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FOUNDATIONS AND SCOPE OF INTERNATIONAL CRIMINAL LIABILITY OF MAJOR BANKS: A CASE STUDY OF BNP PARIBAS IN LIGHT OF INTERNATIONAL STANDARDS ON COMBATING ECONOMIC AND TRANSNATIONAL CRIME

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ABSTRACT

The paper examines the foundation and the constraints of the criminal responsibility of large financial institutions by international criminal law with a specific emphasis on the case of BNP Paribas as a prime illustration of breach of sanctions. The paper has analyzed the legal regulations of transnational economic crimes using a comprehensive analysis of the international standards, materials on case reports. It employed a qualitative research approach that encompassed case study analysis and comparison of regulatory frameworks, as well as the doctrinal legal analysis. It was found out that the company, BNP Paribas, had systematically violated U.S. sanctions on Sudan, Cuba, and Iran between 2004 and 2012, Sudan contributing to 6.37 billion during the period of the genocide of Darfur, and this is a settlement of 8.9 billion in 2014 that is divided without victim compensation to the U.S. agencies. The findings have shown how international banks are now caught up in the compliance burdens after extra territorialism in the application of national laws, and the victims are not able to access the international courts or redress. The study proves that money is a driving power of conflicts and genocide, and presupposes that the solution to further violations and ensuring the responsibility of the global financial system is facilitation of international cooperation, victim-focused mechanisms of accountability, and acknowledgment of financial complicity in mass atrocities.

KEYWORDS: International criminal responsibility, financial crimes, sanction breaking, BNP Paribas, money laundering, transnational crime, redressing victims, and genocide financing.

1. INTRODUCTION

1.1. Background

The inter network banking that cuts across national borders has become a reality brought about by globalization of the financial markets [1]. However, this interconnection has provided the financial institutions with the opportunities to misuse international laws and regulations [2]. The Big banks operate in more than one jurisdiction and on any given day, it can transact billions of dollars, thus, they have to abide by different and at times conflicting legislative systems. The vagaries of the foreign banking activity combined with the fact that the profit may be enormous, has compelled some of the institutions to profit at the cost of legal rules [3].

The role of financial institutions in transnational crime has gained more interests by regulators and the law enforcement agencies throughout the entire world. The banks play central roles in the global financial system and their participation in the illegal financial transactions poses a threat to the world peace, security, and economic stability [4]. The emergence of international criminal liability in the banking sector has been very dynamic over the past two decades because of high profile cases, and the increased need to be held responsible [5]. The emergence of the extra-territorial jurisdictions of the states particularly the United States under the office of Foreign Assets Control (OFAC) and the department of justice (DOJ) has resulted in more application of national laws to an extraterritorial level [6].

1.2. Problem Statement

Despite the idea that there is a complex system of international regulations being applied to the eradication of economic offenses, the systemic violations of the sanctions and anti-money laundering laws are still witnessed within the setting of the international banking industry. The situation with BNP Paribas is linked to the issues inherent in identifying and enforcing international liability of financial institutions on international criminal acts that can display a significant degree of lack of regulation, corporate compliance culture, and international cooperation [1].

1.3. Sudan-Darfur Genocide Background:

BNP Paribas facilitated 6.37 billion transactions in Sudan in the period of the Darfur genocide between 2003-ongoing (2004-2012) when the Sudanese government was organized in killing, rape, and displacement of an estimated 300,000-400,000 people [1, 21]. These deals gave an

economic lifeline to a government that was internationally isolated due to crime against humanity essentially foaming off the effects of economic sanctions meant to pressure the government to stop committing the atrocities.

The case casts dire questions of adequacy of legal regimes, effectiveness of deterrence policy, and reveals still-important gaps in accountability: the non-international jurisdiction of the international courts over the financial institutions, the non-existence of victimization remedies, and inadequate appreciation of the role of money as a genocide facilitator and conflict engineer.

1.4. Objectives

The following research study was carried out to:

- I. Consider the legal foundations of the international criminal liability of significant financial actors in the field of violating sanctions and transnational financial crimes.
- II. Consider the case of BNP Paribas specifically, the events surrounding the Sudan violations in the Darfur genocide, identify the violations, regulatory response, and the resultant impact on the banking practice across the world.
- III. Reflect on the effectiveness of the international standards and national laws in attracting and prosecuting economic crimes, and find lapses in the international court jurisdiction and reparation of victims.
- IV. Decide the scope and the limit of the extraterritorial jurisdiction in the enforcement of economic sanctions and money laundering regulations.
- V. Identify flaws in the current regulatory framework and suggest improvements on ways of strengthening accountability, along with proposals of victim redress and international standards of courts.
- VI. Analyze the contribution of money to conflicts and genocide and reconstruct the concept of neutral transactions under the concept of the material support of mass atrocities.

