry’ beyond the pleadings to ‘satisfy itself on authority to entertain the case.’”) (citation omitted). See *supra* n. 1; *Echostar DBS Corp. v. Gemstar-TV Guide Int’l, Inc.*, No. 05 Civ. 8510 (DAB), 2007 WL 438088, at \*4 (S.D.N.Y. Feb. 8, 2007) (“if the allegations of a complaint are contradicted by documents incorporated in the complaint, the documents control and the court need not accept the allegations of the complaint as true”).

conduct referred to in Article 366 of the Criminal Code, punishable conduct which was imputed to him and because of which he is involved in the investigation. This fact leads us to order that the investigation against him in these proceedings is to be terminated, under Article 38 of the Criminal Procedure Code.”) (attached as Exhibit C to Hall Decl.)

Despite seeking damages from Chiquita in tort for 173 separate deaths, the Complaint is essentially bereft of any facts about those deaths. The alleged victims and their family member-plaintiffs are identified by pseudonyms in a string of short, largely verbatim paragraphs that state only that the victim “was killed” or “was disappeared” on a particular date. (Compl. ¶¶ 10-183, 219-227.) The dates of the alleged murders encompass a period of nearly 30 years, from 1975 to 2004. (*Id.*) In some cases, it is alleged in conclusory fashion that “the AUC” was responsible for the murder; in others, “the FARC”; and in still others, no group is identified, only that the killing was “by paramilitaries.” (*Id.*)

There is no description what allegedly happened in any of the incidents, and, significantly, no allegation that purports to link *any* of the murders to Chiquita. The Complaint does not allege that there was any relationship between any victim and Chiquita, let alone that Chiquita had any involvement in, or even knowledge of, any of their alleged deaths. Moreover, while apparently seeking to base liability and causation entirely upon the assertion that Chiquita “financed” or “supported” these groups, plaintiffs allege no facts regarding the significance of the \$1.7 million extorted from Chiquita over seven years by the AUC relative to the overall resources of that group, and nothing whatsoever about the FARC, organizations that are estimated to have taken in several hundred million dollars in income *each year*.<sup>4</sup>

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<sup>4</sup> A recent United Nations report places the annual income of the self-defense forces (*i.e.*, the AUC) at \$286 million, 70% of which is derived from drug trafficking, and of the FARC at (continued...)

On the basis of these allegations, plaintiffs assert nine causes of action. Count I pleads in conclusory fashion that Chiquita “aided and abetted,” “conspired” with, or “hired” the paramilitaries to carry out what are alleged to be “extrajudicial killings” in violation of international law, so as to attempt to invoke the limited grant of federal subject matter jurisdiction provided by the ATS. Count II asserts a similar claim for extrajudicial killing under the Torture Victim Protection Act. The remaining counts assert common law claims for (III) wrongful death; (IV) negligence; (V) negligent hiring; (VI) negligent supervision; (VII) intentional infliction of emotional distress; (VIII) battery; and (IX) assault.<sup>5</sup>

### ARGUMENT

Neither the fact that Chiquita made payments to the paramilitaries, nor any other fact admitted by the company in the Information, suffices to establish liability here. The ATS provides, in full, that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. Although enacted by the First Congress as part of the Judiciary Act of 1789, the ATS was rarely invoked during its first two hundred years, leading some courts to

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\$342 million, 40% of which is derived from drug trafficking. *See* United Nations Dev. Programme, *El conflicto, callejón con salida: Informe nacional de desarrollo humano para Colombia [The Conflict, Alley with an Exit: National Report on Human Development for Colombia]* 285 (2003) (attached hereto as Exhibit D to Hall Decl., with English translation and Affidavit of Accuracy).

<sup>5</sup> Three other ATS lawsuits have been filed against Chiquita by Colombians who allege that they are legal heirs to individuals killed by paramilitaries in Colombia. *See Carrizosa et. al v. Chiquita Brands Intl, Inc. et al.*, No. 07-60821 (S.D. Fla.); *Does 1-7 v. Chiquita Brands Intl. et al.*, No. 07-3406 (D.N.J.); *Does 1-377 v. Chiquita Brands, Intl., Inc. et al.*, No. 07-CV-10300 (S.D.N.Y.). All four ATS lawsuits are based on the same factual allegations with respect to Chiquita and assert similar legal theories. On November 26, 2007, Chiquita filed a motion with the Judicial Panel on Multidistrict Litigation to transfer the other actions to this District for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

observe that “no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (describing the ATS as a “legal Lohengrin”).

The modern era of ATS litigation began when, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit concluded that certain acts of torture committed by state officials violate the law of nations and thus support jurisdiction under the ATS. Since *Filartiga*, ATS litigation has proceeded in two distinct phases: an initial wave of lawsuits against individuals, typically state officials, alleged to have engaged directly in human rights abuses and, more recently, a series of largely unsuccessful lawsuits targeting U.S. corporations alleged to be liable indirectly for human rights abuses committed by others. *See In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1274 (S.D. Fla. 2006) (discussing ATS litigation against corporations and noting that there has yet to be any judgment against a corporate defendant under the ATS).

Recognizing the significant foreign policy consequences of ATS litigation and the concomitant impact on the U.S. judicial system, the Supreme Court recently announced stringent new requirements for recognizing a cause of action under the statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). In particular, the Supreme Court concluded in *Sosa* that the ATS provides subject matter jurisdiction only for those federal common law claims alleging well-accepted and clearly-defined offenses under international law. *Id.* The *Sosa* Court further instructed the federal courts to be “cautio[us]” when exercising their common law powers under the ATS to recognize and remedy purported violations of international law. *Id.* at 725.

Chiquita moves to dismiss the ATS claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Because plaintiffs must allege a “violation of the law of nations” to establish subject matter jurisdiction under the ATS, the standard of pleading is

more stringent than in other contexts. Courts must “engage[] in a more searching preliminary review of the merits [at the motion to dismiss stage] than is required, for example, under the more flexible ‘arising under’ formulation” of 28 U.S.C. § 1331. *Filartiga*, 630 F. 2d at 887-88; *see also Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (“In assessing whether plaintiffs have stated a claim under the Alien Tort Statute, courts must conduct a more searching merits-based inquiry than is required in a less sensitive arena.”). Plaintiffs cannot survive a motion to dismiss in an ATS case by “plead[ing] merely a colorable violation of the law of nations.” *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

Moreover, even without regard to the ATS’s heightened jurisdictional pleading standard, for plaintiffs to survive Chiquita’s Rule 12(b)(6) motion, they must plead “enough facts to state a claim for relief that is plausible on its face,” and the factual allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007). Plaintiffs’ allegations are presumed to be true, and all reasonable inferences are drawn in their favor. *See Maljack Prods, Inc. v. Motion Picture Ass’n of Am., Inc.*, 52 F.3d 373, 375 (D.C. Cir. 1995). The Court, however, “need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations.” *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). “A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 127 S. Ct. at 1964-65 (quoting Fed. R. Civ. P. 8(a)).

This Complaint fails entirely to satisfy Rule 8’s “plain statement” requirement, let alone the heightened pleading standard imposed by the ATS, and thus runs directly afoul of the

restrained conception of ATS jurisdiction that the *Sosa* Court envisioned. No court has *ever* imposed ATS liability based upon such an attenuated and indirect connection between the alleged injuries and the alleged misconduct as alleged in this case. As an initial matter, plaintiffs' claims of extrajudicial killing fail because, while there is a recognized prohibition of summary execution when committed by a state, the private paramilitary groups at issue here were concededly not state actors; and plaintiffs do not and cannot plead facts showing that Republic of Colombia was complicit in each of the alleged 173 murders such that state action should be imputed.

In addition, as a matter of law, aiding and abetting by a private corporation does not constitute an established violation of international law actionable under the ATS, as this District has held. And, even if aiding and abetting or other indirect theories of liability for extrajudicial killing were cognizable, plaintiffs do not and cannot allege that Chiquita substantially assisted any of the alleged killings or that Chiquita intended that the killings occur, both of which are essential elements of an aiding and abetting claim. Plaintiffs' claims under the TVPA fail for similar reasons.

Finally, plaintiffs' state law claims should be dismissed because the laws of the District of Columbia do not apply to the conduct at issue here and, even if they did, plaintiffs have not stated viable claims under those laws.

**I. CHIQUITA IS NOT LIABLE FOR THE ALLEGED "EXTRAJUDICIAL KILLINGS" COMMITTED BY PRIVATE PARAMILITARY GROUPS IN COLOMBIA.**

Plaintiffs seek to hold Chiquita derivatively liable for the alleged "extrajudicial killings" of plaintiffs' family members. (*See* Compl. ¶¶ 234-39.) This theory suffers from two fundamental legal defects. First, because extrajudicial killing is, by its very nature, a summary execution perpetrated by a *state*, not a private party, *see Exxon*, 393 F. Supp. at 25-26 (citing

*Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985)), there can be no international law violation here because these private paramilitaries were not “state actors.” Any attempt by plaintiffs to impute state action to the paramilitaries, or to evade altogether this basic requirement under the facts pled here, is unavailing. Second, even disregarding plaintiffs’ failure to allege state action, there is no basis for derivative liability against Chiquita. Corporate aiding and abetting of a purported extrajudicial killing is not a universally recognized violation of customary international law, and in any event, plaintiffs do not and cannot allege facts sufficient to sustain such a claim.

