UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-MD-01916 (Marra/Johnson)

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

This Document Relates to:

ATS ACTIONS
_____/

JOHN DOE 1 et al. v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80421
_____/

JUAN/JUANA DOES 1-619 v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80480
_____/

JOSE LEONARDO LOPEZ VALENCIA et al. v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80508
_____/

REPLY IN SUPPORT OF DEFENDANT'S CONSOLIDATED MOTION TO DISMISS COMPLAINTS

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Plaintiffs acknowledge that the issue "squarely raise[d]" by their complaints is whether material support of terrorism is actionable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. (Plaintiffs Response in Opposition to Defendant's Consolidated Motion to Dismiss the Complaints ("Pls.' Opp'n") at 2.) Chiquita agrees. Plaintiffs' failure to identify a sufficient basis in the law of nations for such a cause of action is dispositive of this case.

The availability of a cause of action under the ATS, of course, is governed by the demanding standard set forth by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Despite plaintiffs' concerted effort to downplay the significance of that opinion, *Sosa* makes clear that, to satisfy the rare and narrow circumstances where a federal court may exercise its extremely limited common-law making power to recognize new claims under the ATS, it is not enough for a plaintiff to point to an arguable rule of international law that prohibits conduct akin to that alleged against a defendant. Instead, the asserted cause of action must be as well established and clearly defined in the law of nations as the paradigmatic 18th century examples of piracy, assaults on ambassadors, and violation of safe conduct were when the ATS was enacted.

Plaintiffs' task here should be simple — if plaintiffs' asserted claim of terrorism support met *Sosa*'s high standard at the time of Chiquita's conduct, its prohibition by the law of nations should be as obvious, clear in meaning, and beyond doubt to this Court today as the international prohibition on piracy would have been to the First Congress in 1789. Yet that very conclusion is belied by plaintiffs' footnote-dense, 75-page opposition brief and 18-page expert declaration. Far from demonstrating the inarguable clarity and widespread acceptance of plaintiffs' terrorism support claim, their extended exposition on an assortment of international documents — addressing such irrelevant topics as airplane hijackings and protection of nuclear

materials — only reinforces how unsettled, ill-defined, and controversial their purported cause of action actually is.

Plaintiffs' attempt to invent a common law remedy for their expansive and unprecedented claims against Chiquita, in direct contravention of *Sosa*, should be rejected. Chiquita's motion to dismiss plaintiffs' complaints, as well as Chiquita's motions to dismiss the other two ATS complaints related to these actions, should be granted in their entirety.

I. PLAINTIFFS FALL FAR SHORT OF SHOWING THAT TERRORISM SUPPORT CONSITUTED A CLEAR AND WELL-RECOGNIZED VIOLATION OF INTERNATIONAL LAW AT ANY TIME DURING THE PERIOD OF CHIQUITA'S ALLEGED SUPPORT OF THE AUC.

None of the hundreds of separate wrongful death and other injury claims amassed in these complaints is based upon alleged conduct of Chiquita that is unique or particularized as to any individual plaintiff's claim. To the contrary, whether asserted in the language of direct or accessorial liability, all of the claims rise or fall on the single generic allegation that Chiquita provided material support to a Colombian terrorist group between 1997 and February 2004. Accordingly, plaintiffs' opposition acknowledges, as it must, that plaintiffs' claims "squarely raise the issue of whether terrorism and material support of terrorism of this kind are actionable under the ATS." (Pls.' Opp'n 2.) This candid concession frames the controlling legal issue to be decided by this Court: whether plaintiffs have met their burden of demonstrating that, at the time of Chiquita's alleged conduct, there existed a well-established and clearly-defined rule of international law prohibiting "terrorism" or "material support of terrorism." They have not.[1] No

[1] As explained in Chiquita's Opposition to Plaintiffs' Motion to Strike, plaintiffs' argument fares no differently as a matter of international law regardless of whether this Court credits their conclusory allegations that Chiquita also provided the AUC with general logistical support by facilitating arms transfers or drug shipments.

such rule of international law exists today, let alone at any time during which Chiquita allegedly provided support to the AUC.

A. Plaintiffs Do Not Respect the Explicit Limitations on ATS Actions Imposed by the Supreme Court in *Sosa*, Which Plaintiffs Dismiss as Mere "Rhetoric."

Plaintiffs begin their brief by attempting to rewrite *Sosa*. (Pls.' Opp'n 14-18.) In so doing, plaintiffs openly disregard the Supreme Court's explicit admonition that ATS claims may be recognized only if they are "accepted by the civilized world" and "defined with a specificity" comparable to the handful of international law violations with potential for personal liability known to the framers of the statute. In plaintiffs' view, *Sosa*'s critical cautionary language should be dismissed as mere "rhetoric" (Pls.' Opp'n 16), and *Sosa* should be understood as a full-throated affirmation of an expansive view of the reach of the ATS.

But plaintiffs' reading of *Sosa* simply cannot be squared with what the Supreme Court actually wrote in its opinion. The Supreme Court viewed the requirements it set in *Sosa* as establishing a standard that would be extremely difficult to meet, repeatedly emphasizing that its stringent standard would be satisfied for only "a narrow class of international norms today." 542 U.S. at 729. Given the peculiar, judge-made nature of recognizing new causes of action as cognizable under a jurisdictional statute like the ATS, *Sosa* urged "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]," *id*. at 725, and deference to Congress where it provided a clear indication of the appropriate scope of civil liability, *id.* at 731. *See generally id.* at 725-33 (delineating prudential considerations counseling caution). And the Supreme Court's meticulous analysis of the arbitrary detention claim before it in *Sosa* made manifest the searching review the Supreme Court expected federal district courts to undertake in considering whether to accept a claim as cognizable under the ATS. Plaintiffs' facile dismissal of these express limitations in *Sosa* is

completely at odds with the Court's exhortation to district courts that, while "the door is still ajar" to new common law causes of action based on international law, it must be "subject to vigilant doorkeeping." *Id*. at 729.

Plaintiffs have no choice but to mischaracterize *Sosa* because their asserted cause of action falls far short of clearing *Sosa*'s high bar. To begin with, plaintiffs misapprehend the Supreme Court's concerns about crafting implicit judicial remedies in contexts where Congress has acted expressly. The Supreme Court directs federal courts to take care to avoid stepping on congressional prerogative to define available causes of action in areas where Congress has acted and thereby "shut the door" by taking steps that "occup[y] the field." *Id.* at 731; *see also id.* at 760 ("Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field.") (Breyer, J., concurring).

As Chiquita explained in its opening memorandum of law, Congress has done just that, by enacting a carefully-limited civil cause of action for terrorism-related injuries in the Antiterrorism Act ("ATA"), 18 U.S.C. § 2333(a), which excludes plaintiffs' claims. (Opening Br. 15-17.) Plaintiffs respond by arguing that for one statute to "repeal" another, there must be an "irreconcilable conflict" between the two. (Pls.' Opp'n 19-22.) But this misses the point. The issue is not about repeal — of course the ATA did not "repeal" the ATS, a jurisdictional statute — but rather whether federal courts should exercise their limited common law-making authority to recognize a cause of action under the ATS. *Sosa* carefully circumscribed this authority and mandated that any such cause of action must conform — as federal common law always must conform — to any available legislative guidance. *Cf. Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field

have not affirmatively encouraged greater judicial creativity"); *see also id.* at 726 ("the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"). The ATA is contemporary evidence that Congress intended for there to be a civil remedy limited to U.S. victims of terrorism only, and for that remedy to be governed by specific statutory elements and a four-year statutory limitations period. *Sosa* instructs that such congressional action "shuts the door" to federal courts crafting a broad and ill-defined judicial remedy for aliens in these circumstances. 542 U.S. at 731.

But even if plaintiffs' claims were not precluded by this express congressional action, plaintiffs still fail to meet *Sosa*'s stringent standard for recognizing a cause of action under the ATS. Plaintiffs erroneously assume that it is sufficient to point to some purported international sources that reference the subject matter of the asserted claim at a high level of abstraction. But *Sosa* requires a level of specificity such that there is an undeniable "fit" between the conduct pled and the prohibition contained in international law, as the Supreme Court's analysis of the arbitrary detention claim before it showed. *See id.* at 734-37.

Moreover, *Sosa* makes clear that the test for domestic enforcement of customary international law under the ATS is more demanding than the test for whether a customary international law norm is internationally binding. A rule of customary international law can develop from "a general and consistent practice of states followed by them from a sense of legal obligation." *E.g.*, Restatement (Third) of Foreign Relations §102(2) (1987) ("Restatement"). By contrast, the *Sosa* Court held that "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, . . . federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was

enacted." 542 U.S. at 732; *see also id.* at 760 (Breyer, J., concurring) ("to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy.").

The Supreme Court turns to these paradigmatic 18th-century examples to emphasize that, before it is appropriate for a federal court to accept a cause of action as cognizable under the ATS, it must be clear that the law of nations contains an undisputed rule defined specifically and uncontroversially to include the alleged wrongful conduct. *Sosa* thus requires a level of specificity and widespread acceptance manifestly absent from the rule plaintiffs seek to invoke in this case. The whole point of *Sosa* was to remove federal courts from the uncertain business of concocting common law remedies where the asserted rule is ***debatable***. *Sosa* permits domestic civil enforcement of only that small subset of international prohibitions that are sufficiently well-established that they are ***beyond debate***. *See, e.g.*, 542 U.S. at 737 ("Even the Restatement's limits [on the customary international law rule concerning arbitrary detention] are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line ***with the certainty afforded by Blackstone's three common law offenses***.") (emphasis added).[2] As demonstrated below, plaintiffs have not provided sufficient support to establish a rule of

[2] *See also id.* at 736 (observing that the plaintiff "cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit . . . .") (footnotes omitted); *id.* at 738 n.29 ("that a rule as stated is as far from full realization as the one [plaintiff] urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed").

international law with either the level of specificity or the widespread acceptance necessary to survive the "vigilant doorkeeping" required by *Sosa*.

B. Plaintiffs Cannot Paper Over the Absence of A Rule Prohibiting Material Support of Terrorism by String-Citing Dozens of Irrelevant and Insufficient Treaties, U.N. General Assembly Resolutions, and Regional Agreements.

In an exercise of quantity over quality, plaintiffs try to impress this Court with long string-cites to a wide range of irrelevant international treaties and conventions as well as other hortatory documents not competent to establish a rule of customary international law. What plaintiffs proudly describe as their "copious" citations (Pls.' Opp'n 29), however, cannot mask plaintiffs' failure to demonstrate a widespread recognition among nations that "material support of terrorism" is prohibited by international law, let alone that such a prohibition was clearly defined, and specifically encompassed Chiquita's challenged conduct ***at the time it occurred***.[3] Each of the various sources relied upon by plaintiffs suffers from one or more of a number of deficiencies:

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[3] Plaintiffs dismiss *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), as "anachronistic," and assert that, at some indeterminate point in the years since *Tel Oren*, a consensus prohibiting terrorism support "has strengthened immeasurably in the intervening decades into a universal norm" (although plaintiffs do not identify exactly when this purportedly occurred). (Pls.' Opp'n 27.) This assertion overlooks the ample evidence demonstrating that there is no consensus to prohibit terrorism generally, as opposed to narrow agreements to prohibit discrete acts such as aircraft hijackings, and that disagreements about what constitutes "terrorism" continue to this day. *See* Opening Br. at 20-21 (discussing the failure of the U.N. ad hoc committee to reach an agreement on terrorism as recently as March 2008); *see also* Declaration from Eric A. Posner ¶¶ 34-39, dated September 18, 2008 (attached as Exhibit 1). Indeed, federal circuit courts have continued to hold that terrorism is not prohibited by international law as recently as 2003. *See, e.g., United States v. Yousef*, 327 F.3d 56, 106-08 (2d Cir. 2003) ("We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription").

But, in any event, plaintiffs are seeking damages for injuries that occurred ***as early as 1988***, and in order to be actionable, an ATS claim must rest on a rule of international law "that was universally accepted ***at the time*** of the events giving rise to the injuries alleged." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008) (emphasis added); *accord Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 326 (2d Cir. (continued…)

- most do not even address, much less prohibit, the financing of terrorism;
- several are treaties that impose obligations under international law only on states, and not on individuals or corporations;
- several are treaties that are not self-executing[4] and thus impose no obligations whatsoever except by implementing legislation, and what implementing legislation there is does not support plaintiffs' cause of action;
- many are non-binding U.N. General Assembly resolutions or other aspirational or hortatory statements that do not have the legal status to form the basis of a rule of customary international law; and
- almost all of these sources post-date the first alleged injury in 1988; most post-date Chiquita's first alleged payment to the AUC in 1997; and many wholly post-date Chiquita's alleged wrongful conduct, which ended in February 2004.

Consequently, the international law sources relied upon by plaintiffs are not competent to establish a rule of customary international law prohibiting material support of terrorism.

2007) (Korman, J., concurring in part and dissenting in part) (courts "must apply customary international law as it stood at the time of the offences") (internal citation and quotation omitted). Yet almost all of the purported sources of international law cited by plaintiffs post-date the first alleged injury in 1988; most post-date Chiquita's first alleged payment to the AUC in 1997; and many of the purported sources entirely post-date the last alleged payment in February 2004. Chiquita submits that none of these sources provides an adequate basis in international law to support plaintiffs' claims, and plaintiffs (for obvious reasons) utterly fail to address this glaring timing problem. Indeed, their expert references the state of the law on "August 11, 2008," and cites numerous sources dated after Chiquita's payments had ceased. (Declaration by William J. Aceves, p. 6, dated August 15, 2008.). If, however, the Court determines that at some point in time a rule of customary international law formed with such widespread acceptance and clear definition that its violation would be actionable under the ATS, the Court must determine ***when*** that occurred, as it is axiomatic that any and all claims that pre-date that point in time must be dismissed.

[4] Plaintiffs tendentiously contend that Chiquita did not employ the "proper framework" for determining violations of the law of nations insofar as Chiquita argued that the Financing Convention and other cited sources were not "self-executing." (Pls.' Opp'n 33-34.) But in their complaints plaintiffs purport to state causes of action directly under these treaties. (*See* NY Compl. ¶ 882; Fla. Compl. ¶¶ 257; 281, 287; NJ Compl. ¶¶ 69, 105, 111.) The fact that plaintiffs now concede that they do not have direct claims under these treaties because they are not self-executing does not render Chiquita's framework improper.

