

Roadmap on Advocacy Strategy to Prosecute Chiquita's Atrocity Crimes

Chiquita Şirketince İşlenen İnsanlığa Karşı Suçların Soruşturmasında İzlenebilecek Stratejiye İlişkin Yol Haritası

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Abstract

This policy paper draws up a roadmap to conduct strategic advocacy aiming to engage partners from the academic and public interest field, as well as the International Criminal Court (ICC) to investigate, prosecute and eventually convict corporate executives of Chiquita Brands International who indirectly perpetrated crimes against humanity in Colombia and remain at large. We conclude that the Prosecutor of the ICC should open an investigation on the foreign corporate executives who indirectly perpetrated crimes and fueled the conflict in Colombia but cannot genuinely be tried by the domestic transitional justice currently under implementation and negotiation in Colombia. Our idea is to include corporate executives in the concept of most responsible perpetrators of atrocity crimes, thereby empowering victims to pursue justice not only against direct perpetrators but especially against those who knowingly sponsored and represented a necessary condition of the crimes.

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Özet

Bu politika metni, Kolombiya’da insanlığa karşı dolaylı olarak suç işlemiş olan Chiquita Brands International şirketi yöneticilerinin yargılanması ve sonunda cezaya mahkum edilmesine yönelik stratejik bir savunma içeren ve akademik camiayı, sivil toplum gruplarını ve Uluslararası Ceza Mahkemesi’ni de kapsayan bir yol haritası çizmektedir. Makalemizde sözkonusu şirket yöneticilerinin Kolombiya’da insanlığa karşı dolaylı da olsa suç işledikleri ve çatışmayı derinleştirdikleri tespiti yapılmış, ancak şirketin henüz uygulama safhasında olan ve müzakereleri devam eden geçiş dönemi yerel adalet mekanizmaları önünde gerçek anlamda sorumlu tutulmasının pek mümkün görülmediği vurgulanmış, bu cihetle bahsekonu soruşturmanın Uluslararası Ceza Mahkemesi Savcısı tarafından açılması gerektiği sonucuna varılmıştır. Burada temel önermemiz, insanlığa karşı işlenen suçların doğrudan faillerine ilaveten, bilerek bu suçların işlenmesini finanse eden ve gerekli şartları hazırlayan dolaylı faillerinin de sorumlu tutulması gerektiğidir.

Anahtar Kelimeler: Uluslararası Ceza Mahkemesi, Chiquita Şirketi, İnsanlığa Karşı Suçlar, Kolombiya, Geçiş Dönemi Adaleti, Yol Haritası.

I. Introduction

This policy paper draws up a roadmap to conduct strategic advocacy aiming to engage partners from the academic and public interest field, as well as the International Criminal Court (“ICC” or the “Court”) to investigate, prosecute and eventually convict corporate executives of Chiquita Brands International (“Chiquita”) who indirectly perpetrated crimes against humanity in Colombia and remain at large. We first describe the background of the case and later present different courses of

action that could be taken in this strategic plan. We explain why a formal investigation should be opened by the Office of the Prosecutor (“OTP”) of the ICC exclusively regarding foreign corporate executives. We conclude that the OTP should open an investigation on the foreign corporate executives who indirectly perpetrated crimes and fueled the conflict in Colombia but cannot genuinely be tried by the domestic transitional justice currently under implementation and negotiation in Colombia.

We want to give people, specifically, Colombian victims, hope in the ICC to pursue justice through strategies not contemplated before. As a project built on strategic constructivism, we believe in the power of this idea – corporate executives who promoted atrocity crimes must also be accountable. We learned that “constructivism emphasizes how ideas and identities are created, how they evolve, and how they shape the way states understand and respond to their situation.”¹ Our idea is to include corporate executives in the concept of most responsible perpetrators of atrocity crimes, thereby empowering victims to pursue justice not only against direct perpetrators but especially against those who knowingly sponsored and represented a necessary condition of the crimes.

