

Business and human rights versus corporate social responsibility: Integration for victim remedies

Nojeem Amodu*

Research Associate, Centre for Comparative Law in Africa, Faculty of Law, University of Cape Town, South Africa

<https://orcid.org/0000-0001-8959-5060>

Summary: *It is a daunting task to discern between the several debates within and surrounding the corporate social responsibility and the business and human rights movements. At the basic level of objectives, for instance, questions arise as to which movement is substantively or comparatively broader in scope. In contributing to the debates, this article investigates their evolution and the intersections within the fields. It finds both movements to be inextricably-linked regulatory movements directed at establishing accountability for the impact of human rights violations. Using the human rights due diligence requirement elaborated by the influential United Nations Guiding Principles on Business and Human Rights as a springboard, the article integrates the shared objective of the two inseparable movements, describing for scholarship and practice, the ambit of a victim-centred accountability remedial framework for business-related human rights abuses.*

Key words: *accountability; business and human rights; corporate social responsibility; impacts; integration; shared objective; victim remedies*

* LLB (Hons) (LASU) LLM PhD (Lagos); nojeem.amodu@uct.ac.za

1 Introduction

Corporate social responsibility (CSR) is not easy to define; it even is suggested that it is impossible to give a generally-acceptable definition.¹ CSR has been traced to different origins including to a governance code of King Hammurabi dating to 1700 BC in ancient Mesopotamia.² More recently, the CSR movement is traceable to government interventionist corporate governance reforms to check the raw exercise of corporate power in the United States in the 1970s.³ Notwithstanding its unsettled definition and its disputed history, CSR is largely accepted as an evolving concept. It is deemed to have evolved beyond philanthropy or the idea of simply giving back to society out of corporate surplus profits.⁴ It has become an idea geared to sensitive awareness in a complex and multi-dimensional debate which challenges the role of business in contemporary society.⁵ In a development of Galbraith's idea of the state exercising a 'countervailing power' as a check on raw corporate power,⁶ Branson describes the emergence of the CSR movement within corporate governance discourse too as an effective check on the raw exercise of power by corporations.⁷ He notes that the CSR movement in developing a practice beyond corporate charity⁸ as an exemplum of corporate governance reform aimed at a countervail to the raw exercise of corporate power.⁹ Bowen is the first to use the phrase 'corporate social responsibility' and notes that businesses must perform an ethical duty ensuring that the broader social impact of their decisions is considered and that businesses that fail to pay due regard to the social impact of their activities ought not to be seen as legitimate.¹⁰

1 T Campbell 'The normative grounding of corporate social responsibility: A human rights approach' in D McBarnet, A Voiculescu & T Campbell (eds) *The new corporate accountability: Corporate social responsibility and the law* (2007) 529-532.

2 NA Amodu *Corporate social responsibility and law in Africa* (2020) 4-5.

3 D Branson 'Corporate governance "reform" and the new corporate social responsibility' (2001) 62 *University of Pittsburgh Law Review* 605-607-611.

4 'Corporation' and 'business' are terms used interchangeably in this article to connote a legal entity or an incorporated association of persons – regardless of size – carrying on commercial activities using the corporate form. Accordingly, other parts of speech and grammatical forms of these words will have corresponding meanings.

5 J Jonker 'CSR wonderland: Navigating between movement, community, and organisation' (2005) 20 *Journal of Corporate Citizenship* 19-21.

6 JK Galbraith *American capitalism: The concept of countervailing power* (1952) 135-141.

7 Branson (n 3) 607-610.

8 Beyond corporate social responsibility historical perspectives in the philanthropic work of wealthy business owners such as John Rockefeller, Andrew Carnegie and Henry Ford who gave away millions of dollars for social use and causes. Amodu (n 2) 4-5.

9 Branson (n 3) 606.

10 H Bowen *Social responsibilities of the businessman* (1953) 6-10.

The business and human rights movement involves the determination and conceptualisation of a systematic relationship between businesses and human rights.¹¹ Compared to the CSR movement, the concept of business and human rights appeared quite recently. The first discussion of business and human rights in international institutions is traced back to the 1980s with the draft United Nations (UN) Code of Conduct on Transnational Corporations.¹² Significant academic attention to the movement was ignited only in the early to mid-1990s.¹³ The late entrance of business and human rights appears to be informed by the dominant assumption in the early part of the last century that the major responsibility for protecting and advancing respect for human rights lay with government. This view limited corporations to having indirect legal responsibility for human rights abuses.¹⁴ The rise in the power, influence and social control of businesses in the wake of globalisation led to the rebuttal of this assumption and, especially in the 1990s, the efficacy was queried of the formula which underpinned the allocation of responsibility for human rights between businesses and states.¹⁵

Although civil society played a part in raising concerns about the role of corporations in human rights, human rights commitments began to feature in the voluntary ethics codes of major multinational corporations following the infamous execution of Ken Saro-Wiwa and eight other Ogonis by the Nigerian government in November 1995. Summing up, the business and human rights movement is relatively recent and is about reinterpreting and redesigning the international human rights regime in a way that includes and addresses the role of non-state actors and particularly corporations as direct duty bearers.¹⁶

Having traced the evolution of the CSR and the business and human rights movements as regulatory concepts that make businesses answerable for the adverse impacts of their activities, this article investigates the intersection or nexus between the movements. Beyond the further exploration and integration of the shared objectives of the movements, the article targets delimitating

11 F Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* 739-742.

12 Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc E/1990/94 12 June 1990.

13 W Cragg, DG Arnold & P Muchlinski 'Guest editors' introduction: Human rights and business' (2012) 22 *Business Ethics Quarterly* 1.

14 As above.

15 Cragg et al (n 13) 2, noting that globalisation gave rise to serious questions about not only the willingness but also the ability of national governments to fulfil their human rights responsibilities.

16 Wettstein (n 11) 743.

the regulatory ambit of a victim-centred accountability remedial framework for business-related human rights abuses.

Structurally, the article is divided into five parts. Following this introduction, part 2 conceptually clarifies important ideas in the article and explores the relationship between the closely linked movements of CSR and business and human rights. It also integrates their shared objectives. Part 3 investigates the extent to which businesses may be liable to fulfil human rights obligations and the limits, if any, of the human rights to be fulfilled. Part 4 uses the human rights due diligence requirement of the United Nations Guiding Principles (UNGPs) as a springboard to describing a victim-focused remediation framework. The recommended framework targets ensuring corporate responsibility and accountability for impacts related to human rights abuses. Part 5 concludes the article.