Even assuming it is admissible,[5] the expert declaration submitted by plaintiffs fares no better, as it relies on the same purported sources as plaintiffs' opposition. Indeed, the very fact that two reputed scholars — Professor Aceves and Chiquita's expert, Professor Posner — can present competing but reasoned views about whether such a rule currently exists shows that the asserted rule does not meet *Sosa*'s requirement that the rule be beyond legitimate dispute. While there may have been esoteric differences about the precise description of piracy in the 18th century, the very existence of a prohibition against piracy as a matter of international law was beyond debate. *See United States v. Smith*, 18 U.S. (5 Wheat) 153, 161 (1820) ("There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of ***settled and determinate nature*** . . .") (emphasis added). But the haphazard array of irrelevant international treaties and conventions, U.N. resolutions, and regional agreements on which plaintiffs and their expert rely do not support finding a similarly well-recognized prohibition against terrorist support of a "settled and determinate nature."

International Treaties. First, plaintiffs cite to a number of international conventions or treaties involving such things as bombings and aircraft hijackings.[6] A cursory

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[5] Plaintiffs submit as Exhibit 3 to their opposition a Declaration by William J. Aceves ("Aceves Decl."), dated August 15, 2008, regarding a purported international prohibition against terrorism and providing support for terrorism. While Federal Rule of Civil Procedure 44.1 permits expert testimony on a "foreign country's law," international law forms part of the law of the United States, and federal courts are competent to determine international law without it being a matter for evidentiary proof. *See generally Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) (discussing the weight given to the personal opinions advocated in affidavits from interested scholars of international law). To the extent that this Court finds value in the views of scholars regarding whether customary international law prohibits material support of terrorism, please find attached as Exhibit 1 a Declaration from Eric A. Posner ("Posner Decl."), dated September 18, 2008, responding to the Aceves Declaration.

[6] The International Convention for the Suppression of the Financing of Terrorism (the "Financing Convention"), G.A. Res. 54/109, U.N. Doc. A/RES/54/109 — the source plaintiffs primarily cite as support for their asserted rule — is addressed in Part I.C below.

review of the ten cited treaties and conventions that pre-date Chiquita's first alleged payment to the AUC in 1997 makes clear that they are entirely beside the point with respect to the allegations against Chiquita here. None of these treaties prohibits, or even addresses, the provision of financial support to terrorist groups, or attempts to promulgate a general prohibition (or definition) of terrorism. Rather, they specifically address discrete and narrow topics such as

- requiring signatory states to prohibit the hijacking of aircraft and to take certain steps to protect ***civil aviation***[7];
- requiring signatory states to prohibit certain conduct and to take certain steps to protect ***marine navigation*** and ***off-shore drilling platforms***[8];
- requiring signatory states to implement certain controls over dangerous materials, such as ***plastic explosives*** and ***nuclear materials***[9]; and

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[7] Convention on Offenses and Certain Other Acts Committed on Board Aircrafts (Tokyo Hijacking Convention), 20 U.S.T. 2941, 704 U.N.T.S. 219, 2 I.L.M. 1042, T.I.A.S. No. 6768, ratified Sept. 14, 1963 (requiring signatory states to prohibit specified conduct on aircraft); Convention for the Suppression of Unlawful Seizure of Aircrafts (Hague Hijacking Convention), 22 U.S.T. 1641, 860 U.N.T.S. 10510 I.L.M. 133, , T.I.A.S. No. 7192, ratified Dec. 16, 1970 (requiring signatory states to prohibit hijacking of aircraft); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention), 24 U.S.T. 565, 974 U.N.T.S. 177, 10 I.L.M 1151 T.I.A.S. No. 7570, ratified Sept. 23, 1971 (requiring signatory states to prohibit specific threats to civil aviation); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 27 I.L.M. 627, 1589 U.N.T.S. 474, ratified Feb. 24, 1988 (supplementing the Montreal Hijacking Convention and requiring signatory states to prohibit certain acts at international airports).

[8] Convention for the Suppression of Unlawful Acts of Against the Safety of Maritime Navigation (Rome Maritime Convention), 27 I.L.M. 668, 1678 U.N.T.S. 221, ratified Mar. 10, 1988 (requiring signatory states to prohibit certain acts at sea); the Protocol for the Suppression of Unlawful Acts of Against the Safety of Fixed Platforms Located on the Continental Shelf, 27 I.L.M. 685, 1678 U.N.T.S. 304, ratified Mar. 10, 1988 (amending the Rome Maritime Convention and requiring signatory states to prohibit certain acts in connection with off-shore drilling platforms).

[9] Convention on the Physical Protection of Nuclear Materials, 18 I.L.M. 1419, 1456 U.N.T.S. 101, T.I.A.S. 11080, ratified October 26, 1979 (requiring signatory states to take specified steps to protect nuclear materials); and the Convention on the Marking of Plastic Explosives for the Purposes of Detection, 30 I.L.M. 726, 2122 U.N.T.S. 359, ratified Mar. 1, 1991 (requiring signatory states to take steps to ensure plastic explosives could be traced).

- requiring states to prohibit certain specific crimes, such as crimes against ***diplomatic agents*** or certain acts of ***hostage-taking***.[10]

Plaintiffs also cite the International Convention for the Suppression of Terrorist Bombings (the "Bombing Convention"), G.A. Res. 52/164, U.N. Doc. A/RES/52/164, 2149 U.N.T.S. 284, which was ratified on January 12, 1998, and entered into force on May 23, 2001, both during the time period of Chiquita's alleged payments (1997 to February 2004). For the reasons discussed in Chiquita's opening brief, which are not contested in plaintiffs' opposition, the Bombing Convention is likewise not pertinent to the allegations raised in plaintiffs' complaints. (*See* Opening Br. 30-31.)[11]

Even putting this evident lack of fit aside, moreover, plaintiffs have not even tried to show that these treaties reflected actionable rules of international law. As noted above, plaintiffs have abandoned the position that they have direct claims arising under these treaties, insofar as these treaties are not self-executing. Plaintiffs contend that non-self-executing treaties nevertheless should be considered as evidence of the development of a rule of customary international law, but they have presented no evidence that any of these treaties or conventions have the requisite widespread international consent and confirmatory state practice necessary to demonstrate that a treaty reflects such a rule. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233,

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[10] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T. 1975, 1035 U.N.T.S. 167, 13 I.L.M. 41, ratified Dec. 14, 1973 (requiring signatory states to prohibit certain crimes against diplomatic agents); and the International Convention Against the Taking of Hostages, G.A. Res. 34/146 (XXXIV), 34 UN GAOR Supp. (No. 46) at 245, UN Doc. A/34/46 (1979); 1316 UNTS 205; TIAS No. 11081; 18 ILM 1456, ratified Dec. 17, 1979 (requiring signatory states to prohibit certain acts of hostage-taking).

[11] Plaintiffs also cite to one convention that not only entirely post-dates Chiquita's last alleged payment in February 2004, but also has nothing to do with plaintiffs' allegations: the International Convention for the Suppression of Acts of Nuclear Terrorism, U.S. GAOR 59th Sess., U.N. Doc. A/59/766, ratified Apr. 13, 2005 (requiring signatory states to prohibit certain acts of nuclear terrorism).

256 (2d Cir. 2003) (holding that a treaty alone does not provide a sufficient basis to find a norm of customary international law unless "an overwhelming majority of States have ratified the treaty, ***and*** those States uniformly and consistently act in accordance with its principles") (emphasis in original); *see also* Posner Decl. ¶ 15.

U.N. General Assembly Resolutions. Plaintiffs also point to a number of resolutions or declarations of the General Assembly of the United Nations in an effort to demonstrate a pre-existing rule of customary international law prohibiting the material support of terrorism.[12] As noted in Chiquita's opening brief, however, U.N. General Assembly resolutions are aspirational or hortatory documents that impose no legal obligations under international law. *See Flores*, 414 F.3d at 259 (the General Assembly is "not a law-making body" and its resolutions "do not have the power to bind member States"); *see also* Posner Decl. ¶¶ 40, 43. Such resolutions are, in essence, "political" documents reflecting the sentiment of the majority of states, and have no more legal force in international law than "Sense of the Senate" resolutions have under U.S. domestic law. Consequently, such resolutions do not provide evidence of a norm of customary international law cognizable under *Sosa*. *See* 542 U.S. at 734 (holding that the Universal Declaration of Human Rights, like any pronouncement of the General Assembly, does not suffice to establish a cognizable norm); *see also Flores*, 414 F.3d at 259 (General Assembly resolutions "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States").

Nor do the specific resolutions cited by plaintiffs or their expert themselves purport to embody an existing rule of customary international law prohibiting terrorism or

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[12] *See, e.g.*, Aceves Decl. at pp. 4. 10, citing G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994) and G.A. Res. 51/210, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

material support for terrorism. Rather, the resolutions simply contain a generalized condemnation of terrorism by a majority of member nations, ***without even defining what "terrorism" is***. *See, e.g.*, General Assembly Res. 49/60, ¶ 1, U.N. Doc. A/RES/49/60 (Dec. 9, 1994). Given that these General Assembly resolutions do not even define terrorism or claim that it has been criminally prohibited as a matter of international law — and given that they do not even speak to the provision of financial support to terrorism, much less purport to reflect a criminal prohibition of it — they provide no additional support to plaintiffs' asserted rule of customary international law. Instead, they are precisely the type of hortatory documents that *Sosa* dismisses as not relevant to an analysis of whether a cause of action should be held cognizable under the ATS. *See Sosa*, 542 U.S. at 734-38 (declining to accept plaintiff's attempt to establish a norm by piling up hortatory documents that might seem impressive in the aggregate but individually provide little or no evidence of state consent or practice).[13]

U.N. Security Council Resolution 1373. Plaintiffs and their expert also cite to one resolution of the United Nations Security Council issued in response to the terrorist attacks of September 11, 2001: U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).[14] A vote of the fifteen members of the Security Council certainly does not show the "widespread acceptance" or "consistent state practice" required by *Sosa*. But, in any event,

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[13] A number of the General Assembly resolutions cited by plaintiffs or their expert also post-date some or all of Chiquita's challenged conduct, and therefore provide no support for the proposition that Chiquita violated a rule of customary international law existing at the time of Chiquita's alleged conduct. *See, e.g.*, Aceves Decl. at pp. 10-11 (citing General Assembly resolutions from 2005 and 2006).

[14] Plaintiffs' expert also cites to another Security Council resolution that post-dates Chiquita's alleged conduct and therefore would be beside the point even if it were not off-point. *See* Aceves Decl. at pp. 9-10 (citing Security Council resolution from October 2004).

Resolution 1373 suffers many of the same deficiencies as the treaties and General Assembly resolutions cited by plaintiffs.

Resolution 1373 does not purport to create international criminal liability for terrorist acts or for financial or other material support of terrorism. Nor does it purport to recognize that such a crime already existed in customary international law. *See* Posner Decl. ¶¶ 45-49. Nor does it even purport to define terrorism. *Id.* ¶¶ 46, 48. Rather, Resolution 1373 simply imposes certain obligations on member states to refrain from financing transnational terrorism themselves, and calls upon them to ratify existing terrorism-related treaties and to enact legislation implementing those treaties. *Id.* ¶¶ 46-48. *Cf. Flores*, 414 F.3d at 258 (rejecting reliance on a treaty when its obligations "apply only to state actors" and do not profess to govern the conduct of private actors").

Indeed, if there were a pre-existing rule of customary international law prohibiting material support of terrorism, or if Resolution 1373 itself were intended to legislate such a rule, it would have been entirely unnecessary and wholly redundant for Resolution 1373 to call upon states to "[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999." S.C. Res. 1373, U.N. Doc. S/RES/1373. Such ratifications would have served no purpose if there already were such a rule, or if Resolution 1373 created one by fiat. Rather, the Security Council's exhortation reinforces the conclusion that there was no such pre-existing prohibition, and that the appropriate mechanism to address this legal vacuum was through treaty ratification. Consequently, Resolution 1373 provides no evidence that a norm prohibiting material support of terrorism existed at the time that the Resolution was adopted; if anything, it shows that there was not.

Regional Agreements. Finally, plaintiffs and their expert cite to a number of regional agreements that they claim provide support for their assertion that a rule of customary international law prohibits terrorism and material support of terrorism.[15] Rather than support plaintiffs' contention that there is a widely-accepted and clearly defined prohibition against material support of terrorism, however, these varied regional agreements show the diversity of views concerning terrorism and terrorism financing in different regions of the world, and the absence of widespread acceptance of any definition of terrorism.

- Many of the regional agreements contain no definition of terrorism at all. *See* Posner Decl. ¶ 51.
- Others effectively define terrorism so broadly as to encompass any violent crime. *Id*.
- Others contain definitions with exceptions that expressly exclude insurgencies or conflicts concerning self-determination, which arguably encompass the conflict in Colombia. *Id*.
- Some post-date Chiquita's conduct or have not been ratified by the majority of the members of the regional organization of states. *See, e.g.*, *id.* (noting that the Inter-American Convention Against Terrorism was reached June 3, 2002 and was ratified by only twelve of 34 states by the end of 2004).
- Some do not prohibit terrorism at all, but rather facilitate extradition and other forms of mutual assistance with respect to a list of specified violent crimes. *Id.*

Whatever these regional agreements may say, they do not reflect support for the sort of well-established, clearly defined, and widely-accepted rule of customary international law necessary to be cognizable under the ATS.

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[15] *See, e.g.*, Aceves Decl. at pp. 11-14, citing Organization of the Islamic Conference Convention on Combating International Terrorism, July 1, 1999, OIC Res. 59/26-P, annex; Organization of African Unity Convention on Preventing and Combating International Terrorism, July 13, 1999, AHG/Dec. 132 (XXXC); Inter-American Convention Against Terrorism, June 3, 2002, OAS, AG/RES. 1840 (XXXII-O/02); Pls.' Opp'n 25 n.18.

This lack of fit between the sources of international law cited by plaintiffs and their allegations against Chiquita also distinguishes *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007). To be clear, in Chiquita's view the court in *Arab Bank* misapplied *Sosa* and misunderstood international law. *Cf. Barboza v. Drummond Co.*, No. 1:06-cv-61527, slip op. (S.D. Fla. July, 17, 2007) (holding terrorism not actionable under ATS); *Saperstein v. Palestinian Auth.*, No. 1:04-cv-20225-PAS, 2006 WL 3804718, at *7 (S.D. Fla. Dec. 22, 2006) (same). Nevertheless, *Arab Bank* addressed the alleged conduct at a much greater degree of specificity than plaintiffs do here in two respects: first, the plaintiffs in *Arab Bank* alleged significant detail linking the defendant's alleged conduct to each alleged injury — *Arab Bank* concerned specific conduct alleged to have encouraged and provided incentives for a systematic campaign of suicide bombing attacks on Israeli civilians as part of a campaign to destroy the State of Israel, with allegations linking the defendant directly to the particular bombings that injured the plaintiff — and second, the alleged wrongful conduct directly conflicts with ***specific international norms regarding the use of suicide bombings***, and the ***bombing of civilian targets as part of a genocidal campaign***.

