

## **Amicus Curiae**

### **Ibañez Manuel Leandro and others/ Preliminary measures against undetermined financial institutions**

**Juzgado Civil y Comercial Federal N° 7, Secretaría N° 14, Libertad 731 piso 6  
Ciudad Autónoma de Buenos Aires**

**Telephone: 4124-5274/75**

**Judge: Dr. Omar Cancela (Juez Subrogante)**

### **Introduction**

1. This Amicus Curiae is presented before the Juzgado Civil y Comercial Federal n° 7 Sec 14, in the case of *Ibañez Manuel Leandro and others v. Undetermined financial institutions*, by the Essex Transitional Justice Network (ETJN) and the Essex Business and Human Rights Project (EBHRP) of the University of Essex (United Kingdom) and by the Centro de Estudios Legales y Sociales (CELS).

2. The Essex Transitional Justice Network is a network of more than 40 academics at the University of Essex, from different disciplines, currently conducting work in the broad area of transitional justice. One of the aims of the network is to advance understanding and create knowledge in the area of transitional justice and its economic dimensions, particularly in relation to the role and responsibility of transnational corporations in such processes. To this end, it carries diverse activities such as strategic litigation. Dr. Sabine Michalowski and Dr. Clara Sandoval from the School of Law, and Diana Morales, programme manager of the ETJN, were the lawyers of the network involved in the writing of the Amicus.

3. The Essex Business and Human Rights Project is a multi-disciplinary initiative which aims to develop principles and practice concerning the links between business, human rights, and areas of environmental protection related to human rights. The Project engages in several complementary lines of activity: research; assistance with litigation; assistance with formulation of basic policies governing various domains of business activity, and assistance with the Essex academic programme. Professor Sheldon Leader and Dr. Youseph Farah from the School of Law from the EBHRP are involved in writing this Amicus.

4. The ETJN and the EBHRP have counted with the invaluable legal support of Octavio Amezcua, Sandra Caluori, Christopher Kip, Cicek Gockun, Amanda Reiss and Maria Suchkova, students of the LLM in International Human Rights Law (School of Law), and Sylvain Aubry, Human Rights Centre Student Activities Liaison, and Dr. Sanae Fujita, Human Rights Centre Associate. Equally, Diana Guarnizo, LLM student, translated this Amicus to Spanish.

5. The Centre of Legal and Social Studies (CELS) is a non-governmental organisation dedicated since 1979 to the promotion and protection of human rights, and to strengthening the democratic system and the rule of law in Argentina. In order to carry out these tasks, CELS has developed its activities especially from a legal perspective. It is a central objective of the organisation to use domestic courts to guarantee implementation of international human rights standards. In particular, since its origins, CELS has been actively engaged in achieving justice for grave human rights violations that were committed during the military dictatorship between 1976 and 1983. In this way, CELS has positioned itself as a central actor in these lawsuits, acting as plaintiff (*parte querellante*) representing victims and family members of victims in the context of the most important investigations in Buenos Aires, and participating in paradigmatic cases in the provinces. Carolina Varsky, Programme Director, was the lawyer from CELS involved in writing this amicus.

### **The facts of the case**

6. Between 24 March 1976 and 9 December 1983, several commercial banks lent funds to the *de facto* government of Argentina. It is alleged that the financing of the *de facto* regime facilitated the commission of grave human rights violations against the civil population, and in the case at stake, the violations suffered by the plaintiffs.

7. The loans provided to the regime amounted to large sums of money that gave substantial assistance to the expansion of the size and activity of the military as it took over a wide range of state functions.

8. The plaintiffs/victims to whom this particular case refers are: Roberto Anibal Ibañez, Silvia Beatriz Albores, Graciela Beatriz Sagües, Victorio Perdighé and Ana Maria Rita Perdighé.

9. Roberto Anibal Ibañez, an active militant of the Peronist Youth Group and student of medicine, was kidnapped in the afternoon of January 25, 1977 in La Plata. He was last seen in the clandestine prison 'Pozo de Arana' and in the detention centre part of the 5<sup>th</sup> Comisaria the day that he was abducted. Testimonies of former detainees in the places where Mr. Anibal Ibañez was seen confirmed that different methods of torture were commonly used on the detainees in such places. Among those methods, the detainees were subjected to torture techniques such as dry submarine, hanging from hands and feet, rape, and/or psychological torture. Mr. Anibal Ibañez was 24 years old when disappeared and was married.

10. Silvia Beatriz Albores, student of medicine and wife of Roberto Anibal Ibañez, who was staying with her parents and baby after the disappearance of her husband, was taken by security forces for interrogation on 19 May/June 1977. She was never seen again.

11. Graciela Beatriz Sagües was abducted on 22 January 1977 in the streets of Buenos Aires. Graciela's name appears in the records of detainees of the Comisaria 5ta. She was also seen three days after her kidnapping at the clandestine detention centre 'Pozo Arana' as well as in other places such as Banfield. It seems that Ms. Sagües was in Banfield at least until 25 April 1977. Graciela's husband, Victorio

Perdighé, was kidnapped before her abduction on 16 December 1976 as well as his sister, Ana Maria Rita Perdighé. The Perdighé siblings were killed in what appeared to have been an armed confrontation in the public highway.

### **Amicus Curiae under Argentinian law**

12. The purpose of an Amicus curiae is that third parties who are not parties to a lawsuit but have a justified interest in its final outcome, can express their opinions about the legal issues at stake through important contributions so as to support the application of the law to the particular situation.

13. In Argentina, the submission of Amicus curiae has not only been accepted in numerous judicial precedents, but it has also received national recognition through the Regulation of the Supreme Court of Justice of the Nation, Acordada 28/04 of 14 July 2004. In this Regulation, the Court describes this institution as an important instrument of democratic participation in the exercise of judicial power, declaring that the concept of the friend of the court is 'a useful instrument destined, inter alia, to allow citizens to participate in the administration of justice.' This welcome innovation on the part of the highest Tribunal of the Nation demonstrates that the tendency in favour of the acceptance of the Amicus curiae is firm and unequivocal.

14. It needs to be stressed that the submission of an amicus curiae is in no way detrimental to any of the parties to the litigation. To the contrary, its purpose is to make substantial contributions to the process, contributing knowledge, arguments, experience and opinions that can provide considerations to be taken into account at the time of the resolution of the dispute.

15. By virtue of the foregoing, we submit this Amicus Curiae to state our legal arguments in order to contribute to the resolution of the case at issue.

### **Objective and structure of the Amicus**

16. The Amicus aims to provide the honourable Court with relevant information to facilitate its consideration of the case under question. In particular, the Amicus considers two important legal points: Firstly, the right of access to information as essential for victims and members of the justice system to carry out an effective investigation into the alleged complicity of banks in the commission of gross human rights violations during the dictatorship in Argentina (1976-1983) and secondly, the issue of corporate complicity in the wrongs committed.

#### **1. The right of access to information**

17. This section of the Amicus studies the international and domestic standards that apply to Argentina in relation to the right of access to information, followed by an analysis of the status and scope of this right under international law.

## **1.1. Argentina is bound by international and domestic law to comply with the obligations derived from the right of access to information**

18. Argentina has ratified several international and regional treaties that regulate access to information. It ratified the International Covenant on Civil and Political Rights<sup>1</sup> (ICCPR) with no reservations on 8 August 1986 and the American Convention on Human Rights (ACHR) on 14 August 1984, with a reservation to article 21 (the right to property). In addition, Argentina accepted the contentious jurisdiction of the Inter-American Court of Human Rights (IACtHR) on 5 September 1984. Therefore, it is legally bound to respect and ensure the right of access to information by virtue of these international instruments since all of them incorporate this right as is explained in this Amicus.

