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
_____/

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

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MISCELLANEOUS

Plaintiffs in these three related complaints[1] assert claims on behalf of more than 700 Colombian nationals who were allegedly killed or injured between 1988 and 2007 by persons associated with an organization of loosely-affiliated, private right-wing paramilitary groups in Colombia known as the Autodefensas Unidas de Colombia (the United Self-Defense Forces of Colombia or "AUC"). Plaintiffs seek to hold an American corporation, Chiquita Brands International, Inc. ("Chiquita"), liable for these deaths because Chiquita's former Colombian subsidiary was forced to make extortion payments to the AUC between 1997 and 2004, when the AUC controlled the remote, rural areas of Colombia in which Chiquita's subsidiary operated.[2] There is no allegation that anyone from Chiquita or its Colombian subsidiary participated in, facilitated, or even knew about the particular murders alleged.

Plaintiffs assert that the 200 year-old Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, supplies federal court jurisdiction for their novel claims, but this position fundamentally misapprehends the ATS and ignores recent Supreme Court precedent that compels dismissal of their complaints. Plaintiffs' extraordinary theory — which would extend a cause of action not merely to these plaintiffs but potentially to tens of thousands of additional victims of the longstanding violence in Colombia — would require this Court to engage in a dangerous and unprecedented form of activist lawmaking, far beyond anything permitted by the limited common law authority of federal courts.

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[1] As provided for in Section III of the CMO, this consolidated motion to dismiss is addressed to *John Doe 1, et al. v. Chiquita*, No. 08-cv-80421 (filed in D.N.J.) ("NJ Compl."); *Does 1-619 v. Chiquita*, No. 08-cv-80480 (filed in S.D.N.Y.) ("NY Compl."); and *Jose Lopez Valencia v. Chiquita*, No. 08-cv-80508 (filed in S.D. Fla.) ("Fla. Compl.").

[2] By filing this motion, Chiquita does not waive, and hereby expressly reserves, the right to challenge plaintiffs' designation of Chiquita as the proper party defendant in this action.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), the Supreme Court made clear that federal courts "have no congressional mandate" in ATS cases "to seek out and define new and debatable violations of the law of nations," and insisted that federal courts "exercise great caution in adapting the law of nations to private rights." Plaintiffs ask this Court to defy these principles. They seek the judicial creation of an expansive private damages remedy for foreign nationals based upon contested and imprecise international law instruments that do not come close to satisfying the demanding requirements of *Sosa*, and they assert claims that are directly at odds with Congress's explicit determination that no such cause of action should exist in these circumstances. Accepting plaintiffs' theory would have wide-ranging and deleterious practical consequences, effectively converting the federal courts into roving international civil claims tribunals adjudicating violent conflicts around the globe as mass torts with no limiting principle in sight. No court has ever recognized the causes of action asserted in this case, and several, including courts in this District, have rejected it. This Court should follow *Sosa* and do the same.

BACKGROUND

A. Allegations in the Complaints

These complaints are based upon a federal criminal Information charging Chiquita with a single-count violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705(b).[3] IEEPA prohibits a United States person from transacting with a foreign

[3] Plaintiffs expressly reference Chiquita's March 19, 2007 plea, (NJ Compl. ¶ 37; NY Compl. ¶ 856; Fla. Compl. ¶ 79), and their allegations regarding Chiquita's conduct are derived almost entirely, sometimes verbatim, from the criminal Information filed in *United States v. Chiquita Brands International, Inc.*, No. 07-CR-055 (D.D.C. Mar. 13, 2007), a copy of which is attached hereto as Exhibit A. In deciding a motion to dismiss, the Court may consider documents referred to in the complaint and central to the plaintiffs' claims. *See Rosario v. Miami-Dade County*, 490 F. Supp. 2d 1213, 1219 (S.D. Fla. 2007) (citing *Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997)). In addition, "matters of (continued…)

organization determined by the U.S. Secretary of State to be a "Specially Designated Global Terrorist" ("SDGT") without having first obtained a license from the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC"). The Information charging Chiquita with this offense was filed with the U.S. District Court for the District of Columbia on March 13, 2007, and Chiquita entered its plea of guilty on March 19, 2007.

As set forth in the Information and alleged in the complaints, Chiquita is headquartered in Cincinnati, Ohio, and is a producer, marketer, and distributor of bananas. (NJ Compl. ¶¶ 12-13; NY Compl. ¶¶ 11-12; Fla. Compl. ¶¶ 52-53; Information ¶¶ 1-2.) Until 2004, Chiquita's former Colombian subsidiary, C.I. Bananos de Exportación, S.A. ("Banadex"), owned and operated banana farms in Urabá and Santa Marta, two remote regions of Colombia. *Id.* From approximately 1989 to 1997, when left-wing guerrilla groups known as the Revolutionary Armed Forces of Colombia ("FARC") and the Ejército de Liberación Nacional ("ELN") controlled Urabá and Santa Marta, Chiquita paid money to these groups. (NY Compl. ¶ 774; Information ¶ 20.)

In or about 1997, the AUC took control of these regions from the guerrilla groups. (NY Compl. ¶ 775; Information ¶ 21.) At this time, Banadex's General Manager was summoned to a meeting with the then-leader of the AUC, Carlos Castaño, and told by Castaño that Banadex must begin making payments to the AUC. (NY Compl. ¶ 775; Information ¶ 21.) Castaño instructed Banadex to make the payments through a "convivir," a type of private security company used by the AUC as a front to collect money from businesses. (NY Compl. ¶ 775; Fla. Compl. ¶ 68; Information ¶ 21.) As plaintiffs acknowledge in their complaints, the AUC was "a

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public record . . . may be taken into account." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999).

violent, right-wing" paramilitary organization that "routinely engaged in death threats, extrajudicial killings, massacres, torture, rape, kidnapping, forced disappearances, and looting." (NY Compl. ¶¶ 705, 757; *see also* NJ Compl. ¶ 22; Fla. Compl. ¶ 62.) In the meeting with Banadex, Castaño "sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property." (Information ¶ 21.)

Confronted with this threat, beginning in late 1997 Chiquita was forced to begin making semi-monthly payments to the AUC. (*Id.*) At the time, these payments were entirely legal under U.S. law. On October 31, 2001, however, the AUC was designated a SDGT by the Secretary of State, thus prohibiting any U.S. person from engaging in transactions with the AUC without first obtaining a license or other authorization from OFAC. (Information ¶ 8.) On or about February 20, 2003, a Chiquita employee discovered that the AUC had been designated a foreign terrorist organization. (NY Compl. ¶ 811; Information ¶ 55.) Chiquita consulted its outside counsel, who advised the company that the payments had become illegal following the AUC's designation. (NY Compl. ¶ 812; NJ Compl. ¶ 35; Fla. Compl. ¶ 77; Information ¶ 56.) In April 2003, following a report to Chiquita's Board of Directors, the Board directed that the payments be promptly disclosed to the Department of Justice. (NY Compl. ¶ 815; NJ Compl. ¶ 36; Fla. Compl. ¶ 78; Information ¶ 59.)

On or about April 24, 2003, representatives of Chiquita and its counsel met with officials of the Justice Department and voluntarily disclosed the payments. (NY Compl. ¶ 818; NJ Compl. ¶ 36; Fla. Compl. ¶ 78; Information ¶ 62.) The Justice Department officials told Chiquita that "the payments were illegal and could not continue," but at the same time acknowledged "that the issue of continued payments was complicated." (NY Compl. ¶ 818; Information ¶ 62.) The precise content of the communications between Chiquita and the Justice

Department in the April 24th meeting and thereafter, including in particular the question of how Chiquita should resolve the dilemma created by the AUC's threats of violence against Chiquita's employees if the payments were discontinued, is a subject of dispute, but is immaterial to the present motion. Chiquita discontinued the payments in February 2004 and sold its Colombian operations. (NY Compl. ¶¶ 756, 773; NJ Compl. ¶ 32; Fla. Compl. ¶ 74; Information ¶ 2.)

On March 19, 2007, Chiquita entered its plea of guilty to the Information charging the violation of IEEPA. From the time of the Castaño meeting in 1997 to Chiquita's departure from Colombia in 2004, Chiquita made approximately 100 payments to the AUC totaling $1.7 million, although many of these payments predated the designation of the AUC as a SDGT. (NY Compl. ¶ 854; NJ Compl. ¶ 33; Fla. Compl. ¶ 75; Information ¶ 19.)

Aside from the facts taken from the Information, the complaints contain two additional sets of allegations regarding supposed wrongful conduct by Chiquita. Plaintiffs allege that, in 2001, weapons and ammunition were transported from Central America, unloaded at a Colombian port operated by Banadex, and "transferred to the AUC." (NY Compl. ¶¶ 859-860; NJ Compl. ¶¶ 39-40; Fla. Compl. ¶¶ 81-82.) Plaintiffs then speculate "[o]n information and belief," that Chiquita "facilitated" this transfer of weapons, as well as "at least four other[s]," and "intended to provide such support and assistance to the AUC." (NY Compl. ¶¶ 865-866; NJ Compl. ¶¶ 41-42; Fla. Compl. ¶¶ 83-84.) These information-and-belief assertions are contradicted by two public reports[4] that assign responsibility for the 2001 shipment to persons

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[4] *See* Permanent Council, Organization of American States [O.A.S.], *Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia*, at 23, O.A.S. Doc. OEA/Ser.G/CP/doc. 3687/03 (Jan. 29, 2003) ("O.A.S. Report") (attached as Exhibit B); Report of the Colombian Prosecutor's Office, Prosecutor Delegated Before the Criminal Courts, Special Circuit, National Unit Against Terrorism, Office 18, File No. 59.516, dated July 23, 2004 (attached as Exhibit C, with English (continued…)

unrelated to Chiquita or to Banadex. Notably, the report of the Colombian Prosecutor who investigated the 2001 arms shipment explicitly exonerates the only Banadex employee investigated in connection with the affair. (Prosecutor Report at 28-29.) Plaintiffs also allege that "Chiquita . . . assisted the AUC by allowing the use of its private port facilities . . . for the illegal exportation of large amounts of illegal drugs . . . ." but this allegation is likewise made "[o]n information and belief" with no supporting facts of any kind. (NY Compl. ¶ 869; NJ Compl. ¶ 43; Fla. Compl. ¶ 85.) Thus, the only *facts* alleged about Chiquita's behavior supporting plaintiffs' far-reaching claims are those admitted by Chiquita in the Information.

Despite seeking damages from Chiquita in tort for over 700 separate deaths, the complaints are largely bereft of any facts about those deaths. In the New York Complaint, the alleged victims and their family member-plaintiffs are identified by pseudonyms in a string of short, largely verbatim paragraphs that assert only that each victim "was killed," "was disappeared," or "was injured" on a particular date "by AUC Paramilitaries." (NY Compl. ¶¶ 27-686.) While the Florida plaintiffs identify the alleged victims by name, and both the New Jersey and Florida plaintiffs provide some cryptic facts regarding the circumstances of the alleged death or injury, there is nothing to link Chiquita to any of the incidents beyond the rote assertion that the murder was committed "by the AUC" and that Chiquita "support[ed] . . . the AUC." (*See* NJ Compl. ¶¶ 44-62; Fla. Compl. ¶¶ 87-250.) None of the complaints alleges that there was a meaningful relationship between any victim and Chiquita, let alone that Chiquita had any involvement in, or even knowledge of, any of the victims' alleged deaths. Moreover, while

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translation and Affidavit of Accuracy) ("Prosecutor Report"). Both the OAS Report and the Prosecutor Report are matters of public record, which may be taken into account on a motion to dismiss. *See Bryant*, 187 F.3d at 1280.

apparently seeking to base liability and causation entirely upon the assertion that Chiquita "financed" the AUC, plaintiffs allege no facts regarding the relative significance of the $1.7 million extorted from Chiquita over seven years to the overall resources of the AUC (an organization estimated to have *annual* income of $286 million[5]) or that otherwise connect these funds to the particular acts of violence for which they seek to hold Chiquita liable.

On the basis of these allegations, plaintiffs assert multiple causes of action under international law and domestic tort law, all grounded on the theory that Chiquita's "support" of the AUC renders it liable for all acts of violence perpetrated by that group.

B. The Alien Tort Statute and Standard of Review

1. The Alien Tort Statute

Like the federal question (28 U.S.C. § 1331) and diversity jurisdiction (28 U.S.C. § 1332) statutes, the ATS simply provides a basis for asserting federal subject matter jurisdiction but does not itself create any right to relief. The law was passed by the First Congress as part of the Judiciary Act of 1789, which established the original structure and jurisdiction of the federal judiciary. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. As presently codified, the one-sentence statute states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

The ATS went largely unused for nearly 200 years. Then, in 1980, the Second Circuit held that the ATS provided jurisdiction for a cause of action alleging the torture and summary

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[5] *See* United Nations Dev. Programme, El conflicto, callejón con salida: Informe nacional de desarrollo humano para Colombia [National Report on Human Development for Colombia] 285 (2003) ("UN Report") (attached as Exhibit D, with English translation and Affidavit of Accuracy).

execution of a Paraguayan citizen by a Paraguayan public official in violation of the law of nations. *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980). This holding initiated a new era of litigation under the ATS. Since *Filartiga*, ATS litigation has proceeded in two distinct phases: an initial wave of lawsuits against state officials alleged to have engaged in gross violations of international law, and, more recently, a series of largely unsuccessful suits targeting U.S. corporations alleged to be indirectly liable for human rights abuses committed by others.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court considered these novel ATS claims for the first time. While affirming that "the ATS is a jurisdictional statute creating no new causes of action," the Supreme Court nevertheless held that the first Congress enacted the ATS "understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. The Court identified only three offenses against the law of nations that were actionable in 1789: violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id*. at 715, 720. Although the Court did not exclude the possibility that additional international law violations besides these few 18th century paradigms might be recognized, the Court called for extreme caution, explaining 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 was enacted." 542 U.S. at 732.[6]

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[6] Violations of the law of nations might be based on treaties or on what is known as customary international law. Customary international law refers to the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." *See* Curtis A. Bradley *et al*, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 870 n.1 (2007) (attached as Exhibit E) (citing Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987)); *see* (continued…)

Building on this historical analysis, *Sosa* imposes two strict requirements: *First*, the rule of international law in question must be unmistakably "accepted by the civilized world" to the same demanding degree as these eighteenth-century paradigms. *Id.* at 725. *Second*, the rule must be dependably "defined with a specificity" comparable to these historical paradigms. *Id.* The Court viewed these requirements as establishing a standard that would be extremely difficult to meet, repeatedly emphasizing that the requirements would be satisfied for only "a narrow class of international norms today." *Id.* at 729.[7] By citing Justice Story's opinion in *United States v. Smith* as an exemplar, *see Sosa*, 542 U.S. at 732, the Supreme Court highlighted the demanding nature of *Sosa*'s requirements of definite content and universal acceptance. *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 . . ."); *id.* at 162 ("[T]he general practice of ***all*** nations in punishing ***all*** persons, whether natives or foreigners, who have committed this offence against any persons whatsoever.") (emphases

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also State of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (stating that international custom is a source of law that can be applied by the International Court of Justice "as evidence of a general practice accepted as law."). Whichever form of international law the violation rests on, it must still meet *Sosa*'s requirements.

[7] *See also Sosa*, 542 U.S. at 712 (ATS enabled federal courts to "hear claims in a ***very limited category***") (emphasis added); *id.* (ATS originally gave "***limited***, implicit sanction to entertain the ***handful*** of international law *cum* common law claims understood in 1789") (emphases added); *id.* at 715 (a "***narrow*** set of violations of the law of nations" were on the minds of the men who drafted the ATS) (emphasis added); *id.* at 720 (Congress intended the ATS to furnish jurisdiction "for a ***relatively modest*** set of actions alleging violations of the law of nations") (emphasis added); *id.* ("***some, but few***, torts in violation of the law of nations were understood to be within the common law" at the time of the ATS) (emphasis added); *id.* (common law "assumed ***only a very limited set of claims***" were definite and actionable under international law) (emphasis added); *id*. at 721 ("ATS was meant to underwrite litigation of a ***narrow set*** of common law actions derived from the law of nations") (emphasis added); *id.* at 724 (ATS enacted on understanding that "the common law would provide a cause of action for the ***modest number*** of international law violations with a potential for personal liability" in 1789) (emphasis added).

added); *id.* at 163-180 (illustrating through seventeen pages of citations the specificity with which the law of nations defined piracy).

In addition to these historical requirements, the Court instructed federal courts to weigh a number of prudential considerations that "argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]." 542 U.S. at 725:

- *First*, the Court emphasized the post-*Erie* rule that federal courts generally do not have the power to create substantive law: "[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in the shadow for much of the prior two centuries." *Id.* at 726.[8]

- *Second*, the Court also instructed federal courts to set "a high bar" for recognizing private causes of action for violations of international law because of "the potential implications for the foreign relations of the United States" and the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727.

- *Third*, in light of both of these separation-of-powers concerns, the Court noted that Congress may "shut the door" entirely to recognizing such causes of action — not only explicitly, but "implicitly by treaties or statutes that occupy 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).

- *Fourth* and finally, the Supreme Court directed courts to weigh practical consequences in assessing whether to craft a judicially-recognized cause of action to enforce a rule of international law: "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an

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[8] Prior to *Erie*, the federal courts were understood to possess authority to recognize and develop general common law. *See, e.g., Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (applying principles established in the general commercial law). *See generally* Bradley, *supra*, 120 Harv. L. Rev. at 881-85. However, with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts got out of the business of creating new federal common law, except in unique circumstances such as when expressly authorized by Congress, *e.g., Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), or where federal common law rules were essential to interstitial areas of particular federal interest, *e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979).

> element of judgment about the practical consequences of making that cause available to litigants in the courts." *Id.* at 732-33.

With respect to devising new common law causes of action based on international law, therefore, the Court stressed that, while "the door is still ajar," it must be "subject to vigilant doorkeeping." *Id.* at 729.

Applying these principles in *Sosa*, the Court illustrated the demanding degree to which a customary international law rule must be "accepted" and "well-defined" to be actionable under the ATS. In *Sosa*, the plaintiff sought to bring suit under the ATS for "arbitrary detention" in violation of the law of nations, but the Court rejected all of the plaintiff's proposed sources of international law as insufficient to establish an actionable norm. The Court first determined that the Universal Declaration on Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810 (1948) ("Declaration"), and the International Covenant on Civil and Political Rights, F.A. Res. 2220A(xxi), 21 U.S. Doc., GAOR Supp. (No. 16) at 52, U.S. Doc. A/6316 (1966) ("ICCPR"), two pertinent international treaties that plaintiff alleged were central to his claim, had "little utility under the standard set out in this opinion." 542 U.S. at 734. As the Court stated, the Declaration "does not of its own force impose obligations as a matter of international law." *Id.*

The Court likewise rejected reliance on the ICCPR because it was not self-executing and thus was not enforceable in U.S. courts. *Id.* at 735. The Court easily rejected the remaining sources of customary international law cited — including the Restatement (Third) of Foreign Relations Law of the United States, a survey of national constitutions on the topic of arbitrary detention, and a case from the International Court of Justice — reasoning that the sources suffered from too "high [a] level of generality," *id.* at 737 n.27, lacked "the certainty afforded by [the] three [paradigmatic] common law offenses," *id.* at 737, and were, in any event, insufficient

to support "the creation by judges of a private cause of action," *id.* at 738 n.29. In the absence of sufficient support, *Sosa* found no jurisdiction for plaintiff's "arbitrary detention" claim.

2. Pleading Standard

Chiquita moves to dismiss the ATS claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and to dismiss all claims for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Based on the significant foreign policy consequences of ATS litigation, claims brought under the ATS must satisfy a heightened pleading standard in order to survive a motion to dismiss. *See In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006) (applying "heightened pleading standard when determining whether the complaints . . . sufficiently plead facts showing that Defendants violated the law of nations"). Likewise, because plaintiffs must allege an actual "violation of the law of nations" to establish subject matter jurisdiction under the ATS, courts must "engage[] in a more searching preliminary review of the merits [at the motion to dismiss stage] than is required, for example, under the more flexible 'arising under' formulation" of the federal-question statute, 28 U.S.C. § 1331. *Filartiga*, 630 F. 2d at 887-88; *see also Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (citations omitted) ("In assessing whether plaintiffs have stated a claim under the Alien Tort Statute, courts must conduct a more searching merits-based inquiry than is required in a less sensitive arena."). Plaintiffs cannot survive a motion to dismiss in an ATS case by "plead[ing] merely a colorable violation of the law of nations." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

For all other claims in these complaints, plaintiffs must still plead allegations sufficient to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. Conclusory allegations and unwarranted inferences are not sufficient. A complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

While plaintiffs' allegations are presumed to be true, and all reasonable inferences are drawn in their favor, *Jackson v. Okaloosa County, Florida*, 21 F.3d 1531, 1534 (11th Cir. 1994), "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do.[9] Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S.Ct. at 1964-65 (citations omitted). Moreover, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262-63 (11th Cir. 2004).

ARGUMENT

The complaints assert (i) that Chiquita may be held civilly liable under the law of nations for providing material support to a terrorist organization; (ii) that Chiquita, based on the same generic allegations of "support," is indirectly liable as a purported "aider and abettor" or "conspirator" of the unknown paramilitary actors who committed each of the individual "extrajudical killings" or other supposed international law violations alleged in the complaints; and (iii) that Chiquita is liable under domestic law provisions such as the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, or state tort law. However, the complaints fail to establish jurisdiction under the ATS or to state any cause of action. The purported

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[9] "'Bald assertions' will not overcome a Rule 12(b)(6) motion." *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.2d 53, 55, 56 (1st Cir. 1999) (affirming dismissal for failure to state a claim when complaint failed to allege "a factual predicate concrete enough to warrant further proceedings" and provided mere "speculations."')). Likewise, "[p]leadings must be something more than an ingenious academic exercise in the conceivable." *Aldana*, 416 F.3d at 1248 (quoting *Wagner v. Daewoo Heave Indus. Am. Corp.*, 289 F.3d 1268, 1270 (11th Cir. 2002), *rev'd en banc on other grounds*, 314 F.3d 541 (11th Cir. 2002)). Finally, "'unwarranted deductions of fact' are not admitted as true in a motion to dismiss." *Aldana*, 416 F.3d at 1248 (quoting *Fla. Water Dist. Mgmt. Dist. v. Montalvo*, 84 F.2d 402, 408 n.10 (11th Cir. 1996)).

international law claims are not cognizable under the ATS, and plaintiffs do not adequately plead the elements of any of their claims.

Plaintiffs Have No Cognizable ATS Claim. Neither plaintiffs' material support claim, nor their claim for indirect liability for hundreds of separate extrajudicial killings or other violations, meets the stringent conditions of *Sosa* necessary to fall within the "narrow class" of offenses actionable under the ATS:

*As explained in **Part I***, federal courts have no jurisdiction over terrorism-related claims based in international law because Congress has already "occupied the field." In the Anti-Terrorism Act ("ATA"), 18 U.S.C § 2333, Congress chose to limit private rights of action for terrorism to U.S. nationals, and imposed a host of restrictions on such claims, including a four-year statute of limitations. This congressional action forecloses recognition of a parallel and broader cause of action for foreign nationals under the auspices of the ATS.

In any event, *as shown in **Part II***, there simply is no "clearly defined" and "universally accepted" rule of international law establishing civil liability for providing material support to terrorism. The international law sources cited by plaintiffs do not support such a claim, nor has any federal court recognized it.

Moreover, *as described in **Part III***, the profound foreign relations and practical consequences of recognizing a cause of action under international law for these novel claims — consequences which *Sosa* directs this Court to consider — militate strongly against lowering the ATS bar and allowing these claims to proceed, whatever their purported support. A contrary result would open the federal courthouse door to mass tort claims by foreign nationals attempting to adjudicate violent conflicts across the globe, and would impose the costs of such strike suits on every American corporation that does business in unsafe or unstable locales around the world.

As demonstrated in ***Part IV***, plaintiffs cannot evade these limitations of the law of nations by recasting their material support claim as claims that Chiquita should be held indirectly liable for hundreds of "extrajudical killings" or other supposed international law violations allegedly committed by the AUC. The Supreme Court has acknowledged that there is no rule of civil liability for conspiracy under international law. And while this Circuit has accepted a claim of civil aiding and abetting under international law in certain limited instances, it has done so only where the plaintiff alleges that the defendant had the specific intent to cause — and provided substantial assistance to cause — a precise tort. Plaintiffs make no such allegations here, nor can they; their theory is that Chiquita is liable solely because it provided an immaterial portion of the financial resources of a group it knew to be violent. Their attempt to plead material support as an indirect claim can, and must, fare no better than their attempt to plead it directly.

Plaintiffs Have Failed Adequately to Plead the Elements of Their Claims. Even were plaintiffs' claims cognizable, plaintiffs fail to allege the fundamental elements that would be necessary to support such a claim:

As explained in ***Part V***, plaintiffs make no particularized allegations establishing the elements of each of the more than 700 individual claims asserted, each of which must be adequately pled no differently than if they were asserted in 700 different lawsuits. *As* ***Parts VI and VII*** *show*, plaintiffs similarly fail to plead sufficiently the elements of their domestic law claims. In light of these many and insuperable deficiencies, the complaints should be dismissed in their entirety with prejudice.

I. Congress's Consideration Of The Proper Scope Of Civil Remedies For Terrorism-Related Conduct Precludes Plaintiffs' Attempt To Hold Chiquita Liable By Appeal To International Law.

Congress and the Executive have, on several occasions, expressly considered the issue of terrorist activity and financial support for terrorism, and declined to extend a civil action in

federal courts to foreign victims of terrorist attacks. This express congressional action "occupies the field" and thus precludes recognizing broader civil liability through federal common lawmaking under the auspices of the ATS. *See Sosa*, 542 U.S. at 731 (Congress can "shut the door" entirely to recognizing such causes of action through "statutes that occupy the field").

When Congress enacted the ATA in 1986, it made participation in acts of international terrorism that harmed U.S. nationals a criminal offense. *See* Pub. L. No. 99-399, Title XII, § 1202(a), 100 Stat. 853 (1986). In 1992, Congress amended the statute to create a civil remedy for certain victims of terrorist attacks. Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521-24 (1992) (codified, as amended, at 18 U.S.C § 2333). In doing so, however, Congress chose to impose a number of limitations on the scope of the cause of action that are inconsistent with, and would be impinged upon by, plaintiffs' proposed material-support claim:

- Congress made the civil remedy available only to ***U.S. nationals*** injured by acts of international terrorism. 18 U.S.C. § 2333(a).[10]
- Congress imposed a ***four-year statute of limitations*** on claims under the ATA. 18 U.S.C. § 2335(a).
- Congress required plaintiffs to establish ***a causal connection*** between their injuries and the acts of the defendant. 18 U.S.C. § 2333(a) (remedy available only for injuries suffered "by reason of" an act of international terrorism).
- Congress limited the civil remedy to ***intentional acts***. 18 U.S.C. § 2331(1)(B) (remedy availably only for acts "intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping").

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[10] The ATA's particular focus on American victims is reinforced by its legislative history. *See, e.g.*, Senate Floor Debate on Fed. Courts Admin. Act of 1992, Cong. Record-Senate at S17254 (Oct. 7, 1992) (Sen. Grassley: "***American victims*** will be able to bring a claim against a terrorist group for money damages.") (emphasis added).

Congress's determination not to extend access to the federal courts to foreign victims of terrorism for civil damages actions was reiterated in 2002, when Congress enacted implementing legislation for the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, 1, U.S. Doc A/RES/54/109 (Dec. 9, 1999) ("Financing Convention"). As discussed below in Part II.B.2.a, the Financing Convention requires states to prohibit the financing of certain specified politically or ideologically motivated crimes. The implementing legislation again provided for criminal liability for the provision of funding for certain terrorist acts, but did not create a private cause of action. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, Title II, 116 Stat. 721, 724.

Congress's deliberate decisions not to provide a private right of action to foreign victims of terrorism are fatal to plaintiffs' attempt to impose liability on Chiquita in this case. As *Sosa* explained, courts should generally "look for legislative guidance before exercising innovative authority under substantive law," 542 U.S. at 726, and "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *id.* at 727. The force of this warning is most compelling where, as here, a court would be acting not merely against a backdrop of congressional silence, but in the teeth of a clear indication that the prohibition of material support of terrorism is not to be enforced through a private damages action by foreign plaintiffs. *Cf. id.* at 749 (Scalia, J., concurring). For a federal court to expand civil liability through federal common lawmaking — whether by creating direct liability for providing material support to terrorists or indirect liability for aiding and abetting the acts of terrorists — in an area where Congress has already "occupied the field" and provided a carefully-limited private right of action would be a direct affront to the primacy of Congress.

II. Plaintiffs' Claims Are Not Based On Any "Clearly Defined" and "Universally Accepted" Rule of International Law.

The gravamen of plaintiffs' complaints is that Chiquita made payments to private paramilitary organizations in Colombia that committed tortious acts for which Chiquita should be held responsible. Even if Congress had not foreclosed such claims, they would not be cognizable because they do not meet the stringent requirements of *Sosa*.

First, federal courts, including two judges in this District, have rejected precisely such claims. As these courts recognize, there is no clearly defined rule of international law prohibiting material support of terrorism — indeed, there is not even consensus on the definition of terrorism or the proscription of it. *See infra* Section A.

Second, none of the sources relied upon by plaintiffs begin to establish a widely-accepted and well-defined rule of customary international law that would permit a court to recognize a cause of action under the ATS for material support of terrorism. *See infra* Section B.

Third, even if such a norm existed, it would be limited to a criminal prohibition and could not support imposition of civil liability. *See infra* Section C.

A. Federal Courts Have Repeatedly Rejected ATS Claims Similar to Those Advanced By the Plaintiffs Here.

No federal court has ever found a terrorism-based claim based on the theory asserted here cognizable under the ATS. To the contrary, courts, including two judges in this District, have rejected the argument that material support for terrorism is a cognizable cause of action under the ATS. *See Barboza v. Drummond Co.*, No. 1:06-cv-61527, slip op. at 3 (S.D. Fla. July, 17, 2007) (attached as Exhibit F); *Saperstein v. Palestinian Auth.*, No. 1:04-cv-20225-PAS, 2006 WL 3804718, at *7 (S.D. Fla. Dec. 22, 2006) (attached as Exhibit G). This Court should do the same.

In *Saperstein*, plaintiffs brought suit under the ATS against the Palestinian Authority and the Palestine Liberation Organization, alleging that the defendants sponsored terrorist acts against Jewish civilians as well as provided financial support to terrorist entities. 2006 WL 3804718, at *2, *7 n.15. The court, after emphasizing that *Sosa* "admonished the lower federal courts to be extremely cautious about discovering new offenses among the law of nations," engaged in a careful analysis of prior ATS decisions and international agreements to determine whether terrorism-related allegations, including the provision of financial support, constituted a violation of the law of nations. *Id.* at *4, *7. Based on its analysis, the court concluded that "it [is] abundantly clear that politically motivated terrorism has not reached the status of a violation of the law of nations." *Id.* at *7 (citation omitted).

Saperstein is consistent with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), a leading pre-*Sosa* decision addressing whether terrorism-related allegations state a claim under the ATS. In *Tel Oren*, the victims of a 1978 terrorist attack in Israel sued several defendants, including private organizations accused of sponsoring terrorism. The D.C. Circuit rejected plaintiffs' attempt to bring terrorism-based claims under the ATS. *Id.* at 795-96. In a concurring opinion, Judge Edwards considered whether terrorism was a violation of the law of nations and stated:

> While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus . . . . Given such disharmony, I cannot conclude that the law of nations — which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe — outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.

Id.; *see also id.* at 806 (Bork, J., concurring) (agreeing that plaintiffs' "principal claim, that [defendants] violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus").

The lack of consensus on a general definition of terrorism observed in *Tel-Oren* continues today. "We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription," the Second Circuit recently concluded in a non-ATS case, adding that "the mere existence of the phrase 'state-sponsored terrorism' proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law," and that "there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism." *United States v. Yousef*, 327 F.3d 56, 106-08 (2d Cir. 2003); *see also Mwani v. Bin Laden*, No. Civ. A 99-125, 2006 WL 3422208, at *3 n.2 (D.D.C. Sept. 28, 2006) (stating that "[t]he law is seemingly unsettled with respect to defining terrorism as a violation of the law of nations").

The continuing disagreement regarding the definition of "terrorism" is amply illustrated by the fact that an ad hoc committee of the U.N. General Assembly has been laboring over a draft Comprehensive Convention on International Terrorism ***since 1996***, but has been "stymied by the inability to agree on a definition of terrorism." *See* Stephen Marks, *Branding the "War on Terrorism": Is There a "New Paradigm" of International Law?* 14 Mich. St. J. Int'l L. 71, 77 (2006). As recently as March 6, 2008, this ad hoc committee met, but again failed to reach a consensus definition of terrorism.[11] Consequently, there is presently no consensus in the

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[11] *See* Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, at Annex I.B at para. 3-5 (Twelfth Session — 25 and 26 Feb. and 6 Mar. 2008) (discussing the different delegations' competing considerations) (attached as Exhibit H); *see also* Report of the Ad Hoc Committee established by General Assembly (continued…)

international community regarding the definition of terrorism. *See, e.g.*, Robert Kolb, *The Exercise of Criminal Jurisdiction Over International Terrorists* 227-245 (2004) (discussing the wide array of differing definitions proposed or employed for terrorism) (attached as Exhibit J); Marks, *supra*, at 75-80 (discussing international debates regarding the definition of terrorism). These continuing debates regarding the definition of terrorism underscore the difference between plaintiffs' controversial and unsettled claim, on the one hand, and the settled, uncontroversial, clearly-defined, and universally-recognized paradigmatic claims cited by *Sosa*, on the other.[12]

B. None of the International Law Sources Asserted By Plaintiffs In Support of Their Claims Meets the Demanding Requirements of *Sosa*.

Plaintiffs cite to a mishmash of sources in an effort to cobble together the appearance of support for their theory that courts can recognize material support of terrorism as a cause of action under the law of nations. (*See* N.Y. Compl. ¶882; Fla. Compl. ¶ 257; N.J. Compl. ¶ 69.) This effort is to no avail: the sources cited by plaintiffs make clear that there is no rule of customary international law proscribing material support for terrorism that has the same "definite

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resolution 51/210 of 17 December 1996 at Annex I, para. 16-23 (Ninth Session — 28 Mar. - 1 Apr. 2005) (same) (attached as Exhibit I).

[12] Plaintiffs may argue that *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) ("*Arab Bank*") is contrary to this line of cases and supports their position. However, that case differs from the claims here in two material respects. First, plaintiffs there made specific allegations establishing that the defendant bank provided knowing assistance as well as financial incentive to the perpetrators of particular suicide bombings committed as part of an organized, systematic campaign of suicide bombings by Hamas intended to intimidate the Israeli civilian population by targeting innocent Israeli civilians. *Id.* Second, because *Arab Bank* relates to active assistance of suicide bombing of civilian targets, it concerns a much more narrow, clearly defined, and widely-adopted norm than the rule of customary international law asserted here. *Id.* Insofar as *Arab Bank* primarily rests on particular allegations of the bank's direct facilitation and encouragement of these bombings, and thus concerns the scope of indirect liability, it is addressed more fully in Part V.B. In any event, the court in *Arab Bank* failed to weigh the preclusive effect of Congress's enactment of a more limited civil remedy for terrorism-related claims and misapplied *Sosa* in assessing plaintiffs' cited sources of international law.

content and acceptance among civilized nations [as] the historical paradigms familiar when [the ATS] was enacted." *Sosa*, 542 U.S. at 732.

1. Domestic Statutes Cannot Establish a Rule of International Law.

Plaintiffs rely on several U.S. statutes to support their contention that "material support of a terrorist organization" violates a clearly-defined and universally-recognized international norm cognizable under the ATS.[13] As numerous courts have recognized, however, a violation of customary international law cannot be established by reference to U.S. law. *See, e.g.*, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 257 n.33 (2d Cir. 2003) ("[I]t is not possible to claim that the practice or policies of any one country, including the United States, has such authority that the contours of customary international law may be determined by reference only to that country . . . ."); *see also Barboza*, slip op. at 18 (rejecting plaintiffs' reliance on AEDPA and the USA PATRIOT Act as evidence of a customary international law norm prohibiting the "material support to terrorists"). If anything, as explained in Part I above, these domestic statutes preclude recognition of a cause of action under international law by occupying the field.

2. The International Sources Cited By Plaintiffs Do Not Establish An Actionable Rule of International Law Supporting Their Claims.

Plaintiffs also cite to a plethora of purported international law sources in order to give the appearance that their ostensible cause of action for material support of terrorism is well-founded. Many of these sources were expressly rejected as the basis for an ATS claim in *Sosa*, however,

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[13] These statutes include the "Anti-Terror Act," 18 U.S.C. Ch. 113B; provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001). (*See, e.g.*, NY Compl. ¶ 882.)

and the others do not come close to establishing a cause of action for material support for terrorism within the strictures of *Sosa*.

- As discussed above, plaintiffs cite to the Universal Declaration of Human Rights and other U.N. General Assembly Resolutions as support for their ATS claim. The Universal Declaration says not a word about terrorism or material support for terrorism. More fundamentally, *Sosa* expressly held that the Declaration, like any pronouncement of the General Assembly, a body that has no lawmaking power, does not suffice to establish a cognizable norm. 542 U.S. at 734.

- Plaintiffs also point to the ICCPR as support for their ATS claim, even though the ICCPR makes no mention of terrorism. *Sosa* also expressly rejected reliance on the ICCPR as a source of actionable international norms. It did so because, "although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." 542 U.S. at 734.

Of the remaining sources, only two are conceivably relevant: (a) the Financing Convention and (b) the International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, 1 U.N. Doc. A/RES52/163 (Dec. 15, 1997) ("Bombing Convention"). (NY Compl. ¶ 882).[14] As explained below, however neither of these conventions supports the

[14] Plaintiffs cite a number of other international instruments that have no direct bearing on the facts alleged here. For instance, despite making no allegation that Chiquita bribed a foreign public official or that such bribery was the proximate cause of plaintiffs' injuries, plaintiffs cite the Convention on Combating Bribery of Foreign Public Officials in International Business (continued…)

existence of a rule of customary international law prohibiting the provision of material support to terrorists, and certainly not one supporting a cause of action cognizable within the stringent parameters set out in *Sosa*.[15]

a) The Financing Convention Demonstrates That Chiquita's Conduct Did Not Violate Any Existing Rule of International Law At The Time It Occurred, and Cannot Support Finding A Cause of Action for Material Support of Terrorism.

The Financing Convention makes it an international crime to provide or collect funds with the intention or knowledge that they be used to carry out an offense either under one of nine specified treaties, or any other act intended to cause death or serious injury to a civilian for certain purposes. Financing Convention, art 2(1).[16] The main obligation that the Convention

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Transactions, 37 I.L.M. 1 (Dec. 18, 1997). They also cite the Genocide Convention, the Torture Convention, and common Article 3 of the Geneva Conventions. These agreements say nothing about material support for terrorism, and thus have no relevance to the theory that Chiquita should be held liable under the law of nations for allegedly providing such support. To the extent that these agreements are cited in support of indirect theories of liability, they are addressed in Parts IV-V below.

[15] Perhaps recognizing the inapplicability of these conventions to the facts here, the Florida and New Jersey Plaintiffs do not rely upon them. (*See* Fla. Compl. ¶ 257; NJ Compl. ¶ 69.)

[16] As the court in *Barboza* explained, an offense is committed within the meaning of the Financing Convention if a person "by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" (a) a violation of one of nine treaties listed in the annex to the Financing Convention, or (b) "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." *Barboza*, slip op. at 21-22 n.4 (quoting Financing Convention, Dec. 9, 1999, S. Treaty Doc. No. 106-49 (2000)).

The treaties cross-referenced in the Financing Convention are (1) the Bombing Convention; (2) the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; (3) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; (4) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; (5) the International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, (continued…)

imposes on states is a requirement to "adopt such measures as may be necessary . . . to establish as ***criminal offences*** under its domestic law the offences set forth in article 2 . . . ." *Id.* art 4 (emphasis added). The United States fulfilled this obligation when it enacted a criminal law to implement the treaty. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Title II of Public Law 107-197.

The Financing Convention cannot support a civil cause of action for terror financing under the ATS for four separate reasons.

First, it is not a self-executing treaty. A self-executing treaty "operates of itself without the aid of any legislative provision," while a non-self-executing treaty "can only be enforced pursuant to legislation to carry them into effect." *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008) (internal citations omitted). Because the Financing Convention obligates participating states to implement its provisions through legislation, but creates no directly enforceable rights, it is plainly a non-self-executing treaty. Hence, as with the ICCPR considered in *Sosa*, the Convention cannot itself form the basis for a cause of action under the ATS.[17]

1316 U.N.T.S. 205; (6) the Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124; (7) the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, S. Treaty Doc. No. 100-19, 1589 U.N.T.S. 474; (8) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668, 1678 U.N.T.S. 221 ("Safety of Maritime Navigation Convention"); and (9) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685, 1678 U.N.T.S. 304 ("Fixed Platform Convention").

[17] *See also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178 (C.D. Cal. 2005) ("The Court holds that treaties that fail to 'impose obligations' because they are 'not self-executing' do not 'themselves establish the relevant and applicable rule of international law.'"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.16 (D.N.J. 1999) ("[O]nly self-executing treaties, *i.e.*, those that do not require legislation to make them operative, confer rights enforceable by private parties. Since neither the Hague nor Geneva Conventions provide a (continued…)

Second, the Financing Convention does not establish a ***widely-accepted*** rule of customary international law regarding terrorist financing, particularly as of the time of Chiquita's alleged payments. *See Barboza*, slip op. at 3 (rejecting the Convention as basis for cause of action under ATS). Plaintiffs must establish that Chiquita violated international law as it stood at the time of Chiquita's challenged conduct. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008) (ATS claims must rest on a rule of international law "that was universally accepted at the time of the events giving rise to the injuries alleged"); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 326 (2d Cir. 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).

But the Financing Convention — which did not enter into force as a matter of international law until April 10, 2002[18] — was premised on the fact that there was no pre-existing rule of international law addressing 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 General Assembly resolution 51/210 of 17 December 1996, at 3. The Convention thus conclusively establishes that there was no binding international law applicable to terrorist financing prior to April 2002.

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private right of action, they cannot provide a basis for suit under the AT[S].") (internal citations omitted).

[18] Multinational Treaties Deposited With The Secretary General, Financing Convention, at 1, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp ("Financing Convention Decl.") (attached as Exhibit K).

And even after the treaty came into force, the Convention was not evidence of a well-accepted rule of customary international law.[19] "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*, 414 F.3d at 256-57 (emphases added). But plaintiffs cannot show universal ratification or uniform application:

- When the Financing Convention came into force in April 2002, only 26 of the 192 nations in the world[20] — or roughly fourteen percent — had ratified it. And only 111 nations — or 58 percent (*i.e.*, a bare majority) of the nations in the world — had ratified the Financing Convention by the end of February 2004, when Chiquita's alleged payments to the AUC stopped.[21] These figures contrast with treaties like the Torture Convention and the Geneva Conventions, which are thought to reflect customary international law, and which have near-universal adherence.

- Nor have plaintiffs met their burden of showing that state practices reflect either consistent implementation of a rule against providing material support to terrorism, or, in particular, the consistent and universal application of such a rule by states to circumstances similar to those alleged here. *Cf. Smith*, 18 U.S. (5 Wheat) at 162 (noting "the general practice of all nations in punishing all persons . . . who have committed [the offense of piracy] against any persons whatsoever"), *cited with approval by Sosa*, 542 U.S. at 732.

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[19] As discussed in note 6 *supra*, an international law violation can be either a treaty violation or a violation of an accepted rule of customary international law. Of course, not all international law violations meet *Sosa*'s strict requirements. But the fact that the Financing Convention is not self-executing means that the treaty itself cannot form the basis of an enforceable violation of international law. For the reasons that follow, the existence of the Financing Convention also does not support the conclusion that there is any rule of customary international law regarding terrorist financing that would be actionable under the ATS.

[20] See Appendix (listing dates of ratification of the Financing Convention) (citing Ex. K (Financing Convention Decl.)). There are 192 member nations in the United Nations. *See* United Nations, List of Member States, http://www.un.org/members/list.shtml (last visited July 11, 2008).

[21] In fact, Colombia itself did not ratify the Financing Convention until September 14, 2004, seven months after Chiquita's last alleged payment to the AUC. *See* Ex. K at 3.

Accordingly, there was neither widespread ratification of the Financing Convention nor widespread state practices evincing a pervasive recognition and enforcement of any rule of customary international law prohibiting financial support for terrorism at the time of Chiquita's purported wrongful acts.

Third, the Financing Convention cannot provide support for a cognizable rule of customary international law under the ATS because it does not provide ***a clear and well established definition*** that precludes Chiquita's conduct. The norms in the Financing Convention are contested, not well-settled. This is best illustrated by the confusing pack of reservations and declarations[22] that *forty-eight* nations (30 percent of all current ratifiers) have taken with respect to the Convention in their ratification instruments. *See* Ex. K (Financing Convention Decl.) at 8-82. Many of these reservations reflect limitations on nations' agreement to be bound by the full obligations outlined in the Financing Convention, as such, where a nation had not ratified one or more of the listed treaties identifying specific terrorism-related conduct that delimit the Financing Convention's funding proscriptions. As a result of such reservations, the obligations of various ratifying nations under the Convention are a veritable swiss-cheese of loopholes. *Id.*[23] Even more relevant here are the reservations by Syria, Jordan, and Egypt,

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[22] A reservation is non-consent to particular treaty terms. Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1115 U.N.T.S. 331; Restatement (Third) of Foreign Relations Law of the United States § 313 cmt. a (1986). The terms to which nations take a reservation are not binding on that nation. A declaration in the context of the Financing Convention specifies how a nation ratifying the Convention interprets particular terms in the Convention. *Id.*

[23] A review of the declarations and reservations filed upon ratification of the Convention reveals that a substantial number of nations declared that they were not bound with respect to a number of the listed treaties. *See* Ex. K (Financing Convention Decl.). For example, Bahrain, Thailand, and Venezuela each declare that six of the nine treaties listed in the Annex will not apply to it under Article 2; the Bahamas, the Cook Islands, Indonesia, and Luxembourg declare the same with regard to five of the Annex treaties; Belgium, Croatia, Jordan, Latvia, Nicaragua, (continued…)

which specify that armed national resistance movements are ***not*** terrorist acts within the meaning of Article 2 of the Convention. *Id.* These reservations brought strenuous objections from at least 23 other nations that argued the reservations frustrate the purpose of the Convention. *Id.* Such disputes demonstrate that the central prohibitions of the Financing Convention remain controversial and are simply not settled and well-defined in a manner that has general acceptance, including, importantly, in contexts directly related to the allegations in the case — the financing of private parties involved in insurgent conflicts.

Fourth, the Financing Convention cannot support plaintiffs' asserted cause of action, because, as in *Barboza*, plaintiffs here fail to allege any conduct that falls within the specifically enumerated acts prohibited by the Convention. *See Barboza*, slip op. at 22 (noting that the Financing Convention applies only to "enumerated prohibited acts," none of which were applicable). While the Convention proscribes the funding of a number of specified acts, such as hijacking airplanes or taking diplomats hostage, none of the specifically enumerated acts proscribed by the Convention is clearly alleged here.[24] Thus there is no fit between the ostensible rule of customary international law and Chiquita's alleged conduct. By contrast, *Sosa* rejected the "arbitrary detention" claim at issue there — despite a much closer fit between the alleged conduct and supporting sources of international law —because of very slight differences

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and the Philippines declare the same with regard to four of the Annex treaties; Brazil, China, Guatemala, Syria, and Vietnam declare the same with regard to three of the Annex treaties; St. Vincent and the Grenadines, and the Former Yugoslav Republic declare the same with regard to two of the Annex treaties; El Salvador, France, Lithuania, Mauritius, Myanmar, New Zealand, Romania, Saudi Arabia, and Singapore declare the same with regard to one of the Annex treaties; and Egypt, Georgia, Israel, Malaysia, and Moldova declare the same with regard to an unspecified number of the Annex treaties to which they are not parties. *Id.*

[24] The one allegation that involved the use of an explosive device is addressed in Part II.B.2.b below.

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.

Such reasoning led the court in *Barboza* to the same conclusion in a context virtually identical to this case. The plaintiffs there alleged that an American corporation, Drummond Co., was liable for murders committed by the AUC in Colombia. *Barboza*, slip op. at 3. As in this case, the *Barboza* plaintiffs alleged that Drummond provided material support to terrorists in violation of a purported rule of customary international law. *Id.* The *Barboza* plaintiffs relied on the very same sources of law, both domestic and international, cited by plaintiffs here in support of their theory that a well-established and well-defined rule of international law prohibited the provision of "material support to terrorists." Recognizing that *Sosa* places constraints on federal courts' power to recognize new actions under the ATS, the *Barboza* court concluded that an international law prohibition against providing material support to terrorists was too "general" and that the defendant's conduct did not violate any specifically defined norm of customary international law. *Id.* at 17, 22.

b) The Bombing Convention Suffers From Many of the Same Infirmities as the Financing Convention, And Is, In Any Event, Simply Not Pertinent to Plaintiffs' Claims.

The Bombing Convention provides no additional support for, and is largely irrelevant to, plaintiffs' asserted rule of customary international law, as it simply does not address material support for terrorists. Any reliance on the Convention as support for the judicial creation of a cause of action for material support of terrorism is entirely misplaced and just the sort of freehand extrapolation that *Sosa* prohibits. Indeed, out of more than 700 alleged deaths, only one plaintiff here even alleges the use of an explosive device, and even his allegations do not fall

squarely within the Convention's prohibitions.[25] For these reasons, this Court should follow the *Barboza* court in rejecting the proposition that the Bombing Convention could give rise to a rule of international law prohibiting material support for terrorism. *Barboza*, slip op. at 20-22.[26]

3. Even If These Sources Establish A Rule of International Law, At Best the Rule Is Limited To A Criminal Prohibition And Does Not Support Imposition Of Civil Liability.

The Financing and Bombing Conventions are also inapplicable because they require states to develop ***criminal, not civil*** prohibitions. As the Supreme Court recognized in *Sosa*, the fact that international law recognizes a criminal violation does not mean, *a fortiori*, that federal courts should exercise their discretion and expand the violation to encompass potential civil claims: "The creation of a private right of action raises issues beyond the mere consideration whether the underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 727. Plaintiffs have not pointed to any cognizable source of international law that

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[25] *See* Fla. Compl. ¶ 93 (alleging the use of an explosive device). This allegation does not state a violation of the Bombing Convention's proscription, insofar as (i) it fails to establish that the perpetrator (or Chiquita) had the requisite intent (that the alleged contribution was "intentional" and made "with the aim of furthering . . . the purpose of the group" or with knowledge of "the intention of the group to commit the offence"), *see* Bombing Convention, Art. 2, and (ii) the Bombing Convention does not apply when the offense occurs within a single state, and the bomber and the victim are both nationals of that state. *See id.* Art. 3.

[26] The Bombing Convention must also be rejected as a foundation for a rule of customary international law prohibiting material support for terrorism for many of the same reasons as the Financing Convention. Like the Financing Convention, the Bombing Convention establishes international *criminal* norms in a treaty that is not self-executing and thus cannot supply the basis for a cause of action under *Sosa*. Also like the Financing Convention, the ratification history of the Bombing Convention exhibits numerous reservations and declarations that render its central norms contested, as does the inconsistent implementation of its proscriptions. *See* Multinational Treaties Deposited With The Secretary General, Bombing Convention, Declarations, at 7 - 51, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (attached as Exhibit L). Nor is there evidence of consistent state practice with regard to the Bombing Convention reflecting a settled and well-defined rule that is widely observed and applied out of a sense of legal obligation, particularly on facts similar to those alleged here.

suggests that the law of nations imposes *civil liability* on parties who provide material support to terrorism,[27] let alone sufficient authority to conclude that such civil liability is clearly defined and widely accepted, as required by *Sosa*.

Nor can plaintiffs show that the law of nations has a clearly-defined and widely-accepted rule that provides for the imposition of liability on corporations — or, for that matter, on any private actors — for providing financial support to terrorism. The Supreme Court made clear in *Sosa* that, before crafting a new cause of action cognizable under the ATS, federal courts must determine that the law of nations holds ***private actors*** like the defendant liable for violations of the asserted norm: "The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiffs seeks to sue." 542 U.S. at 761 (Breyer, J. concurring). The international law sources cited by plaintiffs, however, do not evidence a rule of customary international law providing that *corporations* should be held liable for providing financial support to terrorism. Indeed, there is not even consensus in international law that non-state actors of any kind should be held liable for support of terrorism. Many states specifically limit their efforts to combat the financing of terrorism to state sponsors of terrorism.[28] In the absence of a well-established and clearly-defined rule of customary international law and consistent state practice of imposing

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[27] By contrast, as discussed above, the United States provided for criminal liability but did not create a civil cause of action when implementing the Financing Convention. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Title II of Public Law 107-197.

[28] *See*, *e.g.*, Organization of the African Union Convention on the Prevention and Combating of Terrorism (July 14, 1999) (committing *States* "to refrain from acts aimed at organizing, supporting, financing, committing, or inciting to commit terrorist acts," but not prohibiting or penalizing private actors who provide financial support to terrorism); Arab Convention for the Suppression of Terrorism (Apr. 22, 1998) (same); Convention of the Organization of Islamic Conference on Combating International Terrorism (July 1, 1999) (same).

liability on corporations that provide material support for terrorism, *Sosa* precludes federal courts from creating such liability pursuant to the ATS.

III. Under *Sosa*, Wide Ranging and Deleterious Practical Consequences Prohibit The Expansion of Liability That Plaintiffs Propose.

At least three practical consequences of extending potential civil liability — which this Court *must* consider under *Sosa* — provide additional, compelling reasons why the Court, in exercising the gatekeeper function assigned to it by *Sosa*, should reject plaintiffs' attenuated theory of liability under the ATS.

1. Recognizing plaintiffs' proposed cause of action logically would give rise to literally thousands of new claims. The concerns expressed by Judge Robb in his concurring opinion in *Tel-Oren* — that recognizing such a cause of action would open U.S. courts to the claims of "every alleged victim of violence" of counter-revolutionaries across the globe, 726 F.2d at 826-27 — are as valid today as when the decision was issued. The purported cause of action under international law advanced by plaintiffs would establish the U.S. federal courts as a forum to arbitrate claims against any state, foreign official, organization, or person who provided resources to any organization alleged to be a terrorist organization, or who in any way participated in, facilitated, or otherwise encouraged the acts of that organization.[29] Like the cause of action proposed by the plaintiff in *Sosa*, "its implications would be breathtaking," 542

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[29] The United States has strongly opposed the recognition of aiding and abetting liability under the ATS on just these grounds. *See* Br. of United States as Amicus Curiae in *Am. Isuzu Motors Inc. v. Ntsebeza* at 14, No. 07-919 (U.S.) (stating that "'no nation has ever yet pretended to be the *custos morum* of the whole world,'" . . . [b]ut that is exactly the result created by the Second Circuit decision below, which virtually invites an ATS action in New York whenever there are allegations of human rights violations anywhere in the world.") (citing *United States v. La Eugenie*, 26 F. Cas. 832 (D. Mass. 1822) (Story, J.)).

U.S. at 736, and would extend, in Judge Robb's words, without any "obvious or subtle limiting principle in sight."

In the present case alone, the logic of the theory of liability advanced by plaintiffs would result in a universe of thousands of potential plaintiffs and defendants. On the plaintiff side, plaintiffs' theory would logically extend a potential cause of action in federal court to every one of the tens of thousands of people allegedly injured or killed by the AUC or the FARC over the course of more than two decades. The New Jersey plaintiffs acknowledge as much in their complaint, which seeks to certify a class of "all persons . . . subjected to abuses" by the AUC, which "may exceed ***ten thousand***." (*See* NJ Compl. ¶¶ 73-74.) (emphasis added).

On the defendant side, similar claims could logically be asserted against (i) any one of the 17,000 militants in the AUC and the 10,000 associates of the AUC described by plaintiffs (including any AUC members extradited to the U.S.), (ii) any other defendants that allegedly provided financial or other support or assistance to the AUC, including (except where barred by sovereign immunity) the Colombian government, any current or former Colombian government officials or military personnel who aided the AUC (including, according to the complaints, the current president of Colombia), or any other Colombian citizen who aided the AUC; (iii) anyone who helped to train or supply the AUC (including, according to the complaints, the U.S. government and its current and former military officers who worked at the School of the Americas); (iv) any other country or foreign official that provided material, financial, or geographic support to the AUC; (v) any local or multinational corporation doing business in an AUC- or FARC-controlled area of Colombia that was therefore required to pay the *vacuna*, or

extortion, payments[30] required by the AUC; (vi) any other person or organization who paid ransom or extortion payments to the AUC, whether Colombian or foreign nationals; and (vii) anyone who purchased narcotics from the AUC, thereby providing the AUC with financial support.

2. Recognizing plaintiffs' proposed cause of action would result in unmanageable litigation. Even without additional claims, meaningful discovery of plaintiffs' allegations would require fact-finding in foreign and dangerous lands regarding the specific circumstances surrounding the alleged role of the Colombian government and military in connection with the AUC's actions, as well as the specific facts and circumstances of each of the AUC's alleged wrongful acts. Resolution of the claims would force the federal courts to adjudicate those facts, including the role of the Colombian government, and possibly other foreign governments, in the conflicts in Colombia. In attempting to fulfill this role, this Court would likely be called upon to make determinations on a host of procedural issues associated with civil liability for which there is no clear guidance in the law of nations, such as the statute of limitations or the operation of doctrines like comparative negligence and joint and several liability. As another federal court in this District observed, the logical conclusion of extending liability in this fashion is to render the federal courts, in effect, international civil claims tribunals, albeit ones that impose disproportionate burdens on persons or companies subject to personal jurisdiction in the United

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[30] In Colombia, the extortive levy or "war tax" imposed by the guerrillas and the paramilitaries is commonly called the *vacuna* or "vaccine" because it "inoculates" the taxpayer against violent attacks by these armed groups. As reported by the United Nations, the *vacuna* has commonly been charged to companies in the "agricultural sector" in the affected areas and "its amount is fixed in accordance with the size and productivity of the estate as a result of a census carried out by the armed group." *See* United Nations Dev. Programme, El conflicto, callejón con salida: Informe nacional de desarrollo humano para Colombia [National Report on Human Development for Colombia] 290 (2003) (attached as Exhibit M, with English translation and Affidavit of Accuracy).

States. *See Saperstein*, 2006 WL 3804718, at *8.[31] This is a role to which U.S. courts are wholly unsuited, and it is plainly not what the First Congress intended when it enacted the ATS in 1789.

3. Recognizing plaintiffs' proposed cause of action would "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727. Evaluating plaintiffs' extrajudicial killing and torture claims, among others (*see* Part V.D.1 *infra*), would also compel the Court to make determinations concerning whether the Colombian government was complicit in the summary executions of its own citizens by terrorist organizations. Indeed, the complaints are replete with such allegations. (*See, e.g.*, NY Compl. ¶ 741 ("The [Colombian] Ministry of Defense was providing legal cover for the paramilitaries."); *id.* ¶ 745 ("[School of the Americas'] graduates are currently involved in the dirty war now being waged in Colombia with US support.").) Adjudication of these claims would "challenge[ ] the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great," *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005),[32] and

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[31] More broadly, by greatly expanding the scope of potential targets for ATS claims, acceptance of plaintiffs' expansive theory of liability would also encourage a renewed interest by the plaintiffs' bar in pursuing strike suits based on international conflict. *See* Bradley, *supra* note 6, 120 Harv. L. Rev. at 924 ("[T]he number of ATS defendants subject to personal jurisdiction in the U.S. would expand; corporations typically have more assets than individual defendants and thus are likely to be a more attractive target for plaintiffs and their lawyers; and private corporations, unlike foreign governments, are not protected by sovereign immunity."). Indeed, plaintiffs' counsel in this matter have made clear that they view the present suit as just such a strike suit — Paul Wolf, counsel in the D.C. action, told the Colombian media that the threat of large damages findings should force Chiquita to reach a lucrative settlement with the plaintiffs quickly. *See* "If it wishes to survive, Chiquita Brands has to negotiate," Cecilia Orozco Tascón, *Si quiere sobrevivir, Chiquita Brands tiene que negociar*, El Espectador, June 15, 2008, at 21 (attached as Exhibit N, with English translation and Affidavit of Accuracy) ("That's why I think that Chiquita's only choice is to negotiate, if it wants to survive.").

[32] *See also Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006) ("[T]he more plaintiffs assert official complicity with the acts of which they complain, the closer they sail to (continued…)

thereby impinge on the prerogatives of the Executive and Legislative Branches. A finding of state action — *i.e.*, of "complicity" between Colombia and the AUC — would contradict official U.S. foreign policy and risk unwarranted judicial interference in U.S. foreign relations, and would require adjudication of the lawfulness of official Colombian conduct that is otherwise entitled to sovereign immunity. Moreover, as a practical matter, the meaningful adjudication by this Court of whether Colombia was complicit in these acts would be essentially impossible. It would exceed the capacity of a U.S. court to determine reliably the extent of official involvement in particular acts committed by unnamed and unknown paramilitaries in a foreign country where the ordinary tools of civil discovery are unavailable and where certain of the paramilitary groups at issue continue to operate.

IV. Plaintiffs Cannot Circumvent the Absence of Direct Liability Under International Law By Attempting to Plead Their Claims Using the Rubric of Indirect Liability.

As an alternative to their material support claim, plaintiffs attempt to recast their claims in the language of indirect or secondary liability. They assert that Chiquita "aided and abetted" or "conspired" with the AUC in committing each of the alleged individual acts of murder, which they characterize as extrajudicial killings, war crimes, or other supposed international law violations. The central premise of these claims, however, is that Chiquita's conduct in providing material support to the AUC, by itself, provides the basis for imposing indirect liability for each of the alleged wrongful acts. (NJ Compl. ¶¶ 30, 32; Fla. Compl. ¶¶ 72, 74.) Plaintiffs cannot circumvent the absence of a direct claim for providing material support for terrorism simply by re-pleading their claims in the language of indirect liability.

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the jurisdictional limitation of the political question doctrine."); *Exxon*, 393 F. Supp. 2d at 26-28 (dismissing ATS claim against a corporation because, among other reasons, a state action inquiry by the court "would create a significant risk of interfering in [a foreign government's] affairs and thus U.S. foreign policy concerns").

A. Plaintiffs' "General Support" Theory of Aiding and Abetting Liability Is Not Recognized by Courts as Accepted Under International Law.

Plaintiffs' theory of aiding and abetting liability rests on the simplistic but erroneous premise that, because Chiquita made payments to some members of the AUC knowing that the AUC was violent, Chiquita is properly held liable for aiding and abetting all of the wrongful acts of any member of any of the loosely organized groups that compose the AUC. No U.S. court has ever recognized such an expansive theory of aiding and abetting liability under international law. Although two *per curiam* opinions of the Eleventh Circuit have previously acknowledged aiding and abetting liability under the ATS, *see Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (per curiam); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (per curiam), these precedents in no way support the far-reaching theory of aiding and abetting presented in plaintiffs' complaints. Rather, each of these cases involved allegations that the defendant provided ***specific*** assistance in the commission of a ***specific*** tort.

In *Cabello*, plaintiffs alleged that a Chilean military officer, Armando Fernandez-Larios, engaged in specific conduct to assist in the killing of a Chilean economist, Winston Cabello, at the hands of the Chilean military. 402 F.3d at 1151. The complaint alleged that Fernandez and five other officers arrived at a military garrison and instructed local officers to provide them with prisoners' files from which the squad selected thirteen prisoners, including Cabello, for execution, following which Fernandez and the rest of the unit drove these prisoners ten minutes outside the garrison, ordered them out of the truck, and executed them. *Id.* The complaint also alleged specific statements by Fernandez suggesting complicity in these crimes. *Id.*

Likewise, *Aldana* involved seven plaintiffs, all of whom were officers in a national trade union of plantation workers called SITRABI, and all of whom represented workers on a banana plantation owned by Bandegua (a Del Monte subsidiary). *Id.* The plaintiffs alleged that after

these individuals had filed a labor complaint against Bandegua, Bandegua hired and met with a private security force "'to plan violent action against the Plaintiffs and other SITRABI leaders.'" *Id.* at 1245. The security force arrived at SITRABI's headquarters, held the plaintiffs hostage, and threatened to kill them. *Id.* A member of the security force explained to the plaintiffs that their union activities were responsible for the area's economic decline, and explained that their union activity could cause Del Monte to abandon their plantation. *Id.* Plaintiffs were then forced at gunpoint — by the security force and the Mayor — to a radio station to announce that the labor dispute was over and that they were resigning. *Id.* Plaintiffs were released after eight hours and told they would be killed if they did not leave Guatemala. *Id.*[33]

In the only ATS case where plaintiffs proceeded to trial on claims that a U.S. corporation aided and abetted international law violations, *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003), plaintiffs likewise alleged that the defendant provided specific assistance to the commission of a specific tort. In *Drummond*, the plaintiffs at trial were family members of three Colombian trade union leaders for SINTRAMIENERGETICA who represented workers at Drummond's mines in Colombia. The plaintiffs alleged that at the time of the victims' deaths, two of them were in the midst of contract negotiations with Drummond on behalf of Drummond employees. *Id.* at 1254. AUC paramilitaries entered a Drummond mine, stated that "they were there to settle a dispute that Locarno and Orcasita had with Drummond," and then killed them. *Id.* The third plaintiff became the union president after Locarno and Orcasita were killed, and at the time of his death he was actively engaged in negotiations with

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[33] The *Aldana* court reinstated only one of plaintiffs' twelve causes of action against Del Monte: torture based on mentally inflicted pain and suffering. 416 F.3d at 1253. On remand, the district court dismissed the case on grounds of *forum non conveniens*. *See Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-CIV, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007).

Drummond for new security agreements for the mine workers. *Id.* He was removed from a bus on his way home from a Drummond mine and then killed by AUC paramilitaries. *Id.* The district court determined that plaintiffs' allegations of Drummond's specific assistance with these specific torts were sufficient to survive a motion to dismiss. *Id.* A jury subsequently found in Drummond's favor.

While in all of these cases the plaintiffs' theory was that defendants provided specific assistance in the commission of specific torts, plaintiffs here, by contrast, take the stunning position that, so long as Banadex made payments to the AUC in ***any*** amount for ***any*** reason, Chiquita should be held liable for ***any*** violent act committed by ***any*** member of the AUC in ***any*** place at ***any*** time for ***any*** reason. This approach does not comport with the particularized showing of participation, involvement, or facilitation of particular tortious acts that is a requirement of aiding and abetting in the Eleventh Circuit. Plaintiffs' generic and conclusory assertions are particularly inadequate given the "heightened pleading standard" applicable to ATS claims. *See Sinaltrainal*, 474 F. Supp. 2d at 1287. Their generalized theory of aiding and abetting liability, if sustained, would represent a radical reformulation of the scope of aiding and abetting liability under even U.S. domestic law, and would drastically expand the scope of ATS jurisdiction beyond anything previously recognized.

Moreover, the continuing viability of aiding and abetting claims under the ATS after *Sosa* has been a subject of considerable debate.[34] Although *Cabello* and *Aldana* were issued after the

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[34] *Compare Exxon*, 393 F. Supp. 2d at 24 (rejecting claims of aiding and abetting liability post-*Sosa*); *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (same), *aff'd*, 503 F.3d 974 (9th Cir. 2007), *with Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-38 (S.D.N.Y. 2005) (allowing claims of aiding and abetting liability); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 287-88 (E.D.N.Y. 2007) (same); *Bowoto v. Chevron Texaco Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at *3-4 (N.D. Cal. Aug. 22, 2006) (same); (continued…)

Supreme Court's decision in *Sosa*, they fail even to mention *Sosa* in their discussion of aiding and abetting, and instead rely on pre-*Sosa* cases holding that the ATS "reaches conspiracies and accomplice liability."[35] Insofar as *Cabello* and *Aldana* simply fail to consider the impact of *Sosa* on whether aiding and abetting theories are cognizable under the ATS, the precedential value of these decisions is questionable.[36] But this Court need not reach the question of whether the recognition of derivative liability in those decisions survives *Sosa*. Whatever the future viability of such claims under the ATS, it is clear that the aiding and abetting theory recognized in the

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Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006) (same); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (same); *Cabello*, 402 F.3d at 1157.

[35] The *Aldana* court did not independently analyze whether aiding and abetting claims are cognizable under the ATS after *Sosa*; the court merely cited *Cabello* for the proposition that "[a] claim for state-sponsored torture under the Alien Tort Act or the Torture Victim Protection Act may be based on indirect as well as direct liability." 416 F.3d at 1248. The *Cabello* court failed to mention *Sosa* at all.

[36] The Eleventh Circuit may soon have opportunity to reconsider the viability of civil aiding and abetting liability under international law under *Sosa*, even in the limited circumstances recognized in *Cabello* and *Aldana*. *See* Br. for Appellees/Cross-Appellants at 67, *Romero v. Drummond Co., Inc.*, No. 07-14090-DD/07-14356-D (11th. Cir.) (appellee requesting that Eleventh Circuit reconsider its ATS precedent on aiding and abetting); Br. for Defendants-Appellees at 35 n.13, *Sinaltrainal v. Coca-Cola Co.*, No. 06-15811-HH (11th Cir.) (noting that "there is reason to doubt that secondary aiding and abetting liability exists under ATS and TVPA" and "reserv[ing] the right to raise this argument with this Court *en banc* or in the Supreme Court").

Although a recusal of four justices precluded Supreme Court review of the sharply-divided panel of the Second Circuit on this issue in *Khulumani*, *see Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919, 2008 WL 117862 (U.S. May 12, 2008), the Solicitor General has consistently advocated in favor of Supreme Court review of this issue and rejection of aiding and abetting liability. *See* Br. of United States as Amicus Curiae at 5, 10, *Am. Isuzu Motors*, 2008 WL 117862 (May 12, 2008) (No. 07-919) (arguing that recognizing a claim for aiding and abetting liability under the ATS "allows [ ] unprecedented and sprawling lawsuit[s] to move forward," and "misapplie[s] *Central Bank* and veer[s] far off course under the ATS."). The Supreme Court will have other opportunities to consider whether aiding and abetting liability is cognizable under the ATS after *Sosa*. *See Mujica v. Occidental Petroleum*, No. 05-56175 (9th Cir.) (argued Apr. 2007); *Presbyterian Church of Sudan v. Talisman*, No. 07-0016 (2d Cir.) (briefing complete); *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800 & 06-4876 (2d Cir.) (briefing complete).

Eleventh Circuit — specific assistance to the commission of a specific tort — does not support recognition of the unprecedented and far-reaching theory of indirect liability presented in plaintiffs' complaints.

B. Conspiracy and Agency Theories Are Not Available Under International Law for Plaintiffs' Claims.

Plaintiffs also allege that Chiquita "conspired" and/or "worked in concert" and/or participated in a "joint criminal enterprise" with the paramilitaries to carry out the more than 700 murders at issue in these three cases. (See NJ Compl. ¶ 16; NY Compl. 24-25; Fla. Compl. ¶ 56.) These conclusory allegations do not support ATS jurisdiction.

Although the Eleventh Circuit has recognized conspiracy liability under the ATS, *Cabello*, 402 F.3d at 1159, there is no broad international norm of conspiracy liability that meets *Sosa*'s stringent standard of settled "definite content" and unambiguous "acceptance among civilized nations." 542 U.S. at 732. As the Supreme Court has made clear since the Eleventh Circuit decided *Cabello* and *Aldana*, only a very small category of conspiracy violations are recognized under the law of nations.[37] *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2784 (2006) (plurality) ("[I]nternational sources confirm that the crime charged here [conspiracy] is not a recognized violation of the law of war. . . . And the only 'conspiracy' crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war."). These narrow categories are not applicable here.[38]

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[37] This is in part because many national legal systems do not recognize conspiracy. *See* Antonio Cassese, International Criminal Law 197 (2003) ("[I]n international law no customary rule has evolved on conspiracy on account of the lack of support from civil law countries for this category of crime.").

[38] Only the New York Complaint even attempts to allege a cause of action for genocide (*see* NY Compl. ¶¶ 907-911), but this claim fails for the reasons set forth below in Part V.D.3.

Consequently, plaintiffs' conspiracy claim is not cognizable under the ATS. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 665-66 (S.D.N.Y. 2006) (dismissing ATS conspiracy claim because only conspiracy to commit genocide and to wage aggressive war are recognized under international law).

Plaintiffs alternatively allege that Chiquita is vicariously liable for the acts of the paramilitaries because they purportedly acted as the "employees" or "agents" of Chiquita in Colombia. (*See* NJ Compl. ¶ 16; NY Compl. ¶ 26; Fla. Compl. ¶ 56.) This attempt to allege claims using the rubric of U.S. domestic common law agency principles is similarly unavailing. There is no support for the proposition that civil agency theories are clearly defined and widely accepted under international law, and plaintiffs' complaints cite none.

V. Even If Plaintiffs' Claim Were Cognizable Under the ATS, Plaintiffs' Conclusory Allegations — Whether Pled In The Language Of Direct or Indirect Liability — Fall Far Short Of Satisfying The Heightened Pleading Standard For ATS Claims.

To state a cognizable claim under the ATS, plaintiffs must plead facts sufficient to meet a "heightened pleading standard." *Sinaltrainal*, 474 F. Supp. 2d at 1287. These facts must be pled by each plaintiff with respect to each element of each individual claim for each separate tort. That plaintiffs' counsel have chosen to amalgamate the separate claims of hundreds of plaintiffs into a single complaint does not relieve them of this basic pleading obligation.

Whether Chiquita's purported liability is characterized as direct or indirect, however, plaintiffs' conclusory allegations are insufficient to meet even the Rule 12(b)(6) standard. *See Jackson*, 372 F.3d at 1262-63 ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal"). Plaintiffs do not plead the elements of any of their claims, whether for material support (*see infra* Section A), aiding and abetting (*see infra* Section B), or conspiracy and agency (*see infra* Section C). And with respect to the derivative liability claims, plaintiffs fail even to plead the elements of a primary violation

of international law by the AUC (*see infra* Section D). Instead, plaintiffs content themselves with attributing the torts at issue to the AUC, and then ascribing them to Chiquita by extension in light of Chiquita's payments. Even if the causes of action asserted here were cognizable under the ATS, plaintiffs have still failed to state a claim with respect to any of them.

A. Plaintiffs Do Not Allege What Would Necessarily be the Required Elements of a Direct Material Support Claim, If Such a Claim Existed.

The absence of a clearly-defined international law norm prohibiting material support to terrorism hinders any assessment of whether plaintiffs have adequately alleged the specific facts necessary to establish the requisite elements of such a claim. Nonetheless, at a minimum, a private cause of action for material support of terrorism would necessarily require:

1. That the defendant provided "material support" to a terrorist organization;
2. That the plaintiff was injured by reason of the defendant's conduct;
3. That the defendant intended to cause the plaintiff's injury or to support the wrongful purposes of the purported terrorist organization; and
4. That plaintiff's injury occurred as a result of an act of terrorism.

As delineated below, plaintiffs have failed to plead sufficient facts to establish any of these four elements. The complaints contain no specific allegations about the particular murders alleged, or that connect Chiquita to them in any way. Instead, they rely on a combination of conclusory allegations and the generic assertion that Chiquita made payments to the AUC. Especially in view of the heightened pleading standard in ATS cases, these generic assertions are inadequate.

1. Plaintiffs' Allegations Do Not Demonstrate "Material" Support.

First, plaintiffs' allegations do not support the notion that the extortion payments made by Chiquita were material to the AUC. Plaintiffs allege that Banadex supported the AUC by making "over 100 payments to the AUC totaling over $1.7 million" over a seven-year period from 1997 to 2004, or an average of less than $250,000 per year. (NJ Compl. ¶ 33; NY Compl.

¶ 854; Fla. Compl. ¶ 75.) The allegations in the complaints fail to account for the relative significance of these payments to the overall resources of the AUC, an organization estimated to have *annual* income of $286 million, 70 percent of which is derived from drug trafficking.[39] Based on those estimates, Chiquita's extortion payments account for less than one-tenth of one percent of the AUC's annual budget. Nor do plaintiffs provide any additional detail to establish that Chiquita's payments were material in any way to the particular acts of alleged wrongdoing by the AUC. Consequently, plaintiffs have failed to meet their pleading burden to establish that any support allegedly provided by Chiquita was material.

2. Plaintiffs' Conclusory Allegations Do Not Establish that Chiquita Caused the Alleged Harm.

Likewise, plaintiffs' claims fail because the complaints do not allege any facts establishing a causal connection between Chiquita's purported financial support of the AUC and the particular alleged murders of plaintiffs' relatives. 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.[40] Consequently, in order to establish the requisite element of causation, plaintiffs must allege specific facts regarding each alleged tort to establish that Chiquita's conduct is the factual cause (*i.e.*, cause-in-

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39 *See* Exhibit D (UN Report) at 285, cited in note 5 *supra*.

40 *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. 2000) (dismissing ATS claim where "[t]he causal chain between the Egyptian government's [allegedly unlawful act] and Coca-Cola's benefit is not articulated"); *Exxon*, 393 F. Supp. 2d at 27 ("[The] allegations fall short of establishing proximate cause here, because [plaintiffs] did not sufficiently allege that defendants controlled the Indonesian military's actions."). *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").

fact or "but-for" causation) and the legal cause (*i.e.*, proximate cause) of the injuries for which they seek damages from Chiquita.

Plaintiffs have not adequately pled that Chiquita's support *in fact* caused the alleged murders and injuries. "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." W. Page Keeton, Prosser & Keeton on the Law of Torts 266 (5th ed. 1984); *see also* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 26 cmt. b (2007) ("[A] factual cause can also be described as ***a necessary condition*** for the outcome.").

Nowhere in the complaints do plaintiffs plead that, but for Chiquita's alleged assistance, the AUC would not have killed plaintiffs' relatives or injured plaintiffs. To be sure, plaintiffs formulaically recite the legal conclusion that Chiquita's payments "caused" every injury alleged in the complaints.[41] But to state a cause of action, plaintiffs must make specific allegations that are sufficient to demonstrate that Banadex's payments to the AUC were a necessary condition to bringing about the alleged injuries. Without that, there is *no* connection whatsoever between Banadex's payments and the torts at issue.

Plaintiffs do not allege such a connection because they cannot. As the complaints acknowledge, the AUC had numerous sources of financial support, including extensive

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[41] *See* NY Compl. ¶ 22 (Chiquita "proximately caused the death of the plaintiff's decedents, and/or injuries to plaintiff(s)."); *id.* at ¶ 883 (Plaintiffs' injuries "were a direct and proximate result of Chiquita's conspiring with and providing aid to" the AUC); Fla. Compl. ¶¶ 87 – 250 (boilerplate language that Chiquita "caused" the alleged murders though its support of the AUC); NJ Compl. ¶¶44 – 62 (same).

involvement in the illegal drug business and use of kidnapping-for-ransom schemes.[42] Moreover, the complaints make clear that the AUC has been engaged in a widespread violent and criminal endeavor that would have proceeded regardless of whether it received any payments from Chiquita. In the face of these facts acknowledged in their own pleadings, plaintiffs offer nothing to suggest that the AUC would not have killed plaintiffs' relatives or injured plaintiffs but for Chiquita's alleged payments.

A fortiori, plaintiffs have not adequately pled that Banadex's payments to the AUC were the *proximate* cause of any plaintiff's or decedent's injury. Proximate cause demands "some ***direct relation*** between the injury asserted and the injurious conduct alleged." *Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 528, 268-69 (1992) (emphasis added) (internal citation omitted).[43] Hence, liability typically extends only to those actions that "were ***a substantial factor*** in the sequence of responsible causation" which led to plaintiff's injury. *See Weiss v. Nat. Westminster Bank PLC*, 453 F. Supp. 2d 609, 631 (E.D.N.Y. 2006) (assessing proximate cause in the context of the ATA) (emphasis added); *Strauss v. Credit Lyonnais*, No. 06-0702, 2006 WL 2862704, at *17 (E.D.N.Y. Oct. 5, 2006) (same). Indirect, remote, or insubstantial causes are not

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[42] *See* NY Compl. ¶ 696 (the AUC "financed itself from a variety of sources, including but not limited to the drug trade and by monetary payments from American corporations"); Fla. Compl. ¶¶ 58, 60 (paramilitaries had achieved financial independence based on participation in the drug trade); NJ Compl. ¶¶ 18-20 (same).

[43] *See also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."); W. Page Keeton, Prosser & Keeton on the Law of Torts 293-94 (5th ed. 1984) ("A distinction is made . . . between consequences which may be regarded as 'directly traceable' from the defendant's act, or as caused 'directly' by defendant's act, and those which result from intervention of other causes at a later time.").

proximate causes. *See, e.g.*, *Holmes*, 503 U.S. at 271 (dismissing RICO claim because "the link is too remote between the stock manipulation alleged and the customers' harm . . .").[44]

As with plaintiffs' *pro forma* recitation of causation in fact, however, their conclusory allegations that they suffered injuries "as a direct and proximate result" of Chiquita's conduct (NJ Compl. ¶ 68; *see also* NY Compl. ¶¶ 22-25; Fla. Compl. ¶ 256) are not sufficient to establish the requisite direct relationship. *See Jackson*, 372 F.3d at 1262-63. Unable to demonstrate even but-for causation, plaintiffs certainly do not plead, as they must, specific facts demonstrating how the alleged financial support Banadex provided to the paramilitaries proximately caused or had a substantial effect on each of the murders at issue here.[45] In the absence of any allegations tying the particular wrongful acts of the AUC to the specific payments made by Banadex, the complaints fail to state a claim.

3. Plaintiffs' Allegations Do Not Establish That Chiquita Had The Requisite Intent.

Moreover, the complaints do not allege at all, let alone plead specific facts showing, 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

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[44] *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*. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. 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 complains.") (emphasis added).

[45] The stunning reach of plaintiffs' theory of liability is highlighted by the fact that more than 60 of the alleged wrongful acts for which plaintiffs seek to hold Chiquita liable occurred in 2005 or later, despite the fact that plaintiffs allege Chiquita stopped making payments in February 2004. Perhaps even more astonishing, more than 60 of the alleged wrongful acts of the AUC for which plaintiffs seek to hold Chiquita liable occurred between 1988 and 1996, despite the fact that the complaints allege that the AUC was not formed until April 1997.

promote the AUC's mission. In the absence of such intent, the complaints cannot state a violation of international law. Plaintiffs make the conclusory allegations that Chiquita "knew or should have known" that the funds paid to the AUC would be used to carry out unspecified violent acts by the AUC. This conclusory assertion of recklessness does not establish the requisite specific intent, and in any event such conclusory pleading would not be sufficient.

4. Plaintiffs' Allegations Do Not Establish That The Alleged Injuries Resulted From An Act of Terrorism.

Finally, the complaints fail to allege specific facts indicating that each of the more than 700 murders or assaults at issue occurred during an act of terrorism. To the extent that there is any international claim for providing material support for terrorism, liability would, by definition, be limited to damages that occur as a result of a terrorist act. That would require, at a minimum, that the act was undertaken for political or ideological purposes to intimidate a population or to compel a government to do or to abstain from doing any act — and not, for example, based on personal motives or as part of general criminal activity.

But the complaints do not contain any particularized facts that would permit one to determine that the particular murders or assaults at issue had such a ***political*** purpose. To the contrary, the complaints indicate that the AUC is a wide-ranging criminal enterprise — one deeply involved in illegal drug trafficking, extortion, and kidnapping-for-ransom schemes — that may well engage in violent conduct wholly unrelated to any terroristic purpose. Indeed, to the extent that the Florida Complaint provides some additional information relating to certain alleged murders, those allegations often evince personal motives inconsistent with the pursuit of political or ideological ends that must motivate terrorism — suggesting that the murders were carried out

for purposes entirely unrelated to terrorism.[46] In the absence of specific allegations sufficient to establish that each alleged murder or assault was an act of terrorism, the complaints fail to state a claim in violation of the law of nations.

B. Likewise, Plaintiffs Fail to Allege Particularized Facts Sufficient to Establish That Chiquita "Aided and Abetted" the AUC in Committing the Alleged Torts.

Plaintiffs' indirect liability claims fail for many of the same reasons. To the extent that aiding and abetting liability is even available under the ATS, plaintiffs at a minimum must plead — with respect to each alleged murder — sufficient facts to show that Chiquita "(1) provide[d] practical assistance to the principal which has a substantial effect on the perpetration of the crime; and (2) [did] so with the purpose of facilitating the commission of that crime." *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring); *id.* at 332-33 (Korman, J., concurring, in part, and dissenting, in part) (joining Judge Katzmann's discussion of the requisite elements of an aiding and abetting claim under the ATS).[47] The complaints, however, do not allege specific facts sufficient to show that Chiquita's payments to the paramilitaries substantially assisted the

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[46] *See, e.g.*, Fla. Compl. ¶ 165 ("Ramos, an AUC commander, told Martinez she must live with him or he would kill her."); ¶ 182 ("Diaz was killed for dating a girl who ran away from home because her mother opposed the relationship, and the mother's relatives were AUC members."); ¶ 192 (victim refused to pay extortion); ¶ 224 (victim indicated to police that person with AUC connections had mugged him); ¶ 228 (victim told wife of AUC commander about husband's mistress).

[47] The *per curiam* Eleventh Circuit opinions discussing the possibility of indirect theories of liability in ATS litigation do not define the requisite elements to such aiding and abetting claims. *See Cabello*, 402 F.3d at 1157-59; *Aldana*, 416 F.3d at 1248. Other federal courts that have recognized such aiding and abetting liability under the ATS, however, have employed standards similar to the one set forth by the Second Circuit. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006); *Arab Bank*, 471 F. Supp. 2d at 291-92 (aiding and abetting requires that defendant's actions have a "substantial effect" on the crime's perpetration and be carried out "intentionally and with knowledge").

particular murders alleged by plaintiffs, or that Chiquita made the payments with the purpose of facilitating those wrongful acts.

1. The Allegations Do Not Establish That Chiquita Provided Substantial Assistance to the AUC in Committing Any of the Alleged Torts.

To satisfy the "substantial effect" element of an aiding and abetting claim, plaintiffs must allege facts sufficient to show that Chiquita assisted the murders allegedly committed by the AUC, and that the murders most probably would not have occurred in the same way without Chiquita's assistance. *See Presbyterian Church*, 453 F. Supp. 2d at 667; *see also Khulumani*, 504 F.3d at 277 ("actus reus component" of aiding and abetting liability requires "'practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime'") (citation omitted) (emphasis in original).

At a minimum, demonstrating this substantial effect requires a showing of causation. *See, e.g., Aetna Cas. & Surety Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 537 (6th Cir. 2000) ("Establishing [substantial assistance] requires the plaintiff to show that the secondary party proximately caused the violation."); *Cromer Fin. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) ("[s]ubstantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated"; "'but-for' causation is insufficient"). Plaintiffs must therefore plead facts sufficient to show that Chiquita's purported assistance to the AUC proximately caused the murders alleged in the complaints. As explained in Part V.A.2, however, plaintiffs have not adequately alleged causation, and their aiding and abetting claims therefore must also fail.

The gross deficiencies in plaintiffs' aiding and abetting allegations are demonstrated by comparison to other ATS cases where defendants were alleged to have aided and abetted murders committed by third parties. In *Arab Bank*, for example, in sustaining plaintiffs' aiding

and abetting claims, the court emphasized that plaintiffs had alleged Arab Bank's services provided particular assistance ***directly related to*** the particular suicide bombings at issue, including, for instance, that the defendant administered benefits paid to the families of suicide bombers, that the defendant assisted in the preparation of lists of beneficiaries of individual suicide bombers, and that the defendant set up individual bank accounts in the names of those beneficiaries. 471 F. Supp. 2d at 291-92; *see also id.* at 261-64 (summarizing the extensive factual allegations by the plaintiffs). Because plaintiffs had "delineate[d] a ***direct correlation*** between the number of attacks, including suicide bombings, and the amount of Mujahideen Committee and Saudi Committee funds, some of which were eventually paid to the beneficiaries through Arab Bank," the motion to dismiss was denied. *Id.* at 292 (emphasis added).

By contrast, where plaintiffs fail to allege specific facts establishing such a direct correlation between defendant's conduct and the particular torts committed, courts have refused to find aiding and abetting liability. For instance, in *Sinaltrainal*, 474 F. Supp. 2d 1273, Judge Martinez considered and rejected a theory of liability substantially similar to the one advanced here. The plaintiffs in *Sinaltrainal*, in an attempt to link the defendants to the particular torts alleged, asserted that "[defendants] hired or conspired with paramilitaries . . . to 'rid' four Colombian bottling plants of the . . . union," *id.* at 1274. The plaintiff also made numerous specific allegations regarding the defendants' purported complicity in the AUC's violent conduct in an attempt to connect the violence to particular labor organizing activities relating to the defendant. *See id.* at 1278-81 (detailing specific factual allegations and specific statements tying the particular acts of violence to particular union activities). Nonetheless, the court dismissed the complaint, concluding that plaintiffs failed to provide sufficiently particular facts linking the defendants to the alleged wrongdoing to impose liability on the defendants for the acts of the

AUC: "Plaintiffs' allegations in the instant cases are too conclusory, too vague, and too attenuated to adequately plead a violation of the law of nations to support subject matter jurisdiction" under the ATS. *Id.* at 1276.

Here, of course, there are no allegations whatsoever "delineating a direct correlation" between the murders and the Banadex payments. Plaintiffs therefore have failed to plead the requisite substantial effect or causal link between the Banadex payments and each of the alleged injuries.

2. The Allegations Do Not Show that Chiquita Had the Requisite *Mens Rea* in Connection with Any of the Alleged Torts.

Plaintiffs likewise fail to plead facts demonstrating that Chiquita intended to facilitate the commission of the alleged murders, or even knew that Banadex's alleged assistance to the AUC would result in the murder of plaintiffs' relatives. *See Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (noting that aiding and abetting claims require showing that the defendant acted "with the purpose of facilitating the commission of [the alleged] crime").[48] Such a *mens rea* requirement is a quintessential element of aiding and abetting. *Cf.* Joshua Dressler, Understanding Criminal Law 475 (3d ed. 2001) ("Most [U.S.] courts . . . hold that a person is not an accomplice in the commission of an offense unless he 'share[s] the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking.'").

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[48] *See also Arab Bank*, 471 F. Supp. 2d at 291 (noting that standards of aiding and abetting liability require a showing that defendant "acted intentionally and with knowledge that its conduct would . . . facilitate the underlying violations when it engaged in the acts alleged"); *Stutts v. De Dietrich Group*, No. 03-cv-4058, 2006 WL 1867060, at *2-3 (E.D.N.Y. June 30, 2006) (dismissing civil terrorism claim where plaintiffs failed to plead that defendant banks had knowledge that their financial credits would further terrorist activities committed by Saddam Hussein or that they had the requisite intent to further such terrorist activities).

The only allegations concerning Chiquita's purported culpable mental state are entirely conclusory and devoid of any actual facts.[49] Plaintiffs do not allege a single incident or event demonstrating that any Chiquita employee knew that the alleged payments made to the AUC had been or would be used to carry out murders as a general matter, let alone facilitate any of the more than 700 specific murders alleged in these complaints. To be sure, Chiquita knew that the AUC was a dangerous organization, but this does not establish that Chiquita provided support to the AUC with the intent of facilitating the commission of murders or had knowledge that the payments would be used for that purpose. Plaintiffs must plead specific facts demonstrating Chiquita's requisite state of mind, and their failure to do so requires dismissal of their aiding and abetting claims.

C. The Complaints Do Not Support Plaintiffs' Invocation of "Conspiracy" or "Agency."

1. Plaintiffs Fail to Allege the Basic Elements of Conspiracy.

Plaintiffs also have failed to plead sufficient facts in support of their conspiracy theory. A claim of civil conspiracy requires a showing that: "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intended to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159 (internal citation omitted).

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[49] *See, e.g.*, NJ Compl. ¶ 2 ("The deaths of plaintiffs' relatives were a direct, foreseeable, and intended result of Chiquita's illegal and tortious actions."); NY Compl. ¶ 22 ("The defendants . . . tortiously, intentionally, willfully, wantonly, maliciously, knowingly, recklessly, and negligently murdered and/or otherwise proximately caused the death of the plaintiff's decedents. . . ."); Fla. Compl. ¶ 1 ("The harm to Plaintiffs and the deaths of Plaintiffs' relatives were a direct, foreseeable, and intended result of Chiquita's illegal and tortious actions.").

Plaintiffs' complaints fall far short of establishing these required elements with specific factual allegations:

- Plaintiffs fail to allege the identities of the purported conspirators, the dates or location of the formation of the conspiracy, or its terms. *See Sinaltrainal*, 474 F. Supp. 2d at 1293-94, 1298 (finding allegations of conspiracy to be insufficient where plaintiffs failed to identify paramilitaries by name or by affiliation and failed to plead dates or locations regarding the formation of the conspiracy).[50]

- The complaints fail to provide the terms of the alleged agreement between Chiquita and the AUC, to identify who at Chiquita reached such an agreement, or to indicate the specific goals of objectives of the purported conspiracy.[51]

- The complaints fail to allege any specific facts connecting the alleged tortious acts for which plaintiffs seek to hold Chiquita liable to the conspiracy or its purported goals. *See id.* at 1295-96.[52]

Rather than provide any specific details about the conspiracy, the complaints simply assert that "Chiquita" conspired with the "AUC." Such conclusory allegations are so generic that they would fail pleading requirements applicable outside of the ATS context. *See Cavitat*

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[50] *Cf. Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (dismissing plaintiff's ATS claim where complaint was "devoid of names, dates, locations, times or any facts that would put [defendant] on notice as to what conduct supports the nature of [the] claims").

[51] The New York plaintiffs generic and unfounded information-and-belief allegation that the Banadex general manager "met with leaders of the AUC . . . *to devise a plan for the financing and coordinating paramilitary operations in the Zona Bananera*" (*See* NY Compl. ¶ 847) is not sufficiently particular to meet *Sinaltrainal*'s standard, nor does it provide a basis to conclude that there was such a conspiracy that is "plausible on its face," *cf. Twombly*, 127 S. Ct. at 1974, particularly given that the allegations is presumably based solely on paragraph 775 of their complaint, which is taken from the Factual Proffer, and indicates that Carlos Castaño "instructed [Banadex's] General Manager that [Banadex] *had to* make payments." (NY Compl. ¶ 775 (emphasis added).

[52] Plaintiffs' generic assertions that Chiquita sought to eliminate labor opposition and social activists and otherwise "benefited" in some unspecified fashion from the various deaths alleged in the complaints does not suffice. (*See* NJ Compl. ¶¶ 2, 31, 32, 66; NY Compl. ¶ 848; Fla. Compl. ¶¶ 1, 73-74, 254.) As the *Sinaltrainal* court noted, in alleging murders occurring in a country beset by violence, such attenuated, generic assertions are simply not enough: "[I]n the context of what the Plaintiffs themselves describe as a country torn by a long-standing civil war, *where the murder of trade unionists and civilians at large is common*, some level of specificity is required to link the explicit agreement between [defendant] and the [AUC] to the horrible acts that occurred." 474 F. Supp. 2d at 1295-96 (quotations omitted) (emphasis added).

Med. Tech., Inc. v. Aetna, Inc., No. 04-CV-01849-MSK-OES, 2006 WL 218018, at *5-6 (D. Colo. Jan. 27, 2006) (dismissing civil conspiracy claim where plaintiff failed to "identify the speakers, the statements made, when the statements were made, or to whom they were made"). They are certainly insufficient to meet the heightened pleading standards applicable in ATS litigation. *Sinaltrainal*, 474 F. Supp. 2d at 1295-96 ("[M]urky allegations of a vague conspiracy between Mosquera [defendant's plant manager] and unspecified paramilitaries *to use threats and violence to 'drive away' union leaders and 'destroy the union'* are not sufficient. . . . While the Complaint details a number of horrific acts, it is scant on the details about the formation and orchestration of the conspiracy which links these acts together.") (emphasis added).[53] Indeed, plaintiffs' conspiracy allegations here are far less specific and detailed than those rejected by the court in *Sinaltrainal*, which also alleged a conspiracy between a U.S. corporation and the AUC. *See* 474 F. Supp. 2d at 1278, 1293-94 (alleging particular details regarding purported meetings between employees of the defendant and the AUC as well as the nature of the purported agreement reached between the defendant and the AUC).

2. Plaintiffs' Agency Theory Is Likewise Insufficiently Pled.

Even assuming that the law of nations provided that Chiquita could be vicariously liable for the conduct of paramilitaries acting as "employees" or "agents" of Chiquita, this allegation is frivolous. To establish an agency relationship, plaintiffs must plead at a minimum facts demonstrating that the paramilitaries acted on Chiquita's behalf and under Chiquita's control in

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[53] The New York plaintiffs' outlandish allegations — for which they allege no specific factual support whatsoever — that Chiquita formed a conspiracy with the AUC for various purposes including obtaining "political, military, and economic control of the Republic of Colombia"; to "seiz[e] . . . banana growing land from the peasants"; and to acquire "monopolistic control over commerce in bananas" are similarly conclusory, unspecific, unsupported, and inadequate as a matter of law. (NY Compl. ¶ 848.)

carrying out the murders at issue here, and that those acts were within the scope of the alleged agency relationship. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (noting that adequate pleading of an agency relationship requires showing of three elements: (1) "the manifestation by the principal that the agent shall act for him"; (2) "the agent's acceptance of the undertaking"; and (3) "the understanding of the parties that the principal is to be in control of the undertaking"). Not surprisingly, plaintiffs make no attempt to plead facts establishing that Chiquita controlled the AUC, let alone that the AUC was acting under Chiquita's control or on its behalf with respect to any of the more than 700 murders alleged here. Plaintiffs cannot survive a motion to dismiss based on conclusory legal assertions that the AUC acted as Chiquita's "agent." *See Jackson*, 372 F.3d at 1262-63 ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.").

D. Plaintiffs' Indirect Theories of Liability Also Fail Because Plaintiffs Do Not Plead A Primary Violation of the Law of Nations by the AUC.

Assuming that they are cognizable at all, plaintiffs' derivative theories of liability also require plaintiffs to establish an underlying violation of the law of nations by the primary actor, the AUC. Virtually all norms of international law apply only to state actors — not private citizens — and plaintiffs have not adequately pled any state action here. The few international law violations asserted by plaintiffs that do not require state action — *i.e.*, war crimes, genocide, and crimes against humanity[54] — are patently inapplicable to the facts alleged here. Plaintiffs' failure to state a primary violation of the law of nations by the AUC, particularly one that meets *Sosa*'s stringent standards, provides an additional basis to reject plaintiffs' indirect claims.

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[54] *See* NJ Compl. ¶¶ 98-102 ("war crimes"); NY Compl. ¶¶ 892-899 (same); Fla. Compl. ¶¶ 274-278 (same); NJ Compl. ¶¶ 89-93 ("crimes against humanity"); NY Compl. ¶¶ 900-906 (same); Fla. Compl. ¶¶ 265-269 (same); NY Compl. ¶¶ 907-911 ("genocide").

1. Plaintiffs Do Not Plead the Requisite State Action With Respect to Any of the Alleged Murders.

The complaints include claims for "extrajudicial killing"; "torture"; "cruel, inhuman or degrading treatment"; "violation of the rights to life, liberty, and security of person and peaceful assembly and association"; and "consistent pattern of gross violations of internationally recognized human rights." [55] Even assuming these causes of action met *Sosa*'s stringent standards, which they do not,[56] pleading them requires plaintiffs to allege facts establishing that the alleged killings constituted state action, and not merely conduct carried out solely by a

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[55] *See* NJ Compl. ¶¶ 85-88; NY Compl. ¶¶ 912-921; Fla. Compl. ¶¶ 261-264 ("extrajudicial killings"); NJ Compl. ¶¶ 94-97; Fla. Compl. ¶¶ 270-273 ("torture"); NJ Compl. ¶¶ 113-117; Fla. Compl. ¶¶ 289-293 ("cruel, inhuman, or degrading treatment"); NJ Compl. ¶¶ 118-121; Fla. Compl. ¶¶ 294-297 ("violation of the rights to life, liberty, and security of person and peaceful assembly and association"); NJ Compl. ¶¶122-125; Fla. Compl. ¶¶ 298-301 ("consistent pattern of gross violations of internationally recognized human rights").

[56] Aside from extrajudicial killing and torture, these causes of action are insufficiently definite under international law to meet *Sosa*'s requirements for recognition under the ATS. Courts, including the Eleventh Circuit, have recognized that "cruel, inhuman, or degrading treatment" does not meet this standard. *See Aldana*, 416 F.3d at 1247 (affirming dismissal of ATS claim of cruel, inhuman, and degrading treatment or punishment in accordance with *Sosa*); *Tel-Oren*, 726 F.2d 774 (dismissing ATS claims premised on, among other things, cruel, inhuman, and degrading treatment); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (same); *Mujica*, 381 F. Supp. 2d at 1183 (concluding that, even though there is a customary international law norm prohibiting "cruel, inhuman, and degrading treatment or punishment," it would be impractical to recognize such claims as actionable under the ATS).

Plaintiffs' claim for "violation of the rights to life, liberty, and security of person and peaceful assembly and association" also fails to meet *Sosa*'s standard. *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006) (dismissing claims premised on the international right to life, liberty, security, and association because there is no particular or universal understanding of the civil and political rights covered by such claims).

The same is true of plaintiffs' claim for "consistent pattern of gross violations of human rights." *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1163 (C.D. Cal. 2002), *rev'd in part on other grounds, Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (concluding that "plaintiffs have not demonstrated that prohibitions against . . . gross violations of human rights constitute established norms of customary international law").

private party.[57] *See Exxon*, 393 F. Supp. at 25-26 ("Traditionally only states (and not persons) could be liable under the Alien Tort Statute for . . . extrajudicial killing.") (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985)); *Kadic*, 70 F.3d at 343 (holding that torture claims require showing of state action); *Bowoto v. Chevron Texaco Corp.*, No. C 99-02506, 2006 WL 2455752, at *5 (N.D. Cal. Aug. 22, 2006) (holding that state action is a requirement of claims for "cruel, inhuman, or degrading treatment"; "violation of the rights to life, liberty, and security of person and peaceful assembly and association"; and "consistent pattern of gross violations of human rights").

There is no such allegation here, however. Plaintiffs do not contend that the armed groups purportedly responsible for their relatives' deaths are Colombian government officials or entities. Instead, they specifically contend that the torts at issue were committed by what they concede are private groups. In an apparent attempt to imbue the conduct of private paramilitaries with state action, plaintiffs vaguely allege various connections between officials of the Colombian government and military and the AUC that are entirely unrelated to the specific tortious acts alleged. (*See* NJ Compl. ¶¶ 25-27; NY Compl. ¶¶ 718-731, 743-753; Fla. Compl. ¶¶ 65-67, 69.) But this effort to shoehorn private conduct into principles applicable only to state actors fails for three reasons.

First, there is no well-established, clearly-defined, and widely-accepted standard under the law of nations for extending liability normally limited to state actors to those merely acting under color of law. Thus, while some courts relied on domestic "color of law" precedent in ATS cases before *Sosa* was decided, this extension of liability cannot be supported after *Sosa*.

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[57] Extrajudicial killing is, by its very definition, a summary execution perpetrated by a ***state***, not a private party.

Second, Plaintiffs make no allegations that Chiquita had such a relationship with the Colombian government or its officials that Chiquita's actions could be considered state action, as they must to hold it liable for these violations. Moreover, even assuming *arguendo* the AUC was equivalent to an arm of the Colombian government, Plaintiffs still would need to plead facts specific facts sufficient to establish that Chiquita controlled or had such involvement in the AUC's conduct to render Chiquita's involvement equivalent to state action, which they have not.

Third, plaintiffs' allegations are not even sufficient to establish that the AUC was acting under color of law even if such a claim were cognizable. As a threshold matter, plaintiffs acknowledge that Colombian law prohibits providing assistance to paramilitaries, and that the Colombian government is actively *investigating* and *prosecuting* government officials for ties to the AUC — a strong indication that paramilitary groups are not officially condoned or sanctioned by the Colombian government. (NJ Compl. ¶ 25; NY Compl. ¶¶ 719-722, ¶ 747; Fla. Compl. ¶ 65.) These admitted facts are inconsistent with the notion that the AUC (or Chiquita) was acting at the behest of the Colombian government in connection with the specific alleged torts.

Moreover, even if it were appropriate to rely on U.S. domestic "color of law" precedent in the absence of clearly defined international standards, generalized allegations of a general relationship or links between the AUC and certain members of the Colombian government or military would not suffice. Rather, the Eleventh Circuit holds that a private actor can be deemed to act under color of law only when the state plays some role in the particular conduct at issue:

> If a thread of commonality is to be drawn from the various forms in which state action can manifest itself through the conduct of private parties, it is that attribution is not fair when bottomed solely on a ***generalized relation with the state***. Rather, private conduct is fairly attributable only when the state has had some affirmative

> role . . . in the ***particular conduct*** underlying a claimant's civil rights grievance.

Rayburn ex. rel. Rayburn v. Hogue, 241 F.3d 1341, 1348 (11th Cir. 2001) (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)) (emphases added). *See also Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 62 (D.C. Cir. 2006) (there must be a "close nexus" between the state actor and the private entity such that the state could be held "***responsible*** for the ***specific conduct*** of which the plaintiff complains.") (emphases added).

Thus, to plead action under the color of law, plaintiffs must allege that Colombian officials had active involvement or played an affirmative role in the particular misconduct. In *Aldana*, for example, the Eleventh Circuit rejected the notion that an allegation that government officials knew of and deliberately ignored the tortious acts of private militias is sufficient to establish state action. 416 F.3d 1242. As the *Aldana* court held, the state's "registration and toleration of private security forces does not transform those forces' acts into state acts." *Id.* at 1248. The court in *Aldana* premised its finding of state action on specific allegations that a specific public official (the Mayor) was himself an active participant — an "armed aggressor, not a mere observer" — in the violent conduct. *Id.* at 1249 (quotations omitted).[58] There is no such allegation concerning any of the torts alleged here. As a result, plaintiffs' attempt to transform the conduct of private paramilitaries into actions of the Colombian government fails.

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[58] Plaintiffs attempt to demonstrate state action by alleging that the payments to the AUC were collected through private *convivir* organizations, which were created to assist local police and the military in providing security, fails for the same reason. (*See* NJ Compl. ¶¶ 64; NY Compl. ¶¶ 732-739, 775; Fla. Compl. ¶¶ 68.) The pertinent actor for purposes of a "color of law" analysis is the defendant, Chiquita, or, at a minimum, the party that allegedly committed the murder — *i.e.*, the AUC, not the *convivir*. There are no allegations that the *convivirs* carried out the murders and assaults alleged here. Nor would licensing alone be sufficient to convert the acts of the *convivirs* into state action.

Finally, even if plaintiffs could satisfy the state action requirement for these claims by pleading facts showing the complicity of the Colombian government in each of these alleged murders, a factual inquiry to test such allegations would necessarily intrude on the foreign affairs function of the political branches, and is therefore nonjusticiable, as discussed in Part III above.

2. Plaintiffs' Allegations Do Not Establish That Any of the Alleged Murders Constituted "War Crimes."

Through their claim of war crimes, plaintiffs invite the Court to find that, because they have alleged that there was an armed conflict in Colombia (*see* NY Compl. ¶¶ 687, 707-715; NJ Compl. ¶ 65; Fla. Compl. ¶ 253), they have effectively pled a claim against Chiquita on behalf of Colombians who have been injured by one of the purported parties to the conflict. This sweeping proposition is untenable, is at odds with *Sosa*'s restrained interpretation of the ATS, *see Sinaltrainal*, 474 F. Supp. 2d at 1289, and is wholly inconsistent with plaintiffs' claims regarding the purported business motive underlying Chiquita's "support" of the AUC.

To establish a cognizable war-crimes claim under the ATS, plaintiffs must do more than allege "the murder of an innocent civilian during an armed conflict." *Saperstein*, 2006 WL 3804718, at *8. Rather, plaintiffs seeking to avoid a state action requirement by alleging war crimes must plead facts sufficient to establish (i) that their alleged injury was caused by a party to an armed conflict; (ii) that the victim was taking no active part in hostilities (*i.e.*, was a noncombatant); (iii) that the injury was caused in the course of hostilities (not due to some reason unrelated to the war (*e.g.*, a personal vendetta)); and (iv) that the perpetrator had the requisite *mens rea* (*i.e.*, carried out the act *intentionally* and *knowing* that the victim took no

active part in hostilities). *See, e.g.*, *Kadic*, 70 F.3d at 243 n.7; *see also* Rome Statute arts. 8(2)(c), 8(2)(e), 30(1).[59]

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

As in *Saperstein*, plaintiffs' artful "war crimes" allegations fail to demonstrate any connection between armed conflict, on the one hand, and any of the more than 700 murders and injuries alleged here, on the other. As the court in *Saperstein* explained, it is not enough for plaintiffs to allege merely that their relatives were innocent civilians killed in the course of an armed conflict:

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[59] Chiquita clearly has not been alleged to have such an intent, and even assuming it could be imputed to Chiquita, the feasibility of assessing the intent of unnamed and unknown perpetrators who are not subject to the Court's jurisdiction raises additional questions about this claim's justiciability.

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

2006 WL 3804718, at *8. Plaintiffs' war crimes allegation is all the more futile when the indirect nature of plaintiffs' claims is taken into account. Plaintiffs have not sued the AUC or it members or commanders; rather, plaintiffs seek to hold Chiquita derivatively responsible for the alleged torts committed by those groups. But there are simply no facts asserted (and none exist) that establish that Chiquita engaged in actions — or acted jointly with the AUC to engage in actions — in furtherance of war hostilities. *See Sinaltrainal*, 474 F. Supp. 2d at 1289 (rejecting war crimes claim under ATS based on corporate defendant's alleged secondary responsibility for the AUC's tortious conduct; "[S]ome modicum of specificity regarding the details of *affirmative* action, whether it be in the form of a conspiracy or joint action to orchestrate hostilities, is required to adequately plead a violation of the law of nations on the basis of war crimes.").

At bottom, the gravamen of plaintiffs' allegations is that Chiquita made payments to the AUC to further its own Colombian business interests, and thus should be liable for all crimes allegedly perpetrated by the AUC. (*See* NJ Compl. ¶ 2; NY Compl. ¶ 848; Fla. Compl. ¶ 1.) But this purported "business motive" is *inconsistent* with any alleged war crimes violation. As the court in *Sinaltrainal* observed in rejecting a similar (though more specifically pled) theory of war crimes liability: "Alleging that the Defendants 'affirmatively acted to benefit from the civil war by making arrangements to have the paramilitaries target their union leaders' is a far cry from alleging that Defendants actually conspired with the paramilitaries to orchestrate hostilities."

474 F. Supp. 2d at 1289 (citation omitted). "[I]ndirect economic benefit from unlawful state action is not sufficient to support jurisdiction over a private party under the [ATS]." *Id.* (citing *Bigio*, 239 F.3d at 449). For these reasons, plaintiffs' war crimes claim must be dismissed.

3. Plaintiffs' Allegations Do Not Establish That Any of the Alleged Murders Constituted "Crimes Against Humanity" or "Genocide."

Plaintiffs' claims of crimes against humanity are even more deficient. Tracking the legal definition of this ambiguous term in conclusory fashion, plaintiffs assert that the AUC, with Chiquita's financial support, "engaged in a widespread and systematic attack on and persecution of large segments of the civilian populations of the banana growing regions of Colombia, including but not limited to the areas where plaintiffs resided, and including plaintiffs' decedents." (NY Compl. ¶ 901; *see also* NJ Compl. ¶ 90; Fla. Compl. ¶ 267.) Yet, none of the specific examples of widespread AUC violence that are alleged appear to bear any relation to the specific murders and injuries suffered by plaintiffs or their decedents. As the Eleventh Circuit has held, mere allegations of "systematic and widespread efforts" against a class of persons (in that case, "organized labor in Guatemala") are "too tenuous to establish a prima facie case" for crimes against humanity. *See Aldana*, 416 F.3d at 1247. For the same reason, plaintiffs' conclusory and tenuous claim of crimes against humanity in this case should be dismissed.[60]

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[60] Plaintiffs' claim for "crimes against humanity" is also insufficiently definite to be recognized as a violation of the law of nations. There is no international consensus on a specific definition of the term. As one prominent human rights scholar put it, "the law of crimes against humanity is difficult to apply, in part because the meaning of the term is shrouded in ambiguity." Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2585 (1991) (emphasis added); *see also* 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."). Although it is sometimes recognized under customary international law, crimes against humanity is thus the type of ambiguous norm that does not provide a basis for ATS jurisdiction under *Sosa*'s cautious approach.

The New York Plaintiffs even go so far as to allege that Chiquita assisted the AUC in committing genocide. Dismissal is similarly warranted for this frivolous claim. Again, tracking the legal definition of genocide in conclusory fashion,[61] the New York Plaintiffs assert that "defendants, their agents servants [sic] and employees committed [a list of atrocities] with the intent to destroy, in whole or in part, the national, ethnical, political or cultural group of which the plaintiff's decedents were a part . . . ." (NY Compl. ¶ 908.) But the complaint is devoid of facts about the decedents' "ethnical, political or cultural" affiliation. It contains information only about their nationality, alleging that all of them were Colombian (NY Compl. ¶¶ 2-3), and it contains nothing to support the sweeping and absurd proposition that the Colombians who made up the ranks of the AUC intended to destroy Colombians as a national group. "[T]his Court need not accept [p]laintiffs' legal conclusions as well-pleaded." *Sinaltrainal*, 474 F. Supp. 2d at 1289; *accord Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 373 (E.D. La. 1997) ("The court is unwilling to make leaps of logic necessary to support a claim for genocide based on unplead facts."). It should therefore dismiss the New York plaintiffs' genocide claim.

VI. Plaintiffs Do Not State a Claim under the Torture Victim Protection Act.

Plaintiffs also seek to hold Chiquita liable for extrajudicial killing and torture under the TVPA, 28 U.S.C. § 1350 note. (*See* NJ Compl. ¶¶ 85-88, 94-97; NY Compl. ¶¶ 912-921; Fla. Compl. ¶¶ 261-264, 270-273.) The TVPA provides a civil cause of action against (1) "[a]n individual who" (2) acting "under actual or apparent authority, or color of law, of any foreign nation" (3) "subjects an individual to" torture or extrajudicial killing. Plaintiffs' TVPA claims fail for several reasons.

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[61] *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

First, "[b]y the clear language of the [TVPA], a party must act 'under actual or apparent authority, or color of law[, of [a] foreign nation]' to be liable under the statute." *Exxon*, 393 F. Supp. 2d at 28; *see also* 28 U.S.C. § 1350 note § 2(a)(1)-(2); *see also Kadic*, 70 F.3d at 245 (TVPA "does not attempt to deal with torture or killing by purely private groups"). For the reasons set forth above in Part V.D.1, plaintiffs do not adequately allege state action and hence these claims should be dismissed.[62] *See Khulumani*, 504 F.2d at 260 (per curiam) (affirming dismissal of TVPA claims because plaintiffs "failed to link any defendants to state aid or the conduct of state officials"). The absence of state action (or any other defect with plaintiffs' ATS claims for torture and extrajudicial killing) would also leave this Court without subject matter jurisdiction over plaintiffs' TVPA claims. *See Sinaltrainal*, 474 F. Supp. 2d at 1301 (stating that "[a]lthough the TVPA creates a private cause of action . . . , it does not confer jurisdiction standing alone," and that TVPA claims "may be entertained only if they fall within the jurisdiction conferred by the [ATS]") (citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996)).

Second, although the Eleventh Circuit has recognized aiding and abetting liability under the TVPA, *see Cabello*, 402 F.3d at 1157-58; *Aldana*, 416 F.3d at 1248, it has done so only where defendants were alleged to have provided particular assistance to a particular tort, not on the "generic support" theory advanced here. *See supra* Part IV.A. Moreover, even if there were authority to support plaintiffs' expansive theory of aiding and abetting under the TVPA, plaintiffs have failed to allege the basic elements of aiding and abetting liability — substantial assistance and *mens rea*. *See supra* Part V.B.

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[62] As explained in above Part III, the need to find state action would also "impermissibly require[ ] adjudication of another country's actions." *Exxon*, 393 F. Supp. 2d at 28.

Third, "[t]he plain reading of the [TVPA] strongly suggests that it only covers human beings, and not corporations." *Exxon*, 393 F. Supp. 2d at 28 (citing *Clinton v. New York*, 524 U.S. 417, 428-29 nn.13-14 (1998)); *see also Mujica*, 381 F. Supp. 2d at 1176 ("The Court holds that corporations are not 'individuals' under the TVPA based on its reading of the plain language of the statute."); *Corrie*, 403 F. Supp. 2d at 1026 (holding that the TVPA does not apply to corporations because "the statute speaks in terms of individuals"). The limitation of the TVPA to claims against "individuals" bars plaintiffs' TVPA claim against Chiquita.

VII. Plaintiffs' State Law Claims Should Be Dismissed For Failure To State A Claim.

Plaintiffs assert various state common law and statutory claims based on tortious conduct by unspecified people allegedly working for Chiquita or the AUC. These state law claims should be dismissed because (1) plaintiffs have not adequately alleged the claims under any applicable law, and (2) most of these claims are time-barred under applicable statutes of limitations.

A. Plaintiffs Have Not Adequately Alleged Any Common Law Tort.

1. Plaintiffs Fail To State the Requisite Elements of Derivative Liability.

To the extent plaintiffs allege state law torts based on the conduct of the AUC,[63] plaintiffs' allegations are inadequate to hold Chiquita derivatively liable for those torts. Any reliance on state law concepts of aiding and abetting or conspiracy fail for the same reasons addressed above.[64] Nor are plaintiffs' allegations sufficient to support any other common law

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[63] *See* NY Compl. ¶¶ 926-929 (battery (Count 7)); NJ Compl. ¶¶ 130-148 (assault and battery (Count 11), intentional infliction of emotional distress ("IIED") (Count 12), negligent infliction of emotional distress ("NIED") (Count 13); Fla. Compl. ¶¶ 306-324 (assault and battery (Count 11), IIED (Count 12), NIED (Count 13).

[64] *See N.J. Dep't of Treasury v. Qwest Communications Int'l, Inc.*, 904 A.2d 775 (N.J. Super. Ct. 2006) (discussing elements of civil aiding and abetting liability); *O'Brien v. Olmstead Falls*, No. 89966, 90336, 2008 WL 2252527, at *6 (Ohio Ct. App. June 2, 2008) (same); *Morgan v. Union County Bd. of Chosen Freeholders*, 633 A.2d 985, 998 (N.J. Super. Ct. 1993) (continued…)

theories of derivative liability. For instance, plaintiffs do not and cannot allege any facts demonstrating the required elements of respondeat superior liability: (1) a master-servant relationship and (2) tortious conduct occurring within the scope of employment. *Carter v. Reynolds*, 815 A.2d 460, 463 (N.J. 2003); *Groob v. KeyBank*, 843 N.E.2d 1170, 1177 (Ohio 2006); *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So. 2d 353, 356-57 (Fla. Dist. Ct. App. 2001); attached Declaration of Eduardo A. Wiesner ¶¶ 2, 4 (describing elements of extra-contractual (*i.e.*, tort) liability under Colombian law). Plaintiffs' conclusory references to the paramilitaries as Chiquita's "employees" or "agents"[65] do not suffice, as they have not pled a single fact demonstrating that Chiquita controlled their activities or the manner in which they employee completed their tasks. *Wright v. State*, 778 A.2d 443, 452 (N.J. 2001); *Groob*, 843 N.E.2d at 1177; *4139 Mgmt., Inc. v. Dep't of Labor & Employment*, 763 So.2d 514, 517 (Fla. Dist. Ct. App. 2000); Wiesner Decl. ¶ 4. If anything, the facts contained in the criminal Information incorporated in the complaints show exactly the opposite. Likewise, plaintiffs have completely failed to allege specific facts sufficient to show that "the particular tortious conduct took place within the scope of [the] employment relationship." *Carter*, 815 A.2d at 464-65; *Groob*, 843 N.E.2d at 1177; *Iglesia Cristiana*, 783 So. 2d at 357; Wiesner Decl. ¶ 4.[66]

(discussing elements of civil conspiracy); *O'Brien*, 2008 WL 2252527, at *6 (same); *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. Dist. Ct. App. 1997) (same). There is no case law in Florida establishing general civil liability for aiding and abetting. *See ZP No. 54 Ltd. Partnership v. Fidelity and Deposit Co. of Maryland*, 917 So.2d 368, 371 (Fla. Dist. Ct. App. 2005) (noting a "dearth of authority" supporting litigant's claim that aiding and abetting constitutes a cause of action).

[65] *See* NJ Compl. ¶¶ 16, 128, 134, 140, 147; NY Compl. p.1 & ¶¶ 923, 931; Fla. Compl. ¶¶ 56, 304, 310, 316, 323.

[66] Plaintiffs' allegations are also missing an essential element of a NIED claim — that they witnessed the alleged injuries to their family members. *See Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980) (NIED or "bystander claim" requires observation of death or injury by plaintiff); *Tschantz v. Ferguson*, 647 N.E.2d 507, 521 (Ohio Ct. App. 1994); *Willis v. Gami Golden* (continued…)

2. Plaintiffs Fail to State Elements Sufficient to Hold Chiquita Directly Liable for a Common Law Tort.

Plaintiffs also allege that Chiquita directly engaged in tortious conduct by negligently "hiring" and "supervising" the paramilitaries, and by negligently paying money to the AUC.[67] Like plaintiffs' derivative liability claims, these direct liability claims presume that Chiquita "employed" members of the paramilitaries, an utterly absurd notion that plaintiffs do not and could not support with specific factual allegations.

Additionally, to establish liability for these negligence-based torts, plaintiffs must allege that Chiquita: (1) had a duty to plaintiffs; (2) breached that duty; and (3) proximately caused the alleged injuries. *Williams v. Davis*, No. SC05-1817, -- So.2d --, 2007 WL 4124479, at *2 (Fla. Nov. 21, 2007); *Johnson v. Usdin Louis Co.*, 591 A.2d 959, 961 (N.J. Super. Ct. A.D. 1991); *Uddin v. Embassy Suites Hotel*, 848 N.E.2d 519, 522 (Ohio Ct. App. 2005); Wiesner Decl. ¶¶ 5-6. To establish duty, plaintiffs must allege that Chiquita "has somehow been responsible for bringing a third person into contact with an employee." *Garcia v. Duffy*, 492 So. 2d 435, 439 (Fla. Dist. Ct. App. 1986); *Marcinkiewicz v. Marrero*, 870 A.2d 753, 757 (N.J. Super. 2005); *Skubovious v. Clough*, 670 N.E.2d 578, 581 (Ohio Ct. App. 1966). To make these showings, plaintiffs cannot simply assert legal conclusions; they must "plead[] sufficient facts to establish that the employer owes a duty to the injured person." *Bennett v. Godfather's Pizza, Inc.*, 570 So.

Glades, LLC, 967 So.2d 846, 850 (Fla. 2007). The New Jersey plaintiffs allege (or intimate) that Jane Doe 2, John Doe 4, and Jane Doe 4 were injured in the presence of family members, but the associated plaintiffs (Jane Doe 1, John Doe 3, and Minor Does 1-4) do not allege that they personally observed the alleged injuries. (*See* NJ Compl. ¶¶ 48, 51, 57.) The Florida Complaint alleges that seven of the victims were injured in the presence of family members, (*see* Fla. Compl. ¶¶ 100, 115, 135, 152, 179, 218, 234), but those family members are not plaintiffs in this case (*see id.* ¶¶ 9, 13, 19, 25, 32, 43, 48 (claims brought by Rev. H. Francis O'Loughlin)).

[67] *See* NY Compl. ¶¶ 930-934 (negligence (Count 8)); NJ Compl. ¶¶ 149-152 (negligence/negligent hiring/negligence per se (Count 14)); Fla. Compl. ¶¶ 325-328 (same).

2d 1351, 1353 (Fla. Dist. Ct. App. 1990); *Garcia*, 492 So. 2d at 440. Plaintiffs offer no such allegations; evidently, they contend that Chiquita owed a legal duty to the entire population of Colombia. Their allegations fail to state a claim, and their common law tort claims must be dismissed.

3. Plaintiffs Do Not State a Claim for Wrongful Death or Loss of Consortium.

Finally, plaintiffs allege causes of action for wrongful death and loss of consortium.[68] Under New Jersey, Florida, and Colombian law,[69] plaintiffs' wrongful death claims assume that Chiquita is responsible for some underlying tortious conduct.[70] Plaintiffs' failure to allege any underlying tortious conduct by Chiquita adequately, as discussed above, therefore precludes plaintiffs' wrongful death and loss of consortium claims.

B. Plaintiffs' State Law Claims Are Largely Time-Barred.

In addition to plaintiffs' failure to plead adequately their state law claims on the merits, most of plaintiffs' claims are also time-barred under the applicable statute of limitations.

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[68] *See* NY Compl. ¶¶ 922-925, 935-936 (wrongful death (Count 6), loss of consortium (Count 9); NJ Compl. ¶¶ 126-129, 153-157 (wrongful death (Count 10), loss of consortium (Count 15); Fla. Compl. ¶¶ 302-305, 329-333 (wrongful death (Count 10), loss of consortium (Count 15).

[69] The New York Plaintiffs plead their wrongful death claim under Ohio law. Under Ohio law, if an injury occurs outside of Ohio, the wrongful death statute requires that a cause of action lie in the state where the injury occurred. Ohio Rev. Code § 2125.01; *Mayor v. Ford Motor Co.*, No. 83297, 2004 WL 1402692, at *3 (Ohio Ct. App. Jun. 24, 2004). Because plaintiffs allege that their family members were injured in Colombia, Ohio law would incorporate Colombian wrongful death law.

[70] *See* N.J. Stat. Ann. § 2A:31-1 (providing wrongful death cause of action against "the person who would have been liable in damages for the injury"); Fla. Stat. Ann. § 768.19 (same); Wiesner Decl. ¶¶ 2-6. The same is true of plaintiffs' claims for loss of consortium. *See Tichenor v. Santillo*, 527 A.2d 78, 83 (N.J. Super. Ct. A.D. 1987) ("A claim for loss of consortium is a wholly derivative cause of action contingent upon a third party's tortious injury to a spouse."); *Urban v. Goodyear Tire & Rubber Co.*, Nos. 77162, 77776, 76703, 2000 WL 1800679, at *5 (Ohio Ct. App. Dec. 7, 2000) (same); *ACandS, Inc. v. Redd*, 703 So.2d 492, 494 (Fla. Dist. Ct. App. 1997) (same); Wiesner Decl. ¶¶ 2-6.

New Jersey. The New Jersey Complaint is governed by New Jersey statutes of limitations.[71] New Jersey law provides a two-year limitations period for personal injury actions, *see* N.J. Stat. Ann. § 2A:14-2(a), for wrongful death claims, *see id.* § 2A:31-3, and for loss of consortium claims, *see Tackling v. Chrysler Corp.*, 185 A.2d 238, 239 (N.J. Super. Ct. 1962) (2-year limitation for underlying personal injury claim also applies to corresponding loss of consortium claim). Each New Jersey Plaintiff's claims are time-barred under these provisions.[72]

New York. The New York Complaint is governed by New York statutes of limitation. New York courts will apply the statute of the place where the cause of action accrued, or the New York statute, whichever is shorter. N.Y. C.P.L.R. § 202. New York law provides a one-year limitation period for battery claims, *see* N.Y. C.P.L.R. § 215, and a three-year limitation period for other personal injury claims, *see id.* § 214(5). The New York plaintiffs allege their wrongful death claims under the Ohio wrongful death statute, and those claims therefore are subject to a two-year statute of limitations. *See* Ohio Rev. Code § 2125.02(D)(1) (two-year limitations period for wrongful death claims); *Lipton v. Lockheed Aircraft Corp.*, 125 N.Y.S.2d 58, 59-60 (N.Y. Sup. Ct. 1953) (stating that New York's statute of limitations does not apply to actions brought under wrongful death statute of another jurisdiction). If the claims accrued in Ohio, then under New York law Ohio's shorter two-year limitation period for bodily injury

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[71] With regard state law claims, "the transferee district court [is] obligated to apply the state law that would have been applied if there had been no change of venue." *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

[72] Even if another jurisdiction's substantive law applied to the New Jersey plaintiffs' claims, the claims would remain barred by New Jersey's two-year limitation period. *See O'Keefe v. Snyder*, 416 A.2d 862, 868 (N.J. 1980) (limitation period for common law tort claim is procedural, so "the statute of the forum governs"); *LaFage v. Jani*, 766 A.2d 1066, 1079 (N.J. 2001) (holding that two-year limitation applies when New Jersey court applies another jurisdiction's wrongful death statute).

claims would apply. *See* Ohio Rev. Code § 2305.10(A). Only 25 plaintiffs' claims would survive under New York's one-year statute of limitations; 30 additional claims would survive under Ohio's two-year statute of limitations.[73] In the unlikely event that New York's three-year personal injury statute of limitations applied, an additional 44 claims might survive.[74] All of the remaining New York plaintiffs' state law claims are time-barred.

Florida. The Florida plaintiffs' claims are governed by Florida statutes of limitation. Under Florida law, a personal injury action does not survive the decedent's death, and such actions must be brought by the decedent's personal representative under Florida's wrongful death statute. *See* Fla. Stat. Ann. § 768.20. As a result, all of plaintiffs' tort claims would be barred by Florida's two-year statute of limitations for wrongful death actions, *see id.* § 95.11(4)(d).

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[73] *See* NY Compl. ¶¶ 64, 133, 139, 167, 187, 196, 308, 361, 366, 368, 375, 382, 459, 486, 488, 505, 509-510, 515, 521, 527, 529, 544, 566, 596 (25 claims arising within one year of the filing of the complaint); *id* ¶¶ 69, 131, 137, 144, 150, 159-160, 165-166, 284, 295, 334, 371, 383, 389, 392, 394, 400, 424, 450, 456, 469-470, 475, 522, 543, 565, 569, 600, 653 (additional 30 claims within two years of the filing of the complaint).

[74] *See id.* ¶¶ 46, 80, 142, 158, 179, 183, 201, 208, 211, 228, 232, 238, 240, 245, 255, 275, 281, 290, 303, 323, 338, 344, 359, 364-365, 374, 402, 416, 444, 449, 482, 511, 541, 549, 557, 579, 592, 634, 650, 655, 662, 671, 678 (additional 44 claims within three years of the filing of the complaint).

CONCLUSION

For the foregoing reasons, Chiquita respectfully requests that the complaints be dismissed with prejudice.

Dated: July 11, 2008

Respectfully submitted,

/s/ Robert W. Wilkins

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APPENDIX

International Convention for the Suppression of the Financing of Terrorism
Countries Ratifying Resolution by Date

[Data from Multinational Treaties Deposited With The Secretary General, Financing Convention 2-8, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp (Exhibit K).]

