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Dangerous Liasons: dilemmas for companies in the midst of conflict

The cases of Chiquita and Drummond have brought a complex issue to the table: the links between business and illegal armed groups in Colombia – which isn't only a problem of multinationals. Avoiding these links requires, however, greater clarity in the rules of the game for companies. These rules would have to strike a balance between the complexities of the conflict (the magnitude of extortion and the difficulty of distinguishing between victims and collaborators) and a trend of tougher international standards toward business (mis)conduct.

- In July of 2004 the multinational banana company Chiquita Brands sold its subsidiary in Colombia, CI Banadex, at a loss. The reason: systematic payments the company had made to paramilitary groups between 1997 and 2004 -which totalled US\$1.7 million- and the consequent legal troubles they had to face in U.S. courts for the "financing of terrorists"¹. The company says that these and other payments, to the FARC and ELN in Urabá, were made to protect their employees. "When I arrived to the Board of Directors (in March 2002), I knew the company was making payments to the paramilitary groups in Colombia....if they hadn't done it our people were going to be murdered" declared the Director of the Board, Morten Arntzen². He also warned that he had gone ahead because the payments were not illegal according to U.S. law³. Notice, nevertheless, that despite being convinced of acting within the law, the company had gone to the trouble of hiding payments, using front men and accounting tricks to camouflage them⁴.

- Besides the payments, Chiquita was also involved in the 2001 trafficking of 3,400 AK-47 rifles and

ammunition that arrived in Urabá on the ship Otterloo from Nicaragua and ended up strengthening the AUC's arsenal. Chiquita unloaded and stored the weapons. This was possible due to Banadex's special customs area that, according to what has been revealed, was obtained with a US\$30,000 bribe paid to DIAN (National Tax Agency) officials⁵. This bribe cost Chiquita a US\$100,000 fine paid to the U.S. Securities and Exchange Commission in the United States.

- In regards to the Chiquita case the Minister of Defence Juan Manuel Santos said "Making payments to illegal armed groups is a crime, the payment of extortion is a crime and we applaud that this (the fine of US\$25 million imposed on Chiquita by a Washington Court) has occurred"⁶. Later, Santos said that "there are legal doubts because of two decisions of the Constitutional Court to define the payment (of extortions) as crime"⁷. Nevertheless, the Attorney General Mario Iguarán has suggested that Chiquita may be put on trial in Colombia because the link wasn't limited to one of "extorted and extorter... it was a criminal relationship involving money and a number of weapons in exchange for the bloody pacification of the Urabá Antioqueño ... in principle what we are witnessing is that some private companies recruited the paramilitaries in order to defend themselves, conscious of the behaviour of paramilitaries which included committing murder"⁸.

- Despite still being in the investigation stage, the Drummond case is similar, except that the suit, also in the United States courts but under the laws known as the Alien Torts Claims Act (ATCA) and the Torture Victims Protection Act (TVPA) is not for paramilitary payments per se but for the murder, in 2001, of Valmore Locarno Rodríguez, Víctor Hugo Orcasita and Gustavo Soler Mora, directives of Sintramienergética⁹. Rodríguez and Orcasita were taken off the bus in which they were travelling and were killed by 15 supposed paramilitaries near

Valledupar, just 48 kilometres from the La Loma mine, owned by Drummond. Soler was murdered in a similar way in October of the same year¹⁰. The families of the trade unionists, who filed the suit, argue that Drummond and specifically its President Augusto Jiménez, instigated the murders. This presumes that Drummond had links with the paramilitaries.

- The trade union, another plaintiff, says that Drummond used the paramilitaries to weaken it¹¹. According to the judge in charge of the case the evidence is weak. However, the testimonies refer exactly to those links. "Luis Carlos Rodríguez, head of security at Drummond, told me that he had a close relationship with the paramilitaries" said a witness. A former employee of Drummond explained that, on various occasions, he had had to fill paramilitary vehicles with fuel and that it was evident at the time that paramilitaries were travelling in trucks contracted by Drummond¹². To complicate the matter further, there are other testimonies, amongst them one made by a member of the armed forces, that denounced the supposed links between the military that Drummond provided help to (through collaboration agreements that are legal in Colombia) and paramilitaries in the region¹³. Drummond has denied the charges and has stated that the company does not negotiate with illegal armed groups¹⁴.