19. Furthermore, article 75(22) of the Constitution of Argentina 1994,<sup>2</sup> explicitly establishes that certain international human rights treaties ratified by Argentina have constitutional hierarchy. Among the instruments explicitly included in the constitutional text are the Universal Declaration on Human Rights<sup>3</sup> (UDHR), the ICCPR and the ACHR. This article gives extra force to these international instruments since they are imported into domestic law with constitutional hierarchy, and so directly bind the judiciary and any other state authority.

## **1.2. The right of access to information under international law**

### ***1.2.1. The right of access to information in the United Nations***

20. Freedom of information, including access to information, has always been a cornerstone of the international human rights system.<sup>4</sup> The UDHR as well as the ICCPR establish in article 19 and 19(2) respectively that everyone has the right to information, which includes freedom to seek, receive and impart information.

### ***1.2.2. The right of access to information in the Organisation of American States***

21. In the Americas, the right of access to information is recognised and guaranteed in different international instruments. Article IV of the American Declaration on the Rights and Duties of Man states that '[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of

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<sup>1</sup> United Nations, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, Vol. 993, p. 3.

<sup>2</sup> *Constitution of Argentina*, 22 August 1994, available at: [http://www.argentina.gov.ar/argentina/portal/documentos/constitucion\\_nacional.pdf](http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf), accessed 19 March 2010.

<sup>3</sup> United Nations General Assembly, *Universal Declaration on Human Rights*, 10 December 1948, resolution 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>4</sup> United Nations General Assembly, *Calling of an International Conference on Freedom of Information*, resolution 59(I), 14 December 1946, available at: <http://www.un.org/documents/ga/res/1/ares1.htm>, accessed 19 March 2010.

ideas, by any medium whatsoever'.<sup>5</sup> Further, article 13(1) of the ACHR, in line with UDHR and the ICCPR, affirms that the right to freedom of thought and expression 'includes freedom to seek, receive, and impart information'.<sup>6</sup>

22. These standards have been consistently confirmed since 2003 by a series of annual resolutions of the General Assembly of the Organisation of the American States (OAS) on access to public information and democracy.<sup>7</sup> In each of these resolutions, the General Assembly reaffirmed this right. In addition, it stated that 'access to public information is a requisite for the very exercise of democracy'.<sup>8</sup>

23. In the Declaration of Nuevo León adopted in 2004, participant states declared that '[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation' in a democratic society.<sup>9</sup> The states also reaffirmed their commitment to '[...] provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information [...]'.<sup>10</sup>

24. The Inter-American Commission on Human Rights (IACoHR) approved the Inter-American Declaration of Principles on Freedom of Expression in October 2000.<sup>11</sup> These principles recognise a right of access information held by the state, as both an aspect of freedom of expression and a fundamental right on its own.<sup>12</sup>

25. The Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights (IACoHR Special Rapporteur) understands the right of access to information as a key element of the right to freedom of expression.<sup>13</sup> The Rapporteur has issued two joint declarations with the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and with the

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<sup>5</sup> Ninth International Conference of American States, *American Declaration on the Rights and Duties of Man*, Bogotá, Colombia, 1948, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>6</sup> Organisation of American States, *American Convention on Human Rights*, adopted 22 November 1969, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>7</sup> Organisation of American States, General Assembly resolutions 'Access to Public Information: Strengthening Democracy': AG/Res. 1932 (XXXIII-O/03), 10 June 2003; AG/Res. 2057 (XXXIV-O/04), 8 June 2004; AG/Res. 2121 (XXXV-O/05), 7 June 2005; AG/RES. 2252 (XXXVI-O/06), 6 June 2006, AG/RES. 2288 (XXXVII-O/07), 5 June 2007; AG/RES. 2418 (XXXVIII-O/08), 3 June 2008; AG/RES. 2514 (XXXIX-O/09), 4 June 2009, available at: [http://www.oas.org/dil/access\\_to\\_information.htm](http://www.oas.org/dil/access_to_information.htm), accessed 19 March 2010.

<sup>8</sup> Ibid., at para. 1 of each resolution indicated in the previous footnote.

<sup>9</sup> Organisation of American States, *Inter-American Democratic Charter*, 11 September 2001, available at: [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm), accessed 19 March 2010.

<sup>10</sup> Extra-ordinary Summit of the Americas, *Declaration of Nuevo León*, p. 11, available at: [http://www.oas.org/documents/specialsummitmexico/DeclaracionLeon\\_eng.pdf](http://www.oas.org/documents/specialsummitmexico/DeclaracionLeon_eng.pdf), accessed 19 March 2010.

<sup>11</sup> Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 108 Regular Session, 19 October 2000, available at: [www.cidh.oas.org/declaration.htm](http://www.cidh.oas.org/declaration.htm), accessed 10 March 2010.

<sup>12</sup> Ibid., at paras. 3 and 4.

<sup>13</sup> Almost each one of the annual reports of the Rapporteur refers to this right.

United Nations Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression (UN Special Rapporteur) in November 1999<sup>14</sup> and December 2004.<sup>15</sup> The declarations state that '[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts)'.<sup>16</sup>

26. The IACtHR has recognised the importance of the right of access to information through its contentious and advisory jurisdiction.<sup>17</sup> For example, in its Advisory Opinion 5/1985, on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, when interpreting article 13 (right to freedom of expression) of the ACHR, recognised freedom of information as a fundamental human right.<sup>18</sup> Equally, in the case of *Claude Reyes and others v. Chile*<sup>19</sup>, the IACtHR held that access to information is guaranteed by article 13 and noted that this right is widely protected 'at the global level'.<sup>20</sup>

### **1.2.3. The right of access to information in other regional human rights systems**

27. Although the provisions outlined below are not binding on Argentina, they demonstrate that there is an international consensus in relation of the right to access to information.<sup>21</sup>

28. As early as 1970, the Parliamentary Assembly of the Council of Europe (CoE) made recommendations to the Committee of Ministers on the 'right of

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<sup>14</sup> Joint Declaration, *International Mechanisms for Promoting Freedom of Expression*, 26 November 1999, available at: <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=141&IID=1>, accessed 19 March 2010.

<sup>15</sup> Joint Declaration, *International Mechanisms for Promoting Freedom of Expression*, 6 December 2004, available at: <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=319&IID=1>, accessed 10 March 2010.

<sup>16</sup> Ibid.

<sup>17</sup> See, for example, Inter-American Court of Human Rights, *López Álvarez v. Honduras*, judgment on the merits, reparations and costs, 1 February 2006, para. 163; *Ricardo Canese v. Paraguay*, judgment on the merits, reparations and costs, 31 August 2004, para. 77; and *Herrera Ulloa v. Costa Rica*, judgment on preliminary objections, merits, reparations and costs, 2 July 2004, para. 108.

<sup>18</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, para. 30.

<sup>19</sup> Inter-American Court of Human Rights, *Claude Reyes and Others v. Chile*, judgment on the merits, reparations and costs, 19 September 2006.

<sup>20</sup> Ibid., at para. 82.

