ABSTRACTS

Monday, 13th September 2010 - Identifying the elements of a potential linkage from the perspective of corporate complicity

CORPORATE COMPLICITY AND HUMAN RIGHTS VIOLATIONS – EMERGING TRENDS

Jim Gobert, Professor of Law, University of Essex

When more than one person is involved in a crime, the person who is the most immediate cause of the harm is referred to as the perpetrator or principal. Persons who assist the principal are referred to as accomplices or aiders and abettors. An aider and abettor may provide assistance before the crime, at the scene of the crime, or after the crime is completed (although the latter today are more likely to be charged with a crime of obstruction of justice). Reflecting the fact that there may be little difference in terms of moral culpability between an accessory and a principal, the law may provide, as does the 1861 Accessories and Abettors Act (UK), that a defendant may be charged as an accessory and convicted as a principal, and that both can be subject to the same penalty. While it might thus appear that there is no real significance between whether one is charged as a principal or accessory, the elements that the prosecution may have to prove to convict defendant as a principal or as an accessory can differ markedly.

The three basic elements of most “result” crimes are a wrongful act (actus reus), a wrongful state of mind (mens rea), and a causal link between the defendant’s act and the resulting harm. How to apply these elements to an accessory has long been problematic. For example, for the principal charged with murder, the actus reus will consist of the infliction of the blow that causes the victim’s death. But what of the accessory, who may hire the principal to commit the murder or simply encourage him to do so. The accessory may provide the murder weapon or critical information (as, for example, where the victim can be found) or may serve as a lookout while the principal kills the victim or the getaway driver afterwards. As for mens rea, it must be proved that the murderer had the intent to kill or cause serious harm to the victim. On the other hand, the accessory need not have any desire that the victim die. She may be ambivalent as to whether death occurs, as where she sells the murderer a gun but cares only about making a profit, or positively hope that the buyer of the gun does not use it to kill anybody. Is it sufficient then that the aider and abettor knows that a murder will be committed (or made easier to commit?) as a result of the assistance provided? Proving causation may also be problematic when the aider and abettor is far removed from the scene of the crime.

As complex as the law of complicity is when the offenders are natural persons, it can become far more complicated when one of the parties is a company and the other is a nation state.
First of all, can a company or a nation state even commit a crime? The traditional penalty imposed on a person convicted of a serious offence, such as murder, is a jail sentence, but it is obvious that neither a company nor a state can be imprisoned. Secondly, given that both companies and nation states are abstract entities, how can they commit an actus reus or form a mens rea? This raises the corollary question of whether actus reus and mens rea must be defined in the same way for a company or nation state as for a natural person? And how does one establish a causal link between, say, a company that pays taxes or a bank that lends money to a corrupt government which uses the money to finance a terror squad to eliminate its political opponents, if the company never asks how its moneys are being used?

A further question arises when the alleged complicity relates to a human rights violation. Are human rights violations criminal offences? If one prevents an individual from exercising their right of free speech or joining a union, a human rights violation has occurred but has a crime been committed? Conversely, are all crimes by definition human rights violations?

These are but some of the thorny issues which can arise when a state turns the spotlight of its domestic law of complicity on companies that have allegedly aided and abetted human rights violations by nation states.
THE DEVELOPMENT OF THE CONCEPT OF CORPORATE COMPLICITY IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW FROM THE NUREMBERG TRIBUNAL TO CURRENT UN CONVENTIONS

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This presentation will focus on the evolution of UN conventions that have incorporated clauses on responsibility for complicity regarding the commission of human rights abuses and on how they are related to the specific kind of corporate complicity.

From 1945 onwards, several international conventions that protect fundamental human rights have been approved. Most of them incorporate specific norms on responsibility of the accomplices who contribute to or collaborate with the principal perpetrators of these crimes. From the Charter of the International Military Tribunal to the Statute of the International Criminal Court we can identify a common denominator: complicity is punished by international criminal law. However, those conventions focus on the responsibility of natural persons rather than on that of corporations as legal entities.