**A. Plaintiffs’ ATS Claims Should Be Dismissed Because Plaintiffs Have Not Alleged And Cannot Allege State Action.**

Plaintiffs’ ATS claims for extrajudicial killings must be dismissed for failing to satisfy the first requisite element in their theory, *i.e.*, that the “extrajudicial killings” alleged in the Complaint involved state action. By plaintiffs’ own admission, these were private groups. Plaintiffs cannot satisfy the state action requirement by asserting in conclusory fashion that the alleged murders were perpetrated “under color of law,” nor evade it by trying to label the murders “war crimes.” Moreover, even if the plaintiffs could satisfy the state action requirement by pleading facts showing the complicity of the Colombian government in each of these alleged murders, a factual inquiry to test such allegations would necessarily intrude on the foreign affairs function of the political branches, and is therefore nonjusticiable.

**1. Plaintiffs do not allege that the paramilitaries are state actors.**

Plaintiffs’ core claim is that Chiquita should be responsible for extrajudicial killings carried out by the paramilitaries. To sustain a claim for extrajudicial killing under the ATS, however, a plaintiff must plead facts establishing that the alleged killing constituted state action rather than conduct carried out solely by a private party. “Traditionally only states (and

not persons) could be liable under the Alien Tort Statute for . . . extrajudicial killing.” *Exxon*, 393 F. Supp. 2d at 25-26 (citing *Sanchez-Espinoza*, 770 F.2d at 206-07).

Plaintiffs do not and cannot allege that the armed groups purportedly responsible for their relatives’ deaths are Colombian government entities; to the contrary, they are concededly private groups. Indeed, plaintiffs describe the FARC as “a left-wing *guerilla* organization” (*see* Compl. ¶ 207), which allegation on its face is completely at odds with the notion that the FARC is a state actor. Plaintiffs’ likewise characterize the AUC as an organization of “loosely-affiliated *illegal* paramilitary groups” (*Id.* ¶ 215 (emphasis added)), *i.e.*, groups *outlawed by the Colombian government*, not officially condoned or sanctioned. Rather than plead state action, plaintiffs instead aver in conclusory fashion that the AUC and the FARC acted “under color of law” in carrying out the murders alleged in the Complaint. (*Id.* ¶¶ 235, 238.) But these allegations, even if they could be substantiated (which they cannot), are insufficient to establish ATS jurisdiction.

Although some courts have held that state action may be imputed to a private party through a “color of law” analysis applicable to claims asserted under 42 U.S.C. § 1983, this District has insisted that ATS jurisdiction lies only when the offending acts are performed by the state. *Exxon*, 393 F. Supp. 2d at 26. “Recognizing acts under color of law would dramatically expand the reach of the statute. Just as aider and abettor liability for international law violations has been rejected by some courts as overly expansive and beyond Congress’ mandate . . . basing liability for Alien Tort Statute violations on color of law jurisprudence is a similar overreach.” *Id.* *See also Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at \*6 (N.D. Cal. Aug. 22, 2006) (holding that “it would be inappropriate to import ‘color of law’ jurisprudence

from § 1983 to expand the [ATS's] reach”), *modified on other grounds*, 2007 WL 2349341, at \*7 (N.D. Cal. Aug. 14, 2007).

The *Exxon* court determined that “[g]rafting § 1983 color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states.” 393 F. Supp. 2d at 26. Moreover, “it is notoriously difficult to determine when a party has acted under color of law, making it harder for courts to engage in ‘vigilant doorkeeping,’” as required by *Sosa*. *Id.* (citation omitted). Of particular relevance to the facts presented here, the *Exxon* court observed that, “[i]t is also highly unfair to corporations operating in states with potentially problematic human rights records which under the color of law rule may (or may not) be subject to liability for doing business there and benefiting from the state’s infrastructure.” *Id.* Indeed, accepting “color of law” allegations in an ATS context could expose companies operating throughout the world to liability for acts of violence that occurred in countries where they operated, even with no significant connection between the company and the illegal acts, while also opening U.S. courts to a flood of litigation. For these reasons, plaintiffs’ “color of law” allegations cannot satisfy the ATS’s state action requirement.

**2. *Even if private action “under color of law” were cognizable under the ATS, plaintiffs have insufficiently alleged such conduct.***

Even if the Court were to construe the ATS to permit claims based on the conduct of private actors carried out “under color of law,” plaintiffs have made only conclusory allegations that the paramilitaries acted “under color of law.” As the Supreme Court has held in the section 1983 context, “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic*

*Ass'n*, 531 U.S. 288, 295 (2001); accord *Williams v. United States*, 396 F.3d 412, 415 (D.C. Cir. 2005). A private individual must act together with state officials or receive significant aid from state officials to act “under color of law.” See, e.g., *Bigio v. Coca-Cola*, 239 F.3d 440, 448-49 (2d Cir. 2000). Moreover, it is not enough merely to associate the private party with the state in general; “the symbiotic relationship must involve the ‘specific conduct of which the plaintiff complains.’” *Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)) (emphasis added).

Plaintiffs fall well short of alleging the facts that would be necessary to establish that, for each of the 173 murders alleged in the Complaint, the perpetrators were acting jointly with and for the Colombian government. The notion that the FARC — a *guerilla* group fighting the government — was actually acting as the government in committing the murders alleged in the Complaint is absurd and contradicted by the plaintiffs’ own allegations. Nor does plaintiffs’ description of the AUC — an admittedly “illegal” group (Compl. ¶ 215) — as “paramilitary security forces [that] are permitted to exist, openly operate under the laws of Colombia, and are assisted by government military officials” (Compl. ¶¶ 235, 238) sufficiently allege conduct perpetrated under “color of law.” Plaintiffs fail to allege even one specific fact to support this conclusory assertion, and there is obviously nothing to connect that general claim to the individual murders alleged in the Complaint. In any event, a state actor’s mere inaction or tolerance of wrongful conduct by a private party is insufficient to impute state action to a private party; rather, the plaintiff must allege facts showing active involvement by the state actor.

For example, in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), the court rejected allegations similar to those pled here — *i.e.*, that the government sanctioned the tortious acts of private security forces by permitting them to exist,

and that government officials knew of and deliberately ignored such acts. As the *Aldana* court held, the state’s “registration and toleration of private security forces does not transform those forces’ acts into state acts.” *Id.* at 1248. The court in *Aldana* ultimately concluded that the state action requirement had been met because the plaintiffs in that case had alleged that a specific public official, the Mayor, was himself an “armed aggressor, not a mere observer,” and was actively involved in the violent conduct. *Id.* at 1249 (quotations omitted).

*Aldana* makes clear that plaintiffs must allege facts that demonstrate the active involvement of a state actor to establish that a private party was acting under “color of law.” The general and conclusory color of law allegations in plaintiffs’ Complaint plainly do not meet this standard.

**3. *Plaintiffs cannot overcome the state action requirement through conclusory allegations that the conduct at issue constituted “war crimes.”***

In a half-hearted attempt to avoid the ATS’s state action requirement, plaintiffs allege, in a single passing reference, that because “the murders were committed in the course of a civil conflict, and the victims were innocent civilians, these were also war crimes.” (Compl. ¶ 235.) This conclusory allegation, unsubstantiated by any actual facts — and, indeed, wholly inconsistent with plaintiffs’ claims regarding the purported business motive underlying Chiquita’s “support” of the AUC — cannot justify the exercise of ATS jurisdiction.

As the Second Circuit held in *Kadic*, violations of the laws of war (*i.e.*, “war crimes”) are among ““a handful of crimes to which the law of nations attributes individual responsibility,”” 70 F.3d at 240 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)), and thus are actionable under the ATS even absent a showing of state action, *id.* at 742. *See also Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 22 n.5 (D.D.C. 2000) (accepting Second Circuit’s conclusion in *Kadic* that ATS extends to war crimes

without requiring showing of state action). To establish a cognizable war crimes claim under the ATS, however, plaintiffs must do more than allege simply “the murder of an innocent civilian during an armed conflict.” *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225-PAS, 2006 WL 3804718, at \*8 (S.D. Fla. Dec. 22, 2006). Rather, plaintiffs seeking to avail themselves of the war crimes exception to the ATS’s state action requirement must allege that “the acts of murder, rape, torture, [or] arbitrary detention of civilians, [were] committed *in the course of hostilities*.” *Kadic*, 70 F.3d at 242 (emphasis added).

Accordingly, courts have required plaintiffs advancing war crimes claims under the ATS to allege atrocities directly tied to, and committed in furtherance of, an armed conflict. In *Kadic*, for example, the Second Circuit found that ATS jurisdiction existed over plaintiffs’ war crimes claims where plaintiffs had alleged that the defendant, a Bosnian-Serb general, “possess[ed] ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by [defendant] and carried out by the military forces under his command.” 70 F.3d at 237. By contrast, in *Saperstein*, the court rejected plaintiffs’ bare assertion that defendants’ alleged “‘murder of [a] civilian[ ] in the course of an armed conflict’” was actionable as a war crime under the ATS. 2006 WL 3804718, at \*8; *see also id.* (“Essentially, Plaintiffs are saying that if they allege a murder of an innocent person during an armed conflict, then they have alleged a per se violation of the law of nations and federal courts have subject matter jurisdiction over the dispute under the ATS. No court has so held.”).