2 Corporate social responsibility versus business and human rights: Clarifications, gaps and intersections

The ambit of the human rights discussed in this article should be clarified. Human rights have been defined in terms of ethics and morality.¹⁷ Therefore, a human right is an especially urgent and morally-justified claim that a person has, simply by virtue of being a human and independently of membership of a particular nation, class, sex, or ethnic, religious or sexual group.¹⁸ Put differently, human rights are fundamental inalienable and inherent rights to which a human is entitled simply by virtue of being a human person regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status.¹⁹ The rights are said to be held by humans prior to and independently of any legal or institutional rules. Therefore, as the most important and fundamental category of moral rights, their violations always denote a form of humiliation, that is, a form of disregard of a human being's human dignity.²⁰ It must be noted that the foundation of human rights in human morality or as inherently and inalienably entitled

17 Immanuel Kant in his 1797 work *Die Metaphysik der Sitten* (*The metaphysics of morals*), eg, defined rights as 'moral capacities for putting others under obligations'. I Kant *The metaphysics of morals* trans Mary Gregor (1996) 30.

18 M Nussbaum 'Capabilities and human rights' in P de Greiff & C Cronin (eds) *Global justice and transnational politics: Essays on the moral and political challenges of globalisation* (2002) 135.

19 E Giuliani 'Human rights and corporate social responsibility in developing countries' industrial clusters' (2016) 133 *Journal of Business Ethics* 39 40.

20 J Feinberg *Rights, justice, and the bounds of liberty. Essays in social philosophy* (1980) 151; Wettstein (n 11) 740 741.

to by humans appears queried in recent times. For instance, there is precedent for filing for property-based claims for human rights protection by businesses in relation to intellectual property rights held by them. This protection was successfully claimed in the case of *Annheuser-Busch, Inc v Portugal*²¹ where, after reviewing cases where property rights had been asserted with respect to patents and copyrights, the European Court of Human Rights (European Court) concluded that article 1 of Protocol 1²² is applicable to intellectual property as such and, therefore, concluded that corporate-held intellectual property rights are property interests subject to protection under the human rights framework in Europe. To be clear, the human rights conception in this article is rooted not in morality, but in law or legal obligations²³ and, therefore, may be claimed by juristic persons within the confines of the law. The article discusses human rights in terms of legal or quasi-legal obligations enforced by the state or other international organisations (such as the UN) engaged in global governance.²⁴

Supporting the central theme of this article is to further clarify the conceptual ambit of CSR. The CSR movement essentially is regulatory, it is about the acceptance or imposition of constraint upon the narrow pursuit of the profit goal in the wider public interest.²⁵ Also, it may be described as a corporate governance and business management model through which companies are held responsible for the economic, social and environmental impacts of their operations,²⁶ and with which businesses remain competitive, managing risks associated with balancing their legal, ethical, social, economic and discretionary responsibilities.²⁷ CSR has

21 App 73049/01, 45 Eur HR Rep 36, 78 (Grand Chamber 2007).

22 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art 1, Paris, France, 20 March 1952.

23 JD Bishop 'The limits of corporate human rights obligations and the rights of for-profit corporations' (2012) 22 *Business Ethics Quarterly* 124-139.

24 A Ramasastry 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* 237-240.

25 J Parkinson 'Corporate governance and the regulation of business behaviour' in S Macleod (ed) *Global governance and the quest for justice Volume II, Corporate governance* (2016) 3-4.

26 Against its earlier narrow definition, the EU in 2011 clarified its CSR concept in a broader definition as 'the responsibility of enterprises for their impacts on society'. Sec 3.1 of the EU, Communication from the Commission to the European Parliament 'The Council, the European Economic and Social Committee and the Committee of the Region: A renewed European Union strategy 2011-14 for corporate social responsibility' COM (2011) 681 Final 6; also AG Scherer & G Palazzo 'Toward a political conception of corporate responsibility: Business and society seen from a Habermasian perspective' (2007) 32 *Academy of Management Review* 1096.

27 N Amodu 'Corporate social responsibility and economic globalisation: Mainstreaming sustainable development goals into the AfCFTA discourse' (2020) 47 *Legal Issues of Economic Integration* 71-75.

become about corporate accountability for impacts on corporate stakeholders including employees, creditors, customers, suppliers, contractors, local communities and host governments among other stakeholders.²⁸ Although ‘corporate accountability’ and ‘corporate liability’ have been semantically differentiated,²⁹ this article uses the terms interchangeably to represent instances of liability to be called to account or legal obligations to answer for responsibilities or conducts. Therefore, corporate accountability for human rights, for instance, would mean corporate liability for legal obligations on a business to be responsible and account or answer for adverse human rights impacts.

CSR is a neutral idea.³⁰ As a regulatory concept, it may instrumentally be used as a countervailing power by the state to check adverse human rights impacts the result of the raw exercise of corporate power,³¹ it may also be self-regulatorily used by the business community to manage risks associated with balancing their legal, ethical and socio-economic responsibilities in the wider societal context. Therefore, there is nothing inherently voluntary or mandatory about the CSR movement or about making businesses behave responsibly and accountably. Different regulatory techniques may be adopted across national or intergovernmental levels whether rule-based, principle-based, soft law, hard law, voluntary, mandatory or a smart mix of all of the above. In this light, Garriga and Mélé describe different theoretical perspectives expanding the ambit of CSR. Their classification of CSR perspectives and theories – into instrumental, political, integrative and ethical – generally is accepted as representing a brilliant account of the foremost academic debate on CSR.³²

Not unrelated to the effects of globalisation and the increased power and roles of corporations beyond commercial activities, CSR political perspectives have grown in influence.³³ For instance, Scherer

28 The stakeholder group in businesses varies depending on size, the nature of business or transaction involved, the time in question, among other factors. Amodu (n 2) 48 49.

29 N Bernaz ‘Enhancing corporate accountability for human rights violations: Is extraterritoriality the magic potion?’ (2013) 117 *Journal of Business Ethics* 493 494.

30 N Amodu ‘Sustainable development and corporate social responsibility under the 2018 petroleum host and impacted communities development trust Bill: Is Nigeria rehashing past mistakes?’ (2019) 4 *African Journal of Legal Studies* 319 324.

31 Branson (n 3) 608; Galbraith (n 6) 141; see also specific laws at nn 83 and 84 below.

32 E Garriga & D Mélé ‘Corporate social responsibility theories: Mapping the territory’ (2004) 53 *Journal of Business Ethics* 53 65.