<sup>21</sup> The right to access to information is also recognised in a large number of domestic legal systems.

freedom of information'.<sup>22</sup> It issued a resolution establishing that besides respect for the right to freedom of expression, there should be 'a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits [...]'.<sup>23</sup> The Committee of Ministers subsequently adopted a Declaration on Freedom of Expression and Information in which it expressed the goal of the pursuit of an open information policy in the public sector.<sup>24</sup> Furthermore, the Committee of Ministers of the CoE adopted on 27 November 2008 the Convention on Access to Official Documents<sup>25</sup>, which is the first legal treaty on the subject.

29. The African Charter on Human and Peoples' Rights<sup>26</sup> (the Charter) guarantees the right to receive information in its article 9(1) (right to freedom of expression). The Charter states that '[e]very individual shall have the right to receive information'. In October 2002, the African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa which endorses freedom of information.<sup>27</sup> It notably advances that 'everyone has the right to access information held by public bodies' and that 'everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right'.<sup>28</sup>

### 1.3. Scope of the right of access to information

30. As already explained, the right to information of any person and the corresponding obligation on the state to provide information, are well-established under international law. The content of the right and its possible limitations will now be outlined.

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<sup>22</sup> Council of Europe, Parliamentary Assembly, Recommendation No. 582, 23 January 1970. It recommended instructing the Committee of Experts on Human Rights Experts to consider and make recommendations on the need to extend the right of freedom of information provided for in article 10 of the European Convention on Human Rights, through the conclusion of a protocol or otherwise, so as to include freedom to *seek* information (which is included in article 19(2) of the ICCPR); and to also state that there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations.

<sup>23</sup> Council of Europe, Parliamentary Assembly, Resolution No. 428, 23 January 1970, Doc. 2687, report of the Legal Affairs Committee.

<sup>24</sup> Council of Europe, Committee of Ministers, *Declaration on the Freedom of Expression and Information*, 29 April 1982, available at: [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM_en.asp), accessed 19 March 2010.

<sup>25</sup> Council of Europe, Committee of Ministers, Convention on Official Documents, 27 November 2008, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>, accessed 9 March 2010. As of 9 March 2010, 12 states have signed, two countries ratified and eight more ratifications are needed for the Convention to enter into force.

<sup>26</sup> African Union, *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

<sup>27</sup> African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17-23 October 2002, available at: [http://www.achpr.org/english/doc\\_target/documentation.html?../resolutions/resolution67\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution67_en.html), accessed 19 March 2010.

<sup>28</sup> *Ibid.*, part IV.

31. The right to information entails an obligation for the state to ensure access (for inspection and copying) for any individual to information held by any public body in all types of storage and retrieval systems.<sup>29</sup> The term 'information' includes any kind of data irrespective of the format it is stored in, its date of production and its source. It also includes access to classified information, which should be subject to the rules of relevance, necessity, and proportionality applicable to other types of data. The term 'public bodies' refers not only to all branches and levels of government, but also to public corporations and private bodies which carry out public functions.<sup>30</sup> Access to information should be provided upon request and is subject to narrow limitations.

32. As noted, the right to access state-held information is not absolute, but any limitation made to it must be 'exceptional'.<sup>31</sup> The IAComHR Special Rapporteur,<sup>32</sup> the IACTHR,<sup>33</sup> as well as other international authorities, have endorsed the principle of maximum disclosure, and the 'presumption that all information is accessible, subject to a limited system of exceptions'.<sup>34</sup>

33. According to article 19(3) of the ICCPR and article 13(2) of the ACHR, restrictions on access to information must be expressly defined by law and be necessary to ensure respect for the rights or reputations of others or the protection of national security, public order, or public health or morals. The Inter-American Declaration of Principles on Freedom of Expression adopts an even stricter approach. It states that limitations of the right to access state-held information may only be possible in case of 'a real and imminent danger that threatens national security in democratic societies'.<sup>35</sup>

34. According to the IAComHR Special Rapporteur,<sup>36</sup> the aims for which the access to information is restricted should be defined 'narrowly and precisely'.<sup>37</sup> This

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<sup>29</sup> UN Special Rapporteur Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, report E/CN.4/1998/40, para. 14.

<sup>30</sup> Article 19, *The Public Right to Know: Principles on Freedom of Information Legislation*, June 1999. The Principles drafted by Article 19 (a non-governmental organisation widely recognised as a leading expert in access to information rights) are based on international and regional law as well as the general principles of law recognised by the community of nations. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Report to the Human Rights Commission and by OAS Rapporteur on Freedom of Expression in his 1999 Report (Volume III of the Report of the Inter-American Commission on Human Rights to the OAS). See also, CoE Convention on Access to Official Documents, Article 1.

<sup>31</sup> *Inter-American Declaration on Principles of Freedom of Expression*, supra, n. 11, at para. 4.

<sup>32</sup> OAS Special Rapporteur on Freedom of Expression, Annual Report 2003, Chapter 4, paras. 32-33, available at: <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=139&IID=1>, accessed 19 March 2010.

<sup>33</sup> See *Claude Reyes*, supra, n. 19 and *Joint Declarations* of the specials rapporteurs, supra, n. 14 and 15.

<sup>34</sup> *Ibid.*, *Joint Declarations*, at para. 92

<sup>35</sup> *Ibid.*, at para. 4.

<sup>36</sup> The UN Special Rapporteur and his regional counterpart in the Americas in making their recommendations largely rely on general and regional international law as well as on national legislation and practice. They do so in fulfillment of their mandates to stimulate awareness of the importance of full implementation of the right to access to information and promotion of greater efficiency and effectiveness of this right. Their recommendations are often endorsed and reinforced by the UN Human Rights Council and the IAComHR.

especially concerns limitations on the ground of national security, which shall be 'highly scrutinized'.<sup>38</sup> There is a similar consensus within the CoE in this respect. According to the Explanatory Report to the CoE Convention on Access to Official Documents, '[t]he notion of national security [...] should not be misused in order to protect information that might reveal the breach of human rights'.<sup>39</sup>

35. Furthermore, in order to restrict access to information, it is necessary to establish that the disclosure threatens to cause substantial (short and long term) harm to the protected aim and that such harm is greater than the public interest in having the information disclosed.<sup>40</sup> In any case, the burden of proof is on the state to demonstrate that a restriction is justified.<sup>41</sup>

36. In addition, international law establishes several procedural requirements applicable to processing requests for state-held information. The procedure of access to official information should be easily accessible and the request for information addressed within a strict and reasonable timeframe as established by law. If access is rejected, the decision should be made in writing and contain detailed reasons for non-disclosure. Equally, an effective remedy must be available to challenge a refusal to grant access to information. The appeal should be heard by an independent body with full powers to investigate the appeal and who should be able to order the disclosure of information if it decides that the refusal was unjustified. Finally, a system of sanctions should be in place if an agency fails or refuses to comply with the legal requirements on access to information.<sup>42</sup>

## 2.4 Right holders

37. Any person may request official information and documents from the state. According to the UN Special Rapporteur, the person does not have to provide any reason for the request since the right of access to information is a 'fundamental human right which can be exercised by all'.<sup>43</sup> Further, the IACtHR confirmed in the case of *Claude Reyes* that the information should be provided without the need to prove a direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction on those entitled to have access applies.<sup>44</sup>

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<sup>37</sup> Annual Report of the OAS Special Rapporteur on Freedom of Expression, supra, n. 32, at para. 46.