We acknowledge and describe, however, the challenges that reality may bring. We understand the importance of having a strong case to move this strategy forward. That is why we have further analyzed the admissibility of a case against the Chiquita executives at the ICC despite the current investigations and models of transitional justices developed in Colombia. Despite the fact that we have a strong case, reality tells us that business actors have real power that might affect the emerging power of our idea. We anyways believe that the process to make Chiquita executives accountable is more important than the outcome.

II. Statement of Facts

U.S. executives from Chiquita, a transnational fruit company, gave substantial assistance to *Autodefensas Unidas de Colombia* (“AUC”) to pacify the Colombian banana region by targeting and killing union lead-

¹ Stephen Walt, *International Relations: One World, Many Theories*, p. 7.

ers, indigenous competitors of the banana industry and people who were supposedly sympathetic with the guerrillas.

The AUC was a violent paramilitary organization which committed mass killings from 1997 to 2006 in the banana-growing regions. Over 3,700 murders and 60,000 forced displacements were perpetrated by the AUC between 1997 and 2004. Former AUC members continue operating in the region under the name *Urabeños*.²

Chiquita executives met with AUC leaders to discuss joint action against their opponents in the banana-growing region. They agreed that Chiquita would pay the AUC to provide “security” in the areas where the company operated.³

Chiquita made payments to the AUC from 1997 to 2004 and also used their exclusive port in the Caribbean to import illegal weapons. In exchange, the AUC pacified the banana-growing region by killing guerrillas, union leaders and other civilians. From September 10, 2001, through February 4, 2004, Chiquita made at least fifty payments to the AUC totaling over \$825,000.⁴

Senior Chiquita U.S.-based executives approved these payments. They knew that the AUC was a paramilitary organization engaged in crimes against humanity. “When I joined the board, I knew the company was making payments to paramilitary groups in Colombia,” said Morten Arntzen, member of Chiquita’s audit committee.⁵

² They previously operated through the Peasant Self-Defense Group of Córdoba and Urabá (“ACCU”) since 1994. See Terrorist Organization Profile: Self-Defense Groups of Córdoba and Urabá (ACCU), available at http://www.start.umd.edu/tops/terrorist_organization_profile.asp?id=109. See also INDEPAZ, *Cartografía del Conflicto: Narcoparamilitares y Guerrilla*, in PUNTO DE ENCUENTRO (March 2012) at 60 available at <http://ediciones.indepaz.org.co/wp-content/uploads/2012/03/No.58-Punto-De-Encuentro.pdf>.

³ U.S. Department of Justice, Plea Agreement (March 13, 2007) available at http://nsarchive.gwu.edu/NSAEBB/NSAEBB340/20070313_sentencing_memo.pdf

⁴ *Id.*

⁵ Laurie Cohen, *Ex-Chiquita Director Faces Legal Jeopardy in Wall Street Journal* (August 2, 2007) available at <http://online.wsj.com/articles/SB118601669056785578>. See also U.S. Department of Justice, Plea Agreement, *supra* note 3.

On March 13, 2007, the United States filed criminal information against Chiquita, as a juridical person, in the U.S. District Court for the District of Columbia. On March 19, 2007, Chiquita pleaded guilty to one count of Engaging in Transactions with a Specially-Designated Global Terrorist.⁶ A \$25 million fine was imposed on Chiquita by the U.S. District Court. Chiquita reported both its 2001-2004 “security” payments and the imposed fine in its 2006 annual report to the SEC, showing that it considered the fact material to its U.S. investors:

*“In March 2007, Chiquita reached an agreement with the DOJ relating to the investigation. Under terms of the agreement, Chiquita will pay a fine of \$25 million over five years and pleaded guilty to one count of violating a U.S. law in connection with payments made from 2001 to 2004 by its former subsidiary to entities affiliated with ‘Autodefensas Unidas de Colombia,’ which had been designated as a foreign terrorist organization. In anticipation of this settlement, the company recorded a reserve for \$25 million in its financial statements for the quarter and year ended Dec. 31, 2006.”*⁷

While Colombia sought extradition of the U.S. Chiquita corporate executives, the U.S. has already denied such a request and they will not likely be extradited if requested again. The statute of limitations of the crime under which the executives were sought in extradition is the conduct of financing terrorism, but the criminal action to indict the executives under this crime will be barred in February 2016.⁸ Additionally, some of the key witnesses have been murdered.⁹

⁶ See U.S. Department of Justice, Plea Agreement, *supra* note 3.

