

## **Contextualising the corporate human rights responsibility in Africa: a social expectation or legal obligation?**

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**ABSTRACT:** It has been nearly impossible to muster global consensus on attributing companies with human rights obligations because of persisting contestations on how best to regulate corporate businesses under international law. Whilst several propositions exist including the recent UN Guiding Principles on Business and Human Rights, they mostly constitute 'soft law', are non-binding and essentially reinforce the same old argument that only states have human rights obligations. They have little or no legal repercussions on businesses, and provide no remedies to victims. Given the fault lines between the global North and South on the issue and the fatal impacts of transnational corporations in Africa, this article conceptualises a legal basis for demanding corporate accountability in Africa. The article utilises a doctrinal methodology, and two analytical approaches – the human right-based approach and insights from Third World approaches to international law – in establishing that since international human rights law places the protection and realisation of fundamental human and group interests at its core, its legal threshold requires that all endeavours which can impact on human rights, including abusive corporate conduct, are bound by its rules. It finds that the concept of 'corporate human rights responsibility' derives from international and domestic human rights law and therefore is vested with a legal basis as against the broader idea of corporate social responsibility that is based on voluntarism. With its emphasis on the protection of groups and individual duties, and recognition of corporate criminal responsibility, the African human rights and evolving criminal justice systems provide a background for conceptualising corporate responsibility in Africa differently.

### **TITRE ET RÉSUMÉ EN FRANÇAIS:**

**Contextualiser la responsabilité des entreprises en matière de droits de l'homme en Afrique: une attente sociale ou une obligation légale?**

**RÉSUMÉ:** Il a été presque impossible de trouver un consensus mondial d'imposer aux entreprises des obligations en matière de droits humains en raison des contestations persistantes sur la meilleure façon de réglementer les entreprises commerciales en vertu du droit international. Bien que plusieurs propositions existent, y compris les récents Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme, elles constituent essentiellement des normes non contraignantes et renforcent l'argument selon lequel seuls les États ont des obligations en matière de droits humains. Ces normes ont peu ou n'ont aucune répercussion juridique sur les entreprises et ne fournissent aucun recours aux victimes. Compte tenu des positions divergentes entre le Nord et le Sud sur la question et les conséquences néfastes des entreprises multinationales en Afrique, cet article conceptualise une base juridique

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pour exiger la responsabilité de ces entreprises en Afrique. L'article utilise une méthodologie doctrinale et deux approches analytiques – l'approche fondée sur les droits de l'homme et les approches tiers-mondistes du droit international – pour établir qu'étant donné que le droit international des droits de l'homme place la protection et la réalisation des intérêts fondamentaux humains et collectifs à sa base, son seuil légal exige que tous les efforts qui peuvent avoir un impact sur les droits de l'homme, y compris les comportements abusifs des entreprises, soient soumis à ses règles. L'article constate que le concept de 'responsabilité des entreprises en matière de droits de l'homme' découle du droit international et national des droits de l'homme et est donc doté d'une base juridique au contraire de la conception plus large de responsabilité sociale des entreprises fondée sur le volontarisme. En mettant l'accent sur la protection des groupes et les devoirs individuels et la reconnaissance de la responsabilité pénale des entreprises, le système africain de droits de l'homme et la justice pénale évolutive fournissent un contexte pour conceptualiser différemment la responsabilité des entreprises en Afrique.

**KEY WORDS:** corporate responsibility, corporate accountability, human rights, social expectation, legal obligation, Africa

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## 1 INTRODUCTION

The unregulated pursuit of business objectives very often results in an adverse human rights impact on society. When undertaken without due regard for its potential impact on society, the corporate desire to maximise profit and minimise cost in the use of labour, land and services can lead to avoidable grievances.<sup>1</sup> Businesses are generally obliged to pursue policies that 'are desirable in terms of the objectives and values of society'.<sup>2</sup> But this is hardly so in Africa where many transnational corporations (TNCs) have come under heavy criticisms for their poor labour conditions, inadequate compensation for land resource acquisition and use, poor consultations with local communities, forced displacement, environmental pollution, and the destruction of the sacred heritages of communities.<sup>3</sup> Undoubtedly, corporate businesses are entitled to pursue the legitimate interests of

<sup>1</sup> S Deva 'Companies must strike a balance between human rights and need for profits' *South China Morning Post* 5 August 2014 <http://www.scmp.com/comment/article/1567010/companies-must-strike-balance-between-human-rights-and-need-for-profits> (accessed 26 May 2017).

<sup>2</sup> HR Bowen *Social responsibilities of the businessman* (2013) 6.

<sup>3</sup> JL Čerňič 'Corporations and human rights: towards binding international legal obligations' in MK Sinha (ed) *Business and human rights* (2013) 1 8; NMC Jägers & MJC Van der Heijden 'Corporate human rights violations: the feasibility of civil recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833 833-834; B Freeman *et al* 'A new approach to corporate responsibility: the Voluntary Principles on Security and Human Rights' (2001) 24 *Hastings International and Comparative Law Review* 423 426.

their primary stockholders, but they must do so with due regard for the rights and interests of those on whom their activities may have a negatively impact. They cannot ignore the foreseeable risks they pose to the society,<sup>4</sup> which equally has the legitimate corresponding expectations that business activities are to be conducted without injuries to third parties, and that where injuries do occur, they are reduced to the barest minimum.

The conceptualisation of corporate responsibility for human rights responds to the urgent need to strike a delicate balance between the competing interests of society and business.<sup>5</sup> It is an attempt to construct some form of civilised response that imposes a measure of answerability on businesses for human rights risks to third parties that are otherwise avoidable or may be mitigated. The basic idea is to make businesses avoid the snares of 'making opportunistic concessions to the most vociferous demands' and act in an informed and responsible manner.<sup>6</sup> If corporate objectives are to be justified, they should be such that benefit the entire society rather than just the owners and managers of enterprises.<sup>7</sup> But the equilibrium needed for the harmonisation of corporate economic interests with the public's human rights concerns perhaps oscillates somewhere between the legitimate expectations of society and the protection and remedies afforded to victims. Hence, the most fundamental point of conceptual contestation has been the definitive basis for the apportionment of human rights responsibility as a standard of conduct to corporate businesses.

Attempts by scholars to justify each principled position have split the debate on the source of corporate responsibility; frequently questioning whether it is merely a social expectation based on voluntary business conduct or rooted in existing human rights law.<sup>8</sup> This conceptual dialectic raises the following pertinent questions: First, are businesses legally bound to observe human rights or merely obliged to do so as a form of earning their social licence to operate? Second, does the theorisation of corporate responsibility mean that businesses can be held accountable for human rights breaches by victims or merely conveys an idea of loose responsibility without answerability? Thirdly, does the appropriation of responsibility to businesses reduce the role of the state in human rights protection or complements it? These questions provoke an inquiry into the conceptual basis of the corporate responsibility idea altogether, notwithstanding the outright disagreements among scholars.

<sup>4</sup> Bowen (n 2 above) 4-5.

<sup>5</sup> Business, in this context, is broadly defined as the economic activity that the corporation undertakes for profit.

<sup>6</sup> KM Leisinger 'On corporate responsibility for human rights' (2006) *Novartis Foundation for Sustainable Development* 17.

<sup>7</sup> Bowen (n 2 above) 5.

<sup>8</sup> JG Ruggie *Just business: multinational corporations and human rights* (2013) xvii.

Indeed, many factors, including context, ideological leanings, the North-South divide<sup>9</sup> as reflected in scholars' academic background and legal writings, and the respective approaches to international law scholarship, have influenced and intensified the unending debates. As Mutua aptly notes, academics are very often 'the subject of intellectual bias and normative location'.<sup>10</sup> These divergences and opinion shifts even more necessitate that the debate must be contextualised. In Africa, where collective values supersede individual interests, the African human rights and criminal justice systems protect individual and group concerns, recognise duties as correlative of rights, and increasingly anticipate a broader regime of accountability that encapsulates atrocious corporate conduct.<sup>11</sup> This paper therefore suggests that context and the victims of corporate human rights abuse are central to any determination of the basis of corporate responsibility in view of the various factors that have shaped its development.<sup>12</sup>

Two propositions are relevant to this discussion. First, this paper suggests that corporate responsibility is based on the notion that domestic and international human rights guarantees imply corresponding obligations from all – individuals, corporate entities and the government – to respect human rights and freedoms. It is unviable to argue otherwise that rights and freedoms are guaranteed only against the state when they can very easily be violated by fellow individuals, groups and corporate bodies. Second, this paper suggests that corporate responsibility is based not on voluntarism but on law. Voluntarism may be a useful complement, not an alternative. Since human rights are guaranteed by international and domestic law, they must be enforceable against all who threaten its protection and realisation. This proposition presupposes it futile to have a responsibility that is unenforceable at law because it contradictorily puts the requirement of accountability and remediation almost entirely at the discretion of corporate violators, and does not ultimately address the concerns of victims. At law, the existence of a right must give rise to a remedy. This is aptly captured by the Latin maxim: *ubi jus, ibi remedium* (where there is a right, there is a remedy). Equally well-established is the international law principle that a wrongful act must give rise to reparation. So, the idea of responsibility must place at its core accountability for corporate wrongs and, possibly, the compensation of victims by abusive corporations.

Accordingly, this paper adopts two essential approaches in its attempt to not only contextualise the subject but in seeking a legal construction of its basis. It relies, first, on the human rights-based

<sup>9</sup> United Nations Commission on Human Rights (UNCHR) 'Human Rights and human responsibilities' [prepared by Miguel Alfonso Martinez] E/CN.4/2003/105 20 (17 March 2003) [http://www.concernedhistorians.org/content\\_files/file/TO/278.pdf](http://www.concernedhistorians.org/content_files/file/TO/278.pdf) (accessed 18 June 2017).