By contrast, plaintiffs here attempt to invoke an essentially limitless "rule" of international law prohibiting anything vaguely terrorism-related, and then try to shoehorn Chiquita's conduct into its scope — citing conventions ranging from civil aviation to control of nuclear materials to protection of diplomatic agents, all in an effort to draw a large enough circle to corral Chiquita's conduct. This approach is flatly inconsistent with *Sosa*'s demand for "vigilant doorkeeping," 542 U.S. at 729, and makes a mockery of the Supreme Court's careful analysis of the arbitrary detention claim before it in that case. Because plaintiffs have failed to

demonstrate the required level of "fit" between their purported sources of international law and Chiquita's alleged conduct, their claim fails under *Sosa*.

C. The Financing Convention Did Not "Codify" Pre-Existing International Law, Nor Does It Give Rise to a Rule Cognizable Under *Sosa*.

It is clear from plaintiffs' opposition and their expert's declaration that the Financing Convention is central to plaintiffs' claim that material support of terrorism is prohibited as a matter of international law. The Financing Convention is the first and primary source addressed by the Aceves Declaration, *see id.* at pp. 3-7, and is the focus of plaintiffs' opposition brief, *see* Pls.' Opp'n 24-25, 29-30. Plaintiffs' heavy reliance on the Financing Convention is understandable, given that it is one of the few sources cited by plaintiffs which actually address payments to terrorist organizations. But the Financing Convention is insufficient to satisfy plaintiffs' burden to demonstrate, in compliance with the standards of *Sosa*, that "international law prohibited provision of material support to a terrorist organization well before Chiquita began to support the AUC in Colombia" (Pls.' Opp'n 29), for a host of reasons.

The Financing Convention Did Not "Codify" Pre-Existing Law. The most obvious is that the Financing Convention did not even take effect until April 10, 2002, well after the substantial majority of plaintiffs' alleged injuries had already occurred. Plaintiffs try to get around this very conspicuous problem by arguing, without citation to authority, that the Financing Convention "codified" a pre-existing rule of customary international law. (Pls.' Opp'n 24, 29). But this contention defies both logic and common sense — if there were already an international criminal prohibition against material support of terrorism as a matter of customary international law, the Financing Convention itself would be redundant and superfluous. The sources discussed above do not suffice to establish such a pre-existing rule,

and the decision by states to ratify the Financing Convention makes clear that, in their view, international law had not already addressed the financing of terrorist organizations.

Indeed, the text of the Financing Convention itself, as well as its *travaux preparatoires* (or drafting history), demonstrate that the Convention was ***premised*** on the fact that there was no pre-existing rule of international law prohibiting the financing of terrorist acts. The Convention's preamble observes that prior international laws "do not expressly address" terrorist financing, and its drafting history establishes that the Convention was designed to fill a "gap in international law" on the subject of financing of terrorism. *See* Report of the Ad Hoc Committee established by G.A. Res. 51/210 of 17 December 1996, at 3. Although Chiquita cited this drafting history in support of its motion (Opening Br. 26), plaintiffs tellingly failed to address it in their opposition. Nor does the Financing Convention itself indicate in any way that it was intended to codify, confirm, or otherwise recognize a pre-existing rule of customary international law. By contrast, some treaties do indicate expressly that they are simply confirming pre-existing customary international law. Article 1 of the Genocide Convention, for example, says that "The Contracting Parties ***confirm*** that genocide … is a crime under international law…" Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III) (December 9, 1948) (Genocide Conv., Art. 1) (emphasis added). Finally, the very fact that the Financing Convention provides that it will "enter into force" as a matter of international law only after 22 signatories had filed notices of ratification with the United Nations, *see* Financing Conv., Art. 26, § 1, is wholly inconsistent with the notion that the Convention was codifying a pre-existing rule of customary international law that was already binding on all states.

Other provisions of the Financing Convention are also inconsistent with the notion that the Convention was codifying a pre-existing, binding rule of customary international law. For example, as discussed in Chiquita's opening brief, the Financing Convention allows signatory states to take reservations from provisions of the treaty, thus limiting their obligations thereunder. That is wholly at odds with the notion that states viewed the obligations embodied in the Convention as simply codifying pre-existing norms already in force. States cannot unilaterally exclude themselves from existing, binding rules of customary international law. *See* Posner Decl. ¶ 28. The Financing Convention thus conclusively shows that there was no binding international law applicable to terrorist financing prior to April 2002.

The Financing Convention Is Not Sufficient Evidence of a New Norm. The Financing Convention does not provide any basis for finding a cause of action for those claims that arose *even after* it came into force on April 10, 2002. Plaintiffs now concede they have no direct ATS claim under the Convention for the simple reason that the treaty is not self-executing. While in some circumstances, a treaty might also provide some evidence regarding the development of a new norm of customary international law, those circumstances are not present here. A treaty alone does not provide a sufficient basis to find a norm of customary international law unless "an overwhelming majority of States have ratified the treaty, ***and*** those States uniformly and consistently act in accordance with its principles." *Flores*, 414 F.3d at 256 (emphasis in original). Yet, as of Chiquita's last alleged payment in February 2004, only a *bare* majority —111 out of 192 member nations of the United Nations, or 58 percent — had ratified the Convention, and a number of major states, including Colombia, China, Egypt, and Saudi Arabia, had not yet ratified it.

As Chiquita explained in support of its motion, even those states that had ratified the convention continued to show a great deal of disagreement regarding its meaning, even after February 2004, and have not demonstrated consistent state practice in accordance with its dictates. (Opening Br. 26-29.) Nor did the 22 months between the Financing Convention's entry into force in April 2002 (reflecting, at that time, the ratification of just 28 nations) and Chiquita's last alleged payment in February 2004 allow sufficient time for a rule of customary international law to develop and become as well-established, clearly-defined, and widely-accepted as the 18th century paradigmatic examples, such as to be sufficiently uncontroversial and beyond debate so as to meet *Sosa*'s stringent standard. The Financing Convention thus offers no support for recognition of plaintiffs' asserted cause of action as cognizable under the ATS — indeed, it provides a compelling case against such recognition.

No Uniform and Consistent State Practice. In addition, before the Financing Convention (or, for that matter, the other sources cited by plaintiffs) can provide support for a rule of customary international law, there also must be evidence that states have uniformly and consistently observed and enforced its prohibitions out of a sense of legal obligation. *See, e.g.*, *Flores*, 414 F.3d at 256 (states must "uniformly and consistently act in accordance" with treaty's principles); *see also id* at 250 (in determining customary international law, courts must look to "concrete evidence of the customs and practices of states"). It is not enough to cite to U.S. domestic law and a couple of other undated statutes, as plaintiffs do here. (Pls.' Opp'n 33; Aceves Decl. at pp. 14-16.) Plaintiffs bear the burden of showing not only that states uniformly and consistently implement legislation giving domestic effect to the purported rule of international law (something which they have not done), but also that states consistently and adequately enforce that prohibition in practice. *Flores*, 414 F.3d at 257 (state practice reflected

in evidence that states "have taken tangible action to implement the principles embodied in the treaty" and "have taken official action to enforce" those principles).

Plaintiffs fail to establish this required foundation of uniform and consistent state practice for their asserted cause of action. Here, the evidence shows that as of early 2004 (when Chiquita's alleged payments ceased), there were "serious problems" in the legislative implementation of the Financing Convention and U.N. Security Council Resolution 1373. *See* Posner Decl. ¶ 62-63, citing Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001), S/2004/70 (January 26, 2004), at p. 15. Nor do plaintiffs present any evidence whatsoever — with the exception of a stray reference by their expert to the entirely inapposite U.S. prosecution of Salim Hamdan by military commission in 2008 — of any concrete state practice of investigating and enforcing such provisions, much less a uniform and consistent one.

Rather than point to actual state practice that supports their asserted rule, plaintiffs improperly attempt to shift the burden to Chiquita, arguing that "Chiquita has not identified a single state in which its provisions of material support to a terrorist organization such as the AUC from 1996 to 2004 would have been legal, nor has it identified a single state that has declared its support for such practices." (Pls.' Opp'n 34.) This turns *Sosa* on its head — it is ***plaintiffs' burden*** to show that there is actual state practice supporting their asserted rule of customary international law. The mere absence of contradictory state practice does not create binding legal norms.[16] Plaintiffs do not point to ***any*** evidence that states have actually,

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[16] Although it is not Chiquita's obligation to demonstrate contradictory state practice, as discussed above, Chiquita has pointed to sources highlighting the "serious problems" states have faced in trying to implement the Financing Convention, as well as failure of states uniformly to adopt such implementing legislation, facts which plaintiffs ignore. *See* Posner Decl. ¶ 62-63.

consistently, and uniformly enforced prohibitions against terrorist financing, let alone evidence demonstrating that such purported prohibitions have been observed and enforced to the same degree as the well-established and widespread 18th century paradigmatic examples cited in *Sosa*. In the absence of such uniform and consistent state practice, there can be no rule of customary international law prohibiting the provision of material support to terrorists.

No Specific Fit. Finally, plaintiffs fail to demonstrate that Chiquita's alleged conduct falls within the specifically enumerated acts prohibited by the Financing Convention, and therefore have not established the requisite specific fit even if the Financing Convention created an actionable norm. As explained in Chiquita's opening brief, the Financing Convention primarily operates by prohibiting willfully providing funds "with the intention that they should be used or in the knowledge that they are to be used" for acts in violation of one of nine pre-existing international conventions listed in the annex of the Financing Convention. *See* Opening Br. 29-30, citing *Barboza*, *supra*. Yet plaintiffs do not explain how they have adequately alleged conduct by Chiquita that violates the specific prohibitions of any of these nine treaties. Thus there is no fit between the ostensible rule of customary international law and Chiquita's alleged conduct. As another court in this district has recognized in a context virtually identical to this case, this failure also warrants dismissal of these claims. *See Barboza*, slip op. at 17, 22; *see also Saperstein*, No. 1:04-cv-20225-PAS, 2006 WL 3804718, at *7 (concluding that "it [is] abundantly clear that politically motivated terrorism has not reached the status of a violation of the law of nations.") (citation omitted).[17] Indeed, *Sosa* rejected the "arbitrary detention" claim at

[17] Plaintiffs misread *Barboza* to claim that they have alleged the sorts of "specific acts of terrorism" that the plaintiffs in *Barboza* did not. (Pls.' Opp'n 27-28.) But the point of the district court in *Barboza* was that the plaintiff there had not alleged facts that fell within any (continued…)

issue there — despite a much closer fit between the alleged conduct and supporting sources of international law — because of very slight differences between the facts alleged and the rules reflected in the sources of international law upon which the *Sosa* plaintiff relied. 542 U.S. at 734-38.

In an effort to avoid confronting the lack of "fit," plaintiffs assert that there is a broad, core prohibition against "acts intended to cause death or serious bodily injury to a civilian when the purpose of such an act, by its nature or its context, is to intimidate a population." (Pls.' Opp'n 24.) But plaintiffs' speculation about the possible contours of a hypothetical agreement on the definition of terrorism that states might someday reach cannot substitute for an actual settled and determinate agreement among states. *See* Posner Decl. ¶¶ 39; *cf. Flores*, 414 F.3d at 255 (rejecting principles "understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them").

Moreover, this amorphous and far-reaching definition — which, as Professor Posner points out, would encompass conduct ranging from ordinary criminal behavior, such as gang violence directed against people who live in the gang's territory, to the use of military force during wartime, such as the American bombing of German and Japanese cities during World War II — cannot provide the close fit that *Sosa* requires, even if plaintiffs were able to demonstrate the requisite state consent. *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (concluding that customary international law cannot be established by reference to "abstract rights and liberties devoid of articulable or discernable standards and

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specifically defined prohibited acts set forth in the Financing Convention or the annexed treaties, slip op. at 22, which holds true for plaintiffs here as well.

regulations"); *Flores*, 414 F.3d at 252 (stating that "it is impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles"); *id.* at 255 (rejecting principles as "vague and amorphous" and "boundless and indeterminate"). It may well be that, going forward, the application of such a principle to concrete situations through consistent and uniform state practice may lead to the development of an international prohibition of terrorism with sufficiently defined parameters to meet *Sosa*'s requirements. But that has not yet happened here. Plaintiffs seek not, as *Sosa* requires, the application of an existing prohibition of "settled and determinate nature," but rather an expansion to create new law. This *Sosa* will not permit.

D. Plaintiffs' Effort to Circumvent the Absence of a Binding Rule of Customary International Law for Terrorism Support By Attempting to Plead Their Case In the Language of Accessorial Liability for Hundreds of Purported Terrorist Murders Is Unavailing and Contrary to *Sosa*.

Plaintiffs attempt to recast their terrorism support claim in the guise of claims that Chiquita should be indirectly liable as an accomplice — under theories of "aiding and abetting," "conspiracy," or "agency" — for hundreds of supposed "extrajudicial killings," "war crimes," or "crimes against humanity" allegedly committed by the AUC. Plaintiffs do not seriously attempt, however, to allege the distinct elements of these specific torts — making plain that, however the claims are denominated, plaintiffs allege in substance nothing other than material support. Plaintiffs cannot evade the absence of an international prohibition against terrorism support actionable under *Sosa* by asserting the same generalized allegations under a rubric of accessorial liability that, whatever its viability under international law in the abstract, is divorced from the conduct of Chiquita alleged here.

It is a basic principle of tort law that defendant is not liable for aiding and abetting ***a person***; liability attaches for aiding and abetting ***the commission of a specific tort***. *See*

Opening Br. 38-42. This common understanding is reflected in the two Eleventh Circuit cases which the plaintiffs point to as support for their aiding and abetting claims, but which, in fact, are completely dissimilar to what is alleged here. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005) (per curiam) (individual defendant drove to military garrison, selected victim for execution, and drove victim to location where he was ordered out of truck and executed); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (per curiam) (Bandegua hired private security force (and apparently the Mayor) to threaten and intimidate seven Bandegua union officers on one specific occasion).[18] It is also reflected in the *actus reus* element of aiding and abetting, which requires plaintiffs to allege that the defendant "provided practical assistance to the [primary tortfeasor] which has a *substantial effect on the perpetration of the crime*." *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (emphasis added); *id.* at 332-33 (Korman, J., concurring in part, dissenting in part) (joining Judge Katzmann's discussion of the requisite elements of an aiding and abetting claim under the ATS); *see also Cabello*, 402 F.3d at 1158 (evaluating whether defendant substantially assisted *in Cabello's killing*).

