Transitional Justice and Foreign Criminal Prosecutions: Delocalizing Justice?

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While multinational companies at times play a notable role in conflicts and mass atrocity events, there is an ongoing debate on how and where to acknowledge their involvement when countries seek to come to terms with past wars or human rights violations. Should economic crimes and other types of corporate complicity be addressed within the Transitional Justice ('**TJ**') process? And considering that corporate involvement in conflicts is often transnational, what States and (domestic or international) judicial bodies should be involved in providing justice?

A recent influx of (criminal) cases against corporate actors in their home countries for their role in mass atrocities abroad raises questions about whether such cases can contribute to achieving justice. A criminal case filed before French courts against the French bank, BNP Paribas ('**BNPP**'), in which the bank

is accused of complicity in atrocities crimes in Darfur, Sudan, provides a starting point to further discuss these issues. More specifically, within the current symposium, this blog will question to what extent cases brought in Global North courts against TNCs delocalize justice in relation to TJ processes.

The Case against BNPP and Sudan's Transitional Justice Process

The case against BNPP comes at a pivotal time: Sudan is currently undergoing a TJ process in the wake of Omar al-Bashir's removal from the presidency in 2019. His reign was marked by war and human rights abuses, including mass atrocities committed in Darfur, and his ouster presents a new opportunity for lasting peace for the first time in thirty years.

TJ is a multi-layered process that employs different mechanisms to help a society come to terms with past conflicts and human rights violations. While the field continues to develop, it is commonly recognized that justice and accountability for past crimes are integral for overcoming mass atrocities, especially for the victims involved. Because of their ability to reveal the truth, punish wrongdoers, and in some cases provide compensation to victims, criminal investigations and prosecutions are considered a cornerstone of TJ.

On 26 August 2020, the war crimes unit of the Tribunal of Paris opened a judicial investigation into BNPP pursuant to a criminal complaint filed by nine Sudanese individuals with the help of several human rights organizations. The complaint alleges that through financial services provided to the Government of Sudan in the early 2000s, including by providing access to international markets to purchase weapons, BNPP was complicit in torture, genocide and crimes against humanity committed in Sudan—especially in Darfur.

Acknowledging the Problem

The case represents an effort to hold the bank responsible for its alleged contributions to crimes that affected thousands of Sudanese people. From a human rights standpoint, especially in light of the right to an effective remedy, the potential to hold a business entity accountable sparks hope. However, given that the case takes place in a court in the Global North, far removed from many of the Sudanese victims, its potential impact becomes more complicated to grapple with. Also, considering that the case takes place in French courts

against a French bank, does it still have bearing on Sudan's TJ goals, including securing effective remedies?

Changing the Question

At first glance, a victims-centred approach seems to be the logical starting point to evaluate how cases such as the one against BNPP—in a French court against a French entity—have bearing on the TJ process far away—in Sudan. Questions such as "do victims feel a sense of satisfaction or redress when the defendant on trial is a remote, indirect perpetrator, being tried in a foreign court?" would surely provide some insight into whether these cases contribute to TJ goals, including victims' sense of justice and retribution.

However, answering such questions poses its own set of problems. First, postulating on how people in Sudan might feel and respond to the BNPP case is not a suitable endeavour for two scholars writing from the Global North; we are in no way entitled to speak for the Sudanese people, let alone articulate what justice should entail for them. Second, victims are not a monolithic group who all feel the same, and even the mere exercise of designating people as "victims" is already a precarious undertaking.

What we can do however, is explore the concept of TJ and its relation to the position of powerful Global North actors in conflicts taking place abroad. Thus, we argue that the more appropriate point of departure for us when examining the impact of trials against Global North actors taking place in the Global North, is to question who frames the conversation relating to Sudan's transitional justice.

Framing the Conversation

TJ is often defined as taking a holistic approach, and that there is no blueprint that can be applied to all conflicts in order to result in a "good" or "successful" TJ process. The conflict, and therefore arguably all its root causes, should be resolved. But because TJ, from this point of view, is seen as a multi-faceted process that is dependent on its context, close scrutiny should be paid to how it is conceptualized, and by whom. In other words, attention must be paid to whose voices are heard when the TJ initiatives are being shaped and evaluated.