After briefly describing the relevant content of these conventions, I will explore the answers to the following questions.: Does the silence of those conventions in terms of corporate complicity imply the non-existence of international responsibility of corporations? If a general principle of law indeed exists in terms of corporate responsibility for complicity, can the Vienna Convention (art. 31.3.c) be applied to interpret those conventions and take into account these other relevant rules of international law? Can a corporation be held liable from a civil legal perspective even when criminal law does not punish it? How has the jurisprudence been answering these questions? How relevant is the recognition of international corporate responsibility given that most domestic legal systems already establish it?
IDENTIFYING THE ELEMENTS OF A POTENTIAL LINKAGE FROM THE PERSPECTIVE OF CORPORATE COMPLICITY: WHAT DO "SOFT LAW" INSTRUMENTS (SUCH AS THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, THE RUGGIE FRAMEWORK AND THE UN GLOBAL COMPACT) HAVE TO CONTRIBUTE?

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There is an interplay between hard and soft law which has both negative and positive aspects. This is particularly apparent in countries emerging from conflict like the DRC. Is there any evidence to support the assertion that 'the private sector can make a meaningful contribution to stability and security in conflict-affected high risk areas? Without such evidence, is there any justification for companies to engage in high risk countries? According to the UN "It is no coincidence that the most serious violations of human rights and international humanitarian law were committed in the provinces of North and South Kivu, Maniema, Orientale and Katanga. These regions, rich in natural resources, came under the control of a succession of national and foreign armed groups, along with foreign armies, spurred on by the lure of these natural resources."

Yet the findings and recommendations of the 2002 and 2003 UN Panel reports were disregarded. Attempts to hold companies to account or to prompt home government action were unsuccessful. The DRC- related complaints to the National Contact Points for the OECD Guidelines for Multinational Enterprises were resoundingly ignored (e.g. Avient case). There were repeated attempts to narrow the remit of the OECD Guidelines (the 'investment nexus argument') which meant that 'trade' cases could not be considered. This effectively excluded most of the companies with links to the Eastern DRC (coltan and cassiterite trade).

Pressure from the UK Parliament (APPG) prompted changes in the way the UK NCP operated which led to two important decisions which went against this trend: DAS Air and AFRIMEX. These and other cases helped the emergence of 'due diligence' as a human rights concept. Governments have been reluctant to use tools at their disposal. UN Sanctions list - governments have discretion in whether to refer companies or named individuals for inclusion on the sanctions list (AMC Judicial Review).

Limitations of soft law exemplified in the Anvil Mining case. And the limitations of transitional justice were all too apparent in the subsequent Kilwa (military) trial. Despite warranties tied to political risk insurance, the fact that Anvil had clearly failed to apply the Voluntary Principles at the time of the massacre had no (economic or political) consequences. Soft law provides the dangerous illusion that it is possible to conduct business in conflict-affected countries. But in attempting this, there is the risk that the focus of attention and resources will be diverted away from victims and the need for an effective remedy.
The Alien Tort Statute (Alien Tort Claims Act) of the U.S. was a rusty piece of legislation of the 18th century which found real life at the end of 20th century. The ATS recognizes the jurisdiction of the district courts over “...any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The ATS is a private law pathway for international law violations. Its most important aspect is that it creates an alternative forum for human rights victims to seek justice and remedies for their violated rights as part of international law. Since its 1980 debut, the ATS has been the basis for many human rights claims which created the discussion of which human rights allegations are actionable under the ATS. It was established by the Filartiga decision that customary international law had an important role in defining the scope of ATS. The Supreme Court decision on Sosa v Alvarez Machain, which is the first Supreme Court decision concerned with the scope of the ATS, has affirmed the role of customary international law as a source of the “law of nations” but has established a more stringent test for the process of deciding whether a norm is part of customary international law. The Sosa test limits the spectrum of customary international law which can be invoked in US district courts unless they are part of a “... treaty of the United States.” Evolution of the ATS and implications of the Sosa test are examined in detail in this essay.

Despite its limitations, the ATS provides an important alternative for human rights litigation compared to unwilling domestic systems, especially of those countries with an authoritarian past, and to the cumbersome procedures available in international fora. The analysis of ATS decisions will demonstrate that several issues had to be resolved under the ATS in relation to human rights violations. These include the issue of a legitimate cause of action and of personal jurisdiction in human rights litigation. In relation to personal jurisdiction state immunities and recently and most importantly corporate liability have been contested concepts. The general principle of “human rights obligations can only be violated by states and state actors” is definitely disowned by the ATS jurisprudence. Today, it is possible to bring cases against private actors including individuals as well as corporations under the

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1 Filartiga v. Pena Irala, F.2d 876 (2d Cir. 1980), 30 June 1980
3 Filartiga v Pena Irala, supra No:1
4 Supra No:1,
5 Sosa v Alvarez Machain, Supreme court, 542 U.S. ____2004, 29 June 200: “Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized”
6 Supra No:5.
7 Supra No:2
9 Kadic v Karadzic, 70 F.3d 232, 64 USLW 2231, 13 October 1995.
ATS. However, a more limited set of human rights violations are foreseen for corporations and individuals. Also, establishing direct liability for corporations has been a challenge. The theory of liability which has mostly been brought against corporations is the complicity theory, especially under the form of aiding and abetting.

