



JUDICIALIZING TRANSNATIONAL CORPORATIONS IN A GLOBAL LEGAL ORDER: THE CHIQUITA AFFAIR IN COLOMBIA

David Restrepo Amariles
Free University of Brussels

I. INTRODUCTION :

The number of transnational corporations that have been taken to trial in different parts of the globe during the last decade for violations of national and international law continues rising steadily. It seems that the emergence of a new global order that stands significantly on the grounds of human rights is at the core of that increasing judicialization of transnational corporations. Emblematic cases like Yahoo in France and the United States; Total in Burma, Belgium, France and The United States, etc. have shown that transnational litigation grounded in human rights is a paramount means for claiming justice beyond state boundaries.

This article focuses on the Chiquita investigation in the United States for financing terrorist groups in Colombia and the consequent victims' claims for reparations before American courts. Although probably the most original contribution of this paper is that it systematizes the legal events of the recent and almost unstudied Chiquita affair, it will also provide some guidelines under which this and future similar cases can be interpreted in the light of the emergent global legal order.

This new legal order that has raised uncertainty among investors, governments, lawyers, citizens, etc. brought into light that modern sovereignty-based law had fallen short in providing legal tools for facing the highly globalized economic order. Classic discussions on competence and jurisdiction give way to concepts like "forum shopping", in which a plurality of legal procedures, regulations and jurisdictions coexisting at the global level grant the parties the possibility of choosing the legal forum most adequate to advance their claims (Cf. Frydman 2007:45-46).

In the first section I provide a brief description of the Colombian conflict, making emphasis on the origins of the guerilla and paramilitary groups as well as on the battle for strategic regions in the country. In the second section, I present the case *Sinaltrainal v. Coca-Cola Co.* to illustrate the participation of transnational corporations in the Colombian conflict and the raising of claims before American Courts by Colombian victims under the Alien Tort Claim Act (ATCA). In the third section, I introduce Chiquita's business in Colombia in sub-section (A), while in sub-section B I present its

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model of corporate responsibility and code of conduct in the light of a co-regulation theory. In section four, I focus on the Chiquita criminal and civil trial. Regarding the former I provide a short description of its particularities in the light of the Anti-terrorist statute (A). Regarding the latter, I disaggregate the few information available and I complement it with some of the issues described in chapter II (B), in order to provide an accurate picture of the American Justice system, and especially the ATCA, as a proper battlefield between Colombian victims and transnational companies (C). I end this paper with some final remarks on the ongoing paradigmatic transformation of law and by pointing out some guidelines under which the Colombian “transitional justice process”¹ can be approached in this new legal map.

II. THE COLOMBIAN CONFLICT: APPROACHING THE CONTEXT

The Colombian internal civil war is perhaps the last remaining trace of the Marxist-Leninist armed ideologies in Latin America. The closed nature of the political system to farmers’ and workers’ participation as the result of the *Frente Nacional* unleashed the radicalization of the workers and farmers’ movement (Nemogá 2001:233-234) at the end of the 1950’s. Probably the most remarkable consequence of this insurrection, certainly seen as the only remaining channel against the official criminalization of left parties and popular demonstrations, was the emergence of armed revolutionary Guerillas (Nemogá 2001:253)- following either the ideas of the Cuban Revolution or those of the Marxist-Leninist ideology in both its Soviet Union and Maoist versions. The Colombian government reacted then with strong armed strategies under the coordination of several American programs aimed at blocking the influence of “communist” ideologies in the Region (Nemogá 2001:254). Although Colombia did not experience the type of dictatorships of the South Cone (Argentina, Chile, Uruguay and Paraguay), Brazil, or even some Andean Region Countries, the alliance set up between the armed forces and “self-defense groups” can be seen as the right-wing military policy of the Colombian state during the Latin American dictatorships’ period. The support given by the Colombian state to emergent landowners and farmers’ self-defense groups at the end of the 60’s was the beginning of a long lasting alliance between the state and the so called “self-defense groups” (Nemogá 2001:252-253), which, later on became paramilitary forces. Nonetheless, the radicalization of the armed struggle would only reach important proportions at the beginning of the 90’s. The guerilla struggle was transformed from a farmers and workers’ movement into a struggle for economic and military survival based on the drug business. The Guerillas, especially the FARC-EP, entered directly and massively into the drug business and consequently the appropriation of territory for production and transportation (exportation) of drugs became their main fighting interest. As a response, self-defense groups, already organized as paramilitary forces, advanced a policy of terror and fear against the civil population claiming its infiltration by guerrilla members. On the other side, the land owners who gained their properties during *La Violencia* and expanded them during the 70’s and 80’s with the support of the political elites, strengthened their

¹ The Colombian conflict has often been treated differently according to the specific field that is studied. Although there is certainly not a post-conflict situation there are different processes currently in progress that correspond to transitional justice, e.g. process of truth, reparation and reconciliation. It could then be understood as a transitional processes within conflict.

² This is the name given to the accord reached by the two main political parties in Colombia to alternate power. This solution, which drove to an end the civil war (la Violencia) between these two parties, dominated the presidential elections from 1958 to 1974 (García Villegas 2001: 318-319)

support to paramilitary groups –consolidating the Autodefensas Unidas de Colombia (AUC)- in order to face the increasing military power of the Guerrillas. This situation of permanent conflict was also a determinant factor that blocked any possible agrarian reform at the time. Finally, it is important to remark the complicity of the state armed forces in contributing to the strengthening of the paramilitary groups during the 90's. .

If one can point out one region in Colombia that has been historically a strategic location for landowners, multinationals and, of course, guerillas and paramilitaries, it is the department of Antioquia, and even more specifically, the region of Urabá (Graph 1). This territory is home to one of the country's largest afro-Colombian populations and is characterized by its extreme fertility for agricultural production, high indexes of poverty and illiteracy, easy access to the Pacific and Atlantic oceans and the nearly complete absence of the state. One may say that political elites have been applying “systematic discrimination” to Urabá, aimed at keeping “informal” control over this rich region under the model of “low intensity armed conflict”.

