10 Multinational corporations, transnational corporate liability and environmental justice in African states: Who will bell the cat?

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1 Introduction

The case study of Kenya presented in the preceding chapter explains the burden that most African legal systems bear in the absence of an adequate, effective, reliable, and credible judicial system to access and deliver environmental justice. In recent months, domestic courts in Europe have given judgements that offer some hope to litigants from African states seeking to hold MNCs accountable for activities that breach human and environmental rights. On 12 February 2021, the UK Supreme Court ruled in *Okpabi v Shell* that the case brought by the Ogale and Bille Nigerian communities against Royal Dutch Shell and its Nigerian subsidiary for oil pollution could proceed in UK courts. Notably, the apex court determined that there is a good and arguable case that Shell is legally responsible for the systemic pollution affecting both oil-producing communities. This follows a similar judgement in the earlier case of *Lungowe v Vedanta* and represents the second Supreme Court ruling on the question of whether UK courts have jurisdiction to hear extraterritorial torts committed by its foreign subsidiaries.

While the Okpabi judgement is not a final determination of the suit, it offers some insight into the continuing search for environmental justice by host communities for the activities of MNCs in Africa. Numerous suits have been filed by Nigeria's oil-producing communities in foreign jurisdictions, seeking to hold parent companies accountable for the activities of their subsidiaries. These communities are being forced to look externally because the jurisprudence emerging from Nigerian courts suggests that the courts are unready to take an activist approach or are constrained by constitutional barriers. At the regional level, a combination of the inadequacy of regional judicial mechanisms, issues of jurisdiction over MNCs, and the greater international law conundrum over the lack of a binding instrument to regulate the activities of MNCs make for a herculean task of securing environmental justice for host

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communities. Consequently, this chapter examines the prospects of these emergent decisions on the international legal landscape in the quest to hold corporations accountable for their activities in Nigeria's extractive industry and the wider African region.

Over the years, MNCs have benefited unfairly from the veil shielding them from the obligation to secure human rights as private actors. This privilege is spurred by the fact that it is considered the primary responsibility of states to *respect*, *protect,* and *fulfil* human rights. However, it can be agreed that this practice is no longer sustainable in a globalised world. As Slaughter alludes to:

> the global economy creates global litigation. When products can have their components manufactured in three different countries, be assembled in a fourth, and marketed and distributed in five or six others, the number of potential forums for resolving disputes multiplies rapidly, leading litigants to battle as fiercely over jurisdiction and choice of forum as over the merits of the case.[1]

Such battles have long been the bulwark of private international law and continue to be so, with corporations increasingly surpassing the Westphalian state in resources. The resource race, particularly in the developing world, places MNCs at the heart of the extractive industry, leading to a crisis of accountability amidst the quest for sustainable development and the climate change question. Thus, corporate accountability is a question in need of an urgent answer. This has led to a litany of approaches to how MNCs can be regulated, ranging from private international law, corporate governance, international criminal law, and international relations. Consequently, the network of scholars and policymakers seeking to establish a globally accepted approach to regulating corporations continues to expand with cross-cutting spheres of influence at the national, regional, and international levels.

In Africa, while the African Union (AU) legal order is in its infancy,[2] the protection of the environment has been considered an essential part of African social, cultural, and religious life for many generations.[3] It is also a necessary part of human rights protection in Africa. This normative make-

1 A Slaughter *A new world order* (2004) 85.

2 On the emergence of AU as a legal order, see O Amao *African Union law: The emergence of a sui generis legal Order* (2018).

3 EP Amechi 'Enhancing environmental protection and socio-economic development in Africa: A fresh look at the right to a general satisfactory environment under the African Charter on Human and Peoples' Rights' (2009) 5 *Law, Environment and Development Journal* 58 at 62.

up of the African human rights system is often expressed in the decisions of regional courts, which are the heart of African judicial environmentalism.[4] According to the African Commission on Human and Peoples' Rights (African Commission), 'collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa'.[5] Significantly, environmental rights are recognised as explicit treaty norms at the African regional level, in normative harmony with other rights and corresponding obligations.[6] Despite this, the African region continues to experience wanton environmental pollution and abuse of human and environmental rights by extractive industry operations of MNCs and the somnolence and under-regulation by states. The African Commission decries 'the increasing rate of destroying the African environment and ecosystem by extractive industrial activities. Consequently, this chapter examines the prospects of these emergent decisions in European domestic courts, the possible impact on the international legal landscape, and the quest to hold corporations accountable for their activities in Africa. It also discusses the potential of regional judicial mechanisms to try MNCs within the purview of international criminal law.

2 The problem with multinational corporations under international law

International law scholarship has long occupied itself with the subject of corporate (or business) responsibility. In its early days, the discourse over the role of the corporation was dominated by two schools of thought. On one side of the debate, scholars insisted on protecting the capitalist values upon which the United States was founded. On the other side stood scholarship that argued for a higher moral ground which defined the limit of corporate profiteering. In the 1970s, Friedmann asserted that the sole responsibility of business was profit[7] and that businessmen who have corporate responsibility are 'unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades'.[8] Friedmann's dismissal of any talk of corporate responsibility was a retort

4 On the role of Africa's fledgling regional courts see in human rights and environmental protection see, CM Nwankwo 'The role of regional courts in judicial environmentalism in Africa' in IL Worika, ME Olivier & NC Maduekwe (eds) *The environment, legal issues and critical policies: An African perspective* (2019) 39-61.

5 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v Nigeria* Communication 155/96 (2001) para 68.

6 M Addaney & AO Jegede *Human rights and the environment under African Union law* (2020) 5.

7 M Friedmann 'The social responsibility of business is to increase its profit' *The New York Times* 13 September 1970.

8 As above.

to the propounding of Abrams, Bowen, and Keith and earlier intellectual debates of business people and scholars at Harvard Business School in 1929 and 1932.[9] However, Friedmann's intellectual currency has waned in the face of corporation-driven breaches of environmental and human rights, climate change, and policy developments in the international sphere.

