UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01916-MD-MARRA/JOHNSON

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

This Document Relates To:
ATS ACTIONS
_____/
NO. 08-80421-CV-MARRA/JOHNSON

JOHN DOE 1 *et al.*,
Plaintiffs,
v.
CHIQUITA BRANDS INTERNATIONAL, INC., *et al.*,
Defendants.
_____/
NO. 08-80480-CV-MARRA/JOHNSON

JUAN/JUANA DOES 1-619,
Plaintiffs,
v.
CHIQUITA BRANDS INTERNATIONAL, INC., *et al.*,
Defendants.
_____/
NO. 08-80508-CV-MARRA/JOHNSON

JOSE LEONARDO LOPEZ VALENCIA *et al.*
Plaintiffs,
v.
CHIQUITA BRANDS INTERNATIONAL, INC., *et al.*,
Defendants.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S CONSOLIDATED MOTION TO DISMISS THE COMPLAINTS

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I. INTRODUCTION

In March 2007, Defendant Chiquita Brands International pled guilty to knowingly providing material support to the *Autodefensas Unidas de Colombia* or "AUC," a paramilitary organization widely known for its violent attacks on Colombian civilians and designated a "Foreign Terrorist Organization" by the United States government. The United States described Chiquita's support to the AUC as "prolonged, steady, and substantial" in the Sentencing Memorandum submitted to the District Court and found, after a full investigation, that "Chiquita's money helped buy weapons and ammunition used to kill innocent victims." For seven years, Chiquita provided not only financial assistance to the AUC but also shipments of arms and ammunition with the knowledge, from the day the first payment was made, that the AUC was a violent organization responsible for extrajudicial killings, torture, forced disappearances, war crimes, and other human rights violations. Chiquita supplied this support in exchange for the pacification of the banana growing regions of the country and the suppression of labor and community opposition to the company. During this time, Colombia was Chiquita's most profitable banana-producing region despite a bloody civil war. The Plaintiffs here are family members of the trade unionists, banana workers, political organizers, activists and others killed by the AUC, with Chiquita's support.

The cases are based on the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, and state tort law. Cases involving human rights abuses of this kind have been standard fare in ATS and TVPA litigation for more than two decades. The Supreme Court recently endorsed this jurisprudence in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The complaints present classic allegations of extrajudicial executions and other human rights violations widely accepted as meeting *Sosa*'s requirements for liability under the ATS. The complaints also squarely raise the issue of whether terrorism and material support for terrorism of this kind are actionable under the ATS. As demonstrated below and in the expert declaration of Professor William Aceves, there is no doubt that terrorism and material support for terrorist acts violate customary international law and that the ATS can be used by victims of terrorism to hold its aiders and financiers accountable. Indeed, the United States has been a leader in the international community in enacting and enforcing prohibitions against the aiders and financiers of terrorism. Chiquita's arguments to the contrary are without merit.

Chiquita also implies that the Court should make factual findings that Chiquita was also a victim of the AUC rather than an aider and abettor of the AUC's violent campaign. This plea must be rejected in the context of a motion to dismiss. Plaintiffs' allegations demonstrate that Chiquita was a willing participant in the alleged human rights violations and not a passive bystander. Plaintiffs' allegations meet the requirements for liability under aiding and abetting, conspiracy and agency.

Chiquita's attempt to circumvent the specific and well-established requirements of the political question and international comity doctrines by asking this Court to dismiss Plaintiffs' claims based on amorphous "practical consequences" is similarly baseless. *Sosa* did not authorize district courts to deny the jurisdiction Congress has provided in the ATS based on a defendant's protestations that it would be unfair to allow a case to proceed. Chiquita's failure to assert a political question or international comity defense speaks volumes about the absence of any legitimate ground to grant their motion.

Plaintiffs' state action allegations, which satisfy the state action requirements of the ATS and TVPA under each of the four tests for determining state action, are plainly sufficient to support the claims that require some connection to state action. Most of Plaintiffs' claims apply whether or not there is state action.

As set forth below, Congress did not exclude corporations from liability under the TVPA. Finally, Plaintiffs' claims under state law are addressed in separate briefs.

Defendant's motion to dismiss should be denied.

II. STATEMENT OF FACTS

The Defendant in these cases,[1] Chiquita Brands International ("Chiquita"), has been involved in the production and export of produce from Central and South America since its founding as the "United Fruit Company" in 1899, and has grown to be one of the largest banana producers in the world, reporting revenues of more than $2.6 billion in 2003. NJC ¶¶12, 29; NYC ¶¶11, 755; VC ¶71. In Colombia, Chiquita operated through its wholly-owned subsidiary, C.I. Bananos de Exportacion, S.A. ("Banadex"). NJC ¶13. Colombia has been Chiquita's most profitable banana-producing operation despite considerable civil unrest. *Id.*; NYC ¶756.

The Plaintiffs are the family members of trade unionists, banana workers, political organizers, social activists, and others killed by the AUC, a paramilitary organization operating in Colombia. NJC ¶¶2, 20-22; NYC ¶9; VC ¶1. Chiquita provided the AUC with substantial support, described in detail below, even after the AUC was designated a "Global Terrorist" by

[1] The relevant complaints are: First Amended Complaint, *Valencia, et al. v. Chiquita Brands Int'l, Inc*., No. 0:08-md-01916-KAM, Dkt. No. 77 (S.D. Fla. June 9, 2008) ("VC"); Amended Complaint , *Does 1-619 v. Chiquita Brands Int'l, Inc*., No. 0:08-md-01916-KAM, Dkt. No. 72 (S.D. Fla. June 6, 2008) ("NYC"); and Complaint, *Doe I, et al. v. Chiquita Brands Int'l., Inc.*, No. 9:08-cv-80421-KAM, Dkt. No. 2 Attach. 2 (S.D. Fla. Apr. 21, 2008) ("NJC").

the United States Department of State. NJC ¶¶35-36; NYC ¶¶785, 812-15, 818, 820-37, 839, 841-43; VC ¶78.

The Plaintiffs include, for example:

- The Rev. H. Francis O'Loughlin, the personal representative of the estate of Edgar Francisco Mesa Montoya who worked in the banana plantations near Chigorodo. On January 23, 1997, three AUC paramilitaries knocked on the door of Mr. Montoya's home on the plantation and instructed him to report to the packing house, where other men from neighboring houses were also being held. They were forced to lie on the floor, and shots were later heard by witnesses. The next day, Mesa's body was found shot and badly beaten. The AUC told his family that this had happened because Mesa was a union organizer. VC ¶¶184-87.

- The Rev. H. Francis O'Loughlin, the personal representative of the estate of Luis Hernando Herrera Morales, who with his brother, Torcuato de Jesus Herrera Morales, worked in an Apartado factory making the boxes into which bananas were packed. Luis was sympathetic to efforts to organize workers. Both brothers were shot and killed while attending a wedding reception. Four motorcycles pulled up in front of the hall; their riders identified themselves as AUC, entered the hall and shot Luis, and afterward his brother. VC ¶¶137-40.

- John Doe 3, the brother of John Doe 4, a banana worker at a plantation in Uraba and a leader of a labor union committee. In 1998 John Doe 4 was involved in a protest against low wages. AUC paramilitaries approached the brothers as they were eating lunch at their banana plantation. The AUC identified John Doe 4 by name and executed him. NJC ¶¶50-52.

- John Doe 7, the father of John Doe 8, a banana worker at a plantation in Uraba. In 2000, AUC paramilitaries accused John Doe 8 of stealing from a banana farm. He was taken by an AUC commander and executed. When John Doe 7 approached the AUC about the killing, the commander said that they had killed John Doe 8 because they were guarding the farm and preventing theft. The commander suggested that the AUC had eliminated an undesirable and threatened John Doe 7 against pursuing an investigation. NJC ¶¶59-62.

- The New York complaint alleges that each of the 655 victims of murder and torture was directly connected to the banana-producing economy as farmers, land owners, distributors, laborers, labor organizers and political activists where Chiquita had substantial land holdings, production facilities, import/export facilities and other banana-related activities. NYC ¶9.

Chiquita knew the AUC was a violent organization responsible for horrific abuses

In 1994, regional right-wing paramilitary organizations in Colombia united under the banner of the AUC under the leadership of Carlos Castaño. It was well known that the AUC was responsible for death threats, extrajudicial killings, torture, rape, kidnapping, forced disappearances, looting, and the destruction and massacre of Colombian communities. NJC ¶¶20-22, 28; NYC ¶¶698, 705, 707-15; VC ¶¶60, 62, 70.

Despite common knowledge of AUC's violent practices, Chiquita met with leaders of the AUC and agreed to make payments and provide other support for their mutual benefit. NYC ¶¶846-862. Chiquita began providing material support to the AUC and its predecessors in the early 1990s. The AUC became an agent of Chiquita and undertook violent acts related to and committed within the course of that relationship. NJC ¶¶16, 33, 75; NYC ¶¶734-35, 776, 846, 854; VC ¶¶56, 68, 75. Chiquita supplied money and arms in return for the pacification of the banana-growing regions of the country – known as the "Zona Bananera."[2] NYC ¶731. The collaboration with Chiquita allowed the AUC to assert control over the Zona Bananera, and, in return, Chiquita operated uninterrupted in an environment in which labor and community

[2] Chiquita has a history of making payments to Colombian paramilitary organizations. Chiquita's proffer, *infra*, admits Chiquita previously paid other Colombian terrorist organizations, including the FARC and ELN. *See also* Katharine Mieszkowski, *When Bananas Ruled the World*, Salon.com (Apr. 19, 2008), http://www.salon.com/books/feature/2008/04/19/bananas/; Jane Bussey & Stephen Dudley, *Payoffs to Terrorists Scrutinzed*, Miami Herald at A1 (Apr. 16, 2007). Chiquita paid these groups between 1989 and 1997, when the FARC and ELN controlled the area where Chiquita had its banana-producing operations. In 1997, the same year Chiquita stopped its payments to them, the FARC and ELN were designated as Foreign Terrorist Organizations. NYC ¶774. At a 1997 meeting between the leader of the AUC and Banadex's then-general manager, the AUC informed Banadex that the AUC was about to drive the FARC out of the Zona Bananera. NYC ¶775.

opposition to the company was suppressed and competition destroyed. Chiquita was able to seize land from peasants; eliminate or dominate labor union organizers perceived by Chiquita as being hostile to its economic interests; and acquire and maintain monopolistic control over banana commerce, including the destruction of competition in the cultivation, distribution, and marketing of bananas. NYC ¶848. The AUC's influence paved the way for a smoother operating environment for Chiquita, characterized by reduced conflict with labor and security for banana plantations. In addition, the AUC dealt out reprisals against real or suspected thieves. NJC ¶¶30-32; NYC ¶848; VC ¶¶73-74.

On September 10, 2001, the United States government designated the AUC as a Foreign Terrorist Organization, a fact widely publicized in the Colombian and American media, including the Wall Street Journal, the New York Times, the Cincinnati Post, and the Cincinnati Enquirer. NJC ¶34; NYC ¶783; VC ¶76. Notwithstanding international condemnation, the AUC enjoyed longstanding and pervasive ties to the official Colombian security forces, including the Colombian Armed Forces and the Colombian National Police. In the 1980s, the Colombian military participated in organizing and arming the paramilitaries. Cooperation with paramilitaries has been demonstrated in half of Colombia's brigade-level Army units. The paramilitaries are called the "Sixth Division," in addition to the five official divisions of the Colombian Army. NJC ¶25; NYC ¶747. As of September 2000, U.S. government records indicate that 285 members of the police and military were under investigation for links with paramilitaries. VC ¶67. These close ties allowed the AUC to establish permanent bases and checkpoints. In addition, government security forces have aided the AUC, supplying the AUC with weapons and munitions; providing transportation, lodging, and intelligence; sharing active-duty soldiers; carrying out joint operations; and failing to carry out arrest warrants for AUC

leaders. NJC ¶26; NYC ¶748. High-level officials in the Colombian government collaborated with and directed AUC operations, including massacres, extrajudicial killings, murders, disappearances, and forced displacements. NYC ¶718. Government security forces have also watched or facilitated AUC assaults, including positioning troops outside the targeted villages to prevent human rights and relief groups from entering to aid the survivors. NJC ¶27; VC ¶¶65, 67; NYC ¶743 (describing destruction of villages).

A February 11, 1994 decree of Colombia's Ministry of Defense and a November 1995 law passed by the Colombian Congress authorized the formation, sponsorship, arming, and licensing of "Rural Cooperatives of Vigilance and Security" ("convivirs") to aid the military in counter-insurgency operations. NYC ¶¶732-33; VC ¶68. The convivirs were legal fronts for the paramilitaries and known paramilitary leaders frequently commanded, controlled, or colluded with them. NYC ¶¶734-35; VC ¶68.

Chiquita's Payments to AUC

In 1997, Banadex's general manager met with Carlos Castaño and other leaders of the AUC to arrange for the financing and coordination of paramilitary operations in the Zona Bananera. NYC ¶¶775, 847; VC ¶68. Chiquita's senior executives knew that the payments were being made and that the AUC was a violent paramilitary organization. NJC ¶¶33-34. Chiquita funneled money to the paramilitaries through the government-chartered Convivir Papagayo, among others. NYC ¶¶736-737, 777. Convivir Papagayo was directed by AUC leaders, who also served as public officials and are currently under arrest or investigation for their role in facilitating the illegal payments to the AUC from Chiquita. NYC ¶¶737-78. In June 2002, Chiquita also began paying the AUC directly according to new procedures established by its senior executives. NYC ¶779; VC ¶75.

From 1997 until at least February 2004, on a nearly-monthly basis, Chiquita made over 100 payments to the AUC, totaling over $1.7 million. NJC ¶33; NYC ¶773; VC ¶¶72, 75. Senior executives of Chiquita, including high-ranking officers, directors, and employees, reviewed and approved these payments, which were recorded in the corporate books as security payments or income contributions made to Banadex executives with the intent that they would be withdrawn as cash and handed directly to the AUC. NJC ¶33; NYC ¶¶776, 854; VC ¶75.

Around September 2000, Chiquita's in-house attorney conducted an internal investigation into the payments, the results of which were discussed at a meeting of the then-Audit Committee of the then-Board of Directors in Chiquita's Cincinnati headquarters. NYC ¶776.

Around September 30, 2002, Chiquita accessed an Internet-based, password-protected subscription service, which contained the following reporting on the AUC:

> International condemnation of the AUC's 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.

NYC ¶784.

Beginning February 21, 2003, outside counsel advised Chiquita that the payments were illegal: "Must stop payments"; "Bottom Line: CANNOT MAKE THE PAYMENT"; "Advised NOT TO MAKE ALTERNATIVE PAYMENT through CONVIVIR"; "General Rule: Cannot do indirectly what you cannot do directly"; "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." NYC ¶812; NJC ¶35; VC ¶77.

Shortly thereafter, Chiquita's full Board of Directors discussed the payments. NYC ¶815. Although Chiquita's Board disclosed payments to the Department of Justice on or about April 3, 2003, on April 8, 2003, Chiquita instructed Banadex to continue making payments to the AUC. VC ¶78. One member of the Board objected to the payments and recommended withdrawing from Colombia. NYC ¶815. Over the objections of its legal counsel and certain members of the Board and despite statements from the Department of Justice that the payments to the AUC were illegal, Chiquita continued to make payments through February 2004. NYC ¶¶785, 812-15, 818, 820-37, 839, 841-43; VC ¶¶77-78. Outside counsel reported that at least one high-ranking officer of Chiquita had said of the payments to the AUC: "just let them sue us, come after us." NYC ¶816.

Additional Aid Provided to the AUC by Chiquita

In November 2001, Chiquita helped convey more than 3,000 AK-47 assault rifles and 5 million rounds of ammunition to the AUC. NJC ¶¶38-39; NYC ¶¶859-61; VC ¶¶80-81. Banadex's agents and employees off-loaded the arms and ammunition at Chiquita's private port facility in the Colombia municipality of Turbo, where those arms and munitions were stored before being loaded onto trucks for delivery to AUC paramilitaries. NJC ¶40; NYC ¶¶730, 860-64; VC ¶82. Chiquita facilitated at least four other arms shipments to the AUC. NJC ¶41; NYC ¶865; VC ¶¶83, 88. In an interview with the Colombian newspaper *El Tiempo*, Carlos Castaño boasted, "This is the greatest achievement by the AUC so far. Through Central America, five shipments, 13 thousand rifles." NJC ¶41; NYC ¶865; VC ¶83. Chiquita was aware of these shipments and knew that its facilities were used to make them. NYC ¶866; VC ¶84.[3]

[3] Defendant's challenge to the facts regarding one of the at least five arms transfers, Def's

Chiquita also assisted the AUC by knowingly allowing the use of its private port facilities, as well as its trucks and other vehicles, for the export of illegal drugs, a major source of income for the AUC. NJC ¶43; NYC ¶869; VC ¶85. In 1997, Drug enforcement agents and customs officials in Belgium and the United Kingdom found more than a ton of almost pure cocaine, with a street value of approximately $150 million, hidden on at least seven Chiquita ships, shipped by way of Chiquita's private port facility at Santa Marta, Colombia. NYC ¶870; VC ¶86.

Mem. at 5-6, is both inaccurate, as addressed in the motion to strike filed concurrently, and inappropriate on a motion to dismiss. On a motion to dismiss, the court must accept the factual allegations in a complaint as true and take them in the light most favorable to the plaintiff. *See infra*, pp. 12-14.

But even if the Court were to consider, on a motion to dismiss, the documents that Chiquita improperly relied on, the documents do not contradict Plaintiffs' allegations. The Organization of American States ("OAS") did not conduct an investigation in Colombia, but only obtained information from the Colombian government. Def's Ex. B, Dkt. No. 93, at 6; *see* NJC ¶¶26, 70 (describing death threats against prosecutors investigating paramilitaries); NYC ¶¶716, 748 (describing close relationship between government and the AUC). In contrast to its extensive analysis of the parties involved in Nicaragua and Panama, the OAS Report draws the following conclusion about Colombia: "What actually occurred at Turbo remains a mystery. It is clear that the Otterloo made port in Turbo …. 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 … was ultimately responsible for the illegal importation of the arms onto Colombian soil." Def's Ex. B at 15-17. The Report confirms that the "shipment of arms and ammunition was unloaded by … Banadex, S.A." *Id.* at 35 (mistakenly describing Banadex as a "shipping company"). The Prosecutor's Report, Def's Ex. C, Dkt. 93, provides no additional clarity, simply declining to indict Banadex's shipping assistant. However, another Banadex employee was indicted. Chiquita neglects to mention Luis Anibal Chaverra Arboleda, also a Banadex employee, who served as a representative of the shipment's owner; was present during the customs inspection in the Banadex yard; and arranged for the transportation of the containers carrying the weapons and ammunition from the Banadex yards to the AUC. Def's Ex. C at 12, 25, 26. Chaverra Arboleda was indicted. *Id.* at 26. To argue that Defendant's Exhibit C "explicitly exonerates the only Banadex employee investigated in connection with the affair," Def's Mem. at 6, is inaccurate. Finally, Plaintiffs have alleged at least 4 additional transfers of arms. NJC ¶41; NYC ¶865; VC ¶¶83, 88.

The Indictment, Chiquita's Guilty Plea and Proffer, and the Government's Sentencing Memorandum

On March 19, 2007, Chiquita pled guilty in U.S. District Court for the District of Columbia to engaging in transactions with a specially designated global terrorist. NJC ¶37; NYC ¶856; VC ¶79. According to the government's sentencing memorandum, Chiquita's payments "fueled violence" and "paid for weapons and ammunition to kill innocent people." NYC ¶857. [4]

In its signed proffer, Chiquita admitted knowingly providing material support to the AUC. Factual Proffer, *U.S. v. Chiquita Brands Intern.*, No. 07-055 (D.D.C. Mar. 19, 2007), attached hereto as Exhibit 1 ("Proffer"), ¶¶3, 5, 19, 22, 27-28. Chiquita also admitted knowing that the AUC was engaged in illegal activities such as "the kidnapping and murder of civilians" and that high-ranking officers of the corporation knew that the AUC was a violent paramilitary organization no later than September 2000. Proffer ¶¶3, 22; *see also* Government's Sentencing Memorandum, *U.S. v. Chiquita Brands Intern.*, No. 07-055 (D.D.C. Sept. 17, 2007) attached hereto as Exhibit 2 ("Sentencing Mem."), at 5-6 (Chiquita internal memoranda described the AUC as "widely-known, illegal vigilante organization"). Chiquita also knew that the AUC had been designated a foreign terrorist organization. Proffer ¶¶27-28; Sentencing Mem. at 6-7. The government's sentencing memorandum describes how Chiquita treated these payments as a "routine business matter" and "came up with a procedure to record these monthly payments in the Company's books and records that failed to reflect the ultimate and intended recipient of these payments." Sentencing Mem. at 14-15. According to the United States, Chiquita made

[4] Documents referred to in the complaints and central to plaintiff's claim may be considered part of the pleadings for purposes of Rule 12(b)(6). *Brooks v. Blue Cross & Blue Shield,* 116 F.3d 1364, 1369 (11th Cir. 1997).

these payments despite the fact that "officers of defendant Chiquita and Banadex recognized that the payments to the AUC were illicit." Sentencing Mem. at 5. "Money is fungible. Regardless of the Company's motivations, defendant Chiquita's money helped buy weapons and ammunition used to kill innocent victims of terrorism." Sentencing Mem. at 13.

III. ARGUMENT

A. Pleading Standard

Chiquita has moved to dismiss Plaintiffs' complaints for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) and for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

"In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff." *See Bruhl v. Price WaterhouseCoopers Intern.*, No. 03-23044-CIV, 2008 WL 899250, at *1 (S.D. Fla. Mar. 31, 2008) (citing *Erickson v. Pardus*, -- U.S.--, 127 S. Ct. 2197, 2200 (2007) (*per curiam*)). The Federal Rules require only "'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, -- U.S. at --, 127 S. Ct. at 2200 (quoting *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955, 1967 (2007)). Plaintiffs' allegations simply have to "raise a right to relief above the speculative level." *Twombly*, -- U.S. --, 127 S. Ct. at 1965; *accord Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008); *Bruhl*, 2008 WL 899250, at *1. Plaintiffs easily satisfy this standard.

Similarly, if a 12(b)(1) motion presents a "facial" challenge to jurisdiction, that is, that the facts as stated supposedly do not provide for federal jurisdiction, "then the facts alleged by

the plaintiff are given the same presumption of truthfulness as they would receive under a 12(b)(6) motion." *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1237 (11th Cir. 2002); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990); *Hutton v. Grumpie's Pizza and Subs, Inc.*, No. 07-81228-CIV, 2008 WL 1995091, at *1 (S.D. Fla. May 7, 2008).[5] "It is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997); *see also Lawrence*, 919 F.2d at 1529 (court merely "look[s] and see[s] if plaintiff has sufficiently alleged a basis of subject matter jurisdiction"). A claim invoking subject matter jurisdiction may only be dismissed if it is not "colorable, *i.e.*, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh*, 546 U.S. at 513 n.10 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Barnett v. Bailey*, 956 F.2d 1036, 1041 (11th Cir. 1992).

If a 12(b)(1) motion also implicates an element of the cause of action, the Eleventh Circuit requires the district court to find jurisdiction exists, and to deal with the objection on the merits, pursuant to the more searching Rule 12(b)(6) standards. *Garcia*, 104 F.3d at 1261; *Heckert v. 2495 McCall Road Co.*, No. 2:07-CV-310, 2008 WL 508079, at *3 (M.D. Fla. Feb. 21, 2008); *CFTC v. G7 Advisory Services, LLC*, 406 F. Supp. 2d 1289, 1292 (S.D. Fla. 2005).

