The contribution of Chiquita corporate officials to crimes against humanity in Colombia

Article 15 Communication
to
the International Criminal Court

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INTERNATIONAL HUMAN RIGHTS CLINIC
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Table of Acronyms

AUC	Autodefensas Unidas de Colombia (United Self-Defence Forces of Colombia)
Banadex	C.I. Bananos de Exportación, S.A., Chiquita's fully-owned subsidiary in Colombia during the times relevant to this communication
CCAJAR	Corporación Colectivo de Abogados José Alvear Restrepo
Chiquita	Chiquita Brands International, Inc.
Chiquita Suspects	Fourteen individuals who are former and current employees, officers, and board members of Chiquita and Banadex. These individuals are not Colombian nationals or based in Colombia. Most are currently or formerly based in the United States and are likely U.S. citizens. To protect their rights and preserve their privacy, their names have been redacted in materials that will be publicly distributed beyond the OTP.
DEA	U.S. Drug Enforcement Agency
ELN	Ejército de Liberación Nacional (National Liberation Army)
EPL	Ejército Popular de Liberación (People's Liberation Army)
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
ICC	International Criminal Court
OTP	Office of the Prosecutor of the International Criminal Court
Peace Agreement	Colombia's Final Agreement for the End of the Conflict and the Construction of a Stable and Durable Peace
SEC	U.S. Securities and Exchange Commission
SJP	Special Jurisdiction for Peace

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.
>
> – Judgment of the Nuremberg Trials[1]

I. Executive Summary

1. This communication requests that the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) expand its preliminary examination of Colombia to include corporate officials of Chiquita Brands International, Inc. (Chiquita).[2] Although the corporate officials (Chiquita Suspects) are neither based in Colombia nor Colombian nationals, the OTP should nonetheless investigate their contributions to crimes against humanity committed by Colombian paramilitaries. The Chiquita Suspects are former and current senior executives, high-ranking officers, employees, and board members of Chiquita and its former wholly-owned subsidiary, Banadex,[3] who knew about the criminal activities of the Autodefensas Unidas de Colombia (AUC),[4] a paramilitary group that formed in 1997 and acted as an umbrella organization for many paramilitary blocs. The Chiquita Suspects were involved in repeatedly making payments to the AUC despite their knowledge of the AUC's involvement in murder, forced displacement, enforced disappearance, sexual violence, torture, and persecution of civilians. For years, the corporate officials oversaw and authorized payments to the AUC blocs called Bloque Norte, Bloque Elmer Cárdenas, and Bloque Bananero, including between November 2002 and February 2004 when the ICC has temporal jurisdiction over the contributions. These three blocs directly perpetrated atrocity crimes in Colombia's banana-growing regions in Antioquia and Chocó (specifically, in the Urabá region) and Magdalena.

2. The ICC in its 2012 Interim Report on Colombia recognized the AUC's involvement in potential crimes against humanity.[5] While Chiquita was operating in Colombia, the AUC's crimes were well-documented and publicized by local Colombian organizations and governments, including the United States. International institutions, such as the United Nations, also documented the AUC's violence. In 2001, the United States designated the AUC as a foreign terrorist organization (FTO); under U.S. law, any transaction with an FTO is illegal.[6] Chiquita Suspects knew about the FTO

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[1] Trial of the Major War Criminals Before the International Military Tribunal, Vol. 1, 223 (1947).

[2] Chiquita is headquartered in Cincinnati, Ohio in the United States and had operations in Colombia between at least 1989 until June 2004, the relevant time period covered in this submission. *See* Howard W. Barker, Jr. et al., Report of the Special Litigation Committee Chiquita Brands International, Inc. 1-2 (Feb. 2009) [hereinafter Exhibit G-23 – SLC Report]; *see also,* Factual Proffer, U.S.A. v. Chiquita Brands International, (No. 07-055) (D.C. Circuit Mar. 19, 2007) (March 2007) ¶¶ 1-2 [hereinafter Exhibit A-1 – Factual Proffer].

[3] *See* Appendix – Chiquita Suspects (Sealed Submission); *see, e.g.,* Exhibit A-1 – Factual Proffer, ¶¶ 9-18.

[4] In English, "United Self-Defence Forces of Colombia."

[5] OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, SITUATION IN COLOMBIA: INTERIM REPORT ¶¶ 25, 51 (Nov. 2012) [hereinafter Exhibit E-29 - Situation in Colombia 2012 Interim Report].

[6] U.S. law provides the legal basis for designating a foreign terrorist organization (FTO) and defines FTOs as organizations that engage in terrorist activity or terrorism. 8 U.S.C. § 1189. Under U.S. law, it is illegal to

designation. Despite being told by the U.S. Department of Justice that the company was committing a "crime"[7] and that the payments "were illegal and could not continue",[8] as well as being explicitly told by outside counsel in 2003 that the illegal payments must stop,[9] the Chiquita Suspects continued to oversee and authorize payments to the AUC until at least February 2004.[10] The payments had been transferred for years, and recorded in an elaborate accounting system set up by Chiquita management to keep the monies confidential; the repeated nature of payments along with the accounting system provide further evidence that the transfers were not mistakes but intentional contributions made to the AUC.

3. Chiquita, as a corporation, pled guilty in U.S. federal court in March 2007 to engaging in illegal transactions with the AUC following an investigation by the U.S. Department of Justice for making payments to a designated FTO.[11] A Factual Proffer, which is appended to the plea agreement with the U.S. Department of Justice included facts that, "[h]ad this case gone to trial, the government would have proven beyond reasonable doubt."[12] In the plea agreement, Chiquita "accept[ed] the attached Factual Proffer as the basis for its admission of guilt, and admit[ted] these facts when its plea is entered before the Court."[13]

4. Chiquita admitted to making payments to the AUC from 1997 through 2004 that amounted to a total of US$1.7 million.[14] At the plea agreement hearing, the U.S. prosecutor noted: "[T]he company's money paid for the weapons and ammunition that the AUC used to kill innocent civilians" and "[t]he AUC was able to purchase a lot of weapons and ammunition with the $1.7 million that the company paid it over the years.[15]

5. At the sentencing hearing, the same U.S. prosecutor also stated at the hearing: "What makes [Chiquita's] conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. . . . Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms."[16]

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provide material support to terrorists, which includes engaging in financial transactions with an FTO. *See* 18 U.S.C. § 2339A.

[7] Exhibit G-23 – SLC Report, at 91.

[8] Exhibit A-1 – Factual Proffer, ¶ 62; *see also* Exhibit G-23 – SLC Report, at 90-91.

[9] Exhibit A-1 – Factual Proffer, ¶ 56.

[10] Exhibit A-1 – Factual Proffer, ¶¶ 64-87.

[11] *See* U.S. Department of Justice, Plea Agreement (March 2007) at 1 [hereinafter Exhibit A-2 – Plea Agreement].

[12] *See* Factual Proffer, U.S.A. v. Chiquita Brands International, (No. 07-055) at 1 (D.C. Circuit Mar. 19, 2007) (March 2007) [hereinafter Exhibit A-1 – Factual Proffer].

[13] Exhibit A-2 – Plea Agreement, at 1.

[14] Exhibit A-1 – Factual Proffer, ¶ 19.

[15] Transcript of Sentencing Before the Honorable Royce C. Lamberth at 13-14, United States v. Chiquita Brands Int'l, Inc., No. 07-55, (D.C. Circuit Sept. 17, 2007) [hereinafter Exhibit A-5 – Sentencing Hearing Transcript].

[16] Exhibit A-5 – Sentencing Hearing Transcript, at 29.

6. In the Factual Proffer, Chiquita admitted paying violent groups in Colombia starting in the early 1990s and that some of its officers started paying the AUC blocs in 1997 following a meeting involving the AUC's then-leader Carlos Castaño and the then-General Manager of Chiquita's wholly-owned Colombian subsidiary, C.I. Bananos de Exportación, S.A. (Banadex).[17] In Turbo and, at least initially, in Santa Marta, payments were routed through private security groups known as "CONVIVIRs"; later, payments were also made directly to the AUC.[18] These payments were ostensibly in exchange for "security services," but do not appear to have resulted in the provision of actual security services or equipment.[19]

7. Despite Chiquita's 2007 plea agreement, no individual corporate officer has ever been prosecuted. The judge who approved the plea agreement remarked, "[i]t gives me some pause that no individuals are held accountable, but that's really beyond the matters that this Court can resolve. The Court resolves the question before it, which is the company's culpability for the crime."[20] This submission focuses on the potential individual responsibility of Chiquita officials, specifically examining contribution liability and potential violations of Article 25(3)(d)(ii) of the Rome Statute of the ICC.

8. The company has tried to maintain that it was extorted into making payments to the AUC. However, outside counsel explained in 2003 that: "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."[21] On 24 April 2003, in a meeting at the U.S. Department of Justice, former Assistant Attorney General Michael Chertoff "commented that he did not see Chiquita's case as one of true duress, because the Company had a legal option – to withdraw from Colombia."[22] The U.S. Prosecutor at the plea agreement hearing regarding the criminal case against Chiquita stated: "Defendant Chiquita fails to square its claimed victimhood with the facts. As a multi-national corporation, Defendant Chiquita was not forced to

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[17] *See* U.S. Department of Justice, Plea Agreement (March 2007) at 1 [hereinafter Exhibit A-2 – Plea Agreement]; Factual Proffer, U.S.A. v. Chiquita Brands International, (No. 07-055) (D.C. Circuit Mar. 19, 2007) (March 2007) ¶¶ 2-3, 9-18, 19, 21, 25(a), 30-54, 57, 58, 65-80, 83-87 [hereinafter Exhibit A-1 – Factual Proffer]. The Factual Proffer includes facts that, "[h]ad this case gone to trial, the government would have proven beyond reasonable doubt." *Id.* at 1. *See also* Exhibit A-5 – Sentencing Hearing Transcript, at 7-8. In addition to making payments to the AUC, from approximately 1989 until 1997, Chiquita made payments to the violent left-wing groups, the FARC and the ELN. Exhibit A-1 – Factual Proffer, ¶ 20. *See also*, Exhibit A-5 – Sentencing Hearing Transcript, at 8.

[18] Howard W. Barker, Jr. et al., Report of the Special Litigation Committee Chiquita Brands International, Inc. 60-61, 80-81 (Feb. 2009) [hereinafter Exhibit G-23 – SLC Report]; *see also* Exhibit A-1 – Factual Proffer, ¶¶ 23, 25.

[19] Exhibit A-1 – Factual Proffer, ¶ 23.

[20] Exhibit A-5 – Sentencing Hearing Transcript, at 30–31. In September 2015, the U.S. Department of Justice stated it would "fully leverage its resources to identify culpable individuals at all levels in corporate cases," but no Chiquita officials have been prosecuted. *See* U.S. Department of Justice, Sally Yates, Memorandum Re: Individual Accountability for Corporate Wrongdoing, Sept. 9, 2015, at 2 [hereinafter Exhibit L-9 – DOJ Yates Memo].

[21] Exhibit A-1 – Factual Proffer, ¶ 56.

[22] Exhibit G-23 – SLC Report, at 90-91.

remain in Colombia for 15 years, all the while paying the three leading terrorist groups that were terrorizing the Colombia people."[23]

9. Article 15 of the Rome Statute requires the Prosecutor to "analyse the seriousness of the information [she] receive[s]".[24] The evidence presented in this submission is sufficiently serious to expand the OTP's preliminary examination on Colombia to include the Chiquita Suspects. In addition, if the Prosecutor finds "a reasonable basis to proceed with an investigation, [she] shall submit to the Pre-Trial Chamber a request for authorization of an investigation."[25] The evidence included in this submission indeed provides a "reasonable basis" to open a formal investigation into the Chiquita Suspects' contribution to crimes against humanity in Colombia.

10. This submission also provides information regarding jurisdiction and admissibility (complementarity and gravity). This analysis considers the relevance of local proceedings, including ordinary criminal mechanisms and the newly created Special Jurisdiction for Peace (SJP).

11. Thus, this submission requests that:

    1) The OTP immediately expand its current preliminary examination on Colombia to include the Chiquita Suspects.

    2) The OTP continue to closely monitor relevant local mechanisms and proceedings to ensure that they apply ICC standards for investigation and prosecution and do not permit continued impunity of the Chiquita Suspects.

    3) If Colombian authorities are unable or unwilling to move forward with charging and prosecuting the Chiquita Suspects, the OTP should request authorization to investigate the Suspects' role in funding, supplying, and significantly contributing to international crimes of the AUC to ensure that impunity does not continue.

[23] Exhibit A-5 – Sentencing Hearing Transcript, at 12.
[24] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, art. 15(2) [hereinafter Exhibit D-1 – Rome Statute].
[25] Exhibit D-1 – Rome Statute, art. 15(3).

II. Background, Scope, and Methodology

12. Chiquita's History of Payments to Guerrilla and Paramilitaries in Colombia. The Factual Proffer that was part of the Chiquita's plea agreement with the U.S. Department explains that Chiquita paid several "terrorist organizations" in Colombia over a fifteen-year period between 1989 and 2004.[26] Initially, Chiquita admitted to initially paying:

> 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"); the National Liberation Army – an English translation of the Spanish name of the groups Ejército de Liberación Nacional" (commonly known as and referred to hereinafter as "the ELN". Defendant CHIQUITA made these earlier payments from in or around 1989 through in or around 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.[27]

The Factual Proffer also states: "The AUC was formed in or around 1997 to organize loosely-affiliated illegal paramilitary groups."[28] Chiquita admitted to paying the AUC "from in or around 1997 through on or around February 4, 2004. . . . in the two regions where it had banana-producing operations."[29]

13. The Identity of the Chiquita Suspects (Filed Under Seal). The corporate entity, Chiquita, agreed to critical facts in a plea agreement that we rely on in this communication.[30] The identities of the employees referred to in the Factual Proffer accompanying the plea agreement were kept confidential. However, the names of some employees were revealed in a report written by a Special Litigation Committee (SLC Report)[31] appointed by Chiquita's Board of Directors to investigate Chiquita's payments to guerrillas and paramilitaries following complaints from shareholders. Based on a cross-referencing of these two documents with other publicly available documents, the sealed portion of this submission identifies fourteen individuals who were involved in overseeing, authorizing, and/or making repeated payments to blocs

[26] Exhibit A-1 – Factual Proffer, ¶¶ 19, 20; *see also* Exhibit A-5 – Sentencing Hearing Transcript, at 12.
[27] Exhibit A-1 – Factual Proffer, ¶ 20.
[28] Exhibit A-1 – Factual Proffer, ¶ 3.
[29] Exhibit A-1 – Factual Proffer, ¶ 19.
[30] While no individual has faced any criminal charges, Chiquita, as a corporation, pled guilty to the crime of "Engaging in Transactions with a Specially-Designated Global Terrorist." *See* Exhibit A-2 – Plea Agreement, at 1. Chiquita agreed to facts that, "[h]ad this case gone to trial, the government would have proven beyond reasonable doubt." Exhibit A-1 – Factual Proffer, at 1.
[31] While we present these factual statements as Chiquita's own admissions, our inclusion of the evidence from the SLC report should not be taken as an endorsement for its conclusions.

of the AUC.[32] These fourteen individuals are former and current employees, officers, and board members of Chiquita and its former wholly-owned subsidiary, Banadex. They include senior executives, directors, legal counsel, members of the Board's Audit Committee, a senior security official, and senior financial officers. These individuals are not Colombian nationals nor are they based in Colombia. Most are currently based or formerly based in the United States and are likely U.S. citizens. We refer to these individuals collectively as the "Chiquita Suspects," and their names and further analysis of each individual's involvement is detailed in an Appendix that has been provided under seal to the OTP and Colombian authorities.

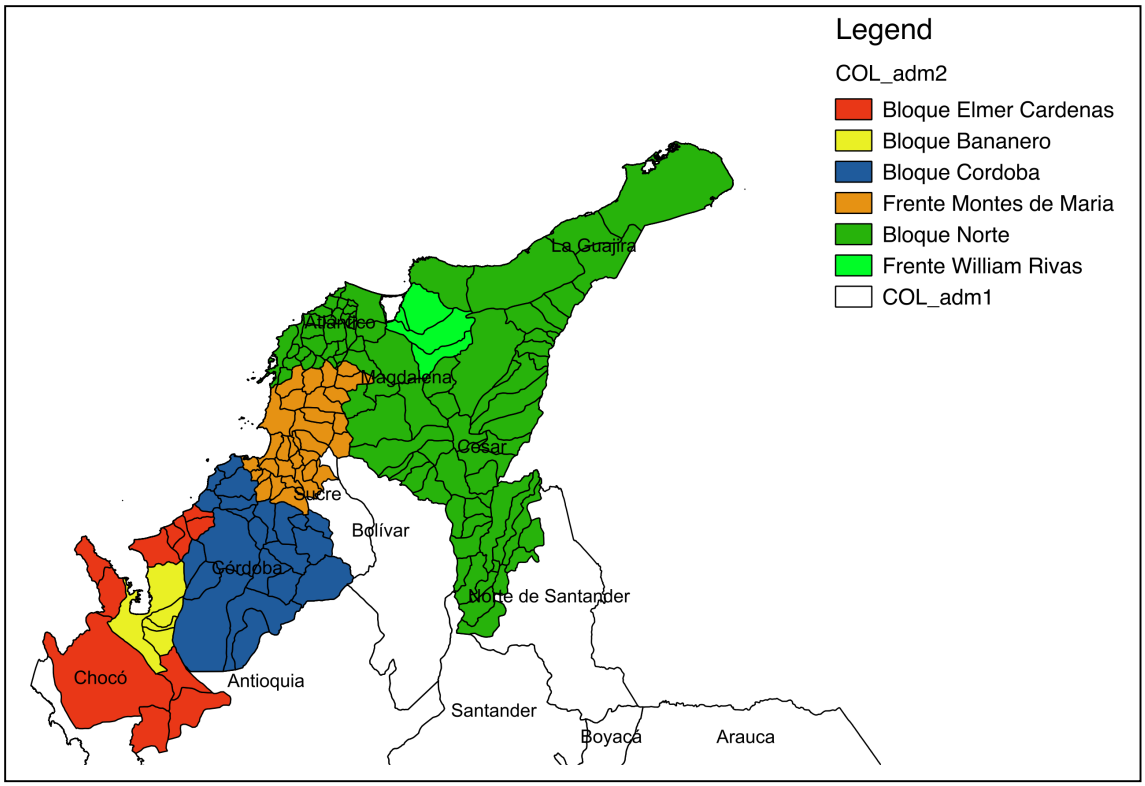
14. Scope of Inquiry—Contribution Liability. This communication focuses on the standards regarding contribution liability under Article 25(3)(d)(ii) of the Rome Statute, but the OTP could also examine and investigate whether the standards for other modes of liability have been met. The analysis examines the *mens rea* and *actus* rea aspects of Article 25(3)(d)(ii). The communication outlines the Chiquita Suspects' role in contributing to crimes perpetrated by the AUC in Colombia by authorizing and/or making payments to particular AUC blocs. It also documents how despite the Chiquita Suspects' knowledge of the widespread and systematic crimes perpetrated against civilians by the AUC in the areas of Colombia where the blocs were active, the payments continued for years. The communication also analyzes how the payments were made intentionally and were not an accident; this analysis includes discussion of the elaborate payment scheme as well as how monies flowed either directly to the blocs or indirectly through cooperatives associated with the AUC, known as CONVIVIRs. Finally, the communication examines how the payments were a significant contribution to the AUC.

15. Temporal Scope. The communication focuses on Chiquita's payments between 1997 and 2004, noting that the ICC's temporal jurisdiction is limited to payments after November 2002. Payments and actions prior to November 2002, however, remain important and provide information on the context and what the Chiquita Suspects knew.

16. Geographic Scope. This communication focuses on Chiquita's activities in the banana growing regions of Antioquia and Chocó (specifically in the Urabá region) and Magdalena (*see* Map 1 and Map 2), where the AUC operated.[33]

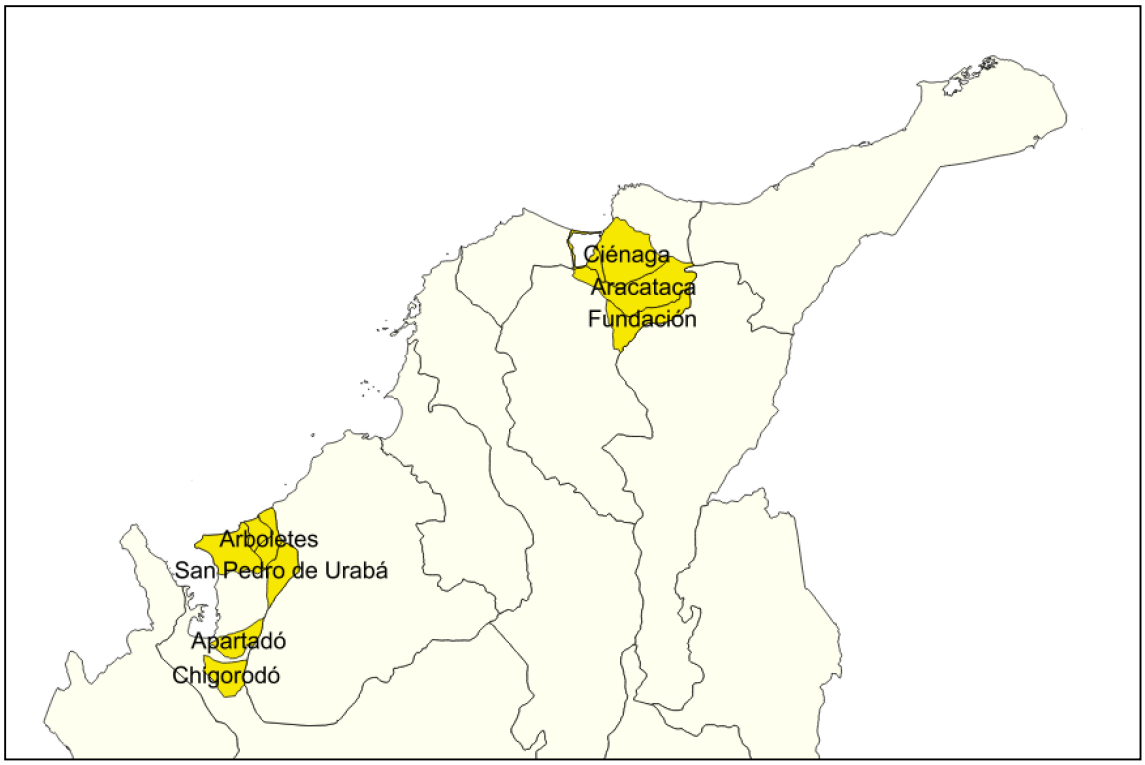
[32] *See* Declaration of Michael L. Evans for the Office of the Prosecutor of the International Criminal Court, Mar. 17, 2017 [hereinafter Exhibit N-2 – Michael Evans Declaration]. *See also* Appendix – Chiquita Suspects (Sealed Submission).

