Corporate Complicity and Finance as a 'Killing Agent'

The Relevance of the Chilean Case

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Abstract

The legal basis for corporate accountability for violations of human rights has evolved robustly over the past decades. Yet, accountability for financial complicity has significantly lagged behind. This article attempts to address this gap in order to help close it. It describes the legal and judicial trends in the evolution of corporate responsibility for complicity, identifying points at which financial complicity could have been addressed as a contributing factor to human rights abuses, but was not. As a case study, it examines the political context of the Chilean dictatorship, the official US position on withholding financial aid, the macroeconomic and budgetary impact of the loans extended, and, finally, their effects on the human rights situation in Chile. It develops the argument that when judging financial complicity, the fundamental criterion to employ should be the foreseeable use *of the commodity, rather than its inherent* quality.

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1. Introduction

This article briefly examines the judicial evolution of corporate complicity in human rights violations, focussing in particular on the role of financial institutions. It explores the historical deficit in legal and analytical precedents on connecting the particular commodity of money to legal liability. This article also looks closely at Chile's Pinochet regime and the financial aid it received. For several reasons, this case offers rich legal, economic, and political raw material for better understanding how money can affect mass violations of human rights. For one, the case is rife with objective facts and figures that detail clearly how financial aid received by the Chilean military government — first public and later private — had an impact on the macroeconomic, budgetary, and bureaucratic realities of Chile, raising questions around both facilitation, and making the regime's crimes more efficient. Second, the official financial position adopted by the United States toward the Pinochet regime raises important red flags about how crucial contributions by other financial actors were to maintaining a regime that had become widely discredited. On the basis of the massive campaign of human rights abuses carried out by this regime, in 1976 the US government decided to stop granting loans and financial aid to the military government. And thirdly, the undeniable proof provided by the report of Professor Antonio Cassese (the 'Cassese Report') — researched and published in 1978 for the United Nations — which explained in astonishing and concrete detail how the financial aid received by the regime was facilitating human rights abuses in Chile.[1]

As the human rights violations perpetrated by the Pinochet regime have had legal and criminal implications, both nationally[2] and internationally,[3] this case is also useful for raising questions around the interrelation between criminal and civil responsibility when evaluating complicity. The recent civil claim filed by victims of the Argentine dictatorship against the foreign banks that financed the last military regime, while criminal trials against dictators are still ongoing shows that these questions are as relevant as they are timely.[4]

1 A. Cassese, *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile*, E/CN.4/Sub.2/412, Vols I–IV (Cassese Report) (1978).

2 For a list of the 66 criminal complaints filed against General Pinochet between January 1998 and March 2000 in the Santiago Court of Appeals, see http://www.memoriayjusticia.cl/english/en.home.html. For a broad description and explanation of the judicial evolution of these cases see the *Anuario de Derechos Humanos* 2005-2009, Centro de Derechos Humanos, Universidad de Chile, available online at http://www.cdh.uchile.cl/publicaciones/anuarios/ (both websites visited 19 April 2010).

3 J. Malamud Goti et al., *Los dilemas morales de la justicia internacional: El caso Pinochet* (Buenos Aires: Miño y Davila Ed., 2003); N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2004).

4 The case is *Ibañez Manuel Leandro y otros casos/Diligencia Preliminar Contra Instituciones Financieras No Determinadas*, No. 95.019/2009, Buenos Aires; see also J.P. Bohoslavsky and V. Opgenhaffen, 'The Past and Present of Bank Responsibility for Financing the Argentinean Dictatorship', 23 *Harvard Human Rights Journal* (2009), 157. As regards the criminal cases see Centro de Estudios Legales y Sociales (CELS) webpages, especially http://www.cels.org.ar/common/documentos/juicios.adelanto.IA_2010.pdf (visited 19 April 2010).

It is also worth mentioning that from 1998 to 2005 Riggs bank was investigated for its complicity with the Pinochet regime, on allegations it had been receiving, concealing, and laundering the wealth he plundered, since the very beginning of the dictatorship.[5] Since the bank specifically helped Pinochet evade a Spanish court order attempting to freeze his bank accounts, this financial institution was directed to create a fund to compensate victims of the Pinochet regime.[6] This case also illustrates the legal relevance of financial agents in the context of massive campaigns of human rights abuses.[7]

The structure of the article is as follows: After our introduction, we will briefly outline the most important judicial developments around responsibility for complicity, focussing on case law dealing with financial contribution, including the relevant Nuremberg Military Tribunals' decisions, recent civil law cases in US courts applying the Alien Tort Claims Act (ATCA), and statutes on preventing the financing of terrorist groups or activities (Section 2). We then highlight the legal and academic lacuna in the attribution of responsibility for financial complicity when studied in the broader context of corporate complicity, and the reasons why the Chilean case can contribute toward closing this gap (Section 3). Next we will touch on the general political context of dictatorships in the Southern Cone in Latin America; the main economic and criminal characteristics of the last Chilean dictatorship; how the multilateral and non-governmental organizations denounced the crimes; what the US government and Congress did to stop granting financial aid to this regime based on the human rights abuses that it was committing at that moment; and the methodology used in — and the conclusions drawn by — the Cassese Report mentioned above (Section 4). Our final section looks at how both the bilateral refusal to financially help the Chilean dictatorship and the Cassese Report substantially contribute to conceptually understanding, and expanding, the current causal links between human rights abuses and financing, therefore shaping better legal arguments on corporate liability for complicity in the specific realm of finance (Section 5).

5 Minority Staff of the Permanent Subcommittee on Investigations, 108th US Cong., Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act (Comm. Print 2004); US Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, 'Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act Supplemental Staff Report on US Accounts Used by Augusto Pinochet', 16 March 2005.

6 See court order issued by Magistrate-Judge Baltasar Garzon Real, Investigating Court No. 5 (Madrid), Case No. 28079-27-2-1996-0007036-78300 (2/25/05); T. O'Hara, 'Allbrittons, Riggs to Pay Victims of Pinochet', *Washington Post*, 26 February 2005.

7 S. Scott, 'Taking Riggs Seriously: the ATCA Case Against a Corporate Abettor of Pinochet Atrocities', 89 *Minnesota Law Review* (2005) 1497–1543.

2. The Judicial Development of Corporate Responsibility for Complicity and the Question of Finance

Over the past few decades, as corporations in both domestic and global markets have increasingly shown their tremendous powers to influence events all over the world,[8] corporate accountability, including responsibility for complicity, has also evolved robustly.[9] This evolution has taken many different forms, including the adoption of corporate 'codes of conduct',[10] numerous UN reports on the topic,[11] prolific academic research,[12] and a number of judicial interventions.[13]

The interpretation of the ATCA being used in US courts has also substantially helped this trend, particularly since it has advanced the premise that *jus cogens* norms also extend and apply to non-state actors.[14] Revived in the

8 A. Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporation Under International Law* (The Hague: Kluwer Law International, 2000) 139–195, at 189 ff.; R. Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations', 10 *Boston College Third World Law Journal* (1990) 1–40, at 2.