2. LITERATURE REVIEW

2.1. Summary of Current Literature.

Academic writing has come to focus on the major financial institutions to the extent that it has resulted in a surge of literature on the subject of international criminal liability of financial institutions. Research has already documented the establishment of the anti-money laundering (AML) regimes and the implementation of sanctions measures that have become a sign that the behavior of corporations in the financial sector is becoming

increasingly criminalized [7]. The banks have been researched as gatekeepers and the roles of banks and banks and their roles in accordance with various international conventions like the United Nations Convention against Transnational Organized Crime [8].

The development of the extraterritorial jurisdiction and particularly the expansion of the U.S. regulatory jurisdiction over overseas financial institutions has been reviewed in the literature [9]. Research has established that the switch to the U.S. dollar in international transactions amounts to a large bargain to the American leaders to press the rest of the world to comply to the sanctions by the U.S. [10]. The studies of the topic of corporate criminal liability have discussed the problems of the challenge of distributing criminal liability to complex organizations and the effectiveness of various sanctioning processes [11]. The research has contemplated the notion of deferred prosecution agreements (DPAs) as a means of trying the cases of corporate misconducts [12].

2.2. Critical Gap in Literature

The current academic literature shows a complete lack of connection between the violation of sanctions by financial institutions and the effects of such violation on human rights. The economic sanctions literature rarely overlaps with the research on genocide prevention despite the correlation existing among economic isolation and continued atrocities. Otherwise missing are systemic examination of accountability mechanisms in the face of international judicial bodies in case of financial institutions, victim rights and damages, and the functions of banks in so-called genocide economics, the financial system that supports regimes that commit mass atrocities.

2.3. Theoretical Framework

The legal theory on the existence of such a theory on the liability of financial institutions internationally is founded on several interrelated legal theories. The doctrine of corporate criminal liability says that corporate organizations are liable to acts of criminal conducts by individuals under work and in the name of the organization [13]. The extraterritoriality of national laws is based on the majority of the jurisdictional principles that are recognized by the international law [14]. The territorial principle offers jurisdiction to the actions of a country that happens on its territory and the effects doctrine offers the jurisdiction to the actions that have an extraterritorial occurrence that leads to major impacts on the territory [15].

The second most prevalent system of offering the international standards of fighting money laundering and terrorist funds is the Financial Action Task Force (FATF) Recommendations, which provide a worldwide array of guidelines of AML/CFT actions [16]. Theoretical framework behind the use of economic sanction as a foreign policy tool is a peaceful coercion in which a state seeks to attempt to change the conduct behavior of the target country through the application of economic coercion rather than military force [17].

2.4. Proposal to the International Criminal Law

The paper suggests the application of corporate rules of criminal liability to the international criminal court under the Rome Statute. Article 25 (3) (c) of the Rome Statute provides liability to persons, who facilitate the commission of crimes in the jurisdiction of the Court, with the purpose of committing such a crime. Banks that methodically avoid sanctions to isolate regimes engaging in genocide can easily pass this bar especially in cases where senior management is shown to be aware of the humanitarian situation [13,14].

2.5. Money as a Conflict Fuel Framework:

This article redefines financial flows in war-torn countries. Instead of viewing money as neutral medium, which is only required to comply with regulations, we offer to view money as fuel that drives genocidal machinery [17]. Economic sanctions are the most common tool of non-military intervention by the international community; their circumvention by the financial institutions is a material assistance to mass atrocities. The fungibility principle is proven by the fact that although particular transactions do not necessarily involve buying weapons, they offer general economic assistance liberating funds to commit atrocities [4,17].

3. METHODOLOGY

3.1. Research Design

The qualitative research design applied in this paper was founded on the doctrinal legal research, case study research, and comparative legal study. This approach was selected because it captured the complexity in the international legal systems, specifics of the BNP Paribas case, and the implications of international banking regulation in general.

3.2. Data Collection Data Analysis

Government documents on regulatory and law enforcement agencies were also part of the data

collection, namely: the U.S. Department of Justice, the U.S. OFAC, the Federal Reserve System, and the New York State Department of Financial Services [21]. These records included criminal complaints, deferred prosecution and consent and settlement agreements which recited the violations and term settlement in great detail. The scholarly literature review was conducted methodically through the legal and interdisciplinary databases. The data obtained were examined based on the method of thematic analysis and legal doctrine analysis. The thematic analysis consisted of systematic coding of documents to establish repeating patterns and concepts in the international criminal liability. Analysis of legal doctrine considered relevant legal principles, their sources, interpretation, and use in the case of BNP Paribas and the corresponding enforcement proceedings [1,21].

