Corporate Complicity in Dictatorships

Leigh A Payne, University of Oxford
Gabriel Pereira, University of Oxford

The case of Bruno Emil Tesch could have, or maybe should have, changed business behaviour. But it did not.

Tesch had been the owner of the company producing the Zyklon B poison gas used in Nazi extermination camps. A British Military Court in Hamburg found him guilty for knowingly providing the gas that killed four and a half million people in the Auschwitz-Birkenau camp alone.[1] He was executed by hanging on 16 May 1946.

The 'rough justice' Tesch faced might have curbed subsequent corporate human rights violations. So too the imprisonment of those who built the mass extermination ovens of Auschwiz-Birkenau,[2] the civil suits against Ford Motor Company, General Motors, and Swiss Banks for financing the extermination, and the reparations paid by Volkswagen for concentration camp slave labour used in the company's assembly lines.

And yet we see that companies continue to collaborate with authoritarian regimes seemingly without fear of legal or financial retribution. Their gamble may have paid off; few cases like Tesch threaten corporations with the legal risk, financial cost, or reputational damage of doing business with dictators or warlords.

What will? Deterrence and rational choice theories suggest that businesses will change their human rights behaviour with the credible threat of high cost sanctions. As long as businesses assume that they can avoid prosecution, win civil or criminal lawsuits, and dodge damaging social costs resulting from their acts, they may continue to profit from their collaborations with human rights abusers or their own human rights abuses. Only when they perceive high tangible costs associated with such behaviours will they change their conduct.

If these theories are correct, international governmental and non-governmental (including corporate sector) organizations' efforts to establish corporate social responsibility and voluntary principles regarding business and human rights are unlikely -- on their own -- to change business behaviour regarding human rights. Some research even suggests that signing onto 'soft law' agreements may provide a smokescreen for continued pernicious behaviour. The lack of enforcement behind voluntary principles fails to meet the criteria of perceived high tangible costs that would prompt businesses to change their practices. Anticipating a future of high tangible costs attached to abusive behaviour may prompt businesses to seek greater protection from sanctions rather than alter patterns of abuse.

Pre-emptive and protective measures have not entirely succeeded, however. The $15.5 million settlement in the Wiwa v Royal Dutch Petroleum Company and Shell Transport and Trading Company in 2009 is still referenced as a cautionary tale for businesses. The company was charged with complicity in human rights abuses against the Nigerian Ogoni people. Shell allegedly collaborated with the Nigerian military regime to violently suppress opposition to the company's environmental degradation of the Ogoni land where it had been operating since 1958. The company's complicity in the 1995 hanging of the 'Ogoni 9,' a group headed by Ken Saro-Wiwa, an internationally respected writer and activist, brought global attention to corporate abuse and its consequences.[3]

The well-known case of Chiquita Brands in Colombia follows a similar pattern. In 2007 the US Department of Justice fined the company $25 million for its connections to Colombian paramilitaries (AUC). This included the payment of $1.7 million to paramilitaries to provide security services that involved the killing of 173 workers assumed to be guerrilla sympathizers.

These two exemplary cases were both decided by courts in the US and not in the domestic courts in countries where the abuses occurred. The Alien Torts Claim Act (ATCA) and Torture Victims Protection Act (TVPA) provided a strategy for seeking civil remedies for corporate abuses in repressive and war contexts in US Courts. Our preliminary study found thirty such cases in eleven different countries over the past seventeen years. The majority of those cases ended in dismissal (18), but four remain ongoing. In a significant minority of cases, companies settled, perhaps in anticipation of losing (7). We found only one case of a company losing a lawsuit. The likelihood of a successful outcome using ATCA is therefore fairly low; ATCA thereby fails to meet the threat of tangible high costs that would curb business abuses. The 2013 US Supreme Court decision in the Kiobel v Royal Dutch Petroleum further reduced that threat by holding that ATCA does not apply to conduct of corporations outside the US. Debate over the reach of the Kiobel decision and its impact on corporate complicity suits continues; our preliminary evidence shows that it contributed directly to the dismissal of two such cases.