In order to make it appear as if the conduct they have alleged fits into an aiding and abetting framework, plaintiffs struggle to disconnect their aiding and abetting allegations from the underlying torts. They state that "Chiquita provided ***the AUC*** with substantial support" (Pls.' Opp'n 3, 44), that their allegations of support to the AUC "easily satisf[y] any plain

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[18] Plaintiffs' only response to this critical point is to say that Chiquita "oddly focuses on the facts alleged in various cases, as if the facts in one case foreclose other fact patterns." (Pls.' Opp'n 39 n.48.) But — putting aside plaintiffs' bizarre attempt to suggest that the meaning of cases is entirely removed from their facts — these fact patterns confirm that the Eleventh Circuit (and all other courts) follow the well-established notion that aiding and abetting liability requires specific assistance to a specific tort. Plaintiffs cite no case finding aiding and abetting liability in circumstances like those presented here.

language interpretation of 'substantial'" (*id.* at 44), and that "the AUC caused the relevant injuries and . . . Chiquita provided substantial assistance ***to the AUC***" (*id.* at 45-46). But alleging that a defendant provided general support ***to a group*** that engages in wrongful activity is simply allegation of material support, which is not actionable under the ATS, for the reasons discussed above. Aiding and abetting liability requires plaintiffs to show that the accomplice defendant provided assistance that "ha[d] a ***substantial effect*** *on the perpetration of the crime*," *i.e.*, a substantial effect *on the commission of each of the more than 700 specific murders alleged by plaintiffs*, a nexus which plaintiffs' allegations do not, and cannot, establish.

Plaintiffs take the same approach with respect to their conspiracy allegations. To whatever extent conspiracy is recognized under international law,[19] a defendant may not be held liable simply for conspiring ***with a person***; liability attaches only for conspiring with a person ***to engage in specific, agreed wrongful conduct***. *See Cabello*, 402 F.3d at 1159 (finding there was proof that Cabello and his fellow military officers "were in accord that their goal was to kill prisoners"). But because plaintiffs cannot plead any facts to show that Chiquita conspired with the AUC to commit extrajudicial killings, war crimes, or crimes against humanity, they are unable to connect the conclusory "agreement" they allege to the torts for which they are suing. (*See, e.g.*, Pls.' Opp'n 5 ("Chiquita met with leaders of the AUC and agreed to make payments

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[19] As demonstrated in Chiquita's opening brief, conspiracy to commit extrajudicial killing, war crimes, or crimes against humanity is not actionable under *Sosa* in any event. (Opening Br. 42-43.) Since *Cabello* and *Aldana* were decided, the Supreme Court has made clear that the only conspiracy crimes that have been recognized by international tribunals are conspiracy to commit genocide, and common plan to wage aggressive war. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2784 (2006) (plurality). In the ATS context, *Hamdan* has been cited to conclude that plaintiffs' theory of conspiracy to commit crimes against humanity is not actionable under *Sosa*. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 663-64 (S.D.N.Y. 2006). And this Court should likewise follow the Supreme Court's instruction in *Hamdan*, rather than the earlier cases *Cabello* and *Aldana*.

and provide other support for their mutual benefit . . . ."); Pls.' Opp'n 52 ("Plaintiffs alleged that Banadex's general manager met with Carlos Castano of the AUC in 1997 to arrange for the financing and coordination of paramilitary operations in the Zona Bananera.").) Plaintiffs contend their complaints show that Chiquita conspired with the AUC to bring about hundreds of individual extrajudicial killings, war crimes, or crimes against humanity, but their conclusory allegations of general agreement with the AUC to provide support are nothing more than a repackaged "terrorism support" claim, which as shown above, is not cognizable under the ATS.

Plaintiffs' agency theory likewise does not fit with their allegations of Chiquita's conduct. To demonstrate their agency theory, plaintiffs outline the ways in which a principal can be vicariously liable for his agent, (*i.e.*, the circumstances where the agent acts within the scope of the principal-agent relationship), and argue that the AUC acted within the scope of its principal-agent relationship with Chiquita. (Pls.' Opp'n 54.) In doing so, plaintiffs ignore the predicate requirement for an agency relationship to exist — that the principal must be in control of the agent. (Opening Br. 56-57 (citing *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006).) The idea that the conduct alleged demonstrates an agency relationship between Chiquita and any member of the AUC is frivolous, a term we do not employ lightly.

Just as plaintiffs must engage in contortions to try to conform their general support allegations to the elements of their accessorial liability theories, their generalized allegations — devoid of any specific, distinguishable facts about the more than 700 individual wrongful acts for which they seek to recover — likewise do not fit to the elements required to establish any underlying tort for which accessorial liability could attach. These are alleged to be terrorist murders committed by a private Colombian paramilitary group, and plaintiffs' attempts to wedge these murders into a different international law construct — whether it be extrajudicial

killing, war crimes, or crimes against humanity[20] — is nonsensical and contrary to *Sosa*'s requirement that the Court must assess the conduct as pled.

Plaintiffs seek refuge in the fact that, unlike material support of terrorism, there is a well-recognized and clearly defined international law norm prohibiting extrajudicial killing. (*See* Pls.' Opp'n 2 (extrajudicial killing is "widely accepted as meeting *Sosa*'s requirements for liability under the ATS."); Pls.' Opp'n 17 n.11 ("There is no doubt in this case that international law prohibits extrajudicial killing . . . .").) But part of this "clear definition" is that an extrajudicial killing is an execution perpetrated ***by a State*** without judicial process.

Plaintiffs try hard to gloss over the state action requirement, repeating instead their ***generalized*** allegations of ties between the AUC and the Colombian government. (*See* Pls.' Opp'n 60 (military participated in organizing the AUC "in the 1980s"); *id.* at 61("some paramilitary members were former police or army members"); *id.* ("285 members of the police and military [are] under investigation for links with paramilitaries").) By doing so, plaintiffs ignore the clear requirement that under *any* test to determine whether a private actor can be deemed to act under color of law, the state or state official must play a role ***in the particular conduct at issue***. *See Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir.

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[20] Plaintiffs do not respond to Chiquita's argument that aside from extrajudicial killing, plaintiffs' other claims requiring state action are not sufficiently definite under *Sosa* for recognition under the ATS (Opening Br. 58 n.56), and consequently appear to have abandoned their claims of "cruel, inhuman, and degrading treatment" (NJ Compl. ¶¶ 113-117; Fla. Compl. ¶¶ 289-293); "violation of the rights to life, liberty, and security of person and peaceful assembly and association" (NJ Compl. ¶¶ 118-121; Fla. Compl. 294-297), and "consistent pattern of gross violations of internationally recognized human rights" (NJ Compl. ¶¶ 122-125; Fla. Compl. ¶¶ 298-301).

Plaintiffs explicitly withdraw their "genocide" claim (NY Compl. ¶¶ 907-911). (Pls.' Opp'n 55 n.63.) And Plaintiffs also appear to have abandoned their "torture" claims (NJ Compl. ¶¶ 94-97; Fla. Compl. ¶¶ 270-273). (Pls.' Opp'n 55 ("Plaintiffs bring . . . one [action] that requires state action (summary execution).."). Accordingly, these claims should be dismissed.

2001).[21] Plaintiffs have no choice but to read the state action requirement out of the tort of extrajudicial killing, because the conduct they allege cannot possibly amount to 700 instances of state-sponsored execution.

Plaintiffs' attempt to mold their generalized material support allegations into a well-recognized international law norm prohibiting "war crimes" similarly fails without allegations to support this assertion for each of the alleged deaths. (*See* Pls.' Opp'n 16 n.10.) Plaintiffs' generic allegations fail to establish any connection between each particular alleged death and an armed conflict in Colombia, so they instead contend that any death that occurs in a country where an alleged war is underway is a "war crime" (*See* Pls.' Opp'n 69 (claiming plaintiffs were killed "in the course of" an armed conflict simply because a war was occurring in Colombia during this time)), an approach expressly rejected by the court in *Saperstein*, *see* 2006 WL 3804718, at *8 (holding that no court has ever recognized the proposition that "alleging a murder of an innocent person during an armed conflict" is a "per se violation of the law of nations"). Even plaintiffs' sources do not support their attempt to eliminate the requirement that the alleged killing must have a nexus with the armed conflict in order for it to constitute a war crime. (*See* Pls.' Opp'n 67-68 (sources stating that war crimes must be committed "in association with" an armed conflict; "within the context of" an armed conflict).) *See, e.g.*, Antonio Cassesse, INTERNATIONAL CRIMINAL LAW 49 (2003) ("[C]rimes committed by civilians

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[21] Effectively conceding that they cannot establish such a particularized connection to the Colombian government, plaintiffs instead argue that the AUC and the Colombian government are indistinguishable. (Pls.' Opp'n 64.) Wholly apart from the fact that such generalized assertions of imputed state action are legally insufficient, Chiquita maintains that it would be improper, under the political question doctrine, for this Court to entertain a claim that a U.S. ally is responsible for the murders of hundreds of its own citizens. (*See* Opening Br. 36-37); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006) ("[T]he more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine.").

against other civilians . . . may constitute war crimes, provided there is a link or connection between the offence and the armed conflict. If such a link is absent, the breach does not amount to a war crime, but simply constitutes an 'ordinary' criminal offence under the law applicable in the relevant territory."). Plaintiffs likewise attempt to avoid their obligation to plead specific facts for each alleged war crime to establish the requisite element of intent. (Opening Br. 62-63 (war crime for targeting civilian occurs only where act was carried out intentionally and knowing that the victim took no active part in hostilities).) By shunning any responsibility to connect any of these 700 killings to an armed conflict or to allege the requisite intent, plaintiffs effectively concede that what occurred here does not resemble "war crimes," as that term has been used in the law of nations.

Nor can plaintiffs shoehorn their allegations against Chiquita into accessorial liability for "crimes against humanity." Whatever the content of a prohibition of crimes against humanity (a concept tied to the Holocaust),[22] there is a requirement that the violence be

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[22] While plaintiffs argue that *Cabello* shows that crimes against humanity is actionable under the ATS (Pls.' Opp'n 66 n.70), there is no indication that the defendant in that action (a Chilean military officer) made the argument that the claim was insufficiently definite to support a claim post-*Sosa*, so the Eleventh Circuit had no occasion to consider it. *See* 402 F.3d at 1161. In fact, every international criminal treaty that has defined crimes against humanity has done so in a different way. The Rome Statute of the International Criminal Court defines crimes against humanity as any one of several specific acts (*e.g.*, "extermination," "enslavement") "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, art. 7 (entered into force July 1, 2002). The Statute of the International Criminal Tribunal for the Former Yugoslavia has a more narrow definition, using a similar list of atrocities but prohibiting them only when committed "in armed conflict." Statute of the ICTY, art. 5, *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf. Narrower still, the Statute of the International Criminal Tribunal for Rwanda defines crimes against humanity as a widespread or systematic attack against any civilian population "on national, political, ethnic, racial or religious grounds." Statute of the ICTR, art. 3, *available at* http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf.

(continued…)

perpetrated as part of an "attack." *See Aldana*, 416 F.3d at 1247 (stating that "to the extent that crimes against humanity are recognized as violations of international law, they occur as a result of 'widespread or systematic attack,'" and concluding that plaintiffs' generic assertion of "systematic and widespread efforts against organized labor in Guatemala is too tenuous to establish a prima facie case, especially in the light of *Sosa*'s demand for vigilant doorkeeping"). Similar to their generalized state action allegations, plaintiffs allege that the AUC sometimes carried out "attacks" (*see, e.g.*, NY Compl. 743, 749), but they have made no effort to connect any of the killings alleged in the complaints to one of these attacks. Plaintiffs have alleged individual or indiscriminate acts of violence by a private group, and they have made no attempt to connect these acts to attacks against a civilian population remotely similar to the atrocities of Nazi Germany.

At bottom, the conduct pled here supports a material support of terrorism claim and nothing more. The sole question is whether, at the time of each killing asserted by plaintiffs, there was an existing international norm that prohibited Chiquita's alleged conduct with the acceptance and specificity that *Sosa* requires. There was not. Plaintiffs' transparent attempt to recast their legally insufficient "terrorism support" allegations into accessorial liability theories, with no serious effort to plead allegations specifically tying Chiquita's conduct to the specific underlying torts alleged, cannot avoid that result.

Thus, although it is sometimes recognized under customary international law, crimes against humanity is the type of ambiguous norm that does not provide a basis for ATS jurisdiction under *Sosa*'s restrained approach. *See* John F. Murphy, *Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 Int'l L. 45, 54 (2000) ("[T]here is no generally accepted definition of crimes against humanity, either as a matter of treaty or customary international law. On the contrary, of the several versions that had been promulgated, no two were alike.").

E. Plaintiffs Naively Ignore — or Consciously Choose to Disregard — the Breathtaking Practical Difficulties That Will Result From Attempting to Fairly Adjudicate Any Such Sweeping Terrorism Support Claims in An American Court, Which *Sosa* Compels This Court to Consider in Determining Whether to Recognize the Cause of Action.

Plaintiffs also ignore the breathtaking practical difficulties that would result from recognition of their asserted cause of action, in blatant disregard of the Supreme Court's express direction in *Sosa*: "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732-33.

Plaintiffs try to characterize their claim as "standard fare" no different than other ATS cases (Pls.' Opp'n 1), and dismiss the wide-ranging ramifications of accepting their attenuated theory of liability as an improper, case-specific consideration, viewing the case through blinders solely focused on Chiquita. But the profound consequences of accepting plaintiffs' theory — which effectively envisions the entire Colombian conflict as a single large-scale mass tort for which any person who provided any support to any of the parties to the conflict could be alleged to be liable as a joint-tortfeasor for the conduct of that party — would wreak havoc on the federal courts, requiring them to apportion liability for any international conflict around the globe in which an aggrieved party asserts a violation of international law.

If a viable claim can be stated against Chiquita for all of the acts of the AUC because it paid the *vacuna* (or extortive levy or "war tax," *see* Opening Br. 34-35 & n.30), the same is true of any other person or organization that provided any form of support to the AUC.[23]

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[23] As explained in Chiquita's opening brief, potential joint tortfeasors would include any person or business who provided any form of support to the AUC, including other businesses or (continued…)

Literally tens of thousands of potential joint tortfeasors would each be subject to potential liability in this ATS suit, to the extent that they were added or otherwise impleaded, and plaintiffs' attenuated theory of liability would require this Court to apportion liability among all of them (as well as, of course, the members of the AUC or its affiliates themselves), whether present or absent, for the alleged tens of thousands of injuries inflicted by the AUC in the course of the Colombian conflict. Accepting such a theory would work a radical transformation of the scope of ATS law and would effectively convert this Court into an international civil claims tribunal for the Colombian conflict.

