LIKE WHEELS TO A CHARIOT: EXPLORING THE SILENT SPRING OF 'BUSINESS AND HUMAN RIGHTS' AND 'CORPORATE SOCIAL RESPONSIBILITY'

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ABSTRACT

In 1962, Rachael Carson released a book entitled 'Silent Spring' which ignited the environmental movement. The book, though opposed by state and non-state actors, changed the world and inspired humans to act as 'stewards of the living earth'. In the long march of mankind, however, the connection between corporations and the international human rights law regime has paradoxically remained aloof from evolution. This article explores the imbroglio of Business and Human Rights (BHR) v. Corporate Social Responsibility (CSR) through an illustrative trajectory. This article first charts the reasons behind the (advocated) "hidden" convergence of CSR and BHR. Subsequently, it demonstrates that the convergence between BHR and CSR is established 'silently' when (i) the true voluntariness nature of CSR is challenged; and (ii) the content of BHR and

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CSR is compared. Following this, the article turns over a new leaf by devising a two-fold fusional model of BHR with CSR, rather than the widely debated BHR treaty. For this, the article takes the cue from, inter alia, the European Union CSR Strategy and the idea of a renowned scholar — who served as a United Nations Special Rapporteur, Olivier De Schutter — to resolve the quandary. We find that an international framework convention viewed through the lens of international customary law and a corresponding domestic framework is imperative, which caters to the deficiencies identified in the BHR treaty. Through this engagement, the paper coalesces BHR and CSR to symptomatically establish a 'duty to protect' human rights instead of the (apparent) dilapidated concept of 'responsibility to respect'.

Keywords: business and human rights, corporate accountability, corporate social responsibility, the European Union

I. INTRODUCTION

'Corporations hold a strict *responsibility* to prevent and/or remedy all adverse human rights impacts which they cause or to which they contribute.'[1]

[1]David Birchall, 'Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' (2019) 1 OxHRH J 120, 146.

The consciousness of the community affects the law. The law affects the behavior, ideas, and values of the society. Concurrently, the consciousness of the community and the law progress by leaps and bounds in two concentric circles. However, it is imperative to note that simmering tensions have been brewing between the law and the community for some time now. One such case is that of the corporates' responsibility towards safeguarding the human rights. The increasingly "voluntary" discretion conferred to the corporates has brought them into an uncharted territory. In this territory, the corporations do not have a sound jurisprudential basis to *respect* human rights. To begin with, we would first consider a few human rights violations to demonstrate the graveness of the issue. These violations virtually appear in all jurisdictions and surprisingly, it is difficult to claim that a particular jurisdiction is alien to this concept. An instance of a corporate-related human rights violation in India, for example, is the LG Polymer case.[2] This recent case sets a peculiar example to show the exigency of the matter. On 07 May 2020, the polymer gas leak incident, caused allegedly due to the company's negligence, killed 11 and injured more than 100 people.[3] Another instance could be the corporate-related human rights violation in the United States. In Texas, as an example, the company—Occidental Petroleum was alleged to have polluted the rivers and streams with highly toxic waste.[4] This increased the level of metals in the blood of people living nearby. On

[2]Tanya Nair and Shefali Chawla, 'The Vishakhapatnam Gas Leak: Another Reason to Enforce Human Rights Obligations against Businesses' (*Voices of Promise*, 12 September 2020) <https://www.promisehumanrights.blog/blog/2020/9/the-visakhapatnam-gas-leak-another-reason-to-enforce-human-rights-obligations-against-businesses> accessed 03 February 2023.

[3]J Justin Jos, 'Another Day, Another Gas Leak: Business and Human Rights in India' (*Cambridge Core blog*, 27 May 2020) <https://www.cambridge.org/core/blog/2020/05/27/another-day-another-gas-leak-business-and-human-rights-in-india/> accessed 12 June 2022.

[4]Reuters, 'Ecuador Cancels an Oil Deal With Occidental Petroleum' *New York Times* (17 May 2006) <https://www.nytimes.com/2006/05/17/business/worldbusiness/17oil.html> accessed 28 March 2023.

25 February 2010, then, Coca-Cola Co. faced, *inter alia*, murder, rape and violence charges against the trade unionists.[5] The said instances evince how corporations do not intend on serving as watchdogs of the interests of the public, rather are merely concerned with their own rights and interests. More recently in the COVID-19 crisis, millions of workers were laid off in the supply chain factories.[6] In the United States, 44 million workers registered themselves as unemployed.[7] The impact is also evident in the negligence of the corporations to ensure healthy working conditions. For instance, the negligence of Walmart in properly cleaning the place and providing protective kits to the workers allegedly led to the death of a person.[8]

The debate surrounding such impacts revolves around the concept of business and human rights (**BHR**). This concept chassis one of the bedrocks on which the world is attempting to prevent human rights violations by corporations.[9] However, at the same time, consideration should also be advanced toward the widely debated concept of Corporate Social Responsibility (**CSR**). In the existing literature, the ongoing debate of CSR v. BHR has garnered different views. For example, academicians have considered the relationship of CSR and

[5]BaşakBağlayan et al, 'Good Business: The Economic Case For Protecting Human Rights' (December 2018) <https://icar.ngo/wp-content/uploads/2020/01/GoodBusinessReport_Dec18-2018.pdf> accessed 12 June 2022.

[6]Mary Robinson and Phil Bloomer, 'Shaping a new political contract through the pandemic' (*Business and Human Rights Resource Centre*, 07 April 2020) <https://www.business-humanrights.org/en/shaping-a-new-social-contract-through-the-pandemic> accessed 12 June 2022.

[7]Lance Lambert, 'Over 44.2 million Americans have filed for unemployment during the coronavirus pandemic' (*Fortune*, 11 June 2020) <https://fortune.com/2020/06/11/us-unemployment-rate-numbers-claims-this-week-total-job-losses-june-11-2020-benefits-claims/> accessed 28 March 2023.

[8]Daniel Wiessner, 'USA: Estate of Walmart Employee Who Died From COVID-19 Sues Company for Failure to Protect Workers' (*Reuters*, 30 April 2020) <https://www.reuters.com/article/health-coronavirus-walmart-lawsuit-idINL1N2BV0QM> accessed 28 March 2023.