9 P.T. Muchlinski, *Multinational Enterprises and the Law* (2nd edn., New York: The Oxford International Law Library, 2007), at 514; D. Weissbrodt and M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* (2003) 901–923, at 903.

10 F. McLeay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations. A Small Piece of a Large Puzzle', New York University School of Law Working Paper (2005), available online at http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLV_015787 (visited 24 March 2010); J. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006).

11 Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the General-Secretary on the Issue of Human Rights and Transnational Corporations and other Business Enterprises John Ruggie, UN Doc. A/HRC/8/5, (Ruggie Report) (2008).

12 See generally, D. Christensen, 'Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain', 62 *Washington and Lee Law Review* (2005) 1219 et seq.; O. de Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart, 2006), at 345–346; A. Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations', 20 *Berkeley Journal of International Law* (2002) 9–159; M. Ratner, 'Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview', 58 *NYU Annual Survey of American Law* (2004) 623–647.

13 For a complete list of cases in Latin America, Canada and US, see Ch. Hutto and A. Jenkins, 'Report on Corporate Complicity Litigation in the Americas: Leading Doctrines, Relevant Cases, and Analysis of Trends', Human Rights Clinic, University of Texas (2010). The most notable current case in the US court is *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

14 Alien Tort Claims Act or Alien Tort Statute, 28 U.S.C. § 1350; *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995). On corporate responsibility, see for example *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and, broadly, M. Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law Through US Torts Law* (Leiden: Martinus Nijhoff Publishers, 2009) and the contribution by K. Gallagher in this issue of the *Journal*.

modern-era in 1980, the use of the ATCA picked up in frequency in the 1990s, when 'suits proliferated against private persons and corporations, usually on the basis of "aiding and abetting" human rights violations'.[15] Confusion around whether international law, domestic law, or both should be applied when dealing with civil responsibility for corporate complicity has been particularly provoked by the debate on applying the ATCA in US courts, since its reference to the 'law of nations' has led this issue to the particular way in which American jurisprudence interprets how domestic and international law relate each other.[16] This technical discussion, however, does not seem to be crucial in terms of the practical (judicial) recognition of this kind of responsibility in general, since most domestic legal systems provide for civil recovery for victims of negligent and intentional torts,[17] particularly in cases of human rights abuses.[18] In cases brought in Australia, Canada, several Latin American countries, and the United Kingdom both international and domestic civil law was used to ground the claims of human rights abuses.[19]

Today, there is a growing consensus that there are some legal standards that corporations have to follow when it comes to doing business with known perpetrators of human rights violations. This notion was recently affirmed by the International Commission of Jurists (ICJ) in its 2008 report *Corporate Complicity and Legal Accountability*, which systematically lays out the development of these legal standards in both criminal and civil terms,[20] as well as in the reports that Special Rapporteur John Ruggie has been elaborating in recent years. [21]

15 R.O. Faulk, 'The Expanding Role of the Alien Tort Claims Act in International Human Rights Enforcement', 10 *Class Action Litigation Report* (2009), at 304, available online at http://works.bepress.com/richard_faulk/24 (visited 8 February 2010).

16 On this discussion see generally J. Goodman, 'The Administrative Law of Nations: A New Perspective on Sosa, The Alien Tort Statute, and Customary International Law', 50 *Harvard International Law Journal Online* (2009) 1–11.

17 In the US, see Restatement (Second) of Torts § 876 (1979).

18 For a broad study on how domestic legal systems react toward corporate complicity, see A. Ramasastry and R. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of 16 Countries*, FAFO Institute of Applied International Studies (2006). Also see A. Sebok, 'Taking Tort Law Seriously in the Alien Tort Statute', 33 *Brooklyn Journal International Law* (2008) 871–898.

19 Hutto and Jenkins, *supra* note 13, at 39; A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), at 55 et seq.

20 International Commission of Jurists (ICJ), *Corporate Complicity & Legal Accountability*, Vols I, II & III (ICJ Report) (Geneva, 2008); 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. In other words, corporations should be held responsible when, with their contributions, they 'make possible', 'facilitate', or 'exacerbate' the human rights abuses in question, *ibid.*, Vol. I., at 9.

21 See generally Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the General Secretary on the Issue of Human Rights and Transnational Corporations and other Business Enterprises John Ruggie, UN Doc. A/HRC/4/35 (Ruggie Report) (2007), at 61.

Despite these developments, the notion of complicity for financial actors has been confusing to say the least, producing mixed jurisprudence on the matter, as even the Nuremberg Military Tribunals' decisions initially showed. Arguably having been influenced by strong political motivations,[22] the first judicial representations of the idea that financing crimes can trigger responsibility were indeed contradictory, as evidenced by *Flick*[23] and *Weizsaecker* (the *Ministries Case*)[24] at the Nuremberg US Military Tribunals. On the one hand, in the *Ministries Case*, the Tribunal understood that money or credit are fungible commodities, which could be used for unlawful enterprises, but this transaction is not a crime under international law.[25] In *Flick* on the other hand, two German industrialists were convicted 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, the Tribunal took it for granted that some of the money had gone into maintaining this organization, regardless of whether it was spent on salaries or lethal gas.[26] Both decisions recognized the substantial effect that money can have over a massive criminal campaign — even if only *Flick* affirmed that this contribution represented a crime in terms of international law.

During the 1990s, hundreds of victims of the Holocaust sued American, Austrian, French, German, and Swiss banks in US courts 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 returning original bank deposits to the victims; and for having used slave labour.[27] These cases were settled, compensation funds were created by these banks, and victims are still receiving payments from these funds.[28]

The recent US ATCA decision of *In re South African Apartheid Litigation* ratified the notion that corporations can — under strict circumstances — be held responsible when contributing to the commission of serious crimes.[29] This decision stated a requirement that the corporate contribution needs to be proven to have had *substantial effect* on the perpetration of the

22 J. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', 109 *Columbia Law Review* (2009), 1094 et seq.; Ch. Simpson (ed.), *War Crimes of the Deutsche Bank and the Dresdner Bank* (New York: Holmes & Meyer, 2002), especially at 1–34.

23 *US v. Flick* (*Flick* case), 22 December 1947, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, No. 10 (1952) 1.

24 *US v. Weizsaecker* (*Ministries case*), *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, No. 14 (1952), at 621–622.

25 *Ibid.*

26 *Ibid.*, at 1221.

27 See Simpson, *supra* note 22.

28 B. Neuborne, 'Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement', 58 *New York University Annual Survey of American Law* (2003) 615–622.

