ABSTRACTS

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TAKING CORPORATE OUT OF CORPORATE COMPLICITY: THE DISURBING DECISION IN KIOBEL

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In 1980, in *Filartiga v. Pena-Irela*, 630 F.2d 786 (2d Cir. 1980), new life was breathed into the Alien Tort Claims Act (ATCA) (also referred to as the Alien Tort Statute or ATS), which had lain virtually dormant since its enactment by the US Congress in 1789. The full potential of the ATCA did not begin to be realised, however, until the following decade when suits against multi-national corporations (MNCs) were brought by victims of human rights abuses. The abuses had usually been inflicted by the governments of the countries in question (as opposed to the MNC’s themselves) but the plaintiffs argued that the violations had been aided and abetted by products, advice and often simply financial support (taxes, revenues, loans, etc) provided to that government by an MNC. The Khulumani litigation, brought against transnational firms that allegedly aided the apartheid government in South Africa to oppress their minority citizens, typified this class of case. Many issues then began to be seriously examined, including the *actus reus*, *mens rea* and the causal connection required to establish corporate complicity.

This promising legal development was brought to an abrupt halt by the 2010 decision of a three judge panel of the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum Company*. The court held that who can be sued under the Alien Tort statute was a question to be determined by customary international law and that the absence of any precedent imposing liability on corporations under customary international law indicated that companies could not be sued for corporate complicity. Needless to add, this decision, if upheld on appeal, renders all other substantive and procedural issues moot.

My presentation will examine not only the Kiobel court’s arguably flawed reasoning but also its more fundamental failure to even ask what a “corporation” is, what functions are served by corporate liability, and why the court’s proposed alternative of individual liability is a cure that may be worse than the disease.
SOME THOUGHTS ON COMPANY DUE DILIGENCE, DEVELOPMENTS OF SOFT LAW, AND THEIR APPLICABILITY TO THE CHALLENGES OF “OLD” TRANSITIONS

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Due diligence has been established over the last few years, especially through the work of Prof. John Ruggie, the Special Representative of the Secretary General on business and human rights issues, as a key concept in the determination of the responsibilities of transnational companies (TNCs). While bindingness of business responsibilities has been explicitly excluded by the SRSG, he acknowledged that the due diligence concept (as well as others not of interest here) may translate into provisions of civil or criminal law in domestic law, acquiring thereto bindingness. From an international perspective, however, the due diligence standard for TNCs is “soft law”. Recently, several international soft law documents, such as the ISO 26000 standard and most probably also the revised OECD Guidelines on Multinational Enterprises that are due to be approved by member states in May 2011, take up the due diligence concept.

This presentation outlines the scope of responsibilities that the current due diligence concept entails for business, not least with respect to the value chain and a company’s subsidiaries. It then moves on to raise different questions related to the applicability of the due diligence standard to situations of past business complicity (lato sensu) in human rights violations, and proposes the argument that in several jurisdictions, legal challenges based on domestic due diligence standards could be more promising to hold companies to account. The contribution international law can make to complicity cases is most probably not so much the due diligence concept. This leaves us with the challenge of making international and domestic law interact in order to determine the scope of the due diligence concept in concrete complicity cases. The presentation does not pretend to deliver answers, but rather sketches the questions and some routes that might be worth exploring.
CONTRACTUALISATION OF HUMAN RIGHTS

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The talk will consider recent trends in Host Government Agreements that operate in countries in transition. Afghanistan, Iraq, and the Democratic Republic of Congo are but a few examples. These states contain significant deposits of natural resources such as Oil, natural gas, and minerals. In past years MNCs have entered into HGA on terms promising to respect, protect and fulfil social and economic rights [occasionally cultural] by for example responsibly engaging security agents, or by promising to provide adequate education, Health clinics, access to water, railways, and adequate housing. This is often referred to as ‘Contractualisation of Human Rights’.

Whilst this phenomenon must be encouraged it may nonetheless pose conceptual and practical problems.

Firstly, it is argued that there is a danger in the contractualisation of Human rights. Contracts that primarily create personal rights led by individualistic ethics are now being used in order to create obligations based on principles of solidarity and societal ethics. It may however be that the consideration for the latter obligations is the grant of the concessionary right. There is a danger, it is submitted, that the contractualisation may relegate Human rights to contractual rights and thus influencing the content and scope of those rights, and the remedy for its breach. There is a lurking danger that contractualisation would become privatisation.