This essay will question the scope of ATS in relation with corporate defendants and put forward whether it provides a fruitful pathway for victims of alleged human rights violations by corporations. The analysis will focus on ATS case-law and pull out the standards necessary for pursuing a case against corporations, as well as challenges which may be faced by plaintiffs.

An introduction to the ATS as a part of international law litigation is followed with the ATS’s function as a human rights litigation instrument. Also, a brief comparative analysis of several cases brought against corporations under the ATS will be presented. The comparison will serve the aim of identifying the standards that apply to corporations with regard to human rights violations, such as the establishment of jurisdiction, a cause of action and theories of liability in addition to the already mentioned issue of aiding and abetting. Aside from the standards of corporate liability the challenges against establishing this liability will be analysed.


11 See Judge Edward’s concurring opinion in supra No:10.
THE COMPLEX LEGALITIES OF CORPORATE COMPLICITY: THE EXAMPLE OF COLOMBIA (PROF. ROBERTO VIDAL, UNIVERSIDAD JAVERIANA, Prof. Roberto Vidal, School of Law, Bogotá, Colombia)

Transitional justice does not have a fixed meaning and should be understood as a contingent historical process that can have very different political contents, depending on the historical and political context in which a transition is taking place, and the transition can be either participatory or authoritarian. Colombia provides an example of a transition led by an authoritarian government that was looking to implement right-wing values. However, this project obtained moral justification from liberal values of entrepreneurship, wealth accumulation and transnational investment. Government, but also the wider society, have concerned themselves with preventing any measure that could hinder corporate foreign investment: new taxes, social policies, peace talks and, of course, any form of corporate accountability for human rights violations. In a neo liberal society, the first problem of linking TJ and the human rights accountability of companies is a moral problem. Even within a TJ process, the example of Colombia shows that it is not clear from a moral point of view whether it is preferable to protect human rights over investment. This kind of moral dilemma is at the core of contemporary TJ processes.

From the unclear meaning of transitional justice follows that it is a field of complex legalities. TJ should not be limited to the languages of human rights and criminal law but rather open to the reception of diverse legal experiences stemming from different areas. From the practical experience of human rights litigation in Colombia, three legalities might contribute to the construction of legal tools for linking TJ and accountability of companies: a) the concern of the state for social justice; b) the tools used in the prosecution of drug trafficking; and c) the fair trade standards for companies. Given that these legal mechanisms do not have a pre-determined meaning, it will be possible to create new political meanings that transform conservative institutions into setting new agendas for the accountability of companies, the protection of human rights and participatory transitions.
Tuesday, 14th September 2010 - Identifying the elements of a potential linkage from a transitional justice perspective

THE NUTS AND BOLTS OF TRANSITIONAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE

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Talk about transitional justice surfaces in societies that are undergoing transitions from a repressive regime or a state of conflict to a democratic, peaceful and rights-respecting form of government. Recent years bear witness of a move away in such talk from an almost exclusive concern with the maintenance of peace and the creation of economic growth towards a more serious consideration of the fate of the victims of serious international crime (genocide, crimes against humanity and war crimes). The change in question seems to be the result of the relative success of the international human rights movement in terms of convincing a growing number of States of the need to improve respect for international human rights at all times and in all places, and to repair the harms and damages caused when those rights have been violated. Indeed, as will be suggested in this presentation, the language of human rights has come to permeate the theory and practice of transitional justice to such an extent that it now makes sense to speak of the emergence of something like a human rights approach to transitional justice.

In the light of these developments, the objective of my presentation is two-fold. The first aim is to direct attention to the main achievements to date in terms of articulating, substantiating and defending a human rights approach to transitional justice. Attention will be afforded to the utility of rights for the purpose of fleshing out the more specific interests of victims. Also considered is the recognition of new rights, ranging from the rights to know, to truth and to memory, as well as the reaffirmation of already established ones, including the rights to compensation and to justice. In addition, I highlight some mechanisms that are thought of as best suited when giving effect to the rights of victims in transitional contexts (such as truth commissions, vetting procedures, prosecutions).