Chiquita misreads *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) and *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) to argue in support of a heightened pleading standard.

[5] If a defendant presents a "factual" challenge, which Chiquita has not done here, the Court looks beyond the pleadings and "in essence conducts a bench trial on the facts that give rise to its subject matter jurisdiction." *Barnett*, 283 F.3d at 1237. If "satisfaction of an essential element of a claim for relief is at issue," the jury is the proper trier of contested facts. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

Consistent with Eleventh Circuit practice, both cases hold that because the ATS requires plaintiffs to plead an element of their claim — that a defendant violated the law of nations — as a requirement for jurisdiction, the "more searching" 12(b)(6) review "of the merits" is required rather than the low subject matter jurisdiction standard. *Filartiga*, 630 F.2d at 887-88; *Kadic*, 70 F.3d at 238; a*ccord Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242 (11th Cir. 2005) (applying 12(b)(6) pleading standard to ATS claims); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1276, 1287 (S.D. Fla. 2006) (requiring more than a "colorable" violation of the law of nations, citing *Kadic*);[6] *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386, 2002 WL 319887, at *5, 14 (S.D.N.Y. Feb. 28, 2002). Neither 12(b)(6) nor 12(b)(1) imposes a heightened pleading standard for ATS claims. *See Presbyterian Church of Sudan v. Talisman Energy, Inc*., 244 F. Supp. 2d 289, 301, 308 (S.D.N.Y. 2003) (a "requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the federal rules, and not by judicial interpretation"); a*ccord Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

B. The Alien Tort Statute: The Sosa Framework

Contrary to Chiquita's contentions, *Sosa* affirmed the pre-*Sosa* ATS jurisprudence in terms directly relevant to the issues before this Court. 542 U.S. at 732-33. *Sosa* recognized that

[6] *Sinaltrainal*, 474 F. Supp. 2d at 1286-87, while acknowledging contrary Supreme Court authority, questioned whether the Eleventh Circuit required a heightened pleading standard for claims under 28 U.S.C. §1983 and therefore whether a heightened pleading standard might be appropriate for ATS "color of law" allegations. The Eleventh Circuit recently recognized that the Supreme Court specifically rejected and "overturned" its decisions requiring a heightened pleading standard in §1983 cases outside the qualified immunity context, which is not applicable here. *See, e.g., Swann v. Southern Health Partners*, 388 F.3d 834, 838 (11th Cir. 2004).

the Founders intended the federal courts to enforce the law of nations and that the federal courts have the authority to apply common law rules of liability where the underlying abuse violates an actionable "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms..." *Id*. at 725; *see* Def's Mem. at 8. The human rights violations at issue in this case are precisely the kind that fit squarely within the *Sosa* paradigm. Chiquita is alleged to have assisted the AUC in carrying out a brutal campaign of assassination and terror. The prohibition against such widespread and systematic killing is at the heart of international humanitarian law and *Sosa* authorizes the federal courts to provide a remedy for such violations.

Chiquita misconstrues several basic principles of ATS jurisprudence, ignoring that the Supreme Court rejected many of its arguments in *Sosa* itself.[7] First, *Sosa* specifically endorsed the approach to identifying actionable ATS norms taken by numerous courts, including the Eleventh Circuit, since *Filartiga*.[8] *Sosa*, 542 U.S. at 732-33. Although *Sosa* contains cautionary language about expanding the universe of actionable norms, the only instance in which it rejected a previously recognized ATS claim was the lower court opinion before it, which had approved Alvarez-Machain's narrow and novel arbitrary detention claim. Pre-*Sosa* cases only sustained ATS claims for egregious violations of international human rights law, including

[7] There is no serious question that corporations may be found liable under the ATS, although Defandant contests that point, Def's Mem. at 32. *See, e.g.*, *Aldana*, 416 F.3d at 1247; *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *Talisman*, 244 F. Supp. 2d at 319 ("A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law....Given that private individuals are liable for violations of international law in some circumstances, there is no logical reason why corporations should not be held liable.").

[8] *See* 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, 2251 (2004).

torture, extrajudicial killings, disappearances, war crimes, and crimes against humanity — precisely the norms at issue in this case.[9] Courts since *Sosa* have reaffirmed these principles repeatedly.[10] Thus, the rhetoric of caution in *Sosa* did not impose a dramatic new restriction on ATS litigation, *Sosa*, 542 U.S. at 731-32, and certainly did not signal any reluctance to allow federal courts to continue to apply the ATS to instances of similarly egregious conduct like the AUC's systematic murder of innocent civilians. Plaintiffs' claims thus fit the model of ATS jurisprudence specifically endorsed in *Sosa*.

Sosa reaffirmed the approach to determining customary international law articulated by the Supreme Court in *United States v. Smith*, as well as the *Smith* Court's determination that piracy is an actionable offense under the ATS, even though a diversity of definitions of piracy existed at the time that the case was decided. 18 U.S. (5 Wheat) 153, 161 (1820); Def's Mem. at 9. *Smith* demonstrates that in order to be actionable under the ATS, international norms need only have a "core definition." Plaintiffs' claims in this case fall squarely within the core definition of each of the offenses they allege.

Chiquita makes the radical claim that *Sosa* directs courts to consult only international instruments that are "self-executing" when determining whether a claim is actionable. Def's

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[9] In the years preceding *Sosa*, the same courts had routinely dismissed claims that did not meet this high hurdle. *See, e.g.*, *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983) (dismissing claim that New York denied Colombian plaintiff due process when it refused to distribute her lottery winnings in a lump sum).

[10] *See Khulumani v. Barclays Nat'l. Bank*, 504 F.3d 254, 270 n.5 (2d Cir. 2007) (Katzmann, J., concurring), *judgment affirmed by American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005) (upholding indirect liability under the ATS for extrajudicial killing and torture); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) (allegations of war crimes, crimes against humanity, and racial discrimination are "least controversial core of modern day [ATS] jurisdiction").

Mem. at 11. This claim is contradicted by the approach taken in *Smith*, *The Paquete Habana*, 175 U.S. 677 (1900), *Filartiga*, and all of the other pre-*Sosa* cases endorsed by the Supreme Court. 542 U.S. at 729-30. In both *Smith* and *The Paquete Habana*, the Court looked to the works of jurists, state practice, treaties, statements and actions by governments, and decisions of the domestic courts of various nations in determining the content of customary international law. *See Smith*, 5 Wheat. at 160-61; *The Paquete Habana*, 175 U.S. at 686-708.

In determining that customary international law prohibited torture, the *Filartiga* court considered the practice of states, including diplomatic exchanges and the laws, constitutions, and high court decisions of various nations and tribunals. *Filartiga*, 630 F.2d at 880-84. The court also looked to the content of various treaties, despite the fact that most had not been ratified by the United States and were non-self-executing, invoking those treaties not because they were binding on the United States, but because they served as evidence that the nations of the world considered torture to be illegal and of mutual concern. *Id*. Additionally, the court considered various resolutions and declarations adopted by international organizations, including the Universal Declaration of Human Rights, as they further established the nearly global consensus concerning the illegality of torture. Chiquita's argument that this court should consider only self-executing international sources directly contradicts *Sosa*'s ringing endorsement of *Filartiga* and its progeny.[11] No court has accepted Chiquita's argument because it is contrary to the

[11] *Sosa* did not endorse Chiquita's argument that non-self-executing treaties or non-binding resolutions were irrelevant to a customary international law analysis. In fact, the Supreme Court considered all of these sources in coming to its conclusion that the international documents relied on by Dr. Alvarez-Machain simply did not support his narrow claim that his twenty-hour detention, supported by a federal arrest warrant and grand jury indictment, violated international law. *Sosa*, 542 U.S. at 738. There is no doubt in this case that international law prohibits extrajudicial executions as pled here.

methodology for ascertaining customary international law that has been endorsed by the Supreme Court for more than a century.

Additionally, Chiquita essentially asks this court to restrict the scope of the ATS on its own initiative. Def's Mem. at 10-11. In doing so, Chiquita ignores the Supreme Court's explicit recommendation in *Sosa* that those seeking to restrict the scope of the ATS should direct such arguments to Congress. 542 U.S at 731. Chiquita also claims that the federal courts' power to enforce international customary law was restricted after *Erie* ignores the explicit language in *Sosa* rejecting such arguments. *Sosa*, 542 U.S. at 730-31 ("[i]t 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. Later Congresses seem to have shared our view.").[12]

Chiquita suggests that this court should dismiss Plaintiffs' claims because of the possible foreign policy consequences that could result. However, Chiquita's claim — particularly when it has not argued for dismissal on political question or international comity grounds — is utterly baseless. This case poses no separation of powers conflicts, as the United States has already indicted Chiquita for the conduct alleged in this case.

[12] Moreover, the Supreme Court has repeatedly explained that an entirely legitimate federal common law exists in various "havens of specialty" or interstitial areas of particular federal interest, including international law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-26 (1964); *Texas Indus., Inc. v. Radcliffe Materials, Inc*., 451 U.S. 630, 641 (1981) (stating that "international disputes implicating ... our relations with foreign nations" qualify as one of the "narrow areas" in which "federal common law" survives *Erie*).

C. Plaintiffs' Claims Are Not Precluded by Congressional Actions Addressing International Terrorism.

Plaintiffs have alleged a number of violations of international law cognizable under the ATS, in addition to terrorism and material support for terrorism, including extrajudicial killing, war crimes, torture, crimes against humanity and cruel, inhuman and degrading treatment. NJC ¶¶85-125; NYC ¶¶586-634; VC ¶¶64-75. Chiquita claims that all of Plaintiffs' ATS claims are precluded by the passage of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, and the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, P.L. 107-197, Title II, 116 Stat. 721, 724 (2002), implementing the International Convention for the Suppression of the Financing of Terrorism ("Financing Convention").

But Plaintiffs' claims for extrajudicial killing and other torts cannot be precluded by virtue of Plaintiffs having also alleged two torts labeled as "terrorism-related." *See, e.g., Almog v. Arab Bank*, 471 F. Supp. 2d 257, 280 (E.D.N.Y. 2007) ("the pertinent issue here is only whether the acts as alleged by plaintiffs violate[d] a norm of international law, however labeled"). Plaintiffs are entitled to plead in the alternative. *ABM Fin. Servs., Inc. v. Express Consolidation, Inc.*, No. 07-60294-CIV, 2008 WL 686920, at *8 (S.D. Fla. Mar. 3, 2008).

Furthermore, Chiquita's argument gets the law exactly backwards. The ATA and the Financing Convention do not eliminate remedies under the ATS for terrorism or material support of terrorism. Indeed, the ***opposite*** is true. *See Almog v. Arab Bank*, 471 F. Supp. 2d 257, 294 (E.D.N.Y. 2007) (ATA and Financing Convention "alleviate[ ] Sosa's concern that there has been no congressional mandate to seek out and define new and debatable violations of the law of nations" (citing *Sosa*, 542 U.S. 692) (internal quotations omitted)). As many courts, including the Supreme Court and the Eleventh Circuit, have held, Congress' enactment of statutes in the

same subject area ***supports*** Plaintiffs' claims by demonstrating a "clear mandate" to allow recovery under the ATS. *Sosa*, 542 U.S. at 728, 731 (passage of Torture Victim Protection Act of 1991 supplements ATS and illustrates "clear mandate" in support of claims of torture and extrajudicial killing under ATS); *Aldana*, 416 F.3d at 1251 (same); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (recognizing TVPA and ATS both provide remedies for torture); *Kadic*, 70 F.3d at 241-42 (passage of Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988) supports liability under ATS even though the statute did not create a private right of action: "the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act"); *accord Khulumani*, 504 F.3d at 283-84.

As this Circuit recognized, the relevant question is whether a later statute repeals or amends a prior statute. *Aldana*, 416 F.3d at 1251. Because repeals by implication are strongly disfavored, Congress' intent to repeal or amend an earlier statute must be clear and manifest on the face of the statute. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Aldana*, 416 F.3d at 1251. There are "two well-settled categories of repeals by implication (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . ." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).[13] When two statutes "are capable of

[13] Chiquita relies entirely on the use of the phrase "occupy the field" in *Sosa*, 542 U.S. at

coexistence, it is the duty of the courts … to regard each as effective." *Id*. at 155 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (ellipsis in original)).

There is no "irreconcilable conflict" here because the statutes are capable of coexistence. *DOT v. Public Citizen*, 541 U.S. 752, 766 (2004) (no "irreconcilable conflict" between statutes where it was possible to comply with both); *U.S. v. Jordan*, 915 F.2d 622, 627-28 (11th Cir. 1990) (fact that Congress codified one remedy does not mean that Congress also implicitly intended to circumscribe preexisting statutory remedies). The ATA provides civil remedies for U.S. nationals injured anywhere in the world by acts of terrorism; the Financing Convention imposes criminal sanctions for certain terrorism-related offenses, and the ATS provides aliens a civil remedy for international torts; these statutes readily coexist. If a criminal statute addressing international violations could preempt ATS claims, then piracy, 18 U.S.C. § 1651, torture, 18 U.S.C. § 2340A, genocide, 18 U.S.C. § 1091, and war crimes, 18 U.S.C. § 2441, would not be actionable under the ATS. That is plainly not the case. *E.g.*, *Sosa*, 542 U.S at 715 (piracy is the paradigmatic ATS norm).

There is also no evidence that the later two statutes "cover[] the whole subject of the earlier one and [are] clearly intended as a substitute." *Radzanower*, 426 U.S. at 154. To the contrary, both the ATA and the Financing Convention statute were intended as additional tools in the fight against terrorism. *See* Presidential Statement, Implementation Of The International Convention For The Suppression of Terrorist Bombings, 2002 U.S.C.C.A.N. 530, P.L. 107-197 (June 25, 2002) (purpose of statute is to "strengthen international efforts to defeat terrorism");

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731 (Congress may "at any time (explicitly, or implicitly by treaties or statutes that occupy the field)" shut the door to the law of nations), Def's Mem. at 16, presumably limiting its argument to the second category of implied repeal.

Hearing on H.R. 3275 Before the H. Comm. on the Judiciary, 107th Cong. 5 (2001) (statement of Michael Chertoff, Assistant Attorney General, Department of Justice) (purpose of Financing Convention statute is "to strengthen the international norm against terrorism and reinforce the international community's intolerance for, and condemnation of, terrorist acts and their financing"); *Drugs in the 1990's: New Perils, New Promises: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 17 (1990) (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State) (describing "growing web of law" to combat terrorism). These statutes all serve the common goal of combating terrorism and are plainly not intended as "substitutes."

D. Terrorism And Material Support for Terrorism Are Actionable Under the ATS.

Plaintiffs' claims for terrorism and material support for terrorism fall within core norms prohibited by customary international law which are clearly defined, widely accepted, and long established, and which are actionable under the ATS.

1. Plaintiffs' Terrorism Claims Are Adequately Pled and Actionable Under the ATS

There are few issues in international law today on which opinion is so united as the notion that "terrorism" is a violation of international law of mutual concern to all nations. Courts considering whether a claim is actionable under the ATS ask whether the conduct at issue clearly violates a well-established, widely-accepted norm, not whether there is universal agreement as to every aspect of the norm. *Kadic*, 70 F.3d at 239; *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995).

Here, the AUC's conduct falls within the core definition of terrorism, a well-established offense under international law. *See* Declaration of William Aceves ("Aceves Decl."), attached hereto as Exhibit 3, at 2-3, 5. For example, Plaintiffs allege that the AUC's violent acts were

directed towards civilians, with the purpose of intimidating individuals and communities and suppressing social and political activities. NJC ¶¶22, 31, 32, 34, 104; NYC ¶¶ 444-46, 58; VC ¶¶ 62, 73, 86, 90, 94, 149, 280. The alleged violent acts committed against Plaintiffs and other civilian victims include extrajudicial killing; forced disappearance; torture; cruel, inhuman, or degrading treatment; kidnapping; rape; forced displacement; crimes against humanity; and war crimes. NJC ¶¶ 73, 27, 44-63; NYC ¶435, 591, 25-427; VC ¶¶ 62, 87-250. These crimes all qualify as acts of terrorism when committed for the purposes of intimidating a population, as Plaintiffs allege here. *See Arab Bank*, 471 F. Supp. 2d at 279-84; *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d at 581. The sufficiency of Plaintiffs' terrorism allegations is further supported by the fact that the United States has labeled the AUC a "Foreign Terrorist Organization" and a "Specially Designated Terrorist Organization." Proffer ¶¶5, 8. Moreover, Chiquita has admitted that the AUC was designated as an "organization engaged in terrorist activity," including the "kidnapping and murder of civilians" and other violent crimes. Proffer ¶¶3, 4. Plaintiffs have met their burden of alleging acts of terrorism for the purposes of their terrorism and material support for a terrorist organization claims.

Disagreements about certain aspects of the definition of terrorism do not undermine the core prohibition against it. *See Sosa*, 542 U.S. at 732, citing *United States v. Smith*, 18 U.S. (5 Wheat.) at 163 (acknowledging "diversity of definitions" of piracy, but holding that core prohibition against "robbery or forcible depredations upon the sea" was specific and universally accepted).[14] There is a clearly defined and widely accepted prohibition in international law

[14] The "law of nations" evolves through the emergence of legal sources such as treaties, declarations, national laws, constitutions, and international and domestic court decisions, which may offer slightly differing definitions of prohibited conduct, but yet affirm the "core content" of

against acts intended to cause death or serious bodily injury to a civilian when the purpose of such an act, by its nature or context, is to intimidate a population. For more than forty years, treaties, international and regional-level resolutions and declarations, and domestic laws have stated that terrorism is an offense of mutual concern.

As early as 1963, states began to enter into binding conventions prohibiting specific acts of terrorism and obliging each state to extradite or prosecute suspects.[15] By 1985, the General Assembly noted that three U.N. declarations, five U.N. resolutions, and five international treaties already condemned terrorism in various ways.[16] Since 1985, the international community has entered into an additional eight conventions condemning other manifestations of terrorism and has approved numerous declarations and resolutions condemning various aspects of the offense.[17] Many regional conventions prohibiting terrorism have been in force for decades.[18] By

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the norm. *See Smith*, 18 U.S. at 163.

[15] *See* Convention of Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941 (Tokyo Convention).

[16] *See* G.A. Res. 40/61, U.N. Doc. A/RES/40/61 (Dec. 9, 1985) ("[u]nequivocally condemn[ing], as criminal, all acts, methods, and practices of terrorism wherever and by whomever committed…") (citing G.A. Res. 3034 (XXVII), U.N. Doc A/RES/3034 (Dec. 18, 1972); G.A. Res. 31/102 (Dec. 15, 1976); G.A. Res. 32/147, U.N. Doc A/RES/32/147 (Dec. 16 1977); G.A. Res. 34/145, U.N. Doc A/RES/34/145 (Dec. 17, 1979); G.A. Res. 36/109, U.N. Doc A/RES/36/109 (Dec. 10, 1981); G.A. Res. 38/130, U.N. Doc A/RES/38/130 (Dec. 19, 1983)); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accord with Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/5217 (1970); Declaration on the Strengthening of International Security, G.A. Res. 48/83, U.N. Doc. A/48/49 (1993); Tokyo Convention, *supra*; Hague Convention for Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641; Convention for Suppression of Unlawful Acts against Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 565; Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975 (New York Convention); International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11, 081, 1316 U.N.T.S. 205 (Hostages Convention).

[17] *See* International Convention on the Physical Protection of Nuclear Material, March 3,

the time of the International Convention on the Suppression of the Financing of Terrorism (Financing Convention)[19] of 1999, the offenses enumerated in the Convention were already universally prohibited. The Convention codified, rather than created, the international norms at issue here.

Moreover, nearly every state has incorporated the international prohibition against terrorism in its domestic laws.[20] *See also* Aceves Decl. at 12-14, 16. Congress did so by

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1980, 18 I.L.M. 1419, 1422-31 (1979); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International 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; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1998, 27 I.L.M. 672 (1988); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, March 10, 1988, I.L.M. 685 (1988); Convention on the Making of Plastic Explosives for the Purpose of Detection, March 1, 1991, 30 I.L.M. 721 (1991); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Jan. 12, 1998); Financing Convention, *supra*; International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005).

[18] *See* Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949; European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 94; South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism, Nov. 4, 1987; Arab Convention on the Suppression of Terrorism, April 22, 1998 ("Arab Convention"); Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999 ("Commonwealth Terrorism Convention"); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999 ("OIC Terrorism Convention"); Organization of African Unity Convention on the Prevention and Combating of Terrorism, July 14, 1999, OAU Doc. AHG/Dec. 132 (XXXV) ("OAU Convention"); Inter-American Convention against Terrorism, June 3, 2002, OAS, AG/RES. 1840 (XXXII-0/02).

[19] International Convention for the Suppression of the Financing of Terrorism (Financing Convention), Dec. 9, 1999, U.N. Doc. A/54/109 (1999), S. Treaty Doc. No. 106-49

[20] Since 2001, the Counter-Terrorism Committee (CTC) of the United Nations has been collecting annual reports from every Member State on the measures existing under its national laws to combat terrorism. The list and full content of states' reports is *available at* http://www.un.org/sc/ctc/countryreports.html.

enacting the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996[21] and the USA Patriot Act in 2001.[22] As of 2001, Colombia had also enacted laws that "bring Colombia's procedures and regulations into line with the international community's requirements with a view to meeting the challenges posed by terrorism."[23] These sources demonstrate that the core definition of terrorism has been a "violation of the law of nations" with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," since long before the mid-1990s, when Chiquita began to provide material support to the AUC. *See Sosa*, 542 U.S. at 732.

Chiquita claims that the federal courts have "repeatedly" rejected ATS claims similar to those advanced by Plaintiffs, Def's Mem. at 18, but the better reasoned domestic authority, supported by the overwhelming weight of international authority, supports Plaintiffs' claim that terrorism is prohibited under international law and actionable under the ATS. *See Arab Bank*, 471 F. Supp. 2d at 279-284 (ATS provides jurisdiction over claims that a corporation aided and abetted "organized, systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population");[24] *see also Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005) ("The violent acts alleged by plaintiffs as giving rise to their injuries, *i.e.*,

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[21] *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 301(a), 110 Stat. 1214 (Jan. 3, 1996) (codified at 18 U.S.C. § 2339B).

[22] USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see* AEDPA, § 726 (addition of terrorism offenses to money laundering statute).

[23] Report of the Republic of Colombia to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council Resolution 1373 ("Colombia CTC Report"), ¶1, U.N. Doc. S/2001/1318 (Dec. 27, 2001).

[24] *Arab Bank* does not use the word "terrorism" to describe the acts giving rise to the offense, but applies the ATS to the same types of claims as the claims raised here, including shootings or stabbings of civilians, the same conduct that Plaintiffs attribute to the AUC. NJC ¶¶44-61; NYC ¶¶25-427; VC ¶¶87-250.

murder, attempt or conspiracy to commit murder, and physical violence that results in serious bodily injury, clearly qualify" as acts of international terrorism); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.D.C. 1998) ("terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis*-an enemy of all mankind").

Chiquita relies heavily on the unpublished opinions in *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006) and *Barboza v. Drummond Co.*, No. 1:06-cv-61527 (S.D. Fla. July 17, 2007), which in turn rely heavily on the fractured District of Columbia Circuit opinions in *Tel-Oren v. Libyan Arab Republic*, rendered nearly twenty-five years ago. 726 F.2d 774 (D.C. Cir. 1984). However, the basic premise of *Tel-Oren* — that there is no international consensus on the prohibition of terrorism — is both inaccurate and anachronistic.[25] By 1984, there was growing concern about terrorism. That consensus has strengthened immeasurably in the intervening decades into a universal norm.

