The Corporate Veil: A Catalyst for Soulless Foreign Investments and Human Rights Abuses

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Abstract

The need for investments that promote human rights has been at the core of the current discourse on international investments reforms. There has been public outrage on the importance of aligning investments with sustainable development. This includes tying the benefits that accrue to investors with the duty and responsibility of investors to act in a manner that protects and promotes human rights. This paper interrogates the concept of the corporate veil under the international investment regime; whether it has incentivized foreign corporate investors to ignore human rights concerns and what can be done to remedy the situation.

1. Introduction

Despite the popularity and recommendation of foreign investment over the years, the current state of foreign investments has suffered major drawbacks. One of the major drawbacks is the prioritization of foreign investor protection at the expense of human rights protection in host states. Human rights in need of protection include civil and political rights as well as economic, social, cultural and environmental rights.

It is against this backdrop that this paper seeks to interrogate foreign corporate investor protection vis a vis human rights protection through the lens of corporate governance. The paper argues that the international investment regime's augmentation and institutionalization of the corporate veil has had negative effects. This is because in addition to the concept of the corporate veil, International Investment Law accords foreign investors protections that make lifting of the corporate veil even harder. Some of

these foreign investor protections include: national treatment; most favored nation treatment; fair and equitable treatment; international minimum standard of treatment; full protection and security; prohibition against expropriation; and prompt, adequate and effective compensation for expropriation and nationalization.

The current Investor-State Dispute Settlement (ISDS) system has been argued to be biased towards over protecting foreign investors and under protecting the host states.[1] This is because it gives leeway to foreign corporate investors to access justice with unclean hands and seek redress for alleged violation of their rights by host states even in the face of gross misconduct, such as human right abuses.[2] Jean Ho argues that the current elusive foreign investor responsibility, particularly corporate investor responsibility, was created by omission.[3]

This omission can be traced back to the Nuremberg trial where the Nazi leaders were convicted but the German Corporations that were involved in financing the autocracies were not charged because corporate liability for misconduct, at the time, was not an established area under International Law.[4] The drafters of the Rome Statute of the International Criminal Court also focused on criminal conduct of individuals and avoided incorporating the underdeveloped concept of corporate misconduct.[5]

Sornarajah notes that foreign investors, especially Multinational Corporations (MNCs), have immense financial resources that could greatly destabilize the economies of weak host states in case they decided to relocate their investments.[6] Hence, capital importing countries often

[1] Jean Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 American Journal of International Law <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/creation-of-elusive-investor-responsibility/66BEA419EB40F67433A1E9DED4EBDD7E> accessed 20 July 2022.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] M. Sornarajah, *The International Law on Foreign Investment* (2010, 3rd edn, Cambridge University Press 2012).

feel the need to relax their human rights and corporate governance laws in order to attract investments from capital exporting countries at the expense of public interest protection. Even though efforts are underway to reform the current international investment regime, this remains to be the biggest challenge.

Incorporation is important to foreign investors because, firstly, through the corporate veil they enjoy protection from personal liability over any violations committed by the company. Secondly, incorporation gives foreign corporate investors immense power which they then use to dictate the regulatory and policy framework that should govern their investments in host states. This paper thus interrogates the concept of the corporate veil under the International Investment regime; whether it has incentivized foreign corporate investors to ignore human rights concerns and what can be done to remedy the situation.

2. Theoretical Framework

This part of the paper briefly discusses some of the corporate governance theories that support and criticize human rights protection, as a means of achieving sustainable investment and corporate governance.

2.1 The Communitarianism Theory

This theory is argued to be the backbone of Corporate Social Responsibility (CSR). It is a socio-political theory that discredits the ideas of individualism and individual liberties as propounded by John Rawls and Robert Nozick.[7] Accordingly, proponents of the communitarianism theory argue that the interests of society should take precedence over individual interests.[8] Some of the proponents of this theory are: Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer.[9] Ubuntu is the African manifestation of the communitarianism theory.

[7] Daniel Bell, 'Communitarianism' (Fall 2020 Edition), The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.) <https://plato.stanford.edu/entries/communitarianism/#pagetopright> accessed 20 July 2022

[8] Ibid.