Nor would this result be by any stretch limited to Colombia. Rather, if ATS jurisdiction exists on the facts alleged here, plaintiffs' attorneys will have every incentive to round up "clients" around the globe to file strike suits against companies or individuals with any connection, however remote, to any international conflict. Regions overseas that are wracked by violence or checkered human rights practices would become hunting grounds for attorneys trying to identify potential defendants and round up potential plaintiffs — companies who did business in Iraq during Saddam Hussein's regime would be sued as contributors to his atrocities; companies who supported the 2008 Summer Olympics would be sued as contributing to China's crack-down on Tibetan dissidents; and companies paying taxes to the Russian government would be blamed for Russia's excesses in its conflict with Georgia. Federal district courts would be

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landowners who also paid the *vacuna*, as well as others who allegedly provided any support to the AUC, whether officials of the Colombian government or military (including, as alleged by the plaintiffs, the current President of Colombia, who was formerly governor of the Department of Antioquia); current or former members of the U.S. military who allegedly trained members of the AUC at the School for the Americas; or anyone else who provided money to the AUC, including purchasers of AUC-produced drugs or victims of kidnapping-and-extortion schemes. Indeed, given plaintiffs' allegations of complicity by the Colombian government in these deaths, any Colombian taxpayer arguably provided support actionable under plaintiffs' theory.

forced to adjudicate and apportion liability in such contexts around the globe as though such disputes were simply run-of-the-mill mass tort cases.

These profound and deleterious consequences would have been inconceivable to the drafters of the ATS and are entirely inconsonant with congressional intent in enacting a jurisdictional statute so limited that it provided the basis for jurisdiction in only one reported federal case in its first 200 years. Given the profound practical impact of accepting plaintiffs' attenuated theory of liability, it is not an appropriate case for this Court to exercise its limited and discretionary federal common law-making powers to recognize plaintiffs' novel claims as cognizable under the ATS.

F. Regardless of Whether Material Support of Terrorism Satisfies *Sosa*'s Challenging Standards, Plaintiffs Have Clearly Failed to Plead the Most Basic Elements of their Claims, and The Complaints Must Be Dismissed for that Reason Alone.

As demonstrated in Parts I.A-E, the conduct alleged in these complaints does not amount to a violation of any clearly established and well-defined norm of international law. Even if the Court concludes that plaintiffs' proposed causes of action are cognizable under the ATS, however, they must be dismissed for the additional reason that plaintiffs have not sufficiently pled the elements of these torts or derivative liability theories, for many of the same reasons discussed above.[24]

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[24] Plaintiffs dispute that a heightened pleading standard applies to their allegations of "violations of the law of nations." (Pls.' Opp'n 14.) This district, in *Sinaltrainal*, recognized such a heightened pleading standard, *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006), which is the general rule in ATS jurisprudence. (Opening Br. 12.) The applicability of a heightened pleading standard in ATS cases is a question that has been directly presented to the Eleventh Circuit in *Sinaltrainal v. Coca-Cola Co.*, No. 06-15851 (11th Cir.). Chiquita submits that plaintiffs' allegations fail to state a claim under any standard, but to the extent this Court disagrees, plaintiffs' contentions must be reviewed under the heightened pleading standards applicable in ATS actions.

Causation. While plaintiffs advance a number of theories of liability, each with its own list of required elements, plaintiffs ignore an overarching fundamental precept of tort law applicable to all of them. Whatever the applicable standards or required elements, there can be no doubt that, to state a tort against a defendant, a plaintiff must establish some meaningful connection between the alleged conduct of the defendant and each of the plaintiff's alleged injuries. That is the fundamental premise of civil liability. Yet plaintiffs here have completely failed to allege any meaningful connection between Chiquita's alleged conduct and the specific individual injuries for which they seek to recover.

As with any other tort claim, where courts have recognized a basis in international law to consider civil tort claims pursuant to the ATS, they have recognized that causation remains an essential element of such torts.[25] *See, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109, 115 (5th Cir. 1988) (dismissing ATS claim in part because the plaintiff "simply cannot demonstrate any causal connection between [the alleged tortious] conduct and his prolonged imprisonment or torture"); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2001) (dismissing ATS claim where "[t]he causal chain between the Egyptian government's [allegedly unlawful act] and Coca-Cola's benefit is not articulated"); *Doe I v. Exxon*, 393 F. Supp. 2d 20, 27 (D.D.C. 2005) ("[The] allegations fall short of establishing proximate cause here, because [plaintiffs] did not sufficiently allege that defendants controlled the Indonesian military's actions.").

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[25] *See also Taliferro v. Augle*, 757 F.2d 157, 161-62 (7th Cir. 1985) (noting that "federal tort statutes . . . are enacted against a background of common law tort principles governing causation and damages").

Under these tort law principles, causation-in-fact is an elemental requirement of a tort claim, and indeed an act cannot be the *proximate* cause of an injury if it was not also the *factual* cause of that injury. *E.g.*, W. Page Keeton, Prosser & Keeton on the Law of Torts 273 (5th ed. 1984) ("Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury."). Yet plaintiffs have failed to allege specific facts regarding each alleged tort to establish that Chiquita's conduct is either the factual cause or the proximate cause of the injuries for which they seek damages from Chiquita. This failure to allege the most basic required element of their claims — however characterized — requires dismissal of their complaints even if they have identified a viable cause of action under the ATS. *See Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (proximate cause demands "some direct relation between the injury asserted and the injurious conduct alleged").

For plaintiffs' material support of terrorism claim, plaintiffs suggest in opposition that it is enough to simply allege that Chiquita made payments to the AUC and that the AUC caused them harm. But that is not sufficient — in order to hold Chiquita civilly liable, plaintiffs at a minimum have to allege some meaningful connection between the support allegedly provided by Chiquita and the particular acts of the AUC for which they seek to recover. *See id.*; *see also* W. Page Keeton, Prosser & Keeton on the Law of Torts 264 (5th ed. 1984) ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. . . . This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complaints."). Here, plaintiffs make no such allegations but rather assume that it is unnecessary

for them to show any relationship between the alleged payments and their alleged injuries. That assumption is incorrect, and consequently plaintiffs' material support claim fails.

Aiding and abetting liability likewise requires a showing that Chiquita's alleged conduct had a substantial effect ***on each particular wrongful act*** for which plaintiffs seek to recover. Plaintiffs do not dispute this "substantial effect" element subsumes a causation requirement. Regardless of whether that causation requirement is one of proximate causation, or mere foreseeability,[26] plaintiffs say nothing in response to the fact that in *Arab Bank*, on which they rely throughout their opposition, the court emphasized that plaintiffs' aiding and abetting allegations were sufficient because defendants had provided particular assistance ***directly related*** to the particular suicide bombings at issue. 471 F. Supp. 2d at 291-92. Plaintiffs simply have not alleged any type of a direct or causal relationship between Chiquita's payments to the AUC over a period of 7 years, and 700 individual killings over a period of nearly 20 years. *See Sinaltrainal*, 474 F. Supp. 2d at 1278-81 (finding plaintiffs allegations that Coca-Cola hired or conspired with paramilitaries to rid bottling plants of labor organizers were "too conclusory, too vague, and too attenuated to adequately plead a violation of the law of nations to support [ATS] jurisdiction").

Plaintiffs' conspiracy theory also fails because there is no link between the purported agreement between Chiquita and the AUC and the injuries for which plaintiffs seek to recover. They do not even try to establish one. As for plaintiffs' agency theory, they cannot

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[26] Plaintiffs state that *Cromer Financial v. Berger* supports their argument that the causation standard for aiding and abetting claims is merely foreseeability. (Pls.' Opp'n 45.) Their quote from *Cromer* conveniently leaves out the first half of the sentence, which clearly demonstrates that causation-in-fact is a predicate requirement of the causation requirement: "***But-for causation is insufficient***; aider and abetter liability requires the injury to be a direct or reasonably foreseeable result of the conduct." 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (emphasis added).

even allege that any member of the AUC acted under Chiquita's control *at any time*, much less during each of these 700 specific alleged murders.

Beyond the failure to plead a casual link between the acts of Chiquita and any of these hundreds of alleged injuries, plaintiffs have also failed to plead other essential elements of their claims. As outlined in Chiquita's opening brief and discussed in Part I.D., the failures with respect to plaintiffs' accessorial theories are so evident that it demonstrates the fundamental inapplicability of those asserted theories. But even if the court were to conclude that there is a *Sosa*-sufficient claim potentially available to the plaintiffs here, they have plainly failed to allege the necessary elements:

- **Material Support of Terrorism.** Plaintiffs also fail to show (1) that Chiquita's alleged support was material to the AUC (particularly where the AUC's annual budget was more than 1000 times the average annual amount of Chiquita's alleged payments); (2) that Chiquita had the requisite intent to facilitate the specific, violent acts of the AUC for which the plaintiffs seek to recover, or even that Chiquita provided the funds to the AUC with a purpose to promote the AUC's mission; or even (3) that the specific deaths or injuries for which they seek to recover resulted specifically from acts or terrorism. (Opening Br. 44-49.)

- **Aiding and Abetting**. Plaintiffs' generic allegations establish neither that Chiquita provided the required substantial assistance of the particular underlying torts nor that Chiquita *intended* to facilitate the commission of these particular 700 underlying alleged murders.[27] (Opening Br. 51-54.)

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[27] Plaintiffs effectively concede that their allegations do not meet the international law standard for aiding and abetting that Chiquita *intended* to facilitate the commission. *See Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring). Instead, they improperly draw on federal common law rather than international law for their asserted *mens rea* requirement of aiding and abetting, and misconstrue comments in *Sosa* regarding the common law status of international torts prior to *Erie* in an attempt to support their reliance on federal common law standards. (Pls.' Opp'n 43 (citing *Sosa*, 542 U.S. at 724).) For "aiding and abetting" to constitute a tort "in violation of the law of nations," it must be a violation of the law of nations to "aid and abet." Plaintiffs' aiding and abetting claims must therefore be rooted in international law, and international law requires intent, not just a generalized knowledge that the principal actor is violent. Moreover, plaintiffs have not established that international law would apply aiding and abetting to many of the particular tort theories under which they seek to recover.

- **Conspiracy.** Plaintiffs' conclusory allegations about the goals of Chiquita's alleged conspiracy with the AUC are unspecific and completely unsupported with any factual allegations. (*Id.* at 54-56.) The only details that plaintiffs can allege about the "agreement" are details about how the actual payments to the AUC were made. (Pls.' Opp'n 53.) For good reason, they cannot allege any details about Chiquita's purported direction or planning of the AUC's military operations or any of the other outlandish goals like seizing land from peasants, or seizing political control of Colombia. (NY Compl. ¶ 848.)

- **Agency.** Plaintiffs ignore the text-book requirement that for an agency relationship to exist, the principal must be in control of the agent. (Opening Br. 56-57 (citing *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006).)

- **State Action.** Plaintiffs' "color of law" analysis in support of their extrajudicial killing claims relies solely on *generalized allegations* of ties between the AUC and the Colombian government. *See* Part I.D (citing Pls.' Opp'n 60-61). A private actor can be deemed to act under color of law only when the state or state official plays some role ***in the particular conduct at issue***. *See Rayburn*, 241 F.3d at 1348. (Opening Br. 58-62.) Plaintiffs also have not established that ***Chiquita*** was acting under color of law or in coordination with the Colombian government in connection with these deaths, instead advancing the novel proposition that Chiquita could be held liable for acts of the AUC based on connections alleged between the AUC and the Colombian government wholly independent of Chiquita. (*Id.* at 60.)

- **War Crimes.** It simply cannot be the case, as Plaintiffs suggest, that any death that occurs in a country where a war is underway is a "war crime." (*See* Pls.' Opp'n 69); *Saperstein*, 2006 WL 3804718, at *8 (recognizing bare allegations of "the murder of an innocent civilian during an armed conflict" as war crimes "would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations"); *see also Sinaltrainal*, 474 F. Supp. 2d at 1289. Plaintiffs have not adequately alleged a connection between the more than 700 alleged murders and any armed conflict in Colombia, and they have not alleged facts that establish that the perpetrators of those alleged murders had the requisite intent to commit a war crime. (Opening Br. 62-64.)

- **Crimes Against Humanity.** Plaintiffs' generic allegations that the AUC sometimes carried out "attacks," wholly unconnected to any of the more than 700 specific alleged murders for which they seek to hold Chiquita liable, is not sufficient to establish the required element that the injuries occurred as a result of crimes against humanity, *Aldana*, 416 F.3d at 1247, even if such a cause of action were cognizable under the ATS. (Opening Br. 65.)

II. PLAINTIFFS' EXTRAJUDICIAL KILLING CLAIMS FAIL FOR THE SAME REASONS UNDER THE TVPA AS UNDER THE ATS.

Plaintiffs' TVPA claims for extrajudicial killing fail for the same reasons that their ATS claims for extrajudicial killing fail. Plaintiffs' theories to hold Chiquita liable as an accessory do not fit the conduct alleged, *see* Part I.D., and plaintiffs have not adequately plead the state action requirement of extrajudicial killing, *see* Opening Br. 58-62 and Parts I.D. & I.F. Moreover, Plaintiffs' attempt to argue that the word "individual" in the TVPA includes corporations is unavailing. In fact, all of the examples plaintiffs cite (in an effort to demonstrate that a word can mean two different things in the same statute) use the word *person*, and often specifically define that term to include corporations. In the TVPA, Congress chose to make "individuals" liable for engaging in torture or extrajudicial killing of other "individuals," and individual is a term that is limited to human beings under the law. *See* 1 U.S.C. § 1 (stating that in determining the meaning of an act of Congress, "the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*").

III. PLAINTIFFS HAVE NOT PLED EITHER THE ELEMENTS OF THEIR STATE LAW CLAIMS OR A PROPER BASIS FOR AVOIDING THE RUNNING OF THE APPLICABLE STATUTES OF LIMITATIONS.

A. Plaintiffs' Various Arguments for Delaying Accrual, Tolling the Limitations Periods or Otherwise Preserving Their Time-Barred State Law Claims Are Without Merit.

It is clear from the face of the complaints that the vast majority of plaintiffs' claims are time-bared. (*See* Opening Br. 71-73.) Admitting this, plaintiffs offer a variety of tolling and other arguments for why these claims — even for injuries dating as far back as 1988 — should proceed.

First, plaintiffs allege that fear of reprisal from the AUC was an "extraordinary circumstance" that prevented them from bringing their claims in a timely manner. (*See* NJ Pls.' Opp'n 4; Fla. Pls.' Opp'n 4.) This argument is transparently unpersuasive. Although plaintiffs might genuinely fear reprisals, the vast majority are proceeding using pseudonyms, an option that has always been available to them. Moreover, for tolling to be appropriate based on "extraordinary circumstances," the obstacle to filing must be both "beyond [plaintiff's] control *and unavoidable even with diligence*." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006). Plaintiffs have not described any steps they took diligently to investigate their options for filing these complaints in a timely manner before U.S. plaintiffs lawyers sought out their participation in these lawsuits.

