

A CASE FOR ADDITIONAL CRIMES TRIABLE BEFORE THE INTERNATIONAL CRIMINAL COURT: THE AFRICAN CONTEXT

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ABSTRACT

This article shows the prevailing weakness of the International Criminal Court's (ICC) failure to try crimes committed by Multi-National Corporations (MNCs). The article examines these crimes, giving their inception, the main actors as well as the effects that have been suffered over the years. It shows reasons as to why these crimes should be considered as part of ICC jurisdiction. This article also justifies why the ICC ought to handle these cases, despite having other alternatives that can be considered. The article outlines various case scenarios in the African context together with recommendations and the way forward. In conclusion, the article asserts that Multi-National Corporations should be held liable by the ICC for their crimes against humanity and the environment in general.

INTRODUCTION

The idea of an international court that would adjudicate over the crimes against humanity was mooted after the Yugoslavia and Rwanda massacres.¹ This led to the formation of the ICC in 1998 and later its commencement of operations in 2002.² It was also an indication of

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¹ James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 2–3 (2009).

² Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (June 25, 2020), <https://www.cfr.org/backgrounder/role-international-criminal-court>.

worldwide efforts to promote respect for human dignity and rule of law. African countries were enthusiastic as this would relieve them of the political and economic burden of prosecuting international crimes as well as complimenting national courts.³ From the onset, environmental and economic crimes were not considered.⁴ Many human rights abuses are predominantly carried on by MNCs that have their main offices in other countries.⁵ Unfortunately, these and the environmental crimes go unpunished. These include the dumping of poisonous waste, land grabbing, illegal fishing, illegal trading in wildlife, and corruption of political leaders, tax evasion and many more.⁶ Human rights observers like Human Rights Watch and Oxfam have long criticized corporations operating in war torn countries for maximizing profits without respect for human rights.⁷ Funding rebels, environmental crimes, and corruption to attain favors among others are some of the crimes that these organizations commit.⁸

The criminal activities by MNCs in Africa should be addressed. The preamble to the Rome Statute emphasizes that there is a determination to create a permanent ICC.⁹ This is however not seen as the perpetrators

³ Hlawulani Mkhabela, *Africa and the ICC Going Forward*, IFRI, 2 (Jan. 17, 2017), <https://www.ifri.org/en/publications/editoriaux-de-lifri/lafrique-questions/africa-and-icc-going-forward>.

⁴ *Id.* at 3.

⁵ Miguel Juan Taboada Calatayud, Jesus Campo Candelas, & Patricia Perez Fernandez, *The Accountability of Multinational Corporations for Human Rights' Violations*, 64/65 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL, 171, 172 (Spain).

⁶ Collins Odote, *Environmental Crime In Africa: Issues, Challenges and The Role of Prosecutors* (March 4, 2014), https://www.iap-association.org/getattachment/Conferences/Regional-Conferences/Conference-Dokumentation-Zambia/3AIORC_Zambia_P1_Collins_Odote.pdf.aspx [hereinafter Collins]; *The case against land grabbing: How corporations and investors are pushing people off their land and wreaking havoc on the environment*, FRIENDS OF THE EARTH, https://foe.org/wp-content/uploads/2017/legacy/Issue_Brief_3_-_The_case_against_land_grabbing.pdf (last visited Feb. 19, 2021) *Corruption: Multinationals in developing countries – who's accountable?*, GLOBAL GOVERNMENT FORUM (July 17, 2017), <https://www.globalgovernmentforum.com/corruption-multinationals-in-developing-countries-whos-accountable/>.

⁷ Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUMAN RIGHTS BRIEF 1 (2004).

⁸ Phumlani Majavu, *The Role of Natural Resources in Civil Wars*, GLOBAL POLICY FORUM (May 3, 2010), <https://archive.globalpolicy.org/the-dark-side-of-natural-resources-st/other-articlesanalysis-and-general-debate/49048-the-role-of-natural-resources-in-civil-wars.html>; Irene di Valvasone, *Holding multinational corporations accountable for the commission of international environmental crime*, CENTRE FOR AFRICAN JUSTICE, PEACE AND HUMAN RIGHTS, <http://centreforafricanjustice.org/holding-multinational-corporations-accountable-for-the-commission-of-international-environmental-crime/>; *Multinational Corporations, Governance Deficits, and Corruption*, GDRC, https://www.gdrc.org/u-gov/doc-business_gg.html (last visited March 10, 2021).

⁹ Rome Statute of the International Criminal Court, Preamble (July 12, 1999).

of these crimes are more likely to remain behind the scenes, issuing secret orders or supplying the means to commit the crime.¹⁰ Environmental and economic crimes must be taken to be some of the most serious crimes given their direct impact on peoples' livelihoods. These environmental and economic crimes have similar effects on the people as compared to the crimes under the jurisdiction of the ICC.¹¹ This is because they are crimes of a serious nature which have a widespread effect on many people.¹² The gravity of these crimes therefore calls for ICC intervention as it will add the much-needed international character to such crimes. MNCs provide employment to Africans, contribute to GDP through tax and are very active in social charitable activities.¹³ However, there needs to be a balance between promoting economic growth and respect for human rights and the law by these companies.

I. HISTORY OF MULTINATIONAL CORPORATIONS

The earliest historical origins of Multi-National Corporations (MNCs) “can be traced to the major colonizing and imperialist ventures from Western Europe, notably England and Holland.”¹⁴ The first MNCs were founded to “undertake colonial expeditions at the behest of their European monarchical patrons.”¹⁵ A majority of European colonies were administered by chartered MNCs and examples of such corporations include the British East India Company, Swedish Africa Company, German East Africa Company and Imperial British East Africa Company

¹⁰ Graff, *supra* note 7, at 3.

¹¹ See generally Alessandra Mistura, *Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 COLUMBIA J. OF ENV'T L. 182 (2019).

¹² *Id.*

¹³ Tejvan Pettinger, *Multinational Corporations in Developing Countries*, ECONOMICS HELP (March 17, 2019), <https://www.economicshelp.org/blog/1413/development/multinational-corporations-in-developing-countries/>; Koen De Backer, Sébastien Miroudot, & Davide Rigo, *Multinational enterprises in the global economy: Heavily discussed, hardly measured*, VOX EU (Sept. 25, 2019), <https://voxeu.org/article/multinational-enterprises-global-economy>; Lok Yiu Chan, *Corporate Responsibility of Multinational Corporations*, UW TACOMA DIGIT. COMMONS, 7 (2014).

¹⁴ Moiseenko Ksenia, Ovseets Maria, and Kostikova Olga, *Multinational Corporations* PLEKHANOV RUSS. UNIV. OF ECON. (2016).

¹⁵ *Multinational Background Information*, BDO, <https://www.bdo-ea.com/en-gb/microsites/sample-bdo-investment-site/multinationals/multinational-background-information>, (last visited March 10, 2021) [hereinafter BDO].

among others.¹⁶ They exploited colonial resources and labor, investing the resultant profits in their home countries.¹⁷ All this was done without any sort of legal controls on these companies and therefore gross abuse of human rights, plundering of resources and so on took place.¹⁸

In 1906, there were two or three leading firms with assets of up to USD500 million, however, by 1971 there were 333 of such companies, holding billions of dollars' worth of assets.¹⁹ All Africa benefited was suffering through environmental crimes and corrupting African leaders who never fought for the African cause.²⁰ In all this, these companies have been involved in a lot of environmental and economic crimes that require immediate attention by the legal tribunals of this world.²¹ Examples include illegal trade in wildlife, corruption, illegal trade in ozone-depleting substances, and the dumping and illegal transport of various kinds of hazardous waste illegal.²² Other crimes include unregulated and unreported fishing, as well as illegal logging and trading in timber.²³ All these crimes directly affect the economy of the continent, as well as the gross abuse of human rights involved when committing the crimes.²⁴ There is a need to bring such crimes and MNCs under the jurisdiction of the ICC.

These companies participate in gross abuse of human rights.²⁵ Some of them go as far as offering African leaders various bribes in form of benefits.²⁶ These require immediate attention by international tribunals.²⁷ In the same context, others compare current activities of the

¹⁶ BDO, *supra* note 15; Buluda Itandala, *African Response to German Colonialism in East Africa: The Case of Usukuma, 1890-1918*, 20 UFAHAMU: A J. OF AFR. STUD. 3, 3–4 (1992).