33 K Buhmann ‘Public regulators and CSR: The “social licence to operate” in recent United Nations instruments on business and human rights and the juridification

and Palazzo, underscoring the interwoven nature of the hitherto traditional roles of business and state actors, give their perspective on a 'political CSR' as being about 'an extended model of governance with business firms contributing to global regulation and providing public goods'.³⁴ The CSR discourse, therefore, is not necessarily a discussion about corporations only; its topics and regulatory ideas also pertain to non-corporate actors including the state in seeking a countervailing force to the raw exercise of corporate power. To this end the elaborate principles, and commentaries within the three differentiated but complementary pillars of the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs)³⁵ not only describe how corporations may behave responsibly in society but also clarify the role of state actors in ensuring that corporations within their jurisdictions are well behaved. Technically, therefore, states have CSR (accountability for impacts) obligations, including business-related state obligations to safeguard human rights from any negative social, environmental, and economic impacts of corporate activities.

Having shown that CSR transcends the practice of corporate charity, it is useful to explain why the idea of limiting the CSR discourse to philanthropy appears to have endured especially in the Global South. The Achilles heel in the debate is voluntariness.³⁶ Associating CSR with voluntary donations beyond legal requirements or giving back to society out of corporate surplus became entrenched in business communities and was promoted as the official position in a large economy and host to many of the largest multinational enterprises, the European Union (EU).³⁷

of CSR' (2016) 136 *Journal of Business Ethics* 699-710.

- 34 AG Scherer & G Palazzo 'The new political role of business in a globalised world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy' (2011) 48 *Journal of Management Studies* 900-901.
- 35 J Ruggie 'Final report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises' endorsed as the 'Guiding principles on business and human rights: Implementing the United Nations' protect, respect and remedy framework' (UNGPs) A/HRC/17/31, 21 March 2011, <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (accessed 7 June 2021).
- 36 For criticism of voluntary conceptualisation, see Parkinson (n 22) 4-7; H Ward 'Corporate social responsibility in law and policy' in N Boeger, R Murray & C Villiers (eds) *Perspectives on corporate social responsibility* (2008) 8-11; C Villiers 'Corporate law, corporate power and corporate social responsibility' in Boeger et al (above) 96-100.
- 37 A Green Paper issued by the European Commission in 2001 defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. European Union 'Communication of European Union country's commission green paper on promoting a European framework for corporate social responsibility' COM (2001) 366 Final 18 July 2001. While not specifically mentioning CSR, the Organisation for Economic Cooperation and Development

The debate has since moved on, especially in the Global North, as voluntariness appears, with minimal exceptions, no longer fundamentally linked to CSR. The EU changed course in its 2011 communication, deviating from its 2001 earlier voluntarism-based approach, broadly defining CSR in terms of the 'responsibility of enterprises for the impact on society'.³⁸ In the renewed EU CSR policy framework corporations are now expected to identify, prevent and mitigate possible adverse impacts which their activities may have on society.³⁹ However, the harm already has been done as the conception of CSR influenced emerging economies and is still restrictively construed as voluntary corporate philanthropy and undertaking community development projects.⁴⁰

The failure until recently to see CSR as neutral in developed economies also impacted the business and human rights debates because it was assumed that the CSR movement focused only on social and environmental matters and did not integrate concerns for corporate-related human rights abuses,⁴¹ whereas the reality is that CSR scholarship has moved beyond voluntary corporate charity and had incorporated human rights as part of its core topic. However, CSR scholars often did not specifically identify the issues as being about human rights. The disconnect, therefore, seems to be that while many business and human rights scholars assumed that CSR advocates addressed something different from corporate responsibility and accountability including human rights impacts, both movements are in agreement in terms of making businesses answerable for the socio-economic and environmental impacts of corporate activities. Wettstein summarised this view as follows:⁴²

To be sure, these elaborations ought not to imply that CSR has avoided or downright ignored human rights issues; in fact, many of the problems that CSR scholars are regularly dealing with are, at their core, human rights problems. Rather, the problem is that they have seldom truly been addressed as such. For the reasons stated above, they have been addressed not in the terminology of justice, but often in that of

(OECD) appear to also define CSR in light of a set of 'voluntary principles and standards for responsible business conduct consistent with applicable laws'. *OECD guidelines for multinational enterprises* (2011) 13.

38 European Union Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: *A renewed European Union strategy 2011-14 for corporate social responsibility* COM (2011) 681 Final 6.

39 European Union (n 38) para 8.

40 Amodu (n 2) 17.

41 Ramasastry (n 24) 239; S Waddock & N Smith 'Relationships: The real challenge of corporate global citizenship' (2000) 105 *Business and Society Review* 47.

42 Wettstein (n 11) 751; also F Wettstein 'Beyond voluntariness, beyond CSR: Making a case for human rights and justice' (2009) 114 *Business and Society Review* 125 (citations omitted).

virtue and beneficence or even philanthropy and charity. This not only sells CSR's own importance and relevance short, but it threatens to empty human rights of the moral urgency that constitutes and defines their very nature as the most fundamental claims and imperatives on the moral spectrum.

These views may hold sway for CSR scholars writing about business and human rights and, although not specifically describing it, a similar approach is correct for business and human rights scholars who discuss topics at the heart of the CSR movement without labelling them. Part 1 of this article alluded to the origins of CSR as a countervailing force by which the state checked the raw exercise of corporate power in society. As is evident from the earlier described origin of business and human rights, the business and human rights movement and writings also are regulatory discussions about countervailing the powerful influence of corporations and redistributing responsibilities, making business accountable for their human rights impacts on society as direct duty bearers.⁴³

The inextricable connection between the regulatory movements of CSR and business and human rights which renders nugatory any attempt to compartmentalise them appears in their ultimate link to the proposals presented by Professor John Ruggie, first within the framework of the United Nations Global Compact (UNGC)⁴⁴ and thereafter with the UNGPs. Ruggie's work is pivotal to these movements; from 1997 to 2001 he served as UN Assistant Secretary-General for Strategic Planning, a post created specifically for him by then Secretary-General, the late Kofi Annan. His areas of responsibility included assisting Mr Annan in establishing and overseeing the UNGC which, as the world's largest CSR initiative, enjoins businesses to support and respect the protection of internationally proclaimed human rights in their sphere of influence. His work from 2005 to 2011 as the UN Secretary-General's Special Representative on Business and Human Rights culminated in the Human Rights Council unprecedentedly and unanimously endorsing UNGPs.