⁷ CHIQUITA BRANDS INTERNATIONAL, INC. 2006 ANNUAL REPORT at 25, available at <http://investors.chiquita.com/phoenix.zhtml?c=119836&p=irol-reportsannual> (last visited: Nov. 11, 2014).

⁸ This crime has a statute of limitations of twelve years and it starts lapsing with the last action of the *actus reus*. See Penal Code, L. 599 of 2000 July 24, 2000, D.O. 44097 (Colom.), arts. 340, 84 and Case No. 22813 (Supreme Court, Penal Chamber, March 30, 2006) (Colom.). “From 1995 until at least February 2004, Chiquita provided material support to the AUC in Urabá and Santa Marta.” Complaint, para. 83.

⁹ See, e.g., Colectivo de Abogados José Alvear Restrepo and Corporación Jurídica Libertad, *Crímenes de Chiquita Brands siguen impunes en Colombia* (Jun. 22, 2015), available

While the U.S. Chiquita executives' conduct is not analyzed in the OTP reports, a preliminary examination has been conducted on Colombia and Colombian nationals since June 2004, regarding crimes against humanity perpetrated from August 2002 and war crimes from November 2009.¹⁰ In September 2015, the OTP issued a statement in response to the announcement that, as part of ongoing peace talks, a domestic special jurisdiction would be established. The OTP is now "engaging in extensive consultations with the Government of Colombia and other stakeholders."¹¹

III. Strategic Constructivist Approach

A. The Idea

Just as thug warlords, Chiquita corporate executives have escaped from domestic justice. While domestic courts could hear victims, Chiquita executives seem to be immune to justice just for being U.S. nationals perpetrating atrocity crimes in the Global South. Courts in both hemispheres could theoretically hold jurisdiction over such cases. Yet, while courts in Colombia are unable to secure extradition of the U.S. Chiquita corporate executives, courts in the U.S. are convenient but unwilling to prosecute and hold their executives liable under individual criminal liability.

B. Courses of Action Addressing the OTP and Other Stakeholders

Making the ICC a forum where victims can have hope to bring corporate executives to justice is not an easy task. As explained below,

at <http://www.colectivodeabogados.org/?Crimenes-de-Chiquita-Brands-siguen-impunes-en-Colombia>

¹⁰ Office of the Prosecutor of the International Criminal Court, *Interim Report: Situation in Colombia*, November 2012, para. 2.

¹¹ Office of the Prosecutor, *Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia*, September 24, 2015.

different options can be analyzed, proposed and implemented. Similarly, different audiences, such as victims, states, international organizations, scholars, practitioners and adjudicators, must be addressed, persuaded and allowed to persuade us for or against any of the available possibilities.

1. The OTP

Article 15 of the Rome Statute states that the OTP “may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.”¹² In doing so, the OTP “may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”¹³

Considering the criteria set out in article 53(1)(a)-(c) of the Rome Statute, we believe that there is a reasonable basis to proceed with an investigation by the OTP with regard to the crimes indirectly perpetrated by the corporate executives of Chiquita in Colombia. The aforementioned facts connote a sensible or reasonable justification for a belief that crimes falling within the jurisdiction of the Court were committed.¹⁴ The following lines analyze whether the crimes perpetrated by Chiquita corporate executives satisfy the jurisdiction and admissibility criteria laid out in article 53(1) of the Rome Statute.

a. Temporal Jurisdiction

We believe that the Court has temporal jurisdiction over crimes perpetrated in Colombia by the executives of Chiquita within the period of August 5, 2002 and February 4, 2004, the date on which Chiquita made

¹² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, Article 15, *entered into force* July 1, 2002 [“Rome Statute”].

