

**UNPEELING THE GROWING SPLIT UNDER THE ALIEN TORT  
STATUTE:  
CARDONA V. CHIQUITA BRANDS INTERNATIONAL, INC.**

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\* J.D. Candidate, 2016, Seton Hall University School of Law; BA Economics, Boston College, 2013. Thank you to Professor Kristen Boon and *Seton Hall Legislative Journal* for their insight and guidance and to my family for their support. "To be just, it is not enough to refrain from injustice. One must go further and refuse to play its game, substituting love for self-interest as the driving force of society." –Pedro Arrupe, S.J.

## I. INTRODUCTION

The Eleventh Circuit Court of Appeals' application of the Alien Tort Statute ("ATS") in its recent decision *Cardona v. Chiquita Brands International, Inc.* demonstrates a mechanical and restrictive application of the holding of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Company*.<sup>1</sup> The Eleventh Circuit declared that since none of Chiquita Brands International's ("Chiquita") relevant conduct took place within the United States, U.S. courts lacked the power to review the claims of over four thousand Colombians who sought to hold Chiquita liable for the deaths of family members.<sup>2</sup>

In March 2007, Chiquita, a major U.S. multi-national corporation, pled guilty to a federal felony of knowingly providing material support to the Autodefensas Unidas de Colombia ("AUC"), a paramilitary terrorist organization notorious for its mass murder of Colombian civilians.<sup>3</sup> Chiquita argued that the AUC extorted its support as payment for protection, and that Chiquita never received services in exchange for those payments from the AUC.<sup>4</sup> However, Chiquita "fail[ed] to square its claimed victimhood with the facts."<sup>5</sup> Contrary to Chiquita's claims that these payments were extorted, internal company documents published by the National Security Archive ("NSA"), an independent research group, strongly suggest that the transactions provided specific benefits to Chiquita.<sup>6</sup> By its

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<sup>1</sup> *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>2</sup> *Cardona*, 760 F.3d at 1188.

<sup>3</sup> Brief for Plaintiffs-Appellants at 1, *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014) (No. 12-14898) ("Chiquita's assistance to the AUC was a federal crime because the U.S. Government had officially designated the AUC a 'Foreign Terrorist Organization' and a 'Specially Designated Global Terrorist,' and thus, a threat to the security of foreign policy of the United States.").

<sup>4</sup> Jim Lobe & Aprille Muscara, *US Banana Firm Hired Colombia Paramilitaries*, ALJAZEERA (April 8, 2011, 2:28 PM), <http://www.aljazeera.com/indepth/features/2011/04/20114813392621189.html>; see also Erik Larson & Christie Smythe, *Chiquita Wins Dismissal of U.S. Suits on Colombia Torture*, BLOOMBERG BUS. (July 25, 2014, 8:35 AM), <http://www.bloomberg.com/news/articles/2014-07-24/chiquita-wins-dismissal-of-u-s-suits-over-colombia-torture-1> ("No executives were charged under the deal, which was reached when Chiquita was represented by then-Covington & Burling LLP lawyer Eric Holder, now the U.S. attorney general.").

<sup>5</sup> See Transcript of Sentencing Hearing at 12, *United States v. Chiquita Bananas Int'l, Inc.*, No. 07-055 (D.D.C. Sept. 17, 2007) [hereinafter *Chiquita Sentencing Hearing*] (arguing that "[a]s a multi-national corporation, Defendant Chiquita was not forced to remain in Colombia for 15 years, all while paying the three leading terrorist groups terrorizing the Colombian people").

<sup>6</sup> Jim Lobe & Aprille Muscara, *US Banana Firm Hired Colombia Paramilitaries*, ALJAZEERA (April 8, 2011, 2:28 PM), <http://www.aljazeera.com/indepth/features/2011/04/20114813392621189.html>. The documents consist of more than 5,500 pages of

own account, between 1997 and 2008, Chiquita made over one hundred payments to the AUC, totaling \$1.7 million, in addition to assisting the AUC in “smuggling arms and ammunition with full knowledge that the AUC was a violent organization responsible for crimes against humanity.”<sup>7</sup>

During this period of support, 3,778 people were murdered in the Uraba region of Colombia, with an additional sixty thousand people forced into what is now the second largest internally displaced population in the world.<sup>8</sup> As the Colombian people were terrorized, from 2001 to 2004, Chiquita turned a \$49.4 million profit from its Colombia operations.<sup>9</sup> “The company, having knowingly and repeatedly approved transactions its own lawyers were flagging, also went to great lengths to disguise the payments, using special vocabulary in company accounting records and various intermediaries on the ground in Colombia”; however, none of the dozens of high level officials who approved the payments have been prosecuted, nor have any reparations been paid to the victims.<sup>10</sup> Chiquita executives classified the payments as “the cost of doing business in Colombia”—a cost that included a shipment of three thousand AK-47 assault rifles and five million rounds of ammunition.<sup>11</sup> Nevertheless, Chiquita maintains that it only paid militias to protect employees and that it should not be held responsible for the tragic violence that plagued Colombia.<sup>12</sup> Notwithstanding the corporation’s cursory justifications, Chiquita aided the AUC because it benefitted from the AUC’s pacification of

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internal Chiquita memos which “reinforce the claim . . . that the company was knowingly complicit in, and thus liable for, the atrocities committed by the AUC” while on the Chiquita payroll. *Id.* (quoting Arturo Carrillo, director of George Washington University’s International Human Rights Clinic).

<sup>7</sup> Brief for Plaintiffs-Appellants, *supra* note 3, at 1–2; *Chiquita Sentencing Hearing*, *supra* note 5, at 29 (“What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists.”).

<sup>8</sup> Steven Cohen, *How Chiquita Bananas Undermined the Global War on Terror*, THINK PROGRESS (Aug. 2, 2014, 2:45 PM), <http://thinkprogress.org/world/2014/08/02/3466915/chiquita-colombia-ruling/>.

<sup>9</sup> *Chiquita Sentencing Hearing*, *supra* note 5, at 13.

<sup>10</sup> *Id.*

<sup>11</sup> Associated Press, *Chiquita Accused of Funding Colombia Terrorists*, CBS NEWS (May 31, 2011, 8:20 AM), <http://www.cbsnews.com/news/chiquita-accused-of-funding-colombia-terrorists/> (“In a 1997 handwritten note, one Chiquita executive said such payments are the ‘cost of doing business in Colombia.’ ‘Need to keep this very confidential—people can get killed.’”).

<sup>12</sup> Erik Larson & Christie Smythe, *Chiquita Wins Dismissal of U.S. Suits on Colombia Torture*, BLOOMBERG BUS. (July 25, 2014, 8:35 AM), <http://www.bloomberg.com/news/articles/2014-07-24/chiquita-wins-dismissal-of-u-s-suits-over-colombia-torture-1->

the banana-growing regions and the suppression of labor union activity and other social unrest that could have harmed Chiquita's operations.<sup>13</sup>

This Note argues that the dissent in *Cardona* was correct in that Chiquita's connections to the United States displaced the presumption against extraterritoriality. Chiquita is incorporated and headquartered in the United States, and Chiquita's participation in reviewing, approving, and concealing a scheme of payments and weapons shipments to a Colombian terrorist organization all took place from its U.S.-based corporate offices. Part II of this Note will discuss the foundation of ATS litigation, from the enactment of the 1789 Judiciary Act through the *Kiobel* decision. Part III will outline and analyze the growing split amongst circuit courts regarding their application of *Kiobel*. Finally, Part IV will examine *Cardona* by reconsidering the dissent and exploring the divergent treatment of corporate liability and aiding and abetting liability under the ATS. Additionally, Part IV will discuss certain international and human rights doctrinal debates which are implicated through ATS litigation.