It is also argued that the ‘Contractualisation of Human Rights’ can only be effectual where access to justice is provided, either under the applicable law or under the contract. HGA agreements would typically call for arbitrating all disputes arising out of the agreement. Third party beneficiaries, affected by for example a mining license would have under normal circumstances limited access, if any, to dispute resolution mechanisms provided for under the contract. Alternatively, third party beneficiaries may depend on the national law of the state/national courts in determining whether they may have standing, or even a cause of action under the contract. Therefore, the efficiency and integrity of national courts has much influence on the fate of those disputes.
TRUTH COMMISSIONS AND CORPORATIONS: POTENTIAL AND LIMITATIONS

Dr. Clara Sandoval, Professor of Law, Essex Transitional Justice Network, University of Essex, UK

Truth and Reconciliation Commissions (TRCs) are one of the most used transitional justice mechanisms worldwide. Their objective is to construct a legitimate version of the truth of what happened during the period of repression or conflict. They do so by looking at large-scale human rights violations and, sometimes, explicitly, they are also mandated to consider root causes of conflict or repression.

The way TRCs have interpreted their mandates has changed in important ways within the last 15 years. One of the most important changes is their identification of those responsible of conflict or repression and/or of large-scale human rights violations. They have moved from a focus on the state as solely responsible to focus on other actors, particularly (but not exclusively) corporations. This change might reflect an important tendency for the future. Given the wide acceptance of TRCs worldwide, this change might denote an important opening within transitional justice to consider the responsibility of corporations. However, how far can transitional justice go with this change? How to make the best use of it? What is the potential and limitations of TRCs to deal with corporations?

This paper will consider some of these questions while looking at the experience of the TRCs in Liberia, Sierra Leone, East Timor and South Africa. These TRCs have addressed the role of corporations in different ways. The paper looks at the conceptual frameworks used by these TRCs to consider the responsibility of corporations bearing in mind existing legal limitations. For example, while it is usually maintained by orthodox international lawyers that corporations cannot violate human rights, it is important to consider what legal frameworks TRCs are using to deal their responsibility. Then, the paper moves to consider the conclusions and recommendations made by these TRCs, their feasibility and implications. Finally, the paper uses the practice of these TRCs to consider the potential and limitations of truth mechanisms to address the responsibility of corporations.
TRANSITIONAL JUSTICE & CORPORATE COMPLICITY: THE SOUTH AFRICAN EXPERIENCE

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The financial cost in maintaining Apartheid ran into billions of dollars. In 1993, the year before the first democratic elections in South Africa, the total public sector foreign debt amounted to $25 billion. The newly elected ANC-led democratic government decided to honour these debts towards the foreign creditors to whom it was owed. The most important creditors were German and Swiss banks who continued to finance the Apartheid government when, at the time, most foreign banks refused to extend further loans and credits.

The loans and credits provided by these foreign creditors provided the Apartheid government with what it needed most in order to maintain its brutal system of racial oppression - much needed arms and ammunition, military technology, fuel and transportation for its military and security forces. The result is that the Apartheid government was able to commit the worst form of violations contrary to customary international law, i.e., torture, extra-judicial killings, indiscriminate shootings, arbitrary and long periods of detention without trial, etc.

The establishment of the Truth & Reconciliation Commission in 1995 was meant, amongst others, to investigate the role multinational corporations played in having aided and abetted the Apartheid government in committing gross human rights violations. In its final report, the TRC submitted that there are legal grounds for instituting a claim for reparations against banks and other corporate entities for having aided and abetted the Apartheid government.

Against this background, two important cases have emerged in post-Apartheid South Africa against multinational corporations. The one is commonly known as the Apartheid lawsuits filed almost ten years ago pursuant to the Alien Tort Statute (ATS) in a New York district court against a number of multinational corporations for having aided and abetted the Apartheid government. Surviving victims of Apartheid are seeking compensation for damages against such companies. The cases have gone from district to the US Supreme Court. The cases deal with complex issues of corporate liability at an international law level.

The other is a more recent test case filed in 2006 by a single ex-mineworker, Thembekile Makayi against his former employer AngloGold Ashanti, a South African gold mining company. Mankayi contracted silicosis, a debilitating lung disease suffered by hundreds of thousands of former mineworkers in South African mines at a time when most of the country’s gold production was extracted for the use of the then South African government in the Zurich gold pool to avoid crippling sanctions. The South African Constitutional Court in a recent landmark judgment upheld the right of mineworkers to institute legal proceedings against their employers, paving the way for thousand of potential claims against mining companies in South Africa.

