

The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship¹

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From 1976 to 1983, Argentina was ruled by a military dictatorship whose tactics included the widespread torture, murder, and enforced disappearance of thousands of people. Since the junta's fall, the country has taken steps to pursue justice for this period of mass repression. With the repeal of controversial amnesty laws in 2003, the dossier on impunity has again been thrown open.

This paper examines a missing element along this spectrum of Argentina's long search for accountability and justice: the role of foreign financial institutions and the potential to claim that they were complicit in supporting a regime well-known to have been committing mass human rights violations. The article begins by considering the technical legal features of corporate complicity in domestic and international law, paying particular attention to jurisprudence on commercial contributions to states that commit crimes against humanity. It then turns to an examination of em-

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pirical and historical data from the Argentinean dictatorship to apply these understandings of corporate accountability to a case-study. It also juxtaposes other factors—such as the Carter administration's withholding of financial assistance to Argentina on the explicit basis of the massive violations of human rights known to be taking place there—suggesting evidence that particular banks were enabling the junta to continue to function in a world that had largely shut down previous channels of economic and political support.

Finally, the authors suggest that the assistance provided by private financial institutions played a significant enough role in the Argentinean dictatorship to warrant a closer examination and possible future legal action on the basis of complicity in crimes against humanity. The authors conclude that further investigation along these lines could fulfill dual goals of filling a missing piece of the Argentinean historical narrative of responsibility for these crimes and, more broadly, furthering the study and evolution of civil responsibility for corporate complicity.

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“By their “rationale,” loans to Nazi Germany would have received *pro forma* approval so long as they were economically viable. Somewhere the line has got to be drawn.”⁴

INTRODUCTION

This paper examines the main legal aspects of corporate civil responsibility for facilitating serious violations of human rights, focusing specifically on bank activity. It analyzes, in detail, the Argentinean case and the financial support received by the last military dictatorship (1976-83).

There are at least three options for legal remedies to channel the consequences of financing crimes against humanity. The first option is to challenge the very validity of the loan, which is related to the odious debt debate.⁵ The second is to prove the criminal responsibility of the accomplices.⁶ And the third—the option this paper focuses on—is to demonstrate civil responsibility for the corporate complicity in question.

The first section of this piece lays out the legal evolution of corporate responsibility for complicity with human rights abuses. It begins by addressing how this concept of responsibility has evolved from the jurisprudence of the post-World War II tribunals to the activities and statutes of current international criminal courts, as well as elaborating generally on soft law in this area. It next touches on some particularly striking developments in corporate accountability, such as recent progressions with the use of the U.S. Alien Tort Claims Act. Following this general description, the paper analyzes the factors that make corporate complicity illegal, the ‘mental state’ requirements for being held responsible, the types of damages recognized as requiring compensation, and the causal links between a corporation’s contribution and these damages. It also presents some of the legal and practical realities that continue to make civil liability for corporate complicity a thorny issue in international law.

The second section—in essence a case-study—provides an empirical analysis of the behavior of the lender banks, the U.S. government, and the

4. Letter from Steven Oxman, U.S. Diplomat, to Warren Christopher, U.S. Deputy Sec’y of State (Jun. 20, 1977) (handwritten notes on a copy of a memorandum from Hal F. Reynolds to A. Nachmannoff) (on file with authors).

5. See generally SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE (2007); Juan Pablo Bohoslavsky, *El Pago al Club de Paris y la Evocación a la Revitalizada Doctrina de las Deudas Odiosas*, J.A. (2008-IV-1407) (exploring the odious debt debate and applying it to the Argentinean case); Lee C. Buchheit, G. Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007); Anita Ramasastry, *Odious Debt or Odious Payments? Using Anti-Corruption Measures to Prevent Odious Debt*, 32 N.C. J. INT’L L. & COM. REG. 819 (2007).

6. Cristina Chiomenti, *Corporations and the International Court*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 287 (Olivier de Schutter, ed., 2006); Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters*, 98 J. CRIM. L. & CRIMINOLOGY, 921, 952 (2008); Report of the International Law Commission to the General Assembly, [1996] 2 Y.B. INT’L L. COMM’N 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

international community toward the last Argentinean dictatorship. In order to assess correlations between the bank loans granted to this country and the criminal activities of the junta, the second section also looks closely at the macroeconomic performance of the Argentinean economy between 1976 and 1983 and the evolution of military expenditures during that time.

This kind of empirical analysis contributes to the essential task of establishing whether the legal requirements of civil responsibility for corporate complicity are present in this case. The Argentinean case is particularly relevant since criminal trials against the former dictators are ongoing today, and the country continues to grapple with unfinished questions of accountability and truth about this era. In this way, studying the Argentinean case is more than an exercise in assessing the boundaries of corporate complicity: on a more fundamental level, examining the role that banks played allows the country to look at a missing piece of the puzzle, to pursue the full spectrum of justice for this era, and to understand both the national and international dynamics that contributed to the junta's rule.

I. CORPORATE CIVIL RESPONSIBILITY FOR CONTRIBUTING TO THE VIOLATION OF HUMAN RIGHTS

A. *The Evolution of Responsibility for Complicity*

Current notions of corporate responsibility for facilitating human rights abuses are backed by legal theories whose origins can be traced back to the trials that followed the Second World War.

The first formal reaction toward corporate responsibility emanated from criminal law. Article 6 of the statute of the Nuremberg Military Tribunal imposed sanctions on individuals who cooperated or contributed to the commission of principal crimes. The so-called "industrial cases," tried in both the Nuremberg and United Kingdom tribunals, have been the foundation stone for this kind of responsibility for complicity. In these trials, grounded in customary international law, German industrialists who collaborated with the Nazi regime were held responsible for their financial and material support. Among other civilians who were tried for assisting in carrying out the genocide committed by the Nazi regime⁷ were Bruno Tesch, who was found to have contributed commercially by providing the lethal gas used in the Auschwitz concentration camp,⁸ and Friedrich Flick, who was found to have contributed financially by profiting from slave labor

7. See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002).

8. Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947) (Brit. Mil. Ct. 1946).

in the camps and then donating a portion of the profits to the SS command to help sustain its activities.⁹

The sentences that such individuals received were clear in terms of analyzing and judging the behavior of corporations,¹⁰ a fact that continues to be elaborated on in contemporary scholarship dealing with this issue.¹¹ This notion of responsibility for complicity was recognized by these post-World War II tribunals, which gave content and vigor to the modern status of corporate responsibility for complicity or, in other words, made clear that so-called entrepreneurs could be held responsible for abetting or facilitating the commission of crimes against humanity.¹² The Nuremberg trial—distinguishing due obedience from cooperation—explicitly pointed out this idea:

Those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it He had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing.¹³

Since 1945, several international conventions that protect fundamental human rights have been approved. Most of them incorporate specific norms about the responsibility of the accomplices who contribute to or collaborate with the principal perpetrators of these crimes. These norms can be found in Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3b of the International Convention on the Suppression and Punishment of the Crime of Apartheid; Article 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Article 3e of the Convention on the Prevention and Punishment of the Crime of Genocide; Article 1.2 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; Article 5.1.b of the United Nations Convention Against Transnational Organized Crime; Article 2.5.a of the International Convention for the Suppression of the Financing of Terrorism; and Article 2.3.a of the International Convention to Repress Terrorist Attacks with Bombs.

9. United States v. Flick (*The Flick Case*), Case No. 5, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 3 (1952) (Nuernberg Mil. Trib. 1947).

10. See Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 325, 343, 362 (2008).

11. See Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094 (2009).

12. Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZ. L. REV. 76, 76 (2007).

13. United States v. Goering (*The Nurnberg Trial*), 6 F.R.D. 69, 112 (Int'l Mil. Trib. 1946).

Likewise, Article 25.3 of the statute of the International Criminal Court and the statutes of the International Criminal Tribunal for Rwanda (art. 6, applied in *Akayesu*¹⁴) and the International Criminal Tribunal for the former Yugoslavia (art. 7, applied in the cases *Furundzija*¹⁵ and *Vasiljevic*¹⁶) explicitly sanction and punish acts of complicity in the commission of crimes against humanity.

Accountability for corporations has evolved over the years, gradually incorporating notions of civil responsibility for the corporations themselves.¹⁷ Emerging soft law, embodied in codes of conduct that give life to social corporate responsibility,¹⁸ has also headed in this same direction. These codes have been promoted and developed by the United Nations (“UN”),¹⁹ the Organization of Economic Cooperation and Development (“OECD”),²⁰ and Amnesty International,²¹ and, notably, some already existed prior to the Argentinean dictatorship.²²

The cumulative evolution of these codes was crystallized and developed in a recent 2008 report, *Corporate Complicity and Legal Accountability*, by the International Commission of Jurists (“ICJ”).²³ This report emphasized that corporations should be held responsible for assisting in gross violations of human rights when they “enable,” “make easier,” or “improve the efficiency” of the commission of those crimes.²⁴ In other words, corporations should be held responsible when, with their contributions, they “make possible,” “facilitate,” or “exacerbate” the human rights abuses in question.²⁵

In terms of the types of crimes that can be seen as connected to this “contribution” from corporations, it has been established that the contribution must be linked to behavior that affects interests protected by the maximum legal strength offered by the law: those protected by *jus cogens*

14. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 471-91 (Sept. 2, 1998).

15. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 187-90 (Dec. 10, 1998).

16. Prosecutor v. Vasiljevic, Case No. IT-94-32-A, Judgment, ¶¶ 94-95, 102 (Feb. 25, 2004).

17. See PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 514 (2d ed., 2007).

18. See JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006); Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations—A Small Piece of a Large Puzzle* (NYU Sch. of Law, Global Law Working Paper 01/05), available at http://www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM_DLW_015830&RevisionSelectionMethod=LatestReleased.

19. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

20. Org. for Econ. Co-Operation and Development [OECD], *OECD Guidelines for Multinational Enterprises* (Jun. 27, 2000).

21. Amnesty Int’l, *Human Rights Principles for Companies*, AI Index ACT 70/01/98, 1998.

22. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, at 3, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974); E.S.C. Res. 1913, 57th Sess., Supp. No. 1A, U.N. Doc. E/5570/Add.1 (1975).

23. 1 INTERNATIONAL COMMISSION OF JURISTS, EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY (2008) [hereinafter ICJ VOL. 1].

24. *Id.* at 9.

25. *Id.*

norms.²⁶ To date, litigation has only been successful in cases dealing with the most egregious violations of international law.²⁷

American jurisdiction has also been forced to tackle these questions of civil corporate responsibility, following a rash of claims (there have been more than forty cases to date²⁸) against corporations that in one way or another have been charged with facilitating the perpetration of serious crimes. These cases, which have produced a range of solutions, according to the circumstances of each case, have included claims against the following:

- Chiquita, for allegedly bankrolling Colombian paramilitaries in order to keep its banana plantations free of “labor opposition and social unrest;”²⁹
- Several American, Austrian, French, German, and Swiss banks and corporations for having aided the Nazi regime by providing it with the necessary financial help to continue World War II for at least another year past the point when it would otherwise have ended, for not reintegrating the bank deposits to the victims, and for using slave labor;³⁰
- Banque Nationale Paris Paribas, for allegedly having paid Saddam Hussein’s regime, in violation of the UN’s Oil for Food program;³¹

26. “*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.” MARK. W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-63 (4th ed. 2003). See also Int’l Law Comm’n, Study Group, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, at 189, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskeniemi); *Report of the International Law Commission to the General Assembly on the Work of its Fifty-Third Session*, at 289-90, U.N. Doc. A/56/10, reprinted in [2001] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

27. Ramasastry, *supra* note 7, at 98.

28. Human Rights Council [HRC], *Promotion and Protection of All Human Rights, Civil, Political, Economic and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); The Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect, and Remedy” Framework, delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (clarifying the concepts of “sphere of influence” and “complicity”).

29. Complaint, ¶ 2, *Does v. Chiquita Brands Int’l, Inc.*, No. 07-CV-10300 (S.D.N.Y. Nov. 14, 2007).

30. See *In re Austrian and German Bank Holocaust Litig.*, No. 98 Civ. 3938 (S.D.N.Y. Mar. 7, 2001); *In re Holocaust Victim Assets Litig.*, No. 96 Civ. 4849 (E.D.N.Y. Nov. 22, 2000) (Swiss corporations); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (French corporations); see also Roger Alford, *The Claim Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKELEY J. INT’L L. 250 (2002); John Authers, *Making Good Again: German Compensation for Forced and Slave Laborers*, in THE HANDBOOK OF REPARATIONS 420-48 (Pablo de Greiff ed., 2006); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 615-22; Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT’L L. 325 (1998); Morris Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. ANN. SURV. AM. L. 623 (2003).

31. *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (S.D.N.Y. Sept. 25, 2008).

- Yahoo, for providing the Chinese government with information and records that permitted it to identify and allegedly torture a human rights activist;³²
- Nestlé, for buying cocoa from and providing services to plantations using children as workers;³³
- Unocal, for participating in the building project of an oil pipeline that allegedly hired security forces that forced people to work and relocated, killed, and raped people in Burma;³⁴ and,
- Barclay's Bank and other multinational companies for providing loans, vehicles, and other essential equipment to support the *apartheid* regime in South Africa.³⁵

Corporations have increasingly become key players in the functioning of the modern economy and also have become increasingly relevant to the decisions and activities that states make and conduct.³⁶ This expansion of the power of corporations has also presumably influenced the legal strengthening of the idea, echoed by courts, that corporations can violate or substantially contribute to the violation of human rights,³⁷ as a result, these private entities also have increasing duties.³⁸

B. *What Factors Make it Illegal to Contribute to the Commission of Human Rights Violations?*

Both sovereign states and private entities,³⁹ including corporations,⁴⁰ must fulfill the international obligations that emanate from *jus cogens*

32. Plaintiff's Second Amended Complaint, ¶ 2, *Xiaoning v. Yahoo! Inc.*, No. 07-CV-02151 (N.D. Cal. July 30, 2007) (case settled).

33. Complaint, ¶¶ 35-37, *Doe v. Nestlé, S.A.*, No. 05-CV-05133 (C.D. Cal. July 14, 2005).

34. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reb'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and vacated and appeal dismissed following settlement*, 403 F.3d 708 (9th Cir. 2005).

35. *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd without opinion sub nom*; *Am. Isuzu Motors Inc. v. Ntsebeza*, 128 S.Ct. 2424 (May 12, 2008), *claims dismissed in part on remand sub nom*. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

36. ZERK, *supra* note 18, at 8.

37. See Adam McBeth, *Holding the Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses*, 23 NETH. Q. HUM. RTS. 7, 20 n.1 (2005); Skinner, *supra* note 10, at 364.

38. Michael Addo, *Human Rights Perspectives of Corporate Groups*, 37 CONN. L. REV. 667, 677 (2005); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139, 189-90 (Menno Kamminga & Saman Zia-Zarifi eds., 2000).