As in *Saperstein*, plaintiffs here fail completely to demonstrate any connection whatsoever between the alleged paramilitary murders and any armed conflict. While plaintiffs describe a conflict between and among various armed groups in Colombia’s banana-growing

region (Compl. ¶¶ 206-214), they assert no facts indicating that the alleged murders of plaintiffs' relatives were in any way related to that conflict. (See Compl. ¶¶ 10-183 (alleging only that plaintiffs' relatives were killed by the AUC or FARC, which "received support from Chiquita and/or Banadex".) And as the court in *Saperstein* explained, it is not enough for plaintiffs to allege merely that their relatives were innocent civilians killed in the course of an armed conflict:

[I]f Plaintiffs' specific allegation, i.e., the murder of an innocent civilian during an armed conflict, was sufficient for purposes of the ATS, then whenever an innocent person was murdered during an 'armed conflict' anywhere in the world, whether it be Bosnia, the Middle East or Darfur, Sudan, the federal courts would have jurisdiction over the dispute. Clearly, such an interpretation would not only make district courts international courts of civil justice, it would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations.

2006 WL 3804718, at \*8.

Plaintiffs' war crimes allegation is all the more futile when the indirect nature of plaintiffs' claims is taken into account. Plaintiffs have not sued the AUC or FARC, or their members or commanders; rather, plaintiffs seek to hold Chiquita derivatively responsible for the alleged torts committed by those groups. But there are simply no facts asserted (and none exist) that establish that Chiquita engaged in actions — or acted jointly with the AUC or FARC to engage in actions — in furtherance of war hostilities. See *Sinaltrainal*, 474 F. Supp. 2d at 1289 (rejecting war crimes claim under ATS based on corporate defendant's alleged secondary responsibility for the AUC's tortious conduct; "[S]ome modicum of specificity regarding the details of *affirmative* action, whether it be in the form of a conspiracy or joint action to orchestrate hostilities, is required to adequately plead a violation of the law of nations on the basis of war crimes.") (emphasis in original).

At bottom, the gravamen of plaintiffs' Complaint is the claim that Chiquita made payments to the AUC and FARC to further its own Colombian business interests, and thus should be liable for all crimes allegedly perpetrated by those groups. (*See, e.g.*, Compl. ¶ 211 ("Chiquita's business boomed as the A.U.C. took over banana-growing lands and murdered thousands of people"); *id.* ¶ 220 ("The A.U.C. was paid to ensure that Chiquita's business ran smoothly.")) But in this regard, plaintiffs' allegations of Chiquita's purported "business motives" are inconsistent with any alleged war crimes violation. As the court in *Sinaltrainal* observed in rejecting a similar (though more specifically pleaded) theory of war crimes liability: "Alleging that the Defendants 'affirmatively acted to benefit from the civil war by making arrangements to have the paramilitaries target their union leaders' is a far cry from alleging that Defendants actually conspired with the paramilitaries to orchestrate hostilities." 474 F. Supp. 2d at 1289 (citation omitted). "[I]ndirect economic benefit from unlawful state action is not sufficient to support jurisdiction over a private party under the Alien Tort Claims Act." *Id.* (citing *Bigio*, 239 F.3d at 449). For these reasons, plaintiffs' war crimes claim must be dismissed.

**4. *Even if state action were properly alleged, an inquiry by an American court into the complicity of the Colombian government's involvement in these offenses would not be justiciable.***

Even if plaintiffs could make the allegations necessary to sustain a claim of state action, the claim would be equivalent to an assertion that the Colombian government was complicit in the summary executions of its own citizens by terrorist organizations. Such a claim would present a nonjusticiable "political question" and should be dismissed because it "challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great." *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wa. 2005), *aff'd*, No. 05-36210 (9th Cir. Sept. 17, 2007), *pet. for reh'g pending* (filed Oct. 9, 2007).

*See also Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006) (“[T]he more plaintiffs assert official complicity with the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine.”); *Exxon*, 393 F. Supp. 2d at 26-28 (dismissing ATS claim against a corporation because, among other reasons, a state action inquiry by the court “would create a significant risk of interfering in [a foreign government’s] affairs and thus U.S. foreign policy concerns”).

In cases that “touch on foreign relations,” the political question doctrine requires the Court to conduct a “discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action.” *Baker v. Carr*, 369 U.S. 186, 211-12 (1962). A finding of state action in this case would directly contradict the foreign policy position of the United States, which sees Colombia as a staunch ally in the fight against terrorism, and would thus constitute unwarranted judicial interference in the foreign relations of the United States.<sup>6</sup> For years, the United States has consistently provided political, economic, and military support to the Colombian government, including support to Colombia’s efforts to disarm and prosecute paramilitaries, and to provide reparations to their victims.<sup>7</sup> A judicial finding of “complicity” between Colombia and the AUC

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<sup>6</sup> *See, e.g.*, President George W. Bush, Remarks at a Press Conference in Crawford, TX (Aug. 4, 2005) (attached as Exhibit E to Hall Decl.) (“[The United States and Colombia] are working together to fight drug trafficking and terrorism, and to promote security, democracy and the rule of law throughout the Americas.”), <http://www.whitehouse.gov/news/releases/2005/08/20050804-2.html>; Amb. Henry A. Crumpton, Coordinator for Counterterrorism, U.S. State Dep’t, Remarks at a Press Conference in the U.S. Embassy in Colombia (Mar. 23, 2006) (attached as Exhibit F to Hall Decl.) (“Colombia is a staunch ally of the U.S. in the hemispheric fight against terrorism.”), <http://usinfo.state.gov/is/Archive/2006/Mar/27-412929.html>.

<sup>7</sup> *See, e.g.*, R. Nicolas Burns, Under-Secretary of State for Political Affairs, United States Dep’t of State, Remarks Before the Council for the Americas (Oct. 22, 2007) (attached as (continued...))

in this case would be at odds with this policy and create the potential for disparate pronouncements by the executive and the judiciary on Colombia's terrorism policies. *See Baker*, 369 U.S. at 217.

Moreover, as a practical matter, discovery into these sensitive issues would be essentially impossible. Litigation of the state action issue will require the parties to investigate each individual act of alleged violence to determine the extent of official involvement. Such an investigation would be exceptionally difficult to conduct in a foreign country where the ordinary tools of civil discovery are unavailable and where certain of the paramilitary groups at issue continue to operate. As set forth in plaintiffs' own filings with the court, the regions where plaintiffs reside (and, presumably, where the murders are alleged to have occurred) are "a hotbed of discontent and armed conflict among various armed guerrilla organizations." (Decl. of Paul David Wolf in Support of Plaintiffs' *Ex-Parte* Motion to Commence & Proceed with Action Using Pseudonyms ¶ 3 (Dkt. 1).) According to plaintiffs, the AUC "controls" and "maintain[s] a reign of terror" in the region, (*id.* ¶¶ 3, 7), where critical evidence about the state's participation in the alleged murders — again, assuming it could be properly alleged — presumably would be located. In this context, there are simply no judicially manageable standards for resolving the state action issue.

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Exhibit G to Hall Decl.) (noting, among other things, that "over many years and with bipartisan support, the United States has made a substantial investment in Colombia's successful struggle against narco-terrorism"), *available at* <http://www.state.gov/p/us/rm/2007/93969.htm>; U.S.A.I.D., Colombia Data Sheet: Support for Demobilization and Reintegration (Doc. No. 514-XXX) (attached as Exhibit H to Hall Decl.), *available at* [http://www.usaid.gov/policy/budget/cbj2007/lac/pdf/co\\_514-XXX.pdf](http://www.usaid.gov/policy/budget/cbj2007/lac/pdf/co_514-XXX.pdf).

In light of these substantial practical difficulties, this Court should fulfill its responsibilities as a “vigilant doorkeep[er],” *Sosa*, 542 U.S. at 729, and dismiss plaintiffs claims at the threshold.