¹⁷ BDO, *supra* note 15.

¹⁸ Kamari Maxine Clarke, *Treat Greed in Africa as a War Crime*, N.Y. TIMES (Jan. 29, 2013), <https://www.nytimes.com/2013/01/30/opinion/treat-greed-in-africa-as-a-war-crime.html> [hereinafter Clarke].

¹⁹ *Special Political and Decolonization Committee*, MUNUC 33 ONLINE 40, https://munuc.org/wp-content/uploads/2020/11/SPECPOL_FINAL_Online.pdf (last visited March 10, 2021).

²⁰ *Multinational corporations and corrupt African leadership*, MMEGIONLINE (Jan. 22, 2016), <https://www.mmegi.bw/index.php?aid=57161&dir=2016/january/22>.

²¹ Clarke, *supra* note 18.

²² Collins, *supra* note 6.

²³ *Id.*

²⁴ Prasadi Wijesinghe, *Human Rights Violations by Multinational Corporations: Nestle as the culprit* 3–9, (March 8, 2018), <https://ssrn.com/abstract=3136321> [hereinafter Wijesinghe].

²⁵ *Id.* at 3.

²⁶ *Foreign Firms Linked to Bribery, Graft Claims Hurting Africa's Image*, THE EAST AFRICAN (March 14, 2015), <https://www.theeastafrican.co.ke/tea/news/east-africa/foreign-firms-linked-to-bribery-graft-claims-hurting-africa-s-image--1333674>.

²⁷ Clarke, *supra* note 18.

MNCs to neo-colonialism²⁸ and see it as an indication of lack of independence in Africa.²⁹ Multinational Corporations have for long used the weaknesses in the legal regime to commit these crimes.³⁰ The absence of corporate personality in international law means that these companies cannot be checked legally on their activities by any authority or tribunal.³¹ They therefore use this gap to commit economic and environmental crimes and this brings untold consequences to Africans as well as the environment.³² There is a need to bring the history to an end and start a new chapter where these MNCs' activities are checked and their crimes brought under the jurisdiction of the International Criminal Court.

II. CURRENT STATUS OF MULTINATIONAL CORPORATIONS

The number of MNCs operating in Africa has increased tremendously.³³ MNCs from countries like China, India, United States, Brazil and Europe have long known about this potential and have made significant investments across Africa.³⁴ Some of them are attracted by African leaders to “invest” in Africa and with this, MNCs' activities have hardly found any legal controls.³⁵ This is because they come with a lot of “favor” from the various host governments.

Governments of developing countries have been subsequently pushed into unfavorable agreements and citizens do not have economic rights.³⁶ This is because MNCs and investors turnover national sovereignty to themselves, enjoying healthy returns on their investments at the expense of the citizens in developing countries.³⁷ At a summit in 2013, African

²⁸ Abayomi Azikiwe, *Burkinabe Masses Rise Up Against Neo-colonial Rule*, PAMBAZUKA NEWS (Nov. 5, 2014), <https://www.pambazuka.org/global-south/burkinabe-masses-rise-against-neo-colonial-rule>.

²⁹ Oseni Taiwo Afisi, *Neocolonialism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/neocolon/> (last visited March 10, 2021).

³⁰ Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 227 (2008).

³¹ *Id.* at 229.

³² Clarke, *supra* note 18.

³³ *5 Multinational Corporations Making Significant Investments in Africa*, DEMAND AFRICA, <https://www.demandafrica.com/travel/culture/5-multinational-corporations-making-significant-investments-in-africa/> (last visited Feb. 19, 2021).

³⁴ *Id.*

³⁵ *See CEO Investment Summit and Investment & Business Leader Awards 2015: Growing Africa's Businesses and Financing the Continent's Development*, OSAA (Sept. 24, 2015), <https://www.un.org/en/africa/osaa/events/2015/aisummit20150924.shtml>.

³⁶ *Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries*, AFRICA ON THE BLOG, <https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/> (last visited Feb. 19, 2021).

³⁷ *Id.*

Union leaders suggested the expansion of the African Court on Human and People's Rights' criminal jurisdiction, in order to include liability for corporations which illicit exploitation of natural resources and the trafficking of hazardous waste.³⁸ However, it is hard to fathom Africans, especially leaders, prosecuting or allowing the prosecution of MNCs. This loyalty exists because these companies majorly contribute to the African economy and any plans or ideas to restrict these activities to be met with serious political opposition.³⁹

In 2011, the United Nations Guiding Principles on Business and Human Rights were unanimously passed.⁴⁰ They seek to provide an authoritative global standard for preventing and addressing the risk of adverse Human Rights impacts linked to business activity.⁴¹ Such a development shows the international recognition of the need to control activities of MNCs, especially in the Human Rights perspective. However, states are at times unable to create or enforce such regulations.⁴² Further, these UN guiding principles are soft law and therefore not binding because corporations are creatures of national law.⁴³ These companies also employ a huge number of people who, irrespective of poor working conditions see this as survival.⁴⁴ For example in South Africa, fifteen international companies have been reported to employ over one million people and the situation is not different in other African countries.⁴⁵ According to the 2010 Oxfam report, Africa was cheated out of US \$11

³⁸ Clarke, *supra* note 18.

³⁹ Chloé Maurel, *Will there be a UN treaty to punish the abuses committed by multinationals?* EQUAL TIMES (July 26, 2018), <https://www.equaltimes.org/will-there-be-a-un-treaty-to#.YEb4XWhKiM8>; Hans Wetzels, *Countries propose a treaty to end corporate impunity*, AFRICA RENEWAL (April 9, 2019), <https://www.un.org/africarenewal/magazine/april-2019-july-2019/countries-propose-treaty-end-corporate-impunity>.

⁴⁰ *The UN Guiding Principles on Business and Human Rights: An Introduction*, THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Feb. 18, 2021).

⁴¹ *Id.*

⁴² Flor Gonzalez Correa, *How Multinational Companies Keep Avoiding the Threat of Regulation*, THE CONVERSATION (March 17, 2015 11:12 AM), <https://theconversation.com/how-multinational-companies-keep-avoiding-the-threat-of-regulation-38795>.

⁴³ Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L. J. 591, 592 (2016).

⁴⁴ Laura Counts, *Do multinational corporations exploit foreign workers? Q&A with David Levine*, BERKELEYHAAS (March 11, 2020), <https://newsroom.haas.berkeley.edu/do-multinational-corporations-exploit-foreign-workers/>.

⁴⁵ NIKKICHALFORDWEALTH, *These 15 SA companies employ 1 million people*, CHALFORD WEALTH MANAGEMENT (June 9, 2015), <https://www.chalfordwealth.co.za/these-15-sa-companies-employ-1-million-people/>.

billion through reduction of tax bills and other tricks by MNCs.⁴⁶ These companies leave the continent grappling with health complications, political problems and economic instability.⁴⁷ They continue to make huge profits with little regard to human rights and the dignity of Africans.⁴⁸ There is a grave need for accountability.

III. THE CASE FOR CRIMINALIZING MNC ACTIVITIES BEFORE THE ICC

MNCs are one of the biggest perpetrators of environmental crimes in Africa but there is no law that brings them to book.⁴⁹ Furthermore, corporations do not only directly commit environmental or economic crimes but they can also facilitate other crimes like terrorism and dealing in contraband.⁵⁰ A case is made on why MNCs' activities in Africa should be subject to legal checks since it is the Africa continent that suffers from the effects.⁵¹ On the other hand, these companies' home countries never experience such effects.⁵²

Environmental crimes are simply crimes against the environment for example pollution, deforestation, swamp reclamation, discharge of poisonous fumes, dumping of wastes and many more.⁵³ These crimes have been credited with causing some of the most dangerous health risks against humans.⁵⁴ The health complications lead to deaths, disabilities, and in most cases, the African governments incurring a lot of expenses

⁴⁶ Multinational Companies Cheat Africa Out of Billions of Dollar, OXFAM INT'L (JUNE 1, 2015), <https://www.oxfam.org/fr/node/10394>.

⁴⁷ Kendyl Salcito et al., *Multinational corporations and infectious disease: Embracing human rights management techniques*, PUBMED.GOV. (Nov. 3, 2014), <https://pubmed.ncbi.nlm.nih.gov/25671119/>.