## II. THE HISTORY OF THE ALIEN TORT STATUTE

The ATS was enacted as part of the Judiciary Act of 1789, granting the national government control over foreign affairs.<sup>14</sup> However, the ATS laid dormant and was essentially ignored for over two centuries, until its revival in 1980 by way of the Second Circuit Court of Appeals decision in *Filartiga v. Peña-Irala*, as well as the rapid expansion of the human rights movement in the late-twentieth century.<sup>15</sup>

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<sup>13</sup> Brief for Plaintiffs-Appellants, *supra* note 3, at 2, 10–13 (stating that through this strategic alliance, Chiquita was able to eliminate union organizers and others it perceived as hostile to its interests, and whom the AUC perceived as guerilla sympathizers, reduce operating costs, and eliminate disruptions and competition).

<sup>14</sup> 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2006)).

<sup>15</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (referring to the ATS as a “rarely-invoked provision”); *see also* *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (calling the ATS “a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.”).

A. *Revival of the ATS: Filartiga v. Peña-Irala*

*Filartiga* concerns the 1976 fatal kidnapping and torture of Joelito Filartiga in Paraguay by Americo Peña-Irala, a Paraguayan police officer, in retaliation for the human rights advocacy and political beliefs of Joelito's father, a Paraguayan physician and activist.<sup>16</sup> Dr. Filartiga commenced a criminal action in the Paraguayan courts against Peña-Irala, unaware that he had fled to the United States.<sup>17</sup> Joelito's sister, who was then living in Washington, D.C., caused Peña-Irala to be served with a complaint, which alleged that Peña-Irala had wrongfully caused the death of her brother by torture.<sup>18</sup> The district court dismissed the case, holding that it was constrained by dicta contained in two recent opinions that stated that the State's treatment of its own citizens did not violate international law.<sup>19</sup>

The Carter administration filed an amicus brief supporting the Filartigas' view that the ATS provided jurisdiction over their claim because: (1) the ATS incorporates an evolving body of international law that affords individual rights that can be directly enforced in domestic courts; (2) the judiciary had the authority to decide the case despite foreign affairs implications; and (3) litigation in Paraguay would not be possible.<sup>20</sup> Less than a month after the executive branch filed its brief, the court in *Filartiga* held that official torture is unambiguously prohibited by the law of nations, noting that the ultimate scope of the fundamental rights conferred by international law "will be subject to continuing refinement."<sup>21</sup> Further, the court held that the ATS affords federal jurisdiction for adjudication over claims that violate universally accepted norms of international law.<sup>22</sup>

B. *Cautious Optimism: Tel-Oren v. Libyan Arab Republic*

The first judicial response after *Filartiga* came in *Tel-Oren v. Libyan Arab Republic*, where the D.C. Circuit Court found that a claim

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<sup>16</sup> *Filartiga*, 630 F.2d at 878.

<sup>17</sup> *Id.* at 878-79.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 880 (citing *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976)); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975)).

<sup>20</sup> Memorandum for the United States as Amicus Curiae at 5, *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

<sup>21</sup> *Filartiga*, 630 F.2d at 885 (2d Cir. 1980) (concluding that the dictum in *Dreyfus v. von Finck* relied on by the district court "is clearly out of tune with the current usage and practice of international law").

<sup>22</sup> *Id.* at 877.

of ATS jurisdiction based on acts of terrorism—specifically, an armed attack on a civilian bus in Israel—should be dismissed; however, the judges disagreed as to the reasoning, as illustrated by the three separate concurring opinions.<sup>23</sup> Judge Edwards largely adhered to the legal principles established in *Filartiga*, but found that factual distinctions precluded a finding of subject matter jurisdiction, while Judge Robb would have dismissed the case on political question grounds.<sup>24</sup>

Judge Bork, however, insisted that the federal courts had no power to recognize a cause of action for the claims at issue in either *Filartiga* or *Tel-Oren*.<sup>25</sup> According to Judge Bork, such a cause of action would intrude upon the foreign affairs powers of the executive branch, a result that could not possibly have been what the drafters of the ATS intended.<sup>26</sup> Judge Bork's critical response to *Filartiga* stemmed from a formalist notion of separation of powers that implicitly rejects the vision of the ATS as a mechanism for developing international law norms.<sup>27</sup>

### C. Affirmation of Modern ATS Litigation: *Sosa v. Alvarez-Machain*

In 2004, the Supreme Court made its first pronouncement on the ATS in *Sosa v. Alvarez-Machain*.<sup>28</sup> The Court determined that the ATS was purely jurisdictional, and “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”<sup>29</sup> Additionally, the Court held that the jurisdictional grant of the ATS took effect from the moment of its enactment, as it was not passed “to be placed on the shelf for use by a future Congress or state legislature.”<sup>30</sup>

*Sosa* involved a Drug Enforcement Agency (“DEA”) agent who,

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<sup>23</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984). Compare *Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring), with *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring).

<sup>24</sup> *Tel-Oren*, 726 F.2d at 776, 796.

<sup>25</sup> *Id.* at 798–823 (Bork, J., concurring).

<sup>26</sup> *Id.* (Bork, J., concurring).

<sup>27</sup> *Id.* at 801 (Bork, J., concurring).

<sup>28</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

<sup>29</sup> *Id.* at 724.

<sup>30</sup> *Id.* at 719 (“The anxieties of the pre-constitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect.”).

while on assignment in Mexico, was captured, tortured and killed.<sup>31</sup> Based on eyewitness testimony, DEA officials believed Alvarez-Machain ("Alvarez"), a Mexican physician, was present at the house to prolong the agent's life in order to extend the interrogation and torture.<sup>32</sup> When requests for help to the Mexican government proved fruitless, the DEA successfully executed a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial.<sup>33</sup> However, Alvarez returned to Mexico and began a civil action against Sosa, several DEA agents, several Mexican civilians, and the United States after the Supreme Court found that Alvarez's forcible seizure did not affect the jurisdiction of a federal court.<sup>34</sup>

Although the Supreme Court asserted that district courts could recognize private causes of action for certain torts in violation of the law of nations, the Court restrained the discretion that district courts should exercise in considering a new cause of action of this kind.<sup>35</sup> The Supreme Court required "any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."<sup>36</sup> Offenses of the law of nations specifically included violations of safe conduct, infringement on the rights of ambassadors, and piracy.<sup>37</sup> Therefore, the Supreme Court reasoned, a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, does not fall within the three spheres of conduct that violate customary international law norms so as to support the creation of a federal remedy.<sup>38</sup>

#### D. Limiting Extraterritoriality: *Kiobel v. Royal Dutch Petroleum*

The majority of modern ATS debate stems from the *Kiobel v. Royal Dutch Petroleum Company* decision, which brought virtually all pending ATS litigation to a halt.<sup>39</sup> The plaintiffs in *Kiobel* were

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<sup>31</sup> *Id.* at 697.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 698.

<sup>34</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

<sup>35</sup> *Id.* at 724.

<sup>36</sup> *Id.* at 725.

<sup>37</sup> *Id.* at 715.

<sup>38</sup> *Id.* at 738.

<sup>39</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (Apr. 18, 2013, 10:51 AM), <http://www.forbes.com/sites/wlf/>

Nigerian nationals who were granted political asylum in the United States.<sup>40</sup> The plaintiffs claimed that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.<sup>41</sup> More specifically, the complaint alleged that Nigerian military and police forces attacked plaintiffs' villages, beating, raping, killing, and arresting residents, and destroying or looting property.<sup>42</sup> These vicious attacks suspiciously occurred after plaintiffs began protesting the environmental effects of Royal Dutch Petroleum's oil exploration and production in the region.<sup>43</sup> The Supreme Court's unanimous decision was fractured by four distinct opinions.<sup>44</sup>

The majority of the Court, led by Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, held that courts exercising their power under the ATS are constrained by the presumption against extraterritorial application.<sup>45</sup> The presumption against extraterritoriality states that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," and to rebut the presumption, a statute would need to demonstrate a "clear indication of extraterritoriality."<sup>46</sup> Although the Court originally granted *certiorari* to consider whether the law of nations recognizes corporate liability, the majority reasoned that the *Kiobel* plaintiffs' claims were barred because the events occurred on the soil of a foreign sovereign state.<sup>47</sup> As Chief Justice Roberts acknowledged, the presumption against extraterritoriality is typically used to discern whether the substantive content of laws applies abroad, in contrast to the ATS, which is utilized to determine jurisdictional

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2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/.