Second, Plaintiffs also rely on the doctrine of "delayed discovery" to justify bringing their time-barred claims. (Fla. Pls.' Opp'n 5-6; NY Pls.' Opp'n 7-10.) That doctrine is inappropriate here. As plaintiffs' cases acknowledge, the doctrine applies to a plaintiff's delayed discovery that a ***tort has occurred***. *See Butler Univ. v. Bahssin*, 892 So.2d 1087 (Fla. Dist. Ct. App. 2004) (cause of action accrues when plaintiff "knew, or through the exercise of due diligence should have known, *of the invasion of his or her legal rights*"); *Collins v. Sotka*, 692 N.E.2d 581, 583 (Ohio 1998) ("The fact that a body was discovered and/or that a death took place is irrelevant unless there is proof that a defendant was at fault.") Thus, it typically applies in cases such as medical malpractice, where the plaintiffs may not be aware of the existence of a tort at the time of the injury. By contrast, these plaintiffs clearly knew that the deaths of their relatives resulted from tortious conduct, regardless of whether the plaintiff is aware of every *particular* defendant against whom he may file a claim.

Third, Plaintiffs argue that Chiquita "fraudulently concealed" its support of the AUC, to justify bringing these otherwise time-barred claims. (NJ Pls.' Opp'n 5-7; Fla. Pls.' Opp'n 5-7; NY Pls.' Opp'n 7-9.) The complaints allege that Chiquita recorded the payments as "security payments" in its corporate books and records, (NJ Compl. ¶ 33; Fla. Compl. ¶ 75; NY Compl. ¶¶ 777, 854), but the plaintiffs do not allege that Chiquita was under a duty to describe the payments with greater specificity. In the absence of such a duty, mere non-disclosure is insufficient to constitute fraud.

To the extent plaintiffs are contending that Chiquita took active steps "calculated to . . . prevent the discovery" of a potential cause of action, *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 701 (11th Cir. 2005), they must plead facts sufficient in their complaints to invoke the theory. *Powell v. Carey Intern, Inc.*, No. 05-CV-21395, 2007 WL 419365, at *1 n.2 (S.D. Fla. Feb. 1, 2007) ("Plaintiffs may not . . . seek to equitably toll the statute of limitations . . . based on grounds not pled in the operative complaint.") (citation omitted).[28] Indeed, Rule 9(b) requires any plaintiff asserting fraudulent concealment to plead "with specificity" the circumstances of the alleged fraud. *See Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1073 (S.D. Fla. 2003).

Moreover, "a party seeking to avail itself of the doctrine of fraudulent concealment must have exercised reasonable care and diligence in seeking to learn the facts which would disclose the fraud." *Berisford v. Jack Eckerd Corp.*, 667 So.2d 809, 812 (Fla. Dist.

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[28] *See Russell v. Witham*, No. 1:07 CV 2890, 2007 WL 4561609, at *5 (N.D. Ohio Dec. 21, 2007) ("A Rule 12 motion on statute of limitations grounds is an appropriate way to dispose of a claim that, on its face, is time-barred . . . . The Court is limited to the allegations in the complaint because, the burden is on [plaintiff] to plead circumstances which would indicate why the [cause of action] was not discovered earlier and which would indicate why the statute should be tolled.") (quotation marks and citation omitted).

Ct. App. 1995); *Lynch v. Rubacky*, 424 A.2d 1169, 1174 (N.J. 1981); *Sosa v. Myers*, 831 N.Y.2d 356, *6 (Sup. Ct. 2006) (same); *Mayor v. Ford Motor Co.*, 2004 WL 1402692, *4 (Ohio App. June 24, 2004) (same). Nowhere in any of the complaints does any plaintiff allege the steps he or she took to pursue diligently his or her rights up until the time U.S. plaintiffs' lawyers traveled to Colombia and solicited their participation in these lawsuits. *See Hall v. Burger King Corp.*, 912 F. Supp. 2d 1509, 1536 (S.D. Fla. 1995) ("Complete knowledge is not required to start the statute running. Rather, any fact that should excite [plaintiff's] suspicion is the same as actual knowledge of . . . [the] entire claim and serves to trigger the statute.") (quotation marks and citation omitted).[29]

Fourth, the New Jersey plaintiffs argue that at the motion to dismiss stage, the Court must consider that these claims might be governed by a 20-year Colombian statute of limitations. (NJ Pls.' Opp'n 7-9.) These plaintiffs misunderstand how New Jersey courts determine which state's statute of limitations applies. New Jersey courts find a statute of limitations to be procedural, and thus apply the statute of the forum state, when the cause of action is one that existed under the common law *of New Jersey*. *See LaFage v. Jani*, 766 A.2d 1066, 1077 (N.J. 2001) (noting that concurring opinion in prior case "convincingly establishes that *New Jersey* had a common law wrongful death cause of action . . . ," and concluding that "our Wrongful Death Act is a codification of *our common law*") (emphasis added). Thus, the

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[29] Even if plaintiffs were granted leave to amend to allege particularized facts in support of their fraudulent concealment theory, it is unlikely that any plaintiff could do so, given that Chiquita first publicly disclosed that it had made payments to Colombian paramilitaries on May 10, 2004 — more than three years before any of these complaints was filed — a disclosure that was widely publicized in Colombia. Moreover, the fact that businesses and landowners operating in the Zona Bananera, such as Chiquita, were required to pay the guerrillas or paramilitaries the *vacuna* has long been public knowledge in Colombia. *See* Opening Br. Ex. M (2003 U.N. Report).

fact that wrongful death is a statutory cause of action *in Colombia* is irrelevant to whether a New Jersey court considers the statute of limitations for a wrongful death claim to be substantive or procedural. (*See* NJ Pls.' Opp'n 8.)

Further, the New Jersey plaintiffs' argument that the Colombian statute of limitations might apply because New Jersey courts "use[] a multifactor test to determine which limitations period applies," is at best misleading. The New Jersey courts developed this multifactor analysis to "discourage forum shopping litigants with slender ties to New Jersey *who desire the benefit of New Jersey's more favorable limitation period*," and to encourage the application of the foreign state's limitation period *when that statute has run*. *Wash. v. Sys. Maint. Corp.*, 616 A.2d 1352, 1355 (N.J. Super. Ct. 1992). This multifactor analysis would not be used to apply a longer statute of limitations period from a foreign jurisdiction.

Finally, the New York plaintiffs assert that their claims are timely under two unique provisions of New York law: C.P.L.R. § 218(8)(a), which allows plaintiffs to timely commence a civil action within one year of from the termination of a criminal action that involves the same alleged conduct; and C.P.L.R. § 213-b, which extends the limitation period for civil suits brought by crime victims to seven years from the date of the crime. These provisions are more unique than plaintiffs realize, and do not apply here, where no crime is alleged to have been committed or prosecuted in New York. *See Von Bunlow v. Von Bunlow*, 634 F. Supp. 1284, 1299 (S.D.N.Y. 1986) ("plain words of the statute . . . limit[] the relief available under CPLR § 215(8) to those who are victims of crimes prosecuted in New York"); *Elkin v. Cassarino*, 680 N.Y.S.2d 601, 604 (App. Div. 1998) ("CPLR 213-b was intended to . . . reach the victims of crimes committed in New York State.").

B. Plaintiffs Fail to Plead the Elements of Their Asserted State Law Claims.

Plaintiffs' state law claims based on accessorial theories of liability fail for many of the same reasons their ATS claims fail. (*See* Opening Br. 68-70 & n.63.) Plaintiffs have not adequately alleged facts establishing that Chiquita aided and abetted the commission of over 700 individual torts, or conspired to commit any of these torts. *Id.*; *see also* Parts I.D & I.F.[30] Nor have they properly alleged any of the required elements of aiding and abetting or conspiracy. *See* Opening Br. 50-57 and Part I.F. Moreover, plaintiffs ignore the very specific state law requirements of *respondeat superior* liability, simply referring back to their inadequate discussion of agency law with respect to their ATS claims. (See Opening Br. 69 (*respondeat superior* liability requires that employer have control over the employee and the manner in which the employee completes his tasks, which plaintiffs do not and cannot allege with respect to the "relationship" between Chiquita and the AUC).)

Finally, Plaintiffs' negligence-based claims all rest on the insufficient and conclusory presumption that Chiquita "employed" the particular AUC members involved in *each* of the alleged killings. (Opening Br. 70.) Plaintiffs cannot avoid this fundamental requirement by arguing that members of the AUC were Chiquita's "independent contractors." (Fla. Pls.' Opp'n 8; NJ Pls.' Opp'n 2.) Even in a contractor-contractee relationship, the employer must still have control over the results of the contractors' work. *4139 Mgm't, Inc. v. Dep't of Labor & Employment*, 763 So.2d 514, 517 (Fla. App. 5th Dist. 2000) ("[I]f control is confined to results only, there is generally an independent contractor relationship."); *Pfenninger v. Hunterdon Cent.*

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[30] The Florida plaintiffs mistakenly state that "Chiquita acknowledges that aiding and abetting and conspiracy liability under Florida law are equivalent to those doctrines under the ATS." (Fla. Pls.' Opp'n 7.) But Chiquita clearly pointed out in its opening brief that civil aiding and abetting liability is not recognized under Florida law, (Opening Br. 70 n.66), a point which Florida plaintiffs fail to refute.

Regional High Sch., 770 A.2d 1126, 1138 (N.J. 2001) (independent contractor does work without being subject to the control of his employer, "except as to the product or result of his work") (citation omitted). Plaintiffs have not alleged that Chiquita assigned any member of the AUC to complete certain tasks, or controlled the result of that person's work.

Wholly apart from these failings, the New Jersey plaintiffs argue that it is not the law in New Jersey, as it is in Florida (Opening Br. 70), that in order to establish duty for a negligent hiring or supervision claim, plaintiffs must allege that Chiquita was responsible for bringing the victims into contact with the AUC. (NJ Pls.' Opp'n 2-3.) But the authorities they cite confirm this basic requirement. (NJ Pls.' Opp'n 3 (duty analysis includes evaluation of relationship between the parties), *id.* at 3 n.1 (duty analysis includes evaluation of the defendant's responsibility for creating the risk).) Plaintiffs have alleged no relationship between Chiquita and any of these more than 700 alleged victims from which a "duty" could arise.

With no underlying tortious conduct, Chiquita cannot therefore be liable for wrongful death or loss of consortium. (Opening Br. 71.)

CONCLUSION

For the foregoing reasons, and the reasons submitted with its motion, Chiquita respectfully requests that the complaints be dismissed with prejudice.

Dated: September 19, 2008

Respectfully submitted,

/s/ Robert W. Wilkins

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF on this 19th day of September, 2008. I also certify that the foregoing document is being served this day on all counsel of record registered to receive electronic Notices of Electronic Filing generated by CM/ECF, and in accordance with the Court's First Case Management Order ("CMO") and the June 10, 2008 Joint Counsel List filed in accordance with the CMO.

By: /s/ Robert W. Wilkins

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-MD-01916 (Marra/Johnson)

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

This Document Relates to:

ATS ACTIONS
_____/

JOHN DOE 1 et al. v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80421
_____/

JUAN/JUANA DOES 1-619 v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80480
_____/

JOSE LEONARDO LOPEZ VALENCIA et al. v. CHIQUITA BRANDS INTERNATIONAL, INC.

Case No. 08-cv-80508
_____/

DECLARATION OF ERIC A. POSNER

I, Eric A. Posner, declare as follows:

Introduction

1. I have been asked to provide my opinion on the question referred to in ¶ 4 below, in the form of a Declaration, to Covington & Burling LLP, Attorneys at Law acting on behalf of Chiquita Brands International, Inc., which is the Defendant in a proceeding brought by John Doe I, et al.

Qualifications and Experience

2. I am Kirkland & Ellis Professor, University of Chicago Law School. I have many years of experience in teaching, writing, and research in the field of international law. I have taught classes in public international law, human rights law, and foreign relations law. I have written two books, The Limits of International Law (with Jack Goldsmith, Oxford University Press, 2005) and Anarchy and Adjudication (University of Chicago Press, forthcoming 2009), and numerous articles on international law. My c.v. is annexed.

Background

3. My understanding on the basis of allegations in the Complaints and in Plaintiffs' Response in Opposition to Defendant's Consolidated Motion to Dismiss the Complaints ("Response") is as follows. Plaintiffs are citizens of Colombia who allege that their family members were killed by the *Autodefensas Unidas de Colombia* ("AUC"), an organization in Colombia that has been designated a foreign terrorist organization by the United States government. The Plaintiffs allege that C.I. Bananos de Exportacion, S.A. ("Banadex"), a wholly-owned subsidiary of the Defendant, Chiquita Brands International, supplied financial and other forms of support to the AUC in return "for the pacification of the banana growing regions of the country and the suppression of labor and community opposition to the company" (Response, p.1). In addition to making monetary payments, Banadex allegedly "facilitated" arms shipments to the AUC (Response, p. 9) and permitted the AUC to use Chiquita's port facilities and equipment to export drugs (Response, p. 10). The alleged financial or in-kind transfers to the AUC began in the 1990s and terminated in February 2004 (Response, p. 9).

The Question

4. Does the transfer of money or logistical resources to an organization that uses violence to intimidate civilians violate a norm of customary international law against material support of terrorism?

Summary of Opinion

5. I am of the opinion that there is no customary international law norm that prohibits material support of terrorism and that therefore the acts alleged in ¶ 3 cannot violate such a norm.

Legal Background

6. Plaintiffs' claims related to international law rely on their expert's Declaration on the International Prohibition Against Terrorism and Providing Support for Terrorism ("Aceves Declaration"). The Aceves Declaration appeals to the two main forms of international law, treaties and customary international law.

7. Treaties are explicit, written contracts between nations. A treaty is "an international agreement concluded between States in written form and governed by international law." Vienna

Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations §102(2) (1987) ("Restatement").[1]

Treaties

8. States enter treaties by signing and ratifying agreements that representatives have negotiated. Most treaties create obligations for states, not for individuals. For example, a trade treaty obligates states to lower tariffs; it does not create international legal obligations for individuals. A small number of treaties, such as the Genocide Convention, create or recognize the existence of international crimes that create individual liability. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. However, most treaties that establish that certain activities constitute offenses direct states to pass domestic laws that criminalize those activities; the treaties do not purport to create an international crime. For example, Article 4 of the Terrorism Financing Convention directs states to pass domestic laws that criminalize the offenses listed in Article 2. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, UN Doc. A/Res/54/109 (Dec. 9, 1999).

9. When states enter treaties, they frequently submit reservations, understandings, and declarations. These statements can affect the scope of a treaty and how it is interpreted. For example, the United States submitted a reservation to the Terrorism Financing Convention that provides that the United States will not be subject to its dispute resolution clause. It also submitted an understanding that declared that nothing in the Terrorism Financing Convention would prevent states from using force against targets in armed conflicts.[2]

10. Under American law, a treaty is either self-executing or non-self-executing. A self-executing treaty has direct domestic legal effect, the same as duly enacted legislation, that is, it creates obligations enforceable in federal court. A non-self-executing treaty does not have such effect until Congress passes legislation that incorporates the treaty into domestic law. Whether a treaty is self-executing or incorporated by Congress into domestic law, people who are injured by treaty violations can file a private right of action only if the treaty or law creates a private right of action. The Terrorism Financing Convention does not create a private right of action (treaties rarely do); to the extent Congress has created a private right of action for the purpose of enforcing this Convention, affected individuals would pursue that right of action under the relevant statute.