43 While not specifically labelled as human rights obligations on businesses, there are a few statutory provisions in Africa and around the world from which human rights and CSR obligations on businesses may be deduced. Eg, see sec 12(1) of Ghana's Constitution of 1992 with Amendments through 1996; sec 15 of the Constitution of the Republic of Malawi 1994, as amended; sec 8 of the Constitution of the Republic of South Africa, 1996; sec 2 of the Constitution of Zimbabwe 2013; sec 20 of the Constitution of Kenya 2010; see also nn 80 and 81 below.

44 United Nations Global Compact, <http://www.unglobalcompact.org> (accessed 7 June 2021).

Criticism⁴⁵ has trailed the UNGPs in the business and human rights regulatory movement, but it remains firmly embedded in the current regulatory ecosystem for business and human rights⁴⁶ and has successfully elaborated the implications of existing standards and practices for states and businesses by integrating them into a single comprehensive template providing a global common platform for action.⁴⁷ These international instruments are vital to any CSR and business and human rights debate as, although based on voluntary commitment by businesses, they clearly articulate the central theme that CSR and business and human rights really are neutral regulatory ideas about corporate responsibility and accountability⁴⁸ for impacts as there is nothing inherently voluntary, soft law, hard law or mandatory about them. The UNGPs, for instance, confirm that states owe the obligation to ensure businesses respect human rights and promote this practice through 'smart' regulation which confers the regulatory latitude afforded states for a mixture of incentives, soft guidance and hard law.⁴⁹

It can be questioned whether the CSR movement is broader in scope than the business and human rights movement despite their being linked. It is contended that business and human rights is a broader construct than CSR as business and human rights contemplates an explicit and essential role for the state in supervising their corporate citizens.⁵⁰ This argument is based on the view that CSR by contrast

45 LC Backer 'Considering a treaty on corporations and human rights: Mostly failures but with a glimmer of success' in JL Cernic & N Carrillo-Santarelli (eds) *The future of business and human rights* (2018) 92-93; S Deva 'Alternative paths to a business and human rights treaty' in JL Cernic & N Carrillo-Santarelli (eds) *The future of business and human rights* (2018) 13-16; D Chirwa & N Amodu 'Economic, social and cultural rights, sustainable development goals, and duties of corporations: Rejecting the false dichotomies' (2021) *Business and Human Rights Journal* 21.

46 The UNGPs remain relevant within the treaty debate in the activities of the UN Open-Ended Intergovernmental Working Group (OEIWG). The OEIWG was given a mandate in 2014 by the Human Rights Council, post-UNGPs endorsement, to elaborate a legally-binding instrument on transnational corporations with respect to human rights. UNHRC, 26th session 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' 14 July 2014 UN Doc A/HRC/RES/26/9. The Human Rights Council is the key independent UN intergovernmental body responsible for human rights. It was created in 2006 replacing the 60-year-old UN Commission on Human Rights. The Office of the UN High Commissioner for Human Rights (OHCHR) has responsibility for the promotion and protection of human rights in the UN system.

47 N Jagers 'Access to justice for victims of corporate-related human rights abuse: An Echternach-procession' (2015) 33 *Netherlands Quarterly of Human Rights* 269.

48 Para 1 of Ruggie's original mandate reads: 'to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'; UN Commission on Human Rights adopted Resolution E/CN.4/RES/2005/69 (my emphasis).

49 Wettstein (n 11) 701.

50 Ramasastry (n 24) 245.

focuses on company decision making in which corporations are actors that need to address their role in society and engagement with communities and stakeholders.⁵¹ On that note, Ramasastry concludes that CSR remains focused on voluntarism and aspirational notions of how companies should engage with stakeholders, whereas business and human rights seeks accountability for victims from corporations implicated in serious human rights abuses.⁵²

This article clarifies that the meaning of CSR extends beyond voluntariness and, in fact, many CSR scholars regularly address human rights problems although seldom labelled as such. It is submitted that business and human rights is not a broader movement.

In the same vein, some authors instead argue that CSR is the broader movement.⁵³ This view also is rejected and it is contended that the debate is not very useful. The contestation of which is broader in meaning is of little value to victims of business-related human rights abuses who require efficient access to effective remedies. Further, although the UNGPs make no specific reference to CSR, this article argues that a holistic view of the explanatory commentaries together with the operational principles of the framework demonstrate that the UNGPs address issues at the core of CSR, especially as elaborated in Pillar II. In the CSR movement it is not illogical to speak about states' CSR obligations in terms of ensuring corporations fulfil human rights obligations as contained in the Pillar I of the UNGPs. A crucial point which concludes this debate is that when appraised against the background of the UNGPs there is a close, inseparable and undeniable nexus between CSR and business and human rights regardless of whichever is considered to have a broader meaning. The movements should be integrated⁵⁴ as having a shared objective directed at corporations' accountability for the social, economic and environmental impacts of their operations. Both are regulatory movements which hold businesses accountable for impacts on human rights.⁵⁵

51 As above.

52 Ramasastry (n 24) 252.

53 Buhmann (n 33) 700 701.

54 Wettstein (n 11) 739.

55 Needless to add that this article does not subscribe to the view that BHR or CSR should be concerned about the broader role that businesses may play in promoting and securing human rights generally. This debate is not addressed in detail in this article, but this author submits that asking corporations to be responsible for the promotion of human rights generally beyond the scope of human rights due diligence is beneficial, neither to the business community the commercial focus of which will become unduly jeopardised having essentially been enjoined to take over the role of the state or to the BHR and CSR movements which, though recognising that states no longer are the sole bearers of direct human rights obligations, should focus only on failures of HRDD and the extent of complicity in any human rights violations by corporations and

It may be argued that the impacts discussed by the CSR movement appear broader than the human rights impact central to the business and human rights movement. However, this argument is not sustainable and misses the important factor that there are different kinds of human rights ranging from social, economic, cultural, civil, political – including the so-called new generation – rights and are interwoven in their implications impacted by businesses. This point is further developed in the next part in delimiting the extent to which corporations are responsible for human rights.

3 Extent of corporate responsibility for human rights

There are human rights and then there are human rights. The responsibility of business enterprises to respect human rights generally refers to internationally-recognised human rights, at a minimum, meaning those expressed in the International Bill of Human Rights (IBHR) and the rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.⁵⁶ However, there are grey areas where human rights (or the extent to which they may be reasonably secured or fulfilled) vary from society to society based on custom, available economic resources and other factors.