<sup>40</sup> *Kiobel*, 133 S. Ct. at 1662–63.

<sup>41</sup> *Id.* at 1662–63.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1659.

<sup>45</sup> *Id.* at 1669.

<sup>46</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)); *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.").

<sup>47</sup> *Id.* at 1663 (After oral argument, the Supreme Court directed the parties to file supplemental briefs addressing an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.").



issues and does not regulate conduct or afford relief.<sup>48</sup>

Although the Court in *Kiobel* found that all the relevant conduct took place outside the United States, the Court also stated that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say mere corporate presence suffices.”<sup>49</sup> The majority opinion, however, gave no indication of what may constitute sufficient contact to displace the presumption against extraterritoriality. This lack of clarity is lamented in the concurring opinions.<sup>50</sup>

Justice Kennedy’s deciding fifth vote is accompanied by a concise and explicit opinion, in which he agreed with the Court’s narrow holding, tailored to the case at hand.<sup>51</sup> Nevertheless, Justice Kennedy also acknowledged that in cases of extraterritorial human rights abuses committed abroad, where neither the *Kiobel* holding nor a statute, such as the Torture Victim Protection Act of 1991 (“TVPA”), are applicable, “proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>52</sup>

Justice Alito argued in his concurrence that causes of action under the ATS should be barred unless the domestic conduct violates an international law norm sufficient to meet the *Sosa* requirements of definitiveness and acceptance among nations.<sup>53</sup> Since none of the acts in *Kiobel* took place domestically, Justice Alito would find the claim barred by the presumption against extraterritoriality.<sup>54</sup>

In his concurrence, Justice Breyer rejected invoking the presumption against extraterritoriality because it “rests on the perception that Congress ordinarily legislates with respect to

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<sup>48</sup> *Id.* at 1664; see Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/> (calling the presumption against extraterritoriality an “odd fit” in the ATS context).

<sup>49</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>50</sup> *Id.* at 1669 (Alito, J., concurring) (arguing that the majority’s narrow approach leaves much unanswered).

<sup>51</sup> *Id.* at 1669–70 (Kennedy, J., concurring).

<sup>52</sup> *Id.* at 1669 (Kennedy, J., concurring); 28 U.S.C. §1350 (2006).

<sup>53</sup> *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

<sup>54</sup> *Id.*; see discussion *infra* Part IV.A.

domestic, not foreign matters.”<sup>55</sup> Under Justice Breyer’s test, there would be jurisdiction under the ATS where: “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>56</sup> Furthermore, Justice Breyer relied on *Sosa* to determine the extent to which the courts may allow the ATS claims of those harmed by activities that take place abroad, and provided a measure of guidance regarding the majority’s standard.<sup>57</sup>

While the first prong of Justice Breyer’s test is not controversial, the second and third prongs present the possibility of divergence from the majority standard.<sup>58</sup> Ultimately, Justice Breyer agreed with the majority and concluded that the plaintiffs’ claims in *Kiobel* did not fall within the jurisdictional purview of the ATS.<sup>59</sup> In arriving at his conclusion, Justice Breyer noted that all parties involved were U.S. citizens, the conduct occurred abroad, and there was no distinct U.S. interest present in the case.<sup>60</sup>

### III. *KIOBEL* AFTERMATH: ANALYSIS OF THE GROWING SPLIT

This part will evaluate the growing split amongst circuit courts in light of the minimal guidance provided by the *Kiobel* decision. Since *Kiobel*, courts have applied the presumption against extraterritoriality to all ATS litigation. Yet circuit courts have employed the presumption, and its ancillary touch and concern test, in both narrow and broad fashions.<sup>61</sup> As courts continue to decipher *Kiobel*, questions regarding the kinds of allegations that are sufficient to satisfy the touch and concern requirement, as well as issues of corporate liability, remain unresolved.<sup>62</sup>

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<sup>55</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1672 (2013) (Breyer, J., concurring) (citing *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010)).

<sup>56</sup> *Id.* at 1671 (Breyer, J., concurring).

<sup>57</sup> *Id.* at 1671–72 (Breyer, J., concurring) (noting that Congress has not sought to limit the statute’s jurisdictional or substantive reach in the wake of *Sosa*).

<sup>58</sup> Compare *Kiobel*, 133 S. Ct. at 1669, with *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

<sup>59</sup> *Kiobel*, 133 S. Ct. at 1678 (Breyer, J., concurring).

<sup>60</sup> *Id.*

<sup>61</sup> See discussion *infra* Part III.A–B.

<sup>62</sup> Ralph G. Steinhardt, *Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 MD. J. INT’L L. 1, 22 (2013) (“[G]iven the level of public interest in the case and the extensive briefing, it was a shock that the *Kiobel* Court was utterly silent on whether corporations even in principle can have international

In *Kiobel*, the Supreme Court relied heavily on *Morrison v. National Australia Bank*, which established the principal that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>63</sup> Nonetheless, *Kiobel* was not a death sentence for the ATS; it only eliminated the particular kind of ATS actions discussed in *Morrison*: “foreign cubed” ATS actions in which (1) foreign plaintiffs are suing (2) a foreign defendant in an American court for conduct that took place *entirely* within (3) foreign territory.<sup>64</sup> Therefore, “foreign squared” cases, where the plaintiff or defendant is a U.S. national or where the conduct occurred on U.S. soil may still be “on the table.”<sup>65</sup>

Chief Justice Roberts appeared to leave the door open for ATS cases involving U.S. plaintiffs or U.S. defendants abroad, even if only narrowly, by espousing the touch and concern requirement.<sup>66</sup> However, in the entirety of the *Kiobel* majority opinion, Chief Justice Roberts referenced the touch and concern requirement exactly once, leaving many questions as to what specifically the test entails.<sup>67</sup>

#### A. Misguided Clarity: *Kiobel*'s Phantom Bright Line Rule

In *Balintulo v. Daimler AG*, the Second Circuit Court of Appeals held that, where plaintiffs have failed to allege that any relevant conduct occurred in the United States, *Kiobel* foreclosed the plaintiffs' ATS claims.<sup>68</sup> In *Balintulo*, South African victims of apartheid brought suits against corporate defendants, including Daimler, Ford, and IBM, for aiding and abetting violations of customary international law committed by the South African government.<sup>69</sup> The court pointedly rejected the plaintiffs' argument that, although “mere corporate presence” is inadequate to touch and concern the United States with “sufficient force,” corporate

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obligations to respect human rights norms.”).

<sup>63</sup> *Kiobel*, 133 S. Ct. at 1664 (citing *Morrison*, 561 U.S. at 255).

<sup>64</sup> *Morrison*, 561 U.S. at 247, 283 n.11 (emphasis added); see Hathaway, *supra* note 48.

<sup>65</sup> Hathaway, *supra* note 48.

<sup>66</sup> *Kiobel*, 133 S. Ct. at 1669; Hathaway, *supra* note 48.

<sup>67</sup> *Kiobel*, 133 S. Ct. at 1669 (“And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”) (internal citations omitted).

<sup>68</sup> *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013).