[9] Ibid.

It thus follows that since corporations do not operate in a vacuum, they have a moral obligation to protect and promote the wellbeing of the particular communities that they operate in. This includes ensuring that corporations respect all the human rights and fundamental freedoms of these communities. Contrarily, the Contractarianism Theory and the Friedman Doctrine hold that corporations have no moral obligations towards society as a whole. The Friedman Doctrine, as put forward by Milton Friedman in 1970, states that the only social responsibility corporations have is to make profits.[10] Therefore, it is not the responsibility of corporations to promote human rights; that is the responsibility of the State.

The Contractarianism Theory or the Nexus of Contracts Theory on the other hand is premised on the notion that (moral) obligations are derived from contracts or mutual agreements.[11] For that reason, proponents of this theory argue that corporations are a nexus of contracts and thus are only obligated to those they are in contract with namely: shareholders, directors, employees, suppliers and creditors among others. Therefore, the corporation has no obligations to the society as whole as it has no contract with it. This theory can be traced back to historical Social Contract theorists; Hobbes, Locke, Kant, and Rousseau.[12] Modern economists that have contributed to the development of the theory include: Ronald Coase, William H. Meckling, Michael C. Jensen, Armen A. Alchian, and Harold Demsetz.[13]

[10] Milton Friedman, 'A Friedman Doctrine - The Social Responsibility Of Business Is to Increase Its Profits' *The New York Times* (13 September 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 20 July 2022.

[11] Ann Cudd and Seena Eftekhari, 'Contractarianism' (Winter 2021 Edition), The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.) <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=contractarianism> accessed 20 July 2022.

[12] Ibid.

[13] William W. Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) Faculty Scholarship at Penn Law <https://scholarship.law.upenn.edu/faculty_scholarship/839> accessed 20 July 2022.

This paper argues that in light of globalization and in the wake of good corporate governance practices, the Contractarianism Theory and the Friedman Doctrine can no longer hold in the current international economic order. This is because human rights are no longer at the periphery of business operations. Corporations are now required to embrace the 3 Ps of sustainability: people, planet and profits as the pillars of their operations and governance. As such, profits are no longer the only pillar.

2.2 The Stakeholder Theory

This theory is based on the proposition that a corporation should protect the interests of all its stakeholders by forging alliances that ensure effective stakeholder engagement.[14] These stakeholders include: employees, shareholders (investors), the community, customers, the government, suppliers, and creditors.[15] Respecting the human rights and freedoms of all stakeholders, including the society as a whole, during their operations then becomes imperative. Opposed to this theory is the Shareholder Theory that argues, the corporation should only safeguard the interests of the shareholders; who are the principals.[16] This was posited by economist Milton Friedman when he published the Friedman Doctrine discussed earlier; a theory on business ethics.[17]

This paper disagrees with the Shareholder Theory and instead relies on the Stakeholder Theory to assert its position that, indeed corporations have an obligation to promote the interests of all parties that may be affected by their operations. Their obligations do not start and end with maximizing their shareholders' value.

[14] Sneha Gaonkar and Priya Chetty, 'The Stakeholder Theory of Corporate Social Responsibility' <https://www.projectguru.in/the-stakeholder-theory-of-corporate-social-responsibility/> accessed 20 July 2022 .

[15] Ibid.

[16] Milton Friedman, supra. n 10.

[17] Ibid.

3. Conceptual Framework: The Foreign Corporate Investor-Human Rights Dichotomy Through the Lens of the Corporate Veil

This part delves into an in-depth discussion of the subject matter. It defines the relevant foreign investment concepts (variables) and interrogates how these concepts relate to human rights abuses. Particular focus is paid to the correlation between the corporate veil and human rights abuses. This analysis highlights the glaring and daunting role of International Investment Law and Corporate Law in promoting human rights abuses.