**B. Plaintiffs ATS Claims Should Be Dismissed Because There Is No Aiding and Abetting Liability As A Matter of Law, and In Any Event, Plaintiffs Do Not Allege Facts Necessary to Support Secondary Liability Against Chiquita.**

Even if plaintiffs could satisfy the state action requirement, plaintiffs’ theory that Chiquita can be held secondarily liable for the acts of the AUC or FARC groups is wrong. While plaintiffs assert in conclusory fashion various alternative theories of secondary liability — including aiding and abetting, conspiracy, and agency — they allege no facts showing that Chiquita directed, encouraged, or hired the AUC or FARC to commit these particular murders; or that Chiquita employees were present at the scene of, or in any way participated in these particular murders; or that Chiquita intended for these particular murders to occur; or that Chiquita even had any knowledge of the murders. Plaintiffs do not even allege that any of the victims had *any* connections to Chiquita, Chiquita’s business operations in Colombia, Chiquita’s banana farms, or labor unions representing Chiquita’s employees.<sup>8</sup>

Rather than make *particularized* allegations showing why Chiquita should be held responsible for *these* murders, plaintiffs instead appear to contend that because Banadex made payments to the paramilitaries, Chiquita should be held liable for *any* violent act committed by them. Plaintiffs’ claims, if sustained, would substantially expand ATS jurisdiction beyond

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<sup>8</sup> Plaintiffs go so far as to allege that Chiquita should be held responsible for several murders that were committed by the AUC *before* Chiquita even began making payments to the AUC. (*See* Compl. ¶¶ 19, 27, 28, 29, 47, 51, 67, 79, 81, 113, 122, 147, 162, 165.) Even worse, plaintiffs seek to hold Chiquita liable for several murders committed by the AUC even before the AUC, by plaintiffs’ own allegations, came into existence. (*Compare* Compl. ¶ 215 (alleging that the AUC “was formed on or about April 1997”) with ¶¶ 19, 27, 28, 29, 47, 51, 67, 79, 81, 113, 122, 147, 162, 165) (alleging murders committed by the AUC prior to 1997).)

anything previously recognized and would stand in direct contravention to *Sosa*'s instruction that the ATS be construed with "caution." 542 U.S. at 725. Indeed, plaintiffs' theory of liability has no obvious limiting principle: if the mere fact of Banadex's payments is sufficient to establish Chiquita's liability for these 173 murders, then any third-party's provision of "support" to a primary violator of international law would create liability under the ATS, regardless of how attenuated such "support" might be from the primary violation, and regardless of the reasons for the "support."

Plaintiffs thus seek to convert the ATS into a vehicle through which all victims of alleged human rights abuses may recover reparations from any corporation that pays taxes, makes loans, sells goods, provides services, or otherwise conducts business with any person, government, or entity that, in turn, violates international law. Under *Sosa*, the ATS cannot be construed to allow such expansive and undefined liability. *See* 542 U.S. at 733 (directing courts to consider the "practical consequences" of making a particular ATS claim "available to litigants in the federal courts"); *cf. Tel-Oren*, 726 F.2d at 826-27 (Robb, J., concurring) (warning of the risks to the U.S. judicial system of making available terrorism-based claims under the ATS with "no obvious or subtle limiting principle in sight").

***1. There is no aiding and abetting liability for the claims asserted here.***

Plaintiffs' core contention is that Chiquita aided and abetted the murders committed by the paramilitaries because it paid money to them. (*See* Compl. ¶¶ 219, 224.) In so contending, plaintiffs rely on a theory of secondary liability whose continued viability following *Sosa* has been the subject of intense controversy among the courts and which has been strongly

opposed by the United States Government.<sup>9</sup> While neither the Supreme Court nor the D.C. Circuit have addressed this issue, at least one Judge in this District has held squarely that aiding and abetting claims are not actionable under the ATS. *See Exxon*, 393 F. Supp. 2d at 24 (Oberdorfer, J.). In so holding, Judge Oberdorfer relied in large part on Judge Sprizzo's decision in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 548 (S.D.N.Y. 2004), in which the court there rejected aiding and abetting claims brought by "three groups of black South Africans [against] several multinational corporations that had done business in South Africa during the apartheid years." *Exxon*, 393 F. Supp. 2d at 24 (dismissing aiding and abetting claims "largely for the reasons explained by the court in [*Apartheid*]").

Judge Sprizzo's decision, however, was recently reversed and remanded by a sharply divided panel of the Second Circuit in a ruling that highlights the intensity of the controversy regarding the viability of corporate aiding and abetting claims under the ATS. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). Two members of the panel in *Khulumani* (Judges Katzmann and Hall) agreed that the ATS recognizes claims for aiding and abetting but were unable to reach consensus on the substantive legal standard applicable to such claims. *See* 504 F.3d at 277 (Katzmann, J., concurring); *id.* at 286 (Hall, J., concurring). The

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<sup>9</sup> Compare *Exxon*, 393 F. Supp. 2d at 24 (rejecting claims of aiding and abetting liability post-*Sosa*); *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (same), *aff'd*, No 05-36210 (9th Cir. Sept. 17, 2007), *pet. for reh'g pending* (filed Oct. 9, 2007) with *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-38 (S.D.N.Y. 2005) (allowing claims of aiding and abetting liability); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 287-88 (E.D.N.Y. 2007) (same); *Bowoto*, 2006 WL 2455752, at \*3-4 (same); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006) (same); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52-53 (E.D.N.Y. 2005) (same); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005). The United States Government has consistently taken the position that no such liability exists under the ATS. *See* Br. of United States as Amicus Curiae in *Khulumani v. Barclay National Bank Ltd.*, Nos. 05-2141, 05-2326 (2d Cir.) (attached as Exhibit I to Hall Decl.); Br. of United States as Amicus Curiae in *Corrie et. al. v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.) (attached as Exhibit J to Hall Decl.).

third member of the panel (Judge Korman) agreed with Judge Katzmann's articulation of the appropriate standard, but rejected the predicate notion that the ATS permits claims for aiding and abetting against corporations. *See id.* at 330, 333 (Korman, J., concurring in part and dissenting in part) (rejecting the "extraordinary proposition that Congress intended the [ATS] to permit jurisdiction to be exercised over claims of aiding-and-abetting without regard to whether the conduct at issue violated an international law norm"). We respectfully submit that Judge Oberdorfer's decision in *Exxon*, and the opinions of Judges Korman and Sprizzo in the *Apartheid* litigation, reflect what would likely be the decision of the Supreme Court if and when it is presented with this issue.<sup>10</sup> In any event, the cross-cutting divisions among multiple respected federal judges belie any notion that there is a settled consensus as to whether claims for aiding and abetting are actionable under the ATS. *Cf. Sosa*, 542 U.S. at 728 (noting that courts should not recognize "debatable violations of the law of nations").<sup>11</sup>

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<sup>10</sup> Defendants in the *Khulumani* litigation have stated that they intend to petition the Supreme Court for a writ of certiorari on the question of whether claims of aiding and abetting are consistent with the *Sosa* Court's narrow construction of the ATS. *See* Defendants-Appellees' Mot. to Stay the Mandates Pending Petition for Writ of Certiorari., Nos. 05-2141, 05-2326 (2d Cir.) (filed Nov. 1, 2007) (attached as Exhibit K to Hall Decl.).

<sup>11</sup> In applying the requirement that an alleged norm of international law must be of "definite content" and sufficient "acceptance among civilized nations" to be actionable under the ATS, *Sosa*, 542 U.S. at 725, the Supreme Court explained that "whether a norm is sufficiently definite to support a cause of action" raises "a related consideration [of] whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732-33 & n.20 (emphasis added). Notably, while several international tribunals have recognized aiding and abetting liability for international law violations, they have done so only in the criminal context. *See* Curtis A. Bradley, et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 927 (2007) (noting that while "the concept of aiding and abetting liability is recognized as a general matter in international criminal tribunals," there is no corollary consensus in favor of "civil liability for corporate aiding and abetting"). Under *Sosa*, that there are norms of *criminal* aiding and abetting does not establish widespread international acceptance of *civil* aiding and abetting liability.

Beyond the reasons stated in opinions of Judges Oberdorfer, Sprizzo, and Korman, plaintiffs' aiding and abetting claims should be rejected for at least three additional reasons. First, plaintiffs' aiding and abetting claims are a blatant attempt to circumvent well-established case law holding that terrorism-related allegations, including those premised on the provision of financial or other support to terrorists, are not actionable under the ATS. Notably, the central premise of plaintiffs' extrajudicial killing claim is that Chiquita "aid[ed] and abet[ed] all acts of violence committed with the *material support provided by Defendants to the terrorist groups they supported.*" (Compl. ¶ 229 (emphasis added); *see also id.* ¶ 1 (alleging "material support [to terrorist groups]"; *id.* ¶¶ 10-183 (alleging that the AUC "received support from Chiquita"); *id.* ¶ 231 (alleging Chiquita provided "funding, equipment and other resources to the terrorist group responsible for the damages alleged herein"); *id.* ¶ 233 (alleging that the harm to the victims was caused by Chiquita's "provision of material support to terrorists"); *id.* ¶ 235 (alleging that Chiquita provided "financial support, arms, and other substantial assistance to the AUC").) But it is clear that plaintiffs could not state a direct claim under the ATS based on Chiquita's alleged provision of "material support to terrorists." *See Barboza v. Drummond Co.*, No. 1:06-cv-61527, slip op. at 3 (S.D. Fla. July, 17, 2007) (attached as Exhibit L to Hall Decl.) (allegations that defendant provided financial or other support to a terrorist organization, which resulted in death or other harm, not actionable under the ATS); *Saperstein*, 2006 WL 3804718 at \*7 (same).<sup>12</sup>

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<sup>12</sup> Both *Barboza* and *Saperstein* are consistent with a leading pre-*Sosa* decision addressing terrorism-related allegations under the ATS, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). In *Tel-Oren*, victims of a 1978 terrorist attack in Israel sued several defendants, including private organizations accused of sponsoring terrorism. The D.C. Circuit rejected plaintiffs' attempt to bring terrorism-based claims under the ATS. *Id.* at 795-96. In a concurring opinion, Judge Robb warned of the potential consequences of making such claims (continued...)