[33] Exhibit A-1 – Factual Proffer, ¶19. In the Factual Proffer, the Department of Justice and Chiquita refer to the region of "Santa Marta." Santa Marta is a city, not a region, so this report refers to the banana growing regions of Magdalena for greater geographic precision. *See also* Exhibit F-18 – 2010 Keiser Testimony, at 5–13.



Map 1: AUC blocs active in northern Colombia, including the Bloque Norte, Bloque Elmer Cárdenas, and Bloque Bananero[34]

[34] CENTRO NACIONAL DE MEMORIA HISTÓRICA, JUSTICIA Y PAZ: TIERRAS Y TERRITORIOS DE LAS VERSIONES DE LOS PARAMILITARES 27 (Yamile Salinas Abdala & Juan Manuel Zarama Santacruz eds, 2012) [hereinafter Exhibit L-20 – Justicia y Paz Tierras y Territorios].



Map 2: Banana growing regions in Urabá (Antioquia and Chocó) and Magdalena.[35]

17. Methodology. This submission is based on information gathered from public archives and legal materials as well as interviews with witnesses and experts.[36] To gather factual evidence on Chiquita's involvement, the Fédération Internationale des Ligues des Droits de l'Hommes (FIDH), Corporación Colectivo de Abogados José Alvear Restrepo (CCAJAR), and the International Human Rights Clinic at Harvard Law School (the Clinic) examined "The Chiquita Papers," an archive created and recently updated with documents obtained through public action by the National Security Archive at The George Washington University.[37] This archive contains internal corporate documents and memoranda that Chiquita turned over to the U.S. Department of

[35] *See Principales Productos Hortofrutícolas - Mapas*, *in* MANUEL DE EXPORTADOR DE FRUTAS, HORTALIZAS Y TUBÉRCULOS EN COLOMBIA (2000), https://perma.cc/QN4S-E8T3 [hereinafter Exhibit K-2 - Principales Productos - Mapas BANANO].

[36] Fact witnesses and experts included congresspersons in Colombia; professors and lawyers who have worked with victims of paramilitary crimes in Colombia; journalists, sociologists, historians, and human rights defenders who have reported on paramilitary activities; and filmmakers who have made documentaries about the paramilitary crimes and interviewed victims of such crimes.

The Clinic informed each interviewee of the nature and purpose of the interview, and informed each interviewee that they did not have to participate in the interview. Each interviewee was informed of the Clinic's intention to make a submission to the ICC based upon findings from the interviews and from other sources of research. The Clinic obtained oral consent for each interview and informed each interviewee that they had the right to discontinue the interviews at any time. Interviewees were not compensated for their time.

[37] Michael Evans, Senior Analyst and Director of the Colombia Project at the National Security Archive, provided expert analysis of the Chiquita Papers. *See* Declaration of Michael Evans, *In Re: Chiquita Brands Int'l, Inc.,* No. 08-01916 (S.D. Fla. March 9, 2016) [hereinafter Exhibit G-6 – Michael Evans Declaration].

Justice and the U.S. Securities and Exchange Commission (SEC) following investigations into the payments Chiquita made to the Colombian authorities as well as the AUC. The Clinic also researched other publicly available materials, including documentaries, newspaper reports, non-governmental organization (NGO) reports, and academic articles. In addition, the Clinic has monitored the Colombia peace process and the creation of the SJP. Finally, the communication relies upon publicly available documents from judicial dockets in the United States and Colombia, including civil litigation against Chiquita in U.S. courts for damages, as well as judicial proceedings against demobilized paramilitaries in Colombia. We have provided the OTP with key sources from this communication, but urge the OTP to examine all of the recently revealed the Chiquita Papers as part of its investigation.

III. Evidence of the Chiquita Suspects' Involvement in Rome State Crimes

18. The Chiquita Suspects' repeated payments to the AUC provide evidence of contribution liability and a reasonable basis to investigate violations of Article 25(3)(d)(ii) of the Rome Statute. Article 25(3)(d)(ii) requires that the "contribution shall be intentional" and "be made in the knowledge of the intention of the group to commit the crime."[38] Although this communication focuses on the Article 25(3)(d)(ii) standard, other modes of liability may also be applicable, including Article 25(3)(d)(i) or Article 25(3)(c).

19. The ICC also laid out the additional requirement that "in order for a person to incur 25(3)(d) liability, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility."[39]

20. In order for the payments made by the Chiquita Suspects to the AUC to meet the standard of Article 25(3)(d)(ii), it must be shown that: (1) the Chiquita Suspects knew the AUC intended to commit and was committing widespread or systematic attacks

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[38] Exhibit D-1 – Rome Statute, art. 25(3)(d)(ii).

[39] Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 288 (Pre-Trial Chamber I, Dec. 16, 2011), https://www.icc-cpi.int/pages/record.aspx?uri=1286409 [Exhibit E-17 - Mbarushimana Decision Confirmation Charges]. In explaining this additional requirement, the Court uses the example that:

> a well-intentioned arms dealer may decide to sell arms to State C instead of warring States A and B, since the arms dealer knows that both States A and B are committing war crimes. However, if State C is merely funneling all of the arms to State A unbeknownst to the arms dealer, then the arms dealer may meet all of the elements for 25(3)(d) liability for uncontroversial non-criminal conduct in the absence of some requirement that he at least be aware that his contribution is going to, in this example, State A.

Id. n. 681. In this example, even the use of an intermediary does not shield the arms dealer from liability if he knows his arms shipments are going to an actor that is committing a crime within the jurisdiction of the Court. Similarly, here, the Factual Proffers discusses the use of intermediaries known as CONVIVIRs that allowed funds to flow to various blocs of the AUC. *See* Exhibit A-1 – Factual Proffer, ¶ 21.

against civilians; (2) the payments were not mistakes but intentional acts; and (3) the contributions were significant.

21. The evidence presented in this submission regarding all the elements of Article 25(3)(d)(ii) is easily sufficient to meet Article 15 "reasonable basis" requirement to merit further investigation. The AUC has been implicated in crimes against humanity in Colombia throughout the time of the payments, between 1997 and at least 2004.[40] The Chiquita Suspects had knowledge of the AUC's involvement in atrocity crimes, but nonetheless continued to support the AUC by authorizing and making repeated payments to the AUC. The payments totaled over US$1.7 million, which was a significant contribution to the AUC and its criminal activity. Finally, there is strong evidence that the Chiquita Suspects considered such payments to be part of the "cost of doing business;" they also understood that they had a choice to withdraw from Colombia rather continue to make payments to groups involved in violence against civilians.

[40] The AUC's criminal activities were widely documented. *See, e.g.,* News Release, Drug Enforcement Agency, Colombian Terrorists Arrested in Cocaine-for-Weapons Deal (Nov. 6, 2002), http://perma.cc/7TD8-6CY6 [hereinafter Exhibit H-6 – DEA Press Release 11062002]; María Flórez, *Estos son algunos de los empresarios (y las empresas) investigados por financiar a los 'paras'*, Pacifista, 19 (Jul. 21, 2016) https://perma.cc/8MVU-88K5 [hereinafter Exhibit H-30 – Florez, Estos Son Algunos]; Kevin G. Hall, *Colombia's Right turns violent to gain recognition,* Cincinnati Enquirer, (Oct. 17, 2001), 6 [Exhibit H-32 – Hall, Colombia's right]; The Associated Press, *Colombian's bio confesses assassinations*, Cincinnati Enquirer, (Feb. 14, 2002), at 17 [hereinafter Exhibit H-33 – The AP, Colombian's bio]; Margarita Martinez, *Colombian paramilitary group declares cease-fire*, Cincinnati Enquirer, (Nov. 19, 2002), at A13 [hereinafter Exhibit H-34 – Martinez, Colombian paramilitary]; Alvaro Eduardo Rojas, *Look to Thine Own*, Akron Beacon J., (Dec. 17, 2001), at A009 [hereinafter Exhibit H-35 – Rojas, Look at Thine Own]. *See also* Juan Forero, *Union Workers in Colombia Are Easy Prey for Gunman*, The N.Y. Times, (Apr. 29, 2001), at 3 [hereinafter Exhibit H-48 – Forero, Union Workers Easy Prey]; Juan Forero, *U.S. Blacklists Paramilitaries In Colombia*, The N.Y. Times, (Sept. 11, 2001), at A10 [hereinafter Exhibit H-40 – Forero, US Blacklists]; Juan Forero, *We're Doing Battle Right and Left, Colombia Insists*, The N.Y. Times, (Mar. 4, 2001), at 3 [hereinafter Exhibit H-41 – Forero, We're Doing Battle]; *Paramilitary Attack Kills 24 in Colombia*, The N.Y. Times, (Oct. 12, 2001), at A9 [hereinafter Exhibit H-42 – NYT, Paramilitary Attack]; Juan Forero, *Rights Group Lists Abuses by Guerrillas in Colombia*, The N.Y. Times, (July 10, 2001), at A4 [hereinafter Exhibit H-43 – Forero, Rights Group]; Larry Rohter, *Colombians Tell of Massacre, as Army Stood By*, The N.Y. Times, (July 14, 2000), at 1 [hereinafter Exhibit H-44 – Rohter, Colombians Tell]; Diana Jean Schemo, *Rightist Avengers Become the Terror of Colombia*, N.Y. Times, (Mar. 26, 1997), at 1 [hereinafter Exhibit H-49 – Schemo, Rightest Avengers]; Juan Forero, *Rightest Squads in Colombia Beating the Rebels*, The N.Y. Times, (Dec. 5, 2000), at A14 [hereinafter Exhibit H-45 – Forero, Rightest Squads; Jeremy McDermott, *Colombia Paramilitary Leader Dead, Rebels Say*, L.A. Times, (Dec. 30, 1998), at A4 [hereinafter Exhibit H-36 – McDermott, Colombia Paramilitary]; T. Christian Miller, *Rebel Army Took No Prisoners on the Bank of the Naya River*, L.A. Times, (May 20, 2001), at 1, A-15 [hereinafter Exhibit H-37 – Miller, Rebel Army 1, Exhibit H-38 – Miller, Rebel Army 2]; T. Christian Miller, *'Rebel' Roundups Stir Controversy in Colombia*, L.A. Times, (Nov. 4, 2002), at 1, at A5 [hereinafter Exhibit H-39 – Miller, Rebel Roundups]; Photo *Essay: Civilians Caught in the Crossfire*, PBS (Nov. 2002), http://perma.cc/4XLH-JL4T [hereinafter Exhibit H-23 – PBS Photo Essay]; *Paramilitary Cell Declared Terrorist*, The Wash. Times (Sept. 11, 2001), https://perma.cc/9ZVF-R4ZZ [hereinafter Exhibit H-28 – Washington Times, Paramilitary cell]; Andrea Koppel, *U.S. to Classify Colombian Group "Terrorist"*, CNN (Sept. 10 2001), http://perma.cc/VX87-VDWM [hereinafter Exhibit H-17 – Koppel, US to classify].

A. KNOWLEDGE OF THE AUC'S CRIMES (*MENS REA*)

22. Article 25(3)(d)(ii) requires the accessory's knowledge of the perpetrator's intention to commit the underlying crimes.[41] There is clearly a reasonable basis, as required by Article 15, for the OTP to believe such knowledge existed here. The AUC's violence against civilians was well documented throughout the entire period that Chiquita was paying the paramilitaries. The company's 2007 plea agreement stated senior Chiquita executives knew no later than September 2000 that the company was paying the AUC and that "the AUC was a violent, paramilitary organization."[42] Indeed, there is also a reasonable basis to believe the Chiquita Suspects were put on notice over a period of many years, including prior to 2000, regarding the AUC's actions and intention to commit widespread or systematic attacks against the civilian population in the regions under their control.

23. The ICC recognized in its 2012 Interim Report that there is a reasonable basis to believe that paramilitary groups have committed crimes against humanity since November 2002, including murder, forcible transfer of population, torture, as well as rape and other forms of sexual violence.[43]

24. The United Nations, governments, and NGOs alike made contemporaneous reports on the AUC and its violence against civilians. For example, the UN High Commissioner for Human Rights released several reports on the situation in Colombia while Chiquita was operating there. In early 2001, for example, the High Commissioner noted the "crimes are part of a systematic offensive against the civilian population."[44] The Commissioner further found evidence of a policy of "social cleansing . . . systematically practised" by the AUC.[45] The U.S. government also reported on AUC abuses: for example, the U.S. Drug Enforcement Agency (DEA) noted in a 2002 press release that human rights groups and the U.S. State Department considered the AUC "to be responsible for 70% of the human rights violations in Colombia".[46] International NGOs made similar reports.[47]

25. The documentation of the AUC's violent attacks on civilians was widely reported in the news. Cincinnati-based, national, and international media,[48] including major

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[41] Exhibit D-1 – Rome Statute, art. 25(3)(d)(ii).
[42] Exhibit A-1 – Factual Proffer, ¶ 22 ("No later than in or about September 2000, [] Chiquita's senior executives knew that the corporation was paying the AUC and that the AUC was a violent, paramilitary organization").
[43] Exhibit E-29 – Situation in Colombia 2012 Interim Report, ¶ 51.
[44] UN High Commission for Human Rights, Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia, ¶ 30, U.N. Doc. E/CN.4/2001/15 (Feb. 8, 2001) [hereinafter Exhibit I-6 – HCHR, Human rights situation in Colombia].
[45] *Id.* ¶ 35.
[46] Exhibit H-6 – DEA Press Release 11062002.
[47] *See, e.g.*, Human Rights Watch, War Without Quarter: Paramilitary Violations of International Humanitarian Law, http://perma.cc/R3WE-RY3T [hereinafter Exhibit I-9 – HRW, Paramilitary Violations].
[48] *See, e.g.*, Jeremy McDermott, Colombia's Growing Paramilitary Force, BBC (Jan. 7, 2002), http://perma.cc/FGF2-68AT [hereinafter Exhibit H-22 – McDermott, Colombia's growing paramilitary]; For newspaper reports, see, e.g., Jared Ketler, *Human rights record assailed: Report criticizes Colombian leader*, Cincinnati Enquirer, (Oct. 5, 2001), 19 [hereinafter Exhibit H-31 – Ketler, Human rights record]; Exhibit H-32 –

financial outlets,[49] reported on the AUC's crimes during the period when Chiquita was making payments. For example, in 2001, The New York Times reported that the AUC was "responsible for most of the massacres in Colombia . . . [and] has also attacked union leaders, university professors, human rights advocates and others with liberal viewpoints."[50]

26. The AUC's abuses were so severe that the U.S. Department of Justice categorized the AUC as an FTO in 2001, a designation that numerous Chiquita Suspects understood no later than February 2003 to mean the payments to the AUC were illegal under U.S. law.[51]

27. Internal Chiquita documents provide evidence demonstrating company knowledge of the paramilitary crimes in the early 1990s.[52] As early as 1994, security reports sent to Chiquita headquarters in Cincinnati, Ohio indicated company awareness of paramilitary violence in the areas where Chiquita operated. One such report mentions paramilitaries tying up and shoving guerrilla members into Jeeps, along with reports of body burnings and burials at nearby farms.[53] This 1994 report states:

> [t]here exist paramilitary groups that keep the guerrilla groups in check; it's the case that, a few weeks ago, a faction of the oldest group suffered 30 losses in an encounter with these groups. We've heard from a witness about how they tied up the guerrillas they'd killed and how they'd pull them until they were able to place them in the Jeeps they had ready for the getaway, in addition to some farmers that affirm that, in parts of their property, some corpses were burned and later buried.[54]

Hall, Colombia's right, at 6; Exhibit H-33 – The AP, Colombian's bio, at 17; Exhibit H-34 – Martinez, Colombian paramilitary, at A13; Exhibit H-35 – Rojas, Look at Thine Own; Exhibit H-48 – Forero, Union Workers Easy Prey; Exhibit H-40 – Forero, US Blacklists; Exhibit H-41 – Forero, We're Doing Battle, at 3; Exhibit H-42 – NYT, Paramilitary Attack, at A9; Exhibit H-43 – Forero, Rights Group, at A4; Exhibit H-44 – Rohter, Colombians Tell, at 1; Exhibit H-49 – Schemo, Rightest Avengers; Exhibit H-45 – Forero, Rightest Squads, at A14; Exhibit H-36 – McDermott, Colombia Paramilitary, at A4; Exhibit H-37 – Miller, Rebel Army 1; Exhibit H-38 – Miller, Rebel Army 2, at 1, A-15; T. Exhibit H-39 – Miller, Rebel Roundups, at 1, at A5; Exhibit H-23 – PBS Photo Essay; Exhibit H-28 – Washington Times, Paramilitary cell; Exhibit H-17 – Koppel, US to classify.

[49] Jose de Cordoba, *U.S. Sought Help of Pariah Army, According to Vega*, Wall Street J., Dec. 7, 2000, at A.16 [hereinafter Exhibit H-51 – Cordoba, US Sought Help]; David I. Oyama, *World Watch The Americas: Paramilitary Chief Indicted*, Wall Street J., Sept. 25, 2002, at A.11 [hereinafter Exhibit H-52 – Oyama, World Watch Uribe]; David I. Oyama, *World Watch The Americas: Bush, Uribe Vow to Pursue Terrorists*, Wall Street J., Sept. 26, 2002, at A.11 [hereinafter Exhibit H-53 – Oyama, World Watch Bush]; Scott Morrison & Adam Thomson, *Killings Threaten Colombian Peace Talks: Rightwing Assaults Claiming 100 Victims May be aimed at Foiling Talks with Leftwing Guerrillas*, Fin. Times, Jan. 12, 1999.

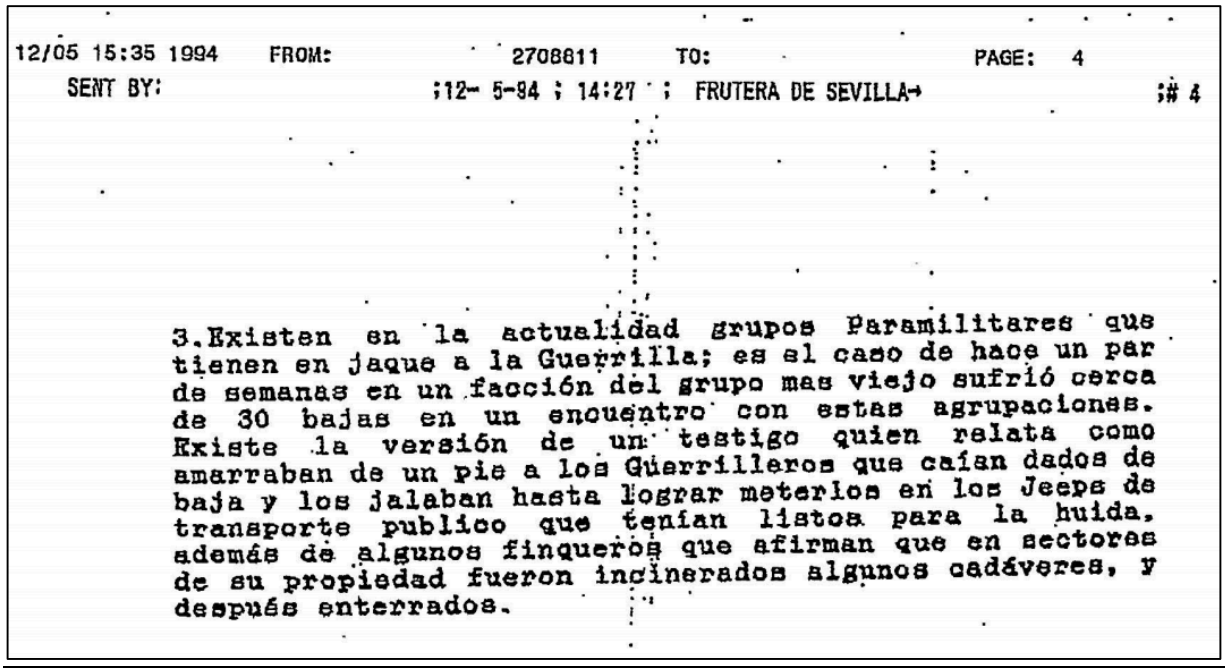
[50] Juan Forero, Rightist Chief in Colombia Shifts Focus to Politics, N.Y. Times (June 7, 2001) [hereinafter Exhibit H-50 – Forero, Rightest Chief].

[51] Exhibit G-23 – SLC Report, at 214-15.

[52] See *infra* ¶¶ 16-25.

[53] Memorandum from Chiquita Brands International to (Redacted) (Dec. 5, 1994) [hereinafter Exhibit B-7 – Internal Memo 19941205].

[54] *Id*. (translated by authors).