3.1 The Correlation Between Foreign Investment Concepts and Human Rights Abuses

This paper finds that there is a positive correlation between foreign investment concepts that protect foreign corporate investors and an increase in human rights abuses. This is because when the standards of foreign investment protection are raised, to become more favorable to foreign investors, the probability of human rights abuses also rises. The protection of human rights is often curtailed by various investment concepts such as: stabilization clauses, foreign investors' legitimate expectation and regulatory chills. These concepts are discussed below.

3.1.1 Stabilization Clauses

These are clauses that essentially freeze laws and regulations, some or all, by limiting the application of new laws and regulations to a foreign investment throughout its life.[18] Stabilization clauses are often drafted in a way that either excuses foreign investors from complying with new laws and regulations or in case of compliance, the host state is required to pay the foreign investor compliance costs.[19] Hence, the clauses negatively affect the host state's duty to meet its international obligations especially on protection of human rights without undue costs and hardships.

[18] Andrea Shemberg, 'Stabilization Clauses and Human Rights' 2009 International Financial Corporation <https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5a9bba-jqeww2e> accessed 20 July 2022.

[19] Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' 2008 International Institute for Sustainable Development <https://www.iisd.org/system/files/publications/iia_business_human_rights.pdf > accessed 20 July 2022.

3.1.2 Foreign Investors' Legitimate Expectation

When a foreign investor establishes an investment in a host state, it is their expectation that the host state will be transparent in its dealing. This includes: full disclosure, clarity, promulgation and consistent application of the laws and procedures relevant to the investment. This concept of foreign investor's legitimate expectation has however been critiqued by various scholars. One such scholar is Jean Ho who argues that a foreign investor should also have a legitimate expectation that laws will change.[20]

3.1.3 Regulatory Chills

Regulatory Chills occur when host states are hesitant to regulate foreign investors for various reasons.[21] This fear arises from the host state's concern that in case they enact new laws to protect human rights, the foreign investor may pull out their investment and take it to another country with no human rights obligations; leading to loss of investment.

Mann notes that the right of the host state to regulate is two-fold: the duty to protect and promote human rights; and the power to enforce sanctions and punishment against violators.[22] The right of the host state to regulate has not been accepted as an international customary practice hence for it to be effective, it should be expressly recognized in IIAs.[23] Otherwise, regulatory chills will continue to act as a catalyst for human rights violations by foreign corporate investors.

[20] Jean Ho, supra. n 1.

[21] United Nations General Assembly, 'Human Rights-Compatible International Investment Agreements' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement> accessed 20 July 2022.

[22] Howard Mann, supra. n 19.

[23] Ibid.

3.2 The Correlation Between the Corporate Veil and Human Rights Abuses

The corporate veil is one of the sacrosanct legal concepts entrenched in corporate law. The concept was first addressed in the *Sutton's Hospital Case (1612).*[24] However, it was formally established in the *locus classicus case of Salomon v Salomon & Co Ltd*[25] where the House of Lords upheld the principle of limited liability. The principle holds that the company is a separate legal entity from its members, hence members cannot be held liable for the actions or inactions of the company and vice versa.[26] This principle subsequently birthed the corporate veil doctrine which shields the members of a company from any liability relating to the company's actions; mostly the shareholders, directors and senior members with authority.

The corporate veil has incentivized foreign corporate investors to violate human rights without any sanction by the host state or the international community. This is because economically, the corporate veil creates a moral hazard. A moral hazard is an incentive to increase one's exposure to risk because one has legal or economic protection.[27] This is one of the problems of the principal-agent relationship in corporations. To illustrate this, this paper analyses some of the corporate governance variables from a law and economics perspective. An economic analysis of these concepts helps interrogate the unintended and often overlooked economic and social consequences of the corporate veil.

In making the assertions that this paper makes, it is important to note that the instant paper acknowledges the importance of the corporate veil in the operations of corporations. Therefore, it appreciates that the concept plays an important role in incorporation and it should

[24] *Sutton's Hospital Case* (1612), 10 Coke Reports, 1a-35a ER 77 937-976.

[25] *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

[26] Ibid.