<sup>10</sup> M Mutua 'Human rights in Africa: the limited promise of liberalism' (2008) 51 *African Studies Review* 17 18.

<sup>11</sup> African Charter on Human and Peoples' Rights; article 31 of the African Charter on the Rights and Welfare of the Child; article 46C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>12</sup> Černič (n 3 above) 4.

approach by showing that the victim as a human being with the inherent right to dignity – rather than the corporation – must be the centrepiece of any determination of the corporate responsibility for human rights.<sup>13</sup> It suggests that the seeming lack of attention to the impact of abusive corporate conduct on individuals and groups frustrates the whole idea of corporate human rights responsibility. Secondly, it adopts the Third World approach to international law in arguing that the ‘dynamics of difference’ in terms of the socio-political and legal structures between the global North and South substantially influences and perpetuates the differing conceptualisation of corporate human rights responsibility.<sup>14</sup> Essentially, the study is desk-based and relies on the legal analysis of existing literature on human rights and business in contributing to this controversial discourse.

In terms of structure, the paper problematises, in the introductory section, the conflicting conceptualisation of corporate responsibility and the need for proportional harmonisation between the social construction of the idea and its legal fortification in the African context. Section two undertakes a definitional and theoretical clarification of the corporate responsibility to respect human rights. Section three evaluates the established but differentiated notion of corporate social responsibility, which is predicated on voluntarism – a conceptual ‘misfit’ in international human rights lexicon. Section four enunciates that the corporate responsibility is driven by the ideal of justice for victims of corporate abuse and the legal accountability of corporate violators. This section also clarifies the role of the state and businesses as unequal human rights duty-bearers. The fifth section concludes by summarising the arguments in this paper and making a case for normative review at different governance levels to reflect this proposed understanding of corporate human rights responsibility.

## 2 CORPORATE HUMAN RIGHTS ‘RESPONSIBILITY’ CLARIFIED

Business involvement in human rights abuse is not a novel occurrence. Corporate businesses can and do, in fact, violate human rights. In Africa, the footprints of corporate human rights violations are traceable to the transatlantic slave trade more than 400 years ago.<sup>15</sup> Corporations were instrumental to Africa’s colonisation and the brutal human rights violations that marked its imperial domination. According to Černič, ‘more than 40 European corporations were involved in facilitating the slave trade or controlling colonised

<sup>13</sup> A Cornwall & C Nyamu-Musembi ‘Putting the “rights-based approach” to development into perspective’ (2004) 25 *Third World Quarterly* 1415 1417-1418.

<sup>14</sup> JT Gathii ‘TWAIL: a brief history of its origins, its decentralized networks, and a tentative bibliography’ (2011) 3 *Trade Law and Development* 31; A Anghe Imperialism, sovereignty and the making of international law (2007) 26 29, 186-189.

<sup>15</sup> S Khoury & D Whyte *Corporate human rights violations: global prospects for legal action* (2017) 136; Černič (n 3 above) 8.

territories.<sup>16</sup> They practiced or were involved in racial differentiation and discrimination, forced and exploited labour, torture, and inflicting harms on the spiritual and cultural life of the people. Many African societies still suffer from the vestiges not only of the slave trade and colonialism but the violations themselves. Even after independence, TNCs have continued to thrive on profits tainted by armed conflicts, extra-judicial killings, large-scale bribery and, very often, poor labour conditions in Africa.<sup>17</sup> What is relatively different, however, is how violations involving corporate actors can be holistically addressed.<sup>18</sup> And so, the issue about corporate responsibility and accountability for human rights violations borders on the determination whether it is an obligation voluntarily assumed by corporations or a legal obligation arising from already existing international human rights standards.

## 2.1 Definition and theories of corporate human rights responsibility

Human rights are the basic rights guaranteed to every individual everywhere in the world by virtue of being a human being. They are grounded on the principle of respect for the individual;<sup>19</sup> and are premised on the fundamental supposition that every human being is a rational being worthy of dignity and respect. Viljoen defines human rights as a peculiar kind of moral claim that all human beings may invoke or 'the manifestation of these claims in positive law'.<sup>20</sup> To a large extent, human rights depend on domestic constitutions and international human rights provisions for their protection and enforcement. Since the aftermath of the Second World War, several human rights instruments have been adopted at the global, regional and domestic levels. The Universal Declaration of Human Rights 1948 (Universal Declaration) is the first international human rights instrument adopted by the United Nations (UN) as 'a common standard of achievement for all peoples and all nations'. It recognises the universality, indivisibility, interrelatedness and interdependence of human rights. Consequently, it makes no distinction or categorisation of rights or obligations. However, ideological differences and rivalries

<sup>16</sup> Černič (n 3 above) 8.

<sup>17</sup> Khoury & Whyte (n 15 above) 136-137; C Kabemba 'Undermining Africa's wealth' 2 March 2014 <http://www.osisa.org/economic-justice/blog/undermining-africas-wealth> (accessed 17 June 2017); J Sarkin 'The coming of age of claims for reparations for human rights abuses committed in the South' (2004) 1 *Sur Revista Internacional de Direitos Humanos* 66 71.

<sup>18</sup> Černič (n 3 above) 8; United Nations Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementation of the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) principles 12-13.

<sup>19</sup> MK Sinha 'Business and human rights: an Indian perspective' in Sinha (n 3 above) 52; United for Human Rights 'Human rights defined' <http://www.humanrights.com/what-are-human-rights/> (accessed 19 June 2017).

<sup>20</sup> F Viljoen *International human rights law in Africa* (2012) 3.

between the pre-Cold War West and East blocs led to the categorisation of rights and the adoption of two separate binding instruments in 1966: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments – the Universal Declaration, the ICCPR with its optional protocols and the ICESCR – jointly make up the ‘International Bill of Rights’. Africa, Europe, and the Americas have their respective human rights treaties.

Like human beings, a corporation is a person in law. It is a business entity established under law to ‘act as a single person distinct from its shareholders’.<sup>21</sup> It can exercise rights and, subject to the terms of its incorporation, may exist indefinitely. The primary goal of a corporate business is to make profit for the benefit of its stockholders – shareholders and creditors. Corporations provide goods and services to the public and are regulated by the laws of the state where they operate. Like individuals and groups, they depend on the protection of the Constitution and laws of the land to secure access and rights to land resources, the commodities they produce, and the properties they acquire. They are equally bound to operate within the confines of law.

The integration of the world market economy and the effects of globalisation have seen the expansion of corporate businesses beyond the shores of the home state. These have spurred the increasing participation of corporations on the international scene and, with much wealth, their steady rise in power and influence. Today, many corporations are richer and more powerful than many states in the developing world, particularly in Africa,<sup>22</sup> and are providing services previously delivered by governments. The negative impact of their wealth and power is being felt by not just weak African states but also individuals and host communities in form of human rights violations. Whilst states have the primary obligation for human rights,<sup>23</sup> the growing incidences of corporations’ alleged involvement in human rights infractions have erupted the debate that corporations should bear some degree of responsibility. Weeramantry states as follows:<sup>24</sup>

Indeed, the economic power of several individual multinationals is greater than that of more than three-quarters of the nation States of the world. But it is power which they wield in the territory of the developing countries, without any responsibility or accountability. It is therefore contrary to a basic democratic principle which postulates that power without responsibility is anathema to the democratic ideal.

<sup>21</sup> BA Garner (ed) ‘Corporation’ in *Black’s Law Dictionary* 9th ed (2009) 391.

<sup>22</sup> Sinha (n 19 above) 60.

<sup>23</sup> C Odinkalu ‘Back to the future: the imperative of prioritising for the protection of human rights in Africa’ (2003) 47 *Journal of African Law* 1 2.

<sup>24</sup> CG Weeramantry ‘Human rights and the global marketplace’ in L Henkin & CG Weeramantry ‘Keynote addresses’ (1999) 25 *Brooklyn Journal of International Law* 27 41.

By itself, the term 'responsibility' means the fact of being accountable for something. It is 'the state or fact of being responsible, answerable, or accountable for something within one's power, control, or management.'<sup>25</sup> It presages an obligation to satisfactorily perform a task that must be fulfilled, the failure of which elicits a penalty.<sup>26</sup> But what is 'corporate responsibility'? Does it have any significance for human rights law? There is currently no precise definition of the term. As such, a definition within context may suffice. Plainly, the term suggests that corporate businesses have an obligation to pursue objectives that are in line with specific rules and principles, failing which they may be held accountable. Rules and principles, in this context, include written or established rules of conduct that are codified in domestic law and international human rights principles. Self-imposed responsibility, which is subject to discretionary compliance and against which no accountability is due, arguably, raises a difficulty of assessment, due to its lack of objective standard to measure compliance. Against this background, the idea of corporate responsibility will be weighed and assessed in the context of established rules.

Ideally, human rights principles are often couched in the language of state obligations. They do not expressly impose human rights duties or responsibilities on corporations towards individuals. The duty to protect, respect, and fulfil human rights is basically that of the state. This is because the state has enormous control over the individual and was the traditional violator of the individual's dignity. Today, it is no longer vigorously contested that corporations are co-violators of human rights. Since the era of globalisation, the massive expansion of corporate business frontiers beyond the boundaries of the nation-state has been unmatched by effective regulation. Local laws are inapplicable beyond national boundaries unless to nationals on foreign soil. Similarly, public international law applies principally to state relations. The ability of corporations to operate on a transboundary basis meant that they could invariably go below the radar of international and domestic regulation. It has been reported that corporate-related violations 'occurred, predictably, where governance challenges were greatest',<sup>27</sup> especially in regions with a history of conflict, high level of corruption and weak rule of law system, such as Africa.<sup>28</sup>

With this in mind, the idea of corporate human rights responsibility (CHRR) is predicated on the argument that with the protection of legal

<sup>25</sup> Dictionary.com 'responsibility' in *Dictionary.com Unabridged* Random House Inc <http://www.dictionary.com/browse/responsibility> (accessed 20 June 2017). In this sense, it is synonymous with 'answerability' or 'accountability'.