Significantly, the *Barboza* opinion Chiquita relies on did not dismiss the claims as inactionable under the ATS; rather, the court granted plaintiffs leave to file a second amended complaint. The defect in *Barboza* was the plaintiffs' allegation of "claims of terrorism in general, not acts of terrorism as specifically defined in a recognized norm of customary

[25] *See, e.g., Estate of Klieman*, 424 F. Supp. 2d 153, 162 (D.D.C. 2006) (declining to follow *Tel-Oren* in a suit regarding a terrorist attack on an Israeli bus and noting proliferation of terrorism-related statutes, Executive Branch condemnation of international terrorism, and numerous judicial decisions under the ATA all post-dating the opinions "lead the Court to conclude that this ship already has sailed with defendants left standing on the dock clinging to the language of two concurring opinions that have been overtaken by legislative action"); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (declining to follow *Tel-Oren* because "the interpretation of international law in *Karadzic* in 1995 is far more timely than the interpretations set forth in *Tel-Oren*, which examined international law as it stood almost fifteen years ago").

international law." No. 1:06-cv-61527 at *22. Here, Plaintiffs have alleged specific acts of terrorism, committed by a group designated as a "terrorist organization" in the United States and abroad,[26] that are expressly condemned in myriad international instruments. *See* Aceves Decl. at 2-3 & n.1, 7 & n.2. [27] Plaintiffs' allegations are free from the pleading defects identified in *Barboza*.[28]

Chiquita also relies on *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), but in *Yousef* the barrier to finding that "terrorism" was a violation of the law of nations was the lower court's reliance on the Restatement (Third) of the Foreign Relations Law of the United States, a non-authoritative source. *Id*. at 98-103, n.37. The parties in *Yousef* had not addressed the international law sources that *Kadic*, *Filartiga*, and *Sosa* identified as the proper sources for determining whether a substantive cause of action is actionable under the ATS. In contrast,

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[26] *E.g.*, Regulations Establishing a List of Entities SOR/2002-284 (Can) (listing the AUC as a terrorist organization in Canada).

[27] The violent crimes committed by paramilitary organizations for the purposes of intimidating a civilian population have been specifically identified by the international community as acts of terrorism. *See, e.g.*, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994) (condemning violence committed by "paramilitary gangs" as acts of terrorism); Press Release, United Nations Security Council 4734th Mtg., U.N. Doc. SC/7718 (Apr. 4, 2003) (statement of Colombian representative to the Counter-Terrorism Committee noting that "international legal norms" proscribed the acts of terrorism committed by Colombia's paramilitary groups, praising international laws labeling the AUC a "terrorist organization," and asserting that "[t]he nature of terrorism should be determined not only by the place where terrorist acts were committed and their reach, but also by the activities that sponsored them and the money that financed them.").

[28] *Barboza* also held that the killing of one union activist was not "widespread and systematic" enough to qualify as a violation of the law of nations, a requirement that the court inappropriately derived from an Eleventh Circuit ATS case involving crimes against humanity, rather than from any independent analysis of the norm against provision of material support to a terrorist organization. *See Barboza slip op.* at *22 (citing *Aldana*, 416 F.3d at 1247 (dismissing a claim alleging crimes against humanity)). Even if this court were to find that terrorist offenses must be "widespread and systematic," Plaintiffs' claims easily satisfy that test.

Plaintiffs in the instant case rely on copious international treaties, declarations, regional agreements, and state practice from countries around the world to establish that the terrorist acts giving rise to Plaintiffs' injuries are both definite and widely recognized violations of the law of nations. *See* Aceves Decl. at 2-3, 5. Moreover, *Yousef*, 327 F.3d at 104, concerned the use of universal jurisdiction in a criminal case (and held that the crimes subject to universal jurisdiction cannot be expanded, in contrast to *Sosa*'s holding, 542 U.S. at 725, regarding the law of nations), not an analysis of the law of nations for ATS purposes, making it inapposite here. *See Almog*, 471 F. Supp. 2d at 280 (*Yousef* irrelevant to ATS analysis).

2. Plaintiffs' Claims of Provision of Material Support to a Terrorist Organization Are Adequately Pled and Actionable Under the ATS

There is a clearly defined and widely accepted prohibition in international law against providing or collecting assets or any kind, directly or indirectly, unlawfully and willingly, to a terrorist organization, with the knowledge or intent that they will be used to carry out attacks of any kind on civilians for the purpose of intimidating or coercing a civilian population. International, regional, and domestic authorities establish that international law prohibited provision of material support to a terrorist organization well before Chiquita began to support the AUC in Colombia. The Financing Convention codified a preexisting international norm prohibiting such conduct.

Plaintiffs allege that the AUC was a terrorist organization that committed violence against civilians with the intention of intimidating and coercing the population. *See supra* pp. 22-23. Plaintiffs further allege that Chiquita provided material support to this terrorist organization in the form of money payments, arms, and other tangible assistance, *see supra* pp. 7-10, and that Chiquita provided such support with the knowledge and intent that it would

facilitate the terrorist acts committed by the AUC, *see supra* pp. 5-7. It is noteworthy that Chiquita has admitted to making these payments to the AUC, despite Chiquita's knowledge that the AUC was a terrorist organization. These allegations firmly support Plaintiffs' claims for material support of a terrorist organization and easily satisfy Plaintiffs' burden.

Chiquita misapprehends the Financing Convention, first by suggesting that it only applies to the annexed list of terrorism conventions, and further by misreading Article 2(b) to suggest that it only applies in situations of armed conflict. Def's Mem. at 29. This reading is facially incorrect and unsupported by legal authority.[29] Terrorism has never been defined as existing only during times of armed conflict.[30]

The Financing Convention codifies the content of decades of international, regional, and domestic efforts to prohibit the facilitation of terrorist acts and clarifies that the definition of "terrorism" reaches beyond conduct specifically enumerated in the eleven treaties annexed to and incorporated in it.[31] Both the Financing Convention and numerous treaties that came before it affirm that one who finances terrorist activities is as culpable for the resulting harm as the principal actor. Many regional anti-terrorism conventions similarly prohibit the financing of

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[29] The *travaux preparatoires* to the Financing Convention make it clear that the Convention applies to attacks against civilians both in peacetime and in wartime. Report of the Ad Hoc Committee established by G. A. Res. 51/210 of 17 December 1996, U.N. Doc. A/54/37 (1999) at 15 & 29.

[30] Even if the Court finds that the Convention only applies to terrorist offenses committed in situations of internal armed conflict, Colombia considers itself to be in such a situation. *See* Colombia CTC Report, *supra*, at ¶6 ("In a country like Colombia, affected by armed confrontation, acts occur that violate existing laws, including international humanitarian law. Such acts can be considered acts of terrorism . . . .").

[31] *See* Financing Convention, *supra*, at Art. 2(1), Annex.

terrorists.[32] The U.N. Security Council has even invoked its binding Chapter VII authority to compel states to prohibit terrorist financing and to cooperate in prevention efforts.[33]

Almost every state in the world has implemented and adopted the norms articulated in these conventions into its domestic laws.[34] In the United States, Congress recognized as early as 1996 — well before the Financing Convention entered into force — that terrorist financing was prohibited under international law.[35] The Colombian government has similarly enacted legal measures that prohibit terrorist financing.[36] These international and national measures demonstrate that providing material support to terrorist organizations is a "violation of the law of nations" with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," and it became such an offense well before Chiquita began to provide material support to the AUC. *See Sosa*, 542 U.S. at 732, 739.

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[32] *See* OIC Terrorism Convention, *supra*, Arts. 2(d) and 4(First)(4)(a); Commonwealth Terrorism Convention, *supra*, Art. 11; OAU Convention, *supra*, Art. 3; Arab Convention, *supra*, Art. 3; *see also* Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, June 16, 2005 (CETS 198).

[33] U.N. Security Council Resolution 1373 requires states to "prevent and suppress the financing of terrorist acts" and "[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals … in the knowledge that they are to be used, in order to carry out terrorist attacks," and to "ensure that any person who participates in the financing" of terrorism "is brought to justice." S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), ¶1(b).

[34] Since 2001, all UN member states have submitted annual reports to the UN's Counter-Terrorism Committee (CTC) on their domestic implementation of the prohibition against terrorist financing. These are *available at* http://www.un.org/sc/ctc/countryreports.html.

[35] The AEDPA, enacted in 1996, prohibits terrorist financing, and was enacted pursuant to Congress's Constitutional authority to "punish crimes against the law of nations and to carry out the treaty obligations of the United States." *See* 18 U.S.C. § 2339B, *supra*.

[36] Colombia CTC Report, *supra*, ¶30, (Colombia's Penal Code "establishes as punishable offences a number of acts relating to the economic and financial aspects of terrorist activities, such as…conspiracy to commit an offence…[and] terrorism...").

No court decisions persuasively hold that provision of material support to a terrorist organization cannot be actionable under the ATS. To the contrary, corporations that provide material support to terrorist organizations have been found liable for their conduct under the ATS. *See Arab Bank*, 471 F. Supp. 2d at 285-86. *Arab Bank* found that "under the Financing Convention, the acts of Arab Bank alleged by plaintiffs amount to primary violations," and confirmed, "[t]here is nothing novel or unusual under international law about imposing such liability." *Id*. at 286.

Chiquita cites two unpublished cases for support, but both are inapposite. Chiquita mistakenly argues that the *Saperstein* opinion rejected "material support" as an actionable offense, but there was no "material support" claim in that case. 2006 WL 3803718, at *7. Chiquita also mischaracterizes the court's decision in *Barboza*, which confirmed that "some acts of financial support of terrorism have been held to be sufficient to support jurisdiction under the ATCA." No. 1:06-cv-61527, at *23.[37]

[37] *Barboza* erroneously held that Article 2(1)(B) of the Financing Convention only prohibits the financing of terrorist acts committed with guns "in situations of armed conflict." No. 1:06-cv-61527 at *22. The Financing Convention is not so limited. *See* Financing Convention, Dec. 9, 1999, S. Treaty Doc. No. 106-49 (2000). The plain text of Article 2(1)(B) states that the Convention shall apply to the financing of any 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" is to intimidate a population. *Id*. The second clause in Article 2(1)(B) is independent from the first, as it is set off from the rest of the Article by commas. Under simple rules of grammatical construction, when a comma does not precede a prepositional phrase, the phrase applies only to the immediately preceding antecedent and to no others. *See, e.g.*, *International Primate Protection League v. Administrators of Tulane Educational*, 500 U.S. 72, 80 (1991); *Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876, 878 (5th Cir. 1973). Thus, the Financing Convention plainly applies to any terrorist act "intended to cause death or serious bodily injury to a civilian" whether or not the circumstances could be described as an "armed conflict." This reading is consistent with the treaty's purpose, which is to address "the worldwide escalation of acts of terrorism *in all its forms and manifestations*" and to reaffirm the Member States' "unequivocal condemnation of *all*

3. Chiquita Fails to Employ the Proper Framework for Determining Violations of the Law of Nations

As Plaintiffs demonstrate *supra*, federal courts have consistently employed a well-established method of discerning customary international law norms since the Supreme Court's *Smith* and *Paquete Habana* decisions. *See, e.g., Filartiga*, 630 F.2d at 881-85.[38] However, Chiquita recites a host of objections to Plaintiffs' reliance on certain legal sources that clearly misapprehend the nature of customary international law.

Chiquita first claims that Plaintiffs have not relied on appropriate legal sources in support of their claims, in part because the Financing Convention "is not a self-executing treaty." Def's Mem. at 25. Chiquita is mistaken when it suggests that only self-executing treaties provide evidence of customary international law. As numerous ATS decisions recognize, a treaty need not be self-executing to prove the existence of an offense under customary international law.[39] Chiquita also argues that the Financing Convention could not have prohibited its conduct because it entered into force after Chiquita had made some payments to the AUC. However, the Financing Convention codified a ***preexisting*** norm of international law when it was adopted.

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acts, methods and practices of terrorism as criminal and unjustifiable, *wherever and by whomever committed*." Financing Convention pmbl. (emphasis added). *Barboza* did not consider any legal sources pertaining to terrorism enacted between 1984 and 2007 other than the Bombing and Financing Conventions.

[38] For example, *Arab Bank* looked to many international authorities that demonstrate that "suicide bombings and other murderous attacks against civilians" are offenses under the ATS. *See Arab Bank*, 471 F. Supp. 2d at 278 (drawing from the centuries-old "principle of distinction" codified in Common Article 3 of the Geneva Conventions as well as from sources outside the international humanitarian law context).

[39] *See, Kadic*, 70 F.3d at 242-43 (making no distinction between self-executing and non-self-executing treaties); *Filartiga*, 630 F.2d at 883-84; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 339 (S.D.N.Y. 2005) (treaty to which U.S. is not a party may serve as evidence of the content of customary international law).

Past ATS decisions, including *Filartiga*, have recognized that an offense may be prohibited under customary international law even before the majority of states adopt an overarching international convention condemning it.[40] Plaintiffs' claims are no different in this respect from those in *Filartiga*, which was cited approvingly by *Sosa*. *Sosa*, 542 U.S. at 732.[41]

Chiquita next claims that state practice does not provide evidence of the customary international law norms on which Plaintiffs base their claims. Yet Chiquita has not identified a single state in which its provision of material support to a terrorist organization such as the AUC from 1996 to 2004 would have been legal, nor has it identified a single state that has declared its *support* for such practices. *See* Aceves Decl. at 6, 11-13. Chiquita also claims that the fact that some states have made reservations to the Financing Convention undermines the universality of the norms articulated therein. This is not the case. *See Arab Bank,* 471 F. Supp. 2d at 282 (states' reservations to the Financing and Bombing Conventions did not undermine fact that underlying norms were sufficiently well-accepted to form the basis of an ATS claim).[42]

Chiquita further claims that Plaintiffs cannot rely on domestic law as proof of the content of international law. Def's Mem. at 22 (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 257 n.33 (2d Cir. 2003)). This claim is erroneous and unsupported by *Flores*. 414 F.3d at 252 (finding that secondary sources such as domestic laws may be consulted to determine the acts

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[40] *Filartiga* held that torture was actionable under the ATS in 1976, despite the fact that the U.N. Convention against Torture was not adopted until 1984, did not or enter into force until 1988, and was not ratified by the U.S. until 1994. 630 F.2d at 878.

[41] Chiquita also claims that the Financing Convention cannot serve as evidence of a rule of customary international law because it does not provide a "clear and well-established definition" of prohibited conduct. This is plainly incorrect. *See* Art. 2(1)(b).

[42] *Arab Bank* noted that even the few regional terrorism treaties which provide an exception for acts taken in pursuit of self-determination recognize that acts of self-determination must taken in accordance with principles of international law. *See id.*

and practices of states). Plaintiffs have demonstrated that the nations of the world prohibit the conduct at issue here and consider that conduct to be of mutual concern.[43]

E. "Practical Consequences" Do Not Preclude Plaintiffs' Claims

Chiquita's "practical consequences" argument misinterprets *Sosa*, 542 U.S. at 727. Def's Mem. at 33. *Sosa* holds only that the "collateral consequences" of a recognizing a particular new international norm is relevant to "the determination whether a norm is sufficiently definite to support a cause of action." *Sosa*, 542 U.S. at 732. Here, where Plaintiffs' claims are founded on established and recognized violations of the law of nations such as extrajudicial killing and torture, *e.g.*, *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992), and where the Eleventh Circuit has already recognized aiding and abetting liability, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005), no such analysis is required or even proper. *See Khulumani*, 504 F.3d at 262 ("As *Sosa* makes clear, this duty [to evaluate collateral consequences] is fulfilled in the decision of a federal court to exercise its judicial discretion to recognize a cause of action for a violation of customary international law, an issue distinct from whether the adjudication of a given suit is barred…"). As *Khulumani* explains, the "collateral

[43] Finally, Chiquita asks this Court to ignore all international criminal jurisprudence since Nuremberg because it arose in the criminal law context. However, since 1789, the ATS has applied to norms with both criminal and civil components. *See Sosa*, 542 U.S. at 721 (citing 1795 opinion of Attorney General Bradford confirming that British citizens injured abroad could bring ATS claims against American attackers even if criminal prosecution was not possible). Congress' objective in enacting the ATS — to provide civil remedies to "aliens" injured in violation of the law of nations — would be undermined if plaintiffs were unable to bring claims based on conduct prohibited by international criminal law. ATS case law confirms that criminal law norms can establish the content of international law. *See Kadic*, 70 F.3d at 241-42 (upholding jurisdiction for claims alleging war crimes and genocide, notwithstanding the fact that war crimes are inherently criminal in nature). As one court explained, "Our past reliance on criminal law norms seems entirely appropriate given that…international law does not maintain [a] hermetic seal between criminal and civil law...." *Khulumani*, 504 F.3d at 270, n. 5 (Katzmann, J., concurring) (citing *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring)).

consequences" analysis applies to the recognition of new norms, not the question of whether an individual case should be dismissed. *Id.*; *see also Sosa*, 542 U.S. at 733, n.21 (discussing separately doctrines of case specific deference such as the political question doctrine).[44]

Even if a "practical consequences" analysis were appropriate here, Chiquita provides no basis for its application. Without explanation or support, Chiquita borrows two of the six factors courts use to evaluate the applicability of the political question doctrine to support its "practical consequences" argument, even though Chiquita does not move to dismiss on political question grounds. *Compare* Def's Mem. at 35-36 (citing unmanageability and impact on executive's ability to manage foreign relations) *with Baker v. Carr*, 369 U.S. 186, 217 (1962) (manageability and separation of powers are two of six factors used by courts to determine whether a case presents a nonjusticiable political question).

Well-settled authority demonstrates that there is nothing unmanageable about this suit. *See Linder*, 963 F.2d at 337 (suit alleging torture and summary execution of noncombatant by Nicaraguan contras during period of civil war is manageable); *see also, e.g., Kadic v. Karadzic*,

[44] To the extent a "collateral consequences" analysis is relevant to recognizing "terrorism" and "material support for terrorists" as violations of international law cognizable under the ATS, Chiquita has failed to show that any consequences weigh against permitting this suit. To the contrary, imposing liability those who provide material support to terrorist groups furthers the interests of the United States. *E.g., Boim v. Quranic Literacy Inst. and Holy Land Found for Relief Land Dev.*, 291 F.3d 1000, 1021 (7th Cir. 2002) (discussing role of businesses that support terror: "the only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts"); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005). Courts have declined to find "collateral consequences" where, as here, none of the governments involved have identified any adverse consequences. *See Arab Bank*, 471 F. Supp. 2d at 288 (rejecting "collateral consequences" argument in the context of an ATS claim for "suicide bombings and other murderous acts intended to intimidate or coerce a civilian population"). *Arab Bank* also extended ATS liability to cover corporate entities which provided material support to terrorist organizations, and found the "practical consequences" argument unpersuasive in that context as well. *See id.*

70 F.3d 232, 249 (2d Cir. 1995) (claims of mass human rights violations in Bosnia during wartime are manageable); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (suit alleging extrajudicial killing by terrorists is manageable).[45]

Plaintiffs' claims do not "imping[e] on the discretion of the Legislative and Executive branches in managing foreign affairs." Def's Mem. at 36. This case poses no separation of powers conflict. To the contrary, the United States has already indicted Chiquita for the conduct alleged here, leading the company to plead guilty and pay a $25 million criminal fine. Ample authority demonstrates that where a suit poses no challenge to United States foreign policy, there is no basis for dismissal on separation of powers grounds. *See Linder*, 963 F.2d at 337 (suit does not impinge on executive branch where "complaint challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war"); *see also Ungar v. P.L.O.*, 402 F.3d 274, 280 (1st Cir. 2005); *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 798 (D.C. Cir. 1984), 726 F.2d at 798 (Edwards, J. concurring) (tort suit arising out of terrorist acts presents no clash between branches of government).[46] Chiquita's assertion that a finding of "state action" would require dismissal is similarly without merit. *Sosa* approvingly cited *Filartiga*, and *In re Estate of*

[45] Chiquita's assertion that this case is unmanageable because of the number of claims is spurious. This litigation has already been consolidated by the MDL panel before this court and the Federal Rules of Civil Procedure provide ample tools for the management of far more complex cases. *E.g.*, *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *In re Holocaust Victim Assets Litig.*, No. CV-96-4849, 2000 WL 33241660 (E.D.N.Y. Nov. 22, 2000) (approving $1.25 billion settlement against Swiss banks for conduct during the Nazi era on behalf of refugees, slave labor survivors, those with deposited assets and those with insurance claims; over 32,000 claims have been made).

[46] Both *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) and *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006), Def's Mem. at 36, turned on the application of the political question doctrine to cases that posed direct challenges to United States foreign policy and are inapposite.

Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994), both cases involving abuses by foreign officials against their own citizens. 542 U.S. at 732; *see also, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184, 187 (D. Mass. 1995).

The fact is that very few American corporations, unsurprisingly, elect to aid and abet extrajudicial killings and terrorist acts by organizations designated a "Global Terrorist" by the United States, or even to knowingly finance such organizations. Permitting Plaintiffs, whose relatives were brutally executed, to hold Chiquita, a United States corporation, responsible for its knowing violation of domestic and international law does not "exceed the capacity of a U.S. court" or open the floodgates to meritless litigation.

F. Aiding and Abetting, Conspiracy, and Agency Liability Are Available and Properly Pled.

1. Aiding and Abetting

a. Aiding and Abetting Liability Is Available Under the ATS and the TVPA

Chiquita concedes that aiding and abetting liability is available under the ATS and the TVPA in this Circuit. Def's Mem. at 38, 67. Indeed, the Eleventh Circuit consistent with every other circuit to have considered this question has recognized aiding and abetting liability. *See Aldana*, 416 F.3d at 1248; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *see also Khulumani*, 504 F.3d at 260; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996) (affirming jury instruction that permitted liability based on aiding and abetting).[47]

[47] A long line of cases, both before and after *Sosa*, illustrate this overwhelming consensus. *See, e.g., In Re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d at 565; *Presbyterian Church of Sudan v. Talisman*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (defendant's

b. The Requirements of Aiding and Abetting Liability Are Met

In order to establish liability for aiding and abetting, Plaintiffs must plead that (1) wrongful acts were committed; (2) the Defendant substantially assisted the person who committed or caused the wrongful acts and (3) the Defendant knew that his/her actions would assist in the illegal or wrongful activity at the time the assistance was provided. *Cabello*, 402 F.3d at 1158; *see also Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); Restatement (Second) of Torts § 876(b) (1979) (aiding and abetting liability attaches where a third person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other").[48]

There can be no doubt that Plaintiffs have adequately pled the elements of aiding and abetting liability here. Plaintiffs allege that the AUC committed wrongful acts against

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argument that *Sosa* had "so changed the landscape of law governing ATS lawsuits . . . was clearly erroneous"); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997). Chiquita's suggestion, Def's Mem. at 40, that the "continuing viability" of aiding and abetting claims under the ATS is doubtful ignores this authority. Moreover, Chiquita cites to only two cases in support of its claim, both of which are inapposite. The decision in *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005), relied heavily on the now-overturned decision in *Khulumani v. Barclay Nat'l Bank*, and the case is therefore of little persuasive value. The court in *Corrie v. Caterpillar, Inc.* dismissed plaintiffs' claims, but in doing so, implicitly acknowledged that aiding and abetting and accomplice liability were available under the ATS. 403 F. Supp. 2d 1019, 1024, 1027 (W.D. Wash. 2005) (finding defendant's sale of goods to Israel could not constitute aiding and abetting because the United States had approved and paid for the sales). These cases do not undermine the long-standing recognition of aiding and abetting liability under the ATS and TVPA.