29 See *Apartheid Litigation*, *supra* note 13.

crime (*actus reus*), and the contributor as a whole entity (the sum of its managers and employees)[30] had the knowledge — although not necessarily purposeful intent — that his action would substantially assist the perpetrator in the commission of a crime (*mens rea*).[31] It is worth mentioning that in its decision, the Court — using the 'inherent quality' of the commodities as its criterion — made a distinction between an agent like poison gas being provided to a regime (referring to the 1946 *Zyklon B* case before a post-World War II British Military Court[32]) and a fungible resource, like finance or investment (referring to the *Ministries* case defendant Karl Rasche[33]), which it felt did not meet the legal standards for responsibility in this case.[34] The court decided when analysing the *actus reus* component that loans could not empirically be sufficiently connected to the crimes in question.[35] Ironically, the Court simultaneously allowed the case to go forward and be heard against IBM for providing computers and software to the Apartheid regime, charging that it had helped to implement a 'de-nationalization' policy against black South Africans.[36]

The criterion of 'inherent quality' seems to ignore the very definition of money as a good that acts as a medium of exchange in transactions, a unit of account, and a store of value.[37] Money allows its holder to do something by virtue of its *purchasing power*. Therefore, what is crucial is what the holder will do with it and this is the point where the foreseeable consequences of

30 This criterion has also been applied in the US to money laundering prosecutions, *US v Bank of New England*, 821 F.d 844, 856 (1st Cir. 1987).

31 See *Apartheid Litigation*, *supra* note 13, at 36 et seq. The mental state requirement has been debated in the jurisprudence: Confirming the '*knowledge test*', *Flick*, *supra* note 23; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 545; Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 193 note 217. On the contrary, arguing that it is necessary to show that the corporation acted with the purpose of supporting the human rights violation, see *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 (2d Cir. 2009), relying on Judge Katzmann's concurring opinion in *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 282 (2nd Cir. 2007), at 268-277. For a detailed analysis of this discussion see the contributions by K. Gallagher and N. Farrell in this issue of the *Journal*.

32 Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 *Law Reports of Trials of War Criminals* (1947), at 93–103.

33 *Ministries Case*, *supra* note 24, at 620–622.

34 For broader comments on this decision see S. Michalowski and J.P. Bohoslavsky, 'Ius Cogens, Transitional Justice and other Trends of the Debate on Odious Debts. A Response to the World Bank Discussion Paper on Odious Debts', 48 *Columbia Journal of Transnational Law* (2010) 61–120.

35 'Supplying a violator of the law of nations with funds — even funds that could not have been obtained but for those loans — is not sufficiently connected to the primary violation to fulfil the *actus reus* requirement of aiding and abetting a violation of the law of nations', *Apartheid Litigation*, *supra* note 13, at 70.

36 *Ibid.*, at 265.

37 F. Mann, *El Aspecto Legal del Dinero* (México: Fondo de Cultura Económica, 1986), at 48; A. Nussbaum, *Teoría Jurídica del Dinero (El Dinero en la Teoría y en la Práctica del Derecho Alemán y Extranjero)* (Madrid: Librería General de Victoriano Suárez, 1929), at 40.

giving money to someone enter into play; this is similar to how most tort law systems assess foreseeable damages and the consequent judgment for just 'repairs'.[38]

This rationale was very well explained in the aforementioned Cassese Report, which looked at the very roots of human rights violations (which includes the surrounding conditions that permit them) and showed how financial aid can have a negative or positive impact in the human rights situation of any given country.[39] This showed why due diligence rules can, on the one hand, make a difference in terms of preventing financing of harmful activities, and on the other one, how it could help corporations avoid bearing expensive judicial decisions by assessing the real risk of financing, making it more than a zero-sum game.[40] Due diligence involves taking of steps so that a corporation can reasonably foresee or predict the potential consequences of its behaviour, applying the 'mental state' requirement in a way that ostensibly reduces risks both to society and the businesses themselves.[41]

US courts decisions related to responsibility for financing terrorism, like those taken in *Boim*[42] and *Almog*[43] confirm and strengthen the idea that lenders can be held responsible for facilitating crimes. The notable differences between what Al Qaeda, Hammas, or the Pinochet regime do are not as important as the fact that these cases indicate that financial contributions can work as a commodity that can make possible, facilitate, or exacerbate crimes. Are the statutory particularities what justify holding terrorist financing as a legitimate cause for charging civil responsibility? More precisely, is this responsibility accepted because of the existence of an International Convention for the Suppression of the Financing of Terrorism? In *Boim*, civil responsibility for financing was based under 18 U.S.C. § 2333(a), even when the court recognized that this statute does not mention secondary liability.[44] In *Almog,* civil responsibility was based not only on the Antiterrorism Act of 1990 but also on the ATCA.[45] Putting together those decisions on terrorist financing with the jurisprudence on corporate complicity, it seems that when customary international law and peremptory norms are involved, the fact that secondary civil liability is

38 L. Corenlis in L. Simont and A. Bruyneel (eds), *La Responsabilité Extra-Contractuelle du Donneur de Crédit en Droit Comparé* (Siena: Feduci, 1984), at 175.

39 Cassese Report, Vol. I, at 3 and 18.

40 On how due diligence can help companies to avoid complicity see Ruggie Report, *supra* note 11, at 20.

41 J. Sherman III and A. Lehr, 'Human Rights Due Diligence: Is it Too Risky?' *Corporate Social Responsibility Journal* (2010), at 6.

42 *Boim v. Holy Land Found. for Relief and Development,* 549 F.3d 685 (7th Cir. 2008).

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

44 See *Boim*, *supra* note 42, at 689.

45 See *Almog*, *supra* note 43, at 259–264.

explicitly mentioned in a particular statute[46] is not conclusive for American courts.[47]

3. Underdevelopment of Financial Complicity and the Relevance of the Chilean Case

In the context of a general need for more consistent and efficient standards and mechanisms for civil liability for gross human rights violations on a global scale,[48] academic research on the legal aspects of corporate complicity and accountability has become increasingly prolific over the past 15 years.[49] This has coincided with a rise in legal action and activism aimed at holding corporations to account for negative impact on human beings and the environment around the world.[50]

There is an increasing awareness of the links between business and human rights abuses,[51] a fact reflected in the judicial and scholarly evolution of both international and domestic law.[52] But few cases and virtually no research has managed to achieve similar success and legal options for specifically linking financial institutions to the commission of human rights violations.[53] What justifies this omission? Why are financial institutions held to such different standards than their business counterparts in the extractive and manufacturing industries, for example?[54] What are some of the unique qualities of finance that make it difficult to draw concrete, i.e. actionable, links between financial flows and the human consequences of these investments?

46 See Central Bank of Denver, *N.A. v. First Interstate Bank of Denver, N.A*, 511 U.S. 164 (1994), involving the 1934 Securities Act and a futile attempt to imply aiding and abetting liability in the context of a complex regulatory scheme.

47 K Hutchens, 'International Law in the American Courts — Khulumani v. Barclay National Bank Ltd.: The Decision Heard Round the Corporate World', 9 *German Law Journal* (2009) 639–681, at 680.

48 See generally S. Bachmann, *Civil Responsibility for Gross Human Rights. The Need for a Global Instrument* (Cape Town: Pretoria University Law Press, 2007).

49 Ramasastry, *supra* note 12, at 91; M. Ramsey, 'International Law Limits on Investor Liability in Human Rights', 50 *Harvard International Law Journal* (2009) 271–321.

50 G. Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in US Courts Under the Alien Tort Statute', 71 *Albany Law Review* (2008) 321–368.