This long-lasting internal conflict has caused many victims among the civil population, especially since 1995, when the conflict reached a permanent state of confrontation between Guerrillas, Paramilitaries (AUC) and the Colombian State. All parties of this three-sided war use tactics against civilians, including forced displacement, forced recruitment, massacres, collective punishment, etc. Nonetheless a deeper exercise is required to unveil the participation of other agents, i.e. transnational corporations, in the Colombian conflict.

If one tracks back on time, one finds that Colombia had already experienced at the end of the 1920's a massacre performed by the Colombian army in defense of the interests of the transnational United Fruit Company, during a workers' revolt for better labor conditions (Cardona 2004). Probably the most known account of this event known as *La Matanza de las bananeras* is the one provided by the Colombian writer Gabriel García Márquez in *One Hundred years of Solitude* (2000: 45, 46, 127, 142) and in *Leaf Storm* (1979; Cf. also Restrepo 2008). Nonetheless, the participation of transnational corporations in the more recent Colombian conflict remains almost unexplored by the current Commission of Reparations, judicial processes against demobilized paramilitaries in the frame of the Peace and Justice Law (Law 975 de 2005), and moreover in political and academic forums.

Probably, one of the most important antecedent in the recent history of the Colombian conflict is the prosecution and lawsuits filed in the United States against Coca-Cola for contracting paramilitaries in the Urabá Region. Considering that the Chiquita affair is fairly recent and that no final decisions have been handed down in the civil trial, I will greatly rely on Coca-Cola's antecedent for approaching the Chiquita case in section III and IV. Although differing in some issues, a brief contrast between these two cases will provide important insights regarding plaintiffs and defendants, the key role played by the global security and anti-terrorist discourse after 9/11, and the future transformation of reparations in the Colombian “transitional justice process”.

III. ESTABLISHING PRECEDENT? COCA-COLA IN COLOMBIA UNDER THE ATCA:

The Coca-Cola affair is perhaps one of the most emblematic cases, which have contributed to the snowball of investigations that are increasingly being undertaken against transnational corporations in Colombia. *Sinaltrainal v. Coca-Cola Co.*³ set the basic premises for the current legal attack in the United States against Chiquita under the Alien Tort Claim Act (henceforth ATCA), also known as Alien Tort Statute (henceforth ATS).

The survivors of an employee (Gil) of the Colombian soft drink bottling plant raised a claim, on the basis of the ATCA, the Torture Victims Protection Act (henceforth TVPA) and the Racketeer Influenced and Corrupt Organizations Act (henceforth RICO), against Coca Cola Co. for the murder of one of its workers. The collective plaintiffs were Sinaltrainal -the trade union- and The Estate of Isidro Segundo Gil. They claimed that the “Collective defendants” composed by Coca-Cola U.S.A., Coca-Cola Colombia, Bebidas y Alimentos Panamerican Beverages Inc., Richard I. Kirby, and Richard Kirby Kielland, representing the United States soft drink licensor and its Colombian subsidiary, together with the Colombian bottler and its managers, were liable under the abovementioned statutes, for the murder of Gil, committed by a paramilitary unit in Urabá. According to the Plaintiffs, Gil, as a leader of Sinaltrainal trade union, was trying to organize the workers at the Coca-Cola U.S.A. bottling plant that Bebidas y Alimentos owned in Urabá, when he was shot inside the plant by members of a paramilitary unit on December 5, 1996. Considering that the defendants had violated international law and the law of the United States and Florida, the plaintiffs asserted the jurisdiction of the District of Florida to pursue their claim against Coca Cola USA and Coca-Cola Colombia, Bebidas y Alimentos Panamericana Beverages on the basis of the *ATCA 28 U.S.C. § 1350* and the *TVPA Pub.L. No. 102-256, 106 Stat. 73 (1992)*, also codified at *ATCA 28 U.S.C. § 1350 Note*. Regarding Richard I. Kirby, and Richard Kirby Kielland (Managers), plaintiffs claimed the violation of the *RICO 18 U.S.C. § 1961 et seq.* Similarly, they claimed the Defendants' denial of the rights to associate and organize union activity as a violation of the ATCA, and the wrongful death under state, federal and Colombian law, as well as the violation of state law by aiding and abetting the paramilitary unit responsible for Gil's death.

I will focus on a motion raised during the pretrial examination in which the Court decided if it had subject matter jurisdiction under the ATCA and the TVPA for advancing the case. I find it interesting to analyze this situation as far as it can contribute to enhance our understating of the ongoing transformations of legal paradigms through practical cases. This analysis gives some clues of what is the present and future of transnational corporations' business liability, and especially, in regards to their participation in the Colombian Conflict under the ATCA. The affirmation of subject matter jurisdiction by American Courts in this case is the opening of a new judicial forum before which Colombian plaintiffs are entitled to claim civil liability of transnational corporations operating in Colombia and involved in the armed conflict.

³ Cited in WestLaw as: 256 F.Supp.2d 1345. The Information provided for this case relies on WestLaw International. The use of the material complies Westlaw conditions of using this information for educational purposes only.

1. The Florida Court following *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir.1980) held that “three elements are required to establish subject matter jurisdiction under the ATCA: (1) the plaintiff must be an alien asserting a claim (2) for a tort that is (3) a violation of international law”. The first two elements were not in dispute, but regarding the last, and considering that motion -12 (b) (1) has been raised by the defendants, the plaintiffs had to identify the specific international law that the defendants allegedly violated, according to precedents such as *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995); *Filartiga*, 630 F.2d at 880. The Court, in accordance with *Kadic* at 239-40, 245; *Filartiga* at 889; *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546, pointed out that plaintiffs, in identifying an international law violation, can choose to allege that the private individuals who shot Gil committed either a war crime or a tort under color of law that exceeded universally recognized standards of civilized conduct.