Among the course-changing events that turned the tide against the extremely capitalist disposition of Friedmann that corporations solely exist for profit was the involvement of the US-based International Telegraph and Telephone Corporation (ITT) in the political transition in Chile. This propelled an intense political debate on corporate responsibility in international law.[10] Consequently, the UN Economic and Social Council passed a resolution requesting the Secretary-General to engage eminent persons to study the role of multinational corporations (MNCs), their impact […] and their implications for international relations.[11] In recognition of the 'fundamental new problems [that] have arisen as a direct result of multinational corporations' growing internationalisation of production,[12] the Group of Eminent Persons recommended that these relations' complexities be addressed without delay.[13] The UN followed up by establishing a Commission on Transnational Corporations (UNCTC) to explore the 'possibility of concluding a general agreement on multinational corporations, enforceable by appropriate machinery, to which participating countries would adhere by means of an international treaty'.[14] Consequently, the UNCTC immediately commenced the negotiation of a draft code of conduct for transnational corporations.[15]

9 See WB Donham 'Business ethics – A general survey' (1929) 7 *Harvard Business Review* 385; M Dodd 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145 at 1153-1154; F Abrams 'Management's responsibilities in a complex world' (1951) 29 *Harvard Business Review* 29; H Bowen *Social responsibilities of the businessman* (1953); D Keith 'Can business afford to ignore social responsibilities?' (1960) 1 *California Management Review* 70.

10 J Anderson 'Memos bare ITT try for Chile *coup*' *The Washington Post* 21 March 1972.

11 The UN Economic and Social Council Resolution 1721 (LIII) 2 July 1972.

12 UN Economic and Social Council 'The impact of multinational corporations on the development process and on international relations' Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations UN Doc E/5500/Add.1 (Part 1) (24 May 1974) 808.

13 R Adeola 'The responsibility of businesses to prevent development induced displacement in Africa' (2017) 17 *African Human Rights Journal* 244 at 245-253.

14 UN Economic and Social Council (n 12) 835.

15 I Bantekas 'Corporate social responsibility in international law' (2004) 22 *Boston University International Law Journal* 309 at 309-318.

Although the process failed to succeed, the draft code reflected an emergent zeitgeist for corporate responsibility at the international level.[16]

On the heels of the efforts of the UNCTC, the Organisation for Economic Co-operation and Development (OECD) followed suit in 1976 by adopting a Declaration on International Investment and Multinational Enterprises.[17] The following year, the International Labour Organisation (ILO) adopted the Tripartite Declaration concerning Multinational Enterprises and Social Policy.[18] Following the 1999 World Economic Forum in Davos, a set of Global Compacts for businesses was agreed upon, covering, among others, principles on human rights and the environment.[19] In 2003, a collection of draft norms on the responsibilities of transnational corporations and other business enterprises was developed by a sessional Working Group set up by the Sub-Commission on Human Rights of the UN Commission on Human Rights.[20] The Sub-Commission adopted these Draft Norms. The Commission on Human Rights responded by requesting the UN Secretary-General in 2005 to 'appoint a special representative on the issue of human rights and transnational corporations'.[21] The special representative's mandate was, amongst other things, to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[22] The same year, the UN Secretary-General appointed John Ruggie as the special representative. Over a period of six years and wide international consultations, Ruggie developed the United Nations Guiding Principles on Business and Human Rights (Guiding Principles).[23]

16 KP Sauvant 'The negotiations of the United Nations Code of Conduct on transnational corporations' (2015) 16 *Journal of World Investment and Trade* 11 at 11-20.

17 Organisation for Economic Co-operation and Development *OECD Declaration and Decisions on International Investment and Multinational Enterprises* (1976).

18 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Council of the International Labour Office at its 204th session in Geneva, Switzerland (1977).

19 UN Global Compact 2000.

20 Draft United Nations norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

21 UN Commission on Human Rights 'Human rights and transnational corporations and other business enterprises' E/CN.4/RES/2005/69 (20 April 2005).

22 UN Commission on Human Rights (n 21) para 1(a); T Thabane 'Weak extraterritorial remedies: The Achilles heel of Ruggie's "Protect, Respect And Remedy" Framework and Guiding Principles' (2014) 14 *African Human Rights Law Journal* 43 at 43-46.

23 UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect And Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) (Guiding Principles).

While there is yet to be a consensus on the normative standard applicable to corporations, particularly on their human rights conduct and the environment, the Guiding Principles represent the first internationally recognised guide on corporate responsibility of businesses in international law, specifically with respect to human rights. Despite their non-binding character, the Guiding Principles have been hailed as 'a lasting beacon for business entities'[24] and 'guidance that will enhance standards and practices regarding business and human rights'.[25]

These events in international law represent progress. However, MNCs' dimensions and scale of human and environmental rights breaches present further challenges. These dimensions make the time frame for establishing a binding international instrument over MNCs still a while away.

The lack of convergence on the best approach for accountability of MNCs under international law has led to various methods that range from governance to soft law and the constant oscillation between private and public international law approaches. By implication, the coverage of laws that impose human rights obligations on MNCs is 'scattered, often indirect, and incomplete'.[26] Cassell and Ramasastry best capture this international law conundrum thus:

> Most of these obligations are indirect: international law obligates States to use their domestic laws and institutions to protect the human rights of persons within their jurisdiction, including from violations by third parties. States must require third parties, including business, to refrain from harming people. In some instances, State obligations to safeguard human rights also obligate States to require business to take positive steps to protect rights, whether by properly training private security forces, providing safe factories and workplaces, or paying workers a minimum wage … These commitments require States to take reasonable measures to prevent human rights violations, by granting State institutions the necessary powers and by using 'all those means of a legal, political, administrative and cultural nature' necessary to prevent violations; to investigate, prosecute, punish, and provide reparations for violations; and, where possible, to restore rights that have been violated…

24 'Business and human rights: Interview with John Ruggie' *Business Ethics* 30 October 2011.

25 UN Human Rights Council 'Human Rights and transnational corporations and other business enterprises' UN Doc A/HRC/17/L.17/Rev.1 (15 June 2011) para 4.

26 See generally, Report of International Commission of Jurists 'Needs and options for a new international instrument in the field of business and human rights' (June 2014) 5 at 9-33.