<sup>26</sup> BusinessDictionary.com 'responsibility' WebFinance, Inc. <http://www.businessdictionary.com/definition/responsibility.html> (accessed 20 June 2017).

<sup>27</sup> United Nations Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/8/5 (7 April 2008) para 16.

<sup>28</sup> T Thabane 'Weak extraterritorial remedies: the Achilles heel of Ruggie's "Protect, Respect and Remedy" Framework and Guiding Principles' (2014) 14 *African Human Rights Law Journal* 43 45.

rights and freedoms comes correlative duties and responsibilities. Under international human rights law, human rights are considered to have express or implicit corresponding obligations. The United Nations (UN) Special Rapporteur on the Study of Human Rights and Human Responsibilities says that it is not possible to think rights without the correlation of duties: 'Every right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.'<sup>29</sup> Similar, the UN Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies clearly states that 'Rights imply duties, and duties demand accountability.'<sup>30</sup> But the suggestion that human rights protection produces correlative duties has been rejected, prominently, by the industrialised states of the global North. They argue that *duty* be construed more broadly to include moral or ethical responsibilities, rather than legal duties; thereby leaving open the debate whether the corporate responsibility for human rights is a legal one, or simply a moral or ethical one.

Accordingly, CHRR as an idea has been subject of conflicting intellectual and definitional propositions. It has been attributed different meanings by different scholars in different jurisdictions under varying contexts. But this should not be. As stated above, it is the responsibility of businesses to observe in their operations human rights principles recognised by domestic and international law.<sup>31</sup> Such principles, existing for the benefit and protection of individuals and groups, constitute aspects of the values of society to be respected by all who live and function in it. As Černič argues, '[t]he protection of human rights is a fundamental value and reflects not only individual interests but also the interests of society as a whole.'<sup>32</sup>

The justification for attributing corporate businesses with legally enforceable human rights responsibility relies on two basic approaches in this paper. First is the human right-based approach, which places the victim of corporate human rights harms at the centre of the debate of corporate responsibility for human rights. It moves away from the traditional notion that 'international norms are created to [only] respond to states' interests and goals,'<sup>33</sup> by presupposing that rights are grounded on legal obligations. According to Khan, former Secretary-General of Amnesty International, 'human rights are rooted in law. Respecting and protecting them was never meant to be an optional extra, a matter of choice. It is expected and required.'<sup>34</sup> A cursory look

<sup>29</sup> United Nations Commission on Human Rights (n 9 above) 43.

<sup>30</sup> Office of the United Nations High Commissioner for Human Rights 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 21 June 2017).

<sup>31</sup> United Nations Human Rights Council (n 18 above) principle 12.

<sup>32</sup> Černič (n 3 above) 12.

<sup>33</sup> C Fernández de Casadevante Romani 'International law of victims' (2010) 14 *Max Planck Yearbook of the United Nations Law* 219 221.

<sup>34</sup> C Avery 'The difference between CSR and human rights' <https://business-humanrights.org/sites/default/files/reports-and-materials/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf> (accessed 22 June 2017).

at the evolution of international human rights standards will show that they advanced to not only restrict state interference with the individual's fundamental rights and freedoms but also to guarantee protection from harm and address violations of whatever kind and by whomsoever. While society may have a genuine expectation that businesses will comply with human rights, the obligation itself to do so is not predicated on society's expectation but on the threshold of law. To that extent, this approach suggests that if human beings are the object of the international human rights protection regime, then the law is the only objective benchmark for their protection.

Voluntary corporate commitments to observe human rights are, by themselves welcome developments, but their absence does not diminish, in the least, the responsibility of corporate businesses to respect human rights. What makes human rights guaranteed is that violators are accountable for any breach based on the root of the law, rather than on a platter of morality or ethics or voluntarism. In this regard, Černič cautions that the fundamental human rights obligations which corporations are bound to observe are enforceable nationally and internationally, and the lack of their enforcement must not be mistaken for a lack of obligation.<sup>35</sup> In essence, he argues that the corporate obligation to observe human rights exists independently of its enforcement.

The effectiveness of moral commitments or voluntary corporate obligations as a channel for meeting society's human rights expectations depends on the socio-economic and legal context of any society. Human rights protection depends on each country's socioeconomic and legal systems, its character and the varied levels of its development.<sup>36</sup> In Africa, the crisis of the post-independence African state in terms of weak institutions, poverty and the inability to forge a common national identity, values and ethos, warranted an objective basis for human rights guarantees, other than the voluntary commitment of its organs of society. So far, the law has been the most potent basis for doing so. Although Zeleza states that human rights in Africa have historically been 'products of concrete social struggles, not simply textual or legal discourse',<sup>37</sup> it is argued that the law has been the only neutral source for securing their protection and their modern conceptualisation on the continent. Odinkalu states rightly that human rights is a normative or value framework that depends for its realisation on differential economic, social, cultural, political, and institutional infrastructure that are proportionate to the evolution of the state.<sup>38</sup>

<sup>35</sup> JL Černič *Human rights law and business: Corporate responsibility for fundamental human rights* (2010) 27.

<sup>36</sup> L Marcinkutė 'The role of human rights NGO's: human rights defenders or state sovereignty destroyers?' (2011) 4 *Baltic Journal of Law & Politics* 52 74; R Goodman & D Jinks 'How to influence states: socialization and international human rights law' (2004) 54 *Duke Law Journal* 623 634.

<sup>37</sup> PT Zeleza 'The struggle for human rights in Africa' in PT Zeleza & PJ McConaughy (eds) *Human rights, the rule of law, and development in Africa* (2004) 6.

<sup>38</sup> Odinkalu (n 23 above) 6-7 (emphasis mine).

Accordingly, for human rights to be realised minimally, 'guarantees of social justice or equitable ground rules' are an essential imperative.<sup>39</sup>

Human rights do not evolve from 'asking favours',<sup>40</sup> nor are they guaranteed merely by society's expectation that they be respected, or by some ethical or moral consideration, or of the personal volition of the beneficent oppressor. Rather, they are protected to the extent that they are recognised by law. They are recognised as 'fundamental human rights' in the constitutions of many African states because they determine the limits of state authority and are enforceable against all potential violators. The fragility of many African states requires that the law and the courts remain the last hope of the individual. Consequently, the legal codification of rights is arguably a sure means of enforcing their protection.

In the global North, however, the socio-economic and legal contexts vary considerably from Africa in terms of the ideology, character, capacity and organisation of the state and its long-established relationship with the individual. The evolutionary processes of the socioeconomic, political and juridical character of the state aligns very much with Western individualistic society and the tendency towards private accumulation of capital, which often conflicts with the broader public interests and shared values of African societies. These ostensibly explain a differential conceptualisation of human rights between western states and the developing world. Murphy observes that ideological interpretations of human rights frequently frustrate consensus on key issues and make it 'difficult to develop specific codes of behaviour which can be used to protect human rights and to punish those who would deny them.'<sup>41</sup>

The Third World approach to international law is similarly relevant in this discourse in that it illustrates how disproportions in the political, legal and socioeconomic structures between the developed states of the Northern hemisphere and their counterparts in the global South essentially shape the progress of the international normative regime. Developments on the international legal scene are understood in this context as being generated by problems relating to development disparity and colonial order.<sup>42</sup> The continuing legacies of Western economic exploitation, according to Anghie, can best be understood within the context of the relationship between colonisation and international law. Anghie describes the exploitation of this developmental imbalance against weak and poor states in the South as a 'dynamic of difference' between the global North and South that gives 'an important impetus in the generation of some of the defining doctrinal problems of international law.'<sup>43</sup> Anghie's idea of a dynamic

<sup>39</sup> As above, 3 (emphasis mine).

<sup>40</sup> C Heyns 'A "struggle approach" to human rights' in CH Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa* (2006) 16.

<sup>41</sup> C Murphy 'Ideological interpretations of human rights' (1972) 21 *DePaul Law Review* 286 291-292.

<sup>42</sup> Anghie (n 14 above) 6-7.

<sup>43</sup> Gathii (n 14 above) 31.

of difference suggests that the lingering developmental imbalances between the global North and South, and the absence of a global governance framework for corporations, in many ways, perpetuates economic exploitation, social injustices and the deep structural inequalities between the North and the South. As Martinez notes in his report to the defunct United Nations Commission for Human Rights,<sup>44</sup> there is a

clear division between the developed countries “of the North” that oppose the formal establishment of the correlation between rights and responsibilities and those of the underdeveloped “South” whose responses unanimously acknowledge this extremely important connection.

The conceptual divergence in framing the responsibility of corporations for human rights harms only incentivises the continuing exploitation of Africa and other third world states by western multinationals. The non-regulation of powerful corporations sustains the status quo of irresponsible business practices that were carried on from the era of exploitative slavery and colonialism. On this basis, the Third World approach considers that corporate voluntary or moral commitments to human rights compliance, without more, appears only to favour capitalism – a Western socio-economic and political ideology – to the detriment of the developing world. In this regard, Evans states that already the current international human rights regime is ‘globalizing capitalism’ because of its emphasis on legal rights without corresponding legal obligations, private property ownership, free market and minimum government regulation.<sup>45</sup> Flere supports this argument by saying that ‘[h]uman rights have become a universal sacred canopy, potentially legitimizing any act convenient for the reproduction of the existing world distribution of power and wealth.’<sup>46</sup>

For ideological conflicts to be narrowed, they must be driven by common humanistic, rather than economic, aspirations as a threshold for global consensus.<sup>47</sup> However, in the race for pocket-deep profits, humanistic aspirations are the least concern of capitalist states and wealthy multinationals. Thus, the argument that only states should directly regulate corporations contrives an international legal order that is legally deficient in demanding accountability from abusive corporations that are more powerful than developing African states.<sup>48</sup>

<sup>44</sup> United Nations Commission on Human Rights (n 9 above) 2.