Further complexities in establishing legal responsibility limit the likelihood of raising the tangible costs for businesses for committing human rights violations. States, and not corporations, have been assigned the right to protect human rights of citizens. This notion is undergoing change as John Ruggie's book *Just Business* suggests. Businesses, like states, are increasingly viewed as having a responsibility to protect human rights. Where companies are complicit in repression or war, as in the case of Tesch, courts may have an easier time prosecuting them for their involvement in established state abuses. Proof that companies knew that their products, services, or financing were used to carry out human rights abuses, however, is difficult to determine. Jurisdictional disputes, as the ATCA case above shows, further allow multinational corporations to bypass host country courts to seek judicial protection in their home jurisdictions. The high cost of litigation may also favour companies over victims in civil courts, particularly when investigation and appeals processes continue for many years. In criminal prosecutions, moreover, states may prove reluctant to bring cases against companies that contribute significantly to national economies.

To overcome some of these limitations on bringing tangible high costs for corporate human rights abuses, new initiatives have begun throughout the world. Specifically, corporate complicity has become the new mechanism in the transitional justice toolkit.

"Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy."[4]

The trials, truth commissions, reparations, lustration and vetting mechanisms typically included in the set of transitional justice mechanisms have focused primarily on state authorities' abuses or abuses by non-state actors directly connected to the state, such as paramilitary groups, death squads, or civil patrols. Recent innovative uses of transitional justice in Argentina have linked businesses to those abuses directly connected to the state. They have also included those abuses carried out by the state's repressive apparatus on behalf of businesses. Transitional justice in Argentina, therefore, connects corporations to states in the human rights abuses following the 1976 military coup. It recognizes the "systematic or widespread violations of human rights" connecting the private sector to the authoritarian regime. Neither one functioned independently of the other.

The connection of corporate complicity to the Argentine regime's abuses became visible with the 24 March 2012 anniversary of the military coup. The new theme of the yearly march that filled the streets of downtown Buenos Aires was the connection of 'economic groups' to the coup and the regime it installed. At the end of the march, and on the stage where the final speeches were broadcast to all of those gathered, an enormous screen projected the names of companies complicit in the dictatorship. Investigations of such complicity led up to that event and took off in its aftermath. We have identified seventeen domestic and multinational corporations of various sizes and in various sectors that now face prosecution for their direct and indirect violation of human rights during the authoritarian regime.

While the 2012 anniversary marked a watershed moment, knowledge of corporate complicity predated it. Argentine social scientist Guillermo O'Donnell referred to 'bureaucratic-authoritarian states' that linked the military, businesses, and technocrats in a single 'capitalist deepening' project in the most economically advanced countries of Latin America: Argentina, Brazil, Chile, Mexico, and Uruguay. The logic behind the authoritarian overthrows of left-leaning democracies in those countries and the subsequent control of repressive security forces was not merely a response to the Cold War or the training in counterinsurgency tactics to end 'left-wing internal subversion.' A corporate logic allied these forces that would also fight communism by, in the words of one of the architects of the Vietnam strategy, 'breed capitalists like rabbits.' The private sector and the repressive apparatus were thus linked. Businesses depended on the state for investment security and low wages to make profits; the state depended on businesses for much-needed capital investment.

Few use the label 'bureaucratic authoritarian state' outside academic circles. And many of the terms that were used to refer to Argentina's authoritarian regime, until recently, missed the connection to business. While the repression following the 1976 coup is still internationally known as 'the dirty war,' Argentine victims, survivors, and human rights advocates reject that term. The military junta adopted the language of 'dirty war' to refer to atrocities committed on both – the military and so-called 'subversive' – sides of the 'war.' Calling the atrocities part of a 'war,' even a dirty war, ignores the state's criminal responsibility for entering private homes in plainclothes, kidnapping individuals, and detaining them in the hundreds of clandestine detention centres throughout the country where they faced torture, death and disappearance. Argentine opponents of these tactics refer to the atrocities carried out after the 1976 coup as 'state terror' in which the military juntas targeted civilian populations for extermination. By 2012, the label changed again to recognize the role of businesses in the state terror. Over the last couple of years, 'civil-military dictatorship' has replaced previous terms that attributed the violence, and the logic behind that violence, to the state alone. In Argentina, businesses allied to the state contributed to terror, similar to non-state actors elsewhere such as paramilitaries, death squads, and community patrols. Indeed, some businesses in Argentina were involved directly in death squad activity before and during the dictatorship. As complicit with the authoritarian regime, therefore, businesses began to be held accountable for that violence.