- Meanwhile, the demobilization of paramilitary groups and the confessions by some of its members, as part of the implementation of the Justice and Peace Law, have uncovered concrete evidence of links between the armed forces and the paramilitaries. The most recent case condemned by the Ministry of Defense was that of active Colonel Hernán Mejía Gutiérrez and his presumed links with the paramilitary group of the leader known as "Jorge 40"¹⁵.

- Extortion has not been an exclusive practice of the paramilitaries. A FARC notebook seized by the military in San Vicente del Caguán (Caquetá) in February had reference to a list of farmers and small businesspeople made to pay extortion by the guerrilla group. Apparently they had paid 8000 million pesos in an undetermined time period. This information prompted the same warning that Minister Santos had given to Chiquita, "I remind you that paying extortion is a crime". This was, however, followed by an exhortation, "I ask you from the heart that you collaborate with the security forces. If no one pays, there will be no more extortion"¹⁶.

- In academic research conducted in 2005 and 2006 regarding the costs of conflict to the private sector, FIP found that small businesses, farmers

and transporters in Huila were harassed by the FARC, who didn't just demand periodic payments. "The situation is very complex for some small businesses" said a source. "With time they don't have sufficient money to pay them so the guerrilla asks for contributions in kind and they offer to get clients for the business. Now the businessperson is trapped. Contact becomes greater and the guerrilla starts asking for information about the neighbourhood, about who is who, if the police come by... there is always the risk they will kill them if they don't collaborate", he added. Another source stated that business shops in one street paid for private security to avoid theft, but the security guard was also in charge of verifying who hadn't made their payments to the FARC; the omission of one payment put everyone at risk if the FARC placed a bomb. In Huila cases have also arisen where those being extorted have revealed the name and details of other potential contributors so the FARC will give them a discount. This is exactly what happens with the promotions done by banks or supermarkets. In this way the degradation of this practice thereby converts victims into potential offenders or accomplices to the crime (See: Siguiendo el conflicto, No. 43 "La telaraña de la Teófilo")

- During the same investigations a contractor of an extractive company stated that the paramilitaries had made him sub-contract "some of their cars" and they had even established the price. "To me that is an extra cost. I later charged the company for it, by inflating some of the costs", he said.

Analysis

These cases give rise to various reflections about the rules of the game for companies when they find themselves in difficult circumstances. Does the protection of a company and its employees justify the systematic payment of money to the guerrillas and paramilitaries? What is the responsibility of a company to the violation of human rights committed by its security contractors and the armed forces that receive their help? Should a farmer or small businessperson be treated the same as a large company that can have security agreements with the armed forces? What is to be done with the financiers or collaborators of an illegal armed group in the middle of a peace negotiation?

Pondering the rules means keeping the following points in mind. Extortion can be more widespread than official figures and research surveys estimate (on average 2,000 per year)¹⁷. This can be deduced from the finances and strategies of the armed groups. Despite the fact that the ELN has increased its connections with drug trafficking, kidnapping and extortion have traditionally been