<sup>69</sup> *Id.* at 179–80 (Plaintiffs claim that these subsidiary companies sold cars and computers to the South African government and consequently facilitated the apartheid regime's innumerable race-based injustices, rapes, tortures, and extrajudicial killings.).

citizenship in the United States is satisfactory.<sup>70</sup> However, the court did not address the factual distinctions between corporate citizenship and mere corporate presence.<sup>71</sup> The court reiterated that the relevant conduct occurred in South Africa, ignoring the touch and concern element of the majority's opinion in *Kiobel*, and maintaining that the court had "no reason to explore, less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States."<sup>72</sup>

The Second Circuit adopted the view expressed by Justice Alito's concurrence in *Kiobel* while at the same time recognizing that a majority of the Supreme Court did not share this view.<sup>73</sup> The Second Circuit justified the application of Justice Alito's test by stating that, while the Supreme Court did not embrace it, "it did not reject it either; the majority simply left open any questions regarding the permissible reach of causes of action under the ATS when *some* domestic activity is involved in the case."<sup>74</sup> However, the same logic can be used to apply the views of Justice Breyer's concurrence, which would have allowed jurisdiction since the defendant was a US citizen.<sup>75</sup> Curiously, the court in *Balintulo* cites *Kiobel* in support of the Second Circuit's holding that corporations are not proper defendants under the ATS when it is unmistakable that the case was decided on other grounds.<sup>76</sup> The court simultaneously denied that the apartheid victims had alleged any relevant U.S.-based conduct and ignored allegations that the defendants took affirmative steps in the United States to circumvent the sanctions regime by supplying the South African government with their products, despite legal restrictions against trade with South Africa.<sup>77</sup> The Second Circuit held that this U.S.-based conduct was not tied to the relevant human rights violations.<sup>78</sup>

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<sup>70</sup> *Id.* at 189–90 ("Accordingly, if all relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.").

<sup>71</sup> *Id.* at 191.

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> *Balintulo v. Daimler AG*, 727 F.3d 174, 191 n.26 (2d Cir. 2013).

<sup>74</sup> *Id.* (internal citation omitted); *see also* *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 746 F.3d 42, 45–46, 49–50 (2d Cir. 2014) (applying *Kiobel* to foreclose jurisdiction over ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner).

<sup>75</sup> *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

<sup>76</sup> *Balintulo*, 727 F.3d at 191 n.26.

<sup>77</sup> *Id.* at 192.

<sup>78</sup> *Id.*

The Eleventh Circuit has reached similar conclusions.<sup>79</sup> In *Baloco v. Drummond Company*, the court concluded that the claimed violations of the law of nations did not meet the touch and concern test established by *Kiobel* and thus did not displace the presumption against extraterritorial application.<sup>80</sup> For this reason, the claims were dismissed. The plaintiffs alleged that Drummond Company, a closely held corporation with its principal place of business in Alabama, operated a coal mining operation in Colombia that aided and abetted or conspired with the AUC by directly funding some of its operations.<sup>81</sup> The plaintiffs also alleged that Drummond collaborated with the AUC to commit a number of murders.<sup>82</sup> Since these murders occurred in the context of an armed conflict between the AUC and the Fuerzas Armadas Revolucionarias de Colombia (“FARC”), a leftist guerilla organization, the plaintiffs classified the murders as war crimes.<sup>83</sup>

The Eleventh Circuit found that, since the extrajudicial killings and war crimes alleged in the complaint occurred in Colombia, the conduct was not sufficient to warrant the extraterritorial application of the ATS, notwithstanding the fact that Drummond was a U.S. national.<sup>84</sup> However, unlike *Kiobel*, which did not involve a U.S. corporate national or any defendant conduct that occurred within the United States, the court in *Baloco* admitted that “these murders ‘touch and concern the territory of the United States (because of Drummond’s alleged involvement).”<sup>85</sup> Nonetheless, the court ruled that the “claims are not focused within the United States” and thus failed to displace the presumption against extraterritorial application.<sup>86</sup> Furthermore, the court denied the plaintiffs’ request for remand, which would have allowed the district court to consider

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<sup>79</sup> See generally *Jaramillo v. Naranjo*, No. 10-21951, 2014 U.S. Dist. LEXIS 138887 (S.D. Fla. 2014) (stating that the Eleventh Circuit has adopted a narrow reading of post-*Kiobel* ATS jurisdiction that focused primarily on the territorial location of the allegations).

<sup>80</sup> *Baloco v. Drummond Co.*, 767 F.3d 1229, 1235 (11th Cir. 2014).

<sup>81</sup> *Id.* at 1233.

<sup>82</sup> *Id.* at 1234.

<sup>83</sup> *Id.* (explaining that the AUC is an organization affiliated with Colombia’s military and which provided security against guerilla attacks for Drummond’s coal mining facility and operations).

<sup>84</sup> *Id.* at 1236 (stating that the issue is not whether the murders “touch and concern” the United States, as plaintiffs suggest, but rather whether the murders “touch and concern the territory of the United States”) (citing *Kiobel*, 133 U.S. at 1669).

<sup>85</sup> *Id.* at 1237–38 (citing *Morrison*, 561 U.S. 247 (2010)).

<sup>86</sup> *Baloco v. Drummond Co.*, 767 F.3d 1229, 1237 (11th Cir. 2014) (explaining that the extraterritoriality inquiry turns on where the transaction that is the *focus* of the statute at issue occurred) (emphasis in original).

the plaintiffs' request to amend their complaint in light of *Kiobel*.<sup>87</sup>

*B. Touch and Concern as a Fact Based Analysis*

In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit held that the plaintiffs' claims, which alleged that a U.S. corporation tortured and mistreated Iraqi citizens during their detention at the Abu Ghraib prison in Iraq as suspected enemy combatants, touched and concerned the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS.<sup>88</sup> Due to a shortage of trained military interrogators, the United States hired CACI Premier Technology, Inc. ("CACI"), a corporation domiciled in Virginia, to provide private interrogators.<sup>89</sup> The plaintiffs alleged that CACI employees instigated, directed, participated in, encouraged, and aided and abetted illicit conduct towards the detainees.<sup>90</sup> Additionally, the plaintiffs alleged that CACI's managers failed to investigate or to report accusations of wrongdoing and repeatedly denied that any CACI employees had engaged in abusive conduct.<sup>91</sup> The Fourth Circuit maintained that the clear implication of the Supreme Court's language regarding touch and concern is that the court should not assume that the presumption categorically bars cases that manifest a close connection to U.S. territory.<sup>92</sup> Rather, "a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims."<sup>93</sup>

In evaluating the touch and concern requirement, the court evaluated several factors, namely CACI's permission from the U.S. government "to conduct interrogations and obtain security clearances, and allegations that CACI managers in the United States acquiesced in, or concealed, misconduct."<sup>94</sup> By distinguishing the attenuated connection to U.S. territory reflected by *Kiobel's* facts

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<sup>87</sup> *Id.* at 1239.

<sup>88</sup> *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 520 (4th Cir. 2014); Jonathan Stempel, *Abu Ghraib Torture Lawsuit Revived by US. Appeals Court*, REUTERS (June 30, 2014, 2:10 PM), <http://www.reuters.com/article/2014/06/30/us-abughraib-caci-idUSKBN0F51BK20140630> ("Photos depicting abuse of Abu Ghraib detainees emerged in 2004. Some detainees claimed they endured physical and sexual abuse, infliction of electric shocks, and mock executions.").

<sup>89</sup> *Al Shimari*, 758 F.3d at 520.

<sup>90</sup> *Id.* at 520–22.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 528–29.

<sup>93</sup> *Id.* (considering a broader range of facts than the location where the plaintiffs actually sustained their injuries).

