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**UNPEELING THE GROWING SPLIT UNDER THE ATS:
CARDONA V. CHIQUITA BRANDS INTERNATIONAL, INC.**

Anastasia Stylianou

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.*¹ demonstrates a mechanical and restrictive application of the holding of the Supreme Court decision *Kiobel v. Royal Dutch Petroleum Company*.² The Eleventh Circuit declared that none of the relevant conduct took place within the United States and thus, ruled that United States courts lacked the power to review the claims of over four thousand Colombians who sought to hold Chiquita Brands International ("Chiquita") liable for the deaths of family members.³

In March 2007, Chiquita pled guilty to a federal felony of knowingly providing material support to the Autodefensas Unidas de Colombia ("AUC"), an illegal paramilitary organization notorious for its mass murder of Colombian civilians.⁴ Under the plea agreement, the Justice Department accepted Chiquita's assertion that the support amounted to payment for protection and that Chiquita never received services in exchange from the AUC paramilitaries.⁵ It took four

¹ 760 F.3d 1185 (11th Cir. 2014).

² 133 U.S. 1659 (2013).

³ *Cardona*, 760 F.3d at 1188.

⁴ Brief for Plaintiffs-Appellants at 1, *Cardona v. Chiquita Brands Int'l*, 760 F. 3d 1185 (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." *Id.*

⁵ 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>. "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." Erik Larson & Christie Smythe, *Chiquita Wins Dismissal of U.S. Suits on Colombia Torture*, BLOOMBERGBUSINESSWEEK (July 25, 2014), <http://www.businessweek.com/news/2014-07-24/chiquita-wins-dismissal-of-u-dot-s-dot-suits-over-colombia-torture>.

years for the United States government to investigate Chiquita's support for the AUC, which was "prolonged, steady, and substantial" — over seven years from 1997–2004.⁶

Contrary to claims by Chiquita that these payments were extorted, internal company documents published by the National Security Archive ("NSA"), an independent research group, strongly suggested that the transactions provided specific benefits to Chiquita.⁷ By its own account, Chiquita paid the AUC \$1.7 million and also "assisted the AUC in smuggling arms and ammunition with full knowledge that the AUC was a violent organization responsible for crimes against humanity."⁸ Throughout the seven-year duration, 3,778 people were murdered in Uraba, with an additional 60,000 forced into what is now the second largest internally displaced population in the world.⁹ "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," but none of the dozens of high level officials who approved the payments have been prosecuted, nor have any reparations been paid to the victims.¹⁰ 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.¹¹ Nevertheless,

⁶ Brief for Plaintiffs-Appellants at 1, *Cardona v. Chiquita Brands Int'l*, 760 F. 3d 1185 (2014) (No. 12-14898).

⁷ 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 internal Chiquita memos which "reinforce the claim...that the company was knowingly complicit I, 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).

⁸ Brief for Plaintiffs-Appellants at 1–2, *Cardona v. Chiquita Brands Int'l*, 760 F. 3d 1185 (2014) (No. 12-14898). "What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists." Sentencing Hr'g Tr. At 29.

⁹ 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/>.

¹⁰ *Id.*

¹¹ 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 executives said such payments are the "cost of doing business in Colombia. . . [n]eed to keep this very confidential—people can get killed." *Id.*

Chiquita maintains that it only paid militias to protect employees and that Chiquita should not be held responsible for the tragic violence that has plagued Colombia.¹² Chiquita aided the AUC because it benefitted from the AUC's pacification of the banana-growing regions and the suppression of labor, union activity and other social unrest that could have harmed Chiquita's operations.¹³

This note argues that the dissent in *Cardona* was correct in that the 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 United States based corporate offices. Part II of this note will discuss the foundation of ATS litigation, beginning with enactment of the 1789 Judiciary Act through the *Kiobel* decision. Additionally, Part III will outline the growing split amongst circuit courts and analyze their disparate 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 and their relevance to the reexamination of *Cardona*, as well as certain international and human rights doctrinal debates which are implicated through ATS litigation.

II. THE HISTORY OF THE ALIEN TORT STATUTE

¹² Erik Larson & Christie Smythe, *Chiquita Wins Dismissal of U.S. Suits on Colombia Torture*, BLOOMBERGBUSINESSWEEK (July 25, 2014), <http://www.businessweek.com/news/2014-07-24/chiquita-wins-dismissal-of-u-dot-s-dot-suits-over-colombia-torture>.

¹³ Brief for Plaintiffs-Appellants at 2, 10–13, *Cardona v. Chiquita Brands Int'l*, 760 F. 3d 1185 (2014) (No. 12-14898) (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.).

The ATS was enacted in 1789 as part of the Judiciary Act that established the federal court system, in order to grant the national government control over foreign affairs.¹⁴ However, the ATS, in effect, lay 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. Pena-Irala*,¹⁵ and the rapid expansion of the human rights movement in the late twentieth century.¹⁶

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

Filartiga concerns the fatal kidnapping and torture of Joelito Filartiga in Paraguay in 1976, 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. Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena, unaware that Pena had fled to the U.S..¹⁷ Joelito's sister, who was then living in Washington, D.C., caused Pena to be served with a complaint that Pena had wrongfully caused the death of her brother by torture.¹⁸ The district court dismissed the case holding that, although official torture violates the norm of customary international law, the court was constrained by dicta contained in two recent opinions of the court which construed narrowly that the law did not apply to the state's torture of its own citizens.¹⁹

During the six months in which the *Filartiga* appeal was pending, the Iran Hostage Crisis occurred, in which Iranian students took hundreds of U.S. citizens hostage and seized the U.S.