⁴⁸ Peter T. Muchlinski, *Human Rights and Multinationals: Is There a Problem?* 77 INT'L AFFAIRS 31, 35, 40 (2001).

⁴⁹ O.E. Udofia, *Imperialism in Africa: A Case of Multinational Corporations*, 14 J. OF BLACK STUD. 353, 367 (1984); *see generally* Hakeem O. Yusuf & Kamil Omoteso, *Combating environmental irresponsibility of transnational corporations in Africa: an empirical analysis*, 21 LOC. ENT 1371–86 (2016).

⁵⁰ Franziska Oehm, *Thinking globally, acting globally*, VÖLKERRECHTSBLOG (May 31, 2016), <https://voelkerrechtsblog.org/de/thinking-globally-acting-globally-ii/>.

⁵¹ *Id.*

⁵² Irwin Arief, *If Africa is so Rich, Why is it so Poor?* PASS BLUE INDEP. COVERAGE OF THE UN (May 18, 2015), <https://www.passblue.com/2015/05/18/if-africa-is-so-rich-why-is-it-so-poor/>.

⁵³ Carole Gibbs & Rachel Boratto, *Environmental Crime*, OXFORD RES. ENCYCLOPEDIAS (March 29, 2017), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-269>.

⁵⁴ *7 million premature deaths linked to air pollution*, WORLD HEALTH ORGANIZATION [WHO] (March 25, 2014), <https://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>.

trying to combat such occurrences.⁵⁵ In 2010, the South African government handled a case where health care waste was dumped all over Free State.⁵⁶ According to Amnesty International, Shell and ENI were responsible for 550 Oil spills in the Niger Delta in 2014.⁵⁷ “Such crimes against environment and nature are frequently linked and part of the same criminal enterprise(s) that are already codified as ‘war crimes’ or ‘crimes against humanity’, as incorporated by the Rome Statute and the ICC.”⁵⁸ MNCs are a major cause of all this and therefore setting up mechanisms to prosecute them for their role in environmental crimes will help in establishing a safer environment by controlling such activities.⁵⁹

For instance, there is new evidence suggesting that “environmental crime including pervasive exploitation and illegal trade in natural resources is helping to push some people out of sub-Saharan Africa.”⁶⁰ Prosecuting MNCs for environmental crimes will therefore ensure that the health risks and effects associated with these activities are dealt with. It will also enable the people to freely enjoy their right to livelihood.

Reports have showed that many of these MNCs get involved in gross human rights abuses.⁶¹ Amnesty international reported that corporations do this by exploiting weak and poorly enforced domestic regulations on people and communities.⁶² Human rights watch also reported that MNCs carry out many activities that devastate vulnerable communities.⁶³ These are inflicted directly on Africans for example forced labor with little or no

⁵⁵ *Niagara’s state oil company and partners spent \$360 million on Delta cleanup: NNPC*, REUTERS (February 17, 2020), <https://www.reuters.com/article/us-nigeria-oil-environment-idUSKBN20B1YL>.

⁵⁶ *Compass Waste Services (PTY) LTD v. The Mec: Department of Health of the Free State Province*, Case No: 4411/2011, 4–7 (S. Afr.), <http://www.saflii.org/cgibin/disp.pl?file=za/cases/ZAFSHC/2012/19.html&query=%20health%20care%20waste>.

⁵⁷ *Oil spills keep devastating Niger Delta*, DW, <https://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732> (last visited Feb. 6, 2021).

⁵⁸ Muhamed Sacirbey, *Should Crimes Against the Environment and Animals Deserve International Prosecution?* HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/crimes-against-environment-animals-deserve-international-prosecution_b_8171798.

⁵⁹ Oehm, *supra* note 50, at 10.

⁶⁰ Wachira Kigotho, *Environmental Crimes Change Face of Sub-Saharan Africa*, BLOOMBERG L. (Oct. 6, 2015), https://www.bloomberglaw.com/product/blaw/document/NVRQ1X3H0JK0?criteria_id=a8817d1f870312ea42d6840cf8811b51.

⁶¹ *Corporations*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/corporate-accountability/>, (last visited Feb. 6, 2021).

⁶² *Id.*

⁶³ *Business*, HUM. RTS. WATCH, <https://backend.hrw.org/topic/business> (last visited March 13, 2021).

wage, land grabbing, and torture to mention but a few.⁶⁴ These acts constitute a direct abuse of international instruments like the International Convention on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).⁶⁵ In *Bodo Community v Royal Dutch Shell*, the court addressed this issue.⁶⁶ “Oil poured from faults in the Trans-Niger Pipeline for weeks, covering the area in a thick slick of oil through spilling as well as the Niger Delta in 2008 and 2009. The 15000 Plaintiffs asked for compensation for losses suffered to their health, livelihoods and land as well as a cleanup for the oil pollution. In 2015, Shell accepted responsibility for the spill and agreed to an out of court settlement of Fifty five million pounds.”⁶⁷ In *Presbyterian Church of Sudan v. U.S.C.A*, Talisman Energy faced legal action for facilitating crimes against humanity in South Sudan in 1998.⁶⁸ This led to unprecedented loss of property and health complications for the people in these areas as some were forced to leave their land and property get destroyed.⁶⁹ These are all in contravention of various international and regional laws and guidelines.⁷⁰

Unfortunately, Multinational Corporations always survive because they have no serious laws that bind them, only soft laws.⁷¹ This exposes the people of Africa to various abuses by these companies.⁷² Since there is no restriction, most of the money they earn is spent in trying to heal from these human rights abuses and not economic development.⁷³ It has been reported that one of the oil giants Exxon began a major effort to

⁶⁴ *Time to Recharge*, AMNESTY INT’L, 18 (November 2017), <https://www.amnesty.org/en/documents/afr62/7395/2017/en/>.

⁶⁵ G.A. Res. 2200A (XXI), art. VII, (Dec. 16, 1966), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. XXIV, art. XXV (Dec. 10, 1948).

⁶⁶ *The Bodo Community v. The Shell Petroleum Development Company of Nigeria Ltd.* [2012] QB Claim 1 (Eng.).

⁶⁷ *Id.*

⁶⁸ *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

⁶⁹ *Sudan: Talisman Energy Must do More to Protect Human Rights*, AMNESTY INT’L (May 1, 2001, 12:00 AM), <https://www.amnesty.org.uk/press-releases/sudan-talisman-energy-must-do-more-protect-human-rights>.

⁷⁰ *See* G.A. Res., *supra* note 65, art. 6.

⁷¹ *Kiobel v. Royal Dutch Petroleum Co.* 621 F.3d 111, 141, 149 (2d Cir. 2010).

⁷² Karen McVeigh, *World is Plundering Africa's Wealth of 'Billions of Dollars a Year'*, THE GUARDIAN (May 24, 2017, 2:00), <https://www.theguardian.com/global-development/2017/may/24/world-is-plundering-africa-wealth-billions-of-dollars-a-year>.

⁷³ Mark Bou Mansour, *\$427bn Lost to Tax Havens Every Year: Landmark Study Reveals Countries' Losses and Worst Offenders*, TAX JUSTICE NETWORK (NOV. 20, 2020), <https://www.taxjustice.net/2020/11/20/427bn-lost-to-tax-havens-every-year-landmark-study-reveals-countries-losses-and-worst-offenders/>.

manufacture doubt about the reality of global warming.⁷⁴ It lobbied to block federal and international action to control greenhouse gas emissions and helped erect a vast edifice of misinformation on climate change that stands to this day.⁷⁵ Such an atmosphere is a clear explanation as to why there is need to establish mechanisms of control and supervision over these companies' activities, given their influential power and economic might. Environmental crimes are a reality in Africa and the attention of the law is needed so that such effects are curbed. Multinational Corporations work in an environment where they have no regulations, laws and/or bodies responsible for supervising their work and ensuring that they follow the law.⁷⁶ Multinational and transnational companies do not exist as an entity defined or recognized by law.⁷⁷ They are made up of complex structures of individual companies with an enormous variety of inter-relationships.⁷⁸ This is mostly attributable to the fact that they operate in many parts of the world and therefore matters of locus, jurisdiction and liability may be hard to ascertain.⁷⁹

It was reported in 2015 that Africa is losing more than \$50bn (£33bn) every year in schemes aimed at tax avoidance, impeding development projects and denying poor people access to crucial services.⁸⁰ This explains why most of these corporations engage in impunity. MNCs present specific regulatory problems to ensure socially responsible conduct, particularly when they operate in developing countries where the regulatory mechanisms are relatively weaker.⁸¹ Such weaknesses are attributable to forces like corruption, poverty, absence of political will among other reasons all of which somewhat affect any sort of enforcement against MNCs.⁸² There should be a legal regime, with prosecution and punishment, for these multinationals for their role in environmental and economic crimes.