<sup>38</sup> Ibid., at para. 49

<sup>39</sup> *Explanatory Report to the CoE Convention on Access to Official Documents*, para. 23, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>, accessed 19 March 2010.

<sup>40</sup> Annual Report of the OAS Special Rapporteur on Freedom of Expression, 2003, supra, n. 32, at paras. 47-48.

<sup>41</sup> See, *Claude Reyes*, supra, n. 19, at para. 93 and Inter-American Commission on Human Rights, *Report on Human Rights and Terrorism*, OEA/Ser.L/V/II.116, 22 October 2002, para. 285.

<sup>42</sup> See, UN Special Rapporteur Report, report E/CN.4/2005/64, paras. 39-43; Annual Report of the OAS Special Rapporteur on Freedom of Expression, 2003, supra, n. 32, at paras. 37-39 and *Claude Reyes*, supra, n. 19, para. 137.

<sup>43</sup> See, UN Special Rapporteur Report to the Human Rights Commission, supra, n. 42, at para. 41.

<sup>44</sup> See, *Claude Reyes*, supra, n. 19, at para.77.

38. The right of access to information has a social dimension. The IACtHR explains that ‘access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.[...] By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society’.<sup>45</sup> As the African Commission also puts it, ‘public bodies hold information not for themselves but as custodians of the public good’.<sup>46</sup>

## 2.5 Right of access to information in Argentina

39. The right of access to information is implicitly recognised in the Constitution of Argentina 1994.<sup>47</sup> Article 1 prescribes that Argentina is a representative federal republic whilst article 33 recognises all rights that are born from the principle of people’s sovereignty and the republican form of government. This in turn is in line with the protection of democratic values for people’s participation to which Argentina has expressed its commitment as an active member of the OAS as has been explained in section 1 of this Amicus.

40. Furthermore, the Constitution confirms the recognition of the right of access to information in article 75(22) by stating that certain international human rights instruments ratified by Argentina have constitutional status. Among those are the UDHR, the ICCPR and the ACHR, which as previously elaborated recognise and protect the right of access to information. Moreover, in the fulfilment of this constitutional norm, and following the content of the right of access to information as understood by the UN and the Inter-American systems, Argentina has the obligation not only to protect but also to regulate the right in question.

41. The Supreme Court of Justice of Argentina, in the case of *Urteaga, Facundo R. c/Estado Mayor Conjunto de las Fuerzas Armadas*<sup>48</sup>, recognised the right of access to information, emphasising that it is inherent to the republican system. Likewise, the Court reiterated the existence of the right of access to information in its decision *Vago, Jorge Antonio c/ Ediciones de La Urraca S.A. y otros*<sup>49</sup> when it established that ‘[s]uch right, even if not expressly enumerated in the National Constitution, has been recognised by the jurisprudence of the Supreme Court as a right of a social nature, which guarantees every person –physical or juridical, public or private- the knowledge about and participation in everything related to political, governmental and administrative procedures’.<sup>50</sup>

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<sup>45</sup> Ibid., at paras. 86-87.

<sup>46</sup> *Declaration of Principles on Freedom of Expression in Africa*, supra, n. 27, part IV.

<sup>47</sup> Supra, n. 2.

<sup>48</sup> Supreme Court of Justice, *Urteaga, Facundo R. c/Estado Mayor Conjunto de las Fuerzas Armadas, s/amparo ley 16.986; U 14 XXXIII; 15 October 1998; T. 321, p. 2767.*

<sup>49</sup> Supreme Court of Justice, *Vago, Jorge Antonio c/ Ediciones de La Urraca S.A. y otros*, V. 91. XXXIII; 19 November 1991; T. 314 pp. 1520-1521.

<sup>50</sup> Ibid.

42. With regard to the constitutional nature of international treaties, including those which protect the right of access to information, the domestic courts have reiterated the autonomous character of the treaties as a 'source of the internal legal system'. In addition, following the jurisprudence of the Supreme Court of Justice, the courts have established that the right of access to information is part of domestic law, based on articles 14 and 32 of the Constitution.<sup>51</sup>

43. Although the state of Argentina has failed to regulate fully the right of access to information, the Executive enacted Decree No. 117/2003, on access to public information, which contains the General Rules of Access to Public Information in the Executive's power.<sup>52</sup>

## **2.6 The right of access to information *vis à vis* the duty to investigate, prosecute and punish and to make adequate reparation**

44. The right to have access to state-held information gains particular importance when what is at stake is the state's obligation to investigate, prosecute and punish *all* perpetrators (intellectual, material and accomplices), of gross human rights violations such as the ones that took place in Argentina between 24 March 1976 and 10 December 1983.

45. The obligation to carry out an effective investigation that could lead to the prosecution and punishment of perpetrators is well grounded in international law as explicitly recognised by treaties like the Convention on the Prevention and Punishment of the Crime of Genocide (articles IV, V and VI); the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (article 12) and the International Convention for the Protection of All Persons from Enforced Disappearances (article 3), all ratified by Argentina. Equally, the IACtHR, the authoritative interpreter of the ACHR according to article 33, has consistently indicated since its first judgment, that the obligation to ensure rights established in article 1(1) of the ACHR implies the obligation to 'prevent, investigate and punish any violation of the rights recognised by the Convention, and, moreover, [...] to provide compensation as warranted for damages resulting from the violation.'<sup>53</sup>

46. The IACtHR has gone as far as to consider that the obligation to investigate, prosecute and punish in relation to crimes against humanity has a unique status under international law. Indeed, the IACtHR has stated that the commission of such crimes is prohibited under international law and 'that said prohibition [...] is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.'<sup>54</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> Executive Power published in the Official Gazette No. 30.291, Decree 1172/2003, 4 December 2003.

<sup>53</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, judgment on the merits, 29 July 1988, para. 166.

<sup>54</sup> Inter-American Court of Human Rights, *Almonacid Arellano et al v. Chile*, judgment on the preliminary objections, merits, reparations and costs, 26 September 2006, para. 99.

47. Such an obligation has been equally upheld by the Supreme Court of Justice of Argentina, which in its groundbreaking decision in the case of *Simón, Julio Héctor and others*<sup>55</sup> re-affirmed the views of the IACtHR,<sup>56</sup> and expressly stated that the duty to investigate has the status of *ius cogens*.<sup>57</sup>

48. As a consequence of the status and binding nature of this obligation in Argentina, this state has the unavoidable obligation to investigate properly and effectively all the crimes against humanity that took place during the dictatorship. Therefore, state-held information cannot be withdrawn from relevant public authorities such as judges, and individuals, who are trying to fulfil the state obligation; otherwise the responsibility of the state will be engaged under international law.

49. The right of access to information is central in guaranteeing a fair and impartial outcome of a judicial process. Where access to information is denied, in relation to gross human rights violations, the individuals and society are prevented from knowing what happened and from identifying the authors and accomplices of the violations.

50. The right to obtain clarification of events that violated human rights as well as the corresponding responsibilities of the state to investigate, has been confirmed on several occasions by the IACtHR.<sup>58</sup> The case-law of the European Court of Human Rights (ECHR), also requires that, where there are allegations of violations of the right to life and prohibition against torture, victims must have access to relevant documents and there should be a sufficient element for public scrutiny over the authorities' actions to investigate such events.<sup>59</sup> The degree of public scrutiny required may vary from case to case. In all cases, however, the next-of-kin of the victim (or the victims themselves) must be involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>60</sup>

51. Equally such information should be released based on the recognition that different international instruments award the right to know the truth as complementing the obligation to investigate, prosecute and punish. For example, the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Impunity Principles)<sup>61</sup> places the issue of access to information within the context of 'the right to know' and the possibility for victims to claim this

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<sup>55</sup> Supreme Court of Justice, Recurso de Hecho, *Simón, Julio Héctor y otros*, s. 1767, 14 June 2005.