their main sources of income, and it is possible that the FARC earn around 40% of their income from extortion¹⁸. Recent confessions of demobilized paramilitaries reveal that extortion was a very frequent activity, though in absolute terms income from drugs outweighed that from extortion. The objectives of extortion were not only economic, but also political and strategic: seeking to block the guerrillas, expanding their own sphere of influence, and purchasing “guarantees”, that is, compromising businesses so that, in the hope of receiving reduced punishments when their day of reckoning with justice comes, they can point to the connivance of “lenders” from the business community whom society would be less inclined to punish. If one looks at the geography of the armed conflict, one would probably conclude that extortion is very frequent and that regional areas are the most affected. According to the official data from Fondelibertad, between 2002 and 2007, the principal cities where extortion occurs most are: Bogota (622 cases), Medellin (232), Bucaramanga (193), Villavicencio (173) and Neiva (155)¹⁹. However, experts agree that, unlike kidnapping and other crimes, there is an underreporting of extortion. “It is perceived that the authorities are not efficient. Moreover, one never knows who’s on whose side: what if the FARC have infiltrated the police?” said an interviewee in Huila. Victims don’t report because they think that the authorities are either incapable of protecting them or don’t do it because they have been infiltrated. Furthermore, in the case of those extorted by the guerrilla, the victims are afraid of facing accusations of being labelled “collaborators” of the guerrilla.

Although it is true that there is a “Policy against extortion and kidnapping for extortion” and the capacity to combat it has been improved²⁰ -of every 100 cases of extortion presented to the authorities 90 are prevented-²¹ the percentage reported is still small.

What does this mean? The underreporting is indicative that the laws haven’t accomplished their purpose of preventing extortion. The law aspires, mainly, to punish the extortionist without alienating the victim of extortion, while at the same time giving the authorities sufficient information about when and where the extortion occurs so they can act appropriately. That’s why the victim of extortion is not punished for paying but for “failing to denounce”, with 3 to 8 years jail time. However, as is clear from the exhortation of the Defense Minister Santos, the legal mechanism does not work in practice, and it makes no sense to incarcerate hundreds of rural workers, farmers

and businesspeople – especially when peace in the areas of influence of the illegal armed groups depends on community solidarity.

The size of the companies matters. It is a fact that small and medium-sized businesses are the most vulnerable to extortion. Large businesses have many ways to protect themselves from the effects of the conflict: their directors live in the large cities, they can hire effective private security, and they can more easily get the authorities’ attention. Yet the alternatives that large companies have are not always optimal nor without problems. In Colombia, relying on the protection of the public security forces carries the risk that its members, or the personnel of private security companies, may become involved in human rights violations or have connections with illegal armed groups, which is what could have happened to Drummond. In any event, this does not excuse large companies that turn automatically to illegal armed groups for their protection. As will be outlined below, there are now rules for these cases. The criteria could be that the businesses have to show that they have made every possible effort and exhausted every possible option before opting to make payments to illegal armed groups. One task for the government is to ensure that the agreements with the public security forces and private security companies carry as little risk as possible for the companies.

The distinction between victims and victimizers is not always clear. For example, not only in the case of the multinational Chiquita but also in those of the small businesses of Huila and of the contractor who inflated his costs, it is clear that extortion results from the difficult connections between businesses, the guerrillas, and paramilitary groups. Chiquita not only made payments, but also allowed Castaño the use of their facilities to import arms illegally. The businessperson not only makes payments in cash, but also does business and supplies information to the FARC. The contractor does not make payments, but benefits economically when the paramilitary groups use its services at guaranteed rates. Where does one draw the line? There is a clue in the points made above and in what follows.

The international tendency is to toughen standards with respect to the conduct of companies. First, there is the growing acceptance that businesses, both multinational and domestic, can and should “do more” in promoting and protecting human rights, among other things by following the principle of “do no harm”, especially in areas of armed conflict and weak governance. Briefly, this principle means not to contribute to violence nor undermine democracy. There is as of yet no