This effort does not come out of the blue; Argentina has been an innovator of transitional justice mechanisms since 1983. It created the first truth commission in the world. It was the first country to convict a head of state – the military juntas – for human rights violations in the contemporary era. Despite having more amnesty laws than any other country in the world, it found creative legal loopholes to circumvent those laws and reach more guilty verdicts for past human rights violations than any other country in the world. This occurred as a result of the domestic and international challenges to amnesty laws that outpaced efforts elsewhere by far. And along with only two other countries, it eventually annulled its amnesty laws. Argentina, unlike those other two countries (Uruguay and Bangladesh), has taken advantage of the removal of the amnesty law to advance human rights trials.

No other country has gone as far as Argentina in transitional justice or has innovated as much. It is perhaps, then, unsurprising that Argentina has also gone further than any other country in linking businesses to human rights abuses of the dictatorship. In our preliminary investigation into corporate complicity cases around the world, 65 percent of those cases under investigation occurred in

Argentina.[5] In addition, Argentina is using law creatively to find ways to hold businesses accountable for their complicity in past human right abuses. These efforts may begin to change corporations' perception of the costs associated with human rights abuses so that they perceive the high cost of committing atrocity and stop doing so.

Argentina thus has not only become a leader in terms of the numbers of cases of corporate complicity under investigation compared to the rest of the world; it has also provided models of innovative uses of law that other countries can adopt to bring those cases forward. We categorize this creative use of law in four different areas: (1) businesses' direct involvement in human rights abuses; (2) businesses' failure to protect workers under labour law; (3) businesses' financing of illegal activities; and (4) businesses engagement in illegal economic activity. We provide some illustrations below.

1. Businesses' direct involvement in human rights violations[6]

A number of top officers from several companies face criminal prosecution for their alleged participation in human rights violations. The emblematic case in this category involves the trial of the corporate leaders of the Ledesma sugar mill in 2012 in Jujuy. The company is accused of being complicit in the well-known "Noche del Apagón" ("Night of the Blackout") between July 20-27, 1976. An estimated 400 workers, students, and professionals were allegedly kidnapped, tortured, killed, and disappeared during this incident. Four policemen were detained for their involvement in the repression. From Ledesma's top management, Alberto Lemos and Carlos Pedro Blaquier were indicted for the firm's involvement in human rights violations, including providing the trucks used in kidnapping workers. In addition, the company is accused of having caused the blackout by cutting off electricity to facilitate the military operation. The company further allowed the armed forces to set up a clandestine detention centre, Esquadron 20, on its grounds. As a result of their involvement in these abuses, the firm's directors are now prevented from leaving the country.[7]

Two automobile manufacturers – Mercedes Benz and Ford Motor Company – have also faced investigation for direct human rights violations. The charges against Mercedes Benz involve the company's creation of a 'blacklist' of workers who were subsequently kidnapped. These workers were members of the internal workers committee. A criminal action was opened in 2002 but there has been no indictment so far.[8] In October 2013, an Appeals Court confirmed the charges against three former Ford Motor Company executives (Pedro Muller, Guillermo Galarraga, and Hector Francisco Jesus Sibilla) for their crimes against humanity due to targeting union leaders for kidnapping and torture. They stand accused, and are under house arrest, for having helped the repressive security apparatus in the illegal kidnapping and torture by providing names, national identification numbers, photographs, and home addresses. The Army forces took two dozen union workers off the Ford factory floor to be tortured and interrogated and sent to military prisons. Bail is set at $142,000.[9]