¹⁴ 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, s 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. s 1350.

¹⁵ 630 F.2d 876 (2d Cir. 1980).

¹⁶ *Id.* at 880 (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, s 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came").

¹⁷ *Filartiga*, 630 F.2d at 878–79.

¹⁸ *Id.*

¹⁹ *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)).

embassy in Tehran four over fourteen months, in response to the decision to permit the exiled Shah to receive medical treatment in New York. The impact of this national crisis on the court's deliberations was discussed in the memoirs of the judicial clerk who drafted the *Filartiga* decision as a tense choice between national ideals and national interests.²⁰

The Executive branch filed an amicus brief supporting the *Filartiga*'s view that the ATS provided jurisdiction over their claim because the ATS incorporates an evolving body of international law, the judiciary had the authority to decide the case despite foreign affairs implications, that international law affords individual rights that can be directly enforced in domestic courts, and that litigation in Paraguay would not be possible.²¹ Less than a month after the Executive branch filed its brief, the court in *Filartiga* held that the 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."²² Further, the court held that the ATS affords federal jurisdiction for adjudication over claims that violate universally accepted norms of international law.²³

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

After *Filartiga* the first judicial response came in *Tel-Oren v. Libyan Arab Republic*,²⁴ where the court agreed that the claims alleging ATS jurisdiction based on acts of terrorism—specifically an armed attack on a civilian bus in Israel—should be dismissed, but disagreed as to the reasoning illustrated by the three separate concurring opinions.²⁵ Judge Edwards largely

²⁰ Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 Notre Dame L. Rev. 1467, 1481 (2014).

²¹ Memorandum for the United States as Amicus Curiae at 5, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980) (No. 79-6090).

²² *Filartiga*, 630 F.2d at 884 (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").

²³ *Id.* at 887.

²⁴ 726 F.2d 774, 776 (D.C. Cir. 1984).

²⁵ Compare *Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring) with *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring).

adhered to the legal principles established in *Filartiga*, but found that factual distinctions precluded a finding of subject matter jurisdiction and Judge Robb would have dismissed the case on political question grounds.²⁶

Further, Judge Bork 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* because such a cause of action would intrude upon the foreign affairs powers of the executive branch, as these claims could not possibly have been what the drafters of the ATS intended.²⁷ Judge Bork's critical response to *Filartiga* stemmed from a formalist notion of separation of powers that, implicitly, reject the vision of the ATS as a mechanism for developing international law norms.²⁸

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*,²⁹ which 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.”³⁰ 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 place on the shelf for use by a future Congress or state legislature.”³¹

Sosa involved a Drug and Enforcement Agency (“DEA”) agent who was captured on assignment in Mexico, tortured and killed.³² Based on eyewitness testimony, DEA officials believed Alvarez, a Mexican physician, was present at the house to prolong the agent's life in

²⁶ *Tel-Oren*, 726 F.2d at 776.

²⁷ *Id.* at 798-823 (Bork, J., concurring).

²⁸ *Id.* at 801 (Bork, J., concurring).

²⁹ 542 U.S. 692, 712 (2004).

³⁰ *Id.* at 724.

³¹ *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”).

³² *Id.* at 697.

order to extend the interrogation and torture.³³ 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 U.S. for trial.³⁴ However, Alvarez returned to Mexico and began a civil action against Sosa, several DEA agents, Mexican civilians and the U.S. after the Supreme Court found that Alvarez's forcible seizure did not affect the jurisdiction of a federal court.³⁵

Although the Supreme Court asserted that district courts would 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.³⁶ The Supreme Court required that "any claim based on the present-day law of nations rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms," which include violation of safe conducts, infringement on the rights of ambassadors, and piracy.³⁷ Therefore, the Supreme Court reasoned that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, does not violate customary international law norms so well defined as to support the create of a federal remedy.³⁸

D. Limiting Extraterritoriality: Kiobel v. Royal Dutch Petroleum

The source of most modern ATS debate surrounds the holding of *Kiobel v. Royal Dutch Petroleum Company*³⁹, which virtually brought all pending ATS litigation to a halt.⁴⁰ The

³³ *Id.* at 697.

³⁴ *Id.* at 698.

³⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

³⁶ *Id.* at 725.

³⁷ *Id.*

³⁸ *Id.* at 738.

³⁹ 133 U.S. 1659 (2013).

plaintiffs in *Kiobel* were Nigerian nationals who now reside in the United States as legal residents after seeking political asylum from alleged atrocities.⁴¹ 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.⁴² More specifically, the complaint alleges that the Nigerian military and police forces attacked Plaintiffs' villages, beating, raping, killing, and arresting residents and destroying or looting property after Plaintiffs began protesting the environmental effects of Royal Dutch Petroleum's oil exploration and production in the region.⁴³ The Supreme Court's unanimous decision was fractured by four distinct opinions.⁴⁴

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.⁴⁵ The presumption against extraterritoriality provides 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."⁴⁶ 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 and thus, none of the conduct took place within U.S. jurisdiction.⁴⁷ As Chief

⁴⁰ Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (April 18, 2013, 10:51 AM), <http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>.

⁴¹ *Kiobel*, at 1663.

⁴² *Id.* at 1662.

⁴³ *Id.* at 1662–63.

⁴⁴ *Id.* at 1659.

⁴⁵ *Id.* at 1662.

⁴⁶ *Id.* (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); *See also* *EEOC v. Arabian American 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").