[9]In this article, the terms companies, corporates, businesses, business entities are used synonymously.

BHR through the view of moral rights,[10] how BHR can draw an analogy from CSR for creating incentives from corporates' operations,[11] and their legal nature.[12] In consequence, the ideal solution that has emerged is a straitjacket BHR treaty which may consider the aspects of CSR. We do not contest that CSR initiatives should include human rights or that the formulation of a BHR treaty should not be effectuated, in a manner. Instead, we attempt to clarify that indeed CSR initiatives include human rights, and in this context, a BHR treaty is not feasible given that one-size-does-not-fit-all. This is done using an illustrative reflection of, *inter alia*, the European Union (**EU**) and the idea of a renowned scholar who served as a UN Special Rapporteur, Olivier De Schutter. Through this, we demonstrate that a *silent* convergence between CSR and BHR has already been established and distinctively, BHR is not *prima facie* a "purely" voluntary concept now. Having said that, the illustrative analysis would allow us to chart/recommend a two-fold framework, which due to its flexibility can be adopted by the jurisdictions across the world as per their requirements while ensuring legal compliance with the ideals of BHR and CSR. This, resultantly, eradicates the impediments arising from corporate accountability.

In the above context, Part II of the paper accords a background to the discussion by understanding the conceptualisation of CSR and BHR separately. Part III of the paper, then demystifies the gap between CSR and BHR which has been filled up, through a legal, conceptual, contextual, and differential framework. We consider a two-pronged approach: one, the nature of CSR and BHR; and two, the relationship

[10]Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 Business Ethics Quarterly 739.
[11]Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237.
[12]Ana Čertanec, 'The Connection Between Corporate Social Responsibility and Corporate Respect for Human Rights' (2019) 10:2 Law, Economics and Social Review Issues 103-127.

between the elements of CSR and BHR. Drawing from this discussion, the paper finds that whenever BHR policies have been addressed, an attempt has been made to devise a BHR treaty. And whenever, CSR and BHR have been addressed as a consolidated concept, an attempt has been made to show that human rights incentives should be part of the CSR initiatives. This paper, on the contrary, claims that there exists no unified mechanism for implementing the treaty and the problem of "one-size-does-not-fit-all" persists. Accordingly, Part IV of the paper endeavours to devise a two-fold framework to address the issue. Part V of the paper finally provides the conclusion.

II. THE BIRTH OF THE CONTROVERSY

In this section, we will discuss the two concepts of CSR and BHR in isolation.

A. The Sensitizing Concept—CSR and the Muddling Term—Responsibility

In 1953, William J. Bowen contrived the term CSR.[13] Following this, the Committee for Economic Development released a report titled 'Social Responsibilities of Business Corporations' in the 1971 watershed movement.[14] It devised a three-fold model: namely, the inner, intermediate, and outer circle, which highlighted the essence of sensitisation and the onus to bear responsibility.[15] Imperatively, a full-fledged CSR wind commenced in the late 1990s when the German

[13]Archie B Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) Business and Society 268, 270.
[14]The Committee for Economic Development, 'Social Responsibilities of Business Corporations' (June 1971) <https://www.ced.org/pdf/Social_Responsibilities_of_Business_Corporations.pdf> accessed 14 March 2023.
[15]Ibid.

corporate, Betapharm decided to effectuate CSR initiatives in its work.[16]

With the advent of time, the widely-ventilated concept of CSR has been defined in countless conflicting manners. For instance, a few argue that CSR encompasses only social, environmental, and economic standards while others confer it a broader connotation.[17] On a *prima facie* view, these definitions are not universally recognized. To clarify this, several commentators have expressed CSR to be an 'umbrella' term.[18] Here, 'umbrella' signifies the conflicting perceptions in regard to the 'responsibilities of business and its role in the society'.[19] Another commentator, J. Jonker, has termed CSR as a sensitising concept.[20] The varied connotations evidence that CSR is perplexed with complexities and is/will be not an easy term to be associated with (when talking in the context of human rights).

While it is difficult to restrain CSR in a watertight container, it is imperative to offer a panorama of the legal and voluntary content of CSR. Today, one is of the view that CSR is not a legal requirement and works in the voluntary interests of the corporations.[21] Assuming that

[16]Poonam Lakra, 'Corporate Social Responsibility Effect on Human Right Standards and Sustainability and CSR Effect on Various Indian Corporate' (2014) 16 IOSR Journal of Business and Management 96.

[17]Consultancy and Research for Environmental Management, Amsterdam, 'Corporate Social Responsibility in India: Policy and Practices of Dutch Companies' (February 2004) CREM Report No. 03.650.

[18]G. Palazzo and A.G. Scherer, 'Entfesselung und Eingrenzung - Konsequenzeneiner global entfesseltenökonomischen Vernunft für die sozialeVerantwortung der Unternehmen' in Breuer, M., Mastronardi, P. and Waxenberger (eds), *Markt, Mensch und Freiheit: Wirtschaftsethik in der Auseinandersetzung* (2009) 81.

[19]Ibid.

[20]J. Jonker, 'CSR Wonderland: Navigating between Movement, Community, and Organisation' (2005) 20 Journal of Corporate Citizenship 19.

[21]Li-Wen Lin, 'Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China' (*Oxford Business Law Blog*, 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/mandatory-corporate-social-responsibility-legislative-innovation-and> accessed 17 February 2022. ('Corporate social responsibility (CSR) often refers to "companies voluntarily going beyond what the law requires to achieve social and environmental objectives during

the view is correct, it has, without any doubt, implications for answering the following issue: what is the threshold for the responsibility of a corporate towards human rights. Our understanding of this responsibility is in line with the views of Buhmann and Wettstein.[22] They opine that CSR encapsulates legally mandated actions. Symptomatically, reflecting CSR as a purely voluntary action lacks cogent substantiation. To be sure, Buhmann and Wettstein were significantly concerned with the legal nature of CSR for it to coincide with BHR. Thus, it can be observed that a corporation should have a *duty* instead of a r*esponsibility* to respect. The words *responsibility to respect* instead of a *duty* conveys that respecting human rights is not typically a requirement that the international human rights law imposes on corporations and in fact, is a voluntary and soft-law corporate responsibility, even though domestic legislations might have adduced certain elements indicating towards their *duty* to respect.[23] However, as indicated, again, the legal nature perception differs across jurisdictions. For instance, in the United States, CSR is regarded as an *implicit* practice i.e., voluntary action; while in the United Kingdom, it is gauged as an *explicit* practice i.e., mandatory requirement.[24] Furthermore, there is no mechanism to quantify CSR at an individual corporate level.[25] Since then, therefore, scholars and jurisdictions have

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the course of their daily business activities." CSR is typically considered voluntary and beyond compliance with the law.')