Ratification Before April 2002

1	Botswana	9/8/2000	10	Malta	11/11/2001	19	Netherlands	2/7/2002
2	Sri Lanka	9/9/2000	11	Lesotho	11/12/2001	20	Guatemala	2/12/2002
3	United Kingdom	3/7/2001	12	Palau	11/14/2001	20	Canada	2/19/2002
4	Uzbekistan	7/9/2001	13	Cuba	11/15/2001	22	Antigua & Barbuda	3/11/2002
5	Azerbaijan	10/26/2001	14	St. Kitts & Nevis	11/16/2001	23	San Marino	3/12/2002
6	Algeria	11/8/2001	15	Cyprus	11/30/2001	24	Cote d'Ivoire	3/13/2002
7	Peru	11/10/2001	16	Grenada	12/13/2001	25	St. Vincent and the Grenadines	3/28/2002
8	Monaco	11/10/2001	17	France	1/7/2002	26	Mali	3/28/2002
9	Chile	11/10/2001	18	Bolivia	1/7/2002			

Ratification Before March 2004

27	Spain	4/9/2002	56	Portugal	10/18/2002	85	Tunisia	6/10/2003
28	Albania	4/10/2002	57	New Zealand	11/4/2002	86	Bosnia and Herzegovina	6/10/2003
29	Iceland	4/15/2002	58	Nicaragua	11/14/2002	87	Nigeria	6/16/2003
30	Bulgaria	4/15/2002	59	Latvia	11/14/2002	88	Kenya	6/27/2003
31	Austria	4/15/2002	60	Russian Federation	11/27/2002	89	Liechtenstein	7/9/2003
32	Cape Verde	5/10/2002	61	Brunei Darussalam	12/4/2002	90	Guinea	7/14/2003
33	Rwanda	5/13/2002	62	Ukraine	12/6/2002	91	Malawi	8/11/2003
34	Estonia	5/22/2002	63	Tonga	12/9/2002	92	Jordan	8/28/2003
35	Sweden	6/6/2002	64	Singapore	12/30/2002	93	Venezuela	9/23/2003
36	Japan	6/11/2002	65	Romania	1/9/2003	94	Switzerland	9/23/2003
37	USA	6/26/2002	66	Mozambique	1/14/2003	95	Madagascar	9/24/2003
38	Turkey	6/28/2002	67	Mexico	1/20/2003	96	Afghanistan	9/24/2003
39	Finland	6/28/2002	68	United Republic of Tanzania	1/22/2003	97	Comoros	9/25/2003
40	Panama	7/3/2002	69	Costa Rica	1/24/2003	98	Siera Leone	9/25/2003
41	Libyan Arab Jamahiriya	7/9/2002	70	Marshal Islands	1/27/2003	99	Poland	9/26/2003
42	Norway	7/15/2002	71	Equatorial Guinea	2/7/2003	100	Papua New Guinea	9/30/2003
43	Denmark	8/27/2002	72	Israel	2/10/2003	101	Burkina Faso	10/1/2003
44	Ghana	9/6/2002	73	Lithuania	2/21/2003	102	Kyrgzstan	10/1/2003
45	Slovakia	9/13/2002	74	Kazakhstan	2/24/2003	103	Uganda	11/5/2003
46	Barbados	9/18/2002	75	Liberia	3/5/2003	104	Luxembourg	11/5/2003
47	Morocco	9/19/2002	76	Togo	3/10/2003	105	Croatia	12/1/2003
48	Micronesia	9/23/2002	77	Honduras	3/25/2003	106	Belize	12/1/2003
49	Viet Nam	9/25/2002	78	Italy	3/27/2003	107	Ecuador	12/9/2003
50	Australia	9/26/2002	79	Swaziland	4/4/2003	108	Philippines	1/7/2004
51	Samoa	9/27/2002	80	India	4/22/2003	109	Uruguay	1/8/2004
52	Georgia	9/27/2002	81	Mauritania	4/3/2003	110	Republic of Korea	2/17/2004
53	Serbia	10/10/2002	82	South Africa	5/1/2003	111	Mongolia	2/25/2004
54	Moldova	10/10/2002	83	Sudan	5/5/2003			
55	Hungary	10/14/2002	84	El Salvador	5/15/2003			

Ratification Before NJ Complaint Filed (July 18, 2007)								
112	Cook Islands	3/4/2004	128	Thailand	9/29/2004	144	United Arab Emirates	9/23/2005
113	Armenia	3/16/2004	129	Niger	9/30/2004	145	DR Congo	10/28/2005
114	Bhutan	3/22/2004	130	Belarus	10/6/2004	146	Vanuatu	10/31/2005
115	Seychelles	3/30/2004	131	Paraguay	11/30/2004	147	Bahamas	11/1/2005
116	Greece	4/16/2004	132	Mauritius	12/14/2004	148	Cambodia	12/12/2005
117	Maldives	4/20/2004	133	Turkmenistan	1/7/2005	149	Czech Republic	12/27/2005
118	Belgium	5/17/2004	134	Egypt	3/1/2005	150	Cameroon	2/6/2006
119	Germany	6/17/2004	135	Gabon	3/10/2005	151	Djibouti	3/13/2006
120	Tajikistan	7/16/2004	136	Syrian Arab Republic	4/24/2005	152	Sao Tome and Principe	4/12/2006
121	Former Yugoslav Republic of Macedonia	8/30/2004	137	Nauru	5/24/2005	153	China	4/19/2006
122	Benin	8/30/2004	138	Ireland	6/30/2005	154	Indonesia	6/29/2006
123	Colombia	9/14/2004	139	Argentina	8/22/2005	155	Myanmar	8/16/2006
124	Bahrain	9/21/2004	140	Bangladesh	8/26/2005	156	Montenegro	10/23/2006
125	Slovenia	9/23/2004	141	Kiribati	9/15/2005	157	Congo	4/20/2007
126	Senegal	9/24/2004	142	Jamaica	9/16/2005	158	Malaysia	5/29/2007
127	Dominica	9/24/2004	143	Brazil	9/16/2005			

Ratification July 18, 2007 through Present		
159	Saudi Arabia	8/23/2007
160	Guyana	9/12/2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF on this 11th day of July, 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

Fla. Bar No. 578721
rwilkins@jones-foster.com

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	**CRIMINAL NO.:**
	:	
v.	:	
	:	**VIOLATION:**
CHIQUITA BRANDS INTERNATIONAL, INC.,	:	
	:	**Engaging in Transactions with a Specially-Designated Global Terrorist**
Defendant.	:	**(50 U.S.C. § 1705(b); and 31 C.F.R. § 594.204)**
	:	

INFORMATION

The United States Attorney charges that:

COUNT ONE
(Engaging in Transactions with a Specially-Designated Global Terrorist)

At all times material to this Information:

A. General Allegations

Defendant Chiquita Brands International, Inc.

1. Defendant **CHIQUITA BRANDS INTERNATIONAL, INC. ("CHIQUITA")**, was a multinational corporation, incorporated in New Jersey and headquartered in Cincinnati, Ohio. Defendant **CHIQUITA** engaged in the business of producing, marketing, and distributing bananas and other fresh produce. Defendant **CHIQUITA** was one of the largest banana producers in the world and a major supplier of bananas throughout Europe and North America, including within the District of Columbia. Defendant **CHIQUITA** reported over $2.6 billion in revenue for calendar year 2003. Defendant **CHIQUITA** had operations throughout the world, including in the Republic of Colombia.

2. C.I. Bananos de Exportación, S.A. (also known as and referred to hereinafter as "Banadex"), was defendant **CHIQUITA'S** wholly-owned Colombian subsidiary. Banadex produced

bananas in the Urabá and Santa Marta regions of Colombia. By 2003, Banadex was defendant **CHIQUITA'S** most profitable banana-producing operation. In June 2004, defendant **CHIQUITA** sold Banadex.

The AUC

3. The United Self-Defense Forces of Colombia – an English translation of the Spanish name of the group, "Autodefensas Unidas de Colombia" (commonly known as and referred to hereinafter as the "AUC"), was a violent, right-wing organization in the Republic of Colombia. The AUC was formed in or about April 1997 to organize loosely-affiliated illegal paramilitary groups that had emerged in Colombia to retaliate against left-wing guerillas fighting the Colombian government. The AUC's activities varied from assassinating suspected guerilla supporters to engaging guerrilla combat units. The AUC also engaged in other illegal activities, including the kidnapping and murder of civilians.

4. Pursuant to Title 8, United States Code, Section 1189, the Secretary of State of the United States had the authority to designate a foreign organization as a Foreign Terrorist Organization ("FTO") if the organization engaged in terrorist activity threatening the national security of the United States.

5. The Secretary of State of the United States designated the AUC as an FTO, initially on September 10, 2001, and again on September 10, 2003. As a result of the FTO designation, since September 10, 2001, it has been a crime for any United States person, among other things, knowingly to provide material support and resources, including currency and monetary instruments, to the AUC.

6. The International Emergency Economic Powers Act, 50 U.S.C. § 1701, *et seq.*,

conferred upon the President of the United States the authority to deal with threats to the national security, foreign policy and economy of the United States. On September 23, 2001, pursuant to this authority, President George W. Bush issued Executive Order 13224. This Executive Order prohibited, among other things, any United States person from engaging in transactions with any foreign organization or individual determined by the Secretary of State of the United States, in consultation with the Secretary of the Treasury of the United States and the Attorney General of the United States, to have committed, or posed a significant risk of committing, acts of terrorism that threaten the security of United States nationals or the national security, foreign policy or economy of the United States (referred to hereinafter as a "Specially-Designated Global Terrorist" or "SDGT"). This prohibition included the making of any contribution of funds to or for the benefit of an SDGT, without having first obtained a license or other authorization from the United States government.

7. The Secretary of the Treasury promulgated the Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.201, *et seq.*, implementing the sanctions imposed by Executive Order 13224. The United States Department of the Treasury's Office of Foreign Assets Control ("OFAC"), located in the District of Columbia, was the entity empowered to authorize transactions with an SDGT. Such authorization, if granted, would have been in the form of a license.

8. Pursuant to Executive Order 13224, the Secretary of State of the United States, in consultation with the Secretary of the Treasury of the United States and the Attorney General of the United States, designated the AUC as a Specially-Designated Global Terrorist on October 31, 2001. As a result of the SDGT designation, since October 31, 2001, it has been a crime for any United States person, among other things, willfully to engage in transactions with the AUC, without having

first obtained a license or other authorization from OFAC.

Relevant Persons

9. Individual A was a high-ranking officer of defendant **CHIQUITA**.

10. Individual B was a member of the Board of Directors of defendant **CHIQUITA** ("Board").

11. Individual C was a high-ranking officer of defendant **CHIQUITA**.

12. Individual D was a high-ranking officer of defendant **CHIQUITA**.

13. Individual E was a high-ranking officer of defendant **CHIQUITA**.

14. Individual F was a high-ranking officer of Banadex.

15. Individual G was an employee of Banadex.

16. Individual H was an employee of defendant **CHIQUITA**.

17. Individual I was an employee of defendant **CHIQUITA**.

18. Individual J was a high-ranking officer of defendant **CHIQUITA**.

Defendant Chiquita's Payments to the AUC

19. For over six years – from in or about 1997 through on or about February 4, 2004 – defendant **CHIQUITA**, through Banadex, paid money to the AUC in the two regions of Colombia where it had banana-producing operations: Urabá and Santa Marta. Defendant **CHIQUITA** paid the AUC, directly or indirectly, nearly every month. From in or about 1997 through on or about February 4, 2004, defendant **CHIQUITA** made over 100 payments to the AUC totaling over $1.7 million.

20. Defendant **CHIQUITA** had previously paid money to other terrorist organizations operating in Colombia, namely to the following violent, left-wing terrorist organizations:

Revolutionary Armed Forces of Colombia – an English translation of the Spanish name of the group "Fuerzas Armadas Revolucionarias de Colombia" (commonly known as and referred to hereinafter as "the FARC"); and the National Liberation Army – an English translation of the Spanish name of the group "Ejército de Liberación Nacional" (commonly known as and referred to hereinafter as "the ELN"). Defendant **CHIQUITA** made these earlier payments from in or about 1989 through in or about 1997, when the FARC and the ELN controlled areas where defendant **CHIQUITA** had its banana-producing operations. The FARC and the ELN were designated as FTOs in October 1997.

21. Defendant **CHIQUITA** began paying the AUC in Urabá following a meeting in or about 1997 between the then-leader of the AUC, Carlos Castaño, and Banadex's then-General Manager. At the meeting Castaño informed the General Manager that the AUC was about to drive the FARC out of Urabá. Castaño also instructed the General Manager that defendant **CHIQUITA'S** subsidiary had to make payments to an intermediary known as a "convivir." Castaño sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property. Convivirs were private security companies licensed by the Colombian government to assist the local police and military in providing security. The AUC, however, used certain convivirs as fronts to collect money from businesses for use to support its illegal activities.

22. Defendant **CHIQUITA'S** payments to the AUC were reviewed and approved by senior executives of the corporation, to include high-ranking officers, directors, and employees. No later than in or about September 2000, defendant **CHIQUITA'S** senior executives knew that the corporation was paying the AUC and that the AUC was a violent, paramilitary organization led by Carlos Castaño. An in-house attorney for defendant **CHIQUITA** conducted an internal investigation

into the payments and provided Individual C with a memorandum detailing that investigation. The results of that internal investigation were discussed at a meeting of the then-Audit Committee of the then-Board of Directors in defendant **CHIQUITA'S** Cincinnati headquarters in or about September 2000. Individual C, among others, attended this meeting.

23. For several years defendant **CHIQUITA** paid the AUC by check through various convivirs in both the Urabá and Santa Marta regions of Colombia. The checks were nearly always made out to the convivirs and were drawn from the Colombian bank accounts of defendant **CHIQUITA'S** subsidiary. No convivir ever provided defendant **CHIQUITA** or Banadex with any actual security services or actual security equipment in exchange for the payments, for example, security guards, security guard dogs, security patrols, security alarms, security fencing, or security training. Defendant **CHIQUITA** recorded these payments in its corporate books and records as "security payments" or payments for "security" or "security services."

24. In or about April 2002, defendant **CHIQUITA** seated a new Board of Directors and Audit Committee following defendant **CHIQUITA'S** emergence from bankruptcy.

25. Beginning in or about June 2002, defendant **CHIQUITA** began paying the AUC in the Santa Marta region of Colombia directly and in cash according to new procedures established by senior executives of defendant **CHIQUITA**. In or about March 2002, Individual C and others established new procedures regarding defendant **CHIQUITA'S** direct cash payments to the AUC. According to these new procedures:

(A) Individual F received a check that was made out to him personally and drawn from one of the Colombian bank accounts of defendant **CHIQUITA'S** subsidiary. Individual F then endorsed the check. Either Individual F or Individual G cashed the check, and Individual G hand-

delivered the cash directly to AUC personnel in Santa Marta.

(B) Banadex treated these direct cash payments to the AUC as payments to Individual F, recorded the withholding of the corresponding Colombian tax liability, reported the payments to Individual F as such to Colombian tax authorities, and paid Individual F's corresponding Colombian tax liability. This treatment of the payments made it appear that Individual F was being paid more money and thus increased the risk that Individual F would be a target for kidnapping or other physical harm if this became known.

(C) Individual F also maintained a private ledger of the payments, which did not reflect the ultimate and intended recipient of the payments. The private ledger only reflected the transfer of funds from Individual F to Individual G and not the direct cash payments to the AUC.

26. On or about April 23, 2002, at a meeting of the Audit Committee of the Board of Directors in defendant **CHIQUITA'S** Cincinnati headquarters, Individual C described the procedures referenced in Paragraph 25. Individual A, Individual B, and Individual E, among others, attended this meeting.

Designation of the AUC as a Foreign Terrorist Organization

27. The United States government designated the AUC as an FTO on September 10, 2001, and that designation was well-publicized in the American public media. The AUC's designation was first reported in the national press (for example, in the Wall Street Journal and the New York Times) on September 11, 2001. It was later reported in the local press in Cincinnati where defendant **CHIQUITA'S** headquarters were located – for example, in the Cincinnati Post on October 6, 2001, and in the Cincinnati Enquirer on October 17, 2001. The AUC's designation was even more widely reported in the public media in Colombia, where defendant **CHIQUITA** had its

substantial banana-producing operations.

28. Defendant **CHIQUITA** had information about the AUC's designation as an FTO specifically and global security threats generally through an Internet-based, password-protected subscription service that defendant **CHIQUITA** paid money to receive. On or about September 30, 2002, Individual H, from a computer within defendant **CHIQUITA'S** Cincinnati headquarters, accessed this service's "Colombia – Update page," which contained the following reporting on the AUC:

> "US terrorist designation
>
> International condemnation of AUC human rights abuses culminated in 2001 with the US State Department's decision to include the paramilitaries in its annual list of foreign terrorist organizations. This designation permits the US authorities to implement a range of measures against the AUC, including denying AUC members US entry visas; freezing AUC bank accounts in the US; and barring US companies from contact with the personnel accused of AUC connections."

Defendant Chiquita Continued to Pay the AUC after the AUC was Designated as an FTO.

29. From on or about September 10, 2001, through on or about February 4, 2004, defendant **CHIQUITA** made 50 payments to the AUC totaling over $825,000.

30. On or about September 12, 2001, Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $31,847.[1]

31. On or about November 14, 2001, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $56,292.

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[1] With respect to all statements in this Information relating to payments by check, the "on or about" dates refer to the dates on which such checks cleared the bank, not the dates on which the checks were issued or delivered.

32. On or about December 12, 2001, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $26,644.

33. On or about February 4, 2002, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $30,079.

34. On or about March 7, 2002, Individual F and Individual G paid the AUC in Urabá and Santa Marta by check in an amount equivalent to $25,977.

35. On or about March 31, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in two equal payments in amounts equivalent to $3,689 each.

36. On or about April 16, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $35,675.

37. On or about May 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $10,888.

38. On or about May 31, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in two equal payments in amounts equivalent to $3,595 each.

39. In or about June 2002, Individual F and Individual G began making direct cash payments to the AUC in the Santa Marta region of Colombia according to the procedures referenced in Paragraph 25.

40. On or about June 11, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in three payments in amounts equivalent to $4,764, $6,670, and $6,269, respectively.

41. On or about June 14, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $31,131.

42. On or about July 2, 2002, Individual F and Individual G paid the AUC in Urabá by

check in an amount equivalent to $11,585.

43. On or about July 9, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,917.

44. On or about August 6, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $4,654.

45. On or about August 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $27,841.

46. On or about September 2, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $4,616.

47. On or about October 7, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $8,026.

48. On or about October 15, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $40,419.

49. On or about November 8, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,164.

50. On or about November 29, 2002, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,685.

51. On or about December 9, 2002, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $47,424.

52. On or about January 21, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,954.

53. On or about January 27, 2003, Individual F and Individual G paid the AUC in Urabá

by check in an amount equivalent to $22,336.

54. On or about February 11, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,291.

Defendant Chiquita Continued To Pay the AUC Against the Advice of Outside Counsel.

55. On or about February 20, 2003, Individual I stated to Individual C that Individual I had discovered that the AUC had been designated by the United States government as a Foreign Terrorist Organization. Shortly thereafter, Individual C and Individual I spoke with attorneys in the District of Columbia office of a national law firm ("outside counsel") about defendant **CHIQUITA'S** ongoing payments to the AUC.

56. Beginning on or about February 21, 2003, outside counsel advised defendant **CHIQUITA**, through Individual C and Individual I, that the payments were illegal under United States law and that defendant **CHIQUITA** should immediately stop paying the AUC directly or indirectly. Among other things, outside counsel, in words and in substance, advised defendant **CHIQUITA**:

- "Must stop payments."
  (notes, dated February 21, 2003)

- "Bottom Line: CANNOT MAKE THE PAYMENT"
  "Advised NOT TO MAKE ALTERNATIVE PAYMENT through CONVIVIR"
  "General Rule: Cannot do indirectly what you cannot do directly"
  "Concluded with: CANNOT MAKE THE PAYMENT"
  (memo, dated February 26, 2003)

- "You voluntarily put yourself in this position. Duress defense can wear out through repetition. Buz [business] decision to stay in harm's way. Chiquita should leave Colombia."
  (notes, dated March 10, 2003)

- "[T]he company should not continue to make the Santa Marta payments, given the AUC's designation as a foreign terrorist organization[.]"

(memo, dated March 11, 2003)

- "[T]he company should not make the payment." (memo, dated March 27, 2003)

57. On or about February 27, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $17,434.

58. On or about March 27, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $19,437.

59. On or about April 3, 2003, Individual B and Individual C first reported to the full Board of Directors of defendant **CHIQUITA** that defendant **CHIQUITA** was making payments to a designated Foreign Terrorist Organization. A member of defendant **CHIQUITA'S** Board of Directors objected to the payments and recommended that defendant **CHIQUITA** consider taking immediate corrective action, to include withdrawing from Colombia. The Board agreed to disclose promptly to the Department of Justice the fact that defendant **CHIQUITA** had been making payments to the AUC.

60. On or before April 4, 2003, according to outside counsel's notes concerning a conversation about defendant **CHIQUITA'S** payments to the AUC, Individual C said: "His and [Individual B's] opinion is just let them sue us, come after us. This is also [Individual A's] opinion."

61. On or about April 8, 2003, Individual C and Individual D met at defendant **CHIQUITA'S** headquarters in Cincinnati with Individual F, Individual G, Individual H, and Individual I. According to the contemporaneous account of this meeting, Individual C and Individual D instructed Individual F and Individual G to "continue making payments" to the AUC.

62. On or about April 24, 2003, Individual B and Individual C, along with outside counsel, met with officials of the United States Department of Justice, stated that defendant

CHIQUITA had been making payments to the AUC for years, and represented that the payments had been made under threat of violence. Department of Justice officials told Individual B and Individual C that defendant **CHIQUITA'S** payments to the AUC were illegal and could not continue. Department of Justice officials acknowledged that the issue of continued payments was complicated.

63. On or about April 30, 2003, Individual B and Individual C told members of the Audit Committee of the Board of Directors and the outside auditors of defendant **CHIQUITA** about the meeting with Department of Justice officials on April 24, 2003. Individual B and Individual C said that the conclusion of the April 24th meeting was that there would be "no liability for past conduct" and that there had been "[n]o conclusion on continuing the payments."

64. On or about May 5, 2003, according to the contemporaneous account of this conversation, Individual I instructed Individual F and Individual J to "continue making payments" to the AUC.

65. On or about May 12, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,105.

66. On or about May 21, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $47,235.

67. On or about June 4, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $7,623.

68. On or about June 6, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in two payments in amounts equivalent to $6,229 and $5,764, respectively.

69. On or about July 14, 2003, Individual F and Individual G paid the AUC in Santa

Marta in cash in an amount equivalent to $7,139.

70. On or about July 24, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $35,136.

71. On or about August 8, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $5,822.

72. On or about August 25, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $12,850.

73. On or about September 1, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,963.

74. On or about September 8, 2003, outside counsel advised defendant **CHIQUITA** in writing, through Individual C and Individual I, that: "[Department of Justice] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments."

75. On or about October 6, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $18,249.

76. On or about October 6, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $9,439.

77. On or about October 24, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $30,511.

78. On or about November 5, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,937.

79. On or about December 1, 2003, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $6,337.

80. On or about December 2, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $30,193.

81. On or about December 4, 2003, Individual B and Individual C provided the Board of Directors additional details concerning defendant **CHIQUITA'S** payments to the AUC that had not previously been disclosed to the Board. A member of defendant **CHIQUITA'S** Board of Directors responded to this additional information by stating: "I reiterate my strong opinion – stronger now – to sell our operations in Colombia."

82. On or before December 4, 2003, defendant **CHIQUITA** created and maintained corporate books and records that did not identify the ultimate and intended recipient of the payments to the AUC in Urabá in calendar year 2003 as follows:

Reporting Period	Description of recipient	Description of payment
1st Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security service."
2nd Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security services."
3rd Quarter 2003	"Papagayo Association, a 'Convivir.' (Convivirs are government licensed security providers.)"	"Payment for security services."

83. On or about December 16, 2003, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $24,584.

84. On or about December 22, 2003, Individual B sent an email to other Board members on the subject of defendant **CHIQUITA'S** ongoing payments to the AUC, stating, among other things: "This is not a management investigation. This is an audit committee investigation. It is an audit committee investigation because we appear to [be] committing a felony."

85. On or about January 9, 2004, Individual F and Individual G paid the AUC in Santa Marta in cash in an amount equivalent to $10,630.

86. On or about January 13, 2004, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $27,958.

87. On or about February 4, 2004, Individual F and Individual G paid the AUC in Urabá by check in an amount equivalent to $4,795.

88. From on or about October 31, 2001, and continuing until on or about February 4, 2004, within the District of Columbia and elsewhere, defendant **CHIQUITA** engaged in a continuing course of conduct willfully to engage and attempt to engage in transactions with a Specially-Designated Global Terrorist, by contributing funds to and for the benefit of the AUC, without having first obtained the required authorization from the Department of the Treasury's

Office of Foreign Assets Control, located in the District of Columbia.

(**Engaging in Transactions with a Specially-Designated Global Terrorist,** in violation of Title 50, United States Code, Section 1705(b); Title 31, Code of Federal Regulations, Section 594.204.)

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Dated: March 13, 2007

EXHIBIT B

PERMANENT COUNCIL

OEA/Ser.G
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29 January 2003
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REPORT OF THE GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES ON THE DIVERSION OF NICARAGUAN ARMS TO THE UNITED DEFENSE FORCES OF COLOMBIA

January 6, 2003

This document is being distributed to the permanent missions and will be presented to the Permanent Council of the Organization.

NOTE:

This edition of the General Secretariat's Report on the Diversion of Nicaraguan Arms to the United Self Defense Forces of Colombia does not contain Annexes III through VII. In all other respects this edition is identical to the complete report.

Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Self Defense Forces of Colombia

January 6, 2003

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1. Executive Summary:

I. Summary

In October 1999, a series of events began which resulted in the illegal diversion of 3000 AK47s and 2.5 million rounds of ammunition from Nicaraguan government stocks to the *Autodefensas Unidas de Colombia* (AUC), a terrorist organization in Colombia. The diversion was made possible by negligent actions on the part of various government officials and private companies, and the willful and criminal actions of several private arms merchants.

The original, legitimate, transaction was to be a trade between the Nicaraguan National Police and a private Guatemalan arms dealership, *Grupo de Representaciones Internationales* (GIR S.A.). The Nicaraguan Army introduced GIR S.A. to the police. GIR S.A. offered the police a quantity of new Israeli manufactured pistols and mini-uzis in return for five thousand surplus AK47s and 2.5 million rounds of ammunition. This was an attractive arrangement for the police since it was a cashless transaction and would provide the police with arms more suitable for police work.

GIR S.A. shopped for a buyer for the police arms and settled on Shimon Yelinek, an Israeli arms merchant based in Panama. Yelinek claimed to be representing the Panamanian National Police, and during the negotiations presented GIR S.A. and Nicaraguan officials with a Panamanian Police purchase order, which has been proven to be a forgery. Neither GIR S.A. nor any Nicaraguan official ever questioned the purchase order or attempted to verify that Panama had in fact offered to buy the weapons.

Yelinek inspected the police weapons some months after the deal was made, and after Nicaraguan authorities had given permission for the transaction. He declared them to be unserviceable and unsatisfactory. This threatened the transaction. GIR S.A. and the Nicaraguan Army solved the problem by arranging a swap of 5000 surplus police AK47s for 3117 serviceable weapons in the Nicaraguan Army inventory. GIR S.A. delivered the Israeli arms to the police and the Nicaraguan Army took over responsibility for delivering the AK47s. Although the parameters of the transaction changed, no new authority was requested from responsible Nicaraguan agencies.

Yelinek identified a Panamanian maritime company, Trafalgar Maritime Inc., to pick up the arms in Nicaragua and take them to Panama. The arms were transported by the army to the port of El Rama, Nicaragua, and were loaded aboard the company's only ship, the Otterloo, which declared for Panama. Instead, the Otterloo sailed directly to Turbo, Colombia where the arms were delivered to the AUC. The Captain of the ship disappeared shortly thereafter, and the maritime company was dissolved several months later. The Otterloo was sold to a Colombian citizen.

Immediately after the shipment left Nicaragua, GIR S.A. began to organize another sale to Yelinek from the Nicaraguan Army, using the same purchase order, this time for an additional five thousand AK47s and 17 million rounds of ammunition. Prices were exchanged between the three, Yelinek made a down payment, and the deal was under way.

When the diversion of the initial shipment became known, the intelligence services of Colombia, Nicaragua and Panama agreed to organize a "sting" operation, ostensibly to track this second

shipment and identify those responsible for the first diversion. This plan fell apart fairly quickly when GIR S.A. found out that it was in play and canceled the shipment.

The OAS investigative team believes that:

1. Shimon Yelinek is likely guilty of fraud and of violating Colombian anti-terrorism laws, and possibly Panamanian anti-terrorism laws, among others. An associate Marco Shrem, appears complicit in these activities, but to an unknown degree.

2. The owner of the Otterloo, the ship which transported the arms to Colombia, is apparently guilty of conspiring with Yelinek to provide the AUC with arms and of violating Colombian, and possibly Panamanian, anti-terrorism and other laws.

3. The captain of the ship which transported the arms to Colombia, along with his first mate, may have been cognizant of, and a participant in, the arms diversion organized by Yelinek.

4. Although the Investigative Team found no evidence that Ori Zoller and Uzi Kissilevich, the owner and general manager of of GIR S.A., respectively, were co-conspirators in the arms diversion, their failure to make any attempt to verify the actual destination for the arms contributed to the diversion.

5. The Government of Nicaragua failed to comply with a number of provisions of the Inter-American Convention Against the Illicit Manufacture and Trafficking in Weapons, Munitions, Explosives and Related Materials (CIFTA), to which it is a party. Nicaraguan authorities are guilty of professional negligence with their failure to verify whether the Panamanian National Police was indeed the true end-user in the arms exchange.

6. There appears to be no involvement of Panamanian authorities in the exchange of arms, or their diversion.

7. Colombia is the victim of the arms diversion. However several Colombian customs agents were likely accomplices of, or were bribed by, the AUC in order to allow the Otterloo to land its cargo of arms and ammunition in the port of Turbo.

II. Recommendations:

The OAS Investigative Team presents below a number of recommendations to strengthen the existing Inter-American arms control regime and prevent diversions of this type from occurring in the future.

Recommendation 1: The governments of Colombia, Nicaragua, and Panama should vigorously pursue investigations into possible criminal conduct on the part of any and all persons involved in this case, and should seek the collaboration of other governments including Canada, Guatemala, Israel, Mexico, and the United States of America in the investigation and prosecution of these possible crimes. These efforts should include attempts to resolve the unanswered questions presented in section VII of this report.

Recommendation 2: The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, (CIFTA), is, and should remain, the primary multilateral hemispheric tool to prevent the illicit manufacturing and trafficking in arms and ammunition. All member states of the Organization who have not done so should sign and ratify the Convention. The Consultative Committee of CIFTA should spearhead an effort to ensure full implementation of the Convention and to promote its full adoption.

Recommendation 3: With regard to full implementation of the Convention, particular emphasis should be placed on the provisions of paragraph 3 of Article IX of the Convention, requiring evidence of the pre-issuance of the necessary import licenses or authorizations before any shipments of firearms are released for export. Articles VIII, and X, should also be paid particular attention. Member states should consider applying the CICAD Model Regulations to facilitate implementation of the CIFTA Convention.

Recommendation 4: OAS member states should consider establishing surplus arms destruction programs. OAS member and observer states should provide financial and technical assistance for such surplus arms destruction.

Recommendation 5: Persons engaged in the import, export and in-transit movement of firearms, or as dealers, or carriers and/or shippers of firearms, should be registered by national governments in order to do business in each country in which they have an office, and in each country in which a transaction takes place. Member states should not engage in business activities with any non-registered broker.

Recommendation 6: All member states should review their national legislation and administrative practices for the exportation of firearms and establish a legal regime sufficient to exert meaningful control over the inventory and export of firearms.

Recommendation 7: Harmonized import certificates should be used by all member countries. Electronic formats of the certificates should be developed so that the information can be readily shared with other countries involved in a transaction.[1] Additionally, harmonized export and in-transit documents should be developed and used by all member states to regulate the importation, export and transit of arms and ammunition and related materials.

The OAS Investigative Team limited its work to the specific mandate it was given. However the investigation revealed serious issues which the Team strongly recommends be investigated by governments (see page 34).

[1] It should be noted that this recommendation and others referring to the exchange of information among countries is subject to the confidentiality provisions set out in Article XII of the Convention.

2. Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Self Defense Forces of Colombia

I. Background:

A. Request for an Investigation:

On May 8, 2002, the Ministers of Foreign Affairs of Colombia, Nicaragua and Panama, Guillermo Fernandez de Soto, Norman Caldera C. and José Miguel Alemán, respectively, wrote to OAS Secretary General César Gaviria. The Ministers requested that the General Secretariat of the Organization conduct an investigation into the circumstances surrounding the export of an official shipment of arms and ammunition which originated in Nicaragua in November 2001, and was subsequently diverted to the United Self Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC). The letter is contained in Annex V of this report, as document No. 17, for reference.

The Ministers requested that the Secretary General investigate the events and report to their respective governments setting out the facts drawn from the investigation, together with conclusions and recommendations for suggested mechanisms and procedures designed to prevent the recurrence of similar situations in the future.

Given the importance of this joint request in the post-September 11, 2001 environment, the Secretary General responded by appointing Ambassador Morris D. Busby as his Special Representative to lead the investigation[2].

B. Investigative Task:

The general task of the investigation was to determine how an official arms transfer between the Nicaraguan National Police (NNP) and a firearms brokerage company located in Guatemala, *Grupo de Representaciones Internacionales*, (GIR S.A.), led to the diversion of the Nicaraguan arms to the port of Turbo, Colombia, where the arms subsequently came into the hands of the United Self Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC), a paramilitary group considered a terrorist organization. It had been represented to the responsible Nicaraguan authorities that the arms were being sold and shipped to the Panamanian National Police.

The Investigative Team undertook the following specific tasks:

1. To determine the actual facts of the case and prepare a complete chronology of all events pertinent to the diversion;

[2] Ambassador Busby led an OAS Investigative Team composed of Christopher Hernández-Roy, Advisor to the Assistant Secretary General, serving as Ambassador Busby's Deputy; Michael Sullivan, Principal Attorney of the Department of Legal Affairs; Jimena Duque, Security Specialist, Office of the Assistant Secretary General; Sergio Caramagna, Director of the Office of the General Secretariat in Nicaragua; and Hernan Hurtado, Director of the Office of the General Secretariat in Panama.

2. To develop information on possible violations of national law and make appropriate recommendations to the governments for follow-on investigation and/or action;

3. To ascertain whether any of the governments involved failed to adhere to their relevant international obligations, and;

4. To make appropriate recommendations to avoid a recurrence of similar situations in the future.

C. Methodology:

On May 28 and 29, 2002, the three governments requesting the investigation each submitted to the General Secretariat a report on their findings related to the arms diversion. These reports contained facts of the case developed during their internal investigations, and also copies of original documentation. Based on an extensive review of this documentation, the investigating team requested additional information from the three governments on July 15, 2002, which the governments provided in late July.

Members of the Investigative Team traveled to Nicaragua, Guatemala and Panama, to obtain additional information and documentation, and to interview government officials and private individuals with direct knowledge of the case.

In Guatemala, the team met with the owner and the general manager of the firm *Grupo de Representaciones Internacionales*, (GIR S.A.), Messrs. Ori Zoller and Uzi Kissilevich. GIR S.A. was the broker that put together the deal.

In Nicaragua, the team met with the Foreign Minister, the Minister of Defense, the current and former Ministers of Government (*Ministro de Gobernación*), the current and former Chiefs of Police, the *Contralor General de la República*, the Chief of the Nicaraguan Army, the Inspector General of the army, several other civilian, police and military officials, and with representatives of the Nicaraguan shipping company, Agencia Vassali which handled the loading of the arms onto the Otterloo for ultimate transport to Colombia.

In Panama, the team met with the Foreign Minister; the Minister of Government and Justice (*Ministro de Gobierno y Justicia*); the Vice-Minister of Foreign Affairs; the Executive Secretary of the Security Council (*Secretario Ejecutivo del Consejo de Seguridad*); the Chief of the Panamanian National Police; the prosecutor (*Fiscal*) responsible for the case in Panama; Marco Shrem, one of two private individuals located in Panama who were involved in the transaction; Gustavo Padilla, a Panamanian lawyer who incorporated Trafalgar Maritime Inc.; Yariela Brown, the Secretary of Trafalgar Maritime Inc.; Carlos Aguilar, the first mate of the ship Otterloo, whose registered owner is Trafalgar Inc., and other people with knowledge of the case. The Investigative Team made several unsuccessful attempts to interview the other private individual located in Panama who was involved in the arms diversion, Shimon Yelinek. These attempts were made through Yelinek's lawyers following his arrest by Panamanian authorities in November, 2002. Table 1 (below) contains a complete list of individuals interviewed or contacted by the Investigative Team.

The Investigative Team did not travel to Colombia, rather, requests for information from the Government of Colombia were made through that country's Ambassador, Permanent Representative to the OAS, Humberto de la Calle Lombana, and through contacts with knowledgeable individuals.

The Investigative Team was able to reconstruct the facts surrounding the transfer of arms from Nicaragua to Colombia based on information provided by the countries, and other information collected during meetings with government officials and others. The investigation also sought, and received, information from the governments of Belize, Guatemala, Israel, Mexico, and the United States of America.

Table1: Persons Contacted or Interviewed by the Investigative Team

Belize:

- Lisa Shoman, Ambassador, Permanent Representative of Belize to the Organization of American States.

Colombia:

- Humberto de la Calle, Ambassador, Permanent Representative of Colombia to the Organization of American States.
- Brigadier General Jose Leonardo Gallego-Castrillon, Commander, Colombian National Police, Valle de Aburra.

United States of America:

- Oliver P. Garza, Ambassador of the United States of America in Nicaragua.
- Roger Noriega, Ambassador, Permanent Representative of the United States of America to the Organization of American States.
- Christopher McMullen, Chargé, Embassy of the United States of America in Panama.

Guatemala:

- Ori Zoller, Owner of *Grupo de Representaciones Internacionales*, GIR S.A.
- Uzi Kissilevich, Director General of *Grupo de Representaciones Internacionales*, GIR S.A.
- Arturo Duarte, Ambassador, Permanent Representative of Guatemala to the Organization of American States.

Israel:

- Rafael Barak, Chargé, Embassy of Israel in the United States of America.
- Jacob Dayan, Alternate Permanent Observer of Israel to the Organization of American States.

México:

- Miguel Ruiz Cabañas, Ambassador, Permanent Representative of Mexico to the Organization of American States.

Nicaragua:

- H.E., Enrique Bolaños Geyer, President of the Republic.
- Norman Caldera, Minister of Foreign Affairs.
- Arturo Harding, Minister of *Gobernación.*
- René Herrera, former Minister of *Gobernación.*
- José Adan Guerra, Minister of Defense.
- Carlos Ulvert, Ambassador of Nicaragua to the United States of America.
- Leandro Marín Abaunza, Ambassador, Permanent Representative of Nicaragua to the Organization of American States.
- General Javier Alonso Carrión McDonough, Commander in Chief of the Nicaraguan Army.
- General Roberto Calderón, Inspector General of the Nicaraguan Army.
- Edwin Cordero, First Commissioner, NNP.
- Francisco Bautista Lara, Commissioner of Police, NNP.
- Melby Gonzalez, Commissioner of Police, NNP.
- Francisco Montealegre, former First Commissioner of Police, NNP
- Julio César Solis, General Manager, Naval Operations, *Agencia Vassali*.
- Augusto Canales Aguilar, Owner, *Agencia Canales Aguilar.*
- Members of the Superior Council of the Comptroller General of the Republic of Nicaragua (*Consejo Superior de la Contraloría General de la Republica de Nicaragua*), including the Council's former President, Guillermo Arguello Poessy, and its current President, Francisco Ramírez Torres.

Panamá:

- José Miguel Aleman, Minister of Foreign Affairs.
- Anibal Salas, Minister of Government and Justice (*Ministro de Gobierno y Justicia*).
- Harmodio Arias Cerjack, Deputy Foreign Minister.
- Ramiro Jarvice, Executive Secretary of the Security Council.
- Carlos Barés, Chief of the PNP.
- Juan Manuel Castulovich, Ambassador, Permanent Representative of Panama to the Organization of American States..
- José Isaza, Chief of the Maritime Service (*Jefe del Servicio Marítimo*).
- Gustavo Leonardo Padilla Martinez, Trafalgar Maritime Inc.'s lawyer.
- Yariela Brown, Trafalgar Maritime Inc.'s secretary.
- Fredison Carvajal, PNP
- Alexis Vergara, PNP
- Patricio Candanedo, Second Prosecutor Specializing in Crimes Related to Drugs, Public Ministry (*Fiscal Segundo Especializado en Delitos Relacionados con Drogas, Ministerio Publico).*
- Marco Shrem, owner/partner, Marksman Latin America S.A, y Marksman Panamá, commercial enterprises located in Panama.
- Carlos Aguilar, merchant marine captain, first mate aboard the Otterloo.

II. Principal Actors in the Arms Diversion:

The following persons had substantive roles in the arms transaction:

In Guatemala:

- Ori Zoller: An Israeli citizen and owner of GIR S.A., a firearms dealership and brokerage agency established in Guatemala in 1996, and a representative of Israeli Military Industries (IMI). Zoller was formerly a member of the Israeli Army's special forces, and an intelligence officer. He was the broker who organized and managed the transfer of the NNP firearms.

- Uzi Kissilevich: An Israeli citizen and partner of Zoller's in GIR S.A., also formerly a member of the Israeli military. He serves as GIR S.A.'s general manager and was also involved in the NNP firearms transfer.

In Nicaragua:

- General Roberto Calderón Meza: Inspector General of the Nicaraguan Army and formerly its Chief of Logistics. Over the years, General Calderón allegedly had a number of business dealings with Zoller. Calderón became involved in the present case through his relationship with Zoller. He was instrumental in providing Nicaraguan Army firearms to the NNP when the firearms that the NNP was planning to transfer were found to be unsatisfactory to the ultimate buyer.

- Major Alvaro Rivas Castillo: Major of the Nicaraguan Army, and Aide de Camp of General Calderón. He took responsibility for logistics and the actual export of the firearms that are the subject of the investigation.

- René Herrera: Nicaraguan Minister of Government (*Gobernación*) until September 30, 2000. Ex-Minister Herrera approved the terms of the transfer of the NNP firearms to GIR S.A. Herrera also requested Nicaragua's Comptroller General (*Contraloría General*) to exempt this firearms transaction from Nicaragua's Law governing State Contracts (*Ley de Contrataciones del Estado*). Herrera personally briefed the then United States Ambassador to Nicaragua on the terms of the original arms deal – describing it as a sale of antiquated arms to a broker for re-sale to collectors in the United States.

- Commissioner Francisco Montealegre: Chief of Police from September 1996 to September 6, 2001. Montealegre concluded the initial arms exchange contract with Zoller.

- Edwin Cordero Ardilla: Present Chief of the NNP. He became involved in the firearms transfer following Montealgre's retirement and saw it through to final completion.

In Panama :

- Shimon Yelinek: Actual purchaser of the Nicaraguan firearms, through GIR S.A., purportedly for the PNP. He is an Israeli citizen.

- Marco Shrem: A business associate of Yelinek. Shrem put Yelinek in contact with Zoller, collaborated with Yelinek in the purchase of the Nicaraguan firearms through Zoller, and attempted to buy/sell additional arms though Zoller. He is a Peruvian citizen.

- Miguel Onattopp Ferriz: General Manager and owner of Trafalgar Martime Inc., the company identified as the registered owner of the Otterloo. The Otterloo loaded the arms in El Rama, Nicaragua, and transported them to Colombia. Miguel Onattopp Ferriz is a Mexican citizen.

- Jesús Iturrios Maciel: Captain of the Otterloo at the time of the diversion, employed by Trafalgar Maritime Inc. He is a Mexican citizen.

Annex II contains a complete listing of all of the natural and legal persons and other entities involved in the case.

III. The Chain of Events:

The chain of events of the case can be broken down into the following four phases:

- The first phase, from October 1999 to June 2000, begins when the Chief of the NNP, Commissioner Francisco Montealegre, aware that his police force has insufficient and inappropriate firearms and a lack of financial resources to acquire new ones, is introduced to Ori Zoller of GIR S.A. by the Inspector General of Nicaragua's army, General Roberto Calderón. A proposed arms transfer was conceived whereby the NNP would provide a quantity of AK47 firearms to the broker Zoller, and in exchange, Zoller would provide the NNP with more suitable firearms (pistols and mini-Uzis). During this stage, the necessary approvals within the Nicaraguan Government were sought and obtained, and a formal contract to effect the exchange was entered into between the NNP and Zoller's GIR S.A.

- The second phase occurred between July 2000 and July 2001, when Zoller identified a buyer for the Nicaraguan arms, Shimon Yelinek and his associates. A shipping company was established in Panama, Trafalgar Maritime Inc., apparently for the purpose of transporting the arms to the AUC in Colombia. It was during this stage that the arms diversion appears to have been planned.

- During the third phase, between July 4, 2001 and November 3, 2001, there was a flurry of activity, beginning when Yelinek inspected the NNP arms being offered for sale by Zoller and determined that their condition was not adequate for the transaction to proceed. In an attempt to salvage the transaction, Zoller and General Calderón entered into an agreement whereby the Nicaraguan Army offered to exchange the unacceptable NNP arms for better quality ones in the army's possession. This was also the period when the final logistical arrangements and customs and export procedures were executed, and culminated with the arms and ammunition being exported from Nicaragua and diverted to Colombia.

- The fourth and final phase took place from late November 2001 to February 2002, when preparations were made to purchase a second shipment of arms from Nicaragua, again ostensibly for the Panamanian Police. The intelligence services of Colombia, Panama, and Nicaragua, through a tri-national operation, proposed by the Nicaraguan Armny, attempted to put together a "sting", supposedly to uncover those responsible for the diversion.

Narrative Summary of the Chain of Events:

The narrative presented below was reconstructed from interviews and documents obtained by the Investigative Team. A documented chronology of events is presented in Annex I which provides additional details regarding the events surrounding the diversion, and the persons, institutions, and businesses involved.

Phase I:

The Nicaraguan National Police, a force consisting of approximately 7000 police officers, has only about half the number of side-arms necessary to equip every officer. This has forced the police to issue AK47 assault rifles to many officers, these arms being plentiful as they were left over from Nicaragua's civil war. The Police leadership recognizes that AK47s are not appropriate for a police force.

In 1999, General Roberto Calderón, the Inspector General of the Nicaraguan Army, introduced the Chief of the NNP, Commissioner Francisco Montealegre, to Ori Zoller, the owner of GIR S.A. Zoller and Calderón had a prior business relationship, as GIR S.A. had sold arms and equipment to the Nicaraguan military in the past. In the fall of 1999, Zoller presented Montealegre with a proposal to obtain suitable side arms which would not require the NNP to pay cash for the arms.

Zoller and Montealegre worked out an exchange, whereby GIR S.A. would provide the NNP with new side arms (465 Jericho pistols and 100 Uzi-submachineguns) in exchange for aging surplus police AK47s, ammunition and bayonets (initially, 5000 AK47s, 2.5 million rounds of ammunition, and 6000 bayonets).

Between February and the end of May, 2000, various bureaucratic procedures were undertaken within the Nicaraguan Government to obtain approval for the exchange of arms. The exchange was approved by the Minister of *Gobernación*, who has responsibility for the NNP; it was also approved by the President of the Republic (as mentioned in a February 3, 2000 letter from the Minister of *Gobernación,* see document No. 156 in Annex V). An exemption to the state purchases Law, to allow for a "sole source" transaction of the arms, was approved by the Comptroller General on May 22. The Minister of *Gobernación* also informed the United States Embassy in Managua of the possible exchange, as Zoller originally indicated he would sell the AK47s as collectors items to a broker in the United States, Century International Arms.

While these internal procedures were being followed, Montealegre and Zoller formalized the agreement by jointly signing a letter of intent, outlining the terms under which the exchange was to be made. Once the various approvals were obtained for the exchange, Zoller and Montealegre signed a formal contract on June 2, 2000. Among other clauses in the contract was a requirement for Zoller to produce an end-user certificate for the Nicaraguan arms to be exported.

Meanwhile, in order to make the maximum cash profit on the exchange, Zoller was searching for buyers for the military equipment. He found three potential buyers for the arms: 1) Brian Sucher, of Century International Arms Inc., based in Miami, Florida; 2) Pedro Bello, another Miami-based arms broker; and 3) Shimon Yelinek, an Israeli citizen residing in Panama.

Shimon Yelinek was introduced to Zoller by Marco Shrem, another resident of Panama, and an associate of Yelinek. Zoller's business partner, Uzi Kissilevich, had been informed by Haim Geri, an advisor to Century International Arms Inc. and former representative of Israeli Military Industries in Colombia, that Marco Shrem was seeking to purchase AK47s. Once Kissilevich contacted Shrem, and the latter introduced Yelinek, it was only a short time before Zoller and Yelinek reached a deal, as the latter apparently offered Zoller the best price for the Nicaraguan arms and ammunition.

Yelinek and Shrem purported to be acting as brokers or middlemen for the Panamanian National Police, which was allegedly the entity ultimately interested in purchasing the arms and ammunition[3]. Yelinek, Shrem, Zoller, and Yelinek's brother in law, Haviv Aviad, traveled to Nicaragua on April 28, 2000, to inspect the arms that the Nicaraguan National Police was to provide as part of the exchange. On May 18, Zoller traveled to Panama to meet Yelinek and Shrem. Yelinek agreed to purchase 2500 AK47s (later increased to 3000) and 2.5 million rounds of ammunition (later increased to 5 million rounds). Zoller agreed to have the NNP arms reconditioned and crated, a task which was contracted to the NNP and associates of General Calderón. That same day, Zoller instructed Kissilevich to fax to Panama GIR S.A.'s bank account information so Yelinek could make a down-payment for the arms purchase. On June 16, $75,000 was deposited in GIR S.A.'s account, via wire transfer. The total value of the Zoller-Yelinek deal was approximately $575,000.

Phase II

Over the next several months, Yelinek and Shrem solicited additional price quotes from GIR S.A. for firearms, missiles and other kinds of military equipment. At the same time, GIR S.A. sent a series of reminders and instructions to Yelinek as to how to send wire-transfers to GIR S.A.'s bank account. On May 15, 2001, Yelinek met Zoller at his offices in Guatemala City, where he provided Zoller with an alleged Panamanian Police purchase order[4], which specified a much larger quantify of arms and ammunition. The purchase order included language which could allow the order to be used simultaneously as an end-user certificate.

Yelinek inspected the NNP arms in Nicaragua a second time (this time in the presence of Uzi Kissilevich, Zoller's associate) on July 4, 2001. As a result of this inspection, at some point in July or August of 2001, Yelinek indicated to GIR S.A. that the police arms were of poor quality and did not meet his requirements. Zoller quickly corrected this problem by making a side deal with the army through General Calderón, whereby the army agreed to accept the NNP's 5000 old AK47s, in return for 3117 new AK47s in the possession of the army. As a result, these new army weapons would then be the arms exchanged with GIR S.A. under the original contract signed between the NNP and GIR S.A. In a further modification of the original deal, the Nicaraguan Army also agreed to provide an additional 2.5 million bullets and 3000 additional bayonets; GIR S.A. agreed to provide the army with a number of bullet-proof vests. Zoller also hired Haim Geri to train the police on their new weapons.

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[3] Yelinek, in a affidavit sworn on July 1, 2002, before a notary public in Tel Aviv, Israel, denies that he concluded any business dealings with Zoller (see document No. 1 in Annex III). However, the Investigative Team has concrete documentation which shows this is untrue.

[4] The Investigative Team is satisfied that the alleged Panamanian Purchase Order is a forgery. The document seems to have been created from a true blank purchase order form, but the signatures on the document have apparently been forged, and there are other irregularities as well. See Annex IV for information and analysis on the alleged purchase order, provided by the Government of Panama.

Two side-deals were also arranged by Zoller. One hundred fifteen of the guns supplied by the Nicaraguan Army, were to be sold to the Guatemalan Military. Nine thousand bayonets were to be sold to Century International Arms, Inc, in Miami. From the perspective of laws on international arms trafficking, both of these two side-deals appear to be legitimate.

Virtually at the same time, on July 11, 2001, a Mexican National, Miguel Onattopp Ferriz, reportedly a Captain in the Mexican Merchant Marine, established a new shipping company in Panama City, Trafalgar Maritime Inc., through a Panamanian lawyer, Gustavo Padilla. The company's only ship, the Otterloo, had been purchased from Dutch owners in early July 2001, and was given a provisional Panamanian ship's license on July 24.

Phase III

All of the arrangements necessary to export the arms and ammunition were coordinated between the Nicaraguan Army, which undertook this role on behalf of the NNP, GIR S.A.'s shipping agent, Guatemala-based Leonel Cordon, a shipping agent in Nicaragua, Agencia Vassali S.A., and a customs broker, hired by the police, *Agencia Aduanera Canales Aguilar*.

By the end of October, 2001, GIR S.A. had virtually fulfilled its side of the bargain with the NNP, providing all but five of the side-arms stipulated in the original contract with the police. By the middle of the month, Yelinek had wire-transferred to GIR S.A. approximately $550,000, which was only $25,000 short of the total owed. The logistical aspects had also largely been arranged, and the arms and ammunition were ready to be exported. On October 19, 2001, Yelinek informed Zoller that the arms and ammunition were to be transported on a Panamanian-flagged vessel, the Otterloo, owned by Panamanian-based Trafalgar Maritime Inc, whose representative was Miguel Onattopp Ferriz. On October 22, 2001, Police Commissioner Edwin Cordero Ardilla notified the *Contraloría General* of the quantitative change in the arrangement with GIR S.A., and also the army-police arms exchange.

The Otterloo sailed from Veracruz, Mexico, on October 15. Before sailing, the captain of the Otterloo, Iturrios Maciel, provided Mexican authorities with a signed Bill of Lading in which he stipulated that his ship was transporting 9 containers of plastic balls to Panama. The Otterloo arrived at the Nicaraguan port of El Rama on November 26. After a delay of several days, on November 2, 2001, the Otterloo was loaded with 14 containers of arms and ammunition. The Otterloo's captain signed a ship manifest and a Bill of Lading stating that the ship had been loaded with the 14 containers and that the ship's destination was the port of Colón, Panama. The Otterloo left Nicaragua on November 3, 2001.

On November 5, 2001, the Otterloo arrived at the port of Turbo, on Colombia's Caribbean coast, without ever having stopped in Panama. The ship was unloaded two days later by a Colombian shipping company called Banadex S.A., at the request of a shipping agent Turbana Ltd. The Otterloo sailed for Baranquilla on November 9, where the Captain, Jesus Iturrios Maciel disembarked, stating he was ill, and disappeared. After a series of other stops, the Otterloo returned to Panama.

In April 2002 Trafalgar Maritime, Inc. was dissolved and the Otterloo was sold to a Colombian citizen, Edgar Enrique Aaron Villalba (see document No. 11, Annex III). The Investigative Team was informed that the new owner may have registered the ship in Belize. However, the Government

of Belize has not been able to find the vessel in its registry, the International Merchant Marine Registry of Belize.

A final footnote to this arms diversion was provided by the leader of the United Self-Defense Forces of Colombia, Carlos Castaño, On June 30, 2002, in an interview granted to Colombia's newspaper, El Tiempo, he answered a question about the Otterloo, and said "This is the greatest achievement by the AUC so far. Through Central America, five shipments, 13 thousand rifles", (see document No. 14a in Annex V).

Phase IV

Almost immediately after the Otterloo unloaded its cargo in Turbo, a second, larger arms sale began to be organized by Zoller, at the request of Yelinek, also allegedly for the Panamanian National Police. On November 21, Zoller sent a fax to the Nicaraguan Army, explaining that the PNP wished to purchase an additional 5000 AK47s and 17 million rounds of ammunition. He attached a copy of the same Panamanian purchase order, dated February 10, 2000. Zoller began making arrangements with his shipping agent to purchase 23 containers for this second shipment of arms. A January 3, 2002, fax from Kissilevich to Leonel Cordon informed Cordon that the containers should be sent to the Nicaraguan Army in Managua, and that the contact person was General Calderon's aide, Major Rivas. On January 11, 2002, the Nicaraguan Army issued a bill for $980,000 addressed to the PNP. On January 16, 2002, Yelinek wire-transfered $50,000 to GIR S.A's account as a down-payment.

Towards the end of January, 2002, Colombian authorities became aware that the AUC had received the Nicaraguan arms, and informed the Panamanian Naval Intelligence Service, who in turn informed the Nicaraguan Army on January 30, 2002. This put into motion a three-nation effort on the part of Colombian, Panamanian and Nicaraguan intelligence services[5]. Representatives of the three services met in Managua in early February, and on February 6, signed an agreement called "Operation Triangle" (O*peración Triangulo*), described as a "sting" operation to catch the arms traffickers, utilizing the second deal being organized by Zoller (See Annex V, document No. 24). The NNP was not informed by the Nicaraguan Army that the arms they had exchanged had been diverted to Colombia, nor were they included in *Operación Triangulo.*

Zoller, in an interview with the Investigative Team, said that on or about February 15, 2002, he decided to stop the second deal when General Calderón informed him of Operación Triangulo. He notified Julio Solis of *Agencia Vassali* as well as his own agent, Leonel Cordon, that he no longer needed the containers. General Calderón told the OAS Investigating Team that Zoller knew nothing about *Operación Triangulo*.

IV. Analysis:

Although it was not the purpose of this investigation to uncover wrongdoing on the part of any specific individual, governments may wish to probe further into the facts to determine if their national laws have been violated. The following provides the Investigative Team's own perspective.

As a general comment, the Team would note that although a great deal of interest and attention to detail is evident in the movement of the firearms out of Nicaragua, Zoller, Kissilevich and the others involved readily accepted the bogus Panamanian purchase order, and displayed a complete lack of

[5] The army is responsible for Nicaraguan intelligence.

interest as to where the arms were ultimately going. There is no record of any communications between GIR S.A. and the Panamanian Police Force or any other Panamanian authority. Nothing in the evidence indicates that Zoller, Kissilevich, or any of the many Nicaraguan officials involved ever attempted to verify whether the purchase order provided by Yelinek was legitimate. As well, to rely on this one purchase order, unsupported by any other documentation throughout this complex transaction, and to utilize this one document as determinative of the identity of the end-user, is unprofessional and not credible. This matter becomes even more damning considering that a second, larger, shipment was planned for the same alleged customer immediately on the heels of the first shipment. Again, no efforts were made by anyone involved to contact Panamanian authorities, even though it is difficult to understand why the Panamanian Police Force would purchase upwards of 8000 AK47s and 22 million rounds of ammunition when the entire force consists of only 13,000 officers, including administrative staff, and when the NNP leadership had recognized that AK47s were unfit for police work.

(1) The brokers and shippers

Messrs. Zoller and Kissilevich of GIR S.A. in Guatemala, Yelinek and Shrem in Panama, Onattopp Ferriz, the owner of the shipping company Trafalgar Maritime Inc., and Iturrios Maciel, the captain of the Otterloo, are the persons most closely linked to the diversion.

Yelinek, situated in Panama, appears consistently at the heart of the matter. He provided Zoller with the Panamanian purchase order on which the sale of the Nicaraguan firearms was based. He inspected the NNP arms, pronounced them unfit and with Zoller set in train the substitution of army firearms. Yelinek paid GIR S.A. for the arms and provided GIR S.A. the name of the Otterloo, communicated the particulars about the company that owned it, and the name of its legal representative. Yelinek departed Panama in April 2002, shortly after the diversion became public, and reappeared only in mid-November 2002, when he was arrested by Panamanian authorities on suspicion of arms trafficking. His abrupt departure from Panama following the publicizing of the original diversion seems to indicate that he did not wish to be present to be investigated in any possible proceeding. At the time this report was published, Yelinek was still in Panamanian custody.

Onatopp Ferriz established Trafalgar Maritime Inc. in early July 2001, purchased the Otterloo, registered it in Panama and obtained its provisional Certificate of Navigation from the Panamanian authorities. Coincident with the timing of Yelinek's departure from Panama, the offices of Trafalgar closed in April 2002. Onatopp Ferriz also disappeared from Panama around the same time.

The captain of the Otterloo, Iturrios Maciel, signed the cargo manifest and Bill of Lading, both of which falsely indicate that the final destination of the arms was the port of Colón, Panama. Iturrios Maciel also signed the Acta de Salida form of Nicaragua's Ministerio de Gobernación, again falsely declaring his departure to Colón and stating the same destination to the Nicaraguan navy. Two days later, confirmation of the Otterloo's arrival at Turbo, Colombia was evidenced by Iturrios' signature on a Colombian *Departamento Administrativo de Seguridad* form. The Otterloo then proceeded to Barranquilla where Iturrios disembarked and disappeared.

Ori Zoller and Uzi Kissilevich coordinated of all the activities associated with the sale of the Nicaraguan arms. They put all of the deals together and had on-going contacts with many Nicaraguan officials including NNP Commissioner Montealegre, his successor, Commissioner Cordero, their subordinates, with General Calderón, Major Rivas and other army officers. In addition

GIR S.A. seems to have had undue influence over internal Nicaraguan aspects of the transfer considering that they are civilians and foreigners. They were the link to Shrem, Yelinek, Haim Geri and others, and had extensive dealings involving this and other potential firearms transactions, as well as proposed arms transactions after the diversion. They accepted the fraudulent Panamanian Police purchase order from Yelinek and provided it to Nicaraguan authorities for both the original deal, as well as the potential second arms sale. For experienced arms brokers, at best, Zoller and Kissilevich exhibited negligence and perhaps willful blindness over this part of the transaction.

(2) The Nicaraguan Authorities

(a) The NNP and Nicaraguan Civilian Authorities

The initial proposed exchange of the NNP's obsolete weapons to Zoller in exchange for new ones appears to have been conducted in a transparent fashion. NNP Commissioner Montealegre's January 2000 correspondence to Minister Herrera seeking his approval of the letter of intent to effect the exchange with GIR S.A,. and the need to obtain an end-use certificate as a part of the transaction are evidence of this. Herrera also told Commissioner Montealegre of the need to submit the proposal to the Contaloría. This was required because the acquisition of the new arms from GIR S. A. was considered a government purchase which, pursuant to Article 3 (k) of the *Ley de Contrataciones del Estado* required that an open bidding competition be held.

Subsequently Montealegre and Minister Herrera asked the *Contraloría* to grant an exemption from the usual bidding processes ordinarily required for government purchases. Initially, the *Contraloría* found deficiencies in the application which it challenged. However, these were specific technical points: failure to cite the value of the (obsolete) Nicaraguan arms being traded, failure to cite the bonafides of GIR S.A., and failure to show the Government of Israel's approval of the sale of IMI firearms (through GIR S.A.). The basis of the proposal itself was not questioned, and after reviewing the NNP reply, a "Cédula de Notificación" that granted the exemption was issued in May 2000 under the general criteria of "reasons of urgency, security or others in the public interest". The *Contraloría* further stated that the exemption was granted to permit formalization of the agreement with GIR S.A. and to avoid having the firearms fall into the hands of terrorists and drug-traffickers. This process appears to be in accordance with established internal procedures.

Although the *Contraloría* requested that the Government of Israel's approval of the transaction be obtained (given that the Government of Israel is the owner of Israeli Military Industries, IMI), no effort was made by Commissioner Montealegre of Minister Herrera to comply with this request. Instead, the contract signed by Zoller and Montealegre simply included a statement explaining that the transaction was one between the Nicaraguan National Police and a commercial entity, and not a government to government transaction, and therefore, it was not possible to obtain approval from the government of Israel.

(b) The Nicaraguan Army

When Yelinek inspected the NNP arms for a second time, and informed GIR S.A. that the arms were unsatisfactory, General Calderón, apparently with no other authorization, made the army's firearms available as a substitute. The substitution is simply noted in an *Acta de Entrega* documenting the transfer of the army's firearms to the NNP. In late October NNP Commissioner Francisco Bautista Lara wrote to the Nicaraguan Ministry of Finance requesting a change in the official records of the

NNP's firearms inventory. The Ministry of Finance promptly replied to Lara that the records of the firearms holdings of the NNP had been adjusted. The ministry also indicated, in a separate communication to NNP Deputy Chief Commissioner Cordero Ardilla, that the export transaction had been approved.

Through Major Rivas, Calderón's aide de camp, the army took responsibility for the logistics of the export operation, transporting the firearms to the coast and supervising loading them on the Otterloo. The army also coordinated with Leonel Cordon, GIR S.A.'s shipping agent, and Agencia Vassali, which prepared the Bill of Lading to ensure that the shipment could be exported.

Although there is no firm evidence that the army acted illegally, it is not clear under what authority General Calderón exchanged army firearms for NNP firearms, much less trading serviceable, or new, AK47s for reportedly useless ones.

Again, although the original contract was drastically changed from what the *Contraloría* approved, it appears legal since Nicaraguan law states that the NNP has the authority to approve the export of firearms, (Art. 76 (e) of Decree 26-96, the *Reglamento de la Ley de la Policia Nacional de Nicaragua*, 1996), and the army was arguably acting in this case for the NNP. Therefore, while there is a system of controls in place and an adherence to certain Nicaraguan legal regulations is required, there are significant weaknesses in Nicaraguan law.

(c) Private Nicaraguan Entities

In October of 2001 when the export transaction was brought to the attention of (then) Minister of *Gobernación*, Ing. Marenco Cardenal, he requested the Director of the Nicaraguan Center for Export Administration, CETREX, (*Centro de Trámites de Exportación de Nicaragua*) to take the necessary steps to have the arms exported. The CETREX Export Form was completed by Agencia Canales Aguilar documenting the shipment of the arms to the PNP at the port of Colón, Panama.

Agencia Canales Aguilar is a private enterprise not a government agency, but it appears that the government depended on it to ensure the security of an international movement of firearms. Apparently Canales Aguilar was acting under the authority of the Nicaraguan Police, by means of powers granted it by a "power of attorney" signed before a notary on October 30, 2001, by Commissioner Bautista Lara under authority granted him by Commissioner Edwin Cordero. This document contains important deviations in the specifications of where, and how many, arms and ammunition were to be exported when compared with the actual quantities exported (see document No. 60 in Annex V).

On November 2, 2001 a Nicaraguan Customs Form documenting shipment of the arms to the PNP, as well as a ship manifest and Bill of Lading were filed. These last documents are on Agencia Vassali stationery, another private company whose role and authority in the arms transaction is not fully explained. They documented that the arms and ammunition were being sent to the Panamanian Police, and were certified by the Otterloo's Captain, Iturrios Maciel.

There are a number of Nicaraguan government mechanisms applicable to arms export, which in fact were applied to the export of this shipment of firearms. These however do not meet the Government of Nicaragua's responsibilities under the CIFTA Convention. In the last analysis the existing

Nicaraguan mechanisms are clearly inadequate since their application was incapable of preventing the diversion.

(3) The Panamanian Authorities

The Government of Panama does not appear to have been involved in the transaction. Panama factors only because the Panamanian National Police Force is identified as the purchaser of the arms and ammunition on the purchase order provided by Yelinek. Panama has consistently denounced the purchase order as a fake. How and from what source the purchase order came into Yelinek's possession is not known.

Other than the purchase order, there is no other paper or statement that links the Panamanian Police Force to the transaction. All recorded communications coming from inside Panama flow from Yelinek to Zoller or Kissilevich, never from the Panamanian Police Force and, it might be added, never to any of the Nicaraguan authorities.

The registration of the Otterloo and the establishment of Trafalgar Maritime Inc. occur in Panama. While this reflects the country's liberal commercial and maritime practices, those events are not indicative of any role by government authorities in the diversion nor did they contribute materially to what happened.

(4) Colombia

What actually occurred at Turbo remains a mystery. It is clear that the Otterloo made port in Turbo based on the signing by its captain, Iturrios Maciel, of a *Departamento Administrativo de Seguridad Seccional Antioquia, Puerto Operativo Turbo* form. But beyond that, all that is known is that the guns somehow found their way to the AUC. This would have meant that someone in Colombia, associated with Yelinek, Onattopp Ferriz or possibly even the Otterloo Captain, Iturrios Maciel was ultimately responsible for the illegal importation of the arms onto Colombian soil.

V. Legal Commentary

A number of national laws appear to have been broken. Yelinek appears to have committed a fraud in passing off a false Panamanian Police purchase order for the firearms. This would constitute an offence under Panamanian law, and, to the extent that the fraudulent purchase order was accepted by Nicaraguan authorities, a contravention of Nicaraguan law as well. More importantly, Yelinek's actions together with those of Onattopp Ferriz and Captain Iturrios Maciel of the Otterloo constituted part of a conspiracy to fraudulently export firearms from Nicaragua and to import them into Colombia.

Likewise, Iturrios Maciel committed fraud under Nicaraguan and perhaps Panamanian law when he falsely certified the destination of the firearms on the manifest and on the Bill of Lading and then went to a different destination. If Iturrios was acting under the direction of the Otterloo's owner, Onattopp Ferriz, would also be guilty of fraud and of violating Panamanian, Nicaraguan and Colombian laws.

The importation of firearms into Panama is controlled by Article 307 of the Constitution of 1972 (as amended by legislative Acts of 1983 and 1994); by Article 1 of Decree No. 2 of 1991, and; by Article

11 of Decree No. 354 of 1948. The Constitution provides that only the government may possess military weapons and products. Executive permission is required for their manufacture, importation and export. It further provides that the government will define arms not considered to be non-military, and regulate their importation, manufacture and use.

Under Panamanian law, the Ministry of Government and Justice (*Gobierno y Justicia*) can authorize natural or legal persons to engage in the business of importing firearms and ammunition for hunting, sport and personal defense (which does not include the types of firearms that were being exported from Nicaragua). All requests to import firearms and ammunition must be made to the Minister of *Gobierno y Justicia*, and a certified copy (*copia autenticada*) of a permit approved by the Ministry of *Gobierno y Justicia* is required for the merchandise to be released from customs storage, as is evidence of the payment of duties.

Clearly, importation into Panama of the types and quantities of firearms in this case required considerably more than a purchase order. Presumably Zoller and Kissilvich, as established arms dealers in the region, would have knowledge of these requirements and could have questioned the purchase order provided by Yelinek. The same, perhaps, can also be said of the Nicaraguan authorities in this case.

Colombian law was violated because, among other reasons, under Colombia's Constitution and applicable law, only the Government may introduce or manufacture firearms, ammunition and explosives. The fact that the arms ended up in the hands of the AUC could also mean that in addition to committing a smuggling offence, Yelinek, Iturrios, Onattopp Ferriz, and possibly Zoller and his associates, may have also committed an offence against Colombia's anti-terrorism laws, as well as the laws of other countries which sanction assistance to terrorist groups.

The applicable Nicaraguan law appears to be Art. 76 (e) of Decree 26-96 which states that the NNP has responsibility for authorizing the export of firearms. This perhaps explains why other approvals to authorize export of the firearms were not sought, since the NNP has the primary authority.

Independently of whether laws were broken, the adequacy of Nicaraguan laws and the extent to which Nicaraguan national practices are effective for controlling movements of firearms is open to serious question. The fact that there is no clear evidence that laws were broken in this case by Nicaraguan authorities, and yet the diversion took place, is strong testimony that the laws and practices are seriously inadequate.

VI. Application of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, (CIFTA)

Two of the principal countries involved in this case, Nicaragua and Panama, have ratified the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, (CIFTA). Adherence to the Convention and application of its provisions to national practices would have made the diversion far more difficult, if not prevented it outright.

(a) Illicit Trafficking

The key element of illicit trafficking is the absence of authorization by any other State Party involved in the international movement of firearms. In this particular case, even though Panama was allegedly the recipient State, there was no authorization, nor were there any attempts to verify that Panama had indeed authorized any arms purchase.

(b) Import and Export Provisions[6]

In the case of Nicaragua, the provisions of the Convention that address exports of firearms were not applied. Articles VIII, IX, and X of the Convention call for the application of effective and secure measures to prevent illicit trafficking of firearms.

Key among these is Article IX, entitled Export, Import and In-Transit Licenses or Authorizations, which in paragraph 3. provides as follows: *"3. States Parties before releasing shipments of firearms, ammunition, explosives and other related materials for export shall ensure that the importing and in-transit countries have issued the necessary licenses or authorizations*."

In a broader sense, Paragraph 1 of Article IX calls for the States Parties to *"establish or maintain an effective system of export, import and international transit licenses or authorizations for transfers of firearms"*, while Article VIII, Security Measures, requires the States Parties, "*in an effort to eliminate loss or diversion, [...] undertake to adopt the necessary measures to ensure the security of firearms and ammunition imported into, exported from or in transit through their respective territories*." A particular security measure is called for in Article X which calls for the "*strengthening of controls at export points."*

While the Nicaraguan authorities apparently exercised a measure of control over a number of internal steps concerning the export of the arms, the absence of any contact between officials in Nicaragua and Panama to confirm the legitimacy of the transaction is a glaring deficiency. The Convention requires that before shipments are released, the authorities responsible for the exportation must be satisfied that the receiving country has authorized the importation. A purchase order alone, even had it been legitimate, cannot serve as the sole and sufficient authority upon which Nicaraguan officials could authorize the export. Under Nicaraguan law, the responsibility to ensure compliance would appear to lie with the entity ultimately responsible for approving the export, in this case, the NNP. By failing to confirm the legitimacy of the purchase order with their Panamanian counterparts, the Nicaraguan National Police, although perhaps adhering to national practice, violated the Convention.

As with Article IX, the Nicaraguan government's adherence to Articles VIII and X, which require controls over the security of the exported firearms is questionable.

(c) Exchange of Relevant Information

The exchange of relevant information between States Parties called for under Article XIII of the Convention was plainly lacking. There is no indication that Nicaraguan authorities ever attempted to verify from Panamanian authorities that there was an import license for the arms it was proposing to

[6] General references to legal measures applying to the terms "import" and "export" in relation to firearms throughout this report are also intended to apply, as appropriate, to in-transit movements through countries. Transit has not been referred to expressly, because the case did not have an in-transit component.

export. The authorities involved took on faith that the firearms would go to the stated destination, based upon fraudulent information provided third-hand by Yelinek.

An exchange of information on the matters referred to in clause 1. (a) of Article XIII about *"authorized producers, dealers, importers, exporters and, wherever possible carriers, of firearms …"* would have been helpful to authorities in determining whether business should be carried on with such individuals as Yelinek and Shrem, Zoller and Kissilevich.

VII. Issues Requiring Further Investigation:

The OAS Investigation Team reviewed all available documentation in this case and conducted exhaustive interviews. However, the Organization of American States has no police powers, and although the Team requested certain information from several governments, investigators and prosecutors are understandably reluctant, and in some cases barred by national laws, to share evidentiary information. As a result, it is the Team's opinion that the following areas require follow-on criminal investigations by national governments:

1. The governments of Guatemala, Nicaragua and Panama should investigate the business relationship and dealings between GIR S.A., the Nicaraguan officials involved, and Shimon Yelinek and his associates, to determine if violations of anti-corruption laws have occurred. A thorough cooperative investigation into their financial transactions must be done to determine what laws were violated. Annex V, document No. 179, contains copies of wire transfers sent to GIR S.A.'s account.

2. The fraudulent Panamanian Police purchase order gives rise to numerous questions. Where did it originate? How did the individuals preparing the false document determine the authorizing names (which are of legitimate officials) to put on the document? What is the significance of the extensive listing and sophistication of arms on the document - a list far in excess of the reasonable needs of the Panamanian Police, a force consisting of only 13,000 officers, including many unarmed administrative staff? Why did none of the many persons involved in the events, including Zoller, Calderón, Montealegre, Cordero and others never question the legitimacy or content of such an inappropriate and unlikely document?

3. The governments of Panama and Mexico should cooperate to find and interview Miguel Onattopp Ferriz and Jesus Iturrios Maciel and to conduct criminal investigations into their activities in this case.

4. The Government of Nicaragua should conduct a thorough sight check of the Nicaraguan Army's inventory of arms and ammunition. The Investigative Team has been able to positively ascertain that the Nicaraguan Army, through General Calderón, was approached on a number of different occasions by GIR S.A. for the sale of arms and ammunition, in addition to contacts related to the exchange of arms which is the subject of this report.

   One such occasion occurred on January 5, 2001, when GIR S.A. sent a fax to Calderón, listing arms and ammunition, including twin and four barrel anti-aircraft guns, surface to air missiles, rocket propelled grenades, anti-tank "launchers" and small arms, with quantities and prices (see document No. 121 in Annex V). The document was a request from Zoller for the

sale of Nicaraguan Army equipment, at the prices and quantities listed by Zoller. The Investigative Team has been able to link this list of arms to a request from a Lebanese arms broker, Samih Osailly currently in custody in Europe and under investigation by several nations for ties to Al-Queda. He was at the time working for the Revolutionary United Front (RUF) in Sierra Leone, under an arms-for-diamonds arrangement[7]. This broker sought to purchase arms and ammunition from Shimon Yelinek, who in turn sent the list of arms and ammunition to Zoller, who forwarded the list to General Calderón.

While the Investigative Team did not uncover any evidence to suggest that the Nicaraguan Army acted on Zoller's request of January 5, 2001; this fact, plus the dealings relating to the second arms shipment allegedly to the PNP organized in the fall of 2001 and early 2002, suggest that international arms brokers repeatedly saw Nicaragua as a potential source of weapons of war for illegal purposes.

5. The Government of Colombia should ascertain whether any of the diverted arms have been recovered during operations against the AUC. The Investigative Team has been told informally that this is the case. Document 80 in Annex V, lists the serial numbers of the arms diverted to Colombia.

6. The June 30, 2002 statement by Carlos Castaño (see document No. 14a in Annex V) implying that the Otterloo had provided 13,000 rifles is inexplicable. The diversion investigated by the OAS team supposedly involved only 3000 AK47s. If at all possible, the governments involved should try and reconcile these apparent incongruities. The Government of Colombia should ascertain whether any Nicaraguan AK47s, beyond the 3000 that were shipped to Turbo aboard the Otterloo, have been recovered in Colombia.

7. Although the Team had no mandate to delve into the details of the second shipment, it presents a number of inconsistencies which require further investigation and which may also shed more light on the initial diversion: The documentation shows that the purported "sting" operation (*operación triangulo*) was conceived after Nicaraguan and Panamanian officials became aware that the original shipment had been diverted to the AUC. These officials became aware of the diversion on or about January 30, 2002 (see document No. 27, in Annex V). Yet it appears that Zoller and the Nicaraguan Army were much further along in the operational execution of the second shipment than previously reported since it had been initiated more than two months before officials in any of the countries involved knew that the initial shipment had been diverted. Only three weeks after the first shipment left Nicaragua, on November 21, 2001, Zoller sent the Nicaraguan Army a written request to purchase an additional 5000 AK47s and 17 million rounds of ammunition, using the same false Panamanian purchase order dated February 10, 2000. On January 11, 2002, the Nicaraguan army issued an invoice addressed to the PNP for $980,000 for payment for the arms and ammunition, but sent the invoice to Zoller and not the Panamanian Police. Zoller acknowledges sending his November 21 note to the army, but claims that he sent it on January 31, 2002, and that it was back-dated to November 21, 2001 at the request of the army. This series of facts leads the Investigative Team to suspect that Zoller and the Nicaraguan Army were well aware that the Panamanian purchase order was fraudulent, and

[7] Sierra Leone is under a United Nations arms embargo. Samih Osailly has been arrested by Belgian authorities and remained in custody at the time this report was published. In addition to alleged ties to Al-Queda, he is suspected of connections to the bombings of US Embassies in east Africa.

that the second shipment of arms was not going to the PNP. Otherwise, why send the invoice to Zoller instead of the PNP? These facts also give rise to the question as to whether the original diversion was in fact the only sale of arms to Zoller, especially when considered in light of Carlos Castaños' statement of June 30, 2002.

VIII. Conclusions:

1. It appears that Shimon Yelinek committed fraud by providing a forged purchase order from the Panamanian National Police to serve as an end-user certificate for the arms exchange. As the purchaser of the arms, he also apparently planned and organized an illegal arms diversion for the United Self Defense Forces of Colombia, a group considered a terrorist organization. Yelinek is also likely guilty of violating Colombian anti-terrorism laws, and possibly Panamanian anti-terrorism laws, among others. Marco Shrem appears complicit in these activities, but to an unknown degree.

2. Miguel Onattopp Ferriz established Trafalgar Maritime Inc. in July 2001 as a front company for the purpose of transporting arms to the AUC. It appears that he was engaged in criminal activity and was conspiring with Yelinek to provide the AUC with arms, thus violating Colombian, and possibly Panamanian anti-terrorism, and other laws.

3. Captain Iturrios Maciel provided Mexican authorities with a signed Bill of Lading in which he deliberately and wrongly stipulated Panama as the destination of 9 containers of plastic balls. He also provided Nicaraguan authorities with a signed Bill of Lading and ship manifest in which he deliberately and wrongly stipulated Panama as the destination of his ship and its cargo of arms. Iturrios Maciel, along with his first mate, Carlos Aguilar, may have been cognizant of, and participants in the arms diversion. Iturrios Maciel is also apparently criminally complicit in providing arms and ammunition to a terrorist organization, and of violating Colombian anti-terrorism and other laws.

4. Although the Investigative Team found no evidence that Ori Zoller and Uzi Kissilevich were co-conspirators in the arms diversion, their failure to make any attempt to verify the actual destination for the arms, not only for one, but for two shipments to the same customer, contributed to the diversion. At the least they appear guilty of serious neglect and their actions will lead to the loss of life in Colombia. As well, their association with Yelinek and his attempts to locate arms for the Revolutionary United Front of Sierra Leone should be investigated to determine if they are criminally liable.

5. The Government of Nicaragua failed to comply with a number of provisions of the CIFTA convention. Nicaraguan authorities are guilty of professional negligence and with violating the CIFTA convention with their failure to verify whether the Panamanian National Police were indeed the true end-users in the arms exchange. One telephone call could have prevented the entire arms diversion. The involvement of the Nicaraguan Army in the first arms deal appears to be legitimate, even if negligent, not least of which because the exchange was to benefit another part of the Nicaraguan State (the Police) but because the transaction with Zoller was essentially cashless. However, the same cannot be said about the army's involvement in the second arms shipment. Here it appears that senior officers in the army acted criminally in their plan to sell state goods in return for almost one million U.S. dollars,

without the knowledge of Nicaragua's civilian authorities, using a purchase order that was unlikely to be legitimate and which was almost two years old.

6. There appears to be no involvement of Panamanian authorities in the exchange of arms, or their diversion. The issue of where the forged purchase order originated remains unresolved.

7. Colombia is the victim of the arms diversion. However several Colombian customs agents were likely accomplices of, or were bribed by, the AUC in order to allow the Otterloo to land its cargo of arms and ammunition in the port of Turbo.

ANNEX I

Documented Chronology of the Chain of Events

The entire chain of events has been reconstructed based on documentary and other evidence:

- On October 26, 1999, GIR S.A. sent Commissioner Montealegre a fax, stipulating the conditions and terms for an arms exchange: Three million 7.62 x 39 caliber bullets; 6000 Kalashnikov AK47 assault rifles; 24,000 AK47 magazines; and 6000 AK47 bayonets – in exchange for – 500 9mm Jericho pistols and accessories, and 100 9mm Mini-Uzi machine pistols and accessories, both manufactured by IMI. [See doc. No. 177, Annex V].

- On November 2, 1999, another fax was sent by GIR S.A., signed by Kissilevich, the Director General of the company, outlining the same terms for the exchange, but this time assigning a monetary value to the arms to be exchanged. The NNP arms, ammunition and accessories were valued at $261,000; and the IMI arms and accessories were valued at $264,000. [See doc. No. 176, Annex V].

- On November 4, 1999, Uzi Kissilevich sent a fax to Century International Arms, an arms company based in Fairfax, Vermont and Miami, Florida, to the attention of Haim Geri. Kissilevich informed Geri that NNP Commissioner Montealegre agreed to sell the arms, ammunition and accessories. He also informed Geri that they were attempting to identify arms which were not of Russian manufacture and forwarded some prices for the goods established by Montealegre (saying that Montealegre complained the original prices for the goods were too low). Kissilevich asked Geri to keep in mind that "tanto la mercaderia, como su empaque, se encuentran en perfecto estado". [See doc. No. 175, Annex V].

- On November 11, 1999 – Haim Geri sent an e-mail to Kissilevich asking him to send a price quote for 2000 new AK47s to Marco Shrem, located in Panama, adding Shrem's fax number (507-217-6023 and 507 215-2306) and telling Kissilevich to say that he was sending the fax at the request of Geri. [See doc. No. 173, Annex V]

- On November 12, 1999 Kissilevich sent Shrem the quote for 2000 new AK47s. [See doc. No. 172, 171, Annex V].

- On December 2, 1999, Century International Arms Inc. sent Ori Zoller a fax signed by Brian Sucher, in which Century agreed to purchase the 3 million 7.62 x 39 caliber bullets; 2000 AK47 assault rifles; 24,000 AK47 magazines; and 6000 AK47 bayonets; provided such goods were in very good condition, and were importable into the United States. [See doc. No. 170, Annex V].

- On December 3, 1999, Zoller sent a fax to Commissioner Montealegre, thanking him for his courtesy during Zoller's visit to Nicaragua, and once again, outlining the goods to be exchanged: 3 million 7.62 x 39 caliber bullets; 6000 AK47s assault rifles; 24,000 AK47 magazines; and 6000 AK47 bayonets – in return for 600 9mm Jericho pistols and accessories, and 100 9mm Mini-Uzi machine pistols and accessories. [See doc. No. 168, Annex V].

On the same day, GIR S.A. sent an un-signed draft end-user certificate letter to Marco Shrem's fax number in Panama. [See doc. No. 169, Annex V].

- On December 20, 2000, GIR S.A. sent an "invoice", really a note offering goods at a certain price, to Pedro Bello, President of "Armamentos Inc.", with offices in West Palm Beach, FL, offering for sale the 3 million 7.62 x 39 caliber bullets; 6000 AK47s assault rifles; 24,000 AK47 magazines; and 6000 AK47 bayonets. [See doc. No. 166, Annex V]. The same day, Bello wrote back asking for clarification as to whether GIR S.A. was offering 3 million rounds of ammunition, or 300,000 thousand. [See doc. No. 167, Annex V]. Kissilevich later confirmed that it was 3 million. [See doc. No. 165, Annex V].

- On January 14, 2000, Zoller and Kissilevich sent a fax to Marco Shrem in Panama, regarding his travel to Nicaragua to inspect the arms – the inspection was scheduled to take place on January 18. [See doc. No. 162, Annex V].

- Also on January 14, 2000, GIR S.A. sent Commissioner Luis Muñoz Morales, Chief of General Administration of the NNP, a corrected draft version of the letter of intent outlining the terms of the exchange between GIR S.A. and the NNP. The quantity of NNP equipment was changed in the revision: from 3 million rounds of ammunition to 2.5 million rounds, from 6000 AK47s to 5000 AK47s; and the AK47 magazines were dropped from the deal. In exchange, GIR S.A. would then provide the NNP with 450 Jericho pistols and 100 Mini-Uzis [See doc. No. 163, Annex V]. These changes were confirmed in a fax from GIR S.A. to Commissioner Montealegre sent January 19, 2000. [See doc. No. 161, Annex V].

- On or about January 18, 2000, Zoller inspected the arms in Nicaragua, possibly along with Marco Shrem. [See doc. No. 2, Annex III].

- On January 21, 2000, Pedro Bello wrote to Kissilevich, asking him for the new quantity of items ready to be sold, along with the date he could go and inspect the goods. He lamented that an earlier inspection was not possible and stated that he had buyers ready to see the goods. [See doc. No. 160, Annex V].

- On January 27, 2000 Commissioner Muñoz wrote to Commissioner Montealegre, forwarding him the draft letter of intent, explaining that GIR S.A. had accepted the NNP's last changes [presumably a change in the number of Jericho pistols the police was to receive, 465 instead of 450 [See doc. No. 159, Annex V]. [See note of March 2, 2000 below].

- The same day, Commissioner Montealegre wrote to Minister René Herrera, *Ministro de Gobernación*, who had oversight of the National Police, sending him the draft letter of intent for the exchange of arms with GIR.SA. Montealegre said he intended to sign the letter of intent, adding that he would include a clause in the letter which would require GIR S.A. to provide an end-user certificate for the arms exchanged by the NNP. [See doc. No. 158, Annex V].

- On February 1, 2000, Montealegre wrote again to Minister Herrera, and asked that Herrera give him written permission to execute the exchange, request approval from the Contraloría General, and sign the letter of intent. [See doc. No. 157, Annex V].

- On February, 3, 2000, Minister Herrera replied to Montealegre and approved the exchange of arms. Herrera mentioned that the Nicaraguan Presidency, and the US Embassy in Managua had been informed about the exchange of armament. He further mentioned that the exchange should be submitted to the Controlaría General for approval. [This latter point was made because government purchases are subject to article 3 (k) of Law 323, *Ley de Contrataciones del Estado*, which requires that purchases be made by open bid competition. In order to effect the exchange with GIR S.A., a waiver of the bidding process would have to be granted by the Controlaría.] [See doc. No. 156, Annex V].

- On March 1, 2000, Minister Herrera wrote to Guillermo Arguello Poessy, the *Contralor General* of Nicaragua, requesting his help in obtaining the waiver from the *Contraloría* for the transaction in question. [See doc. No. 155, Annex V].

- On March 2, 2000, GIR S.A. sent a fax to Montealegre, with the final changes to the terms of the exchange, i.e. 465 Jericho pistols, instead of 450. [See doc. No. 154, Annex V].

- On March 3, 2000, Kissilevich sent Montealegre a fax which contained Ori Zoller's travel information for a visit to Managua, to take place on March 6, 2000. [See doc. No. 153, Annex V].

- On March 8, 2000, Commissioner Montealegre and Ori Zoller, signed a "*Convenio de Intención de Recambio de Armamento*" – a letter of intent establishing the terms of reference for the eventual exchange. The terms in the notice made the exchange subject to approval by the Ministry of *Gobernación*, and by the *Contraloría General*. Under the term, GIR S.A. was required to produce an end-user certificate for the weaponry. [See doc. No. 152, Annex V].

- On April 4, 2000, in a note to Herrera, Arguello informed him that the Contraloría could not approve the exemption to the bidding process until additional information regarding the exchange was provided. Arguello requested information on the quantity and value of the arms to be exchanged and also mentioned that the exemption request lacked the "documentos inherentes a la legalidad de esta Empresa [GIR S.A.], su denominación, domicilio, constitución, debida autorización del Estado Israelí, y otras consideraciones pertinentes a la delicada operación propuesta." and mentioned that these should also be provided. [See doc. No. 150, Annex V].

- On the same day, Pedro Bello, wrote to Zoller and Kissilevich saying that GIR S.A. had not produced the much talked-about inventory [of arms] in Managua, and that they should call when they had something firm. [See doc. No. 151, Annex V].

- On April 28, Zoller sent Commissioner Muñoz a draft end-user certificate, which the NNP was supposed to sign and send to Amiram Maor, Director of Marketing for Latin America, of IMI, certifying the end-use for 500 Jericho pistols. [See doc. No. 148, Annex V].

- Also on April 28, 2000, Shrem and Yelineck met Zoller in Managua to inspect the NNP's inventory. [Interview with Zoller and Shrem].

- On May 2, 2000, Kissilevich sent Commissioner Muñoz another note outlining the latest terms of the change. The number of Jericho pistols had then been increased to 500. The rest of the terms remained unchanged: Jerichos, plus 100 uzis, in exchange for 2.5 million rounds, 5000 AK47s

and 6000 bayonets – the transaction was valued by Kissilevich to be worth $250,000. [See doc. No. 147, Annex V].

- On May 4, 2000, Montealegre sent Arguello some documents in an attempt to address Arguello's concerns outlined in his April 4 letter to Herrera. Montealegre did not address the question of Zoller's "*debida autorización del Estado Israeli*" – Montealegre further qualified the NNP's arms as obsolete, and hence of no monetary value. [See doc. No. 144, Annex V].

  On the same day, Zoller wrote to Commissioner Muñoz, providing him with a detailed breakdown of the costs of the IMI equipment GIR S.A. was going to provide to the NNP. The total cost was $242,000. [See doc. No. 145, Annex V].

- On May 12, 2000, Heriberto Correa Guerrero, Director of *Contrataciones Administrativas del Estado*, of the *Contraloría General*, wrote to Commissioner Muñoz, requesting the quantity and unit value of the NNP items to be exchanged. He also asked for an explanation as to what GIR S.A. would do with the exchanged AK47s. [See doc. No. 143, Annex V].

- On May 15, 2000, Montealegre replied to Correa Guerrero's letter, but directly to Contralor Arguello, giving the unit cost of the AK47s and the ammunition. Montealegre did not say how GIR S.A. was to use the arms, but instead stated that the letter of intent established that the deal could only take place with the approval of the Minister of Gobernacion, the Contraloria, and once GIR S.A. produced an end-user certificate [See doc. No. 142, Annex V].

- On or about May 18, 2000, Zoller traveled to Panama to conclude the sale of 2500 AK47s (later 3000) and 5 million rounds of ammunition to Shimon Yelinek. Once the deal was concluded, Kissilevich (from Guatemala) sent Zoller a fax to his hotel room in Panama, with information on how Yelinek could send a wire transfer to GIR S.A.'s bank account (Westrust Bank Ltd, account 40692-9) [Interview with Zoller]. This was so that Yelinek could send GIR S.A. a down payment. [See doc. No. 141, Annex V].

- On May 22, 2000, the *Contraloría General* issued a "Cédula de Notificación", essentially a resolution, approving the Ministry of *Gobernación* request for an exception to the bid competition requirement for government purchases. The Cédula mentioned that this exemption was being granted so that the Contract between the NNP and GIR S.A. could be formalized. [See doc. No. 140, Annex V].

  The Cédula clearly stated that the appropriate government authorities must ensure that all necessary measures were taken to ensure that the exchange of arms was done in accordance with applicable international conventions and laws. The Cédula also recommended that any final Contract on the exchange of arms should include a provision stating the Government of Israel's agreement/approval.

  On the same day, Kissilevich sent Shrem, in Panama, information on an aircraft that GIR S.A, had for sale. [See doc. No. 139, Annex V].

- On May 31, 2000, Kissilevich sent Commissioner Montealegre a fax, requesting a copy of the contract to be signed between GIR S.A. and the NNP so that Zoller could review it prior to traveling to Nicaragua on June 1, 2000 (traveling to sign the contract). Kissilevich attached two

letters, one from Amiram Maor, Deputy Vice-President of marketing for of Israeli Military Industries, IMI, certifying that GIR S.A. was IMI's sole representative for any agreement with the NNP; the other from Gabriel Bernstein, Director of Marketing for Latin America of IMI, detailing the warranty that comes with the IMI arms to be supplied by GIR S.A. [See doc. No. 138, Annex V].

- On June 2, 2000, Montealegre, and Zoller, signed a Contract for the exchange of arms, "*Contrato de Permuta de Armamento y Municiones*". In respect of the Contraloría's suggestion that certification be obtained from the Israeli Government, the Contract stated that it was not a Contract between two governments (Nicaragua and Israel) and therefore, it was not possible to obtain a certification from the Israeli Government. The Contract was an exchange of 2.5 million 7.62 x 39 caliber bullets; 5000 AK47s assault rifles; and 6000 AK47 bayonets – in return for 465 9mm Jericho pistols and accessories, and 100 9mm mini-uzi machine pistols and accessories. [See doc. No. 137, Annex V].

- On June 6, Zoller sent Shrem in Panama, information on military trucks for sale. [See doc. No. 135, Annex V].

- On June 7, Zoller sent Shrem information on how to send a wire transfer to GIR S.A's Westrust bank account number 010063264, sub account 40692-9 - through Barclay's Bank in Miami Fl, explaining that the transfer that Shrem attempted to do one week before did not go through. [See doc. No. 136, Annex V].

- On June 16, $74,972 was deposited in GIR S.A.'s account as a down-payment for the purchase of 2500 AK47s and 5 million rounds of ammunition by Yelinek. [See doc. No. 133, Annex V].

- On September 20, 2000, Montealegre wrote to Zoller, explaining that the NNP had not received any of the 465 Jericho pistols stipulated in the contract – and he threatened to cancel the contract unless Zoller informed him when the pistols were to be delivered. [See doc. No. 129, Annex V]. On September 27, Kissilevich replied, explaining that they were doing their best to send the pistols. [See doc. No. 128, Annex V]. On September 29, Montealegre wrote back asking GIR S.A. to tell him when the pistols will be delivered – or he would cancel the contract. [See doc. No. 126, Annex V]. On October 2, 2000, Kissilevich wrote to Gabriel Bernstein, giving him the NNP address in Managua to which the Jericho pistols should be sent. [See doc. No. 125, Annex V].

- On October 2, 2000, $50,000 was deposited by Yelinek in GIR S.A.'s bank account. [Interview with Zoller].

- On January 2, 2001, Yelinek sent Zoller an e-mail, saying that "our friend in Africa" wants an urgent price quote on the following items, and whether he has them in stock: 600 AK47s; 200 rocket propelled grenade launchers (RPG7); 400 grenade launchers; 6 twin-barrel and 4 four-barrel anti-aircraft guns, 6000 hand-grenades and 50 anti-tank grenade launchers; plus attendant ammunition. [See doc. No. 123, Annex V].

- On January 3, 2001, Yelinek sent another e-mail to Zoller – saying "This is the start price list that I send to my contact. He already told me that it expensive. I reply that if he take it all we will make discount for him. Please check item no 3-7-8-11-14-15 [grenade launchers, anti-tank

grenade launchers, 60 mm launchers, 2000 grenades, 200 anti-tank rockets, 800 60 mm rockets] if you have in stock and prices. Please do not travel to your man before I will receive the green light that the money is ready in my contact's hand and the end-user certificate is ready also. Send me by e-mail of fax under what name – or to whom to need the paper". The same e-mail contains a forwarded e-mail from Yelinek to the person in Africa, identified only as Guy/Alfa, saying that "the country in this area have (sic) everything in stock in good condition" and that "we can arrange as well the transport to your place". [See doc. No. 122, Annex V].

- On January 5, 2001, Eugenia de Leon, a secretary working at GIR S.A., sent a fax to General Calderon of the Nicaraguan Army, attaching a list of arms and ammunition, along with prices. The list of arms and ammunition corresponded to the list of equipment requested in Yelinek's e-mail of January 2, 2001. [See doc. No. 121, Annex V].

- On January 12, 2001, Ibrahim Bah, received a handwritten list of arms and ammunition, with prices. [See doc. No. 120b, Annex V].

- On January 16, 2001, GIR S.A. sent a fax to Yelinek at phone number 305-937-0806 in Miami, attaching a draft end-user certificate, addressed to Mr. Sergey Ladigin, *Director de Departamento Regional de la America Latina de la Empresa Estatal Unitar Rosoboronexport*. ("ROSOBORONEXPORT" Federal State Unitary Enterprise a specialized agency responsible for Russian arms export). [See doc. No. 120, Annex V].

- On January 16, 2001, Yelinek sent a hand-written copy of the January 16, 2001 draft end-user certificate (above) to Ibrahim Bah. [See doc. No. 120a, Annex V].

- On February 1, 2001, Zoller sent Yelinek a fax, with the details of how to send a wire-transfer to GIR S.A.'s bank account (the Westrust Bank account). [See doc. No. 118, Annex V].

- On February 9, 2001, Kissilevich sent Yelinek a fax, with the technical specifications of AK47 assault rifles and ammunition, and the details of how they were packed. [See doc. No. 117, Annex V].

- On March 5, 2001, Zoller sent Yelinek a fax, with the details of how to send a wire-transfer to GIR S.A.'s bank account (the Westrust Bank account). [See doc. No. 114, Annex V].

- On March 6, 2001, $100,000 was deposited in GIR S.A.'s bank account via wire transfer from Discount Bank and Trust Company, Geneva, Switzerland; through Citibank, New York. [See doc. No. 113, Annex V].

- According to sworn statements given by Zoller, on May 10, 2001, [See doc. No. 2, Annex III], Yelinek met Zoller in Guatemala City, where he gave the former a purchase order from the Panamanian National Police, dated February 10, 2000. [See doc. No. 1, Annex IV]. The Order was for the purchase of 10,000 AK47s (AKM), 15 million rounds of ammunition, 1,000 machine guns (PKMS), 1,000 rocket propelled grenades (RPG7), 1000 Dragonov rifles, 10 million rounds of ammunition for PKMS, 10,000 RPG7 grenades, and 500 Jericho pistols". A fax from Zoller to the Hotel Quinta Real (where Zoller also had his offices) sent on May 15, asked the Hotel to send him the bill for Yelinek's stay in the hotel. [See doc. No. 112, Annex V].

- According to a statement made by Gustavo Leonardo Padilla Martinez (the lawyer for Trafalgar Martime Inc.) to the Panamanian National Police [Interview with Padilla], Miguel Onattopp Ferriz purchased the ship Otterloo from Holland in early July, 2001.

- On July 2, 2001, Kissilevich sent Yelinek a fax, informing him of Zoller's trip to Manauga, scheduled for July 4, 2001. [See doc. No. 110, Annex V].

- On July 3, 2001, Kissilevich sent another fax to Yelinek, informing him that Zoller could not travel, and that he, Kissilevich, would travel to Managua on July 4, 2001, instead. He also asked Yelinek for his arrival time in Manauga, so that he could pick him up at the airport. [See doc. No. 109, Annex V].

- On July 3, 2001, $10,450 was deposited in GIR S.A.'s bank account. [Interview with Zoller].

- On or about July 4, 2001, Kissilevich and Yelinek visited the NNP Armory, to inspect the AK47s.

- On July 6, 2001, Kissilevich sent Yelinek a fax with the name and contact information of GIR S.A.'s shipping agent, who would be responsible for shipping the containers. The agent was Leonel Cordon, Ave. 6-26 Zona 09. oficina 702, Guatemala Ciudad, 502-334-7070. [See doc. No. 108, Annex V].

- On July 11, 2001, lawyer Gustavo Padilla filed papers to have Trafalgar Maritime Inc., established as a company in Panama. Miguel Onattott (sic) Ferriz was stipulated as the President of the Company. The company was legally established the same day. [See doc. No. 107a, Annex V].

- On July 24, 2001, the Panamanian *Ministerio de Hacienda y Tesoro*, granted a Provisional Certificate of Navigation to the Otterloo. [See doc. No. 106, Annex V].

- On September 6, 2001, Commissioner General Francisco Montealegre, retired as head of NNP – Francisco Bautista Lara became new Chief of Police.

- On September 18, 2001, Zoller wrote to José Antonio López Dolmuz, Deputy Administrative Chief of the NNP, informing him that he authorized "*cedo*" the Nicaraguan Army to remove from the NNP's warehouse, 2.5 M munitions, 5000 AK47s, and 6000 bayonets. [See doc. No. 103, Annex V].

- On 26 September 2001, the Chief of the army's Logistical branch, Col. Ramón Calderón Vindell, wrote to Melby González, the NNP's Chief of General Administration, to inform her that he had assigned Lt. Col. Uriel Moreno Corea, Chief of the Military's Technical Section, to receive the NNP's 5000 AK47s. He quoted Zoller's September 18 note. [See doc. No. 102, Annex V].

  Also on September 26, Zoller sent a fax to his shipping agent, Leonel Cordon, informing him that title to the containers to be used to export the NNP arms should be given to the *Ministerio de Gobierno y Justicia, Policía Nacional, Republica de Panamá.* [See doc. No. 101, Annex V].

- On September 28, 2001, Kissilevich sent Yelinek a fax, providing him the serial numbers of the containers which were to be used to export the Nicaraguan arms. [See doc. No. 98, Annex V].

- On the same day, Zoller sent Nicaraguan Army Major Alvaro Rivas, responsible for the logistical aspects of exporting the arms from Nicaragua, a fax in which he informed Major Rivas that the containers should not be loaded with more than 13 tons or 26,000 pounds. [See doc. No. 99, Annex V].

- Also on September 28, Kissilevich sent General Calderon a fax, providing an accounting of a transaction in which the army sold to GIR S.A. 2.5 million rounds of AK47 ammunition worth $112,000, agreed to exchange the 5000 old NNP AK47s, for 3117 new AK47s for a fee of $20,000, and sold 300 ammunition-carrying vests worth $15,000 – in return for 500 bullet-proof vests and accessories from GIR S.A., valued at $185,620. Kissilevich informed Calderon that the army owed GIR S.A. $68,120 for the balance of the transaction, and attached information on how to send a wire-transfer to GIR S.A.'s account. [See doc. No. 100, Annex V].

- On October 1, 2001, (retransmitted on the 12th and 19th) – Kissilevich sent Commissioner Gonzalez a fax informing her that GIR S.A. was sending the NNP 100 Jericho pistols [See doc. No. 96, Annex V]. He added that in order to deliver the remaining 5 pistols (for a total of 465) he needed the NNP to send IMI an end-user certificate [See doc. No. 95, Annex V]. He sent the NNP a draft.

  Also on October 1, Leonel Cordon informed Kissilevich by e-mail that 4 of the containers to be used to export the arms from Nicaragua had to be replaced. He sent Kisslevich a new list of serial numbers for the containers that were to be used. There were 12 containers. This information was then faxed to Yelinek. [See doc. No. 94, Annex V].

- On October 2, 2001, Kissilevich sent Major Rivas the same fax that was sent to General Calderon on September 28. He retransmitted the Fax on October 8. [See doc. No. 93, Annex V].

- On October 9, 2001, Kissilevich sent Yelinek a fax with a price list for 10,000 uniforms and boots. [See doc. No. 90, Annex V].

- On October 10, 2001, Col. Carlos Gilberto Chavarría Hernandez, Chief of Guatemala's Military Industry, certified that 115 AK47s were to be purchased from GIR S.A. for the exclusive use of Guatemala's Military Industry. [See doc. No. 89, Annex V].

- On October 12, Major Rivas sent Zoller an e-mail, explaining that they were working towards October 18, and hence, needed the 12 trucks to carry the containers on the morning of October 17. He added that it was imperative that he received the end-user certificate by the morning of October 15. [See doc. No. 86, Annex V].

- On October 13, the Captain of the ship Otterloo, Jesus Fernando Iturrios Maciel, signed a ship manifest in the port of Veracruz, Mexico, stating that his ship was carrying 9 containers of plastic balls, and that he was sailing to Panama. [See doc. No. 85, Annex V].

- On October 15, 2001, $99,775 was deposited in GIR S.A.'s bank account via wire transfer from a certain Kolel Shomrei Aahomot by way of the Mercantile Discount Bank Ltd, Tel Aviv, Israel. [See doc. No. 84, Annex V].

- On October 16, 2001, $212,265 was deposited in GIR S.A.'s bank account via wire transfer from S.H and A. Diamonds Ltd, by way of Chase [bank] in New York. [See doc. No. 83, Annex V].

- On October 17, 2001, Colonel Ramon Calderon Vindell and Commissioner Melby Gonzalez, by way of an *Acta de Entrega* – document the army handing-over 3,117 AK47s and 2.5 million bullets to the NNP. [See doc. No. 80, Annex V]. In another document, with the same date, Col. Calderon certified that the AK47s were made before 1986. [See doc. No. 81, Annex V].

- On the same day, GIR S.A. sent a Fedex package to Major Rivas, apparently containing the end-user certificate, which took the form of an alleged Panamanian National Police Purchase Order, dated February 10, 2000. [See doc. No. 82, Annex V].

- On October 18, 2001, Kissilevich sent Yelinek an e-mail, attaching an account balance, which showed that Yelinek owed GIR S.A. approximately $25,000. [See doc. No. 79, Annex V].

- Also on October 18, 2001, the Nicaraguan Army wire transferred $68,120 to GIR S.A.'s bank account in Miami [See doc. No. 78, Annex V] – this was the amount owned on the side-deal for the bullet-proof vests and the commission for exchanging the arms with the NNP.

- On October 19, 2001, GIR S.A. forwarded a note from Yelinek to their shipping agent, Leonel Cordon. The note from Yelinek contained the name of the ship (Otterloo), and the company name (Trafalgar Maritime Inc), also identifying the company's legal representative as a certain Captain Onattopp Ferriz. [See doc. No. 76, Annex V].

- Also on October 19, Major Rivas sent an e-mail to Kissilevich in which he asked for (1) a new end-user certificate for the AK47s which were going to the Guatemalan Army, and the end-user certificate he had was only for 115 guns, and 117 were to be shipped; (2) the name of the port of embarkation and the port where the "large package" was to be unloaded; and, (3) similar information for the bayonets. [See doc. No. 77, Annex V].

  GIR S.A. apparently replied that only 115 guns were going to Guatemala, and therefore the end-user certificate that the army had would serve; and they also provided the address for Century Arms. [See doc. No. 77, Annex V].

  In relation to the "large package" GIR S.A. informed that the address was Captain Onatto Frizz [stet – Miguel Onattopp Ferriz] P.O. box 873276, Zona 7, Panama, Republica de Panamá. [See doc. No. 77, Annex V].

- On October 22, 2001, First Commissioner Edwin Cordero Ardilla, notified the *Contraloría General* (acting Contralor, Francisco Ramírez Torres), of a quantitative change in the arrangement with GIRSA. He informed that 3,117 AK47s instead of 5,000 AK47s and 5 million rounds of ammunition, instead of 2.5 million rounds were to be exchanged. He further explained that the change was necessary as the original 5,000 guns did not meet GIR S.A.'s technical requirements, and therefore an exchange with the army would solve the problem. He further

informed that the corresponding inventories kept by *Bienes del Estado*, were to reflect the exchange. [See doc. No. 75, Annex V].

- On October 24, 2001, General Commissioner Francisco Bautista Lara, wrote to the Minister of Finance, Esteban Duque Estrada, requesting that the paper inventory of arms of the NNP be adjusted to reflect the receipt, from the army, of 3,117 AK47s, and then the exchange of those arms, under the GIR S.A. contract. Changes were also made to stocks of munitions and bayonets. [See doc. No. 72, Annex V].

- On October 25, 2001, the Director of Government Accounting, of the *Ministerio de Hacienda y Crédito Público*, Luis Bravo Henriquez, certified that the corresponding changes in the paper inventories of the Ministry had been made. He then wrote 3 separate letters, all dated October 25, 2001, informing Commissioner Bautista Lara, of the changes to the inventories. [See doc. No. 67, Annex V].

- On October 25, 2001, the new Minister of Gobernación, Ing. José Marenco Cardenal, wrote to Jorge Molina Lacayo, the Director of the *Centro de Trámites de Exportación del Estado de Nicaragua* (CETREX), copied to new National Police Commissioner, Edwin Cordero Ardilla, and requested that he take the necessary steps to export the arms and munitions; [See doc. No. 68, Annex V].

  The Minister also wrote directly to Commissioner Cordero to inform him that he had authorized the export of the arms. [See doc. No. 69, Annex V].

- On October 26, 2001, Otterloo arrived in El Rama, Nicaragua. [See doc. No. 63, Annex V].

- On October 30, 2001, Brian Sucher, Executive VP of Century Arms, certified his company's importation of the Bayonets into the United States. [See doc. No. 61, Annex V].

- Also that day, Nicaraguan Army Major Ramiro Martinez Rivera left Managua, leading a convoy of trucks from Managua to the port of El Rama, where it arrived the next day, October 31. [See doc. No. 50, Annex V].

- On October 31, 2001, Acting Contralor, Francisco Ramírez Torres, replied to Commissioner Bautista Lara, informing the latter that the NNP could make purchases of items for exclusive police work "*sin ajustarse a los procedimientos ordinarios de la Ley*". Ramírez Torres informed the Commissioner that he must, however, send a copy of the contract to the Contraloría, within 10 days of its signature, "*para su debida fiscalización*". [See doc. No. 57, Annex V].

- On November 1, 2001, the Agencia Aduanera Canales Aguilar filled-out an export form, documenting the export of 115 AK47s from the Managua airport to the Ministry of National Defense in Guatemala. [See doc. No. 54, Annex V].

- On November 2, 2001, following a delay of two days, the 14 containers (Note: there were 14 containers: 10 containers with ammunition, 4 with AK47 assault rifles) were loaded by Agencia Vassali onto the Otterloo. The Otterloo first had to unload 9 containers (allegedly containing plastic balls) it had on its deck, loaded the 14 arms containers into its hold, then re-loaded the 9 containers on its deck. [See doc. No. 6, Annex V].

- Also on November 2, 2001, a CETREX Export Form was filled-out by Agencia Canales Aguilar, and it documented the export of arms and ammunition to the Panamanian National Police, at the port of Colon, Panama. [See doc. No. 53, Annex V]. A Nicaraguan custom form similarly documented the shipment to the PNP. [See doc. No. 53, Annex V].

  Two other documents were also filled-out - the Otterloo's ship manifest (on Agencia Vassalli stationary) [See doc. No. 53, Annex V] and a Bill of Lading, [See doc. No. 53, Annex V], both dated November 2, 2001. They also documented the arms and ammunition, including the serial numbers of the containers that contain the goods). The manifest and the Bill of Lading were certified by the Otterloo's Captain (Master), Jesus Iturrios Maciel, and indicated that the final destination was the Panamanian National Police.

- On November 3, 2001, the Captain of the Otterloo, Iturrios Maciel, signed an *Acta de Salida*, a form from the Nicaraguan *Ministerio de Gobernacion*, indicating his imminent departure to the port of Colón, Panama. [See doc. No. 52, Annex V] The Nicaraguan Navy documented the Ottlerloo sailing out of the port of El Bluff, with the declared destination being the port of Colón, Panama. [See doc. No. 52, Annex V].

- On November 5, 2001, the Otterloo arrived at the port of Turbo, as documented by a form of the *Departamento Administrativo de Seguridad, Seccional Antioquia, Puesto Operativco Turbo,* which was signed by the Captain of the Otterloo, as well as by a Colombian customs official. [See doc. No. 51, Annex V]. On November 7, the shipment of arms and ammunition was unloaded by a shipping company called Banadex S.A., at the request of a the shipping agent Turbana Ltd, and the AUC took possession of the weaponry [see doc. 14a, Annex V]. The Otterloo then sailed for Baranquilla on November 9. [See docs. Nos. 51 and 25, Annex V].

- On November 9, 2001, GIR S.A. sent Yelinek a fax outlining the entire transaction on the sale of equipment and related shipping costs, and detailing payments received from Yelinek. The entire cost of the operation amounted to $603,805, of which GIR S.A. had received $547,642 from Yelinek - GIR S.A. was owed $ 56,343. [See doc. No. 45, Annex V].

- Also on November 9, the Agencia Aduanera Canales Aguilar completed the required export documents for exporting 9000 AK47 bayonets to Century Arms in Miami, by way of Puerto Cortes, Honduras. [See doc. No. 46, Annex V].

- On November 21, Ori Zoller sent a fax to the Nicaraguan Army (tel: 505-228-7605), explaining that the Panamanian National Police wished to purchase a second consignment of arms and ammunition: 17 million rounds of ammunition of two different types, along with 5000 AK47s. Zoller outlined how payment was to be made for the purchase of such equipment, and he attached the February 10, 2000 purchase order which he characterized as "*debidamente firmada y sellada por el Ministerio de Gobierno y Justicia, Policia Nacional de Panamá*". [See doc. No. 42, Annex V].

- On December 4, 2001, Zoller's bank account received two wire transfers. The first, for $6,475, from a certain Stein Svi, by way of the Mercantile Discount Bank Ltd, Tel Aviv, Israel [See doc. No. 40, Annex V]; the second, for $49,568 from a certain Chaim Mann, by way of the First International Bank of Israel, Ltd. Tel Aviv, Israel. [See doc. No. 41, Annex V].

- On December 13, 2001, the Otterloo returned to Puerto Colón, Panama, after having traveled from Baranquilla, Colombia (on November 9), to ports in Venezuela and Suriname. [See doc. No. 25, Annex V].

- On December 14, 2001, GIR S.A. sent a fax to Yelinek in which the prices were shown for a list of military hardware, which included 5000 AK47s, 10 million rounds of ammunition, 100 PKMS machine guns, 50 rocket propelled grenades RPG7, and 1000 grenades for RPG7. [See doc. No. 39, Annex V].

- On January 2, 2002, GIR S.A. sent Yelinek a fax, providing pricing for the purchase of 24 containers, and transportation and customs costs. [See doc. No. 38, Annex V]

- On January 3, 2002, Kissilevich sent a fax to his shipping agent, Leonel Cordon, giving him the address to which the containers should be sent (*Comando de Apoyo Logístico*, in Managua), and the contact person, Major Rivas of the Nicaraguan Army. [See doc. No. 34, Annex V].

- Also on January 3, 2002, Kissilevich apparently sent Major Rivas a copy of the Panamanian purchase order, describing it as the "*Certificado de Usuario Final correspondiente a la mercaderia solicitada*". [See doc. No. 37, Annex V].

- On January 8, 2002, Kissilevich sent a fax to Major Rivas, explaining that he was sending him a list of serial numbers for "ten more containers". [See doc. No. 32, Annex V].

- On January 11, 2002, the *Jefe de la Dirección de Financias del Ejercito de Nicaragua*, Coronel Miguel Guzman Bolaños, issued a bill for $980,000, addressed to the Panamanian National Police, but sent only to Zoller, for 17 million rounds of ammunition, and 5000 AK47s. [See doc. No. 31, Annex V].

- On January 16, 2002, $50,000 was wire-transferred to GIR S.A.'s Westrust Bank account from a Bank in Israel. [See doc. No. 29, Annex V].

- On January 23, Julio Solis, of Agencia Vassali in Nicaragua, sent an e-mail to GIR S.A.'s shipping agent in Guatemala, Leonel Cordon, informing him that 23 containers were available for immediate purchase. [See doc. No. 28, Annex V].

- On January 30, 2002, Ovidio Escudero, Chief of Naval Intelligence of the Panamanian Navy, sent a fax to Captain Manuel S. Mora Ortiz of the Nicaraguan Navy, asking him for any information he may have regarding the ship Otterloo. Escudero added that the Ship was suspected of transporting armament to the Fuerzas Armadas Revolucionarias de Colombia (FARC). [See doc. No. 27, Annex V].

  The next day, Mora replied to Escudero, explaining that the Otterloo had sailed from Nicaragua on November 2, 2001, loaded with 3000 AK47s and 5 million bullet, which had been sent to the Panamanian National Police. [See doc. No. 26, Annex V].

- On February 6, 2002, el Teniente Coronel, Wilson Laverde, Jefe de la Unidad Antiterrorista de la Policía Nacional de Colombia; Elmer E. Acuña del Consejo de Seguridad Publica y Defensa

Nacional de Panamá; el Mayor Francisco León Rodríguez, Jefe del Departamento de Contra Inteligencia del Ejercito de Nicaragua, y el Sub-Comisionado Arnulfo Escobar, de la Policía Nacional de Panamá, signed a document called "Propuesta de Trabajo para el Desarrollo de la Operación Triangulo". [See doc. No. 24, Annex V].

- On February 15, 2002, GIR S.A. sent a fax to Julio Solis, informing him that they no longer wanted the 23 containers that were for sale. GIR S.A. sent a copy of this fax to their shipping agent, Leonel Cordón. [See doc. No. 22, Annex V].

- On March 5, 2002 during a meeting of Chiefs of Police in Bolivia, Carlos Barés, Chief of the Panamanian National Police, asked Edwin Cordero, by then the Chief of the Nicaraguan National Police, for an explanation regarding the export of Nicaraguan arms, allegedly to Panama. Cordero later testified that up until March 5, he had no knowledge of Operacion Triangulo, nor that the Nicaraguan arms had been diverted to Colombia. [Interview with Cordero].

- On March 8, 2002, Barés and Cordero met in Panama to review the facts of the case. [Interviews with Cordero and Barés].

- On March 19, 2002, Shimon Yelinek sent Ori Zoller an e-mail, saying "I am sorry for the delay, I am doing my best to comply, I have some delay, on Friday, I will call you. Try to hold the pressure". [See doc. No. 20, Annex V].

- On April 21, 2002, the Colombian newspaper, "El Tiempo" published a story regarding the diversion of the Nicaraguan Arms.

- April 30, 2002, Trafalgar Maritime Inc.'s Office closed permanently for business, and they gave up their office lease on May 1, 2002. [See doc. No. 13, Annex III].

- On May 8, 2002, the Ministers of Foreign Affairs of Colombia, Nicaragua and Panama, requested that the OAS conduct an investigation into the circumstances surrounding the arms diversion. [See doc. No. 17, Annex V].

- On June 14, 2002, the Otterloo was sold to Enrique Aaron Villalba, Colombian citizen, by Julio Matute, Panamanian citizen, and at this point the legal representative of Trafalgar Maritime Inc. The ship was sold for $125,000, of which only $100,000 changed hands. [See doc. No. 11, Annex III].

- On June 28, 2002, Trafalgar Maritime Inc., was formally dissolved by the lawyer Gustavo Padilla. [See doc. No. 11a, Annex V].

ANNEX II

List of All Actors

NAME	TITLE
ACAL	Canales Aguilar Compañía Limitada (ACAL) – Customs agency in the name of Augusto Canales Meléndez.
Acuña, Elmer E.	Council for the Public Security and National Defense of Panama. Signatory of the document "Operación Triángulo".
Aguilar, Carlos	Panamanian citizen. Second Officer of the merchant ship Otterloo. Later became its Captain.
Argűello Poessy, Guillermo	President of the Superior Council, Office of the Comptroller General of the Republic of Nicaragua (*Consejo Superior de la Contraloría General de la República de Nicaragua).*
Aviad, Haviv	Brother in law, and business associate of Shimon Yelinek.
Bah, Ibrahim	Principal provider of arms and diamond dealer for the United Revolutionary Front (RUF) of Sierra Leone.
Banadex S.A.	Colombian shipping company that unloaded the Otterloo's containers in Turbo, Colombia.
Bautista Lara, Francisco	Deputy Chief of the Nicaraguan National Police.
Barés, Carlos	Chief, National Police of Panama.
Bello, Pedro	President, "Armamentos Inc.," a firearms sales company in West Palm Beach, FL, USA.
Berenstein, Gabriel	Marketing Manager, Israeli Military Industries, Ltd. (IMI).
Bravo Henríquez, Luis	Director General, Government Accounting Department, Ministry of the Treasury and Public Credit.
Calderón Vindell, Col. Ramón	Chief, Logistics Department, Nicaraguan Army.
Calderón, General Roberto	Inspector General of the Nicaraguan Army.
Canales, Augusto	Owner of ACAL, legal representative of the Nicaraguan National Police during firearms exports customs procedures.
Carrión, General	Commander-in-Chief, Nicaraguan Army.
Cordero Ardilla, Edwin	First Commissioner, Director General, Nicaraguan National Police, as of September 2001.
Cordón, Leonel	Owner of Tramocaribe (Guatemala), the shipping company contracted by GIR S.A. to coordinate transportation of the arms.
Correa Guerrero, Heriberto	Deputy Director General, State Procurement and Tenders of Nicaragua.
Chavaría Hernández, Col. Carlos Gilberto	Head, Guatemalan Military Industries, which purchased 115 AK-47 from GIR S.A.
de León, Eugenia	Secretary, GIR S.A.

Díaz Lazo, Melba	Nicaraguan customs agent.
Duque Estrada, Esteban	Minister of the Treasury and Public Credit.
Escobar, Arnulfo	Deputy Chief of Police, National Police of Panama. Signatory of the Operación Triángulo document.
Escudero, Ovidio	Chief, Department of Naval Intelligence, Ministry of the Interior and Justice of Panama.
Ferriz, Miguel Onattopp	Manager/Owner, Trafalgar Maritime International Inc., the company under whose name the Otterloo was registered.
Gehri, Haim	Former IMI trader in Colombia. Is now a consultant for Century International Arms in Miami.
GIR S.A.	Grupo Representaciones Internacionales, S.A., firearms sales Company. Address: Prolongación Boulevard, Los Próceres, Zona 15, Kilómetro 9, Carretera a El Salvador, Área Comercial Hotel Quinta Real.
González, Melby	Chief, General Administration Division, Nicaraguan National Police.
Guzmán Bolaños, Miguel	Chief, Finance Department, Nicaraguan Army.
Herrera Zúñiga, René	Minister of Government of Nicaragua until September 30, 2000.
Iturrios Macial, Jesús	Captain/Master of the Otterloo.
Jiménez, Jaime	General Manager, Transportes Intermodal, a company contracted to transport the arms from Managua to Puerto El Rama.
Kissilevich, Uzi	General Manager of GIR S.A.
Ladigin, Sergey	Director, Latin American Regional Department, Federal State Unitary Enterprise "Rosoboronexport," a specialized agency handling Russian firearms exports.
Laverde, Wilson (Lt. Colonel)	Chief, Anti-terrorist Unit, National Police of Colombia.
López Dolmuz, José Antonio	Deputy Administrative Chief, Nicaraguan National Police.
Maor, Amiram	Deputy Vice President and Marketing Director for Latin America, Military Industries of Israel, Ltd. (IMI).
Marenco Cardenal, José	Minister of Government of Nicaragua from October 1, 2000 until the change of government (January 10, 2002).
Martínez Rivera, Ramiro	First Officer, Military Technical Office of Nicaragua, responsible for accompanying the firearms from Managua to Puerto del Rama.
Molina Lacayo, Jorge	Director, Exports Processing Center (CETREX).
Montealegre Callejas, Francisco (Franco)	First Commissioner, Chief of Nicaraguan National Police until September, 2001.
Mora Ortiz, Captain Manuel S.	Naval Forces of Nicaragua.
Moreno Corea, Lieutenant Colonel Uriel	Chief, Military Technical Office.
Muñoz Morales, Luis	Chief, General Administration Division, Nicaraguan National Police.
Osailly, Samih	Lebanese arms dealer who works for Ibrahim Bah.
Padilla Martínez, Gustavo Leonardo	Attorney who established the company Trafalgar Maritime International, Inc.

Ramírez Torres, Francisco	Acting President and later President of the Superior Council, Office of the Comptroller General of the Republic of Nicaragua.
Rivas Castillo, Álvaro (Major)	General Roberto Calderón's Assistant (Aide de Camp).
Rodríguez, Francisco León (Major)	Chief, Department of Counterintelligence, Nicaraguan Army.
Rojas Arrollo, Santiago	National Taxation and Customs Department (DIAN), Colombia.
Shrem, Marcos	Peruvian businessman, resident in Panama, associate of Shimon Yelinek.
Solís, Julio	Employee of Agencia Vassali, a Nicaraguan transportation and shipping company.
Sucher, Brian	Vice President, Century Arms.
Trafalgar Maritime Inc.	Transportation company under whose name the ship Otterloo was registered.
Vasalli S.A., Agencia "AVASA"	Agencia Vassalli, S.A. "AVASA" loaded the firearms onto the Otterloo in Puerto del Rama, Nicaragua.
Shimon Yelinek	Israeli businessman resident in Panama. Allegedly bought Nicaraguan firearms and ammunition.
Zoller, Ori	Owner of GIR S.A., a firearms sales company with headquarters in Guatemala.

EXHIBIT C

Part 1

TRANSPERFECT

AFFIDAVIT OF ACCURACY

I, Carrie Russ, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of the attached Colombian Prosecutor General Report from Spanish into English.

Carrie Russ
TransPerfect Translations, Inc.
601 Thirteenth Street, NW
Suite 370 South
Washington, DC 20005

Sworn to before me this
10th day of December 2007

Signature, Notary Public

Lisa Sherlinski
Notary Public, District of Columbia
My Commission Expires 01-01-2009

Stamp, Notary Public

Washington, DC

OFFICE OF THE COLOMBIAN PROSECUTOR GENERAL
PROSECUTOR'S OFFICE FOR CRIMINAL COURTS OF THE SPECIALIZED CIRCUITS
National Anti-Terrorism Unit
Office 18

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File No. 59,516

Bogota, Capital District, July 23, 2004

MATTER TO BE DECIDED

Determine the propriety of the investigation being conducted by this prosecutor's office into the activities of HENRY HERNANDO RAMIREZ BAHAMON, HERMINIO MARTINEZ MERCADO, CARMELO CORDOBA CAMPO, PAOLA KATHERINE ROMERO BENAVIDES, YOVANNY HURTADO TORRES and LUIS ANIBAL CHAVERRA ARBOLEDA, who were linked to the investigation, by unsworn statement, as presumed perpetrators of the crimes as set forth in article 286, 322, amended by article 73 of Law 788 of 2002 and article 366 of the Criminal Code, concerning the issuance of false or inaccurate government documents, the fabrication, trafficking and carrying of weapons and munitions, the use of which is restricted to the armed forces, and favoritism by a civil servant, with respect to the first three individuals named, [and] the latter three individuals for the offense set forth in article 366 of the same text, once the investigational phase in these proceedings is concluded and the time allowed by law to present charges has expired.

FACTUAL SUMMARY

In response to the arguments of counsel for the civil servants employed by the DIAN [Dirección de Impuestos y Aduanas Nacionales – Colombian tax and customs authority], we affirm that there can be no doubt whatsoever as to the manner in which the arms and munitions were brought into the country, which commenced in November 2001, military material intended for paramilitary groups operating in the Departments of Córdoba and Antioquia. This occurred once the ship Otterloo weighed anchor at the shores of Uraba on November 5, 2001 and unloaded 23 containers onto *bongos* (flat-bottomed vessels) that transported them to the Banadex S.A. yards at a

Nicaraguan port, or more precisely, Puerto El Rama, where the contents of 14 of the 23 containers (plastic balls) were exchanged for the 3000 rifles (AK-47 rifles) and 5,000,000 5.62 caliber cartridges for those rifles, which arsenal had documentation not only relative to the plastic balls purchased in Mexico, but also a supposed purchase of arms from the Nicaraguan police by its counterpart in Panama, the latter to avoid any problems in case of interception on international waters.

The 23 containers having arrived at Uraba on the motorboat Otterloo, they were placed in several bongos and brought onshore to the yards of the company Banadex S.A. at Puerto Zungo (Carepa), at which location the task of inspecting the containers was carried out by Messrs. HENRY HERNANDO RAMIREZ BAHAMON, HERMINIO MARTINEZ MERCADO and CARMELO CORDOBA CAMPO, agents of the DIAN office in Turbo commissioned for this purpose, in order to "verify compliance with custom laws in force and Merchandise Monitoring." Having completed this task, the customs agents recorded in the inspection report of November 8, 2001 (folio 192 c.c. 4.), that "the merchandise inspected corresponded to the merchandise declared."