Second, allowing an aiding and abetting claim to proceed based on the attenuated theory of liability asserted here would run afoul of a central premise of *Sosa*, *i.e.*, that courts should exercise “judicial caution when considering the kinds of individual claims that might implement the jurisdiction” conferred by the ATS. *Sosa*, 542 U.S. at 725; *see also* Curtis A. Bradley, et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 924 (2007) (“[The] best reading of *Sosa* is that ATS liability cannot be extended to corporations based on an aiding and abetting theory absent further action by Congress.”). If allowed to proceed, plaintiffs’ aiding and abetting claims, which are not based on any particularized allegations regarding the 173 murders at issue, *see* Part I.B.2., *supra*, would effect a substantial expansion of the ATS and result in a corresponding increased burden on the federal courts. *Cf. Sosa*, 542 U.S. at 732-33 (directing courts to consider the “practical consequences” when determining whether to make a particular “cause available to litigants in federal court”). Moreover, as noted in Part I.A.4., *supra*, plaintiffs’ claims are likely to have substantial consequences for, and repercussions on, U.S. foreign relations. *See Exxon*, 393 F. Supp. 2d at 24-25 (warning of the foreign policy consequences of recognizing aiding and abetting claims). Such considerations strongly counsel against a finding of aiding and abetting liability for the claims alleged here.

Third, allowing aiding and abetting claims under the ATS would be inconsistent with settled law. In *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), the

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available in U.S. courts: “The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue . . . that they are entitled to their day in the courts of the United States. . . . Indeed, there is no obvious or subtle limiting principle in sight.” 726 F.2d at 826-27. Judge Robb’s observations, made more than ten years ago, are equally applicable to plaintiffs’ claims in this case.

Supreme Court held that whether to allow aiding and abetting liability for civil claims is fundamentally a legislative choice for Congress, and not the courts, to make. *See id.* at 181-82, 189-90 (concluding that the availability of civil aiding and abetting liability under § 10(b) of the Securities Exchange Act of 1934 could not be inferred absent some indication that Congress intended such liability). The Court explained that “Congress has not enacted a general civil aiding and abetting statute . . . for suits by private parties” and that, as a consequence, “there is no general presumption that the plaintiff may sue aiders and abettors.” *Id.* at 182 (further noting that the concept of aiding and abetting in a civil context is “at best uncertain in application”). *Central Bank* is especially relevant here, as there is no evidence that Congress intended aiding and abetting liability for international law violations. *See Exxon*, 393 F. Supp. 2d at 24. Given the absence of any indicia that Congress intended to impose aiding and abetting liability under the ATS, it would be highly inappropriate for a court to expand the scope of ATS jurisdiction to reach alleged aiders and abettors. *Cf. Sosa*, 542 U.S. at 726 (noting that the trend has been for federal courts to avoid “innovative” interpretations over substantive law in an area such as foreign relations, which rather should be left to Congress).

**2. *Even if aiding and abetting liability exists under the ATS, plaintiffs do not — and cannot — plead sufficient facts to establish such a claim.***

Even if plaintiffs’ aiding and abetting claim is cognizable under the ATS, they have failed to plead the necessary facts in support of such a claim. Aiding and abetting liability under the ATS may be established only when the defendant “(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime; and (2) [did] so with the purpose of facilitating the commission of the crime.” *Khulumani*, 504 F.3d at 277 (Korman, J., concurring); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006). Other courts have articulated similarly stringent standards. *See, e.g.,*

*Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 291-92 (E.D.N.Y. 2007) (aiding and abetting requires that defendant's actions have a "substantial effect" on the crime's perpetration and be carried out "intentionally and with knowledge"); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1012 (7th Cir. 2002) (in case brought under the federal Antiterrorism Act, 18 U.S.C. § 2333, defendant must know about the primary actor's violation and substantially assist such violation to be liable for aiding and abetting).

Here, plaintiffs fail to allege facts that even come close to satisfying any standard for aiding and abetting liability under the ATS. Specifically, plaintiffs have failed to plead facts showing that Chiquita acted with the requisite *mens rea*, or that Chiquita's payments to the paramilitaries substantially assisted the particular murders alleged by plaintiffs here.

a) *Substantial Effect*

To satisfy the "substantial effect" element of an aiding and abetting claim, plaintiffs must allege facts sufficient to show that Chiquita assisted the murders allegedly committed by the FARC and the AUC, and that the murders most probably would not have occurred in the same way without Chiquita's assistance. *See Presbyterian Church*, 453 F. Supp. 2d at 667; *see also Khulumani*, 504 F.3d at 277 ("actus reus component" of aiding and abetting liability requires "practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime") (citation omitted) (emphasis in original). Similarly, under the "substantial assistance" formula of liability for aiding and abetting, plaintiffs must plead facts sufficient to show that Chiquita's purported assistance to the paramilitaries proximately caused the murders alleged in the Complaint. *See, e.g., Aetna Cas. & Surety Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 537 (6th Cir. 2000) ("Establishing [the element of substantial assistance] requires the plaintiff to show that the secondary party proximately caused the violation.").

Mere conclusory assertions of proximate causation do not to satisfy plaintiffs' pleading burden. *See Kowal*, 16 F.3d at 1276. Thus, plaintiffs' bare allegations that "the harm to Plaintiffs was caused by the commissions or omissions of Defendants" (Compl. ¶ 73), or that the "tortious conduct alleged herein carried out by the terrorist groups receiving material assistance from Defendants was reasonably foreseeable" (*id.* ¶ 232), are not sufficient. Rather, plaintiffs must plead specific facts demonstrating how the financial "support" Banadex provided to the paramilitaries proximately caused or had a substantial effect on the murders at issue here.<sup>13</sup>

In this respect, the Complaint is woefully inadequate. Plaintiffs allege that Banadex made "over 100 payments totaling over \$1.7 million to the AUC," and that the AUC "received support from Chiquita." (Compl. ¶¶ 10-183, 219.) Plaintiffs allege no facts, however, demonstrating how the funds extorted from Banadex proximately caused the particular murders in this case or had a substantial effect in their commission. (*See* note 4, *supra*, noting the AUC's estimated annual income of \$286 million from multiple criminal enterprises.) Plaintiffs may not rely upon general allegations that the AUC or the FARC were "supported" by Chiquita as a

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<sup>13</sup> As noted *infra* at pp. 4-6, plaintiffs' allegations that Chiquita assisted the AUC with weapons-trafficking in November 2001 are shown to be untrue by the very documents that plaintiffs rely on and incorporate into their Complaint as support for their assertions. Based on these reports, which are referenced in the Complaint, and are central to plaintiffs' allegations that Chiquita was involved in weapons-trafficking, these allegations are facially deficient. *See Echostar DBS Corp. v. Gemstar-TV Guide Int'l, Inc.*, 2007 WL 438088, at \*4 (S.D.N.Y. Feb. 8, 2007) ("if the allegations of a complaint are contradicted by documents incorporated in the complaint, the documents control and the court need not accept the allegations of the complaint as true"); *Rapoport v. Asia Elecs. Holding Co., Inc.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) (granting motion to dismiss where "documents [referenced but not attached to complaint] contradict Plaintiff's allegations.") Furthermore, even assuming that plaintiffs' allegations relating to Chiquita's involvement in arms smuggling were true, plaintiffs allege no facts demonstrating how the "support" allegedly provided to the AUC proximately caused the particular murders in this case. Plaintiffs may not rely upon general allegations that the AUC was financed by Chiquita or that arms were smuggled on a Chiquita ship as a substitute for specific allegations demonstrating how that support caused the murders in this case.

substitute for specific allegations connecting Chiquita's payments to the alleged murders in this case — especially when the funds provided were small in relation to the funds available to these organizations from other sources.

The gross deficiencies in plaintiffs' aiding and abetting allegations are demonstrated by comparison of this case to other ATS cases in which defendants were alleged to have aided and abetted murders committed by third-party actors. In *Arab Bank*, for example, U.S. and foreign plaintiffs alleged that the defendant, a Jordanian bank, aided and abetted the murders of multiple victims by knowingly providing banking and administrative services to organizations that conducted or facilitated suicide bombings in Israel. 471 F. Supp. 2d at 259-60. In sustaining plaintiffs' claims, the court emphasized that plaintiffs had alleged *specific facts* demonstrating that Arab Bank's services were *directly related to* the suicide bombings at issue, including, for instance, that the defendant administered benefits paid to the families of suicide bombers, that the defendant assisted in the preparation of lists of beneficiaries of individual suicide bombers, and that the defendant set up individual bank accounts in the names of those beneficiaries. *Id.* at 291-92; *see also id.* at 261-64 (summarizing the extensive factual allegations made by the plaintiffs). Because plaintiffs had "delineate[d] a *direct correlation* between the number of attacks, including suicide bombings, and the amount of Mujahideen Committee and Saudi Committee funds, some of which were eventually paid to the beneficiaries through Arab Bank," the defendant's motion to dismiss was denied. *Id.* at 292 (emphasis added).