Customary international law

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[1] The Alien Tort Statute refers to the "law of nations;" courts and commentators today refer to "customary international law" instead of "law of nations," but the meaning is roughly the same.

[2] The statements can be found in the UN treaty database; available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp.

11. Because treaties rarely create individual legal obligations enforceable in federal court, plaintiffs who file claims under the Alien Tort Statute usually argue that the conduct in question violated customary international law.

12. To establish a norm of customary international law, one must satisfy two requirements. One must show that *state practice* is consistent with the purported norm, and that there is *state consent* to the purported norm.

13. *State practice* refers to the behavior of states, that is, whether agents of the government, such as the police and military, actually comply with the purported norm. With limited and controversial exceptions that are not relevant here, a norm of customary international law can exist only if states comply with it. Perfect compliance is not necessary, but if states frequently fail to comply with an asserted norm of customary international law, that norm cannot be said to exist. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 n.29 (2004) ("that a rule as stated is as far from full realization as the one [the plaintiff] urges is evidence against its status as binding law."); Letter from John G. Bellinger III, Legal Advisor, U.S. Dept. of State, to Jakob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006) (on file with the U.S. Dept. of State) ("State Department Letter").[3]

14. *State consent* (also called *opinio juris*) means that states believe that they have a legal obligation to comply with the purported norm. A state may comply with an asserted norm of customary international law for political reasons, or for reasons of comity, but if not out of a sense of legal obligation, then the norm does not exist. In addition, the sense of legal obligation must be general; the state must consider itself obligated to all states. If a state acts in a certain way because of a treaty, then its sense of obligation is only with respect to other treaty partners, and it does not have the general sense of legal obligation necessary for establishing a norm of customary international law. Diplomatic, judicial, and other official statements may provide evidence as to whether a state acts out of a sense of legal obligation or for some other reason. In the words of the International Court of Justice, which is the judicial organ of the United Nations:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. . . . The States concerned must therefore feel that they are conforming to what

[3] In responding to a study of customary international law by the International Committee of the Red Cross, the State Department Legal Advisor commented:

> [T]he Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practiee in conneetion with actual military operations. We also are troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.

State Department Letter.

> amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

North Sea Continental Shelf Cases, 1969 I.C.J. 3, 44 (Judgment of Feb. 20).

15. The strongest evidence of customary international law consists of official policy statements that declare that a state action is being taken out of a sense of legal obligation. *See* Restatement § 103 cmt. a. A multilateral treaty can also serve as evidence of customary international law. "However, a treaty will only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles." *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 162-63 (2d Cir. 2003). General principles of law, decisions of courts interpreting international law, and the writings of scholars may also provide evidence of customary international law. *See* Statute of the International Court of Justice, June 26, 1945, Art. 38, 59 Stat. 1055, 1060, U.S.T.S. 993.

16. *International Crimes*. Most international legal obligations bind states, not individuals or private entities. For example, if a government orders security personnel to spy on a diplomat in violation of the international law governing the treatment of diplomats, then the legal violation was committed by the state, not by the people who gave and carried out the orders to spy. The injured state would have a remedy against the wrongdoing state (such as reparations), not against the individuals, who could not be held criminally or civilly liable for their actions under international law.

17. International law does recognize, in a few instances, international liability for individuals. A small number of international crimes exist, such as war crimes, genocide, and piracy. An individual who commits an international crime may be prosecuted by a specially constituted international tribunal such as the Nuremberg Tribunal. In recent years, most states (but not the United States) have agreed to the creation of a permanent international criminal tribunal known as the International Criminal Court. The Rome Statute of 1998, which established that court, provides it with jurisdiction over war crimes, crimes against humanity, and genocide, but not over terrorism or support for terrorism. Rome Statute of the International Criminal Court, July 17, 1998, Art. 5, 2187 U.N.T.S. 90.

18. Most behavior that we recognize as criminal in domestic law is *not* an international crime. "Ordinary" murder or armed robbery, for example, is not an international crime. It is therefore clear that an act does not become an international crime merely because it is atrocious or evil. For an act to be an international crime, states must agree that the act is of *international or mutual concern.*[4] A murder that takes place in Russia is not of concern to the United States; it is

[4] An often-cited definition of international crime is:

understood that states are, for the most part, responsible for regulating behavior on their own territory. By contrast, piracy is an international crime because, under international law, no state has the power to regulate conduct on the high seas, aside from conduct occurring on ships bearing its own flag. Hundreds of years ago states agreed to recognize an exception to this rule for piracy because piracy posed a threat to all states. By declaring piracy an international crime, states gave permission to any state whose navy captured a pirate to try and punish him, regardless of the nationality of the ship's flag, the pirates, or their victims.

19. The Relevance of Sosa. In *Sosa*, the Supreme Court further clarified the means by which norms of customary international law are to be identified for the purpose of the Alien Tort Statute. The Court said that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 [the Alien Tort Statute] was enacted." *Sosa*, 542 U.S. at 732. The Court offered the example of piracy and found that the asserted norm in the *Sosa* case—against arbitrary arrest—was not in fact a norm of customary international law of sufficient definiteness and acceptance. The plaintiff's two main sources—the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights—did not suffice to establish a norm of customary international law against arbitrary arrest. In addition, the Court did not accept the plaintiff's attempt to establish a norm by piling up sources, such as hortatory documents, that might seem impressive in aggregate but individually provide little or no evidence of state consent or practice. *See Sosa*, 542 U.S. at 734-38.

20. It is not sufficient, under *Sosa*'s approach, for a court to believe that, on balance, international law appears to prohibit the defendants' conduct, or that international law contains a universally recognized general principle that arguably extends to the defendants' conduct. Rather, the inquiry is whether international law contains an undisputed rule defined specifically and uncontroversially to include the defendants' conduct.

The Alleged Norms Against Terrorism and Material Support of Terrorism

21. The Aceves Declaration asserts that "International law firmly prohibits terrorism and providing support for terrorism. These norms are well-established and universal." Aceves Declaration, p. 2. Terrorism is defined as "attacks against civilian populations." Id., p. 3. In fact, none of the sources that Aceves cites uses his definition, which would appear to include ordinary criminal behavior, such as gang violence directed against people who live on the gang's territory, and the use of military force during wartime, such as the American bombing of German and Japanese cities during World War II.

> An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.

United States v. List (The Hostages Trial) (U.S. Mil. Trib. Nuremberg 1948), in 8 Law Reports of Trials of War Criminals 34 (U.N. War Crimes Comm'n ed., 1949).

22. The sources cited by Aceves provide narrower definitions; however, as I discuss below, these definitions are not widely accepted at a level of specificity that is necessary for finding a norm of customary international law, especially under the heightened *Sosa* standard.

23. The Aceves Declaration does not appear to claim that Chiquita violated any particular treaty obligation of the United States. Rather, it argues that Chiquita violated a norm of customary international law, and it is that claim that I will address. As I note below, the Financing Convention (and all other treaties discussed in the Aceves Declaration) creates obligations for states, not for individuals; it is non-self-executing; and it does not create a private right of action.

The Financing Convention

24. In 2002, the Financing Convention entered into force. The Convention makes it an offense to "provide[] or collect[] funds with the intention that they should be used or in the knowledge that they are to be used … in order to carry out: (a) An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or seriously bodily injury to a civilian … when the purpose of such act … is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." Financing Convention, Art. 2(1). The treaties listed in the annex create various offenses: for example, the International Convention for the Suppression of Terrorist Bombings prohibits certain types of bombings. Thus, the Financing Convention prohibits the financing of these types of bombings for states that have ratified the Bombings Convention, but not for states that have not.

25. Like most treaties, the Financing Convention created new treaty-based legal obligations on the part of states. Under the Convention, each state "shall adopt such measures as may be necessary … to establish as criminal offences under its domestic law the offences set forth in article 2 …." Financing Convention, Art. 4(a). Compliance with the treaty mainly takes the form of governments enacting new domestic criminal law that incorporates the treaty's provisions.

The Financing Convention Did Not "Codify" Prior Norms of International Law

26. The Aceves Declaration claims that the Financing Convention "codified preexisting practice" (Aceves Declaration, p. 4), and thus implies that a norm of customary international law against terrorist financing predated adoption of the treaty in 2002. *See* Response, p. 25.

27. However, the Convention did not purport to recognize an existing customary international law norm against terrorist financing. The international treaties and other sources cited by the Aceves Declaration and Plaintiffs do not suffice to create such a preexisting norm. The Preamble of the Convention notes "that existing multilateral legal instruments do not expressly address such financing." Financing Convention, Preamble. By contrast, some treaties do recognize existing customary international law. For example, the Genocide Convention, Art. 1, says that "The Contracting Parties *confirm* that genocide … is a crime under international law…." Genocide Convention, Art. 1 (emphasis added). Instead of confirming or recognizing an

existing international norm, the Financing Convention creates a new offense and provides that it will be enforced by states, which are to include that offense in their criminal codes.

28. In addition, the fact that parties are permitted to enter reservations limiting their obligations under the Convention shows that the states did not recognize these obligations as norms of customary international law whose legal force predated the Convention's entry into force, as states are not permitted to unilaterally exclude themselves from existing norms of customary international law. *See* North Sea Continental Shelf Cases, 1969 ICJ Reports 4, 38-39. The language in the treaty thus shows that prior to 2002 states recognized no norm of customary international law that prohibited terrorist financing.

The Financing Convention Did Not Bring Into Existence New Customary International Law

29. Thus, for there to be a customary international law norm against terrorist financing, it would have to be the case that the Convention helped establish a *new* norm of customary international law—that, in effect, the drafting of the Convention provoked or encouraged states to recognize a new norm. Proof of such a new norm would exist only if "an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles." *Flores*, 343 F.3d, at 162-63 (emphasis in original). It would have to be shown that the norms incorporated in the treaty are sufficiently definite to be customary international law. And it would have to be shown that state practice has converged with extraordinary rapidity, as the treaty came into force only two years before the alleged payments from Chiquita ceased. None of these showings have been made.

30. As of February 2004, when the alleged payments ceased, 111 states were parties to the Convention. At the time, 192 states were members of the United Nations, so only 58 percent of nations had ratified the treaty. Notably, Colombia was not one of those nations; it ratified the Convention in September 2004. Several other major states did not ratify the Convention until after 2004, including China (which ratified the Convention in 2006), Egypt (2005), Indonesia (2006), Malaysia (2007), and Saudi Arabia (2007).[5] For this reason, ratifications of the Financing Convention do not provide evidence that a norm against terrorist financing or support received widespread acceptance among nations.

31. Even among the states that have ratified the Convention, a great deal of disagreement exists about which acts count as terrorism in violation of international law. The Convention makes it an offense to finance an offense defined in one of the nine treaties listed in the Convention's annex, but also allows states, by declaration, to avoid being legally obligated to recognize offences in treaties they have not ratified. Numerous states have done just this. For example, Indonesia has not ratified five of those treaties and therefore has no international obligation to combat financing of the types of violent crime that are covered by those treaties.[6]

32. In addition, many parties to the treaties have issued reservations and declarations that narrow or reject aspects of the definition of terrorism in the treaty, provoking responses by other states claiming that those reservations are invalid. For example, Egypt, Jordan, and Syria claim

[5] Available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp.
[6] *Id.*

that the definition of terrorism in the treaty does not encompass the violent activities of national liberation movements, while the United States, the United Kingdom, and other countries disagree.[7] Thus, there remains great controversy over what forms of terrorist financing are, and ought to be, banned by international law.

33. In sum, in 2004 a bit more than half the states agreed that terrorist financing should be banned, while disagreeing among themselves about what terrorist financing means. A customary international law norm against terrorist financing did not exist.

The Failure to Agree on a Terrorism Treaty

34. It is a striking fact that although states have managed to negotiate a Financing Convention, they have failed to negotiate a comprehensive terrorism treaty because of failure to agree to a definition of terrorism. This failure reinforces the conclusion that the Financing Convention reflects weak and transitory agreement about the meaning of terrorist financing even among the states that ratified it.

35. The United States and many other countries have long deplored the absence of a definition of terrorism that commands universal acceptance. The absence of such a definition was recognized as far back as 1985, by the D.C. Circuit, *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and as recently as 2003, by the Second Circuit, *see U.S. v. Yousef*, 327 F.3d 56, 107 (2d Cir. 2003) ("there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism").

36. Because states could not agree on the meaning of terrorism, they opted to craft narrow treaties that prohibited certain types of terrorism-related activity, such as hijacking of aircraft, under limited conditions. Rather than define terrorism, these treaties identified certain violent acts—bombings, hijackings, and so forth—and provided that states should provide for extradition and offer other forms of mutual assistance when the offenders and victims have multiple nationalities or the acts occurred in the territory of one state while involving nationals of at least one other state. To avoid reaching an impasse, the states tried to refrain from defining "terrorism."

37. The disagreement about the meaning of terrorism dogged other efforts to advance international criminal law. During the negotiations that led to the Rome Statute of 1998, several countries sought to give the International Criminal Court jurisdiction over terrorism, but this effort failed, and the Rome Statute does not give the Court jurisdiction over terrorism. Its jurisdiction is limited to war crimes, genocide, and crimes against humanity. *See* Geoffrey Robertson, Crimes Against Humanity 358 (2d ed. 2002).

38. Meanwhile, recognizing the lack of agreement about the meaning of terrorism, the UN established a committee to negotiate a terrorism treaty. Writing in 2003, one scholar summarized that committee's failure:

[7] *Id.*

> Since the fall of 2000, this group has continued its efforts to conclude a Comprehensive Convention on International Terrorism. Negotiators are grappling with the difficult issue of defining terrorism. Some states still want their friends to be able to use terrorism to advance their favorite causes. The oft-repeated phrase, "one's man [sic] terrorist is another man's freedom fighter," unfortunately remains relevant.

Eric Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 Am. J. Int'l. L. 333, 334 (2003) (footnotes omitted). The absence of a universally recognized legal definition of terrorism was again recognized in 2005, after the alleged payments by Chiquita had ceased, by the Secretary-General of the United Nations, who cited continuing disagreement on this issue as a threat to global security, and urged states to establish such a definition by treaty. Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All ¶ 91 (2005).[8] Recent years have brought no more progress.

39. Plaintiffs argue that "[d]isagreements about certain aspects of the definition of terrorism do not undermine the core prohibition of it." Response, p. 23. However, if states cannot enter a treaty that clearly defines terrorism because of a disagreement about non-core issues, then the absence of the treaty deprives observers of evidence about the beliefs of the states, without which one cannot come to any conclusions about customary international law. Plaintiffs must come forth with positive evidence of a consensus; they cannot satisfy this requirement by claiming that under some hypothetical set of conditions, where states had chosen to put aside their differences about non-core issues, they would have agreed on the core issues.