Regarding the first option, i.e. to plead a war crime, plaintiffs must allege, in accordance with *Kadic* at 243-244, that a private individual, who was a party to an armed conflict, committed a tort against civilians *in the course of that conflict*. The fact alleged by the plaintiffs in the claim is that the murder happened within a conflict involving guerillas, paramilitaries, and the Colombian government. The Court considered that although the complaint alleged the existence of an ongoing civil war, the plaintiffs failed to argue that Gil was murdered in the course of a conflict between the guerillas and the paramilitaries, or Colombian military or police, etc. “Moreover the complaint clearly alleges that the paramilitaries were the “hired guns” of who acted on behalf of the Defendants when they shot Gil. Therefore the District Court considered that the complaint failed to allege a war crime sufficient to invoke subject matter jurisdiction”.

The second possibility was, then, to plead a tort under color of law, in accordance with precedents such as *Lugar v. Edmondson Oil Co*, *Arnold v. Board of Educ. of Escambia County, Alabama*, *Busby v. City of Orlando* and of course *Filartiga v. Pena-Irala* and *Kadic v. Karadzic*. According to holding in *Kadic*, 70 F.3d at 243 in particular, if the complaint alleged that the Defendants murdered Gil by acting together with the paramilitary unit who acted under color of law by acting in concert with Colombian officials or with significant aid from the Colombian government, then an international law violation would be sufficiently stated for purposes of subject matter jurisdiction. However, this affirmation would not end the jurisdictional inquiry because it does not *establish* that the defendants violated international law by taking some action under the color of the law. The complaint must also allege that each Defendant participated in Gil's death by acting together with the paramilitary.

Plaintiffs try to show that link in a threefold argument. First, Plaintiffs allege the Bottler's Agreement gives Coca-Cola U.S.A. control over all aspects of the bottling operation at Bebidas, including labor policies and employee security. Second, Plaintiffs allege a series of alter ego and/or agency relationships to link Mosquera's decision, as the Bebidas plant manager, to conspire with the paramilitary, to Kirby, Kielland, Coca-Cola Colombia and Coca-Cola U.S.A. “Lastly, the alter ego and agency allegations permit Plaintiffs to ultimately allege that Coca-Cola U.S.A. and Coca-Cola Colombia knew, either directly or through facts known to their alleged agents (Kirby, Kielland, and Bebidas), that Mosquera was working with the paramilitary to destroy the union and that plant employees were in danger. Coca-Cola U.S.A.'s complete control over Bebidas, together with the agency or alter ego relationships that link the Defendants together, in Plaintiffs' view, ties every Defendant to the conspiracy between Mosquera and the paramilitary that drove the Sinaltrainal labor union out of the Bebidas plant

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and resulted in Gil's murder” (Cf. Westlaw 256 F.Supp.2d 1345 p. 9; Gil at 18-29; 42-40, 51).

The Court when analyzing the abovementioned claims rejected some of them by unveiling their weaknesses and underlying contradictions. For example the Court holds that the Bottler's Agreement does not give Coca-Cola U.S.A. or Coca-Cola Colombia the duty or right to control all aspects of the Bebidas plant operation as alleged; rather, it is the type of agreement typically found in a franchise relationship. The Court also agrees that nothing in the agreement gives Coca-Cola U.S.A. the right, obligation, or much less the duty, as Plaintiffs argue, to control the labor policies or ensure employees' security at Bebidas. The Bottler's Agreement clearly refutes Plaintiffs' allegation that Coca-Cola U.S.A. had total control. Without such control, Plaintiffs cannot tie the Coca-Cola Defendants with their alleged alter egos or agents. In brief, and after deepening in the rest of the arguments, the District Court of Florida held that (1) there was no jurisdiction over licensor or its subsidiary under ATCA, but that (2) there was ATCA jurisdiction over bottler and managers.

2. Now, in the light of the TVPA claim, District Courts have Subject Matter Jurisdiction for a civil cause of action against an individual who, under color of law of any foreign nation, subjects another person to torture or extrajudicial killing (28U.S.C. § 1350, note, § 2 and § 3). Therefore, District Courts must decline to hear a claim if the plaintiff has not exhausted all adequate and available remedies in the place in which the conduct giving rise to the claim occurred *[Id. at § 2(b)]*. The Court argued that the color of law element of a TVPA claim was identical to that under the ATCA, and therefore, given that the Court did not have subject matter jurisdiction over the ATCA claim against Coca-Cola U.S.A. and Coca-Cola Colombia, it did not have subject matter jurisdiction over the TVPA claim against the Coca-Cola Defendants either. Nonetheless, the court held that it had jurisdiction over bottler and managers under TVPA.

In the previous analysis I focused on the participation of Coca-Cola U.S.A and Coca-Cola Colombia because the main interest of this analysis is the liability of transnational corporations and its subsidiaries. Just to close out this case it is interesting to point out that the District Court found inapplicable the Racketeer Influenced and Corrupt Organizations Act (RICO), which however is not further studied as far as it is not relevant for our analysis.

The Coca-Cola affair laid down essential premises that constitute a point of reference to future liability claims against transnational corporation before American Courts for participating in the Colombian conflict. The District Court of Florida did not claim subject matter jurisdiction under the ATCA and TVPA against Coca-Cola U.S.A. and Coca-Cola Colombia because the complaint failed to establish the link between the former and the paramilitary forces involved in Gil's death required to plead a tort under color of law. However, the fact that the District Court did claimed subject matter jurisdiction over bottler and managers shows that future claims on similar issues must be careful in detailing the causal links between the transnational corporation and the action of the agents directly involved in the violation of international law.

In the next sections I will present the framework of the Chiquita affair proving, first, an introduction to its history and corporate governance model, and then, an account of the current legal claims filed before American Courts for its participation in the Colombian

conflict. I intend to show that the Coca-Cola affair must remain a reference case to these claims, which themselves, constitute the first step through which victims could seek reparation at an international level. This may constitute, as it will be further exposed, a theorization of the Colombian landscape as a diffuse transitional justice process that may require a further study of global law theories.

IV. THE CHIQUITA AFFAIR: PRECEDENTS AND CORPORATE GOVERNANCE

In this section I will sketch the history and corporate responsibility model of Chiquita as a first approach for understanding the regulatory and operational mechanisms through which transnational corporations are developing their business. I hold that this regulatory mechanism by its own produces mostly symbolic effects of regulation rather than effective coercive measures themselves. However, I also claim that a full system of co-regulation with inter-state cooperation may highly contribute to a comprehensive treatment (e.g. one that includes private actors) of transitional justice in a globalized legal and economic order.