39. See Ramasastry, *supra* note 7, at 95.

40. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 59 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305-14 (S.D.N.Y. 2003); Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265-67 (2004). See also Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001). Explaining the rationale behind corporate responsibility, the U.S. Supreme Court has said that there was "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents. . . . If it were not so, many offenses might go unpunished. . . ." *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494-5 (1909).

norms⁴¹ as they relate to states (in lending money, for example⁴²). This implies that there is also a responsibility to refrain from perpetrating (as principal) or facilitating (as accomplice) crimes that infringe on those norms that are at the very heart of international law.

On this particular issue, *ius cogens* norms have given expression to customary international law, which was first explicitly recognized and shaped during the Nuremberg trials. Customary international law has been further strengthened and solidified through the passage of various international conventions, treaties, and emerging jurisprudence, which today constitute the legal umbrella for the sanctions around aiding, abetting, and complicity. In terms of reparations, rules of international law⁴³ translate into the duty to compensate for the damages produced—a duty that must be respected by both public and private entities, even if they did not necessarily perpetrate the crimes themselves and are not the primary perpetrators. In this regard, customary international law has been understood to give rise not only to criminal but also civil remedies.⁴⁴

From the perspective of U.S. jurisprudence, the question of whether the legal requirements for this responsibility are defined by international or domestic norms remains controversial.⁴⁵ This debate stems largely from the fact that the Alien Tort Claims Act (“ATCA”), which opens the jurisdiction of U.S. courts to the hearing of cases in which the law of nations has been violated in other countries, requires that basic norms of international

41. See generally THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER. *Jus Cogens* and Obligations Erga Omnes, (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

42. See Elizabeth Reichard, *Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks Liable for Human Rights Abuses*, 36 CASE W. RES. J. INT’L L. 255, 260 (2004).

43. Such rules include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 244; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3; and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

44. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 36 (1801); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 161 (1795); *República v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784). See generally Memorandum of Law Submitted by Plaintiffs in Response to Expert Submissions Filed by Legal Academics Retained by Defendants, *In re Holocaust Victim Assets Litig.*, No. 96 Civ. 4849 (E.D.N.Y. June 17, 1997).

45. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Khulumani v. Barclays Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). See David Christensen, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219 (2005); Carlos Vásquez, *Sosa v. Alvarez-Machain and Human Rights Claims Against Corporations Under the Alien Torts Statute*, (Georgetown Univ. Law Ctr., Business, Economics and Regulatory Policy Working Paper No. 844350, 2005). On this discussion see Curtis Bradley, Jack Goldsmith & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924–29 (2007); Paul L. Hoffman & Daniel A. Zaher, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47 (2003); Ralph Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2251 (2004); William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 650 (2006).

law have been violated in order to justify this extraterritorial jurisdiction.⁴⁶ The debate also stems from the particular relationship between the U.S. legal system and customary international law.⁴⁷ Apart from the particular case of the ATCA, however, the fundamental bases of responsibility for complicity in the U.S. are reflected in the domestic laws of states. It is the states that specifically regulate complicity and respond when corporate civil responsibility for damages provoked in the territory of a state is being debated (*lex loci delicti*, which significantly reduces the application of the *forum non conveniens* doctrine⁴⁸). In this way the U.S. legal system has established particular compensatory norms for matters of complicity.⁴⁹ If the ATCA requires that domestic law provide a direct basis in cases related to aiding and abetting, U.S. federal law already provides this direct basis for corporate complicity.⁵⁰

Argentinean tort law protects those who were illegitimately harmed⁵¹ or suffered damages stemming from human right abuses; in these cases, the protection offered by constitutional law is even more rigorous. For example, Article 1081 of the Civil Code obliges accomplices to compensate for damages provoked by the primary perpetrator of the illicit act.⁵² This notion of complicity for contributing to the commission of a crime in Argentinean law is compatible with existing ideas in international law as discussed above.

On the specific issue of banking, the responsibility for granting abusive loans is viewed as a particular kind of “extra-contractual” liability and is recognized by numerous legal systems, including the Argentinean system.⁵³ This liability is characterized by the failure to fulfill the duty to assess adequately the credit risk of the borrower, and it can generate civil responsibility if the finances being provided facilitate an illicit activity, such as

46. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). See generally Michael Ramsey, *International Law Limits on Investor Liability in Human Rights*, 50 HARV. INT'L L. J. 271 (2009).

47. See generally Josh Goodman, *The Administrative Law of Nations: A New Perspective on Sosa, The Alien Tort Statute, and Customary International Law*, 50 HARV. INT'L L. J. ONLINE 1 (2009), <http://harvardilj.org/online/164>.

48. This doctrine allows a court to refuse to hear a case because there is a more appropriate forum available for the parties of this case brought before it.

49. See RESTATEMENT (SECOND) OF TORTS § 876 (1979). See generally Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871 (2008).

50. See generally *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1019 (7th Cir. 2002) (supporting the idea that ATCA can be applied to cases of aiding and abetting in certain circumstances); Nilay Vora, Note, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARV. INT'L L. J. ONLINE 195, 212 (2009), <http://harvardilj.org/online/152>.

51. CÓDIGO CIVIL [CÓD. CIV.] arts. 1067, 1109 (Arg.).

52. Cód. Civ. art. 1081 (Arg.).

53. Cód. Civ. art. 1109 (Arg.); JUAN PABLO BOHOSLAVSKY, CRÉDITOS ABUSIVOS: SOBREEN-DEUDAMIENTO DE ESTADOS, EMPRESAS Y CONSUMIDORES (Ábaco de Rodolfo Depalma ed. 2009); FABRIZIO DI MARZIO, ABUSO NELLA CONCESSIONE DEL CREDITO (2004); GUY-AUGUSTE LIKILLIMBA, LE SOUTIEN ABUSIF D'UNE ENTREPRISE EN DIFFICULTÉ, (2001); LA RESPONSABILITÉ EXTRA-CONTRACTUELLE DU DONNEUR DE CRÉDIT EN DROIT COMPARÉ (Lucien Simont & André Bruyneel eds., 1984).

the perpetration of crimes against humanity, which is a harmful activity *par excellence*. This duty implies, at the very least, the duty to be aware of the political contingencies of the sovereign borrower.

Financial institutions, regardless of whether they are private, official, or multilateral, are held to a sophisticated deontology when evaluating the risks assumed in granting loans. This requirement promotes the efficient use of resources and protection of the institution's credit;⁵⁴ it also aims to prevent damages to third parties. For the purposes of this discussion, it is important to understand that the fundamental intent here is to avoid the harmful consequences that can result from loans granted in a speculative or reckless way, as these loans violate the most basic rules for assessing credit risk. Assessing the risk not only includes anticipating the financial capacity to repay the loan but also creates responsibilities around what the borrower presumably does with the money being lent. Particularly clear examples of this kind of bank liability are evident in legal responsibilities for financing terrorist activities⁵⁵ or projects that are environmentally damaging.⁵⁶

The international norms and jurisprudence supporting responsibility for complicity also lend political weight to the compensating duties, as these create incentives for actors in the international community to take greater responsibility for how complicity operates. This is the dialogue that tort law strikes up with constitutional law when damages derived from crimes violating basic human rights lead to claims for compensation. It is precisely this interaction between tort law—embodied in the general norms of civil responsibility—and the international system for protecting fundamental human rights that adds the concept of deterrence to this particular set of economic responsibilities, understood as a responsibility to deter financial activities that are harmful to the interests of the international community.

54. "It must, at present day, anticipate dangers in imposing upon communities having no voice in negotiation fiscal burdens lacking local approval, unless the benefits of the loan through the expenditure of the proceeds are confined to the territory burdened with service." Charles Hyde, *The Negotiation of External Loans with Foreign Governments*, 16 AM. J. INT'L L. 523, 531 (1922).

55. G.A. Res. 54/109, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/109 (Dec. 9, 1999). The UN Security Council urged states to "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts." S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373, (Sept. 28, 2001). When considering whether routine banking activities can give rise to complicity liability, a U.S. court affirmed the following: "[A]cts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts. . . . Nor is there a requirement of an allegation that the suicide bombers would not, or could not, have acted but for the assistance of Arab Bank." *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 291-92 (E.D.N.Y. 2007).

56. See Jean-Pierre Buyle, *La Responsabilité du Banquier, Dispensateur de Crédit, en Matière d'Environnement*, in AMÉNAGEMENT ENVIRONNEMENT 165 (2004) (regarding the normative and jurisprudential developments in this field).

C. *Mental State of the Accomplice*

There is substantial controversy in international criminal law around the degree to which one must prove that an accomplice had knowledge that its actions would facilitate the perpetration of a crime and whether it is necessary to prove the intent of that person or entity to facilitate the crime (the “purpose” test, which is elaborated below).⁵⁷

Most of the international statutes and jurisprudence on corporate accountability require that there be some degree of knowledge on behalf of the abetting party, and some assert that this knowledge can be a liability, even if the entity’s primary purpose was not to commit the principal crime in question. The Nuremberg Tribunals⁵⁸ and the International Criminal Tribunals for Rwanda⁵⁹ (“ICTR”) and for the former Yugoslavia⁶⁰ (“ICTY”) all arrived at this conclusion.

In contrast, a few months prior to the ICTY’s decision on this matter in the *Furundzija* case, the Rome Statute of the International Criminal Court (“ICC”) was approved, establishing in Article 25.3 a much more stringent requirement to prove both the actor’s knowledge and purpose in facilitating or abetting a crime.⁶¹ Some commentators have said that this purpose can be secondary or non-exclusive. For example, “one who knowingly sells gas to the gas chamber operator for the primary purpose of profit may be inferred to have a secondary purpose of killing people, so that he can keep selling more gas to kill more people.”⁶² This thesis seems to be supported by the fact that Article 25.3.d of this same statute stipulates that the criminal responsibility of the member of a group only requires the knowledge of the criminal purpose of the group, rather than full knowledge of the specific criminal acts being considered.

57. See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. J. INT’L HUM. RTS. 304 (2008).

58. United States v. Flick (*The Flick Case*), Case No. 5, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 1217 (1952) (Nuernberg Mil. Trib. 1947). In this case, two industrialists, Flick and Steinbrinck, were convicted for contributing funds to the SS with knowledge of the crimes committed by that organization. According to the tribunal, “[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.” *Id.* See also United States v. Von Weizsaecker (*The Ministries Case*), Case No. 11, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 620-22 (1952) (Nuernberg Mil. Trib. 1949); Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93-103 (1947) (Brit. Mil. Ct. 1946).

59. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998). See Andrew Clapham & Scout Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339 (2001) (analyzing the Akayesu judgment in detail).

60. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 193 n.217 (Dec. 10, 1998).

61. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 (July, 2002).

62. CASSEL, *supra* note 57, at 315.

[D]espite the ‘purpose’ test in ICC Statute article 25 (3) (c), one can make a responsible argument that customary international law, as reflected in the majority of the post-World War II case law, the case law of the ICTY and ICTR, the ILC Draft Code, and group crimes under article 25 (3) (d) of the ICC Statute, requires that those who aid and abet merely have knowledge that they are assisting criminal activity.⁶³

Although some claim that negligence emanates from domestic tort law,⁶⁴ since civil responsibility for complicity currently derives its primary content from international law, it is prudent not to force both concepts in terms of the mental state of the accomplice. It is important to recognize the authority of international law in supporting, not without some resistance,⁶⁵ the knowledge test,⁶⁶ which from a procedural perspective allows for contemplation of both actual and constructive knowledge.⁶⁷

According to the ICJ report on complicity, which supports the standard for mental state suggested here, a corporation can be held liable if:

[It] actively sought to contribute to gross human rights abuses, or simply [if] it knew that its course of conduct was likely to contribute to such abuses and, even though it may not have wanted the abuses to occur, undertook the course of conduct anyway.⁶⁸

It is clear that this group of experts demands either the corporation’s knowledge and acceptance of the consequences of its contribution or its concurrence with the criminal intention of the principal perpetrator.

63. *Id.* at 314.

64. ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO INSTITUTE OF APPLIED INTERNATIONAL STUDIES, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF 16 COUNTRIES 22 (2006); FAFO & INTERNATIONAL PEACE ACADEMY, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW 26 (2003).

65. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 261 (2d Cir. 2009) (arguing that knowledge is not sufficient and that it is instead necessary to show that the corporation acted with the purpose to support the human rights abuses perpetrated by the principal).

66. Cassel, *supra* note 57, at 325; *see In re South African Apartheid Litig.* 617 F. Supp. 2d 228, 259 (S.D.N.Y. 2009).

67. As one of the judges explained in *Khulumani*: “Under a proper application of [Restatement (Second) of Torts] § 876 to ATCA civil aiding and abetting claims, liability should be found only where there is evidence that a defendant furthered the violation of a clearly established international law norm in one of three ways: (1) by knowingly and substantially assisting a principal tortfeasor, such as a foreign government or its proxy, to commit an act that violates a clearly established international law norm; (2) by encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international law norm in the process of completing that act; or (3) by facilitating the commission of human rights violations by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.” *Khulumani v. Barclays Nat’l Bank Ltd.* 504 F.3d 254, 288-89 (2d. Cir. 2007).

68. ICJ VOL. 1, *supra* note 23, at 19.

In the context of banks, which present a case of extra-contractual or civil responsibility, it must be proven either that the lenders knew or could not have *not known* about the criminal activity of the government borrower that they were financing and economically supporting. Even when the abettor and perpetrator do not share the same criminal intention, a corporate entity's knowledge of its essential contribution to the commission of these abuses implies that this course of action has been accepted: "Even where a company does not actively wish to contribute to gross human rights abuses, it may still be legally responsible if it knew or should have known that its conduct was likely to help cause such abuses."⁶⁹ This notion of serious negligence can be used as indirect evidence to prove the *dolus* of the collaborator.⁷⁰

In order to assess whether a corporation passes this test of actual or constructive knowledge, it is necessary to analyze all the information reasonably available at that moment.⁷¹ Banks, in particular, because they are characterized by a high degree of professional diligence,⁷² have to fulfill rigorous obligations of means in order to establish the risk that their transactions involve. This means that when a bank is conscious of the fact that particular kinds of harm can result from its conduct, and even when it behaves with the hope that this damage will not happen, giving priority to the profit derived from the transaction can be seen as consenting to the harm, or acting with *dolus eventualis*.⁷³ Specialized jurisprudence has established that this knowledge can be proven through direct or indirect means, including by inference from objective facts.⁷⁴ The types of indirect evidence to be taken into account may include: the date and volume of the loans, the state of public knowledge about the crimes at the time, the seriousness or gravity of the crimes, and whatever corporate "consciousness" can be assumed about how likely the loans were to contribute to the sustenance and strengthening of a regime and, consequently, how the loans contributed to the perpetration of the crimes.