> While these laws are formally directed at States, the real objects of regulation, albeit indirectly, are business corporations.[27]

Some scholars have animated calls for international criminal jurisdictions over MNCs. The corporate crime approach emphasises that international corporate criminal liability is the most productive way to deal with the realities of corporate crime in a crooked, globalised world.[28] A perspective from contemporary conflict studies links wars to competition over scarce resources and economic underdevelopment, and this necessitates a new generation of international criminal law that addresses economic actors and economic crimes.[29] In the same vein, the argument is made that international criminal law as an instrument for global peace must address economic networks (corporations in this context) that sustain local conflicts.[30] Human rights scholarship establishes a nexus between the current gap in the global governance of MNCs and the enjoyment of impunity from a lack of accountability for human rights abuses related to their global activities, particularly in the global south.[31]

3 Private litigation in foreign courts as a panacea to lack of congruence in corporate accountability?

Due to the lack of binding legal obligations on MNCs, individuals increasingly resort to transnational litigation to seek remedies for breaches.[32] Famous attempts in US courts to hold MNCs to account for

27 D Cassell & A Ramasastry 'White paper: Options for a treaty on business and human rights' (2016) 6 *Notre Dame Journal of International and Comparative Law* 1 at 14-15.

28 See J Stewart 'A pragmatic critique of corporate criminal theory: Lessons from the extremity' (2013) 16 *New Criminal Law Review* 261; J Sundell 'Ill-Gotten gains: The case for international corporate criminal liability' (2011) 20 *Minnesota Journal of International Law* 648.

29 See Van den Herik & D Dam-De Jong 'Revitalizing the antique war crime of pillage: The potential and pitfalls of using international criminal law to address illegal resource exploitation during armed conflict' (2011) 15 *Criminal Law Forum* 237.

30 M Delas-Marty 'Ambiguities and lacunae: The International Criminal Court ten years on' (2013) 11 *Journal of International Criminal Justice* 553 at 557.

31 On the point of the governance gap see S Joseph 'Taming the leviathans: multinational enterprises and human rights' (1999) 46 *Netherlands International Law Review* 171. See also J Ruggie 'Protect, respect and remedy: A framework for business and human rights' report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises UN Doc A/HRC/8/5 (7 April 2008) in particular 11-16, 34-36, 47-49.

32 The lawsuits database of the Business and Human Rights Resource centre shows that over 54 per cent of the corporate human rights cases profiled worldwide are transnational, meaning that they are filed in a different country from where the alleged abuse by an MNC occurred. See 'Corporate human rights litigation: Trends from 200 seminal lawsuits' (2020) https://mailchi.mp/business-humanrights/org/corporate-

civil breaches in foreign jurisdictions have been rather unsuccessful. In *Kiobel v Royal Dutch Petroleum*,[33] the plaintiff instituted an action in a US court under the Alien Torts Statute (ATS)[34] for violations of the law of nations occurring within the territory of another state other than the United States. The US Supreme Court held that overseas human rights violations might not be litigated in federal courts under the Alien Tort Statute except when they sufficiently 'touch and concern' the US.[35]

More recently, the US Supreme Court decided in *Nestle USA Inc v Doe*[36] that 'general corporate activity in the US is not a sufficient domestic basis to warrant ATS jurisdiction over claims against a US corporation for alleged human rights violations'. While the issue of extraterritoriality has remained a constant outlook of the US Supreme Court, the second aspect of the decision in the *Nestle* case held that US corporations can be sued under the ATS for torts committed in violation of international law.

While the case law emanating from the US reduces the chances of obtaining redress through domestic courts, the EU has emerged as the preferred locus for litigants, particularly from African states. This is driven by the low level of success recorded by African litigants against MNCs in domestic courts and the lack of implementation of regional court decisions.[37] Thus, these litigants are directing their suits to European countries where the responsible MNCs originate. At the regional

legal-accountability-quarterly-update-issue-37-december-2020?e=[UNIQID] (accessed 22 November 2022).

33 133 S Ct 1659, 1669 (2013).

34 The Alien Tort Statute (ATS) (28 USC S 1350) also referred to as the Alien Tort Claims Act (ATCA) is a section in the United States Code that gives federal courts jurisdiction to entertain lawsuits filed by foreign litigants for torts committed in violation of international law.

35 The Court held thus: 'On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See Morrison, 561 US (slip op. at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.'

36 593 US (2021).

37 The practice of bringing action against the actual tort feasor which are mostly the subsidiaries of MNCs operating in African countries and their mother companies in European courts has been described as a 'form of forum shopping in private international law'. See C Okoli 'Corporate due diligence and private international law: A note on the Hague Court of Appeal's decision in Shell' Nova Centre on Business, Human Rights and Environment Blog 17 February 2021 https://novabhre.novalaw.unl.pt/corporate-due-diligence-private-international-law-note-hague-court-decision-shell/ (accessed 12 September 2021).

level, EU laws are favourable to litigants under the Brussels I Recast Regulation[38] which provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.[39] By implication, the domicile or home state of legal persons such as corporations will be the primary locus from which these actions can be instituted in domestic courts by litigants from other jurisdictions. Theoretically, this opens the door for MNCs to be sued in courts of an EU Member State, even for actions committed outside of the EU, at least in terms of jurisdiction. The principal jurisdictional ground of the defendant's domicile, included in Article 4 of the Jurisdiction Regulation, operates independently of the activities to which the action relates.[40]

A good example of the application of the provisions of the Brussels Recast Regulation is the case of *Milieudefensie v Shell*,[41] where the top management of Shell Development Petroleum Corporation (SPDC), the Nigerian subsidiary of Royal Dutch Shell (RDS), was brought before a Dutch court by a Dutch environmental NGO (Milieudefensie), seeking (with a number of Nigerian farmers) to find the parent company liable for environmental pollution in Nigeria. Therefore, pursuing a holding company with a domicile in the EU is easy from a jurisdictional point of view. However, subjecting that company to EU law (or the national implementation thereof) is more challenging with respect to applicable law.[42] Regarding the applicable procedure law, the Hague District Court resolved the matter of jurisdiction against Shell by holding that it had international jurisdiction by virtue of Article 7(1) of the Dutch Code of Civil Procedure (DCCP). Article 7(1) of the DCCP allows connected claims against a parent company for acts committed by the subsidiary. In this case, the claim was filed against RDS, the parent company, and to SPDC (the subsidiary) on the ground that 'the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'.

On the substantive matter, the District Court held that the leaks from SPDC facilities that led to the pollution of the communities in question were caused by sabotage, thereby exculpating SPDC. The claimants appealed[43] the lower court's ruling, while Shell cross-appealed on the

38 Regulation (EU) 1215/2012.

39 Article 4 of the Brussels Recast Regulation.

40 G van Calster 'Environmental law and private international law' in E Lees & JE Viñuales *The Oxford Handbook of Comparative environmental law* (2019) 1508.