UN General Assembly Resolutions

40. The Aceves Declaration observes that the Preamble of the Financing Convention "references numerous General Assembly Resolutions, [which] indicates that the Convention codified existing practice rather than establishing new international norms." Aceves Declaration, p. 4. However, the General Assembly does not have the power to make binding law, and its resolutions do not establish the existence of norms of customary international law.

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[8] *See also* Madeleine Albright, *et al.*, A New U.N., The Wall Street Journal, July 8, 2005, p. A10 ("Furthermore, the U.N. member states should seize this opportunity to define terrorism by aecepting the U.N. secretary general's definition. The failure to develop such an agreed definition in the past has complicated international diplomacy and slowed global eounterterrorism efforts."). In the words of the ad hoc committee charged with drafting a comprehensive terrorism treaty:

> As a background note, finalizing the comprehensive convention has been elusive. A major point of difference has been the lack of agreement on whether the activities of "armed forees" proper should be exempted from the scope of application of the convention since those are governed by international humanitarian law, and whether the exemption should also cover armed resistance groups involved in struggles against colonial domination and foreign occupation. There is also disagreement regarding activities of a State's military forces and whether there should be any cireumstance in which official aetions could be considered acts of terrorism.

General Assembly, Department of Public Information, Ad Hoc Body Elaborating Comprehensive Convention on Terrorism to Reeonvene Early Next Year, Sixth Committee Decides, UN Doc. GA/L/3292 (Nov. 29, 2005).

41. General Assembly resolutions may provide evidence of state consent to a norm of international law, but they do so only if in fact they suggest that states consider themselves legally obligated to obey such a norm. None of the resolutions cited by the Aceves declaration does so.

42. For example, Resolution 50/6 merely states that UN members will "[a]ct together to defeat the threats to States and people posed by terrorism, in all its forms and manifestations." UN General Assembly Res. 50/6, UN Doc. A/RES/50/6 (Oct. 24, 1994), ¶ 1. Resolution 49/60 proclaims that UN members "solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed." UN General Assembly Res. 49/60, UN Doc. A/RES/49/60 (Dec. 9, 1994), ¶ 1. All the other resolutions cited in the Aceves Declaration similarly condemn terrorism without defining it or claiming that terrorism, let alone the financing of terrorism, is an international crime.

43. These resolutions have no legal status. The General Assembly does not have the power to make international law. Nor do the resolutions purport to establish or recognize norms of customary international law. They are, rather, political documents that indicate that many states believe that a serious problem exists and that it should be addressed in some way. Such political expressions no more have the force of law than do unpassed bills, legislative proposals, concurrent resolutions, and other documents that politicians use to advocate domestic legal change when they do not have the means to effectuate it.

44. If the General Assembly resolutions clearly showed that states recognized a norm against terrorism in existing international law, then they would provide evidence of customary international law. But they do no such thing. Instead, they express an aspiration that states later tried to realize in the Financing Convention and other terrorism-related treaties. Only these treaties are relevant sources of law. Therefore, the Resolutions cited by the Aceves Declaration provide no evidence of a customary international law norm against material support of terrorism.

UN Security Council Resolution 1373

45. The Aceves Declaration also cites UN Security Council Resolution 1373, which was adopted in 2001. UN Security Council Resolution 1373, UN Doc. S/RES/1373 (Sept. 28, 2001). A Security Council resolution, unlike a General Assembly resolution, does have binding legal effect on all nations. However, Resolution 1373 did not purport to create international criminal liability for terrorist acts or financial or other material support for terrorism; nor did it purport to recognize such a crime in customary international law. Therefore, it provides no evidence that such a norm exists or existed at the time that it was adopted.

46. Resolution 1373 provides that *states* shall refrain from financing terrorism and take steps to prevent the private financing of terrorism, including through the enactment of criminal laws. [9] If a state fails to pass such legislation, it violates international law, and it may be sanctioned by

[9] The UN Charter is a non-self-executing treaty; thus, Security Council resolutions cannot automatically become American domestic law.

the Security Council, but it does not follow that individuals who engage in the acts that states were directed to criminalize by Resolution 1373 commit an international crime. The Resolution does not define "terrorism" but instead calls upon states to ratify existing terrorism-related treaties. Unlike, for example, the Genocide Convention (*see supra* ¶ 8), Resolution 1373 fails to say that an international crime already exists; it also does not declare that material support of terrorism is an international crime.

47. The absence of an international crime of terrorist financing explains why Resolution 1373, ¶ 3(d) calls upon states to "[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999." If Resolution 1373 itself had been intended as an act of legislation that created new international crimes by fiat, then it would have served no purpose for the Resolution to call upon states to ratify treaties that provided for those same international crimes. The Security Council appeared to believe that treaty ratification was necessary and proper for creating new law to fill the existing legal vacuum—in particular, the absence of a widely accepted and specific definition of terrorism and terrorist financing.

48. The reason that Resoloution 1373 did not define "terrorism" or "terrorist financing" is that the Security Council failed to achieve consensus as to the meaning of these terms. The problem was handed off to the General Assembly, which was supposed to negotiate a comprehensive terrorism treaty for ratification by states but never succeeded in doing so.

> One of the reasons the CTC [the Counter-Terrorism Committee, a Security Council committee] has maintained such broad support from member states is that it has been able to avoid dealing with the divisive issue of the definition of "terrorism." Resolution 1373 does not include a single definition; rather, it allows each member state to define terrorism under its domestic system.... The Council has left the discussion of a single definition to the General Assembly, in particular the Sixth (Legal) Committee, which is currently engaged in negotiations on a Comprehensive Convention on International Terrorism. As noted above, these negotiations are stalled precisely as a result of an inability to reach a consensus on this issue.[10]

Rosand, *supra*, at 339-40 (footnote omitted).

49. In sum, Resolution 1373 directed states to ratify existing treaties and urged states to improve their domestic enforcement practices, but it neither created nor recognized a norm of customary international law against terrorism or terrorist financing or support.

Regional Treaties Related to Terrorism

[10] *See also* Stefan Talmon, The Security Council as World Legislature, 99 Am. J. Int'l. L. 175, 189 (2005) ("the international community still has not arrived at a consensus on the definition of terrorism"); Jean-Marc Sorel, Some Questions About the Definition of Terrorism and the Fight Against Its Financing, 14 Eur. J. Int'l L. 365, 370 (2003) ("the agreement on the need for a definition [of terrorism] is not matched by an agreement on what its content should be").

50. The Aceves Declaration also cites three regional treaties and argues that they provide further evidence that a norm of customary international law prohibits terrorism and support of terrorism. Aceves Declaration, p. 11-14. Plaintiffs cite several more. Response, p. 25 n. 18. However, these treaties provide no such evidence.

51. The Inter-American Convention Against Terrorism, June 3, 2002, does not include a definition of terrorism but incorporates the definitions in the UN terrorism treaties; only twelve of 34 states had ratified this treaty by the end of 2004. The Organization of the Islamic Conferences' Convention on Combating Terrorism, July 1, 1999, does contain a definition of terrorism but excludes from the definition "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law" (Art. 2). The Organization of Africa Unity's Convention on the Prevention and Combating of Terrorism, July 14, 1999, also excludes national liberation movements (Art. 3). The European Convention on the Suppression of Terrorism, Jan. 27, 1977, does not define terrorism but facilitates extradition and other forms of mutual assistance with respect to a list of violent crimes. The South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism, Nov. 4, 1987, defines terrorism so broadly as to include almost any violent act, as does the Treaty on Cooperation Among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999.[11]

52. These treaties indicate that "terrorism" is understood differently in different regions of the world, from which it follows that there is no universal or widespread definition of terrorism.

The Comparison to Piracy and Other International Crimes

53. The fundamental principle of international law is that of sovereignty, according to which every state has the exclusive right to regulate behavior on its own territory and no right to regulate behavior on foreign territory. The principle of sovereignty arose from the recognition that when governments claim an interest in how people in foreign territories are treated by their governments, conflict and war often result. International criminal law carves out exceptions to the principle of sovereignty in narrow conditions where states have a legitimate interest in how a foreign state regulates its own population.

54. As noted in ¶ 18, the international crime of piracy reflected the special status of the high seas. Because traditionally states had no jurisdiction over foreign ships on the high seas, the high seas were virtually lawless. In such a legal vacuum, piracy springs into existence and poses a threat to international trade. States accordingly agreed to allow each other to pursue, try, and punish pirates so that the high seas would be safe. In relaxing their exclusive jurisdiction over

[11] After citing various treaties, the Convention defines terrorist acts to include:

> Murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property.

Art. 1(e).

ships of their own nationals, states acknowledged that piracy was an international crime, over which all states have concurrent jurisdiction. They did so because they deemed their interests in protecting their own nationals from possibly unfair enforcement efforts by foreign states subordinate to the need to maintain order on the high seas.

55. War crimes were recognized as international crimes because war is an inherently inter-state phenomenon. States have long acknowledged an interest in limiting the brutality of war, and over the centuries have agreed on a number of protections—for example, for prisoners of war and for civilians in war zones. When soldiers of one state violate these rules, the traditional principle of sovereignty would seem to suggest that the other state, if it captures the wrongdoers, would not have the power to try and punish them. Recognition of war crimes makes clear that states do indeed have that power.

56. Finally, genocide and crimes against humanity were recognized as international crimes because World War II taught the international community that atrocities of sufficient magnitude, even if directed by a government against its own population and not against the population of a foreign state, may spread across borders and result in conflict. The humanitarian basis for the principle of sovereignty—that permitting states to claim an interest in the living conditions of foreign nationals outside their territory would just lead to war—had to yield in the face of atrocities of extraordinary magnitude.

57. Piracy and war crimes were relatively easy to define and had natural limits. Piracy occurs on the high seas; war crimes require a state of war. Crimes against humanity have involved greater definitional complexity because atrocities that occur within the territory of a state are sometimes better handled by domestic law and sometimes appropriate for international law. Terrorism poses similar problems.

58. Terrorism is sometimes but not always international and of mutual concern. In the 1960s and 1970s Palestinian terrorists attacked foreigners of various nationalities, and states responded by adopting treaties that would discourage state support of terrorism and encourage international cooperation to capture terrorists. But much terrorism is purely domestic; it is just a kind of crime—murder, kidnapping—that normally would be governed by domestic law because, however bad in its effect, these acts are not of international concern. The basis for piracy, war crimes, and crimes against humanity, do not exist for terrorism. This may explain why states have had such trouble agreeing on a terrorism treaty.

59. Although it is possible that in the future states will finally come to an agreement about the nature of terrorism and terrorist support, today no such agreement exists. In 2004, when the alleged payments by Chiquita ceased, there was also no such agreement. The types of violent acts that are of international rather than domestic concern remain contested.

State Practice and Domestic Law

60. As noted in ¶ 13, a prohibition can be a norm of customary international law only if state practice is consistent with it. Treaties, UN Resolutions, and the like may provide evidence of state consent or *opinio juris*, but not state practice.

61. The Aceves Declaration provides no evidence that governments comply with their treaty obligations by investigating and prosecuting terrorist financing of the type covered by the treaty. It merely cites a few domestic statutes that implement treaty obligations. Aceves Declaration, pp. 12-14, 16. The Plaintiffs claim that these statutes constitute evidence of state practice. Response, pp. 25-26, 31. Like the Aceves Declaration, the Response does not mention any actual prosecutions or convictions.

62. However, if statutes are not enforced adequately, then state practice does not exist. It is well known that international efforts to encourage states to pass and enforce domestic laws against terrorist financing have had disappointing results. The Counter-Terrorism Committee, which was set up to implement Resolution 1373, noted in January 2004 that "it is clear that the implementation of Resolution 1373 is encountering serious problems, both at the States and at the Counter Terrorism Committee levels." [12] States are unwilling to make counterterrorism a priority and prefer to concentrate resources on other matters of concern. As recently as this year, the Committee commented, in a report cited by Plaintiffs (Response, p. 25 n. 20):

> However, effective implementation [of Resolution 1373] remains elusive. Some regions still lack the basic components of a regime to counter terrorist financing, and implementation in other regions is uneven. Many States do not yet have in place the necessary laws, policies, institutions or trained staff. A major shortfall for many States, particularly those in East and West Africa, the Pacific islands region, South-East Asia and Latin America, is the absence of laws criminalizing the financing of terrorism in accordance with paragraph 1(b) of the resolution. Moreover, very few States have introduced effective mechanisms to implement fully the provisions that require States to freeze without delay the funds and assets of terrorists, as required by paragraph 1(c) of the resolution. The capacity to do so requires several components, which are absent in almost all States.

Survey of the Implementation of Security Council Resolution 1373, UN Doc. S/2008/379, ¶ 145 (2008).[13]

63. This report reveals that few states have put into place adequate laws and institutions for combating terrorist financing, almost four years after the transfers alleged by the Plaintiffs ceased. The absence of consistent state practice that supports the alleged norm against terrorist financing reflects the unfortunate fact that states' priorities lie elsewhere.[14]

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[12] *See* Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001), UN Doc. S/2004/70 (January 26, 2004), at p. 15; available at http://daccessdds.un.org/doc/UNDOC/GEN/N04/219/97/PDF/N0421997.pdf?OpenElement.

[13] Available at http://daccessdds.un.org/doc/UNDOC/GEN/N08/375/56/PDF/N0837556.pdf?OpenElement.

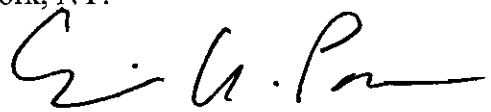
[14] *See* Sorel, *supra*, at 377 ("States have often hesitated to equip themselves with restrictive financial legislation because the law can become an obstacle to the free flow of capital, capital which is indispensable to the economy. This reality remains true today—in the fight against financing terrorism it is difficult to persuade states that can ill afford to lose vital income."); Talmon, *supra*, at 191 (noting, in connection with Resolution 1373, a "certain compliance fatigue … among the UN member states").

64. In sum, there is little evidence that state practice is consistent with a norm against terrorist financing or support.

Conclusion

65. Chiquita did not violate a norm of customary international law that forbids terrorism or terrorist financing, or other forms of terrorist support such as supplying logistical capacity that a terrorist organization uses to commit domestic crimes, including the smuggling of drugs and arms. No such norm exists. It follows that *Sosa*'s heightened standard for the finding of customary international law for Alien Tort Statute purposes is also not satisfied.

Executed on September 18, 2008, in New York, NY.



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Work in Progress:

State Justices Project (with Stephen Choi and Mitu Gulati)

Treaties, State Size, and Development (with Tom Miles)

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Available upon request