4. RESULTS

4.1. The BNP Paribas Violations

A study that was carried out on the enforcement documents showed that the BNP Paribas had engaged in systemic violations of the U.S. economic sanctions between the year 2004 and 2012 and made approximately 8.83 billion transactions in violation of the U.S. sanctions against Sudan, Iran and Cuba [1,21]. The violations were premised upon the coordinated schemes to conceal the character and the source and destination of the prohibited transactions to give access to the United States financial market to the authorized clients by the U.S. operations of BNP Paribas.

Sudan-Darfur Case Focus: The total number of violations; \$6.37 billion (72.1) comprised about 4000 transactions on behalf of Sudan [121]. This is the exact timeframe (2004-2012) that coincided with the Darfur genocide (2003-ongoing). Vital critical path correlation:

- ✓ 2003: Darfur genocide starts; the government and Janjaweed militias start systematic attacks.
- ✓ 2004: BNP Paribas reported breaches commence; Darfur genocide proclaimed by U.S. Congress.
- ✓ UN Security Council Resolution 1591 (March 2005) and 1593 (March 2005) impose sanctions on Sudan and refer Darfur to ICC, respectively.
- ✓ 2004-2012: BNP Paribas transacts with Sudan, amounting to 6.37 billion as 300,000-400,000 people are killed in Darfur.
- ✓ March 2009: ICC announces an arrest warrant on President Omar al-Bashir on crimes against humanity.

- ✓ July 2010: ICC passes second warrant on al-Bashir on genocide.
- ✓ 2012: The violations at BNP Paribas persist to this year.

These dealings helped an international isolation regime over on kindles against genocide, which acted as fuel, keeping military activities, militia payments and governmental capacity afloat when mass atrocities were going on [1,4,17].

Documentary evidence existed that BNP Paribas employed several means of evading being spotted. The bank automatically deleted or altered, with payment messages, record of approved parties, and this is referred to as stripping [21]. This pretending was not permitting the U.S. correspondent banks and sanctions screening systems to classification transactions with jurisdictions that were approved. It was revealed that the high profile management was aware of the breaches and issued orders on how to continue to add transactions that were prohibited [1].

4.2. Execution of Measures and punishment

The resolution involved the different enforcement actions by different agencies of the U.S. On June 30, 2014, BNP Paribas was convicted of conspiracy to violate the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) as well as falsification of business records [1,22]. All the financial fines summed up to \$8.97 billion and this was given to different agencies [22]. The criminal penalty the company was fined by the American Justice Department was 140 million dollars. OFAC considered a civil penalty amounted to 963 million [23]. The Federal Reserve had fined 205 million on unsafe banking. In two years, the New York State Department of Financial Services assessed 2.24 billion of the U.S. dollar clearing business and halted part of its operations [24].

The Victim Compensation Gap: even of the penalties of 8.97 billion dollars not a single cent went to victims in Sudan, Iran, or Cuba [22,23,24]. In the case of Darfur, genocide survivors who had survived genocide, survivors of systematic rape, witnesses of the killing of their kin, forcibly displaced groups of people were not recognized during their enforcement processes. The settlements did not provide any program of victim participation, victim statements, and victim compensation funds. This is basic breach of justice: although BNP Paribas could be effectively punished in terms of the offense, it was carried out in the framework of the state-centered regulation that does not see the violation of the sanctions as a

crime, instead it is a crime against state power [22].

4.3. Legalistics of Liability in the Law

The U.S legal jurisdiction was established based on a number of sources. Because of the use of the U.S. financial institutions and the system in clearing with the U.S dollar there was sufficient contact with U.S territory to have a jurisdiction over territory [14]. The principle of protection of jurisdictions supported the extra-territoriality of the concept because crimes were threatening the U.S. national security interest [15]. Respondent superior was applied to determine liability in the area of corporate crime in which corporations are liable to criminal actions of employees as a part of employment agreement and in the best interests of the organization [13].

Lack of International Court Jurisdiction: There was no international court or tribunal that claimed

it had jurisdiction over the actions of BNP Paribas even though they happened in the same timeframe as ICC was handling an active genocide case in Sudan against the Sudanese President al-Bashir. The Rome Statute does not give jurisdiction to corporations only to natural persons [13,14]. Article 25(1) says: The Court shall have jurisdiction over natural persons in accordance with this Statute. This poses a significant loophole: ICC is able to prosecute individuals who perpetrate or facilitate genocide, but not corporate organizations that offer financial infrastructure to facilitate genocide. Article 25(3)(c) reaches out to aiding the crime of ICC but the corporate immunity does not allow this [13].