41 C/09/337058 / HA SA 09-1581.

42 Van Calster (n 40).

43 Case number 200.126.804 and 200.126.834.

issue of jurisdiction. The claimants' appeal was successful, and the cross-appeal of the defendants was dismissed. On the main issue on appeal, the Court of Appeal held, inter alia, that RDS and her Nigerian subsidiary SPDC were liable in compensation to the claimants according to Nigerian law because Shell had to prove beyond reasonable doubt that there was sabotage in order to avoid liability, which Shell was unable to do in this case.[44]

In order to correct the procedural barriers that have long frustrated the ability of litigants to rely on private international law rules to bring actions against MNCs in domestic courts in Europe, the European Union's draft legislation on corporate due diligence[45] proposes amendments to the Brussels I Recast and Rome II Regulations. The proposed amendment of Brussels I Recast would allow, inter alia, for claims to be brought in an EU Member State against an EU-domiciled parent company for business-human rights violations that occur in the non-EU Member States where their subsidiaries or companies are the actual tort fears. The proposed amendment to the Rome II Regulation, on the other hand, provides for a choice of law rule that would allow the victims of such business-human rights violations to choose between the laws of the place of damage, place giving rise to the damage, the place where the parent company is domiciled or if not domiciled in the EU, the place where it operates.

Okoli expresses caution over the application of Nigerian law in the case and argues that at the Dutch Supreme Court, the claimants may suffer some setbacks:

> Though the applicable law, which the parties mutually consented to applying, in this case, did not lead to injustice for the claimants because the Hague Court of Appeal held that under Nigerian law, Shell's parent company owed the claimants a duty of care for the acts of their subsidiary, I question the substantive application of Nigerian law in this case. This rule circumvents the principle in Nigerian law that a parent company is not liable for the acts of its subsidiary based on the principle of corporate legal personality and that since both entities are separate, the parent company will only be liable under Nigerian law where the subsidiary acts as an agent of the parent company and vice versa (see the Nigerian Supreme Court cases of *Bulet Int (Nig) Ltd & Anor v Olaniyi & Anor*) (2017) LPELR – 42475 (SC); *Union Beverages Ltd.*

44 As above.

45 European Union Parliament Committee on Legal Affairs, 'Draft report on corporate due diligence and corporate accountability' (2020) https://www.europarl.europa.eu/RegData/commissions/juri/projet_rapport/2020/657191/JURI_PR(2020)657191_EN.pdf (accessed 22 November 2023).

> *v Pepsicola Int. Ltd* (1994) 3 NWLR). If this case goes to the Dutch Supreme Court, it could reach the same conclusion as The Hague District Court that under Nigerian law, Shell's parent company did not owe a duty of care to the claimants for the acts of their subsidiary company in Nigeria.[46]

This possibility is why the proposed amendment of the Brussels I Recast and Rome II Regulations is a welcome development and can undoubtedly clear uncertainties over the potentialities of domestic courts in Europe as a forum for litigants.

In the United Kingdom, recent jurisprudence appears to favour victims rather than corporate defendants, marking what may represent the emergence of a more victim-centred approach to corporate liability. In a trio of decided cases termed the 'holy trinity'[47] of corporate accountability (*Chandler v Cape plc*;[48] *Vedanta Resources plc v Lungowe*,[49] and *Okpabi v Shell*)[50] UK courts have laid down the marker in judgements that may open the floodgates for private litigants for human rights violations by MNCs in African states. The *Vedanta* and *Okpabi* cases are closely linked because both directly concern actions of a subsidiary company of a UK parent alleged to have caused environmental harms that have adversely affected indigenous communities in Zambia and Nigeria, respectively. In both cases, the central issue for determination was whether the parent company owes a duty of care to victims on behalf of the subsidiary.

The facts of both cases are important for the analysis to follow. In *Vedanta,* villagers brought a claim against a UK-based company Vedanta Resources, and its Zambian subsidiary Konkola Copper Mines (KCM) plc over effluents from KCM's Nchanga Copper mine, which polluted water used for drinking and irrigation. The court found that the parent company owed a duty of care to the victims. Although the issue of duty of care was merely a preliminary procedural issue (discussed within the jurisdictional hearing) prior to later consideration of the facts, the matter was never

46 C Okoli 'Corporate due diligence and private international law: A note on the Hague Court of Appeal's decision in Shell' *Nova Centre on Business, Human Rights and the Environment Blog* 17 February 2021 https://novabhre.novalaw.unl.pt/corporate-due-diligence-private-international-law-note-hague-court-decision-shell/ (accessed 12 September 2021.)

47 T van Ho 'On emissaries and control: Corporate accountability in the aftermath of the Shell litigation in the UK and the Netherlands' (rapid response event 19 February 2021) https://www.youtube.com/watch?v=iq7YwPNMafA&feature=youtu.be (accessed 5 September 2021).

48 [2012] EWCA Civ 525.

49 [2019] UKSC 20.

50 [2021] UKSC 3.

heard on the facts and was settled in January 2021. However, the case had direct consequences for the later *Okpabi* case as admitted by Lord Hamblen, who, while delivering the unanimous judgment in Okpabi, stated that it might reasonably have been expected that the guidance provided by [Vedanta] would resolve this appeal without the need for a hearing [although it] proved not to be the case.[51]

In *Okpabi*, over 40 000 Nigerian citizens 'allege that numerous oil spills . . . have caused widespread . . . water and ground contamination', affecting safe water usage in their communities for 'drinking, fishing, agricultural, washing or recreational purposes'.[52] The first defendant was (SPDC), the Nigerian registered subsidiary of RDS, the UK-based parent company. The claimants argued that RDS owed a common law duty of care because it 'exercised significant control over material aspects of SPDC's operations [through] the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals' which were insufficient to protect the communities from 'harm arising from SPDC's operations'.[53] It was also claimed that SPDC is liable on an individual basis.[54]

The central question of procedure in *Okpabi* concerned the jurisdictional 'gateway' test in paragraph 3.1(3) of the UK Practice Direction 6B.[55] This states that appellants must establish that their claims against the anchor defendant [RDS] raise a real issue to be tried, which means they have a real prospect of success. The question was twofold: first, it was asked whether there is an arguable case for a duty of care owed by RDS. This grounded the second issue, which was whether SPDC was a necessary or proper party to the claim that RDS owed a duty of care, which would allow UK jurisdiction to be granted to the foreign subsidiary.[56] On appeal, the Court held that there was 'no arguable case' that RDS owed a duty of care in these circumstances based on evidence.[57]

It is noteworthy that following the Court of Appeal's ruling in *Okpabi* in 2018, the Supreme Court took a different approach in 2019 in *Vedanta,* where it ruled that there was no 'limiting principle' that a parent could never incur a duty of care in respect of the activities of a subsidiary

51 *Okpabi* (n 50) para 2.