2. Company failure to protect workers

Some businesses are accused of failing to protect their workers' safety under a creative use of Argentine labour law. In February 2012 in the "Ingenieros"" case, an Appeals Labour Court dismissed the statute of limitations claim of a legal action brought to the court. Maria Gimena Ingenieros, the daughter of Enrique Roberto Ingenieros, brought the case. She requested financial compensation for her father's disappearance during the civil-military dictatorship. She claimed that Techint SA should pay compensation, alleging its co-authorship of the crime of disappearance on the company's grounds. The company denied the claims. It further contended that the work safety law under which the case was brought had a two-year statute of limitation that had run out. The Appeals Court rejected that claim, declaring that statutes of limitation do not apply to compensation claims linked to crimes against humanity.[10]

In April 2007, the Supreme Court of the Province of Buenos Aires used a similar ruling in the SIDERCA case brought by Ana María Cebrymsky, the wife of Mr Oscar Orlando Bordisso. Mr Bordisso disappeared shortly after he left for the day from his job at SIDERCA in 1977. In 1995, his wife brought the case against SIDERCA claiming compensation under Argentine labour law. She claimed that under Argentine work safety law the company was obliged to protect her husband on entering and exiting the work site. The company rejected the claim and argued against legal action due to the statute of limitations. The first instance tribunal accepted the claim against the company. On appeal, the company again lost in the Provincial Supreme Court. The Court ordered compensation for Mr Bordisso's widow.

3. Corporate financing of illegal activities

Argentina has also investigated cases in which businesses have financially collaborated with the dictatorship's repressive apparatus. In 2010, the *Garragone* case was brought to courts by Martin Garragone, the son of one of Argentina's disappeared, against Citibank and the Bank of America. Garragone argued that the banks' loans to the dictatorship were crucial for its abuses of human rights. Based on a report prepared by Juan Pablo Bohoslavsky, he claimed that the banks were aware that the funds transferred to Argentina would be used to support the illegal infrastructure used to commit human rights violations. The case is in its early stages; the court still needs to declare that it has jurisdiction to review the case under procedural law.[11]

4. Corporate involvement in illegal business transactions

In an additional creative legal turn, Argentine courts have begun to investigate companies' involvement in illegal business transactions. The Papel Prensa case is illustrative. Some observers consider the case to be an example of the Kirchner government's political misuse of transitional justice in order to punish and weaken the government's current political opponents; others see it as an important case for correcting the wrongs of the previous regime and its corporate allies. After an initial flurry of activity around the case, it somewhat died down until the end of 2012 when files related to the case appeared in an Air Force headquarters.

The case involves events following the death in 1976 (in an airplane crash) of David Gaiver, the owner of the Papel Prensa newsprint company. Gaiver had alleged links to the left-wing urban guerrilla Montonero movement opposed to the dictatorship[12] After his death, Gaiver's wife, Lidia Papaelo, and some months later, his brother, Isidoro Graiver, were abducted and tortured by the state security forces. These heirs to the company were allegedly coerced under torture to sell the company to FAPEL (Fábrica Argentina de Papel) that was later sold to the three biggest Argentine newspapers, securing their monopoly over news production in the country during the dictatorship: La Nación, Clarín and La Razón. What remains in debate in Argentina is whether this is a clear case of state terror and control over media or another battle in the war between the Kirchner government and their journalistic adversary, Clarín. The recovered Air Force files could provide the evidence necessary to the case. Due to the controversy surrounding it, worries about evidence tampering have surfaced. The criminal trial is in its early stages, and the investigation is allegedly frozen.[13]

Final Reflections[14]

How likely is it that the lessons learned from the Argentine experience of corporate complicity will spread to other countries in the region or in the world and become the kind of tangible high cost sanction that will change businesses' human rights practice?

It is too early to tell. Most of the cases in Argentina have only recently begun, and legal practitioners and courts are working out models for civil and criminal trials, as the cases we have discussed here show. We do know, however, that Argentina has been a leader in transitional justice in the past and it is likely to be a leader in this innovative tool to hold perpetrators of past human rights violations accountable.