The second aim of my presentation is to foster a more critical debate on the challenges ahead and which must be tackled in order for a human rights approach to transitional justice to gain a more solid foothold in international practice than it has achieved so far. To this end, I will consider a few problems associated with the notion of rights in general and their concrete manifestations in the field of transitional justice. Thereafter attention is turned to the claim about the compatibility between the goal of realizing rights of the victims with other goals of societies undergoing transitions. To conclude, I point to the lack of sufficient attention to the range of conditions (both legal and non-legal) that must be in place for public actors, not least the courts, to be able to live up to the new expectations in terms of realizing the rights of the victims in concrete settings.
CORPORATE RESPONSIBILITY AND TRANSITIONAL JUSTICE: BILLING CORPORATIONS TO BUILD DEMOCRACIES

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This paper aims to explore possible ways in which a society could apply transitional justice mechanisms in order to hold accountable corporations that made profit during times of conflict. The reflections presented in the chapter take as a point of departure the international legal framework on reparations and some current local initiatives, mainly carried out in Colombia. It will argue for a threefold strategy based on three different theories of justice depending on the availability of proof of responsibility. The first option to consider is based in the principle of corrective justice, which is supported by international human rights law, and particularly the right to reparations. This avenue is commonly used for cases where there is proof of direct corporate responsibility. A second option, associated with international developments in corporate social responsibility, looks to hold companies responsible for violations without proving their direct participation in violations when they know that the violations will benefit their activities. Finally, a third option is to litigate the responsibility of companies for violations where neither direct nor indirect proof of participation exists, but where the companies substantially benefited from the period of conflict and, in virtue of the principle of distributive justice, have an obligation to contribute to the process of transition.
1. Have 'economic crimes' been dealt with by TJ? The answer is yes, and by "TJ" we mean "TJ mechanisms". In practice, a few TRCs have been expressly mandated to address economic crimes -- Chad, Liberia, and now Kenya -- and others addressed them anyway, even without that express mandate -- Sierra Leone, Timor Leste, South Africa.

2. But were they addressed 'effectively'? That question deserves to be answered with a question: do we ask this of TRCs that have addressed (only or mainly) human rights violations? The fact, for example, that Pinochet -- 'the person most responsible' for violations in Chile -- was never tried or convicted for any crime, even after 3 truth commissions in Chile presided over dissecting his regime -- tells us that 'accountability' can't be measured through criminal justice standards. Or at least not human rights violations whose redress may not really be done thru prosecution -- as in the case of ESR violations.

3. Economic crimes are HR violations or serve to maintain the impunity of those who commit HR violations; at the same time, repression allows regimes to commit economic crimes. There is enough empirical and country-based evidence of the mutually-reinforcing relationship between HR violations and economic crimes, particularly large-scale corruption and despoliation.

3. TJ mechanisms can and should make use of international legal standards that have emerged to deal with economic crimes. TJ has an implicit (or is it explicit?) claim that it is not merely a component of human rights law. International legal standards have developed -- outside of human rights law -- that (a) consider certain economic crimes as egregious enough to be addressed by the international community, not just individual States and (b) are either already seen as embodying customary norms or can be developed into such norms. The UN Convention Against Corruption (UNCAC) -- of which I was a member of the drafting committee - is an example. The Rome Statute contains provisions on the forfeiture of assets amassed unlawfully by perpetrators of HR violations -- which would likely be assets obtained through economic crimes.
The ruthless exploitation of natural resources such as oil, timber and minerals has been the cause of conflicts in resource rich countries like Nigeria, Sierra Leone, Angola and the Democratic Republic of Congo. It has also been the means by which such conflicts have been perpetuated. Moreover, academic research suggests that countries reliant on abundant natural resources have a higher chance of being ruled by authoritarian regimes.\(^\text{12}\) Whilst addressing resource exploitation in politically tense transition periods can be prohibitively risky, failure to do so can also act as a major barrier to lasting peace and meaningful transition.\(^\text{13}\)

A significant number of corporations engage with natural resources either as part of their core business or in their supply chains. They therefore become implicated to greater or lesser degrees in fuelling conflict and unlawful or illegitimate exploitation, as well as the human rights violations that can be associated with such resource extraction. The lack of corporate accountability for ensuring that companies do not contribute to conflict and human rights violations in this context has been the subject of intense criticism.\(^\text{14}\)

This paper seeks to propose a different legal perspective for addressing the phenomenon of natural resource plunder than has hereto been suggested in transitional justice settings. It hopes to use this perspective to test the political and legal tensions inherent to dealing with this phenomenon. It will take a broad view of the term “resource plunder” to encompass all resource exploitation that violates human rights, whether conducted during armed conflict or peace time.