binding regulation or international treaty on which enforceable laws applicable to the behavior of business can be based. Nevertheless, such growing expectations are being included in voluntary codes of conduct, performance standards of international institutions, and quality standards that have a real impact in the market. This leads to a situation where multinational companies cannot use the absence of laws as an argument in their defense. The "soft doctrine" and common sense related to universal democratic values act to fill the legal gap. One example of these standards is the business code called Voluntary Principles on Security and Human Rights which was negotiated and signed by the large multinationals of the resource-extraction sector such as BP, BHP Billiton, AngloAmerican, Occidental Petroleum, Chevron-Texaco, Shell and Rio Tinto, by international NGOs such as Human Rights Watch, International Alert and Amnesty International, and by the governments of the United States, Great Britain, Norway and The Netherlands²². The Voluntary Principles recommend how to carry out risk analysis of security, political and socio-economic issues so that businesses can identify the risks of operating in areas where violence occurs and the impacts that their actions can have, especially on conflict dynamics and on the human rights situation. In addition, the code enumerates best practices with respect to business' relationships with the public security forces (among them the terms of cooperation agreements with local security forces), and with respect to the contracting of private security companies. These practices have been included in contractual clauses for agreements with security forces, private security companies, and service providers for extractive industries throughout the world, including in Colombia. Similarly, since 2006 some provisions of the Voluntary Principles have been included as performance standards to obtain loans from the International Financial Corporation (IFC) for economic projects in countries like Colombia, and they also appear in the contents of the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones of the Organization of Economic Cooperation and Development (OECD), that applies to the companies from thirty of the most developed countries in the world, among them the United States, France, Germany, Australia, Switzerland, Great Britain and Norway.²³ The more foreign investment that comes to Colombia, the more these rules of the game apply here.

Additionally, amongst the experts and community of lawyers talk has now begun regarding the "complicity" of companies in the violation of human rights. For instance, the majority of the

cases under ATCA in the United States, 40 up until now, have in fact tried to demonstrate that the companies had indirect responsibility for the violation of human rights through their payments to armed forces disrespectful of human rights, to hardline governments responsible for the death of civilians, to private security firms with connections to paramilitaries that assassinated trade unionists or activists or that they contracted "slave" labour, amongst other charges. In the case of indirect participation there is "complicity" to "aiding and abetting" in the directive of crimes. The crime has various fundamental requisites: 1) that it is a crime against humanity; 2) that the accomplice has contributed materially, "directly and substantially" to the crime; 3) there must be elements of knowledge or intent, or imprudent behaviour²⁴. According to the International Council on Human Rights Policy there would be at least four types of complicity: 1) Active assistance: a company assists actively, directly or indirectly, in human rights violations committed by others; 2) Direct beneficial relationship: when a company has a contract of association, or similar, with a government and could reasonably foresee or eventually obtain knowledge that it is possible the government will commit abuses in the implementation of their part of the agreement; 3) Indirect beneficial relationship: a company benefits from the opportunities or environment created by the violations of human rights although they don't aid or cause the perpetrator to commit the violations; and 4) Silent testimony: a company remains silent or fails to act in the face of human rights violations²⁵. One therefore talks of a "norm cascade" by means of which characterisation of these crimes will become clearer as time passes²⁶.

The second process that has raised the standards for companies is the greater political and legal attention paid to the fight against terrorism since the September 11 attacks of 2001. The International Convention for the Suppression of Financing of Terrorism, adopted by the United Nations General Assembly in 1999 and the 2001 resolution 1373 of the United Nations Security Council have served to drive the anti-terrorist legal development at the global level and lay down stricter norms for companies. Chiquita was judged and obligated to pay for "financing terrorism", not for being an accomplice to the violation of human rights²⁷. Moreover, that they were victims of extortion was not an argument that the lawyers for the defense used. Colombia legislation makes the financing of terrorism an offense under Law 1121 of 2006. A person can be accused of financing terrorism when they "directly or indirectly provide, collect, deliver, receive, administer, contribute,

keep or hold funds, goods or assets, or realize any other act that promotes, organizes, supports, maintains, finances or sustains economically illegal armed groups or member of such groups, or national or foreign terrorist groups, or national or foreign terrorists, or terrorist activities". The law calls for a prison sentence of minimum 13 years and maximum 22 years and for a fine of 1,300 to 15,000 times the monthly minimum salary at the time the offense was committed. However, it is important to remember that since 1993, with the passing of Law 40 (National Statute against Kidnapping), the Congress foresaw the imposition of sanctions on national and foreign companies who hide or collaborate in the payment of extortion through kidnapping. These provisions of Law 40 were questioned at that time by the Constitutional Court²⁸.