1. The Emergence and Consolidation of Chiquita as a Transnational Corporation

“Chiquita is worldwide known for its delicious bananas”¹. This transnational corporation is one of the largest players in the world food industry today. Since its very origins in 1870, when Lorenzo Dow Baker sailed the first bananas from Jamaica to Jersey City, this business has been closely related to Latin America. In the following years the banana and railroad company business developed by Minor C. Keith in Costa Rica merged with Boston Fruit Company, which was a partnership between Capitan Baker and Andrew Preston, to give birth to United Fruit Company on March 30, 1899. Here, I want to remark the apparently unknown or unveiled line of continuity existing between the transnational company nowadays known as Chiquita Brands International, Inc., and United Fruit Company, the corporation implicated in the 1928 historical *Matanza de las Bananeras* -Banana’s Massacre- performed by the Colombian army. This continuity is proved by the fact that in 1999 Chiquita celebrated its 100th Anniversary based on the date in which United Fruit Company was founded as the result of the merger previously described. Moreover, although “Chiquita” was registered as a trademark in United States in 1947, when the company was still named United Fruit Company, in 1970, after the merger with AMK Corporation, it was renamed United Brands Company, and finally in 1990, it was named Chiquita Brands International, Inc. “to take advantage of global name recognition”.

In the last decade Chiquita has promoted several agreements for the improvement of labor standards. In that sense, in 2000, the company adopted Core Values and updated its Code of Conduct to include Social Accountability International’s SA800 labor standards; in 2001, Chiquita signed with IUF and COLSIBA agreement on Labor Rights for banana workers, and in 2002, Chiquita joined Ethical Trading initiatives. This agreements have been awarded several recognitions: in 2003 when the *The Progressive Investor* named Chiquita one of top 20 "green stocks", in 2003 when the company received the “Conscience Award’ from Social Accountability

¹ Quoted from <http://www.chiquita.com/>. All the information regarding Chiquita was taken from its Official Webpage.

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International, and in 2004, when 100% of its farms in Latin America were certified to SA8000 labor standards. According to the official information upload in its webpage, in 2004 Chiquita sold its production and part of operation in Colombia. Chiquita interpreted its situation in Colombia as an "excruciating dilemma between life and law due to the difficulties it faced to implement its social responsibility standards in a zone of conflict"⁵.

2. Chiquita's Core Values, Code of Conduct and Corporate Governance

As mentioned above, in 2000, Chiquita adopted company Core Values and updated its Code of Conduct to include Social Accountability International's SA800 labor standards. The former are constituted by integrity, respect, opportunity and responsibility (Alsever 2006: 23) and Chiquita seeks to link them with its company vision in the everyday business activity.

The Code of Conduct seeks to incorporate an important number of ILO Conventions (N. 29, 105, 87, 98, 100, 111, 135, 138, 155, 159, 177, 182) on issues as child labor, forced labor, health and safety, freedom of association and the right to collective bargaining, discrimination, disciplinary practices, working hours, compensation, management systems, etc. The code of conduct also includes ethical and legal responsibilities regarding fair competition, government request and cooperation, corporate political activity, antitrust compliance, etc. Finally the Code includes "additional responsibilities" regarding environment, community involvement and workforce reduction (Chiquita CC: 7-18). Although there is a reference in the Code of Conduct to improper payments, it does not make reference to Foreign Terrorist Organizations (FTG) or other illegal groups, but to bribes and relationships with governments (Chiquita CC:16). Finally the code of conduct defines the social responsibilities to which Chiquita holds itself accountable (Chiquita CC: 1) - this is the very essence of the Code of Conduct. Each of its business units "will be required to fully comply with these standards, but we recognize that their efforts to do so will take time (Chiquita CC: 5). Chiquita "will provide a copy of this to our suppliers and joint venture partners, and we will ask them to adhere to the standards of conduct we demonstrate in our owned operations. Further, we will establish a program to work with our principal suppliers and joint venture partners to assess their current social responsibility performance and to establish plans to meet these standards within a reasonable period of time" (Chiquita CC: 1). The code of conduct enacted by Chiquita meets well what can be considered as the three basic *zones* (categories) of any code of conduct regarding (1) internal conditions of the company, (2) immediate surrounding environment, and (3) larger surrounding (political) environment (Frydman 2007:15-18)

Besides "strict legal compliance", Core Values and its Code of Conduct, Chiquita pursues a model of Corporate Responsibility that includes Social Responsibility (Alsever 2006: 23). This management model is developed by a board chosen to perform important tasks of direction, auditing and control, among which I highlight to "insist that the Company's Code of Conduct is followed". Certainly, this makes part of the so-called Social Responsibility of Transnational Corporations (Corporate

⁵ Paraphrasing the title contained in an article of Aguirre Fernando (Chairman and CEO, Chiquita Brands International, Inc) U.S Chamber of Commerce. BCLC Business Civic Leadership Center. The Corporate Citizens, April 2007.
http://www.uschamber.com/bclc/resources/newsletter/2007/chiquita_newsletter_april2007.htm

Responsibility) model, in which the business agent is not seen anymore as a simply *homo economicus*, but as someone that has to contribute to moral behavior of the companies themselves. Transnational Corporations enact rules to which they will abide in a global order in which they are not confined to comply with a specific and unique state regulation. Given the limitation of the nation states to regulate transnational corporations' businesses, plus the deregulatory movement that is part of the liberal consensus and the consequent implicit co-regulatory agreement, transnational corporations seem to need a consciousness, or moreover a soul (Fydman 2007:2).

Nonetheless, to present, there have been no reports of internal or external -excluding state- investigations in accordance to the company's internal principles (code of conduct, core values and corporate responsibility) regarding the facts that will be presented in the next chapter. Moreover, the company has held that the payments made to paramilitaries were always made in good faith and for protecting the life of its workers.

