

# RE-EXAMINING CORPORATE LIABILITY AT THE INTERNATIONAL CRIMINAL COURT THROUGH THE LENS OF THE ARTICLE 15 COMMUNICATION AGAINST CHIQUITA BRANDS INTERNATIONAL

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*To date, the International Criminal Court ('ICC') has focused its attention on prosecuting governmental and military leaders. This article uses the recent communication submitted to the ICC seeking the extension of the Office of the Prosecutor's ongoing preliminary investigation in Colombia as a framework to explore whether the ICC should expand its focus to include atrocity crimes committed by corporations and their employees. The article specifically addresses the questions raised in the communication regarding the financial involvement of Chiquita Brands International Inc ('Chiquita') with paramilitary forces in Colombia between 2002 and 2004. The article also examines the current arguments in favour of extending the ICC's criminal liability to include corporations and highlights the shortcomings of those sentiments above and beyond the fact that the Rome Statute of the International Criminal Court explicitly excludes such liability. It also discusses the modes of individual liability contained in arts 25(3)(c) and (d), and analyses whether employees of Chiquita could be exposed to prosecution under either provision. The article concludes that the ICC should make greater efforts to investigate and prosecute corporate actors for their involvement in human rights abuses. However, it cautions that the facts as they relate to Chiquita suggest that such efforts should not be concentrated on this case as it is unlikely that an investigation into this case will result in a successful prosecution.*

## CONTENTS

I	Introduction.....	1
II	The Accusations against Chiquita.....	2
III	Who Can Be Charged? .....	4
IV	What Charges Can Be Brought?.....	11
	A Article 25(3)(d).....	11
	B Article 25(3)(c).....	17
V	Conclusion.....	20

## I INTRODUCTION

To date, the International Criminal Court ('ICC') has focused its attention on prosecuting governmental and military leaders for crimes falling under its jurisdiction. However, three non-governmental organisations recently submitted an art 15 communication to the ICC ('the Communication'), seeking the expansion of the Office of the Prosecutor's ongoing preliminary investigation in Colombia to include corporate officials of Chiquita Brands International Inc ('Chiquita').<sup>1</sup> The Communication alleges that Chiquita corporate officials made repeated payments to subsidiaries of the paramilitary group Autodefensas Unidas

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<sup>1</sup> International Human Rights Clinic, Colectivo de Abogados José Alvear Restrepo and International Federation for Human Rights, 'The Contribution of Chiquita Corporate Officials to Crimes Against Humanity in Colombia: Article 15 Communication to the International Criminal Court' (Article 15 Communication to the International Criminal Court, 18 May 2017) <[https://www.fidh.org/IMG/pdf/rapport\\_chiquita.pdf](https://www.fidh.org/IMG/pdf/rapport_chiquita.pdf)> archived at <<https://perma.cc/6WNS-HZUE>> ('The Communication').

de Colombia ('AUC'), despite the fact that those officials were aware that the groups were committing crimes against humanity.<sup>2</sup> The corporate officials implicated are 'former and current senior executives, high-ranking officers, employees, and board members of Chiquita'.<sup>3</sup> If the ICC were to accept these allegations and enlarge its investigation it would represent an expansion of the types of crimes the ICC has concerned itself with and put corporate officials on notice that they can no longer involve themselves with organisations that commit atrocity crimes without repercussions. This in turn will serve the ICC's overarching goal of ending impunity.

This article addresses this issue in three parts. First, it describes the activities that Chiquita has admitted to engaging in and discusses how they connect to the crimes against humanity allegedly committed by the AUC. It will also attempt to contextualise these claims within the ICC's larger preliminary investigation of Colombia. Secondly, this article examines what charges, if any, might be brought as a result of Chiquita's activities. This involves an analysis of whether charges can be brought directly against corporations at the ICC and an examination of the current arguments in favour of allowing such jurisdiction. The article also examines how the crimes allegedly committed by the AUC and its forces might be ascribed to Chiquita and its employees. Thirdly, the article concludes that the ICC should expand its activities to include investigations and prosecutions into corporations and their employees, but will caution that this case involving Chiquita might not be the best candidate in which to initiate such an expansion.

## II THE ACCUSATIONS AGAINST CHIQUITA

The ICC began its preliminary examination of Colombia in June 2004.<sup>4</sup> The examination was for the purpose of determining whether war crimes or crimes against humanity had been committed in Colombia during more than fifty years of armed conflict between government led military forces, a variety of different left-wing guerrilla organisations including Fuerzas Armadas Revolucionarias de Colombia — Ejército del Pueblo ('FARC-EP'); the Ejército de Liberación Nacional ('ELN'); and paramilitary groups referred to collectively as the AUC.<sup>5</sup> Although the preliminary examination began in 2004, it was partially limited in temporal scope by an art 124 declaration made by the Colombian government when the *Rome Statute of the International Criminal Court* ('*Rome Statute*') was ratified in 2002.<sup>6</sup> Article 124 permits states ratifying the *Rome Statute* to declare that, for a period of seven years after the ratification, the ratifying state does not accept the ICC's jurisdiction for war crimes as defined in art 8. Article 124 declarations are limited to the extent that the alleged war crimes being excluded must have been committed by nationals of the state or within the state's own

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities* (Report, 14 November 2016) 52 [231] ('*Preliminary Examination Activities Report*').

<sup>5</sup> Ibid 52 [234], 53 [237]–[238].

<sup>6</sup> United Nations, *Rome Statute of the International Criminal Court: Declarations and Reservations* (20 July 2018) United Nations Treaty Collection <[https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mt\\_dsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mt_dsg_no=XVIII-10&chapter=18&lang=en)> archived at <<https://perma.cc/2ZND-C46B>>.

territory.<sup>7</sup> Therefore, the ICC's jurisdiction in Colombia extends to art 6 and art 7 crimes occurring at any time after the *Rome Statute* came into force in Colombia on 1 November 2002, and to art 8 crimes committed after 1 November 2009.<sup>8</sup>

The Office of the Prosecutor issued an interim report on its preliminary investigation into Colombia in 2012. At that time, the Prosecutor concluded that a reasonable basis existed to believe that guerrilla and paramilitary groups had committed crimes against humanity and war crimes during the relevant temporal periods.<sup>9</sup> Although many of the alleged crimes were ascribed to members of FARC-EP and ELN, the investigation also produced evidence that AUC also committed crimes against humanity prior to being disbanded in 2006.<sup>10</sup> The report identifies at least six members of the AUC that were convicted of crimes committed within the temporal jurisdiction of the ICC, including convictions for murder, attempted murder, abduction, forced displacement and child recruitment.<sup>11</sup>