<sup>45</sup> T Evans ‘Does globalizing capitalism violate human rights?’ 10 December 2016 <https://blog.oup.com/2016/12/globalizing-capitalism-human-rights/> (accessed 29 June 2017).

<sup>46</sup> S Flere ‘Human rights and the ideology of capitalist globalization: a view from Slovenia’ (2001) 52(8) *Monthly Review* <https://monthlyreview.org/2001/01/01/human-rights-and-the-ideology-of-capitalist-globalization/> (accessed 29 June 2017) (emphasis mine).

<sup>47</sup> Murphy (n 41 above) 289.

<sup>48</sup> There is already the danger of procuring universal acceptance of a definition of corporate responsibility for human rights from a purely western notion of voluntarism or morality. This is a danger because ascribing voluntary obligations to prescriptive principles waters down the inherent value of human rights as an instrument of and for accountability.

## 2.2 The corporate ‘responsibility’ to respect human rights – an implied duty

Human rights are moulded by interactions between human beings and organs of society, and by the progressing dialogue on our common humanity.<sup>49</sup> Like individuals, corporations interact with people and segments of society. By this relationship, they are expected to observe the same rules that foster social order. Human rights principles form part of the rules of social engagement. They govern the relationship between the state and individuals including corporations on a vertical dimension as well as the relationships among individuals, groups and corporate entities themselves horizontally. In other words, human rights are protected not only against the state but also between individuals and corporate entities. The Universal Declaration requires that each individual and organ of society ‘shall strive’ to promote *respect* for human rights and freedoms.<sup>50</sup> Henkin poignantly argues that, by this prescription, the Universal Declaration applies to everyone including companies. He says that ‘[e]very individual includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace.’<sup>51</sup>

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms) reiterates the understanding that corporate businesses, as organs of society, ‘are also responsible for promoting and securing the human rights set forth in the Universal Declaration’.<sup>52</sup> Equally, the ICCPR and ICESCR each provide that nothing in the Covenants may imply that any *person*,<sup>53</sup> *group* or state can ‘engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms’ thereby guaranteed.<sup>54</sup> Since a corporation is a person composed of a group of individuals and functions as an important organ of society, it accordingly falls within the contemplation of the International Bill of Rights. Based on this understanding, the Committee on Economic, Social and Cultural Rights recently clarified that ‘under international standards, business entities are expected to respect Covenant rights regardless of whether

<sup>49</sup> J Ife *Human rights and social work: towards rights-based practice* (2001) 6.

<sup>50</sup> Universal Declaration of Human Rights 1948 Preamble. The effect of the phrase ‘shall strive’, even though appearing in the Preamble, is underlined by the expectation that non-state social actors like individuals and corporations shall act in accordance with the principles enshrined in the Declaration.

<sup>51</sup> L Henkin ‘The Universal Declaration at 50 and the challenge of global markets’ in L Henkin & CG Weeramantry ‘Keynote addresses’ (1999) 25 *Brooklyn Journal of International Law* 17 25; also see JL Čerňák ‘Corporate human rights obligations at the international level’ (2008) 16 *Willamette Journal of International Law and Dispute Resolution* 130 147–150.

<sup>52</sup> UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights Preamble (third paragraph).

<sup>53</sup> The use of ‘person’ as against the Covenant’s usual reference to ‘individual’ or ‘everyone’ suggests that individuals and corporations are required to respect the rights and freedoms so guaranteed.

<sup>54</sup> Article 5(1) of the ICCPR; article 5(1) of the ICESCR.

domestic laws exist or whether they are fully enforced in practice.<sup>55</sup> These, largely, depict law as the fundamental foundation of the corporate obligation to respect human rights.

Flowing from the above, it is clear that the international protection regime anticipates that the human rights of every individual are holistically recognised and guaranteed. The recognition of a right is only effectively secured by the assurance that it will not be violated by either the state or third parties. This assurance is confirmed by the inferable duty of observance imposed by each right. If the protection of rights entails corresponding duties from those most likely to impact them, as voiced by the Special Rapporteur on the Study of Human Rights and Human Responsibilities, then the mere circumstance that an instrument does not expressly impose duties does not diminish or reduce the intrinsic value of the responsibility of observance. Indeed, only states can assume the international obligation of compliance upon ratifying an instrument. However, this does not imply that it is only the government of the ratifying state that has an obligation to respect the right. In monist states, ratification warrants that every person – and ‘person’ here includes corporate person – and institution under state control comply with the standard of obligation assumed under the treaty. In other words, a monist state’s ratification of a treaty demands that every capable violator desist from so doing.<sup>56</sup> No one – individual, group, corporation or the state – may interfere with such right.

To illustrate the point, imagine for a moment that the right of an individual to equitable and just conditions of work is guaranteed under an international instrument or under the constitution and local laws of the state in which he resides. On a vertical dimension, the legal fortification by domestic and international law means that the individual is legally protected from arbitrary state policies and actions in respect of his labour. His labour services cannot be unfairly exploited nor can he be subjected to conditions of work that undermine his dignity or are injurious to his health. Should the state violate this right in any material respect, he is entitled to seek redress before a court of law or, where the circumstances permit, an international tribunal. This is the vertical relationship between the individual and the state. Assuming however that this individual is the employee of a private employer – individual or corporate. Is he protected from a vicious employer? Does the fact that the private employer is not party to the international instrument or enforcer of the domestic law mean that it is not bound to observe the employee’s right to fair labour conditions?

<sup>55</sup> Committee on Economic, Social and Cultural Rights ‘General Comment No 24 on state obligations under the ICESCR in the context of business activities’ UN Doc E/C12/GC/24 (23 June 2017) para 5.

<sup>56</sup> D Sloss ‘Domestic application of treaties’ (2011) 3. <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> (accessed 29 June 2017); I Brownlie *Principles of public international law* (2008) 32–33.

The answer is not a complicated one, but frequently twisted by ideological perspectives.<sup>57</sup> This paper considers that once the right to fair and satisfactory work conditions is guaranteed by law, it is protected against all except the right holder. No employer is permitted to trample upon the right on the justification that the employer is not the state. The protection of the right is linked to the correlative duty of observance by all other members of society. In other words, individuals including juridical persons, as articulated by Henkin, owe each other the obligation to respect rights in their interpersonal relationships. There is already proof of this right-duty correlation under international law. Under the African Charter on Human and Peoples' Rights (African Charter), for example, the rights of every individual are neither exclusive nor only correlatively applicable to the state. Rather, they are exercisable with due regard to the rights of others, collective security, morality and common interest.<sup>58</sup> The African Charter arguably exemplifies the horizontal application of international human rights obligations. Besides, if corporate individuals enjoy rights which are expected to be respected by other members of society, then they must be considered to owe corresponding obligations to individuals as well. In Europe, corporations have successfully relied on the protection afforded under the European Convention on Human Rights.<sup>59</sup> They have judicially secured the rights to property, privacy, fair trial and freedom of expression under the Convention.<sup>60</sup> Therefore, it appears so convenient for businesses to legally claim these rights while rejecting the responsibility to respect those of others.<sup>61</sup>

Essentially, the content of the human rights responsibility of corporate enterprises is based on the principle of respect. To respect simply is to have due regard for the rights of others;<sup>62</sup> to not encroach on their rights – to do them no harm.<sup>63</sup> Corporate businesses have an obligation to respect the human rights of individuals who may be impacted by their day-to-day activities by exercising due diligence and

<sup>57</sup> P Muchlinski 'The development of human rights responsibilities for multinational enterprises' in R Sullivan (ed) *Business and human rights: Dilemmas and solutions* (2003) 35.

<sup>58</sup> Article 27(2) of the African Charter on Human and Peoples' Rights. Although neither the African Commission nor the African Court has articulated a linear or horizontal application of this obligation, it is arguably a basis for do so. Also, under article 46C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, corporations can now be held criminally liable for human rights atrocities in Africa.

<sup>59</sup> J Wouters & A Chané 'Multinational corporations in international law' Working Paper No 129 – December 2013 5-7 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2371216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216) (accessed 19 June 2017); M Emberland *The Human Rights of Companies: Exploring the structure of ECHR protection* (2006) 125.

<sup>60</sup> *Sovtransavto Holding v Ukraine* ECHR 2002-VII 95; *Sunday Times v The United Kingdom* (1979) Series A no 30; *VGT Verein gegen Tierfabriken v Switzerland* ECHR 2001-VI 243 para 57.

<sup>61</sup> H Paul 'Corporations are not human, so why should they have human rights?' September 2011 <http://www.econexus.info/publication/corporations-are-not-human-so-why-should-they-have-human-rights> (accessed 28 June 2017).

<sup>62</sup> Oxford Dictionaries 'respect' <https://en.oxforddictionaries.com/definition/respect> (accessed 29 June 2017).