Before going into the next section, it is important to remark that Chiquita's center of operation in Colombia was Urabá, the same region where the Coca-Cola affair took place. Hence, more inquiries are needed today to bring forth the participation of other companies settled down in this troubled region at the time, and that could have been, directly or indirectly, involved in this entire conflict. In the next section, I will depict the emergent Chiquita Affair and the route it can take in forthcoming years. I have chosen this new and relatively unknown case because I believe it has the potentiality to become an emblematic affair to the level of those of Yahoo, Total and Nike. I do want to remark before going into its proper analysis, the paradox underlying Chiquita's corporate responsibility model and its participation in the Colombian conflict. The social responsibility engagement stated in its code of conduct and social standards contrast sharply with its breach of national and international law, raising therefore questions on the moral coherence of its concept of social responsibility.

However, instruments implemented by transnational corporations for social responsibility are not the only mechanisms implied by a co-regulatory system (Gunningham and Sinclair 1999:53-54), which I claim could be useful for studying the diffuse transitional justice process in Colombia. Codes of conduct correspond to the co-regulation *mechanism of self-regulation*. They are run by associations whose members are at the same time financing their structure and subjected to their supervision. A co-regulatory model also includes *voluntary mechanisms*, which are rules enacted by individual private actors who engaged unilaterally in their respect and independently of external coercion. Another mechanism of co-regulation refers to *economic instruments* that under a market functioning logic aims at regulating a specific field or subject. *The information strategy* as a fourth mechanism seeks the publicity of private actors functioning on finances, advertisement, commercial labels, etc. Finally, the mechanism of *command and control regulation* would be the classic state regulation that is composed by enacted rules and authorities that sanction those who breach them. In brief, co-regulation is not a category of instrument in itself but the combination of categories and instruments of regulation abovementioned (Cf. Hennebel & Lewkowicz 2007: 155). I will turn now to the analysis of the Chiquita affair, but I will retake the idea of co-regulation in the last section as a first area to be explored in a research agenda on the field of responsibility of transnational corporations in transitional justice processes within a global law framework.

V. LOOKING FOR RESPONSIBILITY AND REPARATION BEYOND BOUNDARIES

Chiquita's intervention in the Colombian armed conflict remained unknown for several years. Today Colombian victims have turned their eyes to foreign judicial forums aiming at giving visibility to their claims while trying at the same time to profit of more expeditious procedures. In the next three sections I aim at providing initial guidelines on which new researches can be relied upon to deepen in the forthcoming events on the field. This affair provides undoubtedly useful elements to study a possible widening of the reparation framework for Colombian victims framed within the "Truth, Justice and Reparation" project contained in the Law 1975/2005. In that sense, I present in the first section relevant information regarding the plea agreement between The United States and Chiquita for financing terrorist groups. In section two, I introduce the tort claims brought by Colombian plaintiffs against Chiquita that have been already filed in American Courts. Finally, I present some consideration on the Subject Matter Jurisdiction of American Courts under the ATCA over Chiquita in the light of the lessons drawn from the Coca-Cola affair.

1. Prosecuting Chiquita under the Terrorist Statute

According to the Anti-terrorist Statute of the United States, whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, is subject to punishment (*18 U.S.C.A. § 2339B(a)*, *50 U.S.C. § 1705(b)*; and *31 C.F.R. § 594.204*). The important modification introduced in 2004, *§ 2339B(a) (1)*, adds that a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section *212(a)(3)(B)* of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d). On the basis of the abovementioned legal dispositions, Chiquita was prosecuted before the District Court for the District of Columbia - *United States of America v. Chiquita Brands International*.

In March 2007, Chiquita pleaded guilty before the Washington D.C. Judge Royce Lamberth of charge of paying paramilitaries in the region of Urabá. Chiquita accepted to have paid for a seven-year period (1997-2004) 1.7 million dollars through its Colombian subsidiary Banaldex (Alsever 2006: 25). In the *United States of America v. Chiquita Brands International* plea agreement, on the one hand, Chiquita agreed to pay a \$25 million fine for knowingly making payments to a group classified as terrorist by the American government since November 10, 2001 (*§ 27*, Alsever 2006:25, Forero 2007), while on the other hand, the Department of Justice accepted not to raise charges against the executive directors of Chiquita (El País 2007). The support given by Chiquita to the AUC was made in violation of *8 U.S.C.A. § 1189*, *18 U.S.C.A. § 2339B(a)(1)*, *50 U.S.C. § 1705(b)*; and *31 C.F.R. § 594.204*. Moreover, as stated in *U.S. v. Rahmani* and *U.S. v. Hammoud*, as well as according to *§ 1189*, defendants cannot challenge the AUC terrorist designation as FTO during a trial or hearing.

According to prosecutors⁶, and as it can be verified in the decision, Chiquita's attorneys made it clear that the payments were improper, since several memos included in Court show that the company's outside counsel advised that the payments were not legal. Moreover, although on April 24, 2003 company officials and lawyers approached the Justice Department and told prosecutors they had been making the payments, according to court documents, the payments continued for months.

According to Fernando Aguirre, chairman and chief executive officer of Chiquita, "the payments made by the company were always motivated by our good faith concern for the safety of our employees. Nevertheless, we recognized – and acted upon – our legal obligation to inform the DOJ [Department of Justice] of this admittedly difficult situation" (Alsever 2006: 25, Ryan 2007). U.S. Attorney Jeffrey Taylor said in a statement: "Funding a terrorist organization can never be treated as a cost of doing business. American businesses must take note that payments to terrorists are of a whole different category. They are crimes." (Ryan 2007).

From the Colombian side, the attorney general Iguarán has claimed that his office was going to seek the extradition to Colombia of the eight Chiquita executives from who participated in the payments. Moreover, Iguarán said that, among the issues his office is investigating in the Chiquita case, is the unloading of Central American assault rifles and ammunition at the Caribbean dock operated by Banadex, and detailed in the 2003 Organization of American States report (*OAS 2004. CP/doc. 3687/03*). It is important to remark that the Justice Department of the United States did not deal with the smuggling operation in its plea deal (Forero 2007).