While some of the cases have advanced, primarily in labour courts, others remain stalled. It is possible that businesses will have the same success in Argentina that they have enjoyed elsewhere in avoiding prosecution for human rights violations. On the other hand, Argentina is known for going farther in defending human rights victims than all other countries in the world. Indeed, a recent book by Horacio Verbitsky and Juan Pablo Bohoslavsky, *Cuentas Pendientes* (Outstanding Scores to Settle), advances the idea of following the country's earlier innovative transitional justice approachess to advance corporate complicity cases. The authors advocate a national truth commission to investigate corporate financial support of the dictatorship, arguing that the dictatorship could not have existed or carried out the repression without corporations' direct and indirect involvement. The role of the proposed truth commission would involve laying the groundwork for trials, just as the CONADEP truth commission did for the trial of the generals. In other words, Argentina is once again covering new ground in transitional justice.

Few countries have followed in Argentina's footsteps on human rights trials against state actors, suggesting that even fewer would endeavour to follow the country in corporate complicity cases. Yet we have already found trials for corporate complicity outside Argentina. These may not have explicitly followed Argentina's lead, but they represent the extension of innovative transitional justice strategies around corporate human rights abuses.

Of the 116 countries that have experienced some sort of transition from authoritarian rule or war, we found civil and criminal cases against businesses in only nine countries (including Argentina). Most of these cases, unlike Argentina, are pursued outside the country in foreign or international courts. In addition, the other eight countries include only one case each; Argentina remains the leader with 17 cases underway.

The kinds of cases pursued outside Argentina follow very similar types of abuses. There are cases of direct involvement in human rights crimes, such as CMPC in Chile or L-3 Communications in Croatia where the companies are accused of involvement in the detention and disappearance of the company's workers in the former or training and carrying out genocidal acts in the latter. The so-called 'media case' in the International Criminal Tribunal of Rwanda convicted and sentenced three heads of Radio Télévision Libre des Mille Collines (RTLM) for instigating the genocide.

More commonly, companies are alleged to have participated in logistic and financial support for repressive regimes. This is the case of the Canadian Anvil Mining company's involvement in the Democratic Republic of Congo's army in the rape, torture, and murder of the people of Kilwa in 2004. The Dalhoff, Larsen, and Horneman (DLH) company in Liberia has also faced accusations for buying lumber from companies that funnelled the profits to Charles Taylor, fueling the civil war. Similarly, the Total SA company's subsidiary in Myanmar faces civil charges in Belgian and French courts for providing logistic and financial support to the military junta of the 1990s to carry out forced labour, deportation, murder, arbitrary executions, and torture. The US Federal Court in San Francisco has heard a case against Chevron for the company's provision of helicopters and boats, as well as payment, to the Nigerian military and police in 1998 and 1999 to shoot, detain and torture, and destroy two villages where protesters have opposed Chevron oil activities in the Niger delta. Finally, a Paris Court has investigated the French software company, Qosmos, for providing surveillance equipment to the Bashar El-Assad regime in Syria that led to the targeting, monitoring, arrest, and torture of government dissidents.

No other cases apply the innovative technique of using labour law or illegal business transactions to hold companies accountable. Nonetheless, this array of cases show that in every region of the world courts are investigating corporate complicity. It is unclear what the tipping point might be and when businesses might see the threat of continuing to participate in human rights abuses or supporting repressive regimes financially or logistically. The more attention drawn to these cases, the more company executives may begin to recognize that the threat of prosecution is tangible and that prior strategies to dismiss cases and avoid sanctions no longer succeed in protecting firms from those costs.

It is not only because of Argentina that this awareness has emerged. Argentina along with those efforts by other countries show that such strategies are possible. They provide legal models that put innovative transitional justice tools in the hands of victims and human rights advocates, domestic legal practitioners, and foreign and international courts. As the use of these tools spreads, so too will the perception of tangible and high cost sanctions attached to corporate human rights abuse. It is then that we may begin to see the effect of modern-day Tesch and Zyklon B cases.