As will be discussed, these two cases demonstrate the role that litigation plays achieving South Africa’s transition to peace and democracy.
TRANSITIONAL JUSTICE IN ARGENTINA

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The reopening of the trials for the crimes committed during the latest Argentinean dictatorship offered a new opportunity for Argentina to deal with its past. The aim of the presentation is to offer a chronological view of the legal and political events that led to the current circumstances. In addition, the presentation aims to present transitional justice mechanisms available today in Argentina.
Corruption has two faces: one comes from the public sphere, the state and government officials and the other is the private sector. Corruption can only exist if we have the two elements: disloyal officials and civil servants, on the one hand, and the complicity of many national and international companies, on the other.

In fact, the Organisation for Economic Cooperation Development has pointed out that the most effective and uniform measure to fight bribery that involves a foreign public official in international transactions is to establish the liability of legal persons.

Similarly, it is necessary to implement a rule to make legal entities criminally liable when they engage in corruption and thus foster self-regulatory measures that in turn will lead to the preservation of social values and public order and balance the principles of free enterprise and economic responsibility.

Accordingly, there it is a clear tendency in Public International Law towards to make legal entities liable for criminal actions.

With regard to the codification of the liability of legal entities in Argentina, neither the Penal Code nor any additional rules impose criminal liability on corporations, companies, civil associations and/or foundations for criminal acts they may commit.

However, in order to comply with those international obligations a group of legislators and the Executive Branch has submitted bills to impose the liability of legal persons. The bill had a favourable reception and should now be discussed in Congress. As for the bill sent by the Executive Branch, it has yet to go round the respective committees.

The implementation of the criminal liability of legal persons is a breakthrough in the field. The purpose is to amend our criminal law now and make it compatible with the international law that Argentina has ratified. In many cases, it is the corporation who is the beneficiary of the outcome of corruption. Whereas, in other cases, it is the instrument through which the subject (public officials) performs the illicit act. The reform aims to punish the "other face" of corruption, and in this way, it means an essential progress in wiping this scourge.
CASE AGAINST BANKS FOR FINANCING MILITARY DICTATORSHIP

Gabriel Morini, Journalist, Página/12, Buenos Aires, Argentina

The publication of articles related to human rights violations has always been uncomfortable for the mass media. The common interests between social actors who have been also the main perpetrators and the media companies is a problem that is usually solved by applying previous censorship. Fortunately, the justice system has evolved healthily in recent years to achieve a significant degree of acknowledgement of public opinion related to the crimes committed during the last dictatorship in Argentina. This has forced the media to take position about these systematic violations of human rights. Beyond the Buenos Aires Herald --the only newspaper that published the first habeas corpus in relation to the disappearances--, Página12 is the main reference newspaper that included, since its origins, the agenda of the cases and investigations that were coming out of trials. In the last few years, the rest of the most important newspapers were forced —whether they wanted or not— to include these issues into their own agendas, as the annulment of the amnesty laws triggered an increase in cases and decisions all over the country. But corporate complicity is a new ethical problem for the mass media, as private newspaper companies whose funding source is private advertising, find that the provision of information about issues related to this might adversely affect their commercial relationships. Financial institutions and banks are nowadays one of the most relevant powers of the world and defying them is not without consequences.

In the middle of all this, independent journalists are most likely to be the weakest part of the chain in this context, as they need to apply a lot of professional care to avoid legal problems by mentioning specific corporations, and also have to be careful with regard to how the information is managed to prevent that it affects the normal path of the investigations. The relationship that the journalist can establish with the different sources that are involved will be, at the end, what will ensure that the final informative product reflects the most trustworthy version of the truth that can be achieved. With lack of documentary sources on cases that occurred many years ago, the data must be constructed skilfully. Journalists have moreover to deal with media operations, and banks’ public affairs policies, which are intended to generate confusion and deactivate any threat for their own image and interests.