52 *Okpabi* (n 50) para 4.

53 *Okpabi* (n 50) para 7.

54 *Okpabi* (n 50) para 8.

55 *Okpabi* (n 50) para 10.

56 *Okpabi* (n 50) para 1.

57 *Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2018] CoA 169.

merely by laying down group-wide policies. The Supreme Court found that the Court of Appeal incorrectly interpreted the principles of duty of care concerning parent liability for three key reasons. Firstly, there was an 'inappropriate focus' on the issue of control (by RDS over the subsidiary SPDC). While this was a significant aspect of the Court of Appeal decision, here, it was held that 'control is just a starting point'[58] for any such decision. Instead, what is important is the extent to which any management processes were or were not shared. To this end, it was clarified that 'control' and 'de facto management of activity are two different things. A subsidiary may maintain de jure control of its activities but delegate de facto management of part of them to the emissaries of its parent'.[59] Control is, therefore, less relevant than the parent's public statements holding itself out as exercising a 'degree of supervision and control'[60] of its subsidiary's operations. Secondly, the Court of Appeal indicated that group-wide policies or standards are insufficient to indicate a duty of care on the part of the parent.[61] Thirdly, and overall, as per *Vedanta* and *AAA v Unilever plc*,[62] it held that 'there is nothing special or conclusive about the bare parent/ subsidiary relationship'.[63] Essentially, the mere existence of a parent/ subsidiary relationship is insufficient either to demonstrate a lack of duty of care or the existence of a duty of care.[64]

The UK Supreme Court judgment here mainly answers a threshold question on whether the claim may proceed. However, the decision is still significant in many respects. As already indicated, domestic courts' inclination to apply English law is to adopt a strict approach to recognising the principle of corporate separation. However, the Supreme Court's unequivocal rejection of any 'special category of law to be applied to the facts in *Okpabi* seems to mark a more dynamic (and claimant-friendly) approach to the question of who owes a duty to whom within a corporate structure'.[65] This approach aligns with the direction of travel of decisions emanating from other jurisdictions, such as Canada and New Zealand.[66]

58 *Vedanta Resources plc* (n 49) para 147.

59 *Vedanta Resources plc* (n 49) para 147.

60 Lord Briggs in *Vedanta* UKSC 53 cited in *Okpabi* para 148.

61 *Vedanta Resources plc* (n 49) para 143.

62 [2018] BCC 959 para 36.

63 *Vedanta Resources plc* (n 49) para 49.

64 S Hopkins et al Case Note *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 2 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795295 (accessed 22 November 2023).

65 As above.

66 C Connellan et al '*Okpabi v Royal Dutch Shell Plc*: Supreme Court allows Nigerian

In Canada, the courts have recently held parent companies liable for breaches of 'customary international law' regarding damage caused by their subsidiaries.[67] Coupled with the recent decision in *Milieudefensie* and suits pending in other European courts,[68] one may argue that the corporate veil may no longer provide sufficient cover for parent companies from liability for the acts of their affiliates in the not-too-distant future.

As some have observed:

> because of the more dynamic approach the Okpabi decision signals, it is conceptually possible that UK courts will consider claims to be 'arguable' against a wider set of UK-based entities than if, as the Court of Appeal had seemed to advocate, a 'special' duty in this situation applied, tied to the presence of the shareholding relationship.[69]

However, the decision does not necessarily imply a carte blanche to bring these class actions to the UK. For example, in the Fundão dam case,[70] a group of more than 200 000 Brazilian citizens brought a £5bn action against mining group parent, BHP, in respect of damage they argued they had suffered following the collapse of an iron ore dam in Brazil, owned by a subsidiary. The English High Court threw out the suit because it viewed the claim as a 'clear abuse of process'.[71] The English Court based its decision on the duplication and parallels with pending Brazilian proceedings and the great number of different claimants, and it considered the case 'irredeemably unmanageable'.[72]

citizens' environmental damage claims to proceed against UK parent company' *White & Case Blog* 19 February 2021 https://www.whitecase.com/publications/alert/okpabi-v-royal-dutch-shell-plc-uk-supreme-court-allows-nigerian-citizens (accessed 13 September 2021).

67 *James Hardie Industries PLC v White* [2018] NZCA 580 and *James Hardie Industries Plc v White* [2019] NZSC 39.

68 Recently, a number of suits have been instituted in French courts under the 2017 duty of vigilance law which has pushed corporations to reconsider their operations as NGOs monitor compliance. See GIR Insight 'Europe, Middle East and Africa Investigations Review' (2020) https://www.whitecase.com/sites/default/files/2020-06/compliance-france-2020.pdf (accessed 22 November 2023).

69 Hopkins et al (n 64).

70 *Municipio de Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC).

71 *Municipio de Mariana* (n 70) para 141.

72 *Municipio de Mariana* (no 70) para 104.

4 What hope for the African litigant in the region?

Since the *Kiobel* case,[73] private litigants in Nigeria have increasingly approached British and Dutch courts to remedy the environmental damages wrought by the extractive industry activities of Shell. Although domestic courts in Nigeria have been confronted with quite a number of cases in this context, it is home country courts in the global north in particular that have witnessed a sharp increase over the past two decades of corporate accountability lawsuits relating to human rights violations and environmental damages in host countries.