But in addition to the DIAN agents, as stated by the accused in their unsworn statements and as appears in the corresponding documentation, also present at the Banadex S.A. yard were Mr. YOVANNY HURTADO TORRES, representing Banadex S.A.; LUIS ANIBAL CHAVERRA ARBOLEDA and ERASMO DE JESUS SALDARRIAGA CUARTAS, representing the owners of the merchandise (folio 112 et seq. c.c. 3), there being a document showing that CHAVERRA ARBOLEDA was handling vis-à-vis Banadex S.A. the matter concerning importation in the name of NELSON SALDARRIAGA CUARTAS, legal representative of Banadex S.A., and was the person who coordinated the arsenal's exit in 14 trucks he had arranged for this purpose and which arrived at their final destination, the paramilitary groups operating in the Antioquia and Córdoba departments (folio 54 et seq. c.c. 4).

III

IDENTIFICATION OF THE ACCUSED

HENRY HERNANDO RAMIREZ BAHAMON, identified by national identification card no. 12,128,309, issued at Neiva (Huila), born in Garzón (Huila) on January 3, 1965, age 38 at the time of the investigation, son of HERNANDO RAMIREZ and ANA BAHAMON, living in civil union with FANY GUEVARA RODRIGUEZ, with whom he has a son, three years of age, by the name of HENRY ALEJANDRO, University studies, graduate of the faculty of Law of Funiuraba-Incca, a civil servant and revenue technician for the DIAN at Turbo (Antioquia), where he resides at Calle 102 no. 15-110.

HERMINIO MARTINEZ MERCADO, identified by national identification card no. 82,330,333 issued at Acandi (Choco), where he was born on December 10, 1965, 37 years of age at the time of the investigation, son of HERMINIO MARTINEZ and CATALINA MERCADO, married to MARITZA SAAVEDRA, with whom he has three daughters by the names of TAMMY SHIRLEY, 14 years of age, CAROLINA, nine years of age and ALEJANDRA CATALINA, 14, 9 and 3 years in order of age [sic], University studies in business administration, graduate of UNAD, a civil servant and Assistant III 1208 for the DIAN at Turbo (Antioquia), where he resides at Calle 106 No. 11-16.

CARMELO CORDOBA CAMPO, identified by national identification card no. 8,427,057, issued at Turbo (Antioquia) where he was born on November 5, 1957, 46 years of age at the time of the investigation, son of ALEJANDRO CÓRDOBA and ISABEL CAMPO, lives in civil union with LUZ MARINA TORRES, with whom he has five sons by the name of CESAR ROBERTO, 22 years of age, SIRLEY, 24 years of age, NOHORA, 18 years of age, LUIS ALEJANDRO, 20 years of age and OSCAR, 17 years of age, a public accountant by profession working for the DIAN at Turbo (Antioquia), where he resides at Calle 97 No. 16-47.

PAOLA KATHERINE ROMERO BENAVIDES, identified by national identification card no. 43,751,469, issued at Envigado (Antioquia), born in Turbo (Antioquia) on July 20, 1976, 27 years of age at the time of the investigation, daughter of MANUEL and RAQUEL, lives in civil union with NESTOR AUGUSTO MEZA, with whom she has one daughter, 20 months

of age by the name of MANUELA, a Business Administrative Technologist working as Secretary of Public Deposits [at] Inversiones Arizana, and resides at Carrera 13 No. 102-13 in Turbo (Antioquia).

LUIS ANIBAL CHAVERRA ARBOLEDA, identified by identification card no. 71,934,588 issued in Apartado (Antioquia), born in Yati (Antioquia) on October 20, 1963, 39 years of age at the time of the investigation, son of VICTOR and VIRGELINA (deceased), married to MARIA IDALI CANO GOMEZ, with whom he has two sons, ALEJANDRO and SEBASTIAN, 12 years and six months of age, respectively, as well as his stepdaughter by the name of EDITH YOLIMA ARIZA CANO, 22 years of age, a businessman by occupation, bachelors degree, a resident of Apartado (Antioquia) in the Manzanares neighborhood, telephone 8283074.

YOVANNY HURTADO TORRES, identified by national identification card no. 71,947,726, issued at Apartado (Antioquia), where he was born on December 16, 1977, 25 years of age at the time of the investigation, son of FABIO and ISABEL, single, employed by the Banadex S.A. as an operations assistant, education to the seventh semester of financial technology and accounting, resident of Churido, district of Apartado (Antioquia).

EVIDENCE PUT FORTH IN THE PROCEEDINGS

1. During the evidentiary phase, various exhibits were submitted to the record, consisting of intelligence reports, documents indicating the measures adopted by a private Guatemalan agency engaging in the business of buying and selling arms and munitions (GIR S.A., folio 16 et seq. c.c. 4), reports of regional institutions such as the OAS, as well as the Report of Chartering and Leasing of Ships dated October 30, 2001 (folio 52 c. o 1), from which we know that the motorboat Otterloo was chartered by the firm Inversiones Banoly Ltda. (folio 49 idem), the existence and legal representative of which is indicated at folio 35 c. o 3., to load 23 containers of plastic balls at the Port of Veracruz (Mexico), bound for Colombia, more precisely, Turbo (Antioquia), which course was changed when the vessel docked at Puerto El Rama in Nicaragua (folio 153 et seq. ss. idem), under the pretext of making repairs.

2. Similarly, the record contains the order for the vessel to set sail for Turbo, the notice of arrival, notice of arrival of carrier, report of visit of the vessel by the Captain of the Puerto de Turbo, report of incoming vessel, invoice for purchase of plastic balls, bill of lading, and cargo manifest (folio 53 et seq. idem).

3. With respect to the motorboat, according to statements, it left Puerto de Veracruz (Mexico) with 23 containers of plastic balls, arrived at El Rama, a Nicaraguan port, where it underwent repairs, which was an opportunity to load the arsenal consisting of 3000 AK-47 rifles and 5,000,000 5.62 mm cartridges for those rifles.

4. With respect to the actions taken by the Colombian customs authorities in regard to the arrival of the Otterloo in Colombia, we have in the record the *Auto Comisorio Aduanero*[1] of November 8, 2001 (folio 94 idem) appointing DIAN officials HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO to "ensure compliance with customs regulations in force and Merchandise Monitoring"; there is also the Customs Inspection Report dated November 8, 2001 (folios 95 and 96 idem), signed by officials CARMELO CORDOBA CAMPO and HENRY HERNANDO RAMIREZ BAHAMON as agents of the DIAN and by YOVANNY HURTADO TORRES on behalf of Banadex S.A., a formality which also included Mr. HERMINIO MARTINEZ MERCADO, also an official at the DIAN, and the document demonstrates that the merchandise inspected corresponds to the merchandise declared.

5. At folio 100 idem, there appears the document entitled Simplified Import Declaration, signed by HERMINIO MARTINEZ MERCADO, and the documentation verifying that the Otterloo was anchored at El Bluff, the Nicaraguan port (folio 153 et seq. idem), the intelligence report, which provides a detailed account of the actions taken for the purchase of arms in Nicaragua by the firm GIR S.A., the ship's departure from Veracruz (Mexico), its arrival at the Port of El Bluff (Nicaragua),

[1] Translator's note: administrative act by the cognizant Customs official commissioning a judge or other authority to carry out formalities when the location of the goods at issue is other than location of the proceedings.

up to the unloading at the Colombian port and transport by trucks to the departments of Córdoba and Antioquia.

6. Also in the record is a report from the Interpol office of the DAS (folio 3 et seq. c.c. 3), attaching a list of rifles with serial numbers and the numbers of three containers in which they were packed, sent by Interpol Nicaragua, which list is also contained on a diskette.

7. Having carried out the judicial inspection at the decommissioned arms depot of the National Army, Fourth Brigade, headquartered in Medellín, by officials of the DAS commissioned for this purpose (folio 199 et seq. c.c. 3), there were 23 rifles in those army units, the serial numbers of which correspond to those that left Nicaragua and the list mentioned above.

8. Photographs were provided that show the portion of the Gulf of Uraba where the ships were anchored and from which the merchandise was unloaded and loaded onto the bongos which [floated] until they reached Puerto de Zungo, in this case. There is also a map of the area mentioned (folio 99 et seq. c.c. 8).

9. Pursuant to our request for international judicial assistance from authorities of the Republic of Guatemala in regard to the company GIR S.A., and for which purpose letters rogatory were issued, the items set forth at folio 166 et seq. c.c. 8 were received.

10. A sworn declaration was taken from Mr. JOSÉ ANTONIO MUÑOZ CARDOZO, a crane operator at the Banadex S.A. yards (folio 210 et seq. c.c. 4), who states that he had noted something unusual in the process of unloading the containers, since, as he states, "...everything arrives at the customs zone and never unloaded directly to the trucks from the [flat] and in this case it was done ...," adding that "...those who were there at the [flat] unloaded the trucks directly, ..." [sic] and that he was able to note that the first containers that he lifted with the crane weighed between approximately 18 and 22 tons, while the others weighed between 6 and 9 tons.

A. Documents put forth by counsel for Messrs. MARTINEZ MERCADO, RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO (folio 213 et seq. c.c. 8), which are detailed below: Customs Administration Directive 0005, originating from the Special Administrative Unit, the title of which indicates that its subject was to provide instructions for officials of the various units having to do with customs operations, operations which "are all the actions undertaken to prevent, control and effectively counteract the entry of the merchandise and exit and/or movement of domestic merchandise subject to customs restrictions in the country (without complying with the standards, requirements and conditions established by customs regulations.)" (Emphasis added). Another document submitted is Administrative Order 005 of June 7, 2002, "establishing procedures to reinforce customs controls to prevent the entry of prohibited merchandise or merchandise whose importation is restricted [to] authorized locations." In addition, there is another Directive, the number of which is illegible, but dated January 23, 2002, originating from the Administrator of the DIAN office in Turbo, which identifies the customs obligations to be completed by officials of the DIAN relating to the entry of foreign merchandise by sea through the Uraba area. Circular No. 8341001-0001 of April 16, 2002, issued by the office of the DIAN Administrator in Turbo, which concerns control of unloading merchandise. Memorandum No. 8341001-001 of April 9, 2001, also referring to control of unloading merchandise, also originating from the same office. The sworn declaration of Mr. EDUARDO ANTONIO OTERO ERAZO was heard, who, at the time of the events, served as Administrator of the customs office in Turbo (Antioquia), and, among other things, makes statement in regard to the distances between the location where the ships were anchored in Uraba and the Puerto de Zungo (folio 201 et seq. c.c. 8).

PROVISIONAL LEGAL CHARACTERIZATION

The presumed illegal conduct of Messrs. HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA

CAMPO is described in the abstract by the Criminal Code as follows:

1. Second Book, Title IX, Third Chapter, Article 286, which provides:

"Issuing a false or inaccurate public document. A civil servant who, in the exercise of his duties, records a falsehood or conceals all or part of the truth through the issuance of a public document that may serve as evidence, shall be subject to a term of four to eight years in prison and shall be barred from the exercise of public rights and functions for five to six years."

2. Second Book, Title X, Fourth Chapter, Article 322, amended by Article 73 of Law 788 of 2002, which provides:

"Favoritism by a civil servant. A civil servant who collaborates, participates, transports, distributes, alienates or in any other manner facilitates the theft, concealment or diversion of merchandise under the control of customs authorities, or the introduction of such merchandise through unauthorized locations, or fails to carry out the legal or regulatory controls for which he is responsible to achieve the same purposes, and the value of merchandise involved is less than 50 times the minimum legal monthly salary in effect, shall be subject to a fine of 300 to 1500 times the minimum legal monthly salary and effect, or in any event at least 200% of the customs value of the goods involved, and shall be barred from the exercise of public rights and functions for three to five years.

"If the conduct described in the preceding paragraphs involves merchandise of a value in excess of 50 times the minimum legal monthly salary, the penalty imposed shall be a sentence of five to eight years' imprisonment; a fine of between 1500 and 50,000 times the minimum legal monthly salary, or in any event at least 200% of the customs value of the goods involved; and bar on exercising public rights of functions for five to eight years.

"The amount of the fine shall not exceed the maximum fine established in this code."

3. Second Book, Title XII, Second Chapter, Article 366, which provides:

"Fabrication, trafficking and carrying weapons and munitions, the use of which is restricted to the armed forces. Anyone who imports, traffics, fabricates, repairs, stores, maintains, acquires, supplies or carries weapons or munitions, the use of which is restricted to the armed forces, shall be sentenced to three to 10 years in prison.

..."

These actions were undertaken by officials of the DIAN and served as the means to perpetrate multiple distinct crimes under the circumstances warranting the maximum penalties mentioned in article 58, numeral 10 of the Criminal Code.

THE STATEMENTS GIVEN BY THE ACCUSED

HENRY HERNANDO RAMIREZ BAHAMON states that he was commissioned on November 8, 2001, along with HERMINIO MARTINEZ MERCADO and CARMELO CORDOBA CAMPO, to inspect merchandise which had arrived at port on the motorboat Otterloo and was located at the Banadex S.A. yards in cooperation with Mr. YOVANNY HURTADO TORRES, the Banadex employee responsible for conducting the inspection process to determine that the merchandise contained in the 23 receptacles corresponded to the description on the import declaration so as to begin to nationalize it. He states that when it came time for the inspection, he and his two DIAN colleagues inspected 21 of the 23 containers, stating that what they saw were plastic balls, and he has no knowledge that the containers transported any other type of merchandise, and that his function "within the process of nationalizing the merchandise was only to inspect the cargo described in the import declaration and nothing else, and had he seen anything unusual or been alerted to [anything] equally unusual or illegal, he would have proceeded in accordance with customs regulations." He states that from the time the boat anchored in front of the port until the time of the inspection, three

days elapsed, approximately, and the distance between those locations is fairly substantial.

HERMINIO MARTINEZ MERCADO gives an unsworn account in terms very similar to those of the accused above, and states that together with MARTINEZ MERCADO and CARMELO CORDOBA CAMPO, he conducted the inspection of 21 of the 23 containers that arrived on the Otterloo and had not seen any weapons or munitions in any of those receptacles, nor even merchandise other than the plastic balls, adding that Messrs. ERASMO SALDARRIAGA, who he states was in charge of merchandise, and LUIS ANIBAL CHAVERRA were also present at the inspection, in addition to Mr. YOVANNY HURTADO TORRES, the Banadex yard supervisor. He states that he was the one who ordered the merchandise to be released, in other words, ordered it to be taken out of the yards once the inspection was completed, and that not all of the containers be reviewed, "... first, because over 90% of the homogeneous merchandise had been reviewed, and secondly, because I had to return to Turbo to authorize another release of merchandise," and that it is normal practice not to review all of the merchandise." He adds that Mr. HURTADO TORRES was at the inspection for a short time, and ERASMO SALDARRIAGA and LUIS ANIBAL CHAVERRA were also present, and that PAOLA KATHERINE ROMERO BENAVIDES was not there because she was about to have a baby, having drawn up the document for her to sign, and that HENRY HERNANDO RAMIREZ BAHAMON AND CARMELO CORDOBA CAMPO followed up with the merchandise, because it involved a boat that was arriving at the port for the first time. He also states that from the time the motorboat anchored until they reached the Banadex yards, the containers were transported on bongos, "... where something other than unloading them at Banadex could have happened during the trip ...," noting that there is a great distance between the place where the boat anchored and the port, and moreover, the review took place three days after the boat arrived.

CARMELO CORDOBA CAMPO begins his unsworn statement by indicating, like the other DIAN employees, that the inspection took place three days after the arrival of the boat, also noting the great distance between

the place where the motorboat was located and the Banadex yards, and that it was humanly impossible to review every one of the containers. He adds that at the time and before the occurrence of the facts under investigation, he, like his DIAN colleagues, had been in bad economic condition [sic] and that after reviewing 21 of the 23 containers they saw no weapons or munitions, nothing but plastic balls; he adds that he believes that Ms. PAOLA KATHERINE ROMERO BENAVIDES was not present during the formalities, as well as to have signed [sic] the customs inspection report and the *Auto Comisorio Aduanero* upon attending the task of reviewing the containers, that her actions were in accordance with customs regulations, and that when a review such as the one carried out is conducted by him and his DIAN colleagues, a detailed comparison is made between what is recorded on the documents and what can be seen and felt [by physical inspection].

PAOLA KATHERINE ROMERO BENAVIDES agrees that she was contracted to carry out the processes corresponding to importing and nationalizing the merchandise coming from Veracruz, Mexico in 23 containers, presumably plastic balls, but that because she was close to giving birth (the inspection was conducted on November 8, 2001 and she gave birth on the 20th of the same month and year) she was not present at the Banadex S.A. yards at the time the inspection was conducted by the DIAN officials, which circumstance is corroborated by Messrs. HERMINIO MARTINEZ MERCADO and HENRY HERNANDO RAMIREZ BAHAMON, who carried out that process, and by YOVANNY HURTADO TORRES, who was in charge of the Banadex S.A. yards. The accused adds that in addition to the DIAN members, the Banadex S.A. representative and Erasmo de Jesus Saldarriaga Cuartas were at the Banadex yards when the inspection of the receptacles took place, noting that the presence of the latter seemed normal, "... as he was the brother of the representative from Inversiones Banoly." She adds that from the fact of having signed the document in which it appears as though [she] was present at the Banadex S.A. yards, she thought that this might cause some type of problem, but that it was not the first time that she was not present for the review and they brought the document to her for her to sign, although this was the first time she did not attend because she was indisposed due to

her pregnancy. Regarding the importation of balls by Inversiones Banoly Ltda, she states that this appeared unusual, since that company did not usually bring that type of merchandise into the country, since what is imported was electrical appliances, dishes and umbrellas. She states that Mr. NELSON SALDARRIAGA CUARTAS, legal representative of Inversiones Banoly Ltda., knew about it when they were captured because he would do import procedures on behalf of Banoly with CARLOS MAZO, who was in charge of handling the documents.

LUIS ANIBAL CHAVERRA ARBOLEDA begins his account by stating that at the request of a man by the name of RICARDO ARANGO, who he states was recommended by his friend Mr. Gildardo Hincapie to handle the corresponding processes before the DIAN, since it would import balls and this is how he got to TURBOADUANAS [CUSTOMSTURBO], where they told him what documentation that he had to gather together. He states that after this, he went to Banadex, where they also told him what had to be done, and as Mr. RICARDO ARANGO, who had been traveling, was returning, he took him to Turboaduana where he left him speaking with the manager of that company by the name of Angel, stating that he does not recall his last name, and after Mr. RICARDO ARANGO left Turboaduana he said that everything had been arranged for the importation and nationalization of the merchandise and that once it arrived at the Banadex yards, the inspection of the merchandise was conducted and it was ordered to be released and taken out on trucks by the DIAN officials. He states that he did not go back to see Mr. RICARDO ARANGO and does not know his address or that of the gentlemen said to be his friend, Gildardo Hincapie. He affirms having been [present] at the time of the inspection of the containers at the Banadex yards and not having seen any objects other than plastic balls.

YOVANNY HURTADO TORRES states that his function as Administrator in charge of the Banadex yards, because the individual who held the job was on vacation [sic] at the time the 23 containers arrived in early November 2001, that according to the shipping documents they were plastic balls, it was the reception and coordination of his office [sic] once the nationalization process was completed. He states that in addition, he reviewed the

identification numbers of the receptacles, and did nothing else, because he says he is not authorized to review the contents of receptacles when merchandise arrives. He states that the individuals who conducted the review of the containers were the DIAN employees, HENRY HERNANDO RAMIREZ BAHAMON, HERMINIO MARTINEZ MERCADO, and CARMELO CORDOBA CAMPO, accompanied by Messrs. LUIS ANIBAL CHAVERRA ARBOLEDA and ERASMO SALDARRIAGA, who he believed represented the importer. He repeats that his function was only to receive the containers and dispatch them after the DIAN had reviewed their contents, that he was present during the opening of eight or nine of the containers, which he says contained plastic balls, because he had a need to be there, leaving the location where the review was being conducted, because he had to be there providing all the services required as an administrator of Banadex [sic]. He adds that once the review was completed, the DIAN officials ordered the merchandise to be released and gave him a copy of the declaration with the release of the merchandise and gave the containers to LUIS ANIBAL CHAVERRA ARBOLEDA, who coordinated the departure of the trucks that were loaded with the crane, one per container. He also states that Ms. PAOLA KATHERINE ROMERO BENAVIDES was not there at the time the containers were reviewed.

PLEAS AND DEFENSES PRESENTED

GUSTAVO RAMIREZ BARREIRO, ESQ., counsel for Messrs. HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO; MARIANNA SALCEDO VELOZA, Esq., counsel for Mr. LUIS ANIBAL CHAVERRA ARBOLEDA; and RUBEN DARIO TAMARA MURCIA, Esq., counsel for Mr. YOVANNY HURTADO TORRES, presented their pleas and defenses within the times provided by law.

Mr. RAMIREZ BARREIRO asked, on behalf of his client, that the investigation of his client be terminated, asserting as the basis for his request that the arrival of the arsenal at the Zungo port was not established with certainty, since, according to counsel for the civil servants employed by

the DIAN, there were credible and well-founded doubts, since he considers it true that the arms entered illegally, but not the manner in which they arrived, or when or where. Given the absence of testimonial proof, serious indications, documents or expert opinions to accuse the DIAN employees, who in his view have violated no legal provision relating to the issuance of false or inaccurate government documents, preferential treatment by a civil servant, or fabrication, trafficking and carrying weapons and munitions the use of which is restricted to the armed forces. He states that the sworn accounts of the Administrator of the DIAN office in Turbo are contradictory and that an essential, definitive fact taken into account by the undersigned was the declaration of Mr. JOSÉ ANTONIO MUÑOZ, the crane operator at the Banadex depot, who stated that there were differences in the weight of certain containers in relation to others, a situation which, according to the petitioner, should have been reported to the DIAN officials. In addition, he states that the statements of Mr. ADUARDO OTERO, Administrator of the DIAN office in Turbo, were taken into account as to the violation of customs standards on the part of the employees under his supervision. He adds that on a second occasion, José Antonio Muñoz stated that he had never said that there was a difference in the weight of certain containers, and therefore the statement by the crane operator did not disprove the statements of his clients. In summary, counsel states that no credence should be given to the statements of Messrs. EDUARDO OTERO and JOSÉ ANTONIO MUÑOZ, because neither the first nor the second told the truth, [in support of which he] transcribes a large portion of the testimony of the Administrator of the DIAN office in Turbo, arguing that his clients acted in accordance with customs regulations and that there is no evidence that they committed the actions with which they are charged, stating that the weapons and munitions entered the company, but nowhere is it proved that they were in the containers reviewed by the DIAN employees. But he also states that the weapons could have arrived concealed in the plastic balls in the containers, "... such that it was impossible to notice them," relying once again on the theory of the "switch" whereby the containers were moved at some point from the location where the Otterloo anchored to the Banadex S.A. yards, since there is a great distance between those two points, and raises a series of issues aimed at raising doubts

as to the existence of the containers, how many arrived in Colombian territory, whether the containers transported by the motor boat arrived at Zungo, whether there is any authoritative evidence establishing that there were only 23 containers on the Otterloo, that there could have been twin containers, false floors where they could have been hidden, etc. Counsel argues that the DIAN officials recorded what they saw, and accordingly, they recorded in the inspection report that the merchandise inspected was consistent with the declaration and therefore they cannot be accused of issuing false documents. He concludes his arguments by stating that his clients are persons with no criminal backgrounds, worthy of respect and trust, and outstanding civil servants, and repeating his request that the investigation of his clients pursuant to these proceedings be terminated.

Marianna Salcedo Veloza also asks that the investigation of her client, Mr. LUIS ANIBAL CHAVERRA ARBOLEDA, be terminated on the ground that he has not committed the crime with which he is charged, as provided in article 366 of the Criminal Code, stating that it is established that her client was at the Banadex S.A. yards, but not as the representative of any company, as he stated in his declaration, adding that he was waiting for the containers to be loaded onto the tracks. She also refers to the statements by codefendants HERMINIO MARTINEZ MERCADO and YOVANNY HURTADO TORRES, who identified her client as the individual who attended the review of the containers along with ERASMO SALDARRIAGA, on behalf of the owners of the merchandise, to detract from their credibility, stating that those accounts are not supported by any documents in the record, and continues this time making a lengthy presentation on the Sociedades de Intermediación Aduanera (customs brokers), their roles, responsibilities, obligations, etc., also providing citations and quotations from customs and inspection laws, and finally, dedicates a paragraph to a discussion of the presumption of innocence and teaches us, in an ironic manner, that *coautoría impropia* [the responsibility of multiple persons who cooperate in a crime by committing different elements of the crime] does not exist, citing definitions from Spanish dictionaries, stating that we were wrong to use the term "impropio," calling the use of the term absurd, for its misuse to characterize "... that particular manner of engnging in punishable conduct." She concludes by citing article 6, which concerns the principle of legality in

the Criminal Code as well as the Criminal Procedure Code, citing due process "... and not accuse one person who acted in good faith, ..."

The defense lawyer of the accused YOVANNY HURTADO TORRES, after making a statement about the functions and procedures for which his client was responsible as manager of the Banadex S.A. yards, asks for termination of the investigation that is to be carried out in respect of his client as allegedly jointly liable for an offence under Article 366 of the Criminal Code, on the grounds that HURTADO TORRES, as manager, was not authorized to undertake inspections, open containers or examine goods contained therein, since those are functions of the DIAN officials and so he could hardly have known what was in the containers but he was, however, sometimes present at the time of the inspection, since he had to deal with other aspects of deposits. He transcribes rules relating to obligations of the DIAN, such as a section of Article 469 of the Customs Regulations, amended by Decree 2685 of 1990, which states:

"The only authority with competence to verify the lawfulness of the importation of goods introduced or circulated in national Customs territory will be the Department of National Taxes and Customs ..."

He concludes his arguments by asking for termination on the basis of absence of guilt.

RECITALS

Preliminary clarification

Before we start our study of the classification of the merits of the summary proceedings, we wish to note that this decision only relates to the following persons: LUIS ANIBAL CHAVERRA ARBOLEDA, YOVANNY HURTADO TORRES, HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON, PAOLA KATHERINE BENAVIDES ROMERO and CARMELO CORDOBA CAMPO because, in respect of Messrs. ERASMO and

NELSON SALDARRIAGA CUARTAS, a date and time has been fixed at their request to carry out the procedure referred to in Article 40 of the Criminal Procedure Code.

We shall now study the classification to be given to the proceedings and we note that the rule contained in Article 397 of the Criminal Procedure Code states as follows:

Substantial requirements for a decision to charge. The National Prosecutor or his delegate will issue a decision to charge when the occurrence of the event has been shown and there is a confession, evidence that offers serious grounds for belief, irrefutable presumptions, documents, expert evidence or any other evidence that indicates that the accused is liable."

This office then determines whether those substantial requirements or prerequisites, as stated in the rule transcribed above, are met in the case in question, that is, whether the investigation proceedings contain evidence sufficient to allow a decision to charge to be made or whether, on the contrary, there is an absence of those elements and therefore it would be appropriate to terminate the summary proceedings in respect of HENRY HERNANDO RAMIREZ BAHAMON, HERMINIO MARTINEZ MERCADO and CARMELO CORDOBA CAMPO, who are involved in this investigation as allegedly jointly liable for offences under Arts. 286, 322 and 366 of the Criminal Code and with regard to LUIS ANIBAL CHAVERRA ARBOLEDA, YOVANNY HURTADO TORRES and PAOLA KATHERINE BENAVIDES ROMERO, who are allegedly guilty of the conduct described in Article 366 of the Criminal Code.

CONCERNING THE OCCURRENCE OF THE EVENT

The material or objective aspect of the criminal event is properly proven in the file by means of the evidence listed in the heading concerning this evidence. This material reveals that it is a certain fact that Inversiones Banoly S.A., represented in Turbo (Antioquia) by Mr. NELSON SALDARRIAGA CUARTAS, was the firm that was entrusted with carrying out the appropriate steps to bring into the national territory, by chartering the motor vessel Otterloo, three thousand

(3,000) AK-47 guns and five million (5,000,000) 5.62 caliber cartridges. These weapons were loaded onto the aforesaid motor vessel, which departed with 23 containers carrying plastic balls from the Port of Veracruz in Mexico and arrived at the Nicaraguan port of El Bluff, where the weapons and munitions in said quantities were put into 14 of the 23 containers. The vessel left on November 3, 2001 (page 98 c.c. 1.) and anchored on November 5, 2001 opposite the coasts of Uraba. The containers were discharged onto bongos, which carried them ashore, to the Banadex S.A. yards, and their departure from these yards to their final destination, the paramilitaries, was then ordered. These events have been proven by the Receipt List available at page 68 c.c. 4., by the photocopies of the deposits made to Bancolombia on the Banadex S.A. account, settling the sums relating to the container storage service (page 79 c.c. 4.) and by the orders to dispatch the containers from the Banadex S.A. depot (page 191 c.c. 1.).

Once the containers arrived ashore, they were physically inspected by officers of the DIAN attached to the Turbo (Antioquia) Office, HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO, in order to "confirm compliance with current Customs rules and monitoring of goods." They inspected 21 of the 23 containers and stated on the Customs Inspection Certificate that the inspected goods matched the declared goods when, in fact, 14 of the 23 containers held the weapons and munitions shipped in Nicaragua (page 94 et seq. c.c. 1.). These weapons are listed in the file (page 115 et seq. c.c. 3), sent by Interpol, Nicaragua to its authorized agent of the DAS [Departamento Administrativo de Seguridad – Administrative Security Department] in Colombia. 23 of the guns that arrived in that Central American country were found with the Fourth National Army Brigade in Medellin, when the Criminal Investigation Police Officers charged with this task carried out a Criminal Investigation Inspection in the Seized Weapons Depot in this military garrison (page 207 et seq. c.c. 5).

To return to the issue of the inspection carried out at the yards of Banadex S.A., Messrs. ERASMO DE

JESUS SALDARRIAGA CUARTAS and LUIS ANIBAL CHAVERRA ARBOLEDA were present at this and they are said to have been acting on behalf of the owners of the goods. CHAVERRA ARBOLEDA is said to have arranged the movement of 14 trucks each laden with a container, to be sent to the AUC [Auto Defensas Unidas de Colombia – paramilitary organization] in the Departments of Antioquia and Córdoba. This is proved by the statement of Mr. CARLOS MAURICIO USUGA, the driver of one of the vehicles on which the weapons were carried (page 147 c.c. 4), who states that he was hired along with other drivers to carry the containers that held balls, according to him, he was told by those who hired them and said that they agreed to a price of eight hundred thousand pesos for each container carried, that the weight of the cargo was approximately six (6) tons, the single container weighing one and a half tons and the cargo four and a half tons. He stated that they reached a place called Los Manguitos and around ten (10) more people appeared with short-range weapons and they made them get out of the vehicles and they took away the motors and left the drivers at a property, watched over by two armed men, from nine in the morning until eight at night, when the people with the trucks appeared, on that day, November 8, 2001.

With regard to the carriage of the containers in national territory, a statement was also taken from Mr. HELIODINO USUGA HERRERA, the driver of one of the vehicles that were carrying the containers (page 204 et seq. c.c. 5), who states that he was actually hired for the sum of eight hundred thousand pesos to take a container to the coast. The container was loaded onto his vehicle and he set off but, a kilometer from Apartado, the truck's transmission failed and so the trip was made by another vehicle.

These actions have been subjected to the usual examination and we can conclude that, from an objective point of view, the facts are proved to the extent required by the transcribed procedural rule, which mentions the substantial requirements for a decision to charge, since it is a certain fact that, on November 5, 2001, weapons from Nicaragua arrived in the Port of Zungo in Carepa. These weapons consisted of three thousand (3,000) AK-47 guns and five million (5,000,000) cartridges for them. The firm Inversiones Banoly Ltd., domiciled in Turbo (Antioquia),

had chartered the motor ship Otterloo, of Panamanian flag. She left the Port of Veracruz (Mexico) with 23 containers containing plastic balls. This vessel stopped at the Port of El Bluff in Nicaragua, where 14 of the 23 containers, containing plastic balls, were replaced with the same number of containers where the weapons were deposited. The documentation related not only to the plastic balls but to a supposed purchase made by the National Police of Panama from their counterpart in Nicaragua, possibly so that, if they were intercepted in international waters, they could show this documentation and thus avoid any problems.

When the motor vessel Otterloo reached Colombian territorial waters in Uraba, she anchored at a certain distance from the Port of Zungo, to deposit the 23 containers onto drums that took them to the Port of Zungo and, when they reached the Banadex S.A. yards, the DIAN officials, HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO, who were charged with "confirming compliance with current Customs rules and monitoring of goods," inspected 21 of the 23 containers and stated on the Customs Inspection Certificate that the inspected goods matched the declared goods.

CONCERNING THE GUILT OF THE ACCUSED

With regard to the matter of the guilt of HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO in the events under examination, there are also very many pieces of evidence in the proceedings that lead this Delegate Prosecution Office to state the involvement of the accused in the punishable events under investigation, since there is serious evidence of guilt against these civil servants, such as their presence in the place where the containers holding the weapons and munitions were examined in the Banadex S.A. yards, the evidence of involvement, since they were civil servants of the DIAN entrusted with checking compliance with current Customs rules and

monitoring of the goods, as required of them in the Customs Procedural Order and the evidence of no grounds, since in their unsworn statements they have declared themselves to have been uninvolved in the criminal activities proved in the proceedings, because if, of the 23 containers that arrived from Central America, 14 contained the weapons and, if they examined 21 of the total, then it is impossible to convince the courts that the weapons were not in them.

In the same way, we find in the conduct of the accused evidence of their ability to offend since, as long-standing officials of the DIAN, they had the necessary intellectual capacity for the action undertaken, which required those who committed the offence to have sufficient intellectual powers to undertake these actions which led to with the unlawful introduction of the weapons from Central America.

With regard to the accused, CARMELO CORDOBA CAMPO, against whom it is proceeded in absentia, since he has remained in hiding during these proceedings, this conduct can well be taken into account as evidence of criminal behavior.

And the documentation on the file strengthens the matter of the guilt of the DIAN officials attached to the Turbo Office.

During their appearances in the proceedings, MARTINEZ MERCADO, RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO in the same way insist that there could have been a "change-over" undertaken during the journey made by the bongos carrying the twenty (23) containers from the place where the Otterloo anchored to the Banadex S.A. yards. The time taken during this journey could have been used because of the considerable distance between the two points and this theory is also stated in a document submitted by the defense lawyers of the accused. But this office's response to this is that, if the accused have maintained that the goods that arrived on the motor vessel Otterloo on November 5, 2001, which were observed by them when the containers were subjected to inspection for purposes of nationalization, were plastic balls and not the weapons

then, what was the "change-over" that they say could have taken place during the journey of the containers on the bongos?

When they state in their unsworn statements that there was possibly a "change-over," this seems to be more of a tacit acceptance by the accused that what they found in the containers was the weapons, since it is understood that this "change-over" would consist of replacing the plastic balls with weapons and munitions, which is what was really carried on 14 of the 21 containers carried on the Otterloo.

The DIAN officials' method of conduct in having recorded on the Customs Inspection Certificate of November 8, 2001 that the inspected goods matched the declared goods is conduct involving an offence since, as civil servants belonging to the DIAN Turbo Office, in the exercise of their functions, they recorded a falsehood in that document that would be used in evidence, when they had a duty and obligation to adhere strictly to the truth concerning the contents of the containers. We therefore state that HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO have committed conduct that is contrary to the legal authority contained in Article 286 of the Criminal Code, which concerns ideological falsehood in a public document and it is punishable conduct, accepted by the accused, when they state, contrary to the truth of the events, that what was found in the containers matched the declaration contained in the importation and nationalization documents for the goods.

The same conclusion must be reached in relation to the conduct of the officials, who failed to comply with the requirements of the Customs Procedural Order of November 8, 2001, which required them to "confirm compliance with current Customs rules and monitoring of goods." They failed to comply with this mandate since the task entrusted to them was not carried out and they recorded in the Deed of Customs Inspection of the same date as the Procedural Order that the inspected goods matched those declared, which was untrue since, as we have said above, in 14 of the 23 containers, of which 21 were examined, the

weapons loaded in Nicaragua onto the Otterloo motor vessel were to be found, which allowed the unlawful introduction into national territory of the weapons for the paramilitaries in Córdoba and Antioquia.

Furthermore, the conduct of the DIAN officials is also contrary to the prohibition contained in Article 366 of the Criminal Code, since it resulted in the commencement of unlawful trafficking of weapons and munitions for the exclusive use of the Law Enforcement Forces and they formally and materially infringed the legally protected interest of the public security. With regard to the former conduct, it is sufficient to remember that, under Article 233 of the Constitution, the distribution and handling of weapons and munitions is a State monopoly and so no private individual may trade with them without the express authorization of the competent authority.

What is penalized is the undertaking of any action for which no express authorization has been given to the person and, if this is the case, it may well be considered, as the highest court of justice has stated in the past, that this is an offence of "mere conduct," in as much as it does not require the production of a specific result.

The response of the State is to restrain the individual where there is no evidence of a presumption that he has been given the right for the use for which the weapon was created because otherwise such an activity of itself implies an attack on the security and tranquility of society, especially if, as in this case, there was a large number of AK-47 guns and 5.62 caliber munitions for them, which came into the hands of paramilitary groups that have been sowing terror in our country, that is, the AUC. This is what one of its commanders, CARLOS CASTAÑO GIL, stated in a press interview which appeared in the El Tiempo newspaper and rejoiced over the introduction of the three thousand (3,000) guns and the five million (5,000,000) cartridges for them, which came from Nicaragua, saying: "This is the best goal that I have scored."

Viewed thus, the conduct of HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO, as stated above, is typical of the conduct described in rules 286, 322 and 366 of the Criminal Code since the file shows that, on November 8, 2001, the aforesaid civil servants permitted the introduction into the country of three thousand (3,000) AK-47 guns and the five million (5,000,000) cartridges for those guns.

Well now, the unlawful nature of the punishable conduct is clear from any viewpoint since, without any justification whatsoever, the accused acted against and damaged legally protected interests, which were the law of legal authority, social economic order and public security.

In relation to the issue of their guilt, which is regarded as consciously and willfully acting in a manner that can only be regarded with censure, there can be no dispute either. As we have seen, the accused admitted that they examined 21 of the 23 containers that arrived on the motor vessel Otterloo and also that they signed the Customs Inspection Certificate, although not that they found weapons or munitions inside these containers. But this statement is not supported in any way in the proceedings and this office considers that it is untrue. The oft-mentioned civil servants are clearly guilty, since there is not the least evidence to the contrary and thus have they been dealt with.

Therefore, it is appropriate for this office to issue a Decision to Charge against HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO, as materially and jointly liable for the offences referred to in Arts. 286, 322-2 and 366 of the Criminal Code which deal with ideological falsehood in a public document, favoritism by civil servants and the fabrication, trafficking and carrying of weapons and munitions, the use of which is restricted to the armed forces, in the same way and in the circumstances requiring maximum penalty described in Article 58 (10) of the Criminal Code.

Well now, the aim of this decision is to deal with the issue of classification of the merits of the summary proceedings in respect of LUIS ANIBAL CHAVERRA ARBOLEDA, PAOLA KATHERINE BENAVIDES ROMERO and YOVANNY HURTADO TORRES, who are accused in relation to the prohibition contained in Article 366 of the Criminal Code, which deals with the fabrication, trafficking and carrying of weapons and munitions, the use of which is restricted to the armed forces, so we shall now turn to this issue and state that, with regard to the first of the aforesaid, Mr. CHAVERRA ARBOLEDA, he was the person who went to the Banadex S.A. yards with ERASMO DE JESUS SALDARRIAGA CUARTAS on behalf of the owners of the goods so that, when the containers that arrived on the motor vessel Otterloo arrived, as shown in the photocopies of pages 49 and 50 of the Persons Entering the Stores Book of this company (pages 112 and 113 c.c. 3.), a fact corroborated by YOVANNY HURTADO, HERMINIO MARTINEZ and HENRY HERNANDO RAMIREZ and we should add that, on page 67 of c.c. 3, there is a document signed by Mr. LUIS GERMAN CUARTAS C., of the Legal Department of BANADEX S.A., which states that Mr. LUIS ANIBAL CHAVERRA ARBOLEDA was involved to a large extent in the activities to unlawfully introduce into the country the containers holding three thousand (3,000) guns and five million (5,000,000) cartridges for them, and he was, as he himself states, the person who arranged the carriage in trucks of the containers holding the weapons, from the Banadex S.A. yards to the final destination of the weapons, which was the paramilitary groups that operate in the Departments of Córdoba and Antioquia.

Although CHAVERRA ARBOLEDA wishes to give the impression that he was not involved in the events, using the story of having been contacted to deal with firms charged with goods importation and nationalization tasks by a man called RICARDO ARANGO, on the recommendation of GILDARDO HINCAPIE, his friend, he does not supply any addresses or contact details for these people and this is a story that this office simply does not believe.

With regard to the occurrence of the event, the reasons set out above in the heading dedicated to this requirement of Article 397 of the Criminal Procedure Code are admissible and allow us to state that this aspect of the

investigation proceedings have been properly proven in the proceedings, as stated therein.

Well now, with regard to the alleged guilt of Mr. CHAVERRA ARBOLEDA in relation to the activities against Public Security, that is, the breach of Article 366 of the Criminal Code, the evidence in the file has been considered and we find that there is serious evidence of guilt against the aforementioned accused, such as his presence on November 8, 2001 together with ERASMO SALDARRIAGA and the three DIAN officials in the place and at the time of inspection of the containers that held, apart from plastic balls, weapons and munitions in the quantities already stated. He was also present in these yards on the 9th of the month and year stated, in order to arrange the departure of the vehicles, loading the weapons destined for paramilitaries in Córdoba and Antioquia.

Evidence of involvement is also apparent from the proceedings since CHAVERRA ARBOLEDA was in the place, as we have said, and he was also coordinating the loading and departure of the 14 trucks that were carrying the same number of containers holding the weapons, which is evidence of his involvement in the punishable conduct with which he is charged.

The intellectual capacity to offend should be added to the above evidence since, as the accused himself has clearly stated, he worked for Banadex S.A. and so he had the intellectual ability to undertake the punishable activities that involve him in these proceedings and there is also his lack of justification since, as we have said above, the statement that he acted as he did on the recommendation that his friend GILDARDO HINCAPIE made to RICARDO ARANGO to contact him to carry out the relevant actions is clearly an untruthful statement.

An analysis of the evidence convinces us that LUIS ANIBAL CHAVERRA ARBOLEDA was guilty of joint involvement in the activities against Public Security and so he should be held on remand in these proceedings, in these circumstances where the maximum penalty applies, as

stated in Article 58(10) of the Criminal Code and so it is appropriate that this office should issue a Decision to Charge against him, as allegedly jointly guilty of an offence under Article 366 of the Criminal Code, in the circumstances of maximum penalty mentioned in Article 58(10) of the Criminal Code

Well now, as regards Mrs. PAOLA KATHERINE BENAVIDES ROMERO, her conduct in the investigation, the merits of which are classified by means of this decision, has been examined. She is connected to this investigation by means of an unsworn statement and she has been remanded in custody as allegedly guilty of an offence under Article 366 of the Criminal Code and this office is of the opinion that the investigation made of her should be terminated and the same decision should be made in respect of Mr. YOVANNY HURTADO TORRES, on the basis of the reasons set out below.

It is certainly true that Mrs. BENAVIDES ROMERO worked for a Customs Brokerage Company. She was responsible for dealing with the DIAN in matters relating to the importation and nationalization of the goods carried by the motor vessel Otterloo in 23 containers, which supposedly held balls and it was her duty to attend the inspection carried out on the containers but, because she was pregnant and close to giving birth, she did not attend that examination and the accused herself states this in her unsworn statement and this is also corroborated by the same DIAN officials who carried out the examination of the containers discharged from the motor vessel Otterloo on November 5, 2001.

Well now, the accused was not present when the containers said to contain the weapons and munitions were examined but that was not her function, since it is the function of the DIAN officials and, besides, she was not responsible for any other activities that might lead us to consider that she was involved in the offence against Public Security, as alleged against her, since, by means of the procedure carried out after the precautionary measure, there was no certainty as to the guilt of Mrs. BENAVIDES ROMERO as regards the punishable conduct and this

requirement must be taken into consideration when deciding whether to issue a decision to charge against an accused.

We note how her non-attendance at the examination of the containers did not have any harmful effects on the legally protected interest that would have led us to the conclusion that the accused was guilty.

By her omission, the accused did not carry out any risky activity which might suggest any attempt against legally protected interests and, although it is true that the file shows that the event did occur, the same is not the case as regards the guilt of the accused.

In order "for a conduct typical of the offence to be punishable, it is a requirement that the interest protected by the criminal law should have been harmed or actually endangered, without just cause," according to Article 9 of the Criminal Code

Furthermore, although it is true that Mrs. BENAVIDES ROMERO did not attend the yards of Banadex S.A. on the eighth (8) November 2001, because she was about to give birth, which occurred on the 20th of the same month and year, she did not in fact have a duty to do so because, as the employee of a private company, her duties were restricted to carrying out the procedures prior to the importation and nationalization of the goods.

As she states in her unsworn statement, this was not the first time that Mrs. BENAVIDES ROMERO did not attend the Customs inspection carried out by the DIAN. She states that there were several such occasions and so we believe that her conduct was not guilty and so it is appropriate to apply Article 39 of the Criminal Procedure Code, which takes this fact into account when considering termination of the investigation.

We therefore repeat that the investigation against Mrs. PAOLA KATHERINE BENAVIDES ROMERO carried out by this Prosecution Office will be terminated.

With regard to Mr. YOVANNY HURTADO TORRES, we note that his conduct is also free of

any guilt since, as Manager of the Banadex S.A. yards when the 23 containers from Nicaragua arrived, he only carried out his own particular duties, which were to receive the containers and arrange their departure from the Banadex S.A. yards once the goods nationalization process had been carried out by the DIAN officials. This accused, as he states in his unsworn statement and there is no evidence to suggest the contrary, was only able to witness the examination of eight or nine containers, since his duties as manager of the establishment did not permit him to be present when the DIAN officials were inspecting the containers.

As an employee of Banadex S.A., the duties of Mr. HURTADO TORRES did not include checking the containers to ascertain their content and so he could hardly have done so.

We note that the activities of Mr. HURTADO TORRES should be regarded as not characterizing this offence, since they did not come within the punishable conduct referred to in Article 366 of the Criminal Code, punishable conduct which was imputed to him and because of which he is involved in the investigation. This fact leads us to order that the investigation against him in these proceedings is to be terminated, under Article 38 of the Criminal Procedure Code

It should be noted that, after the precautionary measure imposed on Mr. HURTADO TORRES, no evidence whatsoever was added to the file that would have disproved his unsworn statement and so, as stated above, the investigation carried out against him as allegedly jointly guilty of an offence under Article 366 of the Criminal Code will be terminated and the precautionary measure against him is to be revoked.

RESPONSE TO THE ARGUMENTS

We respond to the arguments of the defense counsel of the civil servants attached to the DIAN by stating that there can be no doubt whatsoever as to the manner in which the arms and ammunition were brought into the country in early November 2001, [this being] military materiel

in transit to the paramilitary groups operating in the Departments of Córdoba and Antioquia. That took place once the ship was anchored off the coast of the Gulf of Uraba on November 5, 2001. Twenty-three containers were unloaded into drums that were used to transport them to the grounds of Banadex S.A. at the Port of Zungo, 14 of which contained the arsenal and 9 of which contained plastic balls, as is known from the documentation added to the record, consisting of documents pertaining to agencies that engage in the transportation of merchandise from abroad, as well as intelligence reports from the OAS, in containers that, as is known, come sealed, until the members of the DIAN tasked with inspecting the same remove the seals.

While it is true that we have not found any expert reports within the evidentiary file, we nevertheless have documents, testimony, and clear circumstantial evidence that lead us to consider Messrs. HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO to be suspected accomplices liable for violating Arts. 286, 322 and 366 of the Criminal Code and therefore to charge them as we are doing by means of this resolution. That evidence is related to the paragraph concerning the bases of judgment attached to the file.

Now, for the sake of argument, if the depositions of Messrs. EDUARDO OTERO, Managing Director of the DIAN in Turbo and JOSE ANTONIO MUÑOZ, contain contradictions that detract from their credibility, there are other bases of judgment in the trial, such as clear circumstantial evidence of liability and documents referred to in this decision, that allow us to issue an INDICTMENT against the civil servants attached to the DIAN. Furthermore, the arms entered the country in 14 containers, and the arms were confirmed as being inside the containers, because otherwise, why were they being transported in 14 trucks? It would not be the plastic balls that ended up in the hands of the paramilitary agents of CARLOS CASTAÑO, who, furthermore, in an interview with the newspaper El Tiempo, boasted about having scored a coup by bringing the arsenal into the country. Now, if it is true, as counsel for the defense says, that the arms and ammunition blended in with the plastic balls, we do not believe it because, as clearly affirmed in the record, the DIAN officers who conducted the inspection of the containers searched all the way to the bottom of the same and inspected 21

in addition to the 23. Thus, we rule out that possibility, and if this concerns the "switch" that the accused and the defense counsel have been wielding up until now, we have already stated that, if this took place, the members of the DIAN would be admitting that what arrived and was inspected by them consisted of containers holding the three thousand (3,000) guns and the five million (5,000,000) cartridges for the same.

The fact is that counsel for the defense makes speculations that are groundless and therefore lack any evidentiary support whatsoever that would detract from the charges made against his clients. Through these speculations, defense counsel, at this stage in the proceedings, would have us determine whether the motor ship has false floors that were used for purposes of transporting the arsenal, as well as whether there were doubles of those containers, etc. on the vessel.

What is clear in this case is that the accused parties who were in charge of inspecting the containers committed a falsehood on the Inspection Record made of the same when they stated on that document that what they had inspected was consistent with the declaration given.

In response to the defense counsel of the accused CHAVERRA ARBOLEDA, we shall state that our opinion that the latter committed the crime defined in Article 366 of the Criminal Code is based on: (a) the fact that he was present at the inspection as a representative of the owner of the contents of the 14 containers, at the coordination the owner carried out so that the containers would be loaded onto the same number of trucks, as admitted by both the same accused individual and by his defense counsel, in order to be taken to their final destination, the paramilitary agents, (b) the message signed by an officer of Banadex S.A., who tells us that LUIS ANIBAL CHAVERRA ARBOLEDA was making arrangements for the importation of the plastic balls, which ended up being a front for the actual situation, which was the importation of arsenal into the country, and (c) the statements made by co-defendants HERMINIO MARTINEZ MERCADO and YOVANNY HURTADO TORRES, whom ARBOLEDA assisted with the inspection at the yards of Banadex S.A. on behalf of the owners of the merchandise, these circumstances having been corroborated by the photocopies of the log used for recording entries to the yards of Banadex S.A., for the days of November 8 and 9, 2001.

Nevertheless, the transcriptions of customs laws regarding the definition of Customs Intermediary Entities (SIAs) constitute regulations that reinforce our position because they are consistent with our submissions to the effect that the DIAN officials failed to observe the provisions regulating the entry of merchandise into the country. Likewise, [there are] those regulations concerning SIAs since we know the duties of the party that represented the party to which NELSON SALDARRIAGA granted power to made arrangements with the DIAN for the importation and nationalization of the plastic balls that turned out to be the front.

Moreover, it is important to note that the presumption of innocence regarding Mr. CHAVERRA ARBOLEDA began to disappear when he opted to arrange the importation and nationalization of the plastic balls, the sole purpose of which was the illegal importation into this country of the arsenal originating in Nicaragua. Furthermore, it is most surprising to us that Ms. SALCEDO VELOZA is unfamiliar with the phenomenon of conspiracy to commit a crime, which arises in cases in which several persons undertake a criminal activity, knowingly and willingly dividing the work for purposes of achieving a characteristic result. Since all of the participants have the status of perpetrators, their conduct, taken in isolation, does not fall directly within the definition of the crime because all of the participants are united in the criminal design and act knowingly and willingly for purposes of achieving the result mutually sought or at least assumed to be likely.

Now, it is important that we explain to the defense counsel of the accused CHAVERRA ARBOLEDA that the meanings contained in regular dictionaries, whether of the Spanish language or of the Royal Academy, are one thing, and those contained in legal dictionaries [are another] because they differ in terms of their semantics. Therefore, it is advisable to consult the latter when entering into this sort of controversy.

Finally, the undersigned does not believe he has violated either the principle of legality adduced as proof by the complainant or the due process of the defendant she represents. However, as

stated previously, there is clear circumstantial evidence, as indicated earlier, that leads us to issue an indictment against the same, as a presumed accomplice liable for violating Article 366 of the Criminal Code, under the aggravating circumstances contained in section 10 of Article 58 of the Criminal Code.

With respect to the arguments presented at trial by Mr. TAMARA MURCIA with a view to having the Court terminate the investigation that has been conducted against his client, YOVANNY HURTADO TORRES, as a suspected accomplice in violating Article 366 of the Criminal Code, as noted in the body of this resolution, we have decided to proceed as requested by his defense counsel. Therefore, we shall refrain from engaging in lengthy elaborations that would agree with the petition his counsel deemed fit to make.

Therefore, the undersigned Public Prosecutor before the Penal Courts of the Circuit of Bogotá and Cundinamarca

RESOLVES as follows:

1. To ISSUE an indictment against Messrs. HERMINIO MARTINEZ MERCADO, HENRY HERNANDO RAMIREZ BAHAMON and CARMELO CORDOBA CAMPO, previously identified, as suspected accomplices liable for violating Arts. 286, 322 and 366 of the Criminal Code, through a series of related crimes, under the aggravating circumstances prescribed in section 10 of Article 58 of the Criminal Code, in accordance with the statements made in the grounds for this resolution.

2. To ISSUE an indictment against Mr. LUIS ANIBAL CHAVERRA ARBOLEDA, previously identified, as a suspected accomplice liable for violating Article 366 of the Criminal Code, under the aggravating circumstances provided in section 10 of Article 58 of the Criminal Code, in accordance with the statements made in the grounds for this resolution.

3. To TERMINATE the investigation being conducted against PAOLA KATHERINE BENAVIDES ROMERO and YOVANNY HURTADO TORRES regarding the crime referred to in Article 366 of the Criminal Code based on the grounds set forth in this decision.

4. The pre-trial detention order against the aforementioned accused individuals is REVOKED, and it is hereby ordered that they be SET FREE and that any official letters appropriate for this purpose be issued.

5. To REMAND the file containing this order to the Criminal Court Judge of the Specialized Circuit – Division [sic] – of Apartado, Antioquia, in order to continue the trial phase and to petition the Attorney General of the Nation to appoint the appropriate official to conduct the aforementioned phase.

6. The necessary evidence shall be verified in order to continue the investigation regarding Messrs. DARIO ENRIQUE VELEZ TRUJILLO and JESUS FERNANDO ITURRIOS MACIEL.

[It is resolved that] the provisions of Article 364 of the Criminal Procedure Code BE APPLIED.

LET IT BE KNOWN; IT IS SO ORDERED.
[signed]
HERNAN DAVID QUIÑONES PABÓN
Specialized Prosecuting Attorney
Filing 59,516.

EXHIBIT C

Part 2

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FISCALÍA GENERAL DE LA NACIÓN
FISCALÍA DELEGADA ANTE LOS JUZGADOS PENALES DEL CIRCUITO ESPECIALIZADOS
Unidad Nacional contra el Terrorismo
Despacho 18

Rad. 59.516.

Bogotá D. C., julio veintitrés de dos mil cuatro.

ASUNTO A DECIDIR

Calificar el mérito de la averiguación que se adelantara por esta Fiscalía Delegada en contra de los señores HENRY HERNANDO RAMÍREZ BAHAMÓN, HERMINIO MARTÍNEZ MERCADO, CARMELO CÓDOBA CAMPO, PAOLA KATHERINE ROMERO BENAVIDES, YOVANNY HURTADO TORRES y LUIS ANÍBAL CHAVERRA ARBOLEDA, quienes fueron vinculados a la instructiva, mediante injurada, como presuntos coautores de los delitos contenidos en los arts. 286, 322, modificado por el art. 73 de la Ley 788 de 2002 y 366 del C.P., que tratan de la Falsedad ideológica en documento público, Fabricación, tráfico y porte de armas y municiones de uso privativo de las fuerzas armadas y Favorecimiento por servidor público, los tres primeramente nombrados, mientras que los tres últimos por el punible a que hace referencia el art. 366 de la misma obra, una vez clausurado el ciclo instructivo en estas diligencias y fenecidos los términos que para presentar alegatos concede la ley.

SINOPSIS FÁCTICA

A las argumentaciones del señor defensor de los servidores públicos adscritos a la DIAN, respondemos manifestando que no cabe duda alguna sobre la forma como fueron introducidas al país las armas y municiones aquel comienzo de noviembre de 2001, material bélico con destino a los grupos paramilitares que operan en los Departamentos de Córdoba y Antioquia. Ello ocurrió na vez fondeara el barco Otterloo frente a las costas del Urabá el 5 de noviembre de 2001 y se descargaran 23 receptáculos en bongos que los trasladaron hasta los patios de Banadex S. A., en el Puerto de

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nicaraguense, más exactamente Puerto El Rama, donde el contenido de catorce (14) de los veintitrés (23) receptáculos (pelotas plásticas) fue cambiado por las tres mil (3.000) armas (fusiles AK 47) y cinco millones (5'000.000) de municiones calibre 5.62 para las mismos, arsenal que contó con la documentación no solo relativa a pelotas plásticas compradas en Méjico, sino a una supuesta compra de armas a la Policía de Nicaragua por parte de su homóloga de Panamá, esto último, para eludir cualquier inconveniente en caso de interceptaciones en aguas internacionales.

Llegados los veintitrés (23) contenedores al Urabá en la motonave Otterloo, se depositaron en unos bongos que los trasladaron a tierra, a los patios de la firma Banadex S. A., en Puerto Zungo (Carepa), sitio este donde por parte de servidores de la DIAN Delegada en Turbo, comisionados para el efecto, señores HENRY HERNANDO RAMÍREZ BAHAMÓN, HERMINIO MARTÍNEZ MERCADO y CARMELO CÓRDOBA CAMPO, se llevó a cabo la tarea de inspeccionar los contenedores a fin de "Verificar el cumplimiento de las normas aduaneras vigentes y Seguimiento Mercancías", quienes una vez llevada a cabo la tarea consignaron en el documento Auto y Acta de Inspección de noviembre 8 de 2001 (fl. 192 c. c. 4.), que "La mercancía inspeccionada, corresponde con lo declarado."

Pero además de los servidores de la DIAN, estuvieron en los patios de Banadex S. A., como así lo señalan los inculpados en sus versiones sin juramento y aparece en la documentación correspondiente, el señor YOVANNY HURTADO TORRES, en representación de Banadex S. A., LUIS ANÍBAL CHAVERRA ARBOLEDA y ERASMO DE JESÚS SALDARRIAGA CUARTAS, en representación de los dueños de la mercancía (fl. 112 y ss. c. c.3), existiendo documento en la cual se hace constar que CHAVERRA ARBOLEDA estuvo gestionando ante Banadex S. A. lo concerniente a la importación a nombre de NELSON SALDARRIAGA CUARTAS Representante Legal de Banadex S. A. y fue la persona que coordinó la salida del arsenal en catorce (14) camiones que tenía dispuestos para el efecto los que llegaron a su destino final, los grupos paramilitares que operan en los Departamentos de Antioquia y Córdoba (fl. 54 y ss. c. c. 4).

FILIACION DE LOS INCULPADOS

HENRY HERNANDO RAMÍREZ BAHAMÓN, identificado con cédula de ciudadanía No. 12.128.309, expedida en Neiva (Huila), nacido en Garzón (Huila) el 3 de enero de 1.965, con 38 años de edad para cuando fue indagado, hijo de HERNANDO RAMÍREZ y ANA RITA BAHAMÓN, vive en unión libre con FANY GUEVARA RODRÍGUEZ, con quien tiene un hijo de tres años de nombre HENRY ALEJANDRO, estudios universitarios, egresado de facultad de derecho de Funiuraba-Incca, servidor público como Técnico en Ingresos Públicos de la DIAN en Turbo (Ant.), donde reside en la calle 102 No. 15-110.

HERMINIO MARTÍNEZ MERCADO, identificado con cédula de ciudadanía No. 82.330.333 expedida en Acandí (Choco), donde nació el 10 de diciembre de 1.965, con 37 años de edad para cuando fue indagado, hijo de HERMINOIO MARTÍNEZ y CATALINA MERCADO, de estado civil, casado con MARITZA SAAVEDRA, con quien tiene tres hijas, de nombres TAMMY SHIRLEY de 14 años de edad, CAROLINA de 9 años y ALEJANDRA CATALINA, de 14, 9 y 3 años en su orden, estudios universitarios en Administración de Empresas egresado de la UNAD, servidor público como Auxillar III 1208 de la DIAN en Turbo (Ant.), donde reside en la calle 106 No. 11-16.

CARMELO CORDOBA CAMPO, quien se identifica con cédula de ciudadanía No. 8.427.057 expedida en Turbo (Ant.), donde nació el 5 de noviembre de 1957, con 46 años de edad para cuando fue indagado, hijo de ALEJANDRO CÓRDOBA e ISABEL CAMPO, vive en unión libre con LUZ MARINA TORRES, con quien tiene cinco (5) hijos de nombres CESAR ROBERTO de 22 años, SIRLEY de 24, NOHORA de 18, LUIS ALEJANDR de 20 y OSCAR de 17, de profesión Contador Público, labora para la DIAN de Turbo (Ant.), donde reside en la calle 97 No. 16-47.

PAOLA KATHERINE ROMERO BENAVIDES, identificada con cédula de ciudadanía No. 43.751.469, expedida en Envigado (Ant.), nacida en Turbo (Ant.) el 20 de julio de 1976, con 27 aos para cuando fue indagada, hija de MANUEL y RAQUEL, vive en unión libre con NESTOR AUGUSTO MEZA, con quien tiene una hija de 20 meses

de edad de nombre MANUELA, Técnologa en Administración de Negocios, labora como Secretaria de Depósito Público Inversiones Arizana, residente en la carrera 13 No. 102-13 en Turbo (Ant.).

LUIS ANÍBAL CHAVERRA ARBOLEDA, cedulado bajo el numero 71.934.588 expedida en Apartadó (Ant.), nacido en Yatí (Ant.) el 20 de octubre de 1963, con 39 años de edad para cuando fue indagado, hijo de VÍCTOR y VIRGELINA (fallecida), de estado civil, casado con MARÍA IDALÍ CANO GÓMEZ, con quien tiene dos hijos, ALEJANDRO y SEBASTIÁN, de 12 años y 6 meses respectivamente, además una hijastra de nombre EDITH YOLIMA ARIZA CANO de 22 años de edad, de ocupación comerciante, grado de instrucción bachiller, residente en Apartadó (Ant.) en el Barrio manzanares, teléfono 8283074.

YOVANNY HURTADO TORRES, identificado con cédula de ciudadanía No. 71.947.726 expedida en Apartadó (Ant.), donde nació el 16 de diciembre de 1977, con 25 años de edad para cuando fue indagado, hijo de FABIO e ISABEL, de estado civil soltero, de ocupación empleado en Banadex S. A., como Auxiliar Operativo, grado de instrucción séptimo semestre de Tecnología Financiera y Contable, residente en Churidó, Corregimiento de Apartadó (Ant.).

PRUEBAS ALLEGADAS A LA ACTUACIÓN

1.- Al plenario se llegaron plurimos elementos de juicio conformados por informes de inteligencia, por documentos que demuestran las gestiones adelantadas por una agencia privada guatemalteca dedicada a compra-venta de armas y municiones (GIR S. A., fl. 16 y ss. c. c. 4), informes de organismo regional como la OEA, así como con el Informe de Fletamento y Arrendamiento de Naves de octubre 30 de 2001 (fl. 52 c. o 1), por el que sabemos que la motonave Otterloo fue fletada por la firma Inversiones Banoly Ltda. (fl. 49 ib.), de cuya existencia y representación legal se da cuenta a fl. 35 c. o 3., para cargar veintitrés (23) receptáculos con pelotas plásticas en el Puerto de Veracruz (Méjico), sallendo con destino Colombia, más exactamente Turbo (Ant.), rumbo que se cambió al atracar la motonave en el Puerto El Rama en Nicaragua (fl. 153 y ss. ib.), con el pretexto de hacerle una reparación.

2.- De igual manera se cuenta en lo actuado con la orden de zarpe de la embarcación con destino Turbo, Aviso de Arribo, Aviso de Llegada del Medio de Transporte, Acta de Visita a la embarcación por la Capitanía de Puerto de Turbo, Acta de Recepción de Buques, Factura de Compra de las Pelotas Plásticas, Documento B/L, Manifiesto de Carga (fl. 53 y ss. ib.).

3.- En cuanto a la motonave, como se señalara salió del Puerto de Veracruz (Méjico), con veintitrés (23) receptáculos conteniendo pelotas plásticas, tocó El Rama, puerto nicaraguense, donde se sometió a reparación, oportunidad para embarcar el arsenal conformado por tres mil (3000) fusiles AK47 y cinco millones (5'000.000) de cartuchos calibre 5.62 mm. para los mismos.

4.- En lo relativo a gestiones propias adelantadas por las autoridades aduaneras colombianas relacionadas con la llegada de la motonave Otterloo a Colombia, se cuenta en el paginario con el Auto Comisorio Aduanero de noviembre 8 de 2001 (fl. 94 ib.), mediante el cual se comisiona a los funcionarios de la DIAN HENRY HERNANDO RAMÍREZ BAHAMÓN y a CARMELO CÓRDOBA CAMPO, para "Verificar el cumplimiento de las normas aduaneras vigentes y Seguimiento de Mercancías", de igual manera se cuenta en la actuación con el Acta de Inspección Aduanera de noviembre 8 de 2001 (fls. 95 y 96 ib.), signada por los funcionarios CARMELO CÓRDOBA y HENRY HERNANDO RAMÍREZ BAHAMÓN, como servidores de la DIAN y por YOVANNY HURTADO TORRES en representación de Banadex S. A., diligencia esta a la que también asistió el señor HERMINIO MARTÍNEZ MERCADO, igualmente funcionario de la DIAN, documento este en que se hace constar que la mercancía inspeccionada corresponde con lo declarado.

5.- A folio 100 ib., milita el documento Declaración de Importación Simplificada que firma HERMINIO MARTÍNEZ MERCADO y la documentación que acredita que la motonave Otterloo estuvo fondeada en El Bluff, puerto nicaraguense (fl. 153 y ss. ib.), el Informe de Inteligencia, en el cual se hace un pormenorizado recuento de las gestiones para la compra de las armas a Nicaragua por parte de la firma GIR S. A., la salida de la motonave desde Veracruz (Méjico), la llegada al puerto de El Bluff (Nicaragua),

hasta el desembarco en puerto colombiano y salida de este en camiones hacia los departamentos de Córdoba y Antioquia.

6.- De igual manera, milita en la foliatura informe originario de la Oficina de Interpol del DAS (fl. 3 y ss. c. c. 3), anexando la relación de fusiles, con su serie y número de cajas en que fueron empacados, enviada por Interpol Nicaragua, relación esta, de igual manera contenida en un diskette.

7.- Practicada Inspección Judicial en el Depósito de Armas Decomisadas de la Cuarta Brigada del Ejército Nacional con sede en Medellín por parte de funcionarios del DAS comisionados para el efecto (fl. 199 y ss. c. c. 3), se hallaron veintitrés (23) fusiles en esas dependencias castrenses, cuyo serial corresponde con los salidos de Nicaragua y a cuya relación se hizo mención en antelación.

8.- Se allegaron fotografías que recogen la parte del Golfo de Urabá donde fondean las embarcaciones y desde donde desembarcan las mercancías cargandolas a bongos que se deslizan hasta tocar el Puerto de Zungo, en este evento. También milita un mapa de la zona mencionada (fl. 99 y ss. c. c. 8).

9.- A solicitud por nuestra parte de Asistencia Judicial Internacional a las autoridades de la República de Guatemala en relación con la firma GIR S-. A., para lo cual se libró Carta Rogatoria, se recibieron los elementos de juicio que obran a folio 166 y ss. c. c. 8.

10.- Se escuchó en declaración juramentada al señor JOSÉ ANTONIO MUÑOZ CARDOZO, operador de la grúa en los patios de Banadex S. A. (fl. 210 y ss. c. c. 4), quien afirma haber notado algo anormal en el procedimiento de descargue de los contenedores, ya que como lo señala, "... todo llega a zona aduanera y de la plana nunca se descarga directamente a los camiones y este caso se hizo...", añadiendo que "..., los que se encontraban en la plana los descargúea los camiones directamente, ..." y que pudo notar que los primeros contenedores que levantó con la grúa pesaban entre 18 y 22 toneladas aproximadamente, mientras que los demás, entre 6 y 9 toneladas.

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11.- Documentos allegados por la defensa técnica de los señores MARTÍNEZ MERCADO, RAMÍREZ BAHAMÓN y CÓRDOBA CAMPO (fl. 213 y ss. c. c.8.), que se puntualizan a continuación: Instrucción Administrativa Aduanera 0005, originaria de la Unidad Administrativa Especial, que como su título lo indica, su objetivo fue llevar instrucción a los funcionarios adscritos a las diferentes dependencias que tienen que ver con Operativos de carácter Aduanero, operativos estos que "Son todas las acciones encaminadas a prevenir, controlar y contrarrestar de manera efectiva, el ingreso de mercancías y el egreso y/o movimiento de mercancías nacionales con restricciones aduaneras en el país (sin el cumplimiento de las exigencias, requisitos y condiciones establecidos por las normas aduaneras.)" (Subrayas fuera de texto). Otro documento allegado lo es la Orden Administrativa 005 de junio 7 de 2002, "Por la cual se fijan procedimientos tendientes a reforzar los controles aduaneros para prevenir el ingreso de mercancías de prohibida o restringida importación por los lugares habilitados." De igual manera se observa otro Instructivo cuyo número no es legible, pero de fecha 23 de enero de 2002, originario de la Administración de la DIAN Delegada de Turbo, que señala las obligaciones aduaneras a cumplirse por parte de funcionarios de la DIAN relacionadas con el ingreso de mercancías de procedencia extranjera por la zona de Urabá, vía marítima. Circular No. 8341001-0001 de abril 16 de 2002, expedida por la Adminstración Delegada de Turbo, que tiene que ver con el Control a descargue de mercancías. El Memorando No. 8341001-001 de abril 9 de 2001, también referente a Control descargue de mercancías, también originario de la misma delegada. Fue escuchado en declaración jurada el señor EDUARDO ANTONIO OTERO ERAZO, quien para la época de los hechos fungía como Administrador de Aduanas Delegada de Turbo (Ant.), quien entre otras cosas hace manifestación en relación con las distancias existentes entre el lugar donde fondean los barcos en el Urabá y el Puerto de Zungo (fl. 201 y ss. c. c. 8).

CALIFICACIÓN JURÍDICA PROVISIONAL

Los comportamientos presuntamente punibles atribuidos a los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA

CAMPO, se hallan descritos de manera abstracta en el Estatuto Represivo, así:

1.- Libro Segundo, Título IX, Capítulo Tercero, art. 286, que es del siguiente tenor:

"Falsedad ideológica en documento público. El servidor público que en ejercicio de sus funciones, al extender documento público que pueda servir de prueba, consigne una falsedad o calle total o parcialmente la verdad, incurrirá en prisión de cuatro (4) a ocho (8) años e inhabilitación para el ejercicio de derechos y funciones públicas de cinco (5) a seis (6) años."

2.- Libro Segundo, Título X, Capítulo Cuarto, art. 322, modificado por el art. 73 de la Ley 788 de 2002, que a la letra dice:

"Favorecimiento por servidor público. El servidor público que colabore, participe, transporte, distribuya, enajene o de cualquier forma facilite la sustracción, ocultamiento o disimulo de mercancías del control de la autoridades aduaneras, o la introducción de las mismas por lugares no habilitados, u omita los controles legales o reglamentarios propios de su cargo para lograr los mismos fines, cuando el valor de la mercancía involucrada sea inferior a cincuenta (50) salarios mínimos legales mensuales vigentes, incurrirá en multa de trescientos (300) a mil quinientos (1500) salarios mínimos legales mensuales vigentes, sin que en ningún caso sea inferior al 200% del valor aduanero de los bienes involucrados e inhabilitación para el ejercicio de derechos y funciones públicas de tres (3) a cinco (5) años.

"Si la conducta descrita en el inciso anterior recae sobre mercancías cuyo valor supere los cincuenta (50) salarios mínimos legales mensuales vigentes, se impondrá una pena de prisión de cinco (5) a ocho (8) años, multa de mil quinientos (1500) a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes , sin que en ningún caso sea inferior al doscientos por ciento (200%) del valor aduanero de los bienes involucrados e inhabilitación para el ejercicio de derechos y funciones públicas de cinco (5) a ocho (8) años.

"El monto de la multa no podrá superar el máximo de la pena de multa establecida en este código."

3.- Libro Segundo, Título XII, capítulo Segundo, art. 366, que señala:

"Fabricación, tráfico y porte de armas y municiones de uso privativo de las fuerzas armadas. El que sin permiso de autoridad competente importe, trafique, fabrique, repare, almacene, conserve, adquiera, suministre o porte armas o municiones de uso privativo de las fuerzas armadas, incurrirá en prisión de tres (3) a diez (10) años.

..."

Esos comportamientos se asumieron por parte de los servidores de la DIAN en la modalidad concursal heterogénea y en las circunstancias de mayor punibilidad a que hace mención el numeral 10 del art. 58 del C.P.

DE LAS INJURADAS

HENRY HERNANDO RAMÍREZ BAHAMÓN, señala haber sido comisionado junto con HERMINIO MARTÍNEZ MERCADO y CARMELO CÓRDOBA CAMPO, para llevar a cabo el 8 de noviembre de 2001 inspección a mercancías llegadas a puerto en la motonave Otterloo, las cuales se encontraban en los patios de Banadex, coordinando con el señor YOVANNY HURTADO TORRES, encargado de los patios de esa empresa la realización del proceso de inspección para determinar que la mercancía contenida en los veintitrés (23) receptáculos correspondiera con la descrita en la declaración de importación para así entrar a nacionalizarla. Dice que llegado el momento de la inspección se revisaron por él y sus dos compañeros de la DIAN veintiun (21) contenedores de los veintitrés (23), afirmando que lo que observó fue pelotas de plástico y que no tiene conocimiento que en los contenedores se transportara mercancía diferente a eso y que su función "...dentro del trámite de nacionalización de la mercancía fue solamente la de inspeccionar la carga descrita en la declaración de importación y no otra, de haber observado algo inusual o haber sido alertado de lago igualmente inusual o ilegal, hubiese procedido de conformidad con las normas aduaneras." Señala que desde cuando la motonave se fondeó frente al puerto, hasta el momento de la inspección, transcurrieron tres (3)

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días aproximadamente y la distancia entre esos dos sitios es bastante larga.

HERMINIO MARTÍNEZ MERCADO, rinde su versión sin juramento en términos muy similares a los expuestos por el anterior inculpado, ya que manifiesta haber practicado junto MARTÍNEZ MERCADO y CÓRDOBA CAMPO inspección a veintiun (21) contenedores de los veintitrés (23) llegados en la motonave Otterloo y no haber visto en ninguno de tales receptáculos armas o municiones, ni siquiera mercancías diferentes a estas a pelotas plásticas, agregando que también estuvieron en la inspección los señores ERASMO SALDARRIAGA a quien señala como encargado de la mercancía y LUIS ANÍBAL CHAVERRA, a más del señor YOVANNY HURTADO encargado de los patios de Banadex. Señala haber sido quien ordenó el levante de la mercancía, esto es, ordenó su salida de los patios una vez se practicó la inspección y que no se revisó la totalidad de los contenedores, "...primero porque se había revisado más del 90% de una mercancía homogénea y segundo porque me tocaba devolverme hasta Turbo a autorizar otro levante de mercancía." y que es costumbre no revisar la totalidad de la mercancía. Agrega que el señor HURTADO TORRES, estuvo en la inspección por momentos, que también estuvieron presentes en la inspección ERASMO SALDARRIAGA y LUIS ANÍBAL CHAVERRA, que PAOLA KTHERINE BENAVIDES no asistió por encontrarse próxima a tener bebé, habiendo llevado el acta para que esta la firmara y que HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO le hicieron seguimiento a la mercancía, pues se trataba de motonave que arribaba por primera vez al puerto. También manifiesta que desde el lugar donde se fondeó la motonave hasta los patios de Banadex los contenedores se transportaron en bougos, "... donde en su recorrido ha podido pasar algo diferente a desembarcarlos en Banadex, ...", manifestando que del sitio donde se fondeó la motonave al puerto hay una gran distancia y que además la revisión se llevó a cabo tres días después del arribo del barco.

CARMELO CÓRDOBA CAMPO, inicia su versión sin juramento manifestando, al igual que los demás servidores de la DIAN, que la revisión de los contenedores se practicó tres días después del arribo del buque, señalando de igual manera la gran distancia existente

entre el sitio donde quedó la motonave y los patios de Banadex y que era humanamente imposible llevar a cabo la revisión de la totalidad de los contenedores. Añade que en el momento y antes de ocurrir los hechos que se investigaron, él, como sus compañeros de la DIAN han estado en malas condiciones económicas y que al haber revisado veintiuno (21) de los veintitrés (23) contenedores no observaron armas ni municiones, nada diferente a pelotas plásticas, agregando creer que la señora PAOLA KTHERINE BENAVIDES no asistió a dicha diligencia, así como haber firmado los documentos Acta de Inspección Aduanera y Auto Comisorio Aduanero, al asistir a las labores de revisión de los contenedores, que su actuación fue de acuerdo a las normas aduaneras y que cuando se hace una revisión como la practicada por él y sus compañeros de la DIAN, se lleva a cabo una confrontación entre lo consignado en los documentos y lo que se observa y se palpa.

PAOLA KATHERINE ROMERO BENAVIDES, acepta haber sido contratada para adelantado la tramitación correspondiente para la importación y nacionalización de la mercancía que proveniente de Veracruz Méjico en 23 contenedores, presuntamente pelotas plásticas, pero que por su estado de gestación (la inspección se efectuó el 8 de noviembre de 2001 y ella dio a luz el 20 del mismo mes y año), no asistió a los patios de Banadex S. A. para cuando se llevó a cabo la inspección a los contenedores por parte de los funcionarios de la DIAN, circunstancia es corroborada por los señores HERMINIO MARTÍNEZ MERCADO y HENRY HERNANDO RAMÍREZ BAHAMÓN, que practicaron dicha diligencia, así como por YOVANNY HURTADO TORRES encargado de los patios de Banadex S. A. Agrega la inculpada, que además de los miembros de la DIAN, asistieron a los patios de Bandex para cuando se llevó a cabo la diligencia de inspección a los receptáculos, el representante de Banadex S. A.y ERASMO DE JESÚS SALDARRIAGA CUARTAS, señalando que la asistencia de este último le pareció normal, "... siendo el hermano del representante de Inversiones Banoly." Añade que por el hecho de haber firmado el acta en que aparece como si hubiera asistido a los patios de Banadex S. A., pensó que podría traerle alguna clase problemas, pero que esa no fue la primera vez que no asistió a las revisiones y le llevaron el acta para que la firmara, aunque en esta oportunidad no asistió por encontrarse indispuesta por la

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proximidad del parto. Respecto de la importación de balones por parte de Inversiones Banoly Ltda., dice que le pareció raro, ya que no era normal que dicha firma trajera esa clase de mercancía al país, pues lo que importaba eran electrodomésticos, vajillas y sombrillas. Señala que al señor NELSON SALADARRIAGA CUARTAS, Representante Legal de Inversiones Banoly Ltda., lo vino a conocer cuando los capturaron, ya que los trámites de importación por parte de Banoly los hacía con CARLOS MAZO, quien se encargaba de llevar los documentos.

LUIS ANÍBAL CHAVERRA ARBOLEDA, inicia su versión manifestando que por solicitud de un señor de nombre RICARDO ARANGO, quien le manifestó venir recomendado por su amigo el señor GILDARDO HINCAPIÉ, para que le adelantara el trámite correspondiente ante la DIAN, pues importaría balones y fue así como se dirigió a TURBOADUANAS donde le señalaron la documentación que debería allegar. Dice que después de esto se dirigió a BANADEX donde de igual manera le manifestaron lo que se debía hacer y regresando el señor RICARDO ARANGO, quien había viajado, lo llevó hasta TURBOADUANA donde lo dejó hablando con el Gerente de esta empresa de nombre ANGEL, dice no recordar su apellido y que una vez salió el señor ARANGO de TURBIADUANA le manifestó que todo había quedado arreglado para la importación y nacionalización de la mercancía y que llegada esta a los patios de Banadex, se llevó a cabo la inspección a la mercancía y se ordenó por los funcionarios de la DIAN el levante y se ordenó la salida de la misma en camiones. Dice no haber vuelto a ver al señor RICARDO ARANGO y no saber de su residencia, así como la de quien dice ser su amigo, GILDARDO HICAPIÉ. Afirma haber estado para el momento de la inspección a los contenedores en los patios de BANADEX y no haber visto en esos receptáculos objetos diferentes a pelotas plásticas.

YOVANNY HURTADO TORRES, manifiesta que su función como Administrador encargado de los patios de Banadex, ya que el titular se encontraba disfrutando de vacaciones, para cuando llegaron los veintitrés contenedores para comienzos de noviembre de 2001, que según los documentos de viaje se trataba de pelotas plásticas, fue la recepción y coordinación de su despacho una vez surtido el trámite de nacionalización. Afirma que además, revisó los números de

identificación de los receptáculos y solo se limita a eso, pues, señala no estar autorizado para revisar el contenido de receptáculos donde vienen las mercancías. Señala que quienes llevaron a cabo la revisión de los contenedores fueron los servidores de la DIAN, HENRY HERNANDO RAMÍREZ BAHAMÓN, HERMINIO MARTÍNEZ MERCAD y CARMELO CÓRDOBA CAMPO, acompañados de los señores LUIS ANÍBAL CHAVERRA y ERASMO SALDARRIAGA, de quienes creyó representaban al importador. Reitera que su función era únicamente la recibir los contenedores y despacharlos una vez la DIAN revisó el contenido de los receptáculos, que estuvo durante la apertura de ocho (8) o nueve (9) de esos contenedores, de los que dice contenían pelotas plásticas, ya que tuvo necesidad de estar retirándose del lugar donde se practicaba la revisión, ya que tenía que estar prestando todos los servicios propios como administrador de Banadex. Añade, que terminada la revisión, se ordenó el levante por parte de los funcionarios de la DIAN, quienes le entregaron una copia de la declaración con levante de la mercancía y procedió a entregarle los contenedores a LUIS ANÍBAL CHAVERRA ARBOLEDA, quien se dedicó a coordinar la salida de los camiones que eran cargados con la grúa, uno por contenedor. También manifiesta que la señora PAOLA KATHERINE BENAVIDES no se encontraba para cuando se llevó a cabo la revisión de los contenedores.

ALEGATOS PRESENTADOS

Dentro del término legal presentaron sus alegaciones el doctor GUSTAVO RAMÍREZ BARREIRO, defensor de los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO; la doctora MARIANNA SALCEDO VELOZA, defensora del señor LUIS ANÍBAL CHAVERRA ARBOLEDA y el doctor RUBÉN DARÍO TÁMARA MURCIA, en defensa del señor YOVANNY HURTADO TORRES.

El doctor RAMÍREZ BARREIRO solicita a favor de su prohijado la preclusión de la investigación que en su contra se adelantó, centrando como fundamento de su pedimento el que no está acreditado con certeza el ingreso del arsenal por el puerto de Zungo, pues al decir del señor defensor de los servidores públicos adscritos

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a la DIAN, existen serias y fundadas dudas, ya que considera un hecho cierto que entraron las armas de forma ilegal, pero no la forma en que lo hicieron, en qué momento y por qué lugar. Que no existe la prueba testimonial, indicios graves, documentos o peritazgos para acusar a los servidores de la DIAN, quienes en su sentir no han infringido la normatividad relativa a la Falsedad ideológica en documento público, el favorecimiento por servidor público y Fabricación, tráfico y porte de armas de fuego y municiones de uso privativo de las fuerzas armadas. Señala las versiones juramentadas del Administrador de la DIAN Delegado en Turbo como contradictorias y que el fundamento fáctico definitivo tenido en cuanta por el suscrito ha sido la declaración del señor JOSÉ ANTONIO MUÑOZ, operario de la grúa en el depósito de Bannadex, quien manifestó existir diferencia en el peso de algunos contenedores en relación con otros, circunstancia esta que al decir del libelista ha debido poner en conocimiento de los funcionarios de la DIAN esa circunstancia. Además, dice que se tuvo en cuenta el dicho del señor ADUARDO OTERO, Administrador Delegado de la DIAN en Turbo sobre incumplimiento de la normatividad aduanera por parte de sus pupilos. Agrega, que JOSÉ ANTONIO MUÑOZ en una segunda oportunidad manifestó no haber dicho jamás que existiera diferencia en el peso de algunos contenedores y por ello el dicho del operador de la grúa no desvirtuó el dicho de sus defendidos. En resumen, el señor defensor afirma que no se debe dar crédito a los dichos de los señores EDUARDO OTERO y JOSÉ ANTONIO MUÑOZ, pues el primero ni el segundo de los nombrados dijeron la verdad dijo la verdad, transcribiendo gran parte de las deponencias del Administrador Delegado de la DIAN en Turbo, concluyendo que sus prohijados actuaron de acuerdo con la reglamentación aduanera y no existe prueba que los responsabilice de las ilicitudes que se les imputan, afirmando que las armas y municiones entraron al país, pero tampoco está probado que estas se encontraran en los contenedores que revisaran los servidores de la DIAN. Pero además señala que las armas han podido venir mimetizadas entre las pelotas plásticas en los contenedores, "...de tal manera que fuese imposible percibirlos.", trayendo una vez más a colación la tesis aquella del "cambiazo" para cuando se trasladaron los contenedores desde donde se encontraba fondeada la motonave Otterloo hasta los patios de Bannadex S. A., ya que existe una gran distancia entre uno y otro puntos y plantea una serie de preguntas dirigidas a plantear dudas

en relación con la existencia de los contenedores, sobre cuántos llegaron a territorio colombiano, si los que transportaba la motonave llegaron a Zungo, si por alguna autoridad se estableció que en el Ottereloo se encontraban solo 23 receptáculos, que pudieron existir contenedores gemelos, pisos falsos donde pudieran venir, etc. Se arguye por el letrado que los funcionarios de la DIAN plasmaron lo que vieron y por eso plasmaron en el Acta de Inspección existir concordancia entre lo inspeccionado y lo declarado y por ello no se les puede imputar falsedad. Termina sus alegaciones manifestando que sus prohijados son personas sin antecedentes, dignas de crédito y confiabilidad y magníficos servidores públicos y reiterando su solicitud de preclusión de la investigación que se les ha seguido con estas diligencias.

Por su parte la doctora MARIANNA SALCEDO VELOZA solicita igualmente precluir la investigación adelantada en contra de su pupilo, el señor LUIS ANÍBAL CHAVERRA ARBOLEDA, al estimar que no ha cometido el delito prescrito en el art. 366 del C.P. que se le imputa, señalando que está demostrado que su pupilo estuvo en los patios de Banadex S. A., pero no como representante de empresa alguna, como lo afirmó en su injurada, añadiendo que estuvo pendiente para que los contenedores fueran subidos a los camiones. También hace referencia a los señalamientos hechos por los cosindicados HERMINIO MARTÍNEZ y YOVANNY HURTADO, quienes señalan a su prohijado como la persona que asistió a la revisión de los contenedores con ERASMO SALDARRIAGA, en representación de los dueños de la mercancía, para restarles eficacia probatoria, al señalar que esas versiones no tienen respaldo documental alguno en la actuación y continúa haciendo esta vez una larga exposición sobre lo que son las Sociedades de Intermediación Aduanera, sus funciones, su responsabilidad, sus obligaciones, etc. y de igual manera se extiende en citas y transcripciones de legislación aduanera, la inspección, y por último dedica un párrafo para tratar lo que es la Presunción de inocencia y de manera irónica enseñarnos que la coautoría impropia no existe, citando acepciones de diccionarios de la Lengua Española, señalando que no fuimos acertados al emplear el término impropio, calificando de absurda su utilización, por su mal uso para calificar "...esa particular forma de intervenir en una conducta punible." Termina citando el art. 6°, que trata del principio de legalidad tanto

en el Código Penal como en el de Procedimiento Penal, citando el debido proceso "...y que no se acuse a una persona, que ha obrado de buena fe, ..."

El señor defensor del inculpado YOVANNY HURTADO TORRES, después de hacer manifestación de cuáles eran las funciones y procedimientos a cargo de su pupilo como Administrador de los patios de Banadex S. A., solicita la preclusión de la investigación que se adelantara en contra de su defendido como presunto coautor de infracción al art. 366 del C. P., al estimar que HURTADO TORRES como administrador no estaba facultado para llevar a cabo inspecciones, abrir contenedores, revisar mercancías que estos contengan, pues esas son funciones de los funcionarios de la DIAN y por tanto mal podría haber tenido conocimiento de lo que transportaban los contenedores, que no obstante ello se hacía presente esporádicamente al momento de la inspección, pues debía atender otros frentes en el depósito. Transcribe normas relativas a obligaciones a cargo de la DIAN, como aparte del art. 469 del Estatuto Aduanero, modificado por el Decreto 2685 de 1990, que dice:

"La única autoridad competente para verificar la legalidad de la importación de las mercancías que se introduzcan o circulen en el territorio aduanero nacional, será la Dirección de Impuestos y Aduanas Nacionales..."

Concluye sus alegaciones solicitando la preclusión por ausencia de responsabilidad.

CONSIDERACIONES

Aclaración previa

Antes de entrar al estudio de la calificación del mérito sumarial de las diligencias, queremos dejar anotado que esta decisión solo comprende lo referente a los señores LUIS ANÍBAL CHAVERRA ARBOLEDA, YOVANNY HURTADO TORRES, HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN, PAOLA KATHERINE BENAVIDES ROMERO y CARMELO CÓRDOBA CAMPO, ya que respecto de los señores

ERASMO y NELSON SALDARRIAGA CUARTAS, por solicitud de los mismos se ha señalado fecha y hora para adelantar la tramitación a que hace referencia el art. 40 del C.P.P.

Entrando en el estudio de la calificación que ha de darse a la actuación, diremos, que la norma contenida e al art. 397 del C.P.P., es del siguiente tenor:

Requisitos sustanciales de la resolución de acusación. El Fiscal General de la Nación o su delegado dictará, resolución de acusación cuando esté demostrada la ocurrencia del hecho y exista confesión, testimonio que ofrezca serios motivos de credibilidad, indicios graves, documentos, peritación o cualquier otro medio probatorio que señale la responsabilidad del sindicado."

Entonces se procede por el despacho a determinar si esas exigencias o requisitos sustanciales, como lo señala la norma que viene de transcribirse, se reúnen en el caso bajo estudio, esto es, si la instructiva contiene elementos de juicio para dictar resolución acusatoria o si por el contrario, por ausencia de esos elementos lo que procede es precluir la instrucción respecto de los señores HENRY HERNANDO RAMÍREZ BAHAMÓN, HERMINIO MARTÍNEZ MERCADO y CARMELO CÓRDOBA CAMPO, vinculados a esta averiguación como presuntos coautores responsables de infringir los arts. 286, 322 y 366 del C.P. y en cuanto a los señores LUIS ANÍBAL CHAVERRA ARBOLEDA, YOVANNY HURTADO TORRES y PAOLA KATHERINE BENAVIDES ROMERO, presuntamente incursos en las conducta punible contenida en el art. 366 del Estatuto de las Penas.

DE LA OCURRENCIA DEL HECHO

El aspecto materialidad u objetivo del acontecimiento delictual se encuentra cabalmente acreditado en la foliatura con los elementos de prueba que se encuentran relacionados en el acápite relativo a tales medios, material este del cual se extrae que es un hecho cierto que Inversiones Banoly S. A., representada en Turbo (Ant.) por el señor NELSON SALDARRIAGA CUARTAS, fue la firma encargada de adelantar los trámites correspondientes para que mediante el fletamento de la motonave Otterloo se introdujeran a territorio

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nacional tres mil (3.00) fusiles AK 47 y cinco millones (5´000.000) de cartuchos calibre 5.62, arsenal este embarcado en la nombrada motonave, la cual zarpó con veintitrés (23) contenedores que traían pelotas plásticas del Puerto de Veracruz en Méjico y arribó a puerto nicaraguense, El Bluff, donde en catorce (14) de los veintitrés (23) receptáculos se introdujeron las armas y las municiones en las cantidades dichas, zarpando el día tres (3) de noviembre de 2001 (fl. 98 c. c.1.), para el cinco (5) de noviembre de 2001 fondear el barco frente a las costas de Urabá, desembarcando los receptáculos en bongos y en estos llevados a tierra, los patios de Banadex S. A., para después ordenar la salida de dichos patios a su destino final, los paramilitares, circunstancias estas acreditadas con la Planilla de Recepción visible a folio 68 c. c. 4., con las fotocopias de las consignaciones hechas a Bancolombia en la cuenta de Banadex S. A. cancelando los valores correspondientes al servicio de bodegaje de los contenedores (fl. 79 c. c. 4) y con las órdenes de salida de los contenedores del depósito de Banadex S. A. (fl. 191 c. c. 1.).

Una vez llegados a tierra los contenedores, se llevó a cabo la tarea de inspección física a los mismos por parte de funcionarios de la DIAN adscritos a la Delegada de Turbo (Ant.), señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO, para "Verificar el cumplimiento de las normas aduaneras vigentes y Seguimiento Mercancías", quienes inspeccionaron veintiuno (21) de los veintitrés (23) contenedores, consignando en el Acta de Inspección Aduanera que la mercancía inspeccionada corresponde con lo declarado, cuando lo cierto fue que en catorce (14) de los veintitrés (23) receptáculos venían depositadas las armas y municiones embarcadas en Nicaragua (fl. 94 y ss. c. c. 1), armas cuya relación milita en la foliatura (fl. 115 y ss. c. c. 3), remitida por Interpol de Nicaragua a su homóloga del DAS en Colombia, hallando veintitrés (23) fusiles de los llegados de aquella nación centroamericana en la Cuarta Brigada del Ejército Nacional en Medellín, una vez funcionarios de Policía Judicial comisionados para el efecto, llevaron a cabo Inspección Judicial al Depósito de Armas Decomisadas en dicha guarnición militar (fl. 207 y ss. c. c. 5).

Volviendo a lo de la inspección llevada a cabo en los patios de Bandex S. A., la misma contó con la asistencia de los señores

ERASMO DE JESÚS SALDARRIAGA CUARTAS y LUIS ANÍBAL CHAVERRA ARBOLEDA, de quienes se afirma lo hacían en representación de los propietarios de la mercancía, habiendo CHAVERRA ARBOLEDA coordinado el desplazamiento de catorce (14) camiones cargados cada uno con un contenedor, con destino a las AUC de los Departamentos de Antioquia y Córdoba, lo que se acredita con la deponencia del señor CARLOS MAURICIO USUGA, conductor de uno de los vehículos en que se transportó el arsenal (fl. 147 c. c. 4), quien dice haber sido contratado junto con otros conductores para transportar los contenedores que contenían balones, como dice, les afirmó quien los contrató, señalando que acordaron un precio de ochocientos mil pesos por cada contenedor transportado, que el peso de la carga era de aproximadamente seis (6) toneladas, pesando el solo contenedor tonelada y media y la carga cuatro y media toneladas, afirmando que llegando a un sitio llamado Los Manguitos aparecieron unas diez (10) personas que con armas de corto alcance los hicieron apear de los vehículos, quienes se llevaron los rodantes dejando a los conductores en un estadero custodiados por dos hombres armados, desde las nueve de la mañana hasta las ocho de la noche, hora en que regresaron las personas con los camiones, ese día 8 de noviembre de 2001.

En lo tocante con el transporte de los contenedores en territorio nacional, también se escuchó en declaración juramentada al señor HELIODINO USUGA HERRERA, conductor de uno de los vehículos que transportaron los contenedores (fl. 204 y ss. c. c.5), quien manifiesta que efectivamente fue contratado por la suma de ochocientos mil pesos para llevar hacia la costa un contenedor, que una vez cargado su vehículo con el receptáculo y habiendo salido, a un kilómetro de Apartadó, al camión se le averió la transmisión y por tanto el viaje lo hizo otro vehículo.

Ahora, sometido al estudio de rigor lo actuado, se puede concluir que desde el punto de vista objetivo los hechos se hallan demostrados en la medida que lo reclama la norma procedimental transcrita la cual hace mención a los requisitos sustanciales de la resolución de acusación, pues es un hecho cierto que el cinco (5) de noviembre de 2001, llegó hasta el Puerto de Zungo enCarepa un arsenal proveniente de Nicaragua, consistente en tres mil (3.000) fusiles AK47 y cinco millones (5´000.000) de cartuchos para los mismos,

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habiendo la firma Inversiones Banoly Ltda., con domicilio en Turbo (Ant.) fletado la motonave Otterloo de bandera panameña la cual salió del Puerto de Veracruz (Méjico) con veintitrés (23) contenedores, conteniendo pelaotas plásticas, embarcación que tocó el Puerto El Bluff en Nicaragua donde se reemplazaron catorce (14) de los veintitrés (23) receptáculos que contenían pelotas plásticas por igual número donde se depositó el arsenal, contando con documentación relativa, no solo a las pelotas plásticas, sino a una supuesta compra realizada por la Policía Nacional Panameña a su homóloga de Nicaragua, posiblemente para en caso de ser interceptados en aguas internacionales, enseñarla y así eludir cualquier inconveniente.

Una vez llega la motonave Otterloo a aguas territoriales colombianas en el Urabá, es fondeada a cierta distancia del Puerto de Zungo, para ser depositados los veintitrés (23) contenedores en bongos que los transportaron hasta el Puerto de Zungo y ya en patios de Banadex S. A., por parte de los funcionarios de la DIAN, señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA, comisionados para "Verificar el cumplimiento de las normas aduaneras vigentes y Seguimiento de Mercancías", llevando a cabo revisión de veintiuno (21) de los veintitrés (23) contenedores, haciendo constar en el Acta de Inspección Aduanera que la mercancía inspeccionada corresponde con lo declarado.

DE LA RESPONSABILIDAD DE LOS INCULPADOS

Respecto al elemento responsabilidad de los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO, en los hechos investigados, igualmente se cuenta en la actuación con plúrimos elementos de juicio que llevan a esta Fiscalía Delegada a predicar el compromiso de los inculpados en las conductas punibles objeto de investigación, pues gravitan en contra de los servidores públicos graves indicios de responsabilidad, tales como el de presencia en el lugar donde se llevó a cabo la revisión de los receptáculos contentivos de las armas y municiones en los patios de Banadex S. A., el indicio de participación, ya que fueron los servidores públicos de la DIAN comisionados para verificar el cumplimiento de la normatividad

aduanera vigente y para hacer seguimiento a las mercancías, como se les señalara en el Auto Comisorio Aduanero y el indicio de mala justificación, pues en sus injuradas se han mostrado ajenos al comportamiento delictual acreditado en la actuación, siendo que de los veintitrés (23) receptáculos llegados desde Centroamérica, catorce (14) de ellos contenían el arsenal y si revisaron veintiuno (21) del total, imposible hacer creer a la judicatura que en ellos no venía el material bélico.

De igual manera nos encontramos en el comportamiento de los inculpados el indicio de capacidad para delinquir, ya que como funcionarios de larga data en la DIAN tenían la capacidad intelectual necesaria para la acción realizada, la cual requería en los sujetos activos del delito las suficientes facultades intelectuales para ejecutar los actos que culminaron con la introducción ilegal del arsenal procedente de Centroamérica.

Respecto del inculpado CARMELO CÓRDOBA CAMPO, quien es procesado en contumacia, ya que ha permanecido oculto mientras se adelanta esta tramitación, bien puede ser tenida en cuenta esa actitud como indicio de delincuencia.

Y es que la documentación que milita en el paginario, robustece el aspecto responsabilidad que recae en los servidores de la DIAN adscritos a la Delegada de Turbo.

En sus salidas procesales los señores MARTÍNEZ NMERCADO, RAMÍREZ BAHAMÓN y CÓRDOBA CAMPO, de igual manera enfatizan al señalar que en el recorrido hecho por los bongos transportando los veintitrés (23) contenedores desde el sitio donde fondeó el Otterloo y los patios de Banadex S. A., ha podido ocurrir un "cambiazo", aprovechando el tiempo transcurrido en el recorrido por la distancia considerable entre uno y otro punto, tesis también consignada en un escrito por la defensa de los inculpados. Pero a ello el despacho responde : si los inculpados han venido sosteniendo que lo la mercancía llegada en la motonave Otterloo aquel 5 de noviembre de 2001 y que fue observada por ellos una vez sometidos a inspección los receptáculos para fines de nacionalización, fueron pelotas plásticas y jamás el arsenal, entonces, cuál fue el "cambiazo"

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que dicen pudo presentarse al efectuarse el recorrido de los contenedores en los bongos?

Más parece una aceptación tácita por parte de los inculpados que lo por ellos hallado en los contenedores fue el arsenal, cuando afirman en sus versiones sin juramento un posible "cambiazo", pues se entiende que consistiría en reemplazar las pelotas plásticas por armas y municiones, que fue lo que en verdad venía en catorce (14) de los veintiún (21) contenedores transportados en el Otterloo.

La modalidad conductual consistente en haber consignado por los servidores de la DIAN en el Acta de Inspección Aduanera de noviembre 8 de 2001, que la mercancía inspeccionada corresponde con lo declarado, es comportamiento constitutivo de delito, ya que como servidores públicos adscritos a la DIAN Delegada de Turbo, en ejercicio de sus funciones, en ese documento que serviría de prueba, consignaron una falsedad, teniendo el deber y la obligación de ceñirse estrictamente a la verdad respecto del contenido de los receptáculos. Por ello es de predicarse que los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN CAREMELO CÓRDOBA CAMPO se encuentran incursos en el comportamiento contra la fe pública contenido en el art. 286 del C.P. que trata de la Falsedad ideológica en documento público, conducta punibles además, aceptada por los inculpados, cuando afirman, contrariando la verdad de los hechos, que lo hallado en los contenedores corresponde con la declaración contenida en los documentos propios del trámite de importación y nacionalización de las mercancías.

Igual predicamento ha de hacerse en relación con la conducta asumida por los funcionarios, cuando con su actuar omitieron cumplir con lo mandado en el Auto Comisorio Aduanero de noviembre 8 de 2001, mediante el cual recibieron el mandato de "Verificar el cumplimiento de las normas aduaneras vigentes y Seguimiento de Mercancías", mandato que no cumplieron, por cuanto la labor encomendada no se cumplió, haciendo constar en el Acta de Inspección Aduanera de la misma fecha del auto comisorio, que la mercancía inspeccionada corresponde con lo declarado, algo alejado de la realidad, pues como se ha señalado anteladamente, en catorce (14) de los veintitrés (23) contenedores, de los que se

revisaron veintiuno (21), venía el arsenal embarcado en Nicaragua en la motonave Otterloo, con lo cual se permitió la introducción ilegal a territorio nacional el material bélico con destino a los paramilitares de Córdoba y Antioquia.

De otra parte, el comportamiento asumido por los servidores de la DIAN también los hace incursos en la prohibición contenida en el art. 366 del C.P., ya que con su actuar se dio inicio a un ilegal tráfico de armas y municiones de uso privativo de la Fuerza Pública, pues vulneraron formal y materialmente el bien jurídico tutelado de la seguridad pública. En cuanto a lo primero, basta recordar que la distribución y manejo de armas y municiones, por mandato constitucional –art. 223-, es monopolio estatal y en tal virtud ningún particular puede traficar con ellos, salvo autorización expresa de autoridad competente.

Lo que se penaliza es el desarrollo de una cualesquiera de las conductas para las que no se ha autorizado expresamente a la persona y si ello es así, bien puede calificarse, como antaño lo ha considerado el máximo órgano de justicia, que se trata aquí de un delito de "mera conducta", en tanto que no requiere la producción de un específico resultado.

La respuesta del Estado, es la represión del sujeto ante la ausencia de demostración sobre la presunción que le dará el uso para el que ha sido creado el artefacto bélico, pues de contera, pos sí misma, una actividad de tal naturaleza, lleva implícita la causación de un atentado a la seguridad y tranquilidad del conglomerado social, máxime si como en el evento de la especie, se trata de gran cantidad de fusiles AK47 y municiones calibre 5.62 para los mismos, los cuales fueron a parar a manos de grupos paramilitares que han vendido sembrando el terror en nuestra país, vale decir, las Autodefensas Unidas de Colombia, como lo sostiene uno de sus comandantes, CARLOS CASTAÑO GIL en entrevista de prensa aparecida en el diario El Tiempo e elació con la introducción de los tres mil (3000) fusiles y los cinco millones (5´000.000) de cartuchos para los mismos procedentes de Nicaragua, al manifestar: "Es el mejor gol que he hecho."

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Bajo esa óptica, los comportamientos asumidos por los señores HERMINIO MARTÍNEZ MERCADO. HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO, como se señalara anteriormente, tienen adecuación típica en las normas 286, 322 y 366 del C.P., pues se demuestra en la foliatura que los nombrados servidores públicos fueron quienes el 8 de noviembre de 2001, permitieron la introducción al país de tres mil (3000) fusiles AK47 y cinco millones (5'000.000) de cartuchos para esos fusiles.

Ahora bien, la antijuridicidad de las conductas punibles es palpable, desde cualquier ángulo, como quiera que sin mediar justificación alguna, lesionaron los inculpados con su accionar contra derecho bienes jurídicos tutelados por la ley, como el de la Fe pública, el Orden económico social y la Seguridad pública,

Y desde el plano de la culpabilidad, entendida como la actitud consciente de la voluntad que de contera da paso al juicio de reproche negativo, tampoco existe discusión. Como se observa, los inculpados admitieron haber llevado a cabo la revisión de veintiuno (21) de los veintitrés (23) contenedores llegados en la motonave Otterloo, así como haber firmado al Acta de Inspección Aduanera, aunque no haber hallado armas ni municiones en el interior de esos receptáculos, afirmación que no encuentra respaldo alguno en las diligencias y que el despacho considera carente de veracidad.
La condición de imputables de los plurimencionados servidores públicos es evidente, pues no existió el mínimo de asomo de lo contrario y así han sido tratados.

Entonces, lo procedente es que por el despacho se profiera Resolución de Acusación en contra de los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO, como coautores materiales de los reatos a que hacen referencia los arts. 286, 322-2 y 366 del C.P., que tratan, en su orden de la Falsedad ideológica en documento público, Favorecimiento por servidor público y Fabricación, tráfico y porte de armas y municiones de uso privativo de las fuerzas armadas, en la modalidad heterogénea y en las circunstancias de mayor punibilidad a que hace mención el numeral 10 del art. 58 del C.P.

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Ahora, como con esta decisión ha de resolverse lo concerniente a la calificación del mérito sumarial respecto de los señores LUIS ANÍBAL CHAVERRA ARBOLEDA, PAOLA KATHERINE BENAVIDES ROMERO y YOVANNY HURTADO TORRES, a quienes se les imputa la prohibición contenida en el art. 366 del C.P., que trata de la Fabricación, tráfico y porte de armas y municiones de uso privativo de las fuerzas armadas, a ello se procede y diremos que en cuanto al primero de los nombrados, el señor CHAVERRA ARBOLEDA, fue la persona que se hizo presente junto a ERASMO DE JESÚS SALDARRIAGA CUARTAS en los patios de Banadex S. A. en representación de los propietarios de la mercancía para cuando se efectuó la revisión de los contenedores llegados en la motonave Otterloo, como se demuestra con las fotocopias de los folios 49 y 50 del Libro de Ingresos de Personas a la bodega de dicha empresa (fls. 112 y 113 c. c. 3.), circunstancia esta corroborada por YOVANNY HURTADO, HERMINIO MARTÍNEZ y HENRY HERNANDO RAMÍREZ, a lo que hay que agregar que a folio 67 del c. c. 3 milita escrito signado por el señor LUIS GERMÁN CUARTAS C., del departamento Legal de C. I. BANADEX S. A., donde se dice que el señor LUIS ANÍBAL CHAVERRA ARBOLEDA intervino en gran medida en las gestiones de introducción ilícita al país de los receptáculos que contenían tres mil (3000) fusiles y cinco millones (5'000.000) de cartuchos para los mismos y ser, como él mismo lo afirma, la persona que coordinó el transporte en camiones de los receptáculos contentivos del arsenal, desde los patios de Banadex S. A. hasta el destino final del material bélico que lo fue los grupos paramilitares que operan en los Departamentos de Córdoba y Antioquia.

Y aunque CHAVERA ARBOLEDA quiera aparecer ajeno a los hechos con la historia de haber sido contactado para gestionar ante firmas encargadas de labores de importación y nacionalización de mercancías por un señor de nombre RICARDO ARANGO, por recomendación de GILDARDO HINCAPIÉ, su amigo, de quienes no suministra direcciones, ni datos donde se les pueda localizar, es versión que no le merece al despacho credibilidad alguna.

En cuanto a la ocurrencia del hecho, valgan los razonamientos plasmados en antelación en el acápite dedicado a ese presupuesto exigido por el art. 397 del C.P.P., para decir que este aspecto de la

instructiva se haya cabalmente demostrado en lo actuado, como allí se señalara.

Ahora, en cuanto al presupuesto responsabilidad que podría caberle al señor CHAVERRA ARBOLEDA en el comportamiento contra la Seguridad Pública, es decir, la infracción al art. 366 del C.P., se tiene que analizado el haz probatorio arrimado al paginario, emergen en contra del nombrado inculpados indicios graves de responsabilidad, como el de presencia en el lugar y momento en que se llevó a cabo la inspección a los contenedores que contenían, a más de pelotas plásticas, armas y municiones en las cantidades ya conocidas, presencia hecha junto a ERASMO SALDARIAGA y los tres funcionarios de la DIAN, aquel 8 de noviembre de 2001, asistencia a dichos patios que también lo fue para el día 9 del mes y año mencionados, a fin de coordinar la salida de los vehículos cargando el material bélico con destino los paramilitares de Córdoba y Antioquia.

También emerge de lo actuado el indicio de participación pues CAVERRA ARBOLEDA estuvo en el lugar, como se dijera y además, coordinando la embarcada y la salida de los catorce (14) camiones que transportaron igual número de receptáculos contentivos del arsenal, lo que es indicativo de su participación en la conducta punible que se le imputa.

A los anteriores indicios es de sumarse el de capacidad intelectual para delinquir, ya que como bien es señalado por el mismo inculpado laboró al servicio de Banadex S. A. y por ello poseía las capacidades intelectuales para ejecutar la conducta punible que lo mantiene vinculado a estas diligencias, a más del de mala justificación, pues como se señalara anteriormente, la manifestación de haber actuado como lo hizo por recomendación de su amigo GILDARDO HINCAPIÉ hecha a RICARDO ARANGO para que lo localizara para adelantar las gestiones del caso, son manifestaciones carentes de veracidad.

El análisis del haz probatorio nos lleva a la convicción de ser LUIS ANÍBAL CHAVERA ARBOLEDA responsable a título de coautor del comportamiento contra la Seguridad Pública por el cual soporta medida cautelar en estas diligencias, en la circunstancia de mayor

punibilidad a que hace relación el numeral 10 del art. 58 del C.P. y por ello lo procedente es que por el despacho se profiera en su contra Resolución de Acusación como presunto coautor responsable de infringir el art. 366 del C.P., en las circunstancias de mayor punibilidad a que hace mención el numeral 10 del art. 58 del C. P.

Ahora bien, en lo tocante a la señora PAOLA KATHERINE BENAVIDES ROMERO, una vez adelantado el análisis correspondiente a su actuación en la investigación cuyo mérito se califica con esta resolución, averiguación a la cual se encuentra vinculada mediante injurada soportando medida de aseguramiento de detención preventiva como presunta autora responsable de infringir el art. 366 del C.P., el despacho es del criterio de precluir la investigación seguida en su contra, decisión que de igual manera se ha de proferir respecto del señor JOVANNY HURTADO TORES, en consideración a los razonamientos que a continuación se consignan.

Es un hecho cierto que la BENAVIDES ROMERO laboraba para una Sociedad de Intermediación Aduanera, encargada de gestionar ante la DIAN lo relativo a la importación y nacionalización de la mercancía que transportaba la motonave Otterloo en veintitrés (23) contenedores, que contenían presuntamente pelotas y que siendo su deber asistir a la inspección que se llevó a cabo a los contenedores, por su estado de gestación y estar próxima a dar a luz, no asistió a esa revisión, circunstancia esta que la misma inculpado afirma en la diligencia de injurada con ella practicada y que a su vez es corroborada por los mismos funcionarios de la DIAN que practicaron la revisión a los receptáculos desembarcados de la motonave Otterloo aquel cinco (5) de noviembre de 2001.

Ahora, la inculpada no estuvo presente para cuando se adelantó la revisión de los receptáculos que se afirma contenían las armas y las municiones, pero esa no era función de ella, pues esta es propia de los funcionarios de la DIAN y además no tuvo a su cargo otra u otras actuaciones que nos lleven a estimar que hubo participación por su parte en el delito contra la Seguridad Pública que se le imputa, ya que a través de la tramitación adelantada con posterioridad a la medida cautelar no se llegó a la certeza respecto a la responsabilidad a cargo de la señora BENAVIDES ROMERO en la conducta

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punible, presupuesto a tenerse en cuenta para proferir resolución acusatoria contra un imputable.

Observemos como su no comparecencia a la revisión de los contenedores no trajo consecuencias lesivas de naturaleza alguna para el bien jurídico tutelado por la ley para concluir en la responsabilidad penal de la inculpada.

La inculpada con su omisión no desplegó actividad riesgosa de la cual se pueda concluir afectación alguna a intereses jurídicos y si bien es cierto en este evento la ocurrencia del hecho está de presente en el paginario, no ocurre igual cosa en cuanto al aspecto responsabilidad de la inculpada.

Y es que "Para que una conducta típica sea punible se requiere que lesione o ponga efectivamente en peligro, sin justa causa, el bien jurídicamente tutelado por la ley penal", como lo señala el art. 9° del C.P.

De otra parte, si bien es cierto que la señora BENAVIDES ROMERO no asistió a los patios de Banadex S. A., para ese ocho (8) de noviembre de 2001, ya que se encontraba próxima a dar a luz, lo cual ocurrió el 20 del mismo mes y año, ello no era su obligación, por cuanto como servidora de una empresa privada su deber estuvo circunscrito a adelantar los trámites previos a la importación y nacionalización de la mercancía.

Y es que la señora BENAVIDES ROMERO, como bien lo afirma en su versión sin juramento, no fue esa la única vez que no asistió a la inspección aduanera que lleva a cabo la DIAN, manifiesta que fueron varias y por ello creemos que su actuar está excento de responsabilidad, siendo lo procedente aplicar el art. 39 del C.P.P. que contempla esta circunstancia para precluir la investigación.

Por ello, reiteramos, se precluirá la investigación que en contra de la señora PAOLA KATHERINE BENAVIDES ROMERO se adelantó por este Despacho Fiscal.

En cuanto al señor YOVANNY HURTADO TORRES, se observa que su actuar de igual manera está exento de responsabilidad alguna,

ya que como Administrador encargado de los patios de Banadex para cuando llegaron los 23 contenedores procedentes de Nicaragua, se limitó a ejercer las funciones que le eran propias, cuales fueron las de recibir los contenedores y coordinar la salida de los patios de Banadex S. A. de los mismos una vez surtido el trámite de nacionalización de la mercancía por parte de los servidores de la DIAN. Y es que este inculpado, como lo afirma en su injurada y no hay elemento de prueba alguna que demuestre lo contrario, solo pudo observar la revisión de ocho o nueve contenedores, ya que su tarea al frente de la administración de la bodega no le permitió estar presente para cuando inspeccionaban los de la DIAN los receptáculos.

El señor HURTADO TORRES como servidor de Banadex S. A. no tenía como una de sus funciones el revisar los receptáculos para saber su contenido y por tanto mal podría hacerlo.

Observamos como el actuar de HURTADO TORRES, es de considerarse atípico, pues su actuar no encuadra en el comportamiento punible a que hace referencia el art. 366 del C.P., punible este que se le imputó y por el cual se encuentra vinculado a la investigación. Esta circunstancia nos lleva a decretar la preclusión de la investigación que en su contra se venía adelantando con estas diligencias, de conformidad al mandato contenido en el art. 38 del C.P.P.

Es de anotar que con posterioridad a la medida cautelar que se impuso al señor HUTRTADO TORRES, no se allegó a la foliatura un solo elemento de juicio que llegara a infirmar su dicho en injurada y por tanto, como se dijera anteladamente, se precluirá la investigación que en su contra se adelantara como presunto coautor responsable de infringir el art. 366 del C. P., revocando la medida de aseguramiento que en su contra pesa.

RESPUESTA A LOS ALEGATOS

A las argumentaciones del señor defensor de los servidores públicos adscritos a la DIAN, respondemos manifestando que no cabe duda alguna sobre la forma como fueron introducidas al país las armas y municiones aquel comienzo de noviembre de 2001, material bélico

con destino a los grupos paramilitares que operan en los Departamentos de Córdoba y Antioquia. Ello ocurrió una vez fondeara el barco Otterloo frente a las costas del Urabá el 5 de noviembre de 2001 y se descargaran 23 receptáculos en bongos que los trasladaron hasta los patios de Banadex S. A., en el Puerto de Zungo, de los cuales 14 contenían el arsenal y 9 pelotas plásticas, como se sabe por la documentación allegada a la actuación consiste en documentos propios de agencias dedicadas al transporte de mercancías desde el extranjero, informes de inteligencia, de la OEA, en contenedores que como se sabe vienen sellados, hasta cuando los miembros de la DIAN comisionados para la revisión de los mismos levantan los sellos.

Ahora, cierto es que dentro del haz probatorio no hallamos peritazgos, pero sí se cuenta con documentos, testimonios e indicios graves que nos llevan a tener a los señores HERMINIO MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y a CARMELO CÓRDOBA CAMPO, como presuntos coautores responsables de las infracciones a los arts. 286, 322 y 366 del C.P. y por tanto a acusarlos como se hace con esta resolución, probanzas esas que están relacionadas en el acápite dedicado a los elementos de juicio allegados a la actuación.

Ahora, en gracia de discusión, si las deponencias de los señores EDUARDO OTERO, Administrador Delegado de la DIAN en Turbo y JOSÉ ANTONIO MUÑOZ, presentan contradicciones, que les restan credibilidad, existen en le plenario otros elementos de juicio, como indicios graves de responsabilidad y documentos señalados en esta decisión que permiten proferir Resolución Acusatoria en contra de los servidores públicos adscritos a la DIAN. Además las armas entraron al país en 14 contenedores y se acreditó que se encontraban en estos, pues si no, para qué se transportaban en catorce camiones? No serían las pelotas plásticas las que fueron a parar a manos de los paramilitares de CARLOS CASTAÑO, quien además en entrevista al diario El Tiempo hiciera gala de haber dado todo un golpe al introducir el arsenal al país. Ahora si es como dice el señor defensor que las armas y municiones han podido mimetizarse con las pelotas plásticas, no lo creemos, pues como bien se afirma en el paginario, ya que los funcionarios de la DIAN que practicaron la revisión a los contenedores penetraron hasta el fondo de estos y además de los 23

revisaron 21. Así es que se descarta esa posibilidad y si se tratara del "cambiazo" que hasta último momento vienen manejando inculpados y defensor, ya lo decíamos anteriormente, si esto ocurrió estarían aceptando los miembros de la DIAN que lo que llegó y ellos revisaron fueron receptáculos que contenían los tres miles (3000) fusiles y los cinco millones (5'000.000) de cartuchos para los mismos.

Es que por parte del letrado se hacen especulaciones sin fundamento y por tanto carentes de sustento probatorio alguno que tiendan a desvirtuar las imputaciones hechas en contra de sus pupilos, queriendo con ello que por nuestra parte y a estas alturas de la tramitación se proceda a determinar si en la motonave hay pisos falsos que sirvieron para transportar el arsenal, así como si en la embarcación existieran gemelos de esos contenedores, etc.

Aquí en este evento lo que se vislumbra es que los inculpados encargados de la revisión de los contenedores plasmaron en el Acta de Inspección llevada a cabo a los mismos una falsedad cuando consignaron en dicho documento que lo revisado concuerda con lo declarado.

Dando respuesta a la señora defensora del inculpado CHAVERRA ARBOLEDA, diremos que nuestra convicción de estar este incurso en el delito contenido en el art. 366 del C. P. se funda en el hecho de haber estado presente en la operación revisión en carácter de representante del dueño del contenido de los 14 contenedores, en la coordinación que ejerció para que estos fueran cargados en igual número de camiones, como así lo acepta el mismo inculpado, lo mismo que su defensora. para ser llevados a su destino final, los paramilitares, la comunicación signada por un funcionario de Banadex S. A., quien nos dice que LUIS ANÍBAL CHAVERRA ARBOLEDA estuvo adelantando gestiones para la importación de las pelotas plásticas que resultaron siendo fachada del verdadero asunto que era la introducción del arsenal al país, los señalamientos hechos por los cosindicados, HERMINIO MARTÍNEZ MERCADO y YOVANNY HURTADO TORRES, para quienes ARBOLEDA asistió a la revisión en los patios de Banadex en representación de los dueños de la mercancía, circunstancias estas corroboradas con las fotocopias del libro que registra la entrada a los patios de Banadex S. A., para los días 8 y 9 de noviembre de 2001.

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Ahora bien, las transcripciones de normas de carácter aduanero, sobre lo que son las Sociedades de Intermediación Aduanera, es normatividad que refuerza nuestra posición, pues concuerda con lo sostenido por nuestra parte en el sentido de haber los funcionarios de la DIAN inobservado las disposiciones que regulan la entrada de mercancías al país. Así mismo, lo relativo a las SIAs cuando sabemos cuáles eran las funciones de quien representaba a la que NELSON SALDARRIAGA otorgó poder para gestionar ante la DIAN la importación y nacionalización de las pelotas plásticas que resultó ser lo de fachada.

De otra parte, es necesario dejar anotado que la presunción de inocencia respecto del señor CHAVERRA ARBOLEDA, comenzó a desaparecer cuando este optó por gestionar la importación y nacionalización de las pelotas plásticas, gestión que tuvo como único fin la ilegal entrada al país del arsenal proveniente de Nicaragua y nos extraña sobremanera que la doctora SALCEDO VELOZA no tenga conocimiento de la existencia del fenómeno delictual de la coparticipación criminal impropia, que se presenta en los casos en que varias personas proceden en una empresa criminal, con consciente y voluntaria división del trabajo para la producción e un resultado típico, todos los partícipes tienen la calidad de autores, así su conducta vista en forma aislada no permita una directa subsunción en el tipo , porque todos están unidos en el criminal designio y actúan con conocimiento y voluntad para la producción del Resultado comúnmente querido o, por lo menos, aceptado como probable.

Ahora, es necesario hacer claridad a la señora defensora del inculpado CHAVERRA ARBOLEDA en cuanto a que una cosa son las acepciones traídas por los diccionarios comunes, ya sea de la lengua española o de la Real Academia y las contenidas e los diccionarios jurídicos, pues difieren en su semántica y por ello lo aconsejable es consultar estos últimos cuando se trata de entrar en polémicas de esta naturaleza.

Por último, estima el suscrito no haber vulnerado el principio de legalidad traído a colación por la libelista, así como tampoco el debido proceso respecto de su defendido, pero en contra de este,

como se señalara anteriormente, existen indicios graves de responsabilidad, como se señala en anterioridad, que nos llevan a proferir Resolución de Acusación contra el mismo, como presunto conutor responsable de infringir el art. 366 del C.P., en las circunstancias de mayor punibilidad contenidas en el numeral 10 del art. 58 del C.P.

Respecto de los argumentos traídos al plenario por el doctor TÁMARA MURCIA, en procura de que por el despacho se precluya la investigación que en contra de su prohijado, el señor YOVANNY HURTADO TORRES, se ha vendido adelantando como presunto conutor de infringir el art. 366 del C.P., como se ha dejado anotado en el cuerpo de esta resolución, nuestra decisión es la proceder tal como lo está solicitando su defensor y por tanto estimamos no extendernos en elucubraciones que van a coincidir que el pedimento que tubo a bien hacer el letrado.

Como corolario de lo anterior ¿mente expuesto, el suscrito Fiscal Delegado ante los Juzgados Penales del Circuito de Bogotá y Cundinamrca,

RESUELVE

Primero.- PROFERIR Resolución de Acusación en contra de los señores HERMINIO J. MARTÍNEZ MERCADO, HENRY HERNANDO RAMÍREZ BAHAMÓN y CARMELO CÓRDOBA CAMPO, de condiciones civiles y personales conocidas, como presuntos conutores responsables de infringir los arts. 286, 322 y 366 del C. P., en concurso heterogéneo, en las circunstancias de mayor punibilidad prescritas en el numeral 10 del art. 58 del C.P., de conformidad a lo consignado en las consideraciones de esta resolución.

Segundo.- PROFERIR Resolución de Acusación en conra del señor LUIS ANÍBAL CHAVERRA ARBOLEDA, de condiciones civiles y personales conocidas, como presunto conutor responsable de infringir el art. 366 del C.P., en las circunstancias de mayor punibilidad contempladas en el numeral 10 del art. 58 del C.P., de conformidad a la motivación contenida en esta decisión.

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Tercero.- PRECLUIR la investigación que se adelantara en contra de los señores PAOLA KATHERINE BENAVIDES ROMERO y JOVANNY HURTADO TORRES respecto del delito a que hace mención el art. 366 del C.P., por lo expuesto en las consideraciones de este proveído.

Cuarto.- Se REVOCA la medida de aseguramiento que pesa en contra de los nombrados inculpados y se orden la LIBERTAD de los mismos, librando los oficios a que haya lugar.

Quinto.- REMITIR el expediente contentivo de este diligenciamiento al Juez Penal del Circuito Especializado –Reparto - de Apartadó Antioquia , para que se continúe con la etapa del juicio y solicitar al señor Fiscal General de la Nación la designación del funcionario correspondiente para el adelantamiento de la señalada etapa.

Sexto.- Se compulsarán las piezas necesarias a fin de continuar la investigación en relación con los señores DARÍO ENRIQUE VELEZ TRUJILLO y JESÚS FERNANDO ITURRIOS MACIEL.

DAR aplicación a lo normado en el art. 364 del C.P.P.

NOTIFÍQUESE Y CÚMPLASE

HERNÁN DAVID QUIÑONES PABÓN
Fiscal Especializado

Rad. 59.516.

EXHIBIT D

TRANSPERFECT

AFFIDAVIT OF ACCURACY

I, Carrie Russ, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of a portion of the attached 2003 UNDP National Report on Human Development for Colombia [page 285], from Spanish into English.

Carrie Russ
TransPerfect Translations, Inc.
601 Thirteenth Street, NW
Suite 370 South
Washington, DC 20005

Sworn to before me this
10th day of December 2007

Signature, Notary Public

Lisa Sherfinski
Notary Public, District of Columbia
My Commission Expires 01-01-2009

Stamp, Notary Public

Washington, DC

Taking away funds for the war:
Armoring income

A. Composition of Income

Determining the amount of income received by illegal armed groups is not an easy task. Although the figures vary significantly from one source to the next, Table 12.1 attempts to consolidate the most reliable partial estimates for the FARC and the ELN. The national government estimates that the self-defense forces' annual income totals $286 million, 70% of which represents drug trafficking (Office of the Presidency, National Planning Department, 2003:33).

Table 12.1. Estimated Income of Guerrilla Forces (Annual Millions of Dollars)

	FARC	ELN	Approximate total	%
Drug Trafficking	204	(**)	204	41.9
Extortion	96	59	155	31.8
Kidnapping	32	74	106	21.8
Other (*)	10	11	21	4.3
Total	342	144	486	100

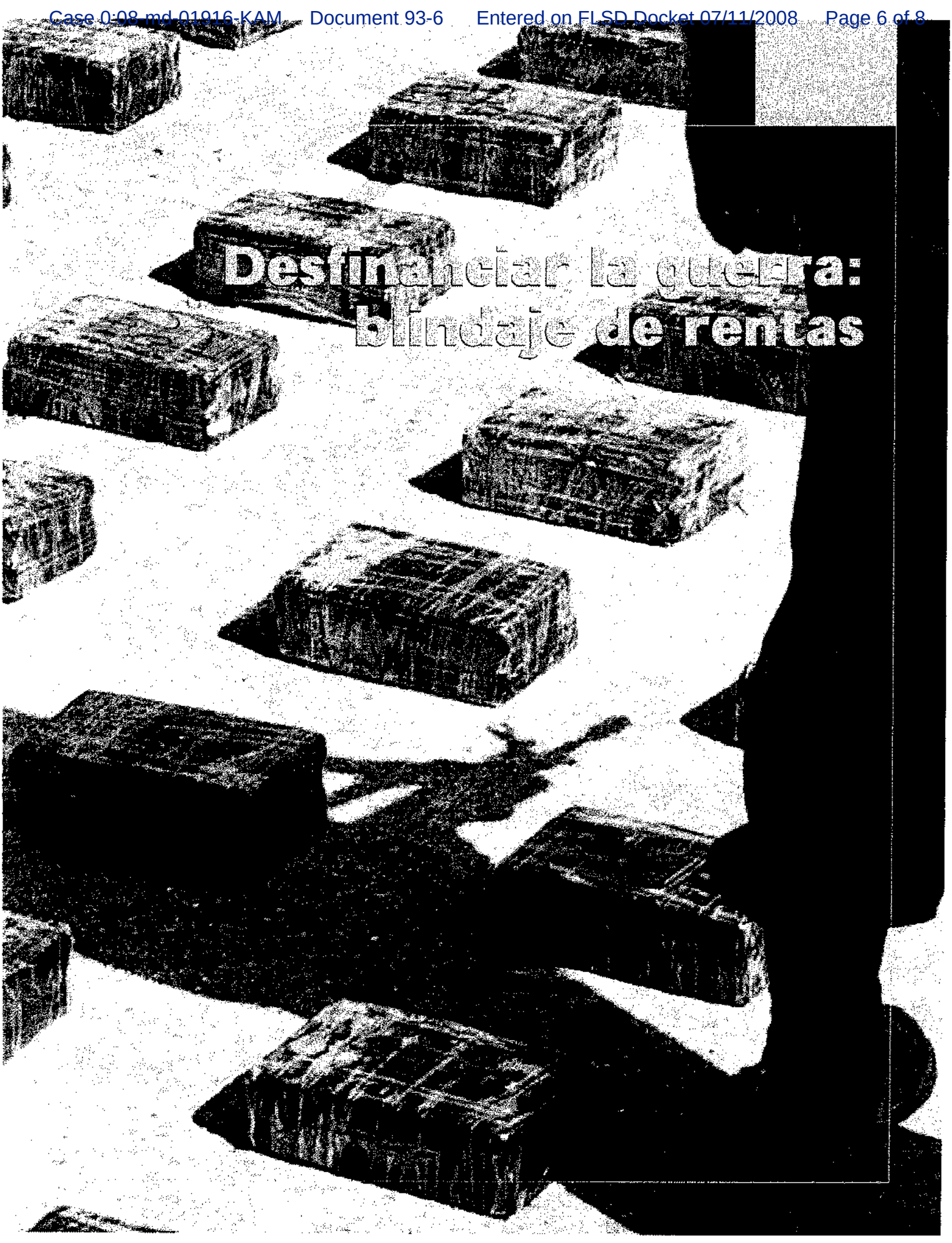
* "Other" includes capture of public funds, corporate attacks/robbery, and theft.