¹³ *Id.*

¹⁴ Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, para. 35.

its last payment to the AUC. The Statute came into force for Colombia after its ratification on August 5, 2002. However, Colombia ratified it with a reservation restricting the ICC's temporal jurisdiction over war crimes which were perpetrated before November 2009.¹⁵

b. Territorial Jurisdiction for Non-nationals of Colombia

We believe that the Court has territorial jurisdiction as well, due to the fact that the crimes indirectly perpetrated by the executives took place on the territory of Colombia, a state party to the Statute as of August 5, 2002. In other words, territorial jurisdiction of the Court applies in this situation by virtue of article 12(2) of the Statute regardless of the fact that the perpetrators, executives of Chiquita, are not nationals of a state party to the Rome Statute.

c. Subject Matter Jurisdiction: Crimes Against Humanity

The crimes indirectly perpetrated by the executives of Chiquita should be qualified as crimes against humanity defined in article 7 of the Statute. Prioritizing their business interests over the basic rights and well-being of many Colombians, the Chiquita executives overlooked, condoned, or even approved the egregious crimes committed by the paramilitaries in Colombia who had been engaging in the following atrocity crimes penalized by the Rome Statute:

- *Murder*,¹⁶
- *Extermination*,¹⁷
- *Deportation or forcible transfer of population*,¹⁸

¹⁵ See International Criminal Court, *Colombia*.

¹⁶ Rome Statute, *supra* note 12, Article 7(a)

¹⁷ *Id.*, Article 7(b)

¹⁸ *Id.*, Article 7(d)

- *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,*¹⁹
- *Torture,*²⁰
- *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law,*²¹
- *Enforced disappearance of persons,*²² and
- *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*²³

A plea agreement entered by Chiquita before the U.S. District Court points out the “reasonable basis”²⁴ for the crimes being indirectly committed by executives, and constitutes a strong legal justification for the OTP to open an investigation. The Chiquita company, as a legal entity, pled guilty before the U.S. judiciary on the grounds of financing the paramilitaries and facilitating provision of arms by allowing them to use a Caribbean port exclusively destined for the company’s use, which resulted in imposition \$25 million fine on the company.

The following piece from the Plea Agreement demonstrates the willingness of the executives to carry on their engagement with the paramilitaries despite their awareness of their atrocities:

“88. From on or about October 31, 2001, and continuing until on or about February 4, 2004, within the district of Colombia and elsewhere, defendant Chiquita engaged in a continuing course of conduct willfully to engage and attempt to engage in transacti-

¹⁹ *Id.*, Article 7(e)

²⁰ *Id.*, Article 7(f)

²¹ *Id.*, Article 7(h)

²² *Id.*, Article 7(i)

²³ *Id.*, Article 7(k)

²⁴ *Id.*, Article 15(3).

ons with a Specially-Designated Global Terrorist, by continuing funds to and for the benefit of the AUC..."²⁵

Likewise, according to the aforesaid agreement, it is documented that the company continued to transfer money several times to the AUC, a Specially-Designated Global Terrorist, even after they were warned by an outside counsel that the company "must not", "should not", and "could not" make the payment directly or indirectly.²⁶

The following notes, taken by Chiquita Senior Counsel Robert Thomas, were included in the U.S. investigation against the company, "indicat[ing] awareness that payments were for security services:"²⁷

From: [Redacted]

Chiquita Brands International ①

3/6/00

Commercial Corporation

↳ disguised the real purpose of providing security

don't know who the shareholders are

"produce harvest and export fruit and cattle"

Some people who formed Convivir formed this new company; gov't won't permit another Convivir; too much political pressure re: paramilitary.