Enneking contends that the motivation for victims and civil society to bring their claims before their home country rather than host country courts often involves inadequate options for redress in the host country. Some of the impediments litigants in African countries contend with include a lack of independence of the local judiciary, fear of discontinuation or persecution, a local legal system that is ill-equipped to deal effectively with complex legal claims, or difficulties in getting local courts' verdicts enforced.[74] Another critical factor that appears to have inspired the preference of home states as the locus for litigation is the application of public opinion in the home country. This encourages greater public scrutiny of the role that parent companies of multinational enterprises should play in preventing the activities of their foreign subsidiaries or supply chain partners from having an adverse impact on human rights and the environment in host countries.[75] As a consequence of the ineffectiveness of the extant regulatory framework governing the activities of MNCs, debates over the most effective means of regulation have taken several turns. Some scholars have advocated for new regulatory paradigms at the African Union (AU) level.[76] So far, the African human rights system has struggled to make any substantial progress on the issue. In this vein, the African Commission on Human and Peoples' Rights (The Commission) has been criticised for its consistency in holding the African states responsible for the protection of human rights while

73 *Kiobel v Royal Dutch Petroleum Corporation* 569 US 108.

74 LFH Enneking 'Transnational human rights and environmental litigation: A study of case law relating to Shell in Nigeria' in I Feichtner, M Krajewski & R Roesch *Human rights in the extractive industries: Transparency, participation, resistance* (2019) 513.

75 As above.

76 Ekhator for instance clamours for all hands to be on deck at the regional level. He cites, inter alia, the exploration of AU mechanisms such as the African Peer Review Mechanism (APRM) as a means to tighten regulation at the AU level. See EO Ekhator 'Regulating the activities of multinational corporations in Nigeria: A case for the African Union?' (2018) 20 *International Community Law Review* 30.

omitting to establish any such liability on the path of MNCs, which are often significant actors in these cases. In *SERAC v the Federal Republic of Nigeria*,[77] the African Commission ruled thus:

> [I]n the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors and oil companies to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of States.[78]

Commenting on the communication of the African Commission in the Ogoni case, Biltchiz observes that the fact that the Commission focused its attention only on the actions and obligations of the government is puzzling: the oil companies could arguably have been said to have primary responsibility for the harms caused yet the Commission never addresses their responsibilities directly.[79]

Amao also argues that '[t]he SERAC decision may therefore be criticised because it was directed solely to the Nigerian state and omitted consideration of the accountability of the non-state actor'.[80]

Thus, it leaves much to be desired that the Commission only scrutinise the Nigerian government's role in aiding and abetting the destructive operations of the oil companies without considering the actions of both Shell and NNPC that caused all the damage. This is the reason why legal liability accrues only to the state. Therefore, the Commission believed that nothing in place in the African Charter on Human and Peoples' Rights (African Charter) or Nigerian law could have created legally binding human rights obligations against Shell.[81] This approach by the human

77 n 5.

78 Ekhator (n 76) para 58.

79 D Bilchitz 'The necessity for a business and human rights treaty' (2010) 203 *Business and Human Rights Journal* https://business-humanrights.org/sites/ default/ files/ documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20 Business%20and%20Human%20Rights%20Treaty%20February%202015%20 FINAL%20FINAL.pdf (accessed 8 September 2021).

80 O Amao 'The African regional human rights system and multinational corporations: Strengthening host state responsibility for the control of multinational corporations' (2008) 12 *International Journal of Human Rights* 761 at 773.

81 T Chinyoka 'The Ogoni case revisited: Should corporations like states bear obligations to respect and protect human rights' (2017) 3 *Revista DIREITO UFMS* 45.

rights bodies at the regional level has warranted calls for a change of approach at the regional level.

A significant institution in this respect will be the proposed African Court of Justice and Human Rights, which was expanded through the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol).[82] The Malabo Protocol is significant in that it adds a third section to the proposed African Court of Justice and Human Rights (ACJHR), which had already formally anticipated the possibility of a regional tribunal with jurisdiction over human rights issues as well as general disputes arising between the African States.[83] The new regional court, once its statute enters into force through the required number of ratifications (15), will possess the competence to investigate and try international, transnational, and other crimes within its three separate chambers. These chambers are the General Affairs Section, the Human and Peoples' Rights Section and the International Criminal Law Section (African Criminal Court).[84] The merger of these three chambers addressing inter-state disputes, human rights, and penal aspects into a single court with a common set of judges represents a 'significant development in Africa and wider regional institution building and law-making'.[85]

The proposed African Criminal Court (ACC) contains some progressive features. Among them is the Court's proposed adjudicative authority over corporations. According to Article 46C of the ACC's Statute, which is annexed to the Malabo Protocol and entitled 'Corporate Criminal Liability', 'the Court shall have jurisdiction over legal persons, with the exception of States'.[86] This provision departs from other international criminal courts that limit jurisdiction to natural persons only.[87] The desirability of the Court in Africa may be said to have been

82 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014) https://www.african-court.org/wpafc/wp-content/uploads/2020/10/23-PROTOCOL-ON-AMENDMENTS-TO-THE-PROTOCOL-ON-THE-STATUTE-OF-THE-AFRICAN-COURT-OF-JUSTICE-AND-HUMAN-RIGHTS.pdf (accessed 22 November 2023).

83 KM Clarke, CC Jalloh & VO Nmehielle 'Origins and issues of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 1.

84 Art 46(C) of the Malabo Protocol.

85 As above.

86 Article 46(C)(1).

87 See eg art 25 of the Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute);

settled by virtue of the adoption of Article 46C in itself.[88] This reflects the increasing global convergence towards corporate criminal liability in African domestic systems.[89] However, differences exist in national models for corporate criminal liability, particularly in civil law countries that continue to reject the concept of corporate criminal liability and consider it antithetical to the individual-ethical concept of guilt upon which their criminal law is based.[90]

While the singular adoption of Article 46C in the Malabo Protocol may have a groundbreaking effect when it becomes operative, it is not without difficulties. Therefore, it is pertinent to look at some important aspects of the provision and its challenges. It is imperative to cite the provisions of Article 46C fully:

> Corporate Criminal Liability
>
> (1) For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
> (2) Corporate intention to commit an offence may be established by proof that it was the corporation's policy to do the act that constituted the offence.
> (3) A policy may be attributed to a corporation where it provides the most reasonable explanation of its conduct.
> (4) Corporate knowledge of the Commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

art 6 of the Statute of the International Tribunal for the Former Yugoslavia, UNSC Res 827, 25 May 1993, UN Doc S/RES/827 (1993); art 5 of the Statute of the International Tribunal for Rwanda UNSC Res 995, 8 November 1994, UN Doc S/RES/955 (1994).