The core of internationally-recognised human rights is contained in the IBHR consisting of (i) the Universal Declaration of Human Rights (Universal Declaration)⁵⁷ and the main instruments through which the declaration has been codified: (ii) the International Covenant on Civil and Political Rights (ICCPR),⁵⁸ and (iii) the International Covenant on

the ultimate obligation to protect, promote and secure human rights remains with state actors. Perhaps lessons should be learnt from the failure of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of which the core report was that businesses were responsible for 'promoting and securing the human rights set forth in the [UN] Universal Declaration of Human Rights'. See Preamble para 3 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, 2003 Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12 (Geneva, Switzerland: United Nations). Cf Bishop (n 23), suggesting at 137 that 'in countries in which basic health care and schools are not provided by the state, a corporation would be under an obligation to pay school fees and health insurance', eg, towards securing such rights.

56 UNGPs, Operational Principle 12.

57 United Nations General Assembly, Universal Declaration of Human Rights adopted 10 December 1948, GA Res 217 A (III), UN GAOR, 3rd session, UN Doc A/810 (1948).

58 International Covenant on Civil and Political Rights (ICCPR) 1976, opened for signature on 16 December 1966, 999 UNTS 171 and entered into force 23 March 1976.

Economic, Social and Cultural Rights (ICESCR).⁵⁹ These are coupled with the fundamental rights in the eight International Labour Organisation (ILO) core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.⁶⁰ The first step in understanding the extent of corporate responsibility for human rights is to establish the limits of human rights to which corporations may be held accountable, if they are impacted negatively. The UNGPs, for instance, have not distinguished between different categories of rights as either civil, political, social, economic or cultural, because corporations can have an impact on virtually the entire spectrum of internationally-recognised human rights and their responsibility is to respect all such rights.⁶¹ There is no agreement among human rights scholars on the possibility and desirability of establishing any hierarchy of human rights⁶² and no inherent jurisprudential reason exists for denying the justiciability of any human right.⁶³

In light of the above the value in compartmentalising rights as civil and political rights and others as economic, social and cultural rights appears elusive especially as victims simply seek an effective remedy for violations.⁶⁴ It is arguable that no principled reason exists for upholding the justiciability⁶⁵ of some rights over others,⁶⁶ but there is no gainsaying that the full realisation and fulfilment of some rights may depend on certain circumstances and facts. For instance, it is well established not only within the framework of the ICESCR⁶⁷ but also in scholarship and practice that the fulfilment of the economic, social and cultural rights depends on the maximum

59 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976, opened for signature on 16 December 1966, 999 UNTS 3 and entered into force 3 January 1976.

60 UNGPs, Commentaries to Operational Principle 12.

61 As above. The importation limitation is that even if it applies to all rights, nonetheless they must be in the sphere of the corporations' responsibility as simplified in the HRDD framework.

62 Giuliani (n 19) 41.

63 J Nolan & L Taylor 'Corporate responsibility for economic, social and cultural rights: Rights in search of a remedy?' (2009) 87 *Journal of Business Ethics* 433 436.

64 To this effect, it is curious why two human rights covenants – ICCPR and ICESCR – ended up being adopted where only one originally was envisaged. In the UN General Assembly Draft International Covenant 1950 there was initial support for a single international covenant. Nolan & Taylor (n 63) 435 436.

65 A right is justiciable if it is 'capable of being formulated to impose strict, judicially enforceable obligations' under law. WM Cole 'Strong walk and cheap talk: The effect of the international covenant of economic, social, and cultural rights on policies and practices' (2013) 92 *Social Forces* 168.

66 Nolan & Taylor (n 63) 436.

67 Art 2(1).

economic resources available to individual states⁶⁸ and other similar circumstances.⁶⁹

In light of the foregoing it may be questioned that corporations lawfully can avoid liability and accountability for certain kinds of human rights. As elaborated upon in the paragraph below this article argues against the interests of victims of human rights abuses. Part 4 below describes a framework applicable to all human rights and provides an alternative remedial mechanism based on the human rights due diligence of the UNGPs.

In determining the limit to corporate obligations for human rights, cultural rights (as recognised within the IBHR) add a further dimension to the debate. Culture is a complex whole which includes knowledge, beliefs, arts, morals, laws, customs and any other capabilities and habits acquired by a human as a member of society. Cultural rights may be interpreted broadly and involve the right to take part in cultural life, the right to enjoy the benefits of scientific progress and the right to benefit from the protection of moral and artistic rights derived from production of literary or artistic works or other forms of cultural knowledge.⁷⁰

Understanding culture and cultural rights so broadly, this article submits that the compartmentalisation of rights, if done at all, should be targeted at delimiting the extent of remedies to victims when violated and not in determining whether or not they should be or are capable of being fulfilled by states or non-state actors. A useful example appears in the right to education.⁷¹ Even though the right to education is a cultural right, it can be viewed as an economic right because of the associated ability to earn a living. It may equally be viewed as a social right in the sense that it is a means of and for social participation and community benefit.⁷² The right to education may be categorised as a part of civil and political rights since ICCPR guarantees freedom of thought, conscience and religion in teaching and recognises the liberty of parents to ensure the religious and

68 A Nolan 'Privatisation and economic and social rights' (2018) 40 *Human Rights Quarterly* 832.

69 JL Cernic 'A glass half full: Corporate and state responsibilities under economic and social rights during the on-going European financial crisis' (2014) 11 *South Carolina Journal of International Law and Business* 87 93. The European Court has also not found austerity measures to be in violation of the European Convention on Human Rights (European Convention), as states have been given a wide margin to determine an individual's socio-economic rights in accordance with the available financial resources of the state. *NKM v Hungary* App 66529/11, Eur Ct HR (2013) 71.

70 Arts 22 & 27 Universal Declaration; art 15 ICESCR; art 27 ICCPR.

71 Art 26 Universal Declaration; arts 13 & 14 ICESCR.

72 Nolan & Taylor (n 63) 435.

moral education of their children in conformity with their own convictions.⁷³

In this context corporations will not escape accountability for their failure of human rights due diligence if it negatively impacts the right to education of a victim even if such a right is viewed, for instance, as an economic, social and cultural right which is generally considered inferior or not justiciable.

This article submits that such categorisation of rights should be less articulated in business and human rights and CSR discourses especially in the largely neglected area of establishing an effective remedial framework for victims. Further, compartmentalisation or delimiting the extent of rights appears to be inutile. not only because corporations can and do violate all kinds of human rights but also because the extent of human rights capable of being adversely impacted by corporations varies depending on the level of development of a society's human rights system. Therefore, compartmentalisation into a one-size-fits-all model may disadvantage some victims in certain jurisdictions. For example, the question of the right to keep and bear arms, particularly in relation to gun ownership. It is arguable that a gun is only property and not a necessity for survival. However, this argument is difficult to sustain generally. In many rural areas of developing countries, in Africa for instance, the ownership of firearms is considered essential not only for hunting game but also for religious purposes.⁷⁴ A gun ownership system is presented as part of cultural life and a means of survival for such people and a source of identity, meaning and promoting a sense of belonging and is claimed to require being safeguarded by the state if limited by the rights of other members of society.