69. ICJ VOL. 1, *supra* note 23, at 20.

70. Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 831 (2005) (commenting on § 876 of the Restatement (Second) of Torts).

71. See 2 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 33 (2008).

72. TRATADO DE RESPONSABILIDAD CIVIL 188 (L. Fernando Reglero Campos ed., 2002).

73. 3 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 13 (2008) [hereinafter ICJ VOL. 3]; SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 50-53 (2004).

74. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 548 (Sept. 2, 1998); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 65 (June 25, 1999); Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 675-76, 689 (May 7, 1997); United States v. Goering (*The Nurnberg Trial*), 6 F.R.D. 69, 163-65 (Int'l Mil. Trib. 1946); United States v. Carl Krauch (*The Farben Case*), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 1187 (1949) (Nuernberg Mil. Trib., July 29, 1948).

The sophisticated legal theory around responsibility for granting abusive loans requires banks to undertake a serious and reasoned analysis of the economic and political characteristics of the borrower. Though banks enjoy considerable leeway in making these assessments, they cannot take unreasonable or limitless risks, precisely because of the potential damages caused by their activity to public interests and third parties. A bank is judged on the basis of what it knew or can be presumed to have known. In other words, the ostrich syndrome cannot be invoked as a legitimate defense; this is also the rationale behind the extended know your customer rule, a standard in international and domestic banking practices.⁷⁵

D. Compensable Damages

Because the kind of responsibility studied in this paper is activated when an entity contributes to the violation of fundamental human rights, it would be prudent to show that the types of damages that require compensation are connected to crimes that have violated *jus cogens* norms.⁷⁶ This catalog of crimes includes genocide,⁷⁷ slavery,⁷⁸ torture,⁷⁹ and other crimes against humanity.⁸⁰ In contexts where reparations are granted by the same state that committed the crimes, reparations may be uniform⁸¹ or standardized,⁸² and limited in proportion to the state's own budgetary restrictions.⁸³ In these cases, the responsibility of the accomplices can remain an enduring

75. See generally Financial Action Task Force, <http://www.fatf-gafi.org> (last visited Nov. 20, 2009).

76. See Andreas Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation*, 74 *NORDIC J. INT'L L.* 306 (2005).

77. See Corte Suprema de Justicia [CSJN], 24/8/2004, "Arancibia Clavel, Enrique Lautaro asociación ilícita," Fallos (2004-327 3304) (Arg.).

78. See *Doe v. Unocal*, 395 F.3d 932, 945 (9th Cir. 2002).

79. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Prosecutor v. Furundzija*, Case No: IT-95-17/1-T, Judgment, ¶¶ 155-57 (Dec. 10, 1998).

80. Rome Statute, *supra* note 61, art. 7(1).

81. The Argentinean state implemented several initiatives seeking compensation for the damages suffered by the victims of the last dictatorship. The different norms that established these reparations policies recognized standardized and limited compensation. Decrees 70/1991 and 1313/1994 and statutes 24.043, 24.411, 24.823 and 25.914 linked the compensations (for detentions, injuries, and murders) to the salaries of the state employees, independently of the circumstances of each victim beyond the generic categories of "disappeared," "assassinated," "injured," and "heir or relative of a disappeared or murdered." Law No. 24043, Nov. 27, 1991, [LII-A] A.D.L.A. 30; Law No. 24411, Jul. 12, 1994, [LV-A] A.D.L.A. 7; Law No. 24823, May 23, 1997, [LVII-C] A.D.L.A. 2894; Law No. 25914, Aug. 25, 2004, [30473] B.O. 1; Decree No. 70, Oct. 1, 1991, [LI-A] A.D.L.A. 332; Decree No. 1313, Jan. 8, 1994, [LIV-C] A.D.L.A. 3373. For a complete description of the evolution of reparations implemented in Argentina, see Christina Wilson, *Argentina's Reparation Bonds: An Analysis of Continuing Obligations*, 28 *FORDHAM INT'L L. J.* 786 (2005). See e.g., M.J. Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in *THE HANDBOOK OF REPARATIONS* 21-54 (Pablo De Greiff ed., 2006).

82. J. Malamud-Goti & L. Grossman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in *THE HANDBOOK OF REPARATIONS* 539-59 (Pablo De Greiff ed., 2006).

83. Office of the U.N. High Comm'r for Human Rights [OHCHR], *Rule-Of-Law Tools for Post-Conflict States: Reparations Programmes*, 27-28, U.N. Doc. HR/PUB/08/01 (2008).

issue of significant relevance.⁸⁴ This stems from the fact that, as articulated in U.N. General Assembly Resolution 60/147, reparations that follow massive human rights violations must cover all measurable economic damage, and the compensation must be proportional to the seriousness of the facts of each case.⁸⁵ Additionally, the individual circumstances of each victim must be taken into account.⁸⁶ At the same time, this resolution seeks reparations that produce “satisfaction” in the sense that the facts related to the human rights abuses must be discovered and revealed, which inevitably reveals complicities.⁸⁷ Additionally, the statute of the ICC establishes that reparations cannot “be interpreted as prejudicing the rights of victims under national or international law.”⁸⁸

E. Establishing Causal Links between Corporate Contributions and Human Rights Abuses

According to the 2008 ICJ report on corporate accountability, in order for a corporation to be held liable, it must have granted the commercial assistance with knowledge of the risks implied in terms of their potential contribution to human rights violations. The corporation must have been in a place of proximity to the principal perpetrator of the crime, in terms of the nature of the connection, commercial transactions, and duration and frequency of the relationship. The closer the company’s contribution is to the actual commission of the crimes, “the more likely it is that [the company] will have the power, influence, authority or opportunity necessary for its conduct to have a sufficient impact on the conduct of the principal perpetrator to establish legal liability.”⁸⁹

Such contribution can be seen in a wide variety of corporate activities including, for example, providing transportation or logistics and supplying goods or technological services; however, this paper focuses specifically on how financial institutions can contribute to the commission of human rights crimes.⁹⁰ The key challenge is always to determine whether, without this contribution, the chain of causality would have been interrupted or whether the contribution had a substantial effect on the development of the

84. When the Argentinean Supreme Court had the opportunity to judge in detail a compensatory judicial claim due to certain crimes against humanity committed during the last dictatorship, analyzing the concrete damages and sufferings, it took into account a wide range of variables and personal circumstances that contributed to provoking that damage. Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 31/8/1999, “Tarnopolsky, Daniel v. Estado Nacional/proceso de conocimiento,” Fallos (1999-322-1891) (Arg.).

85. G.A. Res. 60/147, ¶ 20, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

86. *Id.* ¶ 18.

87. *Id.* ¶¶ 22, 24.

88. Rome Statute, *supra* note 80, art. 75(6).

89. ICJ VOL. 1, *supra* note 23, at 24.

90. *Id.* at 10, 27-28; ICJ VOL. 3, *supra* note 73, at 27 (2008).

financed activity.⁹¹ The presence of this substantial effect is what permits us, in the long run, to assert that an efficient causal link exists.

In terms of defining how to measure and establish whether a substantial contribution from the collaborator existed, U.S. jurisprudence has identified the following key factors: the nature of the act supported or backed;⁹² the quantity of the collaboration provided;⁹³ the entity's presence at the moment when the damages were provoked;⁹⁴ the entity's relationship to the principal(s) of the crime;⁹⁵ the entity's knowledge about the facts;⁹⁶ and the duration of the assistance provided.⁹⁷ The issue of financial contribution was discussed at length during the Nuremberg Tribunal, but the court produced contradictory opinions on the topic. On the one hand, in the *Ministries Case*, the Tribunal stated that:

A bank sells money or credit in the same manner as the merchandiser of any other commodity Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law.⁹⁸

Despite this stance, two German industrialists were convicted in *Flick* because even though the prosecution could not show that any part of the money the two had donated to the Schutzstaffel ("SS") was directly used for criminal activities,⁹⁹ the Tribunal took it for granted that some of the money had gone into maintaining this organization:

[I]t remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of

91. ICJ VOL. 1, *supra* note 23, at 12; ICJ VOL. 3, *supra* note 73, at 22.

92. *Halberstam v. Welch*, 705 F.2d 472, 483-84 (D.C. Cir. 1983).

93. *Id.*

94. *Id.*

95. See *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (noting that in October 2008, the plaintiffs in the case decided to concentrate on the bank that had directly granted loans to the military/police South African sector; they emphasized that one of the directors of the lender bank participated in a state board that took decisions related to the implementation of domestic security measures during the apartheid).

96. See *Halberstam*, 705 F.2d at 483-84.

97. *Id.*

98. *United States v. Von Weizsaecker (The Ministries Case)*, Case No. 11, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 622 (1952) (Nuernberg Mil. Trib. 1949).

99. *United States v. Flick (The Flick Case)*, Case No. 5, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 1217-23 (1952) (Nuernberg Mil. Trib. 1947).

this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas.¹⁰⁰

Beyond the different legal conclusions drawn in these cases, they both affirm the notion that loans can contribute to the commission of crimes. Nuremberg case law does not draw a clear line between the liability of someone who provided the financial means to make the commission of crimes possible and that of someone who committed the crimes himself.¹⁰¹ However, it is not essential to resolve this contradiction here, as international law has developed considerably since the Nuremberg trials in its “denunciation of financing human rights abuses.”¹⁰²

When analyzing these causal links, the objective must be to assess which loans actually harmed the borrower’s population in terms of *jus cogens* and to establish that this would have been foreseeable to the lenders if they had made a serious evaluation regarding the probable application of these funds. Hence, the *dolus* lies in foreseeing the effects of the loan, anticipating that it will substantially contribute to the production of the damage, looking for the profits obtained through this activity, and accepting the high probability of the occurrence of harmful consequences.¹⁰³ It has been said that in the context of dictatorial regimes, it should be presumed that the money borrowed will be used to support the political system and, in that way, that these funds will enable the commission of the regime’s crimes.¹⁰⁴ In some contexts, it could be argued that particular public projects benefit the population; for example, even Saddam Hussein’s palaces served a marginal social utility. However, it can also be argued that the very availability of these funds allows the government to free other funds that they can then apply to harmful purposes (i.e. military expenditures to commit the crimes)¹⁰⁵ and, moreover, that these expenditures suppress critics and thus

100. *Id.* at 1221.

101. See Sabine Michalowski & Juan Pablo Bohoslavsky, *Jus Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts—A Response to the World Bank Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT’L L. 61 (2010).

102. Shaw W. Scott, Note, *Taking Riggs Seriously: the ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1533 (2005) (referring to the U.S. decisions in *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002) and *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (S.D.N.Y. 2003) and developments in the context of international codes of conduct for transnational corporations, money-laundering and funding of terrorist activities). See also Ines Tofalo, *Overt and Hidden Accomplices: Transnational Corporations’ Range of Complicity for Human Rights Violations*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 345-46 (De Schutter ed., 2006) (referring to anti-terrorist funding laws and U.N. Security Council resolutions on asset freezing for such funding); Ramasastry, *supra* note 7, at 113 (arguing that the *Ministries* decision is outdated in that international criminal law and accomplice liability have since developed and, in any case, this decision itself should be tempered by an examination of the nature of the relationship between the financier and the criminal perpetrator and stating: “[i]f the bank or the banker provides continuous, ongoing and knowing financial support for criminal conduct in the form of loans, why should it not trigger accomplice liability?”).

103. Clapham & Jerbi, *supra* note 59, at 339.

104. Scott, *supra* note 102, at 1497.

105. ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 707 (1931).

help to consolidate the regime.¹⁰⁶ Bearing in mind the fact that this issue has not been sufficiently settled in international law, it would be prudent to assume that even in the occasional context when a loan to a dictatorship appears to have some benefit (the so-called “good projects”), the overall support to that regime’s capacity to carry out human rights abuses could, according to the factual characteristics of each case, negate these benefits and call for some level of shared responsibility.¹⁰⁷

The cornerstone of legal responsibility here lies in the foreseeable application of the funds borrowed by the sovereign. In other words, there would be liability for knowing that this money would contribute to the financial support of a particular state machinery through which crimes against humanity would be openly perpetrated, and yet granting the loans despite these highly probable consequences.¹⁰⁸ To establish the causal link between harmful action and civil responsibility, most legal systems require evidence that the outcome is a foreseeable consequence of this conduct and normally occurs as a result of the act. In each case it must be determined whether it is logical to expect that the loans being granted to a government that is committing crimes against humanity will substantially influence, facilitate, or give continuity to these practices. For example, one must be able to assess to what extent a government needed the loans to maintain its grip on power, whether the volume of the loans itself had an impact on the performance of the bureaucratic apparatus, and whether the loans had an effect on the military’s budget and expenditures.

Recognizing that loans to governments who perpetrate serious crimes against their own populations assist the governments in committing those crimes, two economists have presented an innovative proposal that would discourage this kind of financial support.¹⁰⁹ An international organism (e.g. the U.N. or the Organization for Co-operation and Development) would declare the character of a particular government as “odious” and, thereafter, any loan granted to it would bear this label, rendering the lend-

106. SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT 52-58, 82-83 (2007). More than 30 years ago, Professor Antonio Cassese addressed the issue of how economic assistance to Chile similarly helped to strengthen and maintain a dictatorial regime’s grip on power and pursuit of a policy of large-scale violations of human rights. Antonio Cassese, *Foreign Economic Assistance and Respect for Civil and Political Rights: Chile—A Case Study*, 14 TEX. INT’L L.J. 251 (1979).

107. Omri Ben-Shahar & G. Mitu Gulati, *Partially Odious Debts*, 70 J. L. & CONTEMP. PROBS. 47, 74-75 (2007).

108. *See Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 691-92 (7th Cir. 2008). This case made several distinctions between civil and criminal liability with regard to financing a known terrorist organization, but it resulted in a majority rule of sweeping primary liability for donors to terrorist organizations, even in cases where the said organization might have a humanitarian “arm.” The ruling states that the causation element of civil liability statute could be satisfied if defendants have donated money to a terrorist organization but there also must be a showing of deliberate disregard of the interests of others.