[27] J. A. Mirrlees, 'The Theory of Moral Hazard and Unobservable Behaviour: Part I' (1999) 66 (1) The Review of Economic Studies <https://doi.org/10.1111/1467-937X.00075 3 - 21> accessed 21 July 2022 3-21.

only be lifted in serious occasions. One such serious occasion is when corporations abuse human rights and fundamental freedoms. Violation of human rights is not a risk corporations should be allowed to take because the social costs of the same by far outweigh any envisioned benefits.

3.2.1 The Law and Economics of Agency Law and the Corporate Veil

The law of agency can be traced in the nexus of contracts theory or the contractarianism theory. The theory, as discussed earlier, holds that since corporations are not natural persons they have no minds, bodies or souls; they are merely creatures of the law and the company's contracts. The economics of agency law is therefore to ensure that corporations can operate efficiently by creating a principal (shareholders) and agents (directors and managers).[28] This way there are natural persons that give the corporation a mind, body and soul.

Similarly, the corporate veil ensures the agents carry out their mandate at optimum levels without any interferences, such as being held liable for any decisions made on behalf of the corporation, positive or negative. This is why courts are always reluctant to lift the corporate veil by ignoring the agency relationships within a corporation unless provided for under statutory law or common law. In Kenya, the corporate veil may be lifted under the Companies Act 2015 in cases involving: fraudulent trading; a sham company; an alien/enemy company; reduction or increase in statutorily required number of members; deliberate evasion of contractual and statutory obligations, such as payment of tax; holding and subsidiary companies; and misdescription of the company.[29]

[28] George M. Cohen, 'Law and Economics of Agency and Partnership' (2018). Oxford Handbook of Law and Economics, Forthcoming, Virginia Law and Economics Research Paper No. 2018-11, <https://ssrn.com/abstract=3208640> accessed 21 July 2022.

[29] The Companies Act No. 17 of 2015.

From an economics perspective, lifting the corporate veil for some corporations, such as publicly traded companies that have large numbers of shareholders, may not be effective.[30] This is because these shareholders have the financial muscle to diversify and absorb the risk of liability, hence the severity of the liability will not be felt. The same can be said about foreign corporate investors. Therefore, alternatives to lifting the corporate veil may be needed to ensure members of corporations are held liable for human rights abuses.

3.2.2 The Law and Economics of Ethical Conduct, Due Care and Risk Management

An economic analysis of tort law involves analyzing non-market behaviors such as ethical conduct, due care and risk management. Robert Cooter and Thomas Ulen note that the law on torts seeks to govern injuries that do not arise from a breach of contract.[31] Tortious liability arises when there is a breach of duty primarily fixed by the law; such duty being towards all persons generally.[32] Based on this, a logical argument can be made that promotion of human rights, especially those that fall under tort law, is a duty owed by corporations to the society.

The economic purpose of tort law is to induce injurers to internalize the costs of harm by making them compensate victims for harm caused.[33] Internalization of harm therefore acts as incentive to invest in safety at the most efficient level.[34] Going by the Coase Theorem, the cost of bargaining in tort is high because tort claims are private claims.[35] Bargaining would thus require every human to individually

[30] Philip Örn, 'Piercing the Corporate Veil - A Law and Economics Analysis' (Master Thesis, University of Lund 2009) <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1563314&fileOId=1566244> accessed 21 July 2022.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

bargain with another human on how to deal with tort matters.[36] A good illustration of this is the case of faulty products where each manufacturer would be required to negotiate with each consumer on how to allocate the cost of any accident that may occur. Thus economically, tort liability is one of the ways of optimally deterring risk by inducing optimal precautions by both the injurers and the victims.

When corporations commit torts because they: (a) failed to act ethically, (b) disregarded due care, or (c) did not effectively manage their risks, those affected are innocent by standers who are not privy to their operations. Unlike creditors of a company who assume the risks/externalities of the company's operations, tort victims do not consent to these risks.[37] Accordingly, it is argued that for acts of tort, the standard for lifting the corporate veil should therefore be lower.[38] This will aid in achieving a fair and effective allocation of blame and costs because costs are internalized by the party better equipped to do so, economically or otherwise.[39] In this case, corporations especially foreign corporate investors are better placed to internalize the costs of protecting human rights.