This debate is beyond the purview of this article, but the gist lies in the above supporting a view that human rights (or the extent to which they may be negatively impacted by corporations and beyond) may be interpreted differently by a society or culture. Compartmentalising groups of rights jeopardises the interests of victims in individual circumstances and any categorisation or compartmentalisation should be aimed at delineating the nature or extent of the remedy available to victims depending on facts or circumstances involved in individual cases but not to answer the question whether or not a categorised right is capable of being fulfilled or violated.

⁷³ Art 18 ICCPR; art 13(3) ICESCR.

⁷⁴ For the 'Ode' group as local hunters among the Yoruba tribe in Nigeria, guns are not used only for hunting purposes but also as an important expression of their cultural and religious lives.

The focus of business and human rights and CSR movements may be shifted to the much-neglected Pillar III within the UNGPs to getting human rights violations remedied to the extent it does not limit others enjoyment of rights.⁷⁵ This approach corresponds to the UNGPs' recognition that all rights are capable of violation but also is consistent with the Universal Declaration that

[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁷⁶

4 Remedial framework for victims

Following on from the discussion of the inseparable link between business and human rights and CSR as regulatory movements and as sharing an objective of accountability for impacts, this part builds on the argument relating to abandoning the categorisation of human rights in favour of focusing on mechanisms which provide effective remedies to victims of all human rights abuses. It is emphasised that the only limitation to seeking remedies for violations of a victim's human rights should be the law.

A state – whether in a domestic or international human rights legal framework not – providing protection for a human right can be supplemented by the remediation framework described below. The remedial framework below – taking into consideration their individual available economic resources, culture and any other relevant factors – nevertheless depends on states explicitly⁷⁷ prescribing appropriate and complementary legal provisions safeguarding human rights in their corporate law system.

This proposed framework proceeds on the assumption that in the absence of a legally-binding international obligation on corporations to fulfil all human rights, the most useful technique to hold corporations accountable for their impacts is through an accountability mechanism building on the human rights due diligence exercise in the UNGPs. The UNGPs are not legally binding on corporations, but

⁷⁵ Art 30 Universal Declaration.

⁷⁶ Art 29(2) Universal Declaration.

⁷⁷ In many jurisdictions there are haphazard labour or environmental laws or provisions which may border on protection of business-related human rights abuses. See, eg, R Janda & JC Pinto 'Canada' in LH Urscheler & J Fournier (eds) *Regulating human rights due diligence for corporations – A comparative view* (2017) 48.

they constitute a useful reinforcement of societal expectations that corporations owe obligations to respect and safeguard human rights in their sphere of responsibility. The human rights due diligence, therefore, becomes pivotal to business and human rights and CSR as regulatory movements creating accountability for impacts. Human rights due diligence is a process where states and businesses not only ensure compliance with laws but also manage the risk of human rights abuses with a view to avoiding them.⁷⁸ The purpose of the human rights due diligence is not merely to identify and review any negative impacts of company operations on human rights but also to assess possible measures for the prevention or mitigation of such impacts. The scope of due diligence varies from business to business, transaction to transaction depending on circumstances.⁷⁹ This article submits that states should incorporate the human rights due diligence in the fabric of their corporate law system to provide remedies to corporate stakeholders the victims of business-related human rights abuses.

The process encompasses the state imposing a legal obligation in the primary company legislation on its business community. In that way every business is subject to the obligation to not only identify and review any negative impacts of company operations on human rights and the environment but also demonstrate to the reasonable satisfaction of relevant adjudicatory or human rights monitoring bodies that all possible measures for the prevention or mitigation of such violations not only were taken but were seen to have been taken.

The imposition of human rights due diligence as a constraint on the otherwise narrow pursuit of profit by the business community raises the level of alertness in the business community to be accountable for their impacts. The legal obligation should be supported by effective remedies easily accessible by victims. A supposed legal obligation not matched by an effective and accessible remedy is worthless,⁸⁰

78 UNGPs, Operational Principle 17. In the ISO Norm 26000 (point 2.4) due diligence is defined as a review of the 'social, environmental and economic impacts' of business operations.

79 J Fournier & LH Urscheler 'International standards in the domain of corporate social responsibility' in Urscheler & Fournier (n 77) 21.

80 Para 10 of the ICESCR Statement, 'The pledge to leave no one behind: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development' E/C.12/2019/ adopted by the Committee at its 65th session, held from 18 February to 8 March 2019, https://sustainabledevelopment.un.org/content/documents/21780E_C.12_2019_1_edited.pdf (accessed 7 June 2021); L Sealy 'Directors' "wider" responsibilities – Problems conceptual, practical and procedural' (1987) 13 *Monash University Law Review* 164 177; A Keay 'The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model' (2010) 10 *Journal of Corporate Law Studies* 35 37.

The failure of a demonstrable effective human rights due diligence will result in accountability and liability for the corporation involved.

The manner in which efficient access is granted to victims for effective remedies before competent adjudicatory or human rights monitoring bodies is now the focus. This remedial framework should be adopted by states within their respective corporate legislative framework and linked to an alternative normative and regulatory corporate objective model as has been argued elsewhere.⁸¹ Suffice it to say that the law imposing the human rights due diligence obligations must be worded so as to provide effective access for genuine victims of business-related human rights abuses, but also to keep the commercial focus of businesses in enhancing shareholder value in the confines of the law.

The proposed human rights due diligence framework will be a default⁸² rule of corporate law, which means that it applies automatically to corporations regardless of the contents of their memorandum or articles of association and may be avoided only by discharging the duty to the reasonable satisfaction of adjudicatory bodies. The effective discharge of the legal duty will depend on many factors being considered by the adjudicatory bodies. These factors range from the nature of the human rights violated, the time in question, the size and nature of business of the corporation or the industry or sector of the economy where the corporation operates, and many more. Mitigating factors that may weigh positively on the decisions of the adjudicators will vary from the demonstration of an internalised company policy and work ethic which adheres to CSR and business and human rights standards, requirements and guidelines contained in acceptable foreign or international instruments such as the French *Devoir de Vigilance*,⁸³ the English Modern Slavery

81 N Amodu 'The responsible stakeholder model: An alternative theory of corporate law' (2018) 5 *Journal of Comparative Law in Africa* 1; Amodu (n 2) 64-73 196-206.