From: [Redacted]

Chiquita Brands International ②

Don't know whether the gov't is aware what this organization does.

Military in Santa Marta may know what this company does. Military won't acknowledge formally that they know what the corporation does.

Note: In Turbo we issue a check to Convivir or another code name and deliver it to a variety of intermediaries for transfer to Convivir.

For Your Signature For Your Information

Please Return For Your Files

Please Handle As Requested

For Your Comments and Suggestions

For Your Signature For Your Information

Please Return For Your Files

Please Handle As Requested

For Your Comments and Suggestions

These notes taken by Chiquita senior executive and later transcribed during the U.S. investigation against the company further serve as evidence of the mens rea of the individuals.²⁸

²⁵ U.S. Department of Justice, Plea Agreement, *supra* note 3, P 16.

²⁶ *Id.*, p.11.

²⁷ George Washington Law School, *The Chiquita Papers*, available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB340/>

²⁸ *Id.*

[Redacted] 7/6/99	
• General in the zone for several years	[Excised] 7/6/99 General in the zone for several years
• Turbo improved while he was there	Turbo improved while he was there
• Mayor in Apartado said he was with death squad ↳ got him suspended from the Army	Mayor in Apartado said he was with death squad [mayor] got him suspended from the Army
• Quite well respected in the zone	Quite well respected in the zone
• Forced to leave Military – sacrificial lamb	Forced to leave military – sacrificial lamb
• [Redacted] wants to make a donation in its own name	[Excised] wants to make a donation in its own name
• Helped us personally security	Helped us personally Security
• information that prevented kidnaps	information that prevented kidnaps
• Went to show our P16 mm = \$9000	Want to show our P16 mm = \$9000
• Other companies are putting in their	Other companies are putting in their
• Very popular in the military	Very popular in the military
• Guerrillas asked to fire	Guerrillas asked to fire

Other accounting documents show the amount of the payments and that they were done in a monthly basis through bank wires, check and sometimes in cash.²⁹

In a nutshell, we deeply believe that the ICC bears the subject-matter jurisdiction over the crimes which clearly fit within the definition of crimes against humanity set out in article 7. The substantial evidence at hand shows that the executives of Chiquita funneled money and arms to a terrorist group in an attempt to pacify the banana region by knowingly and willfully enabling its members to target and kill union leaders, indigenous competitors of the industry and people who were supposedly sympathetic with guerrillas.

d. Complementarity

Despite Colombia's efforts to create a special domestic jurisdiction, it is genuinely unable to prosecute the responsible Chiquita executives.

²⁹ See *id.*

Although it can be purported that there have been domestic investigations and prosecutions against the executives going on, the ability and willingness of Colombian authorities to genuinely carry on the proceedings have to be questioned.

In that regard, first it has to be noted that inability would result from the fact that the U.S. has already denied extradition of the Chiquita executives and they will not likely be extradited if requested again, in spite of the extradition treaty signed between the US and Colombia in 1979. Under article 17(1)(a) of the Rome Statute, the ICC held that Libya's national judicial system was "unavailable genuinely"³⁰ to prosecute Gaddafi on the ground, inter alia, that it was unable to obtain him.³¹ Failure in bringing the accused before the domestic judicial mechanism is among those assessed by the OTP as a factor triggering the ICC's competence to take over the situation.³²

Second reason for Colombian authorities' inability to genuinely carry on the proceedings is the regretful fact that some of the key witnesses have been murdered.³³ As is put in the Policy Paper of the OTP, the absence of conditions of security for witnesses is among the precursors denoting the inability of the competent authorities to exercise their judicial powers in the territory concerned.³⁴ In the same line, Under article 17(1)(a) of the Rome Statute, inability to get witness statements for the trial was one of the grounds for the ICC's ruling that Libya's national judicial system was unavailable genuinely to prosecute Gaddafi.³⁵ The following statement by EarthRights International, a non-profit human

³⁰ Rome Statute, *supra* note 12, Article 17(1)(a).