<sup>63</sup> United Nations Human Rights Council (n 27 above) para 24.

taking steps to avoid or mitigate actual or potential harm. According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), the respect obligation entails undertaking due diligence to 'avoid infringing on the human rights of others' and 'address adverse human rights impacts' with which businesses are involved.<sup>64</sup> It further states that '[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights' as stipulated in the International Bill of Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. In the commentary on Principle 12 of the UNGPs, it is categorically emphasised that '[t]hese are the benchmarks against which other social actors assess the human rights of business enterprises.'<sup>65</sup> Under the UN Draft Norms, 'internationally recognized human rights' have been defined as 'civil, cultural, economic, political, and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.'<sup>66</sup>

Despite its ground-breaking articulation of corporate responsibility, the UNGPs have been described as 'a weak regime that suffers from serious deficiencies,'<sup>67</sup> and are considered in this paper to be replete with conflicting postulations. Specifically, the method or 'principled pragmatism' adopted by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other businesses (SRSG) seemed to have failed in many material respects to logically address two important points: one, it failed to establish a clear basis of the corporate responsibility to respect human rights by ambivalently attributing the responsibility to social expectation without clearly defining its parameters; and second, it misinterpreted the scope of the corporate responsibility by attributing the *corporate* responsibility to all business enterprises.

On the first point, the SRSG seems to have misconceived the basis of the concept of corporate responsibility. In the 2008 report to the Human Rights Council, also called the 'Ruggie Framework', the SRSG declared that the corporate responsibility to respect 'is the basic expectation society has of business';<sup>68</sup> that the broader scope of this responsibility 'is defined by social expectations – as part of what is sometimes called a company's social licence to operate' the breach of which can subject companies to the courts of public opinion'.<sup>69</sup>

<sup>64</sup> United Nations Human Rights Council (n 18 above) principle 11.

<sup>65</sup> United Nations Human Rights Council (n 18 above) principle 12 commentary.

<sup>66</sup> UN Draft Norms para 23.

<sup>67</sup> S Deva & D Bilchitz 'Response of Surya Deva and David Bilchitz to comments of Professor John Ruggie on "Human rights obligations of business: beyond the corporate responsibility to respect?" (Cambridge University Press, 2013)' 15 January 2014 <https://business-humanrights.org/sites/default/files/media/documents/surya-deva-david-bilchitz-re-ruggie-15-01-14.pdf> (accessed 26 June 2017).

<sup>68</sup> United Nations Human Rights Council (n 27 above) para 9 (emphasis mine).

<sup>69</sup> United Nations Human Rights Council (n 27 above) para 54 (emphasis mine).

Subsequently in the UNGPs, which are essentially the implementation rules for the Ruggie Framework, the SRSG declares that the responsibility to respect refers to 'internationally recognized human rights' as benchmarks. In the same breadth, the SRSG argues that international human rights instruments should only be 'carefully constructed precision tools' to be deployed where other means have failed.<sup>70</sup> This is a paradox of articulation that has misled quite a bunch of scholars to think that the corporate responsibility does not emanate from law. Relying on the SRSG's position, Redmond has strenuously argued that the responsibility refers to moral obligations or social expectations that are neither derived from international law nor 'grounded in legal obligations beyond the domestic law of the host states'.<sup>71</sup> But this is absolutely not the case. Like Bentham states, every legal principle commands and, by doing so, creates duties or obligations.<sup>72</sup>

The SRSG claims that the responsibility to respect is different from legal liability and enforcement.<sup>73</sup> He suggests that human rights standards are just reference points or 'precision tools' for social expectations.<sup>74</sup> This proposition is problematic for two reasons.

First, the argument inordinately disengages the positive application of international human rights law in many jurisdictions that have no requirement of domestic legislation. In many monist states, the ratification of an international instrument becomes immediately operational, binding all organs of state, juridical entities and individuals locally.<sup>75</sup> Bilchitz strongly disagrees that international human rights law is a mere tool to be used for other issues than to protect and realise fundamental human interests.<sup>76</sup> The UNGPs, touted to be grounded on international human rights principles, cannot be isolated from legal liability, nor can companies appropriate the discretion to comply with them. An internationally-recognised right is a legal interest that demands observance from all-and-sundry. As such, its full protection is such that must be reinforced by not just its importance to social life but by firm and persistent pressure to conform.<sup>77</sup> Therefore, the assertion that the corporate responsibility to respect is short of a legal basis becomes untenable.

<sup>70</sup> J Ruggie 'A UN business and human rights treaty? an issues brief by John G. Ruggie' 28 January 2014 5 <https://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf> (accessed 28 June 2017).

<sup>71</sup> P Redmond 'International corporate responsibility' in T Clarke & D Branson (eds) *The SAGE handbook of corporate governance* (2012) 602.

<sup>72</sup> J Bentham *Of laws in general* ed HLA Hart (1970) 294.

<sup>73</sup> United Nations Human Rights Council (n 18 above) principle 12 commentary.

<sup>74</sup> JG Ruggie 'Business and human rights: the evolving international agenda' (2007) 101 *The American Journal of International Law* 839; Deva & Bilchitz (n 67 above) 2-3.

<sup>75</sup> NJ Botha 'National treaty law and practice: South Africa' in DB Hollis *et al* (eds) *National treaty law and practice* (2005) 600-602.

<sup>76</sup> Deva & Bilchitz (n 67 above) 3.

<sup>77</sup> HLA Hart *The concept of law* 2nd ed postscript eds P Bulloch & J Raz (1961) 85-88; HLA Hart 'Legal and moral obligation' in AI Melden (ed) *Essays in moral philosophy* (1958) 82-107.

Second, the ideologically-influenced argument that human rights claims lie only against states seems to be inconsistent with reality.<sup>78</sup> In many third-world states, the Bill of Rights in the constitution does not categorically restrict respect for human rights to the state. Rather, they often elastically provide that anyone who considers that any provision of the Bill of Rights has been, is being or like to be violated in relation to him or her, may file an action before a competent tribunal for fundamental rights enforcement.<sup>79</sup> Such provisions put to rest the argument that rights are protected only against the state, because they leave open the question of who may be held accountable for human rights violations. In South Africa, the Constitution expressly provides that '[a] provision of the Bill of Rights binds a natural or a *juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'<sup>80</sup> This accordingly confirms that, contrary to the dominant argument in the West, legally protected rights are also considered to elicit corresponding duties that demand corporate compliance.

Social expectations, on their own, can be highly problematic as a basis of business compliance. In many fragile states where there are competing socio-economic and political interests among various groups and stakeholders internally, it is difficult to measure social expectations if state regulation and law enforcement are weak and multinationals have government officials by the groins. This is because expectations of society are often multi-faceted, starkly diverse, and incoherent. Contrary to the SRSG's position, they are not enough to ensure responsible corporate conduct. The assertion that failure to act consistently with the responsibility to respect can render abusive corporations amenable to the court of public opinion is equally weak; it does not anticipate any potential accountability in the face of brutal violations and weak legal systems. It implies that abusive corporations like Shell in Nigeria's Niger Delta region, should only be accountable to the court of public opinion where they neglect to abide by this responsibility, even when a legal and judicial system like Nigeria's is glaringly incapable of properly dispensing with the matter. Undeniably, however, social expectations do shape normative action, but they by no means guarantee compliance. Being indicative of social concerns, they should be taken into consideration in the normative development process. But they do not and, in fact, cannot alter corporate conduct to act in accord with them, without proper regulation through legal prescriptions. Green suggests that 'obligations are central to the social role of law'.<sup>81</sup>

<sup>78</sup> Muchlinski (n 57 above) 36.

<sup>79</sup> See the enforcement provisions in the constitutions of many states, especially in the third world.

<sup>80</sup> Sec 8(2) of the Constitution of the Republic of South Africa (emphasis mine); M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *Potchefstroom Electronic Law Journal* 3114.

<sup>81</sup> L Green 'Legal obligation and authority' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2012) <https://plato.stanford.edu/archives/win2012/entries/legal-obligation/> (accessed 28 June 2017).

The SRSG has been highly criticised for the weak language and approach to corporations in the Framework and the UNGPs.<sup>82</sup> The preference for 'responsibility' over 'obligation' or 'duty' deepens perceptions of a collusive attempt to push the business and human rights dialogue from one that is victim-focused to one that is more romantic to the very companies cited for corporate abuses.<sup>83</sup> Lopez queries why the rationale for the corporate responsibility to respect is predicated on social norms, the origin and character of which was never clarified.<sup>84</sup> He also observes that although the SRSG attributes society's expectations with normative value in his report, 'the report does not appeal to any source, ethical or moral system or religion-based ethics, as the normative underpinning of those social norms that give rise to corporate responsibilities.'<sup>85</sup> The SRSG may have been presumptuous to conclude that social expectations were universally accepted to have normative value, when in fact they are not. Recently, Ruggie stated that there is 'near-universal recognition' of the corporate responsibility to respect as a social norm.<sup>86</sup> For this reason, he argues further that '[w]e know that the corporate responsibility to respect human rights is a transnational social norm because the relevant actors acknowledge it as such'.<sup>87</sup> But should normative value be attributed to an idea merely because some of its stakeholders acknowledge it as such? What about the several other hundreds of thousands of companies which do not? It may be this forced universalisation of Western ideology that does not resonate in the third world.<sup>88</sup>

The SRSG's preference for the term 'responsibility' as against 'obligation' or 'duty' further feeds the reservations of critics. A major Achilles heel of the conceptualisation of the respect obligation is the effort to design a new paradigm of human rights obligations for companies that amounts to no accountability.<sup>89</sup> All the talk about the corporate responsibility to respect human rights is contrived simply to transpose corporate social responsibility into the business and human rights debate at the international level. The Framework and UNGPs suggest that only states have *duties* under international human rights law, and that corporations only have *responsibilities* because they

<sup>82</sup> S Deva 'Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 91.

<sup>83</sup> Deva & Bilchitz (n 67 above).

<sup>84</sup> C Lopez 'The "Ruggie process": from legal obligations to corporate social responsibility?' in Deva & Bilchitz (n 82 above) 65.

<sup>85</sup> As above.