82 In corporate governance parlance, default or presumptive rules are provisions in law that automatically apply to businesses or companies regardless of the contents of their memorandum or articles of association and may only be avoided by discharging the duty to the reasonable satisfaction of adjudicatory bodies (regulators and domestic courts). For detailed discussions on the three forms of corporate rules, see BR Cheffins *Company law: Theory, structure and operation* (1996) 218 219.

83 Businesses are already obliged to identify, consider and balance the impacts of their operations within the framework of other laws outside corporate law framework. Eg, the French *Devoir de Vigilance* (the Law on the Duty of Vigilance) Law 2017-399 of 27 March 2017, establishing a duty of vigilance in the French Commercial Code, ie a legal obligation of prudent and diligent conduct, owed by the parent companies of groups that employ at least 5 000 employees in France or 10 000 employees worldwide. These companies are obliged to establish and implement an effective vigilance plan including reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental

Act,⁸⁴ the OECD Due Diligence Guidelines,⁸⁵ the UNGPs, together with other soft law, self-regulatory initiatives, or by membership of international certification or global reporting scheme for responsible and sustainable business conducts such as the Guidance on Corporate Responsibility Indicators in Annual Reports, published in 2008 by the UN Conference on Trade and Development (UNCTAD),⁸⁶ and the Global Reporting Initiative (GRI).⁸⁷

It is crucial to clarify that the demonstration of an effective internal CSR policy, membership or compliance with relevant domestic laws and global best practices or international certification should constitute only a rebuttable presumption and *prima facie* evidence and is not conclusive proof that a corporation behaved responsibly having effectively discharged the human rights due diligence obligation. The conclusiveness or otherwise should be determined, on a scale of probabilities acting both judiciously and judicially, on a case-by-case basis depending on circumstances of time and the facts involved. A finding of a contravention of this default rule need not necessarily lead to financial compensation to victims. Remediation orders not only should fit the nature of the injuries sustained by victims but also consider the question of the long-term survival of the business involved. Such remedies may include any one or a combination of the following: a published apology; restitution; rehabilitation; financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines); as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

freedoms, and the health and safety of persons and the environment resulting from the activities of society and those of the companies it controls directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established commercial relationship is maintained, where these activities are related to that relationship. See also the Conflict Minerals Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017, laying down supply chain due diligence obligations for the EU importers of tin, tantalum and tungsten, their ores, and gold (3TG) originating from conflict-affected and high-risk areas, and ensuring that such imports meet international responsible sourcing standards, set by the OECD, similar to the EU Conflicts Minerals Regulation.

- 84 Under the Modern Slavery Act 2015 (UK), businesses carrying on in the UK with an annual turnover of €36 million or greater are required to make a statement disclosing the steps the business took to ascertain that no slavery was involved in its business or its supply chain towards ensuring that businesses respect the human rights impacts of their operations and do not profit from slavery.
- 85 OECD 'OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas' (2016), <http://dx.doi.org/10.1787/9789264252479-en> (accessed 7 June 2021).
- 86 United Nations Conference on Trade and Development (UNCTAD) Guidance on Corporate Responsibility Indicators in Annual Reports, (UNCTAD/ITE/TEB/2007/6), https://unctad.org/en/docs/iteteb20076_en.pdf?user=46 (accessed 7 June 2021).
- 87 <https://www.globalreporting.org/standards> (accessed 7 June 2021).

It is important that the commercial focus of corporations is kept to enable businesses to enhance shareholder value. Therefore, the proposed framework is not a mandatory but a default rule giving corporations the leeway to self-regulate their human rights due diligence policies in the course of their normal operations but remaining susceptible to state scrutiny when violations are alleged. Further, in giving access to potential victims of human rights violations, minimal procedures may be instituted to ensure that meddlesome interlopers are kept away from interfering with the smooth daily operations of corporations or distracting corporate managers with frivolous claims. To forestall the unnecessary opening of the floodgates to meddlesome petitions and litigation, a potential victim should establish to the reasonable satisfaction of the adjudicatory or human rights monitoring bodies two things, namely, (i) qualification as a legitimate corporate stakeholder relevant to the long-term survival of the corporation involved; and (ii) verifiable abuse or heightened risk⁸⁸ of injury to his or her human rights.

As clarified elsewhere,⁸⁹ this proposal is based on an appreciation of the important contribution of corporate stakeholders such as employees, host communities, customers, creditors, and host governments to the long-term survival of corporations. Therefore, it safeguards the fulfilment of their human rights by the corporations as a reasonable and legitimate societal expectation that the state upholds having created the opportunity for the existence of corporations and having responsibility. If prospective claimants satisfy these demands, the evidentiary burden passes to the corporation which, as part of the default legal obligation for a human rights due diligence, *prima facie* is presumed to have acted irresponsibly in the circumstances to demonstrate that it is not responsible for human rights abuse.

Genuine victims need not establish that the corporation operating within their community is responsible for the damage. The corporation has an obligation to demonstrate its responsibility or otherwise by effectively discharging the human rights due diligence obligation prescribed in the corporate law system. This onus of proof is justified as a countervailing power of the state against the raw

88 These are risks from businesses' potential human rights impacts or violations and such impacts should be addressed through prevention or mitigation. This second hurdle is as important as the first to prevent meddlesome interlopers from successfully instituting frivolous actions and detracting businesses from their commercial focus. This notwithstanding, qualified potential victims as legitimate corporate stakeholders will overcome the obstacle by showing the absence of preventative measures from businesses to address an imminent violation of human rights. See Principles 13(b), 15(b) together with commentaries to Principles 17 and 19 of the UNGPs.

89 See n 81.

exercise of corporate power. It should drastically reducing corporate complicity in human rights violations and discourage activities such as greenwashing by opportunistic rogue businesses that pay only lip service to CSR obligations as they know that their internally developed CSR policies and human rights due diligence exercises are not, in themselves, conclusive proof of behaving responsibly but they will be scrutinised by adjudicatory bodies.