However, publishing these types of information related to corporate complicity is a new issue than can contribute to taking pressure off the victims, and also legitimate the efforts of progressive lawyers facing public opinion. A careful examination of how news are being constructed around articles published by different mass media on human rights violations will create recognition of the idea that journalism is a powerful and essential tool to assist justice and to inform people, in order that countries may adopt the relevant measures that are necessary to prevent the repetition of these abuses.
FROM NUREMBERG TO BUENOS AIRES TO JUJUY: THE MERCEDES BENZ AND LENDESMA CASES

Wolfgang Kaleck, Director of the European Centre for Constitutional and Human Rights, Berlin, Germany

1. I will make my arguments from the perspective of a European human rights lawyer who has been workings since 1998 with the German Coalition against Impunity to initiate investigations and prosecutions against Argentine military officers in the German justice system and who brought the criminal complaint in the case of the disappeared trade unionists of Mercedes Benz Argentina in 1999. Also as the head of the 2007 founded European Center for Constitutional and Human Rights (see www.ecchr.eu) we try to develop a broader concept of strategic human rights litigation. One blueprint for our work is the Argentinean experience which consists of two important elements: a) the outstanding role of the human rights movement and the close cooperation between lawyers, family members and social movements and b) the exhaustion of all political and legal remedies from the local to the regional to the transnational and international level.

2. From Nuremberg to Buenos Aires refers to two developments: first, the Nuremberg trials stand for the beginning of International Criminal Justice. Second, in Germany we brought our case against Mercedes Benz to the Prosecutor from Nuremberg where it was investigated but finally dismissed in 2004. But it was brought again as an ATCA case in the US and as a criminal case in Argentina. Both cases are still pending.

3. In Jujuy a small local group of survivors and family members and the local prosecutor supported by the special unit of the prosecutors in Buenos Aires are investigating a huge case complex of over 100 victims, mainly trade unionists from the sugar company Ledesma.

4. As the workers movement and trade unions were one of the main targets of the military and the political and economic changes of the dictatorship still have an important impact on today’s society in Argentina it is crucial that the scope of the current investigations and prosecutions in Argentina will be broadened and include also economic actors and that not only the criminal justice undertake appropriate measures to deal with illegal economic transactions during the dictatorship.
REVIEW OF COLOMBIAN CASES INVOLVING CORPORATE COMPLICITY, HUMAN RIGHTS VIOLATIONS AND TRANSITIONAL JUSTICE: LINKS, IMPACT, POTENTIAL AND LIMITATIONS

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The author states how there is a strong connection between development and human rights violations in Colombia. Sometimes this relationship materialises in complex contexts and structures, within situations of armed conflict or other systematic human rights violations. However, apparently, transitional justice experiences have not considered such contexts and structures, or have only considered them in a tangential way. Thus, corporations and enterprises as relevant actors of armed conflicts hardly ever appear in post-conflict mechanisms.

The following presentation explores the scope and limitations of the transitional justice mechanisms in Colombia, focusing on their possibilities for identifying and prosecuting corporations and enterprises implicated in human rights violations, within the armed conflict.
THE DRUMMOND INVOLVEMENT IN THE COLOMBIAN CONFLICT: A CASE FOR THE ANALYSIS OF PATTERNS OF RESPONSIBILITY AND POSSIBLE REMEDIES

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About the case: The Drummond Company has been the subject of numerous lawsuits regarding the murders of 70 union miners and railroad workers. While paying the AUC to protect its property and U.S. workers, Drummond allowed the AUC terrorists to set up a military base of operations on its property, and supplied electric, food and fuel. An initial suit alleged that in a November, 2000 meeting, Drummond executives in Colombia directly ordered the execution of three union leaders, "guys that were causing problems," at the Drummond mines.

About the litigation: In 2002, the families of three deceased Colombian labour leaders and the union they belonged to, Sintramienergética, filed suit against Drummond Company, Inc. and its wholly-owned subsidiary Drummond Ltd. in US federal court. The trial was held in July 2007. The jury acquitted Drummond finding that the company was not liable for the deaths of the three labour leaders.

In the meantime, former paramilitary leaders and key witnesses in the case provided testimony before the Colombian General Attorney’s Office indicating that by 1999 Drummond began colluding with the AUC after leftist guerrillas targeted the company’s mining and transportation operations. These depositions were obtained by virtue of the Transitional Justice legal framework set up in Colombia through the “Justice and Peace Law”.

Based largely on the testimony of demobilized paramilitary leaders, in March 2009, the children of three slain Colombian union leaders filed a new lawsuit in US federal court against Drummond alleging the company’s complicity in the killings. Another lawsuit was filed in US federal court against Drummond in May 2009 alleging that the company had made payments to the AUC to kill labour leaders. These cases are still pending.

Based on the same confession, a criminal judge in Colombia has asked the Attorney General to launch a criminal investigation of top executives at Alabama-based Drummond Co. Their Colombian counterparts have already been indicted.