[48] Throughout its brief, Chiquita oddly focuses on the facts alleged in various cases, as if the facts in one case foreclose other fact patterns. However, *Cabello*'s holding that aiding and abetting liability is available is binding here, as is the standard it recognized. *Cabello*, 393 F. Supp. 2d at 1158.

Plaintiffs[49] with the substantial assistance of Chiquita.[50] Plaintiffs also allege that Chiquita knew that its actions would assist in the wrongful activity in which the AUC engaged.[51] Indeed,

[49] *See, e.g.*, NJC ¶¶22, 23, 27, 32, 45, 48, 51, 54, 57, 60; NYC ¶¶27-686; VC ¶¶89, 93, 97, 100, 104, 110, 113, 115, 120, 123, 125, 128, 133, 135, 139, 141, 144, 148, 152, 156, 159, 162, 165-66, 170, 175, 179, 181, 185-86, 190, 195, 198, 201, 203, 207-08, 214, 217-18, 222, 225, 227, 231, 234, 241, 245-46, 249; *see also supra* pp. 3-4.

[50] *See, e.g.*, NJC ¶¶32, 33 (Chiquita paid the AUC every month, making over 100 payments totaling over $1.7 million), 41 (Chiquita facilitated at least four arms shipments to the AUC), 43 (Chiquita allowed the AUC to use its port facilities for the drug trade, which was a major source of income for the AUC); NYC ¶¶192, 773, 860-61 (Chiquita shipped and unloaded 3,000 assault rifles and 5 million rounds of ammunition for the AUC), ¶¶865, 871 (Defendant's freighters materially and substantially aided the AUC in exporting drugs); VC ¶¶74-75, 82-83, 85; *see also supra* pp. 7-10.

[51] *See, e.g.*, NJC ¶¶34 (Chiquita's senior executives knew the corporation was paying the AUC and that the AUC was a violent organization, payments were hidden on the books as 'security payments' or made in cash), 33 (outside counsel advised Chiquita that payments were illegal), 63 (Chiquita knew the AUC was engaging in extrajudicial killings, torture, forced disappearances and other wrongs against civilians in Colombia); NYC ¶¶776 (the results of an internal investigation into the payments were provided to and discussed by Chiquita senior executives and a committee of the board of directors), 783 (Chiquita knew the AUC was designated a Foreign Terrorist Organization), 815 (a member of Defendant's Board of Directors objected to the payments and recommended withdrawal from Colombia), 818 (Department of Justice officials informed Chiquita that payments to the AUC were illegal and could not continue), 866; VC ¶¶75, 77-78; *see also supra* pp.5-9; U.S. Dep't of State, Colombia Country Report on Human Rights Practices for 1997 (Jan. 30, 1998) (describing AUC as umbrella organization for illegal paramilitary groups, which targeted teachers, labor leaders, community activists and others for selective killings, intimidation, and forced displacement). Plaintiffs further allege that Chiquita benefited from the AUC's actions. *See, e.g.*, NJC ¶¶31 ("[i]n exchange for its financial support to the AUC, Chiquita was able to operate in an environment in which labor and community opposition was suppressed"), 32 (AUC reduced labor strife, provided protection services, dealt reprisals to thieves); NYC ¶¶731 (Chiquita supplied money and arms to the AUC in return for the bloody pacification of the Zona Bananera.), 848 (Chiquita benefited from the AUC's actions which reduced unrest in the banana growing regions, provided for the seizure and/or acquisition of banana growing land from peasants, eliminated labor union organizers, and destroyed competition in the cultivation, distribution and marketing of bananas); VC ¶¶1, 74 (The AUC also provided protection services to Chiquita, dealing out reprisals against real or suspected thieves, as well as against social undesirables, and suspected guerrilla sympathizers or supporters), 90, 94, 98, 101, 118, 121, 124, 126, 130, 134, 136, 140, 142, 145, 149, 153, 157, 160, 163, 168, 171, 176, 180, 183, 187, 191, 196, 199, 204, 209, 215, 219, 223, 226, 229, 232, 235, 242, 247, 250; *see also supra* pp.5-6.

Chiquita pled guilty and signed a factual proffer admitting that the company provided material support to the AUC although it knew that the AUC engaged in illegal activities such as "the kidnapping and murder of civilians." Proffer ¶¶3, 5, 19, 22, 27-28; *supra* p. 11. In addition, the United States' Sentencing Memorandum recites additional facts demonstrating aiding and abetting liability, including that "Defendant Chiquita's financial support to the AUC was ***prolonged, steady, and substantial***" and that "Chiquita's money helped buy weapons and ammunition used to kill innocent victims." Sentencing Mem. at 6, 13-15 (emphasis added).

Chiquita erroneously claims that to successfully plead aiding and abetting liability Plaintiffs must allege, with respect to each alleged murder, facts sufficient to show that Chiquita specifically intended for its payments to the AUC to substantially assist that particular murder. Def's Mem. at 50, 67.[52] No such requirement exists. In *Halberstam*, 705 F.2d at 476, which the Supreme Court has called the "comprehensive opinion on the subject" of civil aiding and abetting liability, *Central Bank v. First Interstate Bank*, 511 U.S. 164, 181 (1994), the D.C. Circuit upheld a finding that the spouse of a burglar who not only did not know about or intend to assist with a murder that occurred during a burglary committed by her husband — and who did not know her husband was a burglar at all — was nevertheless liable for aiding and abetting.

[52] Chiquita simultaneously asserts that a specific intent requirement can be derived from the facts in *Cabello*, 402 F.3d at 1157-59, and *Aldana*, 416 F.3d at 1248, Def's Mem. at 38, and that these opinions "do not define the requisite elements to such aiding and abetting." Def's Mem. at 50. Chiquita is wrong on both counts. The aiding and abetting standard in the Eleventh Circuit is well established, *supra* pp.38-39, and does not include a specific intent requirement. Chiquita also relies on *Stutts v. DE Dietrich Group*, No. 03-cv-4058, 2006 WL 1867060, at *3 (E.D.N.Y. June 30, 2006), which held that allegations of routine financial services, without more, were insufficient to give rise to aiding and abetting liability. *Stutts* has no bearing here, as Plaintiffs do not allege routine financial services but cash payments and arms transfers to a terrorist group.

Halberstam affirmed that "it was not necessary" for the wife to intend to assist with or even know that her husband was committing a murder; rather, "when she assisted him it was enough that she knew he was involved in some type of personal property crime at night." 705 F.2d at 488; *see also Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998) ("shared intent" is not an element of aiding and abetting in civil context); *Linde*, 384 F. Supp. 2d at 586 ("[i]t is not necessary that [plaintiffs] allege that Arab Bank either planned, or intended, or even knew about the particular act which injured a plaintiff … Arab Bank also argues, in effect, that the requisite intent is the specific intent to cause the acts of terrorism which injured the plaintiffs. The Bank is incorrect.").

Chiquita purports to derive a specific intent requirement from one of the concurring opinions in *Khulumani*, 504 F.3d at 275-77. Def's Mem. at 50. Yet Judge Katzman's concurring opinion concluded only that aiding and abetting liability was sufficiently well-established and universally recognized to constitute customary international law for the purpose of recognition under the ATS. *Khulumani*, 504 F.3d at 276. Judge Katzman specifically declined to address the argument that the standard for aiding and abetting liability could be supplied by domestic federal common law. *Id.* at n.13.[53] In fact, the *Khulumani* panel did not

[53] Nonetheless, Plaintiffs meet the standard described by Judge Katzman. Plaintiffs allege that at the time that Chiquita made the first payment to the AUC, senior executives knew that the AUC was a violent paramilitary organization engaged in extrajudicial killings and other violence targeting labor union organizers, political organizers and other activists, (*e.g.*, NJC ¶¶20-22, 28, 33-34); Chiquita met with the AUC to arrange for the financing and coordination of paramilitary operations (*e.g.*, NYC ¶¶775, 847; VC ¶68); Chiquita hid the payments on its books (*e.g.*, VC ¶75); Chiquita supported the AUC for seven years with cash payments and arms transfers (*supra* pp. 7-10); and Chiquita benefitted from the suppression of labor strife and unrest (*supra* pp. 5-6). These allegations are sufficient for intent, which moreover is a question of fact. *See Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472 (11th Cir. 1991) ("a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be

determine whether the standard for aiding and abetting liability derives from international or federal common law and thus is of limited precedential value on this point. Instead, this Court should follow the Eleventh Circuit's decision in *Cabello* and *Aldana*.[54]

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determined after trial"); *Bennett Marine, Inc. v. Lenco Marine, Inc.*, Slip Copy, No. 04-60326-CIV, 2008 WL 906766, at *4 (S. D. Fla. Apr. 3, 2008) (refusing to determine whether the element of intent was satisfied at the motion to dismiss stage because an inquiry into a defendant's intent is "a factual one and certainly cannot be resolved prior to completion of discovery. Moreover, resolving this type of factual dispute may require credibility determinations best left for trial"). In addition, a showing of conscious avoidance or willful blindness may substitute for the *mens rea*. *See United States v. Peddle*, 821 F.2d 1521 (11th Cir. 1987) (upholding use of "conscious avoidance" instruction in conviction of conspiracy and possession of cocaine with intent to distribute).

[54] The standard utilized by this Circuit and adopted by Judge Hall is more consistent with the Supreme Court's decision in *Sosa*, 542 U.S. at 724 (holding that, consistent with the use of the word "tort" in the statute, the ATS "is best read as having been enacted on the understanding that the *common law* would provide a cause of action") (emphasis added). *See also Project Hope v. M/V IBN SINA*, 250 F.3d 67, 76 (2d Cir. 2001) (citing Restatement (Second) of Torts as a source of federal common law); *Halberstam*, 705 F.2d at 477-78 (citing Restatement § 876). Moreover, for the purpose of this case, the question of whether to apply international law standards or domestic tort standards is academic. The standard this Circuit follows in civil tort cases is very similar to the standard that has been applied by existing tribunals. *Compare Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment ¶245 (Dec. 10, 1998) (person who gives some assistance and support with knowledge that torture is being practiced aids and abets torture) *with Cabello*, 402 F.3d at 1158 (person who provides substantial assistance and knows that their actions assist in wrongful activity aids and abets). International jurisprudence makes clear that aiding and abetting does not require specific intent. The aider or abettor need not "share the mens rea of the perpetrator, in the sense of positive intention to commit the crime." *Furundzija*, case no. IT-95-17/1/T, at ¶245; *see also U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1217, 1222 (1952) (Steinbrinck convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities).

The ATS enforces the law of nations, not any particular treaty. The Rome Statute is relevant only to the extent it codifies customary international law. The *mens rea* requirement of the Rome Statute, consistent with customary international law, has been interpreted to mean that the perpetrator be "aware that the consequence will occur in the ordinary course of events." Gerhard Werle, Principles of International Criminal Law, ¶¶306-307, 330. The jurisprudence of the ICTY explicitly reflects the applicable customary international law because the Security Council and the United States insisted that the decisions be based on accepted principles of customary international law. Report of the Secretary-General Pursuant to Para. 2 of Security

Chiquita further argues that Plaintiffs have failed to adequately allege that Chiquita provided "substantial" assistance to the AUC. Def's Mem. at 51-53. Plaintiffs clearly allege that Chiquita supplied approximately $1.7 million to known terrorists who were violently murdering labor organizers and other potentially disruptive forces on and near their plantations. *Supra* p. 8. Chiquita has admitted as much. Proffer ¶¶3, 5, 19, 22, 27-28. Plaintiffs have also alleged that Chiquita facilitated weapons transfers and permitted the AUC to use its ports for its profitable drug trade. *Supra* pp. 9-11.

Such assistance easily satisfies any plain language interpretation of "substantial." *E.g.*, *Halberstam*, 705 F.2d at 488 (finding "substantial assistance" standard met even though "amount of assistance may not have been overwhelming"); *Linde*, 384 F. Supp. 2d at 584 (financial services provided to a foreign terrorist organization satisfies "substantial assistance requirement"). Indeed, after its full investigation, the United States Department of Justice found that Chiquita's support for the AUC was "substantial." Sentencing Mem. at 13.

Chiquita argues for a broader interpretation of "substantial assistance" that is tantamount to specific causation. *See* Def's Mem. at 51-53. Chiquita claims that the decision in *Almog v. Arab Bank* supports its claim, but *Arab Bank* explicitly ***rejected*** Chiquita's argument:

> Contrary to defendant's argument, plaintiffs need not prove that each perpetrator of an underlying attack was motivated by the "martyr" benefit plan in order to succeed on their claims . . . ***Nor is there a requirement of an allegation that the suicide bombers would not, or could not, have acted but for*** the assistance of Arab Bank. As discussed above, substantial assistance need not be a *conditio sin qua non* of the acts of the perpetrators.

Council Resolution 808 (1993) on the Establishment of the ICTY, U.N. Doc. S/25704, para. 34 ("the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law"); *see also Mehinovic*, 198 F. Supp. 2d at 1344 n.21 (tribunals are specifically empowered to prosecute only those violations of international humanitarian law that are "beyond any doubt customary law") (internal citations omitted).

Arab Bank, 471 F. Supp. 2d 257, 292 (S.D.N.Y. 2007) (emphasis added); *see also Linde v. Arab Bank*, 384 F. Supp. 2d 571, 583-86 (E.D.N.Y. 2005) (no requirement that suicide bomber "would not or could not have acted but for the assistance of Arab Bank"); *Talisman*, 244 F. Supp. 2d at 323-324 ("While the assistance must be substantial, it 'need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.'"); *see also Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion & Judgment ¶688 (May 7, 1997) (providing certain means to carry out crimes constitutes substantial assistance, even if the crimes could have been carried out some other way). The assistance of the accomplice need not have caused the act of the principal, but can occur after the fact. *Furundzija*, Case No. IT-95-17/1-T, ¶¶233-34; *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment ¶391 (Feb. 22, 2001). Defendant offers no persuasive support of its claim that Plaintiffs' allegations do not sufficiently allege "substantial" assistance.[55]

Chiquita further argues that Plaintiffs have not pled sufficient facts to establish that Chiquita was the proximate cause of Plaintiffs' injuries. Def's Mem. at 47-48. Chiquita's argument misstates the requirement of proximate causation for aiding and abetting claims. Plaintiffs have alleged that the AUC caused the relevant injuries and that Chiquita provided

[55] Chiquita cites two cases for this requirement but both actually support Plaintiffs' (and the Eleventh Circuit's) view. *Aetna Cas. & Surety v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 537 (6th Cir. 2000) holds that substantial assistance "does not mean *necessary* assistance." (Emphasis in original). *Cromer v. Fin. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) holds that substantial assistance requires a showing of proximate cause, but that proximate cause is shown by, as Plaintiffs contend, foreseeability: "aider and abettor liability requires the injury to be a direct ***or*** reasonably foreseeable result of the conduct." (Emphasis added). The only other case cited by Chiquita for support is *Sinaltrainal*, 474 F. Supp. 2d 1273. However, that complaint was dismissed for reasons unrelated to the adequacy of the pleadings regarding substantial assistance.

substantial assistance to the AUC, *supra* pp. 3-4, 7-10, which is sufficient for proximate cause, as Defendant's own authority demonstrates. *See Aetna Cas. & Surety*, 219 F.3d at 537. To show proximate cause, Plaintiffs need show only that an "ordinarily prudent person" should have foreseen that some harm probably would come to someone. *Hannah v. Gulf Power Co.*, 128 F.2d 930, 931 (5th Cir. (Fla.) 1942); *see also Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987) (defendant may be held liable for harm that is foreseeable "as well as for unforeseeable harm attributable to his conduct, unless it appears that the chain of events is 'highly extraordinary in retrospect'").[56] Chiquita disregards the basic rule that proximate cause is an issue for the jury and not a proper issue for a motion to dismiss. *See, e.g., Doe v. U.S.*, 718 F.2d 1039 (11th Cir. 1983); *Threaf Properties, Ltd. v. Title Ins. Co. of Minnesota*, 875 F.2d 831 (11th Cir. 1989). Plaintiffs' allegations of proximate cause are plainly sufficient in this context.

The cases that Chiquita purports to rely on to assert that proximate cause must be "direct" either actually demonstrate that the standard is "foreseeability" or are inapposite. For example, *Weiss v. Nat'l Westminster Bank, PLC*, 453 F. Supp. 2d 609, 631 (E.D.N.Y. 2006) and *Strauss v. Credit Lyonnais, SA*, No. CV-06-0702, 2006 WL 2862704, at *17 (E.D.N.Y. Oct. 5, 2006), both authored by the same judge, hold that a showing of proximate cause requires that the injury was "reasonably foreseeable or anticipated as a natural consequence." Both opinions also hold, as Plaintiffs here contend, "because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun" and conclude that the provision of funds to a terrorist organization "is thus the proximate cause of the terrorist acts

[56] The fact that Plaintiffs' injuries resulted from wrongdoing by the AUC does not break the chain of causation if the intervening criminal acts were foreseeable. *Vining v. Avis Rent-a-Car Systems, Inc.*, 354 So.2d 54, 56 (Fla. 1977).

engaged in the [by] the organization." *Strauss*, 2006 WL 2862704, at *18; *see also Weiss*, 453 F. Supp. 2d at 631-32.[57]

Plaintiffs allege that Chiquita provided substantial, ongoing support to the AUC (NJC ¶¶30, 32, 33; NYC ¶¶586-605; VC ¶¶64-71), including clandestine transfer of arms and ammunition from Nicaragua (*e.g.*, NJC ¶¶38-43). Plaintiffs further allege that Chiquita knew at all times that the AUC was a violent paramilitary organization that engaged in vicious crimes and human rights violations against civilians in Colombia, including extrajudicial killing, torture, and forced disappearances (*e.g.*, NJC ¶63). Finally, Plaintiffs allege that their relatives were tortured and executed by the AUC, and that the abuses they suffered at the hands of the AUC were similar in kind to the abuses the AUC was renowned for committing (*e.g.*, NJC ¶¶27-28, 67, 123). Thus, Plaintiffs' proximate cause allegations are not "conclusory" (Def's Mem. at 48); but based on the overwhelming evidence that Plaintiffs' injuries were the foreseeable consequence of Chiquita's material support for the AUC, a "Global Terrorist" organization.

2. Conspiracy and Agency

a. Conspiracy and Agency Theories Are Available for Plaintiffs' Claims Under the ATS and the TVPA

The Eleventh Circuit holds that conspiracy and agency liability are available under the ATS and TVPA. *See Aldana*, 416 F.3d at 1248 (quoting *Cabello*, 402 F.3d at 1157) (the ATS "reaches conspiracies and accomplice liability" and the TVPA reaches those who ordered, abetted, or assisted in the wrongful act). Defendant concedes that *Cabello* extended liability to

[57] *Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258 (1992), discusses proximate cause under the RICO statute and the Clayton Act, but its holding is based on the requirement of direct causation in the Clayton Act — a requirement not found in the common law of tort. *See, e.g.*, Restatement (Second) Torts § 876, comment on Clause (b) (requiring "forseeability" for liability for acts done by third party).

conspiracy to commit offenses recognized under the ATS. Def's Mem. at 42. The Eleventh Circuit has also made it clear that the principles of agency law are appropriate to determine liability under the ATS. *Aldana*, 416 F.3d at 1247-48; *see also Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1261-62 (N.D. Ala. 2003).

The Eleventh Circuit decisions on secondary liability under the ATS and the TVPA are supported by the weight of decisions from other circuits. *See Khulumani*, 504 F.3d at 288, n.5 ("secondary liability was recognized as an established part of the federal common law" applicable to claims under the ATS) (Hall, J., concurring); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996) (upholding a jury instruction that a foreign leader could be found liable if he "'directed, ordered, ***conspired with***, or aided' in torture, summary execution, and disappearance, or that he had knowledge of that conduct and failed to use his power to prevent it" under the TVPA) (emphasis added); *see also Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463-64 (S.D.N.Y. 2005); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52-54 (E.D.N.Y. 2005); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 122 (E.D.N.Y. 2000). Chiquita relies on *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 665-66 (S.D.N.Y. 2006), Def's Mem. at 43, but *Talisman* specifically acknowledged that its decision was contrary to *Cabello*, which it declined to follow, 453 F. Supp. 2d at 665, n.64. [58]

[58] This Circuit and the vast majority of courts to have considered the issue have found not only that conspiracy and agency liability apply to the ATS and the TVPA, but that the standard of liability is governed by federal common law. *See, e.g.*, *Cabello*, 402 F.3d at 1158-59 (citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which provides standard for conspiracy liability under federal common law); *Sarei*, 2007 WL 1079901, at *5; *Bowoto v. Chevron Corp.*, 312 F. Supp. 2d 1229, 1247-48 (N.D Cal. 2004) (affirming availability of agency claims under the ATS under "'generalized federal substantive law on disregard of [the] corporate entity'"

The majority of federal courts to have considered the issue, including the Eleventh Circuit, also reject Defendant's claim that "only a very small category of conspiracy violations are recognized under the law of nations." Def's Mem. at 42 (suggesting liability for ATS claims is limited to conspiracies to commit genocide and war crimes). In *Cabello*, the Eleventh Circuit permitted conspiracy liability for claims of torture, extrajudicial killing, and crimes against humanity. 402 F.3d at 1158-59. In *Hilao*, the Ninth Circuit's jury instruction permitted liability for conspiracy in the context of torture, summary execution, and "disappearance." 103 F.3d at 776. Other courts have allowed claims alleging conspiracy in the context of terrorist hijacking. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003).

(internal citation omitted)).

Chiquita erroneously claims that in order for conspiracy or agency to provide the basis for liability in an ATS action, international law must provide a norm that establishes conspiracy or agency with the same definite content and unambiguous acceptance among civilized nations as the actionable norms — such as extrajudicial killing — under the ATS. Def's Mem. at 42. However, as Plaintiffs have already demonstrated, although international law provides the content of actionable norms under the ATS, the scope of liability for violations of those norms is determined with reference to federal common law. *See, e.g.*, *Sarei*, 2007 WL 1079901, at *5, *reh'g en banc granted*, 2007 WL 2389822 (citing to the Restatement of Agency law for the federal common law standard to be applied to an ATS claim); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (the ATS "establishes a federal forum where courts may fashion *common law remedies* to give effect to violations of customary international law) (emphasis added). However, even those courts which have looked to international law to determine the availability of accomplice liability have determined that it is available under the ATS. *See, e.g.*, *Flores*, 414 F.3d at 251 (agency principles have become part of international law as "general principles of law recognized by civilized nations" as well as "judicial decisions."). Thus, regardless of the source of law on which they have relied, the majority of courts to have considered the issue have found that both agency and conspiracy liability are available under the ATS.

Chiquita erroneously suggests that under *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), conspiracy liability is only available for genocide and common plan to wage aggressive war. Def's Mem. at 42. *Hamdan* merely held that the Government had failed to show that a conspiracy to violate the law of war is itself a violation of the law of war triable by a military commission. *Id*. at 603-04, 610. The plurality discussed at length the specific requirements of the statute governing such commissions, *id.* at 590-609, which are not applicable here. Moreover, while the plurality concluded that the military commission did not have jurisdiction over a charge of conspiracy to commit a war crime as a separate, substantive offense, it did not foreclose the possibility that conspiracy is recognized internationally as a theory of liability, like aiding and abetting liability, rather than a crime on its own. *Id*. at 611 n.40. Both *Aldana* and *Cabello* upheld conspiracy as a basis for liability under the ATS by reference to requirements of that statute. *Hamdan*'s holding that the crime of conspiracy is not a war crime triable by military commission is irrelevant to this case because Plaintiffs refer to conspiracy as a form of secondary liability for the substantive torts, not as an independent violation of international law.