**Part One: Conflict resources**

Turning first to address the issue of natural resource exploitation during times of armed conflict, this paper assesses the extent to which what is colloquially referred to as “natural resource plunder” correlates with the notion of plunder in international law. It will be argued that the notion of pillage has developed since world war two to encompass what has often been phrased “economic plunder” or “spoliation” and which includes natural resource exploitation. Whilst commentators have suggested that in light of this development the notion of natural resource plunder should be subsumed under the definition of pillage in the ICC statute, the current paper will challenge this assertion on a number of fronts.

The paper highlights the current limitations of the development of plunder under customary international law, namely its restriction to international armed conflicts. It will then outline

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13 Lessons UNlearned: How the UN and Member States must do more to end natural resource fuelled conflict, Global Witness, January 2010; From Conflict to peace building: The role of natural Resources and the Environment, UNEP, November 2009
both the prima facie advantages and disadvantages of extending the notion of plunder to situations of internal armed violence. It will do so by highlighting why the extension of plunder to all situations of armed conflict is considered to be so attractive to commentators, particularly as it relates to corporate complicity. It will then outline the complex factual matrix to which the offence would need to be applied, using the Democratic Republic of Congo as a case study. It will discuss the shortfalls of the notion of plunder in the legal sense. These are, in short, the distinctions inherent to the laws of occupation from which resource plunder has evolved. They include distinctions between public and private property, and the nature of the property at issue (movable or immovable/in situ or ex situ), highlighting that not all natural resource exploitation by forces in occupation is in fact prohibited. The political ambiguities of applying such rules to internal armed conflicts will be discussed before considering the implications of applying such law in practice. This will cover difficulties relating to property rights and the problem of mixing, a problem inherent to consumables. The paper will go on to question the utility of attributing individual criminal responsibility in dealing with corporate complicity in resource plunder, highlighting the complex chains of supply which make causation and mens rea extremely difficult elements to satisfy. It will specifically question the expedience of international criminal law as means of achieving transitional justice in the special case of natural resource plunder. It will be argued that it may be equally if not more beneficial to take a more outward looking approach to address resource plunder in the transitional context.

Part two: Sovereignty over natural resources

Whilst looking to sanction corporate complicity in natural resource plunder through backward looking criminal law, this section suggests that the law on permanent sovereignty over natural resources might prove to be a more fruitful avenue to facilitating forward looking transition.

The paper asks what it is that we are truly seeking to sanction in making natural resource plunder an offence. It highlights the fact that the wrong being challenged by the term “plunder” is, in fact, dispossession of a peoples from the resources which they should be able to utilise to their own benefit. The paper points out that this wrong prevails beyond conflict situations to peace time regimes and is a wrong that transcends traditional notions of property ownership. Indeed, ruling elites who secure revenue independently of taxes often see little cause to be responsive to the needs of their people, preferring to maintain authority through resource allocation to privileged parties rather than through growth-oriented economic policies and regulation of the extractive sector. This section questions whether corporate transactions with such elites can themselves be challenged for their violation of the principle that natural resources be utilised to the benefit of the peoples who vest their sovereignty in the state.

The paper enquires whether, in times of transition, when issues of self determination are in sharp focus, attention might be better placed on the existing architecture of the law relating to natural resources and its relation to state legitimacy. It questions whether these laws can be used to establish that all states are responsible for ensuring the existence of accountability mechanisms for non-state actors emanating from (incorporated within) their territory who interfere with the principle of permanent sovereignty by failing to exercise due diligence. It argues that such an obligation might open the doors to more effective enforcement mechanisms in respect of natural resource plunder, such as civil litigation.

Determining whether such a legal obligation might be established in international law would require an in depth exploration of the law relating to state responsibility, and permanent sovereignty over natural resources as well as international human rights law.