<sup>94</sup> Stempel, *supra* note 88.

from the allegations of torture committed by U.S. citizens who were employed by a U.S. corporation in *Al Shimari*, the court was able to conclude that these claims surpass the “mere corporate presence” that was fatal in *Kiobel*, thus overcoming the presumption of extraterritoriality.<sup>95</sup> The court observed that “mechanically applying the presumption to bar these ATS claims would not advance the purposes of the presumption,” since the plaintiffs in *Al Shimari* sought to enforce the customary law of nations against torture.<sup>96</sup> The court also stated that the case did not present any potential problems associated with bringing foreign nationals into U.S. courts to answer for conduct committed abroad, given that the defendants were U.S. citizens.<sup>97</sup> Unlike the Second Circuit, the Fourth Circuit in *Al Shimari* employed the touch and concern test “by considering a broader range of facts than just the location where the plaintiffs actually sustained their injuries.”<sup>98</sup>

Most recently, in *Doe I v. Nestlé USA, Inc.*, the Ninth Circuit similarly rejected a blanket ruling against extraterritoriality and remanded the case for further proceedings in light of *Kiobel*'s ambiguous touch and concern standard.<sup>99</sup> The plaintiffs were three victims of child slavery who alleged that Nestlé and other defendants “aided and abetted child slavery by providing assistance to Ivorian farmers.”<sup>100</sup> The court reasoned that:

[d]espite their knowledge of child slavery and their control over the cocoa

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<sup>95</sup> *Al Shimari*, 758 F.3d at 528.

<sup>96</sup> *Id.* at 529–30.

<sup>97</sup> *Id.* (“A basic premise of the presumption against extraterritorial application is that United States courts must be wary of international discord resulting from unintended clashes between our laws and those of other nations.”) (citing *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 322–24 (D. Mass. 2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because “[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself”).

<sup>98</sup> *Id.* at 529. *But see* *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 746 F.3d 42, 45–46, 49–50 (2d Cir. 2014) (applying *Kiobel* to foreclose jurisdiction over ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner).

<sup>99</sup> *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (“Rather than attempt to apply the amorphous touch and concern test on the record currently before us, we conclude that the plaintiffs should have the opportunity to amend their complaint in light of *Kiobel*.”).

<sup>100</sup> *Id.* at 1016–17 (“They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to escape, and John Doe III knew that the guards forced failed escapees to drink urine.”).

market, the defendants operate in the Ivory Coast ‘with the unilateral goal of finding the cheapest sources of cocoa.’ The defendants continue to supply money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate the use of forced child labor.<sup>101</sup>

The court rejected the defendant’s argument that the court should apply the *Morrison* focus test, noting that while the test may be informative, the Supreme Court in *Kiobel* did not explicitly adopt it, instead choosing the touch and concern requirement to articulate the legal standard.<sup>102</sup>

#### IV. REEXAMINATION OF *CARDONA*

##### A. *Majority Opinion*

In *Cardona*, the Eleventh Circuit Court of Appeals, on interlocutory review, determined that the complaints did not state claims within the jurisdiction of U.S. courts.<sup>103</sup> The court did not address the specific questions that were certified for review.<sup>104</sup> The court acknowledged that during the pendency of this appeal, the Supreme Court had acted with respect to ATS claims.<sup>105</sup> Drawing a parallel between *Kiobel* and *Cardona*, the court noted that both cases involved the commission of tortious actions by a corporation in conjunction with paramilitary forces within a foreign territory.<sup>106</sup> In reaching its holding, the majority maintained that the distinction between the corporation in *Kiobel*, which was merely present in the United States, and the corporation in *Cardona*, a U.S. corporation, did not lead to “any indication of a congressional intent to make the statute apply to extraterritorial torts. . . . [And,] ‘[i]f Congress were to determine otherwise, a statute more specific than the ATS

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<sup>101</sup> *Id.* at 1017–18 (noting that defendants have also lobbied against congressional efforts to curb the use of child slave labor).

<sup>102</sup> *Id.* at 1028 (citing *Morrison*, 130 U.S. at 2284). The focus test states that a cause of action falls outside the presumption against extraterritoriality only if the events or relationships that are the focus of congressional concern in the relevant statute occur within the United States. *Kiobel*, 133 U.S. at 1669; see Mark J. Mullaney, *Ninth Circuit Allows Child Slaves to Amend Complaint to Satisfy New Kiobel Standard*, INT’L RIGHTS ADVOCATES (Sept. 26, 2014, 12:16 PM), <http://www.iradvocates.org/blog/ninth-circuit-allows-child-slaves-amend-complaint-satisfy-new-kiobel-standard> (“The court rejected the Defendants’ calls to directly apply the restrictive *Morrison* “focus” test, observing that *Kiobel* explicitly avoided using the terms of art found in *Morrison*.”).

<sup>103</sup> *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1187 (11th Cir. 2014).

<sup>104</sup> *Id.* at 1188 (“Because we conclude that neither this court nor the district court has jurisdiction over the action, we untimely will not answer those specific questions . . .”).

<sup>105</sup> *Id.* at 1189.

<sup>106</sup> *Id.*



would be required.”<sup>107</sup> The court flatly concluded that “[t]here is no other statute. There is no jurisdiction.”<sup>108</sup> According to the majority, Chiquita’s U.S. citizenship was completely irrelevant to the ATS evaluation.<sup>109</sup>

The court rationalized its holding by noting the history of the ATS, specifically *Sosa*, precluded the court from applying the ATS to the allegations in *Cardona*.<sup>110</sup> In evaluating the touch and concern test, the majority stated, “[t]here is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force.”<sup>111</sup> The majority offered no further explanation. Consequently, as the murders at the center of the plaintiffs’ allegations took place in Colombia, the majority chose not to apply the touch and concern test at all, reflecting the restrictive version of the test advocated by Justice Alito’s concurrence in *Kiobel*.<sup>112</sup> However, many have criticized the ruling as impudent in light of the facts and the infamous legacy of Chiquita’s operations in developing nations.<sup>113</sup> The majority did not address, let alone consider, the allegations of U.S.-based aiding and abetting, or that Chiquita’s actions were U.S. crimes under anti-terrorism laws.<sup>114</sup>

### B. Dissenting Opinion

Judge Martin, in dissent, argued that the facts of *Cardona* are sufficient to overcome the presumption against extraterritoriality for two reasons.<sup>115</sup> First, the primary defendant was Chiquita Brands International, a corporation headquartered and incorporated within the territory of the United States.<sup>116</sup> Second, Chiquita “participated in a campaign of torture and murder in Colombia by reviewing,

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<sup>107</sup> *Id.* (quoting *Kiobel*, 133 U.S. at 1669).

<sup>108</sup> *Id.*

<sup>109</sup> See generally *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014).

<sup>110</sup> *Id.* at 1190.

<sup>111</sup> *Id.* at 1191.

<sup>112</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669–70 (2013) (Alito, J., concurring).

<sup>113</sup> Cohen, *supra* note 8 (“This opinion is shockingly negligent in terms of just actually dealing with the facts and dealing with the issues . . . . It’s almost flippant in terms of just gleefully throwing the case out.”) (quoting Terry Collingsworth, one of the chief litigators for the Chiquita victims, in an interview with Think Progress).

<sup>114</sup> Petition for Writ of Certiorari at \*14, *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015) (No. 14-777).

<sup>115</sup> *Cardona*, 760 F. 3d at 1192 (Martin, J., dissenting).