⁷⁴ Jenny White, *2016 Top Ten Corporate Criminals*, GLOBAL EXCHANGE (2018), <https://globalexchange.org/campaigns/corporatecriminals2016/#Exxon>.

⁷⁵ *Id.*

⁷⁶ Amao O Olufemi, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 J. AFR. L. 89, 96 no.1 (2008).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Mark Anderson, *Africa Losing Billions from Fraud and Tax Avoidance*, THE GUARDIAN (Feb. 2, 2015, 10:43), <https://www.theguardian.com/global-development/2015/feb/02/africa-tax-avoidance-money-laundering-illicit-financial-flows>.

⁸¹ Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project*, 16 AFR. J. INT'L & COMP. L. 83 (2008).

⁸² *See id.* at 83, 86, 91.

Multinationals have been cited as chief sponsors of callous corruption endeavors by many African leaders.⁸³ They promise such leaders favors and benefits from projects, with conditions.⁸⁴ Such conditions entail various activities like land grabbing, freedom to dump waste, enacting laws favoring the MNCs activities, at the expense of indigenous people and many others.⁸⁵ It was observed that some MNCs in Africa such as Halliburton in Nigeria, Mabey & Johnson in countries such as Ghana, Madagascar, Angola, Mozambique and South Africa among others have been involved in various corrupt practices in collaboration with corrupt government officials.⁸⁶ These activities lead to deficits on the national GDP and service provision of government is curtailed.⁸⁷ It has been alleged that Western countries led by the US, Britain, France and lately by China, continue to sell weapons to horrible dictators to crash democratic forces throughout the continent using these companies.⁸⁸ The additional military power adds political power in the African setting and leaders can therefore use their positions to allow illicit activities by these companies, with the least concern for fellow Africans.⁸⁹ However, the fact that environmental and economic crimes are not under the ambit of international courts yet the local mechanisms are full of corruption means such corporations are answerable to no one.⁹⁰ This shows the urgent need to prosecute these companies.

MNCs have been documented to plunder African resources.⁹¹ Foreign multinational and foreign owned corporations have been scrambling for Africa's resources.⁹² As a result of bad political leadership that is mainly interested in short-term gains, Africa's resources are being used for individual enrichment and preservation of political elitism.⁹³ This shows a serious problem as the resource misuse involves the African leaders who

⁸³ Richard E. Brissel & Michael S. Radu, *Africa in the Post-Decolonization Era*, 29 AFR. STUD. REV. 125 vol. 29, no. 4 (1986).

⁸⁴ Mark Thomas, *Minerals in Africa: A Curse or an Excuse for Plunder*, USPIKED (Aug. 2015), <https://www.uspiked.com/editorial/2015/08/21/minerals-in-africa-a-curse-or-an-excuse-for-plunder/>.

⁸⁵ *See id.*

⁸⁶ Zekeri Momoh, *Multinational Corporations (MNCs) and Corruption in Africa*, 5 J. MGMT. AND SOC. SCI. 80 no.2 (2016).

⁸⁷ Solly Rakgomo, *Multinational Corporations and Corrupt African Leadership*, MMEGIONLINE (Jan. 22, 2016), https://www.mmegi.bw/index.php?aid=57161&dir=2016/january/22_.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Franziska Oehm, *Thinking Globally, Acting Globally*, VOLKERRECHTSBLOG (May 31, 2016), https://intr2dok.vifa-recht.de/receive/mir_mods_00003053.

⁹¹ Christopher Oyier, *Multinational Corporations and Natural Resources Exploitation in Africa: Challenges and Prospects*, 1(2) J. Conflict Mgmt. & Sustainable Dev. 69, 74 (2017).

⁹² Thomas, *supra* note 84.

⁹³ *Id.*

are in a better position to fight this.⁹⁴ They have also been showed as eminent perpetrators of crimes against the environment and human resources.⁹⁵ Richly endowed with natural resources, African states often need the investment of multinational corporations in order to harness these resources.⁹⁶ Yet, many African states lack the capacity to regulate multinational corporations effectively.⁹⁷ Unsurprisingly, therefore, multinational corporations are able to make significant profits with little regard for or even complicity in the violation of human rights and environmental laws.⁹⁸

Prosecuting Multinationals will not only help fight the prevalence of environmental crimes in Africa but also conserve the environment and protect African resources.⁹⁹ It is an internationally recognized right that all people are entitled to live in a clean and healthy environment which entails that a person will only remain healthy if he is living in the healthy environment and his surroundings are clean.¹⁰⁰ We need fresh air to breathe; fresh water to drink, shelter to live, etc.¹⁰¹ All this is becoming mythical in Africa due to MNCs' activities.¹⁰² There is also need for African states to start benefiting directly from their resources.¹⁰³ Introducing a mechanism of prosecuting MNCs in the frame of the ICC will ensure that the living standards of Africans improve.

IV. LESSONS FROM OTHER LEGAL REGIMES

The ICC would be best suited to try Multinationals and have jurisdiction for economic and environmental crimes.¹⁰⁴ The ICC was established in 1998 to ensure that crimes against humanity and mass

⁹⁴ See Zekeri, *supra* note 86 at 92, 93.

⁹⁵ *Id.* at 92.

⁹⁶ Isaac Terungwa Terwase, Cyril Iligh, Felix C. Asogwa & Clifford Terhide Gbasha, *Conflict, War, and Peace Building in Africa as Emerging Economy* 1 CCU J. HUMAN. 1, 3, 10 no. 1 (2019).

⁹⁷ See *Corporations*, *supra* note 61.

⁹⁸ See *id.*

⁹⁹ Matiangai V.S. Sirleaf, *Prosecuting Dirty Dumping in Africa*, in 20 THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT 553, 554–55 (Cambridge U. Press 2019).

¹⁰⁰ *Right Clean Environment*, L. Tchr. (July 3 2019), <https://www.lawteacher.net/free-law-essays/human-rights/right-to-clean-environment.php>, see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

¹⁰¹ *Id.*

¹⁰² Oyier, *supra* note 91, at 78.

¹⁰³ Alex Blair, *Africa's Natural Resources: 3 Things Governments Need to Get Right*, OXFAM, <https://politicsofpoverty.oxfamamerica.org/africas-natural-resources-3-things-governments-need-to-get-right/> (last visited Mar. 15, 2021).

¹⁰⁴ Sacirbey, *supra* note 58.

atrocities do not occur with impunity.¹⁰⁵ The court has existed for 19 years and its mandate has a criminal element about it.¹⁰⁶ However, it is important to appreciate the established mechanisms that have been employed by other regions to make MNCs accountable. Lessons can be drawn out of the discussion on how to go about the aspect of making these companies accountable. New alternatives may also be considered, so that the ICC acts as the last resort.

A. *The Alien Tort Claims Act (ATCA) of the United States of America*

This Act can also be referred to as the Alien Tort Statute.¹⁰⁷ This was an act passed in 1789 and grants jurisdiction to United States Federal Courts over any civil action by an alien for tort.¹⁰⁸ The ATCA allows foreigners to sue foreign companies and individuals who are not American citizens but are in America for any violations of the law.¹⁰⁹ This Act/Statute has over the years been used to bring MNCs before courts for the offences they commit.¹¹⁰

In *Doe v. Unocal and Total*, the defendants were charged with abuses of human rights including forced labor, rape, torture and murder committed during the construction of the Yadana pipeline in Myanmar.¹¹¹ The court, in finding for the plaintiffs held that the Alien Tort Statute empowered American courts to handle matters that involve non-citizens.¹¹² This case represents various criminal activities that MNCs are involved in today like forced labor, forced relocation and torture.¹¹³ The defendants were found liable and ordered to pay compensation.¹¹⁴ This is a clear example of a corporation that is held accountable for its human rights abuses.