[22]K. Buhmann, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case' (2011) 7 International Journal of Law in Context 139-179; F. Wettstein, 'Beyond Voluntariness, Beyond CSR: Making a Case for Human Rights and Justice' (2009) 114 Business and Society Review 125.

[23]John Ruggie, 'The Corporate Responsibility to Respect Human Rights' (*Harvard Law School Forum on Corporate Governance*, 15 May 2010) <https://corpgov.law.harvard.edu/2010/05/15/the-corporate-responsibility-to-respect-human-rights/> accessed 03 February 2022.

[24]Čertanec (n 12) 106.

[25]Carol Newman et al., 'Corporate Social Responsibility in a Competitive Business Environment' (2020) 56 The Journal of Development Studies 1; Markus Kitzmueller, Jay Shimshack, 'Economic Perspectives on Corporate Social Responsibility' (2012) 50 Journal of Economic Literature 51.

offered contrasting opinions on the nature of CSR, and have continued to map its intricacies.

B. The Expansive and Minuscule Viewpoints of BHR

For the purposes of this article, we demystify the concept of BHR in a two-fold manner: one, the expansive view of BHR which is the jurisprudence pertaining to the international human rights regime; and two, the minuscule view of BHR which is the consolidated niche concept of BHR itself. This segregation has been made because human rights form an indispensable, inherent, and indivisible part of the society and human dignity;[26] yet, conducting business in accordance with human rights is still an idea that needs to be firmly ingrained as a requirement.

With respect to the first view, we opine that human rights have been inherently inculcated in the society. For example, the Universal Declaration of Human Rights, 1948,[27] the European Convention on Human Rights, 1950,[28] the Civil Rights Act, 1964,[29] the International Covenant on Economic, Social and Cultural Rights, 1966;[30] and the American Convention on Human Rights, 1969;[31] among others, all confer an obligation on the state and individuals to safeguard human rights violation. Thus, we summarily argue that human rights, particularly, those that are violated by corporations, embody the international customary international law (**CIL**) and CIL matters in

[26]Wettstein (n 10) 740.
[27]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[28]European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.
[29]Civil Rights Act 1964, 42 U.S.C. § 2000d et seq.
[30]International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.
[31]American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

protecting human rights.[32] For instance, the Universal Declaration of Human Rights 1948 recognises human rights and is drafted to ensure 'common standard of achievement for all peoples and nations'.[33] As on date, several provisions of the said Declaration have been accorded the status of CIL, which is binding on all states.[34] This customary nature can be also corroborated by Wettstein who claims human rights to be moral rights.[35] Scholars also evidence that the validity of human rights is neither dependent nor based on their codification into positive law.[36] In light of these claims, it can be drawn that human rights constitute an expansive viewpoint. And due to this very premise, human rights pervade every society and every corporation. Generally speaking, the incorporation of human rights into business has not gained wide acknowledgement legally, and it thus remains a niche concept. It can also be said to happen since these corporations are not legally bound to safeguard human rights.[37] Not only this, but a notion also exists that safeguarding human rights is the sole duty of the states. However, at the outset, human rights should not (and could not) be associated with the sole duty of the states.[38] This view is also in consonance with the Universal Declaration of Human Rights, 1948, which delineates that 'every individual and every organ of the society' should foster respect for human rights.[39] Impliedly, the wide connotation includes corporations under its realm. Further, Articles 29 and 30 of the

[32]For further clarity on the intersection of Business and Human Rights, see Section III of this Article.

[33]United Nations, 'International Human Rights Law' (*OHCHR*) <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> accessed 03 February 2023.

[34]Hurst Hannum, 'The Status of Universal Declaration of Human Rights in National and International Law' (1995) 25 GA J Int'l and Comp Law 289.

[35]Wettstein (n 10) 740.

[36]Hans Kolstad, 'Human Rights and Democracy – Obligations and Delusions' (2022) 7(1) Philosophies 8; Joel Feinberg, Social Philosophy (Prentice-Hall, 1973).

[37]Steven P. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 3, 463.

[38]Wettstein (n 10) 742-745.

[39]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

Universal Declaration of Human Rights provide that both the states and non-state actors including private entities have a *duty* to protect against human rights abuses.[40] A question that emanates here is that if such a duty exists, then why are the business entities alienated to endorse this duty. This can be succinctly demonstrated through a trajectory of opposition to international instruments promulgated in this regard, as follows.

a) The 1990s wind: the UN Draft Norms 1997, Global Compact 2000, and the UN Draft Norms 2003

In the 1970s, the corporates, political parties, and the capital exploring countries fought a war against the human rights dwellers who were fighting for seeking consolidation of business and human rights. Clearly, the former won the battle. However, a need to resurrect the fallacy in the battle arose, which resultantly led to the formation of the Sub-Commission on the Promotion and Protection of Human Rights Norms in 1997.[41] Following this, the UN Global Compact initiative attempted to align the businesses with the ten universally accepted human rights principles.[42] The initiative was not a success due to, one, it did not assess the performance of the corporates; and two, the initiative was not legally binding.

Subsequently, in 2003, the Sub-Commission proposed a draft on the responsibilities of transnational corporations and other business enterprises in regard to human rights.[43] Textually, these norms paved

[40]Ibid arts 29 and 30.

[41]Nadia Bernaz, *Business and Human Rights* (1st edn, Routledge 2017) 82.