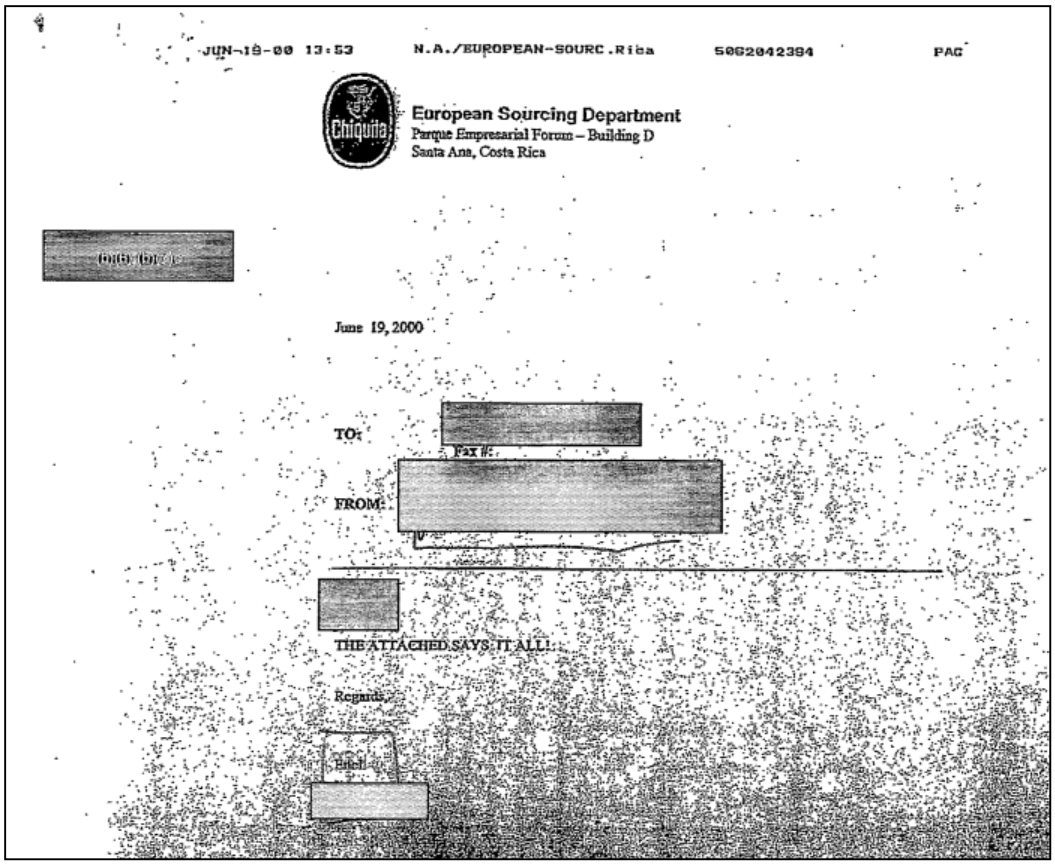


12/05 15:35 1994 FROM: 2708611 TO: PAGE: 4
SENT BY: ;12- 5-94 ; 14:27 ; FRUTERA DE SEVILLA→ ;# 4

3.Existen en la actualidad grupos Paramilitares que tienen en jaque a la Guerrilla; es el caso de hace un par de semanas en un facción del grupo mas viejo sufrió cerca de 30 bajas en un encuentro con estas agrupaciones. Existe la versión de un testigo quien relata como amarraban de un pie a los Guerrilleros que caían dados de baja y los jalaban hasta lograr meterlos en los Jeeps de transporte publico que tenían listos para la huida, además de algunos finqueros que afirman que en sectores de su propiedad fueron incinerados algunos cadáveres, y después enterrados.

28. One fax exchange from June 2000 reveals Chiquita officials' knowledge of the AUC's actions. The body of the fax reads: "THE ATTACHED SAYS IT ALL!" The attached was a newspaper clipping detailing that the AUC killed 391 people in the first five months of 2000 alone.[55]

[55] Internal Chiquita fax (June 19, 2000) [hereinafter Exhibit B-18 - Internal Chiquita fax 20000619].Exhibit B-18 - Internal Chiquita fax 20000619]. It reads: "Bleeding: the army stated that guerillas and the paramilitary killed 785 civilians between January and May of this year, 170 more than during the same period in 1999. According to that report, guerillas killed 394 people and the United Self Defenders of Colombia killed 391."



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Chiquita

European Sourcing Department
Parque Empresarial Forum – Building D
Santa Ana, Costa Rica

June 19, 2000

TO:

Fax #:

FROM:

THE ATTACHED SAYS IT ALL!

Regards,

El Mundo newspaper
Medellin, Colombia
June 18, 2000

Bleeding

The army stated that guerillas and the paramilitary killed 785 civilians between January and May of this year, 170 more than during the same period in 1999. According to that report, guerillas killed 394 people and the United Self Defenders of Colombia killed 391.

29. An internal draft memo from 2000 describes the AUC as a "widely-known, illegal vigilante organization."[56] This memorandum was written based on research done by one of the Chiquita Suspects in Colombia, was discussed directly with at least one

[56] Exhibit B-1 – Internal Memo 20000900 at 2. The full text of this screenshot reads:
[ ]
[ ]and told him that the Autodefensas was supporting the establishment of a new Convivir organization for the Uraba region and would like to meet with Banadex management. [Autodefensas is a widely-known, illegal vigilante organization.][ ]
that Banadex had no choice but to attend the meeting. Banadex was, and still is a well-known member of the Medellin business community. Refusing to meet would antagonize the Colombian military, local and state government officials, and the Autodefensas.

other Chiquita Suspect, and then was presented at the Audit Committee meeting in September 2000 in Chiquita's Cincinnati headquarters.[57]

30. In September 2001, the U.S. government designated the AUC as an FTO.[58] U.S. law provides that organizations are designated as "foreign terrorist organizations" if they engage, or retain the capability and intent to engage, in terrorist activity or terrorism.[59]

31. Under U.S. domestic law, terrorism is defined to include activities such as engaging in premeditated, politically motivated violence against civilians.[60] Though this definition does not overlap perfectly with crimes against humanity as defined by the Rome Statute, the common element in both crimes against humanity and terrorism is the intentional use of violence against civilians.

32. The designation of the AUC as a FTO was not only widely reported in U.S. media,[61] but was also reported in October 2001 in two local newspapers in Cincinnati, Ohio, where Chiquita is headquartered.[62] The U.S. prosecutor who worked on the Chiquita case stated that information about the federal designation of the AUC as a FTO was available "in spades through the wide-spread reporting on it in the public media, both in the United States as in Colombia."[63] In addition, in September 2002, one of the Chiquita Suspects accessed "an Internet-based, password-protected subscription service" that "Chiquita paid to receive", specifically accessing the "Colombia – update page," which stated the following:

> 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.[64]

33. In a meeting of the Audit Committee of Chiquita's Board of Directors held in April 2002, the Legal Department reported about the Colombia payments, which were then discussed by the Audit Committee.[65] More specifically, at this meeting "the directors were told about the Santa Marta group's demand for cash payments and

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[57] Exhibit A-1 – Factual Proffer, ¶ 22; Exhibit G-23 – SLC Report, at 65.
[58] Exhibit A-1 – Factual Proffer, ¶ 27.
[59] Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. Department of State, https://perma.cc/EDH5-5U5B [hereinafter Exhibit L-11 – Foreign Terrorist Organizations].
[60] 22 U.S. Code § 2656f(d)(2), https://perma.cc/VB5N-TY9Y [hereinafter Exhibit D-4 – 22 USC 2656f].
[61] *See* Exhibit G-23 – SLC Report, at 75–76.
[62] Exhibit A-1 – Factual Proffer, ¶ 27.
[63] Exhibit A-5 – Sentencing Hearing Transcript, at 9.
[64] *Id.* ¶ 28.
[65] Exhibit G-23 – SLC Report, at 86; *see also* Exhibit A-1 – Factual Proffer, ¶ 26.

the new procedures that would be used to make the payments."[66] The SLC Report stated that the meeting specifically included discussion of the CONVIVIRS, and Chiquita's General Counsel told others that the company had learned that the CONVIVIRs were "being used to support the paramilitaries."[67] Thereafter, the Audit Committee "continued to be apprised of the convivir payments through Olson's regular FCPA [Foreign Corrupt Practices Act] reports at Audit Committee meetings."[68]

34. Furthermore, corporations normally undergo general due diligence processes based on legal and financial grounds that include human rights risk assessments.[69] It is within the scope of corporate officials' and directors' fiduciary duty to anticipate and answer questions of legality and to assess business risks.[70] It is reasonable to assume that Chiquita's Board of Directors would have examined the risks involved in doing business with the AUC, including the risks of becoming involved in illegal activities, before making such business decisions.[71] At a minimum, corporate officials should have monitored the violent groups committing crimes within the banana-growing region.

35. Chiquita's 2003 annual report demonstrates that corporate officials were in fact evaluating business risks. The company stated that it "must continually evaluate the risks in . . . Colombia, where an unstable environment has made it increasingly difficult to do business. The Company's activities are subject to risks inherent in operating these countries, including . . . political instability and terrorist activities."[72] From this annual report, it appears that the Chiquita corporate executives were aware of the violence and instability in Colombia and would have examined the legality and risks of making payments to the AUC.

36. Cumulatively, the weight of many years' evidence indicates that the Chiquita Suspects had the requisite knowledge that the AUC was committing crimes against humanity. At a minimum, and even before 2000, this knowledge should have put the Chiquita Suspects on notice that their payments to the AUC were improper, even assuming they did not have a full understanding of international law. At some point, and at latest by 2003, the Chiquita Suspects also knew that the payments were illegal under at least U.S. law.

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[66] Exhibit G-23 – SLC Report, at 86; *see also* Exhibit A-1 – Factual Proffer, ¶ 26.
[67] Exhibit G-23 – SLC Report, at 86.
[68] *Id.*
[69] Niklas Hansson, *Corporate Responsibility in Conflict-Affected and High-Risk Areas,* Diakonia 27 (2013) https://perma.cc/CS4A-JVEL [hereinafter Exhibit L-8 – Diakonia Corporate Responsibility Report].
[70] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) [hereinafter Exhibit J-27 – Unocal v Mesa Petroleum] (citing Lipton and Brownstein, Takeover Responses and Directors' Responsibilities: An Update, p. 7, ABA National Institute on the Dynamics of Corporate Control (December 8, 1983)).
[71] *See id.*
[72] Chiquita Brands International, 2003 Annual Report 27 [hereinafter Exhibit C-1 – 2003 Chiquita Annual Report].

B. KNOWINGLY AND INTENTIONALLY CONTRIBUTING TO THE AUC (*MENS REA*)

37. As discussed above, there is a reasonable basis for the OTP to conclude the Chiquita Suspects knew of the AUC's crimes. There is similarly strong evidence for the OTP to find the Chiquita Suspects knew about and intentionally made repeated payments to the AUC that supported the organization's activities. The *mens rea* standard of Article 25(3)(d)(ii) requires the "contribution shall be intentional". This condition is not a requirement that the suspects have a specific intent.

38. The payments here were not mistakes but rather intentional actions; the Chiquita Suspects contributed in different forms to the payment scheme, ranging from authorizing it, to designing it, to implementing it. As such, there is clearly a reasonable basis under Article 15 for the OTP to further investigate these financial contributions as meeting the Article 25(3)(d)(ii) standard.

39. A U.S. prosecutor working on the Department of Justice investigation of the corporation called Chiquita's conduct "morally repugnant", noting that it "went forward month after month, year after year, to pay the same terrorists. . . . Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms,"[73] often using an elaborate system of intermediary organizations and accounting systems that were designed to conceal payments to certain parties. Payments to violent groups, including the FARC and ELN started in or around 1989.[74] The payments to the AUC were made over a period of at least seven years, starting in 1997.[75] Payments made during the period from November 2002 to at least February 2004 fall within the jurisdiction of the ICC.[76] Even after being explicitly told not to make further payments by outside counsel[77] and after the Department of Justice

[73] Exhibit A-5 – Sentencing Hearing Transcript.
[74] Exhibit A-1 – Factual Proffer, ¶¶ 19, 29-87.
[75] Exhibit A-1 – Factual Proffer, ¶¶ 19, 29-87.
[76] Additionally, while not the focus of this communication, the ICC should also look into whether the formal withdrawal of Chiquita from Colombia in June 2004 actually ended the wrongdoing. Chiquita sold Banadex's assets to Invesmar in June 2004. Chiquita Brands International, 2004 Annual Report 26 [hereinafter Exhibit C-2 – 2004 Chiquita Annual Report]. Invesmar's subsidiary, Banacol, continued operations with some of the local officers formerly working for Banadex. *See* Fiscalía General de la Nación [Attorney General of the Nation], Diligencia Indagatoria Recepcionada Señor Charles Dennis Keiser Pasaporte Número 452816421 Nacionalidad Estados Unidos, Docket No. 1007839, Feb. 12. 2010 [hereinafter Exhibit F-18 – 2010 Keiser Testimony], at 14-15. *See also* Exhibit I-5 – Hands Off the Land Landgrabbing Report, at 14. According to the Colombian Prosecutor, Banacol also continued Chiquita's system of paying the paramilitaries between 2004 and 2007. *See also Chiquita continues in Colombia* [*Chiquita sigue en Colombia*], El Espectador (Sept. 5, 2009) https://perma.cc/8EEH-XVD3 [hereinafter Exhibit H-12 – El Espectador, Chiquita sigue]. Banacol would sell pineapples and bananas at a discount to Chiquita for the next 8 years. Exhibit C-2 – 2004 Chiquita Annual Report, at 26. *See also* Exhibit I-5 – Hands Off the Land Landgrabbing Report, at 14. Chiquita admits in its 2011 annual report that it sourced 12 percent of its bananas from Colombia, and Banacol was its largest global supplier. Chiquita Brands International, Annual Report (Form 10-K) (Feb. 27, 2012), at 2 [hereinafter Exhibit C-4 – Chiquita 10K]. *See also*, Exhibit F-18 – 2010 Keiser Testimony, at 14-15 (Discussing Chiquita's relationship with local company Olinsa, which was founded in 2005 by former Chiquita local officer, Gloria Andrea Cuervo Torres).
[77] Exhibit A-1 – Factual Proffer, ¶ 56.

indicated the payments were a "'crime'",[78] the Chiquita Suspects continued to authorize, oversee, and make repeated payments.

40. Repeated Payments despite knowledge of the AUC's Crimes. The AUC was not the first violent group in Colombia to which Chiquita made payments. While the payments between November 2002 and February 2004 are most relevant to the OTP's inquiry, Chiquita's payments to violent groups date to the late 1980s and were repeated over a fifteen-year period. Chiquita has admitted to making more than 100 payments to the AUC between 1997 and 2004 alone.[79]

41. The Factual Proffer states that Chiquita made payments to the FARC and the ELN in 1989 through 1997 in areas where the company had its "banana-producing operations."[80] The SLC report indicates that Chiquita approved payments to the FARC in the late 1980s,[81] and that "Banadex continued to make payments to the FARC and other guerilla groups in the early and mid-1990s."[82]

42. 1997 was an important year for several reasons. The AUC consolidated under the leadership of Carlos Castaño in 1997.[83] The Factual Proffer states that after the head of Banadex met with Castaño in 1997, Chiquita began making payments to the AUC.[84] The Factual Proffer also notes that payments were made through intermediaries known as "CONVIVIRs", which the AUC used as fronts to collect from businesses to support its illegal activities.[85]

43. 1997 also saw several Chiquita Suspects investigating and discussing "security payments" in Colombia during this transition period, indicating that payments that were being made to both guerrillas and CONVIVIRs.[86] CONVIVIRs, and their legality and connection to paramilitaries, appear to be a focus of attention in 1997 meetings where Chiquita suspects were in attendance.[87] At least one Chiquita employee's handwritten notes from the time shows his clear understanding of the choice to be made: "Cost of Doing Business in Colombia – maybe the Question is not why are we Doing this But Rather we are in Colombia and Do we want to ship Banana from

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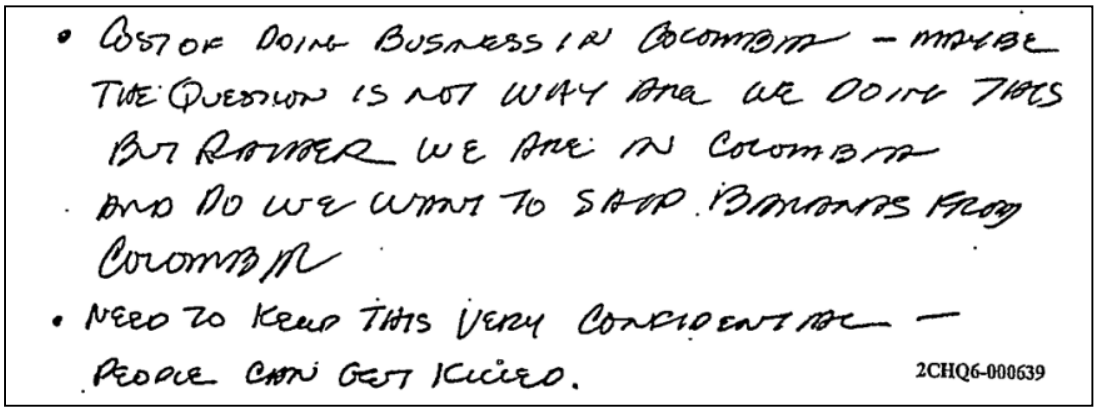
[78] Exhibit G-23 – SLC Report, at 91.
[79] Exhibit A-1 – Factual Proffer, ¶ 19.
[80] Exhibit A-1 – Factual Proffer, ¶ 20.
[81] Exhibit G-23 – SLC Report, at 30–31.*See also* Exhibit A-1 – Factual Proffer, ¶ 20; Exhibit A-5 – Sentencing Hearing Transcript, at 8.
[82] Exhibit G-23 – SLC Report, at 31–32.
[83] Exhibit A-1 – Factual Proffer, ¶ 3, 21; Exhibit G-23 – SLC Report, at 45.
[84] Exhibit A-1 – Factual Proffer, ¶ 3, 21; Exhibit G-23 – SLC Report, at 45.
[85] Exhibit A-1 – Factual Proffer, ¶ 3, 21; Exhibit G-23 – SLC Report, at 45.
[86] Exhibit G-23 – SLC Report, at 51-52 (discussing May 7, 1997 meeting where payments to guerillas and CONVIVIRs were discussed along with legality of payments to CONVIVIRs); Chiquita handwritten notes, May 7, 1997 and April 22, 1997 [hereinafter Exhibit B-22 – Chiquita Handwritten Notes]. *See also* Exhibit A-1 – Factual Proffer, ¶ 23 (discussing so-called "security payments").
[87] Chiquita handwritten notes, May 7, 1997 and April 22, 1997 [hereinafter Exhibit B-22 – Chiquita Handwritten Notes]; *see also* Exhibit G-23 – SLC Report, at 53-55 (discussing September 1997 meeting).

Colombia". The notes indicate that the severe consequences involved: "Need to keep this very confidential -- People can Get killed."[88]



44. Some of the Chiquita Suspects sat on Chiquita's Audit Committee, a sub-committee of the Board of Directors, which learned of security payments to CONVIVIRs no later September 1997.[89]

45. No later than mid-September 2000, the Committee definitively knew that the money to the CONVIVIRs was actually going to the paramilitaries.[90] One member of the Audit Committee told The New York Times in 2007, "[w]hen I joined the board [in 2002], I knew the company was making payments to paramilitary groups in Colombia."[91]

[88] Chiquita handwritten notes, May 7, 1997 and April 22, 1997 [hereinafter Exhibit B-22 – Chiquita Handwritten Notes].
[89] Exhibit G-23 – SLC Report, at 53-55; Exhibit A-1 – Factual Proffer, ¶ 21.
[90] Exhibit G-23 – SLC Report, at 68–69; Exhibit A-1 – Factual Proffer, ¶ 22.
[91] Laurie P. Cohen, *Chiquita Under the Gun: After Disclosing Payments to Colombian Terrorists, Prominent* Ex-Chiquita Director Faces Legal Jeopardy, Wall Street J. (Aug. 2, 2007), http://perma.cc/24XY-9LVS [hereinafter Exhibit H-2 – Cohen, Chiquita Under the Gun]. Arntzen joined the board in 2002, as evidenced by his own LinkedIn profile. Morten Arntzen, LINKEDIN, http://perma.cc/Y6WX-LXDL [hereinafter Exhibit L-25 – LinkedIn Morten Arntzen].

46. The Factual Proffer shows that the CONVIVIRs in fact provided no "actual security services" in exchange for the Chiquita payments:[92]

> 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."

47. In 2000, Chiquita again investigated security payments in Colombia.[93] One Chiquita Suspect gathered information about Banadex's interactions with and payments to the CONVIVIRs.[94] This Chiquita employee "returned to Cincinnati and reported his findings orally to Thomas [senior counsel at Chiquia] on 1 August 2000, and Thomas . . . summarized those findings in a memo."[95]

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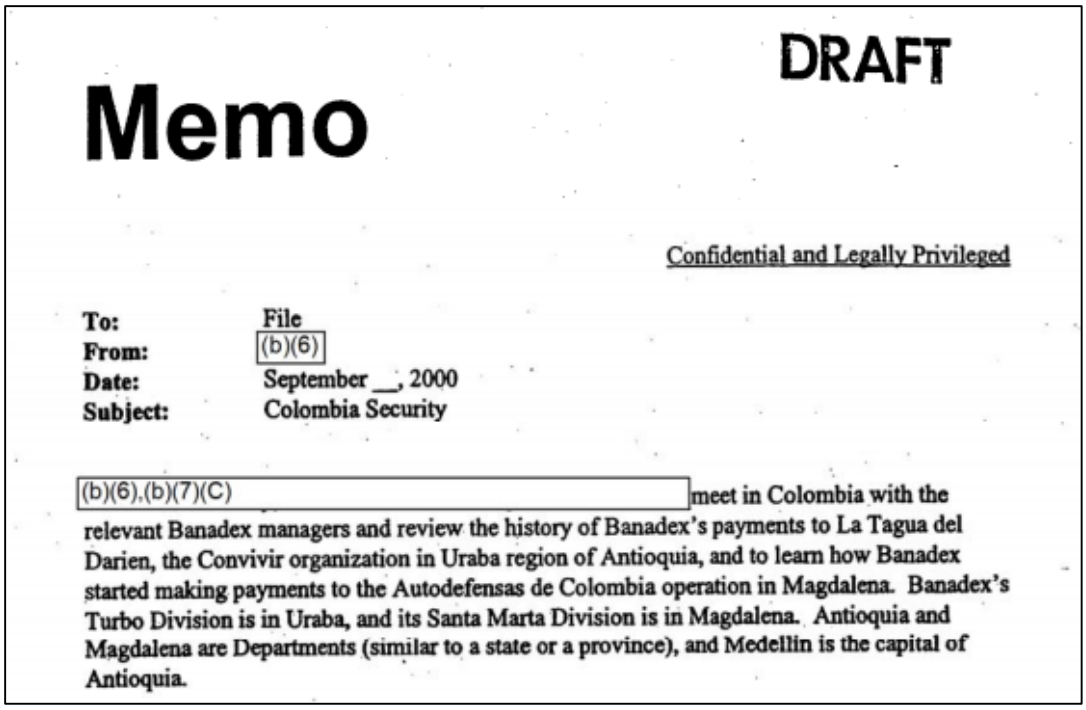
[92] Exhibit A-1 – Factual Proffer, ¶ 23.
[93] Exhibit G-23 – SLC Report, at 63-65.
[94] Exhibit G-23 – SLC Report, at 65.
[95] *Id*. *See* Exhibit B-1 – Internal Memo 20000900 at 1. The text of the first paragraph of the memo states:

> [redacted] meet in Colombia with the relevant Banadex managers and review the history of Banadex's payments to La Tagua del Darien, the Convivir organization in Uraba region of Antioquia, and to learn how Banadex started making payments to the Autodefensas de Colombia operation in Magdalena. Banadex's Turbo Division is in Uraba, and its Santa Marta Division is in Magdalena. Antioquia and Magdalena are Departments (similar to a state or a province) and Medellin is the capital of Antioquia.