Although the fine imposed to Chiquita is seen as an important achievement in the accountability of transnational companies in the Colombian context, Yolanda Rúa, a member of a women's peace organization in Urabá, claimed that the \$25 million that Chiquita will pay to settle the Justice Department's investigation should go to the victims of the paramilitaries that Chiquita supported. She said: "We don't need a long prison sentence for them. We need to see some sort of reparation". More demanding is José Benítez, a leader of the banana workers' trade union, who said Chiquita and the other firms that have paid paramilitaries must be held accountable, because "It's like they are trying to erase all those deaths with money that the victims here will never see. If there is justice, the Chiquita executives will see the inside of a Colombian prison." (Brodzinsky 2007)

2. Claiming Justice Abroad: Chiquita's Gate to Victims' Reparations

Several lawsuits invoking jurisdiction under the *ATCA 28 U.S.C. § 1350* were filed in 2007 against Chiquita, just after it pleaded guilty for supporting paramilitary groups. The plaintiffs, different groups of Colombian nationals, claimed civil liability of Chiquita for the killings executed by the AUC to which Chiquita had given economic support. Since the payments were recognized as illegal only since 2001, when the AUC

⁶ "The document filed by federal prosecutors is known as an information. Unlike an indictment, it is normally worked out through discussions with prosecutors and is followed by a guilty plea" (AP. msncb 2007)

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were listed as a terrorist group, the claims only cover the executions after 11 November 2001.

Since the lawsuits are very recent and they are still in the stage of solving procedural issues, I will focus on Florida District Court case *Carrizosa et al. v. Chiquita*⁷, as far as it provides not only the general idea of the issue at stake but also enough information regarding the roots of the claims, the legal basis and the procedural paths.

There are currently three different claims filed in US Courts against Chiquita. The oldest lawsuit was filed in the U.S. District Court for the District of Columbia (henceforth D.C. Complaint) the 7th June 2007. The Plaintiffs are 144 Colombian nationals who allege to be the legal heirs to 173 Colombian nationals killed by the AUC. They assert that Chiquita, through its Colombian subsidiary Banadex, paid \$1.7 million to the AUC between 1997 and 2004, and that officers and employees of Chiquita reviewed and authorized these payments. The plaintiffs also allege that Chiquita knew or had reason to know about the illegal activities of the AUC, but nonetheless continued to provide them financial support. The complaint therefore asserts nine causes of action: “(1) extrajudicial killing under the *ATS*, 28 *U.S.C. § 1350*; (2) extrajudicial killing under the Torture Victim Protection Act, 28 *U.S.C. § 1350*; and common law claims for (3) wrongful death; (4) negligence; (5) negligent hiring; (6) negligent supervision; (7) intentional infliction of emotional distress; (8) battery; and (9) assault” (2007 WL 2666222).

The second complaint, *Carrizosa et al. v. Chiquita*, was filed in U.S. District Court for the District of Florida the 13th June 2007. As in the D.C. Complaint, plaintiffs in this case allege they are surviving family members of Colombian nationals allegedly killed by the AUC in Colombia. All time in accordance to the D.C complaint, plaintiffs here allege that Chiquita, through its former Colombian subsidiary, Banadex, paid \$1.7 million to the AUC beginning in 1997, that these payments were reviewed and authorized by Chiquita executives, and that Chiquita made these payments despite its knowledge of the AUC's violent activities. In addition, the Florida plaintiffs allege that Chiquita met with officials from the U.S. Department of Justice to discuss the payments. The plaintiffs in the Florida Complaint assert causes of action that are substantially similar to those of the D.C. Complaint: “(1) providing material support to a terrorist organization resulting in death under the *ATS*, 28 *U.S.C. § 1350*; (2) extrajudicial killing under the *ATS* 28 *U.S.C. § 1350*; and common law claims for (3) negligent retention and supervision; and (4) negligent hiring (2007 WL 2666222).

The third complaint, *Doe v. Chiquita Brands International*, was filed in the U.S. District Court for the District of New Jersey on July 18, 2007 by Colombian families represented by EarthRights International (ERI), together with the Colombian Institute of International Law (CIIL), Judith Brown Chomsky, and Schonbrun DeSimone Seplow Harris & Hoffman LLP (SDSHH). In the Defendants' Memorandum in Support of Motion to Transfer Venue to the District of Columbia, the defendants in *Carrizosa et al. v. Chiquita* assert they had not yet been served with the New Jersey Complaint, but that it will concern the same subject matter as the two previous complaints. The defendants hold that: “the New Jersey Complaint contains

⁷ Westlaw Cited as: 2007 WL 2666222. Antonio Gonzalez CARRIZOSA, et al., Plaintiffs v. CHIQUITA BRANDS INTERNATIONAL, INC., an Ohio corporation, and Chiquita FreshNorth America LLC, a Delaware corporation, Defendants. No. 07-60821-Civ. (Marra/Johnson)

substantially similar allegations and causes of action. Indeed, pursuant to the District of New Jersey's local rule (*D.N.J. L. Civ. R. 11.2*) requiring that the complaint contain “a certification as to whether the matter in controversy is the subject matter of any other action pending in any court,” the New Jersey plaintiffs certified that the D.C. Complaint and the Florida Complaint so qualify -New Jersey Compl. At 31-” (FN2 2007 WL 2666222).

3. Jurisdiction under the ATCA

Following *Sinaltrainal v. Coca-Cola Co.*, as previously explained, and *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir.1980), the case has been admitted in the D.C and Florida Courts for the moment, as far as no motions have been raised by the defendants. The three elements required for establishing subject matter jurisdiction under ATCA seem to be met. The plaintiffs are (1) citizens and permanent domiciled of Colombia, (2) claiming a tort for the killing of their relatives in hands of the AUC, (3) as a result of Defendants' illegal activities in Colombia in violation of USA and international Law. Therefore, in contrast with the Coca-Cola Affair, Chiquita's case presents an important difference. The fact that Chiquita pleaded guilty of knowingly providing material support to a designated FTO by the US government in violation of the *8 U.S.C.A. § 1189* and *18 U.S.C.A. § 2339B(a)(1)* marks an important antecedent that makes me think the US Courts will, contrarily to the Coca-Cola Company case, assert subject matter jurisdiction over the company itself and not only over its managers, in case a motion is raised during the pretrial proceedings.