³¹ *Prosecutor v. Saifal-Islam Gaddafi & Abdullah al-Senussi*, Case No. ICC-01/11-01/11, paras. 206-14.

³² Policy Paper on Preliminary Examinations, International Criminal Court-the Office of the Prosecutor, November 2013, p.14.

³³ See, e.g., Colectivo de Abogados José Alvear Restrepo and Corporación Jurídica Libertad, *supra* note 9.

³⁴ Policy Paper on Preliminary Examinations, p.14.

³⁵ *Prosecutor v. Saifal-Islam Gaddafi & Abdullah al-Senussi*, Case No. ICC-01/11-01/11, paras. 206-14.

rights NGO representing the victims, exemplifies how safe and secure the witnesses are with regard to this issue:

“Among the plaintiffs, who must remain anonymous for fear of reprisals, is Jane Doe 1, the daughter of a community activist, Jane Doe 2, who was involved in a range of civic and social activities in Uraba region of Colombia where she lived with her family. Jane Doe 2 indicated that she was afraid she would be killed for her activities. Approximately one week later, AUC paramilitaries arrived at Jane Doe 2’s house and executed her in front of her family. Subsequently, the family of Jane Doe 2, including Jane Doe 1, fled their community in fear.”³⁶

Moreover, in addition to aforesaid factors as to complementarity criteria, one should bear in mind that Colombia lacks adequate legislative framework to genuinely carry on the proceedings against the executives in the sense that the statute of limitations of the crime under which the executives were sought in extradition is the conduct of financing terrorism, but the criminal action to indict the executives under this crime will be barred in February 2016.³⁷ In other words, even if the State is deemed to be willing to take steps to prosecute the executives, it would be unable to do it in the near future. The existence of the statute of limitations in Colombian legislation that serve as a bar to domestic proceedings should be given utmost priority while assessing the complementarity of this issue at hand.

³⁶ EarthRights International, “ERI Launches New Lawsuit Against Chiquita for Funding, Arming, and Supporting Colombian Terrorists”, July 19, 2007, available at <http://www.earthrights.org/legal/eri-launches-new-lawsuit-against-chiquita-funding-arming-and-supporting-colombian-terrorists>

³⁷ This crime has a statute of limitations of twelve years and it starts lapsing with the last action of the *actus reus*. See Penal Code, L. 599 of 2000 July 24, 2000, D.O. 44097 (Colom.), arts. 340, 84 and Case No. 22813 (Supreme Court, Penal Chamber, March 30, 2006) (Colom.). “From 1995 until at least February 2004, Chiquita provided material support to the AUC in Urabá and Santa Marta.” Complaint, para. 83.

d. Gravity

We believe that crimes indirectly perpetrated by the Chiquita executives exceed the admissibility threshold envisaged in article 17(1)(d), and of sufficient gravity that allows the OTP to open an investigation. In this connection, an investigation by the OTP can be justified by any quantitative and qualitative considerations taking into account the scale, nature, manner of commission of the crimes that took place in Colombia, and their impact.³⁸

With respect to the scale of the crimes and their impact, the intense of acts of crimes committed by the executives via knowingly financing a terrorist organizations and enabling them to commit their atrocities is considerably high. The U.S. District Court established the fact that the Chiquita executives had made over 100 payments, totaling more than \$1.7 million, to the AUC, which has been designated as a Foreign Terrorist Organization by the U.S. government.³⁹ Having been equipped, armed and financed by Chiquita, the AUC carried out mass killings from 1997 to 2006 in the banana-growing regions, resulting in over 3,700 murders and 60,000 forced displacements.

Likewise, the individual offences making up crimes against humanity inflicted on the victims were perpetrated in the nature and form of killings, rapes and other crimes involving sexual or gender violence, extermination, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution against any identifiable group or collectivity on political grounds, enforced disappearance of persons, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁴⁰

Moreover, it is proved that Chiquita knew the AUC was a violent, terrorist paramilitary organization, whose designation as a foreign ter-

³⁸ Policy Paper on Preliminary Examinations, p. 15

³⁹ EarthRights International, *supra* note 36.