DRAFT

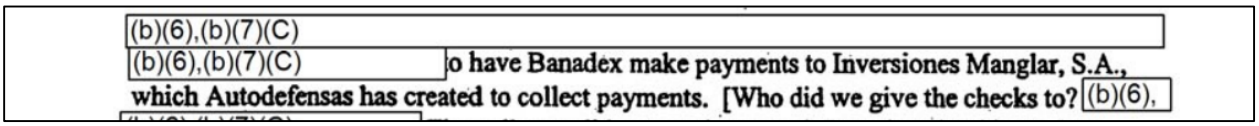
Memo

Confidential and Legally Privileged

To: File
From: (b)(6)
Date: September __, 2000
Subject: Colombia Security

(b)(6),(b)(7)(C) meet in Colombia with the relevant Banadex managers and review the history of Banadex's payments to La Tagua del Darien, the Convivir organization in Uraba region of Antioquia, and to learn how Banadex started making payments to the Autodefensas de Colombia operation in Magdalena. Banadex's Turbo Division is in Uraba, and its Santa Marta Division is in Magdalena. Antioquia and Magdalena are Departments (similar to a state or a province), and Medellin is the capital of Antioquia.

48. The draft memorandum shows the corporate officials understood exactly how the company's money flowed to the AUC; for example, Chiquita would make payments directly to the CONVIVIR "La Tagua del Darién" in Urabá, which then forwarded funds to "Inversiones Manglar, an entity created by the AUC to collect payments."[96] The draft memorandum similarly acknowledges that the AUC created Inversiones Manglar:[97]



(b)(6),(b)(7)(C)
(b)(6),(b)(7)(C) o have Banadex make payments to Inversiones Manglar, S.A., which Autodefensas has created to collect payments. [Who did we give the checks to? (b)(6),

49. One part of the draft memorandum indicates that at least one Banadex employee had knowledge of the relationship between the CONVIVIR and the AUC, recounting that at least one Banadex official was told that the AUC "support[ed] the establishment of a new Convivir organization for the Uraba region" and "would like to meet with Banadex management."[98] This same section also describes the AUC as a "widely-known, illegal vigilante organization."[99]

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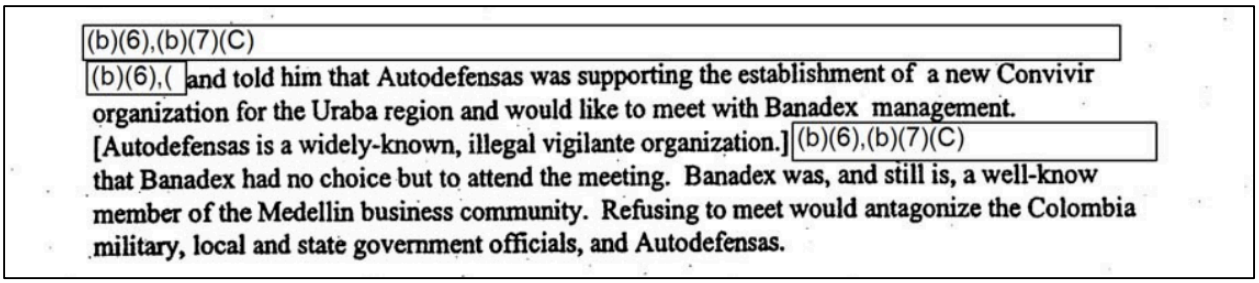
[96] *Id*. at 65–66.

[97] Exhibit B-1 – Internal Memo 20000900 at 3. The text of this section reads:

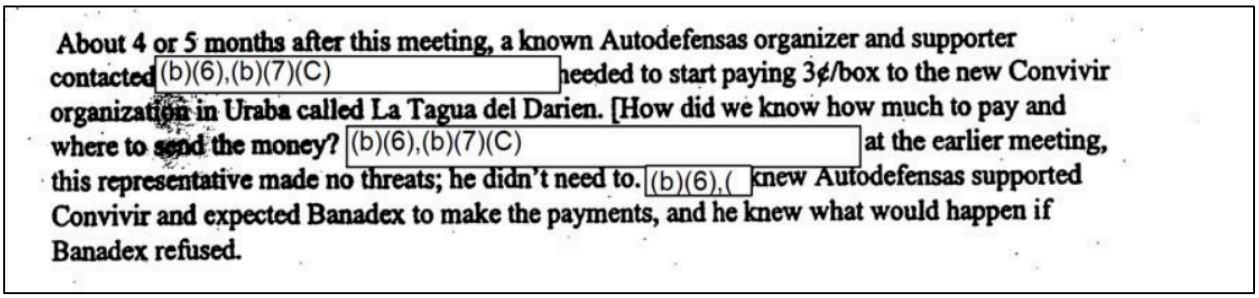
[redacted]o have Banadex make payments to Inversiones, S.A.
which Autodefensas has created to collect payments [Who did we give checks to? [redacted]

[98] Exhibit B-1 – Internal Memo 20000900 at 2.

[99] Exhibit B-1 – Internal Memo 20000900 at 2. The full text of this screenshot reads:


(b)(6),(b)(7)(C)
(b)(6),(and told him that Autodefensas was supporting the establishment of a new Convivir organization for the Uraba region and would like to meet with Banadex management. [Autodefensas is a widely-known, illegal vigilante organization.](b)(6),(b)(7)(C) that Banadex had no choice but to attend the meeting. Banadex was, and still is, a well-know member of the Medellin business community. Refusing to meet would antagonize the Colombia military, local and state government officials, and Autodefensas.

50. A similar account later in the draft memorandum shows how a "known Autodefensas organizer and supporter" was the individual who contacted Banadex to tell them to start paying and specify the amount they should pay. [100] This section also states that the "Autodefensas supported Convivir and expected Banadex to make payments.[101]


About 4 or 5 months after this meeting, a known Autodefensas organizer and supporter contacted (b)(6),(b)(7)(C) needed to start paying 3¢/box to the new Convivir organization in Uraba called La Tagua del Darien. [How did we know how much to pay and where to send the money? (b)(6),(b)(7)(C) at the earlier meeting, this representative made no threats; he didn't need to. (b)(6),(knew Autodefensas supported Convivir and expected Banadex to make the payments, and he knew what would happen if Banadex refused.

51. Finally, another section of the draft memorandum demonstrates knowledge that Chiquita's payments were being directed to the AUC.[102]

[redacted] and told him that the Autodefensas was supporting the establishment of a new Convivir organization for the Uraba region and would like to meet with Banadex management. [Autodefensas is a widely-known, illegal vigilante organization.][ ] that Banadex had no choice but to attend the meeting. Banadex was, and still is a well-known member of the Medellin business community. Refusing to meet would antagonize the Colombian military, local and state government officials, and the Autodefensas.

[100] Exhibit B-1 – Internal Memo 20000900 at 2.

[101] Exhibit B-1 – Internal Memo 20000900 at 2. The full text reads:

> About 4 or 5 months after this meeting, a known Autodefensas organizer and supporter contacted [redacted] needed to start paying 3 cents per box to the new Convivir organization in Uraba called La Tagua del Darien. [How did we know how much to pay and where to send the money? [redacted] at the earlier meeting, this representative made no threats; he didn't need to. [redacted] knew Autodefensas supported Convivir and expected Banadex to make the payments, and he knew what would happen if Banadex refused.

[102] Exhibit B-1 – Internal Memo 20000900 at 4. The full text reads:

> The first two payments were given to [redacted] How?]. The third payment was given to [redacted] which forwarded it to Autodefensas in Magdalena. Future payments will also be made through [redacted]

> The first two payments were given to (b)(6), (b)(7)(C) How?]. The third payment was given to (b)((b)(6), which forwarded it to Autodefensas in Magdalena. Future payments will also be made through (b)(6),(b) Banadex will manage the amount and timing of these payments as they do the (b)(6),(b)(ayments. Despite these efforts, the payments are expected to average _____ per month.

52. The memo went to another Chiquita Suspect, Individual C in the Factual Proffer.[103] The main conclusions of this investigation were: "(i) that the convivir in Urabá was linked to Carlos Castaño, who was a 'very bad guy'; (ii) that payments made in Santa Marta were going to paramilitaries; and (iii) that payments were being routed to Santa Marta through the Urabá convivir."[104]

53. This knowledge of the payment scheme was relayed to higher ranking officials within the company. The findings of the investigation were discussed with at least one other Chiquita Suspect,[105] as well as an Audit Committee meeting in September 2000 in Chiquita's Cincinnati headquarters.[106] The relevant portion of the Factual Proffer states:

> Banadex will manage the amount and timing of these payments as they do the [redacted]ayments. Despite these efforts, the payments are expected to average _____per month.

[103] Exhibit A-1 – Factual Proffer, ¶ 22.
[104] Exhibit G-23 – SLC Report, at 65.
[105] Exhibit G-23 – SLC Report, at 66. The SLC Report states: "Olson discussed Thomas' findings with Kistinger and Warshaw. Thomas said that he briefed [Chiquita Employee #2], Kistinger, Tsacalis, Hills, and possibly Warshaw on [Chiquita Employee #1]'s findings." *Id.* The SLC states further that: "Based on these facts, the SLC concluded that the Legal Department, and very likely other members of senior Chiquita management in Cincinnati, were aware of the connection between the convivirs and the AUC as of the fall of 2000." *Id.*
[106] Exhibit A-1 – Factual Proffer, ¶ 22.

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.

54. Thus, by no later than September 2000, there is clear evidence of knowledge at the highest levels of the company and among the Chiquita Suspects of Chiquita's payments going to the AUC. Despite this knowledge, payments continued for years, including into the time when the ICC has temporal jurisdiction starting in November 2002. Indeed, as discussed below, some Chiquita Suspects developed new systems for funneling money for the AUC.

55. In June 2002, Chiquita began paying the AUC in Santa Marta directly and in cash.[107] These payments involved a process by which one Banadex employee would receive a check, endorse it, cash it, and then hand it directly to AUC personnel in Santa

[107] Exhibit A-1 – Factual Proffer, ¶ 25, *see also* Exhibit G-23 – SLC Report, at 80–81.

Marta.[108] In Banadex's accounting, these were treated as payments to the Banadex employees.[109]

56. In February 2003, one Chiquita Suspect, identified as Individual I in the Factual Proffer, realized that the U.S. government had listed the AUC as an FTO, reported this to a high-ranking Chiquita officer, Individual C, and retained counsel to provide advice on whether the payments were illegal.[110]

57. Outside counsel advised Chiquita, including some Chiquita Suspects, to stop making these payments, but the Chiquita Suspects continued making them for years:[111]

> 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)

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[108] Exhibit A-1 – Factual Proffer, ¶ 25; *see also* Exhibit G-23 – SLC Report, at 80–81.
[109] Exhibit A-1 – Factual Proffer, ¶ 25; *see also* Exhibit G-23 – SLC Report, at 80–81.
[110] Exhibit A-1 – Factual Proffer, ¶ 55. The outside counsel appears to be the law firm of Kirkland & Ellis. *See* Exhibit G-23 – SLC Report, at 83.
[111] Exhibit A-1 – Factual Proffer, ¶¶ 56–61 (outside counsel noting "Duress defense can wear out through repetition. Buz [business] decision to stay in harm's way. Chiquita should leave Colombia."); *See id.,* ¶¶ 59, 81 (noting at least one board member raised possibility of withdrawing from Colombia as an option upon learning of payments).).

58. In a meeting on or about 3 April 2003, Chiquita corporate officials, including a Chiquita Suspect, reported the AUC's FTO designation to the Board of Directors.[112] One board member clearly stated that the payments could not continue, because they were illegal;[113] another recommended that Chiquita consider withdrawing from Colombia.[114] The Board agreed to disclose the fact of the payments to the DOJ.[115]

59. On 4 April 2003, one Chiquita Suspect, identified as Individual C in the Factual Proffer, stated in a conversation with outside counsel that it was his opinion that the company should continue making payments, even if the DOJ would prosecute,[116] saying "just let them sue us, come after us".[117] Individual C further stated that this opinion was held by two other high-ranking Chiquita officials, specifically identified as Individuals B and A in the Factual Proffer.[118] There is, therefore, no reasonable doubt that payments made after this legal advice were not mistakes but were made intentionally.

60. On or about 8 April 2003, the Factual Proffer stated that two Chiquita Suspects, high-ranking company officials, Individuals C and D, met in Chiquita's Cincinnati headquarters with Individuals F, G, H, and I (who included other Chiquita Suspects as well as Banadex employees), and instructed them to "continue making payments" to the AUC.[119]

61. In late April 2003, the Factual Proffer noted that Individuals B and C met with officials from the U.S. Department of Justice, who advised the Chiquita corporate officials that the payments "were illegal and could not continue."[120] These Chiquita corporate officials reported this meeting back to the Audit Committee.[121] Chiquita continued making payments to the AUC through February 2004.[122]

62. On 4 December 2003, the Factual Proffer states that Individuals B and C provided the Board of Directors with additional details about Chiquita's payments to the AUC[123] and stated that the Department of Justice was not satisfied with Chiquita's cooperation.[124] In late December, Individual B, who has since died, sent an email to other Board members regarding Chiquita's ongoing payments to the AUC, stating: "This is not a management investigation. This is an audit committee investigation. It

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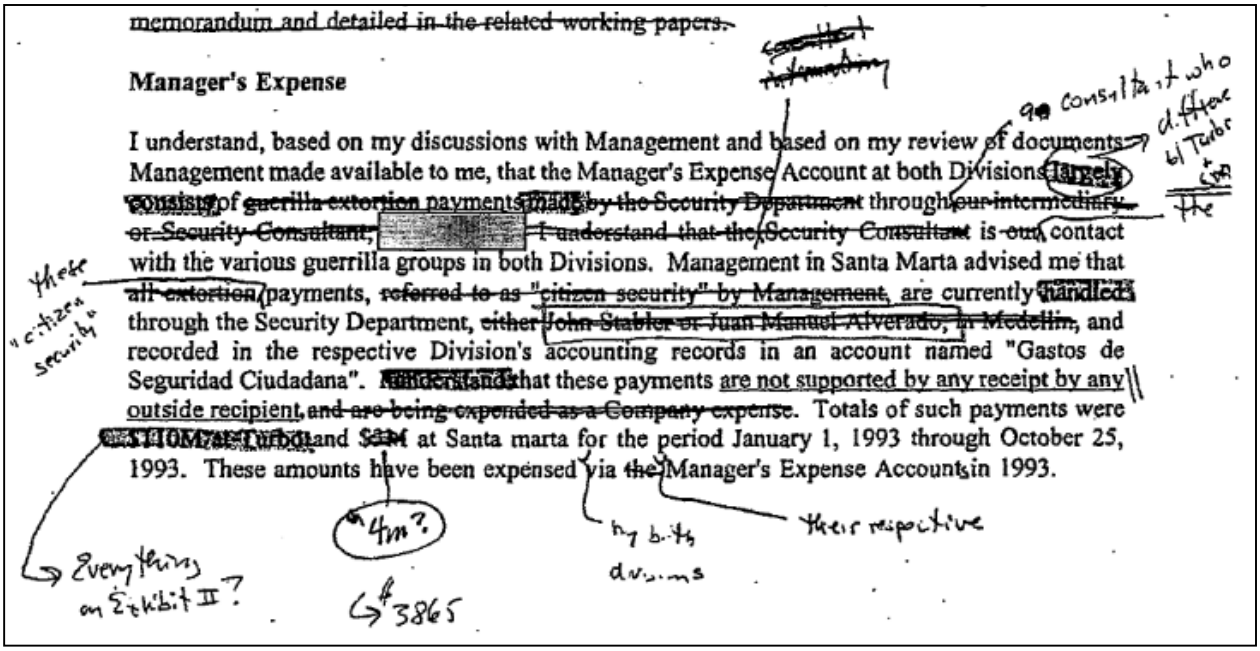
[112] Exhibit A-1 – Factual Proffer, ¶ 59; *see also* Exhibit G-23 – SLC Report, at 87-88.
[113] Exhibit G-23 – SLC Report, at 88.
[114] Exhibit A-1 – Factual Proffer, ¶ 59.
[115] *Id*.
[116] *Id.*, ¶ 60. *See also* Exhibit G-23 – SLC Report, at 88–89.
[117] Exhibit A-1 – Factual Proffer, ¶ 60.
[118] *Id.*
[119] *Id.*, ¶ 61. *See also* Exhibit G-23 – SLC Report, at 89.
[120] Exhibit A-1 – Factual Proffer, ¶ 62; *see also* Exhibit G-23 – SLC Report, at 90-92.
[121] Exhibit A-1 – Factual Proffer, ¶ 63, *see also* Exhibit G-23 – SLC Report, at 94.
[122] Exhibit A-1 – Factual Proffer, ¶¶ 65-80, 83, 85-87.
[123] *Id.* ¶ 81.
[124] Exhibit G-23 – SLC Report, at 115–16.

is an audit committee investigation because we appear to [be] committing a felony."[125]

63. Elaborate Payment and Accounting Scheme. In addition to the repeated payments, the elaborate payment and accounting system developed by the company provides evidence that Chiquita tried to conceal payments to the AUC. Evidence suggests that certain Chiquita Suspects helped design and oversee the scheme. The payment and accounting scheme evolved over time, was complex and detailed, and would have needed to be developed purposefully.

64. The complexity of the payment and accounting systems for funneling monies to violent groups in Colombia pre-dated the company's payments to the AUC. A 1994 internal Chiquita document provides evidence of an earlier payment system to guerrillas:



memorandum and detailed in the related working papers.

Manager's Expense

I understand, based on my discussions with Management and based on my review of documents Management made available to me, that the Manager's Expense Account at both Divisions largely consists of guerrilla extortion payments made by the Security Department through our intermediary or Security Consultant, [redacted] I understand that the Security Consultant is our contact with the various guerrilla groups in both Divisions. Management in Santa Marta advised me that all extortion payments, referred to as "citizen security" by Management, are currently handled through the Security Department, either John Stabler or Juan Manuel Alverado, in Medellin, and recorded in the respective Division's accounting records in an account named "Gastos de Seguridad Ciudadana". I understand that these payments are not supported by any receipt by any outside recipient, and are being expended as a Company expense. Totals of such payments were $1[illegible] Turbo and $3[illegible] at Santa marta for the period January 1, 1993 through October 25, 1993. These amounts have been expensed via the Manager's Expense Accounts in 1993.

This is the transcription of the memo, with handwritten insertions italicized.

~~memorandum and detailed in the related working papers.~~

Manager's Expense

I understand, based on my discussions with Management and based on my review of documents Management made available to me, that the Manager's Expense Account at both Divisions largely consists of ~~guerrilla extortion~~ payments made ~~by the Security Department~~ through ***a consultant who [illegible]/ Turbo & SM [NB: Santa Marta]*** ~~our intermediary or Security Consultant,~~ [redacted] ~~I understand that the~~ ***consultant intermediary*** ~~Security Consultant~~ is ~~our~~ ***the*** contact with the various guerrilla groups in both Divisions. Management in Santa Marta advised me that ~~all extortion~~ ***these "citizen security"*** payments, ~~referred as "citizen security" by Management,~~ are currently handled through the Security Department, ~~either~~

[125] Exhibit A-1 – Factual Proffer, ¶ 84; *see also* Exhibit G-23 – SLC Report, at 122.

~~John Stabler or Juan Manuel Alvarado,~~ in Medellin, and recorded in the respective Division's accounting records in an account named "Gastos de Seguridad Ciudadana". I understand that these payments are not supported by any receipt by any outside recipient~~, and are being expended as a Company expense~~. Totals of such payments were $110M at Turbo ***Everything on Exhibit II?*** and $3M ***4m? → $3,865*** at Santa marta for the period January 1, 1993 through October 25, 1993. These amounts have been expensed ***by both divisions*** via ~~the~~***their respective*** Manager's Expense Account***s*** in 1993.[126]

65. Handwritten notes on Chiquita accounting documents indicate payments were made to "guerrilla" groups, including the FARC and the ELN.[127] These notes reveal a coded payment system, where payments to guerrilla group are labeled as "grey" (*gris*), payments to the ELN are labeled as "blue" (*azul*), and payments to the FARC are labeled as "red" (*rojo*). This coding shows a history of intentional and planned payments to armed groups.

66. Once payments to the AUC began in 1997, one typical method involved paying CONVIVIRs.[128] Chiquita's accounting documents show considerable amounts paid on a monthly basis through bank wires, checks, and sometimes cash, to CONVIVIRs.[129]

67. Other internal documents show how some of the Chiquita Suspects tried to conceal their payments to the AUC by using accounting schemes and elaborate payment structures. One memo written in 1999 and redistributed on November 26, 2001, detailed how employees were to record "Confidential Payments."[130]

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[126] Exhibit B-19– Internal Chiquita Memo 19940105, at 1.

[127] Exhibit B-14 - Security receipt 19930311, at 3.

[128] Exhibit A-1 – Factual Proffer, ¶ 21; Exhibit G-23 – SLC Report, at 46–47, 52–54.

[129] *See, e.g.,* Summary of Payments, Statement of Policies and Procedures (Oct. 1–Dec. 31, 2002) [hereinafter Exhibit B-26 – Security Payments]; Quarterly Report of Payment, First Quarter 2003 [hereinafter Exhibit B-27 - 1st Quarter Security Payments 2003]; *see also* Exhibit A-1 – Factual Proffer, ¶ 23.

For example, some of Chiquita's payments were funneled through *Convivir Papagayo* to the AUC. Exhibit F-2 – Veloza García, High Tribunal of Bogota 2013, ¶¶ 693, 710. In the words of the Colombian courts, "[AUC]'s control over *Convivir Papagayo* was of such a magnitude that practically both organizations, one of legal origin and the other a criminal organization, had a meeting of objectives, actors and managers." Exhibit F-12 – 2012 Fiscalia Resolution, at 11-12 (*citing* Decision, Tribunal Superior de Antioquia, Sala de Decisión Penal, April 17, 2012).