Clarifying the rules is crucial in the current situation for at least three reasons. The first is that Colombia, unlike many other countries with armed conflicts, as FIP has stressed (See: Ending the Conflict), has a robust private sector and democratic institutions. This represents both challenges and opportunities. The challenges: the instrument of transitional justice which has been created for the movement from war to peace, the Peace and Justice Law, has loopholes. It didn't consider the complete political economy of conflict nor did it anticipate that the confessions of the paramilitaries were going to unveil their different links, direct or indirect, with companies through shady or legal transactions. For example, it is very possible that the links between business sectors and illegal armed groups will become clearer by those seeking protection under the Justice and Peace Law and by means of the use of the principle of opportunity²⁹ set out by the Prosecutor's Office, which offers benefits to the front men of the paramilitary groups in exchange for their confession.

Furthermore, the shift in the balance of power between republicans and democrats in the United States makes it even more important that Colombia has a serious answer to this problem – as unjust as it appears to some. Let us not forget how many times the democrats have suggested that Colombian businesspeople have been instrumental to the conflict.

A second reason is the post-conflict scenario. No post-conflict situation is easy, it is not one-hundred percent peaceful and is not exempt from breakouts of criminal activity that arise with the re-adjustment of the old forms of social, political and economic control exercised by the armed groups. In Colombia

the sprouting of criminal bands involved in extortion and illegal trafficking indicate that the abuse of the legal economy, and in particular extortion, are here to stay. The risk to companies is high.

Finally, the construction of a lasting peace will have to go through the consolidation of the democratic institutions and greater economic development in the regions where the conflict has found a greater hold. This is what reconstruction means. There won't be any reconstruction if the economy cannot function properly and is trapped by mafia rules and "bound transactions" that impose heavy costs upon companies. The large companies will have problems being competitive, while the small and medium-sized businesses, upon whom we rely on for regional development, will not be viable. Ending the conflict is not only a question of political will and resources, it is also a question of clarifying everybody's practices, including those of companies.

Note

Fundación Ideas para la Paz, along with other multinational and Colombian companies, has been facilitating the process of adoption of the Colombia Guidelines. This is a code of conduct made by Colombians and inspired by the Voluntary Principles of Security and Human Rights. See more details at: <http://www.ideaspaz.org/>

*Notes

* With the collaboration of Román D. Ortiz y Juan Carlos Palou.

1 "Chiquita admits payments to terror groups", *The Seattle Times*, May 12, 2004; "Chiquita Agrees to Sell Operations in Colombia", *PRNewswire*, June 11, 2004; "Documents: Chiquita paid up despite warnings", *Miami Herald*, April 17, 2007.

2 "The Extraditable", *Semana*, Edition 1300, March 31, 2007.

3 *Ibid.*

4 "Chiquita Brands International have links to the AUC", *El Espectador*, March 14, 2007.

5 "Banana para-republic", *Semana*, Edition 1298, March 17, 2007.

6 "Mindefensa applauds fining of Chiquita Brands", *Radio Station of the Colombian Army*, March 15, 2007.

7 "Apparent legal loopholes impede the extradition of Chiquita Brands directors", *Caracol Radio*, March 18, 2007.

8 "Office of the District Attorney investigates multinational Drummond", *Portafolio*, March 21, 2007.

9 The Alien Tort Claims Act (ATCA) is a 200+ year-old law that grants jurisdiction to US Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Torture Victim Protection Act (TVPA) concerns the victims of torture and extra-judicial execution and has also been used on various occasions to sue companies in the United States, amongst them Drummond in Colombia.

10 Estate of Rodriguez, et. al. v. Drummond Company, Inc., et. al. Case No. CV-02-0665-W (N.D. Ala. 2002).

11 *Ibid.*

12 “Darkness in the mine”, *Semana*, Edition 1299, April 24, 2007.