⁴⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659, 1662 (2013) (After oral argument, the Supreme Court directed the parties to file supplemental briefs addressing an additional question: "Whether and under what

Justice Roberts acknowledges, the presumption against extraterritoriality is typically used to discern whether the substantive content of laws applies abroad, and is not utilized to determine jurisdictional issues, like the ATS, which does not regulate conduct or afford relief.⁴⁸

Although the Court in *Kiobel* found that all the relevant conduct took place outside the U.S., the Court also stated in pertinent part that, “even where the claims touch and concern the territory of the U.S., 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.”⁴⁹ The majority opinion, however, gives no indication of what may constitute sufficient contact to displace the presumption against extraterritoriality, and this lack of clarity is lamented in the concurring opinions.⁵⁰

Justice Kennedy’s deciding fifth vote is accompanied by a concise and explicit opinion, in which Kennedy agreed with the Court’s narrow holding tailored to the case at hand.⁵¹ Nevertheless, Justice Kennedy also acknowledged that 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.”⁵²

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*

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.”)

⁴⁸ *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).

⁴⁹ *Kiobel*, at 1669.

⁵⁰ *Id.* at 1670 (Alito, J., concurring) (arguing that the majority’s narrow approach leaves much unanswered).

⁵¹ *Id.* at 1671 (Kennedy J., concurring).

⁵² *Id.* at 1671–72 (Kennedy J., concurring); 28 U.S.C. §1350 (2006).

requirements of definitiveness and acceptance among nations.⁵³ Since none of the acts in *Kiobel* took place domestically, Justice Alito would find the claim barred by the presumption against extraterritoriality.⁵⁴

In his concurrence, Justice Breyer rejects invoking the presumption against extraterritoriality because it “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”⁵⁵ 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 U.S. from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind”⁵⁶ Further, Justice Breyer relied on *Sosa* to determine the extent to which the courts may permit ATS claims of those harmed by activities that take place abroad and provides much needed guidance to the majority’s standard.⁵⁷

While the first prong of the Breyer test is not controversial, as it is a literal translation of the touch and concern test, the second and third prongs present the possibility of divergence from the majority standard.⁵⁸ Ultimately, Breyer agreed with the majority and concluded that the plaintiffs’ claims in *Kiobel* did not fall within the jurisdictional view, since neither the plaintiffs nor the defendants were U.S. citizens, the conduct occurred abroad, and there was no distinct

⁵³ *Id.* at 1662 (Alito, J., concurring).

⁵⁴ *Id.*

⁵⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659, 1671–72 (2013) (Breyer, J., concurring) (citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)).

⁵⁶ *Id.* at 1672 (Breyer, J., concurring)

⁵⁷ *Id.* at 1672, 1677 (Breyer, J., concurring) (noting that Congress has not sought to limit the statute’s jurisdictional or substantive reach in the wake of *Sosa*).

⁵⁸ Compare *Kiobel*, 133 U.S. at 1669 with *Kiobel*, 133 U.S. at 1674 (Breyer, J., concurring).

U.S. interest present in the case, the plaintiffs' claims in *Kiobel* did not fall within this jurisdictional view.⁵⁹

After *Kiobel*, in 2014, the Supreme Court created an additional hurdle against transnational businesses in U.S. courts. In *Daimler AG v. Bauman*,⁶⁰ the Court held that due process did not permit the exercise of general jurisdiction over a corporation that is not headquartered or incorporated within its jurisdiction.⁶¹ The case involved a claim by foreign plaintiffs against a foreign defendant based on events that occurred entirely outside the United States.⁶² However, the significance of *Bauman* is still indeterminable as a result of the unsettled standard of the *Kiobel*. On the one hand, *Kiobel* may limit the consequences of *Bauman* and on the other, *Bauman* could become another significant barrier.

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*'s issuance, courts have uniformly applied the presumption against extraterritoriality to all ATS litigation, although circuit courts have employed the presumption, and its ancillary touch and concern test, in both narrow and broad fashions. As courts continue to decipher *Kiobel*, questions of what allegations are sufficient to satisfy the touch and concern requirement and issues of corporate liability remain unresolved.⁶³

⁵⁹ *Kiobel*, 133 U.S. at 1678 (Breyer, J., concurring).

⁶⁰ 134 S.Ct. 746 (2014).

⁶¹ *Id.*

⁶² *Id.* at 751.

⁶³ 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 obligations to respect human rights norms.”).

The Supreme Court in *Kiobel* relied heavily on *Morrison v. National Australia Bank*,⁶⁴ which established the principal that, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁶⁵ Nonetheless, *Kiobel* did not sign a death sentence for the ATS because it only eliminated from future ATS litigation those 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.⁶⁶ 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.”⁶⁷ Chief Justice Roberts leaves the door open for extraterritorial ATS cases.⁶⁸ However, in the entirety of the *Kiobel* majority opinion, Chief Justice Roberts references the “touch and concern” exactly once, leaving many questions as to what specifically the test entails.⁶⁹

A. Misguided Clarity: Kiobel’s Phantom Bright Line Rule

The Second Circuit Court of Appeals held in *Balintulo v. Daimler AG*⁷⁰ that, where plaintiffs have failed to allege that any relevant conduct occurred in the U.S., *Kiobel* foreclosed the plaintiff’s ATS claims.⁷¹ In *Balintulo*, South African victims of apartheid brought suits against corporate defendants, including Daimler, Ford, and IBM, for aiding and abetting

⁶⁴ 561 U.S. 247 (2010).

⁶⁵ *Kiobel*, 133 U.S. at 1661 (citing *Morrison*, 561 U.S. at 261).