[42]The ten universally accepted principles can be found here: United Nations Global Compact, 'The UN Global Compact Ten Principles and the Sustainable Development Goals: Connecting, Crucially' (White Paper, June 2016) <https://media.business-humanrights.org/media/documents/files/documents/UNGCPrinciples_SDGs_White_Paper.pdf> accessed 15 June 2022.

[43]'Sub-Commission on the Promotion and Protection of Human Rights Norms, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003); David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of

the way for the transition of the voluntary activities of the corporations to a legally binding regime. They established that the international legal principles, treaties, and policies are applicable to the corporates. However, the term 'textually' in the above statement itself deciphers that the norms were not accepted.[44] This was for the reason that the corporations conjectured that only the states can be associated with these obligations. Nevertheless, the wind to foster respect for human rights commenced thereof.

b) The birth of the Ruggie's framework

In 2005, the saying 'head above the water' was shattered due to the presence of a complex global value chain for production. Without any doubt, the chain led to the augmentation of the global political economy.[45] Simultaneously, it led to a discourse on the human rights impact being caused owing to the increase in production globally. Resultantly, Professor John Ruggie was appointed as the United Nations Special Representative of the Secretary-General on BHR in 2005.[46]

Ruggie's mandate was two-fold:[47] one, to clarify the contentious concepts in the norms proposed prior to his election, and two, to clarify

Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 American Journal of International Law 901.

[44]For an insight into the challenges and the reasons for opposition, refer, Olivier De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (2006) 1.

[45]Jessica T. Mathews, 'Power Shift' (1997) 76 Foreign Affairs 50.

[46]Clara Pacce P Serva and Luiz Carlos S Faria Jr, 'Mandatory Human Rights Due Diligence in Brazil' (*International Bar Association*, 17 June 2022) <https://www.ibanet.org/Mandatory-human-rights-due-diligence-Brazil> accessed 03 February 2023.

[47]Major Reports to UN Human Rights Council, 'John Ruggie (1944-2021) - UN Guiding Principles' (*Harvard University)* <https://scholar.harvard.edu/john-ruggie/un-guiding-principles> accessed 14 March 2023; P.S. Wheeler, 'Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social License to Operate' (2015) 19 The International Journal of Human Rights 757; D. Kinley and R. Chambers, 'The UN Human Right Norms for Corporations: The

the reasons behind the opposition to such norms. With the 'principled pragmatism' character of his mandate,[48] Ruggie published two reports in 2008.[49] Comprehensively, the reports devised three pillars: 'Protect', 'Respect' and 'Remedy'. These three pillars construe that the state has a *duty to protect* against human rights violations, the corporates have a *responsibility to respect* human rights and the requirement for an efficacious mechanism so as to provide a *remedy* in case of infringement of human rights standards. Separately, this tripartite framework *ex-facie* reflects that the corporations will not face any legal implications in case of abuse due to the word play that the framework encapsulates. This untenable statement is a derivation from two issues:

Firstly, it may seem that Ruggie establishes a truly negative obligation for the businesses. However, we contend that although the framework has not been accepted, Ruggie's model attempts to establish a positive obligation for corporations. For instance, Ruggie proposes a 'due diligence' approach and claims it to be a 'game-changer'.[50] This approach provides that corporates should not affect human rights adversely. Moreover, the duty is a product of the corporate's 'social license to operate' and 'social expectations.[51] One may also take the cue from the criticism levied on the 2003 UN Draft Norms by Ruggie.

Private Implications of Public International Law' (2006) 6 Human Rights Law Review 447.

[48]John Ruggie, Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' A/HRC/8/5, 07 April 2008.

[49]John Ruggie, Human Rights Council, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity"' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Eighth Session, A/HRC/8/16 (2008A); John Ruggie, 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, A/HRC/8/5 (2008B).

[50]James Harrison, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment' (2013) 31 Impact Assessment and Project Appraisal 107.

[51]Ruggie (n 48) 16.

He claimed the norms to be a 'limited list of rights linked to imprecise and expansive responsibilities' instead of 'defining the specific responsibilities of companies with regard to all rights'.[52] Despite this, Ruggie's proposal to mandate the corporates to only respect human rights is conflicting and seems to be narrowly tailored. Thus, while we acknowledge that there is no truly positive obligation of 'not doing harm', it can also be not construed that there is a truly negative obligation on the corporations.

Secondly, there is no reasonable classification to corroborate the demarcation between *respect v duty* for the corporates and the state. Indeed, the two entities are reasonably different, but the basis of the classification is arbitrary. The basis of our contention is the statement made by Ruggie itself, who while criticizing the UN Draft Norms 2003 stated that the duty of the state and corporates should be similar,[53] and lodges that the Draft Norms 'extend to companies essentially the entire range of duties that States have'.[54]

c) The Guiding Principles on BHR endorsed by the Human Rights Council, 2011: Did we move a step forward for establishing the corporate's duty?

The UN Human Rights Council in 2011 adopted the UN Guiding Principles for establishing the corporate responsibility to respect human rights. *Prima facie*, these guiding principles do not provide for a binding obligation. However, it is imperative to note that the principles provide that there should be a corporate liability in case of violation of human rights. Although it must be also noted that there is no clarity with respect to what liability should be imposed, the

[52]Ruggie (n 48) 14; David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7 International Journal of Human Rights 199.
[53]Bilchitz (n 52) 207, 523.
[54]Ibid 207.

principles seem to be confined only to impact-based liability.[55] At the same time, the language of the principles inclines towards influence-based liability.[56] On one hand, the principles provide that the corporations 'cannot be held responsible for the human rights impacts of every entity over which they may have some influence.'[57] On the other hand, Guiding Principles 17 and 18 provide that a corporation can take the leverage of impact-based liability and undertake the responsibility accordingly.[58] This dilemma is further ignited because Principle 19 seeks to influence the corporations *vis-à-vis* their responsibility towards human rights by developing pressure of integration of human rights responsibility in the corporations' policy.[59] At this juncture, we are of the opinion that the principles require scrutiny in terms of incorporation of the legal compliance function.