4.4. Descriptive Statistics

Table 1: BNP Paribas Sanctions Violations by Country (2004-2012)

Country	Transaction Volume (USD billions)	Percentage of Total	Number of Transactions	Genocide Context
Sudan	\$6.37	72.1%	~4,000	During Darfur genocide
Iran	\$1.74	19.7%	~1,500	Nuclear sanctions period
Cuba	\$0.72	8.2%	~600	U.S. embargo period
Total	\$8.83	100%	~6,100	

Source: U.S. Department of Justice Settlement Agreement [1,21]

Table 2: Distribution of Financial Penalties (\$8.97 billion total)

Enforcing Agency	Penalty Amount (USD billions)	Percentage	Type of Action	Victim Compensation
NY DFS	\$2.24	25.0%	Administrative	\$0
Federal Reserve	\$0.205	2.3%	Civil penalty	\$0
US DOJ	\$0.14	1.6%	Criminal fine	\$0
Treasury (OFAC)	\$0.963	10.7%	Civil penalty	\$0
Criminal Forfeiture	\$5.42	60.4%	Criminal	\$0
Total	\$8.97	100%	Multiple	\$0

Source: Consolidated enforcement documents [1,22,23,24].

5. DISCUSSION

5.1. Interpretation of Results

The findings assist in comprehending that a complex interdisciplinary relationship exists among international criminal responsibility regulations, company bureaucratic shortcomings and regulatory enactment formats. The procedural nature of the BNP Paribas sanctions violations, which was spanned over a decade and implicated thousands of transactions, indicates both the underlying problems with the corporate culture of compliance and the risk management [18]. The fact that the senior management was aware of the tactical secrets in hiding the violations is an indication that the idea of violations was a planned affair and not an isolated case.

Reframing as Genocide Complicity: The Sudan Violations: The Sudan violations should be seen as intentional delivery of financial infrastructures to a

regime actively engaged in genocide in the violations period [1,4]. During 2004-2012, when BNP Paribas handled the total of \$6.37 billion in Sudan, at least 300,000-400,000 people lost their lives in Darfur, more than 2.5 million were forcibly displaced, and rape became a weaponized aspect [21]. The knowledge of the senior management of the Sudanese sanctioned status must have entailed the knowledge of why, which in this case was the genocide commission by the regime. The 6.37 billion does not reflect any abstract monetary flows but actual facilitation of genocidal capacity [4,17].

Genocide fueled with Money: Economic sanctions were aimed at disarming Sudan with the financial capacity to persist with mass atrocities, by isolating it [17] to the global financial system. The systematic circumvention offered by BNP Paribas consisted of: entry to foreign markets, clearing of dollar, economic sustainability within an isolated

environment, and fungibility of resources in the context of general economic support that liberated other resources to military operations [4,10,17]. Even the dealings that did not directly fund military gave overall support that allowed redirection of domestic funds to purchasing weapons and paying off militia. This neutralization of the international sanctions was very effective, as seen in the \$6.37 billion [6,17].

The size of fiscal penalties of nearly 9 billion dollars is an indicator of grave increase in imposing fines [22]. However, the effectiveness of financial fines in the context of preventing the use is quite questionable on the basis of the entire financial portrait of the bank [20]. The extraterritoriality of the U.S law demonstrates the immense assail of the foreign financial institutions under the American control [9]. It relied more on the application of the US correspondent banking relations and dollar transactions as the foundation of jurisdiction [10].

5.2. Comparison and Existing Literature

The findings are in line with the scholarly literature that indicates that criminalization of corporate conduct in the financial sector is on the increase [7]. The BNP Paribas case confirms the results of the systematic failures of compliance in big banks and ineffectiveness of the internal controls. The research results on the extraterritorial jurisdiction are in line with the existing literature on weaponization of the financial system and the growth of the U.S. regulatory jurisdiction [10].

But this is more than a mere review of the literature in that it lays down causal relationships between breaches of sanctions and humanitarian results, suggests the jurisdiction of the international court over corporate facilitators, puts victim justice over state regulatory interests, and views money as a source of conflict and not a source of financial flows [4,7,17].