51 P. Alston, 'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Alston (ed.), *supra* note 19, at 11.

52 Hutto and Jenkins, *supra* note 13, at 6; Ramasastry, *supra* note 12, at 91.

53 *In re Austrian and German Bank Holocaust Litigation*, No. 98 Civ. 3938 (S.D.N.Y. 2001); *In re Holocaust Victim Assets Litigation*, No. 96 Civ. 4849 (E.D.N.Y. 2000) (Swiss corporations); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (French corporations). On academic research see Bohoslavsky and Opgenhaffen, *supra* note 4; E. Reichard, 'Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks Liable for Human Rights Abuses', 36 *Case Western Reserve Journal of International Law* (2004) 255–286.

54 C. Kaeb, 'Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks', 6 *Northwestern Journal of International Human Rights* (2008) 327–353.

Against the backdrop of these questions, and in the hope of contributing to the promotion of more consistent legal standards on corporate responsibility for financial complicity, we will explore the case of Chile. In doing so, we will look especially closely at the stance taken by the United States and other governments in terms of their decision not to grant financial aid on the basis of the borrower's human rights violations, at the same time that private banks started to lend Chile enormous sums money, altering the very macroeconomic ratios of the country and having an impact upon its national budget. The official financial decision of not granting loans to certain military regimes was based on the fundamental idea that money can efficiently be connected to the perpetration of human rights violations. Therefore its contribution toward understanding financial complicity is rather obvious.

In 1977 Professor Antonio Cassese was appointed by the UN Commission on Human Rights as a Special Rapporteur to assess the link between the financial aid that the Pinochet regime was receiving at that moment and the human rights violations the Chilean people were experiencing.[55] In his 260-page report, Cassese developed a sophisticated methodology to evaluate the impact of the financial aid on the human rights situation, concluding that: '[a]s foreign economic assistance largely serves to strengthen and prop up the economic system adopted by the Chilean authorities, which in its turn needs to be based on the repression of civil and political rights, the conclusions warranted that the bulk of present economic assistance is instrumental in consolidating and perpetuating the present repression of those rights.'[56]

Despite the publication in 1979 of a summary version of this report by an important academic journal,[57] the Report was inexplicably ignored for decades by those engaging in the corporate complicity debate. It is our hope that adding this report to the discussion on financial complicity will go far to make it more robust and consistent. Likewise Cassese's findings could significantly contribute to fleshing out Chile's historical narrative. The debate in this country around the links between the military regime and economic factors has been limited to the discovery of substantial Pinochet-owned offshore bank accounts, which decisively broke the myth of his incorruptibility but did little to address the role of outside financial actors.[58] Even when this fact is relevant from the transitional justice perspective,[59] the debate on how economic factors allowed the Pinochet regime to succeed in its criminal campaign still remains.

55 Cassese Report, Vols I–IV.

56 *Ibid.*, Vol. IV, at 24.

57 A. Cassese, 'Foreign Economic Assistance and Respect for Civil and Political Rights: Chile – A Case Study', 14 *Texas International Law Journal* (1979) 251–263, at 251–253.

58 Even when the same bank that kept these accounts hidden also financed the Chilean military regime, see P. Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (New York: New Press, 2003), at 224. Discussions were related to economic crimes committed by Pinochet thanked to the help received by banks, see Scott, *supra* note 7, at 1497.

59 R. Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' 2 *The International Journal of Transitional Justice* (2008) 310–330.

4. The Chilean Case: Money Seen as a *'Killing Agent'*

In the hope of helping to create a better theoretical understanding of how money can be efficiently connected to certain crimes, we now turn to empirically study how financial aid granted to the Pinochet regime affected the human rights situation of Chile. Analysing this connection we follow the methodology developed in the Cassese Report, a global and dynamic approach to understanding how finance interacts with macroeconomic ratios, economic goals of the government, national budget, military expenditures, and therefore, how all this impacts, whether positively or negatively, the civil and political rights situation.[60]

We will also discuss how multilateral and non-governmental organizations reacted toward this dictatorship — especially how the US legislative and executive branches understood the connection between financial aid and large-scale human rights abuses.

A. The Dictatorships in the Southern Cone in Context

The socialist revolution in Cuba (1959) and support from the former United Soviet Socialist Russia fed the threat of political, economical, and social instability in the Southern Cone.[61] During the 1960s and 1970s, several countries in this region suffered military coups and dictatorships with distinctive political and social characteristics. These military governments were supported and legitimated by important sectors of the societies as a reaction to extended political activation of the popular sector, which was perceived by other social classes as a threat to their interests and international affiliations.[62]

Academic literature has largely focused research on the political and social processes of these authoritarian regimes in Latin America[63] and the link between the dominant national classes, the military forces, and the international financial institutions.[64] These regimes, often seen as *bureaucratic-authoritarian states* arose in Latin America in the 1960s, first in Brazil (1964), then

60 Cassese Report, Vol. I, at 3, 18; Vol. IV, at 2.

61 See broadly M. Alcántara and I. Crespo, *Los Límites de la consolidación Democrática en América Latina* (Salamanca: Ediciones Universidad de Salamanca, 1995); T. Halperin Donghi, *Historia Contemporánea de América Latina* (Madrid: Alianza Editorial, 1998); M. Vellinga, *Democracia Política en América Latina* (México: Siglo XXI Editores, 1993).

62 G. O'Donnell, 'Reflections on the Patterns of Change in the Bureaucratic-Authoritarian State', 13 *Latin American Research Review* (1978) 3–38, at 6.

63 G. O'Donnell, *Bureaucratic Authoritarianism: Argentina 1966-1973 in Comparative Perspective* (Berkeley: University of California Press, 1988); G. O'Donnell, 'Modernización y Golpes Militares, Teoría Comparación y el Caso Argentino', 12 *Desarrollo Económico* (1972), 19 et seq.; G. O'Donnell and P. Schmitter, 'Tentative Conclusions about Uncertain Transitions', in G. O'Donnell, P. Schmitter and L. Whitehead (eds), *Transitions from Authoritarian Rule: Southern Europe and Latin America* (Baltimore, MD: The John Hopkins University Press, 1986); D. Collier (ed.), *The New Authoritarianism in Latin America* (Princeton, NJ: Princeton University Press, 1979).

64 S. Mainwaring, 'Autoritarismo y Democracia en la Argentina: Una Revisión Crítica', 24 *Desarrollo Económico* (1984) 447–457, 449.