The pro-BHR wind did not stop. Symptomatically, the International Standard on Social Responsibility ISO 26000[60] and an updated version of the OECD Guidelines for Multinational Enterprises in 2011 were promulgated.[61] Unfortunately, the road taken for implementation of

[55]Wheeler (n 47) 8.
[56]For instance, Guiding Principle 13(b) provides that it is the responsibility of a business enterprise to "influence" the third party's conduct to protect human rights.
[57]Wheeler (n 48) 8; Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31, 21 March 2011.
[58]Ibid principles 17 and 18.
[59]Ibid principle 19.
[60]International Organization for Standardization, 'International Standard on Social Responsibility ISO 26000', (*ISO*, 1 January 2010) < https://www.iso.org/iso-26000-social-responsibility.html>.
[61]Organisation for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises', (*OECD*, 25 May 2011) <https://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm#:~:text=The%20OECD%20Guidelines%20for%20Multinational%20Enterprises%20are%20far%20reaching%20recommendations,to%20observe%20wherever%20they%20operate> accessed 28 March 2023.

these guidelines and standards, which reiterated the corporate responsibility to respect, was not appreciated.[62]

d) The 2014 resolution and the regime ahead: Refusal to even respect?

In 2014, the Human Rights Council adopted a resolution to put an end to the conundrum of the UN Human Rights regime.[63] With this resolution, the Council established an Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Enterprises (**IGWG**).[64] The mandate of IGWG was 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[65] While the initiative was supported by a plurality within the Human Rights Council, at the same time, it was quite divisive. Thus, its sequel could not result in a binding obligation. To corroborate, for instance, the total number of members of the Human Rights Council was 47. Out of them, 20 supported, 14 opposed, while 13 abstained from voting for the resolution.[66] This statistical depiction evidences the

[62]Jernej Letnar Cernic, 'Corporate responsibility for human rights: A critical analysis of the OECD Guidelines for Multinational Enterprises' (2008) 14(1) Hanse Law Review 71-102.

[63]United Nations Human Rights Council, 'Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to human rights' (*OHCHR*) <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc> accessed 03 February 2023.

[64]Ibid.

[65]Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' A/HRC Res. 26/9, 26 June 2014.

[66]The countries which supported the 2014 resolution are: Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam. The countries which opposed the 2014 resolution are: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States of America. The countries which abstained from voting for the 2014 resolution are: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates.

staunch opposition from the superpower countries (such as the United States, and the United Kingdom), businesses, and political groups.

In the 2015 and 2016 sessions of IGWG, the content and core elements for laying down corporate binding obligations were discussed. The discussion led to the IGWG 2017 session, where a paper was proposed.[67] The paper encapsulated, one, that the corporates should comply with all the applicable laws and should foster respect for international human rights law; two, an attempt should be made to prevent negative human rights impacts; three, the impacts should be redressed; and forth, the corporates should implement internal policies to be in consonance with the international human rights law. Yet, there was staunch opposition to the same. Unsurprisingly, the fourth session of IGWG in 2018, which devised a draft treaty, failed to contain any such obligations. What is worrisome is the fact that the draft focuses negatively on the corporates' responsibility, and on the contrary, positively embraces the states' duty to safeguard human rights impact. Needless to say, neither the 2019 draft of IGWG nor the 2020 draft (sixth session) took a different approach. These had merely established that businesses should respect human rights.[68]

[67]Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, Elements for a Draft Legally Binding Instrument on transnational corporations and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/ RES/26/9, 29 September 2017.

[68]Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect human rights, Revised Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.

III. CHARTING THE REASONS FOR CORROBORATING THE *SILENT* CONVERGENCE AND ITS *EX-FACIE* CONSEQUENCES

Businesses consciously ignore human rights. This assertion is a result of the misconceptions related to the intersection of BHR and CSR. Some of these contingent misconceptions may include: (i) businesses have complex structures that make it challenging to comply with the 'one-size-does-not-fit-all' nature of BHR and CSR; (ii) the voluntariness issue; (iii)the corporate tendency to 'kick the can' by holding the state accountable for its actions; (iv) the difference in the content of CSR and BHR, or (v) the internal corporate regulatory mechanisms that determine the content of CSR activities in accordance with their own interests and needs.

We acknowledge that conceptually and contextually, CSR and BHR are different. However, this difference does not evidence that CSR should be considered outside the purview of BHR. We state, both doctrinally and materially, that convergence has been established. To substantiate this, we rely on the comprehensive definition provided by Christopher Avery (**Avery**), the Director of Business and Human Rights Resource Centre and a renowned international human rights lawyer, which lists the differences between CSR and BHR.[69]

A CSR approach tends to be top-down: a company decides what issues it wishes to address. Perhaps contributing to community education, healthcare or the arts or donating to disaster relief abroad or taking steps to encourage staff diversity or reduce pollution. These voluntary initiatives should be welcomed. But a human rights approach is different. It is not top-down, but bottom-up – with the individual at the

[69]Christopher Avery, 'The Difference between CSR and Human Rights' (*Corporate Citizenship Briefing*, 1 August 2006) <https://www.business-humanrights.org/en/pdf-the-difference-between-csr-and-human-rights> accessed 17 June 2022.

centre, not the corporation. When it comes to human rights, companies do not get to pick and choose from a smorgasbord those issues with which they feel comfortable.

Per the said statement, there are two significant differences between CSR and BHR. First, CSR is a *voluntary* activity that is tailored as per the needs of the company, while human rights is not a discretionary obligation and resultantly, the companies cannot enjoy such leverage. Second, Avery lists down a few activities which companies can undertake as their CSR initiatives. This brings us to the question to conceptualize the content of BHR. Thus, it becomes imperative to anatomize these issues in a two-fold manner, as below.

A. The myth of 'voluntariness'

As one believes, CSR is a voluntary practice. The voluntariness has, to an extent, made the CSR practice an inefficient one. Logically, it would be trite to say that if there are no legal implications for CSR activities, why will the corporates perform this voluntary social responsibility beyond mere compliance with the law. The answer to the above question is that considering CSR as a voluntary directive is deceptive. In fact, with the advent of time and strict legal compliance mechanisms, the focus is now on balancing profit maximization for the shareholders[70] giving consideration to ethical, communal, social, and legal concerns.