Chiquita attorneys John E. Hall and Maria Isabel Hoelle, aiming at consolidating all the cases at the D.C District Court, will make use of the motion stated in *28 U.S.C. § 1404(a)* in order to have joint pretrial proceeding at the Columbia District pursuant Section 1404(a) of Title 28 (Interest of justice). Defendants hold that factual allegations and legal theories asserted in the complaints are essentially the same. “They present common questions of law pertaining to federal subject matter jurisdiction, international law, justiciability, adequacy of forum, and choice of law, which questions will require judicial resolution at the outset of both cases” (2007 WL 2666222).

Although I did not find any official source regarding the economic claims of the lawsuits, the D.C Complaint seems to claim a similar amount to the 2004 agreement in which Libya admitted its role and paid up to \$10 million to each of the families of the people killed in the 1988 terrorism bombing of Pan Am Flight 103 in Scotland. In that sense, it could be expected that plaintiffs would claim against Chiquita \$10 million dollars in compensatory damages for each of the victims (Kearney 2007). This however does not constitute a proper precedent that American Courts will be compelled to follow.

VI. WHAT IS NEXT? FINAL REMARKS.

In this final section I will go beyond the similarities between the Coca-Cola affair and the emergent Chiquita case, to introduce their differences (A) and their importance to the Colombian transitional justice processes in the current globalized legal and economic order (B).

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1. Coca-Cola v. Chiquita. Why differences matter?

Undoubtedly the most outstanding similarities between the Coca-Cola affair and the Chiquita one are the fact plaintiffs used the ATCA as the main legal support combined with other legal instruments as the TVPA, RICO, common law of the USA, etc., however it is also important to highlight their differences.

Certainly, a major difference is that, in the Chiquita affair, the complaint has been refined in order to avoid a decision like the one handed down in *Sinaltrainal v. Coca-Cola Co*, in which the District Court of Florida granted a motion concerning its lack of jurisdiction to judge Coca-Cola U.S.A and Coca-Cola Colombia under the ATCA and TVPA. Another major difference concerns the inclusion of the paramilitaries in the US list of FTO, which in the new world interest in global security provides some advantage to Chiquita's plaintiffs. In that sense, the fact that Chiquita pleaded guilty before American Justice for having financed paramilitary groups constitutes a very favorable antecedent for advancing reparation claims, which in this case do not concern the heirs of a killed worker, but an unknown number of victims of the Colombian conflict. This latter difference seems to me of great importance in the current Colombian process of True, Justice and Reparation.

2. The challenge of the Colombian transitional justice process in a globalized legal and Economic order

Although it is arguable that Colombia undergoes in strict sense a transitional justice situation since there is no transition of "political regime" and neither a post-war situation, I argued that the current stage of the Colombian conflict can be assimilated to a transitional justice process. I claim so because the Colombian situation meets the main question of transitional justice i.e. "how to address the legitimate claims for justice of victims and survivors of horrific abuses in a way that treads the delicate balance between averting a relapse into a conflict or crisis on the one hand, and on the other hand consolidating long-term peace based on equity, respect and inclusion" (Mani 2005:54-55).

Furthermore, I claim that transitional justice or alike procedures are following the general paradigmatic transformation of law. This transformation as part of the new legal and economic global order presents at least two outstanding features brought forth in the study of the Chiquita affair: it has a diffuse legal framework and it makes global private actors justiciable. The former refers to the lack of centralized national or international legal frameworks that would embrace the four basic elements that transitional justice seeks to address, in accordance for example, with the TARR-model developed by Parmentier. In his proposal Truth, Justice, Reparation and Reconciliation are considered core elements that bring together the state, society, victims and offenders within transitional justice processes (Parmentier 2003: 207-208), under the umbrella of unified (legal) guidelines.

Regarding the legal responsibility of global private actors, like transnational corporations, the Colombian case also offers new horizons that show the transformation of the legal and economic order. Contrarily to a state-oriented

responsibility common to transitional justice, the Chiquita affair takes a first step to involve private reparation into the transitional justice map. Victims' claims for reparations in the Chiquita affair seem to be only the beginning of a wave of claims before American Courts. If current claims are successful, it is possible to predict that a good number of Colombian victims will turn to claim for "private reparations", through transnational litigation and against transnational corporations, before the American Courts.

The forum shopping could then be settled as a common practice by Colombian war victims seeking for reparation. This will apparently play in detriment of the Justice and Peace Law 975/2005's legitimacy, which is already perceived as lacking regulatory decrees and budgetary resources for providing reparation to paramilitaries', guerillas' or Colombian state's victims. Terry Collingston, an attorney of the International Labor Rights Fund which supports civil lawsuits against Drummond, Nestle, and Coca-Cola, also thinks, as we said before, that the Chiquita affair "can be a precursor case in a larger claim for reparations against transnational companies participating in the Colombian Conflict" (Brodzinsky 2007). I argue that in the ongoing and forthcoming "transitional process" in Colombia, not only the borders between law and politics will become blurred (Elsten 2004: 254 & ss.), but also those between civil and criminal justice as evidenced in the Chiquita plea agreement with the American Government, as well as those between transitional and ordinary justice, and national and international justice. The increasing activity of Colombian victims seeking for reparation seems to cross national legal borders and relied on foreign ordinary justice procedures as mechanisms to make transitional justice.

This transitional justice forum shopping demands intergovernmental cooperation at the political level to provide a coherent legal framework that facilitates a comprehensive transitional justice process - i.e. truth, peace, reconciliation and reparation (Mani 2005, Parmentier 2003: 207-208). The lack of such a framework would not only trust Colombian victims' reparation to chance, but it would render impossible the evaluation of implemented procedures and final outcomes within the whole reparation process. For example, social inequalities among victims would be reproduced in accordance to their available resources to access lawyers and forums to advance their claims for reparation, which will certainly foil the justice component of transitional justice⁸. One evident thing at first sight is the different economic reparations that victims can obtain if they claim before Colombian justice or before the American justice. In the former case, victims will claim not only in the context of a low-income society, but will also have to overcome alliances between political elites and defendants that will hinder effective reparations. Moreover, they will face competition of many other victims also claiming reparation within the Colombian context. In the latter case, although victims may get better economic reparations they could also get immerse in tensions and strategic alliances between transnational litigation agencies, major politics and cause lawyering interests.