In *Wiwa v. Royal Dutch Petroleum Company*, the United States Court of Appeal stated that the interest of the US in pursuing claims committed

¹⁰⁵ *Understanding the International Criminal Court*, ICC, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited Mar. 6, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ STEPHEN P. MULLIGAN, CONG. RESEARCH CTR., *THE ALIEN TORT STATUTE (ATS): A PRIMER* 1, n.2 (2018).

¹⁰⁸ *Id.* at 1.

¹⁰⁹ John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. CHAMBER COMM. (Oct. 8, 2002, 8:00 PM), <https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation>.

¹¹⁰ *See id.*

¹¹¹ *Doe v. Unocal Corp.*, 395 F.3d 932, 936–37 (9th Cir. 2002).

¹¹² *Id.* at 946, 976–77 (citing *Kadic v. Karadzic*, 70 F.3d 232, 234–44 (2d Cir. 1995)).

¹¹³ *Id.* at 942.

¹¹⁴ *Id.* at 962–63.

outside America was vested under the ATCA.¹¹⁵ This Act therefore provides an easier route for any individual who has a claim against any MNC to sue under American jurisdiction.¹¹⁶ African countries can therefore establish written laws that can be used to make MNCs accountable.¹¹⁷ Such laws also empower courts to handle such matters.¹¹⁸ The Rome Statute should therefore be amended to add these crimes to the jurisdiction of the ICC so that the MNCs are subject to the court.¹¹⁹

B. *Multilateral Environmental Agreements*

A Multilateral Environmental Agreement (MEA) is a legally binding agreement between three or more states relating to the environment.¹²⁰ These agreements set out the criteria to be followed by any corporation that is going to use the environment.¹²¹ "MEAs are important in raising environmental standards that are applicable to MNCs, which are otherwise too dependent on national laws."¹²² These agreements are more specific and practical than national laws since they deal with the management of the environment.¹²³ Failure to comply may lead to penalties as set out in the agreement. MEAs can therefore be used to control MNCs since they are cheaper, and the rigors of litigation may be avoided in most cases.¹²⁴ Such agreements can be a starting point by Africans under the African Union to fight impunity by MNCs. Examples include the United Nations convention on climate change which calls on

¹¹⁵ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101, 105 (2d Cir. 2000).

¹¹⁶ See *Plain Responses to Attacks on the Alien Tort Claims Act (ATCA)*, Ctr. for Const. Rts., https://ccrjustice.org/sites/default/files/assets/Wiwa_ATCAQ&A.pdf (last visited on Feb. 8, 2021).

¹¹⁷ See Aaron Xavier Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 YALE HUM. RTS. & DEV. L. J. 241, 244 (2002).

¹¹⁸ See *id.* at 2–4 (ATCA expressly gives the courts the jurisdiction to handle these cases.).

¹¹⁹ See *id.*

¹²⁰ *Multilateral Environmental Agreements*, MINISTRY FOR ENV'T, <https://www.mfe.govt.nz/more/international-environmental-agreements/multilateral-environmental-agreements> (last visited Feb. 8, 2021).

¹²¹ Natalia Escobar-Pemberthy & Maria Ivanova, *Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index*, 12 SUSTAINABILITY 1, 3 (2020).

¹²² Vidyananya Chakravarthy Namballa, *Global Environmental Liability: Multinational Corporations under Scrutiny*, 1(2) EXCHS.: WARWICH RSCH J. 181, 184 (2014).

¹²³ See *id.* at 186 (citing David M. Ong, *The Contribution of State–Multinational Corporation 'Transnational' Investment Agreements to International Environmental Law*, 17 Y.B. ON INT'L ENV'T L. 168, 168, 172, 177 (2007)).

¹²⁴ See Namballa, *supra* note 122, at 183.

signatories to desist climatic crimes and activities that affect the climate.¹²⁵

There is the Stockholm convention on persistent organic pollutants, which bans the use of toxic chemicals that are dangerous to humans.¹²⁶ There is the London dumping convention, which controls dumping of toxic wastes in seas to protect marine life.¹²⁷ All these have helped to protect the environment and can offer reference for African countries wishing to establish controls on MNCs.¹²⁸ This arrangement may also help to unburden the ICC if economic and environmental crimes are added to the Rome Statute.

C. *Transnational Investment Agreements (TIAs)*

These are agreements between MNCs and host states that layout obligations for both parties when the particular MNC is commencing business in the specific state.¹²⁹ Such agreements are therefore used to impose obligations on MNCs in their activities that help to protect the interests of the host states.¹³⁰ Some of the examples are the Baku–Tbilisi–Ceyhan (BTC) Hydrocarbon Pipeline Project, which involves three countries, Azerbaijan, Georgia, and Turkey.¹³¹ The other is the Chad–Cameroon Pipeline Project.¹³² These agreements can therefore help countries to protect their masses against any human rights abuses by these companies.¹³³ However, Vidrayanya, in using the Chad example, argues that these agreements give third world home countries low bargaining power at times because they need the investments more.¹³⁴It

¹²⁵ See *What is the United Nations Framework Convention on Climate Change?*, UNFCCC, <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> (last visited Feb. 21, 2021).

¹²⁶ *Stockholm Convention on Persistent Organic Pollutants*, U.S. DEP'T STATE: OFF. ENV'T QUALITY, <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/stockholm-convention-on-persistent-organic-pollutants/> (last visited Feb. 21, 2021).

¹²⁷ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, INT'L MAR. ORG., <https://www.imo.org/en/OurWork/Environment/Pages/London-Convention-Protocol.aspx> (last visited Feb. 21, 2021).

¹²⁸ See *What is the United Nations Framework Convention on Climate Change?*, *supra* note 125; see also *Stockholm Convention on Persistent Organic Pollutants*, *supra* note 126; see also *id.*

¹²⁹ David M. Ong, *The Contribution of State–Multinational Corporation 'Transnational' Investment Agreements to International Environmental Law*, 17 Y.B. ON INT'L ENV'T L. 168, 168, 172, 177 (2007).

¹³⁰ *Id.* at 177.

¹³¹ *Id.* at 169.

¹³² *Id.*

¹³³ See *id.* at 180.

¹³⁴ See Namballa, *supra* note 122, at 186–87.

would therefore be hard to enforce punishments on MNCs in cases of breach. These contracts may not be favorable for third world countries because of the aspect of bargaining and can therefore offer guidance in establishing more effective ways of prosecuting MNCs.¹³⁵

D. Corporate self-regulation

This is when companies voluntarily commit to desist from certain practices that have unhealthy effects on society.¹³⁶ It is defined as is the process whereby an organization monitors its own adherence to legal, ethical, or safety standards, rather than have an outside, independent agency such as a third-party entity monitor and enforce those standards.¹³⁷ It is used by some organizations in the United States.¹³⁸ This method is more of an advocacy strategy which cannot be legally enforced.¹³⁹ Companies are merely expected to have these mechanisms as a social preference without any force of law.¹⁴⁰ This means that such a strategy may not be as effective in the African setting since companies are given freedom to do anything after registration. African states can therefore appeal to all MNCs conducting business in Africa to adopt these mechanisms as a way of preventing economic and environmental crimes.¹⁴¹

E. Soft International Law

Soft international laws are quasi legal instruments which do not have any legal binding force or whose binding force is weaker than that of traditional law.¹⁴² The UN Guidelines on Business and Human Rights and the Organization of Economic Cooperation and Development (OECD)

¹³⁵ *See id.*

¹³⁶ Daniel Castro, *Benefits & Limitations of Industry Self-Regulation for Online Behavioral Advertising*, INFO. TECH. & INNOVATION FOUND. 2,4 (Dec. 2011), <https://itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf>.

¹³⁷ *Id.* at 3 (citing Anil K. Gupta & Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational, and Political Analysis*, 8 ACAD. MGMT. REV. 416, 417 no. 3 (1983)).

¹³⁸ Adam Hayes, *Self-Regulatory Organization – SRO Definition*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sro.asp> (last updated Apr. 3, 2020).

¹³⁹ Castro, *supra* note 136, at 3, 7.

¹⁴⁰ Susan Margaret Hart, *Self-Regulation, Corporate Social Responsibility, & the Business Case: Do they Work in Achieving Workplace Equality & Safety?*, 92 J. BUS. ETHICS 585, 586 (2009).