109. Michael Kremer & Seema Jayachandran, *Odious Debt*, 96 AM. ECON. REV. 82 (2006) (Paper presentation at the Int’l Monetary Fund Conference on Macroeconomic Policies and Poverty Reduction (Mar. 14-15, 2002)).

ing entity complicit and thus strongly discouraging it from completing the loan. In the most recent incarnation of this proposal, once the government's odious nature has been declared, further credit would be considered legitimate only if the lending body could prove the legal nature and function of its funds and applied a special due diligence to monitoring the true destination of this funding.¹¹⁰

Former leaders in South Africa have admitted that the impact of corporate support was beneficial in the continuation of the apartheid government. One of the country's former prime ministers, referring to the support several corporations provided to the government at that time said that "each bank loan, each new investment [was] another brick in the wall of our continued existence."¹¹¹ The president of the South African Reserve Bank was even more direct:

[I]f the international association of bankers should effectively shut South Africa off from the international trade and payments system, that would be a far more powerful sanctions measure than the trade restrictions which foreign governments imposed.¹¹²

Along this same vein, in 1973, the Corporate Information Center of the National Council of Churches warned that "contributions to South Africa's economic strength are indirect contributions to its military and police systems, designed to perpetuate the domestic racial helotry."¹¹³

However, the latest decision *In re South Africa Apartheid Litigation*¹¹⁴ did not follow this line of reasoning. Following the requirements of *actus reus* and *mens rea* developed in this paper, in order to determine the meaning of "substantial effect," the *Khulumani* court referred to the inherent quality of the resources provided to the perpetrator of the crime. Without doing an empirical analysis of the concrete effect of the loans, the decision established that funds can never be sufficiently connected to the crimes, because they are not "lethal commodities."¹¹⁵ This differentiation, which focuses on the intrinsic qualities of the goods in question rather than assessing the provisions' use and impacts, not only took a very narrow interpretation of previous developments in international law with regard to corporate complicity,

110. See Jonathan Shafer, *The Due Diligence Model: A New Approach to the Problem of Odious Debt*, 21 ETHICS & INT'L AFF. 49 (2007). See also Seema Jayachandran, Michael Kremer, & Jonathan Shafer, Presentation at the Harvard Univ. Ctr. For Int'l Dev. Blue Sky Conference: Applying the Odious Debts Doctrine While Preserving Legitimate Lending (Sept. 9, 2006).

111. Beate Klein, *Bricks in the Wall: An Update on Foreign Bank Investment in South Africa*, WORLD COUNCIL OF CHURCHES, PROGRAMME TO COMBAT RACISM (1981).

112. MASCHA MADÖRIN & GOTTFRIED WELLMER, APARTHEID-CAUSED DEBT: THE ROLE OF GERMAN AND SWISS FINANCE 32 (1999).

113. Corp. Info. Ctr., Nat'l Council of Churches, *The Frankfurt Documents: Secret Bank Loans to the South African Government*, CORP. EXAMINER 3A (1973).

114. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

115. *Id.* at 258.

particularly for financing *jus cogens* violations (e.g. *Flick*¹¹⁶ and *Almog*¹¹⁷) but also used a somewhat confusing rationale. On one hand, it accepted that the computers provided by IBM to the apartheid regime were “sufficiently risky” commodities in their connection to aiding in the denationalization of black South Africans, thus contributing to the State’s crimes.¹¹⁸ Simultaneously, however, the court asserted that even lethal gas could be used in some cases for so-called legitimate purposes.¹¹⁹ This decision, which denies that financial assistance can contribute to, facilitate, or render a campaign more effective in committing human rights abuses, represents a conservative jurisprudential turn in international practice. It also shows that the full scope of a country’s economic reality may not be taken into account when evaluating corporate responsibility for crimes. In this case, the judgment did not focus on issues such as high financial vulnerability and dependence on external capital, or the possibility that external investments could thus have substantial political impact on the country.¹²⁰

Taking all of these factors into account, it seems that loans in these contexts can have a significant impact on the repressive structure of a state, whether by providing military salaries, supporting the maintenance of concentration camps, helping with the implementation of logistics, intelligence, counter intelligence, the purchase of arms and military equipment, etc.¹²¹ As will be elaborated in the case study on Argentina in the next section, there is substantial evidence that loans can influence decisions. For example, the U.S. government made its military and financial aid to the Argentinean dictatorship dependent on the government’s capacity to demonstrate improvements in diminishing its human rights violations,¹²² a rationale that manifested itself in a very concrete way.¹²³

116. See *United States v. Flick (The Flick Case)*, Case No. 5, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN (1952) (Nuernberg Mil. Trib. 1947).

117. See *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

118. *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 265 (arguing that “not every violation of the law of nations involves a killing, and therefore not every corporate entity that aids and abets violations of customary international law need provide a gun, a tank, or poison gas”).

119. *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 259.

120. See generally KUNIBERT RAFFER & HANS WOLFGANG SINGER, *THE ECONOMIC NORTH-SOUTH DIVIDE: SIX DECADES OF UNEQUAL DEVELOPMENT* (2001).

121. See Michalowski & Bohoslavsky, *supra* note 101.

122. Letter from Raul Castro, U.S. Ambassador to Argentina, to Claus Ruser, Director, East Coast Affairs, U.S. Dep’t of State (Feb. 28, 1978).

123. Although the U.S. did not generally believe that trade sanctions could be a primary tool to promote human rights with regards to other countries, the situation in Argentina was so extreme that the Department of State declined the Export-Import Bank credit request in 1978 to buy turbines from the Allis-Chalmers Corporation for the Yacyreta hydroelectric dam. After this rejection, Videla, then-president of the Argentinean military junta, met the American vice-president at the Vatican during the coronation of John Paul II. The military junta agreed to submit to a formal visit from the Inter American Human Rights Commission in order to elaborate a report about the human rights situation, in exchange for approval of this credit. See U.S. Dep’t of State, Memorandum of Conversation: Videla-Mondale, Military Unity, Political Activity (Sept. 15, 1978), available at <http://foia.state.gov/documents/Argentina/0000AA8B.pdf>; Joe Marie Griesgraber, Implementation by the Carter Administration

The message that a decision like *Kbulumani* sends to financial institutions is not consistent with the general legal movement on corporate complicity, which increasingly asks for greater commitments from corporations in promoting human rights. Yet, as the next section briefly explores, the decision also exposes some of the enduring lack of clarity around corporate accountability in international law. By dismissing the claims against the banks, *Kbulumani* implies immunity for banks from the consequences of their actions. While it is hard to predict how other domestic and international courts will react toward the criterion adopted by this decision, it is a reaction that stands to be further affected by the current global crisis and the new duties that the international community will bear in terms of regulating bank activity. If there is little doubt that money is essential to develop projects that pollute or to finance terrorist attacks, it will not be easy to reach consensus if courts continue to deny that money is a commodity that can, on certain occasions, leverage human rights violations. What we can anticipate at this juncture is discontent among the non-financial institutions because they will bear all of the liability for complicity charges. It is reasonable to assume they will try to extend this judicial bill of indemnity to all kinds of corporations and, in a subsidiary manner, force banks to share some financial losses.

F. Looking Ahead: Current Issues in Corporate Accountability

Despite the paths to civil liability for corporate complicity thus far explored in this paper—and being tested globally in active litigation—the issue remains much contested throughout the academic, political, and judicial spheres. Thus, while we believe there is a legal basis and necessity for such liability, the matter has, in practice and interpretation, certainly not become a foregone conclusion.

There are several identifiable factors that contribute to this lack of clarity, including the fact that, due to the primacy rationale of the sovereign nation-state system, the corporation has not yet reached indisputable “subject” status in international law. Furthermore, there are no clear, enforceable regulatory standards or international mechanisms for addressing corporate behavior generally, and jurisprudence on this issue has been mixed and often contradictory. Although many of these issues are beyond the scope of this paper, we seek to briefly explore these issues so as to paint a comprehensive picture of the field as it stands today and a realistic assessment of what the legal regime surrounding corporate complicity may look like going forward.

of Human Rights Legislation Affecting Latin America 227 (Aug. 1983) (unpublished Ph.D. dissertation, Georgetown University) (on file with author); LARS SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARDS LATIN AMERICA 311 (1981); KATHRYN SIKKINK, MIXED SIGNALS: HUMAN RIGHTS POLICY AND LATIN AMERICA 133 (2004).

First, there is a lack of clear accountability mechanisms and legal status for non-state actors because they have not attained the full “international personality” required to be subject to these global laws:¹²⁴

A critical unresolved question confronting contemporary international legal scholars and practitioners centers on the extent to which other actors in the international sphere, besides states and intergovernment[al] organizations, possess international legal personality Many jurists, scholars, and commentators have questioned the conclusion that the extension of international legal personality to corporations is an established fact.¹²⁵

Thus, while many corporations actually exceed the wealth of nations,¹²⁶ to some extent they remain unaffected by the laws of nations and principles of sovereign obligations to citizens, the environment, and other states. International law has not integrated the corporation into the same kind of systemic regulatory structure that binds nations with regards to obligations¹²⁷ to protect their citizens from violations.¹²⁸ At the same time, however, corporations have standing in international law—corporations have the right to sue under law for such matters as intellectual property rights, free speech, and due process. According to those who argue that stronger accountability for corporate complicity is necessary, this duality has produced a system in which “human rights victims’ remedies still generally pale in comparison to the strong remedies available to investors.”¹²⁹

As a result, it is argued that corporations today enjoy a variety of protections and access to justice that are not available to human rights victims.¹³⁰ “Unlike most human rights victims or environmental damage claimants, private foreign investors can appear directly against sovereign nations in international tribunals, bypass normal procedural obstacles such as foreign

124. J.W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. L. & PUB. POL’Y 348, 361 (2009).

125. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT’L HUM. RTS. 222, 227-40 (2008).

126. For example, in 2005, all of the Fortune 500 companies (the world’s largest corporations) had revenues that exceeded the GDP of countries such as Jordan and Jamaica. See Janet Guyon, *The Fortune Global 500*, FORTUNE, July 25, 2005, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/07/25/8266629/index.htm. This disparity has granted corporations enormous power where they operate locally and have tremendous leverage with the government in terms of operational standards. See Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 130, 147 (2008).

127. See generally MUCHLINSKI, *supra* note 17, at 514.

128. For a detailed account of documented human rights violations committed by businesses over the last decade, see Ctr. for Human Rights & Global Justice & Human Rights Watch, *On the Margins of Profit*, Feb. 18, 2008.

129. Pitts III, *supra* note 124, at 348.

130. In the authors’ view, this imbalance is more a by-product of a faulty evolution in corporate accountability than a validation of the primacy of the rights of corporate entities. We have argued precisely that the legal structures to hold corporations liable for complicity do in fact exist and should be further developed to prevent corporations from enjoying impunity when they contribute to human rights abuses.

sovereign immunity and the act of state doctrine, make treaty based claims, and obtain damages for any treaty violations found.”¹³¹ However, the fact that the perfect regulatory structure has not yet developed should not be misinterpreted as a legal exemption for corporations. Rather, it points to the need for increased clarity and stronger legal sanctions going forward.

Corporations have generally been held to few globally recognized regulatory standards, allowing them to set their own internal rules for labor standards, security conditions, environmental impact, and a range of other factors.¹³² Corporations have operated on the basis of a “private law unification—a sort of commercial *lex mercatoria* (“law of merchants”) presaging the more environmentally sensitive and rights-based CSR *lex mercatoria* that also emerged during the 20th century.”¹³³ While this *lex mercatoria* traditionally dealt with regulating trade practices among corporations, there has been a global push for creating a new *lex mercatoria* that surpasses the merely commercial aspects of regulation to include principles of corporate social responsibility (“CSR”). Advocates for this shift are working to change the conception that “corporations are wholly private actors subject only to local and national law with rights but no duties under what might be termed emergent customary global law.”¹³⁴

Soft law in this field seems to reflect some degree of accord about the need for clarifying rights and duties.¹³⁵ This is evident in the advent of recent proactive corporate efforts to “do good” or at least minimize their harms by contributing to the welfare of the local environment or population in which they operate.¹³⁶ The so-called “Equator Principles” implemented by banks are a good example of this internal attempt to create common standards.¹³⁷ However, because participation in CSR is voluntary, it is still possible that corporations may contribute to the abuse of human rights. Human rights advocates argue that codes of conduct do not usually suffi-

131. Pitts III, *supra* note 124, at 347.

132. MUCHLINSKI, *supra* note 17, at 81.

133. Pitts III, *supra* note 124, at 348.

134. *Id.* at 359.

135. See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, delivered to the Human Rights Council, at 61, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007).

136. For example, in 2007 the Coca-Cola Corporation’s South Africa branch partnered with UNAIDS to aggressively promote and make available safe sex education, condoms, and health care to the general population. While the corporation was clearly not the cause of the AIDS epidemic in that country, the corporation nonetheless saw that its own operations were deeply intertwined with the health of its labor pool and took the proactive step to protect it. This notion of ‘doing good’ as a corporation has slowly evolved alongside global criticism of the harms caused by corporations. See Pitts III, *supra* note 124, at 368.

137. ‘The Equator Principles’: A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing, July 2006, available at http://www.equator-principles.com/documents/Equator_Principles.pdf. See Ryan Christopher Hansen, *The Impact of the Equator Principles on Lender Liability: Risks of Responsible Lending*, (Nov. 2006) (LL.M. Dissertation, London Sch. of Econ. & Political Sci.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228.

ciently delineate corporations' obligations from the human rights perspective; the voluntary nature of CSR means there is no enforceability. This fact conspires against the declaimed goals of those codes, despite the fact that from a public relations stand-point, many companies seek to look as if they are being "responsible."¹³⁸ The bottom line is that most companies give absolute priority to their shareholders' interests and bow to corporate responsibility standards when convenient from a public relations perspective, which impacts profitability. For example, Shell has had a much-publicized CSR campaign and was one of the pioneers in the so called *triple bottom line* (people, planet, profit), but it was, at the same time, involved in financing crimes in Nigeria, as we will see below.¹³⁹

Liability for corporate complicity risks trivializing human rights if corporations are allowed to claim a lack of direct human rights obligations,¹⁴⁰ and there is a shortage of tools for enforcing human rights standards even in the limited "state-centered" regime.¹⁴¹ In order to prevent corporate abuses and complicity with abusive actors and to hold corporations responsible for playing a role both on the procedural level and in material terms, realistic and efficient mechanisms must be developed.¹⁴² One measure to achieve this end, for example, could be to systematically assess the costs and impact that ATCA case law or voluntary codes have had in preventing corporate complicity with rights violations to date.

The Optional Protocol ("OP") to the International Covenant on Economic, Social, and Cultural Rights ("ESCR") is one attempt to tackle the limitations of sovereignty and enforceability.¹⁴³ The OP will:

[P]rovide victims of economic, social and cultural rights violations who are not able to get an effective remedy in their domestic legal system with redress at the international level. It is the result of several decades of work by governments, civil society, human rights experts and the UN human rights bodies to remedy a long-term gap in human rights protection under the international system. It has appropriately been described by Louise Arbour, the previous High Commissioner for Human Rights as "human rights made whole."¹⁴⁴

138. See MCBARET ET AL., *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (2007).

139. See Meghan Conley, Presentation at the Annual Meeting of the Int'l Commc'ns Ass'n: "Profits and Principles": Discourse Analysis and Shell Oil's "Living the Values" Campaign (May 25, 2009), available at http://www.allacademic.com/meta/p14070_index.html.