[130] Steven Kreps Accounting Memo 20011126, Chiquita Brands International (Nov. 30, 1999) [hereinafter Exhibit B-6 – Kreps- 20011126 - Accounting Memo 20011126 for Sensitive Payments]. It reads: "There are two options for recording confidential payments. These are the only two options unless you receive authorization to use another method from W. Tsacalis, CBII Vice President and Controller. 1. Follow standard Company practices in recording and classifying these transactions in the operating unit's books and records; or 2. Record these transactions in a Manager's Expense account and comply with the following procedure: a. The General Manager will maintain the details and documents supporting the transactions recorded in the Manager's Expense account. At least once each quarter, the Manager . . . will perform on on-site review of each transaction."

Chiquita Brands International

MEMORANDUM

TO: Distribution **DATE:** November 30, 1999

FROM: Steven Kreps **PHONE:** 513-768-4933

SUBJECT: Accounting for Confidential Payments

There are two options for recording confidential payments. These are the only two options unless you receive authorization to use another method from W. Tsacalis, CBII Vice President and Controller.

1. Follow standard Company practices in recording and classifying these transactions in the operating unit's books and records; or

2. Record these transactions in a Manager's Expense account and comply with the following procedure:

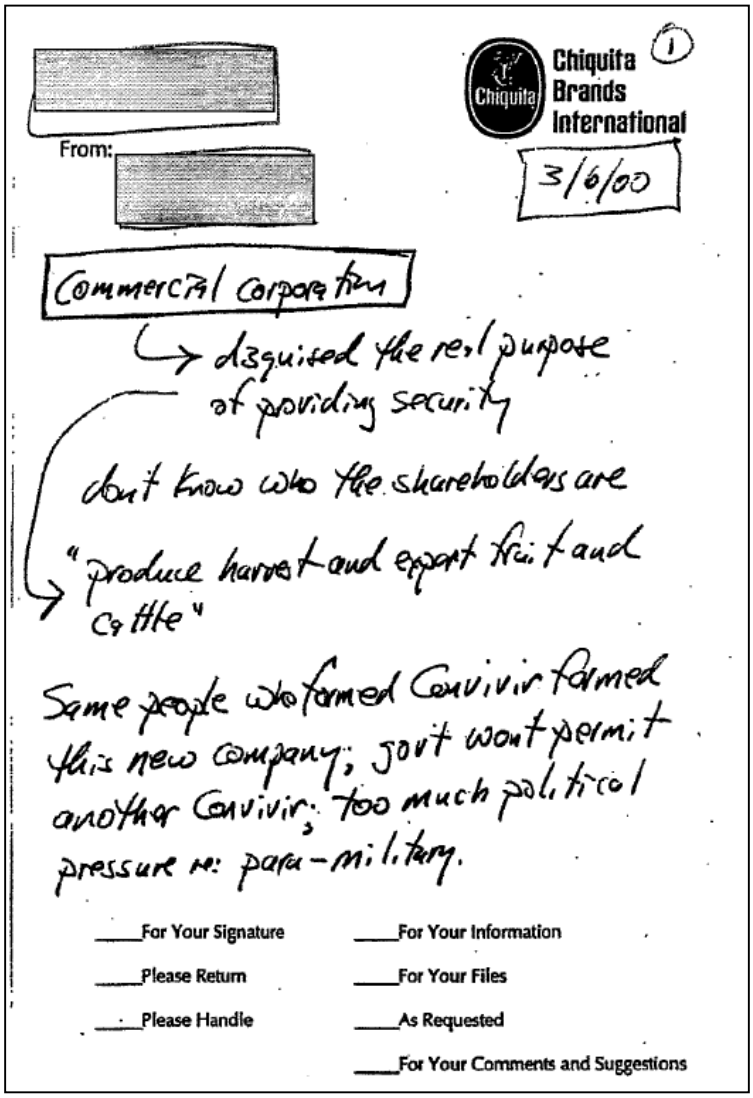
   a. The General Manager will maintain the details and documents supporting the transactions recorded in the Manager's Expense account.

      At least once each quarter, the Manager of the San José, Costa Rica, Internal Audit Regional Office will perform an on-site review of each transaction recorded in the Manager's Expense account to determine whether:

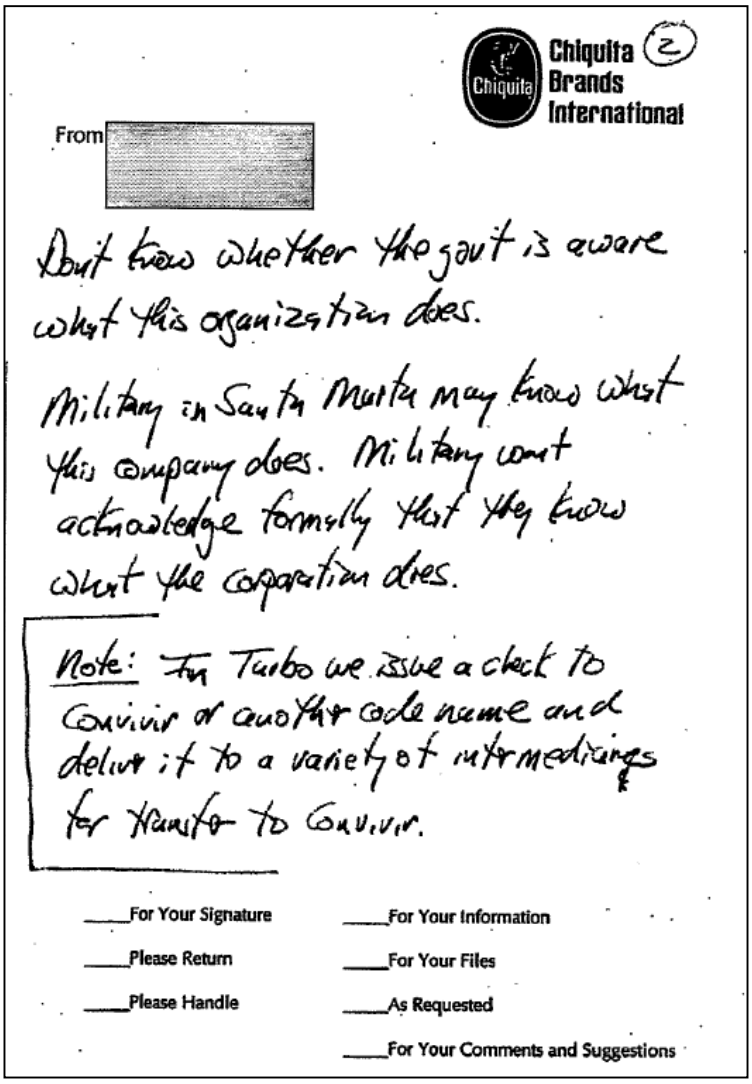
      - The transaction was properly authorized, documented and supported;
      - Documentation and support exists for each transaction (a list of such transactions should be prepared by the local controller); and
      - If required, transactions were reported on an appropriate quarterly Foreign Corrupt Practices Act Compliance Certificate.

      During this review, the Internal Audit Manager may request copies of supporting details and documents for further review with the Law Department.

68. The following note, handwritten by an unknown author in a Chiquita memo in June 2000, indicates the company was making payments to paramilitaries through an elaborate scheme: "In Turbo we issue a check to convivir or another code name and deliver it to a variety of intermediaries for transfer to convivir."[131] The note indicates that a new entity was also created to replace a convivir but carry out the same function: "Same people who formed Convivir formed this new company; govt wont permit another Convivir; too much political pressure re: para-military" and "commercial corporation → disguised the real purpose of providing security."[132]



[131] Memorandum from (Redacted) to (Redacted) (Mar. 6, 2000) [hereinafter Exhibit B-9 – Internal Chiquita notes 20000306].
[132] *Id*.



Chiquita Brands International (2)

From [redacted]

Don't know whether the govt 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.

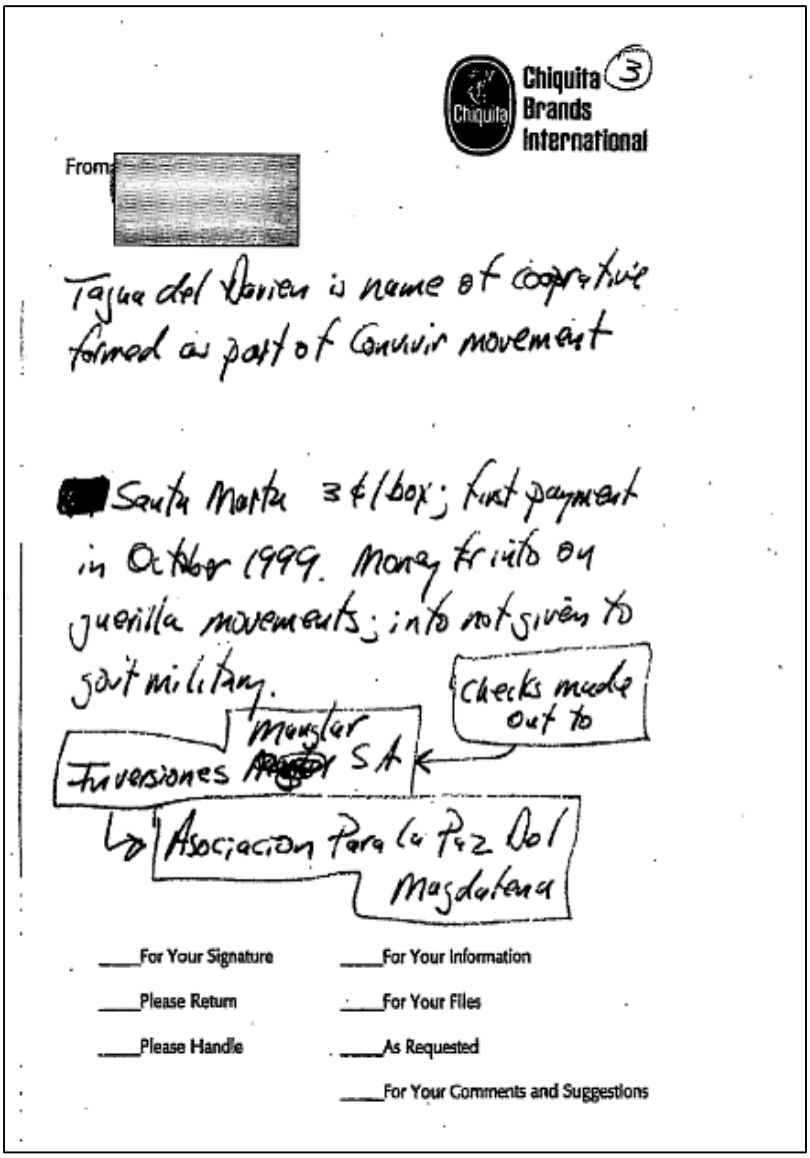
Note: In Turbo we issue a check to Convivir or another code name and deliver it to a variety of intermediaries for transfer to Convivir.

_____For Your Signature
_____Please Return
_____Please Handle
_____For Your Information
_____For Your Files
_____As Requested
_____For Your Comments and Suggestions

69. The following third page of the handwritten note reads: "Tagua del Darien is name of cooperative formed as part of Convivir movement. Santa Marta 3¢/box; first payment in October 1999. Money for info on guerrilla movements; info not given to gov't military. Checks made out to → Inversiones Manglar SA → Asociacion Para La Paz Del Magdalena."[133]

[133] Exhibit B-9 – Internal Chiquita Notes 20000306. The note, in its fourth and last page, reveals that, in consideration of the payments, the company was receiving a benefit that could not be obtained from the Colombian military. It reads: "natural persons w/ no affiliation to military formed Inversiones Manglar S.A. [Redacted] says we should continue making the payments; can't get the same level of support from the military. [Redacted] says all other banana companies are contributing in Santa Marta. Convivir is back up to 2¢ box [illegible]; we were paying 1 1/2¢ box in 1999. Convivir requests 3¢ box." *Id*.

A Colombian court has noted that Inversiones Manglar was a "façade company incorporated with the purpose of managing the moneys from the "Self-defense groups" in Ciénaga – Magdalena." *See Frente Arlex Hurtado*, Audiencia Concentrada de Formulación y Aceptación de Cargos (Accumulated Hearing for Filing and



Chiquita Brands International

3

From: [redacted]

Tajua del Darien is name of cooperative formed as part of Convivir movement

[redacted] Santa Marta 3¢/box; first payment in October 1999. Money to/into 4 guerilla movements; info not given to gov't military.

Checks made out to

Inversiones Manglar SA

Asociacion Para La Paz Del Magdalena

___For Your Signature ___For Your Information

___Please Return ___For Your Files

___Please Handle ___As Requested

___For Your Comments and Suggestions

70. In March 2002, when an AUC member based in Santa Marta asked for direct cash payments, Chiquita Suspects designed and reviewed "a set of procedures for making cash payments to the AUC in Santa Marta."[134] A note dated March 28, 2002 details these procedures.[135] The payments "were to be drawn from a 'Gasto de Gerente" account used by Banadex's General Manager for "travel and entertainment expenses and would be subject to accounting safeguards beyond those that were required for

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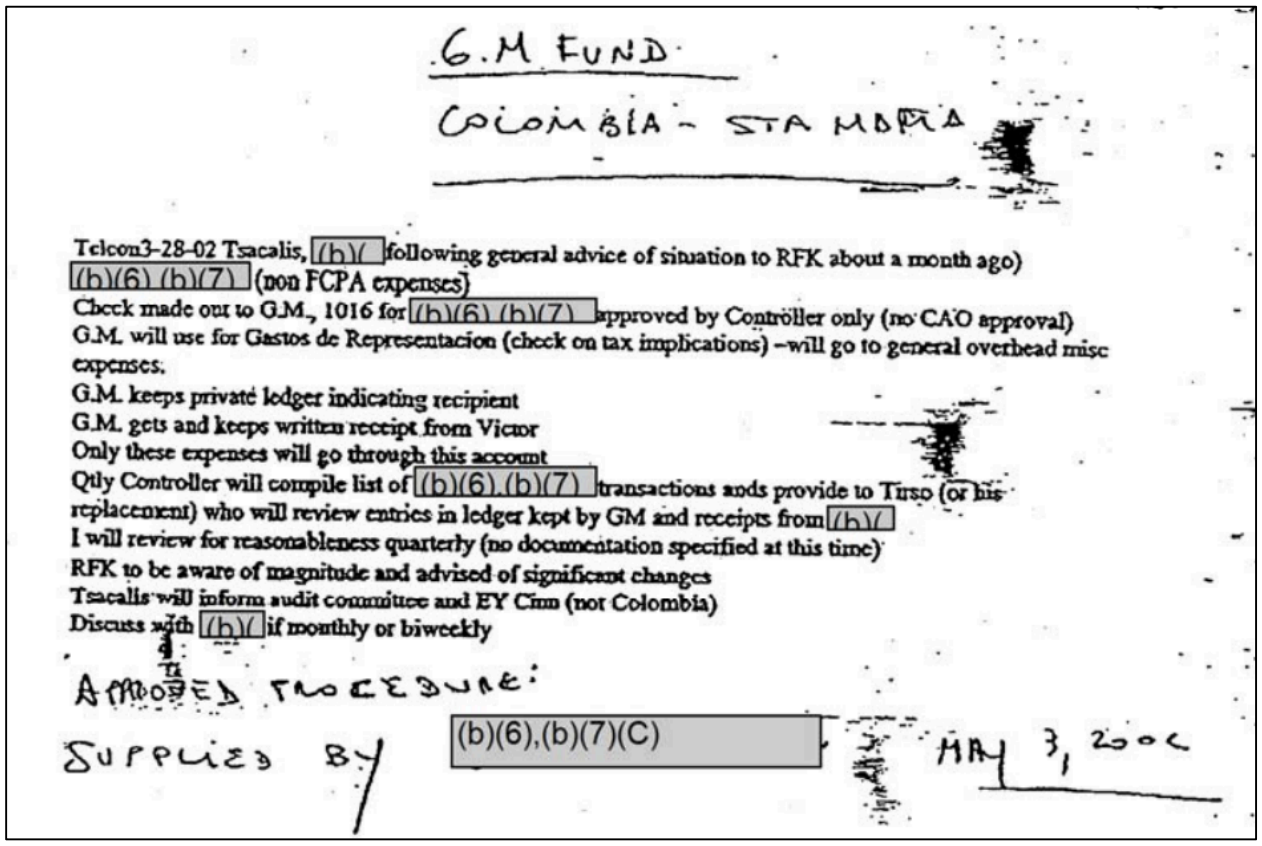
Admission of Charges), Sept. 29 2014, at 24 [hereinafter Exhibit F-6 – Frente Arlex Hurtado Finances]. *See also* Exhibit G-23 – SLC Report, at 61 (stating Inversiones Manglar was created by the AUC to collect money).

[134] Exhibit G-23 – SLC Report, at 80.

[135] Exhibit G-23 – SLC Report, at 80 (citing notes dated March 28, 2002). *See* Note About G.M. Fund (March 28, 2002) [hereinafter Exhibit B-3 – Ordman Notes 20020328Exhibit B-3 - 20020328 - GM Expenses - Telcon notes - includes alt version].

payments by check."[136] The following March 2002 note provide evidence of the direct involvement of some Chiquita Suspects in setting up this payment system:[137]



G.M FUND

COLOMBIA - STA MARTA

Telcom3-28-02 Tsacalis, (b)(following general advice of situation to RFK about a month ago)
(b)(6) (b)(7) (non FCPA expenses)
Check made out to G.M., 1016 for (b)(6) (b)(7) approved by Controller only (no CAO approval)
G.M. will use for Gastos de Representacion (check on tax implications) –will go to general overhead misc expenses.
G.M. keeps private ledger indicating recipient
G.M. gets and keeps written receipt from Victor
Only these expenses will go through this account
Qtly Controller will compile list of (b)(6),(b)(7) transactions ands provide to Tirso (or his replacement) who will review entries in ledger kept by GM and receipts from (b)(
I will review for reasonableness quarterly (no documentation specified at this time)
RFK to be aware of magnitude and advised of significant changes
Tsacalis will inform audit committee and EY Cinn (not Colombia)
Discuss with (b)(if monthly or biweekly

APPROVED PROCEDURE:

SUPPLIES BY (b)(6),(b)(7)(C)

MAY 3, 2002

It reads:

Telcom3-28-02 Tsacalis [redacted] following general advice of situation to RFK about a month ago
[redacted] (non FCPA expenses)
Check made out to G.M., 1016 for [redacted] approved by Controller only (no CAO approval)
G.M. will use for Gastos de Representacion (check on tax implications) –will go to general overhead misc expenses.
G.M. keeps private ledger indicating recipient
G.M. gets and keeps written receipt from Victor
Only these expenses will go through this account
Qtly Controller will compile list of [redacted] transactions and provide to Tirso (or his replacement) who will review entries in ledger kept by GM and receipts from [redacted]
I will review for reasonableness quarterly (no documentation specified at this time)
RFK to be aware of magnitude and advised of significant changes

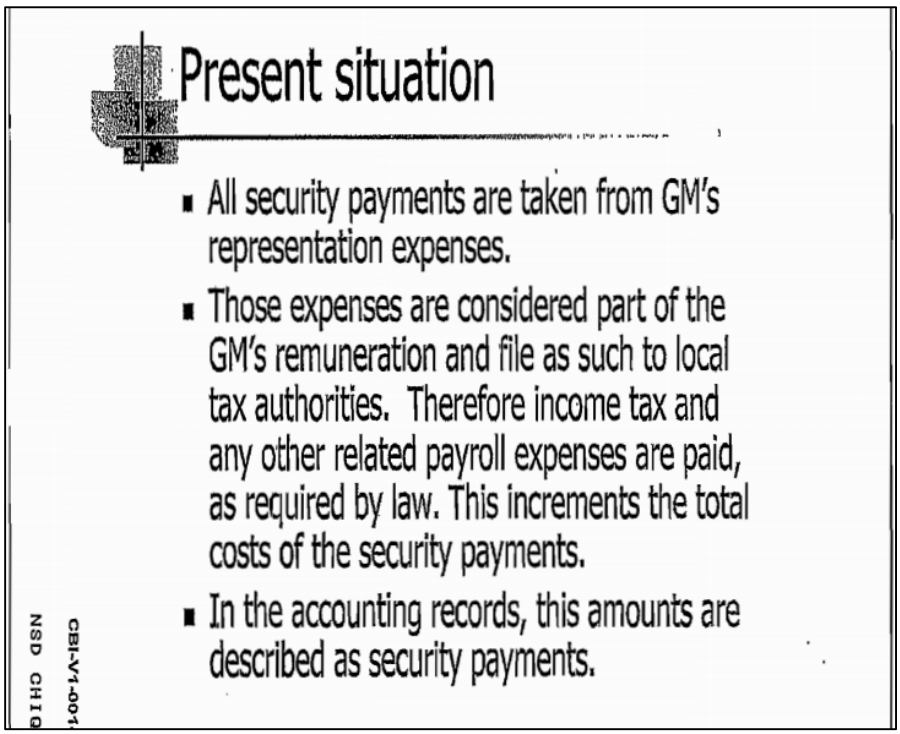
[136] Exhibit G-23 – SLC Report, at 80.
[137] Exhibit G-23 – SLC Report, at 80 (citing notes dated March 28, 2002). See Note About G.M. Fund (March 28, 2002) [hereinafter Exhibit B-3 – Ordman Notes 20020328].Exhibit B-3 - 20020328 - GM Expenses - Telcon notes - includes alt version.

Tsacalis will inform audit committee EY Cinn (not Colombia)
Discuss with [redacted] if monthly or biweekly.

APPROVED PROCEDURE:

SUPPLIED BY [redacted] MAY 3, 2002

71. The Factual Proffer appears to reference this same payment scheme which may have been used to conceal the flow of funds to the AUC: cash payments were made to the AUC and then reported as personal income of the employee who made the payment for the purpose of taxes.[138] The Proffer also notes several Chiquita Suspects discussed this payment system in 2002.[139] The following 2003 PowerPoint presentation appear to relate to such payments:[140]



72. The evidence presented here indicates that the payments to the AUC were not accidental and the Chiquita Suspects had the requisite intent to meet the 25(3) standard. Given repeated nature of the payments and elaborate structures used to hide them, the Chiquita Suspects can hardly argue that they did not intend to engage in the payment scheme. At least some of the Chiquita Suspects were informed by outside counsel and by the U.S. Department of Justice that the payments to the AUC were illegal under U.S. law, but nevertheless deliberately continued making payments. This action by itself is sufficient to show the intentionality and provides a reasonable basis for the OTP to proceed with further investigation.