In cases of pollution and environmental degradation of host communities and violations of their human rights (including the constitutionally-guaranteed right to life and related economic, social and cultural rights) by any corporation, the victim corporate stakeholder (any member of the host community) needs to establish only that its legitimate stake – the right to live in and have maintained a safe and conducive environment (which is relevant to the long-term survival of the corporation involved) it has been infringed upon or has come under a heightened risk of infringement and there has been a verifiable injury or heightened risk of injury to its human rights.⁹⁰

The access to a remedy in this proposed framework, though permissive of minimal procedural hurdles for prospective claimants, in order to prevent opening a floodgate of petitions and litigation and maintain the commercial focus of corporations, also excludes irrelevant procedural bottlenecks in approaching the adjudicatory bodies. The emphasis should be placed on the merits and the justice of individual cases as opposed to any technical procedures in order to prevent frustrations encountered by victims attempting to seek a remedy under the US Alien Tort Claims Act (ATCA).⁹¹

90 The case of *Gbemre v Shell & 2 Others* unreported Suit FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005 appears useful. The Federal High Court of Nigeria in this case had held that the plaintiff (applicant) had enforceable constitutionally-protected human rights including rights to 'clean, poison-free, pollution-free and healthy environment' which the state had a duty to protect and which the respondent, Shell, should respect. The Court found that Shell's action in continuing to flare gas in course of their oil exploration and production activities in the applicant's community violated his right to life and dignity of the human person under the Nigerian Constitution and the African Charter. Even though there was no clear justiciable right to a clean, poison-free, pollution-free and healthy environment in the Nigerian Constitution, the Court adopted an expansive interpretation and construction of the Nigerian Constitution together with the provisions of African Charter (especially art 24) to recognise and apply the said right. O Amao 'The African regional human rights system' in MA Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (2010) 251.

91 The US Alien Tort Claims Act (ATCA), codified at 28 USC § 1350, is a US statute that provides that the US district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US. The first requirement – that the plaintiff is an alien alleging a tort – is not controversial; it is the latter requirement a plaintiff prove a 'violation of the law of nations or a treaty of the United States' that has proven

In summing up, this proposal is grounded in law but is not without its shortcomings. It assumes that corporations require registration by states before carrying on business in the state, it also assumes that states not only will be willing but will be capable of adopting the proposal to check any raw exercise of corporate power. Therefore, it assumes that it is in the national interest⁹² of states to adopt the proposal, which may be viewed as overrating the sovereign equality of states doctrine⁹³ and underestimating the power of corporations⁹⁴ domestically and at an intergovernmental level.⁹⁵ Further, the proposal expects states to incorporate the human rights due diligence obligation in their domestic company law systems, which has its limitations in assisting in the successful combatting of cross-border corporate-related human rights abuses even if all businesses are required to incorporate in individual states before operating in the state. Extra-territorial application runs the usual⁹⁶ risk of interstate friction, even though such extraterritorial application is useful as being a counterweight to the power, influence and threat of large corporations. Finally, unless the proposal is adopted as a legally-binding intergovernmental instrument, jurisdictional arbitrage and forum shopping whereby corporations move around scouting for favourable jurisdictions and countries with weak CSR and business and human rights regulatory frameworks to invest in becomes commonplace.

to be a greater obstacle for plaintiffs and has the effect of excluding victims of economic, social and cultural rights abuses from its framework. In *Sosa v Alvarez-Machain* 542 US 2739 (US S Ct, 2004), the US Supreme Court considered ATCA for the first time and confirmed the ability of plaintiffs to bring suits in US courts under ATCA for a 'narrow set' of human rights infringements based on violations of customary international law.

- 92 Legislative attempts to extend human rights liabilities to home-based companies in the form of private members' Bills in the US Congress and the Parliaments of Australia, the United Kingdom and Canada have met with failure. A notable effort is the Bill C-300 *An Act Respecting Corporate Accountability for Mining, Oil and Gas Corporations in Developing Countries*, introduced in the Canadian House of Commons in 2009 but defeated in 2010; also useful to the topic are the debates surrounding and leading to the eventual sec 172 of the 2006 English Companies Act.
- 93 See the Charter of the United Nations, art 2(1) and a corollary principle that no state may interfere in the domestic affairs of another state. See, generally, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA/Res/2625(XXV): 'No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.'
- 94 Backer (n 45) 95-97.
- 95 Buhmann (n 33) 703.
- 96 OK Fauchald & J Stigen 'Corporate responsibility before international institutions' (2009) 40 *George Washington International Law Review* 1027 1028.

5 Conclusion

The CSR and business and human rights movements have been assumed to have different but related agendas. This article clarifies the issue of whether the CSR movement goes beyond voluntary corporate charity and demonstrates it to be a regulatory movement that not only is used instrumentally as a countervailing power by the state to prevent the adverse human rights impacts of businesses but also has been adopted as self-regulatorily by the business community to manage risks associated with balancing their legal, ethical and socio-economic responsibilities. Adopting a view that transcends the notion that it is the duty of the state to fulfil human rights, the article explains that the business and human rights movement entails a focus on corporate responsibility for any adverse social, economic and environmental impacts on victim corporate stakeholders of human rights abuses. It showed the movements to be inextricably linked and established their shared objective in establishing accountability for impacts and seeking effective remedies for business-related human rights violations.

Both movements are directed at creating corporate liability for the adverse social, economic and environmental impacts of corporate operations in the public interest. The article draws attention to the futility of the debate comparing the movements in relation to finding effective remedies for victims of corporate-related human rights abuses and notes that the social, economic and environmental impacts discussed in the CSR movement are the same as the human rights impacts addressed in the business and human rights movement. The article finds that the disconnect in understanding the similarity had been as a result of many business and human rights scholars assuming that CSR advocates addressed something different from corporate accountability for impacts, including human rights impacts. Both movements expound the limits of making businesses answerable for their adverse impacts on victims' human rights.

The article underscores that the UN Guiding Principles, although not legally binding, are not without value. Based on the human rights due diligence elaborated under the UNGPs, the article proposes a remedial framework within the CSR and business and human rights regulatory movements to secure the human rights of genuine victims of corporate-related human rights abuses. In contributing to the debate about the limits of corporate responsibility for human rights, it proposes a framework focused on offering efficient access to effective remedies to victims and, having discounted any value

being associated with the compartmentalisation of rights, applicable to all human rights.

In order to avoid compromising the commercial focus of corporations, the article maintains that businesses have no obligation to protect, promote or secure human rights beyond the legal obligation for human rights due diligence proposed within the remedial framework. The proposal affords victims a better chance of enforcing corporate fulfilment of their human rights obligations by advocating the exclusion of unnecessary administrative and procedural bottlenecks such as those encountered by claimants using the ATCA. The author identifies challenges in implementation including overrating state sovereignty and assuming the political will and state capability and underestimating corporate capacity to oppose its adoption. There is room for refinement of the proposal in the context of the national interests of individual states. This article offers it as a credible alternative mechanism for state adoption (including in the ongoing treaty-making process) not only as a counterweight to corporate power and as providing effective remedies to victim corporate stakeholders of human rights abuses, but also as supporting businesses to better manage risks associated with their legal, socio-economic and ethical responsibilities in the wider societal context.