⁶⁶ *Morrison*, 561 U.S. at 247, 283 n. 11 (emphasis added); 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/>.

⁶⁷ Hathaway, *supra* note 66.

⁶⁸ *Kiobel*, 133 U.S. at 1669; Hathaway, *supra* note 66.

⁶⁹ *Kiobel*, 133 U.S. 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).

⁷⁰ 727 F.3d 174 (2d Cir. 2013).

⁷¹ *Id.* at 189.

violations of customary international law committed by the South African government.⁷² The court pointedly rejected the Plaintiff's argument that, although "mere corporate presence" is inadequate to "touch and concern" the U.S. with "sufficient force," corporate citizenship in the U.S. is satisfactory.⁷³ Nevertheless, the court did not address the factual distinctions of corporate citizenship from mere corporate presence.⁷⁴ The court reiterates that the relevant conduct occurred in South Africa, consciously 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."⁷⁵

The Second Circuit adopts the view expressed by Justice Alito's concurrence in *Kiobel*, although the court also acknowledges that the Supreme Court neither adopted Justice Alito's reasoning nor rejected it, rather, "the majority simply left open any questions regarding the permissible reach of cause of action under the ATS when *some* domestic activity is involved in the case."⁷⁶ However, the same conclusion can be reached concerning Justice Breyer's concurrence, which would have allowed jurisdiction since the defendant is an American national.⁷⁷ Curiously, the court in *Balintulo* cites *Kiobel* in support of Second Circuit precedent that corporations are not proper defendants under the ATS, when it is unmistakable that the case

⁷² *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).

⁷³ *Id.* at 189–90 ("Accordingly, if all relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*).

⁷⁴ *Id.* at 191.

⁷⁵ *Id.*

⁷⁶ *Balintulo v. Daimler AG*, 727 F.3d 174, 191 n. 26 (2d Cir. 2013); *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).

⁷⁷ *Kiobel*, 133 U.S. at 1674 (Breyer, J., concurring).

was decided on other grounds.⁷⁸ The court simultaneously denied that the Apartheid victims had alleged any relevant U.S.-based conduct, while also ignoring their allegations that Defendants took affirmative steps in the United States to circumvent the sanctions regime, and supplied the South African government with their products, notwithstanding legal restriction against trade with South Africa.⁷⁹ The Second Circuit held that this U.S.-based conduct was not tied to the relevant human rights violations.⁸⁰

The Eleventh Circuit has reached similar conclusions.⁸¹ In *Baloco v. Drummond Company*,⁸² 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 and the claims were subsequently dismissed.⁸³ The plaintiffs alleged that Drummond Company, a closely held corporation with its principal place of business in Alabama, operated a coal mining operation in Columbia that aided and abetted or conspired with the Autodefensas Unidas de Columbia (“AUC”) by directly funding some of its operations.⁸⁴ Plaintiffs also alleged that Drummond collaborated with the AUC to commit murders, which occurred in the context of an armed conflict between the AUC and FARC, a leftist guerilla organization, and hence, Plaintiffs classify the murders as war crimes.⁸⁵ The Eleventh Circuit found that since the extrajudicial killings and war crimes alleged in the complaint occurred in Columbia, the conduct was not sufficient to warrant the extraterritorial application of the ATS, notwithstanding that Drummond

⁷⁸ *Balintulo*, 727 F.3d at 191 n. 26.

⁷⁹ *Id.* at 192.

⁸⁰ *Id.*

⁸¹ *See generally* *Jaramillo v. Naranjo*, 2014 U.S. Dist. LEXIS 138887 (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).

⁸² 767 F.3d 1229 (2014).

⁸³ *Id.* at 1235.

⁸⁴ *Id.* at 1233.

⁸⁵ *Id.* at 1234 (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).

was a U.S. national.⁸⁶ 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 “these murders ‘touch and concern the territory of the United States’ (because of Drummond’s alleged involvement).”⁸⁷ Nonetheless, the court ruled that the “claims are not focused within the United States” and thus, failed to displace the presumption against extraterritorial application.⁸⁸ Furthermore, the court denied Plaintiffs’ request for remand, which would have allowed that district court to consider Plaintiff’s request to amend their complaint in light of *Kiobel*.⁸⁹

B. Touch and Concern as a Fact Based Analysis

The Fourth Circuit Court of Appeals in *Al Shimari v. CACI Premier Technology, Inc.*⁹⁰ held that the plaintiff’s claims, which alleged that a U.S. corporation tortured and mistreated Iraqi citizens during their detention at the Abu Gharib 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.⁹¹ 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.⁹² Plaintiff’s alleged that CACI employees instigated, directed, participated in, encouraged, and aided and abetted conduct towards the detainees and that CACI’s managers failed to investigate or to report accusations of

⁸⁶ *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).

⁸⁷ *Id.* at 1237–38 (citing *Morrison*, 561 U.S. 247).

⁸⁸ *Baloco v. Drummond Co.*, 767 F.3d 1229, 1238 (2014) (explaining that the extraterritoriality inquiry turns on where the transaction that is the focus of the statute at issue occurred) (emphasis in original).

⁸⁹ *Id.* at 1239.

⁹⁰ 758 F.3d 516 (4th Cir. 2014).

⁹¹ *Id.* at 520 (4th Cir. 2014). “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.” Jonathan Stempel, *Abu Ghraib torture lawsuit revived by U.S. appeals court*, REUTERS (June 30, 2014 2:10 PM), <http://www.reuters.com/article/2014/06/30/us-abughraib-caci-idUSKBN0F51BK20140630>.

