Delocalized Justice: The Delocalization of Corporate Accountability for Human Rights Violations Originating in Africa

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More than twenty years ago, nine local activists from the Ogoni region of Nigeria were executed by the armed forces of the then military dictatorship. The story of the Ogoni Nine, however, does not stop in Nigeria; the tale of the nine men, the many lives lost, and the environmental degradation linked to the extraction of oil in the region by Shell has quite literally travelled the world. What is commonly referred to as the Kiobel case—after the claim lodged against Shell by Esther Kiobel (joined by others), the widow of one of the Ogoni nine, Dr. Barinem Kiobel—resulted from this episode. Her case has famously been heard and dismissed by the Supreme Court in the United States, and is now pending before the Dutch courts. The Kiobel case, as well as a flurry of other cases (such as the Bralima instance before the Dutch OECD National

Contact Point, the Nevsun case before the Canadian courts, the Vedanta case before the UK courts, or the Total case before the French courts, among many others) embody what we refer to as the 'delocalization' of corporate accountability processes out of their original contexts. In each of these cases, wrongs have been suffered on the African continent and yet European or American judicial and non-judicial institutions have been asked to deliver justice. This transfer of the site of justice away from the community where harm was suffered is what we propose to call delocalized justice. The transnational quest for an effective remedy by those whose human and/or environmental rights have been violated raises important questions about the legitimacy, effectiveness and modalities of delocalization in the business and human rights (BHR) context. These questions were at the heart of a (digital) conference hosted by the Asser Institute end of March 2021, organized with the support of the AfronomicsLaw blog. We are grateful for the opportunity to publish this bilingual (French and English) blog symposium featuring a sample of the papers presented at the conference by scholars from all over the globe.

Our ambition with this conference was to nurture the conversation around delocalized justice in corporate accountability cases originating on the African continent in particular (for recent blogposts dealing with similar concerns, see here and here). It is often assumed that getting such cases heard by courts in the Global North is an unmitigated good, or at least better than nothing. This is generally premised on the perceived incapacity or unwillingness of domestic courts in some African States to deal with those cases. Here, it is essential to keep in mind that most of these instances of delocalized justice are driven primarily by the victims' legitimate pursuit for justice when—for a variety of complex and context-dependent reasons—it is unavailable to them at home. It is also important to point out that those cases constitute a rather small number of disputes. Delocalized justice is not a wave of forum shopping by a multitude of claimants, but is rather as an *ultima ratio* litigation strategy employed solely in the most egregious cases. Only a small minority of claimants have (access to) the necessary transnational socio-economic resources and will to undergo a (almost) never-ending delocalized judicial process, with little hope for success.

Nevertheless, there are also dangers with the narrative justifying delocalization, which is reminiscent of what Mutua called in another context the 'metaphor of the savior'. The risks of fuelling a form of rights imperialism and neo-

colonialism need to be acknowledged, even if the choice is ultimately made to (attempt to) hold corporations accountable in the Global North. The purpose is not to condemn the victims and their representatives for making hard choices in difficult circumstances. Instead, it is to critically reflect on the potential (unintended) consequences of delocalization. The conference, thus, encouraged the participants to engage with three main themes around the idea of justice processes being delocalized from the Global South to the Global North. Three guiding questions were identified:

- Is delocalized justice a desirable and effective way to hold Global North corporations accountable for human rights violations linked to their activities that affect African rightsholders?
- How should such delocalized justice be operationalized to account for its delocalized nature?
- Under which conditions could such processes remain localized within African institutions?

The first question relevant to our discussions was whether delocalized justice is a realistic and desirable option. Critical reflections on the structural ability of Global North institutions to deliver justice in a BHR context are quite rare (apart from Grietje Baars' work from a Marxist perspective, and a recent article by Caroline Omari Lichuma outlining a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains). Instead, they are often presented as more suitable in providing justice than local institutions from the Global South. In this symposium, Bamidayé Assogba highlights in his post the considerable shortcomings of the French OECD National Contact Point (NCP), which is presented as an institution at the service of the interests of French companies. While it might play a useful role in providing some public relations cover for French corporations engaged in neo-colonial economic exploitation on the African continent, the NCP's added value for claimants is described as minimal, at least in its current structure. On a different level, Nicola Sokoe's piece builds on a detailed case study focused on the Phola Community in South Africa in order to highlight the drawbacks of ESG-inspired disinvestment. She argues that such delocalized justice mechanisms are entrenching community disempowerment and are unlikely to disrupt the radical power imbalances that facilitate corporate impunity for human rights abuses. Michael Elliot shows through his dissection of the reasoning of the UK High

Court in the case Kalma v African Minerals Ltd how the English judge's ruling is imbued with prejudices and othering of Sierra Leoneans. This leaves the question: could this be different? What is getting lost in the translation when cases are dealt with in foreign languages, cultures, settings, and legal processes? Without claiming to offer any definitive answers, we believe that these questions are crucial to have in mind for the future of the BHR discussion. Interestingly, Elliot himself offers a productive way to conceptualize these delocalized processes '*as helping to expose the exploitation and violence of the dominant socio-economic order and their relationship with law, while providing insights into the limits of law's socially-transformative potential as well as its possible strategic use; and we could look to them, too, as both illuminating instances of resistance and affording opportunities for counter-narratives*'. In their blog, Jindan-Karena Mann and Nicky Touw suggest reinterpreting the delocalized nature of BHR cases in the context of transitional justice. They argue that '*the Global North involvement in the justice process must arise out of their initial involvement in the conflict*'. In other words, criminal prosecutions and trials in the home jurisdictions of transnational corporations, such as the one against BNPP for financing the Sudanese government during its civil war and amidst allegations of genocide and crimes against humanity, are presented as '*a way to address all the appropriate localities in which justice needs to be pursued in order to have a truly holistic [Transitional Justice] process*'.