A number of TJ scholars, like Patricia Lundy and Mark McGovern, make the argument that when the conversation is driven by the international community in which Global North voices —of both scholars and practitioners—dominate, the actual framing of TJ can constitute a form of neo-colonialism. This is especially true when the conflicts they seek to address predominantly take place in the Global South. In the TJ discourse, the focus on legal and political mechanisms imported from abroad tends to leave local people out of the process, especially in the conception and design of TJ mechanisms. This happens even when TJ purports to be "victim-centric."

But critiques go even further. Some scholars, like Omar Ba, argue that the Global North dominance over the conceptualization of TJ cultivates a false self-image of Global North actors as being merely bystanders—but not active participants—in human rights abuses in the Global South. By doing so, it exonerates the Global North from even the capacity of committing atrocities. According to Jeffrey Atteberry, this false portrayal obstructs the possibility to understand and resolve many conflicts, especially on the African continent, where conflicts are historically interwoven between local and international forces.

But what can we learn from these insights in relation to cases like the one against BNPP and their possible bearing on TJ processes, taking place in Sudan or elsewhere?

The Importance of Addressing Economic Crimes and Root Causes

First, we argue that in order to truly get at the root causes of conflicts and mass atrocities, TJ processes must indeed adequately consider the role of secondary actors such as powerful TNCs, when they play a part. Conflicts are not localised events, but instead arise from a myriad of influences, including (historical) transnational forces.

Turning to Sudan, we see for example that the marginalization of the Darfur region was one of the direct reasons why the conflict started. Often this marginalization is attributed to ethnic divides and environmental causes. However, looking at Sudan's history and the complex (global) foreign influence of both State and non-State actors on the country's development, we argue that economic motivations play a role as well. While it is beyond the scope of

this blog to delve into the nuances and details, we feel it is safe to say that many examples exist where profits have been prioritized over people, sustaining the conditions of the different Sudanese conflicts and making it harder to reach sustainable solutions.

A strong argument can be made that if TNCs are not held accountable for their contribution to conflicts abroad, they will continue to reap the benefits of their involvement without facing the consequences of their behaviour. Indeed, historical examples from the colonial era to today suggest that in the absence of legal accountability, many companies will continue to operate within a paradigm which prioritizes profits over people. The lack of redress sustains inequalities and marginalization which are often wrongly attributed to the conflict, rather than prevailing effects of a colonial history.

Furthermore, impunity of TNCs will leave intact the neo-colonial undertones of how TJ processes are *conceptualized* (and by whom) at the outset, because the TJ process may ultimately fail to confront, or may even reinforce, the hegemonic global structures in which conflicts play out.

Where to Pursue Justice?

Now that we have established the importance of addressing powerful Global North companies in the TJ process, we turn to the question of where such justice should take place. This question can become sticky when transnational considerations come into play. For example, BNPP is accused of crimes against people in Sudan, for decisions made largely in a French boardroom. Ultimately, the case will be heard before a French audience, far away from the locus of the crime. So, the question still stands: How can it have any bearing, then, on TJ processes in Sudan?

Within the current, narrow dynamics of the TJ process, business and human rights cases like the BNPP case still present a risk of reinforcing the hegemonic voice of the Global North by taking away agency from Global South stakeholders. Also, when the cases are seen in isolation and not as a true part of the TJ process because they take place in a Global North forum, they may even sustain the Global North self-image described by Omar Ba as a “neutral” or “beneficiary” participant in the TJ process, whose only role is to avail their legal system in order to help far-away victims who are unable to achieve

redress in the judicial processes of their “failing” State.

But global inequalities, and the conflicts arising from them, do not present themselves in a local vacuum, even if the physical violence does. In order to address global inequalities, and as such many of the root causes of conflict, we argue that we must shatter the false self-image of the Global North as “neutral” or “beneficiary” and as being exempted from the capacity of committing atrocities. Powerful global actors who contribute to wrongdoing abroad must not continue to hide behind the fact that the physical conflicts take place somewhere far away. Instead, we need to acknowledge that Global North actors, and their States, are full stakeholders in the TJ process and are not exalted to govern it. We argue that the Global North involvement in the *justice process* must arise out of their initial involvement in the conflict.

Could a trial like the one against BNPP contribute to this? If it were possible that a French trial could create the institutional space in the Global North for the transitional justice process to expand as it should, it becomes clear that these trials should no longer be seen as delocalising justice. Put differently, these trials could be a way to address all the appropriate localities in which justice needs to be pursued in order to have a truly holistic TJ process.

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