[138] Exhibit A-1 – Factual Proffer, ¶¶ 25-26.
[139] Exhibit A-1 – Factual Proffer, ¶¶ 25-26.
[140] Security Payments, Proposal for 2003 (2003) [hereinafter Exhibit B-24 – Security Options PPT 20030000].

C. SIGNIFICANT CONTRIBUTIONS TO THE AUC (*ACTUS REUS*)

73. As with the above elements, there is easily sufficient evidence for the OTP to have a reasonable basis to initiate an investigation into whether the Chiquita Suspects made significant contributions to the AUC as required under Article 25(3)(d)(ii).[141] In 2007, when Chiquita pled guilty in the United States to the domestic corporate crime of "Engaging in Transactions with a Specially-Designated Global Terrorist",[142] Chiquita admitted:

> [Chiquita] paid money to the AUC in the two regions of Colombia where it had banana-producing operations: Urabá and Santa Marta. [Chiquita] paid the AUC, directly or indirectly, nearly every month. From in or about 1997 through on or about February 4, 2004, [Chiquita] made over 100 payments to the AUC, totalling [sic] over $1.7 million.[143]

74. This income going to the AUC was being used to finance illegal activities, which included mass executions, torture, forced displacements, and sexual violence.[144] The funds contributed by Chiquita, therefore, supported criminal activity. At the plea agreement hearing regarding the criminal charges against Chiquita in the United States, the U.S. Prosecutor explained the significance of Chiquita's contribution:

> Whatever Defendant Chiquita's claimed motivations, the company's money paid for the weapons and ammunition that the AUC used to kill innocent civilians, or it freed up other AUC money to do the very same thing. It just doesn't matter. Terrorism depends on a fund stream. Defendant Chiquita was a substantial funding stream for the AUC. The AUC was able to purchase a lot of weapons and ammunition with the $1.7 million that the company paid it over the years.[145]

75. Testimony from former paramilitary members confirms that they were being paid by the Chiquita corporate officials. One deposed paramilitary member stated that he overheard Tovar Pupo ("Jorge 40"), a former AUC commander, say that he attended meetings with Chiquita and that Chiquita had made payments to him:

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[141] In *Mbarushimana*, the ICC Pre-Trial Chamber outlined that, under Article 25(3)(d), the contribution must be a significant contribution to avoid liability for "every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes." Exhibit E-17 - *Mbarushimana* Decision Confirmation Charges, ¶ 277 (affirming *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges" ¶ 70 (ICC Appeals Chamber, May 30, 2012) [hereinafter Exhibit E-19 - *Mbarushimana* Judgment Appeal Decision Confirmation Charges]). *See also*, Exhibit E-12 - *Katanga* Judgment, ¶ 1632. The Chamber summarized that what constitutes a significant contribution turns on the context of the contribution: "[A] person must make a significant contribution to the crimes committed or attempted. The extent of the person's contribution is determined by considering the person's relevant conduct and the context in which this conduct is performed." Exhibit E-17 - *Mbarushimana* Decision Confirmation Charges, ¶ 285.

[142] Exhibit A-2 – Plea Agreement.

[143] Exhibit A-1 – Factual Proffer, ¶ 19.

[144] See *supra* note 21.

[145] Exhibit A-5 – Sentencing Hearing Transcript at 13–14.

> Also, I think — I cannot assure, but I think Commander Jorge [40], who is currently in prison in the United States, has information regarding this. Being in prison in Pavilion 1 here, in this — in this prison facility, I overheard Jorge saying that — that this company, Chiquita, paid him. But again, I would like for you to approach and try to get to Jorge [40], Commander Jorge [40], to get more information regarding this issue.[146]

Similarly, AUC Commander Raúl Hasbún (alias Pedro Bonito) also received payments from Chiquita that were described as "taxes".[147]

76. The funds that Chiquita provided to the AUC represented a significant source of income for the organization. According to evidence collected by the Justice and Peace Chambers,[148] the AUC front in charge of receiving payments from private industries in Urabá, Medellín and Magdalena, the Alex Hurtado Front, received 33,292,054,112 Colombian pesos from the banana industry.[149] The banana industry represented by far the largest industry to contribute to the Alex Hurtado Front, accounting for over 70% of its funding, and Chiquita accounted for a significant part of this industry funding.[150]

77. The Chiquita Suspects' contributions were significant in both amount and duration. The ICC has noted the relevance of the "the sustained nature of the participation" in determining significant contribution.[151] Here with more than 100 payments over the course of seven years,[152] which could be used to "purchase a lot of weapons and ammunition,"[153] the standard for significant contribution should be met. Along with the established evidence of the Chiquita Suspects' knowledge of the AUC's crimes and their intentional payments, the OTP has a reasonable basis to proceed with an examination of the Chiquita Suspects involvement in crimes against humanity.

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[146] Deposition of Jesús Ignacio Roldán Pérez at 55, In re Chiquita Brands International, Inc., Case No. 08-01916-MD-MARRA/JOHNSON (S.D. Fla. Aug. 12, 2016) [hereinafter Exhibit G-4 – Deposition of Roldán Pérez].

[147] Exhibit F-2 – Veloza García, High Tribunal of Bogota 2013, ¶ 766; *see also* E-mail from (Redacted) to (Redacted) (Apr. 3, 2002) [hereinafter Exhibit B-8 – Internal Chiquita Email 20020304] (discussing "Special Payments" in the area).

[148] The Justice and Peace Chambers is a part of the Special Jurisdiction for Peace (SJP), the transitional justice mechanism of Colombia's Comprehensive System of Truth, Justice, Reparation, and Non-Repetition, which has the goal of supporting victims of the past conflict in Colombia society. *See* Due Process of Law Foundation, The Special Jurisdiction for Peace in Colombia 3 (2016).

[149] *See* Exhibit F-6 – Frente Arlex Hurtado Finances, at 18–19.

[150] While the average annual payments from the banana industry were COP 3,026,550,373.82, the annual payments from other industries were: COP $751,200,000 from the retailer industry, COP 281,500,000 from the cattle industry, COP 54,200,000 from the inland transportation industry and COP 90,000.000 from the construction industry. *See id.* at 18-19, 23.

[151] Exhibit E-17 - *Mbarushimana* Decision Confirmation Charges, ¶ 284.

[152] Exhibit A-1 – Factual Proffer, ¶ 19.

[153] Exhibit A-5 – Sentencing Hearing Transcript at 13–14.

D. DURESS DEFENSE IS NOT APPROPRIATE HERE

78. Any assertion by the Chiquita Suspects that they acted under duress[154] is belied by the facts. Under the Rome Statute, a duress defense is viable only in very narrow circumstances where a particular criminal action is both necessary and reasonable to avoid the threat.[155] In addition, the choice to escape the situation is evidence that the circumstances were not beyond the control of the accused.[156] This determination requires consideration of whether, at any point, the accused could have refrained from participating in the criminal action or could have taken steps to reduce the harm to civilians.[157]

79. Given the ICC standards for duress and the evidence of repeated, intentional payments by Chiquita, the possibility that the Chiquita Suspects would offer a duress defense should not prevent the OTP from expanding its investigation to include Chiquita officials. Indeed, while the Rome Statute explicitly recognizes the defense of duress,[158] the ICC has never accepted such a duress defense.[159] In particular, at early stages in other proceedings, the ICC has stated that "duress may only lead to the non-confirmation of charges when the evidence is so clear that it negates even the low evidentiary standard applicable."[160]

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[154] Chiquita partially contested the DOJ's Sentencing Memorandum on the basis of alleged duress. *See* U.S. v. Chiquita Brands International, Sentencing Memorandum (Sept. 2007), 1 [hereinafter Exhibit A-4 – Chiquita Response to DOJ Sentencing Memorandum].

[155] Exhibit D-1 – Rome Statute, art. 31. *See also The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, ¶ 151 (Pre-Trial Chamber II March 23, 2016) [hereinafter Exhibit E-22 - *Ongwen* Decision Confirmation Charges].

[156] Exhibit E-22 - *Ongwen* Decision Confirmation Charges, ¶ 154 (observing that "the circumstances of Dominic Ongwen's stay in the LRA (which in the Defence claim constitutes the source of the threat) cannot be said to be beyond his control. . . . The evidence demonstrates that escapes from the LRA were not rare.").

[157] *Id.*

[158] Exhibit D-1 – Rome Statute. *See also* Volker Nerlich, *The Status of the ICTY and ICTR Precedent in Proceedings Before the ICC*, *in* The Emerging Practice of the International Criminal Court 305, 323 n.65 (Carsten Stahn & Göran Sluiter eds., 2009) [hereinafter Exhibit L-26 – Nerlich Status of ICTR and ICC].

[159] Schabas, The International Criminal Court: A Commentary on the Rome Statute, supra note 195, 636 – 37. Previous *ad hoc* tribunals have similarly refused to recognize the defense of duress for crimes against humanity. *Prosecutor v. Drazan Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶75, (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 7, 1997) [Exhibit J-10 – Erdemovic Dissent McDonald and Vohrah]; *Prosecutor v. Drazan Erdemović*, Separate and Dissenting Opinion of Judge Li, ¶12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7 1997) [hereinafter Exhibit J-9 – Erdemovic Dissent Li]. *See also, Prosecutor v. Vasiljević*, IT-98-32-A, Separate and Dissenting Opinion of Judge Shahabuddeen ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25 2004) [hereinafter Exhibit J-34 – Vasiljević Judgment] (reaffirming that duress "may be pleaded only in mitigation"). *But see Prosecutor v. Drazan Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of President Cassese (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 7, 1997) [hereinafter Exhibit J-8 – Erdemovic Dissent Cassese]; *see Prosecutor v. Drazan Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 7, 1997) [Exhibit J-11 – Erdemovic Dissent Stephen]. Although not binding upon the ICC, the lack of successful duress defenses in international criminal law suggests a high threshold for the applicability of this defense.

[160] The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, ¶ 151 (Pre-Trial Chamber II March 23, 2016) [hereinafter Exhibit E-22 - *Ongwen* Decision Confirmation Charges].

80. The U.S. Prosecutor at the plea agreement hearing regarding the criminal case against Chiquita stated: "Defendant Chiquita fails to square its claimed victimhood with the facts. As a multi-national corporation, Defendant Chiquita was not forced to remain in Colombia for 15 years, all the while paying the three leading terrorist groups that were terrorizing the Colombia people."[161]

81. The Factual Proffer notes that: "By 2003, Banadax was defendant CHIQUITA's most profitable banana-producing operation."[162] The U.S. Prosecutor continued to explain why the company remained in Colombia:

> And it was good for the company. Defendant Chiquita turned $49.4 million profit from its Colombia operations during the period while it was making the illegal payments to the AUC. To be clear, the time period I'm referring to is from the designation in September of 2001, through the end of January 2004.[163]

82. Outside counsel and the U.S. Department of Justice recognized that duress was not present here: the reasonable response to any sustained security threat would have been to pull out of operations in Colombia rather than make repeated payments to the AUC over many years.

83. A handwritten note shows that a Chiquita employee contemplated leaving the country as early as 1997 in light of the CONVIVIR payments, stating "[t]he question is not why are we doing this but rather we are in Colombia and do we want to ship bananas from Colombia."[164]

84. Over the course of fifteen years, Chiquita had the time and opportunity to exit the country; accordingly, duress is not a viable argument. In fact, outside counsel informed Chiquita that a duress defense would likely not protect the company against liability in these circumstances. In a memo dated 10 March 2003,[165] outside counsel stated:

- "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)

Counsel thus made clear to the company that this was not a situation of duress, whereby Chiquita was involuntary compelled to remain in Colombia and continuing making payments to the AUC. Rather, the company made a business decision to

[161] Exhibit A-5 – Sentencing Hearing Transcript, at 12.
[162] Exhibit A-1 – Factual Proffer, ¶ 56.
[163] Exhibit A-5 – Sentencing Hearing Transcript, at 13.
[164] Exhibit B-22 – Chiquita Handwritten Notes, at 7.
[165] Exhibit A-1 – Factual Proffer, ¶ 56.

voluntarily remain in Colombia and continue making payments to the AUC for many years.

85. On 24 April 2003, in a meeting at the U.S. Department of Justice, former Assistant Attorney General Michael Chertoff "commented that he did not see Chiquita's case as one of true duress, because the Company had a legal option – to withdraw from Colombia."[166] Also by 2003, the company acknowledged publicly in its annual reports that there was a possibility of leaving, noting that in a country such as Colombia where there is an "unstable environment", if Chiquita faced "threats to employees, political instability and terrorist activities, including extortion . . . the Company might need to curtail, cease or alter its activities in a particular region or country."[167] This only provides further evidence that Chiquita could have left the country much earlier but decided to stay.

86. At the plea agreement here in 2007, the U.S. Prosecutor forcefully rebutted an attempt by Chiquita counsel to raise the duress defense:

> What I would like to simply remind counsel and the defendant, Chiquita, is that Chiquita did not make, one, or two, or three payments in response to a demand that was made in 1997. No doubt in 1977 [sic] this was a horrible situation for the company to face when the AUC said, "Pay this money or else." We don't shy away from that. That's part of the factual assertion, and the factual proffer, and in the criminal information.
>
> What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. It did so knowing full well that while its farms may have been protected, and its workers may have been protected while they literally were on those farms. Chiquita was paying money to buy the bullets that killed Colombians off of those farms. A decision to engage in a course of conduct over years for an individual would fail to make out any duress claim or any extortion claims. For a multinational corporation with choices about where to do business in the world, which markets to enter, which markets to exit, as Chiquita did throughout this time period – it made business choices about withdrawing from Panama, for example, later purchasing farms in other countries, in other places in the world – for this corporation to

[166] Exhibit G-23 – SLC Report, at 96. Noting repeated payments over several years, the U.S. Prosecutor working for the Department of Justice stated: "What makes [Chiquita's] conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. . . . Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms." Transcript of Sentencing Before the Honorable Royce C. Lamberth at 29, United States v. Chiquita Brands Int'l, Inc., No. 07-55, (D.C. Circuit Sept. 17, 2007) [hereinafter Exhibit A-5 – Sentencing Hearing Transcript].

[167] Exhibit C-1 – 2003 Chiquita Annual Report, at 27. The Annual Report notes that "The Company is currently dealing with one such issue, which it has brought to the attention of the appropriate U.S. authorities who are reviewing the matter." However, the "issue" Chiquita mentions that it is dealing with is an investigation into payments it had been making to the AUC since 1997.

> stand before the Court and say it had no choice but to be, quote, a 'victim' of extortion for years while it reaped the profits of those Colombian operations, it does not stand any legitimate scrutiny. I understand that that's the company's position and it's the position the company has maintained from day one. It does not withstand any scrutiny.[168]

E. FURTHER CONSIDERATIONS

87. While the focus of this communication has been on article 25(3)(d)(ii) and the Chiquita Suspects' payments to the AUC, the OTP should closely examine other issues in assessing whether there is a reasonable basis to proceed under Article 15. The actions of some of Chiquita Suspects may meet the standards for responsibility under other modes of liability, for example aiding and abetting under article 25(3)(c).

88. Whichever mode of liability is being considered, the OTP should look into additional issues: the connection between the Chiquita Suspects, the AUC, and land dispossession as well as union worker killings.[169]

89. Land Dispossession. The OTP has decided to devote consideration to the illegal dispossession of land.[170] In its 2012 Interim Report on Colombia, the OTP noted that forced displacement of land had particular effects on populations, including indigenous and Afro-Colombian communities.[171] The OTP observed that the AUC utilized forced displacement on Afro-Colombian land to support economic development plans ("megaprojects") which included "acquir[ing] lands illegally for plantations and cattle ranching."[172] Part of the OTP examination here should thus also include assessment of the relationship between Chiquita, AUC, and large-scale displacements of the local population.

90. The Colombian National Center for Historical Memory also recounts that the Justice and Peace Chamber demonstrated a nexus between armed paramilitary groups like the AUC and major economic interests in the commission of forced displacements. The Center states that this process can be understood as a "violent 'agrarian

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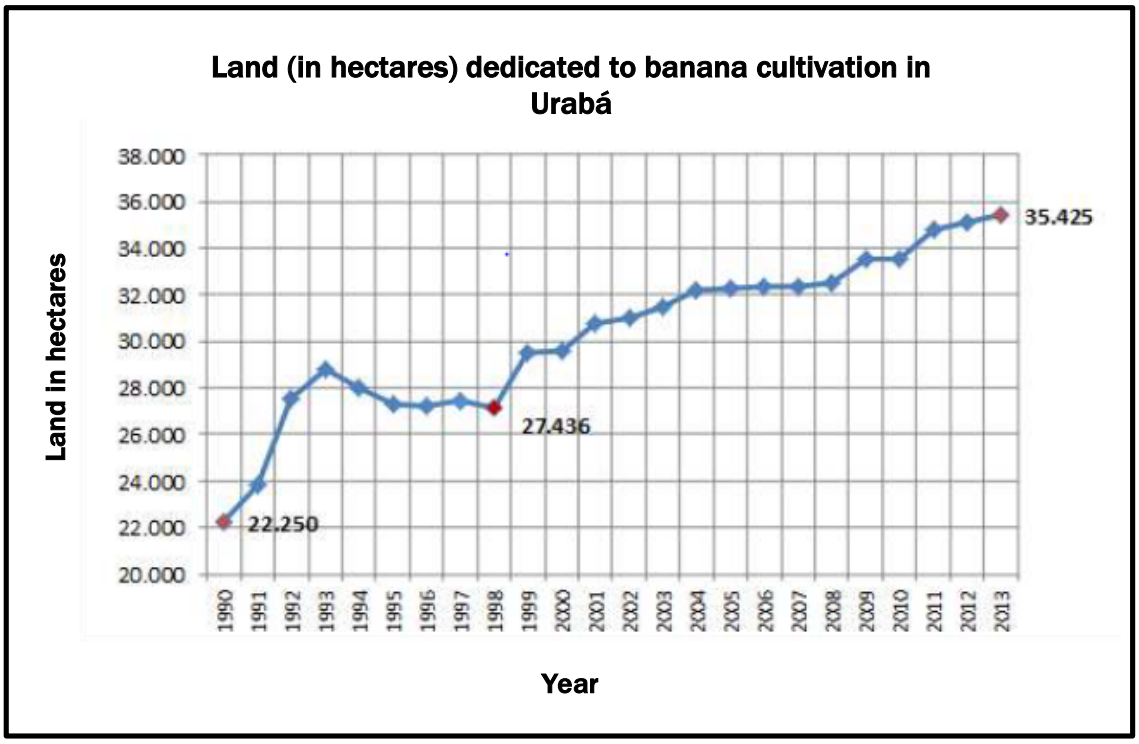
[168] Exhibit A-5 – Sentencing Hearing Transcript, at 29-30.
[169] This communication urges the ICC to investigate whether AUC arms shipment through Chiquita's private port may have occurred with the knowledge of the Chiquita Suspects during the Court's temporal jurisdiction. Colombian judges in the Justice and Peace proceedings have recommended an investigation into Banadex in relation to an 2001 AUC arms shipment. *Por tráfico de armas, ordenan investigar a Banadex S.A.*, VERDAD ABIERTA (Sept. 4, 2013) https://perma.cc/9RYQ-PA5D. One handwritten note from the Chiquita Papers reads: "[Redacted] go on board the vessel. Guns never go in the Customs Zone. Put in trucks & out the door. Port of Cargo – 36,0000 bags – is offloaded. Do we have a bodega receipt [?] Who does the customs clearance work? We didn't confirm it was guns until next day? We had reason to know it was illegal. Do we have anything to do with the customs clearance process?" Handwritten Note (2001) [hereinafter Exhibit B-10 – Internal Chiquita Notes 20010000] (The precise context, date and author of this note are undetermined, but this note warrants further investigation). Any potential involvement of the Chiquita Suspects requires further investigation.
[170] The International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Prioritization (2016) ¶ 7, https://perma.cc/F8BU-8S6F [hereinafter Exhibit E-1 - OTP Policy Paper on Case Selection].
[171] Exhibit E-29 – Situation in Colombia 2012 Interim Report, ¶¶ 60-62.
[172] Exhibit E-29 – Situation in Colombia 2012 Interim Report, ¶ 61.

counter-reform' that expressed itself in the increase of land concentration."[173] According to a report by NGO Coordinación Colombia Europa Estados Unidos, there was an expansion (in hectares) of banana plantations in Urabá between 1990 and 2013, which include the years when the paramilitaries operated:[174]



91. The Inter-Ecclesiastical Justice and Peace Commission (Comisión Intereclesial de Justicia y Paz) has also documented the relationship between the AUC, economic interests, and land concentration in Urabá:

> In the last decades, the development of the banana agroindustry in the Urabá Region has had as a characteristic the expansion of the companies located in the Urabá part of Antioquia, towards the lower bank of the Atrato river (Bajo Atrato), an expansion which benefited from the displacement and dispossession of the communities in an illegal consolidation resulting in relocation of people. The black and mestizo communities settled in Bajo Atrato have suffered processes of dispossession of lands since the late nineties. Although judicial institutions, both national and international, have ruled in favor of communities, so far the situation of dispossession has not been

[173] Exhibit L-20 – Justicia y Paz Tierras y Territorios, at 17–18.
[174] COORDINACION COLOMBIA EUROPA ESTADOS UNIDOS, ESTADO DE LOS DERECHOS HUMANOS EN ANTIOQUIA: INFORME 2015, 39 (2015) [hereinafter Exhibit I-1 – CCEEU, Derechos Humanos en Antioquia].

significantly reversed.[175]

92. Union Worker Killings. Chiquita's payments to the AUC occurred against a backdrop of historical violence against labor organizers in Colombia, particularly violence against unions in the banana-growing regions.[176] In its 2012 Interim Report, the OTP noted reports that it was the policy of the AUC to target trade unionists and social leaders.[177] In light of the noted connection, the OTP should explore the potential relationship between Chiquita's payments, the AUC, and union worker killings.