⁸ The TARR-model of Parmentier for example, claims a more comprehensive content of the justice component in transitional justice processes. He proposes to include within this component retributive justice, restorative justice, social justice, etc. (Parmentier 2003: 206)

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3. Guidelines for a Research Agenda

The question that remains is what to do with the other constitutive elements of transitional justice, for example those that are claimed by the TARR-model? In the era of legal globalization, with decentralized regulatory sources and judging instances new legal strategies are required to incorporate comprehensive demands of transitional justice. The Colombian case, with special regards to what is arising in the Chiquita affair, provides new questions that should contribute to constitute a research agenda on the field.

I am afraid that transitional justice rendered at a global level without coordination can be as empty as the discourse of Social Accountability of transnational corporations without state control. The implementation of corporate governance and codes of conduct as compromises acquired by multinationals to respect core standards (human Rights, ILO conventions, etc) seems a vain promise if one cannot trial their actions before Courts⁹. Although it is true in this new liberal global order that the sovereign state's legal system can exert a limited centralized control over transnational corporations, it is important that this new paradigmatic law in form of "network" (Ost & Kerchove 2002: 267-272), consolidates it nets, so we can provide an answer to cases as problematic as the Colombian one, where the modern figure of the Leviathan seems to vanish in the air.

To illustrate the complexity underlying a diffuse transitional justice process, as I argue can be characterized the Colombian one, I will just remark some points that will certainly arise controversy very soon. The Justice and Peace Law (Law 975 of 2005) can be said to have channeled transitional justice through the judiciary (Kissinger 2001). This judicialization of transitional justice within the Justice and Peace Law framework assumes that demobilized members of illegal groups (ex-combatants) will provide "truthful versions" of the war. Those versions and trials will constitute the grounds for providing reparation to the victims. However, under the model of diffuse transitional justice process, where there is no embracing legal and political framework, questions threatening the transparency of the process will emerge. What will it happen, for example, if important facts (crimes) are proved in American trials, while in the Colombian ones they have not been proved, have been denied by the ex-combatants ,or simply, have not been raised? How to construct a coherent narrative of truth so necessary in transitional justice? Are victims going to be allowed to claim reparation before one judicial forum using narratives of truth from other judicial forums? In which jurisdiction will transnational corporation be trailed? These questions concerning the truth and reparation components can be complemented with other questions concerning the way reconciliation is meant to operate in this context and the concepts of justice that would be involved¹⁰.

⁹ See the important precedent of the Nike affair and the enforceability of its code of conduct by the State and the company itself to suppliers and other "third agents" (Frydman 2007:36-38).

¹⁰ Of course, other questions closely related to political, legal and moral philosophy can be raised before a diffuse model of transitional justice. Questions regarding the morality underlying punishment for the violations of Human Rights (Cf. Nino 1996: 135-148) performed by transnational corporations during an armed conflict. Also questions on universal jurisdiction of judges, i.e. democratic legitimacy of judicial decisions handed down by foreign judges on essentially Colombian issues. One will eventually raise questions on the lack of agency of foreign judges to inflict punishments or to decide justificatory claims grounded on the state of war in that foreign country (Cf. Nino 1996:149-185).

According to the abovementioned dilemmas and my claim that Colombia constitutes a diffuse transitional justice case – or at least a close variant of it-, I argue that it is more important to focus on the role of foreign law and international litigation within that process and their articulation with the Colombian transitional legal framework, rather than on the role of “previous” regime law (Posner 2004: 117-161) or on the transition of the national rule of law –the latter which are core discussions in transitional justice processes. This articulation must at least bring together foreign law, Colombian transitional justice law, Colombian national law and transnational corporations’ instruments for social responsibility. This desirable harmonized transitional justice framework is however highly improvable without understanding that transitional justice is unable to escape the paradigmatic transformation of law in the new global order.

Hence, we must turn our eyes to theories of global law. They will certainly contribute to think the problematic under new analytical schemes, which, on their turn, will facilitate the construction of proper research agendas. Co-regulation is a well settled theory of global law whose claim to build bridges among different mechanisms of regulation must be seriously considered. A first step to be taken could be the testing of this theory in the light of the Colombian case. For example one could study the binding force and efficacy in a context of violence of certification systems that provide initial approval of transnational corporations’ moral behavior or social responsibility (Cf. Frydman 2007: 27-31). If codes of conduct are not merely *gentlemen agreements* anymore and their enforceability is reaching legal instances (Frydman 2007: 39), and even if the market continues to be an important regulatory agent in itself, cases like the Chiquita affair do not seem justiciable under co-regulatory models in which public powers and states’ cooperation networks are not entirely developed. Therefore, co-regulation claim to harmonizing state classic regulation, private regulation (Social Responsibility, Code of Conducts, etc) and international regulation (human rights, universal jurisdiction) emerges not only as a field of research in transitional justice processes, but a practical field where victims, lawyers, states, transnational corporations, offenders etc. can try to find comprehensive answers.

Serious attempts on the political level have to be made, hand by hand with researches on the legal field, to avoid an uncontrolled and unsystematized transitional justice framework that will hinder a comprehensive transitional justice process in Colombia. Politics and legal research, usually distant from each other, find themselves today with a common challenge: approaching transitional justice processes in a global legal and economic order.

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Appendices

Graph 1. Colombia (Uraba on blue)



This map of Colombia shows the Colombian borders with Panama, Ecuador, Peru, Brazil and Venezuela. It also locates the Pacific and Atlantic oceans. Highlighted in the blue zone is the Region or Urabá. In light blue are the territories belonging to the department of Chocó, while in dark blue are territories belonging to the department of Antioquia. Both Coca-Cola and Chiquita affairs took place in the department of Antioquia.

Taken from Instituto Colombiano de Anthropología e Historia.
(Modified David Restrepo)
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