To determine the intersection between CSR and BHR, it is imperative to dissect the "voluntary" nature of CSR. This is evidenced, as below:

Per an overly conventional approach, CSR is the product of external drivers,[71] such as the civil society, non-governmental organizations, investment market, and the instances of adverse impacts by the

[70]Milton Friedman, 'A Friedman Doctrine - The Social Responsibility of Business is to Increase Profits' *The New York Times* (13 September 1970).
[71]Doreen McBarnet, 'Corporate Social Responsibility beyond law, through law, for law' (2009) *Edinburgh School of Law Working Paper Series*, *2009/03* 1-63.

corporates. Let us consider a survey conducted by McKinsey in 2006.[72] The survey found that there is merely eight percent of corporations who genuinely contribute to the social or environmental cause as part of their CSR activities. Scholars Porter and Kramer have described CSR as a "cosmetic" exercise.[73] In light of this, CSR practice is often referred to as a voluntary practice that requires corporates to go beyond the law.[74] The European Commission clarifies the true meaning of 'voluntary' and 'beyond the law' CSR practice.[75] It explicitly provides that the purpose of CSR is not only to comply with the legal obligations as mandated by the respective legislatures, but to also undertake a voluntary step required to attain social and environmental goals, and to consequently reduce the adverse effects of their daily activities. Many countries, such as India, China and Indonesia, have, in fact, undertaken a progressive step by mandating corporations to engage in CSR activities.[76] In a latent sense, CSR *for* the law means that the corporates, civil society, and NGOs regulate the law by "lobbying".[77] While indeed the compliance still remains voluntary to a large extent, there are legal obligations regulating the engagement(s). Accordingly, we are of the opinion that CSR is a directive that is not a 'purely voluntary' activity.

[72]Survey, 'Valuing Corporate Social Responsibility' (*McKinsey and Company*, 1 February, 2009) <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/valuing-corporate-social-responsibility-mckinsey-global-survey-results> accessed 15 July 2022.

[73]M.E. Porter, M.R. Kramer, 'Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility' (2006) 84 Harvard Business Review 78.

[74]Ibid.

[75]Commission of the European Communities, 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM(2001)336/1, 3 December 2001.

[76]Li-Wen Lin, 'Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China' (*Oxford Business Law Blog*, 27 May 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/mandatory-corporate-social-responsibility-legislative-innovation-and> accessed 15 July 2022.

[77]McBarnet (n 71).

Wettstein argues that the voluntariness of CSR can be seen as moral discretion.[78] However, it is imperative to know that this moral discretion, as Kant claims, is open for some judgement.[79] This scope allows the authors to assume that there are inherent legal obligations on the corporations to perform these activities. This assumption is based on the fact that governments across the world are implicating corporates for not adhering to the CSR requirements. For instance, in India, companies can face penal action for up to three years of jail and a penalty, in case of non-compliance with the CSR rules.[80] Further, legal regulatory action can also be found under private law, i.e., contract or tort law. McBarnet has claimed that tort law is utilised to 'extend the legal enforceability of CSR issues' and contract law is used for giving 'CSR standards the weight of legal obligations'.[81] On a deduction, CSR practices can be seen through the lens of law. In other words, compliance with the law is mandated by CSR practices. At the same time, this claim has limitations for the very fact that legal compliance and action is a discretionary concept that varies across states.

While deliberating on the nature of CSR vis-à-vis its compliance for, beyond, or through the law is beyond the scope of this article, a succinct deduction can be made on the above-laid claims: CSR is no more a purely *voluntary* concept. On another note, it is indispensable to find that human rights are also a matter of legal compliance.[82] They constitute an intrinsic facet of the CIL. Čertanec, a scholar, who had extensively deliberated on the present topic, also sets a peculiar instance for evidencing our claims. Čertanec depicts how the right to fair wage is a human rights obligation, and at the same time, possess an

[78]Wettstein (n 10) 748.
[79]Immanuel Kant, *Kant: The Metaphysics of Morals*, Trans. Mary J. Gregor (Cambridge University Press 1996).
[80]The Companies Act 2013 (18 of 2013) s 135.
[81]McBarnet (n 71) 31.
[82]Louise J. Obara, '"What Does This Mean?": How UK Companies Make Sense of Human Right' (2017) 2 Business and Human Rights Journals 249.

intersection with CSR.[83] For clarity, one can take the cue from the state's duty to set a base limit in the namesake of 'statutory minimum wage' which is mandatorily complied with by the corporates. Thus, CSR comes under the strict scrutiny of the law as do human rights.

Additionally, reliance can be placed on the fact that John Ruggie, the father of the BHR debate, also believes that CSR incorporates human rights obligations.[84] The reasoning evidenced by Ruggie for the lack of evident intersection is the predominant focus of the global corporations on social and environmental issues.[85] Wettstein also argues that 'no plausible conception of CSR can turn a blind eye on corporations' human rights obligations'.[86] As well as this, Ramasastry argues that CSR and Human Rights are like 'two close cousins'.[87] Hence, it is high time when the world should do away with the myth of voluntariness, and find that there is a '*wheel to a chariot*' like relationship between CSR and BHR.

To further substantiate, the EU depicts a peculiar example of having a well-established and true engagement with BHR, from a CSR perspective. The authors establish this engagement in a twofold manner: one, *vis-à-vis* the EU CSR Strategy 2011-2014 and its allied CSR initiatives, and two, through the implementation of UNGP's National Adaptation Plans (**NAPs**). At the outset, in 2012, the EU appreciated the UN Working Group on Human Rights and Transnational Corporations and released a statement that it 'looks forward to cooperating with the Group in the effective implementation

[83]Čertanec (n 12).
[84]John Ruggie, *Just Business: Multinational Corporations and Human* Rights (1st edn, 2013).
[85]Ibid.
[86]Wettstein (n 10).
[87]Ramasastry (n 11) 237.

of the Guiding Principles by all relevant stakeholders'.[88] As a result, human rights became an intrinsic facet of its CSR understanding.

The authors begin with the paradigm shift in the understanding of CSR by the EU. The EU in its CSR notes provided a significant definition for the era of globalization:[89]

> "Although there is no "one-size-fits-all" and for most small and medium-sized enterprises the CSR process remains informal, complying with legislation and collective agreements negotiated between social partners is the basic requirement for an enterprise to meet its social responsibility. Beyond that, enterprises should, in the Commission's view, have a process in place to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close cooperation with their stakeholders."