⁹² *Id.*

wrongdoing and repeatedly denied that any CACI employees had engaged in abusive conduct.⁹³ The Fourth Circuit maintains that the clear implication of the Supreme Court’s “touch and concern” language is that the court should not assume that the presumption categorically bars cases that manifest a close connection to U.S. territory; rather, “a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims.”⁹⁴

In evaluating the “touch and concern” requirement, the court evaluated several factors, namely CACI’s “having won U.S. government permission to conduct interrogations and obtain security clearances, and allegations that CACI managers in the United States acquiesced in, or concealed, misconduct.”⁹⁵ By distinguishing the attenuated connection to the United States territory reflected by the facts in *Kiobel* to 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” which was fatal in *Kiobel*, in order to overcome the presumption of extraterritoriality.⁹⁶ 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 and 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 are U.S. citizens.⁹⁷ Unlike the Second Circuit, the Fourth Circuit employs the “touch

⁹³ *Al Shimari*, 758 F.3d at 520–22.

⁹⁴ *Id.* at 528–29 (considering a broader range of facts than the location where the plaintiffs actually sustained their injuries).

⁹⁵ Stempel, *supra* note 91.

⁹⁶ *Al Shimari*, 758 F.3d at 528.

⁹⁷ *Id.* at 529–30 (“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”).

and concern” test “by considering a broader range of facts than just the location where the plaintiffs actually sustained their injuries.”⁹⁸

Most recently, the Ninth Circuit Court of Appeals in *Doe I v. Nestle USA, Inc.*,⁹⁹ similarly rejected a blanket ruling against extraterritoriality and in light of *Kiobel*’s ambiguous “touch and concern” standard, and remanded the case for further proceedings.¹⁰⁰ The plaintiffs were three victims of child slavery who allege that Nestlé and other defendants “aided and abetted child slavery by providing assistance to Ivorian farmers.”¹⁰¹ The court reasoned that:

[d]espite their knowledge of child slavery and their control over the cocoa 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.¹⁰²

The court rejected the defendant’s argument to apply the *Morrison* “focus test,” noting that while the test may be informative, *Kiobel* did not explicitly adopt the “focus test,” and instead chose “touch and concern” when articulating the legal standard.¹⁰³

IV. REEXAMINATION OF *CARDONA*

A. *Majority*

⁹⁸ *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).

⁹⁹ 766 F.3d 1013 (9th Cir. 2014).

¹⁰⁰ *Id.* at 1028 (“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*”).

¹⁰¹ *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.”)

¹⁰² *Id.* at 1017–18 (noting that defendants have also lobbied against congressional efforts to curb the use of child slave labor).

¹⁰³ *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*.”).

On interlocutory review, the Eleventh Circuit Court of Appeals determined that the complaints did not state claims within the jurisdiction of the United States courts.¹⁰⁴ The court did not address the specific questions that were certified for review.¹⁰⁵ The court acknowledged that the Supreme Court acted with respect to the ATS during the pendency of this appeal and drew a similarity between *Kiobel* and *Cardona* with respect to actions by a corporation in conjunction with paramilitary actors within a foreign territory.¹⁰⁶ In reaching its holding, the majority maintained that the distinction between the corporation in *Kiobel*, which was 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 . . . ‘[i]f Congress were to determine otherwise, a statute more specific than the ATS would be required.’”¹⁰⁷ Thus, the court plainly concluded, “[t]here is no other statute. There is no jurisdiction.”¹⁰⁸ According to the majority, Chiquita’s U.S. citizenship is completely irrelevant to the ATS evaluation.¹⁰⁹

The court rationalized its holding by noting the history of the ATS, namely *Sosa*, precluded the court from applying the ATS to the allegations in *Cardona*.¹¹⁰ In evaluating the touch and concern test, the majority stated without further explanation that, “[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.”¹¹¹ Consequently, as the murders at the center of the plaintiffs’ allegations took place in Colombia,

¹⁰⁴ *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1187 (11th Cir. 2014).

¹⁰⁵ *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 . . .”).

¹⁰⁶ *Id.* at 1189.

¹⁰⁷ *Id.* (quoting *Kiobel*, 133 U.S. at 1669).

¹⁰⁸ *Id.*

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

¹¹⁰ *Id.* at 1190.

¹¹¹ *Id.* at 1191.

the majority chose not to apply the touch and concern test at all, reflecting an extremely restrictive version of the test advocated by Justice Alito's concurrence in *Kiobel*.¹¹² However, many have criticized the ruling as impudent in light of the facts and the infamous legacy of Chiquita's operations in developing nations.¹¹³ 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.¹¹⁴

B. Dissent

The dissent argues in the alternative, that facts of *Cardona* are sufficient to overcome the presumption against extraterritoriality.¹¹⁵ First, the primary defendant is Chiquita Brands International, a corporation headquartered and incorporated within the territory of the United States.¹¹⁶ Second, Chiquita "participated in a campaign of torture and murder in Columbia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Columbian terrorist organizations, all from their corporate offices in the territory of the United States."¹¹⁷ Chiquita's U.S.-based officials took substantial measures to conceal these payments over and over again by issuing checks payable to individual employees who would endorse the checks, convert them to cash, and then deliver the funds to the AUC.¹¹⁸ Through this analysis of touch and concern test, Judge Martin found that the plaintiffs met the *Kiobel* standard.

¹¹² *Kiobel v. Royal Dutch Petroleum Company*, 133 U.S. 1659, 1670 (2013) (Alito, J., concurring).