The main focus of the presentation will be part one of this paper.
TO WHAT EXTENT CAN AND DOES LIABILITY FOR CORPORATE COMPLICITY ADVANCE THE GOALS OF TRANSITIONAL JUSTICE?

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In its final report, the South African Truth and Reconciliation Commission concluded that ‘Business was central to the economy that sustained the South African state during the apartheid years’ (Truth and Reconciliation Commission South Africa Report (2003), Volume 4, Chapter 2, at p.58), and that the ‘degree to which business maintained the status quo varied from direct involvement in shaping government policies or engaging in activities directly associated with repressive functions to simply benefiting from operating in a racially structured society in which wages were low and workers were denied basic democratic rights’ (TRC Report, Volume 6, Section 2, Chapter 5, at p.140). Other TRCs, eg that of Sierra Leone, equally make reference to the responsibility of multinational corporations. This raises the question of the extent to which the aims of transitional justice can be achieved without exploring the role of corporations in the human rights violations that occurred. The paper will suggest that to include the problem of corporate complicity into the transitional justice processes would enhance the goal of truth-finding, as without determining the responsibility of all important actors, the account of the truth will inevitably remain partial. Moreover, to include the role of actors such as corporations, whose main motivation to aid and abet gross human rights violations will usually be based on economic considerations, brings a widely neglected but nevertheless important issue to the forefront of the discussion: the role of economic interests in violence and oppression.

To the extent that corporations played a major role in the commission of gross human rights violations, their impunity might also hinder the goal of obtaining justice. And in the context of a lawsuit filed in 2002 by several South African victims’ organisations in US district courts against a variety of multinational corporations for aiding and abetting the international law violations committed by the apartheid regime, Archbishop Desmond Tutu, who had been the Chair of the TRC, explained an additional aspect of liability for corporate complicity as follows:

The obtaining of compensation for victims of apartheid, to supplement the very modest amount per victim to be awarded as reparations under the TRC process, could promote reconciliation by addressing the needs of those apartheid victims dissatisfied with the small monetary value of TRC reparations. (Archbishop Desmond Tutu, quoted in: ‘Reparations have “profound implications” for SA’, Mail and Guardian online, 1 February 2004)
To include the issue of corporate complicity in the transitional justice debate is thus necessary in order to optimise the achievement of various goals of transitional justice. Most importantly, it is doubtful that the recurrence of violence can be prevented effectively without addressing its main causes and without identifying and holding accountable the main perpetrators, including corporations for being complicit in the violations if their complicity was of sufficient severity.
CORPORATE COMPLICITY, FORWARD-LOOKING RESPONSIBILITY, AND THE DEMANDS OF TRANSITIONAL JUSTICE

Sheldon Leader, Professor of Law, University of Essex

Does corporate complicity raise issues in the context of TJ that are different from corporate complicity in other contexts?

Intuitions about responsibility for the use and abuse of corporate power point in two directions: backwards to remedy past wrongs, and forwards to contribute to the shape of a post-conflict society in transition to such goals as peace and the satisfaction of human rights. How might this division between forward and backward – looking concerns affect concrete features of corporate responsibility for complicity in wrongs committed in such societies? The answers must be speculative at this stage, but can be nevertheless drawn from experience. It will be argued that the special features of situations of transitional justice can legitimately require companies and governments to satisfy special requirements of consultation and non-discrimination that may well be different than they are in societies which would not be classified as in transition. Failing in these terms could well open the way to claims of complicity. Examples will be given from recent developments in Kosovo.
CRIMINAL LIABILITY, CORPORATIONS, AND TRANSITIONAL JUSTICE
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Introduction

A myriad of works and official and quasi-official documents devote their attention to transitional justice’s goals and institutions. One of the most important examples of them is the UN Secretary General’s Report, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”. The Report presents a complex understanding of transitional justice, and defines it as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” Among these processes and mechanisms the Report stresses the place of criminal law and promotes the cooperation with the International Criminal Court.

Criminal Law is often deemed to produce certain social effects or to pursue specific goals, such as individual or general deterrence, retribution, education, or the rehabilitation of the perpetrator. In transitional justice contexts, these goals are often slightly redefined, at it is not uncommon to find amendments or qualifications to what is often considered to be the role of criminal law in ordinary times. The Inter American Court of Human Rights (IACHR), for instance, has stated that criminal law is “an effective and adequate remedy to redress the violations committed…” and that “the right to know the truth is included in the right of victims or their next of kin to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through the investigation and prosecution…”

Corporate complicity, on the other hand, is an evolving issue in international human rights law, and possibly also responds to peculiar mechanisms; i.e. a different notion of guiltiness. Moreover, while there are some common principles underlying any democratic national criminal law system, criminal liability principles vary significantly in each country, responding to different conceptions, and performing, accordingly, different functions.