<sup>56</sup> Ibid., at para. 18.

<sup>57</sup> Ibid., at para. 89.

<sup>58</sup> See, particularly, Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, supra, n. 53, and all other judgments after this one. In relation to the application of amnesty laws and status of limitations, see *Barrios Altos v. Peru*, judgment on the merits, 14 March 2001, para. 48.

<sup>59</sup> See, among many others, European Court of Human Rights, *McKerr v. the United Kingdom*, Application 28883/95, judgment of 4 May 2001.

<sup>60</sup> See, among many others, European Court of Human Rights, *Güleç v. Turkey*, Application 21593/93, judgment of 24 July 1998.

<sup>61</sup> Subcommittee for the Promotion and Protection of Human Rights, *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

inalienable right. According to the Principles, courts and commissions of enquiry (truth and reconciliation commissions) must have access to archives in order to know what happened. Therefore, access to information 'may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review'.<sup>62</sup>

52. Furthermore, the issue of access to information is also embodied within the context of reparations to victims of gross human rights violations. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>63</sup> indicate that access to relevant information concerning violations of human rights constitute a form of remedy.<sup>64</sup> Victims are entitled to seek and receive information regarding 'the causes and conditions pertaining to the gross violations of international human rights law [...] and to learn the truth in regard to these violations'.<sup>65</sup>

53. As a consequence, while the right to information may accept some limitations in a few exceptional situations, it is clear that in cases of gross human rights violations, the balance has to be struck in favour of the protection of the right to access state-held information. When restrictions are applied, the authorities must follow the application of a very strict test, a standard procedure established by law, and remedies should always be in place to challenge the restriction. Failure to comply with these requirements would engage the international responsibility of the state.

## **2.7 The information requested by the claimants in the instant case concerns gross violations of human rights that happened more than 30 years ago**

54. As established in article 15(b) of the Draft Senate Law on Access to Public Information<sup>66</sup> no information can be classified as confidential for more than 30 years, unless it has been provided by a diplomatic source. The Draft Law on Access to Public Information<sup>67</sup> which is currently being discussed in the Argentinean Chamber of Deputies establishes in its article 13 a 10 years limitation to a

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<sup>62</sup> Ibid., Principles 15 and 16.

<sup>63</sup> United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, resolution, 60/147, 16 December 2005, available at: <http://www2.ohchr.org/english/law/remedy.htm>, accessed 19 March 2010.

<sup>64</sup> Ibid., at para. 11.

<sup>65</sup> Ibid., at para. 24.

<sup>66</sup> Expediente No. 2409/06, Proyecto de la Ley de Acceso a la Información Pública; available at: [http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=2409/06&nro\\_comision=&tConsulta=3](http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=2409/06&nro_comision=&tConsulta=3), accessed 15 March 2010.

<sup>67</sup> Expediente No. 6167-D-2009, Proyecto de Ley de Acceso a la Información Pública, available at: <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=6167-D-2009>, accessed 15 March 2010.

classification of information as reserved from the public. This limitation can be prolonged by 10 years when the information comes from a diplomatic source. Although only a draft, 30 years limitation seems to be the highest threshold to maintain information away from the public. Therefore, since more than 30 years have passed since the facts that give rise to the present case took place, this restriction should not continue to be applied. Further, the Draft<sup>68</sup> explicitly states in its article 15 that information cannot be classified as secret when violations of civil and political rights, as contained in the ACHR and the ICCPR are being investigated in a judicial process. Since violations of civil and political rights are alleged in the present case, article 15 would certainly apply, reducing even more the restrictions that are possible in such situations. Even if this draft is not yet a final law, it illustrates current political deliberations in Argentina and should be taken into account as an important indicator of the limitations faced when imposing time restrictions on information.

55. Equally, state organs have a duty to act on the request for information placed by individuals and actively protect their rights. Hence, the holding of so called confidential information imposes on the state a duty to proactively review such information and reclassify it constantly. If classified information does no longer fulfil the legal conditions for its restriction it must be immediately disclosed to the public.<sup>69</sup>

56. In the instant case, although more than 30 years have already passed, no investigation of the alleged complicity of international banks has taken place and state-held information on such transactions remains confidential. Such an omission by Argentina breaches the duty to investigate all perpetrators of gross human rights violations and the consequent right of the victims to know what happened.

57. Further, considering the status of *ius cogens* norms of the prohibition of crimes against humanity and the obligation to investigate, prosecute and punish, it is irrelevant whether the information requested involves actions or omissions of state or non state actors.<sup>70</sup> In the present case, the information solicited involves financial institutions that entered into lending agreements with the Argentinean state during the dictatorship. No state, including Argentina, is exempted from its obligations to comply with *ius cogens* rules while contracting with third parties.

## Conclusion

58. Argentina is bound by international and domestic law to respect and ensure the right of access to information. Although, in principle, this right allows for limitations, such restrictions are meant to be “exceptional”, placing a high threshold

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<sup>68</sup> Ibid.

<sup>69</sup> Memorandum on Two Drafts of the Law on Access to Public Information of Argentina – Article 19, London, 2005, p. 13-4, available at: <http://www.article19.org/pdfs/analysis/argentina-access-to-public-information.pdf>, accessed 19 March 2010.

<sup>70</sup> See, for example, Inter-American Court of Human Rights, *Pueblo Bello v. Colombia*, judgment on merits, reparations and costs, 31 January 2006 and *Cotton Field v. Mexico*, judgment on preliminary objections, merits, reparations and costs, 16 November 2009.

on authorities, including the members of the justice system, with regard to legitimate limitations of this right.

59. The obligation to investigate, prosecute and punish gross human rights violations is, in the words of the Argentinean Supreme Court, a *ius cogens* obligation. In addition, the right to know the truth has also been recognised in some international instruments and by the Supreme Court of Argentina.<sup>71</sup>

60. Therefore, given the status of these obligations under international law and domestic law, restrictions on the right of access to information should not be allowed whenever what is at stake is the investigation of gross human rights violations and the identification of *all* perpetrators (intellectual, material and accomplices) of such crimes or the clarification of the truth. In such situations, any balancing exercise should prioritise the obligation to investigate (and what such obligation entails) over competing claims.

61. As a consequence, the judge in the present case should grant the request for precautionary measures so that the judiciary and the victims can have access to historic records that remain confidential and which contain relevant information to identify all responsible parties of such crimes, including those financial institutions that might have been complicit in the commission of such crimes.

## 2. Prima facie case of accomplice liability

62. The submissions on the substance of the complaint that follow are grounded on an interpretation of the Argentinean Civil Code which draws on principles of international law and on analogies with authorities from the other jurisdictions cited below. These authorities deal with similar issues to those arising in this case, and provide a basis for the Court to consider the merits of the solutions offered within the terms of its own system.