4. Jurisprudence: The Prevalence of Human Rights Abuses by Foreign Corporate Investors

Traditionally, the purpose of lifting the corporate veil was to hold members of a company personally liable for wrongs 'done by the company'. Lifting the corporate veil is particularly difficult when trying to hold a parent company liable for the wrongs done by its subsidiary because legally the two entities are separate and independent. Hence, it is always difficult to prove that the parent company was in control of the subsidiary's actions and the burden of proof is on the host state to prove

[36] Ibid.

[37] Philip Örn, supra. n 30.

[38] Ibid.

[39] Ibid.

control. The corporate veil acts as a shield because it is used as a means of defence against personal liability.

However, in Investor-State Disputes the inverse happens and the burden of proof shifts to the foreign corporate investor to prove that they had an investment in the host state. To do this, the parent company has to ascertain that they had control over the subsidiary in a manner that indicates that the parent company and the subsidiary company are one entity deserving of protection. This is important because for the parent company to establish that it has locus standi to bring an Investor-State Dispute against the host state, it has to show connection to the subsidiary company; the corporate veil then becomes a sword that investors use to seek damages from host states.

This part of the paper highlights some international and local cases to illustrate how frequent corporate human rights violations are; and how corporations have used the corporate veil to maneuver liability.

4.1 S. D Meyers Inc. v Government of Canada[40]

S.D. Myers Inc. registered in the United States (the parent company) incorporated S.D. Myers (Canada) Inc. (the subsidiary company) to obtain polychlorinated biphenyl (PCB) waste from Canada for treatment in its facility in the United States. In 1998, the parent company brought an arbitration claim against Canada under Chapter 11 of the North American Free Trade Agreement (NAFTA)[41] because Canada banned the use of polychlorinated biphenyl (PBC), which was the object of their business. The parent company thus claimed that the ban affected its investment and further that it violated the foreign investment principles on national treatment, minimum standard of treatment, performance requirements and expropriation.[42]

[40] *Myers* (S. D.) v. Canada [2002] NAFTA/UNCITRAL Tribunal

[41] Government of Canada, 'NAFTA - Chapter 11 – Investment' <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/SDM.aspx?lang=eng> accessed 22 July 2022.

[42] Ibid.

Canada on the other hand argued that the parent company did not have any investment in Canada because the subsidiary company incorporated in Canada was a separate independent entity hence it did not have standing to bring the suit. Further, that their decision to ban PBC was necessary for environmental protection.[43] The tribunal, however, found that the subsidiary company was an investment because the parent company proved substantial control over the subsidiary. It also held that the ban was discriminatory because it was intended to favor Canadian PCB waste disposal companies hence it was not an environmental protection measure.[44] Accordingly, the tribunal proceeded to award the claimant $6.9 Million Canadian Dollars for the direct loss of profits caused by Canada's action.[45]

In the above judgment, the tribunal re-emphasized that the right to regulate should not violate the minimum standard of treatment and the national treatment principle. However, a reading of the award illustrates that the tribunal was largely concerned with whether the rights of the investor had been violated and failed to consider that there was an actual environmental concern worth addressing.

4.2 The Johnson & Johnson Talc Powder Cases

The American multinational pharmaceutical corporation founded in 1886[46] has been involved in a series of law suits including class actions with regards to its famous baby powder for containing high levels of asbestos, a mineral ingredient that causes cancer.[47] The pharmaceutical has been aware of the ingredient and the grievous effects (health complications and death) for decades but it chose to ignore the same; violating consumer rights.[48]

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[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] Johnson & Johnson, 'About Johnson & Johnson' <https://www.jnj.com/about-jnj> accessed 22 July 2022.

[47] Lisa Girion, 'Johnson & Johnson Knew for Decades that Asbestos Lurked in its Baby Powder' *Reuters Investigation* (14 December 2018) <https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/> accessed 22 July 2022.

[48] Ibid.