Given this context, this presentation will try to explore two questions regarding the role of corporate criminal liability in transitional justice contexts: First, what are the plausible goals of criminal corporate liability in TJ contexts, and how do they differ from individual responsibility? Secondly, how are those goals achieved, namely, how does criminal corporate liability work in transitional scenarios?

While the short-term financial gains can make entering the Flag of Convenience (FoC) industry a most attractive proposition for many transitional and developing States, there is a long-term price to pay. FoC fishing vessels are often linked to the blight of Illegal, Unreported and Unregulated (IUU) fisheries, and as such the international community (acting through Regional Fisheries Management Organisations (RFMOs), and implementing UN agreements such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the UN Fish Stocks Agreement\textsuperscript{20}, the UNFAO Compliance Agreement\textsuperscript{21}) has sought to rid the oceans of this blight.

Thus, when fishing vessels do not adhere to international norms and best practice, it is often the States of registry that bear the consequences, with import bans being put in place against all fish and fish products emanating from States deemed to be non-compliant. This paper will show that trade measures may have the effect of ensuring that States comply with international norms, but they have little tangible impact on the vessel owners.

The shadowy corporations that own the fleets of non-compliant fishing vessels have little trouble finding new States in which to register their boats and transitional States are often particularly attractive havens due to these States’ need for foreign investment. And coupled with the often limited legislative, implementation and enforcement capacities of transitional States it is no wonder that States such as Bolivia, Cambodia, Ghana and Sierra Leone have recently become linked with the FoC industry.

This paper posits the view that while it is understandable that transitional States might be drawn to the industry, they do so at their peril. The vessel-owning corporations show no loyalty to these States: the States are merely short-term hosts who will be left to pick up the pieces once the machinery and trade measures of the international community are brought to bear. The fishing vessels themselves, however, continue to wreak havoc on the marine environment and undermine global food security.


\textsuperscript{21} Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
CONSIDERING THE POSSIBILITIES AND LIMITATIONS OF REPARATIONS BY CORPORATIONS IN TJ PROCESSES: SOME REFLEXIONS

Dr. Clara Sandoval, Senior Lecturer in Law, University of Essex

This paper provides some preliminary thoughts about the limits and possibilities of redress by TNCs in the context of transitional justice processes. To this end, it identifies key core areas of redress in such processes and considers the potential role of TNCs in relation to them. It concludes with some remarks about the difficulties that will need to be faced as well as some proposals as to how to take the discussion forward.

Transitional justice is based on the assumption that gross human rights violations cause serious harm to its victims and should therefore be redressed. This assumption is widely upheld in relation to state responsibility and in relation to individual criminal responsibility. These scenarios leave unaddressed other actors who in certain cases are also alleged to have participated in the commission of atrocities. The Khulumani case is emblematic in this sense. In this case, it is alleged that specific corporations aided and abetted in the commission of apartheid in South Africa. The problem faced by such litigation is that the international law paradigm, that is the law that, as has been suggested, constitutes the normative foundation of transitional justice, has not evolved to the point of making transnational corporations or financial institutions accountable for gross human rights violations or international crimes. Therefore, redress as understood under international law, is not necessarily an applicable concept. This is one of the areas where more research is needed given that such actors could play an important role in redressing harm and helping a society to move forward.

Equally, although there is a consensus that there is a legal foundation to claim reparations under international law both from states and individuals, the standard that is required is that of “adequate reparation” and this standard is yet to be fleshed out. Clearly, there are principles out there to deal with the problem but they are not specific enough so as to properly regulate the issue. Also, there are certain forms to produce redress such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Nevertheless, how to effectively provide adequate reparation using these forms of redress remains a complex matter and one to which there is not yet an appropriate answer. Some consensus seems to exist around the idea that adequate reparation in such situations includes the investigation and prosecution of those who committed the crime(s) but that it should also include a combination of other forms of reparation, given the seriousness of the violation, but always bearing in mind the particular situation of each victim or collective of victims. How could then a corporation participate in such a process? How can it be guaranteed that victims receive adequate reparation from different actors whose responsibility is engaged in different
ways and at different levels? How can reparations paid by the state, an individual perpetrator and a TNC be made compatible and harmonised so that they complement one another? And how can it be avoided that they cause harm?