Chiquita also wrongly suggests that *Cabello* has been superceded by *Hamdan*. Def's Mem. at 42-43. There is nothing in *Hamdan* which is inconsistent with *Cabello*. An extrapolation from the implications of a Supreme Court decision holding on an issue that was not before the Supreme Court does not "upend settled circuit law." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). *Cabello* and *Aldana* remain binding precedent, permitting claims for secondary liability, including claims for conspiracy and agency for violations of customary international law, including extrajudicial killings.

Moreover, Plaintiffs have also alleged that Chiquita participated in a "joint criminal enterprise." Def's Mem. at 42. *Hamdan* recognized that there is a "species of liability for the

substantive offense under international law" referred to as "joint criminal enterprise." 126 S. Ct. at 2785 n.40. Consistent with *Hamdan*, the International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own, and which is a means to hold violators accountable for international law offenses.[59] JCE liability can be thought of as the international analogue to civil conspiracy under U.S. federal common law, according to which liability can be imposed for acts committed in furtherance of a common criminal purpose where those acts could be reasonably foreseen as the natural consequence of the unlawful agreement. *See Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment ¶224 & n.289 (July 15, 1999).[60]

b. Conspiracy Liability Is Sufficiently Pled

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 intending to help accomplish it, and (3) one or more of the violations was

[59] The ICTY cases cited by the *Hamdan* plurality make clear that JCE is well-established in customary international law and has been recognized since Nuremburg. *See Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment (July 15, 1999), *available at* 1999 WL 33918295; *see also Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (May, 21 2003), *available at* 2003 WL 24014138.

[60] The ICTY's delineation of JCE liability in *Tadic* and other cases has been adopted by the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). *See Rwamabuka v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision, ¶¶14-25 (Oct. 22, 2004); *Prosecutor v. Taylor*, SCSL-2003-01-I, Amended Indictment (Mar. 16, 2006). JCE liability provides a means for holding Defendant liable under the ATS. *See* Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109-33 (2007). Thus, even if the Court were to accept Defendant's argument that liability for conspiracy was not available under the ATS, Defendant could be held liable, consistent with international law, for its participation in a joint criminal enterprise.

committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159 (citing *Halberstam v. Welch*, 705 F.2d 472, 481, 487 (D.C. Cir. 1983)); *accord* Def's Mem. at 54. Plaintiffs have adequately alleged conspiracy liability.[61] For example, Plaintiffs allege that Chiquita met with leaders of the AUC and agreed to make payments and provide other support for their mutual benefit. NYC ¶¶846-62. Specifically, Plaintiffs alleged that Banadex's general manager met with Carlos Castaño of the AUC in 1997 to arrange for the financing and coordination of paramilitary operations in the Zona Bananera, NYC ¶¶775, 847; VC ¶68; Chiquita supplied money and arms over a seven year period in return for the pacification of the banana-growing regions of the country, despite knowing the payments and arms shipments were illegal, NJC ¶¶30-41; NYC ¶¶731, 736-739, 773, 775, 779, 847, 848; VC ¶¶68, 75, 80-88; the AUC carried out the extrajudicial killings of Plaintiffs' family members, Colombian villagers who were also trade unionists, banana workers, political organizers or social activists, NJC ¶¶2, 20-22; NYC ¶9; VC ¶1; and that Chiquita benefitted. NJC ¶¶31, 32; NYC ¶¶731, 848; *see also supra* pp. 5-6.

Chiquita argues that Plaintiffs have failed to satisfy the pleading standard for conspiracy, relying upon *Sinaltrainal*, *Med-Tech*, and *Twombly*. As discussed above, *supra* p. 12, *Twombly* requires Plaintiffs to provide Defendant fair notice of what the claim is and the grounds upon which it rests. Plaintiffs' allegations of conspiracy must be more than "speculative." *Twombly*, -- U.S. --, 127 S. Ct. at 1965. In *Twombly*, Plaintiffs based their claims of conspiracy "on descriptions of parallel conduct and not on any independent allegation of actual agreement." *Id.* at 1970. In *Sinaltrainal*, Plaintiffs failed to allege dates; names of individuals involved in the

[61] Chiquita's argument regarding the pleading standard is addressed *supra*, pp. 12-14.

conspiracy; whether the individuals meeting were even agents of the Defendant; any connections between wrongful acts and the conspiracy; and the nature or existence of payment or other exchange. *Sinaltrainal*, 474 F. Supp. 2d at 1293-1301. In *Cevitat Med-Techs, Inc. v. Aetna, Inc.*, No. 04-cv-01849, 2006 WL 218018, at *5-6 (D. Colo. Jan. 27, 2006), the plaintiffs failed to provide information about who made statements, when, what was said, and to whom. *Med-Techs*, 2006 WL 218018, at * 5-6. By contrast, as detailed above, Plaintiffs here have provided names and dates, alleging that the manager of Banadex, Chiquita's wholly-owned subsidiary, met with Carlos Castaño, head of the AUC, in 1997 to development a payment plan and a plan for paramilitary operations in the Zona Bananera. *E.g.*, NYC ¶¶775, 847; VC ¶68. In addition, Plaintiffs have provided detailed information about the total amount of payments made and the individual amounts of each payment. NJC ¶33; NYC ¶773; VC ¶¶72, 75. Plaintiffs have also alleged the mechanisms by which those payments were made. NYC ¶¶737-38, 779; NJC ¶64; VC ¶¶68, 75. Significantly, Chiquita has admitted that these acts occurred, including the meeting with Castaño, the regular payments to the AUC, and the mechanisms by which the payments were made. *See, e.g.*, Proffer ¶¶19, 21, 23, 25. Plaintiffs have also alleged that Chiquita entered into this conspiracy for mutual benefit, and that the violence perpetrated by the AUC inured to the benefit of Chiquita. *E.g.*, NJC ¶¶31, 32; NYC ¶¶731, 846-62; VC ¶¶1, 74, 90, 94. As a result, Plaintiffs' complaints rise above the vague non-specific allegations rejected in *Sinaltrainal*, *Med-Techs*, and *Twombly*.

c. Agency Is Sufficiently Pled

Whether there is an agency relationship is a question of fact, reserved for a jury. *Jackam v. Hosp. Corp. of Am. Mideast Ltd.*, 800 F.2d 1577, 1580 (11th Cir. 1986); *accord Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 173 (5th Cir. 1975) ("The existence and scope of a principal-

agent relationship is generally a question for the jury to determine…"). Under general agency rules, a principal will be held liable for the actions of its agents when the acts are (1) related to and committed within the course of the agency relationship; (2) committed in furtherance of the business of the principal; and (3) authorized or subsequently acquiesced in by the principal. *See Quick v. People's Bank of Cullman County*, 993 F.2d 793, 797 (11th Cir. 1993); *see also Aldana*, 416 F.3d at 1263 (accepting allegations of agency liability where individuals acted with defendant's "advance knowledge, acquiescence or subsequent ratification"); *Bowoto*, 312 F. Supp. 2d at 1247 ("plaintiffs have an independent claim under their ratification theory that their subsequent ratification of [agent's] actions created an agency.")

Plaintiffs have adequately pled agency. Plaintiffs allege that AUC was an agent of Chiquita, and that the AUC undertook violent acts related to and committed within the course of that relationship. NJ ¶¶16 (AUC employed by or an agent of Chiquita, and acted within the scope of such agency and/or employment), 33, 75; NYC ¶¶734-35, 776, 854, 846 (describing meeting between AUC and Chiquita to set up financing and coordinate operations); VC ¶56 (alleging agency), 68, 75. Plaintiffs further allege that the AUC's violent acts were committed in furtherance of Chiquita's business interests in the Zona Bananera. NJC ¶¶13, 33; NYC ¶¶731; 756, 848 (alleging that Chiquita benefitted by operating in an environment of suppressed labor and community opposition and weakened or eliminated competition). Finally, Plaintiffs allege that Chiquita either authorized or acquiesced in the AUC's violent actions. NJC ¶¶33, 34 (alleging that Chiquita senior executives knew that the company was paying the AUC and that the AUC was a violent, paramilitary organization); NYC ¶¶785, 812-15, 818, 820-37, 839, 841-43 (alleging that Chiquita continued paying the AUC, despite being told that such payments were illegal); VC ¶¶77-78 (same).

G. The Complaints Adequately Plead a Primary Violation by the AUC — Both Where State Action Is Required and Where it Is Not.

Plaintiffs bring two kinds of Alien Tort Statute claims: one that requires state action (summary execution), and the others which do not (terrorism, war crimes and crimes against humanity).[62] Chiquita contends that Plaintiffs have not satisfied the state action pleading requirement for the AUC's primary violation of summary execution because, according to Chiquita, liability is not extended to private parties acting under "color of law" and, in any event, AUC's only alleged ties to the Colombian government are weak and bear no relation to the relevant ATS claims. For those claims where state action is not required, Chiquita alleges that Plaintiffs fail to allege a primary violation by the AUC of the ATS because none of the murders constituted war crimes and crimes against humanity.[63] These contentions are false and the arguments unavailing.

Chiquita's preliminary argument is that, despite not addressing the issue whatsoever, *Sosa* should somehow be read to overturn decades of common and statutory law regarding whether nominally private parties can act "under color of" law for ATS purposes. Def's Mem. at 59. Chiquita cites no authority for this proposition and does not explain how it reaches its

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[62] *See Kadic*, 70 F.3d at 239-44 (state action requirement for certain ATS violations, such as summary execution, but not crimes against humanity or war crimes); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (no state action requirement for war crimes, crimes against humanity and genocide). Likewise, Congress, in enshrining causes of action for torture and summary execution in the TVPA, also retained the state action requirement. *Kadic*, 70 F.3d at 245 (under the TVPA, a plaintiff "must establish some governmental involvement" (quoting H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991)). Thus, the TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority, or color of law, of any foreign nation." Pub. L. No. 102-256, 106 Stat. 73 § 2(a) (1992) (codified at 28 U.S.C. § 1350 note).

[63] Allegations in the NY complaint of genocide are withdrawn (fourth cause of action NYC ¶¶907-911).

conclusion. This argument should be rejected not only as counter-intuitive and unsupported, but because it directly contradicts well-established Eleventh Circuit law. *See Main Drug, Inc.*, 475 F.3d at 1230.

1. There Are at Least Four Distinct and Well-Established Ways that Nominally Private Parties, such as the AUC, Can Be Found to Have Acted Under "Color of Law"

In order to determine whether a nominally private party has acted under "color of law" under the ATS or the TVPA, the court must look first to federal common law. *See Sosa*, 542 U.S. at 724; *Khulumani*, 504 F.3d at 286–87 (Hall, J., concurring); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where, "under ordinary principles of tort law [the defendant] would be liable"). In addition to the body of law on state action already well developed under the ATS and TVPA, courts may also look to civil rights jurisprudence under 42 U.S.C. § 1983 for guidance. *Aldana*, 416 F.3d at 1247 ("In construing [the] state action requirement [of the ATS and the TVPA], we look 'to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983.'"); *Kadic*, 70 F.3d at 245. There are at least four ways that parties such as the AUC may be found to have acted under color of law for purposes of the ATS and TVPA.

a. Acting Jointly With or Receiving Significant Aid From the State

A private party is a state actor for the purposes of the ATS and TVPA where the party was a willful participant in joint activity with the state or its agents, or has acted together or in concert with, or has obtained significant aid from, state officials. Section 1983 "does not require that the [actor] be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the

challenged action, are acting 'under color' of law for purposes of 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980); *see also Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982) (state action requirement met where defendant "has acted together with or has obtained significant aid from state officials"); *Kadic*, 70 F.3d at 245 (state action requirement met where defendant "acts together with state officials or with significant state aid"); *Saravia*, 348 F. Supp. 2d at 1150 (adopting *Kadic* standard); *Sinaltrainal v. The Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1353 (S.D. Fla. 2003) (same standard); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005).[64]

b. Sharing a Significant Nexus or Symbiotic Relationship with the State

A private party is a state actor for purposes of the ATS and TVPA when the party has a significant nexus or symbiotic relationship with the state. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). This test was expressly adopted by the court in *Sinaltrainal* in the context of the AUC. *See* 256 F. Supp. 2d at 1353 & n.6 (allegation that the AUC had a "mutually-beneficial [sic] symbiotic relationship with the Colombian government's military"

[64] Moreover, courts applying §1983 standards in ATS cases have asked whether state officials and private parties "acted in concert." *Kadic*, 70 F.3d at 245; *Sinaltrainal*, 256 F. Supp. 2d at 1353; *accord NCGUB v. Unocal*, 176 F.R.D. 329, 346 (C.D. Cal. 1997). "Acting in concert" is a term of art that encompasses aiding and abetting liability as well as civil conspiracy liability; indeed, the section of the Restatement of Torts that discusses both aiding and abetting and conspiracy is entitled "Persons Acting in Concert." *See* Restatement (Second) of Torts § 876 ("Persons Acting in Concert"). *Accord Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580 (1982) (recognizing "concerted action liability" for those "'who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit'" (quoting *Prosser on Torts* §46 at 292 (4th ed. 1971) and citing Restatement §876); *In re: Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005) (noting that courts have permitted ATS actions premised aiding and abetting and conspiracy theories and that therefore the ATS may provide "a concerted action claim of material support by alien-Plaintiffs here"); *see also NCGUB*, 176 F.R.D. at 346–47 ("joint action" in ATS case is satisfied by willful participation as well as conspiracy).

was sufficient to meet the state action requirement); *see also Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 315 (S.D.N.Y. 2001), *reversed on other grounds by Tachiona v. U.S.*, 386 F.3d 205 (2d Cir. 2004) (citing *Burton* test in concluding that private party acted under color of law).

c. Acting Under Actual or Apparent Authority of the State

A private party is a state actor for purposes of the ATS and TVPA where the party, under agency principles, acted under actual or apparent authority of the state or state officials. The TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority" of a foreign nation. Thus, Congress contemplated and this Court has held that, "[i]n construing [the TVPA's] state action requirement," courts also "look to the principles of agency law." *Aldana*, 416 F.3d at 1247 (quoting *Kadic*, 70 F.3d at 245); *see also* S. Rep. No. 102-249, 1991 WL 258662, at * 8 (courts look to agency theory in addition to section 1983 "in order to give the fullest coverage possible"); *Saravia*, 348 F. Supp. 2d at 1149–51 (finding that death squad member acted under apparent authority of El Salvador).

An agent acts with actual authority when, at the time of the act, the agent reasonably believes, in accord with the principal's manifestation to the agent, that the principal wishes the agent to so act. Restatement (Third) of the Law of Agency § 2.01; *see also id.* § 3.01. Apparent authority, by contrast, focuses on the reasonable belief of the third party. It arises when a third party "reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of the Law of Agency § 2.03. Assent may be manifested "through written or spoken words or other conduct." *Id.* at § 1.03. In *Saravia*, for example, the court found that a death squad acted under the apparent authority of El Salvador because the squad got financial and logistical support of the Salvadorian army, included members of the Salvadorian Army and coordinated operations with the army, and benefited from

a National Police cover-up of the murder, which included an attempted assassination on the judge perpetrated by the National Police. *Saravia*, 348 F. Supp. 2d at 1149–51.

d. Acting at the Instigation, or with the Consent or Acquiescence of State Officials

A private party is a state actor for purposes of the ATS and TVPA where the party acts at the instigation, or with the consent or acquiescence of, a public official or other person acting in an official capacity. The TVPA enshrines the principle that abuses violate international law if they are authorized, tolerated, or knowingly ignored by state officials, who are also liable for those abuses. S. Rep. No. 102-249, 1991 WL 258662, at *9. Section 2(a) of the TVPA affords liability against any individual who commits torture or summary execution "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. In passing the TVPA, Congress noted generally that the TVPA "will carry out the intent of" the Torture Convention. S. Rep. No. 102-249, 1991 WL 258662, at *3; *see also* H.R. Rep. No. 102-367, 1992 U.S.C.C.A.N. 84, 1991 WL 255964, at *1 (noting that the TVPA responds to U.S. obligation under the Convention to provide a means of civil redress to torture victims). As the Eleventh Circuit has noted, the TVPA also looks to Article 3 of the Inter-American Convention to Prevent and Punish Torture, which contemplates liability for any public servant who instigates or induces torture, or, being able to prevent it, fails to do so. *Cabello*, 402 F.3d at 1157 (quoting S. Rep. No. 102-249, 1991 WL 258662, at *9 n.16). In *Aldana*, the Eleventh Circuit appeared to accept that state action would exist if the police made a knowing choice to ignore the ongoing commission of abuses. 416 F.3d at 1248–49.

Under international law, liability is also generally accorded when a state fails to act, or where there is instigation, consent, or acquiescence by a public official or other person acting in

an official capacity. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"), art. 1, G.A. Res. 39/46, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984); *accord* Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, § 1, ESC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. No. 1 at 52, U.N. Doc. E/1989/89 (1989).[65]

2. The AUC Committed the Murders at Issue Under Color of State Law

The Supreme Court has stated that it is an "impossible task" to "fashion and apply a precise formula" for determining when state action is present. *Burton*, 365 U.S. at 722. Indeed, in cases with "nonobvious involvement of the State in private conduct," it is necessary to perform a delicate "sifting [of] facts and weighing [of] circumstances." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938 (1982). However, examining the breadth and the depth of the nexus between the AUC and the Colombian state in this case reveals that this is not a close call and, in fact, satisfies each of the four "color of state law" tests enumerated above, although any one of the tests would be sufficient.

The AUC enjoyed longstanding and pervasive ties to the official Colombia security forces, including the Colombian Armed Forces and the Colombia National Police. In the 1980s,

[65] *See also* Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, art. 3(b) (1989), *reprinted in* OEA/Ser.L.V./11.82doc.6.rev.1 at 83 (1992) (person "who at the instigation of the public servant" commits or is an accomplice to torture is guilty thereof); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3542 (XXX), Supp. No. 34, U.N. Doc. A/10034, arts. 1, 8 (1975) (prohibiting torture committed "by or at the instigation of a public official"); *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* [1980] I.C.J. Rep. 2, 29 (holding Iran responsible for acts of the militants who seized the U.S. Embassy in 1979 because the Iranian government had given a "seal of official government approval." The I.C.J. reached this conclusion because, among other things, a government official issued statements encouraging the hostage-takers.).

the Colombian military participated in organizing and arming the AUC. NJC ¶25; NYC ¶747; VC ¶69. Boundaries between the two groups were amorphous, as some paramilitary members were former police or army members, while some active-duty military members moonlighted as paramilitary members and became thoroughly integrated into the groups. VC ¶69. Paramilitary leaders noted that security forces allowed members of the AUC to serve as proxies in the pursuit of guerrilla forces, largely due to the military's operative incapacity to defeat the guerrillas on its own and its willingness to allow paramilitaries to perform its dirty work. *Id.*

Even when not participating in joint operations, half of Colombia's eighteen brigade-level Army units have been shown to have cooperated with paramilitaries. NJC ¶25; NYC ¶747. This cooperation is so pervasive that the AUC is referred to by many in Colombia as the "Sixth Division," in addition to the five official divisions of the Colombian Army. *Id.* As of September, 2000, U.S. government records indicate that 285 members of the police and military were under investigation for links with paramilitaries. VC ¶66.

Colombian security forces have long closely coordinated and worked in tandem with the AUC. NJC ¶26; NYC ¶748. This joint activity includes allowing paramilitaries to establish permanent bases and checkpoints without interference; failing to carry out arrest warrants for paramilitary leaders, permitting them to move about the country freely; withdrawing security forces from villages deemed sympathetic to guerrillas, leaving them vulnerable to attack by paramilitaries; failing to intervene to stop ongoing massacres occurring over a period of days; sharing intelligence, including the names of suspect guerilla collaborators; sharing vehicles, including army trucks used to transport paramilitary fighters; supplying weapons and munitions; allowing passage through roadblocks; providing support with helicopters and medical aid; communicating via radio, cellular telephones, and beepers; sharing members, including active-

duty soldiers serving in paramilitary units and paramilitary commanders lodging on military bases; and planning and carrying out joint operations. *Id.* High-level officials in the Colombian government collaborated with and directed AUC operations, including massacres, extrajudicial killings, murders, disappearances, and forced displacements. NYC ¶718. Government security forces have also stood by or facilitated AUC attacks, including positioning troops outside AUC-targeted areas to prevent human rights and aid organizations from aiding survivors. NJC ¶¶26-27; VC ¶¶65, 67; NYC ¶743. In a recurring pattern, paramilitaries have taken over villages and assaulted inhabitants while nearby security forces have either not intervened or have intervened to facilitate the violence. NJC ¶27; VC ¶69.

Furthermore, payments to the AUC (including Chiquita's) were routinely made through convivirs — state-sponsored neighborhood groups that are licensed and operate under the express authority of Colombian government. NJC ¶64. Convivirs operated as legal fronts for the paramilitaries, and known paramilitary leaders frequently commanded, controlled, or colluded with them. NYC ¶¶734-35; VC ¶68.

Chiquita makes much of the Colombian government's 1989 decree that established criminal penalties for providing assistance to paramilitaries as being incompatible with existence of ties between the state and the AUC. Def's Mem. at 60. However, the continued existence of military/AUC ties has been documented by Colombian non-governmental organizations, international human rights groups, the U.S. State Department, the Office of the U.N. High Commissioner for Human Rights, and the Colombian Attorney General's office. NJC ¶25. Moreover, high-ranking officials from across the Colombian government have been implicated in paramilitary collaboration, including fourteen current members of Congress, seven former lawmakers, the head of the secret police, mayors, and former governors. *Id.* ¶64.

Numerous ATS and TVPA cases have found actions of paramilitary groups to have satisfied the state action requirement where, as here, state officials provide financial and logistical support. *See Kadic*, 70 F.3d 232; *Saravia*, 348 F. Supp. 2d 1112; *Mehinovic*, 198 F. Supp. 2d 1322. Furthermore, the requirement is satisfied where, as here, state officials are involved in supporting and cooperating in the commission of abuses. *See Aldana*, 416 F.3d 1242; *Tachiona*, 169 F. Supp. 2d 259.

In light of the facts recounted above, it is not surprising that the Inter-American Court of Human Rights has repeatedly found the Colombian state responsible for the acts of Colombian paramilitary groups, including the AUC, *after those groups were declared illegal under Colombia law*, when the state acted in concert, aided, knowingly failed to stop, or otherwise assisted abuses committed by the groups. *See, e.g.*, *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005), ¶¶118–23.[66]

Similarly, a later case, *Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006), found that state responsibility for killings by the AUC arose from acts of acquiescence, collaboration, and omission on behalf of the Colombian military, *id.* ¶132, including facilitating entry into the region, failing to help the civilian population, accepting stolen cattle, and withdrawing military from the region before the attacks. *Id.* ¶¶125.85–125.86, 125.32, 132-133. Finally, *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006), illustrates that the state may also be held responsible for failure to act. There the Inter-American Court found Colombia responsible for the acts of paramilitary groups

[66] There, the Colombian military facilitated the advancement of the AUC into the region and provided communications and munitions support. *Id.* ¶¶96.30–96.34. Further, Colombian authorities relocated government troops from the area, leaving the population unprotected. *Id.* ¶96.38. Plaintiffs have alleged similar facts here, *supra* pp. 6-7.

where it had accorded the groups a high level of impunity and did not diligently adopt the necessary measures to protect the population. *Id.* ¶¶126–27, 138, 140. The Colombian authorities had not adopted reasonable measures to control access to available routes in the area, did not assist in the search for the disappeared, and abstained from investigating the attacks. *Id.* ¶¶138, 95.42, 95.44, 95.48, 52, 55.