63. It is well established that the military junta that governed Argentina during the relevant period of March 1976 to December 1983 committed gross violations of international law in the form of torture, extra-judicial killings, forced disappearances and other crimes against humanity.<sup>72</sup> While the defendant banks have not directly participated in the violation of these crimes that caused harm to the plaintiffs/victims, the information sought by them with this action is very likely to demonstrate that they are jointly and severally responsible for the crimes committed by the regime as accomplices (under articles 1109 and 1081 of the Argentinean Civil Code). They meet the various requirements of liability, in that they participated as accomplices in the delict that was committed by the regime and that caused harm to the plaintiff with the requisite *mens rea*; and their contribution was not too remote to give rise to liability.

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<sup>71</sup> Supra, n. 55, at para. 19.

<sup>72</sup> CONADEP, *Report Nunca Más*, 1984; Supreme Court of Justice, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros -causa No.259, A.533.XXXVIII*, 24 August 2004; and *Simón, Julio Héctor y otros*, supra, n. 55.

## 2.1 Corporations as accomplices in civil liability actions

64. Under international law, corporations, including banks, can incur civil liability as accomplices. This follows from treaty law,<sup>73</sup> is a general principle of law recognised by civilised nations in the meaning of article 38(1)(d) of the International Court of Justice (ICJ) Statute,<sup>74</sup> and has been widely recognised by US courts in the context of civil law suits brought against corporations for complicity in gross human rights violations.<sup>75</sup> Moreover, states are “required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction [...] through judicial, administrative, legislative or other appropriate means.”<sup>76</sup>

65. Argentinean law provides the means to implement these principles in article 43 of the Civil Code, read together with article 1081 of the Civil Code.

## 2.2. Participation of the banks as accomplices in the delict

66. The Argentinean military received large amounts of foreign money in the form of loans from private banks over several years.<sup>77</sup> This was a period during which it substantially increased the scope of its control over civil society. At the same time, it is clearly established that the military dictatorship committed serious human rights and other international law violations while in office which have been

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<sup>73</sup> United Nations *Convention against Transnational Organized Crime*, 15 November 2000, article. 10, available at: <http://untreaty.un.org/English/notpubl/18-12E.htm>, accessed 19 March 2010; Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, article 2, available at: <http://www.oecd.org/dataoecd/4/18/38028044.pdf>, accessed 19 March 2009.

<sup>74</sup> Anita Ramasastry, Robert Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (Fafo, September 2006), available at: [www.fafo.no/pub/rapp/536/536.pdf](http://www.fafo.no/pub/rapp/536/536.pdf), accessed 19 March 2010; Brief of *Amici Curiae* of International Law Professors in support of plaintiffs/appellees, submitted to the US Court of Appeals for the Second Circuit in *Balintulo et al. v. Daimler AG et al.*, 22 December 2009, pp. 14-19, available at: [www.khulumani.net/khulumani/documents/category/5-us-lawsuit.html](http://www.khulumani.net/khulumani/documents/category/5-us-lawsuit.html), accessed 19 March 2010.

<sup>75</sup> For example, *In re “Agent Orange” Product Liability Litigation*, 373 F.Supp.2d 7 (EDNY 2005), at 59; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y. 2003), at 305-314; *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2<sup>nd</sup> Circ 2007).

<sup>76</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/11/13, 22 April 2009, para. 87.

<sup>77</sup> According to a World Bank study, ‘Foreign bank commercial credit accounted for roughly two-thirds of Argentina’s external debt in 1982’, World Bank, ‘A World Bank Country Study: Economic Memorandum on Argentina’, (Washington, 1985), at p. 12.

characterized as crimes against humanity carried out in the context of a systematic plan of state terrorism.<sup>78</sup>

67. When the plaintiffs' request for access to the relevant information is granted, it will be possible to specify the amount of money lent by the various banks. Once these facts are established, which will complement those already known, it is submitted that they are likely to provide the basis for liability under article 1081 in conjunction with article 1109 of the Civil Code. That is, the banks, once identified, are likely to be found liable for the harm caused to the victims because they participated in the delicts of the principal, the Argentinean military regime, by providing it with financial loans.

68. On the basis of facts already established, the complaint has made out a *prima facie* case of a substantial effect of the banks' contributions on the commission of the crimes, as well as of a sufficient causal link between the crimes committed by the government and the bank loans it received from the defendant banks that still need to be identified. The complaint bases this link on several factual allegations:

- a. that the significance of the amount lent to the regime in itself evidences the important impact of these loans on the way in which the military government exercised and abused its power during the period under review;
- b. by the support these loans provided for the Argentinean economy, the state budget, and the maintenance of state institutions, the capital made available to the military government allowed it to increase its spending on activities that led directly to the harms caused to the plaintiffs/victims. Military expenditures increased consistently throughout the period, both in absolute and relative terms, going from US\$ 1.278 million in 1975 to US\$ 2.200 million in 1982. At the same time spending on heavy military equipment used in the context of war actually decreased, from which it can be concluded that financial resources were directed in large part toward the support of the internal fight against opponents which was the very framework within which the crimes committed by the state were perpetrated.

### **2.3. Substantial effect of the loan on the commission of the crimes of the regime**

69. The *prima facie case* in this respect rests on several legal principles. First, it is irrelevant that, on the basis of currently available information, it is not possible to show direct links between specific bank loans, on the one hand, and specific violations committed by the military regime, on the other, and even less between

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<sup>78</sup> *Informe Nunca Más*, supra, n. 72; Supreme Court of Justice, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros -causa No.259*", 24 August 2004; *Simón, Julio Héctor y otros*, supra, n. 55.

specific loans and the harm suffered by the plaintiffs/victims in this litigation. To establish such a link is not necessary.

70. The international standard defining the *actus reus* of liability in international law,<sup>79</sup> which is consistently applied by US courts in the context of corporate complicity liability<sup>80</sup> and widely accepted in the relevant academic literature,<sup>81</sup> is that of “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>82</sup> The assistance ‘need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.’<sup>83</sup> Instead, it is sufficient that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. This is, for example, the case “if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.”<sup>84</sup> However, “the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility.”<sup>85</sup>

71. It is thus not necessary that without the assistance or contribution of the banks, the regime would not or could not have committed the violations, but rather simply that, as the plaintiffs/victims allege, the banks played an influential role and that without the loans, the military regime would not have been able to carry out its human rights violations in the same way, for example in the same intensity and over the same period of time.

72. Further, *Mastafa v. Australian Wheat Board Limited and Banque Nationale De Paris Paribas*, a tort case for corporate complicity brought under the US Alien Torts Claims Act, describes the relevant standard as follows:

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<sup>79</sup> International Commission of Jurists, “Report of the Expert Legal Panel on Corporate Complicity in International Crimes,” 2 *Criminal Law and International Crimes* (2008), at p. 17; *Report of the International Law Commission*, Article 2(3)(d) of Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR, 48th Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

<sup>80</sup> US litigation is instructive here, as US courts regularly have to deal with questions of corporate complicity in violations of the law of nations. See, for example, *Khulumani v Barclay National Bank*, 504 F.3d 254 (2<sup>nd</sup> Cir 2007), per Katzmman, Circuit Judge (concurring), at 278; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y. 2003), at 324; *Almog v Arab Bank*, 471 F.Supp.2d 257 (EDNY 2007), at 287; *In Re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (SDNY 2009), at p. 257.