Chiquita, a multinational corporation headquartered in the United States, is one of the largest worldwide distributors of bananas and, until 2004, operated a wholly owned subsidiary in Colombia called CI Bananos de Exportación SA ('Banadex').<sup>12</sup> Chiquita admitted, in a factual proffer filed in the District Court for the District of Columbia during the pendency of a criminal action brought against Chiquita by the US government, that it made payments to the AUC between 1997 and 2004 and continued to do so even after learning that the AUC was committing human rights violations.<sup>13</sup> The factual proffer, signed by representatives of Chiquita, is the result of a plea agreement between Chiquita and the US government and concedes that, had the case gone to trial, the facts contained in the proffer could have been proven beyond a reasonable doubt.<sup>14</sup>

Between 1997 and 2004, Chiquita, through Banadex, made monthly payments to the AUC totalling over USD1.7 million.<sup>15</sup> Chiquita recorded these payments as being "security payments" or payments for "security" or "security services", when in fact the payments were to protect Chiquita's employees and its property from harm threatened by the AUC if the payments were not made.<sup>16</sup> Chiquita was aware, no later than September 2000, that its payments were going to the AUC and that the AUC was a violent paramilitary group.<sup>17</sup> On 10 September 2001, the US government designated the AUC as a 'Foreign Terrorist Organization' for allegedly having committed 'numerous acts of terrorism', including massacres resulting in the deaths of hundreds of civilians, forced

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<sup>7</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 124 ('*Rome Statute*').

<sup>8</sup> See *ibid* art 126; *Preliminary Examination Activities Report*, above n 4, 52 [233].

<sup>9</sup> Office of the Prosecutor, International Criminal Court, *Situation in Colombia: Interim Report* (Interim Report, 14 November 2012) 2–3 [5]–[6] ('*Colombian Interim Report*').

<sup>10</sup> *Ibid* 22–3 [71]–[73], 52–3 [168]. See also at 23 [72]–[74].

<sup>11</sup> *Ibid*.

<sup>12</sup> United States of America, 'Factual Proffer', Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].

<sup>13</sup> *Ibid* [19], [22], [28].

<sup>14</sup> *Ibid* 17.

<sup>15</sup> *Ibid* [19].

<sup>16</sup> *Ibid* [21], [23].

<sup>17</sup> *Ibid* [22].

displacements and kidnappings.<sup>18</sup> Chiquita continued to make payments to the AUC even after becoming aware that the AUC had been declared a Foreign ‘Terrorist Organization’ and despite the fact that Chiquita had received legal advice, both from outside counsel and the Department of Justice, that it was illegal to continue to pay the AUC.<sup>19</sup> Chiquita made its last payment to the AUC on 4 February 2004 before divesting itself of Banadex in June 2004.<sup>20</sup> The AUC disbanded in 2006, pursuant to a demobilisation agreement with the Colombian government, although some factions reorganised under different names following the official demobilisation.<sup>21</sup> The Communication alleges that Chiquita employees, by making payments to the AUC and continuing to make those payments even after learning that the AUC was committing ‘widespread and systematic crimes’ in Colombia, contributed to those crimes in a manner sufficient to incur criminal liability under the *Rome Statute*.<sup>22</sup>

### III WHO CAN BE CHARGED?

The preliminary question to be addressed is who can be charged at the ICC for the alleged criminal activity being attributed to Chiquita. The *Rome Statute* limits criminal responsibility to natural persons (ie individuals) and does not permit corporations to be charged with crimes falling under the statute.<sup>23</sup> This echoes the finding of the International Military Tribunal at Nuremberg that ‘[c]rimes against International Law are committed by men not abstract entities’.<sup>24</sup> As a result, employees of Chiquita, but not Chiquita itself, could potentially be charged with crimes arising out of the corporation’s involvement with the AUC in Colombia. Although this outcome may be disappointing to some, it would still represent a departure for the ICC as it would constitute the first time the ICC made any effort to hold corporate actors accountable for atrocity crimes. The ICC would signal a willingness to broaden its fight against impunity by expanding its reach beyond governmental and military actors.

A debate surrounding whether the ICC should be able to prosecute corporations has been going on since the negotiations at the conference in Rome

<sup>18</sup> Colin L Powell, ‘Designation of the AUC as a Foreign Terrorist Organization’ (Press Release, 10 September 2001) <<https://2001-2009.state.gov/secretary/former/powell/remarks/2001/4852.htm>>.

<sup>19</sup> United States of America, ‘Factual Proffer’, Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].

<sup>20</sup> Ibid [2], [87]; Cliff Peale, ‘Chiquita Sells Colombia Unit: Move Is from Harvester to Marketer’, *The Cincinnati Enquirer* (online), 12 June 2004 <[http://www.enquirer.com/editions/2004/06/12/biz\\_biz1achiq.html](http://www.enquirer.com/editions/2004/06/12/biz_biz1achiq.html)> archived at <<https://perma.cc/RUH7-CTZZ>>.

<sup>21</sup> See Amnesty International, ‘Colombia — Fear and Intimidation: The Dangers of Human Rights Work’ (Research Report, 6 September 2006) 6 <<https://www.amnesty.org/download/Documents/72000/amr230332006en.pdf>> archived at <<https://perma.cc/94FU-QNPE>>.

<sup>22</sup> *The Communication*, above n 1, [14], [18].

<sup>23</sup> *Rome Statute* art 25. See also Norman Farrell, ‘Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals’ (2010) 8 *Journal of International Criminal Justice* 873, 874; Michael J Kelly, ‘Prosecuting Corporations for Genocide under International Law’ (2012) 6 *Harvard Law and Policy Review* 339, 346; Harmen van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’ (2013) 12 *Chinese Journal of International Law* 43, 44.

<sup>24</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946* (1948) vol 22, 466.

produced the *Rome Statute*. A working paper was introduced during the negotiations that would have extended the ICC's jurisdiction to include juridical persons, defined as 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit'.<sup>25</sup> That proposal was ultimately rejected despite many national delegations believing it to be one of great merit.<sup>26</sup> Reasons for not incorporating corporate liability into the *Rome Statute* include: concerns that providing for corporate criminal liability would remove focus from individual responsibility; worries that prosecuting corporations could result in great difficulties in obtaining evidence; and most importantly, that the lack of common standards in national jurisdictions about corporate criminal liability, including the non-recognition of the idea by a number of nations, would make the principle of complementarity ineffective and overload the ICC with corporate cases.<sup>27</sup> Despite the fact that this proposal was rejected and corporate criminal liability was not incorporated into the *Rome Statute*, commentators continue to advocate for increased corporate criminal liability in international criminal law, some going so far as to call for the amendment of the *Rome Statute*.<sup>28</sup>

There are two main arguments in favour of imposing criminal liability against corporations at the ICC. One is of general applicability to all of international criminal law, while the other specifically addresses an issue with the practice of the ICC. The first argument suggests that an impunity gap exists when corporations are not prosecuted for their involvement in atrocity crimes.<sup>29</sup> Essentially, there is a concern that because criminal liability at the modern international and internationalised criminal courts and tribunals is limited to individuals, corporations, as entities, are relatively free to commit atrocity crimes without fear of punishment. Although national laws exist that impose liability on corporations and/or their individual employees they have not proven to be sufficient to deter corporate participation in human rights abuses. Many individual states are often unwilling or unable to adequately regulate human rights abuses committed by corporations within their jurisdiction.<sup>30</sup> In fact, national unwillingness or inability to address crimes committed by corporations is what has driven efforts to provide for corporate criminal liability in

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<sup>25</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23, Paragraphs 5 and 6*, UN Doc A/CONF.183/C.1/WGGP/L.5/REV.2 (3 July 1998) [5].