Chiquita argues that Plaintiffs' allegations of "general" ties to the Colombian government do not relate to the specific torts at issue. Def's Mem. at 60-62. However, this argument turns a blind eye to the depth of the nexus between the AUC and the Colombian government. When a killing is committed by a paramilitary organization founded, populated, organized, coordinated, armed, outfitted and paid through the state or state-sponsored entities, as here, it is impossible to separate the conduct from the pervasive government involvement.[67] Plaintiffs have alleged facts that satisfy all four tests for state action. Plaintiffs allege that the AUC was a willful participant in joint activity with the state; the AUC acted together, or in concert with, state officials; and the AUC has obtained significant aid from, state officials, satisfying the first test for state action. *E.g.*, NJC ¶26; NYC ¶748. Plaintiffs also allege a significant nexus or symbiotic relationship

[67] Indeed this nexus in this case is much stronger than other cases where nominally private parties were found to have acted under color of law under §1983. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (state action when private diner refused to seat black patrons because police knew of diner policy and refused to intervene); *Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (state action where private defendant enjoyed close relationship with police chief and used misleading information to convince the police to commit the plaintiff to a mental hospital); *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 624-25 (S.D.N.Y. 1999) (two private parties who allegedly conspired with a prosecutor to rig evidence presented to a grand jury could be found to have acted under color of law even if role of the prosecutor amounted to no more than non-actionable negligence); *Jackson v. Faber*, 834 F. Supp. 471 (D. Me. 1993). The ATS state action requirement is to be defined consistent with §1983 jurisprudence, *see Aldana*, 416 F.3d at 1247, and these cases draw a line for state action far broader than necessary here.

with the state. *E.g.*, NJC ¶25; NYC ¶747; VC ¶69. Plaintiffs' complaints assert that the AUC acted with the actual or apparent authority of the state or state officials. *E.g.*, NYC ¶718. Finally, Plaintiffs have appropriately alleged that the AUC acted at the instigation, or with the consent or acquiescence of, a public official or other person acting in an official capacity. *E.g.*, NJC ¶26; VC ¶69.

3. Because the Murders of Plaintiffs' Relatives Were War Crimes, Crimes Against Humanity, and Terrorism, Plaintiffs Need Not Show State Action

a. The Killings at Issue Constitute Crimes Against Humanity, Which Does Not Require State Action

Defendant concedes that crimes against humanity (CAH) does not require state action. Def's Mem. at 57.[68] CAH requires a widespread or systematic attack directed against any civilian population. *Cabello*, 402 F.3d at 1161. Thus, Plaintiffs need not demonstrate state action for any abuse suffered as part of that pattern.

Chiquita claims that "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." Def's Mem. at 65. This makes no sense. The over 700 murders at issue in these cases have been explicitly alleged to have been part of the pattern of abuse—that is, they *are* "examples of widespread AUC violence."[69] Accordingly, Chiquita's reliance on *Aldana*,

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[68] *Accord Kadic*, 70 F.3d at 236; *id*. at 239-40 (private persons may be found liable for violations of international humanitarian law); *Tadic*, IT-94-1, Trial Chamber ¶¶654-55 (May 7, 1997) (ICTY CAH can be committed by "*any* organization or group, which may or may not be affiliated with a Government," and is "imputable to private persons or agents of a State") (emphasis in original).

[69] NJC ¶¶66-67, 91-92; *see also id.* ¶¶2, 22 (AUC victims were typically members of these or similar groups), 23 (AUC abuses affected large population, and were carried out systematically), 44, 46, 47, 50, 53, 56, 59 (Plaintiffs' decedents were trade unionists, banana

416 F.3d at 1247, is misplaced, especially since the plaintiffs in that case did not even plead CAH or a widespread or systematic attack.[70]

b. The Killings at Issue Constitute War Crimes, Which Does Not Require State Action

Defendant concedes that war crimes do not require state action, Def's Mem. at 57; *accord Kadic*, 70 F.3d at 236, 242-43, and that Plaintiffs have alleged an armed conflict. *Id*. Chiquita, however, misstates the elements of war crimes, and ignores Plaintiffs' allegations, which are easily sufficient to meet even Chiquita's mistaken test.

Murders committed "in the course" of hostilities are war crimes. *Kadic*, 70 F.3d at 242-44; *Talisman Energy, Inc*., 453 F. Supp. 2d at 671; *Mehinovic*, 198 F. Supp. 2d at 1350. Although Chiquita at one point recognizes this, Def's Mem. at 62, Chiquita ultimately claims that "it is not enough" that "innocent civilians [were] killed in the course of an armed conflict."

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workers, political organizers, social activists, and others targeted the AUC); NYC ¶¶9 (describing Plaintiffs or their decedents as connected to the banana economy - farmers, land owner, laborers - and others as labor organizers), 705 (the AUC targeted rural workers, trade unionists, community activists, and others), 901, 902; VC ¶¶1 (Plaintiffs are family members of trade unionists, banana workers, political organizers, social activists, and others targeted and killed by terrorists, notably the AUC), 62 (vast majority of the AUC's victims were from these groups), 63 (AUC abuses affected a large population and were carried out systematically), 254-56, 267, 268, 115, 116, 138-40, 169m 170, 184-86, 188-190, 211-213.

[70] Defendant claims in a footnote that CAH is insufficiently definite to be actionable. Def's Mem. at 65, n.60. This is contrary to post-*Sosa* Eleventh Circuit authority. *Cabello*, 402 F.3d at 1161; *see also Aldana*, 416 F.3d at 1247 (noting that crimes against humanity are recognized as violations of international law, though plaintiffs in that case did not allege such crimes in their complaint). Other courts have held likewise. *E.g.*, *Saravia*, 348 F. Supp. 2d at 1154, 1156 (CAH "has been defined with an ever greater degree of specificity than the three 18th-century offenses identified by [*Sosa*] and that are designed to serve as benchmarks for gauging the acceptability of individual claims under the ATCA" and collecting cases); *Mujica v. Occidental Petroleum Corp*., 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005); *Mehinovic*, 198 F. Supp. 2d at 1344, 1352-53 (CAH actionable under same test later adopted in *Sosa*). There is no contrary ATS authority.

Id. at 63.[71] Instead, Chiquita asks this Court to create a motive requirement; *i.e.*, that abuses were committed "in furtherance" of a conflict. *Id.* There is no such requirement.

Warring parties often commit atrocities against innocents for reasons other than furthering military aims. Both U.S. and international humanitarian law seek to redress such senseless brutality. Both therefore eschew the motive requirement Chiquita advances. The murder and abuse of noncombatants is forbidden regardless of the interests or motivations of the perpetrators.

U.S. law does not require that an act must be committed "in furtherance" of an armed conflict. The statutory definition is that the abuse be "committed in the context of and in association with an armed conflict." 18 U.S.C. § 2441(c)(3). This reflects international law. The customary international law of war crimes, codified in Common Articles 3 of the Geneva Conventions, *see, e.g.*, Convention Relative to the Treatment of Prisoners of War, Geneva Convention No. III, arts. 3, Aug. 12, 1949 6 U.S.T. 3316, and Article 8 of the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, bans murder of noncombatants outright. There is no limitation as to motive.

The jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) and that of the new International Criminal Court (ICC), confirm this point. To be considered a war crime, an abuse need only be "committed *within the context* of th[e] armed conflict." *Prosecutor v. Tadic*, No. IT-94-1-T, Opinion & Judgment ¶560 (May 7, 1997) (emphasis added); *see also* Official Journal of the International Criminal Court, *Elements of Crimes* at 33-37 (Sep. 9, 2002) (sufficient if act "took place in the context of and was

[71] Where Chiquita does recognize the proper standard, it distorts that standard by inserting a parenthetical distinction that finds no support in the cited sources. Def's Mem. at 62.

associated with an armed conflict"). Critically, an act may be considered a war crime even if it is committed for a reason other than furthering the armed conflict. *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶287 (Jan. 29, 2007) ("[t]he armed conflict need not be considered the ultimate reason for the conduct"); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Judgment ¶195 (Nov. 16, 1998) (it is not necessary that a crime "be in actual furtherance of a policy" of a party to the conflict). It is sufficient that the conflict play a "substantial role" in the perpetrator's "ability to commit the crime." *Dyilo*, ICC-01/04-01/06, ¶287.[72] Thus, in *Prosecutor v. Kunarac*, the ICTY held that the "conflict need not have been causal to the commission of the crime" and that abuses committed "in the aftermath of the fighting" constituted war crimes when they were "made possible by the armed conflict" and the conflict "offered blanket impunity to the perpetrators." Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment ¶¶58-59, 568 (June 12, 2002). The court further held that the nexus requirement was satisfied if the commission of the act in question "[took] advantage of the situation created by the fighting." *Id.*[73]

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[72] It is also sufficient that the conflict play a "substantial role" in the perpetrator's decision to do so. *Dyilo*, ICC-01/04-01/06 ¶287. Thus, even where a defendant's motive is used to support a finding of a war crime, defendant applies the wrong standard.

[73] Defendant's contrary argument is unpersuasive. Chiquita notes that in *Kadic*, plaintiffs alleged that abuses at issue were committed as part of a pattern of systematic human rights violations that was directed by defendant and carried out by military forces under his command. Def's Mem. at 63, *quoting* 70 F.3d at 237. But those facts do not remotely suggest that all of the abuses were motivated by a military purpose. Even if they did, the quoted passage described plaintiffs' allegations, not the law of war crimes. 70 F.3d at 237. The discussion of the law nowhere suggests that a military purpose is required. *Id.* at 242-43. Regardless, Plaintiffs present allegations indistinguishable from those in *Kadic*. *E.g.*, NJC ¶¶23 (AUC abuses carried out systematically), 66-67 (injuries to Plaintiffs part of pattern of systematic human rights violations, directed by a centrally commanded paramilitary organization). The unpublished decision in *Saperstein*, 2006 WL 3804718, is equally inapposite. There, the court rejected the argument that "the murder of *an* innocent civilian during an armed conflict" was actionable. *Id.*

In sum, Defendant relies upon the wrong standard. The question is whether Plaintiffs were noncombatants killed "in the course of" the conflict. They were. *See* NYC ¶¶707-15 (referencing United States State Department Reports on Human Rights Practices describing Colombia's "internal conflict" causing noncombatant deaths).

Indeed, Chiquita's argument fails for the wholly independent reason that Plaintiffs' allegations suffice to meet even Chiquita's mistaken "in furtherance" standard. Plaintiffs have adequately alleged that the acts were committed in furtherance of the armed conflict.[74] These allegations easily meet the lower standard that is actually enshrined in U.S. and international law.

It is well documented that the AUC regularly killed civilians in furtherance of their ongoing conflict with guerrilla armies. *See, e.g.*, *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (May 15, 2005), ¶96.33-96.35 & 96.39; *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006), ¶¶95.30 & 95.39-95.40 (persons accused of cooperating with guerrillas killed by paramilitaries); *Rochela Massacre v. Colombia*, Inter-Am.Ct. H.R. (ser. C) No. 163 (May 11, 2007), ¶¶74 & 115 (members of commission investigating disappearances executed by paramilitaries and deaths framed as work of guerillas). In fact, the *modus operandi* of Colombian paramilitaries was to target civilians with perceived guerrilla sympathies. Human rights activists and union leaders were targeted because of these

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at *8 (emphasis added). The court specifically contrasted that case with *Kadic*, which (like this case) involved widespread abuses. *Id.* at *8. *See also Mujica*, 381 F. Supp. 2d at 1183 (finding actionable a war crimes claim involving far fewer deaths than are at issue here). Moreover, contrary to Chiquita's claim, Def's Mem. at 63, *Saperstein* said nothing about a connection that must be shown between the crime and the conflict. 2006 WL 3804718, at *8.

[74] NJC ¶¶22 (AUC efforts directed toward elimination of anyone considered close to the guerrillas or who opposed or complicated their control of territory or population), 24, 31, 65 (AUC committed the abuses against Plaintiffs and decedents as part of their prosecution of internal armed conflict); NYC ¶¶428, 429, 444, 447, 708-715; VC ¶¶62, 64, 73, 253.

perceived sympathies and in direct furtherance of the ongoing conflict.[75] Chiquita asserts that the Plaintiffs' allegation that Chiquita paid the AUC to further its own business interests is inconsistent with a war crimes violation. Def's Mem. at 64. But Chiquita's motive is irrelevant to whether the AUC committed a war crime. Regardless, Plaintiffs have adequately alleged that Chiquita's business interests were in line with the AUC's war aims. NJC ¶¶31, 32; NYC ¶571; VC ¶¶73, 74, 86. Moreover, it is irrelevant whether mere indirect economic benefit is enough to hold Chiquita liable, Def's Mem. at 65, since Plaintiffs do not assert liability on that basis.

Last, Defendant claims there are no facts asserted that establish that Chiquita acted jointly with the AUC to engage in actions in furtherance of war hostilities. Def's Mem. at 64. This argument is specious, in light, *inter alia*, of the allegations that Chiquita assisted in running guns to the AUC.

c. The Killings at Issue Constitute Terrorism, Which Does Not Require State Action

Plaintiffs also allege that the killings and abuses at issue constitute terrorism, and that Chiquita's actions constitute material support for terrorism. Plaintiffs allegations in this respect are sufficient, for the reasons noted above. *See supra* pp. 22-23. Terrorism has no state action requirement. Defendant does not suggest otherwise.

H. <u>The TVPA Applies to Corporations.</u>

Chiquita argues that Plaintiffs' claims under the Torture Victim Protection Act, 28 U.S.C. § 1350 note (TVPA), fail for three reasons: due to lack of state action; due to "particularity"

[75] *See* Human Rights Watch, *The "Sixth Division": Military-paramilitary ties and US policy in Colombia*, at 5, 78 & app. 2 (Sep. 2001), *available at* http://www.hrw.org/reports/ 2001/ colombia/6theng.pdf.; *Caballero-Delgado v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995), ¶¶3, 14, & 34, http://www.corteidh.or.cr/docs/casos/articulos/ seriec_22_ing.pdf.

requirements for an aiding and abetting claim; and because corporations are not subject to the TVPA.

The first two arguments are not unique to the TVPA. While the TVPA only applies to torture and extrajudicial killing committed "under actual or apparent authority, or color of law," this is no different from the state action requirement under customary international law applicable to ATS claims; it simply means that "the plaintiff must establish some governmental involvement in the torture or killing to prove a claim." H.R. Rep. No. 102-367, 1992 U.S.C.C.A.N. 84, 87, 1991 WL 255964, at *5. If anything, the TVPA's state action requirement is broader than international law, because its legislative history directs courts to look to color-of-law jurisprudence under 42 U.S.C. § 1983, *see id.*; *see also* S. Rep. No. 102-249, 1991 WL 258662, at *8; and specifically suggests that the statute be interpreted "to give the fullest coverage possible." S. Rep. No. 102-249, 1991 WL 258662, at *8. As discussed above, Plaintiffs have adequately alleged state action in the perpetration of these abuses, and therefore the TVPA's color-of-law requirement is met. Likewise, Plaintiffs have adequately plead an aiding and abetting theory of liability for their TVPA claims. *See supra* pp. 5-10, 39-47.[76]

Finally, Chiquita claims that corporations cannot be held liable under the TVPA. No federal court of appeals has yet addressed this question; the district court decisions on this issue are mixed, but those cases with better analysis, and the cases from this Circuit, reject Defendant's position.

[76] Chiquita's argument that the TVPA is not a separate cause of action and depends on the ATS for jurisdiction, Def's Mem. at 67, is similarly unavailing. The proper source of federal jurisdiction for TVPA claims is 28 U.S.C. § 1331. *See, e.g., Arce v. Garcia*, 434 F.3d 1254, 1257 n.8 (11th Cir. 2006).

Defendant suggests that because the TVPA uses the term "individual" rather than "person," its plain meaning does not cover corporations. This is incorrect from both a linguistic and a legislative history perspective. The legislative history conclusively demonstrates that the word "individual" was chosen over "person" not to exclude corporations (which are not mentioned either way) but to exclude *foreign states*. *See* H.R. Rep. No. 102-367, 1992 U.S.C.C.A.N. 84, 86, 1991 WL 255964, at *4; S. Rep. No. 102-249, 1991 WL 258662, at *6.[77]

And the word "individual" does not necessarily exclude corporations under its plain meaning; the Supreme Court ruled in *Clinton v. New York*, 524 U.S. 417 (1998), that the term "individual" in the Line Item Veto Act was intended "to be construed as synonymous with the word 'person'" and therefore to encompass corporations. *Id.* at 428. The Ninth Circuit subsequently specifically rejected the plain meaning argument in another context, noting that "the ordinary meaning of 'individuals'. . . . does not necessarily exclude corporations," *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000); courts have come to the same conclusion for over a century. *See, e.g.*, *State ex rel. Am. Union Tel. Co. v. Bell Tel. Co.*, 36 Ohio St. 296, 310 (1880) ("The word 'individual' is here used in the sense of person, and embraces artificial or corporate persons as well as natural."); *see also* Black's Law Dictionary 772 (6th ed. 1990) (noting that although "individual" sometimes means only human beings, "this restrictive signification is not inherent in the word, and it may, in proper cases, include artificial persons"). Indeed, Congress passed the TVPA in part to "extend a civil remedy also to U.S. citizens who may have been tortured," giving them the same remedy as aliens have under the

[77] Congress had reason to fear that use of the word "person" would lead to foreign states being included, because the Supreme Court did just that in *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 320 (1978), *superseded by statute on other grounds as stated in Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 304 n.12 (3d Cir. 2002).

ATS. S. Rep. No. 102-249, 1991 WL 258662, at *5. Exempting corporations from liability for torture under the TVPA would thus produce an absurd result, because aliens could sue corporations for torture under the ATS but U.S. citizens could not, contrary to Congress's expressed intent.

Defendant ignores the decisions of courts in this Circuit concluding that the TVPA applies to corporations. *See Sinaltrainal*, 256 F. Supp. 2d at 1358–59; *Lacarno v. Drummond*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003). Although the district court cases cited by defendant come to the opposite conclusion, they do so with little or no analysis. Aside from the faulty plain meaning argument, defendant relies on a point made in *Mujica*, 381 F. Supp. 2d at 1176, that the word "individual" must have the same meaning as it applies to both victims and perpetrators under the TVPA. But this argument is just as flawed, because it fails to recognize the numerous circumstances in which statutes that apply to corporations use the same words for victims and perpetrators without it being possible for corporations to be victims. In fact, the criminal torture statute embodies the very assymetry that the *Mujica* court found so troubling; it defines torture as "an act committed by a *person* acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another *person* within his custody or physical control." 18 U.S.C. § 2340(1) (emphasis added).

There is no question, of course, that corporations are covered under this definition of "person"; in other statutes this asymmetry is even clearer, because the specific definition of "person" includes corporations. For example, the chemical weapons statute prescribes penalties for "[a]ny person" who causes "the death of another person" by chemical weapons, 18 U.S.C. § 229A, and specifically defines "person" to include a "corporation, partnership, firm, [or]

association." *Id.* § 229F. Even though corporations obviously cannot be killed, Congress had no trouble using "death of another person" in a context where it would only apply to a subset of its definition of "person." *See also* 8 U.S.C. § 1324 (prescribing punishment for "any person" who commits various immigration crimes that "result[] in the death of any person") *and id.* § 1101(b)(3) (defining "person" in the immigration code to include "an organization"); 33 U.S.C. § 1319 (providing penalties for "any person" who knowingly "places another person in imminent danger of death or serious bodily injury" when committing acts of water pollution, while also providing separate penalties for "a person which is an organization," which includes "a corporation, company, association"); 42 U.S.C. § 7413 (similar with respect to air pollution). Under defendants' method of statutory interpretation, each of these statutes is absurd because it apparently uses a word in multiple ways in the same law.

Plaintiffs submit that Congress was not, in fact, being inconsistent or absurd in these statutes, but simply using a word in an asymmetrical manner such that not every category covered by that word would be relevant to each use. This is equally true of the use of the word "individual" in the TVPA: just as Congress uses the word "person" to describe both natural persons that can be killed and artificial persons that can be liable for their deaths, in the TVPA Congress used the word "individual" to describe both torture victims that are necessarily human beings as well as perpetrators who may not be.

I. Should the Court Find that Plaintiffs Have Incorrectly Pled Any Claim, Plaintiffs Seek Leave to Amend Their Complaints

In the event that this Court finds that Plaintiffs have not properly pled their claims, Plaintiffs hereby seek leave to amend their complaint to correct any deficiencies in their pleading and to allege additional facts in support of their theories of liability. *Jennings v. BIC Corp.*, 181

F.3d 1250, 1258 (11th Cir. 1999) ("Leave to amend should be liberally granted when necessary in the interests of justice"); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520 (11th Cir. 1996).

IV. CONCLUSION

For the above reasons, Chiquita's motion to dismiss must be denied.

Date: August 19, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF on this 19th day of August, 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.

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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
_____/

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	**CRIMINAL NO.:** 07-055
v.	:	
CHIQUITA BRANDS INTERNATIONAL, INC.,	:	Let this be filed. Royce C. Lamberth U.S.D.J. 3/19/07
Defendant.	:	

FACTUAL PROFFER

Had this case gone to trial, the government would have proven beyond a reasonable doubt that:

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. Defendant **CHIQUITA** never applied for nor obtained any license from the Department of the Treasury's Office of Foreign Assets Control with respect to any of its payments to the AUC.

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.

32. On or about December 12, 2001, Individual F and Individual G paid the AUC in

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[1] With respect to all statements in this Factual Proffer 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.

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.

Defendant Chiquita's Profits from its Colombian Banana-Producing Operations

88. According to defendant **CHIQUITA'S** records, from September 10, 2001, through in or about January 2004, defendant **CHIQUITA** earned no more than $49.4 million in profits from its Colombian banana-producing operations.

JEFFREY A. TAYLOR
United States Attorney
for the District of Columbia
D.C. Bar No. 498610

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Dated: March 13, 2007

Defendant's Stipulation and Signature

I am the Chairman of the Board of Directors, President, and Chief Executive Officer of Chiquita Brands International, Inc. I am authorized by Chiquita Brands International, Inc., to act on its behalf in this matter.

On behalf of Chiquita Brands International, Inc., after consulting with its attorneys and pursuant to the plea agreement entered into this day with the United States, I hereby stipulate that the above statement of facts is true and accurate. I further stipulate that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

Chiquita Brands International, Inc.

3/12/2007
Date

By: _____
Fernando Aguirre
Chairman of the Board of Directors, President, and Chief Executive Officer of Chiquita Brands International, Inc.

Attorney's Acknowledgment

I am counsel for Chiquita Brands International, Inc. I have carefully reviewed the above statement of facts with my client. To my knowledge, the decision to stipulate to these facts is an informed and voluntary one.