<sup>116</sup> *Id.*

approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States."<sup>117</sup> Chiquita's U.S.-based officials took substantial measures to conceal these payments by issuing checks payable to individual employees who would endorse the checks, convert them to cash, and then deliver the funds to the AUC.<sup>118</sup> Through this analysis of the touch and concern test, Judge Martin found that the plaintiffs met the *Kiobel* standard.<sup>119</sup>

The dissent distinguished the facts from *Kiobel* by noting that the plaintiffs did not rely on Chiquita's "mere corporate presence" to justify ATS jurisdiction, as Chiquita is incorporated in New Jersey and headquartered in Ohio.<sup>120</sup> This was not a case, Judge Martin stated, where a defendant was being haled into court under the ATS for actions that took place on foreign soil, or where plaintiffs were seeking to circumvent the presumption against extraterritoriality by holding an American company vicariously liable for the unauthorized action of its subsidiaries overseas.<sup>121</sup> Thus, the dissent concluded that the touch and concern test is satisfied when a defendant aids and abets overseas torts from within the United States.<sup>122</sup> Judge Martin derided the court's unwillingness to enforce the ATS, saying that, by doing so, "we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result."<sup>123</sup>

### C. Distinguishing *Kiobel* from *Cardona*

Through its mechanical application of *Kiobel* in *Cardona*, the Eleventh Circuit ignored major distinctions between the two

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<sup>117</sup> *Id.*

<sup>118</sup> Petition for Writ of Certiorari, *supra* note 114, at \*7.

<sup>119</sup> *Cardona*, 760 F.3d at 1195 (Martin, J., dissenting).

<sup>120</sup> *Id.* at 1192.

<sup>121</sup> *Id.* at 1194.

<sup>122</sup> *Id.* at 1194–95 (Martin, J., dissenting); *see, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323–24 (D. Mass. 2013); *Mwani v. Laden* 947 F. Supp. 2d 1, 13 (D.D.C. 2013); *Krishanti v. Rajaratnam*, No. 2:09-CV-05395, 2014 WL 1669873, at \*29–30 (D.N.J. Apr. 28, 2014).

<sup>123</sup> *Cardona*, 760 F. 3d at 1195 (Martin, J., dissenting); Lauren Carasik, *The Uphill Battle to Hold US Corporations Accountable for Abuses Abroad*, ALJAZEERA AMERICA (Aug. 8, 2014, 6:00 AM), <http://america.aljazeera.com/opinions/2014/8/chiquita-corporate-accountabilityunitednationshumanrights.html>.

cases.<sup>124</sup> In *Kiobel*, all of the alleged atrocities were committed in Nigeria, the defendants were Dutch, British, and Nigerian corporations, and their only relevant connections to the United States consisted of their corporate listing on the New York Stock Exchange and their affiliation with a public relations office in New York.<sup>125</sup> “Moreover, none of the defendants had engaged in any activities in the United States that appeared to be relevant to the claimed tortious acts that occurred in Nigeria.”<sup>126</sup>

Thus, the *Cardona* majority adopted the Second Circuit’s approach and held that the “ATS contains nothing to rebut the presumption against extraterritoriality” and, since the conduct at issue occurred in Colombia, the ATS was inapplicable.<sup>127</sup> Yet the facts of *Kiobel* and *Cardona* are decidedly distinguishable. Unlike the corporations in *Kiobel*, Chiquita is incorporated in New Jersey and headquartered in Ohio. These facts subject Chiquita to U.S. regulation and make the United States responsible for its acts under international law.<sup>128</sup> The plaintiffs sought to hold Chiquita liable for conduct that occurred in the United States: in particular, one hundred separate payments to the AUC that Chiquita reviewed, approved, and directed at the highest corporate levels from its U.S. headquarters.<sup>129</sup>

In contrast to the acts of the corporations in *Kiobel*, Chiquita actively participated in a campaign of torture and murder in Colombia by reviewing, approving, and concealing a scheme of payments and weapons shipments to a Colombian terrorist organization, all from its corporate offices in the United States.<sup>130</sup> At numerous times, Chiquita affirmatively continued to pay the

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<sup>124</sup> Press Release, International Rights Advocates, Eleventh Circuit Decision in Chiquita Tort Status Litigation (July, 25, 2014), available at <http://www.iradvocates.org/press-release/chiquita/press-release-eleventh-circuit-decision-chiquita-alien-tort-status-litigation>.

<sup>125</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1677–78 (2013) (Breyer, J., concurring); see also Paul L. Hoffman, *Commentary on Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT’L L. 28, 31 (2013) (“Though the Court reformulated the question presented broadly, the application of the ATS to such so-called ‘foreign-cubed’ cases was at the heart of most of the briefing and argument.”).

<sup>126</sup> See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 526 (4th Cir. 2014).

<sup>127</sup> *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1189–90 (11th Cir. 2014).

<sup>128</sup> *Id.* at 1192; Brief for Plaintiffs-Appellants, *supra* note 3, at 6, 15.

<sup>129</sup> Brief for Plaintiffs-Appellants, *supra* note 3, at 15.

<sup>130</sup> *Cardona*, 760 F.3d at 1192 (Martin, J., dissenting) (concluding that plaintiff’s claims sufficiently “touch and concern” the territory of the United States because they allege the Chiquita violation international law from within the U.S. by offering substantial assistance to a campaign of violence abroad).

AUC. In March 2000, the payments were directly brought to the attention of its senior executives during a board meeting.<sup>131</sup> In late February 2003, outside counsel advised Chiquita to stop payments to the AUC, and in April 2003, even the Justice Department admonished Chiquita.<sup>132</sup> “Defendant Chiquita continued to pay the AUC even after one of its directors acknowledged in an internal email, on December 22, 2003, that, [] ‘we appear to be committing a felony.’”<sup>133</sup> Still the payments continued.

In *Cardona*, the plaintiffs did not seek to circumvent the presumption against extraterritoriality by holding Chiquita vicariously liable for the unauthorized actions of its subsidiaries in Colombia. Chiquita was a direct a participant in “widespread and systematic human rights violations with indisputable evidence of actions taken by Chiquita in the United States.”<sup>134</sup> If *Kiobel* represents the end of the spectrum where the only connection to the United States is mere corporate presence, *Cardona* falls on the opposite end, representing substantial and repeated connections with the United States.

The majority in *Cardona* mechanically applied the holding of *Kiobel* and failed to advance the purposes of the presumption.<sup>135</sup> The Eleventh Circuit proclaimed that “because our ultimate disposition is not dependent on specificity of fact, we will only briefly review the history of the case.”<sup>136</sup> The majority opinion in *Kiobel* did not assert that the ATS only reaches domestic conduct—this interpretation appeared only in Justice Alito’s concurrence.<sup>137</sup> Justice Alito’s “broader” approach was more restrictive in that it would bar an ATS action “unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance amongst civilized nations.”<sup>138</sup> It is also significant that Chiquita pled guilty to providing support to the AUC, despite its designation as a terrorist organization that threatens U.S. national security.<sup>139</sup> The U.S.

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<sup>131</sup> *Chiquita Sentencing Hearing*, *supra* note 5, at 9.

<sup>132</sup> *Id.* at 10.

<sup>133</sup> *Id.*

<sup>134</sup> Petition for Writ of Certiorari, *supra* note 114, at \*17.

<sup>135</sup> *Al Shimari*, 758 F.3d at 529–31.

<sup>136</sup> *Cardona*, 760 F.3d at 1187–88.

<sup>137</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring).

<sup>138</sup> *Id.*; see discussion *supra* Part II.C; see also *Al Shimari*, 758 F.3d at 527 (stating that “such an analysis is far more circumscribed than the majority opinion’s requirement”).

<sup>139</sup> Brief for Plaintiffs-Appellants, *supra* note 3, at 15.

government has concluded that providing support to the AUC directly concerns vital national interests, and violates U.S. foreign policy and criminal law.<sup>140</sup> Thus, *Cardona* undermines U.S. foreign policy and fails to reinforce international comity.<sup>141</sup>

The dissent in *Cardona* reasoned that *Kiobel* should not be read as “an impediment to civilians harmed by a decades-long campaign of terror they plainly allege to have been sponsored by an American corporation.”<sup>142</sup> As the Second Circuit did in *Balintulo*, the Eleventh Circuit did not address crucial facts in reaching its conclusion, namely, the panel did not explain how Chiquita’s support for a terrorist organization could violate U.S. criminal law and undermine U.S. security, but not touch and concern the United States.<sup>143</sup> Not only did Chiquita aid and abet crimes against humanity, they also interfered with the foreign policy of the United States, actions that should satisfy the touch and concern test and allow for ATS jurisdiction.