** According to certain estimates, drug trafficking may represent 8% of the ELN's income. However, this group is known to be reluctant to take part in the drug trade (Thoumi, 2002).

El conflicto, callejón con salida

Informe Nacional de Desarrollo Humano para Colombia – 2003

UNDP



Desfinanciar la guerra: blindaje de rentas

Agradecimientos

Colaboración: capitán Esteban Arias, Edgar Cataño, Jorge Gaviria, César González Muñoz, Alexandra Guáqueta, Juan Felipe Laverde, Astrid Martínez, Carlos Miguel Ortiz, Juan Camilo Restrepo, Andrés Soto y Rodolfo Uribe.

Página anterior: Foto 12.1 **Decomiso de una tonelada de cocaína** en La Dorada, Caldas • Foto: John W. Vizcaíno/ *El Tiempo*.

Los dos capítulos anteriores se ocuparon de cómo sacar gente de la guerra. Este capítulo y el próximo se refieren a cómo cerrar sus grifos financieros. En el Capítulo 3 clasificamos los ingresos de los grupos armados en función de su papel como factor de degradación del conflicto; para efectos de interrumpir ese flujo de recursos, en este capítulo usaremos una tipología diferente y donde se distinguen tres modalidades: las rentas extorsivas, los intercambios ilegales en los mercados negros paralelos y la simbiosis o infiltración en la economía legal.

• Las *rentas extorsivas* comprenden secuestro, extorsión y clientelismo armado. Frente al primero propondremos fortalecer la prevención, desmontar las bandas y redes criminales que interactúan con los grupos armados, y ciertas reformas de orden legal para reducir el pago de rescates. Ante la extorsión se formulan medidas para inhibir los desembolsos, y sanciones de la comunidad internacional a las empresas involucradas en el pago de extorsiones en Colombia. Respecto del clientelismo armado, sugerimos establecer algunos seguros para proteger los recursos públicos, en particular las finanzas municipales y las regalías.

• Los *mercados negros paralelos* abarcan intercambios ilegales de diversos bienes legales como el oro, las esmeraldas y los hidrocarburos. Sobre estos mercados se plantea eliminar las fallas de regulación estatal a cuyo amparo ocurren los intercambios ilegales.

• La *infiltración o simbiosis con la economía legal* resulta de invertir recursos de origen ilícito en actividades legales. Esta infiltración permite que el grupo armado acceda al sistema financiero y se adueñe mediante testaferros de un sinnúmero de negocios como estaciones de gasolina, tiendas de víveres, joyerías y finca raíz. El capítulo propone bloquear estas prácticas mediante el refuerzo de los controles al lavado de activos.

A. Composición de los ingresos

No es fácil establecer cuál es el volumen de ingresos que perciben los grupos armados ilegales. Aunque las cifras difieren bastante entre una y otra fuente, el Cuadro 12.1 intenta consolidar los estimativos parciales más confiables para el caso de las Farc y el ELN. El gobierno nacional estima que los ingresos anuales de las autodefensas alcanzan los 286 millones de dólares, de los cuales 70% corresponden al tráfico de drogas (Presidencia de la República, DNP, 2003: 33).

[redacted]

	FARC	ELN	Total aproximado	%
Narcotráfico	204	(**)	204	41,9
Extorsión	96	59	155	31,8
Secuestro	32	74	106	21,8
Otros (*)	10	11	21	4,3
Total	342	144	486	100

* "Otros" incluye captura de fondos públicos, asaltos a entidades, abigeato.

** Algunas estimaciones plantean que el narcotráfico puede llegar a representar 8% de los ingresos del ELN. Sin embargo, se sabe que este grupo es bastante reacio a participar en el negocio de las drogas (Thoumi, 2002).

Fuentes: Ufial, 2002; Fonadalia, 1999; Rocha, 2000; Thoumi, 2002 y cálculos del INDH 2003

En todo caso, es probable que muchas de las cifras estén subestimadas dada la infiltración de estos grupos en la eco-

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SOSA, CUSTOMARY INTERNATIONAL LAW, AND THE CONTINUING RELEVANCE OF *ERIE*

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SOSA, CUSTOMARY INTERNATIONAL LAW, AND THE CONTINUING RELEVANCE OF *ERIE*

Curtis A. Bradley, Jack L. Goldsmith** & David H. Moore****

This Article analyzes the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain *against the backdrop of the post-*Erie *federal common law. The Article shows that, contrary to the assertion of some commentators,* Sosa *did not embrace the "modern position" that customary international law (CIL) has the status of self-executing federal common law to be applied by courts without any need for political branch authorization and, indeed, is best read as rejecting that position. Commentators who construe* Sosa *as embracing the modern position have confounded the automatic incorporation of CIL as domestic federal law in the absence of political branch authorization (that is, the modern position) with the entirely different issue of whether and to what extent a particular statute, the Alien Tort Statute (ATS), authorizes courts to apply CIL as domestic federal law. The Article also explains how CIL continues to be relevant to domestic federal common law despite* Sosa's *rejection of the modern position. The fundamental flaw of the modern position is that it ignores the justifications for, and limitations on, post-*Erie *federal common law. As the Article shows, however, there are a number of contexts in addition to the ATS in which it is appropriate for courts to develop federal common law by reference to CIL, including certain jurisdictional contexts not amenable to state regulation (namely, admiralty and interstate disputes), as well as gap-filling and interpretation of foreign affairs statutes and treaties. The Article concludes by considering several areas of likely debate during the next decade concerning the domestic status of CIL: corporate aiding and abetting liability under the ATS, application of CIL to the war on terrorism, and the use of foreign and international materials in constitutional interpretation.*

I. INTRODUCTION

The most contested issue in U.S. foreign relations law during the last decade has been the domestic status of customary international law (CIL).[1] In the mid-1990s, the conventional wisdom among

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Professor Goldsmith served as an expert declarant with respect to some of the issues in this Article in *Bowoto v. Chevron Corp.*, No. C 99-02506 SI (N.D. Cal. Aug. 30, 2006).

[1] CIL, historically referred to as part of the "law of nations," is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* Statute of the International Court of Justice art.

international law academics was that CIL had the status of self-executing federal common law to be "applied by courts in the United States without any need for it to be enacted or implemented by Congress."[2] This "modern position" was criticized by so-called "revisionists" who argued that CIL had the status of federal common law only in the relatively rare situations in which the Constitution or the political branches authorized courts to treat it as such.[3]

A number of modern position proponents argue that the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[4] resolved this debate in their favor. Dean Harold Koh, for example, contends that "all of the . . . circuits have [embraced the modern position] (and now the U.S. Supreme Court has as well, in the *Alvarez-Machain* case)."[5] Professor Ralph Steinhardt claims that CIL "was and [after *Sosa*] remains an area in which no affirmative legislative act is required to 'authorize' its application in U.S. courts."[6] Professor Martin Flaherty similarly maintains that *Sosa*'s "import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute."[7]

38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (stating that international custom is a source of law that can be applied by the International Court of Justice "as evidence of a general practice accepted as law").

[2] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); *see also* Kadic v. Karadžic, 70 F.3d 232, 246 (2d Cir. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d, § 115 cmt. e; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295, 303–04, 332 n.109; Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846–47 (1998).

[3] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); *see also* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

[4] 124 S. Ct. 2739 (2004).

[5] Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004).

[6] Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2259 (2004).

[7] Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004); *see also* Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005) ("[A] six-member majority of the Supreme Court rejected [the revisionist] view in *Sosa v. Alvarez-Machain*."); Recent Case, 119 HARV. L. REV. 1622, 1627 (2006) ("In *Sosa*, the Court clearly rejected this revisionist argument, adopting the language of the predominant view."); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 226, 453 (2004) ("Much of the majority's analysis is consistent with the view that . . . all customary international law has been included within federal common law."); *cf.* William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L

Both the pre- and post-*Sosa* debates largely turn on the implications of the Supreme Court's seminal decision in *Erie Railroad Co. v. Tompkins*.[8] Modern position proponents tend to discount *Erie*'s relevance to the domestic status of CIL.[9] Revisionists, by contrast, insist that *Erie* is of central importance in determining whether and to what extent CIL has the status of federal common law.

The debate over *Erie*'s relevance to the domestic status of CIL has significant practical implications. If modern position proponents are correct about *Sosa*, and CIL automatically has the status of federal law, CIL would provide a basis for federal question jurisdiction, and courts would be authorized to use CIL to preempt inconsistent state law and possibly even to override executive branch action and some federal legislation.[10] These consequences would dramatically expand the international human rights litigation permitted under the *Sosa* de-

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L. 87, 96–97 (2004) (arguing that *Sosa* endorses a particularized rather than wholesale incorporation of CIL into federal common law); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 132 (arguing that *Sosa* allows courts to "recogniz[e] and incorporat[e] international norms, to the extent that they can be harmonized with other federal law"). *But cf.* David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1 (2006) (arguing that *Sosa* not only endorses the revisionist position, but also evidences the emergence of a uniform doctrine governing the status of both treaties and CIL in federal courts).

[8] 304 U.S. 64 (1938).

[9] *See, e.g.*, Koh, *supra* note 2, at 1831 ("Curiously, [revisionists] read *Erie* as effecting a near complete ouster of federal courts from their traditional role in construing customary international law norms."); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997) ("[T]he *Erie* decision did not require that federal courts stop citing cases decided before 1938 and reinvent federal common law from scratch."); Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J. INT'L L. 301, 308 (1999) (criticizing revisionists for "their nearly obsessive focus" on *Erie* and Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 397 (1997) ("[W]hile *Erie* rejected the general common law, it upheld the federal courts' power to develop common law in areas properly governed by federal law, including international law.").

[10] For the claim that CIL creates federal jurisdiction and preempts state law, see, for example, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987), and Brilmayer, *supra* note 2, at 303. For the view that CIL binds the executive branch, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4; Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 324–25 (1985); and Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1116–20 (1985). For the view that CIL might trump inconsistent prior federal law, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4, and Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 876–77 (1987). We should emphasize that not every proponent of the modern position embraces all of these propositions, although there is significant academic support for each of them, and for the more general claim that all of CIL is federal law. *See generally* Bradley & Goldsmith, *supra* note 3, at 817 nn.3–4, 837 nn.150–51.

cision and would provide a vehicle by which U.S. citizens could challenge the actions of their government (state and federal) based on evolving CIL. These consequences might have particularly significant implications for challenges to executive action in the war on terrorism.

In this Article, we hope to make three contributions to the debate about CIL's domestic status after *Sosa*. First, we attempt to focus the debate more directly on *Erie* and its implications for modern federal common law. Like the Court in *Sosa* (but unlike many proponents of the modern position), we believe that *Erie* is centrally relevant to the current status of CIL in U.S. courts. Any theory of the domestication of CIL as federal common law must be consistent with *Erie*'s basic premises, and in this Article we attempt to flesh out the implications of those premises for domesticating CIL.

Second, we examine the emerging claim that *Sosa* constitutes an endorsement of the modern position that CIL is incorporated wholesale into the U.S. legal system as federal common law. As we show, the decision in *Sosa* cannot reasonably be read as embracing the modern position and, indeed, is best read as rejecting it. Commentators who construe *Sosa* as embracing the modern position have confounded the automatic incorporation of CIL as domestic federal law in the absence of congressional authorization (that is, the modern position) with the entirely different issue of whether and to what extent a particular statute, the Alien Tort Statute[11] (ATS), authorizes courts to apply CIL as domestic federal law. The ATS, which was first enacted in 1789, grants federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[12] The Court in *Sosa* held that the ATS authorized federal courts to recognize federal common law causes of action for a narrow class of CIL violations. The Court based this conclusion on what was, in effect, a translation of the specific intentions of the ATS framers to the regime of post-*Erie* federal common law. As we show, the Court's analysis would be superfluous if it agreed with the modern position. Moreover, the Court's reasoning and conclusions on a number of points simply cannot be reconciled with the modern position.

Third, we explain how CIL continues to be relevant to domestic federal common law despite *Sosa*'s rejection of the modern position. The fundamental flaw of the modern position is that it ignores the justifications for, and limitations on, post-*Erie* federal common law. As we show, however, there are a number of contexts in addition to the ATS in which it is appropriate for courts to develop federal common

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[11] 28 U.S.C. § 1350 (2000).

[12] *Id.*

law by reference to CIL. These include certain jurisdictional contexts — namely, admiralty and interstate disputes — and the gap-filling and interpretation of foreign affairs statutes and treaties. In short, rejection of the modern position does not entail a rejection of the judicial domestication of CIL, but at the same time courts can domesticate CIL only in accordance with the requirements and limitations of post-*Erie* federal common law — limitations that, as we explain, were reaffirmed by the Court in *Sosa*.

This Article proceeds as follows. Part II describes the basic principles of *Erie* and its implications for modern federal common law. Part III distinguishes and describes the various existing debates concerning the domestic status of CIL and shows how *Erie* is central to each of these debates. Part IV analyzes the *Sosa* decision, explains its implications for the existing debates, and shows how it is best read as rejecting the modern position. Part V considers some of the many ways in which CIL can, consistent with *Erie*, inform the development of federal common law in the U.S. legal system even after rejection of the modern position. It also discusses several likely areas of debate concerning the domestic status of CIL during the next decade.

II. *ERIE* AND MODERN FEDERAL COMMON LAW

This Part briefly describes the general common law framework that existed prior to *Erie*, the Court's justifications in *Erie* for rejecting that framework, and the contours of the post-*Erie* federal common law. We do not attempt here to offer new insights about these widely discussed subjects; our goal is merely to remind readers of certain settled propositions that, as we explain in Parts III and IV, are relevant to debates over the domestic status of CIL.

*A. Pre-*Erie *General Common Law*

Before *Erie*, federal and state courts in civil cases applied a body of law that came to be known as "general common law."[13] They "resorted to [general common law] to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign."[14] As Justice Holmes would eventually describe and criticize it, general common law was "a transcendental body of law

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[13] *See generally* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279–85 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231 (1985). Early in U.S. history, federal courts also applied a common law of crimes, but the Supreme Court disallowed this practice in the early 1800s. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[14] Fletcher, *supra* note 13, at 1517.

outside of any particular State but obligatory within it unless and until changed by statute."[15]

Courts did not view general common law as having the status of federal law. They did not consider it part of the "Laws of the United States" within the meaning of the Supremacy Clause,[16] and claims arising under it did not fall within either Article III or statutory federal question jurisdiction.[17] Federal court interpretations of general common law were not binding on state courts, and the two court systems sometimes adopted differing interpretations of this law.[18]

A famous early application of general common law occurred in *Swift v. Tyson*,[19] in which the Supreme Court applied "principles established in the general commercial law," rather than New York state court decisions, to resolve a commercial dispute concerning the validity of an assignment of a negotiable instrument, even though the assignment had occurred in New York.[20] In support of its decision, the Court reasoned that the Rules of Decision Act,[21] which requires federal courts to apply the "laws of the several states"[22] in cases not governed by the Constitution, treaties, or federal statutes, applies only to "the positive statutes of the state," and not to state court decisions on "questions of a more general nature."[23]

Although relatively uncontroversial for much of the nineteenth century, the general common law regime became contested in the late nineteenth and early twentieth centuries as courts began to apply it to a broader array of cases. One of many criticisms of this regime was that it allowed litigants to forum shop between federal and state courts for the most favorable interpretation of the general common law. A notorious example of such forum shopping occurred in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[24] In that case, a Kentucky taxicab company reincorporated in Tennessee so that it could sue another Kentucky taxicab company under diversity jurisdiction for interference with an exclusive contract with a railroad

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15 Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Justice Holmes argued elsewhere that, instead of this "brooding omnipresence in the sky," the common law should in fact be understood as "the articulate voice of some sovereign or quasisovereign that can be identified." S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

16 U.S. CONST. art. VI, cl. 2.

17 *See* Fletcher, *supra* note 13, at 1521–25.

18 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note, at 41 (1987).

19 41 U.S. (16 Pet.) 1 (1842).

20 *Id.* at 18.

21 28 U.S.C. § 1652 (2000).

22 *Id.*

23 *Swift*, 41 U.S. (16 Pet.) at 18.

24 276 U.S. 518 (1928).

and thereby obtain a federal court ruling concerning the validity of the contract. The Supreme Court upheld the existence of diversity jurisdiction and affirmed judgment for the plaintiff, even though Kentucky courts would have found the exclusive railroad contract to be invalid.

The Court in *Black & White Taxicab* explained its divergence from the state decisions as follows:

> For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule.[25]

Justice Holmes, along with two other Justices, dissented. He argued that the general common law regime rested on the "fallacy"[26] that law can exist without some definite authority behind it. Once it is recognized that state court application of general common law derives its authority from the state and thus is in effect state law, he reasoned, the practice of federal courts declining to follow that law in diversity cases should be seen as "an unconstitutional assumption of powers by the Courts of the United States."[27]

B. Erie v. Tompkins

The specific issue in *Erie* was what law a federal court sitting in diversity should apply to determine the tort duties that a railroad owed to someone walking along the railroad's tracks. In concluding that state law should be applied, the Court held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[28] The Court further made clear that, henceforth, "[t]here is no federal general common law."[29]

The Court in *Erie* determined that, contrary to its holding in *Swift v. Tyson*, the "laws of the several states" referenced in the Rules of Decision Act included judge-made law. Importantly, the Court explained that if *Swift* had involved only a mistaken statutory interpretation, the Court would have been hesitant to overrule it. But the Court concluded that the "unconstitutionality" of the general common law regime "ha[d] . . . been made clear and compel[led] [the Court]" to abandon it.[30]

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[25] *Id.* at 529–30.

[26] *Id.* at 532 (Holmes, J., dissenting).

[27] *Id.* at 533.

[28] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[29] *Id.*

[30] *Id.* at 77–78. In addition to relying on constitutional grounds, the Court noted the many practical "defects, political and social," that attended the general common law regime, including

In its constitutional analysis, the Court endorsed Justice Holmes's positivist argument that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[31] As a result, the Court denied what it called the "fallacy" that there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[32] This means, explained the Court, that the common law of a state "is not the common law generally but the law of that State existing by the authority of that State."[33]

The Court connected this positivist approach to common law with principles of federalism. The Court explained that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts," and that "no clause in the Constitution purports to confer such a power upon the federal courts."[34] It concluded from these premises that disregard of state court decisions on commercial and tort law questions "invaded rights which . . . are reserved by the Constitution to the several States."[35]

At the time of *Erie*, the Court's constitutional analysis rested on both congressional and judicial incapacity to make common law rules on matters reserved to the states. The Court's observation about limited congressional power became less important as the Supreme Court approved significant expansions of legislative power in the post-*Erie* period. As a result, the Court's reasoning about constitutional limitations on the federal government's power to invade state rights evolved into an argument about limitations on the federal judiciary. As Professor Thomas Merrill notes, "the federalism principle identified by *Erie* still exists but has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government — the federal judiciary."[36]

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the unfairness of allowing out of state plaintiffs to choose whether a case would be heard in state or federal court based on which court had a more favorable view of the general common law. *Id.* at 74–75.

[31] *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

[32] *Id.* (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)) (internal quotation mark omitted).

[33] *Id.*

[34] *Id.* at 78.

[35] *Id.* at 80.

[36] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 15 (1985); *see also* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) ("It is by no means enough [to justify federal common law–making] that . . . Congress could under the Constitution readily enact a complete code of law governing [the subject matter of the case]. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10

C. *Post-*Erie *Federal Common Law*

Although there are statements in *Erie* suggesting that the only common law that federal courts can apply is the common law of the states, *Erie* in fact gave birth to the development of a new common law in the federal courts.[37] This "federal common law" is genuine federal law that binds the states under the Supremacy Clause and potentially establishes Article III and statutory "arising under" jurisdiction.[38]

The Supreme Court has never provided a comprehensive explanation of its approach to federal common law after *Erie*, and it has sometimes simply referred to the fact that there are "enclaves" of federal common law encompassing issues of national importance.[39] Nonetheless, certain basic parameters of post-*Erie* federal common law can be discerned from *Erie* itself and the various post-*Erie* federal common law decisions: it derives its authority from extant federal law, it is interstitial, and it must be tailored to the policy choices reflected in its federal law sources.

First, because "the federal lawmaking power is vested in the legislative, not the judicial, branch of government,"[40] federal common law must be grounded in extant federal law: the Constitution, a federal statute, or a treaty. It is this grounding in a federal law source that allows federal common law to have the status of preemptive law under the Supremacy Clause. Recall that *Erie* insisted that all law applied by federal courts must derive from a domestic sovereign source and thus must be either federal law or state law. *Erie*'s holding — that state law governed in diversity cases — followed from these premises because there was no basis in the Constitution or any federal statute for federal courts to develop their own law in such cases. From these same premises emerged the basic animating principle of post-*Erie* fed-

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CONST. COMMENT. 285, 288 (1993) ("Any major extension of federal power must find its source in the Constitution or in a federal statute, not in the common law decisions of federal judges alone.").

[37] *See* Henry J. Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–07 (1964).

[38] *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."); *see also* Merrill, *supra* note 36, at 6–7 (distinguishing federal common law from general common law). Federal common law is often still "general" in the sense that its content is derived from general principles or practice. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006). But it is not general in the sense of applying across entire fields of law, and it has federal law status, rather than general law status, in U.S. courts. Even the modern federal common law of admiralty is applied in an interstitial way. *See infra* pp. 918–19.

[39] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) (noting that "there are enclaves of federal judge-made law which bind the States"); *see also* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recounting areas in which the Court has approved of federal common law).

[40] Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981).

eral common law: when the common law being developed by federal courts did have some federal law basis, then it would have the status of truly federal law.

The Supreme Court has not always explicitly articulated this requirement of a federal law source. Nevertheless, the reasoning in even its most expansive federal common law decisions typically has reflected this requirement. In *Clearfield Trust Co. v. United States*,[41] for example, the Court held that the rights and duties of the United States government concerning federal checks must be governed by federal common law. The Court reasoned that, because the government's issuance of the check in question stemmed from its constitutional powers and was for services performed under a federal statute, the federal common law rights and duties associated with the check "find their roots in the same federal sources."[42] To take another example, in *Banco Nacional de Cuba v. Sabbatino*[43] the Court held that the act of state doctrine, pursuant to which courts assume the validity of foreign government acts taken within their territory, is a rule of federal common law binding on the states.[44] The Court grounded its decision in two federal law sources: "'constitutional' underpinnings" relating to the separation of powers in conducting U.S. foreign relations,[45] which the Court held "must be treated exclusively as an aspect of federal law,"[46] and numerous federal constitutional and statutory provisions suggesting that sensitive foreign relations questions are exclusive federal concerns.[47]

While there is much scholarly debate about the proper contours of federal common law, there is widespread agreement that federal common law must be grounded in a federal law source. For example, Professor Merrill advocates a restrictive approach to federal common law, whereby there would have to be a showing that the federal common law rule "can be derived from the specific intentions of the draftsmen of an authoritative federal text."[48] By contrast, Professor Martha Field argues for a broader approach, maintaining that the development of federal common law is appropriate so long as the court can "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule."[49] The key point for present

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[41] 318 U.S. 363 (1943).
[42] *Id.* at 366.
[43] 376 U.S. 398.
[44] *See id.* at 424–27.
[45] *Id.* at 423–24.
[46] *Id.* at 425.
[47] *See id.* at 425–26 & n.25.
[48] Merrill, *supra* note 36, at 47.
[49] Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986); *see also* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L.

purposes is that despite disagreement over how it is to be applied, there is general agreement on the requirement of a federal law source. Even Judge Henry Friendly, a particularly enthusiastic supporter of federal common law, tied federal common law to congressional intent.[50]

Second, the post-*Erie* federal common law must be interstitial; that is, courts are to develop it only in retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regimes. This requirement follows from the Court's reasoning in *Erie* that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[51] As Justice Holmes famously noted in a pre-*Erie* dissent anticipating post-*Erie* federal common law, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[52]

Third, when developing federal common law, courts must act consistently with the policy choices reflected in extant federal law. As Justice Jackson explained, "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them."[53] This requirement follows from the fact that federal common law is a derivative form of lawmaking rather than an independent judicial power to make policy decisions.[54] As a result, "a federal court's primary responsibility in deriving an appropriate federal common law rule is to attempt to give effect to the underlying federal policy found in federal statutes, the Constitution, or another federal text."[55]

REV. 263, 288 (1992) ("[F]ederal judges must wait for Congress to take the first step. Once Congress has acted, however, federal courts can make any common law 'necessary and proper' to implement the statute.").

[50] *See* Friendly, *supra* note 37, at 407 ("Just as federal courts now conform to state decisions on issues properly for the states, state courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end."); *see also id.* at 422 (noting that "state courts must follow federal decisions on subjects within national legislative power where Congress has so directed").

[51] City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)); *see also* United States v. Standard Oil Co., 332 U.S. 301 (1947).

[52] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). For post-*Erie* decisions in which the Court emphasized that federal common law is an interstitial judicial lawmaking power, see *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); and *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

[53] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

[54] Professor Stephen Burbank argues that the proposition also follows from the Rules of Decision Act. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); *cf.* Merrill, *supra* note 36, at 31–32 ("The phrase 'require or provide' [in the Rules of Decision Act] is broad enough to embrace at least some interpretation of federal texts, and thus to support the creation of some federal common law.").

[55] Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 968 (1996).

The Supreme Court has noted this requirement even in its broadest assertions of federal common law. For example, in explaining the propriety of developing federal common law to resolve collective bargaining disputes brought under the Labor Management Relations Act of 1947,[56] the Court stated that this law was to be "fashion[ed] from the policy of our national labor laws" and that some federal common law rules would "lie in the penumbra of express statutory mandates," whereas others "[would] lack express statutory sanction but [would] be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy."[57] As Professors Peter Westen and Jeffery Lehman explain, "[f]ederal common law is measured by the same standard of validity as federal statutory interpretation; the measure in each case is whether the law as declared by the courts is consistent with prevailing legislative policy."[58]

Consistent with these three principles, the Supreme Court has stated that the instances in which it is appropriate to develop federal common law are "few and restricted."[59] In the last fifteen years or so in particular, the Court has been emphatic about the exceptional nature of federal common law.[60] The Court has also adopted a restrictive approach in recent years to the judicial recognition of private rights of action under federal statutes and the Constitution, which can be seen as a remedial form of federal common law.[61]

III. PRE-*SOSA* DEBATES REGARDING THE DOMESTIC STATUS OF CIL

The *Sosa* case concerned actions taken by the U.S. Drug Enforcement Agency (DEA). In 1990, the DEA recruited Sosa and other

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[56] ch. 120, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.).

[57] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957); *see also Kimbell Foods*, 440 U.S. at 738 ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy."); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law.").

[58] Peter Westen & Jeffery S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 336 (1980); *see also* Kramer, *supra* note 49, at 287–88.

[59] Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

[60] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997) ("'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." (quoting *Wallis*, 384 U.S. at 68)); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (observing that the instances in which it is appropriate to create a federal common law rule are "few and restricted" (quoting *Wheeldin*, 373 U.S. at 651)). As we explain in this Article, *Sosa* continues this trend.

[61] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–74 (2001) (explaining why *Bivens* remedies for constitutional torts should not be extended to claims against private entities); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

Mexican nationals to abduct Alvarez-Machain, a Mexican national, and transport him from Mexico to the United States to stand trial for his alleged involvement in the torture and murder of a DEA agent in Mexico.[62] After he was acquitted, Alvarez-Machain sued Sosa under the ATS, alleging that Sosa had violated a CIL prohibition on arbitrary arrest.[63] Sosa, and the U.S. government acting as amicus curiae, argued that the ATS was simply a jurisdictional statute that did not create a cause of action for violations of CIL. Alvarez-Machain, by contrast, argued that the ATS did create CIL causes of action, including a cause of action for arbitrary arrest.[64]

The legal controversy in *Sosa* arose against the background of debates, in the courts and the academy, about four distinct issues concerning CIL's status in the domestic legal system. Since many commentators interpreting *Sosa* have confused the decision's resolution of one of these issues with its resolution of others, it is important to distinguish the issues carefully and to understand their relationship to one another. The first debate concerns the historical status of CIL in the U.S. legal system prior to *Erie v. Tompkins* during the era of "general common law." The second debate concerns CIL's domestic legal status, following *Erie*, in the absence of some authorization by the political branches to apply CIL as federal law. The third debate concerns whether the ATS or some related statutory enactment authorizes federal courts to apply CIL as federal law consistent with the usual requirements of post-*Erie* common law creation. The final debate concerns the scope of the CIL that can be applied in ATS litigation and, relatedly, how this CIL is to be identified. As we explain, *Erie* is central to each of these debates.

*A. CIL's Pre-*Erie *Status*

It is uncontroversial that, during the period prior to *Erie*, federal courts often applied CIL (which they referred to as part of the "law of nations") without requiring authorization from the federal political branches. Before *Sosa*, courts and scholars disagreed about whether CIL so applied had the status of genuinely federal law or whether it had the status of nonfederal general common law. Some proponents of the modern position argued that CIL was federal law and thus escaped

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[62] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746–47 (2004).

[63] Alvarez-Machain also sued the U.S. government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000). *See Sosa*, 124 S. Ct. at 2747. Although the Ninth Circuit held that the government was liable for false arrest, the Supreme Court concluded that the government was immune from suit and ordered dismissal of Alvarez-Machain's FTCA claim. *See id.*

[64] *Sosa*, 124 S. Ct. at 2754–55.

Erie's abolition of general common law. Revisionists claimed that CIL was general common law that fell squarely within *Erie*'s scope.

The debate turned in part on the meaning of certain historic statements concerning the domestic status of CIL. In the famous *Paquete Habana* decision,[65] the Supreme Court stated that CIL "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[66] Similarly, the Supreme Court stated in an earlier decision that it was "bound by the law of nations which is a part of the law of the land."[67] And some of the constitutional Founders, speaking later as judges, maintained that the law of nations was part of U.S. law.[68]

Citing these and similar statements, some courts and scholars argued that CIL historically had the status of federal law in the U.S. legal system.[69] Dean Koh claimed, for example, that CIL's status as federal law has been established since "the beginning of the Republic" and reflects "a long-accepted, traditional reading of the federal courts' function."[70] Supporters of this view interpreted phrases like "law of the land," "law of the United States," and "our law" as references to federal law that preempts state law and creates a basis for federal question jurisdiction. In addition, they claimed that viewing CIL as nonfederal law, and thus as not judicially enforceable against the states, would have been inconsistent with the Founders' well-documented desire to ensure that states complied with international law. The Second Circuit in *Filartiga v. Pena-Irala*[71] (the first decision

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65 The Paquete Habana, 175 U.S. 677 (1900).

66 *Id.* at 700.

67 The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); *see also* 11 Op. Att'y Gen. 297, 299–300 (1865); 1 Op. Att'y Gen. 566, 570 (1822); 1 Op. Att'y Gen. 26, 27 (1792); ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 15 (Richard Loss ed., 1976).

68 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (John Jay); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,760) (Samuel Chase and Richard Peters, Jr.); United States v. Ravara, 2 U.S. (2 Dall.) 297, 298–99 (C.C.D. Pa. 1793) (James Iredell, Richard Peters, Jr., and James Wilson); Henfield's Case, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793) (No. 6360) (John Jay); *id.* at 1117 (James Wilson).

69 *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–8 (2d ed. 2003); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 57–58 (1981); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 34–46 (1952); Glennon, *supra* note 10, at 343–47; Koh, *supra* note 2, at 1841, 1846; Lobel, *supra* note 10, at 1090–95; Steven M. Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOK. J. INT'L L. 289, 289–91 (1982).

70 Koh, *supra* note 2, at 1841, 1846.

71 630 F.2d 876 (2d Cir. 1980).

to approve of the use of the ATS for international human rights litigation) similarly asserted that CIL "has always been part of the federal common law."[72]

By contrast, other courts and scholars, and the *Restatement of Foreign Relations Law*, concluded that CIL did not have the status of federal law during the pre-*Erie* period.[73] In support of this conclusion, they cited pre-*Erie* decisions suggesting that CIL was not federal law for purposes of Article III or statutory federal question jurisdiction.[74] They also noted that the executive branch in the nineteenth century repeatedly described itself as lacking the authority, in the absence of congressional authorization, to force the states to comply with CIL.[75] Moreover, they pointed out that the most famous general common law decision — *Swift v. Tyson* — involved the international law merchant, a component of the "law of nations" of the time. These scholars contended that phrases like "law of the land," "law of the United States," and "our law" in the nineteenth century were not references to the "Laws of the United States" in Articles III or VI of the Constitution,[76] but rather were phrases commonly used to refer to general common law.[77] Finally, this group argued that CIL's status as general common law did not conflict with the Founders' desire to prevent states from violating CIL because it merely left the responsibility of policing state

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[72] *Id.* at 885.

[73] *See, e.g.*, Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note, at 41 (1987); Bradley & Goldsmith, *supra* note 3, at 822–26; Clark, *supra* note 13, at 1283; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832–33 (1989); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1233–34 (1988); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 368 (2002); *see also* CHARLES PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES 19 (1928); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 161 (1922).

[74] *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that the question whether forcible seizure in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review"); N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1876) (holding that the Supreme Court has no jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case," because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States"); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828) (holding that a case involving application of the admiralty and maritime law — elements of the law of nations — "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III). In addition, *The Paquete Habana* itself strongly suggested the same conclusion when it stated that CIL as applied by federal courts did not bind either Congress or the President. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that customs and usages of civilized nations govern "where there is no treaty, and no controlling executive or legislative act"); *id.* at 708 (stating that courts must "give effect to" CIL "in the absence of any treaty or other public act of [the] government in relation to the matter").

[75] *See* Bradley & Goldsmith, *supra* note 3, at 825 & nn.56–58.

[76] U.S. CONST. art. III, § 2, cl. 1; *id.* art. VI, cl. 2.

[77] *See* Bradley & Goldsmith, *supra* note 3, at 822–26.

compliance with international law to the federal political branches, which could incorporate CIL into federal statutory or treaty law and could vest federal courts with jurisdiction in cases involving the interpretation of the general common law of CIL.[78]

B. CIL's Domestic Status in the Absence of Political Branch Authorization

The second pre-*Sosa* debate concerned the effect of *Erie* on CIL's legal status in the United States. In particular, the question was whether, after *Erie*, CIL had the status of federal common law.

As we briefly explained in the Introduction, modern position proponents maintained that, after *Erie*, CIL had the status of self-executing federal common law that federal courts were bound to apply even in the absence of political branch authorization.[79] This claim rested in part on the historical proposition, outlined earlier, that CIL had the status of federal law since the Founding and thus remained unaffected by *Erie*'s rejection of federal general common law. It also relied on the Supreme Court's holding in *Sabbatino* that the act of state doctrine, while not required by CIL, is based on principles of separation of powers and is therefore a rule of federal common law binding on the states.[80] The Court in *Sabbatino* reasoned that the act of state doctrine should be subject to a uniform national standard because it was "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."[81] Supporters of the modern position argued that CIL similarly concerns the United States's relationship with the international community.[82]

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[78] *See id.* at 871.

[79] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (expressing the view that CIL "has an existence in the federal courts independent of acts of Congress"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to [customary] international law . . . ."); *id.* § 115 cmt. e ("[A]ny rule of customary international law . . . is federal law . . . [and] supersedes inconsistent State law or policy whether adopted earlier or later."); Brilmayer, *supra* note 2, at 324 (asserting that "whatever [customary] international law requires, it is binding on the states" (emphasis omitted)); Henkin, *supra* note 2, at 1561 (stating that CIL "is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress").

[80] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–27 (1964). The Court in *Sabbatino* said that this conclusion was similar to the position taken by Professor Philip Jessup in an article arguing that, despite *Erie*, state courts should not have the final word on the interpretation of international law. *See id.* at 425 (citing Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)).

[81] *Id.* at 425.

[82] *See, e.g.*, Henkin, *supra* note 2; Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1057–68 (1967).

By contrast to the modern position, the revisionist view was that CIL does not automatically have the status of federal common law and that after *Erie*, federal courts needed some authorization from either the political branches or the Constitution in order to apply CIL.[83] The revisionist view built on the historical contention that CIL was not federal law prior to *Erie*. It argued that, after *Erie*, neither the Constitution nor any federal statute authorizes the modern position's envisioned wholesale application of CIL by the federal judiciary. Articles III and VI of the Constitution both refer to treaties, but not CIL, in their list of federal laws, and the Constitution's only reference to CIL is in the Article I Define and Punish Clause.[84] Revisionists argued that the constitutional text therefore suggests that Congress must act before CIL is incorporated into domestic law. As for *Sabbatino*, revisionists noted that the act of state doctrine, as articulated in *Sabbatino*, was designed to prevent judicial involvement in foreign affairs and was grounded in principles of separation of powers. They then argued that the primary application of the modern position concerns human rights cases against foreign governments — cases that, contrary to *Sabbatino*'s central premise, place federal courts in the center of foreign affairs controversies. They also noted that the application of a CIL of human rights as federal common law would be contrary to the post-*Erie* requirement that federal common law conform to the policies of the federal political branches. Congress has incorporated only select CIL principles into federal statutory law, and in the human rights context in which the modern position matters most, said revisionists, the political branches have made clear through their limitations on U.S. ratification of human rights treaties that they do not want international human rights norms to provide a basis for domestic litigation.

An intermediate position that emerged prior to *Sosa* was that federal courts could apply CIL as a type of law that was neither state law nor preemptive federal law.[85] Under the main variant of this approach, CIL would be applied like pre-*Erie* general common law and thus would be available as a rule of decision for federal and state courts but would neither preempt state law nor provide a basis for federal question jurisdiction.[86] Under a different variant, CIL would

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[83] *See* sources cited *supra* note 3.

[84] *See* U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish . . . Offences against the Law of Nations").

[85] *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); Weisburd, *supra* note 3; Young, *supra* note 73. It is possible that this is what Professor Jessup had in mind. *See* Jessup, *supra* note 80.

[86] *See* Aleinikoff, *supra* note 85, at 97; Weisburd, *supra* note 3, at 48–49; Young, *supra* note 73, at 467–68.

be treated as federal law for purposes of jurisdiction under Article III of the Constitution, but not for purposes of preemption under the Constitution's Supremacy Clause.[87]

C. Did the ATS Authorize Courts To Apply CIL as Federal Law?

The third debate prior to *Sosa* concerned whether there was, consistent with the usual requirements for post-*Erie* federal common law, any congressional statute that authorized federal courts to apply CIL as federal law. This debate was distinct from, though potentially related to, the modern position debate. One could reject the view that CIL is self-executing federal common law and believe nonetheless that Congress has authorized federal courts to apply CIL as federal law in certain cases.[88] The main focus of this debate was the ATS, the fount of modern international human rights litigation. Is the ATS a mere jurisdictional statute, or does it also create a cause of action for human rights abuses or otherwise authorize courts to apply CIL in cases properly brought under the ATS? A variety of answers were offered.

One answer was that the ATS is a purely jurisdictional statute that authorizes nothing with regard to substantive law.[89] This view rested primarily on the plain language of the ATS. Enacted as part of the Judiciary Act of 1789[90] — a statute that regulated the jurisdiction and structure of the federal courts, not causes of action — the ATS's original language provided that federal district courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[91] "Cognizance" was a term of art referring to jurisdiction, and the First Congress used different language when it created statutory civil actions.[92] The jurisdictional reading of the ATS found support in the current codification of the statute, which extends "original jurisdiction" over certain cases brought by aliens and does not refer to damages or other remedies.[93]

This jurisdictional reading of the ATS was consistent with the decision that reinvigorated the ATS in modern times, *Filartiga v. Pena-Irala*. The Second Circuit in *Filartiga* construed the ATS, for purposes of its decision, "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already rec-

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87 *See* Ramsey, *supra* note 85, at 575–77.

88 *See* Bradley & Goldsmith, *supra* note 3, at 872–73 & nn.352–54.

89 *See, e.g.*, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002); Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 358 (1997).

90 ch. 20, 1 Stat. 73.

91 *Id.* § 9(b), 1 Stat. at 77.

92 *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479 (1986).

93 28 U.S.C. § 1350 (2000).

ognized by international law."[94] The court proceeded to hold that a human rights suit brought by Paraguayan plaintiffs against a former Paraguayan official satisfied Article III because CIL was part of federal common law and the plaintiffs' CIL claim therefore arose under federal law.[95] The court in *Filartiga* did not hold, however, that either CIL itself or the ATS created the plaintiffs' cause of action. The court insisted that "the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations," and the "issue of the choice of law to be applied" were "distinct" issues and remanded to the district court to determine whether Paraguayan law or some other law governed the merits of the suit.[96]

A number of courts after *Filartiga*, however, including the Second Circuit, held that the ATS both established federal jurisdiction and also created a substantive federal cause of action for torts in violation of CIL.[97] The most prominent argument in support of this position was that the 1992 Torture Victim Protection Act[98] (TVPA), particularly its legislative history, confirmed that Congress had authorized causes of action in ATS litigation.[99] At least one court adopted a somewhat different position, interpreting the ATS not as creating a cause of action, but rather as authorizing the federal courts to do so.[100] The analogy for this latter position was the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*,[101] which implied federal common law–making powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.[102]

D. Scope and Sources of CIL in ATS Litigation

The ATS refers to torts in violation of the "law of nations," but it does not specify which law of nations rules can be applied or how to discern their content. Prior to *Sosa*, there was disagreement among courts and scholars over the scope and sources of CIL in ATS litiga-

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[94] Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

[95] *Id.* at 886–87.

[96] *Id.* at 889.

[97] *See, e.g.*, Kadic v. Karadžic, 70 F.3d 232, 241 (2d Cir. 1995); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

[98] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

[99] *See, e.g.*, Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996) (stating, in denying rehearing of its earlier decision, that "Congress ha[d] made clear that its enactment of the Torture Victim Protection Act . . . was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens"). The TVPA provides a federal cause of action for acts of torture and "extrajudicial killing" committed under authority of foreign law. *See* 28 U.S.C. § 1350 note.

[100] *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).

[101] 353 U.S. 448 (1957).

[102] *See id.* at 456–57.

tion. In terms of scope, the issue was whether plaintiffs could bring claims under all CIL norms relating to torts or only under a subset of such norms. In terms of sources, the issue was whether, in discerning the content of CIL, courts should focus on verbal evidence of state positions such as treaties and U.N. General Assembly resolutions or should instead focus primarily on state practice. Like the other debates discussed earlier in this Article, this debate over the scope and sources of CIL occurred against the backdrop of the narrow role for judicial lawmaking envisioned by *Erie*.

On the scope issue, the court in *Filartiga* suggested that all CIL rules relating to torts were eligible for ATS litigation. For guidance on the proper standard for determining rules of CIL, the court relied on pre-*Erie* decisions applying CIL outside the context of the ATS, such as *The Paquete Habana*. Based on these decisions, the court stated that, in order for a norm to qualify as a rule of CIL, it must "command the 'general assent of civilized nations.'"[103] Although the court described this requirement as "stringent," it viewed it as a general requirement for CIL, not a requirement unique to the ATS context.[104] The court also concluded that it should interpret international law not as it was in 1789 when the ATS was enacted, but "as it has evolved and exists among the nations of the world today,"[105] again suggesting that all rules properly found to be CIL would qualify.

On the sources issue, the court in *Filartiga* relied primarily on verbal evidence of state assent rather than on state practice. In concluding that official torture violated CIL, the court relied on, for example: references to human rights in the United Nations Charter; the U.N. General Assembly's nonbinding Universal Declaration of Human Rights;[106] another nonbinding General Assembly resolution concerning torture; various treaties that the United States had not at that time ratified; and the prohibitions on torture in a number of national constitutions.[107] The court did not maintain that the international community had abolished torture in practice. Indeed, the court acknowledged that the prohibition on torture is "often honored in the breach," but observed that it was not aware of any nation that verbally asserted that it had the right to engage in torture.[108]

After *Filartiga*, some courts sought to limit the scope of CIL claims by suggesting that only certain well-defined and widely accepted CIL norms could be brought in ATS litigation. The Ninth Circuit, for ex-

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103 Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

104 *Id.*

105 *Id.*

106 G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

107 *See Filartiga*, 630 F.2d at 881–84.

108 *Id.* at 884 & n.15.

ample, stated that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."[109] Other courts suggested that the ATS is limited to particularly egregious violations of CIL. The Second Circuit stated, for example, that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law."[110] Some litigants and commentators suggested that ATS litigation should be limited to violations of *jus cogens* norms.[111] A *jus cogens* norm is a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[112] In the Ninth Circuit opinion that the Supreme Court reviewed in *Sosa*, the court rejected such a *jus cogens* limitation, explaining:

> The notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the [ATS] in 1789. Thus, to restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the [ATS].[113]

With respect to the sources of CIL, the Second Circuit eventually pulled back from the approach in *Filartiga*, which, as we noted earlier, had relied heavily on verbal statements and "consensus" and had downplayed actual practice. In particular, in *Flores v. Southern Peru Copper Corp.*,[114] the court held that, "[i]n determining whether a particular rule is a part of customary international law — i.e., whether States universally abide by, or accede to, that rule out of a sense of legal obligation and mutual concern — courts must look to concrete evidence of the customs and practices of States."[115] In other words, just as with the issue of scope, some courts began to develop a revisionist position with respect to the sources of CIL in ATS litigation. Some

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[109] *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

[110] Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999). The Second Circuit later clarified that "*Zapata* does not establish 'shockingly egregious' as an independent standard for determining whether alleged conduct constitutes a violation of international law." Flores v. S. Peru Copper Corp., 414 F.3d 233, 253 (2d Cir. 2003).

[111] *See, e.g.*, Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997).

[112] Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[113] Alvarez-Machain v. United States, 331 F.3d 604, 614 (9th Cir. 2003) (citation omitted), *rev'd on other grounds sub nom.* Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[114] 414 F.3d 233 (2d Cir. 2003).

[115] *Id.* at 250 (emphasis omitted); *see also* United States v. Yousef, 327 F.3d 56, 103 & n.37 (2d Cir. 2003) (favoring "formal lawmaking and official actions of States" over scholarly opinions as proper bases for determining states' practices). In *Flores*, the court rejected the claim that intranational pollution violates CIL. *See Flores*, 414 F.3d at 255.

scholars, too, began to criticize reliance on verbal statements and "consensus" as a basis for CIL, and to argue for a renewed emphasis on state practice.[116]

Table 1 illustrates the four pre-*Sosa* debates described above:

TABLE 1

	Conventional Wisdom in 1990s	Revisionist View
Pre-*Erie* Status of CIL	Federal law	General law
Post-*Erie* Status of CIL	Wholesale incorporation as federal common law	Selective incorporation based on constitutional or political branch authorization
Nature of ATS	Either creates federal causes of action or authorizes courts to create them	Only jurisdictional
Scope and Sources of CIL to be Applied by Courts in ATS Litigation	All of CIL, derived from wide range of materials	Limited set of CIL norms, based primarily on the practice of nations

IV. *SOSA*, THE ATS, AND THE MODERN POSITION

In this Part, we analyze *Sosa*'s implications for the four debates discussed above. As we demonstrate, *Sosa* directly resolved two of the four debates. With respect to the first debate over the pre-*Erie* status of CIL, the Court clearly understood that CIL historically had the status of nonfederal general common law. With respect to the third debate over whether the ATS authorizes the federal courts to create common law causes of action based on CIL, the Court concluded that even though the ATS was originally intended as only a jurisdictional statute, Congress's expectations in enacting the ATS have the effect today of authorizing courts to develop a narrow set of federal common law causes of action. In addition to resolving these debates, the Court in *Sosa* strongly suggested that, with respect to the fourth debate over the scope and sources of CIL to be applied in ATS litigation, courts

116 *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

should discern and apply CIL more carefully and cautiously than many lower courts did prior to *Sosa*. Finally, although the Court in *Sosa* did not specifically address the second debate over whether CIL is automatically part of the post-*Erie* federal common law, the Court's reasoning and conclusions are incompatible with the claim that CIL has this status. We assess *Sosa*'s implications for this second debate last because these implications are the most complex and are related to the ways in which *Sosa* resolved the other debates.

*A. CIL's Pre-*Erie *Status*

In *Sosa*, the Supreme Court dismissed Alvarez-Machain's CIL claim on the basis of a complicated chain of reasoning. A critical link in that chain concerned the pre-*Erie* status of CIL. Although the Court acknowledged that U.S. courts had applied CIL since the Founding, it made clear that before *Erie* the CIL they applied had the status of general common law, not federal common law. This conclusion, in turn, led the Court to consider carefully the implications of *Erie* for the domestic status of CIL.

The Court repeatedly described the few law of nations claims that it thought could have been brought historically under the ATS as part of the pre-*Erie* "common law."[117] The Court also invoked two famous Holmesian descriptions of general common law in the context of referring to the pre-*Erie* domestic status of the law of nations.[118] Relatedly, the Court explained that the law of nations in the nineteenth century encompassed subjects such as the international "law merchant"[119] that

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[117] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754 (2004) ("[A]t the time of enactment the jurisdiction [conferred by the ATS] enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."); *id.* at 2759 ("[S]ome, but few, torts in violation of the law of nations were understood to be within the common law."); *id.* ("[T]he ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations . . . ."); *id.* at 2764 ("[T]he jurisdiction [conferred by the ATS] was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority.").

[118] *Id.* at 2762 ("[T]he prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))); *id.* at 2760 (noting that the argument that the Continental Congress would have had no reason to recommend that States enact statutes to duplicate international law remedies already available at common law "rests on a misunderstanding of the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the 'brooding omnipresence' of the common law then thought discoverable by reason" (footnote omitted) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting))).

[119] *Id.* at 2756.

were indisputably part of the pre-*Erie* general common law.[120] The Court then stated that "it was the law of nations in this sense" — the same general common law sense as the law merchant — "that our precursors spoke about when the Court explained [in *The Paquete Habana*] the status of coast fishing vessels in wartime grew from 'ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law.'"[121] And the Court noted the change in the prevailing conception of the "common law" brought about in *Erie*, thus further linking the pre-*Erie* status of the law of nations with general common law.[122]

These passages show that the Court in *Sosa* understood CIL as having general law, rather than federal law, status prior to *Erie*. This conclusion is reinforced by the Court's extensive consideration of what it referred to as the "watershed" decision in *Erie* and its implications — consideration that would have been largely unnecessary if CIL were federal law, rather than general law, prior to *Erie*. As a result, *Sosa* repudiated a central historical claim made by many proponents of the modern position — that is, that CIL historically had the status of federal law and thus lay outside of *Erie*'s reach.

B. Sosa *and the ATS*

Sosa, and the U.S. government acting as amicus curiae, argued that the ATS was simply a jurisdictional statute that did not create a cause of action for violations of CIL. Alvarez-Machain, by contrast, argued that the ATS did create CIL causes of action, including a cause of action for arbitrary arrest.

The Court unanimously concluded that "the ATS is a jurisdictional statute creating no new causes of action."[123] The Court reasoned that the original ATS provided that courts would have "cognizance" of certain causes of action, a term that referred to jurisdiction.[124] It further noted that the ATS was placed in § 9 of the Judiciary Act of 1789, "a statute otherwise exclusively concerned with federal-court jurisdiction."[125] In his concurrence, Justice Scalia (joined by Chief Justice

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120 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

121 *Sosa*, 124 S. Ct. at 2756 (quoting The Paquete Habana, 175 U.S. 677, 686 (1900)).

122 *See id.* at 2762. In addition, Justice Scalia's concurrence explained at length that CIL had the status of general common law before *Erie*. *Id.* at 2769–71 (Scalia, J., concurring). The majority opinion disputed several aspects of Justice Scalia's concurrence, but not this one.

123 *Id.* at 2761 (majority opinion); *see also id.* at 2754 ("[W]e agree the statute is in terms only jurisdictional . . . ."); *id.* at 2755 (referring to the ATS's "strictly jurisdictional nature"); *id.* ("[W]e think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

124 *See id.* at 2755.

125 *Id.*

Rehnquist and Justice Thomas) agreed with this analysis.[126] Thus, as the Court explained, "[a]ll Members of this Court agree that § 1350 is only jurisdictional."[127]

The Court in *Sosa* believed that its holding that the ATS is only a jurisdictional statute "raise[d] a new question . . . about the interaction between the ATS at the time of its enactment and the ambient law of the era."[128] Exploration of this new question led the Court to conclude that, although the ATS was not intended to create causes of action related to CIL, it has the effect today of authorizing federal courts to recognize post-*Erie* federal common law causes of action for a limited number of CIL violations. The Court reached this conclusion in three steps.

First, the Court reasoned that the Congress that enacted the ATS in 1789 assumed that there would be preexisting law, with the status of general common law, to apply in cases within ATS jurisdiction. As the Court explained, "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."[129] The Court rejected Sosa's argument (and the executive branch's argument as amicus curiae) that the 1789 Congress believed that the law of nations component of ATS jurisdiction would lie fallow unless and until Congress separately enacted statutory causes of action to be applied in ATS cases.[130] Rather, the historical materials persuaded the Court that "the statute was intended to have practical effect the moment it became law"[131] and that Congress thought the prac-

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126 *See id.* at 2772 (Scalia, J., concurring).

127 *Id.* at 2764 (majority opinion). It is also worth noting that all nine Justices in *Sosa* referred to 28 U.S.C. § 1350 as the "Alien Tort Statute," not the "Alien Tort Claims Act," despite disagreement in the briefs over the proper title for the statute. *Compare* Brief of Petitioner at i, *Sosa*, 124 S. Ct. 2739 (No. 03-339) (referring to the "Alien Tort Statute" in identifying the questions presented), *with* Brief for the Respondent at i, *Sosa*, 124 S. Ct. 2739 (No. 03-485) (referring to the "Alien Tort Claims Act" in identifying the questions presented). The latter title had been favored by those advocating a cause-of-action construction of the ATS. *See* Bradley, *supra* note 89, at 592–93.

128 *Sosa*, 124 S. Ct. at 2755.

129 *Id.*

130 *See id.* at 2758 ("[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."); *id.* at 2758–59 ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.").

131 *Id.* at 2761.

tical effect would be guaranteed by preexisting CIL-related causes of action available at common law.[132]

Second, the Court concluded that it should preserve the 1789 Congress's background expectation that there would be common law causes of action available for judicial application under the ATS. The Court acknowledged that the common law applied in 1789 differed significantly from the common law that federal courts applied after *Erie*. But the Court thought "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[133] In effect, the Court attempted to "translate" the First Congress's expectations about the effect of the ATS, which rested on a pre-*Erie* understanding of general common law, into the contemporary context in which federal courts apply nonstate common law only in specialized circumstances.[134] In justifying this conclusion, the Court noted that "no development in the two centuries from the enactment of § 1350 to the birth of the modern line of [ATS] cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[135] In particular, neither *Erie* nor Congress had categorically prohibited the judicial recognition of claims under CIL.[136]

Third, the Court concluded that the best translation of the original ATS in the post-*Erie* world is that the ATS authorizes the judicial creation of a domestic remedy, in the form of a cause of action, for a narrow set of CIL violations.[137] Thus, as Justice Scalia's concurrence explained (and criticized), the Court inferred, from a jurisdictional statute that enabled courts to apply CIL as general common law, the authorization for courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-*Erie* federal common law.[138] The Court did not explain how this conclusion was consistent with its description of the ATS as only jurisdictional or with its view that "[t]he vesting of jurisdiction in the federal courts does not in and of itself

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[132] *See id.* ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

[133] *Id.* at 2765.

[134] For discussion of a similar idea of translation in the constitutional context, compare Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993), with Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997). *See also* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

[135] *Sosa*, 124 S. Ct. at 2761.

[136] *See id.* at 2761–62.

[137] *See id.* at 2761–65.

[138] *See id.* at 2773 n.* (Scalia, J., concurring).

give rise to authority to formulate federal common law."[139] But its description of the legitimate bases of post-*Erie* federal common law included a citation to *Textile Workers Union v. Lincoln Mills*,[140] a decision in which (as we noted earlier) the Court implied federal common law–making powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.[141] Presumably, the common law powers recognized in *Sosa* were similar.[142]

We should make clear that we are merely describing the Court's reasoning here, not defending it. The idea of "translating" law to fit with changed circumstances is controversial even in constitutional law, where formal amendment of the law is much more difficult than with a statute like the ATS. Moreover, even assuming translation is sometimes appropriate with respect to statutes, it can reasonably be argued that the substantial changes in both the nature of the common law and the content of international law make translating the "law of nations" prong of the ATS too difficult. (This was, essentially, Justice Scalia's position.) There is also tension, if not outright contradiction, in the Court's construction of the ATS as both purely jurisdictional and an authorization for creating causes of action. Full exploration of this potential problem in the Court's analysis is beyond the scope of this project. The key point for present purposes is simply that the Court based its allowance of CIL claims under the ATS on its understanding of Congress's intent in enacting the ATS.

C. Scope and Sources of CIL in ATS Litigation

The Court in *Sosa* limited its holding that the ATS authorizes federal courts to recognize federal common law causes of action based on CIL by requiring that any such recognition satisfy at least two requirements. First, the CIL norm in question must be "accepted by the civilized world" to the same degree as the few law of nations norms that the First Congress would have expected to be enforceable through private claims in 1789.[143] Second, the CIL norm in question must be "defined with a specificity" comparable to the historic law of nations norms.[144] The Court added that the evaluation of "whether a norm is

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[139] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981).

[140] 353 U.S. 448 (1957).

[141] *See id.* at 456–57.

[142] For criticism of the Court's reasoning on this issue, see Note, *An Objection to* Sosa *— And to the New Federal Common Law*, 119 HARV. L. REV. 2077 (2006).

[143] *Sosa*, 124 S. Ct. at 2761. These norms involved violations of safe conduct, infringement of the rights of ambassadors, and piracy. For discussion of the right of safe conduct, see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[144] *Sosa*, 124 S. Ct. at 2761.

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."[145]

The Court made clear that this test for domestic enforcement of CIL under the ATS is more demanding than the test for whether a CIL norm is internationally binding according to the traditional standards for CIL.[146] It made clear, in other words, that the CIL violations Congress made actionable in ATS cases are a subset of all CIL violations. Applying this two-part test, the Court concluded that Alvarez-Machain did not allege a violation of a norm of CIL so well defined and accepted as to support the creation of a federal cause of action.[147] Although this conclusion is easy to state, the Court's analysis of the sources and scope of the CIL available in ATS cases raises a number of questions. In what follows, we explore these questions, and explain why, despite ambiguities in some places, the opinion is best read as significantly limiting the causes of action available in ATS cases.

Consider first the Court's "clear definition" requirement. Many lower courts prior to *Sosa* had not required a close correspondence between the content of the CIL sources relied on by plaintiffs and their causes of action. The Supreme Court in *Sosa* took a stricter approach. For example, the Court maintained that the recognition by national constitutions of a prohibition on arbitrary detention reflected a consensus at too "high [a] level of generality" to support Alvarez-Machain's claim for relief for a one-day detention not authorized by law.[148] Similarly, it found insufficient the *Restatement of Foreign Relations Law*'s claim that a "state policy"[149] of "*prolonged* arbitrary detention"[150] was

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[145] *Id.* at 2766 (footnote omitted).

[146] *See id.* at 2768 ("Alvarez 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 . . . ." (footnote omitted)); *id.* at 2769 ("Even the *Restatement*'s limits [on the CIL 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."); *id.* at 2769 n.29 ("[T]hat a rule as stated is as far from full realization as the one Alvarez 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."); *cf.* Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 519 (2002) (noting that "the fact that a rule has been recognized as CIL, by itself, is not an adequate basis for viewing that rule as part of federal common law").

[147] *See Sosa*, 124 S. Ct. at 2766–69.

[148] *Id.* at 2768 n.27.

[149] *Id.* at 2768 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

a violation of CIL, in part because the *Restatement* required "a factual basis beyond relatively brief detention in excess of positive authority."[151] The *Sosa* decision thus seems to limit causes of action in ATS cases to those for which the content of the CIL norm corresponds closely with the plaintiff's sources.[152] This conclusion is consistent with the Court's insistence, in another part of the opinion, that it had "no congressional mandate to seek out and define new and debatable violations of the law of nations."[153]

The meaning of the "acceptance" prong of the *Sosa* test for recognizing a cause of action in ATS cases is less certain. As we noted earlier, many pre-*Sosa* lower court decisions downplayed the traditional state practice requirement for CIL and emphasized instead state acceptance as reflected in instruments like General Assembly resolutions, multilateral treaties, national constitutions, and official pronouncements of international bodies.[154] *Sosa* appears to render some of these sources irrelevant, minimize the significance of others, and reemphasize the importance of looking to state practice in ATS cases.

The Court in *Sosa* first looked to the Universal Declaration of Human Rights, a U.N. General Assembly resolution outlining fundamental human rights norms that pre-*Sosa* courts had relied on heavily in identifying causes of action in ATS cases.[155] The Court declined to rely on this source as a basis for a CIL cause of action, noting correctly that the "Declaration does not of its own force impose obligations as a matter of international law" and concluding that the Declaration did not itself "establish the relevant and applicable rule of international law."[156] Although the Court went on to acknowledge that the Declaration had a "substantial indirect effect on international law,"[157] it also noted that the Declaration had "little utility under the standard set out in this opinion," and the Court did not consider the Declaration further in its analysis of whether Alvarez-Machain's proposed norm of arbitrary detention had become so well accepted as to warrant a cause of action in ATS cases.[158]

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150 *Id.* (emphasis added) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702).

151 *Id.* at 2769.

152 *See id.* at 2768.

153 *Id.* at 2763.

154 *See supra* section III.D, pp. 888–91.

155 *See Sosa*, 124 S. Ct. at 2767; *see also* Universal Declaration of Human Rights, *supra* note 106, at 71.

156 *Sosa*, 124 S. Ct. at 2767.

157 *Id.* at 2767 n.23.

158 *Id.* at 2767.

The Court reached a similar conclusion with respect to the International Covenant on Civil and Political Rights[159] (ICCPR). Like the Universal Declaration, the ICCPR was widely relied upon in pre-*Sosa* ATS cases for the identification of CIL causes of action. The Court in *Sosa* noted that the ICCPR, unlike the Universal Declaration, was a ratified treaty and therefore bound the United States as a matter of international law. But the Court added that the ICCPR was "not self-executing and so did not itself create obligations enforceable in the federal courts."[160] For this reason, the Court concluded that the ICCPR, like the Universal Declaration, had "little utility" under the *Sosa* standard for identifying CIL causes of action.[161] Although the Court did mention the ICCPR in its subsequent analysis of CIL, it did so only in a negative way. After describing Alvarez-Machain's claim that the CIL prohibition on "arbitrary detention" extended to any brief detention not sanctioned by domestic law, the Court added that "[w]hether or not this is an accurate reading of the [ICCPR], Alvarez cites little authority that a rule so broad has the status of a binding customary norm today."[162] The clear implication is that, contrary to lower court practice prior to *Sosa*,[163] the presence of a norm in the ICCPR no longer provides significant evidence of a CIL cause of action in ATS cases.[164]

The Court in *Sosa* also considered national constitutions, which showed that "many nations recognize a norm against arbitrary detention."[165] This too was a source that lower courts had considered prior to *Sosa*.[166] In contrast to the Universal Declaration and the ICCPR, the Court implied that this source might be influential in establishing that nations had accepted the norm in question.[167] But as explained earlier, the Court dismissed this source because the consensus against arbitrary detention reflected in the constitutions was at a significantly higher level of generality than Alvarez-Machain's claim.[168]

Yet another source the Court considered was the *Restatement of Foreign Relations Law*. Once again, lower courts had relied heavily and uncritically on the *Restatement* in developing federal common law causes of action under the ATS. A number of courts viewed the *Re-*

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159 Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

160 *Sosa*, 124 S. Ct. at 2767.

161 *Id.*

162 *Id.* at 2768.

163 *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d 604, 620–21 (9th Cir. 2003).

164 *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (disapproving pre-*Sosa* district court decisions that had relied on the ICCPR).

165 *Sosa*, 124 S. Ct. at 2768 n.27.

166 *See, e.g.*, *Alvarez-Machain*, 331 F.3d at 620.

167 *See Sosa*, 124 S. Ct. at 2768 n.27.

168 *See id.* at 2768.

statement's list of customary international human rights norms as actionable under the ATS.[169] The Court in *Sosa* rejected this approach. It explained that whether a norm was included in the *Restatement* list was:

> 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.[170]

This passage implies that even if a CIL norm is included in the *Restatement*, the norm might not be sufficiently well defined to support a cause of action under the ATS.

Another way in which the Court limited the sources that had been relied on in pre-*Sosa* cases was by shrinking the allowable gap between actual state practice and the proposed CIL cause of action. The Second Circuit in *Filartiga* had reasoned that "[t]he fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."[171] While acknowledging that "violations of a rule [do not] logically foreclose the existence of that rule as international law," the Court in *Sosa* observed: "that a rule as stated is as far from full realization as the one Alvarez 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."[172] Contrary state practice by itself does not disprove the existence of a rule of CIL or a private cause of action, but courts will be less likely to recognize the rule or cause of action when there is a large gap between it and actual state practice.

In sum, the Court in *Sosa* departed in many respects from the lower courts' prevailing approach to recognizing CIL causes of action in ATS cases. Its "definition" requirement demands a tight connection between the plaintiff's allegations and the sources supporting a CIL cause of action. And its "acceptance" requirement contemplates a nar-

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[169] *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 789, 795 (9th Cir. 1996); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003). The *Restatement* provides that a state violates CIL if:

> as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

[170] *Sosa*, 124 S. Ct. at 2769.

[171] Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

[172] *Sosa*, 124 S. Ct. at 2769 n.29.

row conception of relevant sources of law. More specifically, as compared to pre-*Sosa* practice, the Court in *Sosa* gave little weight to both the Universal Declaration of Human Rights and the ICCPR, narrowed the relevance of national constitutions and the *Restatement*, and reduced the allowable gap between a CIL norm's aspiration and the actual practice of states. It is no surprise, in this light, that the Court in *Sosa* envisioned that, under its approach, only a modest number of claims would be recognized under the ATS.[173]

It remains unclear, however, precisely how far *Sosa* went in this regard. The lack of clarity results from the Court's favorable citation to prior lower court opinions that had embraced the very methods and sources of CIL identification that the Court in *Sosa* appeared to discount. For example, the Court stated that its definition and acceptance limitations were "generally consistent" with the reasoning in *Filartiga*, even though *Filartiga* relied on sources — General Assembly resolutions, unratified or non-self-executing treaties, and a survey of national constitutions — that the Court in *Sosa* discounted or deemed irrelevant.[174] The Court also cited *Filartiga* for the proposition that its position on recognizing CIL causes of action "has been assumed by some federal courts for 24 years."[175] But *Filartiga* did not view the ATS as authorizing the development of federal common law causes of action. Instead, *Filartiga* assumed for the purposes of its analysis that the ATS was a purely jurisdictional statute and was constitutional for suits between aliens because CIL was federal common law; it did not consider the cause of action question and indeed the court remanded on the issue of governing law.[176] The Court's citations to *Filartiga* are all the more puzzling because the Court disapprovingly referred to other cases that had relied on the same sources for the identification of CIL as those relied on in *Filartiga*.[177] This leaves two possible explanations for the *Filartiga* references. The Court may have cited *Filartiga* and related decisions simply for the proposition that *some* aspects of CIL could be domesticated in ATS cases, a point on which *Filartiga* and *Sosa* clearly agree. Or it may have cited *Filartiga* and related decisions not because it agreed with their use of sources, but because it agreed with their ultimate conclusions about particular rules of CIL. Regardless of what one makes of these citations, ultimately they must bear less weight than the Court's own treatment of controversial sources of CIL, which, as discussed above, was significantly restrained.

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[173] *See id.* at 2761, 2764.

[174] *See id.* at 2765–66.

[175] *Id.* at 2765.

[176] *See Filartiga*, 630 F.2d at 889.

[177] *See Sosa*, 124 S. Ct. at 2768 n.27 (disapproving of cases cited in Brief for Respondent Alvarez-Machain at 49 n.50, *Sosa*, 124 S. Ct. 2739 (No. 03-339)).

*D. CIL's Post-*Erie *Domestic Status in the Absence of Political Branch Authorization*

We now turn to the implications of *Sosa* for the modern position that all of CIL, "whatever [it] requires," is automatically incorporated wholesale into post-*Erie* federal common law.[178] Recall that the modern position rests on two principal arguments: first, the historical claim that CIL was part of federal law rather than general law prior to *Erie*; and second, the doctrinal claim that CIL was incorporated wholesale into federal common law after *Erie*.[179] We have already explained how *Sosa* rejected the modern position's historical claim. In this section, we explain why the Court's reasoning in *Sosa* cannot be reconciled with the modern position claim about CIL's post-*Erie* status.

Our basic argument is that the opinion in *Sosa* is preoccupied with the limitations that *Erie* imposes on the federal courts' common law–making powers — limitations that are inconsistent with the modern position. In particular, the Court's insistence in *Sosa* that any federal common law relating to CIL be grounded in, conform to, and not exceed the contours of what the political branches have authorized; its recognition that the ATS authorizes courts to enforce only a very small subset of CIL; and its limited view of judicial power vis-à-vis the federal political branches and even the states in cases involving CIL simply cannot be reconciled with the modern position that all of CIL is automatically part of judge-made federal common law even in the absence of political branch authorization. After making these points, we consider counterarguments.

1. Inconsistencies Between Sosa *and the Modern Position.* — The Court in *Sosa* embraced a conventional understanding of the nature of post-*Erie* federal common law. It noted that *Erie* significantly narrowed the common law powers of federal courts to "havens of specialty," or "interstitial areas of particular federal interest."[180] Although the Court acknowledged that *Sabbatino* had recognized a "competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine," the Court explained that even in the foreign relations context "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[181]

The Court in *Sosa* further suggested that these limitations on post-*Erie* federal common law had certain implications for judicial incorporation of CIL — three concerning separation of powers and one con-

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[178] Brilmayer, *supra* note 2, at 324 (emphasis omitted).

[179] *See supra* section III.A, pp. 882–85; section III.B, pp. 885–87.

[180] *Sosa*, 124 S. Ct. at 2762.

[181] *Id.*

cerning federalism. First, and most fundamentally, in deciding whether the federal courts could incorporate CIL even though the ATS was merely a jurisdictional statute, all nine Justices engaged in a search for positive authority for the incorporation. That is, the Court unanimously turned not to a discussion of powers inherent in the federal courts or of the broad common law status of CIL, but rather to Congress's intent in enacting the ATS. Indeed, the entire thrust of the *Sosa* opinion was an attempt to ground its holding about the incorporation of CIL in what Congress intended and authorized.[182] The historical section of the opinion was consumed by a search for the original understanding of what Congress authorized,[183] and the Court built on this historical understanding to ascertain what the ATS authorized in modern times. So, for example, the Court rejected the claim that the ATS, with its "limited, implicit *sanction*"[184] of judicial recognition of CIL claims, "should be taken as *authority* to recognize the right of action asserted by Alvarez here."[185] Rather, it stated as a reason for judicial caution in creating new causes of action under the ATS that "[w]e have no *congressional mandate* to seek out and define new and debatable violations of the law of nations."[186]

Second, and related to the authorization requirement, the Court made clear that the development of a domestic federal common law of CIL must proceed interstitially and conform to the wishes of the political branches. The Court twice invoked the non-self-execution declaration attached by the United States to its ratification of the ICCPR as a reason not to rely on the ICCPR in developing domestic federal common law related to CIL.[187] It also noted that the "affirmative authority" in the Torture Victim Protection Act, which Alvarez-Machain

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[182] Justice Scalia's concurrence understood the majority's approach in this way, describing it as finding "authorization in the understanding of the Congress that enacted the ATS." *Id.* at 2773 (Scalia, J., concurring).

[183] *See id.* at 2754 (majority opinion) ("[A]t the time of enactment the [ATS] *enabled* federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." (emphasis added)); *id.* (noting that the ATS gave "limited, implicit *sanction* to entertain the handful of international law *cum* common law claims understood in 1789" (emphasis added)); *id.* at 2756 ("It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably *on minds of the men who drafted the ATS* with its reference to tort." (emphasis added)); *id.* at 2759 ("Congress *intended* the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." (emphasis added)); *id.* ("[T]he ATS *was meant to underwrite* litigation of a narrow set of common law actions derived from the law of nations . . . ." (emphasis added)); *id.* at 2761 ("[The ATS] is best read *as having been enacted on the understanding* that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." (emphasis added)).

[184] *Id.* at 2754 (emphasis added).

[185] *Id.* (emphasis added).

[186] *Id.* at 2763.

[187] *See id.* at 2763, 2767.

invoked in support of his claim, "is confined to specific subject matter" and would not support "judicial creativity" beyond its terms.[188] And it tethered modern recognition of CIL-based claims to the historical paradigms Congress anticipated in enacting the ATS. Finally, the Court specifically mentioned the possibility of "case-specific deference to the political branches" in deciding whether to allow particular suits under the ATS.[189]

Third, the Court emphasized that the separation of powers limitations on the common law powers of federal courts were especially forceful in foreign relations cases. As the Court noted, "the potential implications for the foreign relations of the United States of recognizing [federal common law causes of action in ATS cases] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[190]

Fourth, the Court explained that *Erie*'s federalism concerns were relevant even to a federal common law of CIL. In disputing Justice Scalia's contention that the Court's analysis would mean that the federal question jurisdiction statute, like the ATS, would carry "with it an opportunity to develop common law," the Court noted that "our holding today [about the ATS] is consistent with the division of responsibilities between federal and state courts after *Erie* as a more expansive common law power related to 28 U.S.C. § 1331 might not be."[191] Even with regard to CIL, the Court made plain, the federalism justification for a narrow reading of the common law powers of federal courts remains.

This approach to judicial incorporation of CIL is fatal to the modern position that all of CIL is federal common law. As an initial matter, the application of all of CIL as federal common law is inconsistent with the requirement that federal common law be interstitial. There is also no political branch authorization for the application of all of CIL as federal common law. A wholesale incorporation of the CIL of human rights in particular would defy the wishes of the political branches, which have consistently ratified human rights treaties on the condition that they not apply as domestic law. The wholesale *judicial* incorporation of CIL into domestic federal law is also at odds with the proposition that federal courts must act cautiously in this area. Finally, to the extent that the federal common law of CIL in the human

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188 *Id.* at 2763. The Court drew this conclusion even though the TVPA's legislative history endorsed ATS litigation, reasoning that "Congress *as a body* ha[d] done nothing to promote such suits." *Id.* (emphasis added).

189 *Id.* at 2766 n.21.

190 *Id.* at 2763; *see also id.* ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.").

191 *Id.* at 2765 n.19 (citation omitted).

rights context would address traditional domestic concerns like the domestic regulation of the death penalty,[192] it would be in tension with *Erie*'s federalism principles.

Not only is the modern position inconsistent with the post-*Erie* approach articulated in *Sosa*, but it is also inconsistent with what the Court in *Sosa* stated it was allowing. *Sosa* involved a situation, according to the Court, in which the political branches *had* authorized the incorporation of CIL (through the ATS). Even so, the Court made clear that it was authorized to incorporate only a small portion of CIL. In response to Justice Scalia's claim that *Erie* precluded the domestic incorporation of CIL in ATS cases, the Court insisted only that "the door to further independent judicial recognition of actionable international norms" was not shut altogether,[193] but rather was "still ajar subject to vigilant doorkeeping, and thus open to a *narrow class* of international norms today."[194] The Court repeatedly made the point that it was not embracing the wholesale incorporation of CIL. Instead, it was simply defending the possibility that federal courts, consistent with what Congress has authorized, need not "avert their gaze *entirely* from any international norm intended to protect individuals,"[195] that *Erie* did not cause courts to lose "*all* capacity to recognize enforceable international norms,"[196] and that nothing Congress had done "shut the door to the law of nations *entirely*."[197] These passages assume that *Erie* significantly narrowed, but did not eliminate, the circumstances in which CIL could be applied domestically, consistent with political branch authorization. The passages are difficult to square with the modern position claim that all of CIL applies as federal common law in the absence of political branch authorization.

Finally, the Court's disclaimer concerning the federal question jurisdiction statute further supports the view that it rejected the modern position. The Court disagreed with Justice Scalia's claim that under the majority's approach every grant of jurisdiction — most notably the federal question statute, 28 U.S.C. § 1331 — would carry with it the opportunity to develop federal common law related to CIL.[198] The

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[192] *Cf.* William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) ("While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal.").

[193] *Sosa*, 124 S. Ct. at 2764.

[194] *Id.* (emphasis added). The Court made the same point in noting that its dispute with Justice Scalia's approach was over "whether some norms of today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action beyond § 1350." *Id.*

[195] *Id.* at 2764–65 (emphasis added).

[196] *Id.* at 2765 (emphasis added).

[197] *Id.* (emphasis added).

[198] *Id.* at 2765 n.19.

Court observed that in contrast to its conclusion that the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," it had "no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption."[199] The reason there was no comparable congressional assumption was that — as *Sosa*'s historical analysis suggests, and as we further explain below[200] — CIL was not considered federal law and thus was not covered by § 1331.

In addition to ruling out the modern position, *Sosa* also appears to rule out the "intermediate approach" that has been suggested by some scholars, whereby U.S. courts would apply CIL as a form of nonfederal or nonpreemptive law, akin to the pre-*Erie* general common law.[201] As we have already explained, the Court reiterated *Erie*'s assertion that federal courts could no longer apply general common law.[202] The Court specifically observed that "we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction [in *Erie*], that federal courts have no authority to derive 'general' common law."[203] In addition, the Court's narrow allowance of an incorporation of CIL in discrete circumstances authorized by the political branches differs substantially from the automatic, unauthorized incorporation of CIL that took place under the general common law regime.[204] Finally, in referring to the causes of action

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[199] *Id.*

[200] *See infra* section V.A.1, pp. 911–14.

[201] *See supra* pp. 886–87.

[202] Justice Scalia's concurrence similarly described *Erie* as having categorically disallowed federal court application of general common law. *See Sosa*, 124 S. Ct. at 2770–71 (Scalia, J., concurring).

[203] *Id.* at 2764 (majority opinion). It would be theoretically consistent with *Sosa* for federal courts to apply CIL even in the absence of federal authorization if there were pertinent state law authorization. Such an authorization would not likely flow, as some have suggested, *see, e.g.*, Weisburd, *supra* note 3, at 52–55, from state choice-of-law rules, which in general look to foreign law rather than international law. Authorization might conceivably flow from state receiving statutes, which incorporate into state rules of decision at least part of the common law of England and might thereby include CIL. *See* Bradley & Goldsmith, *supra* note 3, at 870 n.345; Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 282–85 (1932). It is doubtful, however, that such receiving statutes authorize the incorporation of modern CIL, *see* Bradley & Goldsmith, *supra* note 3, at 870 n.345, and no state court that we are aware of has construed a receiving statute in that fashion. The important point for present purposes is that any CIL applied by a federal court pursuant to a state receiving statute would not be general common law, but rather would be properly characterized as state law. It therefore would not support the "general common law" intermediate position.

[204] A subtle constitutional point also confirms this reading of the majority opinion. In citing favorably to *Filartiga* and in declining to close the door entirely on suits involving foreign government conduct, the majority appeared to envision that some cases between aliens could properly be maintained under the ATS. If CIL were merely general common law, however, and if (as the Court unanimously concluded) the ATS is simply a jurisdictional statute, then there would be

that would be allowed under the ATS, it referred specifically to "federal common law," not general common law.[205]

2. Counterarguments. — Commentators who have concluded that *Sosa* embraced the modern position tend to ignore the points we have just discussed and rely instead on two other aspects of the *Sosa* decision. We consider these aspects below and conclude that they do not contradict our conclusions.

First, commentators have emphasized the Court's statement that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[206] As we have explained, the Court in *Sosa* understood that CIL did not have the status of federal law before *Erie*, so this historical statement cannot be a claim about CIL's status as federal common law. Indeed, it is telling that the Court merely stated that U.S. domestic law "recognizes" CIL and did not claim that CIL is automatically incorporated into U.S. law, let alone into U.S. federal law. Instead of endorsing the modern position, the Court was claiming only that U.S. law can take account of CIL, which is clearly correct independent of the modern position. There were many instances prior to *Erie* in which federal courts incorporated or took account of CIL, and, as we explain in Part V, there are many post-*Erie* examples in which federal courts, consistent with the Court's statement, borrow from, or "recognize," CIL in select instances, something far short of the wholesale incorporation of CIL into U.S. federal law posited by the modern position.

Second, commentators have emphasized two references by the Court to *Sabbatino*.[207] In a parenthetical, the Court quoted the following dictum from *Sabbatino*: "[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances."[208] The Court also observed in a footnote that *Sabbatino* endorsed the reasoning of a short essay published by Professor Philip Jessup in 1939 that argued that the *Erie* doctrine should not be ap-

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no basis under Article III of the Constitution for hearing claims between aliens based upon CIL. *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) (stating that suits between aliens do not fall within the Article III Diversity Clause). This Article III problem is addressed, however, if the claim has the status of federal common law, because federal common law (unlike general common law) is considered part of the "Laws of the United States" for purposes of Article III. As for the intermediate position pursuant to which courts would apply CIL as federal law only for purposes of jurisdiction, *see supra* pp. 886–87, we would simply note that the Supreme Court even before *Erie* did not view CIL as having this status, *see supra* note 74.

[205] *Sosa*, 124 S. Ct. at 2765.

[206] *Id.* at 2764; *see also* Dodge, *supra* note 7, at 95–96; Neuman, *supra* note 7, at 129; Steinhardt, *supra* note 6, at 2252.

[207] *See, e.g.*, Neuman, *supra* note 7, at 129–30.

[208] *Sosa*, 124 S. Ct. at 2764 (alteration in original) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)) (internal quotation marks omitted).

plied to CIL.[209] Whatever their precise import, these references are not an endorsement of a wholesale federalization of CIL. The quotation from *Sabbatino* refers to the application of CIL "in appropriate circumstances," and the Jessup essay merely argues that CIL should not be treated under *Erie* as state law, not that it should be treated as post-*Erie* federal common law (the conception of which was still in its infancy in 1939). Moreover, as the Court noted in *Sosa*, the *Sabbatino* decision did not even involve the application of CIL.[210] Rather, *Sabbatino* involved the application of the act of state doctrine, which the Court made clear was based on domestic separation of powers considerations and was not required by international law.[211] While the receiver in *Sabbatino* raised a CIL argument (concerning a prohibition on the expropriation of alien property), the Court declined to consider that argument and indeed declined to apply CIL at all. It is not surprising, therefore, that the Court in *Sosa* relied on the language in *Sabbatino* only for the modest proposition that federal courts need not "avert their gaze entirely" from CIL norms protecting individuals.[212]

The Court's two other references to *Sabbatino*, which have not been emphasized by modern position proponents, further confirm that the Court did not view *Sabbatino* as support for the modern position. These references occurred in the course of explaining why courts should exercise restraint in considering new causes of action based on CIL.[213] One of these references approved *Sabbatino*'s use of the act of state doctrine to prevent foreign relations problems that would have resulted from applying CIL as a rule of decision.[214] The Court in *Sosa* believed that similar restraint was required in ATS suits that involve attempts by aliens to enforce international law against their own governments and thus "raise risks of adverse foreign policy consequences."[215] This reliance on *Sabbatino* as a restraint on the consideration of international claims contradicts the argument that the Court viewed *Sabbatino* as supporting the unrestrained incorporation of CIL into federal common law.

The other reference to *Sabbatino* occurred in a discussion of *Erie*'s transformation of the role of federal courts and of the nature of federal common law.[216] In that context, the Court noted that, "although [it has] *even* assumed competence to make judicial rules of decision of

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209 *Id.* at 2765 n.18 (citing Jessup, *supra* note 80).
210 *See id.*
211 *See Sabbatino*, 376 U.S. at 421–23.
212 *Sosa*, 124 S. Ct. at 2764–65.
213 *See id.* at 2762–63.
214 *See id.* at 2762.
215 *Id.* at 2763.
216 *See id.* at 2762.

particular importance to foreign relations," as it did in *Sabbatino*, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[217] The Court next stated, referring to the incorporation of CIL in ATS cases, that it would "be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[218] This understanding of the import of *Sabbatino* simply cannot support the wholesale incorporation of CIL as federal common law.

A final counterargument against our interpretation of *Sosa* might be that the Court's reasoning is relevant only to whether CIL supports a domestic cause of action, but has no implications for CIL's domestic status in other contexts, such as its ability to preempt state law or serve as a basis for federal question jurisdiction. This argument is not open to those who believe that *Sosa* addressed, and embraced, the modern position. In any event, we do not believe that it is a fair reading of the *Sosa* opinion. The Court's elaborate analysis of *Erie* and the nature of post-*Erie* federal common law would have been largely unnecessary if the Court had been simply speaking to the circumstances under which courts may imply a cause of action from existing domestic law, an issue generally governed by different precedent. Indeed, the Court referred to limits on implied rights of action as only one of many reasons for judicial caution in allowing claims under the ATS.[219] Moreover, for all the reasons discussed earlier, the Court's view of post-*Erie* federal common law is inconsistent with the proposition that CIL automatically and in a wholesale fashion has the status of federal law, even outside the context of causes of action.

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217 *Id.*

218 *Id.*

219 *See id.* at 2763.

Table 2 illustrates how *Sosa* resolved the four debates discussed in Part III:

TABLE 2

	Conventional Wisdom in 1990s	Revisionist View	*Sosa*
Pre-*Erie* Status of CIL	Federal law	General law	General law
Post-*Erie* Status of CIL	Wholesale incorporation as federal common law	Selective incorporation based on constitutional or political branch authorization	Selective incorporation based on constitutional or political branch authorization
Nature of ATS	Either creates federal causes of action or authorizes courts to create them	Only jurisdictional	Only jurisdictional, but nevertheless has the effect today of authorizing courts to create some federal causes of action
Scope and Sources of CIL to be Applied by Courts in ATS Litigation	All of CIL, derived from wide range of materials	Limited set of CIL norms, based primarily on the practice of nations	Limited set of CIL norms, with increased emphasis on the practice of nations

V. A POST-*SOSA* APPROACH TO CIL AS FEDERAL COMMON LAW

We argued in Part IV that *Sosa* rejected the modern position that CIL is incorporated wholesale into domestic federal common law. It does not follow, however, that CIL is irrelevant to federal common law outside the context of the ATS. The essential problem with the modern position is that it ignores the significance of *Erie* and the requirements and limitations of post-*Erie* federal common law. As *Sosa* made clear, however, CIL can be incorporated into, or inform, federal common law consistent with the requirements of *Erie*. In this Part, our goal is to sketch a general account of the federal common law of CIL that is more faithful to the premises of post-*Erie* federal common law than the overbroad modern position.

We begin by considering possible jurisdictional bases for applying CIL as federal common law. We next consider a variety of nonjurisdictional contexts in which it may be proper for courts to formulate federal common law rules relating to CIL, either as gap filling for statutes or treaties, or as the result of certain structural constitutional con-

siderations. We conclude by considering several areas of likely debate during the next decade concerning the domestic application of CIL.

A. Possible Jurisdictional Bases for CIL as Federal Common Law

The Supreme Court has made clear that, as a general matter, "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."[220] There are exceptions to this rule. In *Lincoln Mills*, the Court (controversially) interpreted a statute conferring federal jurisdiction over suits involving violations of labor contracts to authorize federal courts to develop substantive federal common law "fashion[ed] from the policy of our national labor laws."[221] And, in *Sosa* itself, the Court interpreted congressional expectations relating to a jurisdictional statute (the ATS) as authorizing courts to develop limited federal common law causes of action related to CIL. Nonetheless, consistent with the general rule, the Court in *Sosa* made clear that its interpretation of the ATS did not "imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law."[222] We now explain why two other jurisdictional provisions — the federal question statute and the diversity statute — do not confer federal common law–making power, and we distinguish them from two jurisdictional clauses in Article III — for interstate disputes and admiralty disputes — that have been construed as conferring such authority.

1. Federal Question. — Aside from the ATS, the statute most often invoked as a basis for federal common law related to CIL is the federal question statute, 28 U.S.C. § 1331, which provides district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[223] Prior to *Sosa*, commentators and litigants had argued that cases based on CIL arose under the "laws of the United States" for the purposes of § 1331. Notice that the argument here is different than under the ATS. *Sosa* addressed whether the ATS authorized federal courts to develop federal common law causes of action under CIL. The argument under the federal question jurisdiction statute, by contrast, is that CIL is part of the "laws of the United States" within the meaning of that statute. If this latter claim is true, then CIL not only gives rise to federal jurisdiction, but is itself also part of federal law with potential implications under the Constitution's Take Care and Supremacy Clauses.

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[220] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981).

[221] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). For criticism of the decision, see, for example, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957).

[222] *Sosa*, 124 S. Ct. at 2765 n.19.

[223] 28 U.S.C. § 1331 (2000).

Before *Sosa*, most lower courts that had addressed the question concluded that CIL was not part of the "laws of the United States" for purposes of the federal question jurisdiction statute and thus could not be a basis for federal jurisdiction under that statute.[224] The Court in *Sosa* itself stated that, in contrast with the ATS, there was "no reason to think that" Congress intended the federal question jurisdiction statute to authorize courts to apply CIL as federal common law.[225] The Court added that the incorporation of CIL as federal common law under the federal question jurisdiction statute might not be consistent with "the division of responsibilities between federal and state courts after *Erie*."[226] For two reasons, such skepticism about CIL and the federal question statute is warranted.

First, an analysis similar to the one that the Court in *Sosa* performed on the ATS, as applied to § 1331 and the "ambient law of the era" at the time that it was enacted, shows that the framers of § 1331 did not view CIL as part of the "laws of the United States." Section 1331 was enacted in 1875 without substantial debate.[227] It was designed to provide a statutory basis for the exercise of federal question jurisdiction provided for in Article III.[228] But in the nineteenth century, when § 1331 was enacted, Article III's reference to judicial power over cases arising under the laws of the United States was not viewed as including the law of nations.[229] This conclusion is consistent with the proposition, confirmed in *Sosa*, that CIL in the pre-*Erie* period was viewed as general common law, not federal law.

Relatedly, in the same year as the enactment of the 1875 statute, the Supreme Court held that the phrase "laws of the United States" in

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[224] *See, e.g.*, Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 193–94 (D. Mass. 1995); Handel v. Artukovic, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985). *But see* Deutsch v. Turner Corp., 324 F.3d 692, 718 (9th Cir. 2003); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

[225] *Sosa*, 124 S. Ct. at 2765 n.19.

[226] *Id.*

[227] *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 857–58 (5th ed. 2003) [hereinafter HART & WECHSLER'S FEDERAL COURTS].

[228] The most widely quoted (and indeed, the only) contemporary statement about § 1331's original meaning came from Senator Matthew Carpenter, who asserted that although "[t]he [Judiciary Act] of 1789 did not confer the whole power which the Constitution conferred . . . [the Act of March 3, 1875 (later, § 1331)] does. . . . [It] gives precisely the power which the Constitution confers — nothing more, nothing less." 2 CONG. REC. 4986 (1874). The Supreme Court later held that § 1331 did not confer all of the jurisdiction provided for in the Article III federal question provision. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

[229] *See, e.g.*, Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 545–46 (1828) (holding that a case involving application of admiralty and maritime law — elements of the law of nations — "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III); *see also* Bradley & Goldsmith, *supra* note 3, at 824; Jay, *supra* note 13, at 1309–11; Weisburd, *supra* note 73, at 1214–17. *See generally* Bradley, *supra* note 89.

the statute regulating appellate jurisdiction over state court decisions did not include the law of nations.[230] The Court reasoned that it lacked appellate jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case" because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States."[231] Many other decisions in the years between the 1875 statute and *Erie* reached similar conclusions.[232] The same well-understood and uncontroversial reason why the law of nations was not part of the "laws of the United States" for statutory appellate jurisdiction — namely, the law of nations' status as nonfederal general common law — would have applied to the original federal question jurisdiction statute.

As a result, unlike the ATS, § 1331 was not enacted on the understanding that federal courts would be able to hear CIL-based claims pursuant to § 1331's jurisdictional grant. Nor is there any indication that Congress intended to confer authority to incorporate CIL as federal common law through the general federal question statute. As with the ATS, probative legislative history surrounding conferral of general federal question jurisdiction is sparse. General federal question jurisdiction was not conferred with any permanence until 1875 and was then subject to a $500 amount in controversy requirement.[233] Nothing in the legislative history of the 1875 conferral of general federal question jurisdiction suggests that Congress even considered CIL. Indeed, recorded legislative debate on the relevant bills did not focus on the conferral of general federal question jurisdiction at all.[234]

Second, as we have already seen, one reason why the Court in *Sosa* resisted the idea that the "laws of the United States" in § 1331 included authority to develop CIL through federal common law–making was

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230 *See* N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286 (1875).

231 *Id.* at 286–87.

232 *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that the question whether forcible seizure in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review"); *see also* Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442–43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892).

233 Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875); *see also* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 6 (3d ed. 2005) (noting that Congress started to grant federal jurisdiction over specific types of cases in 1790 but did not confer "general federal-question jurisdiction until 1875"). Broad federal question jurisdiction was conferred in 1801 by the outgoing Federalist Party but was repealed the following year. *See* Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801), *repealed by* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802); *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 23–28 (1928).

234 *See* 3 CONG. REC. 2168, 2240, 2275 (1875); H.J., 43d Cong., 2d Sess. 611, 647–48 (1875); S.J., 43d Cong., 2d Sess. 371–72 (1875); 2 CONG. REC. 4300–04, 4979–88 (1874); FRANKFURTER & LANDIS, *supra* note 233, at 65 & n.34, 66–68.

that the assertion of such broad federal common law powers might not be "consistent with the division of responsibilities between federal and state courts after *Erie*."[235] It is one thing for federal courts to recognize a limited set of causes of action in suits brought by a narrow class of plaintiffs based on a statute that references the law of nations, as the Court did in *Sosa*. But when federal courts incorporate CIL wholesale into domestic law — including those aspects of CIL that increasingly regulate functions formerly regulated by states — they move from the molecular to the molar, in a manner inconsistent with the limited common law–making powers of federal courts.

In sum, if one performs the same type of analysis under the federal question jurisdiction statute that the Court in *Sosa* performed with respect to the ATS, one reaches the conclusion that the framers of the federal question statute did not intend to authorize the application of CIL.

2. Diversity. — The ATS analysis in *Sosa* also raises a question about whether CIL can be applied as federal common law in diversity cases under 28 U.S.C. § 1332. The Court in *Sosa* tried to recapture in the post-*Erie* world the relationship between the ATS and the "ambient law of the era" when the ATS was written.[236] The diversity statute was originally enacted at the same time as the ATS. Moreover, the framers of the diversity statute clearly contemplated that courts exercising diversity and alienage jurisdiction would apply the law of nations in some cases, at least in the sense in which the law of nations included the law merchant and other aspects of the general law related to commercial transactions. (This was, after all, what *Swift v. Tyson* was all about.) If *Sosa*'s analysis, translating the pre-*Erie* general common law that the ATS's framers thought would apply in ATS cases into post-*Erie* federal common law, applied to the diversity statute as well, then one might argue that the diversity statute should constitute authorization for the application of modern CIL as genuine federal common law in cases that have the required diversity of citizenship and amount in controversy.

For two reasons, we do not believe that this conclusion follows. The main reason is *Erie* itself, which *Sosa* relied on and affirmed. In overruling *Swift*, *Erie* held that diversity jurisdiction was not a basis for the application of general common law (even general common law, like the law merchant, that was part of the law of nations) or for otherwise displacing state common law rules.[237] Thousands of post-*Erie*

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[235] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 n.19 (2004).

[236] *Id.* at 2770.

[237] *See supra* section II.B, pp. 876–77.

cases have applied what was formerly general common law as state law, not federal law.

Second, unlike the diversity statute, the ATS provides jurisdiction over claims arising from a specific body of law — the law of nations — that was historically part of the general common law. The diversity statute, by contrast, provides only party-based jurisdiction and evinces no intent to facilitate particular legal claims. Rather, diversity jurisdiction was intended to secure a certain type of forum for nonresidents and aliens, independent of the source of the underlying claim.[238] The diversity statute does not pose the post-*Erie* translation issue addressed in *Sosa* since the provision of an unbiased forum to qualifying parties is unaffected by *Erie*'s shift in the understanding of substantive law.[239]

3. Interstate and Admiralty Disputes. — The Supreme Court has recognized that it is appropriate to exercise federal common law–making powers related to CIL in two jurisdictional contexts other than the ATS. The same day that *Erie* was decided, the Court drew on principles of CIL to resolve a boundary dispute between Colorado and New Mexico and made clear that its rule of decision, drawn from CIL, had the status of federal common law.[240] Similarly, the Court has indicated that when it develops common law in its admiralty jurisdiction, that law has the status of federal common law.[241]

In our view, the use of CIL in these jurisdictional contexts is easier to justify under traditional principles of federal common law than the use of CIL in the diversity and federal question contexts. Consider interstate disputes first. The best argument for the development of federal common law as a rule of decision in these cases is that uniquely federal interests derived from the Constitution demand a federal rule.[242] These cases are expressly contemplated by Article III, they fall

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[238] *See* Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 554–64 (1989).

[239] To the extent alienage jurisdiction was intended to secure a forum in which treaty obligations (such as those under the Treaty of Peace with Britain) would be enforced, respect for the Supremacy Clause in state courts and general federal question jurisdiction over claims arising under treaties now assist in achieving that intent. *See id.* at 554–64.

[240] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106–07, 110 (1938); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 738–39.

[241] *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409–10 (1953); *see also* G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. (forthcoming 2007) (manuscript at 26–27, on file with the Harvard Law School Library) (arguing that admiralty law was nonpreemptive federal law pre-*Erie*); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 326, 347–48 (1999) (noting, and criticizing, the Supreme Court's attempt "to 'translate' the Framers' conception of maritime law into . . . [the post-*Erie*] context" by transforming maritime law from general law into federal common law).

[242] *See* Texas v. New Jersey, 379 U.S. 674, 677 (1965); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14 (1975) ("[T]he au-

within the Supreme Court's original jurisdiction,[243] they cannot practically be decided by the states or under state law given that the states themselves are parties,[244] they are relatively rare,[245] and they involve the resolution of disputes that are directly analogous to disputes between nations. Moreover, both in the Judiciary Act of 1789 and today, jurisdiction over interstate disputes has been vested exclusively in the Supreme Court.[246]

Even with these limiting factors, the Supreme Court is cautious in stepping into interstate disputes where the creation of common law may be required.[247] When the Court does craft common law to govern interstate disputes, it takes into account not only constitutional[248] but

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thority to create federal common law springs of necessity from the structure of the Constitution, from its basic division of authority between the national government and the states.").

243 U.S. CONST. art. III, § 2, cl. 2; *see also* Clark, *supra* note 13, at 1324–25 (recognizing, but disputing, the conventional notion that federal common law–making authority in interstate disputes derives from Article III's jurisdictional grant).

244 *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (noting that, in interstate disputes, "our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control"); *see also* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1607–08 (1990) (citing Hamilton's understanding that federal jurisdiction over suits involving states is grounded in the principle that no man should judge his own case).

245 *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 279–80.

246 28 U.S.C. § 1251(a) (2000); Judiciary Act of 1789, § 13, 1 Stat. 73, 80.

247 *See* Illinois v. City of Milwaukee, 406 U.S. 91, 93–94, 108 (1972) (denying Illinois's motion to invoke the Court's original jurisdiction while noting that "[i]t has long been [the Supreme] Court's philosophy that '[its] original jurisdiction should be invoked sparingly'" and that the exclusive grant of interstate dispute jurisdiction is read as "obligatory only in appropriate cases," though stating that the Court's restrictions on its original jurisdiction stem, at least in part, from a desire to ease the Court's docket (quoting Utah v. United States, 394 U.S. 89, 95 (1969))); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (citing Missouri v. Illinois, 200 U.S. 496 (1906), and New York v. New Jersey, 256 U.S. 296 (1921), in explaining that "[t]he governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence"); *New York*, 256 U.S. at 309 (citing and applying the high standard of *Missouri v. Illinois*); *Missouri*, 200 U.S. at 521 ("Before this court ought to intervene [in interstate disputes] the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."); *id.* at 517–21; HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 301–03 (noting the Supreme Court's exercise of discretion to refuse to hear even cases within the Court's exclusive jurisdiction); *see also* Oklahoma v. Texas, 258 U.S. 574, 580 (1922) (adjudicating conflicting claims by Oklahoma, Texas, and the United States that had led to efforts to mobilize both states' militias).

248 *See* Colorado v. New Mexico, 459 U.S. 176, 183 (1982) (respecting the constitutional sovereignty and equality of states in developing the doctrine of equitable apportionment); *Connecticut*, 282 U.S. at 670 (noting that in suits regarding the competing water rights of states, "principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system'" (quoting Wyoming v. Colorado, 259 U.S. 419, 465, 470 (1922))); Clark, *supra* note 13, at 1322 (noting that many of the rules developed in interstate disputes "appear to implement the constitutional equality of the states"); *id.* at 1323–25, 1328–31.

also congressional guidance relevant to the dispute.[249] Indeed, when the Court decides issues arising from interstate compacts approved by Congress, the Court in effect interprets a congressional act, a task well within the traditional scope of federal common law–making.[250] Moreover, to the extent the Court looks to CIL in creating common law in these cases, it does not directly incorporate CIL into U.S. domestic law, but rather draws on the narrow component of CIL that governs, for example, international boundary or water rights to inform the federal common law that governs resolution of interstate disputes.[251] In this sense, the federal common law developed in interstate cases is doubly narrow: the occasions in which the Court develops federal common law are rare, and CIL informs domestic federal law in a limited fashion.

An additional factor distinguishes interstate jurisdiction from the federal question and diversity contexts. For over 200 years, courts have not perceived a structural need to apply CIL as federal common law in diversity and federal question jurisdiction cases. By contrast, even before *Erie*, the interstate jurisdiction clause was understood to authorize federal courts to make federal law in the absence of any legislative guidance, subject to subsequent congressional revision.[252]

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[249] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313–15, 317–23 (1981) (noting that Congress may by subsequent legislation displace federal common law regarding interstate disputes and holding that Congress had done just that in enacting the comprehensive Federal Water Pollution Control Act Amendments of 1972); *id.* at 316–17 (explaining that the standard for finding congressional preemption of federal common law is lower than for finding congressional preemption of state law); *Illinois*, 406 U.S. at 101–04 & n.5 (finding that Congress had neither prescribed nor prohibited the remedy Illinois sought but that the statutes Congress had enacted, while "not necessarily [defining] the outer bounds of the federal common law," might "provide useful guidelines in fashioning such rules of decision"); *Missouri*, 200 U.S. at 518–19 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851), in which the Court relied on related but not controlling congressional acts and a congressionally approved interstate compact to resolve an interstate nuisance dispute); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 740 (noting the Court's use of congressional guidance in interstate water pollution disputes, one of few areas of interstate dispute in which congressional guidance is available).

[250] *See Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 565–66 (noting that an interstate compact approved by Congress becomes a law enforceable by the Supreme Court); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 739.

[251] *See* Meltzer, *supra* note 146, at 540; *see also* New Jersey v. Delaware, 291 U.S. 361, 378–85 (1934) (applying the international law doctrine of the Thalweg to resolve a boundary dispute between New Jersey and Delaware); *Connecticut*, 282 U.S. at 670 ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require."); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 287 ("The Court draws on federal, state and international law, as appropriate, in fashioning the[] common law rules [that govern interstate disputes]."); Clark, *supra* note 13, at 1328–30 (noting that in implementing the constitutional equality of the states through its interstate dispute common law, the Court in some cases may "borrow international law doctrines [that were] originally developed to implement the 'absolute equality' of sovereign nations" despite the fact that these doctrines do not apply to interstate disputes "of their own force").

[252] *See Connecticut*, 282 U.S. at 670–71; Kansas v. Colorado, 206 U.S. 46, 97 (1907).

Claims of structural necessity as a basis for federal common law are more plausible if these claims have a long historical pedigree.

The same basic analysis applies to admiralty jurisdiction. Admiralty is, of course, a traditional component of the law of nations that was important to the prosperity of the infant United States.[253] Even the weak national government during the period of Confederation exercised some authority over admiralty disputes.[254] When it came time to craft the new Union, opposition to a broad federal judiciary was strong.[255] The proposed grant of federal diversity jurisdiction, for example, was bitterly opposed.[256] By contrast, even those who opposed the federal judicial system contemplated by the Constitution and established by the Judiciary Act agreed on the need for "national admiralty courts."[257] "When proposals to abolish Congress's Article III authority to establish federal courts were made in the state ratifying conventions and in the First Congress, there was usually an exception for courts of admiralty."[258] As a result, and in notable contrast with the treatment of the law of nations more generally, the Constitution explicitly extended federal judicial authority to include admiralty.[259]

Further, Congress has enacted various statutes to govern private admiralty issues. Thus, much of federal admiralty law today is found in statutes or treaties and not exclusively in the common law.[260] CIL

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253 *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 15; David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 163–64; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 14 (1948).

254 *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 6 & nn.32–33 (describing the Continental Congress's authority "to 'appoint' state courts for the trial of 'piracies and felonies on the high seas'" and Congress's establishment of a national tribunal to hear appeals in capture cases); Frank, *supra* note 253, at 6–9 (describing admiralty courts during the colonial and Confederation periods).

255 *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 6–9.

256 *See id.* at 17, 19; Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1468–71, 1477; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923).

257 WHEELER & HARRISON, *supra* note 233, at 6; *see also* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1520–21, 1523–30, 1539–40, 1555, 1565, 1570–71 (2005); Frank, *supra* note 253, at 9; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 n.6 (1928); Holt, *supra* note 256, at 1428–30 & n.26; Young, *supra* note 241, at 277–80 & nn.41–42, 314–17, 348 (noting a consensus in favor of federal admiralty jurisdiction, though disputing the suggestion that the Framers intended to federalize all substantive admiralty law).

258 WHEELER & HARRISON, *supra* note 233, at 6; *see also* Warren, *supra* note 256, at 119–20 (describing such a proposal in the First Congress); *cf. id.* at 123 & n.166 (noting a similar attempt to amend what became the First Judiciary Act to limit lower federal courts to acting as courts of admiralty).

259 *See* U.S. CONST. art. III, § 2, cl. 1.

260 *See* Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 735; Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1370–77, 1382–84 (1999); Jonathan M. Gutoff, *Federal Common*

is often used for interstitial gap-filling, an uncontroversial use of federal common law[261] that is a far cry from the wholesale incorporation of CIL contemplated by those who advocate the use of the federal question statute or the diversity statute as a basis for treating CIL as federal common law. Even on issues with respect to which Congress has not specifically legislated, the Supreme Court has tried to conform the common law of admiralty to Congress's intent behind related statutes.[262] In short, admiralty is only one small subset of CIL, and it is a subset in which federal common law is used selectively to promote the policies adopted by the political branches.

B. Possible Substantive Bases for CIL as Federal Common Law

We now turn from an examination of possible jurisdictional authorizations to possible substantive authorizations — in statutes, treaties, and executive branch pronouncements — for a federal common law of CIL. As we explain, there continues to be a robust role for CIL in the U.S. legal system even if one rejects the modern position.

1. Statutes. — Some statutes specifically reference CIL and thus invite courts to incorporate and interpret CIL as part of the statutory scheme. An oft-cited example is the federal piracy statute, which pro-

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Law and Congressional Delegation: A Reconceptualization of Admiralty, 61 U. PITT. L. REV. 367, 374 & n.32, 405–06 (2000); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 477 & n.31 (2004); *cf.* Gutoff, *supra*, at 403–06, 417 (finding congressional delegation of authority to create a federal common law of admiralty in Congress's reenactment and expansion of admiralty jurisdiction in 1948).

261 *See* Young, *supra* note 241, at 477.

262 *See* Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001) (citing American Dredging Co. v. Miller, 510 U.S. 443 (1994), for the proposition that federal common law–making in admiralty should "harmonize with the enactments of Congress in the field"); *id.* at 821 (Ginsburg, J., concurring in part) (same); *Am. Dredging Co.*, 510 U.S. at 456–57 (following the Jones Act's lead in finding that state forum non conveniens rules may apply to general maritime claims); *Miles*, 498 U.S. at 27 ("In this era [in which Congress has legislated extensively on admiralty matters], an admiralty court should look primarily to these legislative enactments for policy guidance."); *id.* at 32–37 (limiting recovery under general maritime law to coincide with the limited recovery sanctioned by Congress in related statutes); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–402 (1970) (noting that legislative "policy carries significance beyond the particular scope of . . . the statutes involved" and should "be given its appropriate weight . . . in matters of . . . decisional law" and relying on the policies behind related, but not controlling, federal statutes to recognize a wrongful death remedy in general maritime law); S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (bolstering the conclusion that New York's Workmen's Compensation Act did not apply to a maritime accident by noting that the workmen's compensation remedy would be inconsistent "with the policy of Congress to encourage investments in ships" as manifested in two acts "which declare a limitation upon the liability of [ship] owners"); *cf. Norfolk Shipbuilding*, 532 U.S. at 820 ("[Given] Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress."); Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 n.40 (1981) ("[E]ven in admiralty we decline to fashion new remedies if there is a possibility that they may interfere with a legislative program.").

vides that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[263] This statute clearly authorizes courts to ascertain and apply as federal law the CIL prohibition on piracy.[264] In this situation, it makes sense to talk about a federal law status for CIL. Similarly, the Foreign Sovereign Immunities Act[265] (FSIA) provides an exception to foreign governmental immunity for certain situations in which "rights in property taken in violation of international law are in issue."[266] The phrase "international law" in this exception refers primarily to the CIL governing the expropriation of alien property. When courts apply a CIL standard under this jurisdiction, they are best understood as doing so under a federal common law rationale.[267]

Sometimes courts develop federal common law not pursuant to an express reference in a statute, but rather in order to fill gaps in a statutory scheme. For example, some courts have looked to CIL in interpreting aspects of the FSIA, even where CIL is not expressly incorporated, based on indications in the FSIA's legislative history that this is what Congress intended.[268] Another example comes from the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.[269] In that case, the issue was what body of law should apply in determining whether to pierce the veil between a foreign government and its state-owned corporation for purposes of attributing the government's actions to the corporation (and thereby allowing a counterclaim of expropriation to be brought against the corporation). The FSIA, which provided the basis for subject matter jurisdiction and the potential abrogation of sovereign immunity, did

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263 18 U.S.C. § 1651 (2000).

264 *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

265 Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

266 28 U.S.C. § 1605(a)(3) (2000).

267 *See, e.g.*, West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 n.10 (9th Cir. 1987) ("It is appropriate to look to international law when determining whether [an action] constitutes a 'taking' for purposes of FSIA."); *cf.* 28 U.S.C. § 1350 note (2000) (defining "extrajudicial killing" in the Torture Victim Protection Act as not including a killing "that, *under international law*, is lawfully carried out under the authority of a foreign nation" (emphasis added)); Department of the Interior, Environment, and Related Agencies Appropriations Act, Pub. L. No. 109-54, § 201, 119 Stat. 499, 531 (2006) (requiring the EPA to regulate the use of human subjects in pesticide testing "consistent with . . . the principles of the Nuremberg Code with respect to human experimentation").

268 *See, e.g.*, Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1294–96 (11th Cir. 1999); *cf. In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 497–98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law . . . ."); Tex. Trading & Milling Corp. v. Fed. Republic of Nig., 647 F.2d 300, 310 (2d Cir. 1981) ("[The FSIA's] drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations.").

269 462 U.S. 611 (1983).

not address this issue. In resolving the question, the Supreme Court developed federal common law based on what it described as "principles . . . common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies."[270] As we noted earlier, this sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law.

Applying the *Charming Betsy* canon of construction is another way in which courts may look to CIL in the context of statutory construction. Pursuant to this canon, courts construe ambiguous federal statutes to avoid conflicts with international law.[271] CIL is not applied as a rule of decision under this canon, but rather as a relevant consideration in discerning Congress's intent. This canon almost certainly has the status of federal common law because a state court interpreting a federal statute would be bound to follow it. Indeed, the obligation of state courts to construe a federal statute in the same way that the Supreme Court would construe it (including by reference to the *Charming Betsy* canon where relevant) can be seen as the flip side of *Erie*.[272]

2. Treaties. — When U.S. courts apply treaties, they sometimes look to CIL principles to resolve ambiguities and fill in gaps. In doing so, they often rely on the Vienna Convention on the Law of Treaties,[273] which sets forth a variety of general rules governing the formation, interpretation, and termination of treaties. The United States has not ratified the Convention and thus it cannot bind the United States as a treaty, but the U.S. government has stated that many of the Convention's terms reflect CIL.[274] Perhaps not surprisingly, therefore, courts sometimes invoke the CIL of treaty law as embodied in the Vienna Convention.[275] Most often, they apply the principles of interpretation

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[270] *Id.* at 623.

[271] *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

[272] *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 534 n.305 (1997).

[273] *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[274] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.2 (documenting executive branch statements); S. EXEC. DOC. NO. L, at 1 (1971) (noting that the Vienna Convention "is already generally recognized as the authoritative guide to current treaty law and practice").

[275] The Second Circuit recently explained why (and how) it believed it could apply CIL based on the Vienna Convention even though the United States had not ratified the Convention:

in Articles 31 and 32 of the Convention to construe treaties that the United States has ratified.[276] Sometimes, courts look to principles of CIL as embodied in the Vienna Convention to ascertain whether a treaty exists.[277] It is unclear whether the authorization for courts to apply the CIL of treaty law in these contexts is best thought of as coming from the ratified treaty in question or from the executive branch. But in any event, as in the statutory authorization cases, these gap-filling and interpretive uses of CIL are similar to the federal common law that has been applied in the domestic realm, and these uses are closely tied to the actions and policies of the political branches.

3. Executive Branch Authorization. — In some circumstances, the executive branch can provide the authorization for courts to draw upon CIL in developing federal common law. A particularly good example is the way in which courts have addressed head-of-state immunity. For most of our nation's history, head-of-state immunity was viewed as a component of foreign sovereign immunity. Prior to *Erie*, and consistent with the view that CIL was treated as nonfederal general common law, federal and state courts alike applied the CIL of foreign sovereign immunity on the domestic plane without authorization from Congress or the Executive.[278] Around the time of *Erie*, the Supreme Court stopped applying the CIL of immunity on its own authority, as it had done under the general common law regime, and began to justify its application on the basis of executive branch authorization.[279] The Supreme Court never expressly tied its shift in

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> Although we have previously recognized the Vienna Convention as a source of customary international law, it bears underscoring that the United States has never ratified the Convention. Accordingly, the Vienna Convention is not a primary source of customary international law, but rather one of the secondary sources "*summarizing* international law," that we rely upon "only insofar as they rest on factual and accurate descriptions of the past practices of states."

Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005) (citations omitted) (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 251 (2d Cir. 2003); United States v. Yousef, 327 F.3d 56, 99 (2d Cir. 2003)).

[276] *See, e.g.*, Gonzalez v. Gutierrez, 311 F.3d 942, 949 & n.15 (9th Cir. 2002). *See generally* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004).

[277] *See, e.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 307–08 (2d Cir. 2000).

[278] Thus, for example, in the 1812 decision *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), the Supreme Court applied the CIL of sovereign immunity without bothering to consider domestic authorization to do so. Similarly, in *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (Gen. Term 1876), a New York court relied on an English precedent but no domestic authorization in holding that the former President of the Dominican Republic was entitled to immunity for his official acts. *Id.* at 599–600. *See generally* Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 307–22 (2001).

[279] In *Compania Espanola de Navegacion Maritima S.A. v. The Navemar*, 303 U.S. 68 (1938), decided just three months before *Erie* and issued the day *Erie* was argued, the Court intimated for the first time that courts were bound by executive suggestions of immunity. *Id.* at 74. Subsequently, in its 1943 decision *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the Court squarely

treatment of foreign sovereign immunity doctrines to *Erie*. But the shift took place at approximately the same time as *Erie*, and it is easy to understand why *Erie* was pivotal: *Erie*'s positivism required all applications of law to be grounded in a constitutional or political branch authorization, and there was no other plausible source of authorization.[280]

In 1976, the FSIA transferred the political branch authorization for judicial application of foreign sovereign immunity from executive suggestion to congressional statute. The FSIA did not specify whether its immunities extend to heads of state, either current or former.[281] This silence raised the question of whether a foreign head of state was entitled to immunity in U.S. courts after passage of the FSIA, and if so, on what basis. Although courts have varied in their answers to this question, they have almost always grounded the application of head-of-state immunity in an authorization from the political branches.[282] Some courts view the FSIA as providing for head-of-state immunity, even though the text of the statute is silent on the issue.[283] Most

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held that, because immunity determinations implicated important foreign relations interests, courts were bound to follow executive suggestions of immunity. *Id.* at 587. Two years later, in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court went further, stating that even in the face of executive branch silence, U.S. courts should look to "the principles accepted by the [executive branch]." *Id.* at 35. As a result, the Court explained that "it is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.*; *see also* Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

280 This posture was especially appropriate because, at the time of *Erie*, the CIL of immunity was in the midst of a transformation that rendered it less amenable to independent judicial determination. During the nineteenth century, the United States, like many other countries, adhered to the "absolute" theory of sovereign immunity, under which foreign governments were entitled to immunity for essentially all of their acts, even those that were purely commercial in nature. *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 547–50 (4th ed. 2003). In the early twentieth century, however, a number of countries began embracing the "restrictive" theory, under which foreign governments were entitled to immunity for their public or sovereign acts, but not for their private or commercial acts. *See id.* at 550–52. This shift to the restrictive theory, formally endorsed by the U.S. State Department in 1952, *see* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Attorney Gen. (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952), made the CIL of immunity much more complex and difficult to apply. It also meant that foreign sovereigns would be haled into court more often, thereby heightening the foreign policy stakes associated with immunity determinations. In this environment, it made sense that unelected judges with no foreign relations expertise would seek political branch guidance on whether and how to apply foreign sovereign immunity.

281 The FSIA defines "foreign state" to include a "political subdivision" or an "agency or instrumentality" of a foreign state, 28 U.S.C. § 1603(a) (2000), but neither the statute nor its legislative history mentions head-of-state immunity.

282 Bradley & Goldsmith, *supra* note 279, at 2166.

283 *See, e.g.*, O'Hair v. Wojtyla, No. 79-2463 (D.C. Cir. Oct. 3, 1979), *excerpted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1979, at 897 (Marian Lloyd Nash ed., 1983).

courts, however, view the FSIA as inapplicable to a head of state and instead look to executive branch authorization to apply the doctrine.[284] Among the courts that seek executive branch authorization, some recognize head-of-state immunity only in the face of an explicit suggestion of immunity by the Executive.[285] Others rely on the lack of an executive branch suggestion simply as a factor weighing against immunity.[286] In all these cases, the courts are looking, at least to some degree, for political branch authorization.

C. CIL as Federal Common Law: Future Debates

In this section, we examine three contexts in which CIL's status as domestic law is likely to be most debated during the next decade. The first involves corporate liability for alleged human rights violations, the second involves the war on terrorism, and the third involves the Supreme Court's use of foreign and international materials to inform constitutional interpretation.

1. Corporate Aiding and Abetting Liability. — Some courts prior to *Sosa* suggested that corporations could be held liable under the ATS for aiding and abetting human rights abuses committed by foreign governments.[287] If this proposition were legally correct, it would substantially increase the number and scope of potential ATS cases as compared with the first wave of ATS cases brought against state officials. Among other things, the number of ATS defendants subject to personal jurisdiction in the United States would expand; corporations typically have more assets than individual defendants and thus are likely to be a more attractive target for plaintiffs and their lawyers; and private corporations, unlike foreign governments, are not protected by sovereign immunity. For a variety of reasons, we believe that the best reading of *Sosa* is that ATS liability cannot be extended to corporations based on an aiding and abetting theory absent further action by Congress.

Most international law — both treaty-based and customary — imposes obligations only on States.[288] This is true even of much of hu-

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[284] *See, e.g.*, Ye v. Zemin, 383 F.3d 620, 624–25 (7th Cir. 2004); United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); Doe v. Roman Catholic Diocese, 408 F. Supp. 2d 272, 277–78 (S.D. Tex. 2005); Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994).

[285] *See, e.g.*, Jungquist v. Nahyan, 940 F. Supp. 312, 321 (D.D.C. 1996), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997).

[286] *See, e.g.*, First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1120–21 (D.D.C. 1996).

[287] *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[288] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note (1987); 1 OPPENHEIM'S INTERNATIONAL LAW § 6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 932 (2005).

man rights law. The Convention Against Torture,[289] for example, addresses only torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[290] There are a few norms of international law, such as prohibitions on genocide and war crimes, that apply to individuals, at least for the purpose of criminal prosecution.[291] If such norms were also applicable to corporations (a questionable proposition),[292] a corporation could be subject to liability under the ATS for directly violating one of these norms, assuming the other requirements in *Sosa* are satisfied.[293] Even if a direct liability claim were appropriate, *Sosa* suggests that it may be necessary for courts to apply limiting doctrines designed to promote international comity, such as the act of state doctrine and a requirement of exhaustion of local remedies.[294]

Corporations, however, do not typically commit, or even conspire to commit, genocide or war crimes. As a result, most of the ATS claims

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[289] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

[290] *Id.* art. 1(1).

[291] *See* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, arts. 2–5, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, arts. 2–4, U.N. Doc. S/RES/955 (Nov. 8, 1994). *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2d ed. 2001).

[292] *Cf.* Vazquez, *supra* note 288, at 943–44. It is noteworthy that none of the modern international criminal tribunals extends criminal liability to corporations and that the state parties to the relatively recent International Criminal Court negotiations considered and rejected international criminal liability for corporations. *See* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 198–200 (Roy S. Lee ed., 1999); 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 778–79 (Antonio Cassese et al. eds., 2002). Many scholars nonetheless believe that corporations can be liable under international criminal law. *See, e.g.*, Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003); Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17 (1999); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

[293] This direct liability might even extend to some situations involving conspiracy, joint venture, or vicarious liability. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir. 2006) (allowing suit against a corporation to proceed on the theory that it was vicariously liable for human rights abuses allegedly committed by a foreign government on its behalf).

[294] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004); *see also id.* at 2782–83 (Breyer, J., concurring) (emphasizing the importance of comity considerations in ATS cases). We thus disagree with the Ninth Circuit's 2–1 decision in *Sarei*, in which the court declined to apply an exhaustion requirement to corporate ATS suits, even though it acknowledged that there was international law support for such a requirement. That decision also appears to be inconsistent with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that a statute that allowed for trial of offenses under international law also implicitly incorporated international law limitations on such trials, including procedural limitations. *See id.* at 2794. The ATS's authorization of civil claims for certain international law violations should also be read as incorporating international law limitations on such claims.

brought against corporations have alleged that they were indirectly liable for human rights abuses committed by foreign government actors as a result of their acts of aiding and abetting, such as providing the perpetrators with financial support or materials. There is already a division in the courts over whether such a common law claim is consistent with *Sosa*.[295] We agree with the courts that have found that it is not.

As an initial matter, it is important to recall that the text of the ATS refers to torts "committed" in violation of international law. There is no suggestion in this language of third-party liability for those who facilitate the commission of such torts. By contrast, just a year after the enactment of the ATS, Congress enacted a criminal statute containing specific provisions for indirect liability — for example, for aiding or assisting piracy.[296]

The analysis in *Sosa* suggests a number of reasons why aiding and abetting liability should not be read into the ATS. The Court repeatedly emphasized that, consistent with the limited nature of the ATS and the separation of powers constraints on the federal courts, only a "modest number" of claims could be brought under the ATS without further congressional authorization.[297] The Court further counseled the lower courts to exercise "great caution" in recognizing new claims.[298] And the Court emphasized that "innovative" interpretations should be left to Congress.[299] As we noted earlier, however, allowing corporate aiding and abetting liability would significantly expand ATS litigation. It would also require courts to exercise significant policy judgment normally reserved to the legislature, such as fashioning the precise standards for what constitutes aiding and abetting.

For similar reasons, the Supreme Court declined to imply aiding and abetting liability in civil cases brought under the securities fraud statute. In *Central Bank of Denver v. First Interstate Bank of Denver*,[300] the Court reasoned that allowing aiding and abetting liability for securities fraud would expand litigation in a way that would implicate policy tradeoffs best resolved by Congress.[301] The Court also reasoned that Congress's authorization of aiding and abetting liability in the criminal context did not suggest a general acceptance of that

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[295] *Compare In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (disallowing aiding and abetting liability), *and* Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (same), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 337–38 (S.D.N.Y. 2005) (allowing aiding and abetting liability).

[296] *See* Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114.

[297] *Sosa*, 124 S. Ct. at 2761.

[298] *Id.* at 2763.

[299] *Id.* at 2762.

[300] 511 U.S. 164 (1994).

[301] *See id.* at 188–89.

type of liability in the civil context.[302] Finally, the Court noted the substantial uncertainties associated with the standard for aiding and abetting.[303]

Nor does a claim of corporate aiding and abetting appear to meet the requirement in *Sosa* that norms, to be actionable under the ATS, must have at least the same "definite content and acceptance among civilized nations [as] . . . the historical paradigms familiar when [the ATS] was enacted."[304] There is little evidence that civil liability for corporate aiding and abetting is widely accepted around the world. While the concept of aiding and abetting liability is recognized as a general matter in international criminal tribunals, it is applied in those tribunals only to natural persons, not to corporations. Moreover, even with respect to individuals in these cases, the standards for aiding and abetting liability vary. For example, while the International Criminal Tribunal for the Former Yugoslavia requires an aider or abettor to have mere knowledge that his acts assist in a crime, the International Criminal Court Statute is more demanding, requiring that the aider or abettor act with the purpose of facilitating the commission of the crime.[305]

A comparison between the claim rejected in *Sosa* and the argument for imposing aiding and abetting liability on corporations is revealing. The Court in *Sosa* rejected an arbitrary detention claim under the ATS even though a norm prohibiting nations from arbitrarily detaining individuals was expressly included in the ICCPR, numerous other treaties, the *Restatement of Foreign Relations Law*, and 119 national

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302 *See id.* at 180–85, 190–91.

303 *See id.* at 181 (noting that "[t]he doctrine has been at best uncertain in application"); *id.* at 188 (noting that "the rules for determining aiding and abetting liability are unclear").

304 *Sosa*, 124 S. Ct. at 2765.

305 *Compare* Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 291, art. 7(1), *with* Rome Statute of the International Criminal Court, *supra* note 291, art. 25(3)(c). *See also* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 292, at 801. Some courts have expressed in dicta the view that a 1795 Attorney General opinion, which the Court referred to in *Sosa*, provides support for aiding and abetting liability under the ATS. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1078 n.5 (9th Cir. 2006); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1173 n.6 (C.D. Cal. 2005). The 1795 opinion observes that President Washington declared in his 1793 neutrality proclamation that individuals "committing, aiding, or abetting hostilities" would "render themselves liable to punishment under the laws of nations." 1 Op. Att'y Gen. 57, 59 (1795) (opinion of William Bradford). In *Sosa*, the Court cited to different language in this opinion that specifically referred to jurisdiction under the ATS as support for the proposition that some common law causes of action could historically be brought under the ATS. *See Sosa*, 124 S. Ct. at 2759 (quoting 1 Op. Att'y Gen. at 59). The aiding and abetting language in the 1795 opinion, however, was not referring to the ATS or even to civil liability; rather, it was referring to potential criminal liability. Moreover, the opinion obviously provides no evidence that aiding and abetting liability is *currently* an accepted international law norm in the civil context.

constitutions.[306] The gap between international aspiration and enforceable ATS claims that was too large in *Sosa* is significantly larger with respect to corporate aiding and abetting liability for human rights abuses. There is no relevant treaty that embraces aiding and abetting liability for corporations, the *Restatement* says nothing about such liability, and there is no widespread state practice of imposing liability on corporations for violations of international human rights law. To paraphrase *Sosa*, that a rule of corporate liability is so far from full realization is evidence against its status as binding law and even stronger evidence against the creation by judges of a private cause of action to enforce the aspiration behind the rule.[307]

The "practical considerations" adverted to by the Court in *Sosa* also weigh against judicial recognition of corporate aiding and abetting liability. These suits entail assessments of foreign government conduct that is otherwise immune from U.S. jurisdiction under the Foreign Sovereign Immunities Act. They also pose a risk of interfering with political branch management of U.S. relations with the relevant countries — for example, in choosing whether to promote or restrict investment in these countries.[308] And this litigation is likely to be perceived as improperly extraterritorial, especially when directed at foreign companies.[309] Invoking these policy concerns, the executive branch has expressly opposed corporate aiding and abetting liability under the ATS.[310] Consistent with *Sosa* (and *Erie*), assessment of such policy issues is best left to the political branches.

Finally, the Court in *Sosa* made two specific references to corporate ATS litigation, and neither reference was supportive of aiding and abetting liability. The Court stated in a footnote that, in considering whether a norm is sufficiently definite to support a cause of action under the ATS, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor *such as a corporation or individual.*"[311] Although cryptic, this statement suggests that courts should not broaden the "scope of liability" under international law through concepts such as aiding and abetting. The

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[306] *See supra* pp. 897–900.

[307] *See Sosa*, 124 S. Ct. at 2769 n.29.

[308] *Cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 (2000) (noting that Congress thought the Executive needed flexibility in managing sanctions and incentives aimed at improving human rights in Burma).

[309] *See, e.g.*, Brief for the Gov'ts of the Commonwealth of Austrl., the Swiss Confederation, & the U.K. of Gr. Brit. & N. Ir. as Amici Curiae Supporting Petitioner, *Sosa*, 124 S. Ct. 2739 (No. 03-339).

[310] *See, e.g.*, Supplemental Brief for the U.S. of Am. as Amicus Curiae Supporting Appellants, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628).

[311] *Sosa*, 124 S. Ct. at 2765 n.20 (emphasis added).

Court also referred at length in another footnote to a pending ATS case brought against corporations that had done business with South Africa during the apartheid regime and wrote that there was a "strong argument" that courts should defer to the executive branch's view that this litigation would interfere with U.S. foreign relations.[312] These statements, along with the more general points discussed earlier, suggest that corporate aiding and abetting liability is improper under the ATS after *Sosa*. Whether corporations should be liable for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches.