⁴⁰ Rome Statute, *supra* note 12, Articles 7(b), 7(d), 7(e), 7(f), 7(h), 7(i), 7(k).

rorist organization was well-publicized in the American public media, however this phenomenon didn't deter the executives from facilitating provision of arms and ammunition for the organization and from paying them over \$1.7 million on a regular and systematic basis. The following paragraphs in the complaint concerning the links between Chiquita and the AUC also insinuate the manner of the crimes committed by the executives in complicit with the paramilitaries:

"39. The Nicaraguan National Police provided 3,000 AK-47 assault rifles and 2.5 million rounds of ammunition to a private Guatemalan arms dealership, Grupo de Representaciones Internationales S.A. ("GIR S.A."), in exchange for weapons more suited to police work. GIR S.A., in turn, arranged to sell the AK-47s and ammunition for \$575,000 to Shimon Yelinek, an arms merchant based in Panama. In November 2001, Yelinek loaded the arms onto a Panamanian-registered ship with Panama as its declared destination, but the ship instead went to Turbo, Colombia.

"40. Chiquita, through Banadex, operates a private port facility at the Colombian municipality of Turbo, used for the transport of bananas and other cargo. The arms ship docked at the Chiquita port, and Banadex employees unloaded the 3,000 assault rifles and 2.5 millions rounds of ammunition. These arms and ammunition were then transferred to the AUC."⁴¹

In sum, we deeply believe that Chiquita's payments to the terrorist organizations in Colombia approved by senior executives of the corporation, and resulted in the targeted killings of thousands of individuals, including trade unionists, banana workers, and political organizers, and enforced disappearance of many others, are of sufficient gravity that enables the OTP to open an investigation.

⁴¹ *Verified Consolidated Shareholder Derivative Complaint* (March 19, 2007), US District Court, Southern District of Florida No. 08-01916-MD-MARRA/JOHNSON at 11 available at <http://www.law.du.edu/documents/corporate-governance/international-corporate-governance/in-re-chiquita-verified.pdf>

2. Colombian Government

Once we have our legal arguments in line and have obtained enough support from the academia, we want to inform Colombian authorities about this project. We understand the efforts of the Colombian government to create a system of transitional justice to try demobilized paramilitaries and eventually guerrillas. However, we believe that this system falls short in prosecuting non-Colombian, specifically, U.S. corporate executives who have not been submitted to the Colombian jurisdiction and remain at large. This is the case of the Chiquita corporate executives who sponsored the AUC.

Since the debate will mainly be open in US academic institutions, we want to first address the Colombian ambassador to be present. Through these diplomatic channels we want to engage with the Colombian government. Eventually, we might be able to convince the Colombian government to refer to the ICC the situation of non-nationals perpetrating crimes in Colombia. If the Colombian government cannot do this at the moment, the OTP may still “initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”⁴²

3. Academia

The power of this idea comes from a clinical project that started in the International Human Rights Clinic of Harvard Law School. As such, we consider that we can increase the power of the idea by engaging scholars, practitioners and students from other schools in Harvard as well as further universities and institutions.

We have been fortunate to engage students and professors from the Kennedy School of Government. We have also obtained help from student organizations such as Advocates at the Law School. We further look forward to engage the Harvard Business School as well as other universities and institutions.

⁴² Rome Statute, *supra* note 12, Article 15.