Argentina (1966, 1976) and finally in Uruguay (1973), and Chile (1973). The main characteristics of the bureaucratic-authoritarian state are that higher governmental positions are occupied by people from highly bureaucratized organizations (such as the military, the bureaucracy, and the private sector) and that these regimes pursue the political and economic exclusion of the popular classes.[65]

Two elements are the key to understanding the political and social process during the Chilean dictatorship. First, the origin, success, crisis and failure of the bureaucratic–authoritarian states were strongly related not only to the attitude of the dominant classes and the military forces of the country, but also to the amount of support received from the international financial institutions.[66] Without this support, the authoritarian regimes could not have succeeded in terms of either political stability or economic outcome.[67] Second, the economic and social conditions under which the bureaucratic authoritarian regimes took shape help to explain the depth and brutality through which unpopular governmental policies were implemented. The deeper the economic crisis and the social conflict, the more the dominant classes' interests felt threatened, (therefore) the stronger the support of these classes and the military forces to implementing drastic policies to dissipate those threats.[68] At the same time, even when economic policies impeded reaching the investment rates needed to lever a genuine economic growth or at least overcome crisis, the high level of cohesion between the dominant classes, the military forces, and their international allies compensated expected economic failure, as Chile in 1973 and Argentina in 1976 showed.[69]

B. The Crimes of the Pinochet Regime: Hard Facts

In 1973, Chilean military forces commanded by Pinochet overthrew and killed then-President Salvador Allende, whose government promoted and implemented several socialist policies and ruled in a context of generalized political and economic crisis in which the United States had some role.[70] The repression unleashed immediately after the coup had a notable criminal and ideological anti-communist and antidemocratic profile.[71] Early on in the regime, the

65 O'Donnell, *supra* note 63, at 6.

66 Mainwaring, *supra* note 64, at 449.

67 *Ibid.*, at 448.

68 *Ibid.*, at 449.

69 *Ibid.*

70 See US Senate, 'Covert Action in Chile 1963-1973', Staff Report of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities, 18 December 1975 at http://foia.state.gov/Reports/ChurchReport.asp; 'Hinchey Report. CIA Activities in Chile', CIA, 18 September 2000, available at http://foia.state.gov/Reports/HincheyReport.asp (both websites visited 19 April 2010).

71 W. Heinz and H. Frühling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina (1960-1990)* (The Hague: Kluwer Law International, 1999), at 584.

Organization of American States (OAS), the United Nations, and several non-governmental human rights organizations documented and denounced the many human rights abuses being perpetrated in Chile.[72] These facts are important since, from a legal perspective, they can have substantial impact in terms of mental state of accomplices or contributors.

The OAS started its actions as early as October 1973, when its Secretary-General visited Chile for a preliminary investigation, which was followed by the 1974 formal investigation by its human rights arm, the Inter-American Commission on Human Rights (IACHR).[73] After these visits, Pinochet did not allow these organizations any further access to fact-finding and documentation in Chile. According to the IACHR, Pinochet's 17-year regime saw Chile go through a prolonged period of repression and systematic human rights violations.[74] UN responses to the violations also came at the very onset of the dictatorship. On 1 March 1974, the Commission on Human Rights sent a notification to the Chilean government expressing deep concerns about the serious human rights situation in the country. In 1975, this Commission established an Ad Hoc Working Group on the Situation of Human Rights in Chile, which was renewed until 1979.[75] On 14 September 1973, three days after the coup, Amnesty International formally started reporting on the situation of Chile to the IACHR.[76] In its 1977 report, the ICJ confirmed that thousands were being persecuted, tortured, 'disappeared', or forced to flee the country.

At the domestic level, the criminal campaign is well documented by the 'Rettig Report', a survey elaborated by the Chilean National Commission for Truth and Reconciliation confirming previous claims that more than 3,200 people had been killed or disappeared in Chile and more than 27,000 people were political prisoners and tortured.[77] All this shows the massiveness, scale,

72 Some international journalistic repercussions of the crimes can be read in the following articles: 'Chile's Junta After a Year: Unrelenting Dictatorship', *New York Times*, 13 September 1974; 'U.S.-Chilean Ties Called Strained', *New York Times*, 19 November 1975; 'Torture in Chile Is Charged by a U.N. Inquiry Team', *New York Times*, 15 October 1975; 'Chile Study Says Torture Goes On', *New York Times*, 8 June 1976; 'U.N. Panel Asserts Chile Continues To Abuse Rights but on a Reduced Scale', *New York Times*, 25 October 1977.

73 The IACHR reported the situation of human rights in the country in 1974, 1976, 1977 and 1985, 'Informe sobre la situación de los derechos humanos en Chile', Secretaría General, Organización de los Estados Americanos, OEA/Ser.L/V/II.40 Doc., 10 February 1977; OEA/Ser.L/II.66doc, 17 September 1985.

74 IACHR, 'Tercer informe sobre la situación de derechos humanos en Chile', OAS (Washington, 1977); IACHR, 'Informe sobre la situación de los derechos humanos en Chile', OAS (Washington, 1985).

75 UN Docs A/10285 (1975), A/31/253 (1976), A/32/227 (1977), A/33/331 (1978), A/34/583.

76 Amnesty International, *Human Rights in Chile* (London, 1974).

77 See Informe Rettig (1991), 'Comision Nacional de la Verdad y la Reconciliacion' created by D.S. N° 355/1990, Ministerio del Interior. The report was published by Andros Editores in 1996. http://www.ddhh.gov.cl/ddhh_rettig.html. See also Informe de la Comisión Nacional sobre Política y Tortura, 'Comisión Asesora para la Calificación de Detenidos Desaparecidos, Ejecutados Políticos y Víctimas de Prisión Política y Tortura', created by law N° 20.405, available online at http://www.comisionvalech.gov.cl/InformeValech.html (websites visited 19 April 2010).

and seriousness of the crimes perpetrated by the Pinochet regime which, of course, worked in certain financial, economic and budgetary context.

C. Financial Aid and Economic Policy

Even when important qualifications must to be made when analysing the evolution of the Chilean economy,[78] from September 1973 onward, the military government basically pursued the three following economic objectives: solving the inflation problem; reducing the balance of payments instability, and providing incentives to revive the national economy.[79] To reach these goals the government implemented a set of measures, including restoring the private sector, strategic state enterprises, and lands that belonged to the *Corporación de la Reforma Agraria*,[80] the lifting of price controls on many items,[81] opening the markets through lowering trade barriers,[82] monetarist policies such as devaluation of the peso and restriction of credit expansion, reducing the state expenditures,[83] and the freezing of wages.[84]

The monetarist approach to the balance of payments in a context of decreasing saving and investment rates and an excess of imports — accounting for more than US$7.4 billion between 1977 and 1982, almost three quarters of the total external indebtedness during the same period — contributed to intensifying the need for the import of hard currency in Chile.[85] In this context, it is not surprising that:

> the goal of attracting foreign loans, credits and investment capital has played a key role in the formulation of Chilean economic and other policies since the military take-over in 1973. With what is reported to be Latin America's highest per capita debt … and its second-highest ratio of debt servicing payments to export receipts in 1976, Chile's need for external financial support has been a constant policy preoccupation.[86]

This diagnosis is confirmed by hard numbers. In 1973, the Chilean public external debt was US$2.86 billion, US$6.27 billion in 1979 and US$14.34 billion in 1983.[87] Private external debt also grew dramatically during the

78 R. Ffrench-Davis, 'El Experimento Monetarista en Chile: Una Síntesis Crítica', 23 *Desarrollo Económico* (1983), at 163-196

79 A. Foxley, 'Experimentos Neoliberales en América Latina', *Colección Estudios*, CIEPLAN 7 (Santiago, 1982), at 166; Cassese Report, Vol. II, at 2.

80 *El Mercurio*, 5 and 17 January, 4 and 23 March 1978; *Le Monde*, 18 February and 23 June 1978.