93. Prior to the consolidation of the AUC, union organizing in the Urabá region had been gaining traction; for example, between 1984 and 1988 there were at least 40 days of strikes that were estimated to have costed the banana industry approximately $20 million.[178] AUC commanders had orders to stop strikes in the banana region, and proceeded to kill hundreds of trade unionists from 1995 to 2004.[179]

94. Former AUC main leader Carlos Castaño stated on the record that a three-year absence of any strike activity on banana plantations was due to paramilitary efforts:

> The United Self-Defense Front of Córdoba and Urabá [AUC faction] entered the scene and the war intensified. We defeated the remaining EPL [combatants] and with their help, we expelled FARC from Urabá. Since then, the region has improved considerably. *In the past three years, there have been no strikes in the Banana Axis [region] and the*

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[175] COMISIÓN INTERECLESIAL DE JUSTICIA Y PAZ, EMPRESAS BANANERAS VULNERACIÓN DE DERECHOS HUMANOS Y NARCOTRÁFICO EN EL BAJO ATRATO (Oct. 2016) at 17 [hereinafter Exhibit I-15 - Comisión Intereclesial de Justicia y Paz, Empresas bananeras].

[176] *See, e.g.*, Aviva Chomsky, *Globalization, Labor, and Violence in Colombia's Banana Zone*, 72 INT'L LABOR AND WORKING-CLASS HIST. 90 (2007), https://perma.cc/8TF2-FD4A [hereinafter Exhibit L-41 – Chomsky, Globalization, Labor, and Violence]. Banana cultivation in Colombia began in the Magdalena zone in the late nineteenth and early twentieth century and arrived in the Urabá region in the 1960s. The first experiences of unionization in Colombia arose in the context of large foreign companies, including the United Fruit Company. Unionization began in Urabá in 1964, with the creation of SINTRABANANO, the *Sindicato de Trabajadores del Banano* (Union of Banana Workers). *Id.* at 93, 95. Other unions that arose in the Urabá region include SINTAGRO (*Sindicato de Trabajadores del Agro*), SINALTRAIFRU (*Sindicato de Trabajadores de la Industria Frutera*), SINDEJORNALEROS, and UTRAIBAN (Unión de Trabajadores del Banano). Margarita Ramírez & Ricardo Henao, *Economia Bananera y Movimiento Sindical en Colombia*, in Cambio y Continuidad en la Economía Bananera 77, 84, 86–87 (1988), https://perma.cc/N6LN-SRU8 [hereinafter Exhibit L-40 - Cambio y Continuidad en la Economía Bananera].

[177] *See* Exhibit E-29 - Situation in Colombia 2012 Interim Report, ¶ 42. *See also*, United States House of Representatives, *Congressional Testimony on Violence against Trade Unionists and Human Rights in Colombia*, Human Rights Watch (June 27, 2007, 8:00 PM) [hereinafter Exhibit I-7 – HRW, Congressional Testimony].

[178] Margarita Ramírez & Ricardo Henao, *Economia Bananera y Movimiento Sindical en Colombia*, in Cambio y Continuidad en la Economía Bananera 93 (1988), https://perma.cc/N6LN-SRU8 [hereinafter Exhibit L-40 - Cambio y Continuidad en la Economía Bananera].

[179] Impunity, min. 53:57-54:43 (public hearing of Veloza García).

> *unions assembled in Sintrainagro worked shoulder-to-shoulder with the businessmen to kick off [productivity] in the region.*[180]

83. Former AUC Commander Evert Veloza García (alias "H.H.") confessed to killing union leaders to stop strikes in the banana industry:

> [T]he objective was not only fighting the guerrilla but reviving the banana industry to get the banana companies . . . back on their feet. What were our orders? To force, to prevent the workers at the banana companies from going on strike. And we did that. Before that, strikes lasted for months, crippling the banana industry. We put a stop to all banana strikes. Close to 100 union members were killed in 1995. Not to mention '96 and '97 . . . right up to the 2004 demobilization. So who profited? A few banana industry big shots, as opposed to the people. So the real winners of the Urabá war were banana industry tycoons. All the plantations collaborated — Uniban, Banacol, Chiquita, Dole. They were all in it with us.[181]

84. Similarly, handwritten notes by one of the Chiquita Suspects reference the EPL [Ejercito Popular de Liberación], an illegal left-wing armed group, stating: "EPL helped us out a lot with labor union issue."[182] This note, written in September 1996, reinforces the need for the OTP to investigate the link between Chiquita's payments to armed groups and violence against union workers.

85. The civil case against Chiquita in the United States provides detailed accounts of the AUC targeting laborers who worked at farms owned or controlled by Banadex. For example, on 12 June 2003, an employee of La Escondida plantation was seized by paramilitaries during the workday and executed with two gunshots to the head.[183] On 31 March 2003, paramilitaries forced an employee of the La Juliana plantation off the bus he was taking to work with other workers at the farm gates and executed him.[184] On 17 January 2004, a group of heavily armed paramilitaries stormed the home of a farmer who owned a local banana producer, Agrícola El Retiro S.A..[185] In full view of his wife and children, the paramilitaries tied the victim up, beat him, and

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[180] *See* Mauricio Aranguren Molina, Mi Confesión – Carlos Castaño revela sus secretos, 148 [hereinafter Exhibit L-37 – Carlos Castaño My Confession]. ("Autodefensas Unidas de Córdoba y Urabá entraron en el escenario y se intensificó la guerra. Derrotamos a lo que quedaban del EPL y con su ayuda expulsamos a las FARC de Urabá. Desde entonces la región ha mejorado considerablemente. *Desde hace tres años no han ocurrido paros en el Eje Bananero, y los sindicatos unidos en Sintrainagro trabajan hombro a hombro con los empresarios para impulsar la zona*.") (Emphasis added).

[181] Impunity, min. 53:50-55:02 (public hearing of Veloza García) (translated by authors).

[182] Explanation of How Payments Work, Chiquita Papers 19960913 (Sept. 13, 1996) [hereinafter Exhibit B-32 - How Payments Work].

[183] Exhibit G-14 – 2012 Third Amended Complaint, ¶ 293. At the time of the murder, La Escondida was a plantation owned or controlled by Chiquita. *Id.*

[184] Exhibit G-14 – 2012 Third Amended Complaint, ¶ 343. At the time of the murder, La Juliana was a plantation owned or controlled by Chiquita. *Id.*

[185] The Agrícola El Retiro S.A. banana company was owned or controlled by Chiquita, or supplied Chiquita. Exhibit G-14 – 2012 Third Amended Complaint, ¶ 309.

forced him out of the house. When he was about 200 yards from his home, the paramilitaries murdered the victim with seven gunshots to the head and body.[186]

86. Over the years, the AUC's killings led to a reduction in membership in trade unions[187] and allowed companies to operate in a space largely free of labor protests or resistance. The policy of intimidation benefited Chiquita as Banadex became its most profitable banana-producing operation.[188] Any OTP investigation should thus examine the Chiquita Suspects' knowledge of how company payments were contributing to the AUC's attacks on civilians generally as well as violence against trade unions more specifically.

IV. Jurisdiction & Admissibility: Why the Office of the Prosecutor Can Proceed

87. The ICC has the requisite jurisdiction over this matter as the alleged actions of the Chiquita Suspects fall within the temporal, territorial, and subject matter jurisdiction of the ICC. In addition, the crimes are sufficiently grave and complementarity requirements are met in this case, because Colombia and the United States have not prosecuted any of the Chiquita Suspects.[189] Finally, the actions of the Chiquita Suspects are serious enough to meet the requirements of Article 15,[190] which require the OTP have a "reasonable basis" to investigate. This threshold is met here.

88. The relevant acts here meet the core requirements for ICC jurisdiction. First, the ICC has temporal jurisdiction over crimes against humanity in Colombia committed after 1 November 2002.[191] Second, the ICC has territorial jurisdiction over this case

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[186] Exhibit G-14 – 2012 Third Amended Complaint, ¶ 309.

[187] Protection and Money: US Companies, Their Employees, and Violence in Colombia: Joint Hearing Before the Subcomm. on Intl. Orgs, Human Rights, and Oversight and the Subcomm. on the Western Hemisphere of the Comm. On Foreign Affairs and the Subcomm. on Health, Employment, and Pensions, and the Subcomm. on Workforce Protections of the Comm. on Education and Labor House of Representatives, 110th Cong. 58 (2007) [hereinafter Exhibit L-29 – Protection and Money US Companies, Congressional Report].

[188] Exhibit A-1 – Factual Proffer, ¶ 2.

[189] *See* Exhibit D-1 – Rome Statute, art. 17(1), (3). Article 1 of the Rome Statute declares that the ICC "shall be complementary to national criminal jurisdictions." *Id*., art. 1. Under Article 17, cases are inadmissible where "the case is being investigated or prosecuted by a State . . . unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." *Id.*, art. 17.

[190] *See* Exhibit D-1 – Rome Statute, art. 15(2), 15(6).

[191] International Criminal Court, *Preliminary examination: Colombia*, https://perma.cc/DLH4-SRPG [hereinafter Exhibit E-6 - Colombia Preliminary Examination] (noting that Colombia ratified the Rome Statute on 5 August 2002 and the treaty came into forced on 1 November 2002); *see also* Rome Statute, art. 11(1) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").

So long as the actus reus of the crime falls within the Court's temporal jurisdiction, the ICC can consider events prior to its temporal jurisdiction to provide context and evidence of *mens rea* and gravity. *See, e.g.,* Stéphane Bourgon, *Jurisdiction Ratione Temporis*, *in* 1 The Rome Statute of the International Criminal Court 550 (Antonio Cassese, et al. eds., 2002) ("[A]ll evidence gathered previously to the entrance into force of the Statute should be admissible to establish the mens rea of the accused for continuing violations."); *see also* Situation of the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13-34 16-07-2015 1/27 EC PT, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ¶ 17 (Pre-Trial Chamber July 16, 2015) (discussing gravity) [hereinafter Exhibit E-8 - Comoros Decision Request Review Decision]; the Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi, ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ¶ 125 (Pre-Trial Chamber I, 31 May 2013) ("events which may have

because the crimes in question occurred within the territory of a signatory to the Rome Statute.[192] Finally, the ICC has subject matter jurisdiction over crimes against humanity, which have been implicated here.[193] The jurisdictional analysis includes considerations of gravity under Article 17(1)(D) of the Rome Statute. The crimes outlined in Section III meet the threshold, given their scale, nature, manner of commission, and impact.[194]

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occurred outside the parameters of the case may still be indicative or corroborative of other facts or events that took place within that timeframe.") [hereinafter Exhibit E-11 - *Gaddafi* Admissibility].

[192] *See* Rome Statute, art. 12(2)(a). Article 12 of the Rome Statute contemplates that personal and territorial jurisdiction are alternative bases for jurisdiction. Only territorial jurisdiction if relevant to this communication.

Although the corporate officials may not be nationals of Colombia, which is a State party to the ICC, the Court has territorial jurisdiction over their facilitation of the crimes against humanity that resulted in harms in Colombia. The result of the individual corporate officials' crimes was in Colombia. *See* OTP, Situation in the Republic of Korea, Article 5 Report ¶ 39-40 (June 2014) [hereinafter Exhibit E-26 - OTP Situation in Korea Report] ("39. It is uncontested that the island of Yeonpyeong is South Korean territory. Therefore, the alleged firing of a torpedo into the Cheonan is conduct on board a vessel registered to a State Party and the conduct of firing shells onto Yeonpyeong Island is conduct occurring on the territory of a State Party. It is not possible to separate the conduct of firing from the conduct of hitting the targeted area; this would create an artificial distinction when the acts are one and the same. Therefore, the territorial requirement of Article 12(2)(a) is satisfied. . . . 40. The attack on Yeonpyeong Island was launched from DPRK18 and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a State Party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the perpetrators.") (citations omitted); OTP, Report on Preliminary Examination Activities ¶ 248 (Dec. 2, 2014), https://perma.cc/F8JK-HLJR (noting "the ICC can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.") [hereinafter Exhibit E-23 - OTP 2014 Preliminary Examination]; Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte D'Ivoire, ¶ 188 (Pre-Trial Chamber III Oct. 3, 2011) [hereinafter Exhibit E-9 - Cote D'Ivoire Decision Authorisation of Investigation]; 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 31-03-2010 1/163 CB PT, ¶¶ 178–79 (Pre-Trial Chamber II Mar. 31, 2010) [hereinafter Exhibit E-14 - Kenya Decision Authorization of Investigation]. *See also* Law 599 of 2000, art. 14(3), July 24, 2000, 44097 Diario Oficial [D.O.] (Colom.) [hereinafter Exhibit D-12 – Colombian Penal Code] (Colombia's penal code deems crimes to be perpetrated "[i]n the place where its result was or should have been produced.").

[193] *See* Exhibit E-6 - Colombia Preliminary Examination; *see also* Exhibit E-29 - Situation in Colombia 2012 Interim Report, ¶¶ 5, 37, 38 ("The information available provides a reasonable basis to believe that large numbers of attacks have been carried out against the civilian population by FARC, ELN and paramilitary groups across different parts of Colombia; particularly in Antioquia, Bolivar, Casanare, Cauca, Arauca, Santander, Magdalena, Chocó, Norte de Santander, Putumayo, Sucre, and Valle ."), ¶ 51 ("On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified in future, the Office has determined that there is a reasonable basis to believe that from 1 November 2002 to date, at a minimum the following conduct has been committed by FARC, ELN and paramilitary groups: a. murder constituting a crime against humanity under article 7(1)(a) of the Statute; b. forcible transfer of population constituting a crime against humanity under article 7(1)(d) of the Statute; c. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e) of the Statute; d. torture constituting a crime against humanity under article 7(1)(f) of the Statute; e. rape and other forms of sexual violence constituting a crime against humanity under article 7(1)(g) of the Statute.").

[194] Exhibit E-1 - OTP Policy Paper on Case Selection, ¶ 37. The crimes described in this communication are "serious crimes" that are "of concern to the international community as a whole." *Id.* ¶ 35. Gravity of a situation is analyzed in the totality of circumstances, including pre-2002 facts that may not otherwise fall within the jurisdiction of the Court. *See* Exhibit E-7 - *Comoros* Decision Admissibility Prosecutor's Appeal, ¶ 17.

89. As discussed further below, Article 17 and the ICC's complementarity requirements have been met. None of the Chiquita Suspects have been criminally charged or prosecuted, either in the United States or in Colombia. Even if Colombia ultimately were to decide to act against some or all of the Chiquita Suspects, it appears that there would be difficulties which could affect the State's ability to pursue the U.S.-based Suspects. Additional delay is not justified as it has already been more than a decade since the Chiquita Suspects' involvement in payments to the AUC came to light and the corporate entity pled guilty to felony violations in the United States for supporting the AUC.[195]

90. Inaction in the United States. The United States has jurisdiction in this case over the Chiquita Suspects, but it limited the scope of its prosecution to criminal charges against the corporate entity.[196] As a corporation, Chiquita has paid a US$25 million fine for violating U.S. domestic law.[197] Despite the corporate prosecution, the individual Chiquita Suspects have not faced any criminal charges in the United States. The judge who approved the plea agreement between the U.S. government and the corporation remarked, "[i]t gives me some pause that no individuals are held accountable, but that's really beyond the matters that this Court can resolve. The Court resolves the question before it, which is the company's culpability for the crime."[198] Indeed, despite the 2007 plea agreement and the fine that Chiquita as a corporation paid, most of the Chiquita Suspects appear to have suffered no repercussions from Chiquita, continuing to work for the company or moving to act as executives at other corporations.[199]

91. Complementarity: Colombia's Failure to Investigate and Prosecute. Under the Rome Statute framework, a case is admissible with the ICC when a country has failed to investigate, or is unable or unwilling to file charges and prosecute.[200] Colombia has only opened an investigation regarding the actions of one of the fourteen Chiquita Suspects.[201] This investigation focuses on the funding of illegal armed groups, but ten years have passed without any significant additional action. There is no public

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[195] Exhibit A-2 – Plea Agreement.

[196] Exhibit A-2 – Plea Agreement.

[197] *Id.*

[198] *Id*. at 30–31. The U.S. Department of Justice has since similarly recognized the importance of individual accountability for corporate misconduct. In September 2015, the U.S. Department of Justice stated it would "fully leverage its resources to identify culpable individuals at all levels in corporate cases," but no Chiquita officials have been prosecuted. *See* Exhibit L-9 – DOJ Yates Memo, at 2.

[199] *See* Appendix – Chiquita Suspects (Sealed Submission).

[200] Exhibit D-1 – Rome Statute, art. 17(1)(a).

[201] *See* Fiscalía General de la Nación [Attorney General of the Nation], Certification [hereinafter Exhibit F-1 – Certification of Colombia Investigation], which reads: "THE UNDERSIGNED PROSECUTOR THIRTY-THREE, DELEGATE BEFORE THE PENAL JUDGES OF THE SPECIALIZED CIRCUITS OF MEDELLIN CERTIFIES: That this office conducts an investigation docketed under the number 1.007.839, for the alleged punishable conducts of Conspiracy, Aiding and Abetting, and Illicit Gains, against Sirs. . . . JOHN P. OLIVO, with driver license 1305-0692531-0 and CHARLES DENNIS KEISER with passport # 452816431.Y"; *see also* Exhibit F-18 – 2010 Keiser Testimony, at 17; Fiscalía General de la Nación [Attorney General of the Nation], Response to Right to Petition [*Respuesta a Derecho de Petición*], submitted as Ex. A, B, C to Plaintiffs-Appellees-Cross-Appellants' Motion for Judicial Notice, *In re Chiquita Brands International*, Oct. 4, 2013 [hereinafter Exhibit G-1 – Attorney General Response on Colombia Investigation]; Exhibit H-3 – Colectivo de Abogados, Crimenes, ¶¶ 2, 3, 4.

indication that they have investigated any of the remaining Chiquita Suspects, and to date, there appears to have been an unwillingness to pursue these cases.

92. Inability to bring the accused before the domestic judiciary is a factor to be considered by the OTP when assessing admissibility of cases.[202] Even if Colombia were to decide to charge and eventually prosecute the Chiquita Officials, Colombian authorities are likely to be unable to fully prosecute.

93. In particular, the possible difficulties that could arise during a prosecution in Colombia include the following: 1) the probable inability of Colombia to extradite those Chiquita Suspects who currently reside in the United States; 2) if Colombia were to pursue a trial *in absentia*, any judgment would be highly improbable to be enforced in the United States; 3) the lack of access to key witnesses.

94. Extraditions requests would be unlikely to be granted for two reasons: (1) the Chiquita Suspects have not been indicted in Colombia, and (2) any extradition would only proceed as a matter of comity.[203] The United States has never extradited U.S.

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[202] The International Criminal Court Office of the Prosecutor, Policy Paper on Preliminary Examinations 14 (Nov. 2013), https://perma.cc/T5XL-9LGL [hereinafter Exhibit E-31 - OTP Policy Paper on Preliminary Examinations 2013]. In *Prosecutor v. Saifal-Islam Gaddafi & Abdullah al-Senussi*, the ICC Appeals Chamber held that Libya's national judicial system was unavailable to prosecute Gaddafi on the ground, inter alia, that it was unable to obtain him. *See* Exhibit E-11 - Gaddafi Admissibility, ¶¶ 206–14.

[203] The United States and Colombia signed an extradition treaty in 1979 that came into force in 1982. Extradition Treaty Between the United States of America and the Republic of Colombia, Sept. 14, 1979, https://perma.cc/H4H7-8VGN (1985) [hereinafter Exhibit D-11 – US Colombia Extradition Treaty]. While Colombia passed Law 27 of 1980 ratifying the 1979 treaty, this law was declared unconstitutional by the Colombian Supreme Court in 1986. Judgment No. 111, Case No. 5-R (Supreme Court of Justice, Dec. 12, 1986) (Colom.) https://perma.cc/P4S5-33YK [hereinafter Exhibit D-10 – US Colombia Extradition Treaty Invalid Decision]. Treaties must be expressly ratified by the Colombian Congress after they are signed by the Executive. Politic Constitution, July 4, 1991, art. 150(16) [hereinafter Exhibit D-21 - Colombian Constitution]. *See also id.* arts. 93, 241(10). No subsequent law has ratified the 1979 treaty again. The 1991 Colombian Constitution forbade the extradition of Colombian citizens, which was then changed in 1997, when Colombia passed a constitutional amendment reinstating extradition. U.S. Dept. of State, Third Report on International Extradition Submitted to Congress Pursuant to Section 3203 as Enacted in the military Construction Appropriations Act, 2001, Public Law 106-2566: http://perma.cc/8SW8-D5P3 [hereinafter Exhibit L-36 – US State Dept, Report on Extradition]; Legislative Act 1 of 1997, 43.195 DIARIO OFICIAL D.O., Dec. 16, 1997, Art. 1 (Colom.), https://perma.cc/5M2D-NQRR [hereinafter Exhibit D-17 - Colombian Legislative Act on Peace Agreement]. The amendment simply says, "extradition could be requested, granted or offered according to public treaties and, in their absence, to the applicable laws." ("La extradición se podrá solicitar, conceder u ofrecer de acuerdo con los tratados públicos y, en su defecto, con la ley."). *Id.* Therefore, this amendment does not revive the ratification of the 1979 treaty and, as a matter of fact, the Colombian Ministry of Foreign affairs does not include the 1979 treaty in the list of extradition treaties ratified by Colombia. *See Bilateral Treaties in Force*, Colombian Ministry of Foreign Affairs, http://perma.cc/77DN-AA57 [hereinafter Exhibit L-43- Bilateral Treaties in Force, Colombian Ministry of Foreign Affairs]. *C.f.* United States v. Valencia-Trujillo, 573 F.3d 1171, 1174, n.1 (11th Cir. Fla. 2009) [hereinafter Exhibit J-30 – US v Valencia-Trujillo]; United States v. Gallo-Chamorro (Gallo-Chamorro I), 48 F.3d 502, 504 (11th Cir. 1995) [hereinafter Exhibit J-29 – US v Gallo-Chamorro]; Under section 3184 of the U.S. Code, extradition can only happen "whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under ['the exercise of comity']." *See* 18 U.S.C. §§ 3184, 3181(b) (2012) [hereinafter Exhibit D-3 – 18 USC 3184]. Section 3196 of the Code states that even where a treaty does not require the United States to extradite its citizens, "the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or

nationals to Colombia; in response to a request for information filed by Colombian Honourable Representative, Alirio Uribe Muñoz, the Colombian Chancery replied that since the signature of the 1979 extradition treaty, "U.S. nationals have not been sent in extradition from the United States."[204]

95. Although, Colombian law does provide for the theoretical possibility to conduct *in absentia* trials,[205] as discussed below, it would be difficult to investigate and take testimony given threats and limited access to witnesses. Furthermore, any enforcement in the United States of judgment from an *in absentia* trial would be highly unlikely, as it would require the defendants to waive their right to be present.[206]

96. Witness insecurity[207] and an inability to obtain witness statements[208] are among the factors the ICC considers when assessing whether a domestic prosecution is possible. Key witnesses have been killed or are at risk of being killed. Plaintiffs in the

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convention are met." *See* 18 U.S.C. § 3196 [hereinafter Exhibit D-20 - 18 USC 3196]. The disparity between the interpretations of the United States and Colombian government with regards to the treaty highlights the lack of a coherent extradition system that could guarantee the extradition of the Chiquita corporate officials.