Several victims got favorable court orders against company for damages. To avoid settling claims, the company adopted the court sanctioned Texas two-step law on bankruptcy.[49] Under this law, the first step is to incorporate a separate company and then transfer all the company's liabilities to it[50] (the award orders in favor of the victims). The second step is to file for bankruptcy so that the court issues a moratorium indicating creditors are not to be paid until the unprofitable company holding the liabilities goes through the bankruptcy process.[51] This way the original company (Johnson & Johnson) remains with the assets, the profitable business.

This concept of separation of a company based on its assets and liabilities is entrenched on the concept of the corporate veil because the two companies (the on holding the assets and the one holding the liabilities) become two distinct legal entities. This allows the profitable half of the company to run as usual because there is no moratorium against it while the other unprofitable half is subjected to bankruptcy. The company holding the assets is therefore relieved from the pressure of settling claims; robbing victims of justice by leaving them uncompensated and in limbo not knowing if their awards will ever be enforced.

4.3 Human Rights Abuses at Kakuzi PLC

It was not until August 2019 that allegations of human rights abuses at the Kenyan agricultural company came to light.[52] The company is a subsidiary of Camellia Plc, a company incorporated in the United Kingdom.[53] The human rights allegations included: rape, arbitrary

[49] Brian Mann, 'J&J is Using a Bankruptcy Maneuver to Block Lawsuits over Baby Powder Cancer Claims' NPR 21 October 2022 <https://www.npr.org/2021/10/21/1047828535/baby-powder-cancer-johnson-johnson-bankruptcy> accessed 22 July 2022.

[50] Ibid.

[51] Ibid.

[52] Kenya Human Rights Commission, 'Heavy Price for Kakuzi's Egregious Human Rights Violations' <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> accessed 23 July 2022.

[53] Ibid.

detention, assault, labor injustices, beating to death of alleged avocado thieves, and unsettled land claims.[54] It took the Kenya Human Rights Commission years of advocacy to seek redress for the victims and affected communities through a suit filed in the English courts against Camellia Plc for the egregious human rights violations.[55]

Camellia Plc (the parent company) agreed to pay and settle the claims but again, the actual perpetrators were not personally held liable or even publicly disclosed due to the concept of the corporate veil. Additionally, when parent companies located miles away settle the claims instead of the subsidiary companies in the host states, there is a sense of robbed justice. This is because these corporate foreign investors are allowed to by-pass national domestic laws and prosecution by domestic courts. Hence, host states and the local communities that are the direct victims of the abuses cannot litigate the abuses in their domestic courts; the sense of justice is thus detached from them because they cannot directly confront their abusers.

4.4 The Owino Uhuru Lead Pollution Case

In 2007, a company called Metal Refinery (EPZ) opened a plant to recycle used lead-acid batteries in Owino Uhuru Settlement in Mombasa, Kenya.[56] Shortly thereafter, the local community lodged complaints alleging lead poisoning in their soil and water as a result of poor waste management.[57] The lead poisoning has had negative environmental and health complications, including deaths and respiratory diseases.[58]

[54] Ibid.

[55] Ibid.

[56] Business and Human Rights Resource Centre, 'Metal Refinery (EPZ) Lawsuit (Re Lead Pollution in Kenya)' <https://www.business-humanrights.org/en/latest-news/metal-refinery-epz-lawsuit-re-lead-pollution-in-kenya/#:~:text=In%202007%2C%20the%20Metal%20Refinery,result%20of%20poor%20waste%20management.> accessed 23 July 2022.

[57] Ibid.

[58] Ibid.

The Centre for Justice Governance and Environmental Action, an NGO, brought a class action lawsuit on behalf of the Owino Uhuru community in 2016.[59] The Land and Environment Court sitting at Mombasa in 2020 declared that the residents of Owino Uhuru Settlement had a right to a clean and healthy environment and that Metal Refinery had violated this fundamental environmental right.[60] The court directed the government and some local companies to pay the three thousand (3000) victims Kshs.1.3 billion.[61]

It is noteworthy that the Court found various non-state and actors and state actors negligent and liable for not protecting the Community's right to a clean and healthy environment. One such state actor is the national environmental regulator, National Environmental Management Authority (NEMA). Despite being aware of the lead poisoning, the regulator chose not to act.[62] This highlights the problem associated with various relevant parties becoming gatekeepers in aiding and abetting corporate human rights abuses; one of the biggest challenges in implementing good corporate governance practices and responsible behavior within corporations.