81 *El Mercurio*, 4 February 1978.

82 *Ibid.*, 17 and 19 February 1978.

83 Cassese Report, Vol. II, at 8.

84 *Ibid.*, at 2.

85 See generally R. Ffrench-Davis and J. De Gregorio, 'Lo interno de la deuda externa. El caso chileno', 84 *Nueva Sociedad* (1986), at 28.

86 Cassese Report, Vol. III, at 3, 12.

87 Banco Central de Chile, 'Indicadores Económicos y Sociales de Chile 1960-2000' (Santiago, 2001).

dictatorship: in 1975, it was US$786 million, US$3.42 billion in 1979, and US$9.37 billion in 1983.[88] The proportion of public debt in relation to the total Chilean debt evolved in the following way: it was more than 85% by 1973, 61% by 1979, and 50% by 1983.[89] When focussing on the creditor side, while in 1974 only 19% of Chile's external debt was owed to private creditors, this number grew to 80% by 1981. The Chilean debts with banks grew more than 57% between 1977 and 1981, while the average for most developing countries was 28%.[90] The external financial dependency of Chile was notorious.

D. The US Position, the Cassese Report, and the Link between Finance and Human Rights

Soon after the military coup in 1973, the military government started receiving financial aid from several countries, especially the United States, and multilateral financial institutions.[91] This fact betrays the initial US support to the Pinochet regime, grounded in geopolitical reasons on the fight against communism,[92] as happened with other Latin America countries.[93] As international and US Congressional concerns over human rights violations grew from 1976 onward, official financial and military aid decreased dramatically.[94] Some countries continued to grant aid, saying it was for concrete humanitarian or developmental goals, but the ways in which the government spent these funds did not, in fact, benefit the needy.[95] Likewise, this assistance was often used by the government to replace national resources, which were diverted to other ends, including that of financing the apparatus of repression.[96]

Enabling the government to keep the economic scheme in operation provoked severe repercussions for the population.[97] According to the Cassese Report:

> [this] government economic policy produces to a great extent harmful consequences for the social condition of the vast majority of the population'.[98] Therefore it is not surprising, 'that policy cannot but give rise to discontent and unrest. In order to keep them under control,

88 Banco Central de Chile, 'Deuda externa de Chile' (Santiago, 1984).
89 *Ibid.*
90 Ffrench-Davis and De Gregorio, *supra* note 85.
91 Cassese Report, Vol. III, at 5.
92 Heinz and Frühling, *supra* note 71, at 585.
93 J. Dinges, 'Green Light-Red Light: Henry Kissinger's Two-Track Approach to Human Rights During the 'Condor Years' in Chile and Argentina', in C. Arnson (ed.), *Argentina-United States Bilateral Relations: An Historical Perspective and Future Challenges* (Washington, DC: Woodrow Wilson International Center for Scholars, 2003), at 59–76.
94 Heinz and Frühling, *supra* note 71, at 520.
95 Cassese Report, Vol. III, at 11; Vol. IV, at 15.
96 Cassese Report, Vol. IV, at 24.
97 *Ibid.*, at 22.
98 *Ibid.*, at 24.

> the Chilean authorities need a repressive system, based on the denial of the basic and political rights.[99]

A concrete representation of this idea is confirmed when we see that while social expenditures decreased dramatically during the military government, expenditures in the police and military sector massively grew in the national budget — from 15% in 1969 to 23.3% by 1982.[100] Military expenditures included salaries, support for the maintenance of concentration camps, help with the implementation of logistics, intelligence, counter intelligence, the purchase of arms and military equipment, etc.[101]

From 1976 on, official creditors were replaced by private multinational banks that started lending enormous sums with no stated regard for the potential impact of these loans.[102] This allowed the country to avoid the embarrassing process of renegotiation its external debt in 1976 and 1977.[103] At this same time, following a similar position adopted by the Federal Republic of Germany,[104] the Netherlands,[105] Italy,[106] and Norway,[107] the US government suspended most forms of bilateral economic aid to Chile, expressing disapproval of human rights abuses by the Pinochet government.[108] In fact, the American government expressly warned banks that lending money to Chile

99 *Ibid*. The former Minister of Finance of Chile and ambassador in Washington, DC during the military regime, publicly recognized that only political repression could allow this version of the free market system to survive in Chile. Both conceptual and practical difficulties that a democratic system presents in order to apply this economic and social scheme would disappear as soon as it is agreed to use 'other measures, in the form of the establishment of a centralized system, with the consequent loss of freedom', J. Cauas Lama, 'Política Económica de Corto Plazo', 2 *Banco Central de Chile: Estudios Monetarios* (1970), at 25, 41–42, 44–45.

100 T. Sheetz, 'Gastos Militares en Chile, Perú y la Argentina', 25 *Desarrollo Económico* (1985), at 316–317.

101 T. Scheetz, 'Gastos Militares en América del Sur', Centro Regional de las Naciones Unidas para la Paz, el Desarme y el Desarrollo en América Latina y el Caribe (ed.), *Proliferación de Armamentos y Medidas de Fomento de la Confianza y la Seguridad en América Latina* (Lima, 1994).

102 Cassese Report, Vol. III, at 67. As the article 'How Chile Reappeared on the Tombstones' by Ch. Meynell said in *Euromoney* in its edition of June 1977, at 101–105.: 'Both countries [Chile and Argentina] have arguably staged an economic turnaround which appears to have impressed the international banking fraternity. Although the Carter tirade against those countries infringing Human Rights gave somewhat sticky start to the development of the two countries as a much needed sink-hole for excess banking liquidity, it is plain that doubts over the wisdom of lending to countries that contravene Human Rights are fast being dismissed'.

103 Cassese Report, Vol. III, at 72.

104 Report of the Economic and Social Council: Protection of Human Rights in Chile, Report of the Secretary General, 32 UN GAOR (Agenda Item 12) 9, UN Doc. A/32/234 (1977).

105 *Ibid.*, at 12–13.

106 Study on the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, 31 Sub-Commission on Prevention of Discrimination and Protection of Minorities (provisional Agenda Item 13), UN Doc. E/CN.4/Sub.2/412 (1978), § 407.

107 *Ibid.*, § 409.