<sup>86</sup> JG Ruggie 'The social construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No 67 (June 2017) 13 [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper\\_67\\_o.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_o.pdf) (accessed 18 August 2017).

<sup>87</sup> As above, 14.

<sup>88</sup> Assuming this is not another attempt to universalise western agenda, the ascription of 'near-universal acceptance' of the corporate responsibility to respect to 'a social norm' is nothing but a superficial attempt to blur the lines of disagreements between the global North and South.

<sup>89</sup> Deva & Bilchitz (n 67 above) 3.

derive – not from law but – from social expectations.<sup>90</sup> In this context, the SRSG introduces something quite controversial – the singlehanded differentiation between duty and responsibility, appropriating the former to states and the latter to companies. Nowhere do the contours of international law evidence such distinction. Since international law is fashioned primarily by the consent and customs of states accepted as binding, there is yet no evidence of such distinction or recognition. By the distinctions, duties are suggested to be obligations categorically prescribed by an international instrument while responsibilities are not. But obligations are not duties merely because they are expressly stipulated and attributed to a duty-bearer like the state. Even in the realm of semantics, there is no distinction between ‘responsibility’ and ‘obligation’ or ‘responsibility’ and ‘duty’. They really mean the same thing, and to differentiate them is akin to making a distinction without a difference.<sup>91</sup> Lopez submits that the respect obligation was inaccurately differentiated.<sup>92</sup>

Whether or not the distinction of duties or obligations on the one hand and responsibilities on the other is an accepted UN terminology is questionable. There is evidence to suggest that the opposite may be more accurate: in UN parlance, the term ‘responsibilities’ is usually taken as equivalent or derivative of duties and obligations.

On the second point, the SRSG suggests that the scope of *corporate* responsibility to respect extends to *all businesses* irrespective of size, ownership, structure, sector and operational context.<sup>93</sup> No doubt, this proposition is well intended but logically flawed. The corporate responsibility cannot rationally extend to all business; only to corporate businesses. The whole idea of a *corporate* responsibility was to conceptualise human rights responsibilities applicable to harmful corporate – rather than (in)formal – businesses. Unincorporated businesses – sole proprietorships, partnerships, informal traders, and family trusts – do not fall under the radar of corporate responsibility if properly construed. Those responsible for running this category of businesses arguably bear individual rather than corporate responsibility for any adverse human rights impacts they may have on third parties. If this were not so, the word ‘corporate’ should have been easily substituted with ‘business’, which is a much wider term as aptly captured in the title of the UNGPs. Unlike the UN Draft Norms that was unmistakable in its applications to TNCs and other business enterprises, the Framework and the UNGPs seem to have applied the concept of ‘corporate’ responsibility to all businesses in error. Had it been intended to go beyond the scope of corporate responsibility to include all businesses, there was ample opportunity to make a suggestion to the Human Rights Council for a review of the mandate in this regard.

Furthermore, the SRSG’s mandate was essentially to identify and clarify standards of *corporate responsibility and accountability* of

<sup>90</sup> United Nations Human Rights Council (n 27 above) para 24; United Nations Human Rights Council (n 18 above) principles 11-16.

<sup>91</sup> See the definitions of ‘duty’, ‘obligation’ & ‘responsibility’ respectively in *Black’s Law Dictionary* (n 21 above) 580, 1179 & 1427.

<sup>92</sup> Lopez (n 84 above) 65.

<sup>93</sup> United Nations Human Rights Council (n 18 above) principle 14.

TNCs and other business enterprises with regard to human rights.<sup>94</sup> It is arguable whether the final output was a flawless victory if both the Framework and UNGPs were completely lacking in corporate accountability – an important component of the mandate. One may counter-argue that the unanimous adoption of the UNGPs subsequently ratified whatever zealous elaboration that had been undertaken. But that does not cure the faulty conceptualisation of ‘corporate responsibility’ as applying to all businesses. It also cannot cure the failure to fulfil the *accountability* component of the mandate.

### 3 CONCEPTUAL (DIS)SIMILARITIES WITH CORPORATE SOCIAL RESPONSIBILITY

However, despite the contraption of CHRR within the framework of internationally recognised human rights standards, it is a concept somewhat unpopular in the global North. In North America and Europe, there is a preference for ‘social responsibility’ or ‘corporate social responsibility’ (CSR) – a much broader and differentiated term.<sup>95</sup> CSR is broadly understood in the Northern hemisphere as the social obligation of businesses to conduct their affairs in a manner that is consistent with the concerns of society. Historically, it emanated from the much earlier concept of ‘business responsibility’, a term that is contemplated to have surfaced sometime between 1899 and the Great Depression in the 1920s.<sup>96</sup> The idea of ‘business responsibility’ is known to have been propounded by Bernard Dempsay.<sup>97</sup> But it did not come into prominence until the 1950s when Howard Bowen expounded the idea.<sup>98</sup> Since then, it has steadily evolved as a social construct requiring voluntary business commitments to harmonise corporate objectives with social concerns rather than as a corresponding duty emanating from the legally guaranteed rights of individuals and

<sup>94</sup> Office of the High Commissioner for Human Rights ‘Human rights and transnational corporations and other business enterprises – Human Rights Resolution 2005/69’ para 1(a) Commission on Human Rights 59th meeting 20 April 2005.

<sup>95</sup> L Moir ‘What do we mean by corporate social responsibility?’ (2001) 1 *Corporate Governance* 16 17; K Davis ‘Can business afford to ignore social responsibilities?’ (1960) 2 *California Management Review* 70 (‘Social responsibility’ means different things to businesses. It is on the one hand ‘a broad obligation to the community with regard to economic developments affecting the public welfare’; and on the other hand, it is the ‘obligation to develop and nurture human values’).

<sup>96</sup> N Farcane & E Bureana ‘History of “corporate social responsibility” concept’ (2015) 17(2) *Annales Universitatis Apulensis Series Oeconomica* 31 35; RE Smith ‘Defining corporate social responsibility: a systems approach for socially responsible capitalism’ unpublished MPhil thesis (2011) 1 [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od\\_theses\\_mp](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od_theses_mp) (accessed 21 June 2017).

<sup>97</sup> Farcane & Bureana (n 96 above) 35; Centre for Ethical Business Culture ‘Corporate social responsibility: the shape of a history, 1945-2004’ (2010) Working Paper No 1 9 [http://www.cebcglobal.org/wp-content/uploads/2015/02/CSR-The\\_Shape\\_of\\_a\\_History.pdf](http://www.cebcglobal.org/wp-content/uploads/2015/02/CSR-The_Shape_of_a_History.pdf) (accessed 21 June 2017).

<sup>98</sup> Bowen (n 2 above); RE Smith ‘Defining corporate social responsibility: a systems approach for socially responsible capitalism’ unpublished MPhil Thesis (2011) 1 [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od\\_theses\\_mp](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od_theses_mp) (accessed 21 June 2017).

communities under international human rights law.<sup>99</sup> Hence, a few definitions are considered in this analysis in order to clarify and differentiate the dominant understanding of CSR as exemplified in the global North from the concept of CHRR, which is still very much evolving and enjoys much support from the global South.

By itself, the term 'CSR' is a nebulous idea capable of a multiplicity of meanings.<sup>100</sup> With over 70 known definitions today,<sup>101</sup> each differing from the other, it is one of the most uncertain terms ever conceptualised in human history.<sup>102</sup> Manne asserts that there is 'a considerable amount of confusion inherent in the common use of the phrase "corporate social responsibility".'<sup>103</sup> Bowen, the foremost proponent of the idea,<sup>104</sup> defines CSR as the obligation of businesses 'to pursue those policies, to make those decisions and to follow those lines of action which are desirable in terms of the objectives and values of society.'<sup>105</sup> He argues that when the influence held and the decisions made by businesses are inconsistent with the general welfare of society, businesses have a choice to either reverse them voluntarily or be forced to do so. As many scholars hopped on the CSR bandwagon, early notions of CSR gradually advanced. Johnson, for example, states that a socially responsible company is one that balances many social interests and takes into account its employees, suppliers, partners, local communities and nation rather than only focusing on increasing profits for shareholders.<sup>106</sup> Frederick, another influential contributor to the CSR discourse, describes CSR as the obligation of businesses to 'oversee the operation of an economic system that fulfils the expectation of the public',<sup>107</sup> arguing that 'business corporations have an obligation to

<sup>99</sup> HG Manne & HC Wallich *The modern corporation and social responsibility* (1972) i (where it is said that CSR in America has been 'subsumed as part of the broader subject of the economics of charity').

<sup>100</sup> Davis (n 95 above) 70; Centre for Ethical Business Culture (n 97 above) 23-26. Also see D Crowther & G Aras 'Corporate social responsibility' (2008) 11 <http://mdos.si/Files/defining-corporate-social-responsibility.pdf> (accessed 21 June 2017) - 'There is however no agreed definition of CSR so this raises the question as to what exactly can be considered to be corporate social responsibility.'

<sup>101</sup> MP Low 'Corporate social responsibility and the evolution of internal corporate social responsibility in 21st century' (2016) 3(1) *Asian Journal of Social Sciences and Management Studies* 56-74.

<sup>102</sup> GB Sprinkle & LA Maines 'The benefits and costs of corporate social responsibility' (2010) 53(5) *Business Horizons* 445; A Dahlsrud 'How corporate social responsibility is defined: an analysis of 37 definitions' (2006) 15 *Corporate Social Responsibility and Environmental Management* 3.

<sup>103</sup> Manne & Wallich (n 99 above) 3-4.

<sup>104</sup> Carroll describes Bowen as the 'Father of corporate social responsibility' in AB Carroll 'Corporate social responsibility: evolution of a definitional construct' (1999) 38 *Business & Society* 270.

<sup>105</sup> Bowen (n 2 above) 6.