4.5 Human Rights Violations in the Extractive Sector in Taita Taveta

The Kenya National Commission on Human Rights (KNCHR) through a public inquiry done in 2016 unveiled various human rights abuses by corporations in the mining sector at Taita Taveta.[63] Some of the reported human rights abuses were: loss of entitlement to land by the communities due to irregular title allocation practices; exposure to environmental health and safety risks arising from mining activities; land degradation; child labour; violation of labor rights, including

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Africa Uncensored, 'Lead Poisoning in Owino Uhuru, Mombasa' <https://www.youtube.com/watch?v=SWU6AsfhYs0&ab_channel=AfricaUncensored> accessed 23 July 2022

[63] Kenya National Commission on Human Rights, 'Public Inquiry Report On Mining And Impact On Human Rights: Taita Taveta County, 2016' <https://www.knchr.org/Portals/0/EcosocReports/Taita-Taveta-Inquiry.pdf?ver=2013-02-21-141554-053> accessed 23 July 2022.

denial of leave days and failure to remit statutory deductions.[64] Only a few of these cases have been filed in court for redress. This is because of the complexities presented by the corporate veil when trying to find the specific actors personally liable.

5. Conclusion and Way Forward: The Road Towards Investments with Souls

This paper analyzed the concept of the corporate veil under the international investment regime. It found the concept to be problematic. This is because under the international investment regime the corporate veil is used as a sword against the host state. Once a parent company establishes that a subsidiary company is an investment in the host state, it automatically has standing to bring a claim against the host state for alleged violations; even if they have committed human rights violations.
The paper makes the following recommendations as solutions to the gaps and challenges highlighted throughout the paper:

1. Stakeholders, especially internal stakeholders, sometimes aid and abet the commission of human rights abuses because they have protection under the corporate veil. Subsequently, corporations are held liable for the actions of its personnel (directors and shareholders) and company resources are used to settle claims. The resources used could have otherwise been spent in capital expenditure (investments), payment of recurrent expenditure, operational bills, loan repayments, payment to suppliers and creditors, and payment of dividends. This has in some circumstances led to the failure, collapse and bankruptcy of some corporations.

   Members of the company should use their derivative rights to bring claims against the individuals committing human rights abuses; directors as strategic leaders should promote human rights as part of the business strategy; and shareholders should use their voting rights to vote out directors not making decisions that align with CSR and ESG.

[64] Ibid.

2. IIAs should integrate human rights protection by expressly assigning human rights obligations to foreign investors. Additionally, IIAs should not have precedence over international and domestic human rights obligations. There needs to be an express condition indicating that any breach or violation of human rights by foreign corporate investors will lead to a revocation of the investment certificate and a repudiation of the IIA.
3. Stabilization clauses should not be used to override host states right to regulate and protect its citizens from human right abuses by foreign corporate investors. Similarly, host states should not use their powers to regulate in an arbitrary and discriminatory manner, as this may lead to direct and indirect expropriation. If regulation is done in the public interest, no compensation should accrue. Instead, investors should foresee and assume the risk of changes in law. Further, investors who have committed human rights abuses should not be allowed to approach tribunals and courts with unclean hands.
4. Once found guilty of human rights violations, tribunals should decline to grant foreign corporate investors any remedy for loses suffered as a result of laws or regulations passed by the host state in the public interest.
5. There should be an authoritative, binding and mandatory multilateral international corporate governance regime with a centralized international institution to oversee and monitor the compliance of corporate governance principles. This proposed regime should adopt the international law principles of universal jurisdiction; obligations *erga omnes;* and obligations *erga omnes* partes. Incorporation of these principles will solve the challenge of *forum non conveniens* because States will have universal standing and jurisdiction to prosecute multinational corporations for human rights violations.