<sup>26</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2<sup>nd</sup> ed, 2016) 566.

<sup>27</sup> Kai Ambos, *Treatise on International Criminal Law* (Oxford University Press, 2013–16) vol 1, 145 (citations omitted).

<sup>28</sup> Nadia Bernaz, 'Corporate Criminal Liability under International Law: The *New TV SAL* and *Akhbar Beirut SAL* Cases at the Special Tribunal for Lebanon' (2015) 13 *Journal of International Criminal Justice* 313, 319–20; Kathryn Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14 *Australian Journal of Human Rights* 199, 200; Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 916–17.

<sup>29</sup> Bernaz, above n 28, 319.

<sup>30</sup> Haigh, above n 28, 200; Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19 *Criminal Law Forum* 115, 146–7.

international law.<sup>31</sup> Reasons for this unwillingness or inability include: a lack of financial or legal resources to properly investigate and prosecute alleged crimes; a lack of jurisdiction to investigate and prosecute crimes allegedly committed by multinational corporations in more than one country; the fear that corporations will relocate their operations or redirect foreign direct investment away from countries attempting to investigate or prosecute; the participation of government officials in the crimes alleged against the corporation; or a preference for financial investment over the enforcement of human rights norms.<sup>32</sup> It is thought that the best way to overcome states' inaction in this area is to create international jurisdiction over these crimes, and that the ICC is the best venue in which to do so.

Using international criminal mechanisms to prosecute corporations has the potential to close this impunity gap by promoting the deterrent function of criminal law. Those corporations that participate in atrocity crimes could be specifically deterred from doing so by the knowledge that their actions will have criminal consequences.<sup>33</sup> Specific deterrence is thought to prevent atrocity crimes to the extent that the public stigma and reputational injury that accompanies any suggestion of an individual or group's involvement in such crimes acts as a sufficient disincentive.<sup>34</sup> It has been suggested that corporations are especially susceptible to this sort of deterrence because they are meant to function as rational actors whose decisions are not emotionally or socially motivated.<sup>35</sup> However, corporate decisions, while made on behalf of the corporation, are made either individually or collectively by human beings. This means that subjective human morality cannot be entirely removed from the equation. Further, to the extent that a corporation's decision is a rational one, made on the basis of a cost-benefit analysis, it is entirely possible that the rational decision will be to commit human rights abuses as doing so will be in the best financial interests of the corporation.

International criminal prosecutions of corporations for human rights abuses could also act as a general deterrent. General deterrence, also referred to as expressive deterrence, operates on the theory that punishing the perpetrators of atrocity crimes will 'dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights'.<sup>36</sup> This is achieved through a twostep process: first, it transforms

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<sup>31</sup> Larissa van den Herik and Jernej Letnar Čerňič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8 *Journal of International Criminal Justice* 725, 741.

<sup>32</sup> *Ibid* 728; Kremnitzer, above n 28, 916-17; Haigh, above n 28, 200; Kyriakakis, 'The Complementarity Objection Stripped Bare', above n 30, 146-7.

<sup>33</sup> Joanna Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30 *Leiden Journal of International Law* 221, 236.

<sup>34</sup> Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39, 73-4.

<sup>35</sup> Kyriakakis, 'Implications for the International Criminal Justice Project', above n 33, 236-7.

<sup>36</sup> *Prosecutor v Rutaganda (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [456] ('*Rutagana Judgement*').

‘popular conceptions of correct behavior’; and secondly, it promotes ‘the gradual internalization of values that encourage habitual conformity with the law’.<sup>37</sup> Much as with specific deterrence, the belief is that the stigmatising effects of criminal prosecutions for atrocity crimes, and the potential financial losses associated with that stigma, will convince corporations to comply with the law so as not to negatively affect its business.

To the extent that prosecuting corporations has a general deterrent effect, it is thought to be experienced by the individuals running corporations and not the corporation itself. The influence of criminal sanctions on a corporation has been described as occurring in a ‘twice mediated way’.<sup>38</sup> The consequences of sanctioning a corporation for its actions are felt by the individuals controlling the corporation who then take steps to change how the corporation operates so as to avoid future sanctions.<sup>39</sup> This is seen as creating an extra step to enforcement, particularly where the individuals making the decisions on behalf of corporations to participate in atrocity crimes are already exposed to liability for their actions.<sup>40</sup> To prosecute and punish individuals and corporations for the same actions is redundant, particularly when the actions of the corporation were being determined by the decisions of the individuals. Therefore, the current practice at the ICC imposes sufficient liability on corporations because it holds accountable the individual decision makers.

It is argued in response that sanctioning both the corporation and the individuals controlling the corporation is the only way to successfully deter the commission of future atrocity crimes.<sup>41</sup> Prosecuting and punishing the corporation directly will motivate the corporation to better monitor its actions and hopefully lead to a change in corporate culture and will promote different behaviour in the future.<sup>42</sup> Prosecuting the corporation also guarantees that responsibility for atrocity crimes will be properly apportioned, particularly in instances where individual accountability is impossible. These instances can include when the culpable individual cannot be identified or located or when the corporation’s actions cumulatively constitute a crime but the actions of any one individual do not.<sup>43</sup> Corporate criminal liability minimises these issues and results in greater overall accountability. However, the incorporation of corporate criminal liability into international criminal law does not suggest that individuals should no longer be held responsible for atrocity crimes that can be attributed to the corporation. Even if corporate liability is recognised, it does not change the

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<sup>37</sup> Payam Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ (1998) 20 *Human Rights Quarterly* 737, 747. See also Eric Blumenson, ‘The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court’ (2006) 44 *Columbia Journal of Transnational Law* 801, 828.

<sup>38</sup> Thomas Weigend, ‘*Societas Delinquere non Potest?*’ (2008) 6 *Journal of International Criminal Justice* 927, 941.

<sup>39</sup> *Ibid.*

<sup>40</sup> Mohammed Saif-Alden Wattad, ‘Natural Persons, Legal Entities, and Corporate Criminal Liability under the *Rome Statute*’ (2016) 20 *UCLA Journal of International Law and Foreign Affairs* 391, 421.

<sup>41</sup> Caroline Kaeb, ‘The Shifting Sands of Corporate Liability under International Criminal Law’ (2016) 49 *George Washington International Law Review* 351, 382–3.

<sup>42</sup> Kyriakakis, ‘The Complementarity Objection Stripped Bare’, above n 30, 149.