2. The War on Terrorism. — In the wake of the September 11 attacks and the ensuing "war on terrorism," many of the alleged enemy combatants in U.S. custody have, in various ways, invoked CIL as federal law that, in their view, limits the Executive's discretion to conduct the war. Detainees at Guantanamo have argued, for example, that even if they are not directly covered by the Geneva Conventions, the standards reflected in Common Article 3 of the Conventions are binding on the United States as a matter of CIL and that these standards preclude trial by military commission.[313] They have also argued that their ongoing detention violates CIL prohibitions on arbitrary and prolonged detention that bind the President as part of U.S. federal common law[314] and have sought remedies for interrogation techniques and conditions of confinement that allegedly violate CIL norms.[315] Individuals allegedly subject to detention or rendition elsewhere have likewise asserted violations of CIL norms against prolonged arbitrary detention, as well as torture and other cruel, inhuman, and degrading treatment.[316]

It is highly unlikely that such claims can be brought against the government in an ATS suit after *Sosa*. As an initial matter, the U.S. government is presumptively immune from suit in U.S. courts. The Federal Tort Claims Act[317] (FTCA) partially waives sovereign immu-

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312 *Id.* at 2766 n.21.

313 *See, e.g.*, Brief for Petitioner Salim Ahmed Hamdan at 48–50, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53988. Common Article 3 prohibits, among other things, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

314 *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445, 453 (D.D.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311, 316–17, 328–29 (D.D.C. 2005).

315 *See, e.g.*, Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

316 *See, e.g.*, Complaint at 20–25, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-01417); Petition for Writ of Habeas Corpus at 2, 16, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. 1:05-cv-02374).

317 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000).

nity, but it has an exception for claims "arising in a foreign country"[318] — an exception that the Court in *Sosa*, in a part of the opinion not discussed in detail earlier in this Article, construed in favor of the government.[319] This and related immunity doctrines impose a significant obstacle to ATS suits against the U.S. government and its officials.[320] Even if the immunity obstacle could be overcome, any ATS claim against the government would need to satisfy the requirements imposed by *Sosa*, including the requirement that the CIL norms in question be widely accepted and specifically defined. Post-*Sosa*, it is difficult to say in the abstract whether any given norm would satisfy these requirements. The Court in *Sosa* also made clear that, in deciding whether to allow a CIL claim, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[321] This separation of powers consideration is especially strong with respect to claims directed at the executive branch's management of a war.

War-on-terror claims brought outside the ATS raise additional issues. One fundamental issue is whether courts can apply CIL to override presidential action in the absence of some affirmative authorization in a treaty or statute. Whether CIL binds the President as a matter of domestic law has been the subject of significant academic debate.[322] In *The Paquete Habana*, the Supreme Court stated that it was appropriate to apply CIL "where there is no treaty, and no controlling executive or legislative act or judicial decision."[323] In light of this statement, most lower courts have held that CIL cannot be applied to override the "controlling executive acts" of the President and other high-level executive officials.[324] Although *Sosa* did not address the precise issue, its implicit rejection of the modern position, de-

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[318] 28 U.S.C. § 2680(k) (2000).

[319] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2749–54 (2004).

[320] *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 534–35 (2d ed. 2006).

[321] *Sosa*, 124 S. Ct. at 2762.

[322] *See* Essays, *Agora: May the President Violate Customary International Law?* (pts. 1 & 2), 80 AM. J. INT'L L. 913 (1986), 81 AM. J. INT'L L. 371 (1987); Glennon, *supra* note 10; Panel Session, *The Authority of the United States Executive To Interpret, Articulate or Violate the Norms of International Law*, 80 AM. SOC'Y INT'L L. PROC. 297 (1986); Weisburd, *supra* note 73.

[323] The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* William S. Dodge, *The Story of* The Paquete Habana*: Customary International Law as Part of Our Law*, *in* INTERNATIONAL LAW STORIES (Dickinson et al. eds., forthcoming 2007) (manuscript at 18–22, on file with the Harvard Law School Library) (arguing that *The Paquete Habana* should not be read to suggest that the President can unilaterally disregard CIL).

[324] *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1454–55 (11th Cir. 1986). *But see In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 109–10 (E.D.N.Y. 2005) (reasoning that CIL binds the President at least absent an official presidential proclamation to the contrary).

scribed earlier, would seem to preclude binding the President to CIL as a matter of domestic law in the absence of an incorporating statute or treaty. If CIL is not automatically domestic federal law, then it is hard to see how it is binding on the President as part of the "Laws" that he must faithfully execute under Article II.

Another likely obstacle for war-on-terror claims brought outside the ATS is the lack of congressional authorization. Even in the context of a claim against a private foreign citizen, the Court in *Sosa* searched for congressional authorization for the application of CIL. It is difficult to find any congressional authorization, however, for the judicial application of CIL to regulate the war on terrorism. For example, following September 11, Congress passed the Authorization for Use of Military Force[325] (AUMF), which broadly authorized the President to use "all necessary and appropriate force" against al Qaeda and related entities,[326] but did not refer to CIL, let alone domestic court application of CIL, in its authorization. While the customary laws of war may inform the powers that Congress has implicitly conferred on the President in the AUMF, there is no suggestion that Congress intended to impose affirmative CIL constraints on the President, much less judicially enforceable CIL constraints.[327]

The need for courts to find congressional authorization to apply international law to the war on terrorism is illustrated by the Supreme Court's decision in *Hamdan v. Rumsfeld*.[328] In *Hamdan*, the Court held that the military commissions that President Bush had established after the September 11 attacks were not properly constituted because, among other things, they failed to comply with requirements in Common Article 3 of the Geneva Conventions.[329] Importantly, however,

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[325] Pub. L. No. 107-40, 115 Stat. 224 (2001) (to be codified at 50 U.S.C. § 1541 note).

[326] *Id.* § 2(a), 115 Stat. at 224.

[327] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091–2100 (2005). More recently, in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28, and 42 U.S.C.), Congress prohibited "cruel, inhuman, or degrading treatment or punishment" of anyone "in the custody or under the physical control of the United States Government." *Id.* § 1003(a), 119 Stat. at 2739. This statute purported to incorporate a treaty obligation, not a CIL obligation. In addition, Congress did not provide an enforcement mechanism for the prohibition and in the same statute appeared to preclude or at least limit the Guantanamo detainees' ability to raise this and other treatment-related claims in U.S. courts. *See id.* § 1005(e), 119 Stat. at 2742 (to be codified at 28 U.S.C. § 2241) (authorizing the D.C. Circuit to evaluate "whether the status determination of the Combatant Status Review Tribunal with regard to [a current detainee] . . . was consistent with the standards and procedures specified by the Secretary of Defense" and whether those procedures and standards are consistent with any applicable provisions of the U.S. Constitution and laws, but eliminating both habeas corpus review for detainees and jurisdiction over "any other action against the United States or its agents" by a current detainee or a former detainee who was "properly detained as an enemy combatant").

[328] 126 S. Ct. 2749 (2006).

[329] *See id.* at 2793–97.

the Court repeatedly emphasized that it was applying these requirements because they had been incorporated into U.S. domestic law by Congress. The Court assumed for the sake of argument that Common Article 3 could not be invoked "as an independent source of law"[330] but reasoned that it was nevertheless part of the international "laws of war" and that Congress in § 821 of the Uniform Code of Military Justice had required the President to comply with the laws of war in establishing military commissions.[331] Justice Kennedy's concurrence further emphasized this congressional incorporation of Common Article 3.[332] This insistence on congressional authorization for domestic court application of a *treaty provision* that had already been expressly ratified by the political branches suggests, a fortiori, that there is such a requirement for domestic court application of the unwritten norms of CIL, which may arise internationally without the express endorsement of the political branches.

None of the points made thus far implies that the United States lacks an *international* obligation to comply with norms of CIL relevant to the war on terrorism or that the political branches should not take account of those obligations in conducting the war. Even when CIL is not enforceable by U.S. courts, it still binds the United States on the international plane. This point was obscured in an early draft of an Office of Legal Counsel memorandum concerning the applicability of the Geneva Conventions to the war on terrorism, in which the authors asserted that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda and the Taliban."[333] This assertion is true, at most, only with

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330 *Id.* at 2794.

331 *See id.* at 2774, 2786, 2794. At the time of this decision, § 821 provided that "the provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute *or by the law of war* may be tried by military commissions." 10 U.S.C.A. § 821 (West 1998 & Supp. 2006) (emphasis added).

332 *See Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring) ("[This] is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."); *id.* ("[T]he requirement of the Geneva Conventions of 1949 that military tribunals be 'regularly constituted' . . . controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the 'law of war.'" (citation omitted)); *id.* at 2802 ("Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military commissions.").

333 Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. 34 (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

respect to domestic law, not international law. The final version of the memorandum properly refined this assertion.[334]

3. International and Foreign Sources in Constitutional Interpretation. — In recent years, the Supreme Court has cited and relied on international and foreign materials in the course of interpreting provisions of the U.S. Constitution.[335] This practice has generated significant controversy in the academy, among policymakers, and among members of the Court.[336] There has been little discussion, however, of the relationship between this practice and the practice of applying CIL as domestic law.[337]

We begin with the relationship between an internationalized constitutionalism and the modern position. The two practices bear certain similarities. Both modern position advocates and those advocating an internationalized constitutionalism invoke the same basic sources — treaties (sometimes non-self-executing or unratified ones), foreign laws and decisions, U.N. resolutions, the writings of jurists, and the like — in an effort to persuade domestic courts to grant relief not otherwise available under U.S. law. Moreover, the modern position and internationalized U.S. constitutionalism are complementary strategies for achieving domestic legal change. A good example of this is the juvenile death penalty. For years, litigants argued, largely unsuccessfully, that an alleged CIL prohibition on the execution of juvenile offenders was binding domestic law that preempted state juvenile death penalty laws.[338] These litigants were eventually more successful, however, in using nearly identical sources to convince the Supreme Court that the

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[334] *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. 32 (Jan. 22, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf ("Customary international law . . . cannot bind the executive branch *under the Constitution* because it is not federal law." (emphasis added)).

[335] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005); Lawrence v. Texas, 539 U.S. 558, 572–73 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[336] For articles supporting this practice, see, for example, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); and Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005). For articles critical of this practice, see, for example, Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); and Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005). For examples of controversy among policymakers, see Cleveland, *supra*, at 4 & nn.14–19.

[337] A partial exception is Professor Waldron, who discusses *Sosa* and *Roper* together but does not analyze their relationship. *See* Waldron, *supra* note 336.

[338] For examples, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 490 n.14 (2002).

Eighth Amendment, interpreted in light of these sources, prohibited the execution of juvenile offenders.[339]

Despite these similarities, there are significant differences between the modern position and the use of international and foreign materials in constitutional interpretation. From one perspective, the use of international and foreign materials in constitutional interpretation raises more significant normative concerns than the modern position. While Congress can overrule any judicial domestication of CIL, a point emphasized in *Sosa*,[340] constitutional interpretations bind Congress and can be overturned only through a constitutional amendment. Thus, the use of international and foreign materials in constitutional interpretation raises two levels of potential antimajoritarian concern: unelected federal judges incorporate foreign materials into U.S. law, and they do so in a way that permanently displaces the political branches from their usual role in this regard.

Whatever their similarities, an internationalized constitutionalism does not entail or even support the modern position that all of CIL is domestic federal law. Courts have drawn on foreign and international sources in interpreting the Constitution throughout U.S. history, including during the first 150 years of the nation when CIL clearly did not have the status of domestic federal common law.[341] Moreover, the Supreme Court's constitutional decisions drawing on foreign and international sources have treated these sources, at most, as potentially relevant to the interpretation of vague or uncertain constitutional provisions, not as sources of law that have direct and binding application in the U.S. legal system. The Court has emphasized, for example, that "[t]he opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions."[342] By contrast, under the modern position, CIL is not merely an interpretive tool but is binding of its own force in U.S. courts in a way that is not tethered to any extant federal law.

When we compare the trend towards internationalized constitutionalism with the Supreme Court's analysis in *Sosa*, further contrasts appear. The Court has been much less rigorous with respect to foreign and international materials in its constitutional interpretation cases than it was with respect to these sources in the context of the ATS in

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339 *See Roper*, 125 U.S. at 1198–1200.

340 *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004).

341 For examples, see Cleveland, *supra* note 336; and Jackson, *supra* note 336, at 109–11.

342 *Roper*, 125 S. Ct. at 1200 (emphasis added). Some might think that internationalized constitutionalism is akin to the interpretive use of CIL under the *Charming Betsy* canon of construction. *Cf.* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421 (2004) (arguing that the *Charming Betsy* canon should be applied to constitutional interpretation). For arguments to the contrary, see Bradley, *supra* note 338, at 555–56; McGinnis, *supra* note 336, at 307 n.23.

Sosa. In *Roper v. Simmons*,[343] for example, in which the Court held that the execution of juvenile offenders violates the Eighth Amendment, the Court cited, among other things, the Convention on the Rights of the Child,[344] a treaty that had not been ratified by the United States, and the ICCPR, which the U.S. had ratified with a reservation declining to agree to the ban in that treaty on the juvenile death penalty.[345] By contrast, in *Sosa*, as we discussed earlier, the Court described the ICCPR as having "little utility" in its analysis, even though, unlike in *Roper*, there was no relevant reservation with respect to the issue before the Court.[346]

It is difficult to know what to make of the Supreme Court's differing treatment of foreign and international sources in the constitutional and ATS contexts. The application of foreign law in both contexts might be viewed as consistent with *Erie*'s positivism because in both contexts the Court relies on a domestic sovereign source that purportedly makes relevant the foreign and international materials, and because the resulting legal conclusions reflect domestic U.S. law.[347] Nevertheless, the Court has a more developed theory of the relevance of foreign and international law sources in the ATS context than in the constitutional context — a theory that, consistent with *Erie*, severely limits judicial discretion in relying on foreign and international sources. If the Court begins to place more significant weight on these materials in its constitutional decisions, it will need to pay greater attention to the limitations of these materials, just as it did in the ATS context in *Sosa*.

VI. CONCLUSION

The Supreme Court's decision in *Sosa* resolved a number of the debates concerning the domestic status of CIL. The Court confirmed that CIL historically had the status of nonfederal general law. The Court also made clear that any evaluation of CIL's modern status must operate against the background of *Erie* and the limitations of the post-*Erie* federal common law. Most importantly, the Court's reasoning and conclusions are incompatible with the modern position claim that CIL is automatically part of U.S. federal law. CIL is incorporated into federal law, under the analysis in *Sosa*, only when its incorporation has

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343 125 S. Ct. 1183.

344 *Opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

345 *See Roper*, 125 S. Ct. at 1199.

346 *See supra* pp. 899.

347 *Cf.* Waldron, *supra* note 336, at 143 (noting that in its role of informing the development of domestic law, "it is not necessary that *ius gentium* be understood positivistically; it need only be seen as a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems in this country").

been authorized either by the structure of the Constitution or by the political branches, and it is to be applied interstitially in a manner consistent with the relevant policies of the political branches. Nevertheless, because there are a number of plausible structural and statutory authorizations for the domestication of CIL in select areas, this body of international law will continue to play an important role in U.S. judicial decisionmaking and therefore will continue to be, in the words of *The Paquete Habana*, "part of our law."

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-61527-CIV-DIMITROULEAS

MARINA BARBOZA, on behalf of herself and as heir of the deceased, Candido Jose Mendez, MAIRA MARLENE MENDEZ BARBOZA, on behalf of herself and as heir of the deceased, Candido Jose Mendez, and RAFAEL MENDEZ BARBOZA,on behalf of himself and as heir of the deceased, Candido Jose Mendez,

Plaintiffs,

vs.

DRUMMOND COMPANY, INC., and DRUMMOND LTD.,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

THIS CAUSE is before the Court upon Defendants, Drummond Company, Inc., and Drummond Ltd.'s ("Defendants") Motion to Dismiss [DE 28]. The Court has carefully considered the Motion [DE 28], Plaintiffs' Response in Opposition [DE 34], Defendants' Reply [DE 38], and is otherwise fully advised in the premises.

I. BACKGROUND

On October 10, 2006, Plaintiffs, family members of deceased trade unionist and former employee of Drummond Ltd., Candido Jose Mendez ("Mendez"), filed suit against Defendants pursuant to the Alien Tort Claims Act for damages suffered stemming from the February 19, 2001 murder of Mendez. Plaintiffs allege that Defendants openly associated and conspired with known members of the paramilitary group, the United Self-Defense Forces of Colombia

(hereinafter the "AUC") to silence union members, an act which directly led to the murder of Mendez, a member of the Union of Workers of the Mining and Energy Industry of Colombia ("SINTRAMIENERGETICA"). A substantial portion of the events giving rise to the present action occurred in Colombia, implicating the involvement of paramilitaries as well as Defendants.

The following facts are gleaned from the Amended Complaint and accepted as true for the purposes of Defendants' motions to dismiss. Drummond Company, Inc. ("DCI") is an Alabama corporation in the business of mining and shipping coal. Drummond Ltd. is a wholly-owned subsidiary of DCI that manages the daily operations of coal mining in Colombia (collectively "Defendants"). In Colombia, armed conflicts between the government and terrorist organizations have continued yearly with certain consistency. The "terrorist organization" called the AUC, although demobilized by the Colombian government, still "remains the object of military action" due in part to its involvement in practices such as "unlawful and extrajudicial killings, political killings and kidnappings" among other things. See Pl.s' Resp. at 13, n.10 (citing U.S. Department of State, 2006 Country Reports on Human Rights Practices). A common target of the paramilitary is the union. Under the belief that union members are affiliated with left-wing insurgents, the AUC has targeted and made attacks on all union members. Id. It is with full knowledge of the political ideals and practices of the paramilitary that Defendants hired known AUC members to protect its "mining facilities, railway lines and U.S. workers." (Am. Compl. ¶ 28.) In addition to maintaining facilities for the use of AUC members, Defendants coordinated the activities of members under the supervision of Alfredo Araujo, a community relations manager of Drummond Ltd. (Am. Compl. ¶ 29.)

The SINTRAMIENERGETICA union was formed in July of 1996 by Drummond employees. Consequently, the union was able to commence negotiations with Defendants in an attempt to resolve work related issues such as the protection of employees from the paramilitary. It is based on these negotiations that Defendants allegedly began veiled threats towards the union and its members. (Am. Compl. ¶ 33.)

On February 18, 2001, Mendez, while on his way to work, noticed a suspicious truck parked next to the company bus. The truck resembled trucks typically used by paramilitary forces. On his way home he was followed by what seemed to be the same truck from earlier that day. On February 19, 2001, in the early morning, Mendez and his family awoke to men shouting outside their home. The men shouted that "they would throw a bomb inside" Mendez's home if he did not exit the house. Mendez exited his home and was immediately restrained by approximately thirty men where he was killed in front of his family. Of the thirty men that came to the Mendez's home, "some were wearing paramilitary uniforms, some police uniforms, and others were wearing civilian clothing." (Am. Compl. ¶ 34.)

On October 10, 2006, Plaintiffs filed the Complaint in the above-styled action. On March 23, 2007, Plaintiffs filed a First Amended Complaint (hereinafter "Amended Complaint") alleging a single count against Defendants under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1340, for providing material support to a foreign terrorist organization resulting in death. On April 5, 2007, Defendants filed the instant motions to dismiss the Amended Complaint.

II. DISCUSSION

In its motion to dismiss, Defendant Drummond Ltd. moves to dismiss Plaintiffs'

Amended Complaint pursuant to the doctrine of *forum non conveniens*. Additionally, Drummond Ltd. moves to dismiss the claims against it based on lack of personal jurisdiction, improper venue, and insufficient service of process. Defendant Drummond Company, Inc. also moves to dismiss the Amended Complaint, arguing that Plaintiffs have failed to plead a violation of the law of nations, and therefore this Court does not have subject matter jurisdiction under the ATCA.

A. *Forum non conveniens*

Defendants have petitioned the Court to dismiss the present action pursuant to the doctrine of *forum non conveniens* for "the convenience of the parties and the court, and the interests of justice." Ford v. Brown, 319 F.3d 1302, 1307 (11th Cir. 2003). The central issue before the Court is whether the merits of the case should be resolved before this Court, in the Southern District of Florida, or alternatively be dismissed in order to have "localized controversies decided at home." Ford, 319 F.3d at 1302 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).[1]

The doctrine of *forum non conveniens* permits a "trial court to decline to exercise its jurisdiction . . . where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum." Ford v. Brown, 319 F.3d 1302, 1307 (11th Cir. 2003) (quoting Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218 (11th

[1]Although a court generally must first determine that it has jurisdiction over the category of claim in suit, the Supreme Court has recently held that a court may respond to a defendant's motion for dismissal based on *forum non conveniens* before addressing other threshold questions, particularly where inquiry into subject matter jurisdiction is difficult to determine. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., --- U.S. ----, 127 S. Ct. 1184, 167 L. Ed. 15 (2007)

Cir. 1985)). In determining whether dismissal is appropriate based on *forum non conveniens*, the Court will look to whether "(1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001). Although the doctrine is discretional in nature, the Court must "balance the relevant factors" that exist in order to determine whether dismissal would be appropriate. Ford, 319 F.3d at 1308. As this dispute may be characterized as primarily a Colombian dispute, Plaintiffs' choice of forum is afforded "less deference" as a foreign plaintiff. However, the mere fact that plaintiffs are domiciliaries of Colombia is not an absolute bar to adjudication in this Court as they are afforded some deference. Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir, 2000). A defendant is charged with proving "all elements of a *forum non conveniens* motion, including the burden of demonstrating that an adequate, alternative forum is available." Leon, 251 F.3d at 1310 (quoting Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 951 (11th Cir. 1997)).

1. Adequacy of the Forum

In the instant case, Defendants argue that dismissal is warranted because the case is purely

a Colombian dispute. As such, the doctrine of *forum non conveniens* is invoked as a means to bar further adjudication within the present forum. The 'adequacy of the forum' requirement is a threshold criterion that must be overcome before any balancing of the interest analysis may be entertained. Therefore, Defendants contend that the forum of Colombia is adequate as evidenced by remedies that are available to Plaintiffs within Colombia. In support of its

position, Defendants argue that Plaintiffs "could participate as civil parties in any criminal proceeding against the alleged perpetrators" of the murder of Mendez or, alternatively, file suit against the perpetrators or any private third-party accomplices within the Colombian Civil Court under a civil action. See Ex.1, Decl. of Carlos Gustavo Arrieta ¶ 9. Through these "judicial avenues of redress," Plaintiffs are afforded relief based on their cause of action.

In addition to fulfilling the 'adequacy' criterion, Defendants contend that a forum is deemed 'available' if "all parties are amenable to process and are within the forum's jurisdiction." In Re Bridgestone/Firestone, Inc., Tires Prod. Liability Litig., 190 F. Supp. 2d 1125, 1129 (D. Ind. 2002) (citing Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 803 (7th Cir. 1997)). As such the jurisdiction of Colombian courts is deemed 'available' because of Defendants' voluntary submission to that court's jurisdiction conditioned on the granting of the present motion by this Court.

Plaintiffs counter by qualifying Defendants' definition of "adequate forum," adding that "an alternative forum is 'adequate' when 'the parties will not be deprived of all remedies or treated unfairly.'" Kamel, 108 F.3d at 803 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981)). Plaintiffs contend that if forced to litigate within the Colombian forum they would be open to great risk of harm stemming from this suit due to its implication of paramilitary members and local law enforcement. Plaintiffs allege that Defendants, while maintaining facilities for the local military, knowingly permitted AUC members to operate "in and around the Drummond facilities" due to the "cooperative and symbiotic relationship" that exist between the "regular military soldiers" and the AUC. (Am. Compl. ¶ 29.)

Ordinarily, Plaintiffs' fears, if justified and reasonable would be weighed along with

private interests factors in order to determine the applicability of *forum non conveniens* analysis. See Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 147 (2d Cir. 2000) (In balancing the interests involved "justice is best served in this case by acknowledging the unique and heavy burden placed on Plaintiffs if they are required to litigate in Egypt"). However, what distinguishes the present case from cases such as Guidi is the fact that Plaintiffs' suit directly implicates terrorist organizations, paramilitary members as well as police and military officers in collaboration with the paramilitary. (Am. Compl. ¶ 34.) Therefore, the reality of retaliation against Plaintiffs from the paramilitary or possibly rogue police or military officials is plausible. See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) (reasoning that there does not need to be "an absolute certainty that Plaintiffs would be harmed if they returned: a significant possibility would be sufficient.") With the 2006 U.S. Department of State Country Report indicating that the environment in Colombia is still prone to instances of "forced disappearances; insubordinate military collaboration with criminal groups; torture and mistreatment of detainees; overcrowded and insecure prisons" as well as "an inefficient judiciary subject to intimidation," Plaintiffs' fears seem to be reasonably justified.

Plaintiffs fears against possible retaliation from the paramilitary and parties in collusion with the organization are reasonably justified. However, this Court rejects Plaintiffs' allegations pertaining to the indirect involvement of the Colombian government. Plaintiffs have alleged that there exists a principal/agent relationship between the Colombian government and the paramilitary. Plaintiffs further contend that based on this relationship an atmosphere of corruption and violence exists that have marred the Colombian judicial system thereby making it inadequate as an alternative forum. In citing corruption as a basis for the inadequacy of a forum,

Plaintiffs have undertaken a course of argument that has not enjoyed "a particularly impressive track record." Leon, 251 F.3d at 1312 (quoting Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997)). However, while under other circumstances courts have been reluctant to criticize the judicial systems of other countries, we need not pass judgment on the entire Colombian judicial system to find that there is a legitimate fear of retaliation, making the forum inadequate.

Ultimately, the Court believes that Defendants have not fulfilled their burden of persuasion in establishing the adequacy of the Colombian forum. Although Defendants provided evidence as to the availability of remedies in Colombia, Defendants have failed to overcome the issue of possible harm to Plaintiffs in the Colombian forum. Defendants reliance on personal injury cases that have found Colombia to be an adequate forum does not satisfy this threshold criterion as those cases differ materially in substance and form from the present case.

Having concluded that Defendants have not met the burden of demonstrating the availability of an adequate, alternative forum, the Court could end its analysis here. However, the Court will nevertheless address the private and public interest facts below.

2. Private Interest Factors

In balancing the relevant private interest factors, the Court will look to the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." Piper Aircraft Co., 454 U.S. at 241 (citing Gulf Corp Oil, 330 U.S. at 508).

Defendants argue that all witnesses and evidence are located in Colombia and it would be of considerable expense to the Court to transport witnesses and evidence to the United States. In addition, Defendants contend that with all witnesses situated in Colombia, the Court would have no ability to subpoena anyone who witnessed or was involved in the murder. Defendants also point to the expense that will be incurred in the translation of documents which will primarily be in Spanish. Plaintiffs respond by arguing that this case is not document intensive and that there is no evidence which cannot be easily transported to this forum. In addition, Plaintiffs contends that most documents pertaining to the case as well as several of Defendants' key officials with knowledge of the events are located in Alabama. Plaintiffs have also secured two material witnesses from Colombia willing to voluntarily testify.

Because the Defendants' executive officers are located in the United States, this Court is convinced by Plaintiffs' contention that much of the evidence required for trial is located in the United States and the evidence located in Colombia can easily be transported to this forum. As both Drummond Company, Inc. and Drummond Ltd. are located in the state of Alabama, key decision makers directly linked to the allegations made against Defendants would be located in Alabama. As alleged in the Amended Complaint, it is at Defendants' headquarters in Birmingham, Alabama, on July 22, 1996, that Drummond executive officers discussed the union, SINTRAMIENERGETICA as well as the AUC's involvement in "getting rid of the union." (Am. Compl. ¶ 30.) Therefore, individuals present at this meeting could be possible witnesses.

Pertaining to the question of accessibility to foreign witnesses, a court of the United States is empowered to subpoena U.S. nationals and residents located in a foreign country if the

court finds that testimony or production of documents is "necessary in the interest of justice." 28 U.S.C. § 1783 (2006). Foreign nationals however, are outside the reach of this Court's jurisdiction. Therefore, in the interest of justice, courts within the United States may, at its discretion, secure relevant evidence from foreign nationals in a foreign country through letters rogatory, pursuant to 28 U.S.C. § 1781. As such, this Court is able to acquire material testimony from Colombian citizens by use of this tool. Underlying the issuance of a letter rogatory are principles of international comity where one nation allows the recognition of the legislative, executive or judicial acts of another nation within its territory, "having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895). Therefore, it is the doctrine of comity between the United States and Colombia which allows for the ability to transport evidence with ease. Evidence transported to this forum from Colombia, may require translation from Spanish to English; however, the cost associated with translating important documents would not be so excessive as to burden the Court. See In Re Bridgestone/Firestone, 190 F. Supp. 2d at 1152.

Ultimately, this Court agrees with the reasoning expressed in the case of In Re Bridgestone/Firestone that "in the absence of a clear picture of how many witnesses important to each case are in the United States as compared to the number in Colombia, this factor does not tilt in either direction." In Re Bridgestone/Firestone, 190 F. Supp. 2d at 1141. Therefore, Defendants have failed to establish that dismissal is warranted. As such, the deference given to a foreign plaintiff, although less than his or her counterpart who has chosen to file suit at home, will not be disturbed.

3. Public Interest Factors

Along with private interest factors, the Court will also look to whether public interest factors favor dismissal. Public interest factors include considerations for "administrative difficulties stemming from court congestion, the interest in having local controversies decided in their home forum and the interest in having laws determined by their home tribunal." Gulf Oil Corp., 330 U.S. at 509 (1947).

In the present action, Defendants contend that Colombia's interest in this dispute is far greater than the United States' interest due to the implication of Colombian military and police officers as well as the paramilitary in Plaintiffs' Amended Complaint. Also implicated by Plaintiffs' Amended Complaint is the Colombian government itself, including its past and present conduct with the paramilitary, as well as key industries within the country. Defendants contend that based on Plaintiffs' allegations, Colombia is better suited to address issues pertaining to its judicial competence as well as the mining industry and Colombian law enforcement officials. Defendants also contend that the United States' interest in the present dispute is minimal or non-existent and therefore should not entertain this Colombian dispute. See Defs.' Mot to Dismiss at p.10.

Plaintiffs contend that public interest factors favor adjudication of this suit within Florida. In support of their position, Plaintiffs argue that entertaining the present dispute before this forum would not be a burden due to the Southern District of Florida's ability to efficiently dispose of disputes in a timely manner. See Pls.' Resp., at p.18, (quoting 2003 Annual Report, Southern District of Florida, pg. 22.). In addition, because Defendants are United States corporations with substantial contacts with the State of Florida, the United States would have an

interest in monitoring and deterring the unethical conduct of American corporations in hiring paramilitary members for company use.

Arising from the present action are issues which will directly impact the forum of Colombia. Therefore, this Court agrees with Defendants' arguments presented in support of public interest factors weighing in favor of Colombia. However, Defendants' notion that the United States has no interest in entertaining this suit is rejected. As Defendants are United States corporations, the United States does have an interest in monitoring the activities of its corporations in foreign countries as well as any illegal conduct of its corporations at home as well as abroad. See Reid-Walen v. Hansen, 933 F.2d 1390, 1400 (8th Cir. 1991). Although public interest factors show a strong Colombian interest, it does not show such a strong showing that Plaintiffs' choice of forum should be disturbed.

In conclusion, Defendants have failed to satisfy its burden of proving that dismissal is warranted based on *forum non conveniens*. Each of the factors of the *forum non conveniens* analysis except for the public interest factors favor Florida as the forum for the present suit. Although public interest factors weigh slightly in Defendants favor, Plaintiffs' chosen forum should not be disturbed.

B. Personal Jurisdiction

Defendant Drummond Ltd. also moves to dismiss Plaintiffs' claims against it based on a lack of personal jurisdiction. Defendants contend that there is no personal jurisdiction over Drummond Ltd. because it lacks sufficient minimum contacts with the forum state. The determination of personal jurisdiction over a nonresident defendant under Florida law requires a two-part analysis. Abramson v. Walt Disney Co., 132 Fed. Appx. 273, 275 (11th Cir. 2005).

First the court must determine whether the Florida long-arm statute provides a basis for personal jurisdiction. Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 626 (11th Cir.1996). If so, the court must then go on to determine "whether sufficient minimum contacts exists between the defendants and the forum state so as to satisfy 'traditional notions of fair play and substantial justice' under the Due Process Clause of the Fourteenth Amendment." Id. (quoting Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 256 (11th Cir. 1996)).

Drummond Ltd., as a nonresident defendant, would be amenable to this forum's specific jurisdiction if it possesses sufficient minimum contacts with the State of Florida in order to satisfy due process requirements. Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1552 (11th Cir. 1993). A "federal court may exercise personal jurisdiction over non-resident defendants only to the extent permitted by the forum state's long-arm statute." Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 890 (11th Cir. 1983). Therefore, if there are sufficient minimum contacts with Florida, this Court would be allowed to exercise jurisdiction over Drummond Ltd. to the extent permitted by Florida's Long Arm Statute § 48.193. Vermeulen, 985 F.2d at 1552. In addition, "when a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents." Jet Charter Serv., Inc. v. Koeck, 907 F.2d 1110, 1112 (quoting Sims v. Sutton, 451 So. 2d 931(Fla. DCA 1986)).

Defendant argues that Drummond Ltd. lacks the requisite minimum contacts with the State of Florida to support a finding of personal jurisdiction. To support its position, Defendant contends that Drummond Ltd. "conducts substantially all of its business operations in the Republic of Colombia" and does not conduct, solicit or maintain "any office, agency or agents in

the State of Florida." See Ex. 1, Jones Decl. at ¶¶ 7, 8. In addition, Defendant contends that "Drummond Ltd. is not registered with the Florida Secretary of State to transact business in the State of Florida" and does not share assets or its funds with Drummond Company, Inc. (Jones Decl. at ¶¶ 6, 12.)

Plaintiffs have requested jurisdictional discovery in order to ascertain the relevant facts pertaining to Defendant Drummond Ltd.'s contacts with the State of Florida. Plaintiffs contend that jurisdictional discovery is necessary in order for Plaintiffs to adequately respond to Defendant's motion. However, "[t]here is no absolute right to conduct jurisdictional discovery" and as such, this procedural tool is discretional. Utsey v. New Eng. Mut. Life Ins. Co., No. 07-0199-WS-M, 2007 WL 1076703, *2 (S.D. Ala. Apr. 9, 2007). This is especially so when Plaintiffs have "failed to specify what they thought could or should be discovered." Posner v. Essex Ins. Co, 178 F.3d 1209, 1214 (11th Cir. 1999); see also Instabook Corp. v. Instantupublisher.com, 469 F. Supp. 2d 1120, 1127 (M.D. Fla. 2006)(request for jurisdictional discovery was denied where party "only generally requested such discovery, without explaining how such discovery would bolster its contentions"). A significant period of time has passed in this case during which Plaintiffs could have previously sought permission to conduct jurisdictional discovery and in which relevant information could have been acquired by Plaintiffs. Absent a specific showing by Plaintiffs as to its need for such discovery now, the Court will exercise its discretion by denying Plaintiffs' request for jurisdictional discovery

Plaintiffs have not responded to Defendants' allegations challenging personal jurisdiction. The burden of proving facts justifying the exercise of jurisdiction pursuant to the State's long arm statute is placed with the person invoking jurisdiction (i.e. Plaintiffs). Jet

Charter Serv., 907 F.2d at 1112. Integral to a personal jurisdiction analysis is a defendant's ability to foresee that his "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297(1980). Therefore, with no evidentiary response to Defendant's challenge there are no grounds to satisfy due process requirements as Drummond Ltd. has no contacts with the State of Florida.

Moreover, reviewing the merits of Defendant's jurisdictional argument the Court agrees that Plaintiffs have failed to satisfy their burden of proving Drummond Ltd. is subject to this Court's jurisdiction. In Plaintiffs' Amended Complaint, Plaintiffs only attempt of establishing Drummond Ltd.'s 'contacts' with this forum is through its business relationship with Drummond Company, Inc. However, Plaintiffs' attempt to show a connection between this forum and defendant Drummond Ltd., through its characterization of Drummond Ltd. as "wholly-owned" by Drummond Company, Inc. is misplaced. (Am. Compl. at ¶ 17.) "In order to establish an agency relationship in Florida, a party must show: (1) acknowledgment by the principal that the agent will act for it; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent." Meterlogic, Inc. v. Copier Solutions, Inc., 126 F. Supp. 2d 1346, 1354 (S.D. Fla. 2000).

Here, Plaintiffs have failed to establish these elements in order to show that there is an agency relationship between the two defendants. Plaintiffs have also failed to show that the principal has exercised such control of the agent that it "manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." Florida v. American Tobacco Co., 707 So. 2d 851, 855 (Fla. 4th DCA 1998). Moreover, even

assuming that Plaintiffs could establish an agency relationship here, it is the principal that would be subject to liability from the actions of the agent, and thus the Court agrees that DCI's contacts should not be imputed to Drummond Ltd. See Meterlogic, 126 F. Supp. 2d at 1357. Therefore, this Court agrees that it lacks personal jurisdiction over Drummond Ltd. and will grant Defendant's motion on this ground.[2]

C. Subject Matter Jurisdiction

Defendant DCI moves to dismiss the Amended Complaint arguing that the Court lacks subject matter jurisdiction under the ATCA because Plaintiffs have failed to plead a violation of the law of nations.[3] Defendant argues that Plaintiffs have failed to establish jurisdiction under the ATCA because 1) a violation of international law must be gleaned from international law, not merely United States law, 2) allegations of terrorism in general are not sufficient to establish a violation of the law of nations under the ATCA, and 3) finding a violation of the law of nations based on any law passed pursuant to Congress's Article I, Section 8, Clause 10 powers would impermissibly expand federal court jurisdiction under the ATCA.

Plaintiffs respond that the Court does have jurisdiction over Plaintiffs' claim under the ATCA because specific acts of terrorism have been held to be a violation of the law of nations. Plaintiffs contend that the factual allegations in the Amended Complaint go beyond mere

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[2]Having found that Drummond Ltd. is not subject to the exercise of personal jurisdiction by this Court, the Court need not address Drummond Ltd.'s venue and service of process arguments.

[3]In its motion to dismiss, DCI also argued that 1) Plaintiffs have failed to adequately plead state action or an exception thereto and 2) resolution of this case involves a nonjusticiable political question. Defendant has withdrawn these arguments, however, given Plaintiffs' response that the conduct of the Colombian government is not pertinent to this litigation regarding their state action allegations. See Defs.' Reply at 3 n.6.

allegations of terrorism in general and are sufficiently specific to establish a violation of the law of nations.

The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2005). Conduct constitutes a violation the law of nations "if it contravenes 'well-established, universally recognized norms of international law.'" Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir.1995), cert. denied, 518 U.S. 1005 (1996). Therefore, to obtain relief under the ATCA, "plaintiffs must be (1) an alien, (2) suing for a tort, which was (3) committed in violation of international law." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246 (11th Cir. 2005).

The Supreme Court recently clarified that the ATCA provides both a basis for federal court jurisdiction and a cause of action "for the modest number of international law violations with a potential for personal liability at the time" the ATCA was enacted. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). New causes of action may be recognized if the claim is based on an international norm "accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." Id. A cause of action constituting a violation of the law of nations within the meaning of the ATCA must be sufficiently specific, well-defined, and universally abided by out of a sense of legal obligation and mutual concern. Almog v. Arab Bank, 471 F. Supp. 2d 257, 270-271 (E.D.N.Y. 2007) (citing Flores v. So. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003)). The Supreme Court directed federal courts to exercise great caution in considering new causes of action, however, stating that the door to recognizing new causes of action is "still ajar subject to vigilant

doorkeeping, thus open to a narrow class of international norms today." Sosa, 542 U.S. at 729.

Here, Plaintiffs urge the Court to recognize jurisdiction over the instant claim based on the Plaintiffs' allegations that Defendants violated international law by providing financial support to a terrorist organization resulting in the death of Candido Jose Mendez. In the Amended complaint, Plaintiffs identify several U.S. statutes in support of their claim that Defendants violated the law of nations and that the Court has jurisdiction under the ATCA. Specifically, Plaintiffs cite the Anti-Terror Act, 18 U.S.C. § 133B, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996); and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001). However, reliance on the laws of one nation alone is insufficient to state a violation of the law of nations. See Flores, 414 F.3d at 257, n.33 ("[I]t is not possible to claim that the practice or policies of any one country, including the United States, has such authority that the contours of customary international law may be determined by reference only to that country . . . ."); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds 376 U.S. 398 (1964) ("One pitfall into which we could stumble would be the identification as a fundamental principle of international law of some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples."). Thus, the Court must look to sources of international law including the "myriad of decisions made in numerous and varied international and domestic areas." Saperstein v. Palestinian Authority, 2006 WL 3804718, at *4 (S.D. Fla. 2006) (quoting Flores, 343 F.3d at 154).

Plaintiffs contend that Defendants violated a norm of customary international law by providing material support to a known terrorist organization. Plaintiffs assert that two cases are decisive on the issue of whether aiding and abetting a terrorist organization is a violation of the law of nations–Saperstein, 2006 WL 3804718, and Almog, 471 F. Supp. 2d 257–and that this case is more akin to Almog in which the court found that the conduct alleged was sufficient to establish a violation of the law of nations. For the reasons set forth below, the Court disagrees and finds that it lacks subject matter jurisdiction over the instant Complaint.

In Almog, the court concluded that it had jursidiction under the ATCA, finding the allegations sufficient to state a violation of the law of nations for a) genocide and crimes against humanity and b) for financing suicide bombings and other attacks on innocent civilians intended to intimidate or coerce a civilian population. Almog, 471 F. Supp. 3d at 276. Here, Plaintiffs do not argue that the facts alleged here state a violation of international law based on the first type of violation, genocide and crimes against humanity. Rather, Plaintiffs argue that the Amended Complaint adequately alleges a violation of international law similar to that in Almog based on Defendants' alleged financial support of a terrorist organization.

In Almog, the plaintiffs alleged that the defendant, Arab Bank, PLC, provided financial support to the Islamic Resistance Movement in Palestine ("HAMAS") and other Palestinian paramilitary who engaged in systematic murder of Jews and other civilians in Israel. Specifically, the plaintiffs alleged that Arab Bank provided support which led to suicide bombings and shootings by HAMAS and other paramilitary on eight specific occasions resulting in the death and injury of the family members of the plaintiffs. In reaching the conclusion that the court had subject matter jurisdiction over the plaintiffs' claims in Almog, the court identified

specific international treaties and conventions establishing norms of international law which were violated by the defendants alleged conduct. In particular, the court relied on the International Convention for the Suppression of Terrorist Bombing, ("the Bombing Convention"), the International Convention for the Suppression of the Financing of Terrorism ("the Financing Convention"), and Common Article 3 of the Geneva Conventions of 1949 ("the Geneva Conventions") as support for its jurisdiction under ATCA.

Plaintiffs contend that these international treaties and conventions relied upon in Almog likewise demonstrate a violation of the law of nations based on the facts alleged in this action. See Pls.' Resp. at 8 n.4. However, the Court disagrees. First, the Bombing Convention which prohibits the discharge or detonation of an explosive or other lethal device is clearly inapplicable here. Bombing Convention, G.A. Res. 52/164, 1 U.N. Doc. A/RES52/164 (Dec. 15, 1997). There are no allegations that the paramilitary used explosives or other lethal devices to facilitate their attacks on union leaders. Additionally, Article 3 of Geneva Convention does not apply here because Plaintiffs have not alleged that the alleged tort occurred during the course of an armed conflict. See Common Article 3 of the Geneva Conventions of 1949; see also Almog, 471 F. Supp. 2d at 279 (". . . the Geneva Conventions apply expressly only in situations of armed conflict . . .").

The Court also identified the Financing Convention, adopted by the General Assembly of the United Nations, see G.A. Res. 54/109, 1, U.N. Doc A/RES/54/109 (Dec. 9, 1999) and ratified by over 130 countries, as supporting its finding of jurisdiction over the plaintiffs' ATCA claims. Id. The Financing Convention, which Plaintiffs assert is applicable here, provides in Article 2(1) that

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;[4] or

b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any

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[4]The treaties listed in the annex to the Financing Convention are:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

act.

Dec. 9, 1999, S. Treaty Doc. No. 106-49 (2000). Here, the facts as alleged do not fall within any of the enumerated prohibited acts specifically set forth in the Financing Convention. Plaintiffs do not argue that the conduct alleged violates any of the treaties listed in the annex to the Financing Convention nor does the Court find those treaties to be relevant here. Additionally, as noted above, Plaintiffs do not allege that the alleged tort occurred during an armed conflict as required under Art. 2(1)(b). Moreover, the conduct underlying the alleged violation of international law is not so widespread and systematic as to support a conclusion that the purpose of the Defendants' conduct was "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." See Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (stating under similar facts that allegations of systematic and widespread efforts against organized labor were too tenuous to establish a prima facie case under the ATCA based on crimes against humanity).

Unlike the plaintiffs in Almog, Plaintiffs here have asserted only claims of terrorism in general, not acts of terrorism as specifically defined in a recognized norm of customary international law. Plaintiffs have not identified any particular international convention or other recognized source of determining international law to establish a violation of the law of nations here. Allegations of support for terrorism not based on specific conduct which violates international law "has not reached the status of violation of the law of nations." Saperstein, 2006 WL 3804718, at *7; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) ("[T]he nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus . . . Given this

division, I do not believe that under current law terrorist attacks amount to law of nations violations.").

Although some acts of financial support of terrorism have been held to be sufficient to support jurisdiction under the ATCA, this Court finds that it lacks subject matter jurisdiction over Plaintiffs' claim as pleaded. However, the Court will grant Plaintiffs leave to file a Second Amended Complaint that identifies specific and established international law of which the facts as alleged state a violation.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Drummond Ltd.'s Motion to Dismiss [DE-29] is hereby **GRANTED IN PART AND DENIED IN PART**. This action is dismissed as to Defendant Drummond Ltd. based on a lack of personal jurisdiction.
2. Defendant Drummond Company, Inc.'s Motion to Dismiss [DE-28] is hereby **GRANTED**. Plaintiff's Amended Complaint is hereby **DISMISSED** without prejudice to Plaintiffs filing a Second Amended Complaint on or before July 30, 2007.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 16th day of July, 2007.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

William Wichman, Esq.
Brett Barfield, Esq.

EXHIBIT G

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2006 WL 3804718 (S.D.Fla.)
(Cite as: Not Reported in F.Supp.2d, 2006 WL 3804718 (S.D.Fla.))

C

Saperstein v. Palestinian Authority
S.D.Fla.,2006.
Only the Westlaw citation is currently available.
United States District Court,S.D. Florida.
Moshe SAPERSTEIN, et. al., Plaintiffs,
v.
The PALESTINIAN AUTHORITY, The Palestine Liberation Organization, et. al., Defendants.
No. 1:04-cv-20225-PAS.

Dec. 22, 2006.

Katherine Warthen Ezell, Robert C. Josefsberg, Stephen Frederick Rosenthal, Podhurst Orseck Josefsberg et al, Miami, FL, for Plaintiffs.
Lawrence W. Schilling, Lawrence W. Schilling, Ramsey Clark, Ramsey Clark, New York, NY, for Defendants.

ORDER GRANTING MOTION TO DISMISS THE SECOND AND THIRD COUNTS OF THE THIRD AMENDED COMPLAINT

PATRICIA A. SEITZ, United States District Court.
*1 THIS CAUSE is before the Court on the motion of Defendants the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO") to dismiss the Second and Third Counts of the Third Amended Complaint ("Motion to Dismiss") [DE 71].[FN1] In their Motion to Dismiss, Defendants argue that Counts 2 and 3 of Plaintiffs' Third Amended Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) because 28 U.S.C. § 1350 does not confer subject matter jurisdiction.[FN2]Upon review of the motion, the response and the reply thereto, and all relevant portions of the record, the Defendants' Motion to Dismiss is granted because the Court lacks subject matter jurisdiction over the claims in these two counts.

FN1. Plaintiffs voluntarily dismissed all other defendants, namely, the Palestinian Preventive Security Services, the Estate of Yasser Arafat, Mahmoud Abbas, Yaser Mahmud Alkativ, Nizhard D'Hlis and Naim Mutzran (the "Individual Defendants") on December 13, 2006. (DE 82, 93.)

FN2.28 U.S.C. § 1350 is also referred to as the "Alien Tort Statute" ("ATS") or the Alien Tort Claims Act ("ATCA"). The provision states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."For purposes of this Order, it shall be referred to as the "ATS".

I. BACKGROUND

A. Procedural History

The events prior to the filing of the Third Amended Complaint ("TAC") are helpful to put Defendants' motion into context. Plaintiffs commenced this action on January 29, 2004, and shortly thereafter filed a an Amended Complaint and then a Second Amended Complaint ("SAC"). (DE 1-2, 8.) Defendants then moved to dismiss the SAC for lack of subject matter jurisdiction, lack of personal jurisdiction and insufficiency of process and service of process. (DE 14). Unfortunately for Defendants, however, the Court struck the motion to dismiss because Defendants' attorneys Ramsey Clark and Lawrence Schilling were not members of The Florida Bar and had not been admitted *pro hac vice*.(DE 21.)

In April 2005, Plaintiffs obtained a clerk's default against all Defendants and then moved for default judgment. (DE 37-39.) Prior to ruling on the default judgment motion, the Court granted Defendants motion for a special limited appearance to allow Mr. Clark and Mr. Schilling to appear in this case. (DE 46.) With their counsel now appropriately ad-

mitted, Defendants moved to set aside the default and simultaneously opposed Plaintiffs motion for default judgment. (DE 47.) The Court, however, denied Defendants' motion to set aside the default because Defendants conduct "evinced an intentional disregard" for the proceedings. (DE 51.) The Court also denied Plaintiffs' motion for default judgment without prejudice with instructions that a renewed motion should address whether the Court has personal jurisdiction over the Defendants. *(Id.)* Plaintiffs filed a renewed motion for default judgment. (DE 57.) The Court granted the motion as to Count 1 (Plaintiff Saperstein's FTA claim), denied it with prejudice as to Count 2 (Plaintiff Saperstein's ATS claim) and denied it without prejudice as to Count 3 (Amergi Plaintiffs' ATS claim). (DE 61.)

Thereafter, on August 11, 2006, Plaintiffs filed the operative TAC which Defendants moved to dismiss arguing, inter alia, (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, and (6) failure to state a claim upon which relief can be granted (DE 68, 71). The Defendants' motion to dismiss responded to the allegations of the Amergi Plaintiffs (Counts 2 and 3), but did not respond to the Saperstein Plaintiffs' claims (Count 1).[FN3]

> FN3. As noted, Plaintiff Saperstein was granted default judgment as to Count 1 of the SAC. (DE 61.) In the TAC, however, Plaintiffs amended Count 1 to assert claims on behalf of Mr. Saperstein and his wife and children. These Plaintiffs were not, however, given leave to make such amendment. Further, the text of the FTA (18 USC § 2333) states: "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, *or* his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."(Emphasis added.) Thus, the statute is phrased disjunctively indicating that *either* Plaintiff Moshe Saperstein *or* his estate, survivors, or heirs may sue...." Because Mr. Saperstein was not mortally wounded, "his estate, survivors, or heirs" are not able to bring such action. *Morris v. Khadr,* 415 F.Supp.2d 1323, 1337-38 (D.Utah 2006) (finding that an individual's survivors or heirs cannot recover for a non-mortal injury.) Thus, because Plaintiffs were not given leave to bring their FTA claim on behalf of all Saperstein Plaintiffs and because the FTA only allows the injured person *or* his estate, survivors or heirs to bring this cause of action, the claims of Mr. Saperstein's wife and children must be dismissed.

B. The Allegations of the Third Amended Complaint

*2 The allegations in the TAC, accepted as true for purposes of this motion to dismiss, are as follows. Defendant PA is in de jure and de facto control of territories in the Gaza Strip and in the Judea and Samaria regions of the West Bank. (Complaint ¶ 1.) Defendant PLO is in de jure and de facto control of Defendant PA. (*Id.* ¶ 2.) Dismissed Defendant Alkativ was a commander of the Palestinian General Intelligence Services and of the Al Aksa Brigades in Rafiach, an official law enforcement agency of the PA responsible for maintaining public order and prevention of violence and terrorism in the territories controlled by the PA and PLO. (*Id.* ¶ 4.) Alkativ also acted as purchasing agent of armaments for the PA and PLO and such armaments were used by young Palestinian operatives for acts of terror against Israel and its inhabitants. (*Id.* ¶ 4.)

The PA and PLO advocated, encouraged, solicited, facilitated, incited, sponsored, organized, planned and executed acts of violence and terrorism against Jewish civilians in Israel, Gaza and the Judea and

Samaria regions of the West Bank. (*Id.* ¶ 6.) The United States and Israel repeatedly demanded that the PA and PLO take effective measures to prevent further terrorist attacks. (*Id.* ¶ 7.) In violation of their undertakings and obligations under the Oslo Accords and under international customary law and local law, the PA and PLO refused and ignored American and Israeli demands to take effective measures to prevent further terrorist attacks. (*Id* . ¶ 8.)

Defendants PA and PLO granted financial support to the families of members of the Al Aksa Brigade who had been captured or killed while carrying out acts of terrorist violence against Jewish civilians in Israel, Gaza and the Judea and Samaria regions of the West Bank, thereby providing the Al Aksa Brigades and its members with strong financial incentive to continue to carry out the violence and terrorism against such victims. (*Id.* ¶ 9.) Defendants PA and PLO, through their respective agents continuously advocated, encouraged, solicited, facilitated and incited the use of violence and terrorism against Jewish civilians in Israel, Gaza and the Judea and Samaria regions of the West Bank. (*Id.* ¶ 11.)

Dismissed Defendant D'hliz was a convicted terrorist and member of the Al Aksa Brigades who purchased armaments for the PA and PLO under the orders of Alkativ. (*Id.* ¶ 12.) In early February 2002, Alkativ informed D'hliz that he recruited a young man, Katzir, and requested that D'hliz train Katzir as a terrorist on behalf of the PA and PLO. (*Id.* ¶ 13.) D'hliz trained Katzir in the operation of the AK-47 and techniques to disable passing vehicles and the execution of the vehicles' occupants, and after completing his training, Katzir became a member of the Al Aksa Brigades. (*Id.* ¶ 15.) Katzir executed his last will and testament and made a video statement regarding the acts of terror he was to commit. (*Id.* ¶ 17-18.) Dismissed Defendant Mutzran is a convicted terrorist and a member of the Al Aksa Brigades whom Alkativ recruited. (*Id.* ¶ 17.)

*3 On February 18, 2002, Mutzran drove Katzir to the Netzarim Road in Gaza near Kisufim, Israel. (*Id.* ¶ 20.) At that time and place, Ahuva Amergi, an Israeli citizen and lawyer, was driving home from Ashkelon, Israel. (*Id.* ¶ 36.) Katzir performed the terrorist act that murdered Amergi when he sprayed her car with bullets from an AK-47. (*Id.* ¶ 21, 36.) Two Israeli soldiers heard the shots and came to the aid of Amergi, but were killed while attempting to protect her. (*Id.* ¶ 37.) Immediately thereafter, and further up the road, an Israeli battalion located and exchanged fire with Katzir. (*Id.* ¶ 22.) Katzir died either from his own hand grenade or an explosive device strapped to his body which prematurely detonated. (*Id.*)

II. STANDARD OF REVIEW

A court will not grant a motion to dismiss unless the plaintiff fails to allege any facts that would entitle the plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, (1957). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.,* 795 F.2d 948, 953 (11th Cir.1986).

A defendant may move to dismiss a complaint if it fails to allege facts sufficient to invoke the court's subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). The party invoking jurisdiction bears the burden of producing the necessary facts to establish subject matter jurisdiction. *Taylor v. Appleton,* 30 F.3d 1365, 1367 (11th Cir.1994).

III. ANALYSIS

In their Motion to Dismiss, Defendants PA and PLO argue, *inter alia,*[FN4] that this Court does not have subject matter jurisdiction over the Amergi Plaintiffs' claims in Counts 2 and 3 of the TAC. With reference to Count 2, Defendants contend that the ATS does not grant the Court subject matter jur-

isdiction over claims based upon "private action" i.e., acts committed by a private actor. Defendants further argue that because there is no subject matter jurisdiction over Count 2, there can be no pendant jurisdiction over the Amergi Plaintiffs' common law claims in Count 3 for wrongful death. Plaintiffs' response acknowledges that the PA and PLO are private actors. While Plaintiffs concede that there is no state action, they contend that the ATS encompasses some types of "private (non-state) conduct and it is comfortably within that traditional zone of internationally proscribed conduct that the Amergi's claims lie."(Plaintiffs' Response at 2.)

> FN4. Because the Court lacks subject matter jurisdiction, it is not necessary to analyze Defendants other arguments, which include lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief can be granted.

Thus, the issues for determination are whether the ATS provides subject matter jurisdiction over claims based on the non-state, private action of the PA and PLO, and, if so, do the claims as described in the TAC constitute violations of the laws of nations. The answer to these questions necessitates a journey into the history and interpretation of the enigmatic Alien Tort Statute.

A. The Alien Tort Statute

***4** The ATS provides: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."28 U.S.C. § 1350. The Eleventh Circuit has recognized that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."*Abebe-Jira v. Negewo,* 72 F.3d 844, 848 (11th Cir.1996), cert. denied, 519 U.S. 830 (1996). Thus, the ATS "creates both subject matter jurisdiction and a private right of action."*Estate of Winston Cabello v. Fernandez-Larios,* 157 F.Supp.2d 1345 (S.D.Fla.2001) (citing *Abebe-Jira,* 72 F.3d at 848)). Federal subject matter jurisdiction exists when: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations. *Kadic v. Karadzic,* 70 F.3d 232, 238 (2d Cir.1995).[FN5]

> FN5. Plaintiffs have sufficiently alleged that they are aliens and suing for a tort, therefore the analysis focuses on the third prong, i.e., was the tort "committed in violation of the law of nations."

The Law of Nations

Under the ATS, the "law of nations" refers to a body of law known as customary international law. *Flores v. Southern Peru Copper Corp.,* 343 F.3d 140, 154 (2d Cir.2003). Conduct violates the "law of the nations" if it contravenes "well-established, universally recognized norms of international law."*Kadic,* 70 F.3d at 239.

The Congress first enacted the ATS as part of the Judiciary Act of 1789. The only "violation[s] of the law of nations" known at that time were "violation of safe conducts, infringement of the rights of ambassadors, and piracy."*Sosa v. Alvarez-Machain,* 542 U.S. 692, 725 (2004). Since 1789, new claims may be recognized under common law principles, but they must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms we have recognized."*Id.*

In *Sosa,* the Supreme Court admonished the lower federal courts to be extremely cautious about discovering new offenses among the law of nations. *Id.* at 728. The Court then discussed the five reasons underlying this cautionary restraint: 1) common law judges in the past were seen as "discovering law, but they are now seen as making or creating law; 2) since *Erie v. Tompkins,* 304 U .S. 64 (1938), the role of federal common law has been dramatic-

ally reduced, and courts have generally looked for legislative guidance before taking innovative measures; 3) creating private rights of action is generally best left to the legislature; 4) decisions involving international law may have collateral consequences that impinge on the discretion of the legislative and executive branches in managing foreign affairs; and 5) there is no mandate from Congress encouraging judicial creativity in this area, and, in fact, there is legislative hints in the opposite direction. *See Sosa,* 542 U.S. at 725-728;*Ibrahaim v. Titan Corp.,* 391 F.Supp.2d 10, 13-14 (D.D.C.2005).

Defining customary international law is no simple feat; it is "discerned from myriad of decisions made in numerous and varied international and domestic arenas."*Flores,* 343 F.3d at 154. In *United States v. Smith,* 18 U.S. 153, 160-61 (1820), the Supreme Court counseled that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising [sic] and enforcing that law."Moreover, courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."*Kadic,* 70 F.3d at 238 (quoting *Filartiga v. Pena-Irala,* 630 F.2d 876, 881 (2d Cir.1980)).

*5 To resolve the instant motion, it is necessary to determine first if private actors can be held accountable for a violation of the law of nations. If not, it is not necessary to proceed further as the PA and PLO are private actors.[FN6]However, a finding that private actors can be held accountable for such violation, then requires a determination of whether the conduct alleged in the TAC constitutes a violation of the law of nations. These issues have been developed in the circuit courts over the past 20 years. Accordingly, a review of the relevant case law is helpful to the resolution of this motion.

> FN6. Plaintiffs concede that the PA and the PLO are not state actors for the purposes of the ATS. (Plaintiffs' Response at 2.)

1. The *Filartiga* Case

The leading case interpreting the Alien Tort Statute is *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir.1980). The *Filartiga* decision itself did not contemplate the obligations of a private actor, but it set up the framework for ascertaining violations of the law of nations. In 1979, Dolly Filartiga, who had immigrated to the United States, learned that Americo Norberto Pena-Irala, a former Paraguayan police official, was residing in Brooklyn, New York. *Id.* at 878-79. Thereafter, Filartiga and her father, Dr. Joel Filartiga, filed a wrongful death action in federal district court under the ATS, alleging that in 1976 Pena-Irala kidnaped and tortured to death Joelito Filartiga, Dr. Filartiga's seventeen-year-old son. The district court dismissed the Filartigas' complaint for lack of subject matter jurisdiction. The court of appeals reversed recognizing the emergence of a universal consensus that international law affords substantive rights to individuals and places limits on a state's treatment of its citizens.[FN7]*Id.* at 880-87. The Second Circuit emphasized that federal courts considering whether to assume jurisdiction under the ATS should interpret international law as it has evolved and exists at the time of the case. *Id.* at 881. The court then concluded that official torture is prohibited by the law of nations. *Id.* at 884.

> FN7.*Filartiga* did not consider the alternative prong of the ATS: suits by aliens for a tort committed in violation of "a treaty of the United States."*See*630 F.2d at 880. As in *Filartiga,* Plaintiffs in this case "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary independent sources of law."*Id.* at 880 n. 7.

While *Filartiga* provides guidance regarding how to interpret international law, because it involved "state action" as opposed to private action, it is not entirely dispositive of the instant matter. Therefore, it is necessary to examine the evolution and application of the *Filartiga* decision in more factually

similar cases.

2. *Tel-Oren v. Libyan Arab Republic*

In *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984), cert. denied, 470 U.S. 1003 (1985), victims of a 1978 terrorist attack in Israel sued a number of parties, including several private organizations, for violations of the law of nations under the ATS. The terrorists seized a civilian bus, a taxi, a passing car, and subsequently a second civilian bus and took the passengers hostage. *Id.* at 776. The terrorists tortured, shot, wounded and murdered many of the hostages. *Id.* A three-judge panel unanimously dismissed the case with three separate opinions. Judge Edwards gave the ATS the broadest reach, generally agreeing with the decision in *Filartiga* that acts of official torture violate the law of nations. *Id.* at 791. Judge Edwards, however, found no consensus that private actors are bound by the law of nations with regard to torture.[FN8] *Id.* at 791-95. Only a year later, the court of appeals addressed the issue again in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C.Cir.1985), a case involving allegations of "execution, murder, abduction, torture, rape, [and] wounding" by the Nicaraguan Contras. In *Sanchez-Espinoza*, the appellate court stated quite clearly that the law of nations "does not reach private, non-state conduct of this sort" for the reasons stated by Judge Edwards and Judge Bork in *Tel-Oren*. *Id.* at 205-207.

> FN8. Judge Edwards acknowledged that piracy and slave trading were areas in which individual liability was imposed. *Tel Oren*, 726 F.2d at 794.

***6** In *Tel Oren*, Judge Edwards undertook an in-depth analysis of whether to stretch *Filartiga's* reasoning to incorporate torture perpetuated by a party other than a recognized state or one of its officials. *Tel Oren*, 726 F.2d at 792-95. Judge Edwards observed that the extension would necessarily require the court to venture out of the realm of established international law in which states are the actors and would mandate an assessment of the extent to which international law imposes not only rights but also obligations on individuals.[FN9] *Id.* at 792. He concluded his analysis saying that he "was not prepared to extend the definition of the 'law of nations' absent direction from the Supreme Court." *Id.*

> FN9. Judge Edwards highlighted some of the ramifications of extending the *Filartiga* reasoning to the actions of private entities, stating: "[i]t would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. Would the terrorists be liable, because numerous international documents recognize their existence and proscribe their acts?" He further asked, "would all organized political entities be obliged to abide by the law of nations? Would everybody be liable? As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point." *Tel Oren*, 726 F.2d 59.

Judge Edwards also examined the question of whether terrorism in and of itself was a law of nations violation, regardless of whether it is conducted by a state or private actor. *Id.* at 795-96. In finding that condemnation of terrorism was not universal, he stated that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."[FN10] *Id.* Thus, he concluded that the law of nations, defined as the principles and rules that states feel themselves bound to observe, did not outlaw politically motivated terrorism. *Id.*

> FN10. As support for the proposition that terrorism is not a violation of the law of nations, Judge Edwards referenced documents of the United Nations. He contends that they demonstrate that to some states

> acts of terrorism, in particular those with political motives, are legitimate acts of aggression and are therefore immune from condemnation. As an example, Judge Edwards points to a resolution entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination an racist regimes," G.A. Res. 3103, 28 U.N. GAOR at 512, U.N. Doc. A/9102 (1973), which declared, "The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with principles of international law."

3. *Kadic v. Karadzic*

The 1995 *Kadic v. Karadzic* decision is the most recent circuit court opinion thoroughly analyzing those actions for which international law imposes individual liability. 70 F.3d 232 (2nd Cir.1995). In *Kadic*, the plaintiffs, Croat and Muslim citizens of Bosnia-Herzegovina, sued the president of the self-proclaimed Bosnian-Serb republic within Bosnia Herzegovina. 70 F.3d at 237. Plaintiffs asserted causes of action for various atrocities at the hands of the Bosnian-Serb republic including, genocide, rape, forced prostitution and impregnation, torture, and other cruel, inhuman and degrading treatment such as assault and battery, sex and ethnic inequality, summary execution and wrongful death. *Id.* The district court dismissed the case finding that defendant was not a state actor for purposes of the ATS but the court of appeals reversed. *Id.* at 239. In so doing, the Second Circuit found that the law of nations, as understood in the modern era, did not confine its reach to state action. *Id.* The court of appeals held that "certain forms of conduct violate the laws of nations whether undertaken by those acting under the auspices of a state or only as a private individuals, such as piracy, slave-trading, aircraft hijacking, genocide, and war crimes."[FN11] *Id.* at 240-43. The Second Circuit, however, held that torture and summary execution, when not perpetrated in the course of genocide or war crimes, are proscribed by international law only when committed by state officials under color of law. *Id.* at 243.

> FN11. The definition of genocide is taken "The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, for the United States Feb. 23, 1989. The definition of war crimes is taken from Common Article 3 included in four Geneva Conventions: (1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956 (hereinafter, Geneva Convention 1); (2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956; (3) Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956; and (4) Convention Relative to the Protection of Civilian Persons at Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950, for the United States Feb 2, 1956.

These cases reflect the trend toward finding that certain conduct violates the law of nations whether committed by a state or a private actor, however, which conduct falls into this realm has not been completely defined. Plaintiffs contend that a violation of the "law of war" now called "international humanitarian law" is recognized as a breach of the law of nations and the actions alleged in the TAC constitute such violations. (Plaintiffs' Response at 4-7.)

B. International Humanitarian Law

*7 After the Second World War, the law of war was codified in the four Geneva Conventions which have been ratified by more than 180 nations, including the United States. *See* U.S. Dept. of State, Treaties in Force 398-99 (2006). Common Article 3, which is substantially identical in each of the four Conventions applies to "armed conflicts not of an international character" and binds "each Party to the conflict ... to apply, as a minimum the following provisions:"

Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.

Geneva Convention I art. 3(1).[FN12] Plaintiffs cite *Hamdan v. Rumsfeld,* 126 S.Ct. 2749 (2006) in arguing that the acts alleged in the TAC indicate that the situation surrounding the death of Amergi constitutes an "armed conflict not of an international character" for the purposes of Common Article 3 and that the her murder is a violation of such provision, and therefore, such acts amount to a violation of the law of nations. (Plaintiffs' Response at 5-6.)

FN12. For convenience sake, only citations to Geneva Convention I are used. Full citations to the four Conventions are included in footnote 11.

In *Hamdan,* the Supreme Court was presented with the question of whether the provisions of the various Geneva Conventions, specifically Common Article 3, applied to a combatant fighting for Al Quaeda, who was apprehended in Afghanistan. 126 S.Ct. at 2759. In finding that Common Article 3 did apply, the Supreme Court stated that the conflict between the U.S. and Al Quaeda in Afghanistan was a "conflict not of an international character" and that "the scope of the Article must be as wide as possible."*Id.* at 2796.

With this legal landscape in mind and noting the Supreme Court's cautionary advice regarding the creation of new offenses in the law of nations in *Sosa,* the Court turns to the Plaintiffs' allegations.

C. Plaintiffs Fail to Plead a Violation of the Law of Nations Sufficient to Invoke the Court's Subject Matter Jurisdiction.

To resolve Defendants' motion, it is necessary to determine if the Plaintiffs' TAC allegations fit the categories of conduct that prior courts have found constitute a violation of the law of nations, even when carried out by a private actor. The conduct in *Tel Oren* is substantially similar to the conduct in the present case. Judge Edwards, in *Tel Oren,* made it abundantly clear that politically motivated terrorism has not reached the status of a violation of the law of nations.[FN13]In their own words, Plaintiffs describe Defendants' conduct as terrorism.[FN14]Beginning with their introduction, Plaintiffs state that they bring this action for damages caused by Defendants' "acts of terrorism as defined in federal law, and by reason of related tortious terrorist behavior."(TAC at 2.) Further, Plaintiffs specifically allege that the PA and PLO failed to "denounce and condemn acts of terror, apprehend, prosecute and imprison persons involved directly, and/or indirectly in acts of terrorism and outlaw and dismantle the infrastructure of terrorist organizations. *(Id.* ¶ 67.) [FN15]Thus, if the conduct of the Defendants is construed as terrorism, then Plaintiffs have not alleged a violation of the law of nations.

FN13. Judge Edwards' discussion of terrorism as it relates to the law of nations was in the context of state action rather than

private action.*Tel Oren,* 726 F.2d at 795. Within the analytical framework developed in the cases discussed above, if state action does not violate the law of nations, then there is an even higher threshold to hold private action as a violation the law of nations.

FN14. In fact, Plaintiffs used the words "terror, terrorism or terrorist" at least 20 times in their TAC in relation to Counts 2 and 3.

FN15. Plaintiffs also make other assertions that characterize the Defendants' conduct as terrorism. Plaintiffs contend that the PA and PLO, through Alkativ, purchased armaments for use by Palestinian operatives "for acts of terror against Israel."*(Id.* ¶ 4.) Plaintiffs state that the PA and PLO advocated "acts of violence and terrorism against Jewish civilians."*(Id.* ¶ 6.) Plaintiffs assert that the governments of the United States and Israel repeatedly demanded that the PA and PLO "take effective measures to prevent further terrorist attacks" and the PA and PLO ignored such requests. *(Id.* ¶ 7-8.)

Further, Plaintiffs contend that the PA and PLO financially supported the families of those that had been captured or killed "carrying out acts of terrorist violence against Jewish civilians" which provided an incentive to carry out "violence and terrorism against such victims."*(Id.* ¶ 9.) Plaintiffs also allege that the PA and PLO continuously advocated the "use of violence and terrorism against Jewish civilians Israel, Gaza and the Judea and Samaria regions of the West Bank."*(Id.* ¶ 11.) Plaintiffs allege that Alkativ informed D'hliz, "a convicted terrorist," that he recruited Katzir "as a terrorist" on behalf of the PA and PLO. *(Id.* ¶¶ 12-13.) Plaintiff also states that Mutzran was a "convicted terrorist" and that Katzir executed his last will and testament and made a video statement regarding the "acts of terror he was to commit."*(Id.* ¶ 17-18.) Finally, Plaintiffs alleged that "Katzir performed the terrorist act, which he had been trained for" and that Amergi was "murdered during the terrorist act." *(Id.* ¶ 21, 35.)

***8** Plaintiffs attempt to get around such facts in their response to Defendants' motion to dismiss by characterizing the allegations in the TAC as a "murder of [a] civilian[ ] in the course of an armed conflict," or a war crime.[FN16](Plaintiffs' Response at 2.) In doing this, Plaintiffs are grasping at the *Kadic* decision and attempting to bring the alleged conduct within the language of Common Article 3. Plaintiffs' strategy in this regard is certainly obvious, as the Second Circuit in *Kadic* based much of its analysis of the definition of "war crimes" on Common Article 3. *Kadic,* 70 F.3d at 242-43. However, Plaintiffs then make the overreaching leap by stating that if the conduct falls within Common Article 3 and is prohibited thereby, then they have sufficiently alleged a violation of the law of nations for purposes of the ATS. Essentially, Plaintiffs are saying that if they allege a murder of an innocent person during an armed conflict, then they have alleged a per se violation of the law of nations and federal courts have subject matter jurisdiction over the dispute under the ATS. No court has so held. In fact, as discussed above, international customary law is not taken from one source but rather is "discerned from [a] myriad of decisions made in numerous and varied international and domestic arenas."*See Flores,* 343 F.3d at 154.

FN16. Plaintiffs subsequent arguments make clear that they are now asserting that Defendants conduct constitutes a war crime. (Plaintiffs' Response at 4, discussing the law of war as codified in the four Geneva Conventions.)

Further, while Plaintiffs' reliance on the *Kadic* de-

cision's references to Common Article 3 is understandable, the severe and horrendous conduct alleged in that case, including "brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution" against an entire class of citizens, differentiate it from this case. Unlike the conduct alleged here, the abominate actions the Croat and Muslim plaintiffs asserted in *Kadic* did not require the same extent of canvassing of international law to determine if the prohibition of such conduct was "universally recognized." Thus, the Second Circuit's reliance on Common Article 3 was sufficient to ascertain a consensus in customary international law. In fact, the appellate court specifically directed their decision to the particular horrendous allegations by stating that the "offenses alleged by the [plaintiffs], if proved, would violate the most fundamental norms of the law of war embodied in common article 3."*See Kadic,* 73 F.2d at 243. The court of appeals did not make a blanket holding that any alleged violation of Common Article 3 would be sufficient for the purposes of the ATS.

Further, two practical considerations highlight the flaws in Plaintiffs' desired expansion of the law of nations. First, if it were accepted that any alleged violation of Common Article 3 was sufficient for subject matter jurisdiction under the ATS, then a violation of any provision in the Article would yield the same result. This includes such unspecific conduct as "violence to life," "cruel treatment" and "outrages upon personal dignity." For federal courts to interpret such ambiguous standards to assess its own subject matter jurisdiction would pose problems for federal courts and would not meet the defined standards of specificity that *Sosa* requires. Second, if Plaintiffs' specific allegation, i.e., the murder of an innocent civilian during an armed conflict, was sufficient for the purposes of the AT S, then whenever an innocent person was murdered during an "armed conflict" anywhere in the world, whether it be Bosnia, the Middle East or Darfur, Sudan, the federal courts would have subject matter jurisdiction over the dispute. Clearly, such an interpretation would not only make district courts international courts of civil justice, it would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations. *See Sosa,* 542 U .S. 725. For the foregoing reasons, Plaintiffs do not sufficiently allege a violation of the law of nations and, thus, this Court lacks subject matter jurisdiction.

D. The Count 3 Common Law Claims for Wrongful Death

*9 Having found that the Court does not have original jurisdiction under the ATS over Count 2, there is no basis to assert pendant jurisdiction over the common law claims in Count 3. Fed.R.Civ.P. § 1367(a).

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that:

(1) Defendants' Motion to Dismiss [DE 71] is GRANTED.

(2) All claims against the Individual Defendants are DISMISSED WITH PREJUDICE.

(3) The claims of the Saperstein Plaintiffs other than Moshe Saperstein are DISMISSED WITH PREJUDICE.

DONE AND ORDERED.

S.D.Fla.,2006.
Saperstein v. Palestinian Authority
Not Reported in F.Supp.2d, 2006 WL 3804718 (S.D.Fla.)

END OF DOCUMENT

EXHIBIT H

United Nations

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996

Twelfth session
(25 and 26 February and 6 March 2008)

General Assembly
Official Records
Sixty-third Session
Supplement No. 37 (A/63/37)

General Assembly
Official Records
Sixty-third Session
Supplement No. 37 (A/63/37)

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996

Twelfth session
(25 and 26 February and 6 March 2008)

United Nations • New York, 2008

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Contents

Chapter I
Introduction

1. The twelfth session of the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996 was convened in accordance with paragraph 23 of General Assembly resolution 62/71. The Committee met at Headquarters on 25 and 26 February and on 6 March 2008.

2. In accordance with paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

3. At its 40th meeting, on 25 February 2008, the Committee decided that the members of the Bureau of the Committee at the previous session would continue to serve in their respective capacities. The Bureau was thus constituted as follows:

Chairman:
Rohan Perera (Sri Lanka)

Vice-Chairpersons:
Diego Malpede (Argentina)
Maria Telalian (Greece)
Sabelo Sivuyile Maqungo (South Africa)

Rapporteur:
Lublin Dilja (Albania)

4. Mahnoush H. Arsanjani, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee, assisted by George Korontzis as Deputy Secretary. The Codification Division of the Office of Legal Affairs provided the substantive services for the Committee.

5. At the same meeting, the Ad Hoc Committee adopted the following agenda (A/AC.252/L.17):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of the questions contained in the mandate of the Ad Hoc Committee as set out in paragraph 22 of General Assembly resolution 62/71 of 6 December 2007.
6. Adoption of the report.

6. The Ad Hoc Committee had before it the report on its eleventh session,[1] containing, inter alia, a proposal by the coordinator relating to the preamble and article 18 of the draft comprehensive convention on international terrorism; and the

[1] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 37* (A/62/37).

report on its sixth session,[2] containing, inter alia, a discussion paper prepared by the Bureau on the preamble and article 1 of the draft comprehensive convention on international terrorism; informal texts of articles 2 and 2 bis, prepared by the coordinator; the texts of articles 3 to 17 bis and 20 to 27 prepared by the Friends of the Chairman; texts relating to article 18, one circulated by the coordinator for discussion and the other proposed by the States members of the Organization of the Islamic Conference; and a list of proposals made during the informal consultations on the preamble and article 1 appended to the report of the coordinator on the results of the informal consultations in the Ad Hoc Committee. The Committee also had before it two letters of 2005 from the Permanent Representative of Egypt to the United Nations concerning the convening of a high-level special session of the General Assembly on cooperation against terrorism.[3]

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[2] Ibid., *Fifty-seventh Session, Supplement No. 37* (A/57/37 and Corr.1). See also the reports of the Ad Hoc Committee on its seventh to tenth sessions (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 37* (A/58/37); ibid., *Fifty-ninth Session, Supplement No. 37* (A/59/37); ibid., *Sixtieth Session, Supplement No. 37* (A/60/37); and ibid., *Sixty-first Session, Supplement No. 37* (A/61/37)). See also the reports of the Working Group established at the fifty-fifth to sixtieth sessions of the General Assembly (A/C.6/55/L.2, A/C.6/56/L.9, A/C.6/57/L.9, A/C.6/58/L.10, A/C.6/59/L.10 and A/C.6/60/L.6). The summaries of the oral reports of the Chairman of the Working Group established at the sixty-first and sixty-second sessions are contained in documents A/C.6/61/SR.21 and A/C.6/62/SR.16, respectively.

[3] Letters dated 1 and 30 September 2005 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General and the Chairman of the Sixth Committee, respectively (A/60/329 and A/C.6/60/2).

Chapter II
Proceedings

7. The Ad Hoc Committee held two plenary meetings: the 40th on 25 February and the 41st on 6 March 2008.

8. At the 40th meeting, the Ad Hoc Committee adopted its work programme and decided to proceed with discussions in informal consultations and informal contacts. At the same meeting, Ms. Telalian, Coordinator of the draft comprehensive convention, was requested to continue her consultations and contacts on the outstanding issues concerning the draft convention during the current session of the Committee. At the same meeting the Committee held a general exchange of views on the draft comprehensive convention and on the question of convening a high-level conference. An informal summary of those discussions, prepared by the Chairman, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

9. The informal consultations regarding the draft comprehensive convention on international terrorism were held on 25 February and informal contacts were held on 25 and 26 February and from 27 February to 5 March, on the sidelines of the session of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. During the informal consultations, on 25 February, the Coordinator made a statement, reporting on the results of the informal contacts held intersessionally; and on 6 March, she made a statement on the informal contacts held during the current session. A summary of those reports appears in annex II to the present report, for reference purposes only and not as a record of discussions.

10. The informal consultations concerning the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations were held on 26 February. An informal summary of those discussions, prepared by the Chairman, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

11. At the same meeting, the Ad Hoc Committee adopted the report on its twelfth session.

Chapter III
Recommendation

12. At its 41st meeting, the Ad Hoc Committee decided to recommend that the Sixth Committee, at the sixty-third session of the General Assembly, establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and continue to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.

Annex I

Informal summary prepared by the Chairman on the exchange of views in plenary meeting and on the results of the informal consultations

A. General

1. During the general exchange of views at the 40th meeting of the Ad Hoc Committee, on 25 February 2008, delegations reaffirmed their unequivocal condemnation of international terrorism in all its forms and manifestations, committed by whomsoever, wherever and for whatever purposes. It was emphasized that international terrorism posed a threat to international peace and security, as well as to human life and dignity and to the consolidation of democracy. The continuing importance of the work of the United Nations system-wide, and of the General Assembly in particular, in combating terrorism was highlighted. In this regard, references were made to the landmark strides achieved thus far, including the 16 multilateral counter-terrorism instruments adopted under the United Nations auspices, the 2005 World Summit Outcome (General Assembly resolution 60/1), the United Nations Global Counter-Terrorism Strategy (resolution 60/288, annex), as well as the relevant Security Council resolutions. The importance of implementing the Global Counter-Terrorism Strategy through sustained and collaborative efforts of Member States was underlined. Some delegations also emphasized the necessity of strengthening international cooperation in the struggle against terrorism.

2. Delegations stressed that the fight against international terrorism should be conducted in conformity with international law, including the Charter of the United Nations, as well as relevant instruments concerning international human rights law, international humanitarian law and international refugee law. Some delegations emphasized that an enhanced dialogue among civilizations, including the positive role of mass media in that regard, could contribute to the common cause of eliminating terrorism. Such efforts would promote tolerance and understanding among peoples. It was also reiterated that any attempt to link terrorism with any religion, race, culture or ethnic origin should be rejected, as there was no religion or accepted religious doctrine which encouraged or inspired terrorism. Concern was expressed by some delegations over the use of double standards in the fight against international terrorism. The need to address the root causes of terrorism was also emphasized by some delegations.

B. Draft comprehensive convention on international terrorism

3. During the general exchange of views at the 40th meeting, delegations stressed the importance of finalizing the draft comprehensive convention on international terrorism, as it would be an effective tool for combating international terrorism, complementing the existing legal framework. They also reaffirmed their commitment to the current negotiating process and the early adoption of the draft comprehensive convention.

4. Some delegations observed that the draft comprehensive convention would not be the final answer or sole response of the international community to combating

international terrorism; rather it was intended to fill existing gaps and enhance cooperation among States in areas not yet covered by other legal instruments. It was also observed that the present draft text, having been refined over the years, preserved the integrity of international humanitarian law; it should not be considered to be an instrument by which to make changes to that law.

5. Some other delegations stressed the need for the comprehensive convention to provide for a clear legal definition of terrorism. It was added that such a definition should establish a clear distinction between acts of terrorism covered by the convention and the legitimate struggle of peoples in the exercise of their right to self-determination or against foreign occupation. Furthermore, some speakers considered that the comprehensive convention should include provisions relating to military activities not covered by international humanitarian law, and apply to individuals in a position to control or direct such military activities. The point was also made that the conclusion of the convention should not be at the risk of undermining the principle that terrorism cannot be justified for whatever purposes.

6. With regard to draft article 18, some delegations stated that the latest draft proposal by the Coordinator could be a sound basis for negotiating and reaching a consensus on the text, noting in particular that the proposal constituted a clarification of various aspects of the previous text of the draft article. Some other delegations recalled that they had already accepted the previous draft of the former Coordinator, and also encouraged all States to actively and constructively participate in the consultations on the outstanding issues, maintaining a focus on the scope of article 18. While some delegations reiterated the need to have unambiguous provisions, some other delegations observed that, even if certain terms appear to be vague and unclear, the rules of treaty interpretation would provide the necessary tools and sufficient guidance to effectively provide, in practice, clarity to terms that might seem ambiguous and open. It was stressed in this regard that the margin of interpretation narrowed considerably when the rules of treaty interpretation were applied, as required by international law.

7. Concerning the format of work in the Ad Hoc Committee, some delegations, while viewing the conduct of bilateral consultations as a useful additional tool in addressing the outstanding issues relating to the draft comprehensive convention, also reiterated the necessity of conducting negotiations multilaterally in a transparent and representative format. This point was echoed at the 41st meeting.

8. At the same (41st) meeting, some delegations reiterated their support for the proposed elements and considered that the current text of the draft convention constituted a good basis for a compromise solution. Some other delegations indicated that they continued to seriously consider all aspects of the proposed text and expressed the hope that, with sufficient efforts of all parties, the negotiations of the draft convention could be finalized before the end of the year. Yet, some other delegations, while remaining committed to the current process with a view to finding a solution to all outstanding issues, reconfirmed their previously preferred position relating to draft article 18. Support was also expressed for the convening of a working group during the Sixth Committee to continue the work of the Ad Hoc Committee with a view to concluding the draft convention.

C. Question of convening a high-level conference

9. In the informal consultations, on 26 February, Egypt, as sponsor delegation, reiterated that the convening of a high-level conference was important for several reasons. It would seek to address a myriad of issues concerning terrorism, including its root causes, the relationship between goals and means of combating terrorism, and the respect for the rule of law and human rights in this struggle. The conference could also provide a forum to elaborate a definition of terrorism and to identify practical ways of strengthening the central role of the United Nations in the fight against terrorism. The sponsor delegation recalled that the proposal had been endorsed by the Movement of Non-Aligned Countries, the Organization of the Islamic Conference, the African Union and the League of Arab States. It reiterated that the convening of the conference should not be tied to the completion of the work on the draft comprehensive convention. In this regard, it was stressed that some important issues to be addressed during the conference were not covered in the discussions on the draft comprehensive convention. Moreover, such a conference could provide a fresh impetus to efforts to complete the draft comprehensive convention.

10. During the 40th and 41st meetings of the Ad Hoc Committee, as well as during the informal consultations, some delegations reiterated their support for the convening of a high-level conference and stated that it should not be linked to the draft comprehensive convention. Some other delegations reiterated their support for the consideration of the proposal in principle. However, it was emphasized that the question should be considered after the finalization of the draft convention, which should remain the focus of the Committee. The view was also expressed that discussions on the draft comprehensive convention and the convening of a high-level conference could continue in parallel. Furthermore, support was expressed by some delegations for the elaboration of an international code of conduct in the fight against terrorism.

11. At the conclusion of the debate, the sponsor delegation requested that the issue of the convening of a high-level conference be kept under consideration.

Annex II

Reports on the informal contacts on the draft comprehensive convention on international terrorism

A. Summary of the briefing on the results of intersessional informal contacts

1. In her briefing on 25 February on the informal intersessional contacts, the Coordinator of the draft comprehensive convention, Maria Telalian (Greece), said that two rounds of bilateral contacts had been convened intersessionally, on 13 and 20 February 2008. On several occasions, she had also met informally with a number of delegations outside the framework of those scheduled contacts. The purpose of the bilateral contacts had been to afford delegations the opportunity to remain engaged, particularly in the light of the text containing elements of a package to resolve the outstanding issues surrounding the draft comprehensive convention, which had been presented during the 2007 session of the Ad Hoc Committee.

2. The Coordinator recalled that the proposal built upon already existing language and that the additional elements were presented with a view to seeking to bridge the gaps between divergent viewpoints. Explanations regarding the additional elements had already been offered in detail on several occasions (see in particular, A/C.6/62/SR.16). The Coordinator was encouraged by the continuing interest of delegations in the completion of the draft comprehensive convention, and was most appreciative to all delegations that had spared time to meet with and encouraged her in the concerted efforts to find a solution to the outstanding issues.

3. Most comments made during the bilateral contacts and informal meetings were offered with a view to gaining a better appreciation of the proposal, and those comments surrounded two aspects, namely the need to have a clear delineation between those activities governed by international humanitarian law and those covered by the draft convention and the question of possible impunity of military forces in peacetime.

4. With regard to the need for a clear delineation, the Coordinator recalled that exclusionary clauses already existed in several of the sectoral counter-terrorism instruments, including the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of Acts of Nuclear Terrorism. The proposed elements to draft article 18 were, in substance, very similar to those clauses but, in the light of the broader scope of the draft comprehensive convention, they sought to provide clarity and further guidance, including to those who might be responsible for implementing the sectoral conventions. The purpose of excluding certain activities was not to allow impunity but only to carve out from the scope of the convention certain activities regulated by other fields of law. Since the draft comprehensive convention would be implemented in the context of an overall international legal framework, the importance of preserving the integrity of those other fields of law had been recognized earlier on. It had also been recognized that the draft comprehensive convention, or the earlier conventions, should not attempt to rectify any perceived flaws or problems in such other fields of law, and in particular the complexity of problems that international humanitarian law was intended to confront. Such problems needed to be addressed in other forums and by the relevant law. The Coordinator nevertheless recalled that means and methods of

warfare were not unlimited. International humanitarian law provides principles that offer guidance to States in situations of armed conflict, many of which have been generally accepted, including the principle of the distinction of civilians and non-combatants from combatants, the principle of proportionality, and the principle of prohibition to employ means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

5. The Coordinator pointed out that, already, paragraph 2 of draft article 18 provided a demarcation between what is covered in the draft comprehensive convention and the activities of armed forces during armed conflict, "as those activities are understood under international humanitarian law". The general "without prejudice" clause in the new paragraph 5 aimed to further clarify this delineation. It was reiterated that the term "lawful" in this context should be understood with its double negative connotation, that is "not unlawful acts", since international humanitarian law did not in a literal sense define which acts were "lawful", but which acts were prohibited. In view of the need to distinguish those acts that were "unlawful" under paragraph 1 of draft article 2, which provides that the convention only covers "unlawful" activities, the term "lawful" in paragraph 5 was used as being more appropriate in the circumstances. The addition of this term in paragraph 5 was not intended to broaden the categories of persons falling under the exclusionary clause. The aim of the paragraph was to ensure that international humanitarian law was not prejudiced by the draft convention, and that those who committed offences under that law were regulated by that law. The Coordinator also stressed that the draft convention was not intended to impose international humanitarian standards on States that would become parties to it if they were not bound by such standards. The draft convention was also not intended to supersede such obligations where they already existed.

6. With regard to the question of impunity, the Coordinator recalled that paragraph 3 of draft article 18, read together with paragraph 4, intended to close any gap in relation to the military forces of a State. It did not make lawful otherwise unlawful acts. It simply recognized that other laws apply in such circumstances and did not preclude prosecution under such laws. The new element, the reference to article 2 in paragraph 4 of draft article 18, together with the new preambular paragraph, only sought to accentuate that there is an inner core of conduct which, if committed, would constitute an offence which remained punishable irrespective of the regime that would apply. It was also stressed that a full understanding of draft article 18, whose constituent elements had to be read as a whole, would be incomplete without relating it to the other articles of the draft convention, in particular draft article 2, which in paragraph 1 provides for the purposes of the draft convention the criminal law definition of acts of terrorism. That paragraph contains two key phrases, namely "unlawful" conduct by "any person", which were decisive in understanding the scope of the convention *ratione personae*.

7. The Coordinator also expressed her concerns regarding what she sensed to be a certain reluctance to seize the moment and move ahead towards the completion of the draft convention. It was her sincere hope that the necessary will would be garnered to move ahead towards the conclusion of the draft comprehensive convention. She stressed that, legally, the solution that was currently on the table, which had emerged from intense informal consultations with delegations, was one that would overcome the hurdles that existed; it contained elements for a viable package to complete the draft convention if there was a wish to finalize it. Finally,

the Coordinator reiterated that the solutions that were being offered were embedded in the long negotiating history of the work done by the Committee since 1996.

B. Summary of the briefing on the results of informal contacts during the current session

8. In her briefing on 6 March on the informal contacts held during the current session, the Coordinator of the draft comprehensive convention stated that two rounds of informal contacts had been held, on 25 and 26 February 2008. In addition, she had also met informally with interested delegations, either bilaterally or in groups. The purpose of the informal contacts had been to provide delegations with an opportunity to engage further in discussions on the outstanding issues surrounding the draft comprehensive convention and to seek ways of moving the process forward, particularly in the light of the text containing elements of a package that was presented during the 2007 session of the Ad Hoc Committee.

9. The Coordinator reported that during the contacts, delegations had shared their hopes and concerns and that she had sought to offer clarifications on what was intended by the proposed elements of a package. She noted that delegations had continued to display a positive attitude. Their continued interest in completing the draft convention and their willingness to show flexibility in finding solutions to the outstanding issues surrounding draft article 18 on the basis of a package, was encouraging and pleasing. In particular, more and more delegations were expressing support for the proposed elements, which they considered constituted a viable and legally sound solution to completing the draft convention. She was also pleased that some other delegations had signalled an interest in seriously considering the proposed elements as part of an overall package which would lead to the completion of the text. Those delegations had conveyed that message in the hope that the package would facilitate the reaching of a consensus. Yet some other delegations, while remaining committed to the current process, had reconfirmed that their proposals remained on the table.

10. The Coordinator also referred to a tendency among certain delegations to read specific situations, events and circumstances into the proposed text, which she considered was a natural inclination. Consequently, some delegations found the elements not fully reflective of their concerns. To put matters in perspective, the Coordinator found it important to stress that the proposed elements were drafted in such a way as to project principles that clarify the relationship with, and safeguard the application of, other legal regimes, in particular, international humanitarian law. The draft convention would not exist in a legal vacuum, it would operate in the context of an overall international legal framework. Ultimately, it would be for the parties to the convention and consequently their judicial authorities to make interpretations in the light of the specific circumstances in each case in accordance with well-established canons of treaty interpretation.

11. Recalling that the draft convention was a criminal law enforcement instrument, the Coordinator stressed that parties to the convention would be responsible for its implementation in the context of other rules that form part of the international legal system. In any given situation, the parameters of consideration might be different. What was key for purposes of interpretation and application was the principle that international humanitarian law was not prejudiced by the convention nor did the convention seek to restrain the development of that law. She also reiterated that the

draft convention was not intended to impose international humanitarian standards on States which would become parties to it if they were not bound by such standards, neither did the convention supersede such obligations, where they already existed. Also key was the principle that there was no impunity in respect of military forces of a State which might commit offences that might be similar to the ones the convention proscribed as the latter would be prosecuted under other applicable laws. It was explained that paragraphs 1 to 5 of draft article 18 built some flesh around those principles.

12. The Coordinator reiterated her belief that legally the solution that was currently on the table was one that would overcome the difficulties that existed; it constituted elements of a viable package for the completion of the draft convention. She underscored the importance of political will to bring the process to the next level and conclude the work, which should not be considered an endless process or one that could start all over again. Such political will required an appreciation that the draft convention would operate against the background of other regimes which should be safeguarded to the extent that the international legal system allowed. The necessity to demonstrate a spirit of compromise and accommodation to achieve a positive outcome was also emphasized. The Coordinator was confident that the current session had generated momentum and a better appreciation of the proposed elements as a possible way forward; the months ahead would determine the future of the draft convention.

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EXHIBIT I

A/60/37*

United Nations

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996

Ninth session (28 March-1 April 2005)

General Assembly
Official Records
Sixtieth Session
Supplement No. 37 (A/60/37)*

General Assembly
Official Records
Sixtieth Session
Supplement No. 37 (A/60/37)*

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996

Ninth session (28 March-1 April 2005)

United Nations • New York, 2005

* Reissued for technical reasons.

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Contents

Chapter I
Introduction

1. The ninth session of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 was convened in accordance with paragraph 19 of General Assembly resolution 59/46 of 2 December 2004. The Committee met at Headquarters from 28 March to 1 April 2005.

2. In accordance with paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

3. On behalf of the Secretary-General, the Legal Counsel of the United Nations, Nicolas Michel, opened the ninth session of the Ad Hoc Committee.

4. At the 33rd meeting of the Committee, on 28 March 2005, the Committee re-elected Rohan Perera (Sri Lanka) as its Chairman. The Chairman informed the Committee that its two previously elected Vice-Chairmen, Carlos Fernando Díaz Paniagua (Costa Rica) and Albert Hoffmann (South Africa), as well as the Rapporteur, Lublin Dilja (Albania), were available to continue to act as members of the Bureau at the current session. However, Michael Bliss (Australia), the Committee's Vice-Chairman at the previous session, was no longer available. The Committee paid tribute to Mr. Bliss for his valuable contributions to the work of the Committee. The Committee then elected Maria Telalian (Greece) Vice-Chairperson. The Bureau was thus constituted as follows:

Chairman:
Rohan Perera (Sri Lanka)

Vice-Chairpersons:
Carlos Fernando Díaz Paniagua (Costa Rica)
Albert Hoffmann (South Africa)
Maria Telalian (Greece)

Rapporteur:
Lublin Dilja (Albania)

5. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee, assisted by Anne Fosty (Deputy Secretary). The Codification Division of the Office of Legal Affairs provided the substantive services for the Ad Hoc Committee.

6. At the same meeting, the Ad Hoc Committee adopted the following agenda (A/AC.252/L.14):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of the relevant questions contained in the mandate of the Ad Hoc Committee as set out in paragraph 18 of General Assembly resolution 59/46 of 2 December 2004.
6. Adoption of the report.

7. The Ad Hoc Committee had before it the reports on its eighth,[1] seventh[2] and sixth sessions,[3] the latter containing, inter alia, a discussion paper prepared by the Bureau on the preamble and article 1 of the draft comprehensive convention on international terrorism; a list of proposals made during the informal consultations on the preamble and article 1 appended to the report of the coordinator on the results of the informal consultations in the Ad Hoc Committee; the informal texts of articles 2 and 2 bis, prepared by the coordinator; the texts of articles 3 to 17 bis and 20 to 27 prepared by the Friends of the Chairman; and two texts of article 18, one circulated by the coordinator for discussion and the other proposed by the States members of the Organization of the Islamic Conference; as well as the reports of the Working Group of the Sixth Committee established at the fifty-ninth (A/C.6/59/L.10) and fifty-eighth (A/C.6/58/L.10) sessions of the General Assembly, the latter containing the lists of written amendments and proposals submitted by delegations in connection with the elaboration of a draft comprehensive convention (ibid., annex I.A, B and C).

8. The Committee also had before it a text of the draft international convention for the suppression of acts of nuclear terrorism, prepared by the Bureau of the Ad Hoc Committee for discussion during its eighth session.[4]

9. A list of written amendments and proposals submitted by delegations to the Ad Hoc Committee at its current session in connection with the elaboration of a draft comprehensive convention on international terrorism is contained in annex III.A to the present report.

10. A list of written amendments and proposals submitted by delegations to the Ad Hoc Committee at its current session in connection with the elaboration of a draft international convention for the suppression of acts of nuclear terrorism is contained in annex III.B to the present report.

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[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 37* (A/59/37).

[2] Ibid., *Fifty-eighth Session, Supplement No. 37* (A/58/37).

[3] Ibid., *Fifty-seventh Session, Supplement No. 37* (A/57/37 and Corr.1).

[4] Ibid., *Fifty-ninth Session, Supplement No. 37* (A/59/37), Annex III, para. 1.

Chapter II
Proceedings

11. The Ad Hoc Committee held three plenary meetings: the 33rd, on 28 March, the 34th, on 31 March, and the 35th, on 1 April 2005.

12. At the 33rd meeting, the Ad Hoc Committee held a general exchange of views on issues within its mandate pursuant to paragraph 18 of General Assembly resolution 59/46. An informal summary of those discussions, prepared by the Chairman, is contained in annex II to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

13. Also at the 33rd meeting, the Ad Hoc Committee adopted its work programme. The Chairman reappointed Vice-Chairman Carlos Fernando Díaz Paniagua (Costa Rica) as the coordinator for the draft comprehensive convention on international terrorism and Vice-Chairmen Albert Hoffmann (South Africa) as the coordinator for the draft international convention for the suppression of acts of nuclear terrorism. The Ad Hoc Committee then decided to proceed with discussions in informal consultations of the Committee as a whole.

14. The informal consultations regarding the draft comprehensive convention, coordinated by Mr. Díaz Paniagua, were held on 28 and 29 March. The informal consultations on the outstanding issues pertaining to the draft international convention for the suppression of acts of nuclear terrorism, coordinated by Mr. Hoffmann, were held on 28, 29 and 30 March. Both coordinators also had informal contacts with interested delegations on 28, 29 and 30 March 2005.

15. At the 34th meeting, the coordinators presented their oral reports on the results of the informal consultations and informal contacts on the draft conventions. These reports are contained in annex II to the present report, for reference purposes only and not as a record of the discussions.

16. At its 35th meeting, on 1 April 2005, the Ad Hoc Committee finalized the draft international convention on the suppression of acts of nuclear terrorism, which is reproduced in the recommendation to the General Assembly contained in Chapter III of the present report.

17. Also at its 35th meeting, the Ad Hoc Committee adopted the report on its ninth session.

Chapter III
Recommendations

18. At the 35th meeting, the Ad Hoc Committee, bearing in mind General Assembly resolution 59/46 of 2 December 2004, decided to recommend that the Sixth Committee, at the sixtieth session of the Assembly, establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and keep in its agenda the question of convening a high-level conference, under the auspices of the United Nations, to formulate a joint organized response of the international community to terrorism in all its forms and manifestations.

19. Also at the 35th meeting, the Ad Hoc Committee decided to recommend to the General Assembly the adoption, during its fifty-ninth session, of the following draft resolution, containing in its annex the draft International Convention for the Suppression of Acts of Nuclear Terrorism:

International Convention for the Suppression of Acts of Nuclear Terrorism

The General Assembly,

Having considered the text of the draft international convention for the suppression of acts of nuclear terrorism elaborated by the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and the Working Group of the Sixth Committee,

1. *Adopts* the International Convention for the Suppression of Acts of Nuclear Terrorism annexed to the present resolution, and requests the Secretary-General to open the Convention for signature at United Nations Headquarters in New York from 14 September 2005 to 31 December 2006;

2. *Calls upon* all States to sign and ratify, accept, approve or accede to the Convention.

Annex

International Convention for the Suppression of Acts of Nuclear Terrorism

The States Parties to this Convention,

Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations of 24 October 1995,

Recognizing the right of all States to develop and apply nuclear energy for peaceful purposes and their legitimate interests in the potential benefits to be derived from the peaceful application of nuclear energy,

Bearing in mind the Convention on the Physical Protection of Nuclear Material of 1980,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on Measures to Eliminate International Terrorism annexed to General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism annexed thereto,

Recalling also that, pursuant to General Assembly resolution 51/210, an ad hoc committee was established to elaborate, inter alia, an international convention for the suppression of acts of nuclear terrorism to supplement related existing international instruments,

Noting that acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security,

Noting also that existing multilateral legal provisions do not adequately address those attacks,

Being convinced of the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism and for the prosecution and punishment of their perpetrators,

Noting that the activities of military forces of States are governed by rules of international law outside of the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. “Radioactive material” means nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment.

2. “Nuclear material” means plutonium, except that with isotopic concentration exceeding 80 per cent in plutonium-238; uranium-233; uranium enriched in the isotope 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore residue; or any material containing one or more of the foregoing;

Whereby “uranium enriched in the isotope 235 or 233” means uranium containing the isotope 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

3. “Nuclear facility” means:

(a) Any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;

(b) Any plant or conveyance being used for the production, storage, processing or transport of radioactive material.

4. “Device” means:

(a) Any nuclear explosive device; or

(b) Any radioactive material dispersal or radiation-emitting device which may, owing to its radiological properties, cause death, serious bodily injury or substantial damage to property or to the environment.

5. “State or government facility” includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of a Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

6. “Military forces of a State” means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) Possesses radioactive material or makes or possesses a device:

(i) With the intent to cause death or serious bodily injury; or

(ii) With the intent to cause substantial damage to property or to the environment;

(b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:

(i) With the intent to cause death or serious bodily injury; or

(ii) With the intent to cause substantial damage to property or to the environment; or

(iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.

2. Any person also commits an offence if that person:

(a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b) of the present article; or

(b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

4. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 9, paragraph 1 or 2, to exercise jurisdiction, except that the provisions of articles 7, 12, 14, 15, 16 and 17 shall, as appropriate, apply in those cases.

Article 4

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

4. This Convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States.

Article 5

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its national law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of these offences.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

Article 7

1. States Parties shall cooperate by:

(a) Taking all practicable measures, including, if necessary, adapting their national law, to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences set forth in article 2, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of those offences;

(b) Exchanging accurate and verified information in accordance with their national law and in the manner and subject to the conditions specified herein, and coordinating administrative and other measures taken as appropriate to detect, prevent, suppress and investigate the offences set forth in article 2 and also in order to institute criminal proceedings against persons alleged to have committed those crimes. In particular, a State Party shall take appropriate measures in order to inform without delay the other States referred to in article 9 in respect of the commission of the offences set forth in article 2 as well as preparations to commit such offences about which it has learned, and also to inform, where appropriate, international organizations.

2. States Parties shall take appropriate measures consistent with their national law to protect the confidentiality of any information which they receive in confidence by virtue of the provisions of this Convention from another State Party or through participation in an activity carried out for the implementation of this Convention. If States Parties provide information to international organizations in confidence, steps shall be taken to ensure that the confidentiality of such information is protected.

3. States Parties shall not be required by this Convention to provide any information which they are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.

4. States Parties shall inform the Secretary-General of the United Nations of their competent authorities and liaison points responsible for sending and receiving the information referred to in the present article. The Secretary-General of the United Nations shall communicate such information regarding competent authorities and liaison points to all States Parties and the International Atomic Energy Agency. Such authorities and liaison points must be accessible on a continuous basis.

Article 8

For purposes of preventing offences under this Convention, States Parties shall make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency.

Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its national law in accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the

alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article.

5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its national law.

Article 10

1. Upon receiving information that an offence set forth in article 2 has been committed or is being committed in the territory of a State Party or that a person who has committed or who is alleged to have committed such an offence may be present in its territory, the State Party concerned shall take such measures as may be necessary under its national law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its national law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 of the present article are being taken shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) To be visited by a representative of that State;

(c) To be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 of the present article shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 of the present article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 9, paragraph 1 (c) or 2 (c), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 9, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that that person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present article shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 11

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its national law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article.

Article 12

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.

Article 13

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 9, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 14

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their national law.

Article 15

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 16

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 17

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent; and

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 18

1. Upon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence set forth in article 2, the State Party in possession of such items shall:

(a) Take steps to render harmless the radioactive material, device or nuclear facility;

(b) Ensure that any nuclear material is held in accordance with applicable International Atomic Energy Agency safeguards; and

(c) Have regard to physical protection recommendations and health and safety standards published by the International Atomic Energy Agency.

2. Upon the completion of any proceedings connected with an offence set forth in article 2, or sooner if required by international law, any radioactive material, device or nuclear facility shall be returned, after consultations (in particular, regarding modalities of return and storage) with the States Parties concerned to the State Party to which it belongs, to the State Party of which the natural or legal person owning such radioactive material, device or facility is a national or resident, or to the State Party from whose territory it was stolen or otherwise unlawfully obtained.

3. (a) Where a State Party is prohibited by national or international law from returning or accepting such radioactive material, device or nuclear facility or where the States Parties concerned so agree, subject to paragraph 3 (b) of the present article, the State Party in possession of the radioactive material, devices or nuclear facilities shall continue to take the steps described in paragraph 1 of the present article; such radioactive material, devices or nuclear facilities shall be used only for peaceful purposes;

(b) Where it is not lawful for the State Party in possession of the radioactive material, devices or nuclear facilities to possess them, that State shall ensure that they are placed as soon as possible in the possession of a State for which such possession is lawful and which, where appropriate, has provided assurances consistent with the requirements of paragraph 1 of the present article in consultation with that State, for the purpose of rendering it harmless; such radioactive material, devices or nuclear facilities shall be used only for peaceful purposes.

4. If the radioactive material, devices or nuclear facilities referred to in paragraphs 1 and 2 of the present article do not belong to any of the States Parties or to a national or resident of a State Party or was not stolen or otherwise unlawfully obtained from the territory of a State Party, or if no State is willing to receive such items pursuant to paragraph 3 of the present article, a separate decision concerning its disposition shall, subject to paragraph 3 (b) of the present article, be taken after consultations between the States concerned and any relevant international organizations.

5. For the purposes of paragraphs 1, 2, 3 and 4 of the present article, the State Party in possession of the radioactive material, device or nuclear facility may request the assistance and cooperation of other States Parties, in particular the States Parties concerned, and any relevant international organizations, in particular the International Atomic Energy Agency. States Parties and the relevant international organizations are encouraged to provide assistance pursuant to this paragraph to the maximum extent possible.

6. The States Parties involved in the disposition or retention of the radioactive material, device or nuclear facility pursuant to the present article shall inform the Director General of the International Atomic Energy Agency of the manner in which such an item was disposed of or retained. The Director General of the International Atomic Energy Agency shall transmit the information to the other States Parties.

7. In the event of any dissemination in connection with an offence set forth in article 2, nothing in the present article shall affect in any way the rules of international law governing liability for nuclear damage, or other rules of international law.

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its national law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

States Parties shall conduct consultations with one another directly or through the Secretary-General of the United Nations, with the assistance of international organizations as necessary, to ensure effective implementation of this Convention.

Article 21

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its national law.

Article 23

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months of the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may, at the time of signature, ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 of the present article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 24

1. This Convention shall be open for signature by all States from 14 September 2005 until 31 December 2006 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 25

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 26

1. A State Party may propose an amendment to this Convention. The proposed amendment shall be submitted to the depositary, who circulates it immediately to all States Parties.

2. If the majority of the States Parties request the depositary to convene a conference to consider the proposed amendments, the depositary shall invite all States Parties to attend such a conference to begin no sooner than three months after the invitations are issued.

3. The conference shall make every effort to ensure amendments are adopted by consensus. Should this not be possible, amendments shall be adopted by a two-thirds majority of all States Parties. Any amendment adopted at the conference shall be promptly circulated by the depositary to all States Parties.

4. The amendment adopted pursuant to paragraph 3 of the present article shall enter into force for each State Party that deposits its instrument of ratification, acceptance, accession or approval of the amendment on the thirtieth day after the date on which two thirds of the States Parties have deposited their relevant instrument. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day after the date on which that State deposits its relevant instrument.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 14 September 2005.

Annex I

Informal summary, prepared by the Chairman, of the general discussion at the plenary meeting held on 28 March 2005

1. Delegations reiterated their unequivocal condemnation of all acts and practices of terrorism as criminal and unjustifiable, regardless of their motivation, objectives, forms and manifestations, and reaffirmed their commitment to combating terrorism. It was stressed that terrorism endangered the continued existence of open and democratic societies, posed a grave threat to national and international security and to the values of the United Nations, namely the peaceful settlement of disputes, tolerance among peoples and nations, respect for the rule of law, protection of civilians and enjoyment of human rights, including the right to life. The view was also stressed that terrorism undermined the civil and political, as well as the economic and social rights of individuals.

2. Some delegations recalled that terrorism had no religion, race, nationality or culture, nor was it confined to any particular region. The need for enhancing dialogue among civilizations and fostering intercultural understanding and cooperation was also underscored.

3. Some delegations emphasized the moral duty to address the root causes of terrorism, such as poverty, social deprivation, abuse of human rights, intolerance, sense of powerlessness, cultural and religious discrimination, misperception, despair and resentment, all of which provided propitious grounds for terrorist activities.

4. Delegations stressed that the fight against terrorism must be conducted in full compliance with the obligations under the Charter of the United Nations and international law, including international humanitarian law, where applicable.

5. The point was made that acts of terrorism constituted a major factor threatening the stability and sovereignty of States. In that connection, acts of unilateralism were characterized as being in contravention of the recognized principles of international law, such as respect for State sovereignty, non-interference in internal affairs and the need to take decisions on the basis of international consensus.

6. Some delegations made references to the provisions relating to terrorism in the report of the High-level Panel on Threats, Challenges and Change, entitled “A more secure world: our shared responsibility” (A/59/565 and Corr.1), as well as in the report of the Secretary-General, entitled “In larger freedom: towards development, security and human rights for all” (A/59/2005). They noted with appreciation the statement of the Secretary-General outlining the strategy for fighting terrorism delivered at the International Summit on Democracy, Terrorism and Security, held in Madrid from 8 to 11 March, as well as his address at the summit meeting of the League of Arab States, held in Algiers on 22 and 23 March 2005. Reference was also made to the recommendation of the High-level Panel, stressing that the use of force by States was thoroughly regulated by international law, including the law of armed conflicts, whereas the use of force by non-State actors, such as acts of terrorism, was not effectively regulated. The view was expressed that the conducive atmosphere created by the report of the High-level Panel (A/59/565) and the report of the Secretary-General (A/59/2005) should enable the Ad Hoc Committee to

complete its work before the upcoming summit meeting during the commemorative session celebrating the sixtieth anniversary of the United Nations.

7. Delegations stressed the imperative for States to mobilize their political will with a view to arriving at a consensus to finalize the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism. Furthermore, the view was expressed that the General Assembly, which had successfully contributed to the legal framework of international counter-terrorism instruments, should not delay any further in completing these two draft conventions, since any such delay would only convey a wrong signal to the international community. A point was made that the early adoption of the two conventions would reinforce and revitalize the prerogatives of the General Assembly as the legislative body of the United Nations and help to avoid an overlap between the work of the Assembly and other organs of the Organization dealing with terrorism. A view was expressed in support of the recommendation of the report of the High-level Panel (A/59/565), emphasizing the particular value of achieving a consensus definition of terrorism within the General Assembly, given its unique legitimacy in norm-setting.

8. Some delegations recalled that, under the terms of paragraph 18 of General Assembly resolution 59/46 of 2 December 2004, the Ad Hoc Committee should, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism and resolve the outstanding issues relating to the elaboration of the draft nuclear terrorism convention. Support was expressed for the work being done by the Ad Hoc Committee, with some delegations reiterating their appeal to finalize the two draft conventions as soon as possible. They stressed that the successful conclusion of negotiations on both draft conventions during the current session of the Ad Hoc Committee would add to a comprehensive United Nations strategy against international terrorism, as articulated by the Secretary-General at the International Summit on Democracy, Terrorism and Security. It would also complete the corpus of legislation designed to tackle in a pragmatic way the various terrorist offences as defined and prohibited by those instruments.

9. A point was made that, in order to combat terrorism effectively, the international legal framework against terrorists should be strengthened on the basis of the principle *aut dedere aut judicare* (prosecute or extradite).

10. Some delegations recalled the declaration adopted by the Organization of the Islamic Conference on 30 September 2003 that endorsed the initiative launched by Tunisia to elaborate by consensus an international counter-terrorism code of conduct to which States would adhere on a voluntary basis and urged the United Nations and international organizations to support that initiative.

11. Some delegations appealed to States that had not yet done so to become parties to the existing 12 universal conventions and protocols related to the prevention and suppression of international terrorism, in particular the 1999 International Convention for the Suppression of the Financing of Terrorism. They stressed the great value of the comprehensive legal framework in the field of counter-terrorism established thus far by the United Nations and certain specialized agencies. References were also made to various regional events aimed at promoting accession to the existing global and regional counter-terrorism instruments.

12. Some delegations expressed appreciation for the work of the Counter-Terrorism Committee and urged the continued cooperation of all States to facilitate its activities.

13. Support was also expressed for the work carried out by the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC) in assisting States in becoming parties to the relevant international counter-terrorism instruments and in implementing them. The view was expressed that the fight against terrorism would have little success if efforts were not made to provide immediate technical assistance to those States that needed capacity-building in this area. One delegation pledged to contribute financially to the Office starting from the coming fiscal year for technical assistance in the field of counter-terrorism for countries in need. In addition, that delegation stated that it would continue to extend assistance to States that needed to strengthen their capacity to fight terrorism.

14. Reference was made by some delegations to specific acts of terrorism worldwide and in their countries.

15. Some delegations referred to the new proposals that they submitted for consideration at the current session of the Ad Hoc Committee, relating to the two draft instruments.

Elaboration of a draft comprehensive convention on international terrorism

16. Delegations expressed their support for the early adoption by consensus of a comprehensive convention against terrorism. Some delegations stressed the importance of establishing a comprehensive international legal framework for the fight against terrorism, and of filling the lacunae in the existing counter-terrorism regime. In this regard, concern was expressed over the lack of progress in the negotiation of the comprehensive convention.

17. Some delegations pointed out that the comprehensive convention should bring added value to the existing sectoral conventions, while at the same time preserving their *acquis*. In order to achieve that goal, the Ad Hoc Committee was urged to clarify the relationship between the draft comprehensive convention and the sectoral conventions.

18. With respect to the main outstanding issues, some delegations expressed their support for draft articles 2, 2 bis and 18, as prepared by the Coordinator.[a] A point was also made that the concerns of all delegations, including those articulated by the States members of the Organization of the Islamic Conference, should be taken into account.

19. Some delegations stressed the importance of arriving at a clear and precise legal definition of terrorism. Reference was made to the elements of the definition suggested in the report of the High-level Panel on Threats, Challenges and Change (A/59/565) and in the report of the Secretary-General (A/59/2005), as well as in Security Council resolution 1566 (2004) of 8 October 2004. Some delegations characterized the proposed elements as encouraging and constituting a good basis for further in-depth discussions with a view to arriving at a consensus definition. It was pointed out that the definition of terrorism offered in the report of the High-

[a] For the texts, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 37* and corrigendum (A/57/37 and Corr.1), annexes II and IV.

level Panel took into consideration the relevant provisions of paragraph 3 of resolution 1566 (2004). That definition also took into account the definitions of terrorist acts contained in the existing counter-terrorism instruments, where such acts were defined according to their objective and purpose.

20. In order to reach an agreement on a universal definition of terrorism, a strong preference was expressed for focusing on the purpose and objective of terrorist acts rather than on the description of perpetrators. The view was expressed that acts of terrorism differed from other crimes because of their intention, in particular, to provoke and keep a state of terror in the general public or to compel a Government or an international organization to do or abstain from doing any act. Some delegations were of the view that the existing draft article 2 fulfilled the purpose of such a broad definition. The point was also made that an agreed definition of terrorism would be possible only as an outcome of a process where the general membership of the United Nations was fully involved in its formulation.

21. Other delegations reiterated that a legal definition of terrorism must make an unequivocal distinction between acts of terrorism and the legitimate struggle of peoples for self-determination. In this connection, it was observed that the Charter of the United Nations, relevant resolutions of the General Assembly and the Security Council, international instruments on human rights, the jurisprudence of the International Court of Justice, as well as the relevant practices by the organs and Members of the Organization confirmed the legally binding character of the right to self-determination. According to that view, the fight against terrorism should not undermine the right to self-determination or lead to violations of human rights.

22. While some delegations were in favour of reflecting in the draft convention the concept of “State terrorism”, a point was made that, in the light of the view expressed in the report of the Secretary-General (A/59/2005), debates on “State terrorism” should be set aside.

23. The view was expressed that no exception should be provided for acts of military forces that were not in conformity with the Charter and international law. Furthermore, the point was made that activities of armed forces that were not covered by international humanitarian law should not be excluded from the scope of the comprehensive convention.

Elaboration of a draft international convention for the suppression of acts of nuclear terrorism

24. Delegations called for the completion of the draft international convention for the suppression of acts of nuclear terrorism during the current session of the Ad Hoc Committee. The point was made that the draft nuclear terrorism convention would play a crucial role in preventing terrorist groups from gaining access to the weapons of mass destruction, in particular nuclear arms. In that connection, the view was also expressed that the only way to guarantee that terrorist groups did not acquire such weapons was to eliminate them altogether.

25. It was observed that the adoption of the draft nuclear terrorism convention would constitute an important contribution by the General Assembly to the strengthening of the international legal framework for counter-terrorism measures. Failure to adopt that instrument would embolden perpetrators of terrorist acts. Furthermore, the point was made that once the nuclear terrorism convention was

adopted, the Ad Hoc Committee could concentrate its efforts on solving the remaining outstanding issues relating to the draft comprehensive convention.

26. Some delegations voiced their support for the text of the draft nuclear terrorism convention prepared by the Bureau of the Ad Hoc Committee during its eighth session[b] and characterized it as a balanced text resulting from many years of negotiations and compromise. Other delegations observed that the text was basically complete and constituted a good basis for further deliberation with the aim of finalizing it at the current session of the Ad Hoc Committee. It was stressed that political divergences had to be reconciled, with some delegations calling for flexibility and good will so as to adopt the draft nuclear terrorism convention by consensus. Some delegations emphasized their will to continue to strive for the adoption of the draft nuclear terrorism convention by consensus, but stressed that the time had come to find an agreement on the instrument.

27. The view was expressed that the concerns raised with regard to the scope of application of the draft nuclear terrorism convention pointed to a problem of a more general nature whose solution would go beyond the scope of the sectoral conventions. The point was also made that the draft nuclear terrorism convention should be considered on its own merits and that the outstanding issues pertaining to the instrument should be resolved separately from those relating to the draft comprehensive convention.

28. Furthermore, it was observed that draft article 4 was based on the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, and that it constituted a compromise text aimed at bridging the diverging views on the matter. It was also recalled that the current wording of draft article 4 was supported by a large majority of delegations.

29. The Ad Hoc Committee was informed by one delegation that, in a spirit of compromise and to facilitate the adoption of the nuclear terrorism convention by consensus, it had withdrawn its proposal relating to draft article 4 contained in document A/AC.252/2005/WP.1.

Question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations

30. Some delegations endorsed the proposal to convene a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations. It was suggested that that conference could, among other things, consider formulating an international counter-terrorism code of conduct with a view to facilitating the cooperation of States in the fight against terrorism.

[b] Ibid., *Fifty-ninth Session, Supplement No. 37* (A/59/37), annex III, para. 1.

Annex II

Reports of the coordinators on the results of the informal consultations

A. Draft international convention for the suppression of acts of nuclear terrorism

1. As coordinator on the draft international convention for the suppression of acts of nuclear terrorism, I conducted informal consultations open to all delegations on 28 and 29 March 2005. The consultations focused on four new proposals presented by the delegations of Cuba (A/AC.252/2005/WP.2), Egypt (A/AC.252/2005/WP.3), the United States of America (A/AC.252/2005/WP.4) and the Islamic Republic of Iran (A/AC.252/2005/WP.5).

2. In the course of the informal consultations, the proposals were introduced by their respective sponsors, and were the subject of extensive discussions. Although the exchange of views proved to be useful, it became clear towards the end of those consultations that the proposals did not enjoy general support and the prospects for their possible inclusion in the draft convention seemed rather slim.

3. Therefore, I invited the sponsors to a meeting on 29 March 2005, in which I conveyed to them my concern and requested them to consider, in consultation with their capitals, withdrawing their proposals. I briefed delegations accordingly on 30 March.

4. After the action taken by the delegation of Cuba, I am now in a position to report that all proposals have been withdrawn. Consequently, the only text that remains on the table is the draft international convention for the suppression of acts of nuclear terrorism, contained in annex III of the Ad Hoc Committee's latest report (A/59/37). As a result, the Ad Hoc Committee may wish to present the text of the draft convention to the General Assembly for adoption. By presenting the draft convention to the General Assembly the Ad Hoc Committee would positively respond to the expectations of the international community and pleas made by the Secretary-General. Undoubtedly, the convention would make a substantive contribution towards strengthening the international legal framework for the suppression and combating of terrorism.

5. I would also like to draw attention to the blank spaces in paragraph 1 of Article 24 of the draft convention, relating to dates for the opening of the draft convention for signature, and for its closure. Following consultations with delegations, I would like to suggest that the draft convention be opened for signature on the date of the commencement of the high-level plenary meeting of the General Assembly at its sixtieth session, i.e. 14 September 2005. Following the existing practice, the signature period should be closed at the end of the month of December of the following year, i.e. 31 December 2006.

6. I thus conclude my role as coordinator of the informal consultations on the draft international convention for the suppression of acts of nuclear terrorism, a task that was assigned to me by the Chairman some four years ago. Allow me to express my appreciation to all delegations for their support and cooperation over these years and for the constructive spirit that prevailed at all times during our consultations. In particular, I would like to thank the delegations of Pakistan, Cuba, Egypt, United

States and the Islamic Republic of Iran for their understanding and cooperation, which enabled the Ad Hoc Committee to finalize work on the draft convention. My appreciation also goes to the delegation of the Russian Federation for the initiative they undertook more than seven years ago, in introducing the important issue of nuclear terrorism in the Ad Hoc Committee and for presenting the initial draft convention, on which the current draft is based. Allow me also to thank the members of the Bureau for their support and advice. I also recognize the important role that my predecessor, Richard Rowe, played and the efforts he undertook.

B. Draft comprehensive convention on international terrorism

Introduction

1. During the last three days I have conducted consultations on the pending issues regarding the draft comprehensive convention. In those consultations, my main objective was to give due consideration to the recommendations contained in section VI, paragraph 164, of the report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility" (A/59/565), that may have a direct impact on our negotiations, as well as the recommendation 6 (d) of the report of the Secretary-General, "In larger freedom: towards development, security and human rights for all" (A/59/2005). It should be noted that most delegations felt that the current session of the Ad Hoc Committee should focus on the conclusion of the international convention for the suppression of acts of nuclear terrorism, while maintaining the momentum on the comprehensive convention with the view to its adoption during the sixtieth session of the General Assembly, as it was suggested by the Secretary-General in his report.

2. In this report, as is the Committee's long-standing practice, I will begin by providing a factual summary of the discussion during the informal consultations and the bilaterals. Later, I will put forward some personal observations on where the negotiations stand at the moment and how to move forward.

Summary

3. On 28 and 29 March 2005, in my capacity as coordinator, I conducted informal consultations on the draft comprehensive convention on international terrorism. As in the past, the informal consultations were open to all delegations. With the agreement of the delegations participating, the International Committee of the Red Cross attended as an observer. I also held bilateral contacts with delegations on 28, 29 and 30 March.

4. As noted before, the consultations focused mainly on the outstanding issues relating to the comprehensive convention in the light of recent developments, in particular, the issuance of the report of the High-level Panel on Threats, Challenges and Change, as well as the recent report of the Secretary-General, "In larger freedom: towards development, security and human rights for all" (A/59/2005).

5. The basic texts of reference for the consultations continued to be the two texts relating to draft article 18, one circulated by the former coordinator and the other proposed by member States of the Organization of Islamic Conference (OIC),

contained in annex IV of the 2002 report of the Ad Hoc Committee;[a] and the informal texts of articles 2 and 2 bis prepared by the former coordinator, contained in annex II of that report. In addition, the informal consultations had received a proposal submitted by Cuba to add a new paragraph 4 (d) to draft article 2, contained in document A/AC.252/2005/WP.2, and the suggestions on terrorism contained in paragraph 164 of the report of the High-level Panel.

Consideration of the suggestions contained in the report of the High-level Panel on Threats, Challenges and Change and the report of the Secretary-General

6. I invited delegations to focus on how the report of the High-level Panel and the report of the Secretary-General related to our work.

7. Delegations welcomed the call by the High-level Panel and the Secretary-General to re-energize our work and, in particular, the Secretary-General's call that the Ad Hoc Committee conclude the draft comprehensive convention before the end of the sixtieth session of the General Assembly.

8. The comments and observations on the two reports were pointed and thorough. On the one hand, there was the view that the elements for a definition of terrorism offered in the two reports could help to inform the debate but that they are not to be understood as intended to replace texts negotiated by the Ad Hoc Committee over the years. It was stressed that the Panel had suggested some basic elements, but not a complete definition of terrorism. Some delegations suggested that it was necessary to draw a clear distinction between principles suggested by the Panel and the actual language that it used.

9. Moreover, some delegations noted that, while the broad statements of principle in the two reports were useful, the Ad Hoc Committee, as a legal committee, had a different task, namely, to develop terms in a precise manner that would be suitable for a legal instrument. The mandate of the Ad Hoc Committee was, in that sense, different from the goal embraced by the proposals contained in the two reports. It was acknowledged that the focus of the Ad Hoc Committee was not to elaborate a political definition, suitable for a political declaration, but rather to elaborate a technical definition appropriate for a criminal law instrument.

10. In this connection, delegations noted that substantial progress had already been made by the Ad Hoc Committee on a definition of terrorism. There was already near consensus on what elements should be included in the criminal offence object of the draft comprehensive convention. As it was, draft article 2 was well developed, and more detailed than the proposals of the High-level Panel report. Moreover, it was better drafted from a technical legal point of view. Indeed, the essential elements of the proposals of the High-level Panel report were already covered by draft article 2. The use of the neutral term "persons" in the present article 2 was more accurate than the expression "civilians or non-combatants" used in the report of the High-level Panel. Moreover, article 2 covered other forms of terrorist criminal activity, such as participation, inchoate crimes and criminal conspiracy.

11. Some delegations underscored that the problem was not what to include in the definition, but what to exclude from the scope of the draft convention. It was recalled that that was not unusual; the negotiators of the Convention on the Safety

[a] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 37* and corrigendum (A/58/37 and Corr.1).

of United Nations and Associated Personnel, for example, were confronted with a similar problem. According to this view, it was therefore reasonable, having dealt with the main positive elements of the crime in draft article 2, to focus attention now on article 18, which was intended to deal with issues that ought to be excluded from the scope of application of the draft comprehensive convention.

12. On the other hand, there was another set of views that, while acknowledging the importance of defining terrorism, noted that the elements of the definition proposed in the report of the Secretary-General were not balanced and all-inclusive. Some delegations were rather critical of the elements contained in the report of the High-level Panel and the suggestions contained in the report of the Secretary-General. Those delegations noted that the second report had not taken into account the input of the High-level Panel Report that Member States of the Organization of the Islamic Conference and the Non-Aligned Movement (NAM) had offered to the Secretary-General on the definition of terrorism. In this regard, the attention of the Ad Hoc Committee was drawn to statements and position papers of the Organization of the Islamic Conference and the Non-Aligned Movement made in the context of the consultations of the plenary of the General Assembly on the report of the High-level Panel.

13. Moreover, those delegations noted that the definition suggested both in the report of the High-level Panel and in the report of the Secretary-General, contrary to the right of self-determination enshrined in the Charter of the United Nations, ignored the right of national liberation movements fighting against colonial domination and alien occupation in the exercise of that right. Such exclusions were considered unacceptable for those delegations and those omissions would make it difficult for the General Assembly to make progress on the matter. It was also observed that the suggestions also omitted elements concerning State terrorism. In particular, those delegations noted that the suggestion contained in the report of the Secretary-General that "it was time to set aside debates on the so-called 'State terrorism' because the use of force by States was already thoroughly regulated under international law" was inaccurate, insofar as there were situations where activities of military forces of a State were currently not regulated by international humanitarian law.

14. It was also recalled that the elements proposed by the High-level Panel relied heavily on paragraph 3 of Security Council resolution 1566 (2004), notwithstanding that some members of the Council had indicated that that paragraph did not represent a definition. For some delegations, the elements of the definition proposed in the report of the High-level Panel contained certain loopholes. Regarding the suggestions by the Secretary-General some delegations noted that the negotiation of a definition of terrorism was an exclusive right of Member States.