<sup>81</sup> Andrew Clapham, Scott Jerbi, “Categories of Corporate Complicity in Human Rights Abuses”, 24 *Hastings International and Comparative Law Review* 339 (2001), at p. 344; Doug Cassel, “Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts”, 6 *Northwestern University Journal of International Human Rights* 304 (2008), at para. 16; Anita Ramasastry, “Corporate complicity: from Nuremberg to Rangoon. An examination of forced labor cases and their impact on the liability of multinational corporations”, 20 *Berkeley Journal of International Law* 91 (2002), at p. 143; Sabine Michalowski, “Trazando Paralelos entre la Responsabilidad de Bancos por Complicidad y las Deudas Odiosas”, *Revista Jurídica de la Universidad de Palermo* 279 (2009), at p. 283.

<sup>82</sup> *Prosecutor v Furundzija* (Case No: IT-95-17/1-T), at para. 235.

<sup>83</sup> *Ibid.*, at para. 209.

<sup>84</sup> *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, May 7, 1997, at para. 688.

<sup>85</sup> *Prosecutor v Furundzija* (Case No: IT-95-17/1-T), at para. 233.

“It is not enough that a defendant provide substantial assistance to a tortfeasor; the ‘substantial assistance’ must also ‘advance the [tort's] commission.’ ... providing the Hussein regime with funds-even substantial funds-does not aid and abet its human rights abuses if the money did not advance the commission of the alleged human rights abuses. This does not mean that plaintiffs must allege that the particular funds provided were used to commit the abuses, or that without the funds the Hussein regime would not have been able to commit such abuses, so long as the assistance is ‘a substantial factor in causing the resulting tort.’”<sup>86</sup>

73. The principle underlying this statement and which reflects the “substantial effect” standard drawn from international law, supports the plaintiffs’/victims case in this respect. First of all, the complaint does not simply allege that the banks supported the regime, but rather that by making loans to the regime and thereby enhancing the country military budget and making possible increased military spending, it facilitated the crimes committed by the regime. Based on the evidence provided in the complaint, increased foreign lending was accompanied by a significant increase in military expenditures as well as a drop in social spending,<sup>87</sup> which gives rise to the assumption that a more than trivial part of the loans went into financing military equipment. It is well documented that the military itself as well as military equipment were key in carrying out the repression.<sup>88</sup> An inference can then be drawn that loans that facilitated this increase in military expenditure had a substantial effect on the crimes committed by the regime.

74. In the context of lending, the requirement that the defendants must have played a sufficiently large enabling role in the principal’s offense means that the loans made by the relevant banks must have been of sufficient financial importance to have had an impact on the commission of the violations committed by the regime. While at this stage of the litigation, it is not possible to determine the exact contributions of individual banks, the increase in the military budget during the time of the military dictatorship, seen in the overall economic and financial context in which the regime operated according to the complaint, is of sufficient significance to allow for the conclusion that the loans were a substantial factor in enabling the regime to carry out its internal repression and the resulting crimes.

75. Even though there will hardly ever be a direct link between a loan and a human rights violation, and neither can loans be the direct means by which violations are carried out, this does not mean that loans cannot play a sufficiently important role for the facilitation of a crime. It must be borne in mind that even in

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<sup>86</sup> 2008 WL 4378443 (S.D.N.Y.). See also similar statements regarding the fact that it is not necessary to show a link between an individual loan and the violations committed in the context of funding terrorism under the US Anti Terrorism Act in [Strauss v. Credit Lyonnais, S.A., 2007 WL 2296832, \(E.D.N.Y.2007\)](#) and *In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 2010 WL 432426 (S.D.Fla).

<sup>87</sup> Thomas Scheetz, ‘The Evolution of Public Sector Expenditures: Changing Political Priorities in Argentina, Chile, Paraguay and Peru’, 29(2) *Journal of Peace Research*, 175 (1992), at pp. 178-180.

<sup>88</sup> *Informe Nunca Más*, supra, n. 72.

the context of domestic litigation, it is not uncommon to depart from the normal causal link analysis in favour of an approach which would avoid unfair results. In cases where, because of the particular nature of the contribution, it is extremely difficult to determine a direct link between the action in question and subsequent harm, the responsibility of the actor is nevertheless established where it is possible to show that on the balance of probabilities, his act materially increased the risk of a known source of harm to which the claimant had been exposed.<sup>89</sup> To demand a provable link in such cases would be over-exclusionary. This principle is pertinent in the context of loans, given that the fungibility of money makes it in most cases impossible to trace back the harm to the specific contribution made by any individual lender, while it is exactly this quality of money that turns it into a highly dangerous commodity.<sup>90</sup>

## **2.4. Responsibility for consequences**

76. The damaging effects of the loans fall into the category of mediate consequences, as defined by article 904, rather than being too remote from the violations to give rise to accomplice liability. The facts so far established support the conclusion that the human rights violations committed by the Argentinean military regime were facilitated by and could not have been committed the same way without the international loans received. The violations are accordingly “consequences that only occur through the connection between an act and a different event” (article 901), such as the link between the loans and their use by the military regime in order to facilitate its gross human rights violations. The banks’ responsibility arises in two related ways: a) they either foresaw them or could, with due attention and awareness, have foreseen them (article 904); and b) they failed to act with that level of conscientiousness which article 902 requires when undertaking a particularly risky activity.

### **2.4.1 Actual or constructive knowledge**

77. The International Commission of Jurists makes it clear that the “liability of a financier will depend on what he or she knows about how his or her services and loans will be utilised and the degree to which these services actually affect the commission of a crime.”<sup>91</sup> A similar principle has been expressed by a US court in *Almog v Arab Bank*.<sup>92</sup> With regard to the question of whether routine banking activities can give rise to complicity liability, the Court sustained that ‘acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts’.<sup>93</sup>

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<sup>89</sup> See, though in a different context, *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22.

<sup>90</sup> This has been amply acknowledged in the context of funding terrorism. See, for example, *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7<sup>th</sup> Cir. 2008); Shaw W. Scott, ‘Taking Riggs Seriously: the ATCA Case Against a Corporate Abettor of Pinochet Atrocities’, 89 *Minnesota Law Review* 1497 (2005), at p. 1531.

<sup>91</sup> International Commission of Jurists Report, *supra*, n. 79, at pp. 39-40.

<sup>92</sup> *Almog v. Arab Bank*, 471 F.Supp.2d 257 (EDNY 2007).

<sup>93</sup> *Ibid.*, at p. 291.

78. These principles reflect the assumptions underlying the causation provisions of the Argentinean Civil Code which make indirect consequences of an act attributable to the author of the act as long as they were foreseen or foreseeable and not too remote from the violation that occurred (articles 901, 904 and 906). In order to establish causation, it is then necessary to show, in the individual case, that the lender foresaw or, with due attention, could have foreseen that a loan would facilitate the crimes committed by the military regime.

79. The complaint establishes that the crimes committed by the military regime against the civil population were widely known and had in fact, already in 1976, its first year in power, started to attract international attention. It equally makes out a case, based on the position of the then US Administration, that it was widely acknowledged at the time that loans had an important impact on the human rights situation in the country.<sup>94</sup>

#### **2.4.2 The requirement of conscientiousness**

80. Article 902 makes it clear that alongside the responsibility arising from knowledge, actual or constructive, there is the additional requirement on those who undertake particularly risky activities to “... act with prudence and full conscience of the situation,” In turn, the greater the risk involved, the article adds that “... the greater is the resulting obligation that follows from the possible consequences of one’s acts.”