<sup>43</sup> *Ibid.* 148; Kremnitzer, above n 28, 913.

fact that individual accountability remains the focus of international criminal law.<sup>44</sup> Further, corporate liability, without individual liability, could lead the individual decision-maker to enact corporate practices that will further his or her own interests without concern for the effect of those actions on the corporation.<sup>45</sup> Therefore, ensuring that corporations do not operate with impunity requires an all-inclusive approach with liability extending to both the corporation and the individual. This reasoning is persuasive and supports the idea that corporate criminal liability has a place in international criminal law.

Whether the ICC is the appropriate venue to pursue corporate criminal liability remains to be seen. The complementarity principle represents a significant obstacle to imposing criminal liability on corporations at the ICC. The argument in favour of allowing corporate criminal liability at the ICC alleges that the proliferation of international agreements imposing criminal liability on corporations and the increasing number of states that have adopted domestic laws designed to criminalise corporate behaviour have alleviated many of the complementarity concerns voiced when the *Rome Statute* was being negotiated.<sup>46</sup> The complementarity principle is introduced in the preamble to the *Rome Statute*, and reiterated in art 1. Both provisions emphasise that the ICC's jurisdiction will be complementary to national criminal jurisdictions.<sup>47</sup> The principle is made operative through art 17, which stands for the proposition that the jurisdiction of the ICC is meant to complement domestic criminal jurisdiction and that cases will be inadmissible before the ICC unless the relevant state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>48</sup> The purpose of the principle is to ensure that the ICC will fill any impunity gap caused by a state's unwillingness or inability to prosecute, while also preventing it from intruding on a state's proper exercise of its domestic criminal jurisdiction.<sup>49</sup>

The concern surrounding complementarity as it relates to corporate criminal liability involves whether the ICC could prosecute corporate actions occurring in the territory of a state that does not criminalise corporate behaviour on the grounds that not criminalising those activities makes it unable to prosecute within the meaning of art 17.<sup>50</sup> States that do not impose corporate criminal liability are apprehensive that such an interpretation of art 17 could represent an infringement on their sovereignty by effectively imposing criminal liability on corporations even when national laws do not.<sup>51</sup> Article 17(3) of the *Rome Statute* defines 'inability' as a situation where, 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out

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<sup>44</sup> See Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012) 6.

<sup>45</sup> Kaeb, above n 41, 383.

<sup>46</sup> Kremnitzer, above n 28, 910; Haigh, above n 28, 201, 204; Weigend, above n 38, 928; Kaeb, above n 41, 351–3, 381.

<sup>47</sup> *Rome Statute* Preamble, art 1.

<sup>48</sup> *Rome Statute* art 17(1)(a).

<sup>49</sup> Kai Ambos, *Treatise on International Criminal Law* (Oxford University Press, 2013–16) vol 3, 269.

<sup>50</sup> Haigh, above n 28, 204.

<sup>51</sup> *Ibid* 204–5.



its proceedings'.<sup>52</sup> Antonio Cassese suggested that inability also encompasses situations in which a national legal system is unable to prosecute an accused, 'not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments', citing amnesty laws and statutes of limitations as examples of the sort of legislative impediments within his contemplation.<sup>53</sup> Joanna Kyriakakis builds on Cassese's position by arguing that the non-existence of laws endowing courts with legal competence over corporations also represents a legislative impediment, resulting in the unavailability of domestic courts, producing an inability to prosecute.<sup>54</sup> In the language of the ICC, states that do not impose criminal liability on corporations are unable to prosecute due to the unavailability of the domestic court system, leaving the ICC free to bring charges against corporations.

More states have adopted domestic corporate criminal liability since the *Rome Statute* was concluded in 1998.<sup>55</sup> This suggests to some that the issue of allowing for corporate criminal liability at the ICC should be re-examined.<sup>56</sup> However, even if some states have changed their domestic laws to include corporate criminal liability, others have not.<sup>57</sup> Further, although more states have adopted some form of domestic corporate criminal liability, there remains significant disagreement amongst those domestic laws as to how and when corporations can be held criminally liable. Greater agreement between states about how to implement corporate criminal liability would be necessary before the complementarity concerns can be properly overcome. The lack of recognised international standards about corporate criminal liability, coupled with the fact that some nations still do not impose any form of criminal liability against corporations, continues to make the complementarity principle 'unworkable'.<sup>58</sup> While the complementarity concerns may be diminished, they have not been eliminated and still remain too substantial to permit the expansion of the *Rome Statute* to include corporate criminal liability.<sup>59</sup>

Supporters of imposing corporate liability at the ICC recognise that this complementarity concern still exists and, as a result, have tried to find a way around it. One suggestion has been to create an exception to corporate liability under which corporations that are incorporated in states that do not criminalise corporate behaviour will be excluded from liability at the ICC.<sup>60</sup> This proposal should be given short shrift. An exception that shields corporations from liability based on where they are incorporated or located would only encourage corporations to relocate to those states that do not impose corporate criminal liability. In turn, nations that currently hold corporations criminally liable for

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<sup>52</sup> *Rome Statute* art 17(3).

<sup>53</sup> Antonio Cassese et al, *Cassese's International Criminal Law* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 297.

<sup>54</sup> Kyriakakis, 'The Complementarity Objection Stripped Bare', above n 30, 127.

<sup>55</sup> Haigh, above n 28, 204.

<sup>56</sup> *Ibid* 201; Kaeb, above n 41, 381.

<sup>57</sup> Schabas, above n 26, 564; Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing, 3<sup>rd</sup> ed, 2016) 979, 986.

<sup>58</sup> Ambos, 'Article 25: Individual Criminal Responsibility', above n 57, 986.

<sup>59</sup> *Ibid*.

<sup>60</sup> Haigh, above n 28, 211; Wattad, above n 40, 418.

their actions would be disinclined from doing so to prevent corporations from moving their bases of operations. It could also lead states party to the *Rome Statute* that hold corporations accountable for their criminal actions to leave, or threaten to leave, the ICC, much as some African nations have done over the issue of head of state immunity.<sup>61</sup> Ultimately, an exception like the one described above would have the tendency to diminish, rather than increase, the enforcement of criminal liability against corporations.

Even if the complementarity issue could be avoided in this way, one significant practical concern that has largely gone unaddressed is how the ICC will convince a corporation to participate in the proceedings against it. Currently, the *Rome Statute* prevents the ICC from progressing past the investigation stage without the accused appearing before the ICC. Article 60 describes the '[i]nitial proceedings before the Court' and requires that the accused be informed of the charges following their surrender or voluntary appearance.<sup>62</sup> As a corporation cannot be arrested, one accused of atrocity crimes could only appear following the issuance of a summons. If the corporation refuses to appear, which seems likely, the case will be stymied because there is no statutory provision permitting trial to commence in the absence of the accused.<sup>63</sup> It might be possible to arrest an individual corporate official and have him or her stand in for the corporation. However, if the corporate official refused to assume the identity of the corporation for trial it is difficult to see how the ICC could force an individual to represent a corporation solely based on his or her employment. Therefore, unless the corporation agrees to voluntarily appear for trial, there is no way to adjudicate the crimes alleged against it.