#### *D. Inconsistency with International Law*

“To begin with, it is a fundamental principle of international law that every State has the sovereign authority to regulate the conduct of its own citizens, regardless of whether that conduct occurs inside or outside of the State’s territory.”<sup>144</sup> The Restatement of Foreign Relations Law explicitly says that a state may exercise jurisdiction “with respect to the activities, interests, status, or

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<sup>140</sup> *Id.* at 20.

<sup>141</sup> See, e.g., Press Release, Department of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay \$25 Million Fine (Mar. 19, 2007), available at [http://www.justice.gov/opa/pr/2007/March/07\\_nsd\\_161.html](http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html) (“The message to industry from this guilty plea today is that the U.S. Government will bring its full power to bear in the investigation of those who conduct business with designated terrorist organizations, even when those acts occur outside of the United States.”).

<sup>142</sup> *Cardona*, 760 F.3d at 1195 (Martin, J., dissenting); see also Jonathan Stempel, *Chiquita Wins Dismissal of U.S. Lawsuits over Colombian Abuses*, REUTERS (July 24, 2014, 3:28 PM), <http://www.reuters.com/article/2014/07/24/chiquita-colombia-decision-idUSL2N0PZ28P20140724> (“Chiquita in March 2007 pleaded guilty to a U.S. criminal charge and paid a \$25 million fine for having made payments from 1997 through February 2004 to the right-wing paramilitary group United Self-Defense Forces of Colombia, known in Spanish as AUC.”).

<sup>143</sup> See Exec. Order No. 13,224, 31 C.F.R. § 594.201 (2001) (blocking transactions with terrorists deemed to “threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States”).

<sup>144</sup> See *Cardona*, 760 F.3d at 1193 (Martin, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987)).

relations of its nationals outside as well as within its territory.”<sup>145</sup> *Kiobel* reaffirmed that the primary basis for the presumption against extraterritoriality is protection against “unintended clashes between our laws and those of other nations which could result in international discord” that “should make courts particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs.”<sup>146</sup> By insufficiently considering basic human rights, courts that have denied jurisdiction under the ATS have not met the expectations of the international community and have not recognized rights universally proclaimed by all nations.<sup>147</sup> Through the enactment of the ATS, the United States consciously accepted an obligation to provide a remedy to those injured by its own citizens under international law.

In *Kiobel*, the European Commission submitted an amicus brief that claimed that the assertion of ATS jurisdiction over corporations in its member countries violated international law.<sup>148</sup> These same concerns are inapplicable in *Cardona*, where the defendant is a U.S. citizen. In agreement, the United States argued in their *Kiobel* brief that “the court should not articulate a categorical rule foreclosing any such application of the ATS,” as the United States may be responsible under international law for the actions of U.S. citizens abroad.<sup>149</sup> If a corporation, incorporated and headquartered in the United States while operating worldwide, supports from within the territory of the United States the murder of thousands of people, it violates international law. As the Supreme Court stated over one hundred years ago:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well

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<sup>145</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987).

<sup>146</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

<sup>147</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

<sup>148</sup> See Brief for the European Comm’n on Behalf of the European Union as Amicus Curiae Supporting Neither Party at 6, 24–28, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

<sup>149</sup> Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 15, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

acquainted with the subjects of which they treat.<sup>150</sup>

The *Cardona* court, and courts that have ruled similarly regarding the ATS, have not met the expectations of international comity and have declined to recognize rights universally proclaimed by all nations.<sup>151</sup> In doing so, these courts have declined an opportunity to provide a substantive remedy for victims like those in *Chiquita*.

#### *E. Aiding and Abetting Liability Under the ATS*

Chiquita's acts of aiding and abetting extra-judicial killings, war crimes, and crimes against humanity, which originated in the United States, are themselves torts in violation of the law of nations. Aiding and abetting is recognized as a valid basis for liability under the ATS, and it is a well-established norm of international law.<sup>152</sup> "All international authorities agree that *at least* purposive action . . . constitutes aiding and abetting"; however, there is disagreement regarding whether the *mens rea* required for an aiding and abetting claim is knowledge or purpose.<sup>153</sup> For many ATS cases, the unresolved aiding and abetting standard could have great implications for actions against transnational corporate defendants, as the purpose requirement is a much higher standard than the knowledge requirement.

Regardless of the standard, defendants in *Chiquita* may be held liable under ATS as a result of the theory of aiding and abetting. It is clear that Chiquita had knowledge that it was cooperating with a known terrorist organization and that it repeatedly ignored its counsel's advice to end its relationship with the AUC. The facts demonstrate that Chiquita acted with a purpose to violate the law by maintaining contact with and supporting the AUC financially in exchange for asserting dominance in the banana growing region.

#### *F. Corporate Liability Under the ATS*

The question of the possibility of ATS litigation against corporations has attracted attention, as well as inconclusive answers.<sup>154</sup> The corporate accountability movement, coupled with

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<sup>150</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>151</sup> *Filartiga*, 630 F.2d at 890 ("Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.").

<sup>152</sup> *Doe I v. Nestlé, USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014) (emphasis in original).

<sup>153</sup> *Id.* (emphasis in original).

<sup>154</sup> *Hathaway*, *supra* note 48 ("Those celebrating the demise of the ATS may thus find themselves surprised to discover that the end result of the Supreme Court's

reservations regarding the potential impact on the business environment, has led to starkly divergent responses.<sup>155</sup> The drastic growth of transnational business and globalization has created a safe haven for multinational corporations in both developed and underdeveloped countries that lack appropriate regulation.<sup>156</sup> This section will argue that a defendant's corporate identity should not be dispositive in deciding whether there is jurisdiction under the ATS. To hold otherwise would be to immunize U.S. corporate entities operating in the developing world from "liability arising from their facilitation of torture, destruction of property, extrajudicial killing, and environmental catastrophes."<sup>157</sup>

One of the most prominent issues that the Supreme Court left unanswered in *Kiobel* was whether the law of nations recognizes corporate liability—whether multinational corporations can be held civilly liable under the ATS for their actions or the actions of their subsidiaries and agents.<sup>158</sup> The only reference that the Supreme Court has made toward corporate liability under the ATS is a footnote in *Sosa*, where the Court directed federal courts contemplating the recognition of new ATS claims to consider "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."<sup>159</sup> The Court did not address criminal liability, and some have questioned whether civil liability alone is an adequate response to "corporate participation in unimaginable crimes that deeply shock the conscience of humanity."<sup>160</sup>

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decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations.").

<sup>155</sup> See Nathan Koppel, *Arcane Law Brings Conflicts from Overseas to U.S. Courts*, WALL ST. J. (Aug. 27, 2009, 11:59 PM), <http://online.wsj.com/articles/SB125133677355962497> (noting that litigation has proven controversial).

<sup>156</sup> GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 146 (2013), available at <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> ("States are failing in their obligation to ensure access to elective judicial remedies to victims of human rights violations by businesses operating outside their territory.").

<sup>157</sup> Colin Kearney, Case Comment, *International Human Rights - Corporate Liability Claims not Actionable Under the Alien Tort Statute - Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), 34 SUFFOLK TRANSNAT'L L. REV. 263, 270 (2011).

<sup>158</sup> *Kiobel*, 133 S. Ct. at 1662.