This evolution is a result of the EU CSR strategy 2011-2014 that was promulgated for implementing the UNGPs. Briefly, it aims to cover the financial and economic crisis. The strategy objectified the creation of 'conditions favourable to sustainable growth, responsible business behaviour and durable employment generation in the medium and long term'.[90] It truly strikes a balance between CSR and BHR policies. For instance, it provides that human rights are a part and parcel of their

[88]European Union Permanent Delegation to the United Nations Office and other international organisations in Geneva, 'Contribution of the European Union before the first session of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises' (*OCHR*, 6 January 2012) <https://www.ohchr.org/sites/default/files/Documents/Issues/TransCorporations/Submissions/UNAndIGOs/EuropeanUnion.pdf> accessed 17 June 2022.

[89]'Corporate Social Responsibility: a new definition, a new agenda for action' (*European Commission*, 25 October 2011). <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_730> accessed 13 June 2022.

[90]European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final 6.

broad CSR activities.[91] Such a comprehensive understanding, which eradicates the term "voluntary" accommodates the engagement and sets a benchmark for the other jurisdictions. Furthermore, in 2014, the EU, under its directive 2014/95/EU, mandated CSR for a particular section of the corporates, having more than 500 employees.[92] With this EU Strategy, it provides for a novel two-fold perspective:[93]

- **Doing away with the problem of sole voluntariness**: This is established by ensuring a mix of voluntary initiatives and regulations (binding rules) to ensure corporate accountability towards human rights impact.[94]
- **Eradicating the "one-size-does-not-fit-all" problem***:* With complementary regulation, the Commission also ensured that the corporates should have the flexibility and liberty to adapt an approach CSR policy that is more relevant to their interests. However, here, the approach should not be misinterpreted as the liberty to select a few CSR initiatives and blindly ignore the others.

It is imperative to note that although the strategy eradicates the voluntary concept, it does not make it legally binding. For this, there is a need for devising a mechanism that emphasises more on legal compliance rather than a consortium of 'smart mix'. Nevertheless, the move is a welcome derivative for establishing a convergence between CSR and BHR.

[91]Ibid.

[92]European Union, 'Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/24/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups' Official Journal of the European Union L 330/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095> accessed 5 August 2022.

[93]'The EU's CSR Policy' (*Federal Ministry of Labour and Social Affairs*) <https://www.csr-in-deutschland.de/EN/Policies/CSR-international/The-EUs-CSR-Policy/the-eus-csr-policy-article.html> accessed 5 August 2022.

[94]European Commission (n 90) 7.

Traversing through the NAPs for implementation of the UNGPs reveals that the EU member states have implemented NAPs.[95] An in-depth insight into the NAPs of each member state and their policy framework would defy the research question in this present article. This is for the reason that the EU is considered as an illustration here for the very reason of its updated and indispensable process of honouring BHR through a CSR perspective,[96] and not for the efficiency of the policy framework of every state distinctively. Thankfully, the UK example points to this indispensable process of silent convergence. The UK made a commitment in 2013 to implement its NAP. With the advent of time, the UK Joint Committee on Human Rights has executed an inquiry into the realm of BHR that *prima facie* focuses on the government steps to ensure compliance with UNGPs; to regulate and check how far the businesses are safeguarding or undertaking the responsibility to respect human rights, and to have an effective redressal mechanism.[97] Not only this, but the UK also ensures a review mechanism of the NAPs to keep them in a tie with the developments and violations.[98]

[95]'GPP National Action Plans' (*European Commission*) <https://ec.europa.eu/environment/gpp/action_plan_en.htm> accessed 14 March 2023.

[96]'Corporate social responsibility and Responsible business conduct' (*European Commission*) <https://single-market-economy.ec.europa.eu/industry/sustainability/corporate-social-responsibility-responsible-business-conduct_en> accessed 14 March 2023; European Commission (n 90).

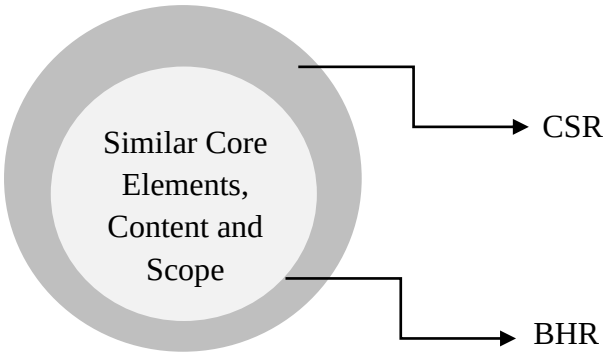
[97]'Human Rights and Business Inquiry' (*UK Parliament*, 5 April 2017) <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> accessed 13 July 2022.

[98]UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (*OHCHR*, December 2014) <http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf > accessed 13 July 2022. It is imperative to note that the UN published the revised versions of the Guidance in November 2015 and 2016 respectively.

Taking the cue from the UK, a member state of the EU, it is possible to ensure that the convergence is explicit and not silent (in other words, there is no "true" voluntariness) at a global level as well.

a) The 'cock and bull story' of the core elements

'CSR and BHR appear to present divergent paths of discourse'.[99] CSR, as one understands, refers to the regulation of corporate activities towards social, ethical, or environmental issues. On the contrary, BHR is a negative obligation for the corporates as the Ruggie's principle of 'doing no harm' also testifies. This view is, however, in our opinion, not entirely cogent. Precisely because whenever an attempt is made to converge the two, the results are, *inter alia*, that: CSR and BHR need to learn from each other;[100] there should be a treaty-making process *vis-à-vis* BHR which should essentially consider CSR as a staircase;[101] and there is a need for closing the governance gap between CSR and BHR to ensure corporate accountability.[102] While we acknowledge that CSR involves the society at large and accounts for not only human rights impacts, and while BHR is limited to the human rights impact by the corporations, we contend that BHR and CSR lie in a concentric circle with CSR having the bigger radius, as shown below:



Source: Authors' Own

[99]Ibid 249.
[100]Wettstein (n 10) 739.
[101]David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 Business and Human Rights Journal 203.
[102]Ramasastry (n 11) 250.