¹⁴¹ *See* Castro, *supra* note 136, at 4.

¹⁴² Bryan H. Druzin, *Why Does Soft Law have any Power Anyway?*, 7 ASIAN J. INT'L L. 361, 361 (2017).

provide guidelines to follow.¹⁴³ The OECD's guidelines were promulgated by World Bank considering the human rights implications of the projects that it finances.¹⁴⁴ These pieces of soft law are however not legally binding and are disregarded by MNCs.¹⁴⁵ However, they can be used in formulating legally binding obligations against multinational companies.¹⁴⁶

F. European Courts

European Courts have also decided cases against MNCs, and this should be an indication that African countries can succeed in prosecuting Multinationals.¹⁴⁷ In the case of *Chandler v. Cape Plc.*,¹⁴⁸ the claimant sued and succeeded for asbestosis contracted because of exposure to dust during his employment by the defendants' subsidiary.¹⁴⁹ The court further noted that national courts of the European Union do not have the power to halt the proceedings on the grounds of lack of jurisdiction in cases brought against European Union domiciled defendants.¹⁵⁰ In *Moses Fan Sithole and others v. Thor Chemicals Holdings Ltd.*, court awarded compensation to victims who had suffered from the mercury activities of the chemicals used by the defendant company in its work.¹⁵¹ These cases show that it is possible for African courts to prosecute these MNCs and also the willingness to provide compensation to victims is a welcome remedy that can be adopted by African courts and the ICC, if they prosecute these cases.

Other jurisdictions have showed willingness and capability to prosecute MNCs through establishing written laws and empowering their

¹⁴³ *Guiding Principles on Business & Human Rights: Implementing the United Nations "Protect, Respect & Remedy" Framework*, UN HUM. RTS. OFF. HIGH COMM'R (June 16, 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [OHCHR, *Guiding Principles*]; *Annual Report on the OECD Guidelines for Multinational Enterprises 2019*, OECD PUBL'G (Oct. 16, 2020), <http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf> [hereinafter OECD, *Annual Report*].

¹⁴⁴ OECD, *Annual Report*, *supra* note 143.

¹⁴⁵ Julianne Hughes-Bennett et al., *A Binding Treaty on Business & Human Rights? Still a way to go.*, HOGAN LOWELLS (Nov. 2, 2017), [¹⁴⁶ See Julianne Hughes-Bennett et al., *supra* note 145.](https://www.hlregulation.com/2017/11/02/a-binding-treaty-on-business-and-human-rights-still-a-way-to-go/#:~:text=By%20way%20of%20background%2C%20the,for%20either%20States%20or%20companies; see OECD, Annual Report, supra note 143.</p>
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¹⁴⁷ See, e.g., *Chandler v. Cape Plc.* [2012] EWCA (Civ.) 525 [70], [79]–[81] (UK).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at [1], [3], [79], [82]–[84].

¹⁵⁰ See *id.* at [40].

¹⁵¹ *Moses Fan Sithole v. Thor Chem. Holdings Ltd.* [2000] 2 AC 2894 (UK).

courts to prosecute these corporations.¹⁵² Others have written laws that establish controls on the activities of MNCs.¹⁵³ Some jurisdictions also encourage more diplomatic systems like contracts and agreements.¹⁵⁴ However, the social economic and political conditions in Africa do not give room for internal controls.¹⁵⁵ This leaves the ICC as the best option to try MNCs, with regard to the salient features of all the above methods.

IV. BENEFITS OF PROSECUTING MULTINATIONAL CORPORATIONS BY THE INTERNATIONAL CRIMINAL COURT

MNCs are currently answerable to no authority in Africa.¹⁵⁶ However, this has been a recipe for disaster.¹⁵⁷ The role these corporations play in the prevalence of environmental crime and their economic crimes cannot be ignored.¹⁵⁸ The worldwide attention that has been given to environmental crimes recently shows that the time is right to make the decision to prosecute MNCs and environmental crimes.¹⁵⁹

MNCs have been known to play a key role in the abuse of human rights through their activities.¹⁶⁰ They grab land, engage in acts of forced labor, dump harmful substances, engage in illegal trading of wildlife and corruption.¹⁶¹ Although globalization has provided massively profitable

¹⁵² See Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 MICH. J. INT'L L. 491, 491–92 (2020) (citing OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, ¶ 41 (2016)).

¹⁵³ See Akindele Babatunde Oyebo, *International Regulation of the Multinational Corporation: A Look at Some Recent Proposals*, 5 NAT'L BLACK L. J. 231, 232, 237 (1977).

¹⁵⁴ Ong, *supra* note 129, at 168, 171.

¹⁵⁵ See Eghosa Osa Ekhaton, *Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?*, 20 INT'L CMTY. L. REV. 30, 30, 35 (2018).

¹⁵⁶ Hans Wetzels, *Countries Propose a Treaty to End Corporate Impunity*, UN AFR. RENEWAL (Apr. 9, 2019), <https://www.un.org/africarenewal/magazine/april-2019-july-2019/countries-propose-treaty-end-corporate-impunity>.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See Irene di Valvasone, *Holding Multinational Corporations Accountable for the Commission of International Environmental Crime*, CTR. FOR AFRICAN JUST., <http://centreforafricanjustice.org/holding-multinational-corporations-accountable-for-the-commission-of-international-environmental-crime/> (last visited Mar. 8, 2021).

¹⁶⁰ Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 L. & POL. AFR., ASIA & LAT. AM. 7, 7–8 no. 1 (2011).

¹⁶¹ See *Multi-National Corporations' Land Grabbing in Africa*, AFR. FAITH & JUST. NETWORK, <https://afjn.org/multi-national-corporations-land-grabbing-in-africa/> (last

opportunities to Multinationals, the opportunity to operate legally and abuse the weak regulatory structure so as to maximize profit makes native African inhabitants frequently continue to suffer.¹⁶² Their role in making the environment less habitable cannot be ignored. This, therefore, means that bringing these corporations under the jurisdiction of the ICC will help to make them accountable for these atrocious acts.¹⁶³ It will help in promotion of human rights, respect for human dignity and the rule of law.

“One of the ways in which MNCs negatively impact developing countries is by lobbying the World Trade Organization and other international bodies for international trade policies that work in their favor and to the disadvantage of developing countries.”¹⁶⁴ “An example of this is the infamous Structural Adjustment Programs (SAPs) imposed on developing nations by the International Monetary Fund (IMF) and the World Bank.”¹⁶⁵ These programs have increased “poverty in developing nations as multinational corporations reap the benefits of said policies.”¹⁶⁶ These companies command a lot of influence and prosecuting them will check their power and promote consideration of Africans in their decisions.¹⁶⁷ It will also ensure that the livelihood of Africans improves as these corporations will work with regard to human rights and the rule of law.

visited Mar. 8, 2021); *see also* Christina Stringer & Snejina Michailova, *Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains*, 26 MULTINATIONAL BUS. REV. 194, 194–95 no. 3 (2018); *see also* Brandon Baker, *Report Exposes Companies That Dumped 206 Million Pounds of Toxic Chemicals Into U.S. Waterways*, ECOWATCH (June 23, 2014, 8:31 AM), <https://www.ecowatch.com/report-exposes-companies-that-dumped-206-million-pounds-of-toxic-chemi-1881928242.html>.

¹⁶² Felix Ebruba Ayanruoh, *Corporate Responsibility & Human Rights Abuse in the Niger Delta*, GLOB. POL'Y F. (Nov. 2009), <https://archive.globalpolicy.org/security-council/dark-side-of-natural-resources/oil-and-natural-gas-in-conflict/africa/48470-corporate-responsibility-and-human-rights-abuse-in-the-niger-delta.html>.

¹⁶³ *See* Miguel Juan Taboada Calatayud et al., *The Accountability of Multinational Corporations for Human Rights' Violations*, 64–65 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 171, 179 n.20 (2008).

¹⁶⁴ Minda Magero, *Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries*, AFR. ON THE BLOG, <https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/> (last visited Mar. 8, 2021).