15. For some delegations, the focus of future work could include other issues beyond the drafting of article 18, which could be addressed separately or in combination with article 18. They stressed that the core problem lay in the lack of distinction between activities during peacetime and activities during armed conflict. Although it might be possible to exclude all activities during an armed conflict from the scope of the comprehensive convention, it was suggested that there ought to be a distinction between those elements that would be applicable during times of peace and those applicable during armed conflict. For those delegations, while article 2 was appropriate during peacetime, it lacked certain elements necessary for its

application during armed conflict. In this regard, they argued that it would be better to limit the discussion to questions concerning civilians during armed conflict as well as non-military targets. They also stressed that a civilian who forfeited his or her protection under international humanitarian law loses the status of non-combatant but that fact does not mean necessarily that he should be considered a terrorist under the draft comprehensive convention. They argued that a person may qualify as a terrorist only when the act perpetrated is a terrorist act. For those delegations, article 18 of the draft convention should not serve to challenge long-standing rules of international humanitarian law.

16. Other delegations cautioned against drawing a distinction between the provisions applicable in respect of combatants and civilians. Such an exercise would require the renegotiation of international humanitarian law, a task which is beyond the mandate of the Ad Hoc Committee. In this regard, attention was drawn to the recent study identifying 161 rules of customary international humanitarian law, sponsored by the International Committee of the Red Cross.

Discussions on article 2, article 2 bis and article 18

17. During the consultations, all delegations confirmed the linkage that exists between articles 2, 2 bis and 18 and the understanding that these draft articles should be considered as part of an overall package. Although some delegations would like to have some amendments made to draft article 2, they have indicated to the Coordinator their willingness to withdraw such proposals in the event of a satisfactory solution on draft article 18 and agreement on the overall package.

Article 2

18. With regard to article 2, the sponsor of the proposal contained in document A/AC.252/2005/WP.2 noted that its proposal was an attempt to explore a possible solution to the problems relating to article 18. It expressed the hope the proposal would generate the interest of delegations and would help to move the discussion on the matter forward. It underscored the importance of including within the scope of the draft comprehensive convention the actions of armed forces of a State that fall outside the scope of international humanitarian law. It was asserted that the draft comprehensive convention should aim at closing all the loopholes that currently exist in the various sectoral multilateral anti-terrorism instruments. The sponsor expressed some flexibility and a willingness to discuss the matter further with other delegations.

19. Other delegations expressed doubts as to whether the element concerning armed forces of a State, as proposed in document A/AC.252/2005/WP.2, could suitably be considered in the context of article 2.

20. In highlighting the need for a definition, it was noted that it was important that article 2 should reflect all viewpoints, including the proposal made by the member States of OIC in document A/C.6/55/WG.1/CRP.30.

21. In the bilateral contacts, some delegations raised some possible changes, of a technical character, to improve the text of draft article 2. They emphasized that those changes could be made after resolving the key substantive issues.

Article 2 bis

22. Regarding draft article 2 bis, some delegations expressed support for its retention, since it would clarify the legal regime applicable in the event of a conflict between a sectoral multilateral anti-terrorism convention and the comprehensive convention. The importance of preserving the *acquis* of the 12 sectoral multilateral anti-terrorism conventions was stressed.

23. During the bilateral contacts, some delegations expressed flexibility as to the inclusion of article 2 bis, while others suggested minor drafting amendments of a technical character with the view to improving the text. They emphasized that those amendments could be made after the key substantive issues were solved.

Article 18

24. Concerning article 18, some delegations reiterated that it was a choice of law provision. It did not seek to exempt armed forces from the application of international law. Customary and treaty law, including international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment continued to govern the activities of armed forces during armed conflicts. They also stressed that it was important to understand that the draft comprehensive convention was a criminal law instrument, which addressed terrorist activities committed by individuals and groups of individuals, sometimes with the support of States. While it was necessary to address these aspects, delving too much into international humanitarian law would be exceeding the mandate and expertise of the Ad Hoc Committee. These delegations stressed their support for the language proposed by the former coordinator without further amendments.

25. Other delegations also expressed support for the text proposed by the former coordinator, noting that it adequately provided the elements of legal precision required for a criminal law instrument. Since article 18 concerned those who would be excluded from the scope of application of the convention, it was necessary to use unambiguous terms. For those delegations, the term “parties” employed in the text submitted by the member States of OIC did not provide the necessary precision. They noted in this regard, that the Geneva Conventions used the term “High Contracting Parties” instead of “parties”. Moreover, they stressed that the value of using the term “armed forces”, as proposed in the text by the former coordinator and as opposed to “parties”, lay in the fact that it was well defined, with established criteria and was well understood in international humanitarian law.

26. Other delegations observed that the term “parties” should not be understood as “States parties to a treaty” but rather as “parties to a conflict”. Such a term is employed in the Geneva Conventions as well as Additional Protocol I and supported by the history behind the elaboration of those instruments, in particular Additional Protocol I. Moreover, the recently published study on customary humanitarian law by ICRC confirms in rule 1 that “parties to conflict” was a term of customary law applicable to both international and non-international armed conflict.

27. Some delegations observed that in the efforts to find a solution to the remaining outstanding issues the Ad Committee should not be constricted by language previously agreed in the sectoral conventions, such as the International Convention for the Suppression of Terrorist Bombings. For them, it was imperative

to explore other possibilities that would generate consensus on article 18. In this connection, it was suggested that instead of reference to "[t]he activities of armed forces during an armed conflict …" in the text circulated by the former coordinator it might be feasible and appropriate to refer to "[t]he activities during an armed conflict …". Other delegations recalled that similar suggestions had been made in 2001 and was then found unacceptable by some delegations.

28. Similarly, it was observed that since article 18 addresses issues that ought to be excluded from the scope of the Convention, and it is closely connected to article 2, its placement should be closer to article 2.

Concluding remarks

29. Following previous practice, I would now like to make some personal observations and concluding remarks based on my many years as Vice-Chairman of this Committee and as coordinator on the pending issues on the draft comprehensive convention.

30. First, the consultations on the suggestions contained in the High-level Panel report and Secretary-General's report have been extremely useful. Their encouragement has served to re-energize our negotiations and I am personally confident that we will be able to achieve a positive result within the time frame suggested by the Secretary-General, that is, that we will be able to conclude satisfactorily the negotiation of the comprehensive convention on terrorism by the end of the sixtieth session of the General Assembly.

31. Second, the essential elements for a possible definition of terrorism contained in the report of the High-level Panel and the Secretary-General's report are already reflected adequately in the text of draft article 2. While we all acknowledge that draft article 2 is part of a broader package, still in negotiation, there is growing support for the provisions contained in it. Moreover, current draft article 2 uses more precise technical legal language, more suitable for a criminal law instrument than the language used in the report of the High-level Panel.

32. Third, the mandate of the Ad Hoc Committee is to draft a technical, legal, criminal law instrument that would facilitate police and judicial cooperation in matters of extradition and mutual assistance. Our mandate is not to draft a political definition of terrorism. Therefore, this Ad Hoc Committee must elaborate a text that fulfils the requirements of criminal law — legal precision, certainty and fair labelling of the criminal conduct — all of which emanate from the basic human rights obligation to observe due process. In this context, I am convinced that this Ad Hoc Committee and its sister working group of the Sixth Committee still are the ideal forums to discuss these questions.

33. Fourth, the comprehensive convention on terrorism must preserve and build upon the *acquis* of the previous 12 conventions on terrorism. The elements common to the previous instruments are already incorporated in our draft. Moreover, we must respect the separate and independent character of the legal regimes established by those instruments.

34. Fifth, we still have some pending issues, mainly on questions of choice of law and the precise delimitation between international humanitarian law and the legal regime to be established by the new convention. These issues of a technical character have a wide range of legal and political implications. These issues cannot

simply be set aside. We must confront them resolutely in order to attain a successful result.

35. Sixth, while we are working under the traditional rules of multilateral law-making negotiation, that is, that all proposals remain on the table until withdrawn by their sponsors, and that "nothing is agreed until everything is agreed", there is a clear feeling that substantial progress has been made and that most articles have been agreed upon in principle. Consequently, we must continue to focus on the outstanding issues and we must avoid reopening matters that have already been sufficiently discussed.

36. Seventh, in the coming months, during the intersessional period, I will continue to consult with all interested delegations on possible ways to solve the few pending issues and to reach an agreement on the complete text of the comprehensive convention on international terrorism. I invite them to approach me with their observations and suggestions.

37. Finally, Mr. Chairman, I would like to thank all delegations for their positive disposition during the informal consultations and the bilateral contacts, and for their valuable contributions. I believe success is at hand; we must only make a final effort to reach it.

Annex III

Amendments and proposals

A. Written amendments and proposals submitted by delegations to the Ad Hoc Committee at its current session in connection with the elaboration of a draft comprehensive convention on international terrorism

Proposal submitted by Cuba (A/AC.252/2005/WP.2): new paragraph 4 (d) in article 2

In article 2 of both draft conventions, add a new paragraph 4 (d) reading:

"Being in a position to control or direct effectively the actions of troops belonging to the armed forces of the State, orders, permits, or actively participates in the planning, preparation, initiation or execution of any of the offences set forth in paragraphs 1, 2 or 3 of the present article, in a manner incompatible with international law, including the Charter of the United Nations."

B. Written amendments and proposals submitted by delegations to the Ad Hoc Committee at its current session in connection with the elaboration of a draft international convention for the suppression of acts of nuclear terrorism

Proposal submitted by Pakistan (A/AC.252/2005/WP.1): new preambular paragraph and new paragraph 2 bis in article 4[a]

1. Add to the preamble the following paragraph:

"*Recalling* the provisions, in particular article 15, of Protocol II Additional to the Geneva Conventions of 12 August 1949 relating to protection of works and installations containing dangerous forces".

2. In article 4, add a new paragraph 2 bis reading:

"Nothing in this Convention shall justify undertaking, encouraging or participating in, directly or indirectly, any action aimed at causing the destruction of, or damage to, any nuclear installation or facility."

Proposal submitted by Cuba (A/AC.252/2005/WP.2): new paragraph 4 (d) in article 2[b]

In article 2 of both draft conventions, add a new paragraph 4 (d) reading:

"Being in a position to control or direct effectively the actions of troops belonging to the armed forces of the State, orders, permits, or actively

[a] On 23 March 2005, Pakistan announced the withdrawal of its proposal contained in document A/AC.252/2005/WP.1.

[b] At the 34th meeting, on 31 March 2005, Cuba informed the Ad Hoc Committee of the withdrawal of its proposal contained in document A/AC.252/2005/WP.2 with regard to the draft international convention for the suppression of acts of nuclear terrorism.

participates in the planning, preparation, initiation or execution of any of the offences set forth in paragraphs 1, 2 or 3 of the present article, in a manner incompatible with international law, including the Charter of the United Nations."

Proposal submitted by Egypt (A/AC.252/2005/WP.3): new preambular paragraph after the thirteenth preambular paragraph[c]

After the thirteenth preambular paragraph, insert a new preambular paragraph reading:

"*Recognizing* that the provisions of this Convention should be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law".

Proposal submitted by the United States of America (A/AC.252/2005/WP.4): revised text of the third preambular paragraph[d]

At the end of the third preambular paragraph, insert the words:

"while recognizing that the goals of peaceful utilization should not be used as a cover for proliferation".

Proposal submitted by Iran (Islamic Republic of) (A/AC.252/2005/WP.5): amendment to the proposal contained in document A/AC.252/2005/WP.4[e]

Amend the proposal contained in document A/AC.252/2005/WP.4 to read as follows:

"and recognizing also that all the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy,"

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[c] On 30 March 2005, Egypt announced the withdrawal of its proposal contained in document A/AC.252/2005/WP.3.

[d] On 30 March 2005, the United States of America announced the withdrawal of its proposal contained in document A/AC.252/2005/WP.4.

[e] On 30 March 2005, the Islamic Republic of Iran announced the withdrawal of its proposal contained in document A/AC.252/2005/WP.5.

EXHIBIT J

Enforcing International Law Norms Against Terrorism

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11

The Exercise of Criminal Jurisdiction over International Terrorists

ROBERT KOLB

I. THE PROBLEM OF DEFINING INTERNATIONAL TERRORISM

IT IS NOT possible to talk about the suppression of a criminal act by the exercise of criminal jurisdiction if the act in question is not properly defined. The problem is rendered even more acute in modern criminal systems predicated on the liberal principle of *nullum crimen sine lege*.[1] The question of a proper definition is particularly delicate in the context of international terrorism. It is not only political divisions on essential points (such as the question of State terrorism, the issue of the means used by movements of national liberation or by secessionist movements, whether the motives of terrorists should be taken into account or only their acts, the question of who is an "innocent" target, etc)[2], which have proved to be insurmountable obstacles up to the present. It is also the

[1]This principle was developed at the time of enlightenment as a protection against arbitrary acts and extraordinary penalties (*poenae extraordinariae*). The formula was coined by JPA von Feuerbach (*Lehrbuch des peinlichen Rechts* (1801), 20). On Feuerbach, see J Bohnert, *P.J.A. Feuerbach und der Bestimmtheitsgrundsatz im Strafrecht* (Minutes of the meeting of the Heidelberger academy of the sciences, philosophical — historical class, Heidelberg, 1982). See Cicero, *In Verrem*, lib II, cap XXXXII; T Hobbes, *De Cive*, cap XIII and *Leviathan*, cap XXVIII; S Pufendorf, *De iure naturae et gentium*, lib VIII, cap III, par VII. See also the foreshadowing of the principle as a maxim of interpretation in *Dig.* 50, 16, 131 (Ulpianus); and *Dig.* 50, 16, 244 (Paulus), both in the title "de verborum significatione". On these historical sources, see HL Schreiber, *Gesetz und Richter – Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege* (Frankfurt, 1976).

[2]On these questions there is very ample literature. See eg R Mushkat, "Technical Impediments on the Way to A Universal Definition of International Terrorism", (1980) 20 *Indian Journal of International Law*, 20, 448 ff; J Dugard, "International Terrorism: Problems of Definition", (1974) 50 *International Affairs*, 75 ff. For a more recent assessment, see J Dugard, "Terrorism and International Law: Consensus at Last?", *Essays in Honour of M Bedjaoui* (The Hague v Law International, 1999), 159 ff. The differences of opinion persist up to the present work of the United Nations bodies. See the Summary of the exchanges of views in the *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, GAOR, 56th Session, Suppl no 37 (A/56/37), Fifth Session (12–23 February 2001), Annex V,

intrinsic difficulty of grasping the constitutive elements of a crime which is over-loaded with different connotations and of finding any general element, common to its multifaceted expressions.[3] It would seem, at first sight, that "terrorism" is the catch-word for a number of crimes somewhat haphazardly thrown together under this heading.[4] One may add to this the multiplicity of functional definitions valid only in a specific context. "Terrorism" for the purpose of seizing financial assets of doubtful groups may not necessarily correspond to "terrorism" when dealing with individual criminal prosecution.[5] Add to this that there are numerous definitions of terrorism under the domestic laws of States, definitions which differ significantly from one to the other. Each of them reflects a specific focus, due to the particular socio-political history and concerns of the collectivity in question.[6] Some other problems can still be added to those mentioned. For example, international terrorist offences possess only a limited autonomy with respect to those defined in the municipal law of the various States. As there is an interplay between both legal orders, if only for the fact that the enforcement of international law rests largely on municipal law and the organs of the State, conflicts and tensions between these legal orders may appear.[7] Further, there is uncertainty as to the role assigned to elements of subjective qualification of the crime of terrorism, especially intent or motive.[8] To this list of difficulties others could easily be added.

p. 11 ff. See also the *Report of the Working Group, Sixth Committee, Measures to Eliminate International Terrorism*, 29 October 2001, Doc. A/C.6/56/L.9, Annex IV, p. 33 ff. On the ambiguities within the United Nations in that field, see also JM Sorel, "Le système onusien et le terrorisme ou l'histoire d'une ambiguïté volontaire", (1996) 6 *L'observateur des Nations Unies*, 31 ff.

[3] See C Daase, "Terrorismus — Begriffe, Theorien und Gegenstrategien", (2001) 76 *Die Friedenswarte*, 59.

[4] See R Higgins, "The General International Law of Terrorism", in R Higgins and M Flory (eds), *Terrorism and International Law*, (London / New York, Routledge, 1997), 27.

[5] See T Stein, "International Measures Against Terrorism and Sanctions by and Against Third States", (1992) 30 *Archiv des Völkerrechts*, 40; JF Murphy, "Defining International Terrorism: A Way Out of the Quagmire", (1989) 19 *Israel Yearbook on Human Rights*, 32 ff.

[6] Some overview over that state of affairs is offered by the periodic reports prepared by the Secretary-General of the United Nations, eg *Report of 3 July 2001*, Doc. A/56/160, p. 3 ff., and the Addendum, A/56/160/Add. 1. At the level of Europe, see the Report of the Commission of the E.C., *Proposal for a Council Framework Decision on Combating Terrorism*, 19 September 2001, COM(2001)521, p. 6–7. A Resolution by the Organization of American States calls its members to provide similar information on their internal legislation to the Organization: *Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, Resolution of 26 April 1996, see <http://www.oas.org/juridico>.

[7] On such problems, see eg B Stern, "A propos de la compétence universelle", *Essays in Honor of M. Bedjaoui*, (The Hague / London / Boston, Kluwer Law International, 1999), 741–6. See also JA Carrillo Sacedo, "Les aspects juridiques du terrorisme international", *Centre d'étude et de recherche de droit international et de relations internationales*, Hague Academy of International Law, *Les aspects juridiques du terrorisme international*, (1988 Session, The Hague / Boston / London, 1989), 20.

[8] See eg Murphy, above n 5, 22 ff; Mushkat, above n 2, 464 ff; TM Franck and BB Lockwood, "Preliminary Thoughts Towards an International Convention on Terrorism", (1974) 68 *American Journal of International Law*, 78–80; K Skubiszewski, "Definition of Terrorism", (1989) 19 *Israel Yearbook on Human Rights*, 50–1. The modern tendencies are to exclude motive from the definition of terrorism through a clause termed "regardless of motive": see for example the Resolution of the Sixth Committee of the United Nations (19 November 2001), A/C.6/56/L.22, para 2: "Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them". It will be nd that there is a distinction between the general political or ideological purposes of the action (as distinguished from purely personal or private ends) and the specific motives, the concrete political, religious or other causes, which are irrelevant.

Faced with these obstacles due to a high level of conceptual uncertainty and a equally high level of political dissent, international practice has for a long time tried to avoid defining the general concept of terrorism. After an unsuccessful attempt in 1937, with an anti-terrorist Convention signed under the auspices of the League of Nations containing a general definition of terrorism,[9] and a clear deadlock in the United Nations after the events at the Olympic games of 1972,[10] a new approach to the problem was adopted. The international community shied away from any attempt to tackle the problem of terrorism generally. Instead, it was considered more conducive to success to suppress specific acts of terrorism, on which some consensus could be achieved, often after tragic events. This so-called sectoral approach produced a long series of conventions, each one dealing with a specific form of terrorism. While the subject matter of these conventions thus varies, the provisions directed at criminal prosecution are largely similar. We are thus confronted with a network of treaties,

[9] On the Convention of 1937, see A Sottile, "Le terrorisme international", (1938-III) 65 *Recueil des Cours de l'Académie de Droit International*, 116 ff. P Wurth, *La répression internationale du terrorisme*, thèse, (Lausanne, 1941) 48 ff and 91 ff; H Mosler, "Die Konferenz zur internationalen Bekämpfung des Terrorismus", (1938) 8 *ZaöRV*, 99 ff; H Donnedieu de Vabres, "La répression internationale du terrorisme: Les Conventions de Genève (16 novembre 1937)", (1938) 19 *Revue de droit international et de législation comparée*, 37 ff; V Pella, "Les Conventions de Genève pour la prévention et la répression du terrorisme et pour la création de la Cour pénale internationale", (1938) 18 *Revue de droit pénal et de criminologie et archives internationales de médecine légale*, 402 ff; AF Panzera, *Attività terroristiche e diritto internazionale* (Naples, 1978), 22 ff; T Herzog, *Terrorismus — Versuch einer Definition und Analyse internationaler Uebereinkommen zu seiner Bekämpfung* (Frankfurt/Main, 1991), 170 ff; E Chadwick, *Self-Determination, terrorism and the International Humanitarian Law of Armed Conflict* (The Hague / Boston / London, Kluwer, 1996), 97 ff. On the drafting of the Convention: G von Gretschaninow, "Der Plan eines internationalen Abkommens betreffend die Bekämpfung politischer Verbrechen und die Errichtung eines internationalen Strafgerichtshofes", (1945) 5 *ZaöRV*, 181 ff. For the official documents: League of Nations, *Actes de la Conférence internationale pour la répression du terrorisme*, Doc. C.94. M. 47 1935 V.

[10] See SM Finger, "International Terrorism and the United Nations", in Y Alexander (ed), *International Terrorism—National, Regional and Global Perspectives* (New York, Simon & Schuster, 1976), 323 ff. L Migliorini, "International Terrorism in the United Nations Debates", (1976) 2 *Italian Yearbook of International Law*, 102 ff. JF Murphy, "United Nations Proposals on the Control and Repression of Terrorism", in MC Bassiouni (ed), *International Terrorism and Political Crimes* (Springfield, Thomas, 1975), 493 ff; Panzera, above n 9, 112 ff; R Lagoni, "Die Vereinten Nationen und der internationale Terrorismus", (1977) 32 *Europa Archiv*, 171 ff.

which could easily be unified by listing the several acts they prohibit and by adding the common jurisdictional provisions aimed at criminal repression. These treaties are mainly the following:[11] the three Conventions on the Safety of Civil Aviation of Tokyo (14 September 1963, Convention on Offences and Certain Other Acts Committed on Board Aircraft), The Hague (16 December 1970, Convention for the Suppression of Unlawful Seizure of Aircraft) and Montreal (23 September 1971, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, with its supplementing Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation signed at Montreal on 24 February 1988);[12] the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted via General Assembly Resolution 3166 (XXVIII) on 14 December 1973;[13] the *New York* Convention against

[11] See the list of treaties presented at: <http://www.untreaty.un.org/English/terrorism.asp>; see also the list in the report by the Secretary General of the United Nations, *Measures to Eliminate International Terrorism*, A/56/160, 3 July 2001, 18 ff or C Bassiouni, "International Terrorism", in C Bassiouni (ed), *International Criminal Law*, vol I, 2nd edn (New York, Transnational, 1999), 767 ff. For a list of these Conventions with a brief comment on each, see B Boutros-Ghali, "The United Nations and Comprehensive Legal Measures for Combating International Terrorism", *Essays in Honor of E Suy* (The Hague / Boston / London, Martinus Nijhoff, 1998), 290 ff.

[12] On these Conventions, see JM Breton, "Piraterie aérienne et droit international public", (1971) 75 *Revue Générale de Droit International Public*, 392 ff; G Guillaume, "La Convention de La Haye du 16 décembre 1970 pour la répression de la capture illicite d'aéronefs", (1970) 16 *Annuaire Français de Droit International*, 35 ff; RH Mankievicz, "La Convention de Montréal (1971) pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile", (1971) 17 *Annuaire Français de Droit International*, 855 ff; K Hailbronner, *Luftpiraterie in rechtlicher Sicht* (Hannover, 1972); C Emmanuelli, "Etude des moyens de prévention et de sanction en cas d'action illicite contre l'aviation civile internationale", (1973) 77 *Revue Générale de Droit International Public*, 577 ff; E McWhinney, "Illegal Diversion of Aircraft and International Law", (1973-I) 138 *Recueil des Cours de l'Académie de Droit International*, 261 ff. E McWhinney, *Aerial Piracy and International Terrorism*, 2nd edn (Dordrecht, Kluwer, 1987). WD Joyner, *Aerial Hijacking as an International Crime* (Oceana, New York, 1974); *Proceedings of the Conference held in the Hague, Aviation Security*, Leyden, 1987; B Cheng, "Aviation, Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports", *Essays in Honor of G Schwarzenberger* (London, 1988), 25 ff. Y Alexander and E Socher (eds), *Aerial Piracy and Aviation Security* (Dordrecht, Martinus Nijhoff, 1990); G Guillaume, "Terrorisme et droit international", (1989-III) 215 *Recueil des Cours de l'Académie de Droit International*, 311 ff; Panzera, above n 9, 45 ff; Herzog, above n 9, 201 ff. See also the *Ekanayake* case (1986), Sri Lanka Court of Appeals, 87 *ILR*, 296 ff. and the *Yunis (no 2)* case (1988), US District Court, 82 *ILR*, 344 ff, 347–49, confirmed by the Court of Appeals (88 *ILR*,176 ff).

[13] On this Convention, see LM Blomfield and GF Fitzgerald, *Crimes Against Internationally protected Persons: Prevention and Punishment. An Analysis of the UN Convention* (New York, Praeger, 1975); M Wood, "The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents", (1974) 23 *International and Comparative Law Quarterly*, 791 ff; F Przetacznik, "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons", (1974) 52 *Revue de droit international, de sciences diplomatiques et politiques*, 208 ff; AF Panzera, "La Convenzione sulla prevenzione e la repressione dei reati contro persone che godono di protezione internazionale", (1975) 58 *Rivista di diritto internazionale*, 80 ff; Panzera,

the taking of Hostages (17 December 1979);[14] the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation with its attending Protocol on the Safety of Fixed Platforms Located on the Continental Shelf, both concluded on 10 March 1988;[15] and the International Convention for the Suppression of Terrorist Bombings adopted via General Assembly Resolution on 25 November 1997.[16] One may also mention the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 26 October 1979,[17] and the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations General Assembly on the 9 December 1999.[18] Apart from the very first of these treaties, the Tokyo Convention, all the other

above n 9, 77–87; Herzog, above n 9, 319–42; Finger, above n 10, 337 ff; JJ Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention* 1979 (Cambridge, Cambridge University Press, 1990); AC McWillson, *Hostage-Taking Terrorism: Incident-Response Strategy* (Basingstoke, St Martin's Press, 1992).

[14] On this Convention, see R Rosenstock, "The International Convention Against the Taking of Hostages: Another International Community Step Againt Terrorism", (1980) 10 *Denver Journal of International Law and Policy*, 169 ff; S Rosenne, "The International Convention Against the Taking of Hostages", (1980) 10 *Israel Yearbook of International Law*, 109 ff; HG Kausch, "Das internationale Uebereinkommen gegen Geiselnahme", (1980) 28 *Vereinte Nationen*, 77 ff; KW Platz, "Internationale Konvention gegen Geiselnahme", (1980) 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 276 ff; S Shubber, "The International Convention Against the Taking of Hostages", (1981) 52 *British Yearbook of International Law*, 205 ff; Herzog, above n 9, 343–74. See also the *Von Dardel v USSR* case, US District Court (1985), 77 *ILR*, 274.

[15] See A Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair* (Cambridge, Cambridge University Press, 1989); D Momtaz, "La Convention sur la répression d'actes illicites contre la sécurité de la navigation maritime", (1988) 34 *Annuaire Français de Droit International*, 589 ff; G Plant, "The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation", (1990) 39 *International and Comparative Law Quarterly*, 27 ff; C Joyner, "The 1988 IMO Convention on the Safety of Marine Navigation: Towards a Legal Remedy for Terrorism at Sea", (1988) 31 *German Yearbook of International Law*, 230 ff; F Francioni, "Maritime Terrorism and International Law: The Rome Convention of 1988", (1988) 31 *German Yearbook of International Law*, 263 ff; M Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", (1988) 82 *American Journal of International Law*, 269 ff; N Ronzitti (ed), *Maritime Terrorism and International Law* (Dordrecht, Kluwer, 1990); M Munchau, *Terrorismus auf See aus völkerrechtlicher Sicht*, (Frankfurt, 1994); Herzog, above n 9, 290–309.

[16] Annex to Resolution A/52/653, 7 ff. See (1998) 37 *ILM*, 249 ff. SM Witten, "The International Convention for the Suppression of Terrorist Bombings", (1998) 92 *American Journal of International Law*, 774 ff; SA Williams, "The Terrorist Bombings Convention: Another Step Forward in the Fight against International Terror Violence", in Canadian Council on International Law (ed), *From Territorial Sovereignty to Human Security* (The Hague, Kluwer, 2000), 96 ff.

[17] For its text, see (1979) 18 *ILM*, 1419 ff. On this Convention, see International Atomic Energy Agency (ed), *Convention on the Physical Protection of Nuclear Material* (New York, 1982).

[18] For its text, see (2000) 39 *ILM*, 268 ff. On this Convention, see R Lavalle, "The International Convention for the Suppression of the Financing of Terrorism", (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 491 ff. A Aust, "Counter-Terrorism, a New Approach: The International Convention for the Suppression of the Financing of Terrorism", (2001) 5 *Max Planck Yearbook on United Nations Law*, 285 ff.

texts contain a clause according to which the State on whose territory the alleged offender is found is obliged in any case whatsoever and without delay to extradite him or to submit him to the competent authorities for prosecution (*aut dedere aut prosequi*, or *aut dedere aut judicare* clause). Currently, for the first time since the deadlock of 1973, the United Nations envisages a general convention on terrorism.[19] These efforts follow the particularly appalling events of 11 September 2001, which have given a new impetus to the search for an international consensus on terrorism.

These efforts have been paralleled by similar action at the regional level, where stronger cultural and political ties seem to allow less burdensome action. The Organization of American States opened the path with the adoption of the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington DC, 1971).[20] The European Convention on the Suppression of Terrorism (Strasbourg, 1977)[21] followed which focuses on facilitating extradition by limiting the availability of the political-offence exception. However, this aim was imperfectly realised, due to some exceptions to the stated principle and the possibility to enter reservations, a possibility used by some States. The partial closing, at least, of such loopholes was soon considered necessary. Consequently, the European Community drafted the Dublin Convention of 1980.[22] Its official title is: Agreement Concerning the Application of the

[19] See Resolution of the 6th Committee of the GA, A/C.6/56/L.22, 19 November 2001, para 16. See also the *Report of the Working Group*, above n 2.

[20] For the text of the Convention: (1971) 10 *ILM*, 255 ff. On this Convention, see RS Brach, "The Inter-American Convention on the Kidnapping of Diplomats", (1971) 10 *Colombia Journal of Transnational Law*, 392 ff; P Juillard, "Les enlèvements de diplomates", (1971) 17 *Annuaire Français de Droit International*, 223 ff; F Przetacznik, "Convention on the Special Protection of Officials of Foreign States and International Organizations", (1973) 9 *Revue belge de droit international*, 455 ff; PP Camargo, "La protección interamericana de functionarios diplomáticos y consulares contra el terrorismo", (1973/4) 26/7 *REDI*, 111 ff. Panzera, above n 9, 74–77; Herzog, above n 9, 310–328.

[21] See the text of the Convention in (1976) 15 *ILM*, 1272 ff. On the European Convention, see C Vallee, "La Convention européenne pour la répression du terrorisme", (1976) 22 *Annuaire Français de Droit International*, 756 ff; L Migliorino, "Iniziative europee nella lotta al terrorismo: la Convenzione del 27 gennaio 1977", (1977) 13 *Rivista di diritto internazionale privato e processuale*, 469 ff; T Stein, "Die Europäische Konvention zur Bekämpfung des Terrorismus", (1977) 37 *ZaöRV*, 668 ff; G Fraysse- Druesne, "La Convention européenne pour la répression du terrorisme", (1978) 82 *Revue Générale de Droit International Public*, 969 ff; F Mosconi, "La Convenzione europea per la repressione del terrorismo", (1979) 62 *RDI*, 303 ff; AV Lowe and JR Young, "Suppressing Terrorism under the European Convention: A British Perspective", (1978) 25 *Netherlands International Law Review*, 305 ff; I Lacoste, *Die Europäische Terrorismus-Konvention* (Zurich, 1982); HJ Bartsch, "Das europäische Übereinkommen zur Bekämpfung des Terrorismus", (1977) 30 *Neue Juristische Woche*, 1985 ff; R Linke, "Das europäische Übereinkommen zur Bekämpfung des Terrorismus vom 27 Jänner 1977", (1977) 32 *Oesterreichische Juristenzeitung*, 232 ff; Panzera, above n 9, 129–136; Herzog, above n 9, 375–431.

[22] Its text can be found in (1980) 19 *ILM*, 325 ff. See eg G Gilbert, "The Law and Transnational Terrorism", (1995) 26 *Netherlands Yearbook of International Law*, 19 ff.

European Convention on the Suppression of Terrorism among the Member States of the European Community. Its purpose, amongst others, is to limit the opposability of reservations to the European Convention as among member States of the Community. Next was the Convention on the Suppression of Terrorism of the South Asian Association for Regional Cooperation (Kathmandu, 1986).[23] This treaty focuses on extradition and contains a *aut dedere aut prosequi* clause.[24] On 22 April 1998, the Arab League opened to signature the Arab Convention on the Suppression of Terrorism (Cairo, 1998).[25] Three more conventions may be mentioned: First, the Convention of the Organization of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1999).[26] It contains a sweeping definition of terrorism (Article 1(2)) and concentrates on cooperation to fight terrorism and on extradition; it does not contain an *aut dedere* clause. Second, the Convention of the Organization of African Unity on the Prevention and the Combating of Terrorism (Algiers, 1999).[27] In contrast to the previous agreement, this convention contains an *aut dedere aut prosequi* clause.[28] Third, the Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (Minsk, 1999).[29]

Most of these sectoral or regional conventions are concerned only with specific types of terrorist acts and do thus not contain any general definition of terrorism. Their subject matter is defined according to the principle of speciality. However, an adding up of those several definitions leads to a body of law covering a considerable segment of terrorist activities. It may be advantageous for any comprehensive definition of terrorism to operate a *renvoi* (referral) to those texts, while adding a second limb with a more general definition of terrorism, designed to complement those special expressions. In the chain of these sectoral conventions, the first text to express a general definition of terrorism was the Convention for the Suppression of the Financing of Terrorism (1999).[30] We should, however,

[23] See the text with a short introductory commentary in H Levie (ed), *Terrorism — Documents of International and Local Control*, vol. 10, (New York, Oceana Publications, 1996), 313 ff. The text is also printed in (1987) 27 *Indian Journal of International Law*, 308 ff.

[24] The *aut dedere* clause is in Article 4.

[25] See its text at: <http:www.web.amnesty.org/ai.nsf/recent/IOR510012002?OpenDocument>.

[26] See its text at: <http:www.oic-un.org/26icfm/c.html>; on the role of the Islamic conference in combating terrorism, see E Alehabib, "The role of Islamic Conference in Combating Terrorism", (1999/2000) 11 *The Iranian Journal of International Affairs*, 524 ff.

[27] See H Boukrif, "Quelques commentaires et observations sur la Convention de l'Organisation de l'Unité Africaine sur la prévention et la lutte contre contre le terrorisme", (2001) 11 *African Journal of International and Comparative Law*, 753 ff.

[28] See Art 6(4). Text of the Convention in Boukrif, *ibid*, 765 ff.

[29] It has been deposited with the Secretariat of the Community of Independent States.

[30] See Art 2 ((2000) 39 *ILM*, 271). Art 2 first makes a *renvoi* to the treaties mentioned in its annex (the previous sectoral conventions), and then adds in letter (*b*): "[A terrorist offence for the purposes of this Convention is] any other act intended to cause death or serious bodily

not conclude too hastily that such a definition, contained in a sectoral convention, really embodies an all-purposive definition of terrorist acts. In fact, such definitions are always expressly limited to the specific convention at stake ("for the purposes of this convention…"). They are more functional than general. Thus, in a convention on combating doubtful financial streams, a field where terrorist groups merge into other organised criminality, one may well expect a broad definition of the activities covered. Only then can proper investigations be guaranteed, there being moreover no reason to limit such investigations by a narrow scope of the activities encompassed. The question will present itself under another angle if a convention deals with individual criminal prosecution. Here the principle of the *nullum crimen* poses more stringent conditions and generally the focus is different.

This being said, it is still possible to analyze the various definitions of terrorism which have been envisaged during the 20th century and after 11 September 2001. From a bird's perspective, it can immediately be said that the crime of terrorism has proven too multifaceted and composite to be expressed in a simple definition. Given the extraordinary variety of the acts under scrutiny, it was deemed preferable to indicate the typical elements, which define the range and provide the measuring tool for the phenomenon to be considered. Consequently, all the attempts at definition more or less split up the phenomenon into several elements whose variable, indeed spectral, interaction is thought to flexibly bundle up the diverse forms of expression of political violence. In that sense, all definitions of terrorism are "elementary" definitions: they combine different elements, either cumulatively or alternatively. In particular, some aspects can be envisioned as central, while others are peripheral, their absence not being fatal to the qualification of certain acts as terrorist.[31]

A. Single Element Definitions

There are only a few definitions which focus on a single element. These definitions are concerned with the specific means used by the offenders in order to achieve their political ends. Thus, for example, some authors and some official texts equate terrorist acts with criminal violence using

injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

[31] For such an approach, see in particular C Greenwood, "Terrorism and Humanitarian Law — The debate Over Additional Protocol I", (1989) 19 *Israel Yearbook on Human Rights*, 189.

"indiscriminate means".[32] Other texts add to this element the further alternative of the use of "heinous means" ("*moyens odieux*").[33] For the reasons already pointed out, it does not seem that such one-tier definitions are able to adequately deal with the complex phenomenon of terrorist violence. Non-discrimination may well be a distinctive sign of some terrorist actions, but it by no means exhausts the phenomenon. Consider, for example, the killing of carefully selected persons of symbolic value. Furthermore, not all indiscriminate violence must necessarily be terrorist. Apart from the question of State terrorism (eg indiscriminate bombings), there is also the aspect of individuals using random violence for non-political ends. It may then well be doubtful if such a crime must be termed terrorist, or if there is much to be gained by such a qualification. The classical example is the threat or use of indiscriminate means in order to extort money from a targeted company or group; or the use of a bomb killing many people randomly if the ultimate aim is to kill a specific person in order to gain the proceeds of his life-insurance.

Another form of one-tier definition is to define a series of acts of violence which amount to terrorism if the foreign ministry (in the United States the Secretary of State) designates the organisation from which they emanate as a terrorist group. This is the basis of Sections 1182(a)(3) and 1189(a)(1) of the Antiterrorism and Effective Death Penalty Act (1996) in the United States of America.[34] This simplified definition rests on a political

[32] See eg *T v Secretary of State for the Home Department*, England, Court of Appeal, (1994) 104 *ILR*, 656 ff, 663, 665: "the use of indiscriminate violence which would or might lead to the deaths of innocent people". See also the *SAARC Convention* (above n 23), Art 1(e): which defines a terrorist act as the commission of certain acts plus indiscriminate means: "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".

[33] See eg, the Centre d'étude et de recherche de droit international et de relations internationales, Hague Academy of International Law, *Les aspects juridiques du terrorisme international*, 1988 Session (The Hague, Kluwer, 1989), 16: "Les actes terroristes au sens des présents principes sont, entre autres, les agressions ou les menaces contre la vie ou l'intégrité affectant aveuglément des personnes, ou utilisant des méthodes odieuses condamnées par la communauté internationale …".

[34] See 8 USC § 1182(a)(3)(B)(ii): "Terrorist activity is defined as any activity which is: unlawful … where it is committed …, and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel or vehicle). (II) The seizing or detaining, and threatening to kill, injure or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or to abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person…or upon the liberty of such a person. (IV) An assassination. (V) the use of any — (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing". For an application of this section, see the *People's Mojahedin*

qualification process with all its selectivity and unilateralism.[35] It hardly recommends itself for international relations where there is no comparable authority and where any broad consensus as to the groups to be put in that category is lacking. For this reason the Security Council of the United Nations is equally unsuited to perform any function of this type.

B. Two Element Definitions

There are other definitions which rely essentially on two elements, however combined. Some sources stress the elements of terror (intimidation)/purpose;[36] or the elements terror (intimidation)/coercion;[37] or specified acts of violence/political purpose;[38] or such acts of violence/

Organization of Iran v US Department of State (1999), US Court of Appeals, Columbia, (1999) 38 *ILM*, 1287 ff.

[35] Section 1189(a)(1) of the quoted act empowers the Secretary of State to designate a foreign terrorist organization if he finds three things: (1) the organization is a foreign organization; (2) the organization engages in terrorist activity as defined by the applicable provisions; and (3) the terrorist activity of the organization threatens the security of the United States nationals or the national security of the United States.

[36] See for example M Williams and SJ Chatterjee, "Suggesting Remedies for International Terrorism, Use of Available International Means", (1976) 5 *International Relations*, 1071: "... terrorism may be defined as an act directed to create fear, panic and/or alarm by means of violence or the threat thereof with a view or not to achieving certain purposes, political or otherwise". See also Sottile, above n 9, 96: "*... acte criminel perpétré par la terreur, la violence, par une grande intimidation en vue d'atteindre un certain but*". See also *Resolution on Measures to Eliminate International Terrorism*, UNGA, Sixth Committee, A/C.6/56/L.22, 19 November 2001, para 2: "... criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes ...".

[37] See G Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge, Cambridge University Press, 1982), 16: "... the use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and / or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to the political demands of the perpetrators". See also the proposal of the Ivory Coast at the United nations Ad Hoc Committee Established by GA Resolution 51/210 of 17 December 1996, *Report of the Fifth Session (12–23 February 2001)*, GAOR, 56th Session, Suppl no 37 (A/56/37), Annex III, p. 6: "Terrorism means any act or omission, whoever the author or authors, that is intended to inflict terror, that is, fear, panic or serious and profound anguish, upon one or more natural or legal persons, with a view to coercing such person or persons, in particular the government authorities of a State or an international organization, to take or to refrain from taking some action".

[38] See ILA, *Report of the Sixty-First Conference*, Paris Session, 1984, p. 314: "... acts of international terrorism include but are not limited to atrocities, wanton killing, hostage taking, hijacking, extortion, or torture committed or threatened to be committed whether in peacetime or in wartime for political purposes...". At the level of municipal law, see the Immigration Amendment Act of New Zealand, 1978: "(a) any act that involves the taking of human life, or threatening to take human life, or the wilful or reckless endangering of human life, carried out for the purpose of furthering an ideological aim" ((1989) 19 *Israel Yearbook on Human Rights*, 23); the United Kingdom Prevention of Terrorism (Temporary Provisions) Act, 1984: "... the use of violence for political ends, [including] any use of

coercion;[39] or such acts of violence/terror (intimidation);[40] or such acts of violence/creation of a common danger;[41] or the creation of a common

violence for the purpose of putting the public or any section of the public in fear" (*ibid*, 23–4); US Executive Branch definition during the 1980s: "... premeditated use of violence against noncombatant targets for political purposes ..." (*ibid*, 26; R Oakley, "International Terrorism", (1987) 65 *Foreign Affairs*, 611); United Kingdom Terrorist Act of 20 July 2000, s 1, where terrorism is defined according to the following parameters: use or threat of action including serious violence against a person or damage to property or risk to the health or safety of the public or a section of the public, for the purpose of advancing a political, religious or ideological cause (by intimidating the public or the government).

[39] See the US Foreign Intelligence Surveillance Act (FISA) of 1978, s 101(c), 50 USC §1801(c): "International terrorism means activities that — (1) involve violent acts or acts that are dangerous to human life...(2) appear to be intended — (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping ...".

[40] See eg Articles 1(2) and 2 of the League of Nations Convention against Terrorism of 1937 (above n 9): "... criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, a group of persons or the general public" (Art 2). Art 2 enumerates the *acta rea*, eg "any wilful act causing death or grievous bodily harm or loss of liberty" to some specified persons. Art 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999): "Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening harm to them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States". Art 16 of the ILC's *Draft Code on Crimes against the Peace and Security of Mankind*: "...acts against another State directed at persons or property and of such nature as to create a state of terror in the minds of public figures, groups of persons or the general public" (Doc A/45/10, 1990). See also the *Draft Single Convention on the Legal Control of International Terrorism*, International Law Association, 59th Conference, Belgrade, 1980, p 497: "... any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons which is directed against internationally protected persons, organizations, places, transportation or communication systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communication systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States". At the level of municipal law, see eg the French Criminal Code, Art 421(1): "*... actes... intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur*". At the level of judicial practice, Lord Mustill and Lord Slynn of Hadley endorsed the definition contained in the 1937 League of Nations Convention: see the *T. v Immigration and Secretary of State for the Home Department* case (1996), House of Lords, 107 *ILR*, 575, 576. In doctrine, see eg G Gilbert, "The Law and Transnational Terrorism", (1995) 26 *Netherlands Yearbook of International Law*, 8: "... includes violent crimes committed with the intention of intimidating some government or group within a State".

[41] See eg the *Third Conference for the Unification of Penal Law* held under the auspices of the International Association of Penal Law at Brussels in 1930. Committee V of that Conference defined the act of terrorism as "the deliberate use of means capable of producing a common danger" to commit "an act imperiling life, physical integrity or human health or threatening to destroy substantial property". At the Paris Session of 1931, the following definition was proposed: "*Quiconque aura, en vue de terroriser la population, fait usage, contre les personnes ou*

danger/indiscrimination of the acts at stake;[42] or finally acts of violence /purpose of provoking international tension (or destabilizing the internal situation of a State).[43] As can be seen in the descriptions given, these elements may merge into one another.

C. Three Tier Definitions

In order better to capture the phenomenon of terrorism, a series of three-tier definitions was proposed. Especially in recent times, such descriptions combining three elements gain more and more ground. Such definitions put forward the elements of acts of violence/terror (intimidation)/political purpose;[44] or, in a slight variation, acts of violence/terror

les biens, de bombes, mines, machines ou produits explosifs ou incendiaires, armes à feu ou autres engins meurtriers ou destructeurs, ou aura provoqué ou tenté de provoquer, propagé ou tenté de propager une épidémie, une épizootie ou une autre calamité, interrompu ou tenté d'interrompre un service public ou d'utilité publique, sera puni ...". (cf. *Actes de la Conférence internationale pour l'unification du droit pénal*, Paris, 1938, p 49). See VS Mani, "International Terrorism: Is A Definition Possible?", (1978) 18 *Indian Journal of International Law*, 207. See also Sottile, above n 9, 113–15; Wurth, above n 9, 27 ff; I Lacoste, *Die Europäische Terrorismus-Konvention* (Zurich, 1982), 14–16; JF Prevost, "Les aspects nouveaux du terrorisme international", (1973) 19 *Annuaire Français de Droit International*, 580–81; G Guillaume and G Levasseur, *Terrorisme international* (Paris, 1977), 82–83. See also *Official Documents of the United Nations, Study by the Secretariat of the United Nations*, Doc A/C.6/418, 2 November 1972, p 10 ff.

[42] See the definition proposed by the ILA's Committee on *Legal Problems of Extradition to Terrorist Offences* (Warsaw Session, 1988), draft Art 1: "... acts which create a collective danger to the life, physical integrity or liberty of persons and affect persons foreign to the motives behind them" (ILA, *Report of the 63rd* Conference, p. 1035).

[43] See the legislation of Belarus, *Report of the Secretary-General* ...(above n 6), 4, para 18, Art 126 of the Criminal Code of Belarus, defines international terrorism as: "organizing the carrying out of explosions, arson or other acts in the territory of a foreign State with a view to causing loss of life or physical injury, destroying or damaging buildings, installations, means of transport, means of communication or other property for the purpose of provoking international tension or hostilities or destabilizing the internal situation in a foreign State, or murdering or causing physical injury to a political or public figure of a foreign State or damaging property belonging to such persons for the same purpose ...".

[44] See eg the *Report of the Secretary-General, Measures to Eliminate International Terrorism, Addendum*, 12 October 2001, A/56/160/Add.1, p 6, para 48, Poland: "... the use of or threat to use violence for political purposes; a method of fighting or reaching specific goals based on intimidation of a society and government by causing human casualties and loss of property, characterized by ruthlessness and violation of moral and legal norms". In legal writings, see Chadwick, above n 9, 2–3: "Terrorist offence includes, but is not limited to, acts of violence or deprivations of freedom which are directed against persons or their property for a political purpose (...). [T]hese acts are intended in the main to spread fear or terror, in order to coerce a change in policy. Thus the instigators of terrorist violence can be an individual, a group, or a government". See also G Guillaume, "Terrorisme et droit international", (1989–III) 215 *Recueil des Cours de l'Académie de Droit International*, 300, who quotes English legislation in the following terms: "*Usage de la violence à des fins politiques, y compris tout usage de la violence dans le but de créer la peur dans le public ou une partie du public*".

(intimidation)/a specific purpose;[45] or acts of violence/terror (intimidation)/attack on the political, economic or social order;[46] sometimes such acts are limited to attacks against civilians.[47] Finally, there is a combination of factors, which is constantly gaining ground, especially within the United Nations. This equation on terrorism reads as follows: acts of violence/terror (intimidation)/coercion.[48]

[45] In doctrine, see Guillaume, *ibid* 306: "*Le terrorisme implique l'usage de la violence dans des conditions de nature à porter atteinte à la vie des personnes ou à leur intégrité physique dans le cadre d'une entreprise ayant pour but de provoquer la terreur en vue de parvenir à certaines fins*". C Bassiouni, "International Terrorism", in C Bassiouni (ed), *International Criminal Law*, 2nd edn, vol I, (New York, Transnational, 1999), 777–78 adds to this only the ideological motives: "... an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves, or on behalf of the state".

[46] These elements were already stressed at the beginning of the XXth century under the heading of anarchist violence: see Conférence pour l'unification du droit pénal, Madrid, 1933, Art 1 of the Draft Convention. "*Celui qui, en vue de détruire toute organisation sociale aura employé un moyen quelconque de nature à terroriser la population, sera puni ...*" (*Actes de la Conférence* ... (above n 41), 50). This type of definition has been used equally in more recent legislations of continental European States. They are not any more directed to the aim of destroying "any social order" but more concretely to the attacks upon the specific social and constitutional order of a State. See eg the Portuguese Criminal Code, Art 300, mentioning prejudice to national interests and the fact of altering or disturbing State's institutions (*"visem prejudicar a integridade ou a independência naciolais, impedir, aqlterar ou subverter o funcionamiento das instituçoes do Estado previstas na Constitiçao ..."*); Art 571 of the Spanish Criminal Code, alluding to the aim of subverting the constitutional order and altering seriously public peace (*"...cuya finalidad sea la de subvertir el orden constitutional o alterar gravemente la paz pública ..."*); or Articles 270bis, 280, 289bis of the Italian Criminal Code, speaking of subversion to the democratic order of the State (*"eversione dell'ordine democratico"*). On these pieces of legislation, see the Report of the Commission of the EC, *Proposal for a Council Framework Decision on Combating Terrorism*, 19 September 2001, COM(2001)521, 7. In its Report, the European Commission proposes the following definition of terrorism: "Terrorist offences can be defined as offences intentionally committed by an individual or a group against one or more countries, their institutions or people, with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country"; see also p 7, 17 (Art 3 of the Framework Decision).

[47] See eg the definition given by the United States Congress: "... premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents" (quoted by M Reisman, "International Legal Responses to Terrorism", (1999) 22 *Houston Journal of International Law*, 9). See also the definition given in the Convention for the Suppression of the Financing of Terrorism (1999), above n 30.

[48] See eg Art 24(2) of The ILC *Draft on a Code of Offences against the Peace and Security of Mankind*, Report on the Work of its 47th Session, 13th Report of D Thiam, Doc A/50/10, p 56–59, paras 105–11, p 58, above n 40: "The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way". See also the more recent *Report of the Working Group* of the United Nations (supra, above n 2), p. 16, informal Article 2: "[if a person] by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a

D. Multi-Dimensional Definitions

In a last group, we may assemble all efforts to describe the notion of terrorism flexibly, by enumerating a series of criteria, which may be relevant in order to catch a phenomenon not reducible to a linear definition. Thus, for Skubiszewski, the terrorist act is characterized by its effect (creation of a common danger; fear), its means (symbolic violence), its victims (indiscriminate number or singled-out prominent figures), and its authors (only individuals, never States *per se*).[49] Oppermann qualifies the crime according to its philosophy (the end justifies the means), its authors (marginal groups), its victims (common danger, indiscriminate violence), its motives (political, religious, social, or military), and its goals (in depth transformation of existing power attributions).[50] Herzog points to the following chain of elements: (1) the threat or carrying out of grievous acts of violence; (2) by individuals not acting on behalf of a State; (3) in the pursuit of political ends, widely defined; (4) with the intent of inducing a state of terror; (5) within the frame of a long-term strategy.[51]

State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities .... resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act". The elements of terror and coercion are presented in a disjunction ("or"). See also the definition advances by Panama, in *Report of the Secretary-General, Measures to Eliminate Intrenational Terrorism*, 3. July 2001, A/56/160, p. 8, §64: " ... committing, organizing, ordering, financing, encouraging, instigating or tolerating acts of violence directed against persons or their property, creating a state of terror (dread or fear) in the minds of leaders, a group of persons or the general public with a view to compelling them to concede certain advantages or act in a given way ... ". See also the proposal of South Africa concerning draft Art 2(1) quoted above which largely follows the definition proposed by the Working group: *Report of the Ad Hoc Committee* ... (above n 37), p. 7, no. 5 or Doc. A/AC.252/2001/WP.5. In legal literature, see eg J Paust, "Terrorism and the International Law of War", (1974) 64 *Military Law Review*, 3–4: " ... the purposive use of violence or the threat of violence by the perpetrators against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target into behavior or attitudes through intense fear or anxiety in connection with a demanded (political) outcome".

[49] K Skubiszewski, "Definition of Terrorism", (1989) 19 *Israel Yearbook on Human Rights*, 42–49.
[50] T Oppermann, "Der Beitrag des internationalen Rechts zur Bekämpfung des internationalen Terrorismus", *Mélanges H.J Schlochauer* (Berlin / New York, 1981), 496–502.
[51] Herzog, above n 9, 106–7. See also Stein, above n 5, 40. For such a "complex" definition, see also A Schmid and AJ Jongman, *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (New Brunswick, Transaction Books, 1988), 28; Lacoste, above n 21, 10 ff, discussing: (1) the means (eg indiscriminate acts); (2) the effects (eg the production of fear); (3) the aims (eg exception for wars of national liberation?); (4) the motives (eg the furthering of social or political causes); and any combination of such elements.

E. Combining the Sectoral Approach with a Global Approach

The most recent tendencies combine the sectoral (or "piecemeal") approach with the global approach. The definition of terrorism is sought by identifying two limbs, one listing the acts covered by the several specific conventions, the other adding a general definition of terrorist acts by having more often than not recourse to the three elements of violent acts/terror/coercion. To the *leges speciales* of the conventions is thus added a *lex generalis* trying to devise the core elements of the terrorist offence beyond the specific subject matter. At the level of definition this merging of the two streams can easily be achieved. More intricate problems may arise when one is dealing with the respective field of application and potential conflicts between a new general convention on international terrorism and the old multiple conventions concluded since 1963.[52] The two-limb approach just described can be found for example in the European Convention on the Suppression of Terrorism of 1977,[53] the Convention for the Suppression of the Financing of Terrorism (1999),[54] the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999),[55] and the Draft Comprehensive Convention on International Terrorism of the Working Group of the Sixth Committee of the UN General Assembly.[56] In view of the preceding discussion, it may be said that some progress has been made towards the definition of a "qualified" terrorist act beyond purely piecemeal descriptions. The point reached is all the more commendable if one takes into account the considerable political obstacles to agreement in such a field. It may well be that the events of 11 September[57] will serve to catalyze further progress, once the urgency of the matter is fully understood. However, for the moment one can only take note of the absence of a universally agreed definition of terrorist acts to be criminally prosecuted. The events concerning the

[52] As to this aspect, see the debates at the United Nations: *Report of the Ad Hoc Committee* ... (above n 37), Annex V, para 16 ff.
[53] Art 1.
[54] Art 2. It reads as follows: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence 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 serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act" (see (2000) 39 *ILM*, 271).
[55] Articles 1(2) and 1(4).
[56] Informal Articles 2 and 2bis. See the *Report of the Working Group* ... (above n 2), p. 16.
[57] On these events see the measured and brief analysis of C Tomuschat, "Der 11 September 2001 und seine rechtlichen Konsequenzen", (2001) 28 *EuGRZ*, 535 ff.

International Criminal Court[58] show quite well the obstacles which are still to be overcome on the path of international jurisdiction. At the moment, the matter of arriving at a general definition of terrorism is in full flux, producing many ideas and moving towards a process to crystallize some core definition of a terrorist act in general. But no such definition is yet identifiable in positive law, a state of affairs which cannot be ignored or discussed away. This has considerable impact on the legal means for the prosecution of terrorist crimes available at the time being in international law. A further point deserves brief attention. It is often claimed that any definition of terrorism which contains the element of "terror" is tautological.[59] This is not exactly the case. The element at stake would be tautological only if it had no other meaning than terrorism itself, i.e. if it was indissolubly linked to terrorism. But this is not true. The element of "terror" can be replaced by any other word connoting the same idea, as for example fear, anguish, dread, intimidation, etc, adding to it eventually a qualification such as "extreme", "considerable", etc. That course was in fact chosen by the ILC when drafting the Code of Offences against the Peace and Security of Mankind.[60] If it is thus replaced, the tautology visibly disappears. There remains an element which may be quite open-ended, but this is another problem, if it is one at all.

F. International Element

International law only deals with terrorist acts which affect international relations. In other words, it is concerned in principle only with international terrorism while leaving local terrorist acts to the exclusive control of the territorial State. International terrorism is made up of terrorist acts (however defined) plus an international element.[61] No further proof of any international element is needed in the context of some anti-terrorist conventions, especially those dealing with the safety of civil aviation.

[58] See infra, II. B.
[59] See already Sottile, above n 9, 95.
[60] See above n 48.
[61] On that question, see Sottile, above n 9, 98–99; Murphy, above n 5, 16, 27, 32; Skubiszewski, above n 49, 49–50; Mushkat, above n 2, 467 ff; Lacoste, above n 21, 21 ff; Franck and Lockwood, above n 8, 78; Wurth, above n 9, 57 ff; Guillaume and Levasseur, above n 41, 66–67; Prevost, above n 41, 589; Oppermann, above n 50, 501–3; Gilbert, above n 40, 10; Bassiouni, above n 45, 778; E. David, "Le terrorisme en droit international", in *Colloque de l'Université libre de Bruxelles, Réflexions sur la définition et la répression du terrorisme* (Brussels, 1974), 127 ff. See also the Report of the Ad Hoc Committee ... (above n 37), Discussion Paper prepared by the Bureau as a Basis for Discussion in the Working Group of the Sixth Committee at the fifty-sixth Session of the General Assembly, A/56/37, p. 3, Art 3: "This Convention shall not apply where the offence is committed within a single State, the alleged offender is found in the territory of that State and no other State has a basis ... to exercise jurisdiction".

Their subject matter is *eo ipso* international and pertains to international law. It is therefore only for the acts not covered by these conventions (and possibly for States not parties to the conventions) that the question of the international character of the acts involved may arise. This may occur, for instance, when national law provides for prosecution or control of acts of "international terrorism" as does the US Foreign Intelligence Surveillance Act (FISA) of 1978.[62] The question may also arise at the international level, in three contexts. First, in those conventions the subject matter of which is not *eo ipso* international, the question is regulated by a specific clause, defining the acts considered to be attacks on international interests.[63] Second, the question may arise in the case of prosecution of terrorist acts by a State outside the framework of a specific convention. If a State claims a form of universal jurisdiction over a terrorist act, be it in the form of customary universality or of *aut dedere aut judicare* derived by analogy from treaty law,[64] it may well be that such a jurisdiction can be exercised only if the acts at stake are to be considered acts of international terrorism, as opposed to purely internal terrorism.[65] Third, the question puts itself in any case to the legislator, since he has to decide which acts constitute a sufficient attack on international interests such as to warrant international control or jurisdiction.

Having thus determined the relevance of the international element we must now turn to its content. Roughly speaking, there is internationality if an act has international consequences in the sense that it affects the duties or rights of more than one State or foreign interests. Hence, there is an international terrorist act when, either: (1) the act or the acts take place in more than one State; (2) the act or the acts take place in a space where no State has exclusive national jurisdiction, eg on the high seas; (3) the perpetrator and victim are citizens of different States; (4) the act or acts affect citizens of more than one State; (5) the acts affect targets having an international status (independently from a specific anti-terrorist convention), eg personnel of international organisations, international communications, transport, postal or other, etc; (6) the effects of the terrorist act are

[62] Sect. 101(c), 50 U.S.C. § 1801 (c): "(3) [activities that] occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum". See also Murphy, above n 5, 27.
[63] See eg Art 3 of the Convention for the Suppression of the Financing of Terrorism (1999): "This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis ... to exercise jurisdiction ..." ((2000) 39 *ILM*, 272). See equally Art 3 of the Convention for the Suppression of Terrorist Bombings (1998), (1998) 37 *ILM*, 254.
[64] On this question, see below, II.
[65] Apart from the fact that in case of purely internal terrorism further problems may arise under the doctrines of double criminality (at the place of the offence and at the place of the forum) and of the political offence exception.

felt in a third State.[66] Conversely, the fact that a perpetrator flees in a third State after the act does not entail that the act itself transforms itself into an act of international terrorism. Rather, the extradition process may be set in motion, but this inter-State procedure concerns only the question of physical control of the culprit, not the quality of the act itself.[67]

The elements internationalising a terrorist act just discussed are quite sweeping and pose many questions of delimitation. Thus, for example, the effects-doctrine permits a considerable extension of coverage,[68] since in the modern interdependent world some effects will easily be felt collaterally to a terrorist offence. There is no means to assign a limited and precise scope to such "effects" which are by their very nature vaguely defined. May one say that simply on account of its gravity an act becomes one of international concern, even if all the victims and other immediate connections of it are exclusively from and in one State?[69] Does its gravity alone make the act a sort of crime *erga omnes*, since it could be seen as attacking the fundamental values of the international community,[70] especially because the protection of human rights has become since 1945 increasingly one of the core elements of the international legal order?[71] It could equally be said that such acts by very definition (or legal fiction) have "effects" felt in other States, to the extent that fundamental common interests are infringed. On the other hand, one could limit that statement to terrorist acts committed by indiscriminate means. If a bomb is placed in a public place, it may well be that by chance no foreign national is injured or killed. But the mere fact of the randomness of the attack created a danger that such foreign nationals could have been killed or injured.

[66] One may also mention the recent efforts under the aegis of the United Nations to prepare a comprehensive convention against terrorism. In that context, some definition of terrorism of international concern was felt necessary. Art 3 of the Discussion Paper prepared by the Bureau as a Basis for Discussion in the Working Group of the Sixth Committee at the fifty-sixth Session of the General Assembly, A/56/37, *Report of the Ad Hoc Committee* ... (above n 37), 3, reads as follows: "The Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis ... to exercise jurisdiction [under this Convention] ...".

[67] Compare Gilbert, above n 40, 10. As the present author, Skubiszewski, above n 8, 50. Art 3 of the Discussion Paper quoted in the above note seems to imply that the flight into a third State could trigger the application of norms relative to international terrorism, but as explained this position does not seem legally correct (see in Art 3 the limb "the alleged is found in the territory of that State").

[68] See for instance the *United States v Noriega* case (1990), United States District Court for the Southern District of Florida, 99 *ILR*, 145 ff.

[69] Compare Mushkat, above n 2, 468, *de lege lata*.

[70] For such statements, see R Kolb, "Universal Criminal Jurisdiction in Matters of International Terrorism: Some reflections on Status and Trends in Contemporary International Law", (1997) 50 *Hellenic Review of International Law*, 70 ff.

[71] See eg the decided statement of C Tomaschat, "International Law: Ensuring the Survival of Mankind on the Eve of A New Century, General Course on Public International Law", (1999) 281 *Recueil des Cours de l'Académie de Droit International*, 220 ff.

That potential damage or that risk may be enough to create an international link, eg under the effects-doctrine (constructive effects or effect through risk). The recent events prompting an upsurge in combating international terrorism and an increase of international solidarity in that enterprise may well be taken as having expanded the circle of "internationality" of terrorist acts while narrowing the correspondent circle of purely domestic terrorism. But what gravity of the act is necessary in order to trigger internationalisation is a delicate question which cannot yet be answered with any degree of certainty.

Another question which may be asked is that concerning secessionist violence. To the extent that such violence is directed solely against the interests of the former unitary State, can it be said that these are acts of international terrorism? Quite apart from the highly controversial question of whether movements of national liberation should be covered by the definition of terrorism[72] (and whether secessionist movements are entitled to such status), it seems that the answer will depend on the internationalisation of the conflict itself, mainly through recognition by foreign States. The applicable law would then be the law of internal (or, if there is foreign involvement, of international) armed conflicts.[73]

Many other questions could be raised, but we stop here, since the essential elements giving rise to the internationalisation of the terrorist act are fairly clear. It may be simply recalled, in conclusion, that an effect of the growing inter-penetration of the modern world has been the increasing internationalisation of terrorist acts. Today, most terrorist

[72] See above n 2.

[73] See, among others, Chadwick, above n 9, 65 ff, 129 ff, 179 ff. As to the question of terrorism in armed conflicts there is ample literature. See eg K Hailbronner, "International Terrorism and the Laws of War", (1982) 25 *CYIL*, 169 ff; C Greenwood, "Terrorism and Humanitarian Law: The Debate Over Additional Protocol I", (1989) 19 *Israel Yearbook on Human Rights*, 187 ff; H-P Gasser, "Interdiction des actes de terrorisme dans le droit international humanitaire", (1986) 68 *Revue internationale de la Croix Rouge*, 207 ff; JJ Paust, "Terrorism and the International Law of War", (1974) 64 *Military Law Review*, 1 ff; AP Rubin, "Terrorism and the Laws of War", (1983) 13 *Denver Journal of International Law and Policy*, 219 ff; Guillaume, above n 44, 375 ff; JA Frowein, in Hague Academy of International Law, 1988, *Les aspects juridiques du terrorisme international* (The Hague/Boston/London, 1989), 75–8; J Paust in AE Evans and JF Murphy (eds), *Legal Aspects of International Terrorism* (Toronto, Lexington Books, 1978), 352–53; WT Mallison and SV Mallison, "The Control of State Terrorism Through the Application of the International Humanitarian Law of Armed Conflict", in MH Livingston, LB Kress and MG Wanek (eds), *International Terrorism in the Contemporary World* (London, Greenwood Press, 1978), 325 ff; M Sassoli, "International Humanitarian Law and Terrorism", in P Wilkinson and AM Stewart, *Contemporary Research on Terrorism* (Aberdeen, Aberdeen University Press, 1987), 466 ff; LC Green, "Terrorism and Armed Conflict", (1989) 19 *Israel Yearbook on Human Rights*, 131 ff; WA Solf, "International Terrorism in Armed Conflict", in HH Han (ed), *Terrorism and Political Violence* (New York, University Press of America, 1993), 317 ff; G Stuby, "Humanitarian International Law and International Terrorism", in H Köckler (ed), *Terrorism and National Liberation* (Frankfurt, 1988), 237 ff. For a critique, see Panzera, above n 9, 180–82. See also Chadwick, above n 9.

strategies are aimed at provoking international concern for their causes, thus wilfully attacking or affecting international interests.

II. THE EXERCISE OF CRIMINAL JURISDICTION OVER INTERNATIONAL TERRORISTS

A. Jurisdiction Exercised by States

Terrorist offences may be prosecuted before domestic courts or at the level of an international criminal tribunal. The latter situation is highly exceptional, since from the Nuremberg Trial up to the *ad hoc* tribunals created by the Security Council in the 1990s in order to deal with the crimes perpetrated in the former Yugoslavia and in Rwanda, there was no international criminal tribunal. In July 2002, the Statute of the International Criminal Court entered into force, and therefore there is now a permanent international court dealing with criminal prosecution at the international level. However, the great mass of crimes will continue to be prosecuted by national courts, since only the State possesses the infrastructure able to deal with the great number of cases arising in situations of armed conflict such as those in former Yugoslavia or in Rwanda. It is thus justified to consider first the jurisdictional bases States possess under international law in the context of the criminal prosecution of terrorist crimes, before reverting to the possibilities in this context of the International Criminal Court.

We will not go into the matter of prosecution of terrorist acts as defined by the numerous pieces of internal legislation of States. This is a matter of internal law only, to the extent that it does not correspond to terrorism as envisaged by international law norms. Conversely, to the extent internal law is necessary for or conflicting with international norms on the suppression of terrorism, either because it implements the latter, or because it claims national jurisdiction for acts of (international) terrorism beyond the provisions of the latter, or because it does not allow implementation of the latter, the problem touches on international law and must thus be addressed.

B. The National Suppression of Terrorist Acts under the Conventional Systems

1. *The Rules Contained in the Conventions*

The several anti-terrorist Conventions concluded on the global level after 1963 are all based on a similar jurisdictional system, with only slight

variations due to experience of shortcomings and emergent political consensus. These conventions provide a series of jurisdictional titles for all the States parties. These titles fall in two categories: (1) a series of specific titles, eg territoriality, personality, State of registration of an air carrier, etc., for which the State is either obliged or allowed to establish jurisdiction; (2) a general clause providing that in all cases where the offender is found in the territory of one State party, it shall in any case exercise jurisdiction if it does not extradite the offender to a more convenient forum (*aut dedere, aut iudicare* or more accurately, *aut dedere, aut prosequi*).[74] Articles 6 and 8 of the recent International Convention for the Suppression of Terrorist Bombings (1998) may serve as an illustration:[75]

"Article 6.

1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
   (a) The offence is committed in the territory of that State; or
   (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
   (c) The offence is committed by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence when:
   (a) The offence is committed against a national of that State; or
   (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
   (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
   (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act, or
   (e) The offence is committed on board an aircraft which is operated by the Government of that State.

[74] For a precise analysis of these conventional systems, see M Henzelin, *Le principe de l'universalité en droit pénal international*, (Geneva, Helbing & Lichtenhahn/Bruylant , 2000), 294 ff. These conventions suffer from a number of problems, such as: (1) the insufficiency of the numbers of ratification or accession for the conventions to fulfill their purpose to close down any save havens; (2) the insufficient application of the treaties; (3) the existence of too many loopholes, eg with the political offence exception or with a too loose duty to search for and to arrest the suspects (on these points see below, § 15 and § 16). See eg A Cassese, "The International Community's Legal response to Terrorism", (1989) 38 *International and Comparative Law Quarterly*, 593–5.

[75] See (1998) 37 *ILM*, 254–6.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article."

"Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. ..."

Under the heading of special jurisdictional titles are thus listed the principles of territoriality, registration, active personality; then passive personality, State security and some other minor bases. The whole scheme is supplemented by the residual clause of *aut dedere aut prosequi*. The special titles slightly vary in the different conventions, according to their subject matters. A convention on terrorist bombings, by its very subject matter, is likely to have a large jurisdictional reach. Conversely, a convention against acts of violence directed at certain defined persons has a narrower jurisdictional ambit. One must note, moreover, that all these conventions contain a clause whereby they do not purport to exclude any criminal jurisdiction exercised in accordance with national law.[76] Thus, to the extent that there are further jurisdictional titles provided for in the national criminal codes, and that these titles are not contrary to international law, a prosecution may be based on them quite independently of the specific provisions of the convention at stake. In legal terms, the titles provided for in the conventions are not exclusive, but complementary to those of national law. There is a difference to the extent that the convention obliges a State to exercise jurisdiction under some titles. Then jurisdiction becomes mandatory, whereas the jurisdiction based on municipal law is optional. The municipal titles correspond to those listed in Article 6(2) of the Convention on Terrorist Bombings, which are expressly termed as being optional ("may also establish jurisdiction"). One may add that the two-tier approach distinguishing at the level of the conventions between mandatory and optional titles is a new technique. In the older conventions, such as the Montreal Convention for the

[76] See eg Art 6(5) of the Convention against Terrorist Bombings.

Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), there were only mandatory titles.[77]

It does not seem warranted at this stage to discuss the specific titles of jurisdiction. Territoriality, personality, active and passive[78], State security or other special links are well-known principles of criminal jurisdiction which do not prompt any particular problems in the context of terrorism.[79] Conversely, the principle *aut dedere aut prosequi* requires more detailed discussion. It is a title specific to international crimes, which has been popularised precisely through the anti-terrorist conventions.

2. *Aut Dedere Aut Prosequi = Conventional Universal Jurisdiction?*

The first question to be raised as to the character of the *aut dedere* principle is whether we can envision it as a type of conventional universal jurisdiction. Universal jurisdiction[80] allows every State to exercise its

[77] See Art 5 of the Convention.

[78] This title has been traditionally somewhat controversial, in particular since the anglo-saxon legal orders did not endorse it. However, the criminal codes of many States contain that principle, allowing them to prosecute persons having committed crimes against their nationals abroad. See generally L Oppenheim in R Jennings and A Watts, *International Law*, 9th edn (London, 1992), 471–72. As for a State applying the principle, see Art 5(1) of the Swiss Criminal Code: "*Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit contre un Suisse, pourvu que l'acte soit réprimé aussi dans l'Etat où il a été commis, si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger, ou s'il est extradé à la Confédération à raison de cette infraction*". For judicial practice on this principle in Switzerland, see eg Arrêts du Tribunal Fédéral (ATF), 108 *Recueil officiel*, part IV, 147 ff; ATF 119 IV, 117 ff; ATF 121 IV, 148 ff. For jurisprudence in general, see the cases quoted in Oppenheim, *ibid.*

[79] See generally Oppenheim, *ibid*, 456 ff, with numerous references.

[80] Universal jurisdiction thus touches closely on the categories of an international public order, of rights *erga omnes* and of *ius cogens* understood as a series of fundamental norms embodying the essential values of the contemporary international community. On the international public order, see H Mosler, "The International Society as a Legal Community, General Course of Public International Law", (1974–IV) 140 *R.CADI*, 33–36; H Mosler, "Der Gemeinschaftliche ordre public in den europäischen Staatengruppen", (1968) 21 *Revista española de derecho internacional*, 523 ff; G Jaenicke, "International Public Order", 7 *EPIL*, 314–18; G Jaenicke, "Zur Frage des internationalen ordre public", (1967) 7 *Berichte der deutschen Gesellschaft für Völkerrecht*, Karlsruhe, 85–96; G Schwarzenberger, "The Problem of International Public Policy", (1965) 18 *Current Legal Problems*, 191 ff (the author rejects the notion); H Rolin, "Vers un ordre public réellement international", *Mélanges J. Basdevant* (Paris, 1960), 441 ff, 451 ff; W Levi, "The International Ordre Public", (1994) 72 *Revue de droit international, de sciences diplomatiques et politiques*, 55 ff. On obligations *erga omnes*, see amongst others M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Oxford University Press, 1997); A De Hoogh, *Obligations Erga Omnes and International Crimes* (The Hague, Kluwer, 1996). See also the synthesis in R Kolb, *Théorie du ius cogens international* (Paris, 2001). Thus, under universal jurisdiction certain crimes are deemed to affect the interests of the international community as a whole in so serious a manner as to warrant an exception to the requirement of a specific link in order to be allowed to prosecute them. Crimes like piracy, the slave trade, war crimes and crimes against humanity constitute offences against the international public order (*delicta iuris gentium*). They infringe upon interests which are common to all members of a given society: this common interest and the seriousness of the crimes legitimize the right of any State that manages to apprehend an alleged culprit to prosecute them. (Note continues overleaf.)

criminal jurisdiction over a number of offences which constitute, in the main, international crimes of concern to the entire international community. This prosecution shall take place regardless of any specific link to the crime or the offender, provided the alleged author is in the custody of that State. Thus, universal jurisdiction is normally based on the idea of a *index deprehensionis*: the State who puts its hands on the criminal should be able to try him. This holds particularly true in the context of terrorist offences as defined by the conventions. The legal aim of this title is to ensure that for certain acts there be no safe havens and that the probability of prosecution is raised to a maximum. This in turn rests on the nature of the crimes, namely their particular gravity and the common concern they arouse.

Ordinary universal jurisdiction is rooted in customary international law. It is under that law that the principle evolved, when it began to be applied to pirates.[81] Consequently, at its beginnings, universal jurisdiction was universal also as to its spatial scope of application, it being devised for crimes addressed by general custom, binding all States. On the other hand universal jurisdiction under customary law was only permissive: it allowed any State to start prosecution if it so wished, but it did not compel it to do so. Classical universal jurisdiction under customary

On universal jurisdiction, see M Henzelin, *Le principe de l'universalité en droit pénal international* (Basel/Brussels, 2000); KC Randall, "Universal Jurisdiction under International Law", (1988) 66 *Texas Law Review*, 785 ff; L Benavides, "The Universal Jurisdiction Principle: Nature and Scope", (2001) 1 *Anuario Mexicano de derecho internacional*, 19 ff (with many references); B Stern, "A propos de la compétence universelle… ", *Essays in Honor of M. Bedjaoui* (The Hague, 1999), 735 ff; C Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", (2001) 42 *Virginia Journal of International Law*, 81 ff. See equally R Higgins, "General Course on Public International Law: International Law and the Avoidance, Containment and Resolution of Disputes", (1991-V) 230 *Recueil des Cours de l'Académie de Droit International*, 90–100; O Schachter, "International Law in Theory and Practice", (1982-V) 178 *Recueil des Cours de l'Académie de Droit International*, 262–65; M Akehurst, "Jurisdiction in International Law", (1972/3) 46 *British Yearbook of International Law*, 160–166; G Guillaume, "La compétence universelle, formes anciennes et nouvelles", *Essays in Honor of G Levasseur* (Paris, 1992), p 23 ff. D Oehler, *Internationales Strafrecht*, 2nd edn (Cologne, 1983), 519–45; DW Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", (1982) 53 *British Yearbook of International Law*, 11–14; FA Mann, The Doctrine of Jurisdiction in International Law", vol 111, 1964–I, 95; L Oppenheim in RY Jennings and A Watts (eds), *International Law*, 9th edn (London, Longman, 1992), 469–70; BH Oxman, "Jurisdiction of States", (1984) 10 *EPIL*, 281; B Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", (1990) 1 *JEDI*, 67 ff; *Conseil de l'Europe, Comité européen pour les problèmes criminels, Compétence extraterritoriale en matière pénale* (Strasbourg, 1990), 15–16; The American Law Institute (ed), *The Foreign Relations Law of the United States, Restatement of the Law Third*, vol I (St Paul, 1987), 254–58, para 404; Harvard Draft, "Jurisdiction with Respect to Crime", (1935) 29 *American Journal of International Law*, Supp, 573–92. See also the detailed analysis by the Australian High Court in *Polyukhovich v Commonwealth of Australia and Another*, (1990) 91 *ILR*, 40 ff, 117 ff.

[81] See Oppenheim, above n 78, 746. Henzelin, above n 80, 269 ff; Benavides, above n 80, 42 ff.

international law was thus both general *ratione personae* and optional *ratione materiae*.

Some authors limit the ambit of universal jurisdiction to the traditional customary principle.[82] They would at maximum concede that a mandatory jurisdiction under customary law (eg for grave breaches to the Geneva Conventions of 1949) could also be covered. They refuse, however, to consider that a convention could create a true universal jurisdiction, and in particular, they do not consider that the principle *aut dedere aut prosequi* could be considered as a form of universal jurisdiction.[83] At most, some of them view the pricciple of *aut dedere* as a quasi-universal jurisdiction,[84] but keep it neatly distinct from it. Conversely, other authors hold that *aut dedere* is a conventional universal jurisdiction principle.[85]

[82] See eg Higgins, above n 80, 98. Benavides, above n 80, 32 ff, 40.

[83] Higgins, *ibid*: "In so far as this provides for the jurisdiction of all parties to the Convention …it is perhaps understandable that it is spoken of as universal jurisdiction. But it is still not really universal jurisdiction *stricto sensu*, because in any given case only a small number of contracting parties would be able to exercise jurisdiction…". See also MN Shaw, *International Law*, 3rd ed. (Cambridge, Cambridge University Press, 1991), 414.

[84] Oxman, above n 80, 281; Henzelin, above n 80, 302, 317 (*"système d'obligation répressive quasi-universelle"*); SA Williams, "International Law and Terrorism: Age-Old Problems, Different Targets", (1988) 26 *CYIL*, 91, for example, hold that this system bears a close resemblance to that of universal jurisdiction, without quite attaining it. See also A Cassese, "The International Community's Legal Response to Terrorism", (1989) 38 *International and Comparative Law Quarterly*, 593. A distinction is also introduced by Oehler, above n 80, 532–33, 497 ff.

[85] Guillaume, above n 44, 350 ff; Guillaume, above n 80, 33–34; D Freestone, "International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction", in R Higgins and M Flory (eds), *Terrorism and International Law* (Routeledge, London, 1997), 50; G De La Pradelle, "La compétence universelle", in H Ascensio, E Decaux and A Pellet (eds), *Droit international pénal* (Paris, 2000), 908; LS Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (The Hague, 1992), 102; Stern, above n 80, 739; Bassiouni, above n 80, 82, 125 ff; Kolb, above n 70, 58 ff; Panzera, above n 9, 160; A Cassese, "The International Community's 'Legal' Response to Terrorism", (1989) 38 *International and Comparative Law Quarterly*, 593; *Final Document of the Conference of Syracuse* (1973), in MC Bassiouni (ed), *International Terrorism and Political Crimes* (Springfield, 1975), XIX; O Schachter, "General Course on Public International Law", (1982-V) 178 *Recueil des Cours de l'Académie de Droit International*, 262–63; B de Schutter, "Problems of Jurisdiction in the International Control and Repression of Terrorism", in Bassiouni (ed), above, 388; S Sucharitkul, "International Terrorism and the Problem of Jurisdiction", (1987) 14 *Syracuse Journal of International Law and Commerce*, 171; Y Dinstein, "Terrorism As An International Crime", (1989) 19 *Israel Yearbook on Human Rights*, 69–70; T Treves, *La giurisdizione nel diritto penale internazionale* (Padova, 1973), 287 ff; H Labayle, "Droit international et lutte contre le terrorisme", (1986) 32 *Annuaire Français de Droit International*, 117; H Labayle, "Sécurité dans les aéroports et progrès de la collaboration internationale contre le terrorisme", (1988) 35 *Annuaire Français de Droit International*, 719–21; Herzog, above n 9, 235–36; Oppenheim, above n 78, 470; G Dahm and J Delbrück and R Wolfrum, *Völkerrecht*, 2nd edn, t. I/1 (Berlin, 1989), 321–22; A Verdross and B Simma, *Universelles Völkerrecht*, 3rd edn (Berlin, 1984), 779; Graefrath, above n 80, 87; Akehurst, above n 80, 161; Randall, above n 80, 819; *Conseil de l'Europe …*(above n 80), 16; *Restatement Third of the Foreign Relations Law of the United States* (above n 80) 255–57. In its recent work on a *Draft Code of Crimes against the Peace and Security of Mankind*, the ILC clearly assimilated the rule *aut dedere aut iudicare* to universal jurisdiction: Art 4 of the Draft, see *Yb.ILC* 1987–II, part 1, 3–4; *Yb.ILC* 1993–II, part 2, 107; *Report of*

Thus, Guillaume writes that the conventions embodying the principle create a system of mandatory but subsidiary universal jurisdiction.[86] In contrast to the customary principle this jurisdiction must be exercised by the State; on the other hand, it is softened by the alternative of extraditing.

The core of the matter is, as often, a problem of definition. Nobody contests that there are differences between the *aut dedere* principle and the classical universal jurisdiction principle. The differences stressed are: (1) *aut dedere* is not universal but limited to the parties to the Convention;[87] (2) universal jurisdiction is a right, an entitlement, whereas *aut dedere* is a duty; (3) universal jurisdiction is a title to try, *aut dedere* is an alternative of either trying or extraditing; (4) universal jurisdiction applies only to a limited number of international crimes on account of their particular gravity, whereas *aut dedere* is contemplated in a number of conventions for a larger category of crimes.[88] All these differences may be acknowledged. They may justify putting the *aut dedere* principle in a separate category, as they can construe it as a special category of conventional universal jurisdiction, a sort of modified, albeit closely related principle (special universal jurisdiction). All depends on the essential criterion which is used to distinguish universal jurisdiction from other types of prosecution titles. If that criterion is seen in its generality *ratione personae*, ie that it applies to all States by virtue of a general custom (on account of the nature of the

the ILC on the Work of its 46th Session, Official Records of the General Assembly of the United Nations, Suppl No 10 (A/49/10), p 78. (For a criticism of this equation, see Benavides, above n 80, 35). The decision of the Bavarian Supreme Court in the *Antonin L c Federal Republic of Germany* case (1979) 80 *ILR*, 679 establishes a linkage with domestic law (universal jurisdiction under Art 316(c) of the German Criminal Code implementing the Hague Convention of 1970 on hijacking of aircraft and its relation to the laws on asylum). On the equivalence between universal jurisdiction and the *aut dedere aut iudicare* rule, see, in the *Aylor* case (1994), the legal opinion of the *Commissaire du gouvernement français*, Commission européenne des droits de l'homme, 100 *ILR*, 670–1, or the *Yunis (no 2)* case (1988), United States District Court, 82 *ILR*, 348–49 (confirmed by the Court of Appeals, 88 *ILR*, 176 ff, 181)). See also the Statement of the Delegate of Sri Lanka, Mr Perera, at the Sixth Commission of the United Nations, 27th session, 2 December 1997, Doc. A/C.6/52/SR. 27, § 54, in the context of the recent international convention on terrorist bombings. See also the statement of Switzerland in the Report of the Secretary-General of the United Nations, Measures to Eliminate International Terrorism, 3 July 2001, Doc. A/56/160, p. 13, § 100.

[86] See Guillaume, above n 44, 350 ff.

[87] See eg Higgins, above n 80.

[88] For the most decided criticism of any confusion, see Benavides, above n 80, 32 ff. As to this last element, namely that universal jurisdiction applies only to some international crimes, one may mention that even under classical international law it was not always accepted. Rather, there were some authors equating the existence of an international crime with the existence of universal jurisdiction. See eg P Fiore, *Il diritto internazionale codificato*, 2nd edn (Turin, 1898), 143, Art 240: "*Apparterrà alla sovranità di ciascuno Stato la giurisdizione penale rispetto ad uno, che sia imputato di avere commesso un fatto qualificato reato secondo il diritto internazionale*". Art 241 shows that he had in mind not only the most egregious crimes, since he mentions, *inter alia*, the damaging of submarine telegraphic cables.

crime which must be an offence against the most fundamental values of the international community), then *aut dedere* is indeed no universal jurisdiction. However, nothing forces us to limit the scope of universality in that way. We may see its essential criterion not in universality *ratione personae* or any other specificities in conventional law, but the *absence of any requirement that there be a specific link in order to be allowed to prosecute*.[89] Then, there is no reason to deny that universal jurisdiction could operate only between the parties to a given agreement. The jurisdiction indeed remains universal, in that it casts away the usual requirement of a specific link between State and individual before allowing the former to prosecute the latter for the commission of acts defined in the agreement. Hence, the difference between a customary universal jurisdiction and a conventional one is merely one of range of application: one is valid *erga omnes*, the other (possibly)[90] only *inter partes*, but in both cases the essential mechanism of universality remains the same. This last interpretation, which makes all due allowance for the differences between *aut dedere* and classical customary universality seems to be preferable in that it goes much more to the core of the matter than to factual aspects such as the number of States involved.

It may be said in sum that *aut dedere aut prosequi* is a universal jurisdiction which is *relative*, *compulsory* and *subsidiary*. As to relativity, it can be seen that the universal jurisdiction established by anti-terrorist conventions has a double relative effect: one in terms of the parties to the agreements (*ratione personae*), and one in terms of the object and purposes thereof (*ratione materiae*).[91] As to compulsoriness, the conventions against terrorism invariably transform this mere faculty into an obligation for the State that holds a suspect. Criminal proceedings must be initiated and carried out against the individual by judicial authorities competent to deal with the case.[92] Finally, as to subsidiarity, the rigidity of the obligation

[89] As is correctly said by De La Pradelle, above n 85, 905: "*La compétence pénale d'une juridiction nationale est dite 'universelle' quand elle s'étend, en principe, à des faits commis n'importe où dans le monde et par n'importe qui; lorsque, par conséquent, un tribunal que ne désigne aucun des critères ordinairement retenus — ni la nationalité d'une victime ou d'un auteur présumé, ni la localisation d'un élément constitutif d'infraction, ni l'atteinte portée aux intérêts fondamentaux de l'Etat – peut, cependant, connaître d'actes accomplis par des étrangers, à l'étranger ou dans un espace échappant à toute souveraineté*".

[90] See below, III.

[91] Cassese, above n 84, 593.

[92] See the several treaty provisions, eg Art 4(2) of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Art 5(2) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Art 3(2) of the United Nations Convention on Internationally Protected Persons (1973), Art 6 of the European Convention on the Suppression of Terrorism (1977), Art 5(2) of the Convention against the Taking of Hostages (1979), Art 6(4) of the Rome Convention on the Safety of Maritime Navigation (1988), and Articles 6(4) and 8(1) of the International Convention for the Suppression of Terrorist Bombings (1997). See also Guillaume, above n 44, 350–353, 367–71; Randall, above n 80, 821.

to try is softened by the alternative option, namely to extradite the alleged culprit to a State able to claim a jurisdictional link. The conventions concerned often favour this option under the *forum conveniens* doctrine.[93] Having thus qualified the "conventional universality" of *aut dedere*, all the similarities and also all the differences with traditional universality under customary international law are put in a clear perspective.

3. *Relationship of the* Aut Dedere *Principle to the Specific Titles of Jurisdiction Contained in the Conventions*

A further question refers to the precise link of the *aut dedere* principle with the several special titles of jurisdiction mentioned in the conventions, eg territoriality or personality. It has been said by authoritative authors[94] that the provision that imposes a duty to prosecute or extradite is not normative in itself, but merely constitutes a *renvoi* to the specific grounds of jurisdiction be they territorial, personal (nationality or flag) or otherwise based, invariably listed in the conventions. Hence, such agreements would merely coordinate repression on those specific grounds, without creating a separate basis of universal jurisdiction.

This restrictive interpretation is not convincing. If such an interpretation were accepted, the separate articles dealing with the obligation to exercise jurisdiction in any case where there is no extradition[95] would be without any *effet utile*. It would have been sufficient to say that a State must exercise its jurisdiction under the specific titles unless it extradites. However, the relevant articles invariably dispose that a contracting State shall be obliged, *without exception whatsoever*, to prosecute if it does not extradite. This is not the same thing as saying that jurisdiction under the specific titles must compulsorily be exercised. A teleological perspective

[93] Guillaume, above n 44, 350, 353, 355 ff. For the European Convention (1977), see eg, G Fraysse-Druesne, "La Convention européenne pour la répression du terrorisme", (1978) 82 *Revue Générale de Droit International Public*, 993 ff.

[94] Higgins, above n 80, 98; Oehler, above n 80, 539.

[95] See eg Art 7 of the Montreal Convention (1971): "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution...". In the Convention of Terrorist Bombings (1998), this clear clause was somewhat complicated by the insertion of a sentence which could lend arguments to the opposers: "in cases to which article 6 applies" (see the relevant text above, para 8). However, on closer inspection, no substantive difference can be found. This sentence operates a *renvoi* to Art 6(1) but also to 6(4), ie to the specific ground of jurisdiction and also to the *aut dedere*-ground. Art 6(4) asks any State party to take all necessary measures to establish its jurisdiction over the offences set forth in Art 2 in cases where the alleged offender is present in its territory and it does not extradite him. Consequently, the new *renvoi* in Art 8 must be taken to mean that *as already stated* in Art 6, the States parties must establish jurisdiction over the crimes envisioned by the convention for any case where the offender is found on their territory and is not extradited.

confirms this reading. If the specific grounds listed in the agreements were exclusive, the purpose of these instruments, which is to fill any *lacuna* or safe haven that would result in impunity for a guilty individual, would be defeated.[96] The contribution of these treaties would be limited to rendering prosecution on the basis of specific grounds of jurisdiction compulsory rather than facultative. Unfortunately, the traditional, specific mechanisms do not suffice to ensure punishment. This is precisely the problem that the conclusion of the agreements was intended to correct.

Moreover, an article common to the various conventions provides for the establishment in domestic systems of grounds of jurisdiction allowing in any case the prosecution of a suspect held in custody.[97] Were the strict interpretation to be retained, the systematic and practical use of this article would also become virtually insignificant: since one finds in almost all domestic legal systems the principles of territoriality, personality, and security of the State, requiring the compulsory introduction of such grounds of jurisdiction in national legislation would be meaningless, except in very marginal cases.[98] While such a narrow reading of the agreements would deprive the text of much of its pertinence, an interpretation that admits the existence of universal jurisdiction explains why the addition of new grounds of jurisdiction is necessary.

This conclusion is also warranted by the examination of the various *travaux préparatoires*, which show the larger interpretation to be most in accordance with the will of the contracting parties. The drafters frequently made explicit as well as implicit references to the principle of universality.[99] Thus, it is not surprising to find that the vast majority of authors and official committees alike consider the rule *aut dedere aut prosequi* to be in itself a ground of jurisdiction, and not a mere cross-reference to the specific links traditionally used in such cases.[100]

In sum, it may be said that the conventions establish a true two-tier system of jurisdiction. One limb is erected on a series of specific titles of jurisdiction, either mandatory or optional, which the States must ensure (or may retain) for prosecuting the persons suspected of having committed a crime within the scope of the convention. Another limb is the jurisdiction based on the *aut dedere* principle, which obliges States to establish in their internal law a right to prosecute also in cases without any specific link to the forum any person charged with such acts, to the extent that no extradition takes place. Thus, the States are obliged, by virtue of the

[96] This object and purpose is underlined by F Francioni, "Maritime Terrorism and International Law: The Rome Convention of 1988", (1988) 31 *GYIL*, 276.

[97] See the provisions cited in above n 92.

[98] See for instance in cases relating to the passive personality principle. On this principle, see Oehler, above n 80, 413–29; Oppenheim, above n 80, 471–72.

[99] Randall, above n 80, 826, with numerous references at above n 238.

[100] See the authors referred to above n 80.

conventions, to amend their internal law so that they may prosecute under universal jurisdiction the crimes defined in those conventions. The ultimate basis of jurisdiction in such cases is the presence of the alleged culprit on the territory of the prosecuting State.

4. *Nature of the Duty to Establish the Necessary Criminal Jurisdiction in Municipal Law: Absolute Duty or Duty to Use Best Endeavours?*

The next aspect to be discussed relates to the question if there is a strict duty of the States parties to provide the necessary criminal jurisdictional titles in their internal law or if there is only an obligation to use best endeavours. The answer to this question is two-fold. At the universal level of the conventions concluded under the aegis of the United Nations, there is a strict obligation to extend the national criminal jurisdiction to the contemplated crimes. The relevant clauses read: "Each State shall take such measures as may be necessary to establish its jurisdiction over the offences mentioned ...".[101] The terms of that provision are mandatory as the use of the word "shall" shows. The term "as may be necessary" related to the means by which the obligation is fulfilled. On this point, the conventions respect the constitutional autonomy of the various States. Thus, in some of them a piece of legislation may be necessary in order to make punishable the contemplated acts, whereas in others a decree or an enactment of administrative rules possibly suffices. One can say that the conventions through the words "as may be necessary" insist on the fact that the obligation posed is one of result rather than of means. However, it is clearly a mandatory obligation, as to the result to be achieved.

The same cannot be said of some regional conventions, which, strangely enough if one thinks of the potentially greater solidarities at the regional level, contain only an obligation to use "(best) endeavours" to extend their national criminal jurisdiction to the acts at stake. Thus, Article 8 of the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and related Extortion that are of International Significance (1971) reads as follows: "[Contracting States have the obligation] to endeavour to have the criminal acts contemplated in this Convention included in their penal laws, if not already so included". This clause seems to be unique. It is not repeated elsewhere, notably not in the European Convention on the Suppression of Terrorism of 1977, which is aligned with the universal conventions.[102] It seems that

[101] See eg Art 5 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Art 6 of the Convention on the Suppression of Terrorist Bombings (1998), etc.

[102] See Art 6: "Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in article 1 ...". No such clause at all is found in other treaties, eg the SAARC Convention on the Suppression of Terrorism of 1987.

the specific tradition of the American States, particularly attentive as to the protection of their internal affairs, has prompted this deviation from the mainstream. In the context of the best endeavours clause, the yardstick for its interpretation can be only the principle of good faith.[103] Its concrete reach is to be determined according to the socio-political environment, as it evolves. To the extent that events, declarations and perceptions bear witness as to an evolution towards a more strongly felt solidarity in matters of terrorism, the result can only be that the best endeavours clause will be strengthened and the interpretation of what it demands will become more exacting. The legal standard[104] of "(best) endeavours" requires an understanding in the light of social background; only therefrom can its concrete and specific content be identified.

5. *The Obligation to Try or to Extradite: True Alternative or Priority of One Element over the Other?*

At the universal level, and more generally speaking at the only exception of the European Convention and its follow-up texts, the obligation seems at first sight to be a true alternative: either the State tries or extradites, at its choice. As to the result considered in synthesis, this reading is certainly correct. However, from one point of view, one may find that the whole system leans toward the "*prosequi*" limb more than to the "*dedere*" limb, in other words that there is some imbalance. The reason for this is that there is in any case a subsidiary obligation to prosecute, whereas there is no obligation at all to extradite.[105] That means that prosecution must in any case take place, subject only to the possibility of setting it aside if extradition happens to take place. Practically speaking, prosecution must start immediately, or within a reasonable time period it then being able to be stopped if there is extradition (or eventually not to start if extradition is granted immediately). In order to determine if extradition may take place, it will, however, often be necessary that some prosecutorial acts have been performed. This interpretation seems to be confirmed by the aim of these conventions, which is to make sure that the chances to see the alleged culprits prosecuted and tried are raised to a maximum. Extradition is only a device for trial, it has no value in itself except to guarantee the most convenient forum.

On a slightly different reading, one might say that the extradition limb is theoretically and practically dominant. The theoretical reason is precisely to ensure the prosecution at the most convenient place, notably

[103] On this principle, see R Kolb, *La bonne foi en droit international public* (Paris, 2000).

[104] On the concept of legal standards, see the explanations in Kolb, *ibid*, 134 ff., with many references.

[105] This is the system of the conventions, independently from other bilateral or multilateral extradition treaties.

where the crime was committed (*forum conveniens*). The practical reason is that a State not otherwise linked with the offence will have some difficulty in prosecuting without the legal aid of other States concerned. Thus, from a practical perspective, it will seek first for extradition to a more convenient forum. Both ways of looking at the relationship of the two limbs are correct. They grasp the phenomenon under different but complementary perspectives.

Furthermore one understands that in regard to the aims only extradition for trial (i.e. extradition proper) suffices to satisfy the conventional requirement. An expulsion is not covered, since it would defeat the object and purpose of the convention, which is to assure that prosecution takes place.

As the preceding explanations have shown, the conventions establish an original obligation to prosecute, unless extradition takes place. In particular, this means that prosecution is not dependent on the existence of a request to extradite that was not acted upon (*primo dedere secundo prosequi*). However, a State may on its own initiative take up contacts with other interested States in order to see if an extradition is possible, desired or otherwise recommended. Its primary obligation to prosecute does not mean that it is precluded to actively seek extradition.[106]

At the European level, the priorities are reversed. In fact, the European Convention on the Suppression of Terrorism (1977) is in the first place an extradition treaty. Thus, it privileges extradition over prosecution. The obligation to prosecute is here limited to cases where an extradition is requested but not granted.[107] The situation is further complicated by a rule of double jurisdiction: the request for extradition must emanate from a State party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State. Put simply: if the request for extradition is based on the principle of passive personality, that title must exist at the level of both municipal laws, that of the requesting State and that of the requested State. The European Convention thus establishes a system of *primo dedere secundo prosequi*. And extradition can be refused if it is not based on the stringent conditions laid down in Article 6 of the Convention. If such refusal takes place, there is a subsidiary obligation to prosecute. This obligation is formulated in Article 7. The whole system, contrary to the other conventions, is not, however, watertight. Its

[106] See Henzelin, above n 80, 298 ff.

[107] See Art 6 of the Convention: "1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State". See also Henzelin, above n 80, 318 ff. As to the European system, see also Freestone, above n 85, 55 ff.

purpose cannot be said to guarantee prosecution in any case where the offender is apprehended on the territory of a State party, since in the absence of a request of extradition, there is no obligation whatsoever to prosecute. It is true that optional prosecution according to the existing jurisdictional titles of municipal law is still possible in such cases. But there is no precise obligation. Such a system, which remains behind the achievements of the global community, is more than strange within a regional community, which misses no occasion to stress its bonds of solidarity.

Extradition in the sense of the conventions is the delivery of a person to another State in order that this State exercises criminal jurisdiction. The terminology used to describe this procedure is not material. The surrender of an alleged culprit to an international tribunal, to the extent that it has jurisdiction over the acts, is also such a procedure, even if there is technically no "extradition". This is to be understood in the sense that the handing over must be for the purpose of prosecution and trial elsewhere. A more delicate question, which could arise in the future, is if the obligation under the convention is satisfied in the following case. A person is delivered to an international tribunal, eg the International Criminal Court, which has no jurisdiction over terrorist crimes as such, but which could try the culprit for other crimes, even more grave in nature (eg crimes against humanity). If the terrorist acts in question, because of their magnitude, fall into such a category, there is no legal difficulty in establishing jurisdiction. In view of the gravity of the crimes, it may well be that the delivery of a terrorist suspect to the Court fulfils the conventional requirement to prosecute suspects, at least as to their spirit: i.e. the alleged culprit will be tried. But he will not be tried for the terrorist acts envisaged in the convention.

Another question arises. The conventions envisage extradition without specifying if this means only extradition to another State party or extradition to any State whatsoever. The fact that the aim of the conventions is to ensure prosecution and that the aim of extradition is to ensure prosecution at the most convenient forum, warrants the interpretation that extradition to any relevant State is allowed.[108] The conventions do not establish a closed system of extradition, aiming only at extraditions *inter partes*. They envisage extradition *tout court*, as an effective means of suppression; that is not linked to the status of a State as a party to the convention. Moreover, by the rules of treaty construction it would have to be expected that the parties, had they intended such a restriction on the scope of extradition, should have expressed it so in the text. Not having qualified the mechanism of extradition in any manner, it is hard to read into the text such a limitation. In a word, such important limitations cannot be presumed in

[108] In the same sense Henzelin, above n 80, 304.

the absence of clear language, or at least intent made explicit in the phase of preparatory work.

Finally it may be noted that the conventions also seek to promote extradition by providing new bases for its performance. Thus, the conventions provide that the offences they list shall be deemed to be included as extraditable offences in already existing extradition treaties.[109] By this technique, the conventions modify older extradition treaties within their scope of application, by way of the *lex posterior* rule. Moreover, the conventions stipulate that they may in themselves be taken as an extradition title if an extradition treaty is absent between the concerned States and this absence would otherwise preclude extradition: "If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences".[110] Note that this provision is only optional, not obligatory.

6. *Conventional Universal Jurisdiction as Mandatory Jurisdiction*

Under customary international law, there is hardly any case in which the principle of universality *must* be exercised by the State holding the offender. An exception may exist for grave breaches of the Geneva Conventions, since under the Conventions jurisdiction is mandatory and it could be argued that by the practically universal ratification of (or accession to) these conventions, the mandatory jurisdiction over grave breaches has become part of customary international law. Apart from this peculiar case, customary universal jurisdiction is optional: international law allows prosecution by any State for the crimes defined under customary law. It does not, however, oblige those States to prosecute. In legal terms, customary universality is predicated on a faculty, not an obligation.[111] Conventional universality may also be optional. One may mention Article 5 of the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).[112] In the other conventions, universality, in the form of the *aut dedere* principle, is mandatory. It is an obligation not a faculty. This holds true for all universal and most regional anti-terrorist conventions. The precise extent of that obligation still has to be analysed.

[109] See eg Art 8(1) of the Montreal Convention (1971) or Art 11(1) of the Convention on Terrorist Financing. In the United Nations Draft Convention on Terrorism (2001), see Art 17(1) (see *Report of the Working Group* ... (above n 2), 13).

[110] See eg Art 8(2) of the Montreal Convention (1971) or Art 11(2) of the Convention on Terrorist Financing. In the United Nations Draft Convention on Terrorism (2001), see Art 17(2) (see *Report of the Working Group* ... (above n 2), 13).

[111] See on this point Stern, above n 80, 737 ff; De La Pradelle, above n 85, 912 ff.

[112] See 1015 UNTS 246.

More precisely, is there simply a formal duty to prosecute or also an obligation to carry out that duty effectively? Can prosecution be prevented or stopped according to rules of internal law, eg by virtue of the opportunity principle?

It should be stressed again that the obligation to prosecute is subsidiary in the sense that it is subject to the absence of extradition. The legal fact of extradition extinguishes that duty.

7. *Duty to Prosecute "in the same Manner as in the Case of any Ordinary Offence of a Serious Nature under Municipal Law"*

The several universal and regional conventions contain a clause whereby the prosecution, if extradition is refused or does not take place, shall be conducted according to the standards of municipal law. This clause reads more or less invariably as follows: "The authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State".[113] The clause amounts to a species of "national treatment" standard as opposed to an international minimum standard, if the analogy may be taken that far.[114]

This aspect of the law may hamper the effective application of the conventions and especially the fulfilment of their primary aim, which is to ensure that prosecution should take place. It is beyond doubt that the clause is a major drawback in the system, since a frequent problem in the field of anti-terrorist action is that even when there are bases of jurisdiction, States often display great reluctance to exercise their right of prosecution. The reasons for this state of affairs are political. In particular, many States fear the political implications of such proceedings or shy away from them because they expect to become the target of terrorist "reprisals". The clause at hand gives them the legal tool in order to comply with the conventional obligation to prosecute. It is obvious that the clause greatly weakens the incisiveness of the obligations. It may be going too far to say that the obligation thus transforms itself into a soft-law duty. However, if one considers the links between the executive branch and the prosecuting organs in many States, the result may not be too far from such a soft duty. Even abuse of the clause may be difficult to claim if the internal practice usually follows such patterns, whereby the executive intervenes in matters of the judiciary.

[113] See eg Art 7 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Art 8(1) of the Convention on the Suppression of Terrorist Bombings (1998), the term "serious nature" being here replaced by the term "grave nature" which does not entail any substantive difference. At the regional level, see eg Art 7 of the European Convention on the Suppression of Terrorism (1977).

[114] As to this question of the law of State responsibility for damages suffered by foreigners on its territory, see eg the synthesis in DF Vagts, "Minimum Standard", (1985) 8 *EPIL*, 382–5.

Conversely, it could be argued that with the ratification of, or accession to, the conventions, and the undertakings thus assumed towards the other States parties, the reach of the "national treatment clause" has been somewhat modified. In other words, it could be said that there is a prevailing duty to investigate the case in good faith according to a minimum standard of diligence. If a prosecution is interfered with or stopped by the political organs for reasons unconnected to the file of the accused, the object and purpose of the conventions would may been circumvented,[115] amounting to a breach of the State's obligations under international law.

Sometimes the problem is that no reasonable prosecution can be expected by the State holding the alleged culprit since it holds a protective hand over him. That was the problem encountered (or at least denounced) by the Western States in the *Lockerbie* case, in which Libya insisted on its right to prosecute the alleged perpetrators of the Panam flight bombed when flying over the locality of Lockerbie.[116] In such cases, the problem is to determine which are the most appropriate remedies. It may be asked, for instance, if it is possible to presume *a priori* that no serious prosecution will take place and hence to take preventive action to secure extradition or surrender of the persons involved. Alternatively — and there are some good arguments for it — the State of custody must first be given a chance to show that it will seriously prosecute, according to the general presumption in international law of the good faith of a State until the contrary is proven.[117] Moreover, what action could be taken, either preventively or after failure to adequately prosecute? In the *Lockerbie* case the Western States were sure to have the backing of the Security Council, which could impose on Libya an obligation to extradite under Chapter VII of the Charter of the United Nations; in fact the Council did so.[118] It may be questioned whether this is an adequate or even practicable way to solve future cases of the same type. Finally, it may be asked who or which body appraises if the prosecution was carried out by the State of custody seriously. A lenient penalty or even the dismissal

[115] Violation of the object and purpose of a treaty may be a ground of breach of the treaty. See R Kolb, *La bonne foi en droit international public* (Paris, 2000), 283 ff. In judicial practice, see notably the *Military and paramilitary activities in and against Nicaragua* (Merits), ICJ Rep 1986, 135 ff.

[116] As to this case in our context, see eg Gilbert, above n 40, 24–25. See also J Chappez, "Questions d'interprétation et d'application de la Convention de Montréal de 1971 résultant de l'incident de Lockerbie. Mesures conservatoires, Ordonnance du 14 avril 1992", (1992) 38 *Annuaire Français de Droit International*, 468 ff. See also A Aust, "Lockerbie: The Other Case", (2000) 49 *International and Comparative Law Quarterly*, 278 ff. On the action of the Security Council in relation to the *aut dedere* principle, see M Plachta, "The Lockerbie case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare", (2001) 12 *European Journal of International Law*, 125 ff.

[117] See eg the *Certain German Interests in Polish Upper Silesia* case (1926), PCIJ, ser A, no 7, p 30. See generally Kolb, above n 115, 124–27.

[118] See Resolution 748 of 1992.

of the proceedings cannot necessarily be seen as proof of lack of good faith. At most, such events may be the cause for further investigation. But who can or should be in a position to judge such facts objectively?

The precise scope of the mentioned "national treatment clause" must be clarified in three ways.

First, it is not automatically incompatible with the conventions to handle a case arising under their regimes according to the principle of opportunity of prosecution. Some degree of discretion may be left to the prosecutor to decide if the case should be pursued or not if the criteria he uses in this regard also apply to comparable municipal crimes. The point would be to know how the discretion has been exercised, i.e. if there are cogent or at least understandable reasons for abandoning prosecution. It needs not be stressed that the appraisal of such discretion by third States is a most difficult undertaking. Probably only cases of the most egregious abuses could give rise to international claims.

Second, proceedings may *a fortiori* be dismissed if it appears that the alleged culprit is innocent or otherwise not punishable. The obligation of the State is not to try, but to submit the case to the competent authorities in view of prosecution. That is the reason why it is preferable to speak of *aut dedere aut prosequi* rather than using the more frequently encountered version of *aut dedere aut iudicare*. If on the face of the proceedings it proves impossible to continue the prosecution of the alleged culprit because of some obstacle of municipal law (eg an amnesty law), is there a newly emerging duty under customary law to extradite the person concerned? It seems that the point has not been raised up to now. It can be argued that such an obligation, dormant pending prosecution, arises once prosecution is barred for reasons other than proof of innocence. This would be consistent with the aim of the conventions, which is to assure widest possible prosecution. More delicate still is the question if such a duty arises also if a prescription or time bar prevents prosecution in a particular State. An affirmative answer is possible, but it could also be argued that in such a case there is no punishable crime any more in the prosecuting State, this being a bar to extradition. And finally it could be asked if a duty of extradition may arise anew if a tribunal dismissed the claim of the accused on some formal grounds. True, the principle *ne bis in idem* does not apply directly to proceedings in two different States.[119] But it seems difficult to impose a duty of extraditing after such a judicial procedure, in the absence of any clear wording in the conventional texts.

[119] See the jurisprudence of the United Nations Committee on Human Rights, *AP v Italy* (1988), *Communication no 204/1986*, para 7.3: "[A]rticle 14(7)... does not guarantee *ne bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State". See also M Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Kehl/Strasbourg, 1993), 272–73.

Third, it may be asked to what extent pardon or any type of amnesty after conviction is compatible with the conventions. The letter of the conventions, which reserves the whole prosecution phase to internal law, covers such pardons or amnesties. This is so because internal law continues to be applicable after conviction. On the other hand, it is apparent that the device of pardon can be used to play havoc with the conventional obligations: a State seems to respect the relevant convention by convicting, but soon after doing so, it empties the obligation to prosecute of all content by exercising its right to grant amnesty. The granting of amnesties for international crimes has been denounced in legal doctrine as being incompatible with the conventions.[120] It could be argued that such acts would be contrary to good faith. If, however, the pardon or amnesty is granted after a long period of time (or even after a shorter period but because of good reasons), it may still be compatible with the conventions. There is no clause in the conventions which expressly takes away from States their sovereign right to grant pardon or amnesty. However, when prosecution of a terrorist suspect takes place by (indirect) application of an international convention, the prosecuting State acts not only for itself but also on behalf of the other States parties. It thus loses the right to grant pardon or amnesty as a means of circumventing the convention, since by that conduct it affects the legal interests of the other States parties. The line between a legitimate and an illegitimate use of pardon or amnesty may be thin in some cases. It may be added that the Rome Statute of the International Criminal Court (1998) provides in Article 110(1) that "the State of enforcement shall not release the person before expiry of the sentence pronounced by the Court". Paragraph 2 adds that "the Court alone shall have the right to decide any reduction of sentence ...". The reasons for such regulation is precisely to forestall actions taken by States parties in bad faith and more generally to prevent inequalities in the length sentences as a result of political influences in the States of enforcement.

Finally, it may be asked to what extent the States having become parties to the conventions assumed a duty to guarantee the effective application of their obligations thereof.[121] It is clearly not sufficient for States to formally submit a case for prosecution to the competent authorities if there is no real intent to carry out that prosecution. Following this line of thinking, it has been argued that the obligation is to handle the case in good faith without seeking to circumvent the obligations under the conventions; no specific guarantee as to effectiveness is spelled out in the conventions or is otherwise incumbent on the States parties.[122] It seems that a somewhat more far-reaching interpretation can be given. As it was

[120] See JA Frowein in *Centre d'étude*, above n 33, 84.
[121] See generally Henzelin, above n 80, 304–6.
[122] *Ibid.*

explained, States undertake to act in good faith, ie in a manner not frustrating the object and purpose of the conventions. Moreover, they undertake the obligation to prosecute (or to extradite) to the maximum possible extent. This duty may provoke international claims that States parties are acting contrary to the object and purpose of the conventions or are failing to fulfil the criterion of effectiveness where municipal law hampers a prosecution. In other words, the *renvoi* to internal law could be construed as a *renvoi* to the ordinary and reasonable rules governing prosecution. Therefore extraordinary and excessive limitations to prosecution under domestic law would be deemed incompatible with the State's treaty obligations. Consequently, effectiveness would be measured according to: (1) the general prohibition of defeating the object and purpose of the convention under the principle of good faith; and (2) the prohibition of excessive municipal law impediments. In the latter case, if a State wants to become a party to the convention, it would have to modify its internal law or enter a valid reservation.

8. *The Faculty of Qualifying a Terrorist Act as a Political Offence*

Most States reserve to their courts or to the executive the right to decide whether a person requested for extradition is a political offender and, if they so find, to refuse extradition. This is part of a long-standing tradition, in particular in anglo-saxon States, but also elsewhere. The idea that terrorist acts should not be covered by the privilege of the political offence exception has since the XIXth century led to the inclusion of so-called Belgian clauses[123] into a series of treaties of extradition. Their aim was to exclude certain terrorist acts from the the political offence exception. A person whose act threatens not only the political system of a State but also the interests of the entire international community should *a fortiori* not qualify for an exemption from extradition. Thus, in principle, the acts listed in the terrorist conventions should not be regarded as political offences. However, the long-standing tradition in several States of allowing the State authorities to decide whether to grant perpetrators the status of a political offender remained. Consequently, since the 1937 League of Nations Convention, when such a clause was debated but not adopted,[124]

[123] This clause owes its name to a modification of the Belgian law on extradition operated in 1856. Its purpose was to deny the status of political offence to acts of violence perpetrated against the person of a foreign head of government or of State or against members of his their family. It had been a consequence of a request for extradition submitted by France against two French anarchists having fled to Belgium after having attempted at the life of Napoléon III. On this clause, see G Wailliez, *L'infraction politique en droit positif belge* (Brussels, 1970), 225.
[124] See J Dugard, "International Terrorism: Problems of Definition", (1974) 50 *International Affairs*, 77–78.

the several anti-terrorist conventions make allowance for political offence qualification. The relevant articles operate a *renvoi* to municipal law, thereby implicitly recognising the availability of the political offence doctrine. Thus, for instance, Article 8 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) provides that any extradition is subject to the extradition treaties among the States concerned (these treaties including normally the political offence reservation) or, if extradition takes place outside such a treaty, that it is subject to the "conditions provided by the law of the requested State" (which again contains that limitation).

One might have thought that at the regional level, where solidarities are more strongly felt, the political offence exception would have become less prevalent. The European Convention on the Suppression of Terrorism of 1977 shows that this is not necessarily the case. Although Article 1 provides that "for the purposes of extradition between contracting States, none of the following offences shall be regarded as a political offence ...", Article 13 allows reservations, and it explicitly allows States to "declare that [a State] reserves the right to refuse extradition in respect of any offence mentioned in article 1 which it considers a political offence".[125] Consequently, the restrictions to the political offence exception listed in Article 1 can be effectively nullified by Article 13. To some extent, this avenue has been narrowed by the Dublin Agreement of the member States of the EC concerning the application of the European Convention of 1977 (1980).[126] Further progress will be made when extradition procedures will be abolished within the EC and replaced by a form of simplified delivery. Developments in that sense are under way.[127]

On the universal level signs of a tightening of the political offence exception have also become apparent. This may reflect the increased perception that terrorism constitutes a common scourge. In parallel, it means that its highly political character is diminishing in favour of a more technical conception which considers only the need to suppress such acts of violence and not the whole context of causes and justifications for terrorist activity. It was the Convention for the Suppression of Terrorist Bombings (1998) which first included the following clause: "None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence ...".[128] Moreover, in order to close any loophole, the Convention adds in Article 9(5) that the provisions of all extradition treaties (or other arrangements) incompatible

[125] On the whole question within European Law, see Gilbert, above n 40, 14 ff.
[126] *Ibid*, 19.
[127] See the Commission's Proposal for a *Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States*, Doc. COM(2001) 522 final/2, 25 September 2001.
[128] Art 11. See (1988) 37 *ILM*, 257.

with regard to offences set forth in Article 2 shall be deemed to be modified as between the States parties to the extent that they are incompatible with the Convention. Thus the Convention with its exclusion of the political offence exception takes precedence over any political offence exception clause contained in previous extradition treaties. Finally, Article 9(1) obliges States parties to include such offences as extraditable offences in any extradition treaty subsequently concluded. Similar clauses are to be found in the later Convention on the Suppression of the Financing of Terrorism (1999)[129] and in more recent regional Conventions, eg the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999).[130] A similar provision is included in the Draft Convention of the United Nations on International Terrorism (2001). Article 14 of that Draft[131] provides that none of the listed offences may be considered as political offences for the purpose of extradition.

To this it may be added that State practice is equally moving towards such a restriction, at least in the practice of Western States.[132] In particular, domestic courts have followed suit. In the United States, the courts in the cases of *Eain v Wilkes* (1981)[133] and *Quinn v Robinson* (1989)[134] opened the way for this evolution. The political offence clause was interpreted to exclude acts of terrorism, particularly where they involved indiscriminate bombings of civilian targets. In *T v Immigration Officer and Secretary of State for the Home Department* (1996),[135] the English House of Lords interpreted the terms of Article 1(F) of the Convention Relating to the Status of Refugees (1951), ie "serious non-political crime", as excluding acts of terrorism, namely acts of indiscriminate killing. In the Netherlands, the State Secretary of Justice sent a letter to the Parliament on the application of the Refugees Convention. In this letter dated 28 November 1997, he explained that hijacking, assaults upon diplomats, kidnapping, hostage-taking, bomb attacks and letter bombs will not be considered political crimes in the context of Article 1F. He added that, furthermore: "[I]n interpreting the concept serious non-political crime, I will take into account the recent developments in the field of suppression of terrorism in the various international fora ...".[136]

It is too early to see in this evolution a growing obsolescence of the political offence exception in the context of terrorist acts. It is difficult to

[129] See Articles 14 and 11: (2000) 39 *ILM*, 275–6.
[130] See Art 1(4)(c). See the text in: <http//www.oic_un.org/26icfm/c.html>;.
[131] See *Report of the Working Group*, above n 2, 12.
[132] See eg J Dugard, "Terrorism and International Law: Consensus at Last?" in *Essays in Honor of M Bedjaoui* (The Hague, 1999), 168–70.
[133] 641 F 2d 504 (7th Cir 1981), 520.
[134] 783 F 2d 776 (9th Cir 1989), 805–6.
[135] 107 *ILR*, 552 ff.
[136] (1999) 30 *Netherlands Yearbook of International Law*, 178 ff, 185.

retroactively read into the earlier conventions an abrogation of the political offence exception in the light of the new tendencies. But a slight change of perspective may shed a different light on the matter. Such an interpretation could be adopted in the more recent conventions which list the acts contained in the previous ones as not falling into the category of political offences.[137] A modification of the old conventions by the *lex poterior* rule could then be assumed, particulary because the older conventions do not contain any explicit clause reserving the political offence qualification. However, this modification would be *inter partes* and could not be automatically taken as extending to all the States parties. As for third States, a general *opinio iuris* would have to be shown. The new tendencies could, however, be considered as exerting a general pressure to interpret those acts listed in older conventions as being exempt from the political offence exception.

To the foregoing it may be added that a State may always refuse extradition on the grounds that it appears that the person whose extradition is requested would face torture or other inhumane treatment in the State seeking his extradition, or if it appears that extradition is sought only to persecute him on account of his race, religion, nationality or political opinion.[138]

9. *The Presence of the Alleged Offender in the Territory of the State*

In order that a State party be subject to the obligation of *aut dedere aut prosequi*, all the conventions invariably require that the alleged offender must be present in its territory. This requirement shows that the *aut dedere* principle is based on the idea of a *iudex deprehensionis*. *In absentia* proceedings are ruled out. To the extent that municipal law is unchanged by the conventions and to the extent that such a requirement is not reflective of customary law, it can still be argued that under other bases of jurisdiction the prosecution of such acts may be also undertaken in cases where the offender is absent from a territory. But under the convention regime this is not possible, and to the best of this author's knowledge, no State yet has passed legislation empowering it

[137] See eg Art 2(1)(a) of the Convention for the Suppression of the Financing of Terrorism (2000), (2000) 39 *ILM*, 271. That provision operates a *renvoi* to all the main anti-terrorist treaties.

[138] See generally DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London/Dublin/Edinburgh, Butterworths, 1995), 73 ff; Nowak, above n 119, 136–7. See also the article by the present author "La jurisprudence internationale en matière de torture et de traitements inhumains ou dégradants", (2003) *Revue universelle des droits de l'homme* (forthcoming). As for conventional clauses, see eg Art 8(2) of the European Convention on the Suppression of Terrorism (1977).

to institute *in absentia* proceedings for a person suspected of terrorist acts prohibited by the conventions.[139]

A further problem is to define the precise scope of the obligations of the States parties in regards to this requirement. If the authorities happen to stumble upon an alleged offender, it stands to reason that they must arrest him and initiate prosecution. But such situations form only part of the matter. It has been argued by many commentators that in order to fulfil the conventional requirement, a State party is obliged to make investigations into the whereabouts of alleged offenders, eg if private persons make a report to the police, or otherwise institute proceedings.[140] It is argued that it is only by such a duty that the obligation to suppress terrorist acts could be fulfilled. No other actor but the State has the means of carrying out such investigations. The duty to investigate would thus be thus incumbent on States party to anti-terrorist conventions. This argument produces the further question as to the scope of that duty on the part of the State. If a duty to actively search for terrorist suspects can be inferred, it would seem excessively onerous to assume that States must take all necessary (and presumably legal) measures in order to secure the presence of the alleged culprits in their territory. States may take such measures,[141] but they are not obliged to do so under the conventions. This interpretation is affirmed by the more recent anti-terrorist conventions. Thus, the Convention on the Suppression of Terrorist Bombings (1998),[142] the Convention for the Suppression of Terrorist Financing (1999),[143] and the United Nations Draft Convention on International Terrorism (2001)[144] all contain a clause which reads as follows: "Upon receiving information that a person who has committed or is alleged to have committed an offence as set forth in article [x] may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information". This clause may be interpreted as providing an obligation to search for alleged offenders, since otherwise the said investigation would lose much of its value. No further positive duties seem to arise under the conventions. The question can be asked if this more extensive duty may have become

[139] The Belgian Legislation of 1993 does not contain any condition of presence in the territory for prosecuting war crimes, crimes against humanity and genocide; terrorism is however not covered. On the Belgian Legislation, see A Andries, C Van Den Wijngaert, E David and J Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", (1994) 11 *Revue de droit pénal et de criminologie*, 1114 ff.

[140] On this question, see eg B Stern, "A propos de la compétence universelle ...", *Essays in Honor of M. Bedjaoui* (The Hague/London/Boston, 1999), 747 ff.

[141] See Stern, *ibid*, 748.

[142] Art 7(1).

[143] Art 9(1).

[144] Art 10(1).

incorporated into the older conventions by reason of recent practice and agreements. If so, this would constitute an informal modification of the former conventions. The answer to this question is uncertain, but it does seem possible to argue that such an implied treaty modification has taken place.

A further point relates to the question of what happens if the alleged offender is not any more on the territory of the prosecuting State. Consider the situation where the suspect is in the territory at the moment the prosecution is launched, but later, because of some reason, eg flight, does not any more find himself in that territory. Must the prosecution be stopped? It has been suggested[145] that the answer depends on municipal law: if such discontinuance is necessary for comparable common crimes under domestic law, then the State may stop the prosecution without violating the convention by applying its internal law to which the conventions refer. This means that a State may also continue the prosecution without violating the convention, to the extent its internal law allows it to do so (which is normally the case). If this interpretation is correct, the rule as to the required presence of the alleged offender in the territory of the prosecuting State must be read to mean that the offender must definitely be present in the territory at the beginning of the proceedings, but that later default of this requirement does not vitiate proceedings already started. This is comparable to the judicial rule of the *forum perpetuum*.[146]

10. *The Problem of Incongruent Offences under the Conventions and Municipal Law*

There is a further problem which will be dealt with only briefly. The conventions oblige States parties to adopt in their internal law legislation

[145] See Henzelin, above n 80, 306.

[146] A rule recently reaffirmed by the International Court of Justice in the *Lockerbie (Preliminary Objections)* case, Judgment of 27 February 1998, ICJ Reports 1998, 9 ff, paras 37–38: "37. In the present case, the United Kingdom has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

38. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established (See *Nottebohm*, Preliminary Objection, Judgment, ICJ Reports 1953, p 122; *Right of Passage over Indian Territory*, Preliminary Objections, Judgment, ICJ Reports 1957, p 142)."

necessary to suppress the acts listed in the conventions. If the States incorporate into their internal law the list of acts under the conventions as such, there would be a perfect congruence between the conventions and internal law. Obviously the interpretations given to the same terms contained in the conventions may differ from State to State, but this is another problem. Sometimes, however, States do not incorporate the crimes in the conventions precisely as they figure in the conventions. While States parties may not fail to suppress all the acts listed in the conventions, they may add to the list of acts in the conventions, either by broadening their definitions, or by providing for the possibility to prosecute further acts not listed in the conventions. To the extent that the conventions do not "exclude any criminal jurisdiction exercised in accordance with national law",[147] there may be no legal difficulty with such a course. It should nonetheless be stressed that for the acts listed in the conventions, there exists *ipso facto* an international title for prosecution at the national level, at least *inter partes*. For acts other than those listed in the conventions, the State must show that national prosecution is allowed under international law, more precisely, under general international law or under some specific title as against the other State(s) involved.

In some cases there may be delicate problems when acts are to be prosecuted by national authorities pursuant to a piece of domestic legislation which goes beyond what is customarily the recognised scope of the universality principle. For example, the Belgian legislation of 1993 provides for prosecution of grave breaches of the Geneva Conventions of 1949 in the context of non-international armed conflicts. It is commonly understood that international law does not go that far. Universality is recognised only for grave breaches committed in the course of an international armed conflict. The problems that may arise in such cases are numerous and cannot be addressed here.[148]

C. The National Suppression of Terrorist Acts under Customary International Law

At the level of customary international law, we must immediately distinguish two sets of situations: (1) the definitions of terrorist acts under the conventions whose status in general international law may be the object of enquiry; (2) the crime of terrorism as such (however defined), which may

[147] See eg Art 5(3) of the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), or Art 6(5) of the Convention on the Suppression of Terrorist Bombings (1998).

[148] See the reflections of Stern, above n 140, 741 ff.

give rise to national prosecutions, especially under universal jurisdiction. Both aspects have to be analysed separately.

1. *Universal Jurisdiction under General International Law for Terrorist Offences as Defined in the Conventions*

What is the status of the various universal anti-terrorist conventions under customary international law? Can they have some normative effects on States not party to them even outside the realm of customary law? In other words: can States initiate the prosecution of suspects on the basis of the universality principle without being party to the instruments that provide for and organise such prosecution? Can their own nationals be prosecuted under universal jurisdiction by a State party to such a convention? Legal commentators answer these questions in three different ways.

The first possible answer is that the anti-terrorist conventions set rules and principles which are strictly conventional and thus only valid *inter partes*. Consequently, the principle *aut dedere aut prosequi* binds only States party to the conventions.[149] It has not yet become customary.[150] There is thus no *erga omnes* universality (*aut dedere*) for terrorist offences as defined by the conventions.[151] This view entails two consequences: (1) the *aut dedere aut prosequi* obligation *must* be exercised only by States parties, third States having no obligation to apply it; but also, (2) the *aut dedere aut prosequi* rule *may* be exercised only by States parties, third States having no title to do so under general international law (but they may have a particular title if there is a delegation of jurisdiction by a State holding jurisdiction). As can be seen, proposition (2) goes very much beyond proposition (1) and is not self-evident. According to both scenarios, a third State has neither the duty, nor the faculty to exercise universality over the offences listed in the conventions. Some authors of this group have recently somewhat softened their position, albeit maintaining that the *aut dedere* principle remains for the time being only conventional. Higgins,[152] for example, is of the view that for the moment the principle is only treaty-based, but that it will soon be possible to ask, as ratification of the anti-terrorist treaties augments, if it does not also apply customarily.

[149] See eg Oehler, above n 80, 520; Cassese, above n 85, 593–4; De Schutter, above n 85, 388; Dinstein, above n 85, 70; Higgins, above n 80, 98; L Migliorino, "La Dichiarazione delle Nazioni Unite sulle misure per eliminare il terrorismo internazionale", (1995) 78 *Rivista di diritto internazionale*, 970.

[150] See LFE Goldie, "Profile of a Terrorist: Distinguishing Freedom Fighters from Terrorists", (1987) 14 *Syracuse Journal of International Law and Commerce*, 141 ff, p. 131; Dinstein, above n 85, 70; *Centre d'étude et de recherche*, above n 33, 39; Migliorino, above n 149, 970; Henzlin, above n 80, 306, according to whom it is specifically the *opinio iuris* that is lacking.

[151] See eg Benavides, above n 80, 59–61.

[152] See Higgins, above n 4, 26.