140. See ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON STATE ACTORS* 33-35 (1st ed. 2006).

141. See Centre Europe Tiers Monde, *The Activities of Transnational Corporations: The Need for a Legal Framework*, http://www.cetim.ch/en/dossier_stnbroch01texte.php (last visited Nov. 20, 2009).

142. Duruigbo, *supra* note 125, at 227-40.

143. See G.A. Res. A/HRC/8/7, U.N. GAOR, 8th Sess., U.N. Doc. A/HRC/8/7* (May 23, 2008).

144. Press Release, NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, NGOs Celebrate Historic Adoption of Optional Protocol for

On September 24, 2009, the OP was opened for signature at a public ceremony at UN headquarters.¹⁴⁵ Once operationalized, it will enable individuals and groups whose economic, social and cultural rights have been violated and who have been denied a remedy in their countries to seek justice internationally by endowing the Committee on ESCR with the competence to review and investigate claims.¹⁴⁶ The OP also aims to influence judicial decisions at the national and regional levels by creating more opportunities for people to advocate for the enforcement of economic, social, and cultural rights within their own countries.¹⁴⁷ Much of the impetus behind this mechanism came from growing acknowledgment of the failure of the international legal system to protect individuals from abuses committed by corporations and the need to create a structure capable of superseding national boundaries.

Another primary goal is to strengthen domestic and regional jurisprudence on these issues, acknowledging that so far it has been both weak and confusing.¹⁴⁸ Jurisprudence to date has shown mixed interpretations of the limits and definitions of corporate responsibility with regards to human rights, resulting in both confusion and controversy, particularly in the case of financial institutions or investors.¹⁴⁹ This fact stems in part from the lack of substantive and systematic technical studies clarifying how commodities, particularly money, may lead to corporate complicity in the commission of crimes. It also reflects the fact that the field is relatively young and divided in terms of grappling with these issues in a consistent manner.

Recent decisions on corporate complicity for human rights violations have produced mixed results. For example, the recent case of *Wiwa v. Shell* (2009),¹⁵⁰ which was initiated on the accusation that the Shell corporation in Nigeria had been complicit in brutal human rights violations—by directly funding the Nigerian military to suppress civilians living in Shell's operational zone—reached closure through an out of court settlement. This

Economic, Social and Cultural Rights at the United Nations (Dec. 10, 2008) (available at <http://www.opicescr-coalition.org/PressReleaseDecember10.pdf>).

145. As of September 29, 2009, 30 states had ratified the OP and only ten ratifications by State parties to the Convention on Economic, Social and Cultural Rights were required to activate it. See ESCR-NET, <http://www.escr-net.org> (last visited Nov. 20, 2009).

146. See U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

147. *Id.*

148. See *Optional Protocol to the International Covenant on Economic, Social & Cultural Rights*, RIGHT TO EDUCATION PROJECT, available at <http://www.right-to-education.org/node/571>.

149. See *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008); *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (S.D.N.Y. Sept. 25, 2008); *United States v. Von Weizsaecker (The Ministries Case)*, Case No. 11, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN (1952) (Nuernberg Mil. Trib. 1949); *United States v. Flick (The Flick Case)*, Case No. 5, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. TEN 3 (1952) (Nuernberg Mil. Trib. 1947).

150. See generally *Complaint, Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (S.D.N.Y. Nov. 8, 1996).

settlement may have implicitly acknowledged Shell's role in contributing to violations against the nine plaintiffs, but it also kept issues around the Shell violations in the region from receiving formal legal treatment, which could have strengthened jurisprudence around matters of funding human rights violations.¹⁵¹

In *Khulumani v. Barclays*, the U.S. Second Circuit decided in October 2007 that there could be liability for corporations who aid and abet the perpetration of gross human rights abuses and that the case was, as such, permissible under the ATCA.¹⁵² The case was originally brought against twenty-three corporate defendants who did business with, and profited from, the South African Apartheid regime. The Circuit Court in *Khulumani* ultimately ruled in favor of the plaintiff, but a recent 2009 decision narrowed the scope of the case by dismissing claims against Barclays National Bank for loaning money and backing the purchase of South African defense forces bonds.¹⁵³

The *Khulumani* case exposes two important issues that have received little attention from scholars: the double standard that courts have applied to judge financial institutions versus other types of corporations, and the challenge of determining the boundaries for corporate accountability, particularly financial investments. *Khulumani* indicates that there may be more protection for financial contributors than to providers of other commodities (such as IBM computers). It also points to the fact that, even if it is recognized that corporations can be held accountable for complicity,¹⁵⁴ there remains confusion about the scope of this responsibility and its broader implications. For example, one question that may arise is if investors bear secondary responsibility for human rights violations committed using funds they have provided, what does this imply for governments who do business with abusive regimes and to what extent can or should every money trail be followed to its conclusion to imply complicity? Is it necessary to develop entirely new procedural criteria to interpret the facts in cases alleging complicity, or do the existing legal tools provide a sufficient framework?

Judge Sprizzo, the former judge in the *Khulumani* case, stated that doing business with a country that perpetrates human rights abuses does not represent a violation of the law of nations, because aiding and abetting liability do not serve as a legitimate basis for the ATCA.¹⁵⁵ Judge Scheinlin, who took over the case after Judge Sprizzo, opted to set a different limit on

151. See Press Release, Ctr. for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch Shell (June 8, 2009), available at <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

152. *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 244 (S.D.N.Y. 2009).

153. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 260-62 (S.D.N.Y. 2009).

154. See generally Kristen Hutchens, *International Law in the American Courts—Khulumani v. Barclay National Bank Ltd.: The Decision Heard Round the Corporate World*, 9 GERMAN L. J. 667 (2009).

155. *In re South African Apartheid Litig.*, 346 F. Supp. 2d 228, 244 (S.D.N.Y. 2004).

the extent to which liability could be pursued for financial institutions in South Africa by dismissing the claims against Barclays Bank PLC (for denying job opportunities on the basis of race) and both Barclays Bank PLC and UBS for loaning money to the South African government and backing the purchase of South African defense forces bonds, drawing a distinction between the provision of goods specifically designed to kill, such as the poison gas used in the Nazi concentration camps, and the more general sale of raw materials or the provisions of loans.¹⁵⁶ It is worth noting that in this decision computers and software were held to be lethal.¹⁵⁷

In contrast, in 2007, judges from the Eastern District of New York declared exactly the opposite in *Almog v. Arab Bank*,¹⁵⁸ when they allowed the plaintiffs to claim liability for human rights violations by a financial institution. In *Almog*, the plaintiffs alleged that Arab Bank “aided and abetted, was complicit in, intentionally facilitated, and participated in a joint venture to engage in acts of genocide in violation of the laws of nations by providing financial and other practical assistance . . . to HAMAS”¹⁵⁹ On September 11, 2009, the company TIAA-CREF made public its voluntary decision to withdraw all of its financial investments in the Africa-Israel company in response to widely publicized reports about the company’s human rights abuses in the diamond industries of Angola and Namibia and its support of Israeli settlements being built in the West Bank.¹⁶⁰

The issue of corporate complicity is one that is constantly being refined both in theory and in practice. In particular, the publication of the hugely influential 2007 *Ruggie Report* strengthened the assertion that there are some minimum international and domestic obligations that affect corporations.¹⁶¹ It remains to be seen whether this trend is likely to tilt toward honoring those responsibilities. The purpose of this paper is to provide the type of concrete and empirical analysis we believe should be undertaken in order to endow substance and viability to the emerging legal theories and practice pushing the evolution of responsibility for corporate complicity.¹⁶² Since private law has long been working on this issue,¹⁶³ we think it would also be useful to look at the development of tort law in this area in order to

156. *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 258 (S.D.N.Y. 2009).

157. *Id.* at 265.

158. *Almog v. Arab Bank*, 471 F. Supp. 2d at 257 (E.D.N.Y. 2007).

159. *Id.* at 265.

160. See Press Release, TIAA-CREF, Statement About Former Holding In Africa-Israel Investments Ltd. (Sept. 14, 2009), available at http://www.tiaa-cref.org/support/news/articles/gen0909_185.html.

161. See Kendra Magraw, *Not Universally Liable? Corporate-Complicity Liability under the Principle of Universal Jurisdiction*, 18 MINN. J. INT’L L. 458 (2009).

162. “The doctrine of international law should take into consideration the realities of international relations and should be in a precise relation to these realities. Otherwise, the doctrine becomes mere philosophical speculation or mental gymnastics, often beautiful and admirable, but of inconsequential value to a jurist.” Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT’L L. 533, 561 (1956).

163. Buyle, *supra* note 56; Likillimba, *supra* note 53.

improve our understanding of the factual mechanisms that link the commodity to the damage being claimed.

We argue, using the example of the Argentinean experience, that the link between human rights violations and the profiteers of the system that facilitated the abuses bolsters the call for clear legal standards and penalties for corporate complicity. While some may argue that this is an *ex-post facto* case that both preceded the evolution of international law and would have reached a statute of limitations, we posit that the Argentinean case is, in fact, legally relevant and very much alive today. As the next section will argue, a case recently filed in Buenos Aires against the banks could significantly bolster international legal jurisprudence on the issue of corporate complicity, contribute to understanding international law from a historical perspective, and also deliver some long overdue accountability.

II. THE ARGENTINEAN CASE

In this section, the legal theory of civil complicity developed in the first section of the paper will be applied to, and combined with, an empirical analysis of the behavior of the banks during the last dictatorship in Argentina. The relevance and timing of this exercise is no accident. This exploration of bank accountability comes at a time in Argentina's history when criminal trials against the former dictators have been revived, with renewed interest in questioning how the dictatorship functioned. Hopefully, examining the role of external financial actors will not only help provide a more complete picture of accountability for this era of abuses but will also contribute to the development of international and national corporate complicity law, particularly laws pertaining specifically to lending, which would ultimately have a deterrent effect.

A. *The Basic Economic Facts of the Military Junta*

Between 1976 and 1982 the Argentinean military junta perpetrated thousands of crimes against humanity, violating *jus cogens* norms through their systematic use of arbitrary detention, enforced disappearances, torture, and extrajudicial executions.¹⁶⁴ The nature of these crimes led the Argentinean Supreme Court to declare that criminal liability could be imposed against the former dictators and that the actions of the government could not be renounced.¹⁶⁵ It is partially due to this determination by the Argen-

164. Nunca Más [Never Again], Report of Conadep [Nat'l Comm'n on the Disappearance of Persons], http://web.archive.org/web/20030803004404/nuncamas.org/english/library/nevagain/nevagain_000.htm (last visited Nov. 20, 2009) [hereinafter Conadep Report].

165. Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, "Etchecolatz, Miguel Osvaldo/ recurso extraordinario," (Arg.), available at <http://www.cij.gov.ar/adj/pdfs/ADJ-0.288435001237979621.pdf>; Corte Suprema de Justicia [CSJN], 13/7/2007, "Mazzeo, Julio Lilo y otros/ rec. de casación e inconstitucionalidad," Fallos (2007-330-3285) (Arg.); Corte Suprema de Justicia [CSJN], 14/6/2005, "Julio Hector Simon y otros/ privación ilegítima de la libertad," Fallos (2005-328-2172)

tinean Supreme Court that these proceedings are still ongoing decades after the offenses were allegedly committed.

During the Argentinean dictatorship, the country's level of debt skyrocketed.¹⁶⁶ The loans were fundamentally granted by syndicates of U.S. and European commercial banks, although Canadian, Arab, and Soviet banks, and even international financial institutions also participated, although in a smaller manner: in 1983 the debt to the commercial banks and its syndicates was U.S.\$20.526 billion, without including the public bonds (U.S.\$6.830 billion) that some of the banks could have held.¹⁶⁷

In order to assess whether the bank loans could have made possible, made easier, or rendered more efficient the commission of human rights violations, it is necessary to analyze the political and economic circumstances of the Argentinean state during the period in which such violations were committed. It is also necessary to look at the concrete behavior of the banks, the way in which the state spent these funds in the military sector, the available information about the crimes, and the conduct of the U.S. government.

B. The Economic Context of the Military Regime and the Necessity of Financial Assistance

To different degrees, developing countries have presented a permanent dependency on external capital since their abrupt ingress into international financial markets during the 1970s. Massive sovereign moratoriums of the early 1980s and the financial crises of the 1990s demonstrate this economic vulnerability and external financial dependency.¹⁶⁸ These factors help give capital markets a strong influence over the operation of these developing countries' governments.

Concern over the economic vulnerability of developing countries was made evident as early as the Bretton Woods Conferences. This concern became even more evident following the deterioration of the terms of trade in the 1970s, which affected the primary commodities exporter countries, pushing them toward greater financial instability.¹⁶⁹ Argentina added to this general trade phenomenon (which had begun prior to the military

(Arg.). See Corte Suprema de Justicia [CSJN], 24/8/2004, "Arancibia Clavel, Enrique Lautaro/ homicidio calificado y asociación ilícita y otros," Fallos (2004-327 3304) (Arg.).

166. See, e.g., U.N. ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN, ESTUDIO ECONÓMICO DE AMÉRICA LATINA Y EL CARIBE-1984, at 79, U.N. Doc. LC/G.1398, U.N. Sales No. 86.II.G.2 (1986); ALDO FERRER, ¿PUEDE ARGENTINA PAGAR SU DEUDA EXTERNA? 54, 63 (El Cid ed., 1982).

167. U.N. Econ. Comm'n for Latin Am. & the Caribbean, *Los Bancos Transnacionales y el Endudamiento Externo en la Argentina*, at 24, U.N. Doc. LC/G.1483-P (Oct. 31, 1987) (prepared by Eric Calcagno).

168. See generally EDUARDO BORENSZTEIN, *LIVING WITH DEBT: HOW TO LIMIT THE RISKS OF SOVEREIGN FINANCE: ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA* (2006); NOURIEL ROUBINI & BRAD SETSER, *BAILOUTS OR BAIL-INS? RESPONDING TO FINANCIAL CRISES IN EMERGING ECONOMIES* (2006).

169. See generally RAFFER & SINGER, *supra* note 120.

coup) additional external debt which, as we will see, also provoked greater external financial dependency.

Between 1976 and 1982, Argentina received enormous funds from commercial banks based in developed countries.¹⁷⁰ The derivation of this mass of money has been attributed to the way in which the Euromarket expanded and to the recycling of petrodollars.¹⁷¹ It can be argued that the banks implemented policies of loan pushing, granting loans to states that did not have the economic capacity to repay these funds¹⁷² and who used public resources to repress their own populations.

In Argentina, these loans were used to support an economic policy that was typically monetarist and included wide economic and financial liberalization, elimination of tariff protections, high domestic rates, and overvaluation of the national currency through precise official measures.¹⁷³ In this general scheme, external finance played a key role in the state's economic development and political reality.