Endnotes

[1] Case No. 9. The Zyklon B, Case. Trial Of Bruno Tesch And Two Others British Military Court, Hamburg, 1st-8th March 1946. Found in *Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1947*accessed on 13 March 2014 at http://www.ess.uwe.ac.uk/wcc/zyklonb.htm.
[2] The Soviet army arrested four of the owners of the company that built the mass incinerator used at Auschwitz-Birkenau (Topf & Sons) and sentenced them to 25 years in a penal colony for assisting the SS in committing genocide. Topf & Sons memorial site "The Site and Its History" accessed on 13 March 2014 http://www.topfundsoehne.de/cms-www/index.php?id=94&l=1
[3] Center for Constitutional Rights, "Wiwa et al v. Royal Dutch Petroleum et al." Accessed on 13 March 2014 at http://ccrjustice.org/Wiwa.
[4] International Center of Transitional Justice, "What is Transitional Justice?" Accessed on 18 December 2009 www.ictj.org/en/tj.
[5] We have initially found these cases using key word searches in the Business and Human Rights Resource Centre archive. See www.business-humanrights.org/.
[6] In addition to Ledesma, Mercedes-Benz, and Ford Motor Company discussed here, top officers from the following companies are being currently prosecuted for direct involvement in human rights abuses: Techint; Atarsa; Minera Aguilar S.A.; Loma Negra, La Veloz del Norte, and Acindar.
[7] See latest developments here http://tiempo.infonews.com/2012/11/16/argentina-91029-la-justicia-proceso-a-blaquier-por-29-casos-de-secuestro-en-1976.php.
[8] See http://www.ambito.com/noticia.asp?id=724383.
[9] While Muller is a Czech national, the other two accused are Argentine. See the latest development here http://www.cij.gov.ar/nota-11452-Lesa-humanidad--procesaron-a-ex-directivos-de-la-empresa-Ford.html.
[10] See latest developments here http://www.diariojudicial.com.ar/fuerolaboral/Se-le-vino-la-noche-a-empresas-donde-hubo-desaparecidos-20120215-0002.html.
[11] Link to the latest developments: http://tiempo.infonews.com/2013/09/09/argentina-109064-argentina-a-un-paso-de-investigar-a-bancos-por-creditos-a-la-dictadura.php.
[12] The Montoneros urban guerrilla movement was one of the most important clandestine and illegal leftist groups during the 1970's in Argentina.

[13] See latest developments here:
http://www.telam.com.ar/notas/201401/48677-para-fresneda-la-causa-de-papel-prensa-se-encuentra-cajoneada.html.

[14] Some additional cases follow. The Acindar case includes violations before and during the dictatorship and has opened up hundreds of accusations of kidnapping, disappearances, and deaths. It is part of what is called the 'megacausa' against the crimes, disappearances, and kidnapping before and during the dictatorship in Villa Constitucion (el Villazo) in 1975 by the Triple A (Argentina Anti-Communist Alliance). The Metalurgical union (UOM) had a strong presence in V.Constitucion and many of the disappeared from the community were union militants. There was a clandestine detention centre (allegedly the first in the country – confirmed by Carlos Rampoldi the ex-comisario inspector) within the company's plant. The firm had strong links to the dictatorship through Jose Alfredo Martinez de Hoz, who was the head of the firm and subsequently became the Minister of the Economy. Having died in 2013, the case has moved against the other directors of Acindar at the time. Martinez de Hoz, according to the former ex-commissioner of the federal police (Rodolfo Pergrino Fernandez) is said to have personally paid each one of the police involved in the repression $100. Also named in the case is Alcides Lopez Aiufranc (Cordobazo and French school of torture – not sure who he was in the firm). http://casapueblos-alegatos.blogspot.co.uk/2013/11/ordenan-investigar-como-acindar.html.

The Techint/Siderca Case is one in which the army was installed at the gates the Sideraca firm, a subsidiary of Grupo Techint, with a list of 'undesireable' workers who worked for the company. These workers were detained in the Tiro Federal de Campana clandestine torture centre that was next to the factory and connected to it through a door.
http://www.agenciapacourondo.com.ar/secciones/ddhh/7291-dictadura-los-roles-de-ledesma-ford-mercedes-benz-y-techint.html.

The Atarsa Shipyard case occurred on the 24th of March 1976, the day of the coup d'etat, the Army blocked the entrance to the shipyard with tanks and flew helicopters overhead. They detained any of the 'rebel' workers identified by the firm and took them to the Comisaría 1ª de Tigre.
http://www.agenciapacourondo.com.ar/secciones/ddhh/7291-dictadura-los-roles-de-ledesma-ford-mercedes-benz-y-techint.html