13 According to *Semana*, the agreement between Drummond and the Ministry of Defence includes “logistical assistance like food, fuel and vehicles”. Drummond would also have financed the construction of military bases that are found near its facilities. According to the statements of Gary Drummond, the company would have paid close to US\$500,000 (more than a thousand million pesos) to the armed forces between 2000 and 2003. See: “Darkness in the mine”, *Semana*, Edition 1299, April 24, 2007; “Coal Exec Denies Link to Paramilitaries”, *Associated Press*, April 10, 2007.

14 “Drummond denies link to armed group”, *Miami Herald*, March 23, 2007.

15 Memo from the Ministry of Defence, January 26, 2007; “From Hero to Villian”. *Semana*, Edition 1291, January 29, 2007.

16 “Paying extortion is a crime”, *SNE*, February 22, 2007.

17 Angelika Rettberg, “The costs of the armed conflict to the Colombian private sector: results of a national survey”, Conpaz-Department of Political Science, University of Los Andes, 2006.

18 Intelligence Committee Group—JIC in Spanish. Estimate of the income and expenditure of the FARC during 2003 based on information collected by State agencies. Bogotá D.C., February 24th, 2005.

19 Office of Advisory against Extortion and Kidnapping, Ministry of National Defence. Interview carried out April 19, 2007.

20 Currently there are 19 Military Kidnap Units and 17 Police Kidnap Units. All authorities in charge of developing policy against these crimes are in the process of implementing an Integrated Information System against kidnapping and extortion (SIIES in Spanish), an information resource allows authorities to have up-to-date and online information about the judicial status of these processes. The institutional structure designed to prevent and combat the crime of extortion also includes another series of operational units. The national Police have an Office of Anti-Kidnapping and Extortion (DIASE in Spanish), the DAS also have a Suboffice of Anti-Kidnapping and Extortion (2002) and in 2001 the Attorney General created a Kidnapping and Extortion Unit. The Treasury also set up an Information and Financial Analysis Unit (UIAF in Spanish) (1999). Finally bodies such as the DIJIN and SIJIN complete the basic structure the State has created to combat this crime.

21 Office of Advisory against Extortion and Kidnapping, Ministry of National Defence. Interview carried out April 19, 2007.

22 See <http://www.voluntaryprinciples.org/>

23 International Finance Corporation, “IFC’s Sustainability Policy Framework: sustainability policy, performance standards, guidance notes, disclosure policy and other resources”, 2006; OECD, “Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones”, 2006.

24 Fafo e International Peace Academy, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, 2004.

25 International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international obligations of companies*, 2002.

26 Another clear indication is that since 2005 the General Secretary of the United there has had a Special Representative specifically for the issue of companies and human rights, John Ruggie.

27 “Chiquita case puts big firms on notice”, *Christian Science Monitor*, April 11, 2007.

28 The implications of this article of Law 40 of 1993 (Art. 25) mean that in the same year the law was issued it was brought before the Constitutional Court, which had then been recently created. At the time the court presented a series of basic reasons to declare the conditional enforceability of this article: “*The rights to life and freedom cannot be sacrificed by a person in honour of the general interest, except when that person accepts the sacrifice freely and voluntarily (...)* Annulling, a rule of the Constitution that established as crime the reasonable conduct of individuals directed to protect life and liberty, their own or a fellow person (...)”. For these reasons the Tribunal decided to declare Article 25 enforceable, except “*when the agent acts in some circumstance under the facts predicted in the penal Law*”. This decision displayed in the 1993 sentence C-542 was reiterated by the Court themselves in the 1994 sentences C-069 and C-213.

29 For the Attorney General, Mario Iguarán, the use of this figure is completely justified: “*It’s so that we know the whole truth, not just who was to blame for the massacre but so that we also know who the masterminds, the transporters, dealers, creditors, insurers, currency exchange offices or casinos were and that they aren’t businesses but fronts*” (Declarations given by the Attorney General, Mario Iguarán Arana, with respect to the application of the principle of opportunity to the paramilitary heads that submitted to Justice and Peace. Office of the Attorney General, March 8, 2007).