This financial dependency was more extreme if we look at how the military government, steeped in an economic policy of assigning internal resources according to the signal of the prices derived from the international market, adopted a system of adjusting internal prices in relation to international ones,¹⁷⁴ which promoted the "dollarization" of the economy. In the face of the demand for dollars in the domestic market and the inefficiency of the country's system of external trade, the state slipped deeper into debt. These dollars were injected into the domestic market at an inferior value, a mechanism implemented through a system known as "the little table," a system that periodically determined the exchange rate.¹⁷⁵ During the first few years through which this system was implemented, 1976 to 1979, funds swelled the international reserves,¹⁷⁶ fed the capital flight circuit,¹⁷⁷ and often were deposited into the same banks from which the funds had been acquired as loans.¹⁷⁸ In this way, the impact of the bank loans on

170. See Eduardo Basualdo, *La Reestructuración de la Economía Argentina Durante las Últimas Décadas: De la Sustitución de Importaciones a la Valorización Financiera*, in NEOLIBERALISMO Y SECTORES DOMINANTES. TENDENCIAS GLOBALES Y EXPERIENCIAS NACIONALES (Eduardo Basualdo & Enrique Arceo eds., 2006).

171. RAFFER & SINGER, *supra* note 120, at 120.

172. See generally WILLIAM DARITY, JR. & BOBBIE L. HORN, THE LOAN PUSHERS. THE ROLE OF COMMERCIAL BANKS IN THE INTERNATIONAL DEBT CRISIS (1988); Cynthia C. Lichtenstein, *The U.S. Response to the International Debt Crisis: The International Lending Supervision Act 1983*, 25 VA. J. INT'L L. 401 (1985).

173. See generally JORGE SCHVARZER, ARGENTINA 1976-81: EL ENDEUDAMIENTO EXTERNO COMO PIVOTE DE LA ESPECULACION FINANCIERA 12 (1983).

174. ALDO FERRER, ¿PUEDE ARGENTINA PAGAR SU DEUDA EXTERNA? 53 (El Cid ed., 1982).

175. See SCHVARZER, *supra* note 173.

176. FERRER, *supra* note 174, at 62.

177. World Bank, *World Development Report 1985* (May 24, 1985).

178. For a thorough explanation of private sector behavior during this period, see generally Eduardo Basualdo, *La Reestructuración de la Economía Argentina Durante las Últimas Décadas: De la Sustitución de Importaciones a la Valorización Financiera*, in NEOLIBERALISMO Y SECTORES DOMINANTES. TENDENCIAS GLOBALES Y EXPERIENCIAS NACIONALES (Eduardo Basualdo & Enrique Arceo eds., 2006);

Argentina can be visualized from two perspectives, one general and macroeconomic and the other more specific to the military expenditures associated with the repression.

In order to grasp the significance of the volume of loans that Argentina received, it is necessary to keep in mind that the total expenditures of the public sector represented more than a quarter of the GDP during the whole period of the dictatorship (from 25.05% in 1976 to 28.38% in 1982).¹⁷⁹ During this time, public expenditure was growing:

Results on the public sector¹⁸⁰
(in thousands of dollars)

	Incomes	Expenditures
1975	4,587,700	7,418,788
1976	8,242,294	11,682,397
1977	16,400,397	18,731,123
1978	23,872,867	28,081,505
1979	35,570,706	42,942,564
1980	54,912,860	67,260,035
1981	31,288,550	43,947,663
1982	13,361,217	19,666,174

It should be noted that from 1976 to 1983 the internal demand and the industrial activity in Argentina continued to decrease—they had begun falling even before 1976¹⁸¹—provoking a negative evolution of the GDP.¹⁸² It is not surprising then that the average fiscal deficit from 1976 to 1980 was 7.4% of the GDP; from 1981 to 1983, during which the Malvinas War occurred, this percentage increased to 14.6% of the GDP.¹⁸³

Eduardo Basualdo & Matías Kulfas, Presentation at La Globalización Económica-Financiera y el Impacto en la Región, Las Estrategias de Regulación y las Respuestas Sociales y Políticas del Movimiento Popular: Fuga de Capitales y Endeudamiento Externo en la Argentina (Jan. 1, 2000).

179. ORLANDO J. FERRERES, DOS SIGLOS DE ECONOMÍA ARGENTINA (1810-2004): HISTORIA ARGENTINA EN CIFRAS 513 (2005).

180. The public sector comprises the central administration, decentralized organisms, social security systems, public enterprises, fiduciary funds, other entities, states and counties. *Id.* at 517.

181. Industrial activity represented 27.8% of the GDP in 1975, and 22.3% in 1982. ERNESTO FELDMAN & JUAN SOMMER, CRISIS FINANCIERA Y ENDEUDAMIENTO EXTERNO EN ARGENTINA 114 (1984).

182. The level of global activity in 1982 was 1.3% lower than 1975. *Id.* at 115; FERRER, *supra* note 174, at 93.

183. M. Damil & R. Frenkel, *Restauración Democrática y Política Económica: Argentina 1984-1991*, in LA POLÍTICA ECONÓMICA EN LA TRANSICIÓN A LA DEMOCRACIA: LECCIONES DE ARGENTINA, BOLIVIA, CHILE Y URUGUAY 85 (Morales & McMahon eds., 1993).

Considering that these macroeconomic variables deteriorated significantly, the external banking support seems to have been key to the survival of the country's economic and financial systems. In general, the notion that investment leads to democratic spillover effects such as economic growth, increased work force, and improved education in countries where there are massive human rights abuses has been a controversial issue.¹⁸⁴ However, in the case of Argentina, where the GDP experienced a "devolution" during the dictatorship, this discussion becomes even more abstract because the loans did not contribute to significant economic growth. Rather, they arguably subsidized a non-viable monetarist policy in the context of an economic recession.¹⁸⁵ This kind of fiscal deficit and the deceleration of real economic activity can ruin a nation's economic system, whether through budgetary adjustments or debt moratoriums, given all the domestic political and social costs that these imply. As illustrated below, the external debt of Argentina increased during the years in which the country was ruled by the military dictatorship:

The evolution of external debt¹⁸⁶
(In billions of dollars)

	Public external debt	Private external debt	Total external debt
1975	4.021	3.854	7.875
1976	5.189	3.090	8.279
1977	6.044	3.635	9.279
1978	8.357	4.139	12.496
1979	9.960	9.074	19.034
1980	14.459	12.703	27.162
1981	20.024	15.647	35.671
1982	26.341	14.362	40.703

External financing seems to have been vital to the temporary sustenance of this monetarist system which, at a very high economic cost, facilitated the maintenance of the financial system's stability, provided liquidity to the government, and helped to curb the claims of several domestic economic players, which had been steadily increasing over the years. At the same

184. See generally AMNESTY INT'L, HUMAN RIGHTS, TRADE AND INVESTMENT MATTERS (2006), available at <http://www.amnestyusa.org/business/HRTradeInvestmentMatters.pdf>.

185. See Tofalo, *supra* note 102.

186. On data from IMF & BAI, see FERRER, *supra* note 174, at 54, 63.

time, this financing allowed the government to meet the financial demands of operating the state apparatus.

Because of these numbers, it is important to ask the hypothetical questions pertaining to the management of a national economy. Economic experts have observed that, prior to the increase in the external indebtedness of Argentina, it would have been difficult to maintain the financial policy implemented by the military junta.¹⁸⁷ At the same time, even if this financial policy had been maintained and if, in addition to external borrowing, other sources had been available to provide financial support to the state, the reserves still would not have been enough and the crisis of the external sector would have likely exploded earlier. Under another scenario, if a stricter monetary policy had been implemented and it had not been turned to the external public indebtedness, the interest rates would have climbed to unforeseeable limits, which would also have sped up the crisis of the policy carried on since 1977.

It is difficult to speculate about the consequences Argentina might have faced in terms of democratization had the economy collapsed earlier, but this is linked to a broader discussion related to the goals and efficacies of international economic sanctions against criminal regimes.¹⁸⁸ It is reasonable to assume that eroding some economic ratios of a country ruled by a military government helps to limit both its operational capacities to carry out its criminal plans and some of the social domestic legitimacy that it can enjoy.

One must ask whether the dictatorship would have been able to pump money into the military without funds from foreign institutions. This kind of question has a limited legal effect in terms of causal links,¹⁸⁹ but given that the secondary market was not yet well developed, the domestic Argentinean savings rate was negatively affected by the economic crisis, and the U.S. was reluctant to provide financing to Argentina, it is highly probable that the junta would have faced significant obstacles in obtaining these funds through other means. In fact, the relevance of private financial support to Argentina was explicitly mentioned in a document approved by a then-high ranking U.S. State Department official:

The Argentine strategy for relations with the U.S. has been based on the following assumptions Argentina can survive U.S. hostility because of access to alternate suppliers of military aid

187. *Id.* at 154.

188. See *Hearings to Examine Issues Involved in and Proposals Regarding the use of Economic Sanctions as an Instrument of U.S. Foreign Policy Before the S. Task Force on Economic Sanctions*, 105th Cong. (1998) (testimony of Kenneth Roth, Exec. Dir., Human Rights Watch).

189. “[I]t is not a defense to criminal or civil liability that another company would have worked with the principal actor if the company in question had not done so. By enabling, exacerbating, or facilitating gross human rights abuses committed by the principal actor, the company may have inserted itself in the chain of causation and must accept the consequences.” ICJ Vol. 1, *supra* note 23, at 17.

and economic and financial opportunities Negative IFI votes are a political embarrassment to Argentina, but such votes do not block access to critical financing. The Videla government's economic success in the external sector has ensured the availability of financial opportunities from a variety of foreign sources.¹⁹⁰

The increment of the interest rates and the reduction of liquidity in the international financial markets unchained a global crisis starting in 1982 onward, creating a situation in which banks stopped lending more money to sovereign borrowers, including Argentina.¹⁹¹ Alongside other political facts, the beginning of the transition to democracy was connected to the outbreak of the so-called debt crisis and the collapse of the Argentinean economy. This collapse led to the destruction of any remnants of the social support base that the dictatorship still enjoyed and resulted in massive bankruptcies of domestic companies and the widespread dismissal of workers.¹⁹² This shows that, even when other factors influence the evolution of this kind of political phenomenon, large-scale financial aid plays a pivotal role in facilitating or hampering the state's ability to implement its plans.

As previously stated, even when other economic, political and social variables factor into government decisions, there seems to be a co-causal nexus between the decision to grant a loan and what the government borrower does with this money, which indicates the strength of the connection between lending and the endurance of *de facto* legitimacy.¹⁹³ As members of the U.S. Congress pointed out when analyzing the role of the Riggs Bank in financing Pinochet's government: "[H]istory has shown that financing is key to terrorism, corruption, and other criminal acts."¹⁹⁴

C. Bank Loans and Domestic Military Expenditures of the Dictatorship

Bank loans can have a direct impact on the concrete criminal activities of the borrower state; the massive provision of cash flow enables and/or improves the otherwise regular functioning of the bureaucratic state structure, which includes all military and repressive logistics. In the case of Argentina, these loans helped to encourage a policy of growing military expenditures¹⁹⁵ that, in the first (and bloodiest) years of the dictatorship, were not

190. U.S. Dep't of State: Evolution of U.S. Human Rights Policy in Argentina 5, 8 (Sept. 11, 1978) (unclassified draft memorandum), available at <http://foia.state.gov/documents/Argentina/0000AA65.pdf>.

191. See RAFFER & SINGER, *supra* note 120, at 160-61.

192. See *id.* at 115-16.

193. See *id.* at 38.

194. MINORITY STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON GOVERNMENTAL AFFAIRS, 108TH CONG., MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT (Comm. Print 2004).

195. These expenditures comprise the direct costs of the external defense service and include, among other things, those areas that seem to be most closely related to the repression of the population:

associated with a “real war hypothesis” but with matters of so-called “domestic security.”¹⁹⁶ In practice, these translated into the repression of the Argentinean population.

As the following chart shows, the evolution of increases in military expenditures also implied a growing participation of the military sector in the GDP itself.¹⁹⁷

The evolution of military expenditures
(In billions of dollars)

	Military expenditures	% of the GDP
1975	1.929	3.7%
1976	2.028	4.2%
1977	2.179	4.3%
1978	2.401	5%
1979	2.499	4.9%
1980	3.009	5.5%
1981	2.867	5.8%
1982	2.604	5.7%

The theory that higher military expenditures during 1976 and 1977 were a response to perceived “domestic security” threats is substantiated by the evolution of the defense imports expenditures that, according to conservative estimations, were as follows: U.S.\$1.57 billion in 1975, U.S.\$1.19 billion in 1976, and U.S.\$626.1 million in 1977.¹⁹⁸ In summary, during the first years of the dictatorship, although military expenditures increased, spending on arms imports actually decreased, indicating that financial resources were directed in large part toward the support of the internal fight against “subversion,” which was the very framework within which crimes against humanity were perpetrated.

This data also contradicts the idea that the loans were taken by the Argentinean state solely for purchasing weapons to defend the territory during the military conflicts with Chile and the United Kingdom. The loans and

1) All the labor costs of the military and civil employees; 2) Costs of operation and maintenance; 3) Purchase of all the materials; 4) Military construction; 5) Expenditures incurred by military attaché; 6) Civil defense; 7) Programs of military public relations; 8) Military intelligence. Cf. THOMAS EDWARD SCHEETZ, “*Gastos militares en America del Sur*”, in *PROLIFERACIÓN DE ARMAMENTOS Y MEDIDAS DE FOMENTO DE LA CONFIANZA Y LA SEGURIDAD EN AMÉRICA LATINA* (on file with authors).

196. See discussion of military expenditures and accompanying data *infra*.

197. See Thomas Scheetz, *Gastos militares en Chile, Perú y la Argentina*, DESARROLLO ECONÓMICO, Oct.-Dec. 1985, at 319 (data in 1977 U.S. dollars).

198. SCHEETZ, *supra* note 195 (data in 1982 U.S. dollars).

the incremental increase of military expenditures started before these conflicts, and, until 1978, the military junta spent the larger part of its military budget in areas that were not directly related to external aggressions.

D. *The Public Character of the Human Rights Abuses*

The first external indicator that systematic human rights abuses were being committed in Argentina came from journalists' reports.¹⁹⁹ The prestige of the foreign newspapers that published this news, the sheer volume of articles describing this situation, and the degree to which journalists emphasized the extreme gravity of what was happening, should have helped banks assess the foreseeable consequences of their loans.