81. Article 902 reflects an internationally recognised principle that ‘the higher the risk, the more cautious a company needs to be. This means that the more likely it is that third parties will be negatively affected by a company’s conduct or the more serious the harm in question, the more care the company needs to take.’<sup>95</sup>

82. It follows that international banks should be held to a higher level of responsibility for the harm caused by their loan policy due to the heightened level of scrutiny required by banking custom. Due to the high monetary value of loans to sovereign nations international banking institutions conduct in-depth country risk analyses before granting loans to sovereign borrowers. One of the key factors in this risk analysis is the political structure and climate of the borrower in question. Because of the industry custom of cautious and well-researched lending to sovereign borrowers, already in place by the time of the events under review (cf para 84 below) the banks should be held to a heightened level of responsibility for the harm caused by their lending practices.

83. The industry custom of generating in depth country risk analysis has continued to evolve from these beginnings. This evolution is manifest in standards

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<sup>94</sup> For a general discussion of the important link between financing and human rights violations as well as the US position in this respect see Scott, *op.cit.* at p.1531; Juan Pablo Bohoslavsky, Veerle Opgenhaffen, “Pasado y Presente de la Complicidad Corporativa: Responsabilidad Bancaria por Financiamiento de la Dictadura Militar Argentina”, *Revista Jurídica de la Universidad de Palermo* 241 (2009), at pp. 258-269. For a discussion of similar principles in the particular case of Chile see Antonio Cassese, “Foreign and Economic Assistance and Respect for Civil and Political Rights: Chile, a Case Study”, *14 Texas International Law Journal* 251 (1979).

<sup>95</sup> International Commission of Jurists Report, *supra*, n. 79, at p. 19.

contained in various non-binding international instruments such as the Equator Principles<sup>96</sup> and inter-governmental bodies such as the Financial Action Task Force (FATF). FATF, of which Argentina is a member, was established in 1989 and has promulgated 40 Recommendations. Its reports stress industry customs of Customer Due Diligence (CDD), including the obligation to Know Your Customer (KYC).<sup>97</sup>

84. According to recommendation 5 (c), CDD includes “obtaining information on the purpose and intended nature of the business relationship.” Paragraph (d) further requires ‘conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution’s knowledge of the customer, their business and risk profile’.

85. Similarly, the Basel Committee on Banking Supervision, states that, at the minimum, due diligence for banks includes “(1) customer acceptance policy; (2) customer identification; (3) on-going monitoring of high-risk accounts; and (4) risk management.”<sup>98</sup> The report further notes that “KYC should be a core feature of banks’ risk management and control procedures, and be complemented by regular compliance reviews and internal audit. The intensity of KYC programmes beyond these essential elements should be tailored to the degree of risk.”<sup>99</sup>

86. Given the common knowledge and public availability of information about the atrocities committed by the Argentinean military regime at the time the loans were made, it is evident that the foreign banks failed in exercising due diligence with respect to several of the above criteria (e.g, monitoring of high-risk accounts, and risk management).

87. Moreover, both the FATF recommendations and the report by the Basel Committee suggest that politically exposed persons require a more serious KYC evaluation than regular customers because of the associated higher reputational and legal risks. The Basel document expressly notes that a bank accepting and managing funds from corrupt politically exposed persons, “could be liable for actions for damages by the state concerned or the victims of a regime.”<sup>100</sup>

88. While in their codified form these industry standards have developed only rather recently, the concept of corporate due diligence is by no means a new phenomenon. As a risk-management tool “it can be traced back to the US Securities Act of 1933, which provided for a ‘due diligence’ defence for broker-dealers when accused of inadequate disclosure of material information to investors.”<sup>101</sup> At its core,

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<sup>96</sup> For a description of the *Equator Principles* see <http://www.equator-principles.com/join.shtml>, accessed 19 March 2010.

<sup>97</sup> *FATF 40 Recommendations (2003)*, available at <http://www.fatf-gafi.org>, accessed 19 March 2010.

<sup>98</sup> Basel Committee on Banking Supervision, “Customer Due Diligence for Banks”, October 2001, at p.5, available at: [www.bis.org/publ/bcbs85.pdf](http://www.bis.org/publ/bcbs85.pdf), accessed 19 March 2010.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, at p. 10.

<sup>101</sup> Harvard CSRI (2009): *Due Diligence for Human Rights: A Risk-Based Approach*, available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_53\\_taylor\\_etal.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf), accessed 19 March 2010.

due diligence requires a company to investigate and evaluate potential risks stemming from its business activities in light of the relevant standard of care. As such, due diligence can help companies avoid legal liability if they can demonstrate they had mechanisms in place which aimed at preventing harm and violations of a standard of care.<sup>102</sup> In contrast, lack of due diligence may increase a company's liability for the harm caused, particularly in cases where the greater likelihood of risk and the seriousness of the harm in question required the banks to exercise heightened levels of care, as noted above. Hence, while the specific content of due diligence requirements may evolve and change over time, the duty to identify and mitigate risks associated with business activities for the purpose of preventing harm has clearly existed over the last decades.

**89.** Given the nature of the military regime and the public knowledge of the crimes it committed, lenders had a heightened due diligence obligation to inquire into the actual use of the money they were lending.<sup>103</sup> This could give rise to a reversed burden of proof. Once it can be shown, after disclosure of the relevant information, that a bank has made loans to the regime that are significant enough to allow a rebuttable presumption that the money might have had a substantial effect on the policies of the regime, including the financing of its human rights violations, it is for the banks to demonstrate where the money went and that it was not, in fact, used for international law violations.<sup>104</sup>

#### ***2.4.3. Actual or constructive intention; negligence***

90. It can also, without at this stage being able to point to individualized defendants, be stated that the banks have acted with the requisite *intention* when making their loans to the Argentinean military regime, or alternatively were negligent in making those loans. The requisite intention can be established from the fact that even if they did not want the damaging consequences of their loans to arise, their awareness of the likelihood of such damage, together with their willingness to make the loans despite such consequences, amounted to *dolus eventualis* within the terms of Argentinean law. Alternatively, to the extent that the banks closed their eyes to this likely consequence of their loans, they acted without the level of care that article 902 requires, as described in paragraph 2.4.2 above.

### **Conclusion**

91. Applying the relevant provisions of Argentinean law in the light of international principles and standards, the facts alleged in the current litigation constitute a *prima facie* case for civil liability of the banks under review because of their complicity in the crimes committed by the Argentinean military regime. The loans made had a substantial effect in facilitating the commission of the gross human

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<sup>102</sup> Ibid.

<sup>103</sup> For a general discussion of duties to investigate risks where companies have reason to believe that 'their products or services could be misused in order to perpetrate gross human rights abuses' see International Commission of Jurists, "Report of the Expert Legal Panel on Corporate Complicity in International Crimes", *supra*, n. 79, at p. 31.

<sup>104</sup> Sabine Michalowski, Juan Pablo Bohoslavsky, "Ius cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts", 48(1) *Columbia Journal of Transnational Law* 61 (2009), at p. 80.

rights abuses that were systematically carried out by the regime. Given the public nature of these violations the banks were put on notice of the potential consequences of lending large sums of money in this way. It is no defence for the banks to claim that they had no actual knowledge of the abuses and/or of the effect of their loans on the commission of these abuses.

92. There is a strong *prima facie* case, calling for further facts to be made available, that the banks failed to exercise due diligence in making the loans they did, and are therefore liable for the foreseeable consequences of their actions.