The second question that we raised concerns the conditions that delocalized justice would have to meet to account for its delocalized nature. How should delocalization be reflected in such a way as to ensure that justice is delivered? How can courts and other institutions safeguard against the cultural and linguistic othering of claimants? How can access to such fora by the affected parties be assured? Rimdolmsom Jonathan Kabré's post focuses mainly on the latter question as he takes a careful look at the availability of legal aid to claimants willing to delocalize their cases outside of their African home states. He reviews both the provision of legal aid by the home country of the claimants and by the host country of the forum they wish to seize of the matter. His conclusion is quite pessimistic as he finds that claimants have access to very little financial aid, and, as a result, participation of local African communities in delocalized justice processes is currently chimerical. Michael Elliot's piece is also relevant here, as it raises the question of the judge's treatment of voices

and perspectives of local communities. While the blogs do not make such a claim outright, the underlying message is that the financial means of applicants is not the only concern, other areas, such as judges in the Global North lacking training on dealing with these types of cases, also pose problems.

Finally, we also encouraged the participants to reflect on the conditions and processes necessary to strengthen and empower local justice processes in Africa. In other words, how could African institutions, which are more legally, linguistically, culturally, and geographically proximate to those that have been harmed, be empowered to deal with such cases? Which effective alternatives can help ensure that BHR disputes remain (more closely) embedded in the context from which they arose? Here the aim was to imagine conditions under which Africa-based institutions and processes could be mobilized to hold corporations accountable for their negative impact on the human rights of Africans. In this regard, Adaeze Okoye proposes in her piece to go through regional institutions, such as the regional courts of ECOWAS or OHADA, to handle claims against companies. While she recognises the challenges ahead for such a regional approach, she believes that the strengthening of local regional capacity could provide a fruitful avenue for '*African solutions which are not dependent on home states*'. Kebene Wodajo and Isabel Ebert in their blog offer an entirely different outlook by engaging an '*alternate perspective of responsibility inspired by the African ethics of duty*', which they apply specifically to the digital ecosystem. Under their framework, corporate responsibility ought to emanate from a sense of membership in a community, be viewed as an obligation to make a difference, and constitute a positive duty to improve the situation. They consider that '[f]raming responsibility from a duty-oriented communal responsibility angle would alleviate challenges that come with delocalization' of justice issues in the digital space.

This symposium aims to encourage a more systematic and critical scholarly engagement with the delocalization of justice in BHR cases involving harms suffered in African states, and the Global South more broadly. It is our contention that until now, with some notable exceptions (see here), scholarly debates in the BHR sphere have insufficiently focused on the justification for, effectiveness of, and alternatives to this uprooting strategy. Yet, this delocalization lies at the heart of many legal processes and regulatory mechanisms aimed at delivering justice (or corporate accountability) in the

Global North for harms that occurred in the Global South. Interrogating this delocalization, and imagining alternative strategies that would enable local populations to gain greater agency through local political and legal processes, should be at the core of scholarship and activism in the BHR field.

Nonetheless, we are also conscious, and cautious, of the (potential) dangers such a discussion brings to the fore. Engaging the complexities and nuances of delocalization is in no way a justification for corporations and their supporters to seize hypocritically upon some of the points raised here to support their calls for inaction and passivity on human rights harms linked to their activities. Instead, the purpose of the conference and this symposium is to critically engage what is being done, and whether other strategies could and should be pursued. Ultimately, we might come to the conclusion that delocalized justice is in fact the best we can hope for at this point to ensure access to remedy to those who have suffered human rights violations at the (indirect) hands of transnational corporations. But, if we go down this road, we need to do so in full awareness of the potential dark sides of such justice, and of the alternatives that are left at the wayside.

Contributors

Bamidaye Assogba: Le PCN Francais: Un Dispositif de Controle des Territoires d'Afrique Noire Francophone

Rimdolmsom Jonathan Kabre: Le Participation Pour les Communautes Locales Africaines Dans la 'Justice Delocalisee'

Adaeze Okoye: Corporate Personality under International Law and Justice Gaps: Could Delocalisation Prompt a Potential Role within African Regional Courts Frameworks?

Jindan-Karena Mann & Nicky Touw: Transnational Justice and Foreign Criminal Prosecutions: Delocalizing Justice?

Michael Elliot: Reproducing Violence and Oppression through Law: An Analysis of the Trial Judgement in Kalma v African Minerals Ltd

Kebene Wodajo & Isabel Ebert: Reimagining COrporate Responsibility for Structural (In)justice in the Digital Ecosystem: A Perspective from African Ethics

of Duty

Nicola Soekoe: 'A Successful Offloading of What Has Been a Difficult Asset': ESG-inspired Disinvestment and the Communities Left Behind

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