The early position of the U.S. government, as discussed below, which warned the military junta that it was exceeding the inalienable limits of the law, should also have sent a clear message to the banks that the loans they were issuing could be used for potentially lethal purposes. As early as 1976, the U.S. Department of State, in a report submitted to Congress detailing potential human rights issues in numerous countries, explicitly noted that the Argentinean leaders were seeking to curb violations of human rights but were thus far unable to control the situation effectively.²⁰⁰ In early 1977, the urgency of the Argentinean situation was again officially confirmed by the U.S. Department of State in a second report to Congress.²⁰¹

International organizations publicized the Argentinean government's abuses. In March 1977, Amnesty International released a report denouncing the human rights abuses occurring in Argentina. The report included an eighteen-page list of the names of people who had disappeared, including the date of their kidnapping and other relevant details.²⁰² A conclusive 1978 report made by the Inter-American Human Rights Commission put to rest any remaining doubts about the situation in Argentina, concluding that "it seems evident that the decision of organizing command units that were involved in the disappearance and possible extermination of those thousands of people, was adopted by the maximum level of the Armed

199. As early as May 26, 1976, the *New York Times* publicized the fact that elements of the military forces seemed to be accelerating the campaign of assassinations, arbitrary detentions and drastic purges. *Repression in Argentina*, N.Y. TIMES, May 26, 1976, at 26. See also *Carter Rights Aide, Visiting Argentina, Warns on Violation*, N.Y. TIMES, Apr. 3, 1977, at 11; *N.Y. group pleased with Venezuela Argentina called worst human rights violator*, GLOBE & MAIL, Dec. 23, 1977.

200. U.S. DEP'T OF STATE, REPORT TO H. COMM. ON INT'L RELATIONS, 94TH CONG., HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU, AND THE PHILIPPINES 5 (Comm. Print 1976) [hereinafter 1976 STATE DEPT. REPORT].

201. U.S. DEP'T OF STATE, REPORT TO SUBCOMM. ON FOREIGN ASSISTANCE OF THE S. COMM. ON FOREIGN RELATIONS, 95TH CONG., HUMAN RIGHTS REPORTS 106-08 (Comm. Print 1977) [hereinafter 1977 STATE DEPT. REPORT].

202. Amnesty Int'l, *Report of an Amnesty International Mission to Argentina*, A1 Index PUB 68/00/77, 1977.

Forces.”²⁰³ In the late 1970s, Amnesty International,²⁰⁴ echoing reports elaborated by the Asamblea Permanente por los Derechos Humanos (“APDH”),²⁰⁵ the New York City Bar Association,²⁰⁶ and the U.S. Department of State,²⁰⁷ continued to denounce the serious and frequent occurrence of kidnappings, disappearances, tortures, illegal detentions, and murders in Argentina.²⁰⁸

Despite evidence suggesting that banks should have been alerted to the possibility that their loans would be used for illegal purposes, it is necessary to address the counter-factual questions regarding the bank’s knowledge about the potential consequences of the loans issued. First, did financial institutions know that there would be no “democratic spillover” as a consequence of lending money to the military regime? From a macroeconomic point of view, the economy had begun deteriorating at the beginning of the dictatorship, and it did not grow during the dictatorship. Therefore, it is unlikely that people could have reasonably expected that there would be general spillovers. From a microeconomic point of view, in Argentina, the projects for specific (“good”) purposes were only a few, so their destinations and *prima facie* benefits would have been very difficult to prove.

Second, could Argentinean citizens have been worse off if banking institutions had refrained from lending money, and their country had descended further into poverty? Since the evidence shows that even from the very beginning of the dictatorship these loans did not improve the economic situation of citizens of Argentina, there is little to support this stance. Regardless, this economic trade-off analysis ignores the possibility that loans of this nature could simultaneously contribute to the increased wealth of Argentinean citizens even while financing human rights violations committed against the same group of people.

E. *The Conduct of the U.S. Government*

President Jimmy Carter’s victory in 1976 set a new stage in terms of human rights, particularly in U.S. policies toward Latin America. This

203. Inter-Am. Comm’n on Human Rights, Org. of Am. States, OEA/Ser.L./V/II.49 (Apr. 11, 1980).

204. See, e.g., Amnesty Int’l, *Summary of the Report of the Inter-American Commission on Human Rights on the Human Rights Situation in Argentina*, AI Index AMR 13/27/80, April 1980, cited in WOLFGANG S. HEINZ & HUGO FRÜHLING, DETERMINANTS OF GROSS HUMAN RIGHTS VIOLATIONS BY STATE AND STATE-SPONSORED ACTORS IN BRAZIL, URUGUAY, CHILE, AND ARGENTINA: 1960-1990 649 (1999).

205. See, e.g., Asamblea Permanente por los Derechos Humanos, Declaración, May 22, 1977, cited in WOLFGANG S. HEINZ & HUGO FRÜHLING, DETERMINANTS OF GROSS HUMAN RIGHTS VIOLATIONS BY STATE AND STATE-SPONSORED ACTORS IN BRAZIL, URUGUAY, CHILE, AND ARGENTINA: 1960-1990 597 (1999).

206. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *Report of the Mission of Lawyers to Argentina* (Apr. 1-7 1979).

207. U.S. DEP’T OF STATE, REPORT TO H. COMM. ON FOREIGN AFFAIRS AND S. COMM. ON FOREIGN RELATIONS, 96TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 241 (Comm. Print 1980).

208. See SCHULTZ, *supra* note 123, at 348-49.

change in leadership marked a significant departure from the policies of the Ford administration, which had supported dictatorships that could work as allies in the fight against communism.²⁰⁹ The public and open work of numerous non-governmental organizations²¹⁰ and the international efforts to raise awareness of both the general public and politicians about human rights violations that were occurring in several Latin American countries, including Argentina, were not in vain.²¹¹ The U.S. government and Congress²¹² adopted several measures seeking to prevent these abuses.

Following the U.S. Department of State's official acknowledgment that human rights violations were occurring in other nations (with special attention given to Argentina),²¹³ and after instituting a policy for dealing with human rights violations that differed significantly from that of the Ford administration,²¹⁴ the Carter administration promoted an aggressive foreign policy toward Argentina with the specific objective of using diplomatic pressure and conditional assistance to reduce human rights violations.²¹⁵ This led to a policy of explicit refusal to give financial and military aid to the Argentinean dictatorship, which arguably had the implicit goal of provoking certain economic hardships in order to force the military government to improve its performance in the human rights field.

As early as 1974, the U.S. Foreign Assistance Act had already stipulated that, except in "extraordinary circumstances," military aid to governments that were involved in "consistent patterns of gross violations of internationally recognized human rights" had to be reduced and eventually extinguished.²¹⁶ In 1976,²¹⁷ and then more clearly in 1978,²¹⁸ the U.S. Congress

209. See generally Cynthia J. Arnson, *Argentina and the U.S. Congress*, in ARGENTINA-UNITED STATES BILATERAL RELATIONS: AN HISTORICAL PERSPECTIVE AND FUTURE CHALLENGES 83-86 (Cynthia J. Arnson ed., 2003); John Dinges, *Green Light-Red Light: Henry Kissinger's Two-Track Approach to Human Rights During the 'Condor Years' in Chile and Argentina*, in ARGENTINA-UNITED STATES BILATERAL RELATIONS: AN HISTORICAL PERSPECTIVE AND FUTURE CHALLENGES 59-76 (Cynthia J. Arnson ed., 2003); Carlos Osorio, *National Security Archive*, in ARGENTINA-UNITED STATES BILATERAL RELATIONS: AN HISTORICAL PERSPECTIVE AND FUTURE CHALLENGES 11-28 (Cynthia J. Arnson ed., 2003).

210. For an overview of the transnational advocacy movement for human rights in Argentina, see MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998).

211. See SCHULTZ, *supra* note 123.

212. With the change of the political composition of the U.S. Congress, in 1974 members of Congress had already started focusing on human rights issues. See CYNTHIA J. ARNISON, *CROSSROADS: CONGRESS, THE PRESIDENT, AND CENTRAL AMERICA, 1976-1993* (1993); ROBERT JOHNSON, *CONGRESS AND THE COLD WAR* (2006).

213. 1976 STATE DEPT. REPORT, *supra* note 200, at 5; 1977 STATE DEPT. REPORT, *supra* note 201, at 106-08.

214. U.S. Dep't of State, Memorandum of Conversation: U.S.-Argentine Relations (Oct. 6, 1976) (on file with authors).

215. Cyrus Vance, *Human Rights and Foreign Policy*, 7 GA. J. INT'L & COMP. L. 223 (1997).

216. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815-16 (adding § 502B to the Foreign Assistance Act of 1961).

217. International Security Assistance and Arms Exports Act of 1976, Pub. L. No. 94-329, § 301(a), 90 Stat. 729, 748-50 (amending § 502B of the Foreign Assistance Act of 1961).

218. International Security Assistance Act of 1978, Pub. L. No. 95-384, § 6, 92 Stat. 730, 731-32 (amending § 502B of the Foreign Assistance Act of 1961).

stated that it was mandatory to deny security assistance to any country whose government engages in a consistent pattern of gross violations of internationally recognized human rights. On February 24, 1977, the U.S. Secretary of State, Cyrus Vance, announced to the Subcommittee on Foreign Operations of the Senate Appropriations Committee that the government was going to reduce its aid to Argentina, Ethiopia, and Uruguay on the basis that gross violations of human rights were being committed in these countries.²¹⁹ In 1977, the U.S. Congress prohibited any additional military aid to Argentina in the way of donations, credits, guaranteed loans, sales, and export licenses, effective from September 30, 1978 onward.²²⁰

At this time, the Overseas Private Investment Corporation ("OPIC") likewise decided to adopt a policy of taking into account the human rights record of a country wherever an American corporation planned to invest. At the end of 1978, OPIC had decided to not consider granting insurance coverage to those companies that wanted to invest in Argentina, precisely because of the serious violations of human rights known to be taking place there.²²¹ By August 1978, the U.S. State Department had withheld an estimated U.S.\$1.25 billion in non-military exports to Argentina based on human rights violations, including eleven Export-Import Bank transactions valued at nearly U.S.\$600 million.²²²

Likewise, when Congress expanded its original Harkin initiative,²²³ it also ordered U.S. representatives in multilateral and development banks to vote against the provision of loans for countries known to be violating the fundamental human rights of its citizens.²²⁴ This initiative appears to have been the primary motivation for the U.S. government to take such a strong stance against the violations occurring in Argentina and also explains why the government abstained or voted against the numerous multilateral loans requested by the military junta.²²⁵

This policy of rejecting multilateral loans for political and legal reasons was explained in the following terms: the U.S. felt it had to use its voice

219. *Foreign Assistance and Related Programs Appropriations for Fiscal Year 1978: Hearing Before the Subcomm. on Foreign Operations of the S. Comm. on Appropriations*, 95th Cong. 9 (1977) (testimony of Cyrus Vance, U.S. Sec'y of State).

220. Act of Aug. 4, 1977, Pub. L. No. 95-92, § 11, 91 Stat. 614, 619-20; see also SCHOULTZ, *supra* note 123, at 260; CONG. RESEARCH SERV., REPORT TO S. COMM. ON FOREIGN RELATIONS, 96TH CONG., HUMAN RIGHTS AND U.S. FOREIGN ASSISTANCE: EXPERIENCES AND ISSUES IN POLICY IMPLEMENTATION (1977-1978) 106 (Comm. Print 1979).

221. SCHOULTZ, *supra* note 123, at 320.

222. Memorandum from Robert Pastor to Zbigniew Brzezinski, U.S. Nat'l Sec. Advisor, Aug. 31, 1978, reprinted in Declassified Documents Reference System (Doc. No. CK3100116847).

223. International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 310, 89 Stat. 849, 860. This legislation added Section 116 to the Foreign Assistance Act 1961, prohibiting the economic aid to countries in which gross human rights violations were committed, unless this aid directly benefited the needy people. *Id.*; see also SCHOULTZ, *supra* note 123, at 195.

224. Act of May 31, 1976, Pub. L. No. 94-302, § 211, 90 Stat. 591, 595; Act of Oct. 3, 1977, Pub. L. No. 95-118, § 701, 91 Stat. 1067, 1069-71.

225. SCHOULTZ, *supra* note 123, at 296-98.

and voting power in the six multilateral development banks to which it belonged at the time in order to protect human rights. This policy included a decision to open channels of assistance to those countries whose governments were not involved in consistent patterns of gross violations of human rights.²²⁶ In the case of the Chilean dictatorship, the U.S. government went as far as warning banks that their decision to grant financial support to the Pinochet regime was inconsistent with the foreign policy of the Carter administration, which believed that human rights were a crucial variable to be seriously taken into account before granting aid or loans.²²⁷

It is true that the Carter administration's human rights policy was not as strong and consistent as it could have been,²²⁸ meaning that it had only a limited impact on the situation in Argentina. It is also true that, even before Ronald Reagan won the 1980 presidential election, U.S. foreign policy had become more conservative and increasingly concerned with commercial and geopolitical interests.²²⁹ However, these facts do not erase the legal and political significance of the U.S. legislative and administrative decisions taken during the years in which human rights violations in Argentina reached their peak.

F. *Timing and Relevance of Scrutinizing the Role of Banks*

The question of bank complicity is being raised at a time when both Argentinean society and the field of human rights can benefit from such an investigation, not only because the country's transitional justice experience is ongoing today but also because international law has evolved to a point where it can more effectively tackle difficult questions about complicity. These two factors render the act of scrutinizing bank responsibility both timely and relevant on several levels: recognizing links between the behavior of corporations and human rights violations, which can have a possible deterrent effect on future corporate behavior and encourages transitional justice mechanisms to look at economic factors as essential components of violations; creating a more complete narrative of the violations that occurred; and, if it is determined that banks should be held accountable, pro-

226. Act of Oct. 3, 1977, Pub. L. No. 95-118, § 701, 91 Stat. 1067, 1069-71; see also *International Development Institutions Authorizations-1977: Hearing on H.R. 5262 Before the Subcomm. on Int'l Development Institutions and Finance of the H. Comm. on Banking, Finance and Urban Affairs*, 95th Cong. 2 (1977).

227. *Reuss: Rights Policy Not Helped by Loans To Chile From Banks*, WASH. POST, Apr. 13, 1978, at A19. The responsibility of the bank that financed the Pinochet government and then opened accounts for him to deposit the looted money has already been the subject of specific legal analysis. See Scott, *supra* note 102, at 1497.

228. Karen DeYoung & Charles A. Krause, *Our Mixed Signals On Human Rights In Argentina; Our Mixed Signal On Human Rights*, WASH. POST, Oct. 29, 1978, at C1.

229. *Human Rights and Mrs. Derian*, N.Y. TIMES, May 31, 1980; Juan de Onis, *U.S. Improving Ties to Latin Rightists*, N.Y. TIMES, Mar. 8, 1981. See William Schmidli, *Institutionalizing Human Rights in United States Foreign Policy: U.S.- Argentine Relations, 1976-1980*, DIPLOMATIC HISTORY (forthcoming 2010).

viding an additional source of funding for reparations to victims and their families.