It is difficult to envision any situation in which an accused corporation would voluntarily agree to appear at the ICC so that it could be tried for committing atrocity crimes. As a result, it would be left to the state in which the implicated corporation is registered or has its corporate offices to try and compel the corporation to participate. This approach has significant shortcomings, not the least of which is that states that are unwilling to try corporations in their own domestic jurisdictions will likely be equally unwilling to oblige those same corporations to voluntarily appear before the ICC. Further, a corporation concerned about the stigma resulting from being accused of human rights violations will be even less inclined to involve itself in a process that could lead to its conviction for those crimes. Therefore, even if the ICC were to amend its

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<sup>61</sup> See, eg, United Nations Secretary-General, *South Africa: Withdrawal* (19 October 2016) United Nations Treaty Collection <<https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-ENG.PDF>> archived at <<https://perma.cc/PH8T-LK2Z>>; United Nations Secretary-General, *Burundi: Withdrawal* (27 October 2016) United Nations Treaty Collection <<https://treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf>> archived at <<https://perma.cc/W2KU-BEMG>>; United Nations Secretary-General, *Gambia: Withdrawal* (10 November 2016) United Nations Treaty Collection <<https://treaties.un.org/doc/Publication/CN/2016/CN.862.2016-Eng.pdf>> archived at <<https://perma.cc/VMC2-YPR6>>. See also Patrick Wintour, 'African Exodus from ICC Must Be Stopped, Says Kofi Annan' *The Guardian* (online), 18 November 2016 <<https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan>> archived at <<https://perma.cc/D8PB-Y8CW>>.

<sup>62</sup> *Rome Statute* art 60(1).

<sup>63</sup> See *ibid* art 63.

statute so that it could charge corporations with crimes falling under its jurisdiction, it is highly unlikely that it would actually result in any trials.

Ultimately, it is immaterial whether it is advisable to permit the ICC to conduct prosecutions against corporations. As currently written, the *Rome Statute* does not allow corporations to be tried before the ICC.<sup>64</sup> The focus must be on whether employees of Chiquita are exposed to liability for their involvement in making payments to the AUC and, if so, under what theory of liability. It must be remembered that corporations are operated by human beings and that even if the corporation cannot be held liable, the individuals acting on its behalf can.<sup>65</sup>

#### IV WHAT CHARGES CAN BE BROUGHT?

##### A *Article 25(3)(d)*

The Communication submitted to the ICC suggests that the Prosecutor investigate possible crimes committed by Chiquita employees with individual criminal liability based primarily on art 25(3)(d)(ii) and secondarily on arts 25(3)(d)(i) and 25(3)(c).<sup>66</sup> Liability under art 25(3)(d) requires a showing of three objective and two subjective elements:<sup>67</sup>

The objective elements are:

- (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.<sup>68</sup>

The subjective elements are:

- (i) the contribution shall be intentional; and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.<sup>69</sup>

Each element will be considered in turn in an effort to evaluate whether the Office of the Prosecutor should invest time and resources into investigating Chiquita's actions.

Not surprisingly, a common element of both modes of liability, detailed in art 25(3)(d), is the requirement that a crime within the jurisdiction of the ICC was attempted or committed.<sup>70</sup> This is relevant with regard to Chiquita because Colombia's art 124 declaration could prevent the ICC from charging employees of Chiquita with war crimes. The conduct complained of in the Communication

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<sup>64</sup> Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010) 102.

<sup>65</sup> Kaeb, above n 41, 374. See also Kremnitzer, above n 28, 911.

<sup>66</sup> *The Communication*, above n 1, [18].

<sup>67</sup> *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [269] (*'Mbarushimana Decision'*).

<sup>68</sup> *Ibid* [269] n 640.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Rome Statute* art 25(3)(d).

occurred between November 2002, when the *Rome Statute* came into force with regard to Colombia, and June 2004, when Chiquita divested itself of its Colombian operations, although an argument could be made that money paid by Chiquita facilitated the commission of crimes by the AUC until it was disbanded in 2006. However, the art 124 declaration precludes the ICC from charging individuals with war crimes allegedly committed by Colombian nationals or on Colombian territory that occurred before 1 November 2009. The temporal bar to bringing war crimes charges is clearly met; it is indisputable that the AUC's alleged activities happened before 1 November 2009. Further, all of the crimes alleged against the AUC are thought to have been committed in Colombia. Therefore, Colombia's art 124 declaration prevents the ICC from prosecuting any individuals for art 8 crimes committed before 1 November 2009. No bar exists to prevent the Office of the Prosecutor from investigating crimes against humanity or genocide.

The ICC has already found evidence suggesting that members of the AUC committed crimes that fall under the jurisdiction of the ICC. In its 2012 interim report, the ICC identified 10 AUC members that had been convicted in Colombian courts of crimes falling under the *Rome Statute* including murder, attempted murder, abduction, forced displacement and child recruitment.<sup>71</sup> At least six of those 10 were convicted of crimes falling under the temporal jurisdiction of the ICC.<sup>72</sup> The ICC also more generally found that evidence existed indicating that the AUC committed crimes against humanity prior to being disbanded.<sup>73</sup> This evidence supports a reasonable suspicion that crimes proscribed by the *Rome Statute* were committed or attempted.

The second objective element requires a showing that the crimes falling under the jurisdiction of the ICC were committed or attempted by a group of people acting with a common purpose. A group is defined as 'two or more persons'.<sup>74</sup> A group can exist without being incorporated into a military, political or administrative structure.<sup>75</sup> Human Rights Watch described the AUC as a well-organised coalition made up of separate paramilitary groups with some form of command structure.<sup>76</sup> Additionally, the AUC was designated as a 'Foreign Terrorist Organization' by the US in 2001.<sup>77</sup> These findings are sufficient to conclude that the AUC was a group, at least for the purposes of a preliminary investigation.

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<sup>71</sup> *Colombian Interim Report*, above n 9, 72–4.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Mbarushimana Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [271], quoting *Prosecutor v Dyilo (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007) [343].

<sup>75</sup> *Prosecutor v Katanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1626] ('*Katanga Judgment*').

<sup>76</sup> Human Rights Watch, 'The "Sixth Division": Military-Paramilitary Ties and US Policy in Colombia' (Report, 2001) 13, 15 ('*The Sixth Division*'); Human Rights Watch, 'Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups' (Research Report, August 2005) 3, 13–14 ('*Smoke and Mirrors*').

<sup>77</sup> Powell, above n 18.