¹¹³ Cohen, *supra* note 9. "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." *Id.* (quoting Terry Collingsworth, one of the chief litigators for the Chiquita victims, in an interview with Think Progress).

¹¹⁴ *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), *petition for cert. filed*, 2014 WL 7463974 (U.S. Dec. 30, 2014) (No. 14-777).

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

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), *petition for cert. filed*, 2014 WL 7463974 (U.S. Dec. 30, 2014) (No. 14-777).

The dissent distinguished the facts from *Kiobel* by noting that plaintiffs do not rely on Chiquita's "mere corporate presence" to justify ATS jurisdiction, as it is incorporated in New Jersey and headquartered in Ohio.¹¹⁹ This case is not a case where a defendant is being haled into court under the ATS for action that took place on foreign soil or which plaintiffs are seeking to circumvent the presumption against extraterritoriality by holding an American company vicariously liable for the unauthorized action of its subsidiaries overseas.¹²⁰ 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.¹²¹ Judge Martin derided the court's unwillingness to enforce the ATS and 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."¹²²

C. Distinguishing Kiobel and Cardona

Through its mechanically application of *Kiobel* in *Cardona*, the Eleventh Circuit ignored the major distinctions between the two cases.¹²³ In *Kiobel*, all of the atrocities were alleged to have been committed in Nigeria, the defendants were Dutch, British, and Nigerian corporations, and there only relevant connection to the U.S. consisted of their corporate listing on the New York Stock Exchange and their affiliation with a public relations office in New York.¹²⁴

¹¹⁹ *Cardona*, 760 F. 3d at 1192 (Martin, J., dissenting).

¹²⁰ *Id.* at 1194.

¹²¹ *Id.* at 1194–95 (Martin, J., dissenting). *See, e.g.* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014); Sexual Minorities Uganda v. Lively, 960 F.Supp.2d 304 (D.Mass. 2013); Mwani v. Laden 947 F. Supp. 2d 1 (D.D.C. 2013); Krishanti v. Rajaratnam, 2014 WL 1669873 (D.N.J. Apr. 28, 2014).

¹²² *Cardona*, 760 F. 3d at 1195 (Martin, J., dissenting); Lauren Carasik, *The uphill battle to hold US corporation accountable for abuses abroad*, ALJAZEERA AMERICA (Aug. 8, 2014 6:00 AM), <http://america.aljazeera.com/opinions/2014/8/chiquita-corporateaccountabilityunitednationshumanrights.html>.

¹²³ Press Release, International Rights Advocates, Eleventh Circuit Decision in Chiquita Tort Status Litigation (July, 25, 2014), <http://www.iradvocates.org/press-release/chiquita/press-release-eleventh-circuit-decision-chiquita-alien-tort-status-litigation>.

¹²⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659, 1677 (2013) (Breyer, J., concurring); *see also* Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT'L L. 28, 31 (2013)

“Moreover, none of the defendants had engaged in any activities in the U.S. that appeared to be relevant to the claimed tortious acts that occurred in Nigeria.”¹²⁵

The Eleventh Circuit Court of Appeals adopted the approach of the Second Circuit and held in *Cardona* that the “ATS contains nothing to rebut the presumption against extraterritoriality” and thus, since the conduct, namely torture and death, occurred in Columbia, the ATS is inapplicable.¹²⁶ Unlike *Kiobel*, Chiquita is incorporated in New Jersey and headquartered in Ohio, and the United States may regulate its own corporations and bears responsibility for their acts under international law.¹²⁷ Plaintiffs sought to hold Chiquita liable for conduct that occurred in the United States, namely that they made one hundred separate payments to the AUC that it reviewed, approved, and directed at the highest corporate levels from its U.S. headquarters.¹²⁸ Distinct from the facts 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 Colombia terrorist organization, all from their corporate offices in the United States.¹²⁹ Plaintiffs did not seek to circumvent the presumption against extraterritoriality by holding Chiquita vicariously liable for the unauthorized actions of its subsidiaries in Columbia. Chiquita was directly a participant in “widespread and systematic human rights violations with indisputable evidence of actions taken by Chiquita in the United

(“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).

¹²⁵ *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 526 (4th Cir. 2014).

¹²⁶ *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1189–90 (11th Cir. 2014).

¹²⁷ *Id.*; Brief for Plaintiffs-Appellants at 15, *Cardona v. Chiquita Brands Int’l*, 760 F. 3d 1185 (2014) (No. 12-14898).

¹²⁸ Brief for Plaintiffs-Appellants at 15, *Cardona v. Chiquita Brands Int’l*, 760 F. 3d 1185 (2014) (No. 12-14898).

¹²⁹ *Cardona*, 760 F.3d at 1992 (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).

States.”¹³⁰ If *Kiobel* represents the end of the spectrum where the only connection to the United States was mere corporate presence, *Cardona* falls on the opposite end, representing substantial and repeated connections with the United States.

The majority applies a mechanical application of *Kiobel*, without considering a broader range of facts, and failing to advance the purposes of the presumption.¹³¹ The Eleventh Circuit pronounced: “because our ultimate disposition is not dependent on specificity of fact, we will only briefly review the history of the case.”¹³² The majority opinion in *Kiobel* did not assert that ATS only reaches domestic conduct—this interpretation appeared only in Justice Alito’s concurrence, where he acknowledge his approach was more restrictive.¹³³ 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.¹³⁴ Thus, the U.S. government has concluding that providing support to the U.S. directly concerns vital national interests and violates U.S. foreign policy and criminal law.¹³⁵ Thus, *Cardona* undermines U.S. foreign policy and does not reinforce international comity.¹³⁶

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

¹³⁰ *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), *petition for cert. filed*, 2014 WL 7463974 (U.S. Dec. 30, 2014) (No. 14-777).