Here of course, there are no allegations whatsoever "delineat[ing] a direct correlation" between the murders and the Banadex payments. *Arab Bank*, 471 F. Supp. 2d at 292. Rather, plaintiffs effectively ask this Court to *assume* substantial assistance from the bare allegation that Chiquita "financed" the AUC. Such conclusory pleading, if allowed, would

vitiates the proximate cause and substantial effect requirements and, in theory, expose Chiquita to liability for every wrongful act perpetrated by the AUC over the seven-year period during which Banadex was forced to make payments. *Cf. Boim*, 291 F.3d at 1011 (analyzing aiding and abetting claims under the Antiterrorism Act, 18 U.S.C. § 2333, and stating: “To say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actors’ intent, could be construed to ‘involve’ terrorism.”) As in *Arab Bank*, plaintiffs must demonstrate a causal link between the purported misconduct — here, the Banadex payments — and the alleged murders. They have failed to do so.

b) *Mens Rea*

Plaintiffs likewise fail to plead facts demonstrating that Chiquita intended to facilitate the commission of the murders alleged in the Complaint, or even knew that Banadex’s alleged assistance to the AUC would result in the murder of plaintiffs’ relatives. *See Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (noting that aiding and abetting claims require a showing that the defendant acted “with the purpose of facilitating the commission of [the alleged] crime”); *id.* at 332-33 (Korman, J., concurring in part and dissenting in part) (same); *Arab Bank*, 471 F. Supp. 2d at 291 (noting that standards of aiding and abetting liability require a showing that defendant “acted intentionally and with knowledge that its conduct would . . . facilitate the underlying violations when it engaged in the acts alleged”); *see also Stutts v. De Dietrich Group*, No. 03-cv-4058, 2006 WL 1867060, at \*2-3 (E.D.N.Y. June 30, 2006) (dismissing civil terrorism claim where plaintiffs failed to plead that defendant banks had knowledge that their financial credits would further terrorist activities committed by Saddam Hussein or that they had the requisite intent to further such terrorist activities); *cf. Joshua Dressler*, *Understanding Criminal Law* 475 (3d ed. 2001) (“Most [U.S.] courts . . . hold that a

person is not an accomplice in the commission of an offense unless he “share[s] the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking.”). Plaintiffs’ failure to allege a single fact demonstrating Chiquita’s intent or knowledge is yet another ground warranting dismissal of their aiding and abetting claims.

The only allegations in the Complaint concerning Chiquita’s purported culpable mental state are entirely conclusory and devoid of any actual facts. (*See, e.g.*, Compl. ¶ 2 (“The Defendants were knowingly engaged in an ongoing campaign of terror against[the victims].”); *id.* ¶ 231 (“Defendants had reason to know and/or did know the nature and scope of the tortious conduct alleged herein . . . .”); *id.* ¶ 235 (“Defendants were aware of . . . the threats posed by [the AUC and other terrorist organizations].”).) Indeed, plaintiffs do not allege a single incident or event demonstrating that any Chiquita employee knew that the alleged support provided to the AUC had been or would be used to carry out murders as a general matter, let alone facilitate the 173 specific murders alleged in the Complaint.

Again, a comparison of plaintiffs’ allegations to the facts in *Arab Bank* reveals the inadequacy of plaintiffs’ claims here. In *Arab Bank*, plaintiffs alleged multiple, specific facts demonstrating that the defendant intended to facilitate suicide bombings in Israel and had knowledge that its provision of banking and administrative services was in fact promoting such terrorist attacks. *Arab Bank*, 471 F. Supp. 2d at 268 (in support of aiding and abetting claim under the ATA, plaintiffs alleged that defendant bank “knew that the funds it received as deposits and transmitted to various organizations were to be used for conducting acts of international terrorism”); *id.* at 290 (noting that plaintiffs further alleged that defendant “knew that the accounts of these various organizations and individuals were being used to fund suicide

bombings and other attacks sponsored by the terrorist organizations” and “knew that the Saudi Committee was soliciting and paying funds to the families” of suicide bombers).

Plaintiffs’ allegations relating to Chiquita’s purported “knowledge” come nowhere close to the level of factual specificity described in *Arab Bank*. Allegations that Chiquita knew that the AUC was a dangerous organization do not establish that Chiquita provided support to the AUC with the intent of facilitating the commission of murders or had knowledge that the payments would be used to commit murders. Plaintiffs must plead specific facts demonstrating Chiquita’s requisite state of mind, and their failure to do so requires dismissal of their aiding and abetting claims.

**3. *Plaintiffs’ vague and conclusory conspiracy allegations do not establish jurisdiction under the ATS.***

Plaintiffs allege that Chiquita “conspired” and/or “engaged in joint action” with the paramilitaries to carry out the 173 murders at issue in this case. (*See* Compl. ¶¶ 229, 235.) This conclusory allegation does not support ATS jurisdiction. As an initial matter, civil conspiracy is simply not an actionable claim under the ATS because there is no broad international norm providing for conspiracy liability. *See Sosa*, 542 U.S. at 732 (holding that the ATS gives rise to liability for only those violations of international law of “definite content” and of sufficient “acceptance among civilized nations”). As one district court recently concluded, international law recognizes conspiracy liability for a very small category of violations, which does not include extrajudicial killings. *See Presbyterian Church*, 453 F. Supp. 2d at 665-66 (dismissing ATS claims of conspiracy because only conspiracy to commit genocide and to wage aggressive war are recognized under international law); *see also Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2784 (2006) (plurality) (“[I]nternational sources confirm that the crime charged [conspiracy] here 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.”); Antonio Cassese, *International Criminal Law* 197 (2003) (“[I]n international law no customary rule has evolved on conspiracy on account of the lack of support from civil law countries for this category of crime.”). Because plaintiffs do not allege (nor could they) that Chiquita conspired to commit genocide or wage aggressive war, their civil conspiracy claims fail under *Sosa*.

Even if conspiracy to commit extrajudicial killings was an actionable violation under the ATS, plaintiffs have failed to plead sufficient facts in support of such a theory to survive a motion to dismiss. A claim of civil conspiracy requires a showing that: “(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intended 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.” *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983).

Nowhere do plaintiffs make any factual allegations regarding the identities of the purported conspirators, the dates or location of the formation of the conspiracy, or its terms. *See Sinaltrainal*, 474 F. Supp. 2d at 1293-94, 1298 (finding allegations of conspiracy to be insufficient where plaintiffs failed to identify paramilitaries by name or by affiliation and failed to plead dates or locations regarding the formation of the conspiracy); *cf. Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (dismissing plaintiff’s ATS claim where complaint was “devoid of names, dates, locations, times or any facts that would put [defendant] on notice as to what conduct supports the nature of [the] claims”). Indeed, the Complaint does not identify a single representative of Chiquita who reached agreement, or had a “meeting of the

minds,” with the AUC, the FARC, or any other unspecified “paramilitary” regarding the formation or terms of the purported “conspiracy” to commit extrajudicial killings.

Rather than providing any specific details about the conspiracy, the Complaint simply asserts that “Chiquita” conspired with the “AUC,” an allegation so generic that it would fail pleading requirements applicable outside of the ATS. *See Cavitat Med. Tech., Inc. v. Aetna, Inc.*, No. 04-CV-01849-MSK-OES, 2006 WL 218018, at \*5-6 (D. Colo. Jan. 27, 2006) (dismissing civil conspiracy claim where plaintiff failed to “identify the speakers, the statements made, when the statements were made, or to whom they were made”).

The Complaint is also devoid of any factual allegations connecting the 173 murders in this case to the particular conspiracy alleged between the AUC and Chiquita. *See Sinaltrainal*, 474 F. Supp. 2d at 1295-96. By plaintiffs’ own admission, Colombia was a country where innocent civilians were, with tragic frequency, intimidated, tortured, and murdered by various armed groups, including the AUC, FARC, and the Colombian military. (*See Compl.* ¶¶ 207-210.) Yet, plaintiffs fail to plead facts linking the *specific* murders in this case to the formation, orchestration or goals of the conspiracy. *Sinaltrainal*, 474 F. Supp. 2d at 1296. Indeed, as noted above, plaintiffs have not even alleged that any of the victims had any ties to Chiquita, its banana farms, or its unions. Rather, plaintiffs rely on generic assertions that Chiquita sought to eliminate leftist and labor opposition and otherwise “benefited” from the various deaths alleged in the Complaint. (*See Compl.* ¶¶ 3, 211, 220, 235.) As the *Sinaltrainal* court noted, in alleging murders occurring a country beset by violence, such attenuated, generic assertions are simply not enough: “[I]n the context of what the Plaintiffs themselves describe as a country torn by a long-standing civil war, *where the murder of trade unionists and civilians at large is common*, some level of specificity is required to link the explicit agreement between

[defendant] and the [AUC] to the horrible acts that occurred.” *Sinaltrainal*, 474 F. Supp. 2d at 1295-96 (quotations omitted) (emphasis added).