A common purpose need not be predefined before it is carried out; it can arise extemporaneously and be inferred from the actions of the group.<sup>78</sup> It also does not have to carry an exclusively criminal purpose, but the common plan must have some criminal purpose, and the intent to achieve that criminal purpose must be shared by the members of the group.<sup>79</sup> The apparent overarching goal of the AUC was to exert territorial control over parts of Colombia, largely for the purpose of cultivating coca, trafficking in cocaine and transporting weapons.<sup>80</sup> This was achieved by forcefully expelling left wing guerrilla groups, including FARC-EP, from parts of the country and by committing acts of violence against the civilian population.<sup>81</sup> Generally speaking, this evidence supports a reasonable belief that the AUC, acting as a group, committed crimes falling under the *Rome Statute* pursuant to a common plan. This evidence fulfils the second objective element of art 25(3)(d).

The last objective element requires a showing that the accused contributed to the crime in a way not described in arts 25(3)(a)–(c). This element represents the greatest impediment to any effort to hold employees of Chiquita accountable for atrocity crimes at the ICC. The ICC has found that not all types of assistance are sufficient for an individual to be liable under art 25(3)(d) but that the accused must have made a significant contribution to the commission of the crime.<sup>82</sup> A significant contribution is one that has a bearing on the occurrence of the crime or the manner of its commission.<sup>83</sup> A determination as to the extent of an accused's contribution to the criminal activity is reached by considering the accused 'person's relevant conduct and the context in which this conduct is performed'.<sup>84</sup> Factors to be considered in this respect are:

- (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.<sup>85</sup>

A case by case analysis is necessary to determine whether a person's contribution was significant enough to support a finding of criminal liability under art 25(3)(d).<sup>86</sup>

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<sup>78</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1626].

<sup>79</sup> *Ibid* [1627].

<sup>80</sup> *Smoke and Mirrors*, above n 76, 1.

<sup>81</sup> *The Sixth Division*, above n 76, 10–11, 18–19, 25–6, 40–6, 48–50.

<sup>82</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1632]; *Mbarushimana Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [283].

<sup>83</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1633].

<sup>84</sup> *Mbarushimana Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [285].

<sup>85</sup> *Ibid* [284] (citations omitted).

<sup>86</sup> *Ibid*. See also *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1634].

With regard to the first factor identified by the Pre-Trial Chamber in *Prosecutor v Mbarushimana* ('*Mbarushimana*'), the evidence shows that Chiquita continued to make payments to the AUC for several years after learning that it was engaged in criminal activity. Chiquita knew of the AUC's criminality no later than September 2000 and continued to make payments to it until February 2004.<sup>87</sup> This demonstrates Chiquita's sustained participation in the activities of the AUC. There is no evidence to suggest that Chiquita did anything to interrupt the AUC's criminal activities as required under the second factor. Additionally, the third factor is inoperative in this case as Chiquita did not create or execute the common plan attributed to the AUC. The fourth factor also does not appear particularly relevant because Chiquita was not a member of the AUC and its position relative to the group was that of minor financial benefactor.

As to the fifth factor, the Communication argues that the USD1.7 million Chiquita paid to the AUC constituted a 'significant contribution' to the AUC's criminal activity.<sup>88</sup> Without knowing the full extent of the AUC's assets during the relevant period, it is believed that by 2002 the AUC controlled 40 per cent of Colombian cocaine trafficking and had an annual income of approximately USD100 million.<sup>89</sup> Therefore, the USD1.7 million paid to the AUC between 1997 and 2004 averages out to annual payments of USD242 815.14, or less than one quarter of one per cent of the AUC's annual income. Based on the financial numbers alone, it is difficult to believe that the money being paid by Chiquita constituted a significant contribution to the AUC's activities. In particular, the contribution of such a small portion of the overall annual income of the group suggests that the money paid by Chiquita did not significantly contribute to the scope of the group's activities. However, without knowing precisely how the AUC used the money it received from Chiquita, it is impossible to entirely rule out the possibility that it did constitute a significant contribution.

The evidence, as it is currently known, indicates that Chiquita continued to pay money to the AUC even after learning of its criminality, which would seem to fulfil the first factor. However, the money paid by Chiquita represented such a small portion of the AUC's overall annual income that it likely had little impact on the seriousness and the scope of the group's activities, suggesting that the fifth factor has not been met. The other three factors are of little relevance to this particular inquiry. Therefore, it remains unclear whether Chiquita's payments to the AUC constituted a significant contribution to its criminality. It must be noted that these factors are meant to assist in the analysis of the accused's contribution but are not meant to be determinative on their own.<sup>90</sup>

Determining the significance of Chiquita's contribution is made no easier by the fact that there is no evidence linking the money paid by Chiquita directly to the AUC's criminal acts. Further, it seems doubtful that such information will

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<sup>87</sup> United States of America, 'Factual Proffer', Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].

<sup>88</sup> *The Communication*, above n 1, [21].

<sup>89</sup> Vanda Felbab-Brown, 'The Coca Connection: Conflict and Drugs in Colombia and Peru' (2005) 25(2) *Journal of Conflict Studies* 104, 107 n 12; Peter Dale Scott, *Drugs, Oil, and War: The United States in Afghanistan, Colombia, and Indochina* (Rowman & Littlefield, 2003) 72, 74.

<sup>90</sup> *Mbarushimana Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [284].

come to light, as it is unlikely that records exist detailing the accounting practices of a criminal organisation that has been defunct for more than a decade. The absence of such evidence is significant as, without it, it will be very difficult to show that the contribution made by Chiquita rose to the level of significance intended by the drafters to give rise to individual liability. As the Trial Chamber pointed out in *Prosecutor v Katanga* ('*Katanga Judgment*'), what is important is that the identified contribution has an effect on the 'realisation of the crime'.<sup>91</sup> In *Mbarushimana*, the ICC explained that without the substantial contribution requirement, any member of the community that provided assistance to a criminal organisation in any form could be exposed to liability so long as he or she was aware of the organisation's criminal purpose.<sup>92</sup> Without evidence connecting the money paid by Chiquita to the AUC's criminal activity, it will be very difficult to satisfy this element. This raises the question of whether it is worth the ICC's money and effort to pursue this case.

The first subjective element of art 25(3)(d) also involves the contribution of the accused. It demands that the act performed by the accused must be intentional.<sup>93</sup> Within this context, the Trial Chamber in the *Katanga Judgment* took pains to make clear that it must be shown that the accused intended to commit the act that contributed to the crime; it is not necessary to show that the accused shared the group's intention of committing the crime itself.<sup>94</sup> Article 30(2) defines the requisite degree of intent to mean that the person 'means to engage in the conduct'.<sup>95</sup> The ICC in the *Katanga Judgment* found that this definition has two elements: the accused's actions must have been deliberate and must be done with awareness of what he or she was doing.<sup>96</sup> To satisfy this element it need only be shown that Chiquita was aware it was making payments to the AUC and that it was doing so deliberately. Based on that rather low bar it is easy to conclude that the payments made by Chiquita employees to the AUC were made intentionally. Chiquita knew no later than 2000 that its payments were going to the AUC.<sup>97</sup> The payments were initially 'reviewed and approved' by senior executives at Chiquita.<sup>98</sup> Beginning in June 2002, the method of payment was changed and Chiquita began using a high ranking officer in Banadex to make direct cash payments to the AUC.<sup>99</sup> Further, the payments being made to the AUC were discussed during a meeting of the Audit Committee of the Board of Directors.<sup>100</sup> This evidence all suggests that Chiquita was aware

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<sup>91</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1635].