88 J Kyriakakis 'Article 46C: Corporate criminal liability at the African Criminal Court' in Jalloh et al (n 83) 795.

89 See for instance sec 89 of the Nigerian Company and Allied Matters Act (2020) which provides that 'any act of the members in general meeting or board of directors, or a managing director while carrying on in the usual way of the business of the company shall be treated as the act of the company itself and the company is criminally and civilly liable to the same extent as if it were a natural person'. See also Botswana (sec 24 of the Penal Code 1964); Ethiopia (art 34 of the Criminal Code 2004); Ghana (sec 192 of the Criminal Procedure Code 1960); Kenya (sec 23 of the Penal Code 1930); Malawi (*Nyasaland Transport Company Limited v R* 1961 – 1963 ALR Mal 328 and sec 24 of the Penal Code); South Africa (sec 332 of the Criminal Procedure Act 1977) to mention a few.

90 For example, in Egypt where only natural persons can be criminally liable on the pretext that free will and awareness can only be exercised by human beings. See M Omara 'Criminal liability of companies (2008)' cited in Kyriakis (n 88).

(5) A corporation may possess knowledge even though the relevant information is divided between corporate personnel.
(6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural perpetrators or accomplices in the same crimes.

The first question of note that arises is the typology of entities that Article 46C contemplates. Subsection (1) provides for the jurisdiction of the ACC over 'legal persons, with the exception of states'. As an adjunct, Article 1 of the Protocol provides that the term 'person' as it appears in the statute 'means a natural or legal person', with the term not defined. By definition, the term legal person denotes organisations with some formal legal status in terms of enjoying some of the rights and responsibilities of legal personality. The most widely recognised form of corporation is a limited liability company given a legal status distinct to shareholders through incorporation. However, other entities such as unincorporated associations, trusts, trade unions, sporting clubs, partnerships, and non-governmental or religious organisations, have distinct legal personalities under municipal law. The legal status of particular entities varies from state to state.[91]

From the perspective of the ACC, the continuous use of 'corporation', 'corporate intention', and 'corporate knowledge' suggests that the concept of a legal person in the statute is limited to incorporated entities-artificial entities that are granted a legal existence distinct from that of the individual members through some domestic process of incorporation.[92] This approach is in tandem with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT),[93] which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

It is also important to understand attribution under the ACC. Attribution principles describe how the elements of substantive crimes and particular modes of participation in crimes can be attributed to a corporation. Such principles are necessary given that corporations can only act through human beings and that primary criminal law principles are generally defined in terms reflective of a human actor. Models of

91 UNODC 'Liability of legal persons, article 10 of the United Nations Convention against transnational organized crime, background paper by the Secretariat' UN Doc CTOC/COP/WG.2/2014/3 (6 June 2014) para 15.

92 UNODC 'Liability of legal persons, article 10 of the United Nations Convention against transnational organized crime, background paper by the Secretariat' UN Doc CTOC/COP/WG.2/2014/3 (6 June 2014) paras 16-17.

93 Adopted 22 May 1969 entered into force 17 January 1980, 1155 UNTS 331.

attribution of criminal liability to legal persons are widely categorised into 'derivative' or 'organisational'. Derivative models of attribution base the liability of the corporation entirely upon the liability derived from the actions of a specific individual or individuals rather than identifying the organisational lapse that created the liability.[94] An example is the concept of vicarious liability, which makes the legal person automatically criminally responsible for the wrongful conduct of any employee, officer, or agent if that conduct was committed within the scope of their employment.[95]

On the other hand, organisational models emerged in direct response to the derivative models of attribution, such as vicarious liability, which had become problematic.[96] The emergence of organisational models is also chiefly influenced by the growing influence of realist schools of thought regarding the ontology of corporate behaviour.[97] The organisational model school posits that the fault of an organisation is separate from the acts of any particular individuals within and is instead a feature that 'inheres in the organisation itself '.[98] In this model, the fault of the corporation does not lie in the decisions of a single organ or individual within the corporation but within the

> policies, standing orders, regulations and institutionalised practices of corporations ... [that are] ... authoritative, not because any individual devised them, but because they have emerged from the decision-making process recognised as authoritative within the corporation.[99]

Article 46C adopts an organisational model for corporate responsibility. This provision appears to have been inspired by the Colvinian model[100]

94 Kyriakis (n 88) 812.

95 For an exposition on common law expressions of vicarious liability see J Clough & C Mulhern *The prosecution of corporations* (2002) 79 -88.

96 Derivative models have been criticised for over-inclusivity, particularly when applied beyond strict liability and regulatory crimes, on the basis that it does not necessarily reflect any fault on the part of the organisation, which may well have taken steps to avoid wrongdoing by corporate officers. The concept has also been critiqued for under-inclusivity which flows from the fact that the corporations's liability still depends upon the wrongdoing of a single individual. See Kyriakis (n 88) 813-815; C Ntsanyu Nana 'Corporate criminal liability in South Africa: The need to look beyond vicarious liability' (2011) 55 *Journal of African law* 86, 98 -103; E Colvin 'Corporate personality and criminal liability' (1995) 6 *Criminal Law Forum* 1 at 15-18.

97 Kyriakis (n 88) 815.

98 Colvin (n 96) 22.

99 N Jorg & S Field 'Corporate liability and manslaughter: Should we be going Dutch?' (1991) *Criminal Law Report* 156 at 159.

100 Article 46C appears to be derived from, or at least influenced by, an approach developed by Professor Eric Colvin in 1995. See Colvin (n 96).

as the drafting appears to be similar.[101] But the ACC model may also be considered *sui generis*. This may enable the Court when it comes into operation, to develop jurisprudence best suited to the cases that come before it. Paragraph 2 of Article 46C provides that the corporation is to have intended an offence where it was the corporation's policy to do the act that constitutes the offence. The clause does not rely on the attribution of conduct to specific individuals, but rather situates corporate culpability within the corporate policies and knowledge that birthed the offence. Paragraph 3 provides that a policy may be attributed to a corporation if it provides the most reasonable explanation of its conduct. Based on its reliance on the Colvinian model, paragraph 3 is arguably intended to extend what can be considered by the Court in determining a corporation's policy to include a wider range of evidence strongly suggestive of the company's internal culture. Colvin explains it thus: 'intent is the rationale that presents the best explanation of the corporation's policies, rules, and practices considered as a whole'.[102] These provisions will go a long way to establish corporations' liability, which is often the problem with holding MNCs accountable under international law.[103]