108 Center for International Policy, 'Chile: An Analysis of Human Rights Violations and United States Security Assistance and Economic Programmes', 1–2 July 1978.

was eroding US foreign policy, which considered human rights a crucial factor when deciding financially to support a regime.[109]

According to the Cassese Report, the aforementioned policies supported by the majority of the international community were being rendered ineffective by the lending practices of a small number of private banks.[110] The Chairman of the US House Banking Committee officially told six of the main multinational banks lending to Chile that their actions appeared inconsistent with standards intended to prevent banking practices from interfering with public interest and thus that he hoped they would make public a full explanation.[111] Leaders of the banking community, however, argued that financial institutions should not be impeded from doing their 'normal business' regardless of the governments they were engaged with.[112]

This stubborn reluctance by international financial institutions to be held in the least bit accountable for the consequences of their loans helped to prompt an unusual step by the United States. In 1978, Senator Edward Kennedy introduced the Foreign Bank Loans Disclosure Act[113] requiring disclosure of bank loans made to known human rights violators. In proposing this act, Senator Kennedy affirmed the fact that 'one of the guiding principles of (US) foreign policy is that except in cases of humanitarian assistance, we shall give no aid to gross violators of human rights'.[114] It also led to discussion on the Senate floor about the capacity of various Latin American dictatorships to retain their stronghold, with his colleague, Senator Church, commenting that, 'massive funding such as (what Hanover Trust provided to Chile's Pinochet) may be what enabled five Latin American governments … to continue their anti-democratic practices and violations of human rights'.[115]

During the Carter administration not only military and bilateral aid was stopped,[116] but also multilateral development bank loans to Southern Cone

109 'Rights Policy Not Helped by Loans To Chile From Banks', *The Washington Post*, 13 April 1978, at A19.

110 Cassese Report, Vol. III, at 29.

111 'Several US banks Accused of Undercutting Policy on Chile', *The Washington Post*, 12 April 1978.

112 For example, in his trip to Argentina in 1978, David Rockefeller — then-chair of US bank Chase Manhattan — made a public speech denouncing President Carter's human rights policy and stressing that it should not be allowed to 'interfere with the normal relations between nations'. In 1978, the chairman of Lloyds Bank in London responded to criticism for granting loans to the Chilean dictatorship, admitting that this regime was repressive, but also alleging that lending money to Chile was not banned. See 'Lloyds bounces Chile protest', *The Guardian*, 31 March 1978.

113 S 3631-Foreign Loans Disclosure Act of 1978, 124 Cong. Rec. 37 678 1978.

114 *Ibid.*

115 *Ibid.*

116 International Security Assistance and Arms Export Control Act of 1976, Sec 406, US Code, Vol. 22, sec. 2370. The human rights policy of the Carter administration was applied through several avenues: diplomatic channels, raising these concerns through public statements of Carter and Patricia Derian, and supporting the reports from the OAS and UN. See R. Cohen, 'Human Rights Diplomacy: The Carter Administration and the Southern Cone', 4 *Human Rights Quarterly* (1982) 212–242, at 217; President Carter, Remarks at the Opening Session of the 8th General Assembly, OAS, Washington, DC, 21 June–1 July 1978. Statements of

governments when they were not intended for meeting basic human needs as required by law.[117] In the case of Chile, the United States opposed the loans because of its already disastrous record on human rights.[118] These measures taken by the United States reflect an understanding that there was a crucial relationship between financial support and the capacities of the Chilean dictatorship to not only survive as a regime, but to actually execute its now famous campaign of mass human rights abuses against its own population.[119]

It is less clear how financial support to the private sector of a country ruled by a military regime impacts in terms of human rights. Even though, if one thinks of the effects of the economic system over the governmental decisions (basically in terms of political and social acceptance of the rulers and public revenues) a broader analysis incorporating private borrowers has to be done.

Even when the foreign policy of the Carter administration helped to improve the human rights situation in Chile,[120] there were also steps that the US government failed to take to promote human rights. For example, the US government failed in the attempt to influence the American private business sectors as we mentioned before. Furthermore, the US government did not succeed in its attempt to internationalize sanctions against the Southern Cone dictatorships. For instance, Chile and Argentina turned to Western European suppliers and Israel when the United States imposed arms embargoes.[121]

Patricia M. Derian, Human Rights in Latin America, Current Policy No. 68, Department of State, Washington DC, June 1979; in Review of Human Rights in Latin America, Current Policy No. 176, Department of State, Washington, DC, April 1980; in Country Reports on Human Rights Practices, Hearings and Markup before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, House of Representatives, 97th Congress, 1st Session, March and April 1981, available online at http://mirlyn.lib.umich.edu/Record/002758048 (visited 19 April 2010). Also symbolic gestures were used to promote human rights. For example, Carter made clear that undemocratic governments in Latin America would not receive a warm welcome in Washington, see Cohen, *ibid.*, at 220.

117 International Financial Institutions Act of 1977, Sec. 701, 22 USC Sec. 262d (supp. II 1978). From January 1977 to August 1980, the United States opposed, either by voting against or abstaining, 23 loans to Argentina, 5 to Chile, 7 to Paraguay and 11 to Uruguay. Cohen, *supra* note 116, at 226; L. Schoultz, *Human Rights and United States Policy Toward Latin* America (Princeton: Princeton University Press, 1981), at 196–198.

118 A detail of US negative votes and abstentions on multilateral development banks loans for human rights reasons, in J.M. Griesgraber, *Implementation by the Carter Administration of Human Rights Legislation Affecting Latin America* (unpublished PhD dissertation, Georgetown University, 1983) (on file with author), at 368.

119 This way to see the link between loans and damages seems to follow the same rationale behind the modern so-called 'Equator Principles' implemented by banks; see R. Hansen, *The Impact of the Equator Principles on Lender Liability: Risks of Responsible Lending* (LLM Dissertation, London School of Economics and Political Science, November 2006), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228 (visited 19 April 2010).

120 Cohen, *supra* note 116.

121 *Ibid.*, at 233.

5. Contributing to the Current Debate on Liability for Financial Complicity

It is obvious that confusion remains around how finance can factually contribute to the commission of human rights violations, and consequently, how the law must react toward institutions that finance their perpetrators. These are the kind of answers that victims of the last dictatorship in Argentina asked in 2009 when they filed a civil claim in Buenos Aires against a number of banks known to have financed the military junta, on allegations of corporate complicity for human rights abuses.[122]

The answers to those questions must be based on the real way in which finance works. For instance, in an *amicus curiae* recently submitted by Essex University and Centro de Estudios Legales y Sociales (CELS) in this same trial in Buenos Aires, some concrete guidelines and responses were suggested as follows: Both international and domestic laws recognize responsibility for corporate complicity, including that of finance. The concrete bank loans granted to the military junta could have had a substantial effect on the crimes perpetrated by the Argentine military junta. According to the public character of the human rights abuses, banks were aware of the potential and foreseeable consequences of lending a huge amount of money to Argentina.[123] Thus, as such, banks failed to apply the due diligence rules contained in non-binding international instruments such as the Equator Principles[124] and inter-governmental bodies such as the Financial Action Task Force (FATF).[125]

Rediscovering the Cassese Report that analyses in a great depth both conceptually and empirically how the link between the financial aid received by the Pinochet regime and the human rights violations carried on by this regime worked definitively helps to understand better the features of one of the most underdeveloped chapter of corporate responsibility for complicity: finance. When analysing the link between financial aid at a high scale and human rights violations the macro and budgetary impacts of the loans must be observed in order to trace how those abuses could be carried on. Reinforcing the holistic approach that financial complicity requires, the

122 R. Mattarollo, 'Los bancos de la dictadura', *Página 12*, 23 November 2009, available online at http://www.pagina12.com.ar/diario/elpais/1-135803-2009-11-24.html; R. Mattarollo, 'El círculo que se cierra', *Le Monde Diplomatic – El Dipló*, No. 127, January 2010; H. Verbitsky, 'Los prestamistas de la muerte', *Página 12*, 16 March 2009, available online at http://www.pagina12.com.ar/diario/elpais/1-121607-2009-03-16.html (websites visited 7 February 2010).