<sup>106</sup> HL Johnson *Business in contemporary society: framework and issues* (1971) 50; Also see RE Freeman 'Stockholders and stakeholders: a new perspective of corporate governance' (1983) 25 *California Management Review* 88-106.

<sup>107</sup> WC Frederick 'The growing concern over business responsibility' (1960) 2 *California Management Review* 54 60.

work for social betterment.’<sup>108</sup>

Despite the growing recognition that business objective must align with social values, the CSR dialogue remains largely unclear as to what its scope and extent are for business. With years of debates and consolidation of the concept, more scholars have made effort to set some conditionality for shaping what the responsibility of business should be. Manne and Wallish worked out some criteria for determining the socially responsible business. They suggest that the responsibility must be: purely voluntary; regarded as a cost rather than an increased profit; and done with genuine charity or philanthropic intentions.<sup>109</sup> But these criteria did not put a stop to the endless debate. In a bid to clarify the dimensions of society’s expectations of business, Carroll declared that ‘[t]he social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time’.<sup>110</sup> By this definition, Carroll brings out four elements of CSR that respond to the concerns of society – the responsibility of business to be economically profitable to its investors, the legal responsibility to comply with local laws and regulations, the ethical responsibility to do what is proper and consistent with society’s values, and the responsibility to undertake discretionary actions such as philanthropy that are beneficial to society. In a subsequent article, Carroll reaffirms that these four elements ‘constitute total CSR’ and ‘might be depicted as the pyramid’ of CSR.<sup>111</sup>

Since the UN Conference on the Human Environment in the 1970s, the environmental element was added as a dimension to the CSR pyramid. Thus, ushering a business approach that promotes the delivery of social, economic and environmental benefits to all stakeholders as a way of contributing to the society’s sustainable development.<sup>112</sup> This integrative approach very much characterised the CSR idea over the next few decades. CSRwire.com, a public relations press service, describes the combination of various social concerns in

<sup>108</sup> WC Frederick ‘From CSR1 to CSR2: the maturing of business-and-society thought’ (1994) 33 *Business & Society* 150 151.

<sup>109</sup> Manne & Wallish (n 99 above) (unnumbered preliminary page ii).

<sup>110</sup> AB Carroll ‘A three-dimensional conceptual model of corporate performance’ (1979) 4 *Academy of Management Review* 497 500.

<sup>111</sup> AB Carroll ‘The pyramid of corporate social responsibility: toward the moral management of organizational stakeholders’ (1991) 34 *Business Horizons* 39 40; AB Carroll ‘Corporate social responsibility’ (1983) 49(19) *Vital Speeches of the Day* 604. NB. In this latter definition, Carroll replaces the words ‘discretionary actions’ with ‘voluntary or philanthropic’ contributions. Carroll has also championed calls for businesses to move away from being merely ‘socially responsible’ to being ‘socially responsive’ and ‘socially performing’ - see AB Carroll ‘Managing ethically with global stakeholders: a present and future challenge’ (2004) 18 *Academy of Management Executive* 114-120; AB Carroll ‘Ethical challenges for business in the new millennium: corporate social responsibility and models of management morality’ (2000) 10 *Business Ethics Quarterly* 33-42; Carroll (n 104 above) 268-295; AB Carroll ‘The four faces of corporate citizenship’ (1998) 100 *Business & Society Review* 1-7.

<sup>112</sup> Financial Times ‘Definition of corporate social responsibility (CSR)’ in *ft.com/lexicon* [http://lexicon.ft.com/Term?term=corporate-social-responsibility--\(CSR\)](http://lexicon.ft.com/Term?term=corporate-social-responsibility--(CSR)) (accessed 21 June 2017).

the corporation's relations with society as 'an integration of business operations and values'.<sup>113</sup> In 1971, the Committee for Economic Development (CED) observed that the basic purpose of business is 'to serve constructively the needs of society – to the satisfaction of society'.<sup>114</sup>

Apart from the inherent fluctuations in the CSR dialogue, other issues suffice from the definitional conundrum upon which its distinction from CHRR can be articulated. But first, the commonalities. Several threads, definitely, run through the hangers and hooks of CSR that are consistent with the idea of CHRR. There is some consensus on both sides of the argument that: corporations can infringe human rights; corporations should bear some responsibility for ensuring that their business objectives do not transgress the interests and values of society due to their increasing power and influence; and that human rights and the conservation of the environment form part of the common interests and values of society. There is also some understanding that the broader degree of 'stakeholders', as defined by Johnson, includes employees, suppliers, partners, local communities and the state.

However, the greatest denominator between both concepts is the voluntariness element. From the above definitions, it is clear that CSR is more-or-less a company's voluntary, moral or ethical commitment to harmonise its stockholders' interests with those of society. However, this essentially leaves two questions unresolved. First, the definitions do not answer the nagging question of accountability of a corporate entity whose policies and actions (in)advertently violate human rights. What will happen to the corporation that fails, neglects or refuses to discharge its so-called ethical obligations, resulting in human rights harm as was the case in the Piper Alpha disaster?<sup>115</sup> Will it be accountable for its human wrongs? What lesson will each violation serve for future occurrence by other abusive corporate enterprises? Second, the definitions do not conceptualise CSR as a corresponding obligation to respect human rights. If the corporate entity itself can enjoy rights as earlier established, can it not therefore be attributed with the obligation to equally respect the rights of other stakeholders in society? Can the corporation freely act in such a way as to take away the life, human dignity, privacy, the fair working conditions, or the freedom from discrimination of an individual without accountability? These questions remain unsolved by many of the opinions on CSR.

Also, what is even more vague is the convenient use of voluntariness in the CSR dialogue. Assuming this paper adopts the pyramidal CSR-structure suggested by Carroll with the addition of the environmental and human rights dimensions as a basis for linking CHRR to CSR,

<sup>113</sup> CSRwire 'Corporate social responsibility categories' <http://www.csrwire.com/categories> (accessed 22 June 2017).

<sup>114</sup> Research and Policy Committee of the Committee for Economic Development *Social responsibilities of business corporations* (1971) 11.

<sup>115</sup> C Woolfson & M Beck 'Corporate social responsibility failures in the oil industry' in Sullivan (n 52 above) 114-117.

Wettstein states that ‘human rights have played a very peripheral role overall for the conceptualization of CSR’.<sup>116</sup> Jenkins has similarly identified that CSR is an entirely inadequate response to human rights issues.<sup>117</sup> In truth, companies give different considerations to the various dimensions of their CSR. The corporation’s approach to stockholders’ profit-making agenda differs considerably from their human rights and environmental responsibilities to society.<sup>118</sup> Whilst they consider stockholders’ interests as an ‘inalienable right’ upon which their survival depends, there seems to be a disproportionate emphasis on the economic, social, environmental and human rights dimensions of their social responsibilities. The latter category becomes mere voluntary obligations.

There is no doubt that the prevailing North-South divide is not without prejudice. The developed states of the Northern hemisphere oppose the idea that corporations should have binding human rights responsibilities because TNCs that have been called out for some of the most vicious human rights violations in Africa are headquartered there. In Eastern Congo, the Canadian-based mining company, Anvil Mining, has been accused of facilitating the massacre of dozens of civilians.<sup>119</sup> In Malawi, Eland Coal Mining – a subsidiary of European-based Independent Oil and Resources – has been cited for forced eviction of local populations and destruction of Malawian farmlands.<sup>120</sup> In Nigeria’s Niger Delta, the European oil giant, Royal Dutch Shell Company, is notorious for thousands of oil spillages and complicity in the extrajudicial killings of Ogoni human rights activists.<sup>121</sup> The growing resistance to abusive multinational corporations in the mining, pharmaceutical and chemicals industries in the global South is

<sup>116</sup> F Wettstein ‘CSR and the debate on business and human rights: bridging the great divide’ (2012) 22 *Business Ethics Quarterly* 739 746.

<sup>117</sup> R Jenkins ‘Globalisation, corporate social responsibility and poverty’ (2005) 81 *International Affairs* 525; Christian Aid *Behind the mask: the real face of corporate social responsibility* (2004) 2.

<sup>118</sup> Enlazando Alternativas ‘Profit before people and human rights: European transnational corporations in Latin America and the Caribbean’ [prepared by: B Brennan *et al*] [https://www.tni.org/files/download/profitbeforepeople\\_o.pdf](https://www.tni.org/files/download/profitbeforepeople_o.pdf) (accessed 4 July 2017). This report accused the European Union and governments of member states of complicity in violations committed by TNCs.

<sup>119</sup> F Ngugi ‘Western multinational corporations are profiting from poor Africans’ in *Face2Face* (14 February 2017) <https://face2faceafrica.com/article/western-corporations-in-africa> (accessed 8 July 2017). M Wagna ‘Trading human rights for corporate profits: Global trade policy weakens protections for health, the environment’ <<http://www.reimaginerpe.org/node/219> (accessed 6 July 2017) (says that the United States and other countries relinquish the power to protect human rights ‘when doing so would interfere with corporate profits’).

<sup>120</sup> K Hodal ‘Mining in Malawi brings forced evictions and ruined crops, report says’ *The Guardian* 27 September 2016 <https://www.theguardian.com/global-development/2016/sep/27/mining-malawi-brings-forced-evictions-ruined-crops-human-rights-watch-report-says> (accessed 29 June 2017); Human Rights Watch ‘“They destroyed everything”: Mining and human rights in Malawi’ 27 September 2016 <https://www.hrw.org/report/2016/09/27/they-destroyed-everything/mining-and-human-rights-malawi> (accessed 4 July 2017).