Our goal is to open the facts of the case to discussion on how to prevent this behavior to be repeated – *i.e.*, corporate executives from the Global North operating unpunished after contributed to the commission of atrocity crimes in the Global South. While the Chiquita case is an example with strong evidence, the debate could be based on further cases in addition to the Chiquita case, in order to show that this is a systemic problem in different countries where corporations and corporate executives have enough power to avoid justice. In fact, the civil society has reported that other corporations that sponsored atrocities in Colombia are “Coca Cola, Nestlé..., Drummond, Cemex, Holcim, Muriel mining corporation, Glencore-Xtrata, Anglo American, Bhp Billington, Anglo Gold Ashanti, Kedhada, Smurfit Kapa..., Monsanto, Dyncorp..., Occidental Petroleum Corporation, British Petroleum, Repsol YPF, Unión Fenosa, Endesa, Aguas de Barcelona, Telefónica, Canal Isabel II, Canal de Suez..., Petrominerales, Gran Tierra Energy.”⁴³

An example in different countries is the “conflict diamonds” of Sierra Leone, Liberia, Angola and the Democratic Republic of Congo, where the conflict was fueled by extractive companies.⁴⁴ Another example is the class action filed by former child slaves against Nestle USA, Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa for aiding and abetting child slavery in the cocoa industry of Côte d’Ivoire.⁴⁵ Through these examples and, particularly, the Chiquita case, we want to open debate and know the opinion of the academia as to the role that the ICC could play in deterring the criminal behavior of some

⁴³ Permanent Peoples’ Tribunal, *Sentencia* (July, 21-23, 2008) at 4, available at <http://www.colectivodeabogados.org/?DICTAMEN-FINAL-AUDIENCIA-TRIBUNAL> (last visited: Nov. 24, 2015). See also Permanent Peoples’ Tribunal, *THE EUROPEAN UNION AND TRANSNATIONAL CORPORATIONS IN LATIN AMERICA* (2010), <http://www.enlazandoalternativas.org/IMG/pdf/TPP-verdict.pdf> (last visited: Nov. 24, 2015).

⁴⁴ See, e.g., Eric Johnson, “Blood Diamonds” (Stanford University ed.), available at <http://web.stanford.edu/class/e297a/Conflict%20in%20Sierra%20Leone.htm> and Nicholas S. Briggs, *Conflict Diamonds in West Africa* (Stanford University ed.), available at <http://web.stanford.edu/class/e297a/Conflict%20diamonds%20in%20West%20Africa.htm>

⁴⁵ *Doe v. Nestle*, 766 F.3d 1017.

corporate executives operating under weak institutions and gaining profit by sponsoring atrocities.

4. International community

Similarly, we want to share this debate with the international community and especially the State Parties of the Rome Statute. Through the Coalition for the ICC, who has already expressed its interest to support this project, we want to ask for a side event during the next Assembly of State Parties. This can further the debate on the role that the ICC can play in deterring the conduct of non-nationals perpetrating atrocity crimes in the territory of the State Parties. It would be emblematic if we can get the support of the African Union and convince its members to refer the situation of foreign corporate executives in Colombia.

IV. Next Actions

Our course of action will start by preparing the legal arguments. The Harvard Law School International Human Rights Clinic has a team of students and instructors who will be guided by a Law School professor and practitioner who is an expert on International criminal law. Besides the admissibility requirements analyzed above, we will further assess the modes of liability of the Chiquita corporate executives.

We will fragment the information to be filed at the OTP through different stages. A first submission will be filed in order to open the debate at different academic spaces such as the Kennedy School of Government, the Business School and other universities. Then, another submission could be filed before the side event at the Assembly of State Parties of the Rome Statute.

We recognize that the power of ideas is better spread through multimedia advocacy. Along this process we want to open a website and create short videos on the case and our goals. To do this we need to engage with partners, students, professors, activists and practitioners that help

us develop a multimedia strategy. We want to follow the example of the campaign developed by Invisible Children to bring Joseph Kony to justice,⁴⁶ as well as the campaign currently developed by Yale Law School and Aljazeera with regards to the acts of genocide currently being perpetrated in Myanmar against the Rohingya-Muslim minority.⁴⁷

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⁴⁶ Invisible Children, *The Warlord. Joseph Kony*, available at <http://invisiblechildren.com/conflict/kony/>

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