3-13-07
Date

_____
Eric H. Holder, Jr., Esq.
Counsel for Chiquita Brands International, Inc.

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	**CRIMINAL NO.: 07-055 (RCL)**
v.	:	
	:	
CHIQUITA BRANDS INTERNATIONAL, INC.,	:	**Sentencing: September 17, 2007**
	:	
	:	
Defendant.	:	

GOVERNMENT'S SENTENCING MEMORANDUM

I. INTRODUCTION

In March of this year, Chiquita Brands International, Inc. ("Chiquita" or "Company"), entered into a written plea agreement with the United States of America as part of an ongoing criminal investigation into payments that defendant Chiquita made to a federally-designated terrorist organization known as the AUC. Defendant Chiquita agreed to plead guilty to a one-count criminal Information that charged the Company with the felony of Engaging in Transactions with a Specially-Designated Global Terrorist. As a basis for its guilty plea, defendant Chiquita admitted as true the facts set forth in the Factual Proffer submitted in support of the guilty plea. Defendant Chiquita also agreed to cooperate in the ongoing investigation. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the United States and defendant Chiquita agreed that, with the Court's approval, the Company should be sentenced to a criminal fine of $25 million and corporate probation of five years.

At a hearing on March 19, 2007, the United States and defendant Chiquita presented the plea agreement to the Court for its approval. Through its General Counsel, James E. Thompson, Esq.,[1] defendant Chiquita admitted its guilt and pled guilty. The Court provisionally accepted the

[1] Mr. Thompson appeared at the plea hearing on behalf of defendant Chiquita. The plea agreement and the Factual Proffer were executed by Fernando Aguirre, Chairman of the

plea agreement at that time. The Court deferred final acceptance of the plea agreement until the date of the sentencing hearing, which is now scheduled for Monday, September 17, 2007, at 10 a.m.

The United States respectfully recommends that the Court accept the parties' written plea agreement pursuant to Rule 11(c)(1)(C) and sentence defendant Chiquita to a criminal fine of $25 million and corporate probation of five years.

II. THE OFFENSE CONDUCT

A. Summary

For over six years – from sometime in 1997 through February 4, 2004 – defendant Chiquita, through its wholly-owned Colombian subsidiary, paid money to a violent, right-wing terrorist organization in the Republic of Colombia, known as the "Autodefensas Unidas de Colombia" or "AUC." The AUC was formed around April 1997 to organize loosely-affiliated illegal paramilitary groups that had emerged in Colombia to retaliate against left-wing guerillas fighting the Colombian government. Defendant Chiquita paid the AUC, directly or indirectly, nearly every month. From 1997 through February 4, 2004, defendant Chiquita made over 100 payments to the AUC totaling over $1.7 million.

From around 1989 through 1997, defendant Chiquita paid money to two violent, left-wing terrorist organizations in Colombia, namely the FARC and the ELN.[2] Thus, defendant Chiquita paid money to Colombian terrorist organizations for approximately fifteen years.

Board of Directors, President, and Chief Executive Officer of defendant Chiquita.

[2] The FARC and the ELN were federally-designated as Foreign Terrorist Organizations in October 1997. There is no evidence that defendant Chiquita made any payments to the FARC or the ELN after those terrorist groups were designated as FTOs.

Defendant Chiquita continued to pay the AUC even after the payments were brought directly to the attention of its senior executives during a Board meeting held in September 2000. Defendant Chiquita continued to pay the AUC after the United States designated the AUC as Foreign Terrorist Organization on September 10, 2001, and as a Specially-Designated Global Terrorist on October 30, 2001. Defendant Chiquita continued to pay the AUC after gaining direct knowledge of the AUC's designation as a Foreign Terrorist Organization in September 2002.

Defendant Chiquita continued to pay the AUC even after its outside counsel emphatically and repeatedly advised the Company, beginning in late February 2003, to stop the payments. Defendant Chiquita continued to pay the AUC after Department of Justice officials admonished the Company, on April 24, 2003, that the payments were illegal and could not continue. Defendant Chiquita continued to pay the AUC after the same outside counsel advised the Company, on September 8, 2003, that the Department of Justice had given no assurances that the Company would not be prosecuted for making the payments. Defendant Chiquita continued to pay the AUC even after one of its directors acknowledged in an internal email, on December 22, 2003, that "we appear [to] be committing a felony."

Not all of defendant Chiquita's executives agreed with the Company's course of action. For example, upon first learning of the payments at a Board meeting on April 3, 2003, one director objected to the payments and recommended that defendant Chiquita consider taking immediate corrective action, to include withdrawing from Colombia. Moreover, within one month of his arrival as defendant Chiquita's new Chief Executive Officer in January 2004, Fernando Aguirre decided that the payments had to stop. According to an internal document, Mr.

Aguirre stated: "At the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country."

B. Inception of the Payments to the AUC

Starting sometime in 1997, defendant Chiquita made payments to two different components of the AUC in the Urabá and Santa Marta regions, where defendant Chiquita had its Colombian operations. Defendant Chiquita made these payments through its wholly-owned Colombian subsidiary, C.I. Bananos de Exportación, S.A. ("Banadex").[3]

Defendant Chiquita began paying the AUC in Urabá following a meeting sometime in 1997 between Carlos Castaño, the leader of the AUC, and the general manager of Banadex. Castaño advised that the AUC was about to drive the FARC out of the Urabá region and instructed defendant Chiquita's subsidiary to make payments to the AUC through an intermediary known as a "*convivir*."[4] Castaño sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex personnel and property. Within a few months after the AUC drove the FARC out of Urabá, and following a demand made by an AUC intermediary, defendant Chiquita began paying the AUC in Urabá by check through a *convivir*. The AUC demanded payment based on a formula tied to the production of bananas. Defendant Chiquita quickly routinized the payments. Sometime in 1998 or 1999, following a similar instruction, defendant Chiquita began making payments to the AUC in the Santa Marta region.

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[3] Defendant Chiquita's payments to the FARC and the ELN had been in those same regions.

[4] "*Convivirs*" were private security companies licensed by the Colombian government to assist the local police and military in providing security. Notwithstanding their intended purpose and apparent legal authority under Colombian law, the AUC used certain *convivirs* as fronts to collect money from businesses for use to support its illegal activities.

For several years defendant Chiquita paid the AUC by check through various *convivirs* in both the Urabá and Santa Marta regions. 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, such as, 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," payments for "security," or "security services."

From the outset, officers of defendant Chiquita and Banadex recognized that the payments to the AUC were illicit, even though they were being made through a *convivir*. These officers also assumed that the payments were a necessary and acceptable cost of doing business in Colombia. For example, in early 1997, according to a contemporaneous, written account, one officer of defendant Chiquita remarked about the payments: "Cost of doing business in Colombia – maybe the question is not why are we [Chiquita] doing this but rather we [Chiquita] are in Colombia and do we [Chiquita] want to ship bananas from Colombia." In June 1997, a senior officer of Banadex approved a *convivir* payment with the written comment: "No alternative. But next year needs to be less."

C. Knowledge of Defendant Chiquita's Senior Officers and Directors

Defendant Chiquita's payments to the AUC were reviewed and approved by senior executives of the corporation, including high-ranking officers, directors, and employees. No later than 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 in August 2000 and prepared a memorandum detailing that investigation. The memorandum made clear that the *convivir* was merely a front for the AUC and described the AUC as a "widely-known, illegal vigilante organization."

The in-house attorney presented the results of his investigation to the Audit Committee of the Board of Directors during a meeting in defendant Chiquita's Cincinnati headquarters in September 2000. According to contemporaneous notes of the meeting, defendant Chiquita's ongoing payments to the AUC were described as "not a voluntary decision (extortion)" and Carlos Castaño was named as the "*convivir* leader." According to the notes, one director responded to the presentation by asking: "Can we reduce [the] amount per box?" There was no recorded discussion about whether to stop the payments or whether to report the payments to any United States or Colombian authorities.[5] Notwithstanding the knowledge of senior officers and directors that the Company was making regular payments to a violent, paramilitary organization, defendant Chiquita continued to make payments to the AUC for another three and a half years.

D. Defendant Chiquita's Knowledge of *U.S. Law Designations Criminalizing the AUC Payments*

On September 10, 2001, the AUC was designated as a Foreign Terrorist Organization ("FTO") by the United States Department of State, making defendant Chiquita's payments to the AUC illegal under the material support statute, 18 U.S.C. § 2339B. On October 31, 2001, the AUC was designated as a Specially-Designated Global Terrorist by the United States Department of the Treasury's Office of Foreign Assets Control, making the payments illegal under the

[5] Prior to the meeting with Department of Justice officials on April 24, 2003, defendant Chiquita had never reported any AUC demands to any department or component of the United States government or the Colombian government. As of the date of that meeting, defendant Chiquita had made over 90 payments to the AUC totaling close to $1.4 million.

International Emergency Economic Powers Act, 50 U.S.C. § 1705(b), and the underlying Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.204.

Defendant Chiquita had information about the AUC's designation as an FTO from the 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 are 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.

In addition to these widely-circulated reports, defendant Chiquita had knowledge of the AUC's designation as an FTO specifically, and global security threats generally, through an Internet-based, password-protected security information service to which defendant Chiquita subscribed. The security service's website reported on the AUC's designation as an FTO when that designation first occurred. The security service was able to provide data establishing that an employee of defendant Chiquita – using defendant Chiquita's password – accessed the service's "Colombia – Update page" from the Company's Cincinnati headquarters on September 20, 2002.[6] At that time, the web page displayed 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."

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[6] The security service does not maintain subscriber access data prior to the summer of 2002.

E. Continuing Payments to the AUC and Misuse of General Manager's Fund

Defendant Chiquita's payments to the AUC were reported to the Audit Committee of the Board of Directors on a quarterly basis. Throughout the duration of the payments to the AUC in Urabá, defendant Chiquita reported them in its books and records as "security payments" or payments for "security services" to a specifically-named *convivir*, even after it was clear to senior officers and directors that no *convivir* was providing defendant Chiquita or Banadex with any security services in Colombia and the *convivirs* were simply fronts for a terrorist organization.

In late March 2002, in response to a new AUC demand,[7] senior officers of defendant Chiquita established new procedures for paying the AUC in Santa Marta directly and in cash and keeping a private ledger of these cash payments. The procedures involved paying a senior officer of Banadex additional "income" from the Banadex general manager's fund. That money, in turn, was provided to an employee of Banadex, who delivered the cash directly to AUC personnel in Santa Marta. The senior Banadex officer reported this additional "income" on his Colombian tax return, and Banadex increased the payments to him to cover this additional personal tax liability. This made it appear that the senior Banadex officer was more highly paid and thus increased the risk that he would be a target for kidnapping or other physical harm.

On April 23, 2002, these new procedures were reviewed at a meeting of the Audit Committee of the Board of Directors in defendant Chiquita's Cincinnati headquarters. The procedures were implemented beginning in June 2002.

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[7] Defendant Chiquita changed its method of payment to the AUC in Santa Marta several times. Initially, defendant Chiquita paid the AUC through a *convivir* located in Santa Marta. Later, defendant Chiquita made combined payments to a *convivir* in Urabá, with the payments shared between the AUC components in Urabá and Santa Marta. Eventually, the AUC in Santa Marta demanded direct cash payments.

Defendant Chiquita's corporate books and records never reflected that the ultimate and intended recipient of these funds was the AUC. With respect to the payments to the AUC in Urabá, the books and records only identified payments to various *convivirs*. With respect to the payments to the AUC in Santa Marta, the private ledger only identified the transfer of funds from the senior Banadex officer to the Banadex employee.

F. Outside Counsel's Advice: Must Stop the Payments

On February 20, 2003, a senior officer of defendant Chiquita was told that the AUC had been designated as an FTO. Within days, other senior executives of defendant Chiquita were told of the FTO designation. Beginning on February 21, 2003, defendant Chiquita's outside counsel repeatedly advised the Company to stop making the payments because they were illegal under U.S. law, principally the material support statute, 18 U.S.C. § 2339B.

Outside counsel's advice was memorialized in a series of contemporaneous memoranda and notes. Among other things, outside counsel 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)

Notwithstanding outside counsel's advice, defendant Chiquita made payments to the AUC in late February and late March 2003.

On April 3, 2003, the full Board of Directors was advised for the first time that defendant Chiquita was making payments to a designated Foreign Terrorist Organization. One director objected to the payments and recommended that defendant Chiquita consider taking immediate corrective action, to include withdrawing from Colombia. That recommendation was not followed.[8] Instead, the Board agreed to disclose promptly to the Department of Justice the fact that defendant Chiquita had been making payments to the AUC.

The following day, on April 4, 2003, according to outside counsel's contemporaneous notes concerning a conversation about defendant Chiquita's payments to the AUC, a senior officer of defendant Chiquita said: "His and [a director's] opinion is just let them sue us, come after us. This is also [a senior officer's] opinion." Four days later, senior officers of defendant Chiquita instructed their subordinates to "continue making payments" to the AUC.

G. The Department of Justice's Admonition: The Payments are Illegal

On April 24, 2003, senior executives of defendant Chiquita, 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 the senior executives that defendant Chiquita's payments to the AUC were illegal and could not continue. Department of Justice officials also cautioned the senior executives, as its outside counsel had warned earlier, that "the

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[8] Upon learning additional details about defendant Chiquita's payments to the AUC at a Board meeting on December 4, 2003, this director told his fellow Board members: "I reiterate my strong opinion – stronger now – to sell our operations in Colombia."

situation that Chiquita described [was] not a case of true duress because Banadex has a legal option – to withdraw from Colombia."

The Department of Justice never authorized defendant Chiquita to continue under any circumstances the Company's payments to the AUC – not at the meeting on April 24, 2003, nor at any other point. To be sure, when first presented with this issue at the meeting on April 24th, Department of Justice officials acknowledged that the issue of continued payments was complicated. But this acknowledgment did not constitute an approval or authorization for defendant Chiquita to continue to break the law by paying a federally-designated Foreign Terrorist Organization. Indeed, as its outside counsel later stated in writing, the Department of Justice never gave defendant Chiquita any assurance that the Company would not be prosecuted for making the payments.

Nevertheless, about two weeks later, on May 5, 2003, an employee of defendant Chiquita instructed others to "continue making payments" to the AUC. Within a week, defendant Chiquita made another cash payment to the AUC. Defendant Chiquita thereafter continued its regular payments to the AUC.

Representatives of defendant Chiquita had other contacts with Department of Justice officials through September 2003. In a memorandum dated September 8, 2003, outside counsel summarized defendant Chiquita's various contacts with the Department of Justice from April 2003 through September 2003. Outside counsel noted 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." Senior officers of defendant Chiquita received copies of this memorandum.

Senior officers and directors of defendant Chiquita were well aware that the Company was continuing to pay a federally-designated Foreign Terrorist Organization and that the Company was subject to criminal prosecution for its continuing conduct. On December 22, 2003, a director of defendant Chiquita sent an email to other directors regarding the Company's ongoing payments to the AUC, in which he said, among other things: "we appear to [be] committing a felony." A week later, according to a contemporaneous account of the conversation, that same director told outside counsel for the Audit Committee that "Chiquita is knowingly violating the law."

H. Defendant Chiquita's New CEO: Decision To Stop the Payments

Fernando Aguirre joined defendant Chiquita as its new CEO in January 2004. Within one month of assuming his new position, Mr. Aguirre decided that the payments had to stop. On January 29, 2004, defendant Chiquita issued its last check for a payment to the AUC. The check cleared on February 4, 2004.

In an email to senior officers of defendant Chiquita, dated January 31, 2004, Mr. Aguirre said: "At the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country." In June 2004, defendant Chiquita sold Banadex to a Colombian company.

III. DISCUSSION OF THE OFFENSE CONDUCT

A. The Gravity of the Core Conduct

This is a very serious matter. Defendant Chiquita has admitted to paying terrorist organizations in Colombia for about fifteen years – from 1989 through February 2004. Defendant Chiquita paid all three major terrorist organizations in Colombia: the AUC, the

FARC, and the ELN. Those terrorist organizations are responsible for a staggering loss of life in that country.

Defendant Chiquita's financial support to the AUC was prolonged, steady, and substantial. Defendant Chiquita paid the AUC on roughly a monthly basis for over six years. Defendant Chiquita's payments to the AUC were typically in amounts equivalent to tens of thousands of U.S. dollars, and in the end totaled in excess of $1.7 million.

The money that defendant Chiquita paid to the AUC (and to the FARC and the ELN before that) was put to whatever use the terrorists saw fit. Money is fungible. Regardless of the Company's motivations, defendant Chiquita's money helped buy weapons and ammunition used to kill innocent victims of terrorism. Simply put, defendant Chiquita funded terrorism.

B. Defendant Chiquita's Motivations

Defendant Chiquita's motivations for paying the AUC are irrelevant to the illegality of its conduct or to the harm that the Company's conduct has caused to victims of AUC violence. As one federal appeals court has noted, "Terrorist organizations use funds for illegal activities regardless of the intent of the donor[.]" Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1027 (7th Cir. 2002) (discussing breadth of criminal liability under the material support statute, 18 U.S.C. § 2339B). Nevertheless, defendant Chiquita's motivations for paying the AUC are relevant to an understanding of the felony charge against the Company.

Preliminarily, it is important to note what defendant Chiquita is not accused of. Defendant Chiquita is not accused of supporting the goals or ideologies of the terrorist organizations that the Company funded. The record reflects that defendant Chiquita did not seek out the AUC to start making these payments. Rather, the AUC, through its leader Carlos

Castaño, instructed that defendant Chiquita's subsidiary would have to start making the payments once the AUC moved into the Company's banana-producing region.

Defendant Chiquita, however, did not make one or two payments while deciding on a course of action to take in the face of the AUC's demand (and implied threat) in 1997. Defendant Chiquita decided to accede to the AUC's demand and make routine payments for fully six years. Although defendant Chiquita would later claim that it was the victim of AUC extortion, the Company did not report the "extortion" to any United States or Colombian authorities for several years.

Defendant Chiquita, as a large multinational corporation, had choices to make about where in the world to operate and under what conditions. The Company chose to enter and exit markets and to buy and sell farms based on its business judgment. Defendant Chiquita chose to remain in Colombia and make payments to the AUC that it deemed necessary to operate in the Urabá and Santa Marta regions of Colombia.

Defendant Chiquita's reason for being in Colombia was, of course, to produce bananas profitably. And there is no question that defendant Chiquita profited from its Colombian operations during the period that the Company paid the AUC. According to defendant Chiquita's records, from September 10, 2001 (the date of the AUC's designation as a Foreign Terrorist Organization), through January 2004, the Company earned approximately $49.4 million in profits from its Colombian banana-producing operations. Indeed, by 2003 the Company's Colombian operations were its most profitable.

Whatever motivated defendant Chiquita at the start, the Company made a business decision to remain in Colombia and pay the AUC for over six years. Officers of defendant Chiquita and Banadex referred to the payments as an unsavory "cost of doing business" at their

inception in 1997. When the internal investigation into the payments was presented to the Board in September 2000, the Board treated them as a routine business matter – a tolerable expense to be kept low. When the AUC in Santa Marta demanded direct, cash payments in 2002, senior officers of defendant Chiquita obliged. These senior executives also came up with a procedure to record these monthly payments in the Company's books and records that failed to reflect the ultimate and intended recipient of the payments.

By late February 2003, when defendant Chiquita's outside counsel advised the Company to stop the payments immediately in light of the AUC's designation as an FTO and the attendant risk of criminal liability, the payments had already been reviewed and approved at the highest levels of the Company for years. The fact of the AUC demand in 1997 and any perceived risk to the Company's employees from doing business in Colombia were not new topics. The payments had been discussed repeatedly in defendant Chiquita's Cincinnati headquarters. The Company had long since made the business judgment to remain in Colombia, to keep paying the AUC, to record the payments in the Company's books and records without identifying the AUC, and not to report the payments to the pertinent United States and Colombian authorities.

The new information in late February 2003 was not the claimed extortion, but rather outside counsel's advice about the risk of criminal liability to the Company for making the payments. Defendant Chiquita chose to reject that advice and to continue to pay the AUC. The Company chose to continue the payments even after being advised by the Department of Justice that the payments were illegal and could not continue.

Defendant Chiquita has claimed that it made the payments to protect its employees. Undoubtedly some officers, directors, and employees of defendant Chiquita with knowledge of the payments firmly believed (and still believe) that the Company's sole motivation for making

the payments was to protect its Colombian employees. As mentioned, the Company's motivation is legally irrelevant and of no comfort to the victims of the AUC's violence. But even this purported rationale for the payments begs serious questions. If defendant Chiquita was solely motivated to protect its Colombian employees from the AUC,

- How did the payments protect the Company's employees during those times when the employees were not working on the Company's farms?
- How did the payments protect the communities in which those employees lived?
- How did the payments protect the families, friends, and associates of the Company's employees?
- What concrete steps did the Company take starting in 1997 to protect its employees from AUC violence, in lieu of making payments to the AUC?
- Why did the Company establish a procedure for paying the AUC in Santa Marta directly and in cash that put a senior officer of Banadex at greater personal risk of physical harm?
- Why did the Company fail to report the AUC's demands to the pertinent United States authorities for years?
- Would the Company have remained in Colombia indefinitely without regard to the profitability of its Colombian operations, just to be able to pay the AUC?

C. Defendant Chiquita's Alternatives

The Department of Justice is not in the business of providing outside parties with advice about how best to comply with the law. Defendant Chiquita is a sophisticated multinational corporation with access to the highest quality business and legal advice. There were a number of points at which the Company could have conformed its conduct to the requirements of the law. Its failure to do so until late in the evolution of this matter is one of the reasons that the Company appears before the Court having pled guilty to a very serious criminal charge.

Defendant Chiquita was not without any alternative to paying the AUC. While there may have been alternatives short of withdrawing from Colombia, withdrawal was plainly an option

that the Company could have considered when faced with the AUC's demand in 1997. As one of its officers noted in 1997, the Company had a choice about whether to remain in Colombia and make these payments. The officer stated, "[M]aybe the question is not why are we doing this but rather we are in Colombia and do we want to ship bananas from Colombia." In late February and March 2003, defendant Chiquita's outside counsel advised it to stop the payments immediately and recommended that defendant Chiquita withdraw from Colombia. When the full Board was first advised of the designation of the AUC as a Foreign Terrorist Organization on April 3, 2003, there was discussion in the Board room about defendant Chiquita's withdrawing from Colombia. Department of Justice officials cautioned defendant Chiquita's senior executives on April 24, 2003, that "the situation that Chiquita described [was] not a case of true duress because Banadex has a legal option – to withdraw from Colombia." Indeed, within one month of joining defendant Chiquita as its new CEO, Fernando Aguirre told senior officers that "if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country."

Defendant Chiquita may well have had other alternatives – other than the course that it pursued. In the end, the issue is not what defendant Chiquita could have done, but rather what it chose to do – and that was to continue paying terrorists for over six years.

IV. THE PLEA AGREEMENT

A. Terms of the Agreement

Pursuant to Rule 11(c)(1)(C), defendant Chiquita signed a written plea and cooperation agreement with the United States. Defendant Chiquita and the United States presented the plea agreement to the Court for its approval at a plea hearing on March 19, 2007. Pursuant to the plea agreement, defendant Chiquita, through its organizational representative James E. Thompson,

Esq., pled guilty to one felony count of a criminal Information, charging defendant Chiquita with Engaging in Transactions with a Specially Designated Global Terrorist, namely the AUC, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204. Defendant Chiquita, through Mr. Thompson, admitted its guilt to the offense conduct described in the Factual Proffer that has been filed with the Court. Pursuant to Rule 11(c)(1)(C), the plea agreement provides for an agreed-upon sentence of a criminal fine of $25 million and corporate probation of five years. The plea agreement provides that defendant Chiquita must pay the criminal fine in five annual installments. Defendant Chiquita must make the first payment of $5 million upon entry of judgment. Defendant Chiquita is required to pay an additional $5 million, plus post-judgment interest, each year for the next four years.