<sup>121</sup> Wettstein (n 116 above) 742; Centre for Constitutional Rights ‘Corporate human rights abuse’ 4 [https://ccrjustice.org/sites/default/files/assets/files/CCR\\_Corp.pdf](https://ccrjustice.org/sites/default/files/assets/files/CCR_Corp.pdf) (accessed 8 July 2017).

precipitating a construction of corporate responsibility under domestic and international law different from CSR. Southern scholars contend that since human rights are legally guaranteed and enforceable against violators, then the responsibility for corporate wrongs must ultimately lead to accountability.

The divergence on corporate responsibility is just one aspect of the conceptual divide. There is another category of scholars who are utterly opposed to the notion altogether that businesses should have any responsibilities beyond those accruing to their primary stockholders. From these opponents have come a backlash to the theorisation of business responsibility to society, arguing dismissively that the idea of business responsibility is analytically loose, lacks rigor, and nothing short of the 'preaching of pure and unadulterated socialism'.<sup>122</sup> They argue that the idea of business responsibility is pure rhetoric that is antithetical to the ideals of a free society. Friedman, for example, emphatically berates that '[w]hen I hear businessmen speak eloquently of the "social responsibility of businesses in a free-enterprise system", I am reminded of ... unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades.'<sup>123</sup> To him, only individuals and corporations have responsibilities; "business" as a whole cannot be said to have responsibilities, even in this vague sense.<sup>124</sup>

Despite Friedman's deep disagreement, his distinction between business and corporate responsibility aligns with this paper's analysis, and much of his reservations may not easily be categorised as misplaced. His position that CSR is fraught with ambiguity and looseness appears justified. Indeed, as he queried elsewhere, if businesses do have responsibilities, 'how are they to know what it is?'.<sup>125</sup> As it stands, the above CSR definitions do not seem to clarify with certainty what those responsibilities are. Are the responsibilities managerial (that is, to meet profit expectations of investors), socio-economic (that is, to act consistently with the objectives and values of society which vary from society to society), legal (that is, to merely meet the legal conditions for their functioning) or discretionary? If they are discretionary, is it in the sense of pursuing philanthropic ends or complying with human rights obligations?

As seen from the incoherence and overly broad attributions to the concept, CSR does not clearly align human rights standards as an integral part of business operations. The emphasis on discretion over and above obligation essentially deviates from the human rights principle that breaches of human rights standards will give rise to redress and accountability.

<sup>122</sup> M Friedman 'Legitimacy and responsibility: the social responsibility of business is to increase its profits' in RF Chadwick & D Schroeder (eds) *Applied ethics: critical concepts in philosophy* Vol 5 (2002) 57 (extracted from *The New York Times Magazine* 13 September 1970).

<sup>123</sup> As above; M Friedman 'Capitalism and freedom: fortieth anniversary edition' (2009) 135.

<sup>124</sup> Friedman (n 122 above) 57.

<sup>125</sup> Friedman (n 123 above) 133.

#### 4 CORPORATE RESPONSIBILITY NECESSITATES ACCOUNTABILITY

Surely, within the context of human rights, any idea of responsibility that deviates from answerability as an ultimate end of justice is no responsibility at all. If the protection of the individual is truly the focus of international human rights law, then no category of violators, especially corporate violators, should be allowed to fly below the accountability radar. Given the events in many parts of the world that show that corporations have been involved in adverse human rights impacts, there is sufficient basis to demand that they be answerable for abuses for which they have been identified.<sup>126</sup> Human rights principles are not cast in stone such that they cannot respond to the exigencies of evolving corporate infractions. They are dynamic and adaptive; and they demand progressive interpretation from local and international tribunals as well as scholars for their full realisation.

The Universal Declaration recognises the imperative of a wholistic human rights regime that responds to and prevents human rights violations by all; and that is why it requires not just individual or states but every organ of society to respect them. Being ‘a common standard of achievement for all mankind’,<sup>127</sup> and notwithstanding its non-binding character, all other standards must meet its humanistic aspirations. The call for corporate accountability is neither utopian nor inconsistent with the Declaration’s sacrosanct objective. To realise the corporate accountability objective, both hard and soft measures may prove to be useful, and voluntary as well as binding obligations may be ideal in this regard. But room for their coherent utilisation will first need to be created. The UNGPs, unfortunately, do not seem to make ample room for such complementarity. By creating elusive distinctions, using weak language, and pulling the essential legal roots of human rights off the corporate responsibility discourse, the UNGPs substantially twist the business and human rights debate from a victim-centred one, and far from the realm of business accountability. In many ways, it advances greater business interests than it does the individual’s.

Internationalising CSR through the UNGPs work at cross-purposes with the international human rights regime and significantly weaken its objective towards protecting and realising fundamental human interests.<sup>128</sup> The goal should not be merely to have in place a regime of global governance for corporations. Rather, it must be to ensure that such regime functions ‘in a normatively desirable way, that is, in

<sup>126</sup> S Khoury & D Whyte ‘How human rights law has been used to guarantee corporations a “right to profit” (15 March 2017) <https://theconversation.com/how-human-rights-law-has-been-used-to-guarantee-corporations-a-right-to-profit-74593> (accessed 28 June 2017).

<sup>127</sup> Universal Declaration Preamble.

<sup>128</sup> Deva & Bilchitz (n 67 above) 3.

accordance with the values and principles underlying international human rights.<sup>129</sup> That is not to say that corporations may not voluntarily employ CSR as a complementary catalyst to further close-up the governance gaps. Their failure to do so should not, however, prevent underlying corresponding obligations that operate in human rights instruments from applying to them.

So far, the UN Draft Norms may have been the only assemblage of standards to have come close to holding abusive corporations accountable for human rights infractions. They stipulate that TNCs and other businesses 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.'<sup>130</sup> However, this prescription of business responsibility has been sternly criticised by prominent scholars from the global North including Ruggie: for directly applying human rights obligations to companies;<sup>131</sup> and for equating the responsibility of states with that of business entities.

There is no doubt that the power and influence of corporations and their potential for perpetrating abuse make them 'informal' duty-bearers under the international human rights regime. This, however, does not ostensibly place corporate enterprises on the same pedestal as the state.<sup>132</sup> The general acknowledgement is that states remain primarily liable for human rights promotion, protection and fulfilment. They however do not bear responsibility for infractions directly committed by companies. Their liabilities lie in their failure to properly regulate potential harmful conduct. Corporate enterprises remain liable for any adverse human rights impacts they create. Illustratively, a company can be held liable for violating the Bill of Rights under the South African Constitution due to the duty imposed by each right.<sup>133</sup> Equally, in a state like Benin where international law applies directly, every right established under a ratified international instrument imposes a duty of observance that is binding not only on the state but also on individuals and juristic persons.<sup>134</sup> In such cases, corporate responsibility and accountability are undisputable. As has been stated above, a distinction however must be made between the obligation to respect human rights and its enforcement. In dualist states, legislation maybe required for the domestic enforcement of international human rights law.

<sup>129</sup> Deva & Bilchitz (n 67 above) 2.

<sup>130</sup> UN Draft Norms para 1.

<sup>131</sup> Černič (n 3 above) 20; Ruggie (n 73 above) 827.

<sup>132</sup> Černič (n 3 above) 13; MT Kamminga 'Corporate obligations under international law' (2004) Submission to the Office of the United Nations High Commissioner for Human Rights 6.

<sup>133</sup> n 80 above.

<sup>134</sup> Articles 34 & 147 of the Constitution of the Republic of Benin 1990.

## 5 CONCLUSION

It must be acknowledged that the international human rights regime falls substantially short of fulfilling its objective of protecting human rights and fundamental freedoms. Its continuing inability to achieve consensus on corporate accountability for human rights violations significantly frustrate victims' hope of supranational redress in instances where domestic judicial systems fail. Domestic law similarly falters in its ability to regulate both local and transnational corporate actors. The inadequacies of both levels of governance (in)advertently appropriate to corporations, power without responsibility, and the liberty to violate individuals and ravage peoples unimpeded. Weak institutions and poor regulatory governance in the Third World, notably in Africa, make corporate human rights violations a recurring phenomenon. Persisting North-South divides do not assuage victims of egregious corporate violations; and the status quo, indeed, only favours the oppressor.

On the flip side, Africa's position on the legal basis of corporate human rights responsibility is far from being imprecise. The African human rights and burgeoning criminal justice systems provide a background for conceptualising corporate responsibility in Africa differently. African human rights instruments emphasise the protection of individual and group concerns, and recognise that rights are underpinned by duties. More so, the recognition of corporate criminal responsibility in Africa amidst the persisting debates at the international level further clarifies Africa's quest to close its accountability deficit. These mark important points of engagement in the CHRR discourse, and are indicative of the growing acceptance on the continent that corporate responsibility should ultimately lead to legal answerability. This also shows Africa's preparedness to depart from a blind allegiance to non-African perspectives on contentious issues, in order to accomplish a broader and more comprehensive regime of accountability and social justice on the continent.

Given the seeming consensus that corporations should, indeed, bear some degree of responsibility, it is long past the time for human rights to cease to be used as 'a political tool in the legitimization of highly diverse political acts on the part of the ruling actors on national and world stages'.<sup>135</sup> States and scholars must put aside ideologically twisted conceptualisations, and place at the core of every human rights debate the individual's fundamental interests. The legal protection of rights imposes an implied duty of observance on all – individuals, groups, companies and the state – domestically and internationally without exceptions. Therefore, for corporate objectives to be justified in law or on the basis of social expectations, they must be consistent with internationally recognised human rights principles; and the breach of these must give rise to accountability. While voluntary commitments by corporate businesses to respect human right are welcome developments, their absence should not diminish the obligation to

<sup>135</sup> Flere (n 46 above).

respect human rights. By this proposition, domestic judicial systems and regional human rights mechanisms should rise up to the challenge of giving human rights protection in Africa a living face.