A second view holds that the principle *aut dedere aut iudicare* already belongs to general international law. This may be argued in several ways. One school of thought[153] is that one needs only to look at State practice and *opinio iuris*. There is the series of treaties which invariably reproduce the same principles, thus showing that there is a general conviction in their suitability or even necessity. There may also be sufficient practice in the form of statements and recommendations at the international level as well as judicial decisions by national courts affirming the principle. Proponents of another school of thought examine the matter on a more axiomatic level. They anchor the customary status of the *aut dedere* principle to a vision of the international community as *civitas maxima* whose role is to safeguard vital interests common to all its members. The prevention and suppression of international crimes is unquestionably a vital need of the international community.[154] A slightly different version of this axiomatic reasoning suggests that the duty to try or extradite is inherent in the concept of an international criminal act (*delictum iuris gentium*). Given that acts that violate the international public order are contrary to an essential aspect of the international rule of law, and that they cannot be punished by non-existent international organs dedicated to this purpose, international law would make their repression (through trial or extradition) incumbent upon each State, through some form of compulsory *dédoublement fonctionnel*.[155] Identifying the source defining the offence, be it custom or a multilateral treaty, would be irrelevant in such a case.[156]

[153] See eg Freestone, above n 85, 60, at least for the conventions having secured a substantial degree of ratifications or accessions: "Indeed, in relation to the core of offences which are covered by those multilateral conventions which have achieved wide adherence – such as hijacking and hostage-taking — it might be argued that this general pattern of treaty practice ... suggests that ... a wider core of terrorist offences are subject to jurisdiction according to this principle [*aut dedere aut prosequi*] under customary international law."

[154] MC Bassiouni and EM Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht, Martinus Nijhoff Publishers, 1995), 22–24, 26 ff; EM Wise, "Extradition, the Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare", (1991) 62 *Revue internationale de droit pénal*, 109 ff. For I Detter, *The International Legal Order* (Aldershot, Dartmouth, 1994), 175, the application of universal jurisdiction to the repression of terrorism is inherent to the prohibitive rule, given the norm's *ius cogens* character.

[155] The term "*dédoublement fonctionnel*" was coined by Scelle. It means that, absent centralized, regular and compulsory organs exercising legislative, executive and judiciary functions on the global plane, State organs that act according to powers they hold through their domestic constitutional regime are also acting on behalf of the international community, filling in a decentralized manner such functions at the international level. See G Scelle, *Précis de droit des gens*, t. 1 (Paris, 1932), 55–57.

[156] See to that effect MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht/Boston, 1992), 499–508; MC Bassiouni, *International Extradition: United States Law and Practice*, 2nd edn (London, 1987), 22–24; MC Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", (1983) 15 *Case Western Reserve Journal of International Law*, 34–36; Bassiouni and Wise, above n 154, 21, 24.

A third position is[157] that the conclusion of a series of substantially similar treaties to respond to the diverse expressions of international terrorism is evidence of the recognition by a large part of the international community that it is urgent and legitimate to facilitate repression of a particular crime on the basis of universal jurisdiction. The conventions are construed as the expression of the general interest in sanctioning a category of offences deemed especially serious by the international community. While this does not suffice *per se* to raise their content to a customary status, other legal effects may nevertheless be attached to the conventional provisions. For instance, one could deduce therefrom a type of permissive value, akin to that of certain resolutions of international organisations. Hence, a third-party State could justify its use of criminal jurisdiction by relying on the growing *opinio* evidenced by the multitude of conventions. The difference between parties to the conventions and non-party States would reside in the fact that the latter, although arguably possessing the *faculty* to proceed according to the universality principle given the increasing acceptance of this exercise, would be under no *obligation* to do so.

A variation on this theme would be the view that the treaties institute universal jurisdiction as declaratory instruments, through which the international community acknowledges the existence of universal jurisdiction for a given crime. The agreement serves here as a catalyst, instantly crystallising the rule into custom. However, this new customary rule is not identical with the conventional rule: it is again only permissive, ie it entitles the third States to prosecute but does not require them to do so. Recent trends seem to reinforce this argument, although States continue to waver between the concept of strict privity of contract inherent in treaty-making and broad acceptance of the duty to prosecute or extradite as an established rule of customary law. There is a number of recommendations, declarations of international political organs (General Assembly or Security Council) and of States (political summits), judicial precedents (especially as to hijacking of air carriers), ILC texts, doctrinal opinion, and

[157] On this third approach, see Randall, above n 80, 821–832. An excellent synthesis can be found in Schachter, above n 80, 263: "May States confer jurisdiction on themselves by agreement? Two possible answers may be given. The first explanation is that a necessary implication (or assumption) is that the community of States recognize that universal jurisdiction exists for the crime in question and consequently States may oblige themselves to exercise it. It follows from this that while non-parties have no such obligation they have the same right (or options) as a party to exercise jurisdiction. It should be nd that this is an inference from the adoption of a general multilateral treaty through the processes of international organization. ... It is not based on State practice as such. ... If a non-party asserts the right to try and punish an offender under one of the treaties in question as an 'international criminal' without any jurisdictional link other than the universality principle, and no protests are made by other States (for example, the offender's national State or the State where the crime occurred) the exercise of jurisdiction would constitute significant precedent for the universality principle".

so forth, which stress the importance of the effective fight against terrorism or which link the principle of universality to the suppression of terrorist acts, without any significant dissent.[158] It can thus be concluded that the practice of States, evidenced by the large number of conventions — now reinforced by the efforts of the United Nations to draft a comprehensive convention against terrorism, based upon a sweeping *aut dedere* principle for all terrorist acts — together with the diffuse non-treaty related practice previously mentioned, has the effect of potentially legitimising a claim of universality by a non-party State to suppress a terrorist offence defined in an anti-terrorist convention. Such a claim of universal jurisdiction might even be seen today as an exercise of an international public order function. It unlikely that any protest to such State action would ensue (except in highly politicised contexts), and if it did occur, it probably would have little force. Consequently, it seems that at least under international law the barriers for the exercise of such jurisdiction have largely been removed, whereas a positive customary title allowing prosecution for terrorist crimes has not yet been firmly established. What was written by the present author some years ago may thus apply *a fortiori* today, when the events of the 11 September 2001 have considerably reinforced the collective conscience and willingness to fight international terrorism:

> [T]here is no heresy in affirming that current international law acknowledges the unilateral *faculty* to claim the privilege of exercising universal jurisdiction for qualified terrorist acts as defined by ... the several anti-terrorist treaties. The strength of the new trends that have emerged in international society can be construed at least as having removed the justification (or the *opinio iuris*) of the alleged prohibitive rule, if it even existed at all. Whether the potential customary rule granting universal jurisdiction for the prosecution of terrorists has positively crystallised or merely remains *in statu nascendi* might not affect the heart of our problem. Suffice it to say that, in all probability, a State's claim to exercise universal jurisdiction in a case related to our topic *would not arouse any protest* in principle on the part of other interested States. Instead of granting a jurisdictional title through custom, the growth of a sufficiently general legal conviction may have reoriented the law towards the recognition of the power (*faculté*) to engage in a repressive endeavour based on titles of municipal law. This would be an intermediary stage between a mere freedom, based on an abstract, negative presumption [that of the *Lotus* case], and an established custom based upon a series of concrete, positive acts. The difference between this stage and a general presumption of freedom lies in its justification, which in the former case is buttressed by additional considerations provided by circumstantial factors. The freedom is not here negatively presumed, but positively conferred.

[158] On this trends, see R Kolb, "Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law", (1997) 50 *Hellenic Review of International Law*, 70 ff.

A relatively uniform and prolonged use of this faculty may, in accordance with recognised rules, result in the emergence of a real customary rule.[159]

2. *Universal Jurisdiction under Customary International Law for Terrorist Offences in General*

The greatest obstacle in the way of recognising universal jurisdiction (or the *aut dedere* principle) over terrorist acts in general is the lack of any universally accepted definition of terrorism. The multiplicity of definitions makes it extremely difficult to identify a sufficiently accepted core definition of the terrorist crime as such. One of the minimum conditions for recognising the capacity of States to prosecute international crimes under the title of universal jurisdiction is that the crime is properly defined: *Nullum crimen sine lege*, but also *nulla iurisdictio sine crimine*. Moreover, that definition must be accepted at the international level, since the crime envisaged should be international in nature and not merely criminalised at the national level. This absence of an agreed definition is the principal reason that many authors simply refute the suggestion that there is any universal jurisdiction over terrorism in customary international law as it stands today.[160] Others acknowledge a growing tendency towards universality for the crime of terrorism in general, but maintain that such a tendency probably falls short of a customary rule,[161] presumably once more because of absence of any commonly agreed definition of terrorism. Another view is that universality is desirable *de lege ferenda* and States are and should be working towards the establishment and acceptance of such a principle.[162] Conversely, certain commentators hold that international terrorism as such is already subject to universality, since the offences involved are directed against the whole international community.[163] In this respect, the recent efforts of the United Nations Working Group to draft a comprehensive convention on international terrorism which is precisely based on the *aut dedere* universality principle, may be seen as a

[159] *Ibid*, 87–8.
[160] See eg Chadwick, above n 9, 106; Freestone, above n 85, 60. See as to the result also Higgins, above n 4, 24, 28.
[161] See eg Randall, above n 80, 789–90, 815 ff. *Restatement Third*, above n 80, 255–7; Schachter, above n 80, 264 (a good case can be made for the customary status); Oppenheim, above n 78, 470.
[162] See eg the Principles adopted in the final Report of the *Centre d'étude*, above n 33, 16: "*Les Etats devraient accepter le principe aut dedere aut prosequi comme règle générale lorsque des personnes présumées coupables d'actes terroristes contre des Etats ou des ressortissants étrangers sont découverts sur leur territoire*". For Reisman, above n 47, 56, the universality principle is "desirable".
[163] See eg Sucharitkul, above n 85, 171; Bassiouni and Wise, above n 154, 31 ff. See also the Draft Single Convention on the Legal Control of International Terrorism of the ILA (1980), Art 2(3), ILA, Proceedings of the 59th Conference, Belgrade, 1980, 498 (*aut dedere aut prosequi*).

further step in the direction of establishing that principle under customary international law.[164] However, this position has still to be widely accepted. Moreover, the UN comprehensive convention itself will have only the scope of a treaty. It will be instructive to note the degree of consensus on such issues during the process of elaboration of the draft convention in order to gain some measure of the customary status of such rules. At the time of writing, it is too early to judge.

As to the definition of terrorism, which remains the major stumbling block in the way of universality, it will be possible to use the definition adopted in the United Nations draft comprehensive convention to the extent that it secures widespread ratification. Nothwithstanding this convention, it could be argued that there is already some convergence in modern international law on a two-tier definition of terrorism, one limb covering the acts listed in the several anti-terror conventions, the other being centered on three elements: certain violent acts/terror (intimidation)/coercion.[165] However, there are still too many uncertainties in these definitions to make any assured statement. Perhaps the most one can say is that a State exercising universality for an egregious act of international terrorism, falling squarely under a recognised form of terrorism in the conventions, might not face today a significant protest for its unilateral assertion of jurisdiction. Thus, the positions outlined above on the recognition of the customary status of the conventional crimes under general international law may be argued, but not *a fortiori*, only tentatively and *a minori*, and, to put it bluntly, with some optimism which might not prove well-founded.

Some authors, faced with the absence of any clearly defined and accepted international crime of terrorism, hold that only some specific terrorist crimes give rise to universality under customary international law. For Freestone,[166] it is only the crime of aerial hijacking which unquestionably possesses that status, this being the result of the very large number of ratifications and accessions to the relevant conventions. Other authors argue that there is universality for hostage-taking[167] or for terrorist bombings,[168] presumably within the scope of the definitions of the crimes in the conventions. If a single terrorist offence has achieved the status of universality under general international law, it would be

[164] See Article 11 of the Draft Convention: *Report of the Working Group*, above n 2, 11.
[165] On the question of definition of terrorism, see above, 1.
[166] Freestone, above n 85, 60. See also JN Douglas, *Aerial Hijacking as an International Crime* (New York, Oceana Publishers, 1974), 182 ff.
[167] F Malekian, *International Criminal Law*, vol II (Uppsala, Almqvist & Wiksell 1991), 1 ff.
[168] G Dahm, J Delbrück and R Wolfrum, *Völkerrecht*, vol 1/1, 2nd edn (Berlin/New York, 1989), 321–22, presumably also under customary international law.

aerial hijacking. This crime has given rise to the clearest judicial practice[169] and to the most widely ratified international conventions.

There is another way by which customary universal jurisdiction can be exercised in regard to terrorist offences. If a terrorist offence fulfils all the elements of another international crime which is subject to universality under customary international law, then the terrorist acts will be subject to universality under that parallel heading.[170] Thus, for instance, if a terrorist attack, by reason of its magnitude, amounts to a crime against humanity,[171] then it will be subject to universality, since crimes against humanity may be covered by universal jurisdiction. This could provide a way for the International Criminal Court to judge some terrorist offences, since the Statute of the Court does not grant any specific jurisdiction for acts of terrorism.

It may be useful, at the end of this section, to briefly point out the major drawbacks of universality in international law. The most conspicuous problem is that universality potentially gives rise to conflicting claims of jurisdiction and that the standards of prosecution and length of sentences vary from State to State. This puts in danger the fair trial to which the accused is entitled.[172] Moreover, the objectivity of municipal courts is not always guaranteed. Universal jurisdiction may also augment tensions between States, which may substantially disagree over a specific prosecution. This issue leads us directly to the question of prosecution of crimes of international terrorism by international tribunals, in particular the International Criminal Court.

3. *Jurisdiction Exercised by the International Criminal Court*[173]

On 1 July 2002, the Rome Statute on the International Criminal Court[174] (ICC) entered into force. The ICC does not have jurisdiction to try persons

[169] See Kolb, above n 158, 74. See also the *US v Yunis* case (1988), United States District Court of Columbia Circuit, 82 *ILR*, 344 ff, particularly 348–49, and the judgment of the Court of Appeals (1991) 30 *ILM*, 403.

[170] See Higgins, above n 4, 28.

[171] It has for example been said that the attacks of the 11 September 2001 in the United States constituted because of their magnitude crimes against humanity. See N Schrijver, "Responding to International Terrorism: Moving the Frontiers of International Law for Enduring Freedom", (2001) 48 *NILR*, 287 ff.

[172] See eg Oxman, above n 80, 281; Craefrath, above n 80, 85; Bassiouni, above n 80, 82.

[173] On the jurisdiction of the ICC in matter of terrorist crimes, see the unpublished paper of J Sulzer, "Réflexion sur la compétence de la Cour pénale internationale pour juger certains actes constitutifs du crime de terrorisme", (on file with author). On the question of advantages and disadvantages to have the crime of terrorism subjected to the jurisdiction of the Court, see S Oeter, "Terrorismus — Ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit", (2001) 76 *Die Friedenswarte*, 12 ff, 27 ff.

[174] See Doc A/CONF.183/9, 17 July 1998.

suspected of terrorist crimes as such. Several proposals to add terrorism to the list of punishable offences were defeated at the 1998 Rome Conference. At the beginning of the Conference, the draft convention contained the offence of terrorism[175] along the lines of the definition proffered by the ILC in its 1995 Draft Code on Offences against the Peace and Security of Mankind.[176] The Netherlands backed this proposal.[177] In the face of the resistance of many States to such an inclusion, mainly because of fears of opening a Pandora's Box on the definition of the crime, the status of movements of national liberation, or the question of State terrorism, some States attempted to indirectly include the crime of terrorism by listing it under acts amounting to crimes against humanity.[178] Terrorism would be punishable if it fulfilled the constitutive elements of that crime. This proposal was equally dismissed. On 14 July, the same States who had sponsored that proposal[179] deployed a last effort to salvage the inclusion of terrorism. They proposed that the same approach be taken for terrorism as for the crime of aggression. A reference to terrorism could then have been included in Article 5 of the Statute, leaving the elaboration of

[175] See Doc. A /CONF.183/2/Add.1, 14 April 1998. The French version reads:

"Aux fins du présent Statut, on entend par 'crime de terrorisme':

1) Le fait d'entreprendre, d'organiser, de commanditer, d'ordonner, de faciliter, de financer, d'encourager ou de tolérer des actes de violence dirigés contre des ressortissants ou des biens d'un autre État et de nature à provoquer la terreur, la peur ou l'insécurité parmi les dirigeants, des groupes de personnes, le public ou des populations, quels que soient les considérations et les objectifs d'ordre politique, philosophique, idéologique, racial, ethnique, religieux ou autre qui pourraient être invoqués pour les justifier;

2) Toute infraction définie dans les conventions ci-après:

a) Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile;

b) Convention pour la répression de la capture illicite d'aéronefs;

c) Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques;

d) Convention internationale contre la prise d'otages;

e) Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime;

f) Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental.

3) Le fait d'utiliser des armes à feu ou d'autres armes, des explosifs ou des substances dangereuses pour commettre des actes de violence aveugle qui font des morts ou des blessés graves, soit isolément soit dans des groupes de personnes ou des populations, ou qui causent des dommages matériels importants.]"

[176] See Articles 20 and 24(2) of the Draft Code, *Report of the ILC to the General Assembly of the United Nations*, A/49/10, para 91 and A/50/10, 58, above n 40.

[177] On the Dutch proposals, see MC Bassiouni, *The Statute of the International Criminal Court, A Documentary History* (New York, Transnational, 1998), 234–5.

[178] See the proposal of India, Sri Lanka, Algeria and Turkey in A/CONF.183/C.1/L.27/Corr.1.

[179] See above n 177.

its precise definition to later stages, i.e. to a revision conference. However, even that proposal was defeated. Thus, the only result reached at the Rome Conference was that in Resolution E, sponsored by Turkey and integrated into the Final Act of the Statute, a later inclusion of the crime in the list of punishable offences is recommended.[180]

After the events of 11 September 2001, Turkey immediately seized the opportunity to insist again upon such an inclusion.[181] Moreover, the Parliamentary Assembly of the Council of Europe adopted two resolutions by which it requests that the Statute of the ICC be revised in order to insert in the list of the punishable offences the crime of terrorism.[182] For

[180] The text of this Resolution is the following (it can be consulted on <http://www.un.org/law/icc/statute/finalfra.htm>): "The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Recognizing that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community,

Recognizing that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,

Deeply alarmed at the persistence of these scourges, which pose serious threats to international peace and security,

Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,

Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".

[181] See Sulzer, above n 173, 2–3: "*Suite aux événements du 11 septembre à New York, la Turquie a été la seule délégation à recommander l'insertion du crime de terrorisme dans la compétence de la CPI en proposant une: «approche pragmatique [en vue] d'examiner la question dans le cadre des délibérations en cours de la Commission préparatoire» ou «organiser une conférence internationale ayant précisément pour mandat de revoir la question de la juridiction de la Cour afin que les crimes de terrorisme constituent une catégorie distincte de crimes, à côté de ceux qui sont déjà énumérés dans le Statut». Ces propositions n'ont été reprises par aucune délégation*".

[182] See Sulzer, above n 173, 3: "*Plus préoccupant, lors de la dernière Assemblée parlementaire du Conseil de l'Europe, une recommandation et une résolution intitulées' «Les démocraties face au terrorisme» ont été adoptées allant dans le sens d'une révision du Statut de la CPI pour inclure les actes de terrorisme.*

Selon la Recommandation 1534 (2001)[1]

«[…]4. L'Assemblée estime que la nouvelle Cour pénale internationale est l'institution propre à juger les actes relevant du terrorisme international.[…]

[…]5. L'Assemblée prie instamment le Comité des Ministres: […]

[…]xi. d'étudier d'urgence la possibilité d'amender et d'élargir le Statut de Rome, pour que figure, parmi les attributions de la Cour pénale internationale, l'aptitude à juger les actes relevant du terrorisme international […]»

Selon la Résolution 1258 (2001)[1]

«[…]5. L'Assemblée estime que la nouvelle Cour pénale internationale est l'institution propre à juger les actes terroristes.[…]

[…]17. L'Assemblée appelle les Etats membres du Conseil de l'Europe à:

[…]ix. étudier d'urgence la possibilité d'amender et d'élargir le Statut de Rome, pour que figure, parmi les attributions de la Cour pénale internationale, l'aptitude à juger les actes relevant du terrorisme international ; […]".

the time being, things have not progressed, and are not likely to do so in the near future. This course, preserving for the moment the integrity of the Statute, is to be welcomed. The Court must now be able to work on a secured Statute, not opened up for a possibly indeterminate number of modifications. The revision conference, which will take place in 2009, will be able to appraise the situation and possibly add a new crime of terrorism to the punishable offences. If a comprehensive United Nations Convention on Terrorism is by that time adopted, States will also be able to take advantage of the legitimacy which it will carry and any agreed definition of the crime of terrorism within the text.

In conclusion, it may be said that the law in relation to the criminal prosecution of international terrorists is at once richly articulated and in ongoing evolution. The anti-terrorist conventions (with their complex blend of customary international law together with treaty rules) provide for a great variety of jurisdictional titles, the most salient and multifaceted of which is the *aut dedere aut prosequi* principle, constituting a form of universality. The relationship between international and internal law is particularly close in this matter, creating a multitude of legal problems. On the other hand, the law is quickly developing in this field. The events of 11 September 2001 bolstered the already felt need to better combat terrorism. It is not difficult to foresee that a further broadening of the law is forthcoming, possibly with a general convention on the suppression of terrorism. If that happens, a milestone will indeed have been reached, the piecemeal approach of specific conventions, which up to now so conspicuously characterised this branch of law, being finally overcome. One may thus follow the events of the next months and years with studious attention. But too much should not be expected.

EXHIBIT K

11. International Convention for the Suppression of the Financing of Terrorism

New York, 9 December 1999

Entry into force:	10 April 2002, in accordance with article 26 which reads as follows: "1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.".
Registration:	10 April 2002, No. 38349.
Status:	Signatories: 132 ,Parties: 160.
Text:	Resolution A/RES/54/109; depositary notifications C.N.327.2000.TREATIES-12 of 30 May 2000 (rectification of the original text of the Convention); and C.N.3.2002.TREATIES-1 of 2 January 2002 [proposal for corrections to the original text of the Convention (Arabic, Chinese, English, French, Russian and Spanish authentic texts)] and C.N.86.2002.TREATIES-4 of 1 February 2002 [Rectification of the original of the Convention (Arabic, Chinese, English, French, Russian and Spanish authentic texts)]; C.N.312.2002.TREATIES-14 of 4 April 2002 [proposal of a correction to the original of the Convention (Spanish authentic text)] and C.N.420.2002.TREATIES-20 of 3 May 2002 [rectification of the original of the Convention (Spanish authentic text)].

Note: The Convention was adopted by Resolution 54/109 of 9 December 1999 at the fourth session of the General Assembly of the United Nations. In accordance with its article 25 (1), the Convention will be open for signature by all States at United Nations Headquarters from 10 January 2000 to 31 December 2001.

PARTICIPANTS

Participant	Signature	Ratification, Acceptance (A), Approval (AA), Accession (a), Succession (d)
Afghanistan		24 Sep 2003 a
Albania	18 Dec 2001	10 Apr 2002
Algeria	18 Jan 2000	8 Nov 2001
Andorra	11 Nov 2001	
Antigua and Barbuda		11 Mar 2002 a
Argentina	28 Mar 2001	22 Aug 2005
Armenia	15 Nov 2001	16 Mar 2004
Australia	15 Oct 2001	26 Sep 2002
Austria	24 Sep 2001	15 Apr 2002
Azerbaijan	4 Oct 2001	26 Oct 2001
Bahamas	2 Oct 2001	1 Nov 2005
Bahrain	14 Nov 2001	21 Sep 2004
Bangladesh		26 Aug 2005 a
Barbados	13 Nov 2001	18 Sep 2002
Belarus	12 Nov 2001	6 Oct 2004
Belgium	27 Sep 2001	17 May 2004
Belize	14 Nov 2001	1 Dec 2003
Benin	16 Nov 2001	30 Aug 2004
Bhutan	14 Nov 2001	22 Mar 2004
Bolivia	10 Nov 2001	7 Jan 2002
Bosnia and Herzegovina	11 Nov 2001	10 Jun 2003
Botswana	8 Sep 2000	8 Sep 2000
Brazil	10 Nov 2001	16 Sep 2005
Brunei Darussalam		4 Dec 2002 a
	19 Mar	

Bulgaria	2001	15 Apr 2002
Burkina Faso		1 Oct 2003 a
Burundi	13 Nov 2001	
Cambodia	11 Nov 2001	12 Dec 2005
Cameroon		6 Feb 2006 a
Canada	10 Feb 2000	19 Feb 2002
Cape Verde	13 Nov 2001	10 May 2002
Central African Republic	19 Dec 2001	
Chile	2 May 2001	10 Nov 2001
China[1]	13 Nov 2001	19 Apr 2006
Colombia	30 Oct 2001	14 Sep 2004
Comoros	14 Jan 2000	25 Sep 2003
Congo	14 Nov 2001	20 Apr 2007
Cook Islands	24 Dec 2001	4 Mar 2004
Costa Rica	14 Jun 2000	24 Jan 2003
Côte d'Ivoire		13 Mar 2002 a
Croatia	11 Nov 2001	1 Dec 2003
Cuba	19 Oct 2001	15 Nov 2001
Cyprus	1 Mar 2001	30 Nov 2001
Czech Republic	6 Sep 2000	27 Dec 2005
Democratic People's Republic of Korea	12 Nov 2001	
Democratic Republic of the Congo	11 Nov 2001	28 Oct 2005
Denmark[2]	25 Sep 2001	27 Aug 2002
Djibouti	15 Nov 2001	13 Mar 2006
Dominica		24 Sep 2004 a
Dominican Republic	15 Nov 2001	

Ecuador	6 Sep 2000	9 Dec 2003
Egypt	6 Sep 2000	1 Mar 2005
El Salvador		15 May 2003 a
Equatorial Guinea		7 Feb 2003 a
Estonia	6 Sep 2000	22 May 2002
Finland	10 Jan 2000	28 Jun 2002 A
France	10 Jan 2000	7 Jan 2002
Gabon	8 Sep 2000	10 Mar 2005
Georgia	23 Jun 2000	27 Sep 2002
Germany	20 Jul 2000	17 Jun 2004
Ghana	12 Nov 2001	6 Sep 2002
Greece	8 Mar 2000	16 Apr 2004
Grenada		13 Dec 2001 a
Guatemala	23 Oct 2001	12 Feb 2002
Guinea	16 Nov 2001	14 Jul 2003
Guinea-Bissau	14 Nov 2001	
Guyana		12 Sep 2007 a
Honduras	11 Nov 2001	25 Mar 2003
Hungary	30 Nov 2001	14 Oct 2002
Iceland	1 Oct 2001	15 Apr 2002
India	8 Sep 2000	22 Apr 2003
Indonesia	24 Sep 2001	29 Jun 2006
Ireland	15 Oct 2001	30 Jun 2005
Israel	11 Jul 2000	10 Feb 2003
Italy	13 Jan 2000	27 Mar 2003
Jamaica	10 Nov 2001	16 Sep 2005
Japan	30 Oct 2001	11 Jun 2002 A
Jordan	24 Sep	28 Aug 2003

	2001	
Kazakhstan		24 Feb 2003 a
Kenya	4 Dec 2001	27 Jun 2003
Kiribati		15 Sep 2005 a
Kyrgyzstan		2 Oct 2003 a
Latvia	18 Dec 2001	14 Nov 2002
Lesotho	6 Sep 2000	12 Nov 2001
Liberia		5 Mar 2003 a
Libyan Arab Jamahiriya	13 Nov 2001	9 Jul 2002
Liechtenstein	2 Oct 2001	9 Jul 2003
Lithuania		20 Feb 2003 a
Luxembourg	20 Sep 2001	5 Nov 2003
Madagascar	1 Oct 2001	24 Sep 2003
Malawi		11 Aug 2003 a
Malaysia		29 May 2007 a
Maldives		20 Apr 2004 a
Mali	11 Nov 2001	28 Mar 2002
Malta	10 Jan 2000	11 Nov 2001
Marshall Islands		27 Jan 2003 a
Mauritania		30 Apr 2003 a
Mauritius	11 Nov 2001	14 Dec 2004
Mexico	7 Sep 2000	20 Jan 2003
Micronesia (Federated States of)	12 Nov 2001	23 Sep 2002
Moldova	16 Nov 2001	10 Oct 2002
Monaco	10 Nov 2001	10 Nov 2001
Mongolia	12 Nov 2001	25 Feb 2004
Montenegro[3]		23 Oct 2006 d
Morocco	12 Oct 2001	19 Sep 2002
Mozambique	11 Nov 2001	14 Jan 2003
Myanmar	12 Nov 2001	16 Aug 2006

Namibia	10 Nov 2001	
Nauru	12 Nov 2001	24 May 2005
Netherlands[4]	10 Jan 2000	7 Feb 2002 A
New Zealand[5]	7 Sep 2000	4 Nov 2002
Nicaragua	17 Oct 2001	14 Nov 2002
Niger		30 Sep 2004 a
Nigeria	1 Jun 2000	16 Jun 2003
Norway	1 Oct 2001	15 Jul 2002
Palau		14 Nov 2001 a
Panama	12 Nov 2001	3 Jul 2002
Papua New Guinea		30 Sep 2003 a
Paraguay	12 Oct 2001	30 Nov 2004
Peru	14 Sep 2000	10 Nov 2001
Philippines	16 Nov 2001	7 Jan 2004
Poland	4 Oct 2001	26 Sep 2003
Portugal	16 Feb 2000	18 Oct 2002
Republic of Korea	9 Oct 2001	17 Feb 2004
Romania	26 Sep 2000	9 Jan 2003
Russian Federation	3 Apr 2000	27 Nov 2002
Rwanda	4 Dec 2001	13 May 2002
Saint Kitts and Nevis	12 Nov 2001	16 Nov 2001
Saint Vincent and the Grenadines	3 Dec 2001	28 Mar 2002
Samoa	13 Nov 2001	27 Sep 2002
San Marino	26 Sep 2000	12 Mar 2002
Sao Tome and Principe		12 Apr 2006 a
Saudi Arabia	29 Nov 2001	23 Aug 2007
Senegal		24 Sep 2004 a
Serbia	12 Nov 2001	10 Oct 2002

Seychelles	15 Nov 2001	30 Mar 2004
Sierra Leone	27 Nov 2001	26 Sep 2003
Singapore	18 Dec 2001	30 Dec 2002
Slovakia	26 Jan 2001	13 Sep 2002
Slovenia	10 Nov 2001	23 Sep 2004
Somalia	19 Dec 2001	
South Africa	10 Nov 2001	1 May 2003
Spain	8 Jan 2001	9 Apr 2002
Sri Lanka	10 Jan 2000	8 Sep 2000
Sudan	29 Feb 2000	5 May 2003
Swaziland		4 Apr 2003 a
Sweden	15 Oct 2001	6 Jun 2002
Switzerland	13 Jun 2001	23 Sep 2003
Syrian Arab Republic		24 Apr 2005 a
Tajikistan	6 Nov 2001	16 Jul 2004
Thailand	18 Dec 2001	29 Sep 2004
The Former Yugoslav Republic of Macedonia	31 Jan 2000	30 Aug 2004
Togo	15 Nov 2001	10 Mar 2003
Tonga		9 Dec 2002 a
Tunisia	2 Nov 2001	10 Jun 2003
Turkey	27 Sep 2001	28 Jun 2002
Turkmenistan		7 Jan 2005 a
Uganda	13 Nov 2001	5 Nov 2003
Ukraine	8 Jun 2000	6 Dec 2002
United Arab Emirates		23 Sep 2005 a
United Kingdom of Great Britain and Northern Ireland	10 Jan 2000	7 Mar 2001
United Republic of Tanzania		22 Jan 2003 a

United States of America	10 Jan 2000	26 Jun 2002
Uruguay	25 Oct 2001	8 Jan 2004
Uzbekistan	13 Dec 2000	9 Jul 2001
Vanuatu		31 Oct 2005 a
Venezuela (Bolivarian Republic of)	16 Nov 2001	23 Sep 2003
Viet Nam		25 Sep 2002 a

DECLARATIONS

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification, acceptance, approval or accession.)

Algeria

Reservation:

The Government of the People's Democratic Republic of Algeria does not consider itself bound by the provisions of article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism.

The Government of the People's Democratic Republic of Algeria declares that in order for a dispute to be submitted to arbitration or to the International Court of Justice, the agreement of all parties to the dispute shall be required in each case.

Argentina

Declaration:

In accordance with the provisions of article 24, paragraph 2, the Argentine Republic declares that it does not consider itself bound by article 24, paragraph 1, and consequently does not accept mandatory recourse to arbitration or to the jurisdiction of the International Court of Justice.

Bahamas

Declaration:

"In accordance with article 2.2 of the Convention for the Suppression of the Financing of Terrorism, the Government of the Commonwealth of The Bahamas declares that it is not a party to the Agreements listed as items 5 to 9 in the annex referred to in paragraph 1, subparagraph (a) of the Convention and that those Agreements shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). Those Agreements are:

Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3rd March, 1980.

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation, done at Montreal on 24th February, 1988.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10th March, 1988.

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome, on 10th March, 1988.

International Convention for the Suppression of Terrorist Bombings adopted by the General Assembly of the United Nations on 15th December, 1997."

Bahrain

Reservation:

The Kingdom of Bahrain does not consider itself bound by paragraph 1 of Article 24 of the Convention.

Declaration:

The following Conventions shall be deemed not to be included in the annex referred to in Article 2, paragraph 1, subparagraph (a), since Bahrain is not a party thereto:

1. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

2. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

3. Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980.

4. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

5. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.

6. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

Bangladesh

Reservation:

"Pursuant to Article 24, paragraph 2 of the Convention [the] Government of the People's Republic of Bangladesh does not consider itself bound by the provisions of Article 24, paragraph 1 of the Convention."

Understanding:

"[The] Government of the People's Republic of Bangladesh understands that its accession to this Convention shall not be deemed to be inconsistent with its international obligations under the Constitution of the country."

Belgium[6]

Declaration :

I. Concerning article 2, paragraph 2 (a), of the Convention, the Government of Belgium declares the following:

The following treaties are to be deemed not to be included in the annex:

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988);

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988);

International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

II. The Government of Belgium interprets paragraphs 1 and 3 of article 2 as follows: an offence in the sense of the Convention is committed by any person who provides or collects funds if by doing so he contributes, fully or partly, to the planning, preparation or commission of an offence as defined in article 2, paragraph 1 (a) and (b) of the Convention. There is no requirement to prove that the funds provided or collected have been used precisely for a particular terrorist act, provided that they have contributed to the criminal activities of persons

whose goal was to commit the acts set forth in article 2, paragraph 1 (a) and (b).

Reservation:

As for article 14 of the Convention, the Government of Belgium makes the following reservation:

1. In exceptional circumstances, the Government of Belgium reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

2. In cases where the preceding paragraph is applicable, Belgium recalls that it is bound by the general legal principle *aut dedere aut judicare*, pursuant to the rules governing the competence of its courts.

Brazil

Upon signature:

Interpretative declarations:

"Interpretative Declarations to be made by the Federal Republic of Brazil on the occasion of signing of the International Convention for the Suppression of the Financing of Terrorism:

1. As concerns Article 2 of the said Convention, three of the legal instruments listed in the Annex to the Convention have not come into force in Brazil. These are the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; and the International Convention for the Suppression of Terrorist Bombings.

2. As concerns Article 24, paragraph 2 of the said Convention, Brazil does not consider itself obligated by paragraph 1 of the said Article, given that it has not recognized the mandatory jurisdiction clause of the International Court of Justice."

China

Reservation and declaration:

1. The People's Republic of China shall not be bound by paragraph 1 of article 24 of the Convention.

[...]

3. As to the Macao Special Administrative Region of the People's Republic of China, the following three Conventions shall not be included in the annex referred to in Article 2, paragraph 1, subparagraph (a) of the Convention:

(1) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March

1980.

(2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

(3) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

Colombia

Declaration:

By virtue of article 24, paragraph 2, of the Convention, Colombia declares that it does not consider itself bound by paragraph 1 of the said article.

Furthermore, by virtue of article 7, paragraph 3, of the Convention, Colombia states that it establishes its jurisdiction in accordance with its domestic law in accordance with paragraph 2 of the same article.

Cook Islands

Declaration:

"In accordance with the provisions of article 2, paragraph 2, subparagraph (a) of the International Convention for the Suppression of the Financing of Terrorism, the Government of the Cook Islands declares:

That in the application of this Convention, the treaties listed in the annex, referred to in article 2, paragraph 1, subparagraph (a) shall be deemed not to be included, given that the Cook Islands is not yet a party to the following Conventions:

(i) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;

(ii) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988;

(iii) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

(iv) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988;

(v) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997."

Croatia

Declaration:

"The Republic of Croatia, pursuant to Article 2 paragraph 2 of the International Convention for the Suppression of the Financing of Terrorism, declares that in the application of the Convention to the Republic of Croatia the following treaties shall be deemed not to be included in the Annex referred to in Article 2, paragraph 1, subparagraph (a) of the Convention:

1. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979,

2. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988,

3. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988,

4. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997."

Cuba

Reservation:

The Republic of Cuba declares, pursuant to article 24, paragraph 2, that it does not consider itself bound by paragraph 1 of the said article, concerning the settlement of disputes arising between States Parties, inasmuch as it considers that such disputes must be settled through amicable negotiation. In consequence, it declares that it does not recognize the compulsory jurisdiction of the International Court of Justice.

Democratic People's Republic of Korea[7]

Upon signature:

Reservations:

1. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 2, paragraph 1, sub-paragraph (a) of the Convention.

2. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 14 of the Convention.

3. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 24, paragraph 1 of the Convention.

Egypt[8]

Reservations and declaration:

1. Under article 2, paragraph 2 (a), of the Convention, the Government of the Arab Republic of Egypt considers that, in the application of the Convention, conventions to which it is not a party are deemed not included in the annex.

2. Under article 24, paragraph 2, of the Convention, the Government of the Arab Republic of Egypt does not consider itself bound by the provisions of paragraph 1 of that article.

Explanatory declaration:

Without prejudice to the principles and norms of general international law and the relevant United Nations resolutions, the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of article 2, paragraph 1, subparagraph (b), of the Convention.

El Salvador

Declarations:

(1) Pursuant to article 2, paragraph 2 (a), the Republic of El Salvador declares that in the application of this Convention, the Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980, shall not be considered as having been included in the annex referred to in article 2, paragraph 1 (a), since El Salvador is not currently a State party thereto;

...

(3) pursuant to article 24, paragraph 2, the Republic of El Salvador declares that it does not consider itself bound by paragraph 1 of that article, because it does not recognize the compulsory jurisdiction of the International Court of Justice; and

(4) El Salvador accedes to this Convention on the understanding that such accession is without prejudice to any provisions thereof which may conflict with the principles expressed in its Constitution and domestic legal system.

Estonia[9]

France

Declarations:

Declaration pursuant to article 2, paragraph 2 (a)

In accordance with article 2, paragraph 2 (a) of this Convention, France declares that in the application of the Convention to France, the Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, shall be deemed not to be included in the annex referred to in article 2, paragraph 1, subparagraph (a), since France is not a party thereto.

Georgia

Declaration:

"In accordance with article 2.2, Georgia declares, that while applying this Convention, treaties to which Georgia is not contracting party shall not be considered as included in the annex to this Convention."

Guatemala

Declaration:

Pursuant to article 2, paragraph 2 (a) of the Convention referred to in the preceding article, the State of Guatemala, in ratifying the Convention, makes the following declaration: "In the application of this Convention, Guatemala deems the following treaties not to be included in the annex: the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed at Rome on 10 March 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988 and the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997. The declaration shall cease to have effect, for each of the treaties indicated, as soon as the treaty enters into force for the State of Guatemala, which shall notify the depositary of this fact.

6 June 2002

Declaration under article 2 (2) (a):

[The Government of Guatemala notifies,]...pursuant to article 2, paragraph 2 of the International Convention for the Suppression of the Financing of Terrorism, that on 14 March 2002 *[should read: 10 April 2002]*, the International Convention for the Suppression of Terrorist Bombings entered into force for the Republic of Guatemala. Accordingly, the declaration made by the Republic of Guatemala at the time of depositing its instrument of ratification that the latter Convention was deemed not to be included in the annex to the International Convention for the Suppression of the Financing of Terrorism has ceased to have effect.

Indonesia

Declaration:

"A. In accordance with Article 2 paragraph 2 subparagraph (a) of the Convention for the Suppression of the Financing of Terrorism, the Government of the Republic of Indonesia declares that the following treaties are to be deemed not to be included in the Annex referred to in Article 2 paragraph 1 subparagraph (a) of the Convention:

1. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

2. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

3. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.

4. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

5. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.

B. The Government of the Republic of Indonesia declares that the provisions of Article 7 of the Convention for the Suppression of the Financing of Terrorism will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States. "

Reservation:

The Government of the Republic of Indonesia, while signatory to the Convention for the Suppression of the Financing of Terrorism, does not consider itself bound by the provision of Article 24 and takes the position that dispute relating to the interpretation and application on the Convention which cannot be settled through the channel provided for in paragraph (1) of the said Article, may be referred to the International Court of Justice only with the consent of all the Parties to the dispute."

Israel[10]

"... with the following declarations:

Pursuant to Article 2, paragraph 2 (a) of the International Convention for the Suppression of the Financing of Terrorism, the Government of the State of Israel declares that in the application of the Convention the treaties to which the state of Israel is not a party shall be deemed not to be included in the Annex of the Convention.

...

Pursuant to Article 24, paragraph 2 of the Convention, the State of Israel does not consider itself bound by the provisions of Article 24, paragraph 1 of the Convention.

The Government of the State of Israel understands that the term "international humanitarian law" referred to in Article 21 of the Convention has the same substantial meaning as the term "the law of war". This body of laws does not include the provisions of the Protocols Additional to the Geneva Convention of 1977 to which the State of Israel is not a party."

Jordan[11]

Declarations:

"1. The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determation as terrorist acts within the context of paragraph 1(b) of article 2 of the Convention.

2. Jordan is not a party to the following treaties:

A. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980.

B. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

C. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Contiental Shelf, done at Rome on 10 March 1988.

D. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997.

Accordingly Jordan is not bound to include, in the application of the International Covention for the Supresssion of the Financing of Terrorism, the offences within the scope and as defined in such Treaties."

Latvia

Declaration:

"In accordance with Article 2, paragraph 2 of the International Convention for the Suppression of the Financing of Terrorism, adopted at New York on the 9th day of December 1999, the Republic of Latvia declares that in the application of the Convention to the Republic of Latvia the following treaties shall be deemed not to be included in the annex referred to in Article 2 paragraph 1, subparagraph (a) of the Convention:

1 . International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

2. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

3. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

4. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988. 5. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997."

20 March 2003

"In accordance with Article 2, paragraph 2 of the International Convention for the Suppression

of the Financing of Terrorism, adopted at New York on the 9th day of December 1999, the Republic of Latvia notifies that the following treaties have entered into force for the Republic of Latvia:

1. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979,

2. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980,

3. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988,

4. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; and

5. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997."

Lithuania

Reservation and declaration:

".....it is provided in paragrah 2 of Article 24 of the said Convention, the Seimas of the Republic of Lithuania declares that the Republic of Lithuania does not consider itself bound by the provisions of paragraph 1 of Article 24 of the Convention stipulating that any dispute concerning the interpretation or application of this Convention shall be referred to the International Court of Justice.

.....it is provided in subparagraph a) of paragraph 2 of the said Convention, the Seimas of the Republic of Lithuania declares that in the application of this Convention to the Republic of Lithuania, the International Convention for the Suppression of Terrorist Bombings, adopted on 15 December 1997, shall be deemed not to be included in the annex referred to in subparagraph a) of paragraph 1 of Article 2 of the Convention."

Luxembourg

Declaration:

Pursuant to article 2, paragraph 2, subparagraph (a), of the Convention, Luxembourg declares that when the Convention is applied to it, the treaties listed in the annex which have not yet been ratified by Luxembourg shall be deemed not to appear in the annex.

As at the date of ratification of the Convention, the following treaties listed in the annex had been ratified by Luxembourg:

Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague, on 16 December 1970;

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, on 23 September 1971;

International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations, on 17 December 1979;

Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980.

Malaysia

Declarations and reservation:

"1. The Government of Malaysia declares, pursuant to article 2 (2) (a) of the Convention, that in the application of the Convention to Malaysia, the Convention shall be deemed not to include the treaties listed in the Annex to the Convention which Malaysia is not a party thereto.

2. In accordance with Article 7 (3) of the Convention, the Government of Malaysia declares that it has established jurisdiction in accordance with its domestic laws over the offences set forth in Article 2 of the Convention in all the cases provided for in Article 7 (1) and 7 (2).

3. The Government of Malaysia understands Article 10 (1) of the Convention to include the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws.

4. (a) Pursuant to Article 24 (2) of the Convention, the Government of Malaysia declares that it does not consider itself bound by article 24 (1) of the Convention; and

(b) The Government of Malaysia reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 24 (1) of the Convention or any other procedure for arbitration."

Mauritius

Declarations:

"(1) in accordance with Article 2, paragraph 2, subparagraph (a) of the said Convention, the Government of the Republic of Mauritius declares that in the application of this Convention to the Republic of Mauritius, the following treaty shall be deemed not to be included in the annex referred to in Article 2 [paragraph 1 subparagraph (a)] of the said Convention, since the Republic of Mauritius is not yet a party thereto -

(1) The International Convention on the Physical Protection of Nuclear Materials:

(ii) In accordance with Article 24(2) of the said Convention, the Government of the Republic of Mauritius does not consider itself bound by Article 24 (1). The Government of the Republic of Mauritius considers that any dispute may be referred to the International Court of Justice only with the consent of all the Parties to the dispute."

Moldova

Declaration and reservation:

1. Pursuant to article 2, paragraph 2 (a) of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Moldova declares that in the application of the Convention the treaties the Republic of Moldova is not a party to shall be deemed not to be included in the Annex of the Convention.

2. Pursuant to article 24, paragraph 2 of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Moldova declares that it does not consider itself bound by the provisions of article 24, paragraph 1 of the Convention.

Mozambique

Declaration:

"... with the following declaration in accordance with its article 24, paragraph 2:

"The Republic of Mozambique does not consider itself bound by the provisions of article 24 paragraph 1 of the Convention.

In this connection the Republic of Mozambique states that, in the each individual case, the consent of all Parties to such a dispute is necessary for the submission of the dispute to arbitration or to the International Court of Justice."

Furthermore, the Republic of Mozambique declare that:

"The Republic of Mozambique, in accordance with its Constitution and domestic laws, may not and will not extradite Mozambique citizens.

Therefore, Mozambique citizens will be tried and sentenced in national courts".

Myanmar

Upon signature:

Reservation:

"The Government of the Union of Myanmar declares in pursuance of Article 24, paragraph (2) of the International Convention for the Suppression of the Financing of Terrorism that it does not consider itself bound by the provisions of Article 24, Paragraph (1)."

Upon ratification:

Reservations:

"Regarding articles 13, 14 and 15 of the International Convention for the Suppression of the

Financing of Terrorism, the Union of Myanmar reserves its right to extradite its own citizen or citizens.

Regarding article 24 of the International Convention for the Suppression of the Financing of Terrorism, the Union of Myanmar declares that it does not consider itself bound by paragraph 1 of the article 24 of the said Convention.

Regarding the 9 Conventions mentioned in the Annex of the International Convention for the Suppression of the Financing of Terrorism, the Union of Myanmar declares that it is yet to be a party to the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980."

Netherlands

Declaration:

"The Kingdom of the Netherlands understands Article 10, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible."

New Zealand

Declaration:

"... AND DECLARES, in accordance with Article 2, paragraph 2 (a), of the Convention, that, in the application of the Convention to New Zealand, the Convention on the Physical Protection of Nuclear Materials adopted at Vienna on [3 March 1980] shall be deemed not to be included in the annex referred to in Article 2, paragraph 1 (a), as New Zealand is not yet a party to it; ..."

Nicaragua

Declaration:

In accordance with the provisions of article 2, paragraph 2, subparagraph (a), of the International Convention for the Suppression of the Financing of Terrorism, the Government of Nicaragua declares:

That, in the application of this Convention, the treaties listed in the annex referred to in article 2, paragraph 1, subparagraph (a), shall be deemed not to be included, given that Nicaragua is not yet a party to the following conventions:

1. International Convention against the Taking of Hostages, adopted by the United Nations General Assembly on 17 December 1979.

2. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

3. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

4. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

Philippines

Declaration:

"... , in ratifying the Convention, the Philippines has to declare, as it hereby declares, that in the application of the Convention the following treaties to which it is not yet a party shall be deemed not included in the annex:

(a) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;

(c) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf;

(d) International Convention for the Suppression of Terrorist Bombings.

... , this declaration shall cease to have effect upon entry into force of the said treaties with respect to the Philippines."

25 June 2004

".....pursuant to Article 2 (a) of the International Convention on the Financing of Terrorism, the Philippine Government has become State Party to the following international instruments:

1. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, entered into force for [the Republic of the Philippines] on 16 January 2004 ([Republic of Philippines] ratification deposited with the ICAO on 17 December 2003);

2. International Convention for the Suppression of Terrorist Bombings, entered into force for [the Republic of the Philippines] on 06 February 2004 ([Republic of the Philippines] ratification deposited with the UN Secretary-General on 07 January 2004);

3. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, entered into force for [the Republic of the Philippines] on 05 April 2004 ([Republic of the Philippines] ratification deposited with the IMO on 06 January 2004); and

4. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, entered into force for [the Republic of the Philippines] on 05 April 2004 ([Republic of the Philippines] ratification deposited with the IMO on 06 January 2004).

Romania

Declaration:

"In accordance with Article 2, paragraph 2, subparagraph (a) of the Convention, Romania declares that, on the date of the application of this Convention to Romania, the International Convention for the Suppression of Terrorism Bombings of 15 December 1997, shall be deemed not to be included in the annex referred to in Article 2, paragraph 1, subparagraph (a)."

Russian Federation

Upon signature:

Declaration:

It is the position of the Russian Federation that the provisions of article 15 of the Convention must be applied in such a way as to ensure the inevitability of responsibility for perpetrating the crimes falling within the purview of the Convention, without prejudice to the effectiveness of international cooperation with regard to the questions of extradition and legal assistance.

Upon ratification:

Declarations:

1. ....

2. It is the position of the Russian Federation that the provisions of article 15 of the Convention must be applied in such a way as to ensure the inevitability of responsibility for perpetrating crimes falling within the purview of the Convention, without prejudice to the effectiveness of international cooperation with regard to the questions of extradition and legal assistance.

Saint Vincent and the Grenadines

Declaration and Reservation:

"In accordance with Article 2 paragraph 2 a) of the said Convention, however, the Government of Saint Vincent and the Grenadines declares that in the application of this Convention to Saint Vincent and the Grenadines the following treaties shall be deemed not to be included in the Annex referred to in its Article 2 paragraph 1(a):

1. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

2. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

Further, in accordance with Article 24 paragraph 2 of the said Convention, the Government of

Saint Vincent and the Grenadines declares that it does not consider itself bound by paragraph 1 of Article 24. The Government of Saint Vincent and the Grenadines considers that any dispute may be referred to the International Court of Justice only with the consent of all the parties to the dispute."

Saudi Arabia

Reservation and declaration:

The Kingdom of Saudi Arabia does not consider itself bound by article 24, paragraph 1 of the Convention relating to the submission to arbitration of any dispute concerning the interpretation or application of this Convention, or their referral to the International Court of Justice should settlement by arbitration be impossible.

The Convention on the Physical Protection of Nuclear Material is not deemed by the Kingdom of Saudi Arabia to be included in the annex referred to in article 2, paragraph 1 (a) of the Convention.

Singapore

Upon signature:

Reservation:

"... the Government of the Republic of Singapore makes the following reservations in relation to Article 2 and Article 24 of the 1999 International Convention for the Suppression of the Financing of Terrorism:

i) The Republic of Singapore declares, in pursuance of Article 2, paragraph 2 (a) of the Convention that in the application of this Convention, the treaty shall be deemed not to include the treaties listed in the annex of this Convention which the Republic of Singapore is not a party to.

ii) The Republic of Singapore declares, in pursuance of Article 24, paragraph 2 of the Convention that it will not be bound by the provisions of Article 24 paragraph 1 of the Convention."

Upon ratification:

"... [S]ubject to the following declarations and reservations:

Declarations and reservations:

Declarations

(1) The Republic of Singapore understands that Article 21 of the Convention clarifies that nothing in the Convention precludes the application of the law of armed conflict with regard to legitimate military objectives.

Reservations

(1) With respect to Article 2, paragraph 2 (a) of the Convention, the Republic of Singapore declares that the treaty shall be deemed not to include the treaties listed in the annex of this Convention which the Republic of Singapore is not a party to.

(2) The Republic of Singapore declares, in pursuance of Article 24, paragraph 2 of the Convention that it will not be bound by the provisions of Article 24, paragraph 1 of the Convention."

Syrian Arab Republic[12]

Reservations and declarations:

A reservation concerning the provisions of its article 2, paragraph 1 (b), inasmuch as the Syrian Arab Republic considers that acts of resistance to foreign occupation are not included under acts of terrorism;

Pursuant to article 2, paragraph 2 (a) of the Convention, the accession of the Syrian Arab Republic to the Convention shall not apply to the following treaties listed in the annex to the Convention until they have been adopted by the Syrian Arab Republic:

1. The International Convention against the Taking of Hostages, adopted by the General Assembly on 17 December 1979;

2. The Convention on the Physical Protection of Nuclear Materials, adopted at Vienna on 3 March 1980;

3. The International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly on 15 December 1997.

Pursuant to article 24, paragraph 2, of the Convention, the Syrian Arab Republic declares that it does not consider itself bound by paragraph 1 of the said article;

The accession of the Syrian Arab Republic to this Convention shall in no way imply its recognition of Israel or entail its entry into any dealings with Israel in the matters governed by the provisions thereof.

Thailand

Declarations:

"I. The Kingdom of Thailand declares in pursuance to Article 2 paragraph 2 (a) of the Convention that in the application of this Convention, the following treaties, which the Kingdom of Thailand is not a party to, shall not be included in the annex of this Convention.

1. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations

on 14 December 1973.

2. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

3. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

4. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

5. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

6. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

II. The Kingdom of Thailand declares, in pursuance to Article 24 paragraph 2 of the Convention, that it does not consider itself bound by Article 24 paragraph 1 of the Convention.".

The Former Yugoslav Republic of Macedonia

Declaration:

"The following treaties are to be deemed not to be included in the annex:

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done on 10 March 1988;

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988."

Tunisia

Reservation:

The Republic of Tunisia,

In ratifying the International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 by the General Assembly at its fifty-fourth session and signed by the Republic of Tunisia on 2 November 2001, declares that it does not consider itself bound by the provisions of article 24, paragraph 1, of the Convention and affirms that, in the settlement of disputes concerning the interpretation or implementation of the Convention, there shall be no recourse to arbitration or to the International Court of Justice without its prior consent.

Turkey

Declaration:

"1. The Republic of Turkey declares that the application of Paragraph 1(b) of Article (2) of the Convention does not necessarily indicate the existence of an armed conflict and the term "armed conflict", whether it is organized or not, describes a situation different from the commitment of acts that constitute the crime of terrorism within the scope of criminal law.

2. The Republic of Turkey declares its understanding that Paragraph 1(b) of Article (2) of the International Convention for the Suppression of the Financing of Terrorism, as stated in Article (21) of the said Convention, shall not prejudice the obligations of states under international law including the Charter of the United Nations, in particular the obligation of not providing financial support to terrorist and armed groups acting in the territory of other states.

3. Pursuant to Paragraph 2 of Article 24 of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Turkey declares that it does not consider itself bound by the provisions of Paragraph 1 of Article (24) of the said Convention."

United Arab Emirates

Reservation:

.....subject to a reservation with respect to article 24, paragraph 1, thereof, in consequence of which the United Arab Emirates does not consider itself bound by that paragraph, which relates to arbitration.

United States of America

Reservation:

"(a) pursuant to Article 24 (2) of the Convention, the United States of America declares that it does not consider itself bound by Article 24 (1) of the Convention; and

(b) the United States of America reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 24 (1) of the Convention or any other procedure for arbitration."

Understandings:

"(1) EXCLUSION OF LEGITIMATE ACTIVITIES AGAINST LAWFUL TARGETS. The United States of America understands that nothing in the Convention precludes any State Party to the Convention from conducting any legitimate activity against any lawful target in accordance with the law of armed conflict.

(2) MEANING OF THE TERM "ARMED CONFLICT". The United States of America understands that the term "armed conflict"in Article 2 (1) (b) of the Convention does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature."

Venezuela (Bolivarian Republic of)

Reservations:

Pursuant to article 24, paragraph 2, of the International Convention for the Suppression of the Financing of Terrorism, the Bolivarian Republic of Venezuela hereby formulates an express reservation to the provisions of article 24, paragraph 1, of that Convention. Accordingly, it does not consider itself bound to resort to arbitration as a means of dispute settlement, and does not recognize the binding jurisdiction of the International Court of Justice.

Furthermore, pursuant to article 2, paragraph 2, subparagraph (a), of the International Convention for the Suppression of the Financing of Terrorism, it declares that in the application of that Convention to Venezuela, the following treaties shall be deemed not to be included in the annex referred to in article 2, paragraph 1, subparagraph (a), of that Convention until they enter into force for the Bolivarian Republic of Venezuela:

1. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;

2. Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980;

3. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988;

4. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

5. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

6. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

Viet Nam

Reservation and declaration:

"Acceding to this Convention, the Socialist Republic of Vietnam makes its reservation to paragraph 1 of Article 24 of the Convention.

The Socialist Republic of Vietnam also declares that the provisions of the Convention shall not be applied with regard to the offences set forth in the following treaties to which the Socialist Republic of Vietnam is not a party:

- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979;

- Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;

- International Convention for [the] Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997."

Objections

(Unless otherwise indicated, the objections were made

upon ratification, acceptance, approval or accession.)

Austria

15 July 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Austria has examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Hashemite Kingdom of Jordan at the time of its ratification of the Convention. The Government of Austria considers that the declaration made by the Government of the Hashemite Kingdom of Jordan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The Declaration is furthermore contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of Austria recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of Austria therefore objects to the aforesaid reservation made by the Government of the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Austria and the Hashemite Kingdom of Jordan."

25 August 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Austria has carefully examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the

Convention. The Government of Austria considers that this declaration is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The Declaration is furthermore contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of Austria recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Austria therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Austria and the Arab Republic of Egypt."

12 September 2005

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of Austria has carefully examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Syrian Arab Republic at the time of its ratification of the Convention.

The Government of Austria considers that this declaration is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The Declaration is furthermore contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of Austria recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Austria therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism.

However, this objection shall not preclude the entry into force of the Convention between Austria and the Syrian Arab Republic."

Belgium

25 July 2005

With regard to the explanatory declaration made by Egypt upon ratification:

The Government of the Kingdom of Belgium has examined the reservation formulated by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism, in particular the part of the reservation in which the Government of the Arab Republic of Egypt declares that it "does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of article 2, [paragraph 1], subparagraph (b), of the Convention". The Government of Belgium considers that this reservation is a reservation that seeks to limit the scope of the Convention on a unilateral basis and that is contrary to its object and purpose, namely, the suppression of the financing of terrorist acts, wherever and by whomever committed.

Moreover, this declaration is contrary to article 6 of the Convention, according to which "each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Belgium recalls that, according to article 19, paragraph (c), of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Belgium therefore objects to the aforementioned reservation made by the Government of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Belgium and Egypt.

24 October 2005

With regard to the reservation made by the Syrian Arab Republic upon accession:

The Government of Belgium has examined the reservation formulated by the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism, in particular the part of the reservations and declarations relating to the provisions of article 2, paragraph 1 (b), of the Convention, in which the Syrian Arab Republic declares that it considers "that acts of resistance to foreign occupation are not included under acts of terrorism". The Government of Belgium considers that this reservation seeks to limit the

scope of the Convention on a unilateral basis, which is contrary to the object and purpose thereof, namely, the suppression of the financing of acts of terrorism, wherever and by whomever committed.

Moreover, this reservation contravenes article 6 of the Convention, according to which "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Belgium recalls that, under article 19 (c) of the Vienna Convention on the Law of Treaties, no reservation may be formulated that is incompatible with the object and purpose of the Convention.

The Government of Belgium therefore objects to the above-mentioned reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Belgium and the Syrian Arab Republic.

Canada

25 August 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Canada has examined the Declaration made by [the] Hashemite Kingdom of Jordan at the time of its ratification of the International Convention for the Suppression of the Financing of Terrorism and considers that the Declaration is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis and is contrary to the object and purpose of the Convention which is the suppression of the financing of terrorism, irrespective of who carries it out.

The Government of Canada considers the Declaration to be, furthermore, contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Canada considers that the above Declaration constitutes a reservation which is incompatible with the object and purpose of the International Convention for the Suppression of the Financing of Terrorism.

The Government of Canada recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to

undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Canada therefore object to the aforesaid reservation made by the Government of the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Canada and the Hashemite Kingdom of Jordan."

18 May 2005

With regard to the reservation made by Belgium upon ratification:

"The Government of Canada considers the Reservation to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to ".....adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of Canada notes that, under established principles of international treaty law, as reflected in Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of Canada therefore objects to the Reservation relating to Article 2 made by the Government of Belgium upon ratification of the International Convention for the Suppression of the Financing of Terrorism because it is contrary to the object and purpose of the Convention. This objection does not, however, preclude the entry into force of the Convention between Canada and Belgium."

26 April 2006

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Canada has examined the Declaration made by the Government of the Arab Republic of Egypt at the time of its ratification of the International Convention for the Suppression of the Financing of Terrorism and considers that the Declaration is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis and is contrary to the object and purpose of the Convention which is the suppression of the financing of terrorism, irrespective of who carries it out.

The Government of Canada considers the declaration to be, furthermore, contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Canada recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Canada therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Canada and the Government of the Arab Republic of Egypt."

With regard to the reservation made by the Syrian Arab Republic upon accession

"The Government of Canada has examined the Reservation made by the Government of the Syrian Arab Republic at the time of its ratification of the International Convention for the Suppression of the Financing of Terrorism and considers that the Reservation seeks to limit the scope of the Convention on a unilateral basis and is contrary to the object and purpose of the Convention which is the suppression of the financing of terrorism, irrespective of who carries it out.

The Government of Canada considers the Reservation to be, furthermore, contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Canada recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. The Government of Canada therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Canada and the Syrian Arab Republic."

31 August 2006

With regard to the understanding made by Bangladesh upon accession

"The Government of Canada has examined the "understanding"made by the People's Republic of Bangladesh at the time of its accession to the International Convention for the Suppression of the Financing of Terrorism and considers that the "understanding" is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis.

The Government of Canada recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Canada therefore objects to the aforesaid reservation made by the People's Republic of Bangladesh to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Canada and the People's Republic of Bangladesh."

Denmark

30 April 2004

With regard to the declaration made by Jordan upon ratification:

".....the Kingdom of Denmark has examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of Jordan at the time of its ratification of the Convention. The Government of Denmark considers the declaration made by Jordan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of Denmark further considers the Declaration to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Denmark recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforesaid reservation made by the Government of Jordan to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Denmark and Jordan."

15 September 2005

With regard to a reservation made the Syrian Arab Republic upon accession:

"The Government of the Kingdom of Denmark has examined the reservation made by Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism upon accession to the Convention relating to Article 2 paragraph 1 (b) thereof.

The Government of Denmark considers that the reservation made by the Government of the Syrian Arab Republic unilaterally limits the scope of the Convention and that the reservation is contrary to the Convention's object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of Denmark further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The Government of Denmark recalls that, according to Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention as between the Kingdom of Denmark and the Syrian Arab Republic". "

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Kingdom of Denmark has examined the Declaration Relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention. The Government of Denmark considers that the declaration made by the Government of the Arab Republic of Egypt to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of Denmark further considers the Declaration to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The Government of Denmark recalls that, according to Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention as between the Kingdom of Denmark and the Arab Republic of Egypt".

Estonia

23 September 2005

With regard to a reservation made the Syrian Arab Republic upon accession:

"The Government of the Republic of Estonia has carefully examined the reservation relating to Article 2, paragraph 1, sub-paragraph (b) of the International Convention for the Suppression of the Financing of Terrorism made by the Syrian Arab Republic at the time of its accession to the Convention. The Government of Estonia considers the Syrian reservation to be contrary to the object and purpose of the Convention, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in Article 2, paragraph 1, sub-paragraph (b). The Government of Estonia finds that such acts can never be justified with reference to resistance to foreign occupation.

Furthermore, the Government of Estonia is in the position that the reservation is contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Estonia recalls that according to Article 19, sub-paragraph (c) of the Vienna Convention on the Law f Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of states that all parties respect the treaties to which they have chosen to become parties as to their object and purpose, and that states are prepared to take all necessary measures to comply with their obligations under the treaties.

The Government of Estonia therefore objects to the afore-mentioned reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Republic of Estonia and the Syrian Arab Republic."

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Republic of Estonia has carefully examined the explanatory declaration relating to Article 2, paragraph 1, sub-paragraph (b) of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention. The Government of Estonia considers the declaration made by Egypt to be in fact a reservation that seeks to limit unilaterally the scope of the Convention and is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in Article 2, paragraph 1, sub-paragraph (b). The Government of Estonia finds that such acts can never be justified with reference to resistance against foreign occupation and aggression with a view to liberation and self-determination.

Furthermore, the Government of Estonia is in the position that the explanatory declaration is contrary to the terms of Article 6 of the Convention, acceding to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate,

domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Estonia recalls that according to Article 19, sub-paragraph (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that all parties respect the treaties to which they have chosen to become parties as to their object and purpose, and that states are prepared to take all necessary measures to comply with their obligations under the treaties.

The Government of Estonia therefore objects to the afore-mentioned declaration made by the Government of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Republic of Estonia and the Arab Republic of Egypt."

Finland

29 April 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Finland has carefully examined the contents of the interpretative declaration relating to paragraph 1 (b) of the Convention for the Suppression of the Financing of Terrorism made by the Government of Jordan.

The Government of Finland is of the view that the declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Finland further considers the declaration to be in contradiction with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts wherever and by whomever carried out.

The declaration is, furthermore, contrary to the terms of Article 6 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of Finland wishes to recall that, according to the customary international law as codified in the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected as to their object and purpose and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland therefore objects to the above-mentioned interpretative declaration made by the Government of Jordan to the Convention.

This objection does not preclude the entry into force of the Convention between Jordan and

Finland. The Convention will thus become operative between the two states without Jordan benefiting from its declaration."

20 July 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Finland has carefully examined the contents of the interpretative declaration relating to paragraph 1 (b) of article 2 of the Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt.

The Government of Finland is of the view that the declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Finland further considers the declaration to be in contradiction with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts wherever and by whomever they may be carried out.

The declaration is, furthermore, contrary to the terms of Article 6 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of Finland wishes to recall that, according to the customary international law as codified in the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected as to their object and purpose and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland therefore objects to the above-mentioned interpretative declaration made by the Government of the Arab Republic of Egypt to the Convention.

This objection does not preclude the entry into force of the Convention between the Arab Republic of Egypt and Finland. The Convention will thus become operative between the two states without the Arab Republic of Egypt benefiting from its declaration."

20 July 2005

With regard to the declaration made by the Syrian Arab Republic upon accession:

"The Government of Finland has carefully examined the contents of the reservation relating to paragraph 1 (b) of article 2 of the Convention for the Suppression of the Financing of Terrorism made by the Government of the Syrian Arab Republic.

The Government of Finland considers the reservation to be in contradiction with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts wherever and by whomever they may be carried out.

The reservation is, furthermore, contrary to the terms of Article 6 of the Convention according

to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of Finland wishes to recall that, according to the customary international law as codified in the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected as to their object and purpose and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland therefore objects to the above-mentioned reservation made by the Government of the Syrian Arab Republic to the Convention.

This objection does not preclude the entry into force of the Convention between the Syrian Arab Republic and Finland. The Convention will thus become operative between the two states without the Syrian Arab Republic benefiting from its reservation."

France

4 December 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

The Government of the French Republic has examined the reservations made by the Government of the Democratic People's Republic of Korea on 12 November 2001, when it signed the International Convention on the Suppression of the Financing of Terrorism, which was opened for signature on 10 January 2000. By indicating that it does not consider itself bound by the provisions of article 2, paragraph 1, subparagraph (a), the Government of the Democratic People's Republic of Korea excludes from the definition of offences within the meaning of the Convention the financing of any act which constitutes an offence within the scope of and as defined in the treaties listed in the annex.

Under article 2, paragraph 2 (a), a State Party is entitled to exclude from the definition of offences within the meaning of the Convention the financing of acts which constitute offences within the scope of and as defined in any treaty listed in the annex to which it is not party; however, it is not entitled to exclude from the definition of offences within the meaning of the Convention the financing of acts which constitute offences within the scope of and as defined in any treaty listed in the annex to which it is party. It just so happens that the Democratic People's Republic of Korea is party to some of those treaties.

The Government of the French Republic lodges an objection to the reservation made by the Democratic People's Republic of Korea regarding article 2, paragraph 1 (a) of the Convention.

11 June 2004

With regard to the declaration made by Jordan upon ratification:

The Government of the French Republic has examined the declaration made by the Government of the Hashemite Kingdom of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism, of 9 December 1999. In that declaration, the Hashemite Kingdom of Jordan states that it 'does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of article 2 of the Convention.' However, the Convention applies to the suppression of the financing of all acts of terrorism, and its article 6 specifies that States parties shall 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.' The Government of the French Republic considers that the aforementioned declaration constitutes a reservation, and objects to that reservation. This objection shall not preclude the entry into force of the convention between France and Jordan.

15 August 2005

With regard to the explanatory declaration made by Egypt upon ratification:

The Government of the French Republic has examined the declaration made by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, whereby Egypt "… does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of article 2,[paragraph 1], subparagraph (b), of the Convention …". However, the Convention applies to the suppression of the financing of all acts of terrorism and states particularly in its article 6 that "each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature". The Government of the French Republic considers that the said declaration constitutes a reservation, contrary to the object and the purpose of the Convention and objects to that reservation. This objection does not preclude the entry into force of the Convention between the Arab Republic of Egypt and France.

With regard to the reservation made by the Syrian Arab Republic upon accession:

The Government of the French Republic has examined the reservations made by the Government of the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, inasmuch as Syria considers, with regard to the provisions of article 2, paragraph 1 (b) of the Convention that "… Acts of resistance to foreign occupation are not included under acts of terrorism …". However, the Convention applies to the suppression of the financing of all acts of terrorism and states particularly in its article 6 that "each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature". The Government of the French Republic considers that the said reservation is contrary to the object and the purpose of the Convention and objects to the reservation. This objection does not preclude the entry into force of the Convention between Syria and France.

Germany

With regard to the declarations made by the Jordan upon ratification:

The Government of the Federal Republic of Germany has carefully examined the substance of the declarations made by the Government of the Kingdom of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism, especially that part of the declarations in which the Government of the Kingdom of Jordan states that it "does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of article 2 of the Convention". The Government of the Federal Republic of Germany is of the opinion that this declaration in fact constitutes a reservation aimed at unilaterally limiting the scope of application of the Convention, and is thus contrary to the object and purpose of the Convention, namely the suppression of the financing of terrorism, regardless of by whom and to what end it is perpetrated.

In this respect, the declaration is furthermore in contravention of Article 6 of the Convention, under which the State Parties commit themselves to adopting "such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of the Federal Republic of Germany therefore objects to the above reservation by the Government of the Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Jordan.

18 May 2005

With regard to the reservation made by Belgium upon ratification:

"The Government of the Federal Republic of Germany has carefully examined the reservation made by the Government of the Kingdom of Belgium upon ratification of the International Convention for the Suppression of the Financing of Terrorism with respect to its Article 14. With this reservation, the Government of the Kingdom of Belgium expresses that it reserves the right to refuse extradition or mutual legal assistance in respect of any offence which it considers to be politically motivated. In the opinion of the Government of the Federal Republic of Germany, this reservation seeks to limit the Convention's scope of application in a way that is incompatible with the objective and purpose of the Convention.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservation made by the Government of the Kingdom of Belgium to the International Convention for the Suppression of the Financing of Terrorism. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Belgium."

16 August 2005

With regard to the reservation made by Syrian Arab Republic upon accession:

The Government of the Federal Republic of Germany has carefully examined the reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism upon accession to the Convention relating to Article 2 paragraph 1 (b) thereof. It is of the opinion that this reservation unilaterally limits the scope of the Convention and is thus in contradiction to the object and purpose of the Convention, in particular the object of suppressing the financing of terrorist acts wherever and by whomever they may be committed.

The reservation is further contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Federal Republic of Germany recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservation by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Federal Republic of Germany and the Syrian Arab Republic.

With regard to the explanatory declaration made by Egypt upon ratification:

The Government of the Federal Republic of Germany has carefully examined the declaration made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism upon ratification of the Convention relating to Article 2 paragraph 1 (b) thereof. It is of the opinion that this declaration amounts to a reservation, since its purpose is to unilaterally limit the scope of the Convention. The Government of the Federal Republic of Germany is furthermore of the opinion that the declaration is in contradiction to the object and purpose of the Convention, in particular the object of suppressing the financing of terrorist acts wherever and by whomever they may be committed.

The declaration is further contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Federal Republic of Germany recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned declaration by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Federal Republic of Germany and the Arab Republic of Egypt.

11 August 2006

With regard to the understanding made by Bangladesh upon accession:

"The Government of the Federal Republic of Germany has carefully examined the declaration made by the Government of the People's Republic of Bangladesh upon accession to the International Convention for the Suppression of the Financing of Terrorism. The People's Republic of Bangladesh has declared that its accession to the Convention shall not be deemed to be inconsistent with its obligations under the Constitution of the country. The Government of the Federal Republic of Germany is of the opinion that this declaration raises questions as to which obligations the People's Republic of Bangladesh intends to give precedence to in the event of any inconsistency between the Convention and its Constitution.

Declarations that leave it uncertain to what extent that State consents to be bound by its contractual obligations are in the opinion of the Government of the Federal Republic of Germany to be treated, in effect, as vague and general reservations, which are not compatible with the object and purpose of a Convention.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned declaration made by the Government of the People's Republic of Bangladesh to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Federal Republic of Germany and the People's Republic of Bangladesh."

Hungary

26 August 2004

With regard to the declaration made by Jordan upon ratification:

"... The Government of the Republic of Hungary has examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Hashemite Kingdom of Jordan at the time of its ratification of the Convention. The Government of the Republic of Hungary considers that the declaration made by the Government of the Hashemite Kingdom of Jordan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The Declaration is furthermore contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the Republic of Hungary recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Hungary therefore objects to the aforesaid reservation made by the Government of the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Hashemite Kingdom of Jordan."

28 February 2006

With regard to the reservatiaon made by the Syrian Arab Republic upon accession:

"The Government of the Republic of Hungary has examined the declaration relating to paragraph 1 (b) of article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Syrian Arab Republic at the time of its accession to the Convention. The Government of the Republic of Hungary considers that the declaration made by the Government of the Syrian Arab Republic is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of article 6 of the Convention according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The Government of the Republic of Hungary recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Hungary therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Syrian Arab Republic."

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Republic of Hungary has examined the explanatory declaration relating to paragraph 1 (b) of article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention. The Government of the Republic of Hungary considers that the explanatory declaration made by the Government of the Arab Republic of Egypt is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The explanatory declaration is furthermore contrary to the terms of article 6 of the Convention according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The Government of the Republic of Hungary recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Hungary therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Arab Republic of Egypt."

Ireland

23 June 2006

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Ireland have examined the explanatory declaration made by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999, according to which the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The Government of Ireland are of the view that this explanatory declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Ireland are also of the view that this reservation is contrary to the object and purpose of the Convention, namely suppressing the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, wherever and by whomever committed.

This reservation is contrary to the terms of Article 6 of the Convention, according to which States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Ireland recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible. It is in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Ireland therefore object to the reservation made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Ireland and the Arab Republic of Egypt. The Convention enters into force between Ireland and the Arab Republic of Egypt, without the Arab Republic of Egypt benefiting from its reservation."

Italy

20 May 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Italy has examined the "declaration" relating to paragraph 1 (b) of article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of Jordan at the time of its ratification to the Convention. The Government of Italy considers the declaration made by Jordan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Italy recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Italy therefore objects to the aforesaid reservation made by the Government of Jordan to the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not preclude the entry into force of the Convention between Italy and Jordan."

20 May 2005

With regard to the reservation made by Belgium upon ratification:

"The Government of Italy has examined the reservation to the International Convention for the Suppression of the Financing of Terrorism made by the Government of Belgium at the time of its ratification to the Convention. The Government of Italy considers the reservation by Belgium to be a unilateral limitation on the scope of the Convention, which is contrary to its object and purpose, namely the suppression of the financing of terrorism, irrespective of where it takes place and of who carries it out.

The Government of Italy recalls that, according to Article 19 (c) of the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Italy therefore objects to the aforementioned reservation made by the Government of Belgium to the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not preclude the entry into force of the Convention between Italy and

Belgium."

12 January 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Italy has examined the explanatory declaration made by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism, according to which the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view of liberation and self-determination, as terrorist acts within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The Government of Italy recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Italy considers that the declaration made by the Government of the Arab Republic of Egypt in substance constitutes a reservation.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Italy further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which the States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Italy wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become Parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Italy therefore objects to the reservation made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Arab Republic of Egypt and Italy. The Convention enters into force between the Arab Republic of Egypt and Italy without the Arab Republic of Egypt benefiting from its reservation."

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of Italy has examined the reservation made by the Government of the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism, according to which the Syrian Arab Republic considers that acts of resistance to foreign occupation are not included under acts of terrorism within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 9B0 of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Italy further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which the States Parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Italy wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Italy objects to the reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Syrian Arab Republic and Italy. The Convention enters into force between the Syrian Arab Republic and Italy, without the Syrian Arab Republic benefiting from its reservation."

Japan

1 May 2006

With regard to the reservation made by the Syrian Arab Republic upon accession:

"When depositing its instrument of accession, the Government of Syrian Arab Republic made a reservation which reads as follows: 'A reservation concerning the provisions of its article 2, paragraph 1 (b), inasmuch as the Syrian Arab Republic considers that acts of resistance to foreign occupation are not included under acts of terrorism'.

In this connection, the Government of Japan draws attention of the provisions of article 6 of the Convention, according to which each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Japan considers that the aforementioned reservation made by the Syrian Arab Republic seeks to exclude acts of resistance to foreign occupation from application of theConvention and that such reservation constitutes a reservation which is incompatible with the object and purpose of the Convention. The Government of Japan therefore objects to the reservation made by the Syrian Arab Republic."

Latvia

30 September 2003

With regard to the declaration made by the Syrian Arab Republic upon accession:

"The Government of the Republic of Latvia has examined the reservation made by the Syrian Arab Republic to the International Convention of the Suppression of the Financing of Terrorism upon accession to the Convention regarding Article 2 paragraph 1 (b) thereof.

The Government of the Republic of Latvia is of the opinion that this reservation unilaterally limits the scope of the Convention and is thus in contradiction to the objectives and purposes of the Convention to suppress the financing of terrorist acts wherever and by whomsoever they may be carried out.

Moreover, the Government of the Republic of Latvia considers that the reservation conflicts with the terms of Article 6 of the Convention setting out the obligation for State Parties to adopt such measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of the Republic of Latvia recalls that customary international law as codified by Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out that reservations that are incompatible with the object and purpose of a treaty are not permissible.

The Government of the Republic of Latvia therefore objects to the aforesaid reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the Syrian Arab Republic. Thus, the Convention will become operative without the Syrian Arab Republic benefiting from its reservation."

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Republic of Latvia has examined the explanatory reservation made by the Arab Republic of Egypt to the International Convention of the Suppression of the Financing of Terrorism upon accession to the Convention regarding Article 2 paragraph 1 (b) thereof.

The Government of the Republic of Latvia is of the opinion that this explanatory declaration is in fact unilateral act that is deemed to limit the scope of the Convention and therefore should be regarded as reservation. Thus, this reservation contradicts to the objectives and purposes of the Convention to suppress the financing of terrorist acts wherever and by whomsoever they may be carried out.

Moreover, the Government of the Republic of Latvia considers that the reservation conflicts with the terms of Article 6 of the Convention setting out the obligation for States Parties to adopt such measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of the Republic of Latvia recalls that customary international law as codified

by Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out that reservations that are incompatible with the object and purpose of a treaty are not permissible.

The Government of the Republic of Latvia therefore objects to the aforesaid reservation made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the Arab Republic of Egypt. Thus, the Convention will become operative without the Arab Republic of Egypt benefiting from its reservation."

23 August 2006

With regard to the understanding made by Bangladesh upon accession:

"The Government of the Republic of Latvia has carefully examined the 'understanding' made by the People's Republic of Bangladesh to the International Convention for the Suppression of the Financing of Terrorism upon accession.

Thus, the Government of the Republic of Latvia is of the opinion that the understanding is in fact a unilateral act deemed to limit the scope of application of the International Convention for the Suppression of the Financing of Terrorism and therefore, it shall be regarded as a reservation.

Moreover, the Government of the Republic of Latvia has noted that the understanding does not make it clear to what extent the People's Republic of Bangladesh considers itself bound by the provisions of the International Convention for the Suppression of the Financing of Terrorism and whether the way of implementation of the provisions of the aforementioned Convention is in line with the object and purpose of the Convention.

The Government of the Republic of Latvia therefore objects to the aforesaid reservation made by the People's Republic of Bangladesh to the International Convention for the Suppression of the Financing of Terrorism.

However, this objection shall not preclude the entry into force of the International Convention for the Suppression of the Financing of Terrorism between the Republic of Latvia and the People's Republic of Bangladesh. Thus, the International Convention for the Suppression of the Financing of Terrorism will become operative without People's Republic of Bangladesh benefiting from its reservation."

Malaysia

Declarations and reservation:

"1. The Government of Malaysia declares, pursuant to article 2 (2) (a) of the Convention, that in the application of the Convention to Malaysia, the Convention shall be deemed not to include the treaties listed in the Annex to the Convention which Malaysia is not a party thereto.
2. In accordance with Article 7 (3) of the Convention, the Government of Malaysia declares that it has established jurisdiction in accordance with its domestic laws over the offences set

forth in Article 2 of the Convention in all the cases provided for in Article 7 (1) and 7 (2). 3. The Government of Malaysia understands Article 10 (1) of the Convention to include the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws. 4. (a) Pursuant to Article 24 (2) of the Convention, the Government of Malaysia declares that it does not consider itself bound by article 24 (1) of the Convention; and (b) The Government of Malaysia reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 24 (1) of the Convention or any other procedure for arbitration."

Netherlands

1 May 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

"The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of the Democratic People's Republic of Korea regarding article 2, paragraph 1 (a), and article 14 of the International Convention for the suppression of the financing of terrorism made at the time of its signature of the said Convention.

The Government of the Kingdom of the Netherlands considers that the reservations made by the Democratic People's Republic of Korea regarding article 2, paragraph 1 (a), and article 14 of the Convention are reservations incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands recalls that, according to Article 19 (c) of the Vienna Convention on the law of treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of the Democratic People's Republic of Korea to the International Convention for the suppression of the financing of terrorism.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the Democratic People's Republic of Korea."

21 April 2004

With regard to the declaration made by Jordan upon ratification:

".....the Government of the Kingdom of the Netherlands has examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the

Financing of Terrorism made by the Government of Jordan at the time of its ratification of the Convention. The Government of the Kingdom of the Netherlands considers that the declaration made by Jordan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of the Kingdom of the Netherlands further considers the Declaration to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of the Kingdom of the Netherlands recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of the States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Jordan."

20 May 2005

With regard to the reservation made by Belgium upon ratification:

"The Government of the Kingdom of the Netherlands has examined the reservation made by the Government of Belgium regarding Article 14 of the International Convention for the suppression of the financing of terrorism made at the time of its ratification of the Convention.

The Government of the Kingdom of the Netherlands notes that the reservation made by the Government of Belgium is expressed to apply only "in exceptional circumstances"and that, notwithstanding the application of the reservation, Belgium continues to be bound by the general legal principle of aut dedere aut judicare. The Government of the Kingdom of the Netherlands further notes that the exceptional circumstances that are envisaged in paragraph 1 of the reservation made by the Government of Belgium are not specified in the reservation.

The Government of the Kingdom of the Netherlands considers the offences set forth in Article 2 of the Convention to be of such grave nature, that the provisions of Article 14 should apply in all circumstances.

Furthermore the Government of the Kingdom of the Netherlands recalls the principle that claims of political motivation must not be recognised as grounds for refusing requests for the extradition of alleged terrorists.

The Government of the Kingdom of the Netherlands therefore objects to the reservation made by the Government of Belgium to the International Convention for the suppression of the financing of terrorism.

This objection shall not preclude the entry into force of the Convention between Belgium and the Kingdom of the Netherlands, without Belgium benefiting from its reservation."

30 August 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Kingdom of the Netherlands has carefully examined the declaration made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism upon ratification of the Convention relating to Article 2 paragraph 1 (b) thereof. It is of the opinion that this declaration amounts to a reservation, since its purpose is to unilaterally limit the scope of the Convention. The Government of the Kingdom of the Netherlands is furthermore of the opinion that the declaration is in contradiction to the object and purpose of the Convention, in particular the object of suppressing the financing of terrorist acts wherever and by whomever they may be committed.

The declaration is further contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of the Netherlands recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible.

The Government of the Kingdom of the Netherlands therefore objects to the above-mentioned declaration by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Kingdom of the Netherlands and the Arab Republic of Egypt."

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of the Kingdom of the Netherlands has carefully examined the reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism upon accession to the Convention relating to Article 2 paragraph 1 (b) thereof. It is of the opinion that this reservation unilaterally limits the scope of the Convention and is in contradiction to the object and purpose of the Convention, in particular the object of suppressing the financing of terrorist acts wherever and by whomever they may be committed.

The reservation is further contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of the Netherlands recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible.

The Government of the Kingdom of the Netherlands therefore objects to the above-mentioned reservation by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Kingdom of the Netherlands and the Syrian Arab Republic."

25 August 2006

With regard to the understanding made by Bangladesh upon accession:

"The Government of the Kingdom of the Netherlands has examined the declaration made by the Government of the People's Republic of Bangladesh upon accession to the International Convention for the Suppression of the Financing of Terrorism. The People's Republic of Bangladesh has declared that its accession to the Convention shall not be deemed to be inconsistent with its international obligations under the Constitution of the country. The Government of the Kingdom of the Netherlands is of the opinion that this declaration raises questions as to which obligations the People's Republic of Bangladesh intends to give precedence to in the event of any inconsistency between the Convention and its Constitution. Declarations that leave it uncertain to what extent a State consents to be bound by its contractual obligations are in the opinion of the Government of the Kingdom of the Netherlands to be treated, in effect, as general reservations, which are not compatible with the object and purpose of a Convention.

The Government of the Kingdom of the Netherlands therefore objects to the above-mentioned declaration made by the Government of the People's Republic of Bangladesh to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Kingdom of the Netherlands and the People's Republic of Bangladesh."

Norway

3 December 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

"The Government of Norway has examined the reservations made by the Government of the Democratic People's Republic of Korea upon signature of the International Convention for the Suppression of the Financing of Terrorism.

It is the position of the Government of Norway that the reservations with regard to paragraph 1 (a) of Article 2 and Article 14 are incompatible with the object and purpose of the Convention, as they purport to exclude the application of core provisions of the Convention. The Government of Norway recalls that, in accordance with well-established treaty law, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Norway therefore objects to the aforesaid reservations made by the Government of the Democratic People's Republic of Korea. This objection does not preclude the entry into force, in its entirety, of the Convention between the Kingdom of Norway and the Democratic People's Republic of Korea. The Convention thus becomes operative between the Kingdom of Norway and the Democratic People's Republic of Korea without the Democratic People's Republic of Korea benefiting from these reservations."

15 July 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Norway has examined the declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of Jordan.

The Government of Norway considers the declaration to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of financing of terrorism, irrespective of where they take place and who carries them out.

The declaration is furthermore contrary to the terms of Article 6 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of Norway recalls that, according to customary international law, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Norway therefore objects to the aforesaid reservation made by the Government of Jordan to the Convention. This objection shall not preclude the entry into force of the Convention between Norway and Jordan."

4 October 2005

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of Norway has examined the contents of the reservation relating to paragraph 1 (b) of article 2 to the Convention for the Suppression of the Financing of Terrorism made by the Syrian Arab Republic.

The Government of Norway considers the reservation to be in contradiction with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts wherever and by whomever they may be carried out.

The reservation is, furthermore, contrary to the terms of Article 6 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, ideological, racial, ethnic, religious or similar nature.

The Government of Norway wishes to recall that according to customary international law as

codified in the Vienna Convention on the Law of Treaties a reservation incompatible with the object and purposes of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected as to their object and purpose and that states are prepared to undertake any legislative changes necessary to comply with the obligations under the treaties.

The Government of Norway therefore objects to the above-mentioned reservations made by the Government of the Syrian Arab Republic to the Convention.

This objection does not preclude the entry into force of the Convention between the Syrian Arab Republic and Norway. The Convention will thus become operative between the two states without the Syrian Arab Republic benefiting from its declaration."

Poland

28 April 2006

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of the Republic of Poland has examined the reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism relating to article 2, paragraph 1 (b) thereof.

The Government of the Republic of Poland considers that the reservation made by the Government of the Syrian Arab Republic unilaterally limits the scope of the Convention and it is, therefore, contrary to the object and purpose of the Convention.

The Government of the Republic of Poland considers that the reservation to be contrary to the terms of article 6 of the Convention, according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of their political, philosophical, ideological, racial, ethnic, religious or other similar nature'.

The Government of the Republic of Poland wishes to recall that according to article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Poland therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the Republic of Poland and the Syrian Arab Republic."

2 August 2006

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the Republic of Poland has examined the explanatory declaration made

by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism relating to article 2, paragraph 1 (b) thereof.

The Government of the Republic of Poland considers that the declaration made by the Government of the Arab Republic of Egypt is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and it is, therefore, contrary to the object and purpose of the Convention.

The Government of the Republic of Poland considers that the declaration to be contrary to the terms of article 6 of the Convention, according to which States Parties commit themselves to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of their political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of the Republic of Poland wishes to recall that according to article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Poland therefore objects to the aforesaid declaration made by the Government of the Arab Republic of Egypt to the International Convention for the Financing of Terrorism. However this objection shall not precluded the entry into force of the Convention between the Republic of Poland and the Arab Republic of Egypt."

Portugal

27 August 2004

With regard to the declaration made by Jordan upon ratification:

".....the Government of Portugal has examined the declaration relating to paragraph 1 (b) of the Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Hashemite Kingdom of Jordan at the time of its ratification of the Convention. The Government of Portugal considers that the declaration made by the Government of the Hashemite Kingdom of Jordan is in fact a reservation that seeks to limit the scope of the convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The declaration is furthermore contrary to the terms of the Article 6 of the Convention according to which State Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Portugal recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Portugal therefore objects to the aforesaid reservation made by the Government of the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Portugal and the Hashemite Kingdom of Jordan."

31 August 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Portugal considers that the declaration made by the Government of the Arab Republic of Egypt is in fact a reservation that seeks to limit the scope of the convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The declaration is furthermore contrary to the terms of the Article 6 of the Convention according to which State Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Portugal recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Portugal therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Portugal and the Arab Republic of Egypt."

With regard to the declaration made by the Syrian Arab Republic upon accession:

"The Government of Portugal considers that the declaration made by the Government of the Syrian Arab Republic is in fact a reservation that seeks to limit the scope of the convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The declaration is furthermore contrary to the terms of the Article 6 of the Convention according to which State Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Portugal recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Portugal therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of

the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between Portugal and the Syrian Arab Republic."

Spain

3 December 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

The Government of Spain has examined the reservations made by the Government of the Democratic People's Republic of Korea on 12 November 2001 to articles 2, paragraph 1 (a), and 14 of the International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999).

The Government of the Kingdom of Spain considers that those reservations are incompatible with the object and purpose of that Convention, since their aim is to release the People's Democratic Republic of Korea from any commitment with regard to two essential aspects of the Convention.

The Government of the Kingdom of Spain observes that according to the rule of customary law embodied in article 19 (c) of the 1969 Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of treaties are prohibited.

The Government of the Kingdom of Spain therefore objects to the aforementioned reservations made by the Government of the People's Democratic Republic of Korea to the International Convention for the Suppression of Financing of Terrorism.

This objection does not prevent the entry into force of the aforementioned Convention between the Kingdom of Spain and the People's Democratic Republic of Korea.

20 May 2005

With regard to the reservation made by the Belgium upon ratification:

The Government of the Kingdom of Spain has examined the reservation made by the Government of the Kingdom of Belgium to article 14 of the International Convention for the Suppression of the Financing of Terrorism at the time of ratifying the Convention.

The Government of the Kingdom of Spain considers that the reservation is incompatible with the object and purpose of the Convention.

The Government of the Kingdom of Spain considers, in particular, that Belgium's reservation is incompatible with article 6 of the Convention, whereby States Parties undertake to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of Spain recalls that, under the norm of customary law laid down in the 1969 Vienna Convention on the law of treaties (article 19 c)), reservations which are incompatible with the object and purpose of a treaty are prohibited.

The Government of the Kingdom of Spain therefore objects to the reservation made by the Government of the Kingdom of Belgium to article 14 of the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not impede the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Belgium.

4 April 2006

With regard to the reservation made by the Syrian Arab Republic upon accession:

The Government of the Kingdom of Spain has examined the reservation entered by the Syrian Arab Republic to article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism upon ratifying that instrument.

The Government of the Kingdom of Spain considers that this reservation is incompatible with the object and purpose of the Convention.

The Government of the Kingdom of Spain considers, in particular, that the reservation entered by the Syrian Arab Republic is incompatible with article 6 of the Convention, whereby States parties undertake to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of Spain recalls that, under the customary-law provision enshrined in article 19 (c) of the 1969 Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of the treaty concerned are not permitted.

Accordingly, the Government of the Kingdom of Spain objects to the reservation entered by the Syrian Arab Republic to article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Syrian Arab Republic.

With regard to the explanatory declaration made by Egypt upon ratification:

The Government of the Kingdom of Spain has examined the reservation to article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism made by the Arab Republic of Egypt at the time of its ratification of the Convention.

The Government of the Kingdom of Spain considers that this reservation is contrary to the object and purpose of the Convention.

The Government of the Kingdom of Spain considers, in particular, that the reservation made by

the Arab Republic of Egypt is contrary to article 6 of the Convention, according to which the States Parties pledge to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of Spain recalls that, according to customary international law as codified in the 1969 Vienna Convention on the Law of Treaties (article 19 (c)), a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of Spain therefore objects to the reservation made by the Arab Republic of Egypt to article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Arab Republic of Egypt.

Sweden

27 November 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

"The Government of Sweden has examined the reservation made by the Democratic People's Republic of Korea at the time of its signature of the International Convention for the Suppression of the Financing of Terrorism, regarding article 2, paragraph 1, sub-paragraph (a) and article 14 of the Convention.

The Government of Sweden considers those reservations made by the Democratic People's Republic of Korea incompatible with the object and purpose of the Convention.

The Government of Sweden would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Democratic People's Republic of Korea and Sweden. The Convention enters into force in its entirety between the two States, without the Democratic People's Republic of Korea benefiting from its reservation."

27 January 2004

With regard to the declaration made by Israel upon ratification:

"The Government of Sweden has examined the declaration made by Israel regarding article 21 of the International Convention for the Suppression of the Financing of Terrorism, whereby Israel intends to exclude the Protocols Additionals to the Geneva Conventions from the term international humanitarian law.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by Israel in substance constitutes a reservation.

It is the view of the Government of Sweden that the majority of the provisions of the Protocols Additional to the Geneva Conventions constitute customary international law, by which Israel is bound. In the absence of further clarification, Sweden therefore objects to the aforesaid reservation by Israel to the International Convention for the Suppression of the Financing of Terrorism.

This objection shall not preclude the entry into force of the Convention between Israel and Sweden. The Convention enters into force in its entirety between the two States, without Israel benefiting from this reservation."

28 May 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of Sweden has examined the declaration made by the Government of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism, according to which the Government of Jordan does not consider acts of national struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of Article 2 of the Convention.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by the Government of Jordan in substance constitutes a reservation.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Sweden further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Sweden wishes to recall that, according to customary international law as codified in the Vienna Convention on the law of Treaties, a reservation incompatible with the

object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the reservation made by the Government of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Jordan and Sweden. The Convention enters into force between the two parties without Jordan benefiting from its reservation."

5 October 2005

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of Sweden has examined the explanatory declaration made by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism, according to which the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view of liberation and self-determination, as terrorist acts within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by the Government of the Arab Republic of Egypt in substance constitutes a reservation.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Sweden further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which the States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Sweden wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the reservation made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Arab Republic of Egypt and Sweden. The Convention enters into force between the Arab Republic of Egypt

and Sweden without the Arab Republic of Egypt benefiting from its reservation."

With regard to the declaration made by the Syrian Arab Republic upon accession:

"The Government of Sweden has examined the reservation made by the Government of the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism, according to which the Syrian Arab Republic considers that acts of resistance to foreign occupation are not included under acts of terrorism within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Sweden further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which the States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Sweden wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Syrian Arab Republic and Sweden. The Convention enters into force between the Syrian Arab Republic and Sweden, without the Syrian Arab Republic benefiting from its reservation."

United Kingdom of Great Britain and Northern Ireland

22 November 2002

With regard to the reservations made by the Democratic People's Republic of Korea upon signature:

"The signature of the Democratic People's Republic of Korea was expressed to be subject to reservations in respect of Article 2 (1) (a), Article 14 and Article 24 (1) of the Convention. The United Kingdom objects to the reservations entered by the Democratic People's Republic of Korea in respect of Article 2 (1) (a) and Article 14 of the Convention, which it considers to be incompatible with the object and purpose of the Convention."

25 February 2004

With regard to the declaration made by Jordan upon ratification:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the Declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of Jordan at the time of its ratification of the Convention. The Government of the United Kingdom consider the declaration made by Jordan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of the United Kingdom further consider the Declaration to be contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of the United Kingdom recall that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the United Kingdom therefore object to the aforesaid reservation made by the Government of Jordan to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the United Kingdom and Jordan."

20 May 2005

With regard to the reservation made by the Belgium upon ratification:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the reservation relating to Article 14 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of Belgium at the time of its ratification of the Convention.

The Government of the United Kingdom note that the effect of the said reservation is to disapply the provisions of Article 14 in "exceptional circumstances". Article 14 provides that:

"None of the offences set forth in Article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence inspired by political motives."

The Government of the United Kingdom note that the provisions of Article 14 reflect in part the principle that claims of political motivation must not be recognised as grounds for refusing requests for the extradition of alleged terrorists. The Government of the United Kingdom consider this principle to be an important measure in the fight against terrorism and the provisions of Article 14 of the Convention in particular to be an essential measure in States' efforts to suppress the financing of terrorist acts.

The Government of the United Kingdom note that paragraph 1 of the reservation made by the Government of Belgium is expressed to apply only "in exceptional circumstances" and that, notwithstanding the application of the reservation, Belgium continues to be bound by the principle of aut dedere aut judicare as set out in Article 10 of the Convention. The Government of the United Kingdom note further, however, that the exceptional circumstances that are envisaged are not specified in the reservation.

In light of the grave nature of the offences set forth in Article 2 of the Convention, the Government of the United Kingdom consider that the provisions of Article 14 should apply in all circumstances. A reservation that seeks to disapply Article 14, even while reaffirming the application of the principle of aut dedere aut judicare, undermines the effectiveness of the provisions of Article 14 of the Convention as a measure in States' efforts to suppress the financing of terrorist acts.

The Government of the United Kingdom therefore objects to the aforesaid reservation made by the Government of Belgium to the International Convention for the Suppression of the Financing of Terrorism. However, this objection shall not preclude the entry into force of the Convention between the United Kingdom and Belgium."

1 May 2006

With regard to the reservaton made by the Syrian Arab Republic upon accession:

The Government of Belgium has examined the reservation formulated by the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism, in particular the part of the reservations and declarations relating to the provisions of article 2, paragraph 1 (b), of the Convention, in which the Syrian Arab Republic declares that it considers "that acts of resistance to foreign occupation are not included under acts of terrorism". The Government of Belgium considers that this reservation seeks to limit the scope of the Convention on a unilateral basis, which is contrary to the object and purpose thereof, namely, the suppression of the financing of acts of terrorism, wherever and by whomever committed.

Moreover, this reservation contravenes article 6 of the Convention, according to which "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Government of Belgium recalls that, under article 19 (c) of the Vienna Convention on the Law of Treaties, no reservation may be formulated that is incompatible with the object and purpose of the Convention.

The Government of Belgium therefore objects to the above-mentioned reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Belgium and the Syrian Arab Republic.

3 August 2006

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the explanatory declaration relating to article 2, paragraph 1 (b) of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention. The Government of the United Kingdom consider the declaration made by Egypt to be a reservation that seeks to limit the scope of the Convention on a unilateral basis.

The Government of the United Kingdom objects to the aforesaid reservation."

With regard to the understanding made by Bangladesh upon accession:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the 'understanding' of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the People's Republic of Bangladesh at the time of its accession to the Convention. The Government of the United Kingdom consider the understanding made by Bangladesh to be a reservation that seeks to limit the scope of the Convention on a unilateral basis.

The Government of the United Kingdom objects to the aforesaid reservation."

United States of America

6 August 2004

With regard to the declaration made by the Jordan upon ratification:

"The Government of the United States of America, after careful review, considers the statement made by Jordan relating to paragraph 1 (b) of Article 2 of the Convention (the Declaration) to be a reservation that seeks to limit the scope of the offense set forth in the Convention on a unilateral basis. The Declaration is contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of the United States also considers the Declaration to be contrary to the terms of Article 6 of the Convention, which provides: "Each state party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the Declaration relating to paragraph 1 (b) of Article 2 made by the Government of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism. This objection does not,

however, preclude the entry into force of the Convention between the United States and Jordan."

20 May 2005

With regard to the reservation made by the Belgium upon ratification:

"The Government of the United States of America has examined the reservation made by Belgium on 17 May 2004 at the time of ratification of the International Convention for the Suppression of the Financing of Terrorism. The Government of the United States objects to the reservation relating to Article 14, which provides that a request for extradition or mutual legal assistance may not be refused on the sole ground that it concerns a political offense or an offense connected with a political offense or an offense inspired by political motives. The Government of the United States understands that the intent of the Government of Belgium may have been narrower than apparent from its reservation in that the Government of Belgium would expect its reservation to apply only in exceptional circumstances where it believes that, because of the political nature of the offense, an alleged offender may not receive a fair trial. The United States believes the reservation is unnecessary because of the safeguards already provided for under Articles 15, 17 and 21 of the Convention. However, given the broad wording of the reservation and because the Government of the United States considers Article 14 to be a critical provision in the Convention, the United States is constrained to file this objection. This objection does not preclude entry into force of the Convention between the United States and Belgium."

9 March 2006

With regard to the explanatory declaration made by Egypt upon ratification:

"The Government of the United States of America, after careful review, considers the explanatory declaration made by Egypt to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The explanatory declaration is contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who perpetrates them.

The Government of the United States also considers the explanatory declaration to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States of America therefore objects to the explanatory declaration relating to paragraph 1 (b) of Article 2 made by Egypt upon ratification of the International Convention for the Suppression of the Financing of Terrorism. This objection does not, however, preclude the entry into force of the Convention between the United States and Egypt."

With regard to the reservation made by the Syrian Arab Republic upon accession:

"The Government of the United States of America, after careful review, considers the reservation contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who perpetrates them.

The Government of the United States also considers the reservation to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the explanatory declaration relating to paragraph 1(b) of Article 2 made by the Government of Syria upon accession to the International Convention for the Suppression of the Financing of Terrorism. This objection does not, however, preclude the entry into force of the Convention between the United States and the Syrian Arab Republic."

Notifications made under article 7 (3)

(Unless otherwise indicated, the notifications were made

upon ratification, acceptance, approval or accession.)

Argentina

Article 7, paragraph 3:

In relation to article 7, paragraph 3, of the Convention, the Argentine Republic declares that the territorial scope of application of its criminal law is set forth in article 1 of the Argentine Penal Code (Act No. 11,729), which states:

"This Code shall apply:

1. To offences that are committed or that produce effects in the territory of the Argentine nation, or in places under its jurisdiction;

2. To offences that are committed abroad by agents or employees of the Argentine authorities during the performance of their duties".

The Argentine Republic shall therefore exercise jurisdiction over the offences defined in article 7, paragraph 2 (c), and over the offences defined in article 7, paragraph 2 (a), (b) and (d), when they produce effects in the territory of the Argentine Republic or in places under its jurisdiction, or when they were committed abroad by agents or employees of the Argentine

authorities during the performance of their duties.

With regard to the offences referred to in article 7, paragraph 2 (e), jurisdiction over such offences shall be exercised in accordance with the legal provisions in force in the Argentine Republic. In this regard, reference should be made to article 199 of the Argentine Aeronautical Code, which states:

"Acts occurring, actions carried out, and offences committed in a private Argentine aircraft over Argentine territory or its jurisdictional waters, or where no State exercises sovereignty, shall be governed by the laws of the Argentine nation and tried by its courts.

Acts occurring, actions carried out, and offences committed on board a private Argentine aircraft over foreign territory shall also fall under the jurisdiction of the Argentine courts and the application of the laws of the nation if a legitimate interest of the Argentine State or of persons domiciled therein are thereby injured or if the first landing, following the act, action or offence, occurs in the Republic".

Australia

24 October 2002

".... pursuant to article 7, paragraph 3 of the Convention, ... Australia has established jurisdiction in relation to all the circumstances referred to in article 7, paragraph 2 of the Convention."

Azerbaijan

16 June 2004

".....in accordance with Article 7, paragraph 3, of the above-mentioned International Convention, the Republic of Azerbaijan declares that it establishes its jurisdiction in all the cases provided for in Article 7, paragraph 2, of the Convention."

Belarus

The Republic of Belarus establishes its jurisdiction over all offenses set forth in article 2 of the Convention in the cases described in article 7, paragraphs 1 and 2.

Belgium

Belgium also wishes to make the following declaration of jurisdiction: In accordance with the provisions of article 7, paragraph 3, of the Convention, Belgium declares that, pursuant to its national legislation, it establishes its jurisdiction over offences committed in the situations referred to in article 7, paragraph 2 of the Convention."

Bolivia

13 February 2002

... by virtue of the provisions of article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Bolivia states that it establishes its jurisdiction in accordance with its domestic law in respect of offences committed in the situations and conditions provided for under article 7, paragraph 2, of the Convention.

Brazil

26 September 2005

"The Government of Brazil would like to inform that according to the provisions of Article 7, paragraph 3 of the International Convention for the Suppression of Financing of Terrorism, by ratifying that instrument the Federative Republic of Brazil will exercise jurisdiction over all hypotheses foreseen in items "a" to "e" of paragraph 2 of the same article."

Chile

In accordance with article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, the Government of Chile declares that, in accordance with article 6, paragraph 8, of the Courts Organization Code of the Republic of Chile, crimes and ordinary offenses committed outside the territory of the Republic which are covered in treaties concluded with other Powers remain under Chilean jurisdiction.

China

In accordance with paragraph 3 of Article 7 of the Convention, the People's Republic of China has established the jurisdiction over five offences stipulated in paragraph 2 of Article 7 of the Convention, but this jurisdiction shall not apply to the Hong Kong Special Administrative Region of the People's Republic of China.

Cook Islands

".....the Government of the Cook Islands makes the following notification that pursuant to article 7, paragraph 3 of the Convention, the Cook Islands establishes its jurisdiction in relation to all cases referred to in article 7, paragraph 2 of the Convention."

Croatia

"Pursuant to Article 7, paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism the Republic of Croatia notifies the Secretary-General of the United Nations that it has established jurisdiction over the offence set forth in Article 2 in all the cases described in Article 7, paragraph 2 of the Convention."

Cyprus

27 December 2001

In accordance with paragraph 3 of Article 7, the Republic of Cyprus declares that by section 7.1 of the International Convention for the Suppression of the Financing of Terrorism (Ratification and other Provisions) Law No. 29 (III) of 2001, it has established jurisdiction over the offences set forth in Article 2 in all circumstances described in paragraph 2 of Article 7."

Czech Republic

"In accordance with article 7, paragraph 3 of the Convention, the Czech Republic notifies that it has established its jurisdiction over the offences set forth in article 2 of the Convention in all cases referred to in article 7, paragraph 2 of the Convention."

Denmark

"Pursuant to article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism Denmark declares that section 6-12 of the Danish Criminal Code provide for Danish jurisdiction in respect of offences set forth in article 2 of the Convention in all the circumstances laid down in article 7, paragraph 2, of the Convention."

El Salvador

... (2) pursuant to article 7, paragraph 3, the Republic of El Salvador notifies that it has established its jurisdiction in accordance with its national laws in respect of offences committed in the situations and under the conditions provided for in article 7, paragraph 2;

Estonia

"Pursuant to article 7, paragraph 3 of the Convention, the Republic of Estonia declares that in its domestic law it shall apply the jurisdiction set forth in article 7 paragraph 2 over offences set forth in article 2."

Finland

"Pursuant to article 7, paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Finland establishes its jurisdiction over the offences set forth in article 2 in all the cases provided for in article 7, paragraphs 1 and 2."

France

In accordance with article 7, paragraph 3, of the Convention, France states that it has established its jurisdiction over the offences set forth in article 2 in all cases referred to in article 7, paragraphs 1 and 2.

Germany

.....pursuant to article 7 paragraph 3 thereof, that the Federal Republic of Germany has established jurisdiction over all offences described in article 7 paragraph 2 of the Convention.

Hungary

"The Republic of Hungary declares that it establishes its jurisdiction in all the cases provided for in Article 7, Paragraph 2 of the Convention."

Iceland

"Pursuant to article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, Iceland declares that it has established its jurisdiction over the offences set forth in article 2 of the Convention in all the cases provided for in article 7, paragraph 2, of the Convention."

Israel

Pursuant to Article 7, paragraph 3 of the Convention, the Government of the state of Israel hereby notifies the Secretary-General of the United Nations that it has established jurisdiction over the offences referred to in Article 2 in all the cases detailed in Article 7 paragraph 2.

Jamaica

"Jamaica has established jurisdiction over the offences set forth in Article 2, with respect to the jurisdiction stated in Article 7(2) (c) which states:

"A State Party may also establish its jurisdiction over any such offence when:

... (c) The offence was directed towards or resulted in an offence referred to in Article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act".

Jordan

"Jordan decides to establish its jurisdition over all offences described in paragraph 2 of article 7 of the Convention."

Latvia

"In accordance with Article 7, paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9th day of December 1999, the Republic of Latvia declares that it has established jurisdiction in all cases listed in Article 7, paragraph 2."

Liechtenstein

"In accordance with article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, the Principality of Liechtenstein declares that it has established its jurisdiction over the offences set forth in article 2 of the Convention in all the cases provided

for in article 7, paragraph 2, of the Convention."

Lithuania

".....it is provided in paragrah 3 of Article 7 of the said Convention, the Seimas of the Republic of Lithuania declares that the Republic of Lithuania shall have jurisdiction over the offences set forth in Article 2 of the Convention in all cases specified in paragraph 2 of Article 7 of the Convention."

Mauritius

"Pursuant to Article 7, paragraph 3 of the said Convention, the Government of the Republic of Mauritius declares that it has established jurisdiction over the offences set forth in paragraph 2 of Article 7."

Mexico

24 February 2003

.....in accordance with article 7, paragraph 3, of the Convention, Mexico exercises jurisdiction over the offences defined in the Convention where:

(a) They are committed against Mexicans in the territory of another State party, provided that the accused is in Mexico and has not been tried in the country in which the offence was committed. Where it is a question of offences defined in the Convention but committed in the territory of a non-party State, the offence shall also be defined as such in the place where it was committed (art. 7, para. 2 (a));

(b) They are committed in Mexican embassies and on diplomatic or consular premises (art. 7, para. 2 (b));

(c) They are committed abroad but produce effects or are claimed to produce effects in the national territory (art. 7, para. 2 (c)).

Moldova

".....pursuant to article 7, paragraph 3 of the Convention for the Suppression of the Financing of Terrorism, adopted on December 9, 1999, in New York, the Republic of Moldova has established its jurisdiction over the offenses set forth in article 2 in all cases referred to in article 7, paragraph 2."

Monaco

The Principality of Monaco reports, pursuant to article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism adopted in New York on 9 December 1999, that it exercises very broad jurisdiction over the offences referred to in that Convention.

The jurisdiction of the Principality is thus established pursuant to article 7, paragraph 1, over:

(a) Offences committed in its territory: this is the case in Monaco in application of the general principle of territoriality of the law;

(b) Offences committed on board a vessel flying the Monegasque flag: this is the case in Monaco in application of article L.633-1 et seq. of the Maritime Code;

Offences committed on board an aircraft registered under Monegasque law: the Tokyo Convention of 14 September 1963, rendered enforceable in Monaco by Sovereign Order No. 7.963 of 24 April 1984, specifies that the courts and tribunals of the State of registration of the aircraft are competent to exercise jurisdiction over offences and acts committed on board it;

(c) Offences committed by a Monegasque national: the Code of Criminal Procedure states in articles 5 and 6 that any Monegasque committing abroad an act qualified as a crime or offence by the law in force in the Principality may be charged and brought to trial there.

The jurisdiction of the Principality is also established pursuant to article 7, paragraph 2 when:

(a) The offence was directed towards or resulted in the carrying out of a terrorist offence in its territory or against one of its nationals: articles 42 to 43 of the Criminal Code permit the Monegasque courts, in general terms, to punish accomplices of a perpetrator charged in Monaco with offences referred to in article 2 of the Convention;

(b) The offence was directed towards or resulted in the carrying out of a terrorist offence against a State or government facility, including diplomatic or consular premises: attacks aimed at bringing about devastation, massacres and pillage in Monegasque territory are punishable under article 65 of the Criminal Code; in addition, article 7 of the Code of Criminal Procedure provides for the charging and trial in Monaco of foreigners who, outside the territory of the Principality, have committed a crime prejudicial to the security of the State or a crime or offence against Monegasque diplomatic or consular agents or premises;

(c) The offence was directed towards or resulted in a terrorist offence committed in an attempt to compel the State to do or abstain from doing any act: the crimes and offences in question normally correspond to one of those referred to above, directly or through complicity;

(d) The offence was committed by a stateless person who had his or her habitual residence in Monegasque territory: application of the general principle of territoriality of the law permits the charging of stateless persons having their habitual residence in Monaco;

(e) The offence was committed on board an aircraft operated by the Monegasque Government: if the Monegasque Government directly operated an aircraft or an airline, its aircraft would have to be registered in Monaco, and the Tokyo Convention of 14 September 1963 referred to above would then apply

Norway

"Declaration: In accordance with article 7, paragraph 3 of the Convention, Norway hereby declares that it has established its jurisdiction over the offences set forth in article 2, of the

Convention in all cases provided for in article 7, paragraph 2, of the Convention."

Republic of Korea

7 July 2004

Pursuant to Article 7, Paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism,

The Republic of Korea provides the following information on its criminal jurisdiction. Principles on the criminal jurisdiction are set out in the Chapter I of Part I of the Korean Penal Code. The provisions have the following wording;

Article 2 (Domestic Crimes)

This Code shall apply to anyone, whether Korean or alien, who commits a crime within the territorial boundary of the Republic of Korea.

Article 3 (Crimes by Koreans outside Korea)

This Code shall apply to a Korean national who commits a crime outside the territorial boundary of the Republic of Korea.

Article 4 (Crimes by Aliens on board Korean Vessel, etc., outside Korea)

This Code shall apply to an alien who commits a crime on board a Korean vessel or a Korean aircraft outside the territorial boundary of the Republic of Korea.

Article 5 (Crimes by Aliens outside Korea)

This Code shall apply to an alien who commits any of the following crimes outside the territorial boundary of the Republic of Korea:

1. Crimes concerning insurrection;

2. Crimes concerning treason;

3. Crimes concerning the national flag; 4. Crimes concerning currency;

5. Crimes concerning securities, postage and revenue stamps;

6. Crimes specified in Articles 225 through 230 among crimes concerning documents; and

7. Crimes specified in Article 238 among crimes concerning seal.

Article 6 (Foreign Crimes against the Republic of Korea and Koreans outside Korea)

This Code shall apply to an alien who commits a crime, other than those specified in the preceding Article, against the Republic of Korea or its national outside the territorial boundary

of the Republic of Korea, unless such act does not constitute a crime, or it is exempt from prosecution or execution of punishment under the *lex loci delictus*.

Article 8 (Application of General Provisions)

The provisions of the preceding Articles shall also apply to such crimes as are provided by other statutes unless provided otherwise by such statutes.

Romania

"In accordance with Article 7, paragraph 3 of the Convention, Romania declares that establishes its jurisdiction for the offences referred to in Article 2, in all cases referred to in Article 7, paragraphs 1 and 2, according with the relevant provisions of the internal law."

Russian Federation

The Russian Federation, pursuant to article 7, paragraph 3, of the Convention, declares that it establishes its jurisdiction over the acts recognized as offences under article 2 of the Convention in the cases provided for in article 7, paragraphs 1 and 2, of the Convention.

Saudi Arabia

The Kingdom of Saudi Arabia has decided to establish its jurisdiction over all offences provided for in article 7, paragraph 2 of the Convention

Singapore

In accordance with the provision of Article 7, paragraph 3, the Republic of Singapore gives notification that it has established jurisdiction over the offences set forth in Article 2 of the Convention in all the cases provided for in Article 7, paragraph 2 of the Convention."

Slovakia

"Pursuant to article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, the Slovak Republic declares that it shall exercise its jurisdiction as provided for under article 7, paragraph 2, subparagraphs a) to e) of the Convention."

Slovenia

"Pursuant to Article 7, Paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism, the Republic of Slovenia declares that it has established jurisdiction over the offences in accordance with Paragraph 2."

Spain

"In accordance with the provisions of article 7, paragraph 3, the Kingdom of Spain gives

notification that its courts have international jurisdiction over the offences referred to in paragraphs 1 and 2, pursuant to article 23 of the Organization of Justice Act No. 6/1985 of 1 July 1985."

Sweden

5 November 2002

"Pursuant to article 7 (3) of the International Convention for the Suppression of the Financing of Terrorism, Sweden provides the following information on Swedish criminal jurisdiction. Rules on Swedish criminal jurisdiction are laid down in Chapter 2 Section 1-5 in the Swedish Penal Code. The provisions have the following wording:

Section 1

Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Section 2

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court when the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,

2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic or Norwegian citizen and is present in the Realm, or

3. By any other alien who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

The first paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.

In cases mentioned in this Section, a sanction may not be imposed which is more severe than the most severe punishment provided for the crime under the law in the place where it was committed.

Section 3

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

1. if the crime was committed on board a Swedish vessel or aircraft, or was committed in the course of duty by the officer in charge or by a member of its crew,

2. if the crime was committed by a member of the armed forces in an area in which a detachment of the armed forces was present, or if it was committed by some other person in such an area and the detachment was present for a purpose other than exercise,

3. if the crime was committed in the course of duty outside the Realm by a person employed in a foreign contingent of the Swedish armed forces,

3a. if the crime was committed in the course of duty outside the Realm by a policeman, custom officer or official employed at the coast guard, who performs boundless assignments according to an international agreement that Sweden has ratified,

4. if the crime committed was a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution,

5. if the crime was committed in an area not belonging to any state and was directed against a Swedish citizen, a Swedish association or private institution, or against an alien domiciled in Sweden,

6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court, or

7. if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.

Section 3 a

Besides the cases described in Sections 1-3, crimes shall be adjudged according to Swedish law by a Swedish court in accordance with the provisions of the Act on International Collaboration concerning Proceedings in Criminal matters.

Section 4

A crime is deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or in the case of an attempt, where the intended crime would have been completed.

Section 5

Prosecution for a crime committed within the Realm on a foreign vessel or aircraft by an alien, who was the officer in charge or member of its crew or otherwise travelled in it, against another alien or a foreign interest shall not be instituted without the authority of the Government or a person designated by the Government.

Prosecution for a crime committed outside the Realm may be instituted only following the authorisation referred to in the first paragraph. However, prosecution may be instituted without such an order if the crime consists of a false or careless statement before an international court or if the crime was committed:

1. on a Swedish vessel or aircraft or by the officer in charge or some member of its crew in the course of duty,

2. by a member of the armed forces in an area in which a detachment of the armed forces was present,

3. in the course of duty outside the Realm by a person employed by a foreign contingent of the Swedish armed forces,

4. in the course of duty outside the Realm by a policeman, custom officer or official employed at the coast guard, who performs boundless assignments according to an international agreement that Sweden has ratified,

5. in Denmark, Finland, Iceland or Norway or on a vessel or aircraft in regular commerce between places situated in Sweden or one of the said states, or

6. By a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest."

Switzerland

Pursuant to article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, Switzerland establishes its jurisdiction over the offences set forth in article 2 in all the cases provided for in article 7, paragraph 2.

Tunisia

The Republic of Tunisia,

In ratifying the International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 by the General Assembly at its fifty-fourth session and signed by the Republic of Tunisia on 2 November 2001, declares that it considers itself bound by the provisions of article 7, paragraph 2, of the Convention and decides to establish its jurisdiction when:

- The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of Tunisia or against one of its nationals;

- The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a Tunisian State or government facility abroad, including Tunisian diplomatic or consular facilities;

- The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel Tunisia to do or abstain from doing any act;

- The offence is committed by a stateless person who has his or her habitual residence in Tunisian territory;

- The offence is committed on board an aircraft operated by the Government of Tunisia.

Turkey

".....pursuant to Article 7, paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism, Turkey has established its jurisdiction in accordance with its domestic law in respect of offences set forth in Article 2 in all cases referred to in Article 7, paragraph 2."

Ukraine

"Ukraine exercises its jurisdiction over the offences set forth in article 2 of the Convention in cases provided for in paragraph 2 article 7 of the Convention."

Uzbekistan

5 February 2002

"Republic of Uzbekistan establishes its jurisdiction over offences referred to in article 2 of the Convention in all cases stipulated in article 7, paragraph 2 of the Convention.".

Venezuela (Bolivarian Republic of)

By virtue of the provisions of article 7, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism, the Bolivarian Republic of Venezuela declares that it has established jurisdiction under its domestic law over offences committed in the situations and under the conditions envisaged in article 7, paragraph 2, of the Convention.

NOTES

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1. *With a communication with respect to Hong Kong and Macao:*

1. In accordance with the provisions of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 138 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, the Government of the People's Republic of China decides that the Convention shall apply to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China.

2. The reservation made by the People's Republic of China on paragraph 1 of Article 24 of the Convention shall apply to the Hong Kong Special Administrative Region and the Macao

Special Administrative Region of the People's Republic of China.

3. The jurisdiction over five offences established by the People's Republic of China in accordance with paragraph 2 of Article 7 of the Convention shall not apply to the Hong Kong Special Administrative Region of the People's Republic of China.

4. As to the Macao Special Administrative Region of the People's Republic of China, the following three Conventions shall not be included in the annex referred to in Article 2, paragraph 1, subparagraph (a) of the Convention :

(1) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

(2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

(3) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

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2. *With a territorial exclusion with respect of the Faroe Islands and Greenland.*

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3. *See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.*

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4. *For the Kingdom in Europe.*

Subsequently, on 23 March 2005, the Government of the Netherlands informed the Secretary-General that the Convention will apply to Aruba with the following declaration:

"The Kingdom of the Netherlands understands Article 10, paragraph 1, of the International Convention for the Suppression of Financing Terrorism to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible."

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5. *With a territorial exclusion with respect to Tokelau to the effect that: ".... consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."*

6. *The Secretary-General received communications with regard to the reservation made by Belgium upon ratification from the following Governments on the dates indicated hereinafter:*

Russian Federation (7 June 2005):

"Russia considers the Convention as an instrument designed to establish a solid and effective mechanism for cooperation between States in preventing and fighting the financing of terrorism regardless of its forms and motives. One of the basic rationales for the establishing of this mechanism is achievement of a common and impartial approach by States to the notion of an offence that consists in financing terrorists and terrorist organizations, as well as to the principles of prosecution and punishment of its perpetrators.

Russia notes that for the purposes of consistent prosecution and prevention of offences related to the financing of terrorism there is, inter alia, a clearly stipulated obligation of its States Parties under the Convention, when considering the issues of extradition based on this offence or mutual legal assistance, not to invoke any presumed connection of the committed offence with political motives.

In Russia's view, conceding to a State Party to the Convention the right to refuse extradition or mutual legal assistance on the ground that the committed offence is of political nature or connected with a political offence or inspired by political motives, impairs the rights and obligations of other States Parties to the Convention to establish their jurisdiction over the offences set forth in the Convention and prosecute perpetrators of such offences.

Moreover, defining an offence as political or connected with a political offence is not an objective criterion and introduces considerable uncertainty to the relations between the States Parties to the Convention.

Thus Russia is of the view that the reservation made by the Kingdom of Belgium can jeopardize the consistent implementation of the Convention and achievement of its key objectives, including creation of favourable conditions for concerted efforts by the international community to counter terrorism and crimes contributing to commitment of acts of terrorism.

Russia reiterates its unequivocal condemnation of all acts, methods and practices of terrorism in all its forms and manifestations as well as any kind of assistance (including financial) in commitment of such acts, and calls upon the Kingdom of Belgium to review its position expressed in the reservation."

Argentina (22 August 2005):

The Government of the Argentine Republic has examined the reservation made by the Government of the Kingdom of Belgium, whereby, in exceptional circumstances, that Government reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offence or an offence connected with a political offence or an offence inspired by political motives.

As its provisions make clear, the intent of article 14 is to establish the inoperability of the nature or political motives of the offence. Article 14 is thus categorical and does not allow for

exceptions of any kind. The Government of the Argentine Republic therefore believes that a reservation of this nature is incompatible with the object and purpose of the Convention, and cannot accept it.

The effect of the reservation would not be offset by the affirmation of the principle aut dedere aut judicare in paragraph 2 of the reservation, since the application of this principle derives from the provisions of the Convention and does not require confirmation by States Parties. Moreover, the application of this principle, in the event that extradition does not take place, entails the exercise of local criminal jurisdiction, but the exclusion made by the Government of the Kingdom of Belgium rules out mutual legal assistance from the outset.

The Government of the Argentine Republic therefore objects to the reservation made by the Government of the Kingdom of Belgium concerning article 14 of the International Convention for the Suppression of the Financing of Terrorism. This objection shall not impede the entry into force of the Convention between the Argentine Republic and the Kingdom of Belgium.

***7.** The Secretary-General received communciations with regard to the declaration made by the Government of the Democratic People's Republic of Korea upon signature from the following Governments on the dates indicated hereinafter:*

Republic of Moldova (6 october 2003):

"The Government of the Republic of Moldova has examined the reservations made by the Government of the Democratic People's Republic of Korea upon signature of the International Convention for the Suppression of Financing of Terrorism.

The Government of the Republic of Moldova considers that the reservations with regard to article 2, paragraph 1 (a), and article 14 are incompatible with the object and purpose of the Convention, as they purport to exclude the application of core provisions of the Convention.

The Government of the Republic of Moldova recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Republic of Moldova therefore objects to the aforesaid reservations made by the Government of the Democratic People's Republic of Korea to the International Convention for the Suppression of Financing of Terrorism.This objection shall not preclude the entry into force of the Convention between the Republic of Moldova and the Democratic People's Republic of Korea. The Convention enters into force in its entirety between the two States, without the Democratic People's Republic of Korea benefiting from its reservations."

Germany (17 June 2004):

The Government of the Federal Republic of Germany has carefully examined the reservations made by the Government of the Democratic People's Republic of Korea upon signature of the

International Convention for the Suppression of the Financing of Terrorism. In the opinion of the Government of the Federal Republic of Germany the reservations with respect to article 2 paragraph 1 (a) and article 14 of the Convention are incompatible with the object and purpose of the Convention, since they are intended to exclude the application of fundamental provisions of the Convention.

The Government of the Federal Republic of Germany therefore objects to the aforementioned reservations made by the Government of the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Democratic People's Republic of Korea.

Argentina (22 August 2005):

The Government of the Argentine Republic has examined the reservation made by the Government of the Democratic People's Republic of Korea, whereby it does not consider itself bound by the provisions of article 2, paragraph 1 (a), of the Convention.

The effect of the reservation to article 2, paragraph 1 (a), would be to exclude from consent the financing of the acts of terrorism listed in the annex to the article. This means that the obligation to criminalize the financing of terrorism, provided for in article 2, paragraph 1, would be void, since that obligation necessarily refers to the acts mentioned in the annex to paragraph 1 (a). This reservation is therefore incompatible with the object and purpose of the Convention, since its legal consequence would be to exclude from consent the main obligation deriving from it.

The Government of the Argentine Republic has also examined the reservation made by the Government of the Democratic People's Republic of Korea, whereby it does not consider itself bound by the provisions of article 14 of the Convention.

As its provisions make clear, the intent of article 14 is to establish the inoperability of the nature or political motives of the offence. Article 14 is thus categorical, and does not allow for exceptions of any kind. The Government of the Argentine Republic therefore believes that a reservation of this nature is incompatible with the object and purpose of the Convention, and cannot accept it.

The Government of the Argentine Republic therefore objects to the reservations made by the Government of the Democratic People's Republic of Korea concerning article 2, paragraph 1 (a), and article 14 of the International Convention for the Suppression of the Financing of Terrorism. This objection shall not impede the entry into force of the Convention between the Argentine Republic and the Democratic People's Republic of Korea.

***8.** The Secretary-General received a communication with regard to the explanatory declaration made by Egypt upon ratification by the following Government on the date indicated hereinafter :*

Argentina (22 August 2005):

With respect to the [declaration] made by the Arab Republic of Egypt [.....] concerning article 2, paragraph 1 (b), and any similar declaration that other States may make in the future, the Government of the Argentine Republic considers that all acts of terrorism are criminal, regardless of their motives, and that all States must strengthen their cooperation in their efforts to combat such acts and bring to justice those responsible for them.

Czech Republic (23 August 2006)

"The Government of the Czech Republic has examined the explanatory declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The Government of the Czech Republic considers that the declaration amounts to a reservation, as its purpose is to unilaterally limit the scope of the Convention. The Government of the Czech Republic further considers the declaration to be incompatible with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, irrespective of where they take place and who carries them out.

In addition, the Government of the Czech Republic is of the view that the declaration is contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of the Czech Republic wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservation made by the Government of the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Arab Republic of Egypt and the Czech Republic. The Convention enters into force between the Arab Republic of Egypt and the Czech Republic without the Arab Republic of Egypt benefiting from its reservation."