¹⁶⁵ Minda Magero, *Winner Takes All: How Multinational Corporations Violate Economic Human Rights in Developing Countries*, AFRICA ON THE BLOG, <https://www.africaontheblog.org/winner-takes-all-how-multinational-corporations-violate-economic-human-rights-in-developing-countries/> (last visited Jan. 30, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ *See* Qingxiu Bu, *Chinese Multinational Companies in Africa: The Human Rights Discourse*, 8 AFR. J. OF LEGAL STUD. 33, 84 (2015).

Prosecuting MNCs will help streamline the operations of these companies as well developing a legal regime to cater for any illicit acts.¹⁶⁸ “MNCs present specific regulatory problems to ensure socially responsible conduct, particularly when they operate in developing countries where the regulatory mechanisms are relatively weaker.”¹⁶⁹ Countries will be able to set down laws that the MNCs will follow which are in conformity with the ICC provisions and there will be internationally recognized limits to the MNCs activities.¹⁷⁰ The recent United Nations guidelines on Business and Human Rights may act as a guide to enable prosecution of these companies.¹⁷¹ It may also give the respective countries a chance to commence legal controls.¹⁷² This will also help to streamline these companies’ operations as set procedures will have to be followed. It will control the corruption and under hand methods these companies use to commence and carry-on operations in African countries.¹⁷³ Corporations “consider the entire world as their market.”¹⁷⁴ “They organize production and marketing of products with little regard for national interest to maximize profits.”¹⁷⁵ Prosecuting them will bring sanity in their operations and encourage focus on the social wellbeing of the people in the areas where they operate.¹⁷⁶ It will also promote rule of law as companies will be subject the laws in place.¹⁷⁷

Prosecuting these corporations will equally improve the relationship between African states and the ICC in terms of being more relevant and closer to some of the key problems faced by the continent.¹⁷⁸ Currently,

¹⁶⁸ See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Force Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERK. J. OF INT. L. 91, 96–97, 157–59 (2002).

¹⁶⁹ Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project*, 16 AFR. J. INT’L COMP. L. 83 (2008).

¹⁷⁰ See Ronald C. Brown, *Due Diligence Hard Law Remedies for MNC Labor Chain Workers*, 22 UCLA J. INT’L L. FOREIGN AFF, 119, 120–21 (2018); Office of the High Commissioner of Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/Pub/11/04 (2011), at 3–4 [hereinafter OHCHR, *Guiding Principles*].

¹⁷¹ OHCHR, *Guiding Principles*, *supra* note 144, at 1, 4–5, 29.

¹⁷² *Id.*

¹⁷³ *Forum: Tackling Fraud and Corruption in Africa*, FINANCIER WORLDWIDE, (Feb. 2019), <https://www.financierworldwide.com/forum-tackling-fraud-and-corruption-in-africa#.YBiV7-hKhPY>.

¹⁷⁴ Kema Iroghe, *Global Political Economy and the Power of Multinational Corporations*, 30 J. THIRD WORLD STUD. 223, 223 (2013).

¹⁷⁵ *Id.*

¹⁷⁶ See OHCHR, *Guiding Principles*, *supra* note 170, at 1.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ Dominique Mystris, *Why a Regional Criminal Court for Africa is a Good Idea*, THE CONVERSATION (Sep. 29, 2019), <https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650>.

the ICC is involved in 13 investigations, 10 of which are all from Africa.¹⁷⁹ “As a result, some African leaders complained that the ICC has unfairly targeted Africans.”¹⁸⁰ “The African Union has also referred the ICC as an impediment to peace, and has eventually called African ICC member States for non-cooperation with the Court.”¹⁸¹

The relationship between Africa and the ICC has therefore been strained and there is animosity towards the court by African states, which constitute one of the largest percentages in terms of membership.¹⁸² It was reported that African leaders “adopted a strategy calling for a collective withdrawal from the” ICC “behind closed doors near the end of an African Union summit.”¹⁸³ Countries like Burundi, South Africa and The Gambia have all showed steps of leaving the court.¹⁸⁴

Prosecuting MNCs will restore some relevance and respect of the ICC in Africa.¹⁸⁵ MNCs abuse people’s rights and commit numerous crimes that directly affect Africans.¹⁸⁶ As discussed earlier, prosecuting MNCs will create a new working relationship between African states and the court.¹⁸⁷ Taking on these crimes by the ICC will fill the void and provide a permanent alternative to these atrocities and therefore represent a positive impact on Africans.¹⁸⁸ It is a win-win situation, as both the ICC and Africa benefit and unity as well as regard to human rights will prevail.

Prosecuting environmental and economic crimes will cultivate more respect for the environment through recognition of the impact of

¹⁷⁹INT. CRIM. COURT, *Situations Under Investigation*, <https://www.icc-cpi.int/pages/situation.aspx> (last visited Feb. 20, 2021).

¹⁸⁰Alebachew Birhanu Enyew, *The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation*, 3 BAHIR DAR U. J.L. 110, 110 (2012).

¹⁸¹*Id.*

¹⁸²*Id.* at 110-11.

¹⁸³*African Leaders Plan Mass Withdrawal from International Criminal Court*, THE GUARDIAN (Jan. 31, 2017), <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>.

¹⁸⁴*Id.*

¹⁸⁵See Joanna Kyriakakis, *Corporations before International Criminal Courts: Implications for the International Criminal Justice Project*, 30 LEIDEN J. INT. L. 221, 232 (2017).

¹⁸⁶See Nick Cummings-Brace, *Oil Companies May Be Complicit in Atrocities in South Sudan, U.N. Panel Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html> (discussing “the continuing violence, the ensuing human suffering, and violations of international humanitarian law” in South Sudan).

¹⁸⁷Kyriakakis, *supra* note 185.

¹⁸⁸See *id.* at 231–32.

environmental crimes on the people and the community.¹⁸⁹ Observers mention wild animal trafficking, indiscriminate logging, electronic waste mismanagement, dumping in rivers and aquifers, illegal fishing as some of the most serious environmental crimes in Africa.¹⁹⁰ Currently, there is no hard law relating to environmental crimes and MNCs activities in Africa and therefore the coast is clear for these crimes to flourish.¹⁹¹ Given the influence these MNCs have coupled with the high levels of ignorance among Africans concerning economic and environmental crimes, they merely increase daily.¹⁹² The ICC should attach an international character to these crimes and raise the level of respect for laws against environmental misuse.¹⁹³ Such development may help create more awareness about these crimes and ease any investigations that would help to bring the guilty parties to book.¹⁹⁴ It will promote environmental conservation and help protect against degradation and any other crimes against the environment.¹⁹⁵ It will also be another way of addressing the challenges of climate change.

There has always been an accountability gap in the operations of MNCs and this has led to profit repatriation and many crimes going uninvestigated.¹⁹⁶ This has kept their operations out of touch with the public.¹⁹⁷ Transparency International has reported that “the world’s biggest companies disclose little or no financial details about their operations outside their home countries.”¹⁹⁸ They “warned that the biggest oil, gas and mining companies were not ready for the kind of transparency

¹⁸⁹ See U.N. Environment Program & Interpol, *The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security* 7–9 (2016), https://reliefweb.int/sites/reliefweb.int/files/resources/environmental_crimes.pdf [hereinafter UNEP].

¹⁹⁰ *Top 5 Environmental Crimes*, SUSTAINABILITY FOR ALL, <https://www.activesustainability.com/environment/crimes-against-the-environment/> (last visited Feb. 6, 2021).

¹⁹¹ Elizabeth Barrett Ristroph, *How Can the United States Correct Multi-National Corporations’ Environmental Abuses Committed in the Name of Trade*, 15 IND. INT’L & COMP. L. REV. 51, 51–53 (2004).

¹⁹² See *Id.* at 52.

¹⁹³ See Alessandra Mistura, *Is There Space for Environmental Crimes Under International Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43 COLUMBIA J. ENV’T L. 182, 214, 220 (2018).

¹⁹⁴ *Id.* at 214; UNEP, *supra* note 190 at 13, 26, 89.

¹⁹⁵ See Mistura, *supra* note 193 at 220.

¹⁹⁶ Menno T. Kamminga, *More Lawsuits Needed Against Multinationals*, BUS. & HUM. RTS. CTR. (July 2008), <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Menno-Kamminga-commentary.pdf>.

¹⁹⁷ Clar Ni Chonghaile & Ami Sedghi, *World’s Top Companies Fall Short on Transparency*, THE GUARDIAN (Nov. 5, 2014), <https://www.theguardian.com/global-development/datablog/2014/nov/05/worlds-top-companies-fall-short-on-transparency>.