123 *Amicus curiae* presented on 26 March 2010 in the case cited *supra* note 4, at 1–26, available online at the Business & Human Rights website http://www.business-humanrights.org/Links/Repository/1000191/link_page_view (visited 20 April 2010). Also see G. Morini, 'En los laberintos de la Justicia', *Página 12*, 24 March 2010, available online at http://www.pagina12.com.ar/diario/elpais/subnotas/142578-45899-2010-03-24.html (visited 24 March 2010).

124 For a description of the 'Equator Principles' see http://www.equator-principles.com/join.shtml (visited 10 April 2010).

125 On the specific obligation to *Know Your Customer* (KYC) see 'FATF 40 Recommendations (2003)', online at http://www.fatf-gafi.org (visited 10 April 2010); see also the *amicus curiae*, *supra* note 123, at 21.

political, economic and sociological perspectives contribute to understanding the whole process since they offer more scientific tools to analyse the link between the dominant national classes, the military forces, and financial institutions. As we explain above, the success and failure of Latin American dictatorships, in terms of both political stability and economic outcomes, strongly depended on the financial support they received.

In this same vein, measures taken early on by the United States and other governments refusing financially help the Chilean military regime are also meaningful in terms of bringing some clarity to this debate. We can conclude that at some point it was officially recognized by the United States and other governments that massive contributions of funds can indeed facilitate crimes against humanity. In particular, what the Carter administration did more than 30 years ago, as well as the efforts of Senator Edward Kennedy and other American parliamentarians decidedly contribute to the current debate on how money works in terms of complicity and how law should answer to this challenge. It is hard to believe that even the Carter administration would have gone to the point of formally banning private lending to the Chilean regime.[126] However, the legal status of the rules that impeded contributing to the perpetration of serious human rights abuses could not have been affected by this omission. Indeed, if one pays close attention to the norms in which refusals to grant US official aid to Latin American dictatorships were grounded, little doubt remains on their *jus cogens* nature.[127]

A concrete example that helps to understand that what really matters is the effect of the commodity instead of its inherent quality, demonstrating that money can not only worsen a situation but also promote its improvement is evident in the impact of the US stance: When it rejected financial support to the Chilean government, it gradually started to change this position by emphasizing the fact that the authorities were in the process of improving the human rights situation in the country. 'Even this new stand reveals that a close link is instituted between foreign economic assistance and respect for human rights in Chile.'[128]

As with any other commodity, the impact of funding depends on what the user of the service or consumer of the good plans to do with it. The recent decision *In re South African Apartheid Litigation* — even though it generally refuted the idea that money can provoke damages because it is not an agent designed to kill or inflict pain — recognized that poison gas also 'may have legitimate uses'.[129] It is worth recalling that this same decision stated that IBM

126 *Weekly Compilation of Presidential Documents*, Vol. 14, No. 13, at 629, publishing the discurse of Carter explaning (referring to Brazil) that free enterprise system and the belief of enhancing human rights around the world are compatible.

127 Referring to the Argentine case: *Arms Trade in the Western Hemisphere: Hearing Before the Subcommittee on Inter-American Affairs of the Committee on International Relations*, 95th Cong. (1978) (statement of Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

128 Cassese Report, Vol. III, at 89.

129 *Apartheid Litigation*, *supra* note 31, at 44 and note 157.

can be held responsible for selling computers and software to the regime. Focussing on the inherent quality of the commodity instead of the actual effects and purpose of its use provokes this kind of contradictory reasoning.[130]

In any case, why is it that legal standards for financial institution are taking such a long time to evolve, while other kinds of corporate contributions are bearing increased rigorous responsibility? Is the political weight of the financial sector blocking the entrance of a minimum set of standards that are already accepted for other corporations? If this is the case, it is to be expected that after the current global crisis financial institutions will have to face tougher questions when they are asked in courts to explain why they granted loans when all signs pointed to the fact that their contribution could provoke serious damages. The international community seems to have started assuming that financial institutions need to be under certain and effective regulation.[131]

However, the challenges that understanding and shaping corporate responsibility for financial complicity propose surpass these sociological and political characteristics. There is an inherent difficulty in tracing money and then assessing its impact on a given human rights context, aggravated in part because international law has historically dealt exclusively with the nation state system and corporations have largely evaded oversight given their status in the cracks of that particular legal regime. At the same time, this obstacle is also the primary motivation for more research and greater efforts in this field, with the aim of setting fair and efficient legal standards for corporate complicity when dealing with the specific commodity of money.

Compared to the legal theory already developed in the civil realm, criminal responsibility for corporate complicity presents a certain 'backwardness'. Some questions regarding criminal responsibility for complicity and its connection with civil liability show the state of the art.[132] We are just beginning to pose questions on the usefulness and feasibility of mobilizing criminal law to establish corporate complicity,[133] two features that seems to be well-established when we think of civil responsibility.

130 Michalowski and Bohoslavsky, *supra* note 34.

131 See for example 'Outcome of United Nations Conference on the World Financial and Economic Crisis and its Impact on Development', UN Doc. A/RES/63/303, New York, 13 June 2009, available online at http://www.un.org/ga/search/view.doc.asp?symbol=A/RES/63/303&Lang=E (visited 19 April 2010).

132 See ICJ Report, Vol. II, *supra* note 20.

133 Looking at the atrocities themselves, how does the efficiency of the legal system work in criminal law when we think of corporate contributions? Is it possible and desirable that criminal law could operate to *neutralize corporate techniques* that develop the necessary social, political and economic conditions so mass human rights violations can be perpetrated? On this topic see generally R. Zaffaroni, 'Is an Efficient Criminal Contribution Possible to Prevent Crimes Against Humanity?' 3 *Rivista di Criminologia, Vittimologia e Sicurezza* (2009) 6–30. Should amnesties benefiting the perpetrators of human rights violations be allowed to impede options for suing the corporations that helped to contribute to them? This last one is a concrete question in the Chilean case since in 1978 an Amnesty Decree Law was passed to give immunity to the military perpetrators of the human rights violations.

The 'justice cascade' of truth commissions and domestic, foreign, and international criminal trials holding former Latin America dictators to account, reflect a more general trend in world politics towards greater accountability.[134] The same has not yet evolved in terms of robust accountability for economic accomplices, which clearly erodes the ultimate preventive, restorative, and reparations goals of transitional justice processes. The civil claim recently filed by victims of the Argentine dictatorship against banks that financed this regime challenges this idea.[135] And the Chilean case offers another opportunity to seriously re-think the link between finance and human rights violations.

134 E. Lutz and K. Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', 2 *Chicago Journal of International Law* (2001) 1–33; K. Sikkink and C. Walling, 'The Impact of Human Rights Trials in Latin America', 44 *Journal of Peace Research* (2007) 427–445.

135 Bohoslavsky and Opgenhaffen, *supra* note 4.