Plaintiffs also fail to allege any specific objective or goal of the alleged conspiracy between the AUC and Chiquita. At most, plaintiffs allege that Chiquita was “one of the financial founders of the AUC,” and in return the AUC ensured that “Chiquita’s business ran smoothly.” (Compl. ¶¶ 220, 222.) But, this is precisely the type of generic allegation that the *Sinaltrainal* court found insufficient to satisfy the heightened pleading requirements of the ATS. *Sinaltrainal*, 474 F. Supp. 2d at 1295-96 (concluding that the “murky allegations of a vague conspiracy between Mosquera [defendant’s plant manager] and unspecified paramilitaries *to use threats and violence to ‘drive away’ union leaders and ‘destroy the union’* are not sufficient”) (emphasis added). Plaintiffs cannot rely on generic allegations that Chiquita sought to suppress union and community opposition as the basis for the purported conspiracy with the AUC, as such allegations are simply inadequate as a matter of law. *Id.*<sup>14</sup>

Notably, plaintiffs’ conspiracy allegations are far less specific and detailed than those pleaded by the plaintiffs in *Sinaltrainal*, where the court dismissed a claim for conspiracy between a U.S. corporation and the AUC. *See Sinaltrainal*, 474 F. Supp. 2d at 1293-94. In *Sinaltrainal*, plaintiffs alleged that the defendant company conspired with the AUC to intimidate and eliminate union opposition at its bottling plants in Colombia. *Id.* at 1278. The multiple complaints in *Sinaltrainal* described in great detail the specific meetings held between employees of the defendant corporation and leaders of Colombian paramilitary groups as well as

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<sup>14</sup> Plaintiffs’ allegations regarding Chiquita’s payments to the AUC are irrelevant to any conspiracy claim. As reflected in the Information, to the extent Chiquita “agreed” to anything with the AUC, it was to pay the AUC’s extortionate demands, not to join the AUC in killing plaintiffs’ relatives

the agreements reached among the alleged co-conspirators to eliminate union opposition.

Notwithstanding this level of specificity, which far exceeds anything contained in the Complaint in this case, the *Sinaltrainal* court dismissed the civil conspiracy claims, finding that the plaintiffs had failed to satisfy the heightened pleading requirements of the ATS. *Id.* at 1293-1301.

Plaintiffs' conspiracy claim amounts to no more than highly generic allegations that Chiquita provided money to the groups; that Chiquita and the AUC shared a common goal of repressing social and labor opposition in the banana-growing regions of Colombia; and that the AUC violently sought to achieve that goal. These allegations, even if assumed to be true, lack the specificity and necessary factual support to meet the pleading requirements of the ATS.

**4. *Plaintiffs do not allege facts to support their claim that the paramilitaries were Chiquita's "agents."***

Plaintiffs alternatively allege that Chiquita is vicariously liable for the acts of the paramilitaries because they acted as the "agents" of Chiquita in Colombia. (*See* Compl. ¶¶ 3, 230, 235.) This allegation is frivolous.

To establish an agency relationship, plaintiffs must plead at a minimum facts demonstrating that the paramilitaries acted on Chiquita's behalf and under Chiquita's control in carrying out the murders at issue here, and that those acts were within the scope of the alleged agency relationship. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (noting that adequate pleading of an agency relationship requires showing of three elements: (1) "the manifestation by the principal that the agent shall act for him"; (2) "the agent's acceptance of the undertaking"; and (3) "the understanding of the parties that the principal is to be in control of the undertaking"). Plaintiffs' Complaint makes no attempt to plead facts establishing the requisite agency relationship. Indeed, there is not a single specific factual allegation that demonstrates

that the AUC was acting on behalf of or under Chiquita's control as a general matter, let alone any allegation that members of the AUC, or the AUC more generally, acted on Chiquita's behalf or under Chiquita's control with respect to the 173 murders alleged here. Plaintiffs cannot survive a motion to dismiss based on conclusory legal assertions that the AUC acted as Chiquita's "agent." *See Kowal*, 16 F.3d at 1276 (on a motion to dismiss, court does not "accept legal conclusions cast in the form of factual allegations").

**5. *The decision of the Southern District of Florida in Sinaltrainal illustrates the weakness of plaintiffs' extrajudicial killing claims.***

The theory of liability upon which plaintiffs in this action base their extrajudicial killing claims is substantially the same as that considered and rejected last year in *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006). In *Sinaltrainal*, plaintiffs sued a Coca-Cola bottler and others under the ATS for allegedly providing support to the AUC and for hiring Colombian paramilitary groups to further the company's business operations in Colombia by suppressing labor opposition. 474 F. Supp. 2d at 1273. Plaintiffs specifically alleged that defendants "hired or conspired with paramilitaries . . . to 'rid' four Colombian bottling plants of the . . . union, and that the Colombian government endorse[d] or tacitly condone[d] this activity." *Id.* at 1274. In support of these claims, plaintiffs made numerous particularized allegations regarding the defendant's purported complicity in the AUC's acts of violence. *See, e.g., id.* at 1278-81 (alleged victims were employees of the defendant corporation, were murdered on the premises of the defendant corporation, and/or were leaders of unions whose members were employed by the defendant corporation).

In assessing the sufficiency of plaintiffs' allegations, the court in *Sinaltrainal* found that, in light of the jurisdictional nature of the ATS, it was "appropriate to require some heightened pleading standard when determining whether the complaints in the instant cases

sufficiently plead facts showing that Defendants violated the law of nations.” *Id.* at 1287. The court accordingly rejected as “wholly conclusory” plaintiffs’ allegations that the AUC acted as defendants’ “agents,” pointing out that “[t]he allegations remain silent as to when, where, and how the Defendants established the agency relationship.” *Id.* at 1293 & n.27; *see also id.* at 1293, 1296 (finding plaintiffs’ allegations “murky,” “scant on the details,” and “conclusory”). Similarly, the court found plaintiffs’ conspiracy allegations insufficient because, *inter alia*, “there is an utter absence of specific allegations connecting the murder of [the first victim] or the kidnapping of [the second victim] to the conspiracy.” *Id.* at 1295; *see also id.* at 1296 (“While the Complaint details a number of horrific acts, it is scant on the details about the formation and orchestration of the conspiracy which links these acts together.”). The court ultimately concluded that “Plaintiffs’ allegations in the instant cases are too conclusory, too vague, and too attenuated to adequately plead a violation of the law of nations to support subject matter jurisdiction” under the ATS. *Id.* at 1276. Accordingly, the court dismissed plaintiffs’ claims. *Id.* at 1302.

If the detailed allegations in *Sinaltrainal* were insufficient to survive a motion to dismiss, there is simply no basis to find that this complaint, which contains no particularized allegations connecting Chiquita to the alleged murders, is adequate.

## **II. PLAINTIFFS’ TVPA CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.**

Enacted by Congress in 1991, the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, provides a civil right of action against (1) an “individual” (2) acting “under actual or apparent authority, or color of law, of any foreign nation” (3) for torture or extrajudicial killing. Claims under the TVPA may only be entertained if they fall within the jurisdiction conferred by the ATS. *Sinaltrainal*, 474 F. Supp. 2d at 1301 (citing *Abebe-Jira v. Negewo*, 72

F.3d 844, 848 (11th Cir. 1996)); *see also Kadac*, 70 F.3d at 246. Plaintiffs' failure to plead a violation of the international prohibition against extrajudicial killing under the ATS, as described above, leaves the Court without jurisdiction for the TVPA claims. *See Sinaltrainal*, 474 F. Supp. 2d at 1301.

First, “[b]y the clear language of the [TVPA], a party must act ‘under actual or apparent authority, or color of law’ to be liable under the statute.” *Exxon*, 393 F. Supp. 2d at 28; *see also* 28 U.S.C. § 1350 note §2(a)(1)-(2). For the reasons set forth in Part I.A., *supra*, plaintiffs do not adequately allege state action. On this basis alone, plaintiffs' TVPA claims should be dismissed. *See Khulumani*, 504 F.2d at 260 (per curiam) (affirming dismissal of TVPA claims because plaintiffs “failed to link any defendants to state aid or the conduct of state officials”). Furthermore, plaintiffs cannot avoid the statutory mandate of state action under the TVPA with allegations regarding “war crimes” because there is no “war crimes” exception for TVPA claims.

Second, as explained in Part I.A.4., *supra*, accepting plaintiffs' assertion that the AUC acted under color of law would require an impermissible ruling on a political question — whether the Colombian government sponsored terrorism in Colombia. The legislative history of the TVPA confirms that a “plaintiff must establish government involvement in the torture or killing” to state a claim under the statute and that the statute “does not attempt to deal with torture or killing by purely private groups.” *See Kadac*, 70 F.3d at 245 (citing H.R. Rep. No. 367, 102d Cong., 2d Sess, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87). A determination of whether the AUC acted under color of law “impermissibly requires adjudication of another country's actions.” *Exxon*, 393 F. Supp. 2d at 28.

Third, “the plain reading of the [TVPA] strongly suggests that it only covers human beings, and not corporations.” *Exxon*, 393 F. Supp. 2d at 28 (citing *Clinton v. New York*, 524 U.S. 417, 428-29 nn. 13-14 (1998)); *see also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) (“The Court holds that corporations are not ‘individuals’ under the TVPA based on its reading of the plain language of the statute.”); *Corrie*, 403 F. Supp. 2d at 1026 (holding that the TVPA does not apply to corporations because “the statute speaks in terms of individuals, and the rationale of *Mujica*, that ‘individual’ must mean the same thing with respect to both victim and perpetrators is reasonable.”). For that reason, plaintiffs may not proceed with a TVPA claim against Chiquita.

### **III. PLAINTIFFS’ STATE LAW CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.**

Plaintiffs assert a variety of state common law and statutory claims based on the tortious conduct of unspecified people allegedly “employed” by Chiquita. These claims should be dismissed because (1) Chiquita is not subject to D.C. tort law for alleged conduct having no connection to that jurisdiction, (2) plaintiffs have not adequately alleged these claims under D.C. law, and (3) most of plaintiffs’ claims are time-barred under the applicable statutes of limitations.