Also noteworthy are paragraphs (4) and (5) of Article 46C, which address corporate knowledge. They provide that where knowledge is an element of an offence, such knowledge can be attributed to the corporation 'by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation'. This is easily achieved by the aggregation of knowledge across corporate personnel. Aggregation of knowledge can be a critical and legitimate strategy for locating faults in the organisational model approach. This is because it links to the broader theme of internal structures governing compliance. The concept of aggregated knowledge is based on the idea that an organisation may know a fact or situation even where such action or inaction is not within the knowledge of a single individual and that organisations have the capacity to establish information-sharing systems that will ensure compliance with the law.[104] The perceived information gaps between parent and subsidiary companies of MNCs, as has been revealed in Shell cases, reveal the need

101 Kyriakis (n 88) 816.

102 Colvin (n 96) 33-34.

103 Kyriakis advises however that the ACC should exercise care when interpreting provisions of the ACC because failure to do so may inadvertently encourage official but unrepresentative policies to be used to shield responsibility. See Kyriakis (n 88) 818.

104 As Kelly rightly argues, perspectives that shield corporations from culpability over knowledge on account that these organisations are too big to share in every knowledge wielded by individuals are disingenuous 'in the modern age, when technology can ensure that large multinational corporations know very well what's going on within their structures'. See MJ Kelly *Prosecuting corporations for genocide* (2016) 80-81.

to establish clear rules governing the attribution of knowledge. It is hoped that careful and calculated application of these provisions will guide the ACC properly in the future.

Also at the regional level, it is imperative to mention the potential that the use of sub-regional courts established to ensure the implementation of theobjectives of regional trade agreements may have on transnational corporate liability. Various authors discuss the importance of direct access to regional courts for economic integration, human rights and the environment.[105] Wiater explains that there are two basic models that prompt states to permit direct access to regional courts thus:

> In integration systems belonging to a first model, states consider the introduction of direct rights of action as the necessary consequence of a bundling of decision-making power and sovereignty at the regional level. The power of private parties to bring actions is explained by the direct, possibly onerous effects that this sovereignty has on the (economic) position of the business entity. An example of this model are the rights of action before the ECJ and the EFTA Court. A second model, on the other hand, sees the opening of direct access to regional courts as an instrument to mobilise the private sector to take economic or legal action and to accept co-responsibility for the integration process. The Economic Community of West African States, the East African Community, the Southern African Development Community, and the Caribbean Community can be assigned to this second model.[106]

While these models can be easily distinguished by applying Wiater's formula, there have been differing results. At the end of the first model is the maximum possible loss of state sovereignty and the attendant loss of procedural autonomy for business entities. At the other end of the spectrum, the state's motivation to give private business entities direct

105 See Nwankwo (n 4); E. Ekhator 'Multinational corporations, accountability and environmental justice: The move towards sub-regional litigation in Africa' (2022) 121 *German Journal of Comparative Law* 118; JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2015) 16 *Chicago Journal of International Law* 386; M Happold & R Radovic 'The ECOWAS Court as an investment tribunal' (2018) 19 *The Journal of World Trade and Investment* 95; MM Mbengue 'The protection of the environment before African Regional Courts and Tribunals' in E Sobenes et al (eds) *The Environment through the lens of International Courts and Tribunals* (2022) 289-324. For a justice approach analysis on international corporate personality, see A Okoye 'Corporate personality under international law and justice gaps: Could delocalisation prompt a potential role within African regional courts frameworks?' *AfronomicsLaw* 8 October 2021.

106 P Wiater 'Rights of action of business entities in regional economic systems' in M Bugenberg et al (eds) *European yearbook of international economic law 2020* (2022) 199.

access to a regional economic court is predominantly functional. The African and American systems of regional economic integration are examples of this motivation, and in this case, the introduction of individual rights of action resulted from the expression of a political turnaround. For these states, the process of empowering private business entities with procedural rights was one essential facet of a deliberately initiated, overarching push towards deepening economic integration by means of judicialization.[107] While these regional courts serve as potential forums for the resolution of investment disputes by 'natural or legal persons' such as MNCs, it remains to be seen whether the courts will be of effective use in the near future as there still exist several procedural and jurisdictional limitations to individual access to regional courts. Ekhator suggests that African regional organisations may wish to:

> mend its relevant treaties and establish a sub-regional environmental court with explicit jurisdiction on environmental issues. Presently, the Revised ECOWAS Treaty requires Member States to protect the environment and ensure the sustainable use of its natural endowments or resources. Thus, any new sub-regional environmental court should have explicit jurisdiction on the above issues. Individuals, communities, and NGOs should be garnished with the requisite locus standi to bring cases before a proposed sub-regional environmental court.[108]

4 Conclusion

While debates over the best approach to regulating MNCs continue to develop, recent judgements in European domestic courts represent a glimmer of hope for litigants from African states. Although expectations that emerging jurisprudence represents a silver bullet that will solve the international law conundrum of corporate accountability may be premature. Nevertheless, these judgements serve as a roadmap towards building what may eventually become global standards applicable across jurisdictions, including the US, where the courts have remained conservative in granting foreign litigants any remedy over tortuous acts that violate international law.

At the regional level, there appears to be a renaissance, at least among regional institutions under the auspices of the AU, to address the problem of corporate accountability amidst continued violations of human rights and the environment as member states look to develop their economies. The African States have so far proven incompetent to regulate these

107 Wiater (n 106) 223.

108 Ekhator (n 105) 23.

corporations through courts or other regulatory bodies domestically. Consequently, the AU and its institutions are attempting to fill the gap. The proposed ACC represents this attempt. However, the Court will only be able to function effectively with the cooperation of AU member states. Article 46H of the ACC envisages that the Court shall function similarly to national justice systems. Thus, African states must be deliberate in ensuring that corporate criminal liability is established under national law, although the ACC statute does not oblige states to modify their substantive criminal law to reflect its elements of crimes and criminal responsibility. Challenges over enforcement are also likely to be an issue under the ACC regime when it comes into effect. Therefore, states must take the requisite steps to strengthen national judicial systems. The tools available at the regional level, whether by judicial means or otherwise, are robust, but they must be matched by seriousness on the part of the states. Until African states are considered severe, litigants may have found respite in foreign courts if recent decisions were followed to a logical end.

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