<sup>159</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004) (referencing the contrasting decisions of the D.C. Circuit and the Second Circuit).

<sup>160</sup> James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 179 (2014) (arguing



The Ninth Circuit affirmed three principles of ATS liability in *Doe I v. Nestlé*.<sup>161</sup> First, the analysis proceeds norm-by-norm: there is no categorical rule of corporate immunity or liability.<sup>162</sup> Second, corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations.<sup>163</sup> Third, norms that are “universal and absolute,” or applicable to “all actors,” can provide the basis for an ATS claim against a corporation.<sup>164</sup> To determine whether a norm is universal, courts consider, among other things, whether it is “limited to states” and whether its application depends on the identity of the perpetrator.<sup>165</sup> The court concluded that three former child slaves could assert their ATS claim against corporate defendants, as the prohibition against slavery is universal and applies to state actors and non-state actors alike.<sup>166</sup>

### G. Human Rights Law

ATS litigation has highlighted the need for corporations to seriously consider their involvement in any potential human rights violations, irrespective of an ultimate finding of liability.<sup>167</sup> In its amicus brief in *Kiobel*, the European Commission argued that some wrongs are “so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them.”<sup>168</sup> It is likely that in the wake of post-*Kiobel* litigation, plaintiffs will focus heavily on forum shopping depending on the facts of each case, and will look for alternatives in transnational tort litigation.<sup>169</sup>

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coupling corporate criminal liability with international crimes in national systems is the next obvious “discovery” in corporate responsibility).

<sup>161</sup> *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (citing *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *judgment vacated*, *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013)).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See generally Santiago A. Cueto, *Alien Tort Claims Act: A Threat to U.S. Corporation Operating Overseas?*, INT’L BUS. LAW ADVISOR (Oct. 9, 2009), <http://internationalbusinesslawadvisor.com/alien-tort-claims-act-a-threat-to-u-s-corporations-operating-overseas/>.

<sup>168</sup> See Brief for the European Comm’n on Behalf of the European Union as Amicus Curiae Supporting Neither Party at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>169</sup> Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLINICAL L. REV. 255, 263–64 (2014):  
Litigation under the [ATS] is complex, drawn-out over many years, and results hinge on minute issues of civil procedure. In many cases, the

Allowing U.S. defendants to be sued for human rights abuses advances the policy of denying safe haven.<sup>170</sup> *Filartiga* underscores this importance. That case paved the way for seeking accountability in U.S. courts by permitting suits against those defendants who enjoy the protection of the U.S. legal system and whose egregious behavior is therefore a legitimate U.S. concern.<sup>171</sup> Redress for human rights violations requires due diligence. Thus, it is not that the state guarantees a remedy for every violation, but instead, due diligence obligations are usually considered obligations of conduct. Due diligence compels institutions, such as courts, to operate prudently. “States may incur responsibility if they are not diligent in pursuing and preventing acts contrary to international law by prosecuting and punishing the private perpetrators.”<sup>172</sup> Nonetheless, human rights law does not bind non-state actors; however, corporate due diligence considerations are developing.

In this vein, John Ruggie, the United Nations Secretary-General’s Special Representative for Business and Human Rights, and an important contributor to international relations, developed “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (the “Ruggie Framework”).<sup>173</sup> The Ruggie Framework has shown itself to be influential. In September 2013, the United Kingdom became the

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principal legal struggle concerns questions of international law and federal jurisdiction—issues such as the mens rea standard for aiding and abetting under international law or the ramifications of the difference between corporate and natural personhood. Briefing and arguing these questions can take years. During this time, the stories of the clients (the merits, or facts) hardly come to light. In such instances, we have had to explain to clients that the question at hand is no longer (or not yet) about whether or not they have suffered the harms they claim to have suffered, but rather about whether or not the court will agree with them that having suffered those harms is legally significant in a U.S. court. This can have the effect of obscuring, rather than highlighting, the wrongs for which they seek recognition and redress.

<sup>170</sup> Brief for Dolly Filartiga, et al. as Amici Curiae at 16, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (No. 13-2162) (“For more than 30 years, the ATS has served a vital role in holding human rights abusers accountable and in providing redress to victims. The Supreme Court has affirmed this role.”).

<sup>171</sup> *Id.* at 16.

<sup>172</sup> DUNCAN FRENCH & TIM STEPHENS, ILA STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW FIRST REPORT 11 (2014), available at [http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045).

<sup>173</sup> UN “Protect, Respect and Remedy” Framework and Guiding Principles, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles> (last accessed Dec. 20, 2015).

first country to launch its implementation plan, which guides companies on integrating human rights into their operations.<sup>174</sup> The action plan demonstrates “important leadership in relation to the protection of human rights defenders working on issues of corporation accountability.”<sup>175</sup> Most notably, the action plan is intended to apply to U.K. companies operating both at home and extraterritorially.<sup>176</sup> Further, amendments to the U.K. Companies Act has clarified that company directors will include human rights issues in their annual reports.<sup>177</sup>

#### V. CONCLUSION

*Cardona* reflects a narrow interpretation of the standard set by the Supreme Court in *Kiobel*, in light of the major distinctions between the two cases. In an effort to strengthen international and multinational corporate accountability, the United States and the Supreme Court should not allow the growing power of multinational corporations to hinder the development of a standard and framework that can properly regulate the conduct of citizens, whether individuals or corporations, on foreign soil. *Cardona* set a precedent that creates burdensome obstacles in the path of victims seeking remedy for abusive corporate actions abroad.<sup>178</sup>

Courts should not apply *Kiobel* narrowly. To apply an ambiguous and unsettled standard so restrictively is imprudent. The

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<sup>174</sup> Press Release, United Kingdom, UK First to Launch Action Plan on Business and Human Rights (Sept. 4, 2013), available at <https://www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights>.

<sup>175</sup> Michael Ineichen, *UK Shows Welcome Leadership on Human Rights Defenders and Corporate Accountability*, INT’L SERV. FOR HUMAN RIGHTS (Apr. 9, 2013), <http://www.ishr.ch/news/uk-shows-welcome-leadership-human-rights-defenders-and-corporate-accountability>.

<sup>176</sup> *Id.*

<sup>177</sup> JOHN RUGGIE, JOHN RUGGIE AND SHIFT COMMENTS TO FINANCIAL REPORTING COUNCIL’S EXPOSURE DRAFT: GUIDANCE ON THE STRATEGIC REPORT 1 (2013), available at <http://shiftproject.org/sites/default/files/John%20Ruggie%20and%20Shift%20Comments%20to%20FRC%20Exposure%20Draft%202013%2011%2015.pdf> (last accessed Dec. 20, 2015).

<sup>178</sup> *Cardona v. Chiquita Brands Int’l, Inc.*, 135 S. Ct. 1842 (2015) (denying petition of writ of certiorari); see also Lawrence Hurley, *U.S. Top Court Rejects Colombian Human Rights Suit*, REUTERS (Apr. 20, 2015, 2:22 PM), <http://www.reuters.com/article/2015/04/20/us-usa-court-rights-idUSKBN0NB1I520150420>; Valentina Stackl, *Supreme Court Allows U.S. Corporation to Finance Terrorism Without Accountability*, EARTHRIGHTS INT’L (Apr. 20, 2015), <http://www.earthrights.org/media/supreme-court-allows-us-corporation-finance-terrorism-without-accountability> (“By declining to hear the case, the Supreme Court has created yet another obstacle in the path of victims seeking remedies for abusive corporate actions abroad, and allows a US corporation to get away with financing terrorism without accountability to its victims in US courts.”).

Eleventh Circuit's declination to address the allegations that the relevant illegal behavior took place inside the United States—when determining if the conduct touched and concerned the United States sufficiently to displace the presumption against extraterritoriality—is in conflict with both *Kiobel* and with other circuit courts.