<sup>92</sup> *Mbarushimana Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [277].

<sup>93</sup> *Rome Statute* art 25(3)(d).

<sup>94</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1638].

<sup>95</sup> *Rome Statute* art 30(2)(a).

<sup>96</sup> *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1638].

<sup>97</sup> United States of America, 'Factual Proffer', Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* [25].

<sup>100</sup> *Ibid* [26].

it was deliberately making payments to the AUC, supporting a finding that the payments were made intentionally.

The final element of art 25(3)(d) liability requires a showing of one of two things: either the contribution being made by the accused was being done ‘with the aim of furthering the criminal activity or criminal purpose of the group’; or in the knowledge that the group intended to commit the crime.<sup>101</sup> This is thought to mean that the accused must specifically intend to promote or encourage the acts of the group through his or her actions.<sup>102</sup> At present, there is no evidence to support a reasonable suspicion that Chiquita’s employees made payments to the AUC for the purpose of furthering the AUC’s criminal activities or criminal purpose. Chiquita conceded that it made the payments, but that it did so under threat and that it feared that non-payment could result in violence against its employees and property.<sup>103</sup> This could constitute duress, which is one of the grounds for excluding criminal liability under art 31(1)(d) of the *Rome Statute*, although it is somewhat debatable whether Chiquita’s employees would be able to make an effective evidentiary showing to that effect.<sup>104</sup> To successfully prove duress, the accused must demonstrate that their criminal activity was necessary to avoid the threat — ie that they had no choice other than to commit the crime.<sup>105</sup> It would be difficult for the Chiquita officials to make such a showing as they did have a choice to avoid the effects of the threat; Chiquita could have divested itself of its Colombian banana holdings when payment was first demanded by the AUC. It is more likely that Chiquita made the payments so that it might be left alone by the AUC and continue to profit from its Colombian banana business. However, whether the Chiquita officials will be able to prove duress is somewhat beside the point as there is still no evidence linking the payments made by Chiquita to the furtherance of the AUC’s criminal activities. Unless contrary evidence is discovered indicating that Chiquita made the payments with that purpose in mind it will be very difficult to prove this element.

Article 25(3)(d)(ii) entails a lesser evidentiary showing than art 25(3)(d)(i) as it only necessitates evidence that the accused made his or her contribution knowing that the crime was going to be committed rather than demanding that the accused act with the goal of furthering the commission of the crime. The difficulty with fulfilling this element has to do with how the term ‘the crime’ should be understood as used in the *Rome Statute*. Referring to ‘the crime’, rather than ‘a crime’ suggests that, for liability to arise under art 25(3)(d)(ii), the accused must know that his or her contribution will assist in the completion of a specific crime and not contribute to the commission of any crime.<sup>106</sup> This is also the only instance of the term ‘the crime’ being used in this way in art 25. In other similar contexts, the phrase ‘a crime’ is used instead. The different usage here suggests an intention on the part of the drafters to distinguish the evidentiary showing required under art 25(3)(d)(ii). If the subsection is read in this way, it

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<sup>101</sup> *Rome Statute* art 25(3)(d).

<sup>102</sup> Ambos, ‘Article 25: Individual Criminal Responsibility’, above n 57, 1015.

<sup>103</sup> United States of America, ‘Factual Proffer’, Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].

<sup>104</sup> See *Rome Statute* art 31(1)(d).

<sup>105</sup> *Ibid.*

<sup>106</sup> Ambos, ‘Article 25: Individual Criminal Responsibility’, above n 57, 1015.



will be much more difficult for the ICC to find that the Chiquita corporate officials are criminally liable. There is no evidence to suggest that the AUC was communicating its criminal intentions to Chiquita's employees so as to make them aware that the money paid by Chiquita was funding specific criminal activity. In fact, there is no evidence linking the payments made by Chiquita to any criminal activity at all. The money being paid by Chiquita could just as easily have been used to feed or house members of the AUC or for some other purpose unrelated to the AUC's criminal activity. Without evidence demonstrating that Chiquita knew that its money was being used to fund atrocity crimes, there can be no liability under art 25(3)(d)(ii).

### B Article 25(3)(c)

In addition to alleging possible art 25(3)(d) liability against Chiquita employees, the Communication also suggests possible art 25(3)(c) liability.<sup>107</sup> Article 25(3)(c) is an issue yet to be litigated before any of the Chambers of the ICC. Article 25(3)(c) is the *Rome Statute's* provision relating to aiding and abetting and requires a showing that:

- 1 A crime proscribed under the *Rome Statute* was committed or attempted;
- 2 The accused aided, abetted or otherwise assisted in the crime's commission or attempted commission, including providing the means for its commission; and
- 3 The accused acted for the purpose of facilitating that crime.<sup>108</sup>

The first of these elements is analogous to the first objective element of art 25(3)(d), and the analysis of that element is equally applicable here. The second element of art 25(3)(c) mandates that the accused aided, abetted or otherwise assisted in the commission or attempted commission of the crimes identified under the first element. Although aiding and abetting are often referred to together in criminal law, art 25(3)(c) is disjunctive and it can be fulfilled upon a showing that the accused participated in any of the three activities listed therein. In international law 'aiding' typically constitutes 'some form of physical assistance in the commission of the crime', although some definitions include assistance in the form of moral support.<sup>109</sup> Abetting is more passive and is achieved through 'exhortation or encouragement' to commit the crime.<sup>110</sup> The term 'otherwise assisted' does not appear to have a set meaning but acts as a catch-all phrase for any behaviour that is not encompassed by aiding or abetting.

It is not sufficient under customary international law to simply show that a person assisted, offered moral support or encouraged the commission of a crime

<sup>107</sup> *The Communication*, above n 1, [18].

<sup>108</sup> *Rome Statute* art 25(3)(c).

<sup>109</sup> Schabas, above n 26, 576; Ambos, 'Article 25: Individual Criminal Responsibility', above n 57, 1004; *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [484]; *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [231] ('*Furundžija Judgement*').