¹³¹ *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 529-31 (4th Cir. 2014).

¹³² *Cardona*, 760 F.3d at 1187–88.

¹³³ *See generally Kiobel*, 133 U.S. 1659 (2013); *See also Al Shimari v. CACI Premier Tech., Inc.* 516, 528 (4th Cir. 2014).

¹³⁴ Brief for Plaintiffs-Appellants at 15, *Cardona v. Chiquita Brands Int’l*, 760 F. 3d 1185 (2014) (No. 12-14898).

¹³⁵ *Id.* at 20.

¹³⁶ *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 (“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.”).

sponsored by an American corporation.”¹³⁷ As the Second Circuit did in *Balintulo*, the Eleventh Circuit ignored sensitive facts in reaching its conclusion, namely, the panel did not explain how Chiquita’s support for terrorist could violate U.S. criminal law and undermine U.S. security, but not “touch and concern” the United States.¹³⁸ At sentencing, the U.S. government emphasized the fact that Chiquita’s criminal acts caused the murders that arise out of the same nucleus of facts. 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 allows 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.¹³⁹ The Restatement of Foreign Relations Law explicitly permits a state to exercise jurisdiction.¹⁴⁰ *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.”¹⁴¹ By flagrantly disregarding basic human rights, courts have failed to meet expectations of international community and respect rights universally proclaimed by all

¹³⁷ *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014) (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> (noting that in March 2007, Chiquita 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).

¹³⁸ *See* Exec. Order No. 12,224, 31 C.F.R. 595097 (2001) (blocking transactions with terrorists deemed to “threaten the security of the U.S. national or the national security, foreign policy, or economy of the United States”).

¹³⁹ *See* Restatement (Third) of The Foreign Relations Law of the United States § 402(2) (1987); *see also* *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014) (Martin, J., dissenting).

¹⁴⁰ Restatement (Third) of Foreign Relations Law §402(2) (1987).

¹⁴¹ *Kiobel*, 133 U.S. at 1664.

nations.¹⁴² Under international law and affirmed through the enactment of the ATS, the U.S. consciously accepted an obligation to remedy those injured by their own citizens.

In *Kiobel*, foreign governments submitted amicus briefs that claimed the assertion of ATS jurisdiction over their corporations violated international law.¹⁴³ These same concerns are inapplicable in *Cardona*, where the defendant is a U.S. citizen. In agreement, the United States argued that 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.¹⁴⁴ A corporation, incorporated and headquartered in the United States, which operates worldwide, supporting from the territory of the United States, the murder of thousands of men, women, and children is irrefutably a violation of international law.

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 acquainted with the subjects of which they treat.¹⁴⁵

By flagrantly disregarding basic human rights, courts have failed to meet expectations of international community and respect rights universally proclaimed by all nations.¹⁴⁶

Responsibility for Chiquita’s callous actions lies with the United States.

E. Aiding and Abetting Liability Under the ATS

¹⁴² *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.”).

¹⁴³ See Brief of the European Comm’n on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 6, 24-28, *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013) (No. 10-1491).

¹⁴⁴ Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 15, *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013) (No. 10-1491).

¹⁴⁵ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁴⁶ *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.”).

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 is a well-established norm of international law. "All international authorities agree that 'at least purposive action . . . constitutes aiding and abetting,'" although there is conflict concerning whether the *mens rea* required for aiding and abetting claim is knowledge or purpose.¹⁴⁷ For many ATS cases, the unresolved aiding and abetting standard could have great implications for actions against transnational corporate defendants, as the purpose test is a much higher standard than the knowledge test.

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 they were cooperating with the a known terrorist organization and repeatedly ignored counsel to end their relationship with the AUC. Chiquita acted with the 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

There is no surprise that the question of the possibility of ATS litigation against corporations has attracted attention and inconclusive answers.¹⁴⁸ The corporate accountability movement coupled with reservations of the potential impact on the business environment has lead to starkly divergent responses.¹⁴⁹ The drastic growth of transnational business and

¹⁴⁷ *Id.*; Doe v. Exxon Mobil Corp., 2014 WL 4746256 (D.D.C. Sept. 23, 2014).

¹⁴⁸ Hathaway, *supra* note 66 ("Those celebrating the demise of the ATS may thus find themselves surprised to discover that the end result of the Supreme Court's decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations.").

¹⁴⁹ 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).

globalization has created a safe haven for multinational corporations in both developed and underdeveloped countries that lack appropriate regulation. 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, extra-judicial killing, and environmental catastrophes."¹⁵⁰

One of the most prominent issues that the Supreme Court in *Kiobel* left unanswered 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.¹⁵¹ 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."¹⁵² 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."¹⁵³

¹⁵⁰ 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).

¹⁵¹ *Kiobel*, 133 U.S. at 1662.

¹⁵² *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).

¹⁵³ 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 coupling corporate criminal liability with international crimes in national systems is the next obvious "discovery" in corporate responsibility).