An additional core area of reparations, TNCs and TJ is related to who can order reparations and how to make such systems harmonic and consistent with one another. Broadly speaking there are two distinct ways of doing it: firstly, a judgment by a domestic Court, an international tribunal (human rights tribunal or criminal court like the ICC or the Extraordinary Chambers in the Courts of Cambodia) or a truth and reconciliation commission –depending on their mandate- and/or secondly, administrative reparation programmes. These systems can be challenged on grounds of fairness. For example, states create their own administrative reparations programmes to respond to the harm suffered by victims of atrocious crimes such as disappearances, arbitrary killings and torture. These programmes aim to benefit thousands of persons who qualify for reparations. However, is it possible to say that such reparation measures are adequate when they do not take into account the particular characteristics of each victim? Or when not all of those who are responsible participate in the process of redress? Or when those who helped in the commission of such crimes can continue carrying out their economic activities as if they had not been part of the problem?

Finally, reparations to victims have also generated an important discussion around their transformative potential. Given that victims of heinous crimes are usually discriminated against and poor, reparations can be seen as a means to move towards development and to challenge structures of discrimination that can be unaltered if the aim of reparation is simply to return the victim to the status quo ante. This potential reach of reparations has, as a consequence, helped to challenge the traditional understanding of transitional justice, one that prefers to see its field in the achievement of justice –retributive justice- for past atrocities rather than in the achievement of distributive justice. Nevertheless, there is no consensus around the extension of the concept of transitional justice to that of a field that targets the root causes of conflict or repression or that is intrinsically linked with development. Therefore, this area also needs to be considered when the idea that TNCs should become a relevant actor of TJ processes and of reparations is reviewed.
In this presentation/paper, I will be examining the international legal framework for stimulating private investor involvement in the socio-economic development of Kosovo, as an example of a society and (possibly soon, a State) in transition. In doing so I will be taking into account the efforts of public international finance institutions (such as the World Bank and its associated institutions) and regional inter-governmental organizations (such as the EC) to provide assistance (both financially & technically) to Kosovo government policies and laws in this regard, despite (or perhaps because of?) its transitory and uncertain legal status, even following the ICJ Advisory Opinion on the Legal Status of the Kosovo Declaration of Independence on 22 July, 2010.

In a nutshell, I will be enquiring whether these international, European, and domestic (Kosovo) efforts to stimulate private investor interest/involvement take sufficient account of the potential for environmental damage from the participation of new investor in sectors such as highway building and power generation? Or, are socio-economic interests being prioritized within Kosovo, as is usually the case within transitional societies and developing countries in similar situations? Is the potential for a 'clean slate' approach encompassing 'real' sustainable development, including the integration and implementation of well-known and accepted principles for environmental protection, as a vital element of Kosovo's overall socio-economic re-construction, being lost/subsumed in the face of more pressing economic development and social conflict resolution issues? The narrative that describes jurisdictions in similar circumstances is usually one involving a low priority being accorded to environmental protection. Thus, socio-economic development is apparently unable to take place without wholesale environmental degradation. Moreover, private actor involvement is perceived as being either a corrupting, or otherwise exacerbating influence on the tendency of such transitional societies to de-prioritize environmental protection when re-constructing their economies.

The thesis I would like to present to the conference is that the global and European institutional framework for stimulating private investment within Kosovo, whether foreign or diaspora in origin, specifically provides for the inclusion, integration and implementation of several significant environmental principles. Among these environmental principles, the provision of procedurally-oriented environmental rights allow for the possibility that individual and community concerns over the adverse environmental impacts of infrastructure projects involving large-scale foreign investment to be adequately represented and addressed. Moreover, both through the self-regulatory efforts of private (transnational) financial institutions (Equator Principles banks), as well as European (EC & ECHR) law developments, private actors are being enjoined to ensure these environmental rights are
being adhered to, even within a transitional society such as Kosovo. While both *systemic* and *individual* failures of the Kosovo judicial and law enforcement authorities prevent these procedural environmental rights from being exercised/enforced against public authorities, private actors may nevertheless implement these procedural environmental rights on their accord.