The lack of scrutiny surrounding Argentinean financial institutions is not unique. Rather, it is consistent with the general historical tendency in international law to fail to hold economic actors accountable for human rights abuses.²³⁰ Examining the responsibility of banks in Argentina could encourage the evolution of sound legal standards around lending, challenging the trend of holding financial actors to be neutral or irrelevant in their proximity to criminal regimes. A thorough examination of the banks' behavior would create recognition of the idea that financial support can be as powerful a legitimating and strengthening tool as other types of assistance to regimes known to violate human rights. This could create precedent to subject other financial institutions to the same kind of scrutiny in the future, which may serve as an overall deterrent effect on corporate behavior.²³¹

Transitional justice efforts to date remain incomplete. Since the junta's fall in 1983, substantial steps have been taken to pursue justice for victims of the crimes committed during the dictatorship. These have included one of the first incarnations of the modern-day truth commission, CONADEP, which in 1984 carried out investigations into the nature of the crimes committed by the junta, even though it lacked judicial authority to act on its findings and furthermore looked almost exclusively at enforced disappearances.²³² Even in the face of ongoing intimidation²³³ and political pressure from the former leaders,²³⁴ efforts have been made to prosecute human rights offenders, and several initiatives have been taken to provide reparations to victims and their families.²³⁵ For example, a number of laws and decrees have been passed to provide forms of restitution, compensation, and rehabilitation to victims of human rights abuses.²³⁶ These have included

230. For discussion of this in relation to human rights and the field of transitional justice in particular, see Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?*, INT'L J. TRANSITIONAL JUST. 310, 310-30 (2008).

231. One need only look at current debates around investments in the Sudan and connections to the human rights abuses being carried out in Darfur to see that this topic continues to gather steam in modern discourse around accountability and complicity. See generally Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, 25 ARIZ. J. INT'L & COMP. L. 1 (2008).

232. Conadep Report, *supra* note 164.

233. Reports of harassment, violence, and even disappearances of witnesses continue to this day. In the most famous example, in 2007, Julio Lopez, a retired construction worker and victim of the military junta, disappeared just hours before the conviction of former Superintendent Miguel Etchecolatz. Countless witnesses have also reported receiving harassing phone calls—many of which can be traced back to the prisons at which former dictators are being held—or being forced into cars and told to drop their testimonies. See Marie Trigona, *Thirty-one Years After the Coup: Disappearances and Terror Back on the Streets*, TOWARD FREEDOM, Mar. 29, 2007, <http://towardfreedom.com/home/content/view/1008/54/>.

234. See Rebecca Lichtenfeld, *Accountability in Argentina: 20 Years Later Transitional Justice Maintains Momentum*, INT'L CTR. FOR TRANSITIONAL JUST., Aug. 2005, <http://www.ictj.org/images/content/5/2/525.pdf>.

235. GUEMBE, *supra* note 81, at 701-31.

236. GUEMBE, *supra* note 81.

compensation for lost labor time, pensions for victims' families, funding to support the work of NGOs such as the Mothers of the Plaza de Mayo,²³⁷ and the creation of a legal status of "absent by forced disappearance," which has allowed families to take care of processing wills, closing estates, and otherwise settling the remaining affairs of victims in their absence.²³⁸

Despite these efforts, most cases regarding disappearances, torture, and extrajudicial executions that occurred during the dictatorship either remain unresolved or are still in the process of being addressed in Argentinean courts.²³⁹ Indeed, the quest to end impunity in Argentina continues with renewed fervor today, motivated by a widespread sense that justice has not yet been achieved. It has been invigorated by the 2003 repeal of controversial amnesty laws,²⁴⁰ which allows for the prosecution of many of the remaining members of the dictatorship. At the time of this writing, hundreds of trials and investigations related to the dictatorship are active in the Argentinean legal system.²⁴¹ The Center for Legal and Social Studies describes the current landscape of legal cases against the former dictators:

[There are] 243 sets of criminal proceedings in relation to state terrorism [underway], in which 1129 persons have been declared to be suspects for purposes of pre-trial investigation. Of these, criminal charges have been laid against 419 persons, while 40 are fugitives from justice. The cases of 83 individuals have been declared to lack probable cause; a further 176 suspects are deceased, 12 have been declared unfit to be submitted to trial, and 33 have been convicted.²⁴²

Economic factors must be added to discussions of human rights abuses. Transitional justice mechanisms have long neglected to take into account

237. See Graciela Lois & Margarita Lacabe, *In Search of Vindication: Reparations for Human Rights Abuses in Argentina*, КО'АГА РОЊЕ'ЋТЉ, May 1999, <http://www.derechos.org/koaga/vii/lois.html>.

238. This terminology improved greatly the previous category of "presumed dead," as it not only invokes acknowledgment of a crime but also confers a legal equivalent of death for civil matters. See Laura Olson, *Mechanisms Complementing Prosecutions*, 84 INT'L COMM. OF THE RED CROSS 185 (2002).

239. In 2003, prior to the repeal of amnesty laws that would allow trials against former junta leaders to resume, Amnesty International claimed that "most 'disappearances' in Argentina have still not been clarified, the fate of the victims has not been determined and the perpetrators remain at liberty." Amnesty Int'l, *Argentina: The Full Stop and Due Obedience Laws and International Law*, AI Index: AMR 13/004/2003, Mar. 31, 2003, available at <http://www.amnesty.org/en/library/asset/AMR13/004/2003/en/ad565c6c-d701-11dd-b0cc-1f0860013475/amr130042003en.pdf> [hereinafter 2003 Amnesty Int'l Report].

240. *Leyes de obediencia debida y punto final – Decláranse insanablemente nulas leyes 23.492 y 23.521. [Due Obedience and Full Stop Laws – Repealing laws 23.492 and 23.521.]* Law No. 25.779, Sept. 2, 2003 [LXIII-D] A.D.L.A. 3843-44. This law repealed the most important of the amnesty laws, the full stop and due obedience laws: Punto Final [Full Stop], Law No. 23.492, Dec. 24, 1986, [XLVII-A] A.D.L.A. 192; Obediencia Debida [Due Obedience], Law No. 23.521, June 8, 1987, [XLVII-B] A.D.L.A. 1548.

241. *Buscan Agilizar los Juicios a Represores*, LA NACIÓN, Feb. 28, 2009, available at http://www.la.nacion.com.ar/nota.asp?nota_id=1104089.

242. Center for Legal and Social Studies (CELS), <http://www.cels.org.ar/wpblogs/ingles> (last visited Nov. 20, 2009).

the economic factors behind a given regime's capacity to repress or abuse the target population—a factor visible in the limited scope of CONADEP's report and in the mandates of almost all truth commissions to date. The failure to address the economic factors that have influenced or helped to maintain a particular dictatorship constitutes a dangerous historical blindness. In other words, to treat only the political factors of a conflict or period of repression and ignore the economic factors is to fuel the risk that the same factors could emerge and thrive again, resulting in the re-emergence or maintenance of the same kind of violent regime in the future. In this way, the Argentinean case provides a conceptual opening for viewing economic factors as an essential part of any holistic assessment of causal factors underlying a given era of human rights violations.

In addition to contributing to human rights and to promoting deterrence, completing Argentina's historical narrative has enduring relevance today for Argentina as it continues to struggle to resolve the crimes of the past. Investigating the banks' contributions to the junta could help to create a comprehensive historical narrative for the period of atrocity, allowing additional factors to emerge in the search for truth about this period, particularly in the sphere of complicity. For example, investigating if and how foreign lenders helped prolong the junta's survival combats the notion that this was purely the wish of a handful of generals carrying out a murderous campaign on their own, and draws out important legal questions about the role that private financial actors played in aiding and prolonging the dictatorship.

As previously discussed, the fact that trials are ongoing offers a unique opportunity for Argentina to set precedent for future transitional justice mechanisms. These trials demonstrate the need to look at civil complicities to determine the truth about a given regime's functioning, as "situations of transition offer unique windows of opportunity to address issues of impunity which are of crucial importance in a society's development."²⁴³ Evidence about collusion or reckless assistance to the junta's leaders could also help provide important information about the systemic and structural nature of the junta's operations as a collective movement, contributing to both the ongoing trials and toward the overall understanding of the patterns of the "system crimes" committed.²⁴⁴ In addition to serving the punitive goals of justice, another function of having criminal trials after periods of mass atrocity is to help create an understanding of the systems that worked together to make these crimes possible, hopefully serving to discourage similar behavior in the future.

243. James Cavallaro & Sebastian Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* 135 (Kieran McEvoy & Lorna McGregor eds., 2008).

244. *Id.*

Should it be determined that these banks should be held accountable, the banks could also provide for just compensation by making additional resources available for reparations funds for victims. This would not only provide a tangible layer of justice for victims and their families in Argentina, but it would also set an important precedent for future cases in which human rights victims seek damages, alleging that corporate contributions have helped finance human rights violations.

FINAL CONSIDERATIONS

It is important to remember that, at the time of the Argentinean dictatorship, the U.S. government recognized that the most “serious” human rights violations, or those that infringe on peremptory norms,²⁴⁵ should be discouraged through the use of severe restrictions in financial and military aid. In 1978, Patricia Derian, then Assistant Secretary for Human Rights and Humanitarian Affairs of the Department of State, publicly defended this policy, arguing that the human rights situation of any given country must be evaluated when deciding whether to grant it assistance.²⁴⁶ In her public statement to representatives of the U.S. government at the time, Derian explained the implications that *jus cogens* norms have on foreign policy:

The rights about which we are concerned . . . are recognized in the Charter of the United Nations, the UN Universal Declaration of Human Rights and other international agreements and covenants as being universal and applicable throughout the world. The countries of the Western hemisphere have also acknowledged basic human rights in the Charter of the OAS and are now according additional attention to them in the American Convention of Human Rights, which is now ratified by 12 countries and has recently entered into force [T]he promotion of internationally recognized human rights is in fulfillment of obligations imposed upon us by the international agreements and covenants described above.²⁴⁷

It is thus clear that the legal source of the financial restrictions formalized and imposed by the U.S. government toward Argentina came from an explicit understanding of the primacy of *jus cogens*, which compels both states and private entities²⁴⁸ to respect these basic legal limits even in civil pro-

245. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006).

246. *Arms Trade in the Western Hemisphere: Hearing Before the Subcomm. on Inter-American Affairs of the H. Comm. on International Relations*, 95th Cong. (1978) (statement of Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

247. *Id.*

248. *Paquete Habana*, 175 U.S. 677 (1900); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995).

ceedings for damages.²⁴⁹ This same principle also affirms that no public authority has the power to exempt private entities from respecting these preemptory, fundamental obligations, since they are inalienable legal rights.

Even the military junta recognized that the U.S. government was applying principles that were protected by the most relevant norms of international law during the first years of the Carter administration. When Jimmy Carter took office, U.S. military aid to Argentina was immediately reduced from U.S.\$48 million to U.S.\$15 million; the U.S. embassy reported that high ranking Argentinean officials were “shaken, disappointed and angered” and had made public statements in their defense against the U.S. position, saying that “no state, whatever its ideology or power, can set itself up as a court of international justice, interfering in the domestic life of other countries.”²⁵⁰

In retrospect, it is worth trying to understand why the phenomenon of commercial bank lending to Argentina has been almost completely absent²⁵¹ from historical, political, and legal efforts to comprehend and account for what took place during these years of systematic and extensive human rights atrocities in Argentina. The reasons for this delay are multiple and stem in part from the inconsistent evolutionary pace of legal standards for corporate complicity. The delay also reflects the severe constraints experienced by the Argentinean population in its ongoing struggle for truth and justice—a struggle evident in the fact that, some thirty years after the dictatorship, criminal trials against the perpetrators are still ongoing.

Banks played a significant economic and political role in Argentina, both by supporting the macroeconomic ratios of the Argentinean dictatorship and by financing the growing military expenditures meant to ensure what the junta deemed “internal security,” which translated into the regime’s capacity to perpetrate crimes against humanity on a mass scale. The question of what legal steps must be taken to hold the banks legally responsible is one that will require extensive economic and political analysis, a task in which Argentinean courts may soon engage (see postscript). While

249. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See also Ramasastry, *supra* note 7, at 91; Ratner, *supra* note 40, at 504.

250. U.S. Dep’t of State, Telegram No. 2053 from U.S. Embassy Buenos Aires, Argentina to U.S. Sec’y of State Cyrus Vance (Mar. 17, 1977) available at <http://foia.state.gov/documents/Argentina/0000A3B9.pdf>; Juan de Onis, *Argentina Says Carter Interferes*, N.Y. TIMES, Mar. 1, 1977.

251. In May 28, 2008, the Argentinean ambassador in the U.S., Hector Timerman, answered a letter from the American representative Carolyn B. Maloney, who was worried about the impact of the 2002-2005 Argentinean default on the global finance and the American economy. Going back to the history of the debt crisis, he raised a compelling question: “Why would somebody lend money to a regime that threw out people alive from airplanes, among them two nuns? Perhaps we should ask ourselves why the victims must pay to bankers and investors who lent money to genocides. Well, it may be that for them it is business as usual.” Letter from Hector Timerman, Argentinean Ambassador to the United States, to Carolyn B. Maloney, U.S. Congresswoman (May 28, 2008) (on file with authors).

counter-factual arguments about history—and thus liability—can help us to understand the complexities of a dictatorship, they cannot replace the technical notion about substantial effect that is required by the causal link to hold an accomplice responsible. Information made available to the public since 1976 about the serious human rights abuses that were being carried out in Argentina, which was strongly corroborated by the conduct of the U.S. government during the Carter administration, the economic characteristics and conditions of Argentina and, therefore, the likely impact of massive loans, suggests that there is a need for a deeper inquiry into the behavior of financial institutions associated with the junta during those years.

This effort to examine the role played by lenders is more than just a timely and relevant exercise. It stands to contribute to Argentina's search for justice and to the evolution of corporate accountability standards globally. The time has come to look into the economic factors that allowed the junta to survive, and to shed light on the connections between bank behavior and human rights violations in Argentina. At the same time, this examination seeks to bolster the evolution of legal standards for corporate behavior, moving the notion of complicity into a legal universe in which lenders can no longer enjoy a unique immunity from accountability for the consequences of their loans.

Postscript

As this article was being written and prepared for publication, the first of several claims was presented in federal court in Buenos Aires, on behalf of two victims charging the foreign financial institutions with complicity for the crimes committed by the junta against their parents, whose disappearances remain unresolved. The claim was filed March 19, 2009, and invokes many of the norms and both international and U.S. jurisprudence discussed in this paper to assert that banks that lent massive amounts of money to the military regime, enabling it to function economically and supporting its systematic repression, should be held accountable under the theory of corporate complicity. As a preliminary measure, the claim requests that the Argentinean central bank provide the complete list of lenders and the terms of the loans that were granted during the dictatorship. In November 2009, both the federal and provincial courts were still discussing matters of jurisdiction to determine in which court the case would be heard.