The Ninth Circuit affirmed three principles about ATS liability in *Doe v. Nestle*.¹⁵⁴ First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability.¹⁵⁵ Second, corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations.¹⁵⁶ Third, norms that are “universal and absolute,” or applicable to “all actors,” can provide the basis for an ATS claim against a corporation.¹⁵⁷ To determine whether a norm is universal, we consider, among other things, whether it is “limited to states” and whether its application depends on the identity of the perpetrator.¹⁵⁸ 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.¹⁵⁹

G. Human Rights Law

ATS litigation has highlighted the need for corporations to manage and seriously consider any potential human rights violations, irrespective of an ultimate finding of liability.¹⁶⁰ The European Commission in its amicus brief in *Kiobel* argues that, some wrongs, no longer limited to piracy and slave trading, are “so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them.”¹⁶¹ It is likely that in the wake of post-

¹⁵⁴ *Doe I v. Nestle USA, Inc.*, 10-56739, 2014 WL 4358453 at *7 (9th Cir. Sept. 4, 2014) (referencing *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) cert. granted, judgment vacated sub nom. *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (U.S. 2013)).

¹⁵⁵ *Doe I v. Nestle USA, Inc.*, 10-56739, 2014 WL 4358453 at *7 (9th Cir. Sept. 4, 2014).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *6–7.

¹⁶⁰ See generally Santiago A. Cueto, *Alien Tort Claims Act: A Threat to U.S. Corporation Operating Overseas?*, INT’L BUSINESS LAW ADVISOR (Oct. 9, 2009), <http://www.internationalbusinesslawadvisor.com/2009/10/articles/international-litigation/alien-tort-claims-act-a-threat-to-u-s-corporations-operating-overseas/>.

¹⁶¹ See Brief of the European Comm’n on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013) (No. 10-1491).

Kiobel litigation, plaintiffs will focus heavily on forum shopping depending on the facts of each case and look for alternatives in transnational tort litigation.¹⁶²

Allowing U.S. defendants to be sued for human rights abuses advances the policy of denying safe haven.¹⁶³ *Filartiga* underscores this importance; it paved the way to seek accountability in U.S. courts in order to permit suits against those defendants who enjoy protection of the U.S. legal system and whose egregious behavior is therefore a legitimate U.S. concern.¹⁶⁴ Redress for human rights violations requires due diligence. Thus, it is not that the State guarantees a remedy or satisfaction for every violation, but instead, due diligence obligations are usually considered obligations of conduct. Due diligence compels institutions, such as the courts, to operate diligently and “[s]tates may incur responsibility if they are not diligent in pursuing and preventing acts contrary to international law by prosecuting and punishing the private perpetrators.”¹⁶⁵ Nonetheless, human rights law does not bind non-state actors, although corporate due diligence considerations are developing.

John Ruggie, the Secretary-General’s Special Representative for Business and Human Rights, is one of the most influential contributors to international relations, where he has

¹⁶² “Litigation under the [ATS] is complex, drawn-out over many years, and results hinge on minute issues of civil procedure. In many cases, the 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.” Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLINICAL L. REV. 255, 263-64 (2014).

¹⁶³ Brief of Amici Curiae Dolly Filartiga, et al. at 16, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (“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.”).

¹⁶⁴ *Id.* at 24.

¹⁶⁵ Duncan French & Tim Stephens, *ILA Study Group on Due Diligence in International Law—First Report*, INTERNATIONAL LAW ASSOCIATION, March 7, 2014 http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

developed “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (the “Ruggie Framework”).¹⁶⁶ The Ruggie Framework has been called “the most comprehensive and authoritative global standard in the area of business and human rights.”¹⁶⁷ In September 2013, the United Kingdom became the first country to launch its implementation plan, which will guide companies on integrating human rights into their operations.¹⁶⁸ The action plan demonstrates “important leadership in relation to the protection of human rights defenders working on issues of corporation accountability.” Most notably, the action plan is intended to apply to UK companies operating both at home and extraterritorially, to integrate human rights in their operations.¹⁶⁹ Further, amendments to the UK Companies Act has clarified that company directors will include human rights issues in their annual reports.¹⁷⁰

VI. CONCLUSION

Cardona reflects a radically narrow interpretation of the standard set by the Supreme Court in *Kiobel*, in light of the facts surrounding the case, including the major distinctions between the two cases. In an effort to strengthen international and multinational corporate accountability, the U.S. and the Supreme Court cannot 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.

¹⁶⁶ UN “Protect, Respect and Remedy” Framework and Guiding Principles, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>.

¹⁶⁷ <http://www.ksg.harvard.edu/m-rcbg/johnruggie/index.html>

¹⁶⁸ Press Release, United Kingdom, UK first to launch action plan on business and human rights (Sept. 4, 2013), <https://www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights>.

¹⁶⁹ Michael Ineichen, *UK shows welcome leadership on human rights defenders and corporate accountability*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS, <http://www.ishr.ch/news/uk-shows-welcome-leadership-human-rights-defenders-and-corporate-accountability>.

¹⁷⁰ *John Ruggie And Shift Comments To Financial Reporting Council’s Exposure Draft: Guidance On The Strategic Report*, SHIFT, <http://shiftproject.org/sites/default/files/John%20Ruggie%20and%20Shift%20Comments%20to%20FRC%20Exposure%20Draft%202013%2011%2015.pdf>.

Courts should not disregard a claim against a U.S. national, whose conduct violates the law of nations, under the false pretext that the case mirrors *Kiobel*, thus preemptively barring the claim before evaluating the facts of the case. To apply an ambiguous and unsettled standard so restrictively is imprudent. Therefore, the Eleventh Circuit's failure in *Cardona* to address the factual allegations that the relevant conduct took place in the U.S., in order to determine if the conduct touched and concerned the U.S. sufficiently to displace the presumption against extraterritoriality is in direct contradiction with *Kiobel* and conflicts with other circuit courts.