The plea agreement provides for a five-year term of corporate probation. In addition to the general conditions of probation, the plea agreement provides for the following specific additional conditions of probation: (1) defendant Chiquita shall pay the sums set forth in the agreement; (2) defendant Chiquita shall implement and maintain an effective compliance and ethics program that fully comports with the criteria set forth in Section 8B2.1 of the United States Sentencing Guidelines, including, but not limited to, (a) maintaining a permanent compliance and ethics office and a permanent educational and training program relating to federal laws governing payments to, transactions involving, and other dealings with individuals, entities, or countries designated by the United States as Foreign Terrorist Organizations, Specially-Designated Global Terrorists, Specially-Designated Narcotics Traffickers, and/or Countries Supporting International Terrorism, and/or any other such federally-designated individuals, entities, or countries, (b) ensuring that a specific individual remains assigned with overall responsibility for the compliance and ethics program, and (c) ensuring that that specific

individual reports directly to the Chief Executive Officer and to the Board of Directors of defendant Chiquita, at least annually on the effectiveness of the compliance and ethics program; and (3) pursuant to 18 U.S.C. § 3563(a)(1), defendant Chiquita shall not commit any federal, state or local crimes during the term of probation.

The plea agreement also contains a cooperation provision that has required defendant Chiquita to provide assistance to the United States in this ongoing investigation. As described below, defendant Chiquita has provided significant assistance to the United States pursuant to that cooperation provision.

B. Maximum Statutory Penalties and the Sentencing Guidelines

On the felony charge to which defendant Chiquita has pled guilty, Engaging in Transactions with a Specially-Designated Global Terrorist (in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204), the Company faces a statutory maximum criminal fine of twice the defendant's pecuniary gain from the offense, pursuant to 18 U.S.C. §§ 3571(c)(2) and (d). The United States and defendant Chiquita have agreed that, based on documents that defendant Chiquita provided to the United States, the Company earned no more than $49.4 million in profits from its Colombian banana-producing operations from September 10, 2001, through January 2004. The United States and defendant Chiquita have further agreed that, based on this estimate of $49.4 million in relevant pecuniary gain, the maximum criminal fine is $98.8 million.

Defendant Chiquita is also subject to a term of corporate probation of five years pursuant to 18 U.S.C. § 3561. In addition, pursuant to 18 U.S.C. § 3013(a)(2)(B), defendant Chiquita is obligated to pay the mandatory special assessment of $400 to the Clerk of the United States District Court prior to the date of sentencing.

V. PLEA AND SENTENCING RECOMMENDATION

The Court should accept the parties' written plea agreement pursuant to Rule 11(c)(1)(C) and sentence defendant Chiquita to a criminal fine of $25 million and five-years of corporate probation, with the specific additional conditions of probations described above. The plea agreement is a fair resolution of the Company's criminal culpability. The agreement gives defendant Chiquita the benefit of its acceptance of responsibility and cooperation, by providing it with a lesser criminal fine than the Court might otherwise impose after a trial and conviction. The agreement also benefits the United States, because it avoids the expense, time, and risk associated with trial by jury. The agreement has already benefitted the United States, in that defendant Chiquita has provided significant cooperation to the United States in the ongoing investigation of this matter.

A. Acceptance of Responsibility

Defendant Chiquita has pled guilty to a very serious charge. In support of its guilty plea, the Company has admitted the truth of the facts sets forth in the Factual Proffer. In so doing, defendant Chiquita has accepted responsibility for its criminal conduct and deserves the benefit of that acceptance of responsibility.

B. Cooperation

This investigation arose from defendant Chiquita's voluntary self-disclosure of its illegal payments. It was a lengthy investigation into conduct that spanned years and that occurred in both the United States and in Colombia. Defendant Chiquita provided voluminous records and made numerous company witnesses available over the course of this investigation. Defendant Chiquita deserves credit for its pre-plea efforts to assist the United States in this investigation.

Defendant Chiquita also deserves credit for its significant post-plea assistance pursuant to the cooperation provision of the plea agreement. The United States gave serious consideration to bringing additional charges in this matter. In the exercise of its prosecutorial discretion, the United States has decided not to do so. Defendant Chiquita, through its post-plea cooperation, provided critical evidence and information that the United States considered in making this determination.[9]

C. Voluntary Disclosure

Defendant Chiquita's voluntary disclosure – standing alone – merits comment. As a matter of good policy and common sense, the Department of Justice encourages self-reporting. The Company deserves and has received some credit for having done so in this case. It is important to point out, however, that defendant Chiquita also admitted as part of its guilty plea that it continued to engage in the same criminal conduct after its voluntary disclosure.

Self-reporting alone does not automatically protect a company from prosecution, any more than a confession would protect an individual from prosecution. The decision whether to prosecute a voluntary disclosure case depends on a myriad of factors, including the nature and scope of the criminal conduct that has been disclosed. Moreover, a voluntary self-disclosure certainly does not authorize the continuation of the underlying criminal conduct.

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[9] The Information and Factual Proffer filed in connection with defendant Chiquita's guilty plea each contain a section captioned "Relevant Persons," who are identified by letter and a cursory description of their respective positions in the Company. Because corporations can only act through individuals, a description of the conduct of certain individuals was necessary to set forth the facts in this case. It was particularly important to make clear that the conduct that led to the Company's guilty plea was not the act of a rogue employee or mid-level manager. However, absent unusual circumstances, Department of Justice policy prohibits the naming of uncharged third-parties. See United States Attorneys' Manual, § 9-27-760.

D. The Criminal Fine

Defendant Chiquita has agreed to pay a $25 million criminal fine. This fine is a substantial criminal penalty. If accepted by the Court, it would be the largest criminal penalty ever imposed under the Global Terrorism Sanctions Regulations.

As in any criminal case, a plea agreement represents a compromise. The maximum criminal fine that defendant Chiquita could have faced was dependent on the Company's profits derived from its illegal payments. The United States and defendant Chiquita had differing perspectives as to the appropriate methodology and estimate of such profits. By agreeing on the appropriate estimate of profits, based on documents provided by defendant Chiquita to the United States, the parties have avoided the expense, time, and risk associated with litigating the relevant profits.

E. The Specific Conditions of Probation

Pursuant to the plea agreement, defendant Chiquita has agreed to implement and maintain an effective compliance and ethics program as described above. The purpose of this program is to ensure that this criminal conduct never occurs again.

VI. CONCLUSION

The United States respectfully requests that the Court accept the parties' plea agreement pursuant to Rule 11(c)(1)(C) and sentence the defendant Chiquita Brands International, Inc., to a criminal fine of $25 million and five years of probation, with the specific additional conditions of

probation provided in the plea agreement.

Respectfully submitted,

By: _____

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was caused to be served on counsel of record through the Court's Electronic Case Filing system, on this 11th day of September, 2007.

_____

Jonathan M. Malis
Assistant United States Attorney

Exhibit 3

DECLARATION ON THE INTERNATIONAL PROHIBITION AGAINST TERRORISM AND PROVIDING SUPPORT FOR TERRORISM

My name is William J. Aceves. I am the Associate Dean for Academic Affairs and a Professor of Law at California Western School of Law. I teach several courses, including Human Rights Law, Comparative Law, and Foreign Affairs Law. I was previously a Ford Foundation Fellow in International Law at the UCLA School of Law. I have written numerous articles on international law and human rights which have been published by legal journals at Berkeley, Chicago, Columbia, Fordham, Harvard, Hastings, Michigan, Pennsylvania, Pepperdine, Vanderbilt, and Virginia. I have also written several essays for the prestigious American Journal of International Law. I am the principal author of the 2002 Amnesty International USA report on torture and impunity. In 2007, my book, The Anatomy of Torture: A Documentary History of Filartiga v. Pena-Irala, was published. I currently serve on the Board of Directors for the Center for Justice & Accountability, the American Civil Liberties Union, and the International Law Students Association. I have previously served on the Board of Directors for Amnesty International USA and currently serve as its Ombudsperson. I have participated in numerous cases in the federal courts and have submitted amicus briefs in several U.S. Supreme Court cases, including DeMore v. Kim, Sosa v. Alvarez-Machain, Sanchez-Llamas v. State of Oregon, Medellin v. Dretke, Republic of the Philippines v. Pimentel, and Boumedienne v. Bush. In 2007, I served as the co-chair for the 101st Annual Meeting of the American Society of International Law. I have appeared

before the Inter-American Commission on Human Rights, the United Nations Special Rapporteur on Migrants, and the United States Commission on Civil Rights.

I. Introduction

International law firmly prohibits terrorism and providing support for terrorism. These norms are well-established and universal. Accordingly, the international prohibitions against terrorism and providing support for terrorism constitute actionable claims under the U.S. Supreme Court's decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

II. International Law Firmly Prohibits Terrorism and Providing Support for Terrorism

The international community has adopted numerous treaties condemning terrorism.[1] While there is variation in the nature of the specific obligations set forth in

[1] See generally Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; 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; 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; International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, U.N. Doc A/34/46, 1316 T.I.A.S. No. 11,081, U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 18 I.L.M. 1419, 1456 U.N.T.S. 1987; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627, 1589 U.N.T.S. 474; 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; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 ILM 685, 1678 U.N.T.S. 304; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726,

these agreements, it is clear that the underlying norms remain constant: attacks against civilian populations violate international law. See Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

In light of the universal condemnation of terrorism, it is not surprising that international law prohibits the provision of support for terrorism. The International Convention for the Suppression of the Financing of Terrorism (Financing Convention) is particularly significant in this regard. International Convention for the Suppression of the Financing of Terrorism, Jan. 12, 1998, G.A. Res. 54/109, U.N. Doc. A/RES/54/109. The treaty's Preamble reveals the extensive international support behind the treaty.

> *Recalling* the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,
>
> *Recalling also* all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed 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 on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and

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2122 U.N.T.S. 359; International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, G.A. Res. 52/164, U.N. Doc. A/RES/52/164, 2149 U.N.T.S. 284; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, G.A. Res. 54/109, U.N. Doc. A/RES/54/109; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, UN. GAOR 59th Sess., U.N. Doc. A/59/766. These treaties are available at the United Nations website on Conventions on Terrorism, which is located at http://untreaty.un.org/English/Terrorism.asp.

> 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, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,
>
> *Recalling also* General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,
>
> *Recalling further* General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

This Preamble, which references numerous General Assembly resolutions, indicates that the Convention codified existing practice rather than establishing new international norms.

Substantively, the Financing Convention provides that any person commits an offence within the meaning of the 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.

Id. at art. 2(1). Liability under the Financing Convention is quite broad. Article 2(4) provides that "[a]ny person also commits an offence if that person attempts to commit an offence as set forth" in Article 2(1). Furthermore, Article 2(5) adds that "[a]ny person also commits an offence if that person:"

> (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
>
> (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
>
> (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 4 of the Financing Convention further provides that each State Party shall adopt any necessary measures to establish these acts as criminal offences and to make these

offences punishable by appropriate penalties that take into account their grave nature. See generally C.J. Shaw, "Worldwide War on Terrorist Financing," 22 Journal of International Banking Law & Regulation 469 (2007); Nicholas Ryder, "A False Sense of Security? An Analysis of Legislative Approaches Towards the Prevention of Terrorist Finance in the United States and the United Kingdom," Journal of Business Law 821 (2007); Anatoli van der Krans, "Terrorism and Financial Supervision," 1 Utrecht Law Review 119 (2005); Ilias Bantekas, "The International Law of Terrorist Financing," 97 American Journal of International Law 315 (2003).

As of August 11, 2008, there are 160 State Parties to the Financing Convention. This means that 160 countries, including the United States, have accepted the Financing Convention as a binding international obligation. The speed with which the Convention was accepted by such a large majority of the international community further attests to the Convention's status as codifying existing state practice in the area of terrorist financing.

The United States ratified the Financing Convention in 2002. It then adopted legislation to implement its provisions. The relevant statute, codified at 18 U.S.C. § 2339C, establishes criminal liability for the financing of terrorism.

> (1) In general. Whoever, in a circumstance described in subsection (b), by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out:

> (A) an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the United States, 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, shall be punished as prescribed in subsection (d)(1).
>
> (2) Attempts and conspiracies. Whoever attempts or conspires to commit an offense under paragraph (1) shall be punished as prescribed in subsection (d)(1).
>
> (3) Relationship to predicate act. For an act to constitute an offense set forth in this subsection, it shall not be necessary that the funds were actually used to carry out a predicate act.

There are numerous other international instruments that further attest to the universal condemnation of terrorism and the concomitant prohibition against providing support for terrorism.[2] U.N. Security Council Resolution 1373, adopted in the immediate aftermath of the terrorist attacks of September 11, 2001, summarizes the numerous

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[2] The International Convention for the Suppression of Acts of Nuclear Terrorism offers an example, in the context of nuclear proliferation, of how international law extends liability to individuals who provide support for terrorism. International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, U.N. GAOR 59th Sess., U.N. Doc. A/59/766. Article 2 establishes liability for the underlying offense. Id. at arts. 2(1) and (2). Liability extends to any individual who participates as an accomplice, organizes or directs others to commit an offense, or in any other way contributes to the commission of the underlying offense. Id. at art. 2(4). Article 7(1)(a) then provides that State Parties shall cooperate by: "[t]aking 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; . . . ."

obligations states have to prevent terrorism, including prohibiting support for terrorism. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). The operative language of Resolution 1373 is particularly instructive.

1. Decides that all States shall:

> (a) Prevent and suppress the financing of terrorist acts;
>
> (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
>
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
>
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:

> (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
>
> (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

> (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
>
> (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
>
> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
>
> (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
>
> (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

Significantly, the U.N. Security Council adopted Resolution 1373 under Chapter VII of the U.N. Charter, which therefore makes it applicable to all states, even those that have not signed or ratified the underlying treaties. See Mark A. Drumbl, "Transnational Terrorist Financing: Criminal and Civil Perspectives," 9 German Law Journal 933, 936 (2008).

Other U.N. Security Council resolutions provide similar statements regarding terrorism. Security Council Resolution 1566, also adopted pursuant to Chapter VII of the U.N. Charter, addresses threats to international peace and security caused by terrorist acts. S.C. Res. 1566, U.N. Doc. S/RES/1566 (October 8, 2004). The resolution reveals

the international consensus against terrorism as well as the obligation of states to prevent and punish terrorism.

> 1. *Condemns* in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security;
>
> 2. *Calls upon* States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens;
>
> 3. *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

The U.N. General Assembly has issued its own statements denouncing terrorism and the support for terrorism. In General Assembly Resolution 49/60, for example, the General Assembly indicated that states must "refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens." G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (February 17, 1995). In General Assembly Resolution 59/195, the General Assembly noted that "States shall deny safe haven to those who finance, plan,

support or commit terrorist acts or provide safe haven, . . ." G.A. Res. 59/195, U.N. Doc. A/RES/59/195 (March 22, 2005). In General Assembly Resolution 60/43, the General Assembly urged states "to ensure that their nationals or other persons and entities within their territory that wilfully provide or collect funds for the benefit of persons or entities who commit, or attempt to commit, facilitate or participate in the commission of terrorist acts are punished by penalties consistent with the grave nature of such acts." G.A. Res. 60/43, U.N. Doc. A/RES/60/43 (January 6, 2006). Significantly, the Global Counter Terrorism Strategy adopted by the U.N. General Assembly in 2006 is quite explicit in denouncing terrorism and any support for terrorism. G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (September 20, 2006). According to the Plan of Action, states undertake the following measures to prevent and combat terrorism:

> 1. To refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens.
>
> 2. To cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens.

Id. at II.

In addition to these international instruments, the prohibition against terrorism and the concomitant obligation to prohibit support for terrorism appear in various regional instruments.

The Inter-American Convention against Terrorism was adopted in 2002 and requires State Parties to prevent, punish, and eliminate terrorism. Inter-American Convention against Terrorism, June 3, 2002, OAS, AG/RES. 1840 (XXXII-O/02). The Convention contains a range of measures to address terrorism and the support for terrorism. In addition, Article 4 sets forth a detailed list of state obligations with respect to terrorist financing. Each State Party, to the extent it has not already done so, must institute a legal and regulatory regime to prevent, combat, and eradicate the financing of terrorism and for effective international cooperation with respect thereto, which shall include:

> a. A comprehensive domestic regulatory and supervisory regime for banks, other financial institutions, and other entities deemed particularly susceptible to being used for the financing of terrorist activities. This regime shall emphasize requirements for customer identification, record-keeping, and the reporting of suspicious or unusual transactions.
>
> b. Measures to detect and monitor movements across borders of cash, bearer negotiable instruments, and other appropriate movements of value. These measures shall be subject to safeguards to ensure proper use of information and should not impede legitimate capital movements.
>
> c. Measures to ensure that the competent authorities dedicated to combating the offenses established in the international instruments listed in Article 2 have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed under its domestic law. To that end, each state party shall establish and maintain a financial intelligence unit to serve as a national center for the collection, analysis, and dissemination of pertinent money laundering and terrorist financing information. Each state party shall inform the Secretary General of the Organization of American States of the authority designated to be its financial intelligence unit.

Id. at art. 4(1).

The Organization of the Islamic Conference adopted the Convention on Combating International Terrorism in 1999. Convention on Combating International Terrorism, July 1, 1999, OIC Res. 59/26-P, annex. Article 3(I) provides that "[t]he Contracting States are committed not to execute, initiate or participate in any form in organizing or financing or committing or instigating or supporting terrorist acts whether directly or indirectly." Article 3(II)(A)(1) adds that State Parties are committed to prevent and combat terrorist crimes and shall see to "[b]arring their territories from being used as an arena for planning, organizing, executing terrorist crimes or initiating or participating in these crimes in any form; including preventing the infiltration of terrorist elements or their gaining refuge or residence therein individually or collectively, or receiving hosting, training, arming, financing or extending any facilities to them."

The Organization of African Unity adopted the Convention on the Prevention and Combating of Terrorism in 1999. Convention on the Prevention and Combating of Terrorism, July 13, 1999, AHG/Dec.132 (XXXV). Article 1(3) defines "terrorist act" in the following manner.

> (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> > (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
> >
> > (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

> (iii) create general insurrection in a State;
>
> (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

Article 2(a) requires State Parties to "establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences." Article 4(1) also requires State Parties to refrain from taking any action to support terrorist acts.

> States Parties undertake to refrain from any acts aimed at organizing, supporting, financing, committing or inciting to commit terrorist acts, or providing havens for terrorists, directly or indirectly, including the provision of weapons and their stockpiling in their countries and the issuing of visas and travel documents.

In light of such enormous international consensus surrounding the prohibitions against terrorism and providing support for terrorism, it is not surprising to find these norms implemented by countries throughout the world in their domestic legislation.

In the United States, for example, terrorism is subject to criminal liability. See, e.g., 18 U.S.C. § 2332b; 18 U.S.C. § 2339. The prohibition against providing material support for terrorism is also codified in the federal code. 18 U.S.C. § 2339A(a) provides criminal liability for providing material support or resources for terrorists. The term "material support or resources" is defined as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation

or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials; . . ." 18 U.S.C. § 2339A(b)(1). 18 U.S.C. § 2339B provides similar criminal liability for providing material support or resources to designated foreign terrorist organizations. It provides that "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life." See generally Wayne McCormack, Understanding the Law of Terrorism 115 (2007); Norman Abrams, Anti-Terrorism and Criminal Enforcement 120 (2005).

Significantly, the United States established the provision of material support for terrorism as an offense triable by military commission. The statute, 10 U.S.C. § 950v(b)(25), establishes liability for providing material support for terrorism.

> (A) Offense. Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.
>
> (B) Material support or resources defined. In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.

This statute was recently applied in the case of Salim Ahmed Hamdan. On August 6, 2008, a military commission convicted Hamdan of providing material support for terrorism and sentenced him to 66 months detention. U.S. Department of Defense, "News Release: Hamdan Sentenced to 66 Months," No. 674-08, August 7, 2008. See also William Glaberson, "U.S. Panel Convicts Bin Laden's Driver," International Herald Tribune, August 7, 2008, at 1.

Other countries have adopted similar legislation concerning the prohibitions against terrorism and providing support for terrorism. In Russia, for example, terrorist activity is broadly defined, and includes the organization, planning, preparation, and implementation of terrorist action. "The significance of such a definition is that any individual involved in any stage – no matter its significance or ultimate contribution – or a particular terrorist action may be convicted of the crime of terrorism." Amos N. Guiora, Global Perspectives on Counterterrorism 202 (2007). Spain offers a similar definition of terrorism, which provides that "mere support – either direct or indirect – of terrorism may lead to prosecution under the law." Id. at 210-211.

III. The International Prohibitions against Terrorism and Providing Support for Terrorism Constitute Actionable Claims Under the U.S. Supreme Court's Decision in Sosa v. Alvarez-Machain

In Sosa v. Alvarez-Machain, the U.S. Supreme Court held that the Alien Tort Statute affords jurisdiction over certain violations of international law. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). To determine whether violations of international law are actionable, the Court indicated that ATS claims 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. at 725. According to the Court, the three historical paradigms that were probably considered by the drafters of the ATS were: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Id. at 724

In Sosa, the Supreme Court offered the definition of piracy in United States v. Smith as a model for the modern application of the ATS. United States v. Smith, 18 U.S. 153 (1820). In Smith, the defendant was accused of piracy, a crime codified by Congress although the definition of piracy was to be defined by the law of nations. The defendant challenged the constitutionality of the statute, arguing that the law of nations did not provide a sufficiently clear definition. Id. at 157. The Supreme Court rejected this argument. The Court asked "whether the crime of piracy is defined by the law of nations with reasonable certainty." Id. at 160. In the absence of an international agreement defining piracy, the Court looked to scholarship, custom, and domestic judicial opinions: "What the law of nations on this subject is, 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 and enforcing that law." Id. at 160-161.

Under the Supreme Court's reasoning in Sosa v. Alvarez-Machain as well as United States v. Smith, terrorism and providing support for terrorism constitute actionable claims under the Alien Tort Statute. Like piracy, terrorism is accepted by the civilized world and defined with specificity. Almog v. Arab Bank, PLC, 471 F. Supp. 2d

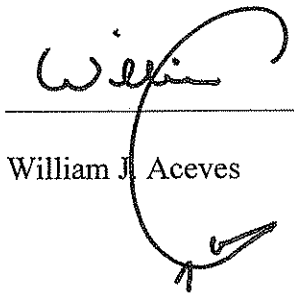
at 284. ("[I]n light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that such conduct violates an established norm of international law.") Indeed, courts and commentators have acknowledged the similarities between terrorism and piracy. See, e.g., Flatow v. Islamic Republic of Iran, 999 F. Supp. 2d 1, 23 (D.D.C. 1998) (emphasis in original) ("[T]errorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's hosti humani generis – an enemy of all mankind. . . ."); Douglas R. Burgess, Jr., "Hostis Humani Generi: Piracy, Terrorism and a New International Law," 13 University of Miami International & Comparative Law Review 293 (2006).[3]

[3] Arguments that reference Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) or United States v. Yousef, 327 F.2d 56 (2d Cir. 2003) to challenge the status of terrorism under international law are misplaced. Tel-Oren was issued several years before the majority of international instruments condemning terrorism were adopted, and Yousef inexplicably fails to reference most of these instruments.

IV. Conclusion

This Declaration has examined international as well as individual state practice regarding terrorism and the prohibition against providing support for terrorism. It is well established that such conduct is prohibited by international law.

Executed on this 15th day of August 2008.



William J. Aceves