<sup>110</sup> Ambos, 'Article 25: Individual Criminal Responsibility', above n 57, 1004, citing *Furundžija Judgement* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [231].

for liability to arise under art 25(3)(c).<sup>111</sup> It is well established in the case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda ('ad hoc Tribunals') that any acts constituting aiding, abetting or another form of assistance must have a substantial effect on the commission of the crime.<sup>112</sup> While a general consensus exists that a substantial effect is necessary to prove aiding and abetting, there has been some disagreement about what is required to prove that the accused's actions constitute a substantial effect. In *Prosecutor v Perišić* ('Perišić'), the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found that, for the acts of the accused to meet the substantial effect requirement, they must be specifically directed towards assisting in the commission of the crimes committed by the principal perpetrators.<sup>113</sup> The purpose of the specific direction requirement was to establish 'a culpable link between assistance provided by an accused individual and the crimes of the principle perpetrators'.<sup>114</sup> The Special Court for Sierra Leone ('Special Court') later rejected this analysis in *Prosecutor v Taylor*. There, the Appeals Chamber found that neither customary international law nor the *Statute of the Special Court for Sierra Leone* required a showing of specific direction.<sup>115</sup> The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia followed that decision in *Prosecutor v Šainović*, and rejected the holding in *Perišić*, concluding that for an effect to be substantial the accused must have 'the knowledge that [his or her] acts assist the commission of the offense'.<sup>116</sup> It also agreed with the Special Court to the extent that the specific direction requirement conflicts with customary international law.<sup>117</sup> This leads to the conclusion that it is not necessary to prove specific direction when establishing that the assistance provided by the individual

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<sup>111</sup> *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1649] ('Šainović Judgement').

<sup>112</sup> *Prosecutor v Delalić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [352]; *Prosecutor v Naletić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [63]; *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [726]; *Rutaganda Judgement* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [43]; *Prosecutor v Musema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-13-T, 27 January 2000) [125]–[126]; *Prosecutor v Ndahimana (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-01-68-A, 16 December 2013) [147]; *Prosecutor v Nindiliyimana (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-56-A, 11 February 2014) [370].

<sup>113</sup> *Prosecutor v Perišić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013) [36].

<sup>114</sup> *Ibid* [37].

<sup>115</sup> *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, No SCSL-03-01-A, 26 September 2013) [472]–[475]. See also *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone*').

<sup>116</sup> *Šainović Judgement* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1649]–[1650].

<sup>117</sup> *Ibid* [1650].

accused of aiding and abetting had a substantial effect on the commission of the principle crimes.

It is unclear whether the substantial effect requirement will be applied at the ICC, although many believe that it will.<sup>118</sup> While the *Rome Statute* generally follows customary international law, there are some areas in which it departs by creating new law or modifying existing law.<sup>119</sup> Customary international law is only considered a secondary source of law at the ICC and therefore it is not required to mechanically transfer the jurisprudence of the ad hoc Tribunals into its own case law.<sup>120</sup> This ability to depart from customary international law is reflected in art 25(3)(c) of the *Rome Statute* which, unlike the law applied at the ad hoc Tribunals, contains a stronger mens rea requirement at the expense of a diminished actus reus standard.<sup>121</sup> Because the ICC applies a diminished actus reus standard when compared to the ad hoc Tribunals and customary international law, it is possible that the substantial contribution requirement will be discarded when aiding and abetting is considered by the ICC. Whether the ICC applies the substantial effect requirement is ultimately of no real importance, so long as some element of art 25(3)(c) obliges the prosecution to demonstrate a connection between the accused's activities and the commission of the atrocity crimes to which he or she is alleged to have contributed.

The final element of art 25(3)(c) liability establishes the heightened mens rea requirement and necessitates that the accused acted with the purpose of facilitating the crime. It is believed that some form of specific intent is required to fulfil this element meaning that it has a mens rea requirement that exceeds that found in art 30.<sup>122</sup> This is thought to be a vital criterion, particularly with regard to aiding and assisting, as those acts can often encompass innocent actions performed without knowledge of the principal perpetrator's intentions.<sup>123</sup> To meet the requirements of art 25(3)(c) one must act with the purposeful will to bring about the crime or to assist in its commission.<sup>124</sup> Mere awareness that one's actions will result in assisting in the commission of a crime is not sufficient to support liability under art 25(3)(c).<sup>125</sup>

This mens rea element shares much in common with the subjective element found in art 25(3)(d)(i), as it also requires evidence that the accused acted with the purpose of enabling the commission of the crimes and will require a similar evidentiary showing. There is little reason to believe that the demands of this element can be met with regard to Chiquita. The evidence indicates that Chiquita made payments to the AUC to avoid threatened acts of violence and not for the

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<sup>118</sup> Ambos, *Treatise on International Criminal Law*, above n 27, vol 1, 164.

<sup>119</sup> *Šainović Judgement* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1648].

<sup>120</sup> *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008) [508].

<sup>121</sup> *Šainović Judgement* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1648]–[1649].

<sup>122</sup> Schabas, above n 26, 578–9; Ambos, 'Article 25: Individual Criminal Responsibility', above n 57, 1009–10.

<sup>123</sup> Schabas, above n 26, 578–9.

<sup>124</sup> Héctor Olásolo and Enrique Carnero Rojo, 'Forms of Accessorial Liability under Article 25(3)(b) and (c)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 557, 584–5.

<sup>125</sup> *Ibid* 585.

purpose of facilitating the AUC's crimes.<sup>126</sup> Further, there is nothing to suggest a direct link between the money paid by Chiquita and the human rights violations committed by the AUC. The mere supposition that because Chiquita paid money to the AUC, and the AUC in turn committed atrocity crimes means that Chiquita's money was used to fund the commission of those crimes, is insufficient to support a reasonable suspicion that Chiquita employees acted with the purpose of facilitating those crimes. For these reasons, it is highly unlikely that an investigation into Chiquita's activities in Colombia will lead to the conclusion that charges can be brought against its employees.

## V CONCLUSION

This analysis highlights how difficult it is under the *Rome Statute* to apportion liability to corporate actors for their contributions made to the commission of crimes falling under the *Rome Statute*. Liability against corporate entities is not included in the *Rome Statute* and, even if the ICC could prosecute corporations, it would be extremely difficult to overcome the complementarity concerns or to compel corporations to involve themselves in the proceedings. The *Rome Statute* does make it possible to hold corporate employees responsible for actions committed while in the employ of a corporation. However, it will often be difficult to find evidence necessary to support a finding that the corporate employees had the requisite intent or knowledge to lead to liability for their actions.

This analysis also demonstrates that the situation involving Chiquita is probably not the right opportunity to expand the ICC's focus to include actions committed by corporate employees. The lack of any direct connection between the money Chiquita paid to the AUC and the AUC's criminal activity, the fact that the payments were likely the result of duress and the fractional amount Chiquita contributed to the AUC's overall assets all indicate that it will be very difficult to build a successful prosecution in this case. If the ICC wishes to investigate and prosecute individual corporate actors for their involvement in human rights abuses, which it should, there are better cases than this to achieve that goal. Although impunity should never be allowed to prevail, it is necessary that the ICC be regarded as legitimate to be able to effectively combat impunity. At this stage, an unsuccessful prosecution of corporate employees could undermine that legitimacy, making it more difficult for the ICC to conduct these sorts of investigations and prosecutions in the future.

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<sup>126</sup> United States of America, 'Factual Proffer', Submission in *United States of America v Chiquita Brands International Inc*, No 07-cr-00055, 19 March 2007 (DC Cir, 2007) [1]–[2].