6. IMPLICATIONS

The implications on theory, practice and policy in International financial regulation are also critical in the case. Theoretically, the case demonstrated that corporate criminal liability might be applied in case of multinational corporations and justify the use of the extraterritorial jurisdiction in the transnational economic criminality [13,14]. Practically, the case has altered the compliance culture within the world banking, where organizations are spending more in sanctions screening technology and augmenting the intensity of the internal control [25].

Policymaking-wise, the case points out the fact that the international community must make greater efforts in collaboration to combat financial crimes [26]. The enforcement by the U.S was great, but the regulatory systems in the world are fragmented providing an opportunity to regulatory arbitrage. Regulatory and information standardization would increase the general ability to counter infractions [16].

New Implications - Victim Justice: The case shows there is dire necessity of international court jurisdiction on corporate enablers of the act of genocide and automatic victim-compensation systems. The existing national enforcement systems are unable to deal with infractions that enable international crimes well [13,14,19]. There is no redress of the victims, and it is an element of a lack of justice that should be reformed [22].

7. LIMITATIONS

This research has several limitations to the scope and generalizability. The limitations of the access to the whole factual record are caused by the use of publicly available documents. Such data that may be contained in internal bank records and in investigative materials not published in the filings may provide a background. It is impossible to conclude by using one case study and drawing numerous conclusions about the trends in the financial world. The time lapse of the study, which examined the violations as far as the year 2012 and is currently being ceased in its enforcement by the year 2014, may not be quite marked in the current regulations.

8. CONCLUSION

It has examined the assumptions and limits of international criminal responsibility of large banks on the basis of the analysis of BNP Paribas case in detail, and especially the case of the Sudan-Darfur genocide crimes. The paper has demonstrated that BNP Paribas had participated in the systematic violations of U.S. economic sanctions over approximately a decade, where it transacted in billions of dollars of prohibited business, and masked the identity of parties subject to sanctions. The governance breaches in the companies, culture of compliance and the risk management were deep rooted and the top management knew and tolerated illegal operations.

The Sudan-Genocide Situation: The \$6.37 billion disbursed on Sudan (2004-2012) took place during the Darfur genocide when 300,000-400,000 were killed, which indicates the role of financial flows as an engine of mass homicide [1,21]. Such

deals were a blessing to the economy that neutralized global penalties aimed at coercing an end to the mass murders, and changed criminality offenses to a possible partaking in genocidal atrocities [4,17].

The Accountability Gaps: The response involved enforcement involving giving unprecedented financial fines amounting to about 9 billion dollars by various agencies of the U.S but none of it made it to victims [22,23,24]. None of the international criminal tribunal claimed jurisdiction although ICC had a parallel case on genocide against the president of Sudan. The inability of Rome Statute to exempt any natural person makes corporate genocide facilitators absolutely immune [13]. The juridical basis of U.S. jurisdiction was broad extraterritoriality of the enforcement of American sanctions [9,10].

9. RECOMMENDATIONS

On these findings some recommendations are given:

1. Introduce International Court Jurisdiction: Revise Rome Statute to allow ICC to have jurisdiction over corporations to facilitate genocide and crimes against humanity, with explicit exceptions, such as systematic character, senior management awareness of humanitarian character, involvement in significant financial flows, and the temporal connection to mass atrocities [13,14].

2. Mandate Victim Compensation Mechanisms: International standard that 50% of penalties on sanctions violations (where a violation is committed by a regime that has committed mass atrocities) be set aside used to pay to victim compensation funds administered by ICC Victims Trust Fund or UN-imposed agencies [22]. The

victims should be allowed to present claims and be part of the proceedings and a right to access the evidence.

3. Historize Money as Conflict Fuel: The systematic circumvention of sanctions should be materialized as support of genocide in the Rome Statute under Article 25(3)(c) and substantial facilitation of financial transactions should be viewed on the same par as weapon transfer [4,13,17].

4. There should be a harmonization of rules globally to come up with similar rules on sanction compliance, and AML rules in various jurisdictions [16,26].

5. To enhance the processes of international cooperation and information sharing of the regulatory bodies, there should be an establishment of better mechanisms of detecting violations [26].

6. Banking institutions ought to aim at good compliance cultures coupled with emphasis on moral behaviors instead of trying to maximize profits on a short term basis [18,25].

7. The regulatory authorities should increase individual accountability measures that include the criminal prosecution of executives that know about the violations.

8. The process of screening of sanctions should be encouraged with the assistance of new technological solutions, which employs the opportunities of artificial intelligence to improve its detectability [25].

9. The stakeholders must discuss further on how to strike the right balance between the effectiveness of the enforcement, the respect of sovereignty and financial stability protection [19,27].

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