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9. *On 30 March 2006, the Government of Estonia notified the Secretary-General that it had decided to withdraw its declaration mde upon ratification. The text of the declaration reads as follows:*

"... pursuant to article 2, paragraph 2 of the Convention, the Republic of Estonia declares, that she does not consider itself bound by the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome, on 10 March 1988, annexed to the Convention;"....

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10. *The Secretary-General received the following communication with regard to the declaration made by Israel upon ratification, by the following Government on the date indicated hereinafter:*

Argentina (22 August 2005):

With respect to the declaration concerning article 21 of the Convention made by the State of Israel upon depositing the instrument of ratification, the Government of the Argentine Republic considers that the term 'international humanitarian law' covers the body of norms constituting customary and conventional law, including the provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977.

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11. *The Secretary-General received the communciations with regard to the declaration made by Jordan upon ratification from the following Governments on the dates indicated hereinafter:*

Belgium (23 September 2004):

The Government of the Kingdom of Belgium has examined the declaration made by the Government of the Hashemite Kingdom of Jordan at the time of its ratification of the International Convention for the Suppression of the Financing of Terrorism, in particular the part of the declaration in which the Kingdom of Jordan states that it "does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of article 2 of the Convention". The Belgian Government considers this declaration to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely, the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

Moreover, the declaration contravenes article 6 of the Convention, according to which "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

The Belgian Government recalls that, under article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Belgian Government therefore objects to the aforesaid reservation made by the Jordanian Government to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Belgium and Jordan.

Russian Federation (1 March 2005):

"Russia has examined the declaration made by the Hashemite Kingdom of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism (1999).

Russia assumes that every state, which has expressed its consent to be bound by the provisions of the Convention, has to adopt, in accordance with article 6, such measures as may be necessary to ensure that criminal acts, set forth in article 2, in particular acts intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or compel a government or an international organization to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Sharing the purposes and principles of the Charter of the United Nations, Russia wishes to draw attention that the right of people to self-determination may not go against other fundamental principles of international law, such as the principle of settlement of disputes by peaceful means, the principle of the territorial integrity of states, the principle of respect for human rights and fundamental freedoms.

In Russia's view, the declaration by the Hashemite Kingdom of Jordan may endanger the implementation of the provisions of the Convention between the Hashemite Kingdom of Jordan and other States Parties and thus impede their interaction in the suppression of the financing of terrorism. It is of common interest to promote and enhance cooperation in devising and adopting effective practical measures to prevent terrorism financing, as well as to fight against terrorism through prosecution of and bringing to justice those involved in terrorist activity, keeping in mind that the number and seriousness of acts of international terrorism to a great extent depend on the financing that may be available to terrorists.

Russia reiterates its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable in all its forms and manifestations, wherever and by whomsoever committed, and calls upon the Hashemite Kingdom of Jordan to review its position."

Japan (14 July 2005):

"When depositing its instrument of ratification, the Government of the Hashemite Kingdom of Jordan made a declaration which reads as follows: "The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of article 2 of the Convention".

In this connection, the Government of Japan draws attention to the provisions of Article 6 of the Convention, according to which each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Japan considers that the declaration made by the Hashemite Kingdom of Jordan seeks to exclude acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination from the application of the Convention and that such declaration constitutes a reservation which is incompatible with the object and purpose of the Convention. The Government of Japan therefore objects to the aforementioned reservation made by the Hashemite Kingdom of Jordan.

Argentina (22 August 2005):

With respect to the declarations made by the Hashemite Kingdom of Jordan and the Arab Republic of Egypt concerning article 2, paragraph 1 (b), and any similar declaration that other States may make in the future, the Government of the Argentine Republic considers that all acts of terrorism are criminal, regardless of their motives, and that all States must strengthen their cooperation in their efforts to combat such acts and bring to justice those responsible for them.

Ireland (23 June 2006):

"The Government of Ireland have examined the explanatory declaration made by the Government of the Hashemite Kingdom of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999, according to which the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation foreign occupation in the exercise of people' right to self-determination as terrorist acts within the meaning of paragraph 1 (b) of Article 2 of the Convention.

The Government of Ireland are of the view that this declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Ireland are also of the view that this reservation is contrary to the object and purpose of the Convention, namely suppressing the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, wherever and by whomever committed.

This reservation is contrary to the terms of Article 6 of the Convention, according to which States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Ireland recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible. It is in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Ireland therefore object to the reservation made by the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Ireland and the Hashemite Kingdom of Jordan. The Convention enters into force between Ireland and the Hashemite Kingdom of Jordan, without the Hashemite Kingdom of Jordan benefiting from its reservation

Czech Republic (23 August 2006):

"The Government of the Czech Republic has examined the declaration relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Hashemite Kingdom of Jordan at the time of its

ratification of the Convention.

The Government of the Czech Republic considers that the declaration amounts to a reservation, as its purpose is to unilaterally limit the scope of the Convention. The Government of the Czech Republic further considers the declaration to be incompatible with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, irrespective of where they take place and who carries them out.

In addition, the Government of the Czech Republic is of the view that the declaration is contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of the Czech Republic wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservation made by the Government of the Hashemite Kingdom of Jordan to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Hashemite Kingdom of Jordan and the Czech Republic. The Convention enters into force between the Hashemite Kingdom of Jordan and the Czech Republic without the Hashemite Kingdom of Jordan benefiting from its reservation."

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12. *The Secretary-General received a communciation with regard to the reservation made by the Syrian Arab Republic upon accession from the following Government on the date indicated hereinafter :*

Ireland (23 June 2006) :

"The Government of Ireland have examined the reservation made by the Government of the Syrian Arab Republic upon accession to the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999, according to which the Syrian Arab Republic does not consider acts of resistance to foreign occupation as terrorist acts within the meaning of paragraph 1 (b) of Article 2 of the Convention.Ireland (23 June 2003): The Government of Ireland are of the view that this reservation is contrary to the object and purpose of the Convention, namely suppressing the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, wherever and by whomever committed.

This reservation is contrary to the terms of Article 6 of the Convention, according to which States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Ireland recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible. It is in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Ireland therefore object to the reservation made by the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between Ireland and the Syrian Arab Republic. The Convention enters into force between Ireland and the Syrian Arab Republic, without the Syrian Arab Republic benefiting from its reservation."

Czech Republic (23 August 2006):

"The Government of the Czech Republic has examined the reservation relating to paragraph 1 (b) of Article 2 of the International Convention for the Suppression of the Financing of Terrorism made by the Government of the Syrian Arab Republic at the time of its accession to the Convention.

The Government of the Czech Republic considers the reservation to be incompatible with the object and purpose of the Convention, namely the suppression of the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention, irrespective of where they take place and who carries them out.

In addition, the Government of the Czech Republic is of the view that the reservation is contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature.

The Government of the Czech Republic wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservation made by the Government of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention between the Syrian Arab Republic and the Czech Republic. The Convention enters into force between the Syrian Arab Republic and the Czech Republic without the Syrian Arab Republic benefiting from its reservation."

EXHIBIT L

9. International Convention for the Suppression of Terrorist Bombings

New York, 15 December 1997

Entry into force:	23 May 2001, in accordance with article 22 which reads as follows: "1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession. 2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.".
Registration:	23 May 2001, No. 37517.
Status:	Signatories: 58 ,Parties: 153.
Text:	United Nations, *Treaty Series*, vol. 2149, p. 256; depositary notification C.N.801.2001.TREATIES-9 of 12 October 2001 [proposal for corrections to the original of the Convention (authentic Chinese text)] and C.N.16.2002.TREATIES-1 of 10 January 2002 [rectification of the original text of the Convention (Chinese authentic text)]; C.N.310.2002.TREATIES-14 of 4 April 2002 [proposal of a correction to the original of the Convention (Spanish authentic text)] and C.N.416.2002.TREATIES-16 of 3 May 2002 [rectification of the original of the Convention (Spanish authentic text)]; C.N.1161.2005.TREATIES-15 of 15 Novemberl 2005 [proposal of a correction to the original of the Convention (Spanish authentic text)].

Note: The Convention was adopted by resolution A/RES/52/164 of the General Assembly on 15 December 1997. In accordance with its article 21(1), the Convention will be open for signature by all States on 12 January 1998 until 31 December 1999 at United Nations Headquarters.

PARTICIPANTS

Participant	Signature	Ratification, Acceptance (A), Approval (AA), Accession (a), Succession (d)
Afghanistan		24 Sep 2003 a
Albania		22 Jan 2002 a
Algeria	17 Dec 1998	8 Nov 2001
Andorra		23 Sep 2004 a
Argentina	2 Sep 1998	25 Sep 2003
Armenia		16 Mar 2004 a
Australia		9 Aug 2002 a
Austria	9 Feb 1998	6 Sep 2000
Azerbaijan		2 Apr 2001 a
Bahrain		21 Sep 2004 a
Bangladesh		20 May 2005 a
Barbados		18 Sep 2002 a
Belarus	20 Sep 1999	1 Oct 2001
Belgium	12 Jan 1998	20 May 2005
Belize		14 Nov 2001 a
Benin		31 Jul 2003 a
Bolivia		22 Jan 2002 a
Bosnia and Herzegovina		11 Aug 2003 a
Botswana		8 Sep 2000 a
Brazil	12 Mar 1999	23 Aug 2002
Brunei Darussalam		14 Mar 2002 a
Bulgaria		12 Feb 2002 a
Burkina Faso		1 Oct 2003 a
Burundi	4 Mar 1998	
Cambodia		31 Jul 2006 a
Cameroon		21 Mar 2005 a
Canada	12 Jan 1998	3 Apr 2002
Cape Verde		10 May 2002 a
Chile		10 Nov 2001 a
China[1]		13 Nov 2001 a

Colombia		14 Sep 2004 a
Comoros	1 Oct 1998	25 Sep 2003
Costa Rica	16 Jan 1998	20 Sep 2001
Côte d'Ivoire	25 Sep 1998	13 Mar 2002
Croatia		2 Jun 2005 a
Cuba		15 Nov 2001 a
Cyprus	26 Mar 1998	24 Jan 2001
Czech Republic	29 Jul 1998	6 Sep 2000
Denmark[2]	23 Dec 1999	31 Aug 2001
Djibouti		1 Jun 2004 a
Dominica		24 Sep 2004 a
Egypt	14 Dec 1999	9 Aug 2005
El Salvador		15 May 2003 a
Equatorial Guinea		7 Feb 2003 a
Estonia	27 Dec 1999	10 Apr 2002
Ethiopia		16 Apr 2003 a
Finland	23 Jan 1998	28 May 2002 A
France	12 Jan 1998	19 Aug 1999
Gabon		10 Mar 2005 a
Georgia		18 Feb 2004 a
Germany	26 Jan 1998	23 Apr 2003
Ghana		6 Sep 2002 a
Greece	2 Feb 1998	27 May 2003
Grenada		13 Dec 2001 a
Guatemala		12 Feb 2002 a
Guinea		7 Sep 2000 a
Guyana		12 Sep 2007 a
Honduras		25 Mar 2003 a
Hungary	21 Dec 1999	13 Nov 2001
Iceland	28 Sep 1998	15 Apr 2002
India	17 Sep 1999	22 Sep 1999

Indonesia		29 Jun 2006 a
Ireland	29 May 1998	30 Jun 2005
Israel	29 Jan 1999	10 Feb 2003
Italy	4 Mar 1998	16 Apr 2003
Jamaica		9 Aug 2005 a
Japan	17 Apr 1998	16 Nov 2001 A
Kazakhstan		6 Nov 2002 a
Kenya		16 Nov 2001 a
Kiribati		15 Sep 2005 a
Kuwait		19 Apr 2004 a
Kyrgyzstan		1 May 2001 a
Lao People's Democratic Republic		22 Aug 2002 a
Latvia		25 Nov 2002 a
Lesotho		12 Nov 2001 a
Liberia		5 Mar 2003 a
Libyan Arab Jamahiriya		22 Sep 2000 a
Liechtenstein		26 Nov 2002 a
Lithuania	8 Jun 1998	17 Mar 2004
Luxembourg	6 Feb 1998	6 Feb 2004
Madagascar	1 Oct 1999	24 Sep 2003
Malawi		11 Aug 2003 a
Malaysia		24 Sep 2003 a
Maldives		7 Sep 2000 a
Mali		28 Mar 2002 a
Malta		11 Nov 2001 a
Marshall Islands		27 Jan 2003 a
Mauritania		30 Apr 2003 a
Mauritius		24 Jan 2003 a
Mexico		20 Jan 2003 a
Micronesia (Federated States of)		23 Sep 2002 a
Moldova		10 Oct 2002 a
Monaco	25 Nov 1998	6 Sep 2001
Mongolia		7 Sep 2000 a
Montenegro[3]		23 Oct 2006 d
Morocco		9 May 2007 a
Mozambique		14 Jan 2003 a
Myanmar		12 Nov 2001 a

Nauru		2 Aug 2005 a
Nepal	24 Sep 1999	
Netherlands[4]	12 Mar 1998	7 Feb 2002 A
New Zealand[5]		4 Nov 2002 a
Nicaragua		17 Jan 2003 a
Niger		26 Oct 2004 a
Norway	31 Jul 1998	20 Sep 1999
Pakistan		13 Aug 2002 a
Palau		14 Nov 2001 a
Panama	3 Sep 1998	5 Mar 1999
Papua New Guinea		30 Sep 2003 a
Paraguay		22 Sep 2004 a
Peru		10 Nov 2001 a
Philippines	23 Sep 1998	7 Jan 2004
Poland	14 Jun 1999	3 Feb 2004
Portugal	30 Dec 1999	10 Nov 2001
Republic of Korea	3 Dec 1999	17 Feb 2004
Romania	30 Apr 1998	29 Jul 2004
Russian Federation	12 Jan 1998	8 May 2001
Rwanda		13 May 2002 a
Saint Kitts and Nevis		16 Nov 2001 a
Saint Vincent and the Grenadines		15 Sep 2005 a
San Marino		12 Mar 2002 a
Sao Tome and Principe		12 Apr 2006 a
Saudi Arabia		31 Oct 2007 a
Senegal		27 Oct 2003 a
Serbia		31 Jul 2003 a
Seychelles		22 Aug 2003 a
Sierra Leone		26 Sep 2003 a
Slovakia	28 Jul 1998	8 Dec 2000
Slovenia	30 Oct 1998	25 Sep 2003
South Africa	21 Dec 1999	1 May 2003
	1 May	

Spain	1998	30 Apr 1999
Sri Lanka	12 Jan 1998	23 Mar 1999
Sudan	7 Oct 1999	8 Sep 2000
Swaziland		4 Apr 2003 a
Sweden	12 Feb 1998	6 Sep 2001
Switzerland		23 Sep 2003 a
Tajikistan		29 Jul 2002 a
Thailand		12 Jun 2007 a
The Former Yugoslav Republic of Macedonia	16 Dec 1998	30 Aug 2004
Togo	21 Aug 1998	10 Mar 2003
Tonga		9 Dec 2002 a
Trinidad and Tobago		2 Apr 2001 a
Tunisia		22 Apr 2005 a
Turkey	20 May 1999	30 May 2002
Turkmenistan	18 Feb 1999	25 Jun 1999
Uganda	11 Jun 1999	5 Nov 2003
Ukraine		26 Mar 2002 a
United Arab Emirates		23 Sep 2005 a
United Kingdom of Great Britain and Northern Ireland	12 Jan 1998	7 Mar 2001
United Republic of Tanzania		22 Jan 2003 a
United States of America	12 Jan 1998	26 Jun 2002
Uruguay	23 Nov 1998	10 Nov 2001
Uzbekistan	23 Feb 1998	30 Nov 1998
Venezuela (Bolivarian Republic of)	23 Sep 1998	23 Sep 2003
Yemen		23 Apr 2001 a

DECLARATIONS

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon

ratification, acceptance, approval or accession.)

Algeria

Reservation:

Reservation of Algeria

The Government of the People's Democratic Republic of Algeria does not consider itself bound by the provisions of article 20, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings.

The Government of the People's Democratic Republic of Algeria declares that in order for a dispute to be submitted to arbitration or to the International Court of Justice, the agreement of all parties to the dispute shall be required in each case.

Belgium

Declaration regarding article 11:

1. In exceptional circumstances, the Government of Belgium reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

2. In cases where the preceding paragraph is applicable, Belgium recalls that it is bound by the general legal principle aut dedere aut judicare, pursuant to the rules governing the competence of its courts.

Bahrain

Reservation:

The Kingdom of Bahrain does not consider itself bound by Paragraph 1 of Article 20 of the Convention.

Brazil

Reservation:

".....the Federative Republic of Brazil declares, pursuant to article 20, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings, adopted in New York on the 15th December 1997, that it does not consider itself bound by the provisions of article 20, paragraph 1, of the said Convention.

Canada

Declaration:

"Canada declares that it considers the application of article 2 (3) (c) of the Terrorist Bombing Convention to be limited to acts committed in furthering a conspiracy of two or more persons to commit a specific criminal offence contemplated in paragraph 1 or 2 of article 2 of that Convention."

China

Reservation:

"... China accedes to the International Convention for the Suppression of Terrorist Bombing, done at New York on 15 December 1997, and declares that it does not consider itself bound by paragraph 1 of Article 20 of the Convention."

Colombia

Declaration:

By virtue of article 20, paragraph 2, of the Convention, Colombia declares that it does not consider itself bound by paragraph 1 of the said article.

Furthermore, by virtue of article 6, paragraph 3, of the Convention, Colombia states that it establishes its jurisdiction in accordance with its domestic law in relation to paragraph 2 of the same article.

Cuba

Reservation and declaration:

Reservation

The Republic of Cuba declares, pursuant to article 20, paragraph 2, that it does not consider itself bound by paragraph 1 of the said article, concerning the settlement of disputes arising between States Parties, inasmuch as it considers that such disputes must be settled through amicable negotiation. In consequence, it declares that it does not recognize the compulsory jurisdiction of the International Court of Justice.

Declaration

The Republic of Cuba declares that none of the provisions contained in article 19, paragraph 2,

shall constitute an encouragement or condonation of the threat or use of force in international relations, which must under all circumstances be governed strictly by the principles of international law and the purposes and principles enshrined in the Charter of the United Nations.

Cuba also considers that relations between States must be based strictly on the provisions contained in resolution 2625 (XXV) of the United Nations General Assembly.

In addition, the exercise of State terrorism has historically been a fundamental concern for Cuba, which considers that the complete eradication thereof through mutual respect, friendship and cooperation between States, full respect for sovereignty and territorial integrity, self-determination and non-interference in internal affairs must constitute a priority of the international community.

Cuba is therefore firmly of the opinion that the undue use of the armed forces of one State for the purpose of aggression against another cannot be condoned under the present Convention, whose purpose is precisely to combat, in accordance with the principles of the international law, one of the most noxious forms of crime faced by the modern world.

To condone acts of aggression would amount, in fact, to condoning violations of international law and of the Charter and provoking conflicts with unforeseeable consequences that would undermine the necessary cohesion of the international community in the fight against the scourges that truly afflict it.

The Republic of Cuba also interprets the provisions of the present Convention as applying with full rigour to activities carried out by armed forces of one State against another State in cases in which no armed conflict exists between the two.

Egypt[6]

Upon signature :

Reservations:

"1. Article 6, paragraph 5:

The Government of the Arab Republic of Egypt declares that it is bound by Article 6, paragraph 5, of the Convention insofar as the domestic laws of States Parties do not contradict the relevant rules and principles of international law.

2. Article 19, paragraph 2:

The Government of the Arab Republic of Egypt declares that it is bound by Article 19, paragraph 2, of the Convention insofar as the military forces of the State, in the exercise of their duties do not violate the rules and principles of international law."

Upon ratification :

1. The Government of the Arab Republic of Egypt declares that it shall be bound by article 6,

paragraph 5, of the Convention to the extent that the national legislation of States Parties is not incompatible with the relevant norms and principles of international law.

2. The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law.

El Salvador

Declaration:

... with regard to article 20, paragraph 2, the Republic of El Salvador declares that it does not consider itsel f bound by paragraph 1 of the said article because it does not recognize the compulsory jurisdiction of the International Court of Justice.

Ethiopia

Reservation pursuant to article 20 (2):

"The Government of the Federal Democratic Republic of Ethiopia does not consider itself bound by the aforementioned provision of the Convention, under which any dispute between two or more States Parties concerning the interpretation or application of the Convention shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice, and states that disputes concerning the interpretation or application of the Convention would be submitted to arbitration or to the Court only with the prior consent of all the parties concerned."

Germany

Upon signature and confirmed upon ratification:

Declaration:

The Federal Republic of Germany understands article 1 para. 4 of [the said Convention] in the sense that the term "military forces of a state" includes their national contingents operating as part of the United Nations forces. Furthermore, the Federal Republic of Germany also understands that, for the purposes of this Convention, the term "military forces of a state" also covers police forces.

India

Reservation:

"In accordance with Article 20 (2), the Government of the Republic of India hereby declares that it does not consider itself bound by the provisions of Article 20 (1) of the Convention.".

Indonesia

Declaration:

"The Government of the Republic of Indonesia declares that the provisions of Article 6 of the International Convention for the Suppression of Terrorist Bombings will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States."

Reservation:

"The Government of the Republic of Indonesia does not consider itself bound by the provision of Article 20 and takes the position that dispute relating to the interpretation and application on the Convention which cannot be settled through the channel provided for in Paragraph (1) of the said Article, may be referred to the International Court of Justice only with the consent of all the Parties to the dispute."

Israel

" ... with the following declarations:

The Government of the State of Israel understands Article 1, paragraph 4, of the Convention for the Suppression of Terrorist Bombings, in the sense that the term "military forces of a State" includes police and security forces operating pursuant to the internal law of the State of Israel.

...

The Government of the State of Israel understands that the term "international humanitarian law"referred to in Article 19, of the Convention has the same substantive meaning as the term "the laws of war"("jus in bello"). This body of laws does not include the provisions of the protocols additional to the Geneva Conventions of 1977 to which the State of Israel is not a Party.

The Government of the State of Israel understands that under Article 1 paragraph 4 and Article 19 the Convention does not apply to civilians who direct or organize the official activities of military forces of a state.

Pursuant to Article 20, paragraph 2 of the Convention, the State of Israel does not consider itself bound by the provisions of Article 20, paragraph 1 of the Convention."

Kuwait

Reservation and declaration:

".....the reservation to its paragraph (a) of article (20) and the declaration of non-compliance to its provisions."

Lao People's Democratic Republic

Reservation:

"In accordance with paragraph 2, Article 20 of the International Convention for the Suppression of Terrorist Bombings, the Lao People's Democratic Republic does not consider itself bound by paragraph 1, article 20 of the present Convention. The Lao People's Democratic Republic declares that to refer a dispute relating to interpretation and application of the present Convention to arbitration or International Court of Justice, the agreement of all parties concerned in the dispute is necessary."

Malaysia

Declarations:

"1. The Government of Malaysia understands the phrase "Military forces of a State" in Article 1 (4) of the Convention to include the national contingents of Malaysia operating as part of United Nations forces.

2. .....

3. The Government of Malaysia understands Article 8 (1) of the Convention to include the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws.

4. (a) Pursuant to Article 20 (2) of the Convention, the Government of Malaysia declares that it does not consider itself bound by Article 20 (1) of the Convention; and

(b) the Government of Malaysia reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 20 (1) of the Convention or any other procedure for arbitration."

Moldova

Declarations:

... with the following declarations and reservation

1. .....

2. The Republic of Moldova declares its understanding that the provisions of article 12 of the International Convention for the Suppression of Terrorist Bombings should be implemented in such a way as to ensure the inevitability of responsibility for the commission of offenses falling within the scope of the Convention, without prejudice to the effectiveness of the international cooperation on the questions of extradition and legal assistance.

3. Pursuant to article 20, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings, the Republic of Moldova declares that it does not consider itself bound by the provisions of article 20, paragraph 1 of the Convention.

Mozambique

Declaration:

"... with the following declaration in accordance with its article 20, paragraph 2:

"The Republic of Mozambique does not consider itself bound by the provisions of article 20 paragraph 1 of the Convention.

In this connection, the Republic of Mozambique states that, in each individual case, the consent of all Parties to such a dispute is necessary for the submission of the dispute to arbitration or to the International Court of Justice".

Furthermore, the Republic of Mozambique declare that:

"The Republic of Mozambique, in accordance with its Constitution and domestic laws, may not and will not extradite Mozambique citizens.

Therefore, Mozambique citizens will be tried and sentenced in national courts".

Myanmar

Reservation:

"The Government of the Union of Myanmar, having considered the Convention aforesaid, hereby declares that it accedes to the same with reservation on Article 20 (1) and does not consider itself bound by the provision set forth in the said Article."

Netherlands

Declaration:

"The Kingdom of the Netherlands understands Article 8, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible."

Pakistan[7]

Declaration:

"The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded

in conflict with an existing jus cogen or preemptory norm of international law is void and, the right of self-determination is universally recognized as *a jus cogen*."

Portugal

Upon signature:

Declaration:

"For the purposes of article 8, paragraph 2, of the Convention, Portugal declares that the extradiction of Portuguese nationals from its territory will be authorized only if the following conditions, as stated in the Constitution of the Portuguese Republic, are met:

a) In case of terrorism and organised criminality; and

b) For purposes of criminal proceedings and, being so, subject to a guarantee given by the state seeking the extradition that the concerned person will be surrended to Portugal to serve the sentence or mesure imposed on him or her, unless such person does not consent thereto by means of expressed declaration.

For purposes of enforcement of a sentence in Portugal, the procedures referred to in the declaration made by Portugal to the European Convention on the transfer of sentenced persons shall be complied with."

Russian Federation

Upon signature:

Declaration:

The position of the Russian Federation is that the provisions of article 12 of the Convention should be implemented in such a way as to ensure the inevitability of responsibility for the commission of offences falling within the scope of the Convention, without detriment to the effectiveness of international cooperation on the questions of extradition and legal assistance.

Upon ratification:

Declarations:

.....

2) "The position of the Russian Federation is that the provisions of article 12 of the Convention should be implemented in such a way as to ensure the inevitability of responsibility for the commission of offenses falling within the scope of the Convention, without detriment to the effectiveness of international cooperation on the questions of extradition and legal assistance".

Spain

29 February 2000

Declaration:

According to article 23 of the Organization of Justice Act 6/1985 of 1 July, terrorism is a crime that is universally prosecutable and over which the Spanish courts have international jurisdiction under any circumstances; accordingly, article 6, paragraph 2 of the Convention is deemed to have been satisfied and there is no need to establish a special jurisdiction upon ratification of the Convention.

Sudan

Declaration concerning article 19, paragraph 2:

This paragraph shall not create any additional obligation to the Government of the Republic of the Sudan. It does not affect and does not diminish the responsibility of the Government of the Republic of the Sudan to maintain by all legitimate means order and law or re-establish it in the country or to defend its national unity or territorial integrity.

This paragraph does not affect the principle of non-interference in internal affairs of states, directly or indirectly, as it is set out in the United Nations Charter and relative provisions of international law.

Reservation to article 20, paragraph 1:

The Republic of the Sudan does not consider itself bound by paragraph 1 of article 20, in pursuance to paragraph 2 of the same article.

Thailand

Reservation:

"The Government of the Kingdom of Thailand does not consider itself bound by Article 20 paragraph 1 of the Convention."

Tunisia

Reservation:

By agreeing to accede to the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, [the Republic of Tunisia] declares that it does not consider itself bound by the provisions of article 20 (1) and affirms that disputes concerning the interpretation or application of the said Convention may only be submitted to the International Court of Justice with its prior consent."

Turkey

Upon signature:

Declarations:

"The Republic of Turkey declares that articles 9 and 12 should not be interpreted in such a way that offenders of these crimes are neither tried nor prosecuted. Furthermore mutual legal assistance and extradition are two different concepts and the conditions for rejecting a request for extradition should not be valid for mutual legal assistance.

The Republic of Turkey declares its understanding that the term international humanitarian law referred to in article 19 of the Convention for the Suppression of Terrorist Bombings shall be interpreted as comprising the relevant international rules excluding the provisions of additional Protocols to Geneva Conventions of 12 August 1949, to which Turkey is not a Party. The first part of the second paragraph of the said article should not be interpreted as giving a different status to the armed forces and groups other than the armed forces of a state as currently understood and applied in international law and thereby as creating new obligations for Turkey.

Reservation:

Pursuant to paragraph 2 of article (20) of the [Convention] the Republic of Turkey declares that it does not consider itself bound by the provisions of paragraph 1 of article (20) of the said Convention."

Upon ratification:

"[W]ith the stated reservations...[:]

1) The Republic of Turkey declares that Articles (9) and (12) should not be interpreted in such a way that offenders of these crimes are neither tried nor prosecuted.

2) The Republic of Turkey declares its understanding that the term international humanitarian law referred to in Article (19) of the Convention for the Suppression of Terrorist Bombings shall be interpreted as comprising the relevant international rules excluding the provisions of Additional Protocols to Geneva Conventions of 12 August 1949, to which Turkey is not a Party. The first part of the second paragraph of the said article should not be interpreted as giving a different status to the armed forces and groups other than the armed forces of a state as currently understood and applied in international law and thereby as creating new obligations for Turkey.

3) Pursuant to Paragraph 2 of Article (20) of the International Convention for the Suppression of Terrorist Bombings, the Republic of Turkey declares that it does not consider itself bound by the provisions of Paragraph 1 of Article (20) of the said Convention."

Ukraine

Reservation:

The provisions of article 19, paragraph 2, do not preclude Ukraine from exercising its jurisdiction over the members of military forces of a state and their prosecution, should their actions be illegal. The Convention will be applied to the extent that such activities are not governed by other rules of international law.

United Arab Emirates

Reservation and declaration:

....subject to a reservation with respect to paragraph 1 of article 20 thereof, which relates to the settlement of disputes arising between States Parties, in consequence of which the United Arab Emirates does not consider itself bound by that paragraph concerning arbitration.

Moreover, the Government of the United Arab Emirates will determine its jurisdiction over the offences in the cases provided for in article 6, paragraph 2, of the Convention and will notify the Secretary-General of the United Nations to that effect in accordance with paragraph 3 of that article.

United States of America

Reservation:

"(a) pursuant to article 20 (2) of the Convention, the United States of America declares that it does not consider itself bound by Article 20 (1) of the Convention; and

(b) the United States of America reserves the right specifically to agree in a particular case to follow the procedure in Article 20 (1) of the Convention or any other procedure for arbitration."

Understandings:

"(1) EXCLUSION FROM COVERAGE OF TERM "ARMED CONFLICT". The United States of America understands that the term "armed conflict"in Article 19 (2) of the Convention does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

(2) MEANING OF TERM "INTERNATIONAL HUMANITARIAN LAW". The United States of America understands that the term "international humanitarian law"in Article 19 of the Convention has the same substantive meaning as the law of war.

(3) EXCLUSION FROM COVERAGE OF ACTIVITIES BY MILITARY FORCES. The United States understands that, under Article 19 and Article 1 (4), the Convention does not apply to:

(A) the military fores of a state in the exercise of their official duties;

(B) civilians who direct or organize the official activities of military forces of a state; or

(C) civilians acting in support of the official activities of the military forces of a state, if the civilians are under the formal command, control, and responsibility of those forces. "

Venezuela (Bolivarian Republic of)

Reservation:

The Bolivarian Republic of Venezuela, pursuant to the provisions of article 20, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings, formulates an express reservation regarding the stipulation in paragraph 1 of that article. Accordingly, it does not consider itself bound to resort to arbitration as a means of dispute settlement, and does not recognize the binding jurisdiction of the International Court of Justice.

Objections

(Unless otherwise indicated, the declarations and reservations were made upon ratification, acceptance, approval or accession.)

Austria

14 April 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Austria has examined the declaration made by the Government of the Islamic Republic of Pakistan at the time of its accession to the International Convention for the suppression of terrorist bombings.

The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose, which is the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention (...) are under no circumstance justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

The Government of Austria recalls that according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Austria therefore objects to the aforesaid reservation made by the Government of the Islamic Republic of Pakistan to the International Convention for the suppression of terrorist bombings.

This objection shall not preclude the entry into force of the Convention between Austria ans the

Islamic Republic of Pakistan. "

Australia

25 July 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Australia has examined the Declaration made by the Government of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings 1997. The Government of Australia considers the declaration made by Pakistan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The Government of Australia further considers the Declaration to be contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention ... are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of Australia recalls that, according to Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Australia objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings. However, this objection shall not preclude the entry into force of the Convention between Australia and Pakistan."

Canada

18 July 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Canada has examined the Declaration made by Pakistan at the time of its accession to the Convention and considers that the Declaration is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis and is contrary to the object and purpose of the Convention which is the suppression of terrorist bombings, irrespective of where they take place and who carries them out.

The Government of Canada considers the Declaration to be, furthermore, contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of Canada considers that the above Declaration constitutes a reservation which is incompatible with the object and purpose of the International Convention for the Suppression of Terrorist Bombings.

The Government of Canada recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Canada therefore objects to the aforesaid reservation made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Canada and Pakistan".

26 April 2006

With regard to the reservation made by Belgium upon accession:

"The Government of Canada considers the Reservation to be contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to ".....adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of Canada therefore objects to the Reservation relating to Article 2 made by the Government of Belgium upon ratification of the International Convention for the Suppression of Terrorist Bombings which it considers as contrary to the object and purpose of the Convention. This objection does not, however, preclude the entry into force of the Convention between Canada and Belgium.

The Government of Canada notes that, under established principles of international treaty law, as reflected in Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted."

Denmark

18 March 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the Kingdom of Denmark considers that the declaration made by Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and

is therefore contrary to its objective and purpose, which is the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention (...) are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature".

The Government of the Kingdom of Denmark recalls that, according to Article 19 C of the Vienna Convention on the law of treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that all parties respect treaties to which they have chosen to become party, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of Denmark therefore objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the suppression of terrorist bombings. This objection shall not preclude the entry into force of the Convention between the Kingdom of Denmark and Pakistan."

Finland

17 June 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Finland has carefully examined the contents of the interpretative declaration made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

The Government of Finland is of the view that the declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Finland further considers the declaration to be in contradiction with the object and purpose of the Convention, namely the suppression of terrorist bombings wherever and by whomever carried out.

The declaration is, furthermore, contrary to the terms of Article 5 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature.

The Government of Finland wishes to recall that, according to the customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties

are respected as to their object and purpose and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland therefore objects to the above-mentioned interpretative declaration made by the Government of the Islamic Republic of Pakistan to the Convention.

This objection does not preclude the entry into force of the Convention between the Islamic Republic of Pakistan and Finland. The Convention will thus become operative between the two states without the Islamic Republic of Pakistan benefiting from its declaration."

France

3 February 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the French Republic has considered the declaration made by the Government of the Islamic Republic of Pakistan, in ratifying the International Convention for the Suppression of Terrorist Bombings of 15 December 1997, that 'nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of self-determination launched against any alien or foreign occupation or domination, in accordance with international law'. The aim of the Convention is to suppress all terrorist bombings, and article 5 states that 'each State Party shall adopt such measures as may be necessary (...) to ensure that criminal acts within the scope of this Convention (...) are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature'. The Government of the French Republic considers that the above declaration constitutes a reservation, to which it objects".

15 August 2006

With regard to the reservation made by Egypt upon ratification:

The Government of the French Republic has examined the reservation made by the Government of the Arab Republic of Egypt upon its ratification of the International Convention for the Suppression of Terrorist Bombings of 15 December 1997. Pursuant to that reservation, the Government of the Arab Republic of Egypt declares that it is bound by article 19, paragraph 2, of the Convention only insofar as the military forces of the State, in the exercise of their duties, do not violate the rules and principles of international law. However, the relevant portion of article 19, paragraph 2, of the Convention states that: "the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention".

The Government of the French Republic considers that the effect of the reservation made by the Government of the Arab Republic of Egypt is to bring within the scope of the Convention activities undertaken by a State's armed forces which do not belong there because they are covered by other provisions of international law. As a result, the reservation substantially alters the meaning and scope of article 19, paragraph 2 of the Convention. The Government of the French Republic objects to the reservation, which is incompatible with the object and purpose

of the Convention. This objection shall not preclude the entry into force of the Convention between France and Egypt.

Germany

23 April 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the Federal Republic of Germany has examined the "declaration" to the International Convention of the Suppression of Terrorist Bombings made by the Government of the Islamic Republic of Pakistan at the time of its accession to the Convention.

The Government of the Federal Republic of Germany considers that the declaration made by Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose, which is the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature."

The Government of the Federal Republic of Germany therefore objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Pakistan."

3 November 2004

With regard to the declaration made by Malaysia upon accession:

"The Government of the Federal Republic of Germany has examined the declaration relating to the Convention for the suppression of terrorist bombings made by the Government of Malaysia at the time of its accession to the Convention.

The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 8 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention.

Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and

purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia."

18 May 2006

With regard to the declaration made by Belgium upon ratification:

"The Government of the Federal Republic of Germany has carefully examined the reservation made by the Government of the Kingdom of Belgium upon ratification of the International Convention for the Suppression of Terrorist Bombings with respect to its Article 11. With this reservation, the Government of the Kingdom of Belgium expresses that it reserves the right to refuse extradition or mutual legal assistance in respect of any offence which it considers to be politically motivated. In the opinion of the Government of the Federal Republic of Germany, this reservation seeks to limit the Convention's scope of application in a way that is incompatible with the objective and purpose of the Convention.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservation made by the Government of the Kingdom of Belgium to the International Convention for the Suppression of Terrorist Bombings. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Belgium."

11 August 2006

With regard to the reservation made by Egypt upon ratification:

"The Government of the Federal Republic of Germany has carefully examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

In this declaration the Government of the Arab Republic of Egypt expresses the opinion that the activities of the armed forces of a State in the exercise of their duties, inasmuch as they are not consistent with the rules and principles of international humanitarian law, are governed by the Convention. However, according to article 19, paragraph 2 of the Convention, the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, as well as the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention, so that the declaration by the Arab Republic of Egypt aims to broaden the scope of the Convention.

The Government of the Federal Republic of Germany is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal

Republic of Germany.

The Government of the Federal Republic of Germany also emphasizes that the declaration by the Arab Republic of Egypt has no effect whatsoever on the Federal Republic of Germany's obligations as State Party to the International Convention for the Suppression of Terrorist Bombings, or on the Convention's applicability to armed forces of the Federal Republic of Germany.

The Government of the Federal Republic of Germany regards the International Convention for the Suppression of Terrorist Bombings as entering into force between the Federal Republic of Germany and the Arab Republic of Egypt subject to a unilateral declaration made by the Government of the Arab Republic of Egypt, which relates exclusively to the obligations of the Arab Republic of Egypt and to the armed forces of the Arab Republic of Egypt."

India

3 April 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the Republic of India have examined the Declaration made by the Government of the Islamic Republic of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings 1997.

The Government of the Republic of India consider that the Declaration made by Pakistan is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis and it is, therefore, incompatible with the object and purpose of the Convention which is the suppression of terrorist bombings, irrespective of where they take place and who carries them out.

The Government of India consider the Declaration to be, furthermore, contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention ... are under no circumstances justifiable by considerations of their political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of India consider that the above Declaration constitutes a reservation which is incompatible with the object and purpose of the International Convention for the Suppression of Terrorist Bombings.

The Government of India recall that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of India therefore object to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between India and

Pakistan."

Ireland

23 June 2006

With regard to the declaration made by Pakistan upon accession:

"The Government of Ireland have examined the declaration made by the Government of the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings according to which the Islamic Republic of Pakistan considers that nothing in this Convention shall be applicable to struggles, including armed struggles, for the realisation of the right of self-determination launched against any alien or foreign occupation or domination.

The Government of Ireland are of the view that this declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Ireland are also of the view that this reservation is contrary to the object and purpose of the Convention, namely suppressing terrorist bombings, wherever and by whomever carried out.

The Government of Ireland further consider the declaration to be contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature.

The Government of Ireland recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible. It is in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Ireland therefore object to the aforesaid reservation made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings. This objection shall not preclude the entry into force of the Convention between Ireland and the Islamic Republic of Pakistan. The Convention enters into force between Ireland and the Islamic Republic of Pakistan, without the Islamic Republic of Pakistan benefiting from its reservation."

Israel

28 May 2003

With regard to the declaration made by Pakistan upon accession:

"The Permanent Mission of the State of Israel to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the declaration of

Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings, 1997.

"The Government of the State of Israel considers that declaration to be, in fact, a reservation incompatible with the object and purpose of the Convention, as expressed in Article 5 thereof.

The Government of the State of Israel recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the State of Israel therefore objects to the aforesaid reservation made by the Government of Pakistan."

Italy

3 June 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Italy has examined the "declaration" to the International Convention of the Suppression of Terrorist Bombings made by the Government of the Islamic Republic of Pakistan at the time of its accession to the Convention.

The Government of Italy considers that the declaration made by Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose, which is the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the term of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature.

The Government of Italy therefore objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Italy and Pakistan."

18 May 2006

With regard to the declaration made by Belgium upon ratification:

"The Government of Italy has examined the reservation to the International Convention for the Suppression of Terrorist Bombings made by the Government of Belgium upon the accession to

that Convention. The Government of Italy considers the reservation by Belgium as intended to limit the scope of the Convention on a unilateral basis, which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where it takes place and of who carries it out. The Government of Italy recalls that, according to Article 19 (c) of the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Italy therefore objects to the aforesaid reservation made by the Government of Belgium to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Belgium and Italy. The Convention enters into force between Belgium and Italy without the Government of Belgium benefiting from its reservation. "

14 August 2006

With regard to the reservations made by Egypt upon ratification:

"The Government of Italy has examined the reservations made by the Government of the Arab Republic of Egypt upon ratification of the International Convention for the Suppression of Terrorism Bombings, according to which 1) The Government of the Arab Republic of Egypt declares that it shall be bound by article 6, paragraph 5, of the Convention to the extent that national legislation of States Parties is not incompatible with relevant norms and principles of international law. 2) The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law.

The Government of Italy considers the reservations to be contrary to the terms of article 5 of the Convention, according to which the States Parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Italy wishes to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Italy therefore objects to the reservations made by the Arab Republic of Egypt to the International Convention for the Suppression of Terrorist Bombings. This objection shall not preclude the entry into force of the Convention between the Arab Republic of Egypt and Italy. The Convention enters into force between the Arab Republic of Egypt and Italy without the Arab Republic of Egypt benefiting from its reservations."

Japan

4 August 2003

With regard to the declaration made by Pakistan upon accession:

".....[The Permanent Mission of Japan] has the honour to make the following declaration on behalf of the Government of Japan.

When depositing its Instrument of Accession, the Government of the Islamic Republic of Pakistan made a declaration which reads as follows:

"The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded in conflict with an existing jus cogen or preemptory norm of international law is void and, the right of self-determination is universally recognized as a jus cogen."

In this connection, the Government of Japan draws attention to the provisions of Article 5 of the Convention, according to which each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

The Government of Japan considers that the declaration made by the Islamic Republic of Pakistan seeks to exclude struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination from the application of the Convention and that such declaration constitutes a reservation which is incompatible with the object and purpose of the Convention. The Government of Japan therefore objects to the aforementioned reservation made by the Islamic Republic of Pakistan."

Netherlands

20 February 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the Kingdom of the Netherlands has examined the declaration made by the Government of the Islamic Republic of Pakistan at the time of its accession to the International Convention for the suppression of terrorist bombings.

The Government of the Kingdom of the Netherlands considers that the declaration made by Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, which is the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of the Kingdom of the Netherlands recalls that, according to Article 19 (c) the Vienna Convention on the law of treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the suppression of terrorist bombings. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Pakistan."

2 November 2004

With regard to the declaration made by Malaysia upon accession:

"The Government of the Kingdom of the Netherlands has examined the declaration relating to the International Convention for the suppression of terrorist bombings made by the Government of Malaysia at the time of its accession to the Convention.

The Government of the Kingdom of the Netherlands considers that in making the interpretation and application of Article 8 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia is formulating a general and indefinite reservation that makes it impossible to identify the changes to the obligations arising from the Convention that it is intended to introduce. The Government of the Kingdom of the Netherlands therefore considers that a reservation formulated in this way is likely to contribute to undermining the basis of international treaty law.

For these reasons, the Government of the Kingdom of the Netherlands hereby objects to this declaration which it considers to be a reservation that is incompatible with the object and purpose of the Convention.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia."

14 August 2006

With regard to the reservation made by Egypt upon ratification:

"The Government of the Kingdom of the Netherlands has examined the declaration relating to article 19, paragraph 2, of the International Convention for the Suppression of Terrorist

Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

In the view of the Government of the Kingdom of the Netherlands this declaration made by the Government of Egypt seeks to extend the scope of the Convention on a unilateral basis to include the armed forces of a State to the extent that they fail to meet the test that they 'do not violate the rules and principles of international law'. Otherwise such activities would be excluded from the application of the Convention by virtue of article 19, paragraph 2.

The Kingdom of the Netherlands is of the opinion that the Government of Egypt is entitled to make such a declaration, only to the extent that Egypt will apply the terms of the Convention in circumstances going beyond those required by the Convention to their own armed forces. The declaration of the Government of Egypt will have no effect in respect of the obligations of the Kingdom of the Netherlands under the Convention or in respect to the application of the Convention to the armed forces of the Kingdom of the Netherlands.

This statement shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the Arab Republic of Egypt."

New Zealand

12 August 2003

With regard to the declaration made by Pakistan upon accession:

"The Government f New Zealand has carefully examined the declaration made by the Government of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings 1997.

The Government of New Zealand considers the declaration made by Pakistan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and who carries them out.

The Government of New Zealand further considers the declaration to be contrary to the terms of article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention...are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature and are punished by penalties consistent with their grave nature".

The Government of New Zealand recalls that, according to article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of New Zealand therefore objects to the reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings 1997. This objection does not, however, preclude the entry into force of the Convention between New Zealand and Pakistan."

Norway

5 September 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Norway has examined the declaration made by the Government of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings.

The Government of Norway considers the declaration to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention according to which State Parties commit themselves to adopt measures as may be necessary to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent wit their grave nature.

The Government of Norway recalls that, according to customary international law, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Norway therefore objects to the aforesaid declaration made by the Government of Pakistan to the Convention between the Kingdom of Norway and Pakistan."

Spain

23 January 2003

With regard to the declaration made by Pakistan upon accession:

The Government of the Kingdom of Spain has considered the declaration made by the Islamic Republic of Pakistan in respect of the International Convention for the Prevention of Terrorist Bombings (New York, 15 December 1997) at the time of its ratification of the Convention.

The Government of the Kingdom of Spain considers this declaration to constitute a de facto reservation the aim of which is to limit unilaterally the scope of the Convention. This is incompatible with the object and purpose of the Convention, which is the repression of terrorist bombings, by whomever and wherever they may be carried out.

In particular, the declaration by the Government of the Islamic Republic of Pakistan is incompatible with the spirit of article 5 of the Convention, which establishes the obligation for all States Parties to adopt "such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention [...] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."

The Government of the Kingdom of Spain wishes to point out that, under customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of treaties are not permitted.

Consequently, the Government of Spain objects to the aforementioned declaration by the Islamic Republic of Pakistan to the International Convention for the Prevention of Terrorist Bombings.

This objection does not prevent the entry into force of the aforementioned Convention between the Kingdom of Spain and the Islamic Republic of Pakistan."

19 May 2006

With regard to the declaration made by Belgium upon ratification:

The Government of the Kingdom of Spain has examined the reservation made by the Government of the Kingdom of Belgium to article 11 of the International Convention for the Suppression of Terrorist Bombings upon ratifying that Convention.

The Government of the Kingdom of Spain considers that this reservation is incompatible with the object and purpose of the Convention.

The Government of the Kingdom of Spain considers, in particular, that the reservation by Belgium is incompatible with article 5 of the Convention, whereby States parties undertake to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or others of similar nature.

The Government of the Kingdom of Spain recalls that, under the customary-law provision enshrined in article 19 (c) of the 1969 Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of the treaty concerned are not permitted.

Accordingly, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Kingdom of Belgium to article 11 of the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Belgium.

11 August 2006

With regard to the reservation made by Egypt upon ratification:

The Government of the Kingdom of Spain has examined the reservation to article 19, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings presented by the Government of the Arab Republic of Egypt.

The Government of the Kingdom of Spain considers that Egypt's reservation relates to an essential component of the Convention, having an impact not only on article 19, paragraph 2,

but also on the clause establishing the scope of the Convention's implementation, because its effect is to alter the law applicable to actions of a State's armed forces which violate international law. As a result, this is a reservation which runs counter to the interests safeguarded by the Convention, and to the Convention's object and purpose.

The Government of the Kingdom of Spain wishes to recall that, according to the provision of international law codified in the 1969 Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty are prohibited.

Consequently, the Kingdom of Spain objects to Egypt's reservation to article 19, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Arab Republic of Egypt.

Sweden

3 June 2003

With regard to the reservation made by Turkey upon ratification:

"The Government of Sweden has examined the reservation made by Turkey to article 19 of the International Convention for the Suppression of Terrorist Bombings, whereby Turkey intends to exclude the Protocols Additional to the Geneva Conventions from the term international humanitarian law. It is the view of the Government of Sweden that the majority of the provisions of those Additional Protocols constitute customary international law, by which Turkey is bound.

In the absence of further clarification, Sweden therefore objects to the aforesaid reservation by Turkey to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Turkey and Sweden. The Convention enters into force in its entirety between the two States, without Turkey benefiting from its reservation."

4 June 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of Sweden has examined the declaration made by the Government of the Islamic Republic of Pakistan upon acceding to the International Convention for the Suppression of Terrorist Bombings (the Convention).

The Government of Sweden recalls that the name assigned to a statement, whereby the legal effect of certain provisions of a treaty is excluded or modified,, does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by Pakistan to the Convention in substance constitutes a reservation.

The Government of Sweden notes that the Convention is being made subject to a general

reservation. This reservation does not clearly specify the extent of the derogation from the Convention and it raises serious doubts as to the commitment of Pakistan to the object and purpose of the Convention.

The declaration is furthermore contrary to the terms of article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention (...) are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature".

The Government of Sweden would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Pakistan and Sweden. The Convention enters into force in its entirety between the two States, without Pakistan benefiting from its reservation".

30 January 2004

With regard to the declaration made by Israel upon ratification:

"The Government of Sweden has examined the declaration made by Israel regarding article 19 of the International Convention for the Suppression of Terrorist Bombings, whereby Israel intends to exclude the Protocols Additional to the Geneva Conventions from the term international humanitarian law.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by Israel in substance constitutes a reservation.

It is the view of the Government of Sweden that the majority of the provisions of the Protocols Additional to the Geneva Conventions constitute customary international law, by which Israel is bound. In the absence of further clarification, Sweden therefore objects to the aforesaid reservation by Israel to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not preclude the entry into force of the Convention between Israel and Sweden. The Convention enters into force in its entirety between the two States, without Israel benefiting from this reservation."

United Kingdom of Great Britain and Northern Ireland

28 March 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the Declaration made by the Government of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings 1997. The Government of the United Kingdom consider the declaration made by Pakistan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The Government of the United Kingdom further consider the Declaration to be contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention...are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, hnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of the United Kingdom recall that, according to Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with object and purpose of the Convention shall not be permitted.

The Government of the United Kingdom therefore object to the aforesaid reservation made by the Government of Pakistan to the International Convention for the Suppression of Terrorist Bombings. However, this objection shall not preclude the entry into force of the Convention between the United Kingdom and Pakistan."

15 May 2006

With regard to the declaration made by Belgium upon ratification:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the reservation relating to Article 11 of the International Convention for the Suppression of Terrorist Bombings made by the Government of Belgium at the time of its ratification of the Convention.

The Government of the United Kingdom note that the effect of the said reservation is to disapply the provisions of Article 11 in "exceptional circumstances". In light of the grave nature of the offences set forth in Article 2 of the Convention, the Government of the United Kingdom consider that the provisions of Article 11 should apply in all circumstances.

The Government of the United Kingdom therefore objects to the reservation made by the Government of Belgium to the International Convention for the Suppression of Terrorist Bombings. However, this objection shall not preclude the entry into force of the Convention between the United Kingdom and Belgium."

3 August 2006

With regard to the reservation made by Egypt upon ratification:

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The declaration appears to purport to extend the scope of application of the Convention to include the armed forces of a State to the extent that they fail to meet the test that they 'do not violate the rules and principles of international law'. Such activities would otherwise be excluded from the application of the Convention by virtue of article 19, paragraph 2. It is the opinion of the United Kingdom that the Government of Egypt is entitled to make such a declaration only insofar as the declaration constitutes a unilateral declaration by the Government of Egypt that Egypt will apply the terms of the Convention in circumstances going beyond those required by the Convention to their own armed forces on a unilateral basis. The United Kingdom consider this to be the effect of the declaration made by Egypt.

However, in the view of the United Kingdom, Egypt cannot by a unilateral declaration extend the obligations of the United Kingdom under the Convention beyond those set out in the Convention without the express consent of the United Kingdom. For the avoidance of any doubt, the United Kingdom wish to make clear that it does not so consent. Moreover, the United Kingdom do not consider the declaration made by the Government of Egypt to have any effect in respect of the obligations of the United Kingdom under the Convention or in respect of the application of the Convention to the armed forces of the United Kingdom.

The United Kingdom thus regard the Convention as entering into force between the United Kingdom and Egypt subject to a unilateral declaration made by the Government of Egypt, which applies only to the obligations of Egypt under the Convention and only in respect of the armed forces of Egypt."

United States of America

5 June 2003

With regard to the declaration made by Pakistan upon accession:

"The Government of the United States of America, after careful review, considers the declaration made by Pakistan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The declaration is contrary to the object and purpose of the Convention, namely, the suppression of terrorist bombings, irrespective of where they take place and who carries them out.

The Government of the United States also considers the declaration to be contrary to the terms of Article 5 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention ... are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other

similar nature and are punished by penalties consistent with their grave nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the declaration made by the Government of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings. This objection does not, however, preclude the entry into force of the Convention between the United States and Pakistan."

22 May 2006

With regard to the declaration made by Belgium upon ratification :

"The Government of the United States of America, after careful review, considers the Declaration made by Belgium to Article 11 of the Convention, to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The Government of the United States understands that the intent of the Government of Belgium may have been narrower than apparent from its Declaration in that the Government of Belgium would expect its Declaration to apply only in exceptional circumstances where it believes that, because of the political nature of the offense, an alleged offender may not receive a fair trial. The United States believes the Declaration is unnecessary because of the safeguards already provided for under Articles 12, 14, and 19 (2) of the Convention. However, given the broad wording of the Declaration and because the Government of the United States considers Article 11 to be a critical provision in the Convention, the United States is constrained to file this objection. This objection does not preclude entry into force of the Convention between the United States and Belgium."

16 August 2006

With regard to the reservation made by Egypt upon ratification:

"The Government of the United States of America has examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The declaration appears to purport to extend the scope of application of the Convention to include the armed forces of a State, to the extent that those forces fail to meet the test that they 'do not violate the rules and principles of international law'. Such activities would otherwise be excluded from the application of the Convention by virtue of article 19, paragraph 2. It is the opinion of the United States that the Government of Egypt is entitled to make such a declaration only insofar as the declaration constitutes a unilateral declaration by the Government of Egypt that Egypt will apply the terms of the Convention in circumstances going beyond those required by the Convention to its own armed forces on a unilateral basis. The United States considers this to be the effect of the declaration made by Egypt. However, in the view of the United States, Egypt cannot by a unilateral declaration extend the obligations of the United States or any country other than Egypt under the Convention beyond those obligations set out in the Convention without the express consent of the United States or other countries.

To avoid any doubt, the United States wishes to make clear that it does not consent to Egypt's declaration. Moreover, the United States does not consider the declaration made by the Government of Egypt to have any effect in respect of the obligations of the United States under the Convention or in respect of the application of the Convention to the armed forces of the United States. The United States thus regards the Convention as entering into force between the United States and Egypt subject to a unilateral declaration made by the Government of Egypt, which applies only to the obligations of Egypt under the Convention and only in respect of the armed forces of Egypt."

Notifications made under article 6 (3)

(Unless otherwise indicated, the notifications were made upon ratification, acceptance, approval or accession.)

Andorra

In accordance with article 6, paragraph 3, of the Convention, Andorra establishes its competence regarding the offences described in article 2, for all the cases covered by article 6, paragraph 2, b), c) and d).

Australia

18 October 2002

"... in accordance with article 6 (3) of the Convention, Australia has chosen to establish jurisdiction in all the circumstances provided for by Article 6 (2), and has provided for such jurisdiction in domestic legislation which took effect on 8 September 2002."

Bolivia

... by virtue of the provisions of article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, the Republic of Bolivia states that it establishes its jurisdiction in accordance with its domestic law in respect of offences committed in the situations and conditions provided for under article 6, paragraph 2, of the Convention.

Brazil

... the Federative Republic of Brazil declares that, in accordance with the provisions of article 6, paragraph 3, of the said Convention, it will exercise jurisdiction over the offences within the meaning of article 2, in the cases set forth in article 6, paragraph 2, subparagraphs (a), (b) and (e) of the Convention."

Chile

In accordance with article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, the Government of Chile declares that, in accordance with article 6,

paragraph 8, of the Courts Organization Code of the Republic of Chile, crimes and ordinary offences committed outside the territory of the Republic which are covered in treaties concluded with other Powers remain under Chilean jurisdiction.

Cyprus

"In accordance with article 6, paragraph 3 of the Convention, the Republic of Cyprus establishes its jurisdiction over the offences specified in article 2 in all the cases provided for in article 6, paragraphs 1, 2 and 4.

Denmark

"Pursuant to article 6 (3) of the International Convention for the Suppression of Terrorist Bombings, Denmark provides the following information on Danish criminal jurisdiction:

Rules on Danish criminal jurisdiction are laid down in Section 6 to 12 in the Danish Criminal Code. The provisions have the following wording:

Section 6

Acts committed

1) within the territory of the Danish state; or

2) on board a Danish ship or aircraft, being outside the territory recognized by international law as belonging to any state; or

3) on board a Danish ship or aircraft, being within the territory recognized by international law as belonging to a foreign state, if committed by persons employed on the ship or aircraft or by passengers travelling on board the ship or aircraft, shall be subject to Danish criminal jurisdiction.

Section 7

(1) Acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall also be subject to Danish criminal jurisdiction in the following circumstances, namely;

1) where the act was committed outside the territory recognized by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than imprisonment for four months; or

2) where the act was committed within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.

(2) The provisions in Subsection (1) above shall similarly apply to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark.

Section 8

The following acts committed outside the territory of the Danish state, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator.

1) where the act violates the independence, security, Constitution of public authorities of the Danish state, official duties toward the state or such interests, the legal protection of which depends on a personal connection with the Danish state; or

2) where the act violates an obligation which the perpetrator is required by law to observe abroad or prejudices the performance of an official duty incumbent on him with regard to a Danish ship or aircraft; or

3) where an act committed outside the territory recognized by international law as belonging to any state violates a Danish national or a person resident in the Danish state, provided acts of the kind in question are punishable with a sentence more severe than imprisonment for four months; or

4) where the act comes within the provisions of Section 183 a of this Act. The prosecution may also include breaches of Sections 237 and 244-248 of this Act, when committed in conjunction with the breach of Section 183 a; or

5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings; or

6) where transfer of the accused for legal proceedings in another country is rejected, and the act, provided it is committed within the territory recognized by international law as belonging to a foreign state, is punishable according to the law of this state, and provided that according to Danish law the act is punishable with a sentence more severe than one year of imprisonment.

Section 9

Where the punishable nature of an act depends on or is influenced by an actual or intended consequence, the act shall also be deemed to have been committed where the consequence has taken effect or has been intended to take effect.

Section 10

(1) Where prosecution takes place in this country under the foregoing provisions, the decision concerning the punishment or other legal consequences of the act shall be made under Danish law.

(2) In the circumstances referred to in Section 7 of this Act, if the act was committed within the territory recognized by international law as belonging to a foreign state, the punishment may not be more severe than that provided for by the law of that state.

Section 10 a

(1) A person who has been convicted by a criminal court in the state where the act was committed or who has received a sentence which is covered by the European Convention on

the International Validity of Criminal Judgments, or by the Act governing the Transfer of Legal Proceedings to another country, shall not be prosecuted in this country for the same act, if,

1) he is finally acquitted; or

2) the penalty imposed has been served, is being served or has been remitted according to the law of the state in which the court is situated; or

3) he is convicted, but no penalty is imposed.

(2) The provisions contained in Subsection (1) above shall not apply to

a) acts which fall within Section 6 (1) of this Act; or b) the acts referred to in Section 8 (1) 1) above, unless the prosecution in the state in which the court was situated was at the request of the Danish Prosecuting Authority.

Section 10 b

Where any person is prosecuted and punishment has already been imposed on him for the same act in another country, the penalty imposed in this country shall be reduced according to the extent to which the foreign punishment has been served.

Section 11

If a Danish national or a person resident in the Danish state has been punished in a foreign country for an act which under Danish law may entail loss or forfeiture of an office or profession or of any other right, such a deprivation may be sought in a public action in this country.

Section 12

The application of the provisions of Section 6-8 of this Act shall be subject to the applicable rules of international law."

El Salvador

With regard to article 6, paragraph 3, the Government of the Republic of El Salvador, gives notification that it has established its jurisdiction under its domestic law in respect of the offences committed in the situations and under the conditions mentioned in article 6, paragraph 2, of the Convention;...

Estonia

".....pursuant to article 6, paragraph 3 of the Convention, the Republic of Estonia declares that in its domestic law it shall apply the jurisdiction set forth in article 6 paragraph 2 over offences set forth in article 2."

Finland

"Pursuant to article 6 (3) of the International Convention for the Suppression of Terrorist Bombings, the Republic of Finland establishes its jurisdiction over the offences set forth in article 2 in all the cases provided for in article 6, paragraphs 1, 2 and 4."

Hungary

"The Government of the Republic of Hungary declares that, in relation to Article 6, paragraph 3 of the International Convention for the Suppression of Terrorist Bombings, the Republic of Hungary, pursuant to its Criminal Code, has jurisdiction over the crimes set out in Article 2 of the Convention in the cases provided for in Article 6, paragraphs 1 and 2 of the Convention."

Iceland

Declaration:

"Pursuant to article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, Iceland declares that it has established its jurisdiction over the offences set forth in article 2 of the Convention in all the cases provided for in article 6, paragraph 2, of the Convention."

Israel

Pursuant to Article 6 paragraph 3 of the International Convention for the Suppression of Terrorist Bombings, the Government of the State of Israel hereby notifies the Secretary-General of the United Nations that it has established jurisdiction over the offences referred to in Article 2 in all the cases detailed in Article 6 paragraph 2.

Jamaica

".....Jamaica has established jurisdiction over the offences set forth in Article 2, with respect to the jurisdiction stated in Article 6 (2) (d) which states:

'A State Party may establish jurisdiction over any such offence when:

...(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act;'..."

Latvia

"In accordance with Article 6, paragraph 3 of the International Convention for the Suppression of Terrorist Bombings, opened for signature at New York on the 12th day of January 1998, the Republic of Latvia declares that it has established jurisdiction in all cases listed in Article 6, paragraph 2."

Lithuania

".....the Seimas of the Republic of Lithuania declares that the Republic of Lithuania establishes

the jurisdiction for the offences provided in Article 2 of the Convention in all cases described in paragraph 2 of Article 6 of the said Convention."

Malaysia

"In accordance with Article 6 (3) of the Convention, the Government of Malaysia declares that it has established jurisdiction in accordance with its domestic laws over the offences set forth in Article 2 of the Convention in all the cases provided for in Article 6 (1) and 6 (2)."

Mexico

24 February 2003

.....in accordance with article 6, paragraph 3, of the Convention, Mexico exercises jurisdiction over the offences defined in the Convention where:

(a) They are committed against Mexicans in the territory of another State party, provided that the accused is in Mexico and has not been tried in the country in which the offence was committed. Where it is a question of offences defined in the Convention but committed in the territory of a non-party State, the offence shall also be defined as such in the place where it was committed (art. 6, para. 2 (a));

(b) They are committed in Mexican embassies and on diplomatic or consular premises (art. 6, para. 2 (b));

(c) They are committed abroad but produce effects or are claimed to produce effects in the national territory (art. 6, para. (d)).

Moldova

Pursuant to article 6, paragraph 3 of the International Convention for the Suppression of Terrorist Bombings, the Republic of Moldova establishes its jurisdiction over the offences set forth in article 2 in cases provided for in article 6, paragraphs 1 and 2.

Monaco

The Principality declares that, in accordance with the provisions of article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, it establishes its jurisdiction over the acts recognized as offences within the meaning of article 2 of the Convention, in the cases set forth in article 6, paragraphs 1 and 2, of the Convention.

Paraguay

..., by virtue of the provisions of article 6, paragraph 3, of the aforementioned Convention, the Republic of Paraguay has established its jurisdiction in accordance with its domestic legislation, under article 6, paragraph 2, of the Convention.

Portugal

16 January 2002

"Pursuant to article 6 (3) of the International Convention for the Suppression of Terrorist Bombings, Portugal declares that in accordance with article 5 (1) (a) of the Penal Code, Portuguese courts will have jurisdiction against the crimes of terrorism and of terrorist organisations, set forth respectively in article 300 and 301 of the same Code, wherever the place they have been committed, thus covering, in connection with the said crimes, the cases set forth in article 6 (2) of the Convention."

Republic of Korea

7 July 2004

Pursuant to Article 6, Paragraph 3 of the International Convention for the Suppression of Terrorist Bombings,

The Republic of Korea provides the following information on its criminal jurisdiction. Principles on the criminal jurisdiction are set out in the Chapter I of Part I of the Korean Penal Code. The provisions have the following wording:

Article 2 (Domestic Crimes) This Code shall apply to anyone, whether Korean or alien, who commits a crime within the territorial boundary of the Republic of Korea.

Article 3 (Crimes by Koreans outside Korea)

This Code shall apply to a Korean national who commits a crime outside the territorial boundary of the Republic of Korea.

Article 4 (Crimes by Aliens on board Korean Vessel, etc., outside Korea)

This Code shall apply to an alien who commits a crime on board a Korean vessel or a Korean aircraft outside the territorial boundary of the Republic of Korea.

Article 5 (Crimes by Aliens outside Korea)

This Code shall apply to an alien who commits any of the following crimes outside the territorial boundary of the Republic of Korea:

1. Crimes concerning insurrection;

2. Crimes concerning treason;

3. Crimes concerning the national flag;

4. Crimes concerning currency;

5. Crimes concerning securities, postage and revenue stamps;

6. Crimes specified in Articles 225 through 230 among crimes concerning documents; and

7. Crimes specified in Article 238 among crimes concerning seal.

Article 6 (Foreign Crimes against the Republic of Korea and Koreans outside Korea)

This Code shall apply to an alien who commits a crime, other than those specified in the preceding Article, against the Republic of Korea or its national outside the territorial boundary of the Republic of Korea, unless such act does not constitute a crime, or it is exempt from prosecution or execution of punishment under the *lex loci delictus*.

Article 8 (Application of General Provisions)

The provisions of the preceding Articles shall also apply to such crimes as are provided by other statutes unless provided otherwise by such statutes.

Romania

"In accordance with Article 6, paragraph 3 of the Convention, Romania declares that it has established its jurisdiction for the offenses set forth in Article 2, in all cases stipulated by Article 6, paragraphs 1 and 2, in conformity with relevant provisions of its domestic law."

Russian Federation

"The Russian Federation declares that in accordance with paragraph 3 of article 6 of the International Convention for the Suppression of Terrorist Bombings (hereinafter - the Convention) it has established its jurisdiction over the offences set forth in article 2 of the Convention in cases envisaged in paragraphs 1 and 2 of article 6 of the Convention."

Sudan

The Republic of the Sudan declares hereby that it has established its jurisdiction over crimes set out in article 2 of the Convention in accordance with situations and conditions as stipulated in article 6, paragraph 2.

Sweden

5 November 2002

"Pursuant to article 6 (3) of the International Convention for the Suppression of Terrorist Bombings, Sweden provides the following information on Swedish criminal jurisdiction. Rules on Swedish criminal jurisdiction are laid down in Chapter 2 Section 1-5 in the Swedish Penal Code. The provisions have the following wording:

Section 1

Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Section 2

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court when the crime has been committed:

1. By a Swedish citizen or an alien domiciled in Sweden,

2. By an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic or Norwegian citizen and is present in the Realm, or

3. By any other alien, who is present in the Realm, and the crime under Swedish law can result in imprisonment for more than six months.

The first paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.

In cases mentioned in this Section, a sanction may not be imposed which is more severe than the most severe punishment provided for the crime under the law in the place where it was committed.

Section 3

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

1. if the crime was committed on board a Swedish vessel or aircraft, or was committed in the course of duty by the officer in charge or by a member of its crew,

2. if the crime was committed by a member of the armed force in an area in which a detachment of the armed forces was present, or if it was committed by some other person in such an area and the detachment was present for a purpose other than exercise,

3. if the crime was committed in the course of duty outside the Realm by a person employed in a foreign contingent of the Swedish armed forces,

3a. if the crime was committed in the course of duty outside the Realm by a policeman, custom officer or official employed at the coast guard, who performs boundless assignments according to an international agreement that Sweden has ratified,

4. if the crime committed was a crime against the Swedish nation, a Swedish municipal uthority or other assembly, or against a Swedish public institution,

5. If the crime was committed in an area not belonging to any state and was directed against a

Swedish citizen, a Swedish association or private institution, or against an alien domiciled in Sweden,

6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court, or

7. if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.

Section 3 a

Besides the cases described in Sections 1-3, crimes shall be adjudged according to Swedish law by a Swedish court in accordance with the provisions of the Act on International Collaboration concerning Proceedings in Criminal matters.

Section 4

A crime is deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or in the case of an attempt, where the intended crime would have been completed.

Section 5

Prosecution for a crime committed within the Realm on a foreign vessel or aircraft by an alien, who was the officer in charge or member of its crew or otherwise travelled in it, against another alien or a foreign interest shall not be instituted without the authority of the Government or a person designated by the Government.

1. on a Swedish vessel or aircraft or by the officer in charge or some member of its crew in the course of duty,

2. by a member of the armed forces in an area in which a detachment of the armed forces was present,

3. in the course of duty outside the Realm by a person employed by a foreign contingent of the Swedish armed forces,

4. In the course of duty outside the Realm by a policeman, custom officer or official employed at the coast guard, who performs boundless assignments according to an international agreement that Sweden has ratified,

5. In Denmark, Finland, Iceland or Norway or on a vessel or aircraft in regular commerce between places situated in Sweden or one of the said states, or

6. By a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest."

Switzerland

Pursuant to article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, Switzerland establishes its jurisdiction over the offences set forth in article 2 in all the cases provided for in article 6, paragraph 2.

Thailand

12 June 2007

"Pursuant to Article 6 paragraph 3 of the International Convention for the Suppression of Terrorist Bombings, the Government of the Kingdom of Thailand hereby notifies the Secretary-General of the criminal jurisdiction it has established in accordance with Chapter 2 of the Thai Penal Code on the Scope of Application as follows:

Section 4: Any person who commits an offence within the Kingdom shall be punished according to the law.

The commission of an offence in any Thai vessel or aeroplane shall be deemed as being committed within the Kingdom, irrespective of the place where such Thai vessel or aeroplane may be. Section 5: Whenever any offence is even partially committed within the Kingdom, or the consequence of the commission of which, as intended by the offender, occurs within the Kingdom, or by the nature of the commission of which, the consequence resulting therefrom should occur within the Kingdom, or it could be foreseen that the consequence would occur within the Kingdom, it shall be deemed that such offence is committed within the Kingdom.

In case of preparation or attempt to commit any act provided by the law to be an offence, even though it is done outside the Kingdom, if the consequence of the doing of such act, when carried through to the stage of accomplishment of the offence, will occur within the Kingdom, it shall be deemed that the preparation or attempt to commit such offence is done within the Kingdom.

Section 6: Whenever an offence is committed within the Kingdom, or is deemed by this Code as being committed within the Kingdom, even though the act of the co-principal, a supporter or an instigator in the offence is done outside the Kingdom, it shall be deemed that the principal, supporter or instigator has committed the offence within the Kingdom.

Section 7: Any person who commits the following offences outside the Kingdom shall be punished in the Kingdom, namely:

(1) offences relating to the Security of the Kingdom as provided in Sections 107 to 129;

(1/1) offences relating to Terrorism as provided in Section 135/1, Section 135/2, Section 135/3 and Section 135/4;

(2) offences relating to Counterfeiting and Alteration as provided in Sections 240 to 249, Section 254, Section 256, Section 257 and Section 266 (3) and (4);

(2 bis) offences relating to Sexuality as provided in Section 282 and Section 283;

(3) offences relating to Robbery as provided in Section 339, and offences relating to Gang-

Robbery as provided in Section 340; which is committed on the high seas.

Section 8: Any person who commits an offence outside the Kingdom shall be punished in the Kingdom, provided that:

(a) the offender is a Thai person, and the Government of the country where the offence has occurred or the injured person has requested for such punishment; or

(b) the offender is an alien, and the Thai Government or a Thai person is an injured person, and the injured person has requested for such punishment;

and, provided further that the offence committed by any of the following:

(1) offences relating to Causing Public Dangers as provided in Section 217, Section 218, Section 221 to 223 except the case relating to the first paragraph of Section 220, and Section 224, Section 226, Section 228 to 232, Section 237, and Section 233 to 236 only when it is the case to be punished according to Section 238;

(2) offences relating to Documents as provided in Section 264, Section 265, Section 266 (1) and (2), Section 268 except the case relating to Section 267 and Section 269;

(2/1) offence relating [to] the Electronic Card according to be prescribed by Section 269/1 to Section 269/7.

(3) offences relating to Sexuality as provided in Section 276, Section 280 and Section 285 only for the case relating to Section 276;

(4) offences against Life as provided in Section 288 to 290;

(5) offences relating to Bodily Harm as provided in Section 295 to 298;

(6) offences of Abandonment of Children, Sick or Aged Persons as provided in Section 306 to 308;

(7) offences against Liberty as provided in Section 309, Section 310, Sections 312 to 315, and Sections 317 to 320;

(8) offences of Theft and Snatching as provided in Sections 334 to 336;

(9) offences of Extortion, Blackmail, Robbery and Gang-Robbery as provided in Sections 337 to 340;

(10) offences of Cheating and Fraud as provided in Sections 341 to 344, Section 346 and Section 347;

(11) offences of Criminal Misappropriation as provided in Sections 352 to 354;

(12) offences of Receiving Stolen Property as provided in Section 357;

(13) offences of Mischief as provided in Sections 358 to 360."

Ukraine

21 May 2002

"Ukraine excercises its jurisdiction over the offences set forth in article 2 of the Convention in cases provided for in paragraph 2 article 6 of the Convention."

Uruguay

Notifies, by virtue of article 6, paragraph 3, of the Convention, that the authorities of the Eastern Republic of Uruguay exercise jurisdiction over the offences set forth in article 2, to which reference is made in article 6, paragraph 2. With regard to article 6, paragraph 2, subparagraphs (a) and (b), that jurisdiction is established in article 10 of the Penal Code (Act 9.155 of 4 December 1933) and, with regard to article 6, paragraph 2, subparagraph (e), in article 4 of the Aeronautical Code (Decree-Law 14.305 of 29 November 1974).

Uzbekistan

15 May 2000

The Republic of Uzbekistan has established its jurisdiction over the crimes set out in article 2 under all the conditions stipulated in article 6, paragraph 2, of the Convention.

Venezuela (Bolivarian Republic of)

Moreover, the Bolivarian Republic of Venezuela, having regard for article 6, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings, declares that it has established jurisdiction under its domestic law over the offences committed in the situations and under the conditions envisaged in article 6, paragraph 2, of the Convention.

NOTES

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1. *On 13 November 2001, the Government of China notified the Secretary-General of the following:*

In accordance with the provisions of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 138 of the Basic Law of Macao Special Administrative Region of the People's Republic of China, the Government of the People's Republic of China decides that the International Convention for the Suppression

of Terrorist Bombings shall apply to the Hong Kong Special Administrative Region and Macao Special Administrative Region of the People's Republic of China.

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2. *With a territorial exclusion in respect of the Faroe Islands and Greenland.*

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3. *See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.*

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4. *For the Kingdom in Europe.*

Subsequently, on 8 February 2005, the Government of the Netherlands informed the Secretary-General that the Convention will apply to Aruba with the following declaration:

"The Kingdom of the Netherlands understands Article 8, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible."

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5. *With a territorial exclusion with resepct to Tokelau to the effect that: ".....consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this accession shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultations with that territory."*

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6. *The Secretary-General received a communciation with regard to the declaration made by the Government of Egypt upon ratification from the following Government on the date indicated hereinafter:*

Canada (14 September 2006) :

"The Government of Canada has examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The declaration appears to extend the scope of the application of the Convention to include the armed forces of a State, in the exercise of their duties, to the extent that those armed forces violate the rules and principles of international law. Such activities would otherwise be

excluded from the application of the Convention by virtue of article 19, paragraph 2.

The Government of Canada considers the effect of the declaration to be a unilateral extension of the terms of the Convention by the Government of the Arab Republic of Egypt to apply only to the armed forces of the Arab Republic of Egypt in circumstances going beyond those required by the Convention. The Arab Republic of Egypt cannot by unilateral declaration extend the obligations of Canada under the Convention beyond those set out in the Convention. Canada does not consider the declaration made by the Government of the Arab Republic of Egypt to have any effect in respect of the obligations of Canada under the Convention or in respect of the application of the Convention to the armed forces of Canada.

The Government of Canada thus regards the Convention as entering into force between Canada and the Arab Republic of Egypt subject to a unilateral declaration made by the Government of the Arab Republic of Egypt, which applies only to the obligations of the Arab Republic of Egypt under the Convention and only in respect of the armed forces of the Arab Republic of Egypt."

Russian Federation (14 November 2006):

The Russian Side has considered the reservation to Article 19 (2) of the International Convention for the Suppression of Terrorist Bombings made by the Arab Republic of Egypt upon ratification of the Convention.

The objective of this reservation is to extend the scope of application of the Convention and to cover armed forces of the States Parties, if they violate "norms and principles of international law"in the exercise of their official duties.

The Russian side regards this reservation of Egypt as unilateral obligation of Egypt to apply the Convention to its own armed forces if they in the exercise of their official duties go beyond the scope of the norms and principles of international law.

The Russian side proceeds from the understanding that Egypt does not have right to unilaterally impose additional obligations on other Parties to the Convention without their explicit consent through formulating its reservation.

The Russian side does not recognize the extension of the Convention to include activities of armed forces of the States Parties except for Egypt, which according to Article 19 (2) are explicitly excluded from the scope of application of the Convention. Thus the Convention applies in relations between the Russian Federation and the Arab Republic of Egypt with the reservation of Egypt, which stipulates only obligations of Egypt and is applicable to its armed forces.

***7.** The Secretary-General received communciations with regard to the declaration made by the Government of Pakistan upon accession, from the following Governments on the dates indicated hereinafter:*

Republic of Moldova (6 october 2003):

"The Government of the Republic of Moldova has examined the declaration made by the Government of the Islamic Republic of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings 1997.

The Government of the Republic of Moldova considers that the declaration is, in fact, a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The declaration is furthermore contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to "adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention...are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature".

The Government of the Republic of Moldova recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Republic of Moldova therefore objects to the aforesaid reservation made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings. This objection shall not preclude the entry into force of the Convention between the Republic of Moldova and the Islamic Republic of Pakistan. The Convention enters into force in its entirety between the two States, without Pakistan benefiting from its reservation."

Russian Federation (22 September 2003):

The Russian Federation has considered the declaration made by the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings, of 1997.

The Russian Federation takes the position that every State which has agreed to the binding nature of the provisions of the Convention must adopt such measures as may be necessary, pursuant to article 5, to ensure that criminal acts which, in accordance with article 2, are within the scope of the Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

The Russian Federation notes that the realization of the right of peoples to self- determination must not conflict with other fundamental principles of international law, such as the principle of the settlement of international disputes by peaceful means, the principle of the territorial integrity of States, and the principle of respect for human rights and fundamental freedoms.

The Russian Federation believes that the declaration made by the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings is incompatible with the object and purpose of the Convention. In the view of the Russian Federation, the declaration made by the Islamic Republic of Pakistan may jeopardize the fulfilment of the provisions of the Convention in relations between the Islamic Republic of Pakistan and other States Parties and thereby impede cooperation in combating acts of terrorist bombing. It is in the common interest of States to develop and strengthen cooperation in formulating and adopting effective practical measures to prevent terrorist acts and punish the perpetrators.

The Russian Federation, once again declaring its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustified, regardless of their motives and in all their forms and manifestations, wherever and by whomever they are perpetrated, calls upon the Islamic Republic of Pakistan to reconsider its position and withdraw the declaration.

Poland (3 February 2004):

"The Government of the Republic of Poland considers that the declaration made by the Government of the Islamic Republic of Pakistan at the time of its accession to the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and which is contrary to its object and purpose, namely the suppression of terrorist bombings, irrespective of where they take place and of who carries them out.

The Government of the Republic of Poland further considers the declaration to be contrary to the terms of article 5 of the Convention, according to which each State Party commits itself to 'adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention (...) are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature'.

The Government of the Republic of Poland wishes to recall that, according to the customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the Republic of Poland therefore objects to the aforesaid declaration made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings.

This objection shall not, however, preclude the entry into force of the Convention between the Republic of Poland and the Islamic Republic of Pakistan."

Ireland (23 June 2006):

"The Government of Ireland have examined the declaration made by the Government of the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings according to which the Islamic Republic of Pakistan considers that nothing in this Convention shall be applicable to struggles, including armed struggles, for the realisation of the right of self-determination launched against any alien or

foreign occupation or domination.

The Government of Ireland are of the view that this declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention. The Government of Ireland are also of the view that this reservation is contrary to the object and purpose of the Convention, namely suppressing terrorist bombings, wherever and by whomever carried out.

The Government of Ireland further consider the declaration to be contrary to the terms of Article 5 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature and are punished by penalties consistent with their grave nature.

The Government of Ireland recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible. It is in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Ireland therefore object to the aforesaid reservation made by the Government of the Islamic Republic of Pakistan to the International Convention for the Suppression of Terrorist Bombings. This objection shall not preclude the entry into force of the Convention between Ireland and the Islamic Republic of Pakistan. The Convention enters into force between Ireland and the Islamic Republic of Pakistan, without the Islamic Republic of Pakistan benefiting from its reservation."

EXHIBIT M

TRANSPERFECT

AFFIDAVIT OF ACCURACY

I, Carrie Russ, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of the accompanying document [PNUD Social Development Report (2003) (ch. 12)] from Spanish into English.

Carrie Russ
TransPerfect Translations, Inc.
601 Thirteenth Street, NW
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Sworn to before me this
10th day of July 2008

Signature, Notary Public

Lisa Chan
Notary Public, District of Columbia
My Commission Expires 1/1/2013

Stamp, Notary Public

Washington, DC

United Nations Development Program
National Human Development Report 2003 for Colombia

2. Extortion

a. Diagnosis

While kidnapping tends to occur in cities and areas where the armed group has little control, extortion is characteristic of regions where its presence is more consolidated, though of course the two activities are not mutually exclusive.

The modalities of extortion vary according to type of economic activity. Extortion of the cattle ranching and agricultural sectors is called *vacuna*[3] ["vaccine"] and its amount is determined as a function of the size and productivity of each estate as reported on a census taken by the armed group.

When oil companies or other large businesses are extorted, the extortion takes on the character of a *contrato de seguridad* ("protection contract"). This is an important source of income for the armed rebels, and especially for the ELN, who doesn't refrain from kidnapping, even though it invokes a certain moralism and even religiosity to avoid participating as heavily as others in the selling of illicit drugs.

Protection contracts also exist in other resource extraction industries (gold and coal mining), as well as in service industries (shipping and transportation). Gold miners pay a monthly fee determined as a function of the type of equipment and machinery they use, such that those who use backhoe loaders pay more than those who use dredges or motor pumps, who in turn pay more than artisans or *barequeros* (*those who pan for gold*). But all are charged, including shopkeepers and restaurant owners in surrounding areas (Rangel, 2001: 398).

In the case of coal mining, the vehicles that transport the coal pay a fee to circulate freely whose amount depends on their chute size and number of shafts. There is even reason to believe that the decrease in kidnapping in coal-mining regions such as La Guajira (Vergara, 2000: 92) could be due to the increase of payments from this type of extortion (Rangel, 2001: 399).

b. Recommendations

The payment of *vacunas* and protection contracts is a source of negative externalities: each payment increases the net benefits expected from the next extortion. Consequently, policies should be based on a principle similar to that invoked by us with respect to kidnapping.

The first priority, of course, is to improve security and the criminal justice system in order to prevent and punish these practices. But in the meantime, we must concentrate on fostering a culture of non-payment.

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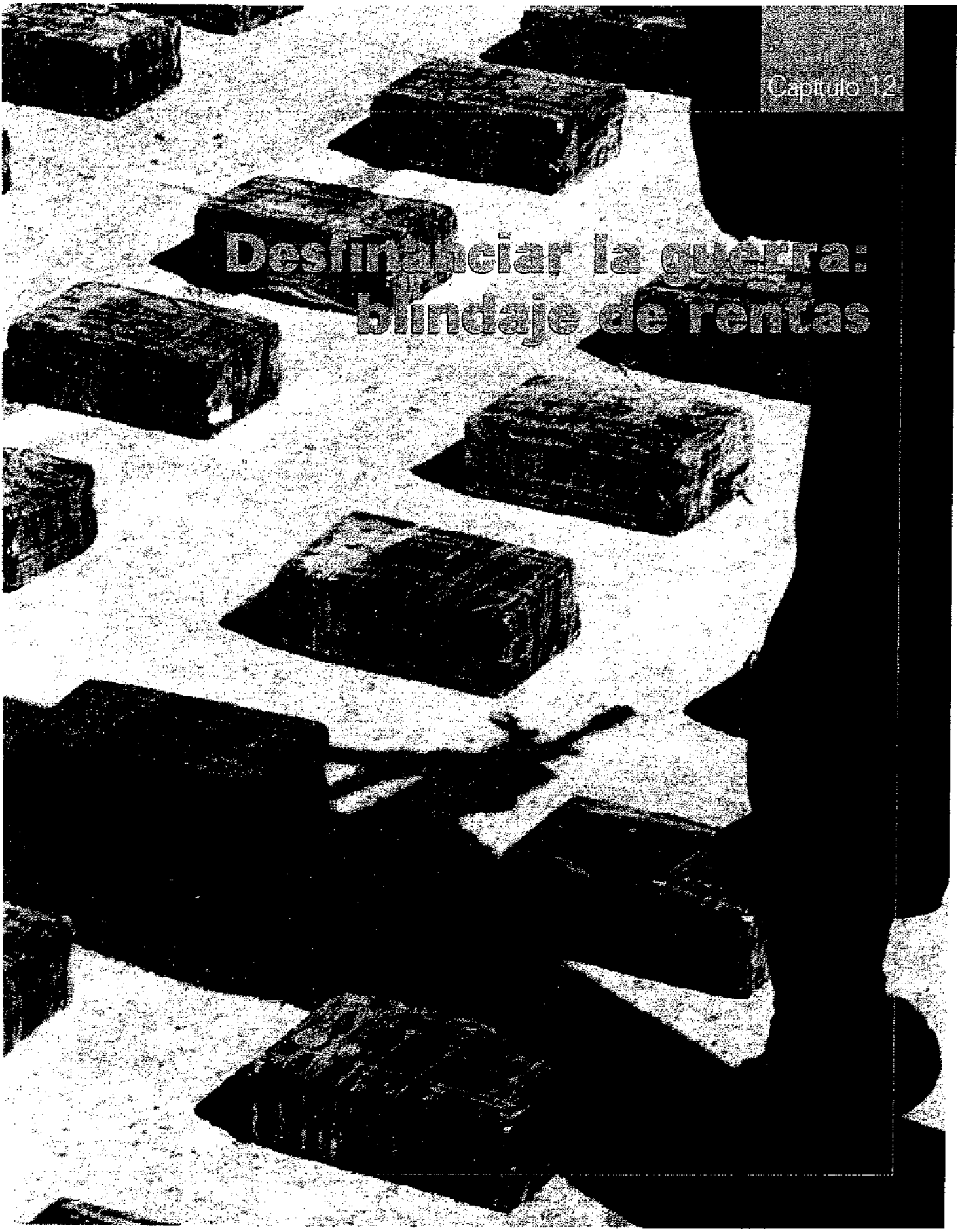
[3] Although, in general usage, the term also applies to extortion of industry and commerce.

Although non-payment agreements ought to be signed in each professional association, it is difficult – as with kidnapping – to ensure that these agreements are upheld when the time comes. It is therefore necessary to resort to legal mechanisms parallel to those mentioned in the previous section, except that in this case, control is even better justified because we do not find ourselves in such a clear *state of necessity*. Congress and Conase (*the National Council to Fight Kidnapping and other Attacks on Personal Freedom*) must therefore determine the most appropriate legal means by which to monitor the assets of those individuals or companies who display evidence of being subjected to *vacuna* or *seguro*. These warning signs could be gathered from inspections of businesses and companies located in very high-risk areas performed by the Superintendence of Companies. This entity would communicate the most severe warning signs to the Attorney General via a mechanism that is comparable to the *suspicious operations reports* currently sent by financial institutions to the Superintendence of Banks. Furthermore, these reports could cover not only income suspected of having origins in illicit enrichment, but also expenses apparently destined for the illicit enrichment of third parties.

El conflicto, callejón con salida

Informe Nacional de Desarrollo Humano para Colombia – 2003



Capítulo 12

Desfinanciar la guerra: blindaje de rentas

AGRADECIMIENTOS

Colaboración: capitán Esteban Arias, Édgar Cataño, Jorge Gaviria, César González Muñoz, Alexandra Guáqueta, Juan Felipe Laverde, Astrid Martínez, Carlos Miguel Ortiz, Juan Camilo Restrepo, Andrés Soto y Rodolfo Uribe.

Página anterior: Foto 12.1 **Decomiso de una tonelada de cocaína** en La Dorada, Caldas • Foto: John W. Vizcaíno/ El Tiempo.

titucionalidad más detenido y la búsqueda de medidas alternativas para impedir el pago de nuevos secuestros.

• Sanciones a empresas multinacionales. Otra fuente de pagos son las compañías extranjeras que operan en Colombia, incluso de aseguradoras que amparan el riesgo de secuestros y aun de firmas especializadas en negociar secuestros (Recuadro 12.1). De acuerdo con Pax Christi, sólo catorce de las doscientas compañías europeas que trabajan en Colombia respondieron una encuesta sobre las condiciones reales de su trabajo en el país. Ninguna de las catorce quiso hablar sobre el pago de extorsiones. Como dijera un alto ejecutivo: "Para una empresa, el secuestro de uno de sus empleados es una tragedia enorme y aunque oficialmente no pagar será siempre la primera opción, la mayoría de las veces cedemos pues no queremos correr con la responsabilidad de jamás volver a ver a nuestros trabajadores" (http://www.mindefensa.gov.co).

Dado que la Corte declaró parcialmente exequibles las normas que sancionan a las empresas que pagan secuestros y a las aseguradoras que amparan este riesgo (artículos 25 y 26 de la ley 40 de 1993, y artículo 12 de la ley 282 de 1996) y dada también la indiferencia con que algunas empresas asumen estas normas, urge que la comunidad internacional —ahora tan sensible al desafío del terrorismo— tome medidas frente a un drama que aunque más silencioso que el macabro asesinato masivo de civiles, constituye un poderoso factor de deterioro de la seguridad humana y de paso una fuente de financiación para seguir perpetrando aquellos otros horrores.

El Consejo Económico y Social de las Naciones Unidas podría adoptar una resolución, complementaria de la Convención contra la Delincuencia Organizada Transnacional aprobada en el 2000, que inste a los estados miembros y especialmente a los países sede de grandes multinacionales a imponer sanciones drásticas sobre aquellas involucradas en el pago, aseguramiento de pagos y negociación de secuestros en Colombia.

A través de los acuerdos binacionales o multilaterales de cooperación judicial, el gobierno colombiano debe además buscar que sus socios comerciales adopten medidas en igual sentido y, en particular, que la Unión Europea adopte un código de conducta más severo.

No menos, la Secretaría del Grupo de Acción Financiera Internacional sobre el Blanqueo de Capitales (GAFI), debería incorporar al listado de recomendaciones para sus 29 países miembros (incluidos los de la OCDE), la adopción de sanciones contra las empresas que paguen, aseguren pagos o negocien secuestros.

a. Diagnóstico

Mientras el secuestro suele ocurrir en ciudades y zonas donde el grupo armado tiene poca capacidad de control, la extorsión es característica de regiones donde su presencia está más consolidada, aunque por supuesto las dos actividades no se excluyen.

Las modalidades de extorsión varían según el tipo de actividad económica. Cuando se aplica al sector ganadero y agrícola es denominada *vacuna*[3] y su monto se fija en función del tamaño y productividad del predio según resulte de un censo que efectúa el grupo armado.

Cuando la extorsión recae sobre compañías petroleras u otras grandes empresas, adquiere el carácter de un *contrato de seguridad*. Ésta es una fuente de jugosas ganancias para los armados y en especial para el ELN, que no se inhibe de secuestrar aunque invoque cierto moralismo y aun cierta religiosidad para no participar tanto como otros en el comercio de drogas ilícitas.

Existen contratos de seguridad sobre otras actividades extractivas (oro y carbón), y de servicios (transporte de mercancías y pasajeros). La actividad aurífera paga una tarifa mensual en función del tipo de maquinaria y equipo utilizados, de modo que quien usa retroexcavadoras paga más que quien usa dragas o motobombas, y éste a su vez paga más que el artesano o *barequero*. Pero a todos se les cobra, incluso a los tenderos y cantineros de las áreas próximas a las explotaciones (Rangel, 2001: 398).

En el caso del carbón, los vehículos que lo transportan cancelan una tarifa de libre circulación que depende del tamaño de la tolva y del número de ejes. Incluso hay bases para pensar que la disminución del secuestro en departa-

3. Aunque el uso generalizado del término aplica también para la extorsión sobre la industria y el comercio.

Firmas internacionales que aseguran secuestros*

La firma Lloyd's de Londres empezó a vender pólizas de seguro contra el secuestro después de la desaparición del hijo de Lindbergh en 1932. En el presente, el Grupo Hiscox —perteneciente a Lloyd's— emite alrededor de cinco mil pólizas al año, que representan aproximadamente 60% del mercado mundial. Además, controla 50% del mercado de seguros antisecuestro en América Latina. Se cree que Hiscox (Lloyd's) cubre cerca de treinta secuestros anuales, pero el grupo se niega a suministrar nombres de sus clientes o detalles sobre el monto de los rescates pagados hasta ahora. La aseguradora norteamericana AIG ocupa el segundo lugar en el mercado mundial, seguida por Chubb, con sede en Nueva Jersey. Algunas de las pólizas que ofrecen cubren también los casos de extorsión.

La póliza siempre se paga en dólares. Al principio este negocio se realizaba en Panamá, luego en otros países centroamericanos o en Miami y, finalmente, en Europa misma. Por ejemplo, la empresa Seitlin & Company —con sede en Miami— utiliza esta vía alterna y se ha convertido en una de las vendedoras más importantes de pólizas antisecuestro en Colombia, a las que denominan *seguro especial de indemnización*. La ya mencionada empresa Lloyd's de Londres opera de la misma manera en Colombia, bajo el nombre de Nicholson Leslie Group Special Risks.

Muchas empresas extranjeras que envían a sus empleados a Colombia, evaden la ley colombiana mediante la compra de la póliza en el país donde se encuentra radicado el asegurador. En otras palabras, el empleado llega a Colombia asegurado.

* Pax Christi Holanda, 2002 *La industria del secuestro en Colombia: ¿un negocio que nos concierne?* Bogotá, Pax Christi Holanda

mentos carboníferos como La Guajira (Vergara, 2000: 92) pudo deberse al aumento de pagos por este tipo de extorsión (Rangel, 2001: 399).

b. Recomendaciones

El pago de vacunas y de contratos de seguridad es una fuente de externalidades negativas: cada pago aumenta los beneficios netos esperados de la siguiente extorsión. Por ende, las políticas deben basarse en un principio similar al que invocamos respecto del secuestro.

La prioridad, por supuesto, es mejorar el servicio de seguridad y justicia penal para evitar y castigar esas prácticas. Pero entretanto habrá que concentrase en la cultura del no pago.

Aunque al interior de cada gremio deberían suscribirse acuerdos de no pago, es difícil —como ocurre con el secuestro— lograr que estos convenios se cumplan cuando llega el momento. Es necesario entonces apelar a herramientas legales paralelas a las del acápite anterior, sólo que acá el control está aún mejor justificado porque no estamos ante un *estado de necesidad* tan claro. El Conase y el Congreso de la Republica habrían pues de evaluar la forma jurídica más apropiada para ejercer vigilancia sobre los activos de aquellas personas o empresas donde haya pistas serias de haber sido sometidas a *vacuna* o *seguro*. Esos indicios podrían derivarse de inspecciones que la Superintendencia de Sociedades realice sobre los negocios y empresas asentados en zonas de muy alto riesgo. La entidad remitiría los más graves a la Fiscalía General de la Nación, en un mecanismo comparable al *reporte de operaciones sospechosas* (ROS) que hoy envían las entidades financieras a la Superintendencia Bancaria. Más aún, los ROS podrían cobijar no sólo los ingresos sospechosos de provenir del enriquecimiento ilícito sino los egresos aparentemente destinados al enriquecimiento ilícito de un tercero.

EXHIBIT N

TRANSPERFECT

AFFIDAVIT OF ACCURACY

I, Carrie Russ, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of the accompanying document [El Espectador - Paul Wolf interview (Spanish) (JEA's edits)] from Spanish into English.

Carrie Russ
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Sworn to before me this
10th day of July 2008

Signature, Notary Public

Lisa Chan
Notary Public, District of Columbia
My Commission Expires 1/1/2013

Stamp, Notary Public

Washington, DC

"If It Wants to Survive, Chiquita Brands Must Negotiate"

Caption. Payments were made with the consent of the company's management in the United States

Date: June 15, 2008
Page: 20

■ **Attorney Paul Wolf may drive the banana-producing multinational into bankruptcy if he wins the civil lawsuit he filed in the United States on behalf of 1,800 families who were victims of the Urabá paramilitaries.**

By Cecilia Orozco Tascón,
Special to El Espectador

The fate of about 10,000 victims of the paramilitaries in the Urabá area of Antioquía affects this gringo more deeply than it does 99% of Colombians.

His name is Paul and although he maintains his residence in Washington, he is already well known in the area, since for the past three years he has dedicated himself almost totally to the preparation of an unprecedented civil lawsuit for damages against multinational banana producer Chiquita Brands, to force it to pay compensation to the survivors of the period of terror imposed by Mancuso, *H.H. and El Alemán* ["The German"] in this region.

The story admitted in the North American court on Chiquita's relationship with the paramilitaries goes back to 1997, when the firm began giving these illegal groups three U.S. cents for each exported box of bananas in exchange for "protection". The company made about one hundred payments until 2004, through operations that were known and approved by some of the directors at the highest hierarchy of the Cincinnati, Ohio multinational. Penny after penny, this apparently trivial sum rose to the amount of 1.7 million dollars, which, once in the AUC's [*Autodefensas Unidas de Colombia*, United Self-Defense Forces of Colombia] possession, was used to buy arms and strengthen their criminal organizations.

Chiquita Brands agreed to pay a 25 million dollar fine over five years to the U.S. Department of the Treasury in exchange for criminal immunity in that country for those responsible at the firm. Nothing compared to the figures for the victims who died during this seven-year period in the Urabá region: between 10,000 and 20,000 dead. But the banana producer did not count on the lawsuits that would later arrive once it officially had acknowledged its guilt.

The person responsible for starting the most voluminous proceeding among the ten that are now pending in various American courts is Paul Wolf, a veteran defender of human rights who has transformed himself, literally speaking, into an attorney for poor people in cases in difficult nations of the world, such as Colombia and Iraq.

Meanwhile, the [Colombian] Attorney General's Office, which is conducting a criminal investigation of the same events, has not yet been able to even obtain from the publicized judicial cooperation program the names of Chiquita's directors, the killers' accomplices. We are far from seeing the elegant blond men who without any pangs of conscience bet their wallets on the New York Stock Exchange in one of Colombia's run-down jails. This Lone Ranger is getting much closer to them. And they know it.

Cecilia Orozco Tascón: Will the civil lawsuit you brought against Chiquita Brands in the United States finally be accepted by the Federal Court in Washington?

Attorney Paul Wolf: It was accepted in principle, but Chiquita later brought a motion that is not strange in the United States. The banana producer argued that we did not provide sufficient details on the plaintiffs in the arguments of the complaint. This is because I wanted to protect their identities for security reasons. As the victims' representative, I petitioned the Court for an order of protection prior to delivering a list to Chiquita Brands with the names. I want to give you an example that justifies my concerns: a Colombian newspaper reported that the *Aguilas Negras* [Black Eagles] stole a thousand case files prepared by an NGO for the proceedings which are underway under the terms of the Law of Justice and Peace. (*) In the United States, anyone who reveals details of cases which have obtained an order of protection from the courts commit a crime. For this reason, my position is fairly reasonable in the eyes of the Court.

C.O.: What will you argue in order for the U.S. court to declare itself competent to rule on cases that occurred in Colombia?

P.W.: In the first place, Chiquita's headquarters is in the United States. The murders were committed in Colombia, but other important events relative to payments and agreements between the *Autodefensas Unidas* and some of Chiquita's directors took place in the United States. In court, I'm going to argue that the murders that occurred in Urabá were war crimes and thus are violations of International Humanitarian Law.

C.O.: Specifically, which were the payments and agreements between the AUC and Chiquita that actually took place in the United States, in your opinion?

P.W.: The payments were made in Colombia, but it is clear that they were carried out with the consent of the company's directors in the United States. So much so that it was learned about the preoccupation of one of Chiquita's directors when the paramilitaries were classified by the State Department as a "foreign terrorist organization". Since he knew that the company had paid the AUC, he wanted to establish if they had committed a crime.

C.O.: Assuming that the lawsuit is accepted by the Federal Court, will it be more difficult for you to prove the direct connection between Chiquita and the paramilitaries' crimes in the banana-producing area? How will you do that?

P.W.: The general argument is that this company is liable for the crimes committed because for more than seven years it paid a monthly amount to Carlos Castaño and the AUC. And this is the organization that perpetrated the killings that occurred at the same time and place. Additionally, we can establish direct links between Chiquita and several of the murders, such as for example when they were committed inside banana plantations that sold their products to the company. Secondly, we have testimony under the Law of Justice and Peace from Mancuso, from alias *H.H.* and from *El Alemán* [The German]. They admitted that they accepted money from Chiquita. Mancuso was more specific because he said that the relationship between his organization and the company was not one of extortion, but that they were hired to provide private security services.

C.O.: How many of the victims' family members do you represent?

P.W.: I now am engaged by 1,800 families, but if we start from the basis that for each murder there are five or six plaintiffs (wife, children and parents), we reach the number of 10,000 people. In addition, it has to be taken into account that even though I began the

work on these cases, there are already other, similar proceedings that total 1,500 crimes. In total, I estimate that there are close to 20,000 plaintiffs and, making a projection, this number can be multiplied somewhere between five and ten times in the future.

C.O.: What are the family members' demands?

P.W.: My clients are very poor, they live in "*invasión*" areas [shanty towns] and many have been displaced from their homes. A typical case is that of victims whose father was murdered, and the mother, with five children, had to flee from her home to go live somewhere else. Since she doesn't have any way to support her children, there is no shame in saying that in addition to justice being done and having the truth revealed, the money is an important compensation. Chiquita's payments to the paramilitaries were calculated as "business expenses". How can reparations be less than that? The economic punishment of Chiquita Brands must serve as an example to other companies, and revealing the names of those responsible would not be enough.

C.O.: If the plaintiffs add up to more than 20,000 people now and about 100,000 in the future, would Chiquita have enough money to pay them? How much monetary compensation could be asked for each victim?

P.W.: Clearly, Chiquita does not have enough money to pay every one of them a fair amount. The compensation for losses caused by wrongful death normally costs millions of dollars in the United States. Even if we limited the company's responsibility to those murders committed close to Chiquita's properties in Urabá, this company would not have [the means] to pay. So, there is a dilemma, and a good solution might be to reach a global agreement with the population so that instead of a few, everyone would receive an equitable sum.

C.O.: What would be an "equitable sum" in a "global agreement" for those concerned from Urabá?

P.W.: I think that the sum of 100,000 dollars per person would be reasonable, and the procedure for payment to the victims could last a few years to minimize its financial effect on the company. However, this amount of money exists in my imagination and nothing has been settled with Chiquita yet. In any case, if the company does not accept any idea that is similar to this one, all the attorneys who are participating will try to have the compensation be as high as possible. If they negotiate with me, and if the majority of the victims agree, the other attorneys who demand larger sums in the future would have to go to trial, the costs of which exceeds a million and a half dollars. Instead, if we negotiate a fair amount, the rest of the people will not want to take this risk or wait five years or more. For this reason, I think that Chiquita does not have any other option but to negotiate, if it wants to survive.

C.O.: In your complaint against Chiquita Brands, do you also attribute personal liability to some of the company's directors?

P.W.: Once the main arguments have been accepted, we will enter into a phase of the proceedings which is called "discovery". This is the stage of revelations. At this time, we have the names of ten executives whom we believe may be involved in this case. We will include not only those directly responsible for the payments made to the AUC, but also those who were members of the company's board of directors in the United States. When Chiquita admitted that it had paid the paramilitaries for several years and negotiated a 25 million dollar fine with United States authorities, of which not even one cent was for reparations to the victims, they fatally wounded the future of Chiquita Brands.

C.O.: Why do you believe that the acceptance of the payment of a 25 million dollar fine was an error, if it is considered a very light sentence here? Perhaps because it opened up the possibility of lawsuits from the victims?

P.W.: Exactly. Chiquita exchanged what it thought was a minor sentence for an overwhelming admission of guilt for criminal charges. They accepted that fine to escape individual liability and, in addition, this amount is small compared to what the firm produces, because its sales are 4.5 billion dollars annually. The fine will be paid over five years, that is to say, five million dollars each time.

This means only 0.1% of its annual sales. What they did not calculate was, that with the admission of guilt, they would open the floodgates to never-ending lawsuits, until all the victims have been located. They still have nine years to submit their cases against Chiquita. If it is also taken into consideration that some directors could be extradited to Colombia, I believe the decision that they took was wrong.

C.O.: Are the directors of Chiquita Brands also facing lawsuits from other company shareholders who were not involved in the payments to the AUC?

P.W.: Yes. This type of proceeding is called a derivative action by shareholders and is filed against the directors as individuals. Some of these people are very rich, but I doubt that they have enough money to repair the damage caused. The plaintiffs can demand compensation for the payment of the 25 million dollar fine. However, this is a small sum when compared to what the suing shareholders will lose when the damages that Chiquita will have to pay the Urabá victims are set. There are four cases already filed by groups of shareholders against the board of directors.

C.O.: If the Colombian Attorney General's office requested the extradition of these directors, do you think that the United States will hand them over to Colombia?

P.W.: Thomas Shannon (Under-Secretary of Hemispheric Affairs) publicly said yes, when asked this question. The extradition request is totally in the hands of Attorney General Iguarán and in my opinion, it is very important for the dignity of Colombia.

C.O.: You have come to the country several times, what new facts have you found to use in your lawsuit in the United States?

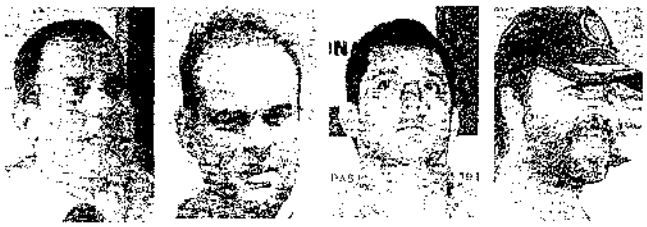
P.W.: First, the testimony from the AUC's commanders. They mentioned various specific events that are related to my clients' cases. Second, the investigations that the Prosecutor's Office is undertaking to identify bodies in mass graves will be very important, as an addition to trials for forced disappearances. Third, the matters discovered at Justice and Peace [proceedings] have an aspect that will also benefit my clients: they can receive compensation through the assets confiscated in Colombia from paramilitary commanders and from Chiquita, since both are liable.

C.O.: If your clients win in your country, what would guarantee that they would actually be paid if they are in Colombia and have no resources to make claims when the trial is over?

P.W.: As a human rights activist who has worked in Colombia for ten years, I think that this project is the most important one in my life. If we win, I will probably need to establish myself in Urabá for part of the year to guarantee that people receive their payments. That is my commitment to [Urabá]. The opportunity to take these displaced persons out of poverty and of fear is the dream that I am planning to dedicate the rest of my life to, if necessary.

El proceso en Colombia

La Fiscalía General, a través de la fiscal 29 especializada de Medellín, Alicia Domínguez, indagó a los representantes legales de Chiquita Brands y no descarta pedir en extradición a funcionarios estadounidenses. En abril pasado fue capturado Raúl Emilio Hasbún Mendoza, alias 'Pedro Bonito' o 'Pedro Pirata', ex comandante del Bloque Bananero y desmovilizado el 25 de noviembre de 2004, en Turbo, Antioquia. Lo señalaron Salvatore Mancuso y Éver Veloza. Le endilgan crímenes de las autodefensas en Urabá desde 1996, a través de una cooperativa de seguridad llamada Papagayo, así como el cobro del "impuesto" bananero.

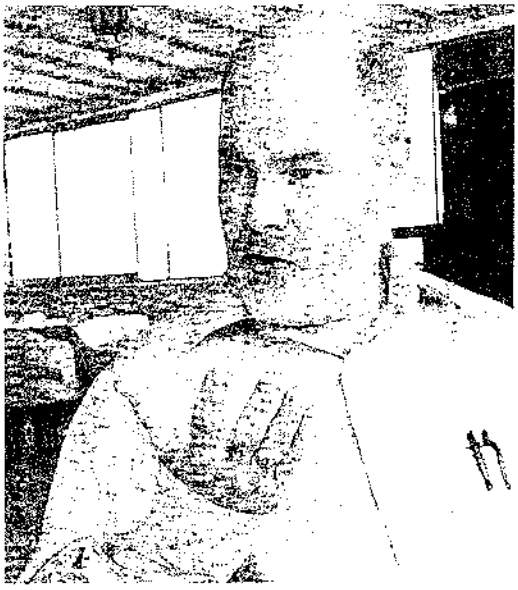


Chiquita le pagaba a Carlos Castaño. Lo admiten Salvatore Mancuso, Éver Velosa 'H.H.' y Freddy Rendón 'El Alemán'.

Entrevista

"Si quiere sobrevivir, Chiquita Brands tiene que negociar"

El abogado Paul Wolf podría conducir a la bancarrota a la multinacional bananera si gana la demanda civil que interpuso en Estados Unidos a nombre de mil ochocientas familias víctimas de los paramilitares de Urabá.



Los pagos se realizaron con el consentimiento de las directivas de la empresa en Estados Unidos.

Cecilia Orozco Tascón
Especial para El Espectador

Se conmueve más este gringo por el destino de alrededor de diez mil víctimas de los paramilitares en el Urabá antioqueño, que el 99% de los colombianos. Se llama Paul y aunque tiene su residencia en Washington, en la zona su figura ya es bien conocida porque desde hace tres años se ha dedicado casi por completo a preparar una demanda civil sin precedentes económicos contra la multinacional bananera Chiquita Brands, para obligarla a que indemnice a los sobrevivientes de la época de terror impuesta por Mancuso, *H.H.* y *El Alemán* en esa región.

La historia admitida ante la justicia norteamericana de la relación de Chiquita con los paramilitares se remonta a 1997, cuando esa firma empezó a darles a los grupos ilegales tres centavos de dólar por cada caja de banano exportada, a cambio de "protección". La empresa ejecutó alrededor de cien pagos hasta el 2004, mediante operaciones que conocían y aprobaron algunos directivos de la más alta jerarquía de la multinacional en Cincinnati (Ohio). De centavo en centavo tal suma, aparentemente irrisoria, ascendió a la cifra de 1,7 millones de dólares que una vez en poder de las AUC, éstas usaron para armarse y fortalecer sus organizaciones criminales.

Chiquita Brands acordó con el Departamento del Tesoro de Estados Unidos el pago de una multa de 25 millones de dólares en cinco años, a cambio de inmunidad penal en ese país para los responsables de la firma. Nada, comparado con el cálculo de víctimas fatales en el lapso de esos siete años en la región de Urabá: entre 10 mil y 20 mil muertos. Pero la bananera no calculó las demandas que vendrían después por haber aceptado oficialmente su culpa.

El encargado de iniciar el proceso más abultado de la serie de diez que existen hoy en varios tribunales estadounidenses es Paul Wolf, un antiguo defensor de derechos humanos que se ha convertido, literalmente hablando, en el abogado de los pobres en casos de complicadas naciones del mundo, como Colombia e Irak. Entre tanto la Fiscalía nacional, que adelanta la investigación penal por los mismos hechos, ni siquiera ha podido obtener del publicitado programa de cooperación judicial, los nombres de los directivos de Chiquita, cómplices de los asesinos. Lejos estamos de ver en una de las desvencijadas cárceles colombianas a los elegantes rubios que juegan sus bolsillos en la Bolsa de Nueva York sin ningún remordimiento. Mucho más cerca les respira este llanero solitario. Y ellos lo saben.

Cecilia Orozco Tascón.- El proceso civil que usted adelanta contra Chiquita Brands en Estados Unidos, ¿será finalmente aceptado por la Corte Federal de Washington?

Abogado Paul Wolf.- Fue aceptado en principio, pero posteriormente Chiquita interpuso una acción que no es extraña en Estados Unidos. La bananera argumentó que nosotros no proveímos suficientes detalles de los peticionarios en los alegatos de admisión. Eso se debe a que quise proteger la identidad de ellos por razones de seguridad. Como representante de las víctimas, le solicité a la Corte una orden de protección antes de entregarle una lista con nombres a Chiquita Brands. Le quiero poner de presente un ejemplo que justifica mis inquietudes: un diario colombiano informó que las Águilas Negras se robaron los archivos de mil casos preparados por una ONG para los procesos que se adelantan dentro de la Ley de Justicia y Paz. (*) En Estados Unidos conoce un crimen quien revele apartes de casos que obtienen una orden de protección de la justicia. Por eso mi posición es bastante razonable a ojos de la Corte.

C.O.- ¿Qué argumentará para que la justicia de Estados Unidos se declare competente en casos ocurridos en Colombia?

P.W.- En primer lugar la sede principal de Chiquita está en Estados Unidos. Los homicidios fueron cometidos en Colombia, pero otros hechos importantes sobre pagos y acuerdos entre las Autodefensas Unidas y algunos directivos de Chiquita sucedieron en Estados Unidos. Voy a argumentar en la Corte que los homicidios ocurridos en Urabá fueron crímenes de guerra y que por tanto constituyen violaciones al Derecho Internacional Humanitario.

> **"No es ninguna deshonra decir que en este caso el dinero es una compensación importante".**

C.O. - En concreto, ¿cuáles pagos y cuáles acuerdos entre las AUC y Chiquita ocurrieron en Estados Unidos, según usted?

P.W.- Los pagos fueron hechos en Colombia, pero es claro que se realizaron con el consentimiento de las directivas de la empresa en Estados Unidos. Tanto es así, que se supo de la preocupación de uno de los ejecutivos de Chiquita cuando los paramilitares fueron calificados por el Departamento de Estado como "organización foránea terrorista". Como él sabía que la empresa le había pagado a las AUC, quiso establecer si habían cometido un crimen.

C.O.- Suponiendo que la demanda se admita en la Corte Federal, será más difícil que usted pueda probar la conexión directa entre Chiquita y los crímenes de los paramilitares en la zona bananera. ¿Cómo lo hará?

P.W.- El argumento general es el de la responsabilidad de esa empresa con los crímenes cometidos debido a que durante más de siete años les pagaron una suma mensual a Carlos Castaño y a las AUC. Y ésta es la organización que perpetró los asesinatos que se presentaron en ese mismo tiempo y zona. Adicionalmente podemos establecer enlaces directos entre Chiquita y varios de los homicidios, como por ejemplo, cuando se cometieron dentro de las fincas bananeras que le vendían su producto a la empresa. Segundo, contamos con los testimonios dentro de la Ley de Justicia y Paz de Mancuso, de alias *H.H.* y de *El Alemán*. Ellos aceptaron que recibieron dinero de Chiquita. Mancuso fue más específico porque dijo que entre su organización y la empresa no hubo una relación extorsiva, sino que ellos fueron contratados para prestar servicios de seguridad privada.

C.O.- ¿A cuántos familiares de víctimas representa usted?

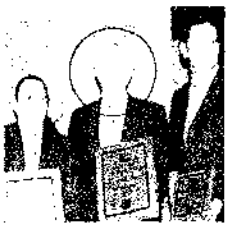
P.W.- Ahora tengo contrato con 1.800 familias, pero si partimos de la base de que por cada homicidio hay cinco o seis reclamantes (esposa, niños y padres), llegamos a la cifra de diez mil personas. Además hay que tener en cuenta que aunque yo comencé a trabajar en estos casos, ya hay otros procesos similares que suman mil quinientos crímenes. En total, estimo que hay cerca de 20 mil reclamantes y, haciendo una proyección, ese número se puede multiplicar entre cinco y diez veces en el futuro.

C.O.- ¿Cuáles son las pretensiones de los familiares de las víctimas?

P.W.- Mis clientes son muy pobres, viven en zonas de invasión y muchos han sido desplazados de sus hogares. Un caso típico es el de las víctimas cuyo padre fue

Y Gaviria les dio premio en la OEA

El 24 de mayo de 2004 la revista *Cromos* reveló que el 14 de abril de ese año el secretario general de la Organización de Estados Americanos (OEA), César Gaviria, presidió la Gala para las Américas en la sede de Washington. La ganadora del galardón de "Conciencia Ciudadana" fue la multinacional bananera Chiquita Brands, cuyo presidente, Fernando Aguirre, recibió una placa conmemorativa. El ex presidente colombiano dijo entonces que fue una "desafortunada coincidencia". "No podía saber con anticipación ni se me informó que Chiquita iba a hacer ese pronunciamiento posterior (el de admitir los pagos a grupos paramilitares)". Sin embargo, documentos de la OEA demuestran que Gaviria sabía del tema por un informe del 6 de enero de 2003 de su propia oficina sobre el contrabando de 3.000 fusiles desde Centroamérica con destino a la zona bananera de Urabá. El arsenal llegó en el barco Otterloo y dos días después fue descargado por la empresa Banadex, la filial colombiana de Chiquita Brands. "La investigación la hicimos, pero no tenía ni idea de que Banadex es la filial de Chiquita en Colombia. Yo no tengo por qué saberlo todo", fue la explicación de Gaviria.



Fernando Aguirre con el premio.

Sepultura de víctimas de los paramilitares en Carepa, eje bananero de Urabá.

asesinado y la madre con cinco niños tuvo que huir de su casa para vivir en otro sitio. Como no tiene ninguna manera de apoyar a sus hijos, no es ninguna deshonra decir que además de obtener justicia y revelación de la verdad, el dinero es una compensación importante. Los pagos de Chiquita a los paramilitares fueron calculados como "gastos del negocio". ¿Cómo pueden las reparaciones ser menos que eso? El castigo económico a Chiquita Brands debe servir como ejemplo para otras empresas y revelar los nombres de los responsables no será suficiente.

C.O.- Si los reclamantes suman más de 20 mil personas hoy y cerca de cien mil mañana, ¿Chiquita tendrá dinero suficiente para pagarles? ¿Cuánto dinero de compensación se podría pedir por cada víctima?

P.W.- Claramente Chiquita no tiene dinero suficiente para pagarles a todos una cantidad justa. La compensación por daños recibidos por homicidio cuesta normalmente millones de dólares en Estados Unidos. Aún si limitáramos la responsabilidad de la empresa a los homicidios cometidos cerca de las propiedades de Chiquita en Urabá, esa firma no tendría cómo pagar. Entonces existe un dilema, y una buena solución podría ser la de llegar a un acuerdo global con la reparación para que en vez de pocos, todos reciban una cantidad equitativa.

C.O.- ¿Cuál sería la "cantidad equitativa" en un "acuerdo global" para los afectados de Urabá?

P.W.- Pienso que una cantidad de cien mil dólares por persona sería razonable, y el proceso de pago a las víctimas podría durar algunos años para minimizar el efecto financiero en la empresa. Pero esa cantidad de dinero es de mi imaginación y nada se ha arreglado con Chiquita hasta ahora. De todas maneras, si la empresa no acepta alguna idea similar a ésta, todos los abogados que intervienen tratarán de que las indemnizaciones sean las máximas posibles. Si negocian conmigo, y si la mayoría de las víctimas están de acuerdo, los otros abogados que pretendían en el futuro mayores cantidades necesitarían ir a un juicio cuyo costo también supera el millón y medio de dólares. En cambio, si negociamos una cantidad justa, el resto de la gente no querrá tomar ese riesgo ni esperar cinco años o más. Por eso pienso que Chiquita no tiene otra opción que negociar, si quiere sobrevivir.

C.O.- ¿En su demanda contra Chiquita Brands le atribuye también responsabilidad personal a algunos de los directivos de esa empresa?

P.W.- Una vez que los argumentos principales sean admitidos, entraremos en una fase del proceso que se llama de "descubrimiento". Es la etapa de las revelaciones. Por ahora tenemos los nombres de diez ejecutivos que creemos que pueden estar involucrados en este caso. Incluiremos no sólo a los responsables directos por los pagos hechos a las AUC, sino también a quienes hacían parte de la junta directiva de la empresa en Estados Unidos. Cuando Chiquita admitió que les pagó a los paramilitares durante varios años y negoció con la justicia de Estados Unidos una multa de 25 millones de dólares, de los cuales ni un centavo era para reparar a las víctimas, lesionaron fatalmente el futuro de Chiquita Brands.

C.O.- ¿Por qué cree que admitir el pago de la multa de 25 millones fue un error si aquí se considera que es una pena muy suave? ¿Tal vez es porque se abrió la posibilidad de demandas de las víctimas?

P.W.- Exacto. Chiquita canjeó lo que consideró como una pena menor por una admisión de culpabilidad contundente por cargos criminales. Ellos aceptaron esa multa para escapar de la responsabilidad individual y, además, ese monto es poco para lo que produce la firma porque sus ventas son de 4,5 mil millones de dólares por año. La multa se pagará en cinco años, es decir a cinco mil millones de dólares cada vez. Eso significa sólo el 0,1% de sus ventas anuales. Lo que no calcularon fue que con la admisión de culpa les abrían las puertas a pleitos sin fin, hasta cuando todas las víctimas hayan sido ubicadas. Estas tienen todavía nueve años para presentar sus casos en contra de Chiquita. Si también se considera la posibilidad de que algunos directivos puedan ser extraditados a Colombia, creen que la decisión que tomaron fue equivocada.

C.O.- ¿Las directivas de Chiquita Brands también enfrentan demandas de otros accionistas de la empresa que no tuvieron que ver con los pagos a las AUC?

P.W.- Sí. Ese tipo de proceso se llama acción derivativa por accionistas y se presenta en contra de los directivos como personas. Algunas de estas son muy ricas pero dudo de que tengan el dinero suficiente para reparar el daño causado. Los demandantes pueden reclamar compensación por el pago de los 25 millones de dólares de la multa. Sin embargo, esa suma es pequeña si se compara con la que perdieron los accionistas reclamantes cuando se estabilizó la indemnización que tendrá que pagarles Chiquita a las víctimas de Urabá. Ya existen cuatro casos entablados por grupos de accionistas contra la junta directiva.

C.O.- Si la Fiscalía colombiana pidiera en extradición a esos directivos, ¿cree que Estados Unidos se los entregaría a Colombia?

P.W.- Thomas Shannon (Subsecretario de Asuntos Hemisféricos) sostuvo públicamente que sí, cuando le hicieron esa pregunta. La petición de extradición está por completo en manos del fiscal Iguarán y es, a mi juicio, muy importante para la dignidad de Colombia.

C.O.- Usted ha venido varias veces al país, ¿qué hechos nuevos ha encontrado para utilizar en su demanda en Estados Unidos?

P.W.- Primero, los testimonios de los jefes de las AUC. Ellos mencionaron varios eventos específicos que se relacionan con los casos de mis clientes. Segundo, las investigaciones que la Fiscalía adelanta para identificar cuerpos en fosas comunes serán muy importantes para anexarlas a los procesos de desaparición forzada. Tercero, los asuntos conocidos en Justicia y Paz tienen un aspecto que también beneficia a mis clientes: pueden recibir indemnización por bienes confiscados en Colombia a los jefes paramilitares y a Chiquita, puesto que ambos tienen responsabilidad.

C.O.- Si sus clientes ganan en el país, ¿cuál será la garantía de que efectivamente les pagarán si ellos están en Colombia, y no hacen recursos para reclamar cuando se termine el proceso?

P.W.- Como activista de derechos humanos que he trabajado en Colombia durante diez años, considero que éste es el proyecto más importante de mi vida. Si ganamos, probablemente necesitaré establecerme en Urabá una parte del año para garantizar que la gente reciba su pago. Es mi compromiso con ella. La oportunidad de sacar de la pobreza y del miedo a estas personas desplazadas es un sueño al que le planeo dedicar el resto de mi vida, si es necesario.

"Los pagos de Chiquita a los paramilitares fueron calculados como 'gastos del negocio'".

WIESNER & ASOCIADOS LTDA.
ABOGADOS

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:

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

Case No. 07-cv-3406(JAG)
_____/

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

Case No. 9:08-cv:80480
_____/

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

Case No. 08-808508-CIV
_____/

DECLARATION OF EDUARDO A. WIESNER

1. I am a lawyer at Wiesner & Asociados Ltda. Abogados in Bogotá, D.C. Colombia. I have been practicing law in Colombia for 17 years, and I am a lawyer in good standing in Colombia. I have reviewed plaintiffs' complaints, and I make this declaration on personal knowledge, in support of Chiquita Brands International, Inc.'s motion to dismiss plaintiffs' complaints.

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2. Colombian civil law provides for both direct and indirect (vicarious) extra-contractual (tort) liability actions. Direct extra-contractual liability actions are governed by article 2341 of the Colombian Civil Code; indirect extra-contractual liability actions are governed by article 2347 of the Colombian Civil Code.

3. Under article 2341, a person who commits an illicit act (negligence, willful misconduct, or fraud) and causes damage (any bodily, moral, or material injury) is obligated to indemnify such damage.[1]

4. Under article 2347, a principal is liable for injury caused by the fault of a person under his supervision, and who is acting within the scope of his powers.[2]

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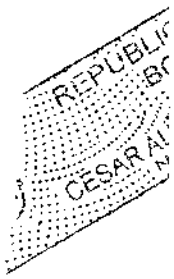
[1] Article 2341 of the Colombian Civil Code provides: "A person who has committed a crime or fault which caused harm to another person is under the obligation to indemnify him or her, without prejudice to the main penalty imposed by the law for the said offense or crime committed."

[2] Article 2347 of the Colombian Civil Code provides:

> Every person is liable, not only for their own actions, for the purposes of indemnifying damages, but also for the deeds of those who are under their care.
>
> *Modified by Article 65 of Decree 2820 of 1974.*- As such, the parents are jointly liable for the act of the minor sons who live in the same home.
>
> As such, the tutor or curator is liable for the conduct of the pupil that lives under his care and dependency.
>
> As such, the directors of schools are liable for the conduct of their disciples while they are under their care and artists and business undertakers for the conduct of their apprentices or subordinates, in the same event.
>
> But the liability of such persons will cease, if the authority and care which their capacity confers and prescribes upon them would not have sufficed to avoid the fact.



5. Both direct and indirect (vicarious) extra-contractual liability actions are based on personal fault, that is, they are grounded on the negligent or willful act of the liable party. In the case of direct liability actions, the liable party must have caused damage in a negligent or willful manner. In the case of indirect (vicarious) extra-contractual liability actions, the liable party must have been negligent in the care it was due to exercise over the person who caused the injury or damage.

6. In both direct and indirect (vicarious) extra-contractual liability actions, the injured party bears the burden of proof and must demonstrate three elements: fault, damage, and a causal relation between them. The Colombian Supreme Court has stated:

> Based on Article 2341 of the Civil Code, this Corporation has historically concluded that, in order to engage the responsibility of an individual or a corporation, on an extra-contractual basis, coexistence of the three elements that traditional doctrine has identified as "fault, damage and causal relation between them" is required. These conditions are the axiological scenery of the claim under study and define the evidentiary burden of the plaintiff, since he has the burden of demonstrating the patrimonial or moral (damage) detriment and that such damage is a consequence of the fault of the plaintiff, because the responsibility is the result of the legal relationship of two individuals: the author of the damage and the person that suffered such damage.[3]

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[3] Corte Suprema de Justicia. Sala de Casación Civil y Agraria. Magistrado Ponente: Dr. José Fernando Ramírez Gómez. Bogotá, 25 de octubre 1999. Referencia: Expediente No. 5012. Original Spanish Text: "*Como desde antaño lo viene predicando la Corporación con apoyo en el tenor del artículo 2341 del C. Civil, para que resulte comprometida la responsabilidad de una persona natural o jurídica, a título extracontractual, se precisa de la concurrencia de tres elementos que la doctrina más tradicional identifica como "culpa, daño y relación de causalidad entre aquélla y éste". Condiciones estas que además de configurar el cuadro axiológico de la pretensión en comentario, definen el esquema de la carga probatoria del demandante, pues es a éste a quien le corresponde demostrar el menoscabo patrimonial o moral (daño) y que éste se originó en la conducta culpable de quien demanda, porque al fin y al cabo la responsabilidad se engasta en una relación jurídica entre dos sujetos: el autor del daño y quien lo padeció.*"

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on the 8th day of July 2008, in Bogotá, D.C., Colombia.

Eduardo A. Wiesner

CESAR AUGUSTO ALVARADO GAITAN
Notaria 36(E) de este Circulo hace constar que la(s) firma(s) que aparece(n) en el presente documento correspondiente(s) a:
EDUARDO A. WIESNER
Identificado con C.C. 39 756 998
Que(son) puesta(s) de su puño y letra en esta Notaria y de cuyo contenido no se responsabiliza
Fecha: 8 JUL. 2008

REPÚBLICA DE COLOMBIA
BOGOTÁ D.C.
NOTARIA 36
CESAR AUGUSTO ALVARADO GAITAN
NOTARIO ENCARGADO