#### **A. D.C. Law Does Not Apply Extraterritorially.**

Plaintiffs plead each of their common law tort claims under D.C. law (*see* Compl. ¶¶ 256, 266, 270, 274, 278), but federal law prohibits the extraterritorial application of D.C. tort law to conduct having no alleged connection to that jurisdiction. In *BMW of North America, Inc. v. Gore*, the Supreme Court held that Alabama courts could not calculate tort damages based on wrongdoing allegedly perpetrated in other states, because “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.” 517 U.S. 559, 572 n.16 (1996) (quotations and citation omitted);

*see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”); *Lauritzen v. Larsen*, 345 U.S. 571, 590 (1953) (“[It is] a denial of due process of law when a state . . . attempts to draw into control of its law otherwise foreign controversies on slight connections, because it is a forum.”). This presumption against extraterritoriality is applicable to statutory and common law claims alike. *See Gore*, 517 U.S. at 573 n.17 (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”).

The notion that D.C. tort law would govern conduct that allegedly occurred in Colombia is flatly inconsistent with the Supreme Court’s holding in *Gore*. Courts have dismissed state law claims in ATS cases for this reason. *See, e.g., Romero v. Drummond Co.*, No. CV-03-BE-0575-W, slip op. at 2 (N.D. Ala. Mar. 5, 2007) (attached as Exhibit M to Hall Decl.) (stating that court “would not apply Alabama common law to the tort claims alleged here, which occurred extraterritorially in Colombia” and dismissing claims “[b]ecause Plaintiffs pursued [these] claims . . . exclusively under Alabama law”); *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.”).

**B. Plaintiffs Have Not Adequately Alleged Any State Law Tort Claim.**

***1. Plaintiffs Fail to State a Claim for Any Derivative Liability Tort.***

Plaintiffs allege a variety of torts under D.C. law based on Chiquita’s derivative liability for alleged conduct of the paramilitaries. (See Compl. ¶¶ 267-278 (intentional infliction of emotional distress (“IIED”) (Count 7), battery (Count 8), assault (Count 9).) But plaintiffs do not and cannot allege any facts demonstrating the required elements of respondeat superior liability – (1) a master-servant relationship and (2) tortious conduct occurring within the scope of

employment. *Giles v. Shell Oil Corp.*, 487 A.2d 610, 611 (D.C. 1985). Plaintiffs repeatedly refer to the paramilitaries as Chiquita's "employees" or "agents" (*see* Compl. ¶¶ 2, 3, 230, 241, 247, 252, 258, 268, 272, 276), but they have not pled a single fact demonstrating that Chiquita controlled their activities "and the manner in which [their] work [wa]s to be done." *See Giles*, 487 A.2d at 611. Likewise, because plaintiffs have not alleged any duties that Chiquita "hired" the paramilitaries to perform, they have utterly failed to allege facts sufficient to show that "the incident at issue occurred while the [employee] was acting within the scope of his employment." *Id.* Far from supporting the claim that Chiquita "controlled" the paramilitaries, the facts imported from the criminal Information referenced in the Complaint show exactly the opposite.

**2. Plaintiffs Fail to State a Claim for Any Direct Liability Tort.**

Plaintiffs also allege that Chiquita directly engaged in tortious conduct under D.C. law by negligently "hiring" and "supervising" the paramilitaries. (*See* Compl. ¶¶ 243-266 (negligence (Count 4), negligent hiring (Count 5), negligent supervision (Count 6).) Like plaintiffs' derivative liability claims, these direct liability claims presume that Chiquita "employed" members of the paramilitaries, an utterly absurd notion that plaintiffs do not and could not support. *See* Part I.B.4., *supra*.

Additionally, to establish liability for negligence-based torts, plaintiffs must allege that Chiquita: (1) had a duty to plaintiffs; (2) breached that duty; and (3) proximately caused the alleged injuries. *Gibson-Michaels v. Securiguard, Inc.*, No. 06-1937 (RMU), 2007 WL 1322111, at \*2 (D.D.C. May 4, 2007). "Inherent . . . in the concept of duty is the relationship between the parties out of which the duty arises," *see Odemns v. District of Columbia*, 930 A.2d 137, 143 (D.C. 2007), but plaintiffs have alleged no relationship between their family members and Chiquita. Plaintiffs' bare-bones allegation that "Defendants had a duty of reasonable care towards Plaintiffs to ensure that neither they nor their agents engaged in

conduct leading to or likely to lead to foreseeable harm” (Compl. ¶ 244), does not establish a relationship between Chiquita and plaintiffs’ relatives. Rather, plaintiffs have evidently alleged that Chiquita owed a legal duty to the entire population of Colombia. Duty, however, “must be limited to avoid liability for unreasonably remote consequences.” *Odemns*, 930 A.2d at 143.

**3. Plaintiffs Fail to State a Claim for Wrongful Death.**

Finally, plaintiffs also allege a cause of action for wrongful death under “the laws of the District of Columbia, the laws of the United States,<sup>15</sup> and the laws of Colombia.” (Compl. ¶¶ 240-42 (Count 3).) Under D.C. law, wrongful death is a statutory cause of action that is only available to remedy “injur[ies] done or happening within the limits of the District.” D.C. Code § 16-2701(a) (2007). Because plaintiffs allege that their relatives were injured in Colombia (Compl. ¶¶ 2, 10-183), they have failed to state a claim for wrongful death under D.C. law. *See Estate of Grant v. Armour Pharm. Co.*, No. 04-1680 (TFH), 2007 WL 172316, at \*5 (D.D.C. Jan. 23, 2007) (“As Plaintiff’s injury occurred in Virginia, . . . the District of Columbia Wrongful Death statute does not provide Plaintiff a remedy.”).

Moreover, under both D.C. and Colombian law, plaintiffs’ wrongful death claim assumes that Chiquita is responsible for some underlying tortious conduct. *See* D.C. Code § 16-2701(a) (2007) (providing wrongful death cause of action against person who “is liable [for a wrongful act, neglect, or default]”); attached Declaration of Eduardo A. Wiesner (describing elements of extra-contractual (*i.e.*, tort) liability under Colombian law). Because plaintiffs fail to allege any underlying tortious conduct on behalf of Chiquita, their claim for wrongful death also fails.

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<sup>15</sup> Although plaintiffs allege wrongful death “under . . . the laws of the United States” (Compl. ¶ 241), there is no federal common law cause of action for wrongful death.

**C. Most of Plaintiffs' State Law Claims Are Time-Barred Under The Applicable Statute of Limitations.**

In addition to plaintiffs' failure to adequately plead their state law claims on the merits, most of plaintiffs' claims are also time-barred under the applicable statute of limitations. Each plaintiff's derivative liability claims are time-barred under D.C. law. *See* D.C. Code § 12-301(4) (2007) (1-year limitation for assault and battery); *Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 87 (D.D.C. 2000) (1-year limitation for IIED claim that is "intertwined" with assault or battery claim). All but 4 of the 144 plaintiffs' direct liability claims (*see* Compl. ¶¶ 25, 36, 54, 168), are time-barred under D.C. law. *See* D.C. Code § 12-301(8) (2007) (3-year limitation for negligence-based actions).

Under D.C. law, each plaintiff's wrongful death claim is time-barred. *See* D.C. Code § 16-2702 (2007) (1-year limitation under D.C. law). If Colombian law applied to plaintiffs' wrongful death claims, only 4 of the 144 D.C. plaintiffs' claims (*see* Compl. ¶¶ 25, 36, 54, 168) would survive. *See Higgins v. Wash. Metro. Area Transit Auth.*, 507 F. Supp. 984, 986 (D.D.C. 1981) (holding that when D.C. court applies another jurisdiction's wrongful death statute, claim is governed by 3-year limitation of D.C. Code § 12-301 covering actions "for which a limitation is not otherwise specifically prescribed").

**CONCLUSION**

For the foregoing reasons, Chiquita respectfully requests that the Court dismiss plaintiffs' Complaint for lack of jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Respectfully submitted,

/s/ Eric H. Holder, Jr.

Eric H. Holder, Jr. (D.C. Bar No. 303115)  
John E. Hall (D.C. Bar No. 415364)  
James M. Garland (D.C. Bar No. 475509)  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 662-5372 (telephone)  
(202) 778-5372 (facsimile)  
eholder@cov.com

*Attorneys for Defendant Chiquita Brands  
International, Inc.*

Date: December 10, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of Defendant Chiquita Brands International, Inc's Motion to Dismiss Complaint, Memorandum in Support, and Proposed Order were served upon:

Terry Collingsworth  
International Rights Advocates  
218 D Street SE (3rd floor)  
Washington, D.C. 20003  
Tel: (202) 347-4100

Paul Wolf  
P.O. Box 11244  
Washington, D.C. 20008-1244  
Tel: (202) 674-9653

*Counsel for Plaintiffs*

by electronic filing under the Rules of this Court on this 10th day of December, 2007.

\_\_\_\_\_  
/s/ Eric H. Holder, Jr.  
Eric H. Holder, Jr.  
*Attorney for Defendant*