¹⁹⁸ *Id.*

rules that will come into force across the EU.”¹⁹⁹ This is a clear indication that MNCs do not do well in matters of accountability and instituting mechanisms of prosecution will help African countries to monitor these companies and promote accountability as governments will be in position to follow up on the activities of these companies and demand for compliance with laws and public policy.

IRENE reports that legal rulings on behalf of claimants won in recent years are “few in comparison with the number of cases where companies have escaped scot-free and the even greater number of violations reported to human rights organizations, trade unions and environmental organizations.”²⁰⁰ The numbers should therefore change to enable more victims’ access justice and compensation where necessary. This will promote transparency in the operations of these companies since there will be laws to fall back on where there is no compliance.

Prosecuting MNCs will not only promote rule of law and respect for authority but also improve the livelihood of the people of Africa.²⁰¹ It will stamp the authority of the respective governments over the affairs of the respective countries.²⁰² It will also professionalize economic relations between these companies and the countries.²⁰³ On the other hand, prosecuting environmental and economic crimes will boost environmental protection and promote the observance of human rights in business.²⁰⁴ It will improve service delivery by governments and the general wellbeing of Africans.²⁰⁵

V. PROPOSED RECOMMENDATIONS

The Rome Statute should be amended to provide for environmental crimes as being under the jurisdiction of the ICC.²⁰⁶ The statute currently provides for crimes against humanity, war crimes, genocide and the

¹⁹⁹ *Id.*

²⁰⁰ *Controlling Corporate Wrongs: The Liability of Multinational Corporations, Legal Possibilities, Initiatives, and Strategies for Civil Society*, INT. RESTRUCTURING EDUC. NETWORK EUR. (IRENE), <http://www.indianet.nl/irene.html> (last visited Feb. 10, 2021); see Calatayud, *supra* note 5 at 186.

²⁰¹ Bu, *supra* note 167 at 84; see Calatayud, *supra* note 5 at 186.

²⁰² See OHCHR, *Guiding Principles*, *supra* note 170 at 4–6, 28–29.

²⁰³ Kyriakakis, *supra* note 185 at 233–237; see Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 VERFASSUNG UND RECHT IN UBERSEE 7, 14–15 (2011) (Ger.).

²⁰⁴ See UNEP, *supra* note 190 at 7–9.

²⁰⁵ Rob White & Grant Pink, *Responding to Organised Environmental Crimes: Collaborative Approaches and Capacity Building*, SA CRIME Q., June 2017, at 37–38; *Prosecuting Economic and Environmental Crimes: USIP’s Work in the DRC*, U.S. INST. PEACE (USIP), <https://www.usip.org/publications/2016/12/prosecuting-economic-and-environmental-crimes> (last visited Feb. 11, 2021).

²⁰⁶ Mistura, *supra* note 194 at 221–22.

recently added crime of aggression, this limits the ICC to handling matters concerning only the afore mentioned crimes.²⁰⁷ The Rome Statute should be amended to provide for economic and environmental crimes as this will add a force of international recognition of these crimes and give jurisdiction to the ICC to handle them.

The other recommendation is to make provision for corporate personality in international law.²⁰⁸ The concept provides that a company is a person in law with capacity to sue and be sued.²⁰⁹ Unfortunately, this concept is not recognized in international criminal law and therefore MNCs are not subject to criminal legal proceedings.²¹⁰ This explains why there is hardly any company that can be internationally held liable for environmental or economic crimes and any other illicit activities. This concept should be provided for under international law. This will contribute to accountability and respect of human rights by these organizations.

The United Nations Guidelines on Business and Human Rights should be incorporated in national laws so that enforcement can begin at the national level.²¹¹ These guidelines set down regulations to be followed by MNCs in their operations, with strict regard to respect of human rights.²¹² These guidelines can help in drafting laws and regulations that provide a framework to follow. This will give an opportunity for states to control activities of the MNCs and will also ease enforcement by international tribunals.²¹³

African states should strive to work towards economic empowerment of their people so as to create an alternative to the work done by these MNCs. This will allow for companies owned by Africans to compete favorably with MNCs and thus make it easy to control their activities and protect the African population. It will also curb on the forces of neo colonialism that come with having MNCs operate on most parts of Africa.

Finally, there should be an intensive effort to sensitize the masses about the activities of MNCs and their limits. Additionally, the sensitization about economic and environmental crimes should also be undertaken, so that it is easy to track and investigate any illicit activities by the corporations, as well as any sort of commission of environmental

²⁰⁷ Rome Statute of the International Criminal Court art. 5, Jul. 17, 1998, 2187 U.N.T.S. 38544.

²⁰⁸ David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARVARD INT. L. J. 35, 38–39 (2016).

²⁰⁹ *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²¹⁰ See Scheffer, *supra* note 209 at 35.

²¹¹ Office of the High Commissioner of Human Rights (OHCHR), *The Corporate Responsibility to Protect Human Rights*, U.N. Doc. HR/Pub/12/02 (2012), at 1–2 [hereinafter OHCHR, *Corporate Responsibility*].

²¹² *Id.*

²¹³ OHCHR, *Guiding Principles*, *supra* note 170 at 1–8.

crimes. This will involve the ordinary people in promoting rule of law and reporting any illicit activities and thus encourage these companies to follow the set laws.²¹⁴

In our view, the above recommendations can help the continent make strides in the fight against the impunity engineered by Multinationals and control the cases of environmental crime in Africa.

CONCLUSION

It has been a long time since MNCs commenced operations in Africa.²¹⁵ Over the years, many have joined the continent in search of investment opportunities, mostly in the extractive industry.²¹⁶ However, their activities have not been accounted for and regulated.²¹⁷ These companies have been implicated in several schemes and illicit activities that have led to human rights abuses, while disregarding the rule of law and the aspirations of the people.²¹⁸ These corporations have also played a vital role in the rate at which environmental and economic crimes have been committed over the years.²¹⁹ The role of MNCs in economic crimes and crimes against the environment cannot be ignored. Many have died, lost property, and have become disabled because of MNCs activities.²²⁰ Environmental crimes have directly affected the backbone of the African continent, which is agriculture, because they have brought disease and under development.²²¹ Economic crimes have negatively impacted service delivery by governments and the economy generally.²²² There is a great

²¹⁴See UNEP, *supra* note 190, at 31.

²¹⁵ See Lord Aikins Adusei, *Multinational Corporations: The New Colonisers in Africa*, PAMBAZUKA NEWS (Jun. 4, 2009), <https://www.pambazuka.org/governance/multinational-corporations-new-colonisers-africa> (describing the history of colonialism in Africa and its culmination in MNCs).

²¹⁶ O. E. Udofia, *Imperialism in Africa: A Case of Multinational Corporations*, 14 J. BLACK STUD. 353, 355-57 (1984).

²¹⁷ See *Controlling Corporate Wrongs*, *supra* note 201.

²¹⁸ Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 VERFASSUNG UND RECHT IN ÜBERSEE 7, 7-9 (2011) (Ger.).

²¹⁹ See Ristroph, *supra* note 191 at 51–52.

²²⁰ See Cummings-Brace, *supra* note 187; *Integrated National Disability Strategy: White Paper*, IND. LIVING INST. (last visited Mar. 13, 2021), <https://www.independentliving.org/docs5/SANatIDisStrat1.html>.

²²¹ See, e.g., *50 Years of Environmental Governance and Sustainability in Africa*, NEW PARTNERSHIP FOR AFR.'S DEVELOPMENT at 8, <http://www.nepad.org/aepp/index.php/themes/category/6-environmental-crime-and-corruption-in-africa?download=15:english-environmental-crime-and-corruption> (last visited Feb. 13, 2021).

²²² Press Release, United Nations Congress on Crime Prevention and Criminal Justice, *Consequences of Economic Crimes Affect People's Sense of Society's Fairness*, Crime Congress' Committee 1 Told, U.N. Press Release SOC/CP/324 (Apr. 19, 2005).

need to bring an end to this impunity by establishing laws that will influence and demand change in this regard. It is also important to strengthen this effort by implementing a forum that can adjudicate over resulting disputes, and in our view, the ICC has the capacity to best serve this purpose.