[204] Letter from Alejandra Valencia Gartner, Director of International Legal Issues [Directora de Asuntos Jurídicos Internacionales], Chancery [Cancillería], to Honorable Representative Alirio Uribe Muñoz, Ref. No. S-DIAJI-16-104510, ¶ 2 (Nov. 16, 2016) (on file with the authors) [hereinafter Exhibit L-42 - 2016 Chancery Letter on Extradition].

[205] *See* Law 600 of 2000, Art. 344, July 24, 2000, 44097 Diario Oficial [D.O.] (Colom.) [hereinafter Exhibit D-14 – Colombian Law 600 of 2000 Art. 344]; Law 906 of 2004, Art. 127, Aug. 31, 2004, 45658 Diario Oficial [D.O.] (Colom.) [hereinafter Exhibit D-15 – Colombian Law 906 of 2000 Art. 127]. *See also* Judgement C-627/96 (Constitutional Court Nov. 21 1996) (Colom.), https://perma.cc/EL56-ZXF8 [hereinafter Exhibit F-13 - Constitutional Court C-627/97] (*In absentia* trials have been upheld as consistent with Colombia's constitution so long as other aspects of procedural due process are guaranteed, including, for example, the appointment of public counsel and service of process. Notice can be served in person, by edict, or through de facto notification.); Judgement T-880/12 (Constitutional Court Oct. 29, 2012) (Colom.), https://perma.cc/S2FQ-9KTA [hereinafter Exhibit F-14 - Constitutional Court T-880/12] (The state must use all available "effective" instruments to notify the defendant.); Judgement C-248/04 (Constitutional Court, 16 Mar. 2004) (Colom.), https://perma.cc/9EN2-32JR [hereinafter Exhibit F-15 - Constitutional Court C-248-04] (Where notification fails, the Constitutional Court has endorsed the UN Human Rights Committee observation that *in absentia* trials must comply with a strict observance of defense rights.); Judgement C-592/05 (Constitutional Court, 9 June 2005) (Colom.), https://perma.cc/HRK7-F2WD [hereinafter Exhibit F-16 - Constitutional Court C-592/05] (A judge can declare a defendant absent after a prosecutor's request to that effect, and after notification has been published in national radio and press.).

[206] In *Crosby v. United States*, the U.S. Supreme Court found that Rule 43 of the Federal Code of Criminal prohibits the trial in absentia of a defendant unless the defendant waives his or her right to be present. *Crosby v. United States*, 506 U.S. 255 (1993) [hereinafter Exhibit J-6 – Crosby v US] ("The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."). *See also* 28 U.S. Code § 2467 (2012) (noting judgment would not be enforced in the United States if "the court finds that (a) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law.") [hereinafter Exhibit D-5 – 28 USC 2467].

[207] Exhibit E-1 - OTP Policy Paper on Case Selection, ¶ 51.

[208] *See also* Exhibit E-11 - *Gaddafi* Admissibility, ¶¶ 206–14.

U.S. civil litigation against Chiquita have also remained anonymous to protect themselves from reprisals.[209]

97. Key witnesses who have confessed or accused other individuals have been killed and others are at risk of potential retaliation if they provide testimony. In 2015, the organizations representing victims in one investigation published a press release where they documented this risk; for example, the organizations stated that two individuals who worked with a CONVIVIR that was used as an instrument of the AUC were killed after one of them acknowledged that the organization facilitated crimes in the Banana Bloc.[210]

98. It will also be difficult for Colombia to obtain critical testimonies from the Chiquita Suspects as well as former paramilitaries could act as key witnesses. The paramilitaries were extradited to the United States, rendering this evidence unavailable to date to Colombian prosecutors. Colombian judges cannot compel testimony from witnesses who are granted permission to stay in the United States.[211]

99. In May 2014, the former Colombian Deputy Minister of Justice expressly acknowledged the country's inability to secure the extradition of paramilitaries from the United States.[212] Some of those ex-paramilitaries have only been able to be

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[209] *See* EarthRights International, ERI Launches New Lawsuit Against Chiquita for Funding, Arming, and Supporting Colombian Terrorists (July 19, 2007), http://perma.cc/6UVU-V8KH [hereinafter Exhibit H-14 – ERI, ERI Launches New Lawsuit] (noting plaintiffs "must remain anonymous for fear of reprisals").

[210] Exhibit H-3 – Colectivo de Abogados, Crimenes, ¶ 5 ("[T]wo of the witnesses who have appeared in the proceedings have been murdered: Alberto Osorio Mejía, who was convicted for conspiracy to commit crimes in his capacity of legal representative of the Convivir Papagayo and José de Jesús Pérez Jiménez, an accused under Justice and Peace who acknowledged that Convivir Papagayo was an instrument of the Banana Block.").

According to Human Rights Watch, AUC successor groups have posed risks to victims and witnesses in the banana-growing regions of Antioquia and Chocó, departments where the banana-growing region of Urabá is located. *See* Human Rights Watch, Paramilitaries' Heirs: The New Face of Violence in Colombia 1 (2010), https://perma.cc/ABS6-QQA5 [hereinafter Exhibit I-8 – HRW, Paramilitaries' Heirs Report].

[211] Although Colombia and the United States have both ratified the Inter-American Treaty on Letters Rogatory, the United States made a reservation excluding the treaty from applying to such letters when they are to be used to take evidence abroad. Inter-American Convention on Letters Rogatory, *opened for signature* Jan. 30, 1975, http://perma.cc/45LU-PLHR [hereinafter Exhibit D-8 – OAS Convention Letters Rogatory]. The reservation reads, in its relevant parts: "1. Pursuant to Article 2 b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party." Inter-American Convention on Letters Rogatory, Signatories and Ratifications, *opened for signature* Jan. 30, 1975, https://perma.cc/464J-G9ED [hereinafter Exhibit D-7 – OAS Convention Letters Rogatory Signatories]. Article 2(b) states that the scope of the treaty includes "[t]he taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect." *See* Exhibit D-8 – OAS Convention Letters Rogatory, art. 2(b). As a result of the U.S. reservation, letters rogatory under this specific treaty can only be used for service of process. There is an Inter-American Treaty for the Taking of Evidence Abroad, while Colombia is a party to this treaty, the United States is not. Inter-American Convention on the Taking of Evidence Abroad, Jan. 30, 1975, 1438 U.N.T.S. 289, http://perma.cc/ZZ4Z-LBQA [hereinafter Exhibit D-9 – OAS Convention Taking Evidence]. This treaty status would be an obstacle to obtaining testimony not only from former paramilitaries extradited to the United States, but also from U.S.-based Chiquita corporate officials.

[212] Oliver Sheldon, *Former Drug Lord Avoids Deportation Back to Colombia*, Colombia Reports (May 14, 2014), https://perma.cc/AX5B-XDL8 [hereinafter Exhibit H-4 – Colombia Reports, Former drug lord] (citing Colombia's

present in other Colombian cases via teleconference from the United States under a collaboration agreement between the authorities of both countries.[213] However, the scope of this agreement only includes individuals detained in U.S. prisons, and several of these ex-paramilitaries have been released in the United States or will soon be released. The complications with obtaining testimony from U.S.-based ex-paramilitaries is likely to affect key witnesses in this case: former AUC commanders Veloza-García (alias "H.H."), Rodrigo Tovar-Pupo (alias "Jorge 40"), and Salvatore Mancuso.[214]

100. Other AUC members in similar circumstances have been permitted to stay in the United States, such as former commander Juan Carlos Sierra Ramírez (alias "El Tuso") who "was extradited to the United States in 2008 and testified against former

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Deputy Minister of Justice, Miguel Samper). *See* also *id.* (citing Miguel Samper Strous (@MiguelSamperS), May 14, 2014, 6:04 AM, https://perma.cc/MN9E-J579 [hereinafter Exhibit L-38 – Miguel Sampers Twitter].

[213] COLOMBIAN MINISTRY OF JUSTICE, INFORME DE GESTIÓN 31 (2013) [hereinafter Exhibit L-39 – Colombia Ministry of Justice Report].

[214] *See* Deborah Sontag, *The Secret History of Colombia's Paramilitaries and the U.S. War on Drugs*, N.Y. Times (Sept. 10, 2016), https://perma.cc/5LGZ-54D7 [hereinafter Exhibit H-57 Sontag on Secret History of Colombia's Paramilitaries].

Veloza-García (alias "H.H."), who surrendered to the Colombian authorities, served as a key witness of mass atrocities in Colombia during the Justice and Peace Process; during forty-seven hearings, H.H. confessed to over 835 atrocity crimes. *See* Milestones in the Justice and Peace Process Against *Hebert Veloza García*, International Center for Transitional Justice, http://perma.cc/RR87-F2BK [hereinafter Exhibit L-16 – ICTJ, Milestones] (On February 2, 2006, Veloza García handed himself in to the Colombian authorities in light of the justice and peace process. However, he later absconded from justice when he was called for an initial appearance. He was captured on April 3, 2007.). He was extradited to the U.S. on March 5, 2009. *Id.* A Colombian court convicted Veloza-García in absentia for atrocious crimes, including in the banana regions of Antioquia and Magdalena. *Veloza García*, Case No. 11-001-60-00 253-2006 810099 (High Tribunal of Bogota 2013) (Colombia) ¶¶ 8-11 [hereinafter Exhibit F-2 – Veloza García, High Tribunal of Bogota 2013]. When the judgment was issued, he was still being held at the Metropolitan Correctional Center of New York. *Id.* ¶ 14. The U.S. records available show that he has been released. Federal Bureau of Prisons, *Find an inmate*, https://perma.cc/XR3Z-35G4 (The Federal Bureau of Prisons (BOP) public records show that a person called Herbert Veloza-Garcia, registered under the number 62010-054, was released on October 31, 2016.). It is likely that he has been allowed to stay in the United States.

Tovar Pupo (alias "Jorge 40"), who was first detained in a Colombian prison and then extradited to the United States, was sentenced to serve sixteen and a half years in a U.S. prison for drug trafficking. *See* Press Release, Dep't of Justice, Former Colombian Paramilitary Leader Sentenced to More than 16 Years in Prison for International Drug Trafficking (Nov. 6, 2015), http://perma.cc/FVH3-R52D [hereinafter Exhibit H-8 – DOJ Press Release 11062015]. While in Colombian prison, he told another paramilitary member, deposed in Colombia, that he attended meetings with Chiquita and that Chiquita had made payments to him. Deposition of Jesús Ignacio Roldán Pérez 55, In re Chiquita Brands International, Inc., Case No. 08-01916-MD-MARRA/JOHNSON (Aug. 12, 2016) [hereinafter Exhibit G-4 – Deposition of Roldán Pérez].

Salvatore Mancuso was extradited to the United States and sentenced to serve 15.8 years in a U.S. prison for drug trafficking. Press Release, Dep't of Justice, Colombian Paramilitary Leader Sentenced to More Than 15 Years in Prison for International Drug Trafficking (June 30, 2015), http://perma.cc/7LDU-WWGA [hereinafter Exhibit H-7 – DOJ Press Release 06302015]. Mancuso made a declaration to the media that Chiquita willingly paid the AUC for protection from the guerrillas. The JenniferGS, *Chiquita Banana 60 Minutes*, YouTube (May 14, 2014), at 10:03-10:45. Mancuso has testified that he was instructed by the Castaño brothers to form the CONVIVIRs in the north of Colombia, which includes the Magdalena region. CENTRO NACIONAL DE MEMORIA HISTÓRICA, JUSTICIA Y PAZ: TIERRAS Y TERRITORIOS DE LAS VERSIONES DE LOS PARAMILITARES 28 (Yamile Salinas Abdala & Juan Manuel Zarama Santacruz eds, 2012) [hereinafter Exhibit L-20 – Justicia y Paz Tierras y Territorios].

President Alvaro Uribe for paramilitary ties, [and who was kept from being] deported back to Colombia to face further charges."[215] He was released, obtained a permission to remain in the United States, and has been not sent back to Colombia, despite outstanding sentences delivered by Colombian courts in absentia:

> Now, just over a year after having been released from prison, [El Tuso] has been granted permission to live and work in the United States, avoiding a return to Colombia, where he would have faced further charges of drug trafficking, financing of terrorism, money laundering and illegal use of communications equipment. . . . Sierra, who in 2008 was extradited along with 13 other criminal leaders, only served five years in prison, after reaching an agreement with the United States justice system to provide information and collaborate. . . . Despite Colombia requesting his extradition, Sierra has successfully argued that were he to return, the security of both himself and his family would be at high risk on account of the declarations he made to US authorities.[216]

101. Colombia's inability to secure the appearance or testimony of suspects and witnesses based abroad affirms the need for the OTP to intervene in this case. Moreover, the ICC should act quickly; as time has passed, key witnesses in Colombia have been killed, while others continue to be at risk of death or other forms of intimidation.[217]

102. Complementarity: Recent Developments. On November 24, 2016, the government and the FARC entered into a historic peace agreement. Through the agreement,[218] the Colombian government promises to intensify actions against paramilitary organizations and their support networks to prevent recurrence of abuses.[219] This includes the accountability of third parties ("terceros"), including those who funded and/or otherwise supported paramilitary groups alleged to have committed crimes against humanity.[220]

103. On February 2, 2017, the Prosecutor General's Office announced that "the voluntary financing of paramilitary groups by banana companies" would be investigated as a crime against humanity.[221] Since the funding of paramilitaries has been deemed a crime against humanity, no statute of limitations will apply.[222] .

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[215] Oliver Sheldon, *Former Drug Lord Avoids Deportation Back to Colombia*, Colombia Reports (May 14, 2014), https://perma.cc/AX5B-XDL8 [hereinafter Exhibit H-4 – Colombia Reports, Former drug lord].
[216] *Id*.
[217] Exhibit H-3 – Colectivo de Abogados, Crimenes, ¶ 5. *See also* EarthRights International, ERI Launches New Lawsuit Against Chiquita for Funding, Arming, and Supporting Colombian Terrorists (July 19, 2007), http://perma.cc/6UVU-V8KH [hereinafter Exhibit H-14 – ERI, ERI Launches New Lawsuit].
[218] Exhibit L-7 – Colombia Peace Agreement, Section 3.4, at 77.
[219] *Id.* at 77.
[220] Exhibit L-7 – Colombia Peace Agreement, at 77-78, 138, 158-59, 180-81.
[221] Noticias Caracol, *Financión de bananeros a paramilitares es declarada delito de lesa humanidad*, (Feb. 2, 2017), http://noticias.caracoltv.com/colombia/financiacion-de-bananeros-paramilitares-es-declarada-delito-

104. According to the Peace Agreement, "the Special Jurisdiction for Peace" (SJP)[223] has the competence to review allegations of "financing or collaborating with paramilitary groups," however, only where such action was "not the result of duress" and where the accused had an "active or determinative participation in the commission of crimes" falling under the competency of the SJP.[224]

105. However, in order to take effect, the SJP requires implementing domestic legislation, and as of filing, concerns and uncertainty remain regarding this implementing legislation, which affects critical questions such as extradition and accessory liability. For example, that the Colombian Congress has required that "determinative participation" must have "had an effect" and "been decisive."[225] Any interpretation of this and other standards must be consistent with ICC jurisprudence. While an accessory's contribution must reach a level of significance with regards to the underlying crime, the ICC has found that the contribution does not need to be essential.[226]

106. Similarly, with regards to duress, the Attorney General of Colombia stated:

> We can say with absolute clarity that those businesspersons who, under duress, extortion, or blackmail, contributed to the funding of the armed conflict, are not obliged to show up to any court, such as the Special Jurisdiction for Peace or the ordinary [courts].[227]

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de-lesa-humanidad [hereinafter Exhibit H-54 – Noticias Caracol, Financiacion]; Telesur, Crimes that are classified as Crimes Against Humanity in Colombia have no Statute of Limitations. *Id.*

[222] *Id.*

[223] Exhibit L-7 – Colombia Peace Agreement, at 125.

[224] Exhibit L-7 – Colombia Peace Agreement, at 149.

[225] Informe de Conciliación al Proyecto de Acto Legislativo Numero 002 de 2017 Senado, 002 de 2016 (Acumuado con el Proyecto de Acto Legislativo Numero 003 de 2017) Cámara, marzo 21, 2017 [N° 152] Gaceta del Congreso (Colom.) [hereinafter Exhibit D-19 – SJP Colombian Constitutional Amendment] at 9. ("*se entiende por participación determinante para estos efectos auella acción eficaz y decisiva en la realización de los delitos enunciados.*")

[226] *See Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (ICC Pre-Trial Chamber I, Dec. 16, 2011), https://perma.cc/9BH6-A2LQ [hereinafter Exhibit E-17 - *Mbarushimana* Decision Confirmation Charges] (finding "that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise"), 279 (recalling that it "has already found that the level of contribution under article 25(3)(d) of the Statute cannot be as high as . . . an essential contribution").

[227] *La Fiscalía Aclara Situatión de Empresas que Hayan Financiado Grupos Ilegales (The Attorney General's Office Clarifies the Situation Regarding the Businesses that had Funded Illegal Groups)* (Sept. 02, 2016, 6:27 PM) https://perma.cc/SC76-W9QK [hereinafter Exhibit H-47 – Semana, Fiscalia aclara situacion] ("Podemos decir con absoluta claridad que aquellos empresarios que por coacción, extorsión o chantaje contribuyeron con la financiación del conflicto armado no están obligados a comparecer a ninguna jurisdicción como la Jurisdicción Especial para la Paz o la ordinaria.").

Any duress standard must be consistent with the requirements of the ICC, as discussed in Section III.D. The Rome Statute also requires attendance to court and judicial resolution to exempt individuals from liability.[228]

107. The ICC should monitor the developing legislation and its implementation to ensure adherence with ICC requirements. Such action would be consistent with the action the ICC has taken thus far in monitoring the situation in Colombia.

108. For the above reasons, the ICC has a reasonable basis to include the Chiquita Suspects in Colombia's preliminary examination and to begin an investigation. The ICC has material, temporal, and territorial jurisdiction regarding the crimes described in this communication. Pursuing this matter will also advance the interests of justice given the gravity of the crimes and the lack of action taken by the Colombian State on this case.

V. Request to the Office of the Prosecutor

109. In light of the evidence presented in this communication regarding the crimes of the Chiquita Suspects, we ask that the OTP pursue independent action on this matter. In providing significant contributions to the AUC, the OTP has a reasonable basis to examine whether the Chiquita Suspects have "facilitated the commission of Rome Statute crimes".[229] Given that this case reflects the OTP's stated case selection priorities and that the Chiquita Suspects have enjoyed persistent impunity, this case calls for urgent action.

110. The OTP's action on this matter would reflect the Office's current policy on case selection and prioritization of specific crimes and modes of liability. The OTP has stated that it is a priority to promote "direct interaction with victims and victims' associations at all stages of its activities," and it also takes into consideration the interests of affected victims and communities.[230] One of the affected communities in this case, the Community of Peace of San José de Apartadó, has previously sent a communication to the OTP regarding the AUC crimes that have affected them. In the words of one community member, the "palms and bananas were fertilized with the blood of our loved ones."[231] The affected community has an interest in seeing prosecutions proceed against those who contributed to the harms they have experienced.

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[228] *See* Exhibit D-1 – Rome Statute, arts. 31(1)(d), 31(2) ("[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility [, such as duress,] to the case before it.").

[229] *See* Exhibit E-1 - OTP Policy Paper on Case Selection, ¶¶ 7 (discussing, inter alia, "land grabbing", "terrorism"), 41 (discussing, inter alia, "the illegal dispossession of land").

[230] Exhibit E-1 - OTP Policy Paper on Case Selection, ¶¶ 9, 50(c).

[231] COMISIÓN INTERECLESIAL DE JUSTICIA Y PAZ, EMPRESAS BANANERAS VULNERACIÓN DE DERECHOS HUMANOS Y NARCOTRÁFICO EN EL BAJO ATRATO (Oct. 2016) at 51 [hereinafter Exhibit I-15 - Comisión Intereclesial de Justicia y Paz, Empresas bananeras]. In addition, black and mestizo communities in parts of the Urabá Region have lost lands since the late nineties because of the expansion of the banana agroindustry. *Id.* at 7 ("Although judicial institutions, both national and international, have ruled in favor of communities, so far the situation of dispossession has not been significantly reversed.").

111. Moreover, the OTP's case selection policy includes consideration of "the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes."[232] The community still witnesses ongoing criminality that could be prosecuted and affected by OTP action. In addition, OTP action would also show other multi-national corporations who act as accessories to these crimes that such actions will be pursued, which will help prevent future crimes.

112. Accordingly, we urge the OTP to consider this submission as part of its efforts to end impunity for those involved in breaches of the Rome Statute and to provide justice for affected Colombian communities and individuals. In particular, we the undersigned respectfully request:

1) The OTP immediately expand its current preliminary examination on Colombia to include the Chiquita Suspects and ultimately investigate these individuals for funding, supplying and, in general, providing significant contributions to the blocs of the AUC that operated in the banana growing zones in Magdalena and the Urabá region of Antioquia and Chocó.[233] We have provided the OTP with key sources in this communication, but urge the OTP to further consider the Chiquita Papers as well as other sources as part of this expanded examination.

2) The OTP continue to closely monitor relevant local mechanisms and proceedings to ensure that they apply ICC standards for investigation and prosecution and do not permit continued impunity of the Chiquita Suspects. This monitoring should take place as part of the preliminary examination.

3) If Colombian authorities are unable or unwilling to move forward with charging and prosecuting the Chiquita Suspects, the OTP should request authorization to investigate the Suspects' role in funding, supplying, and significantly contributing to international crimes of the AUC to ensure that impunity does not continue.

[232] *Id*. ¶ 50(d).
[233] Exhibit A-1 – Factual Proffer, ¶ 19. *See also* Exhibit F-18 – 2010 Keiser Testimony, at 5–13.