For an in-depth insight of the concentricity of the concepts, we refer to the two concepts through a core elements trajectory, which demonstrate that (largely) the elements of BHR are similar to that of CSR.[103] Through this, we juxtapose each corporate-related human rights violation with the content of CSR in a twofold manner with the example of: one, labour rights; and two, non-labour rights.

Labour rights: The following are the labour rights that remain the same for both the concepts: freedom of association,[104] right to equal pay for equal work,[105] right to collective bargaining,[106] equality at work,[107] non-discrimination,[108] fair and reasonable remuneration,[109] abolition of

[103]The content of the core elements is drafted by the authors after taking the cue from the Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' A/HRC/8/5 (07 April 2008). Here, we, on the basis of instances of corporate-related human rights violation, drew a chart to understand if the BHR elements constitutes the elements of CSR standards as well.

[104]CSR is a concept which is for the law, and works beyond mere compliance with the law. The CSR initiatives include core labour standards which particularly emphasise on trade union rights, such as freedom of association and collective bargaining. Thus, an engagement is evident, in this regard, between CSR and BHR. For discussion on trade union vis-à-vis CSR. See, for example, Jim Baker, 'Freedom of Association and CSR' (*OECD*, 19 June 2001) <http://www.oecd.org/daf/inv/mne/1898226.pdf> accessed 05 August 2022.

[105]Kase Grosser, 'Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues' (2005) 62 Journal of Business Ethics 327.

[106]Baker (n 104).

[107]Grosser (n 105).

[108]CSR initiatives ask for ensuring that there is no discrimination. For discussion, see Abreu, Jose Luis, et. al., 'Corporate Social Responsibility, Human Rights and Discrimination' (2014) 9(3) Daena: International Journal of Good Conscience 205; Marco Fasciglione, 'Corporate Social Responsibility and the Right to Employment of Persons with Disabilities' in Valentina Della Fina and Rachele Cera (eds), *Protecting the Rights of People with Autism in the Fields of Education and Employment* (2015) 171.

[109]Lance A. Compa, 'Corporate Social Responsibility and Worker's Rights' (2008) 30 Comparative Labor Law and Policy Journal 1; Andrea Werner and Ming Lim, 'The Ethics of the Living Wage: A Review and Research Agenda' (2016) 137 Journal of Business Ethics 433.

forced labour,[110] right to the safe work environment,[111] eradication of child labour,[112] right to rest,[113] and right to work,[114] among others. Thus, it can be safely deduced that, in regard to labour rights, the content of CSR and BHR is more or less exact.

Non-labour rights: The following are the non-labour rights which remain the same for both the concepts: the right to life, personal liberty, and security,[115] peaceful assembly,[116] adequate standard of living,[117]

[110]'Strengthening Employer's Activities against Forced Labour' (*International Labour Organisation*) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_097734.pdf> accessed 14 March 2023; Alex Marx, Jan Wouters, 'Combating Slavery, Forced Labour and Human Trafficking. Are Current International, European and National Instruments Working?' (2017) 8 Global Policy 495.

[111]European Agency for Safety and Health at Work, 'Corporate Social Responsibility and Safety and Health at Work' (2004) <https://www.lu.lv/materiali/biblioteka/es/pilnieteksti/veseliba/Corporate%20social%20responsibility%20and%20safety%20and%20health%20at%20work.pdf> accessed 06 August 2022.

[112]Erna Margret Thordardottir, *Combating Child Labour Through Corporate Social Responsibility: A Case Study of Côte d'Ivoire* (Master thesis, Lund University, 2011).

[113]ILO's Work in Progress, 'The right to rest for domestic workers – setting a floor' (*ILO*, April 2015) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_364744.pdf> accessed 14 March 2023.

[114]Lance A. Compa, 'Corporate Social Responsibility and Worker's Rights' (2008) 30 Comparative Labour Law and Policy Journal 1; Andrea Werner, Ming Lim, 'The Ethics of the Living Wage: A Review and Research Agenda' (2016) 137 Journal of Business Ethics 433.

[115]This is an indirect convergence between the two concepts. For instance, ensuring a safe environment, rendering proper wages, equality, labour rights, liability in case of loss of lives are intrinsic facets of CSR. Thus, there is a convergence with right to life and liberty. See, for example, Leela Kumar, 'The Impact of Corporate Social Responsibility on Sustainable Development' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426049> accessed 07 August 2022.

[116]Nicole Irina, 'Corporate Social Responsibility and Human Rights in the Context of European Union' (2008) Working Paper Series Number *16 CCGES/CCEAE* 3.

[117]CSR, while working in the philanthropy has indirectly improved the standard of living of individuals. See, Peter Utting, 'CSR and Equality' (2007) 28 Third World Quarterly 697.

right to social security,[118] freedom to profess religion and conscience,[119] and right to education,[120] among others. Thus, in regard to non-labour rights as well, the authors deduce that the content indirectly or directly is converging and exact. Consequently, the corporates have a duty towards preventing corporate-related human rights violations.

Considering the above demonstration, we submit that CSR and BHR are two interrelated concepts. The veracity can be further substantiated from the following instance: OECD opines that 'CSR is useful to the extent it opens up the possibility for workers to define and defend "their own interests"'.[121] Symptomatically, CSR involves a central issue, namely trade union rights which on a further bifurcation include freedom of association, right of collective bargaining, among others.[122] Furthermore, the cogency of the inclusion or intersection is also justified by the corporations of Australia.[123] The Australian Human Rights Commission considers CSR and BHR to be interrelated and the CSR policies of Australia contain the threshold of BHR standards. Kristin has also asserted that compounding or converging the two concepts will streamline corporations' notions in relation to human

[118]Aniruddha Bonerjee and Sumona Ghosh, 'Corporate Social Responsibility and Social Protection' (2014) 2 Development Advocate 52.

[119]'Promoting Freedom of Religion and Belief: A Corporate Social Responsibility' (Religious Freedom and Business Foundation) <https://religiousfreedomandbusiness.org/corporate-social-responsibility-and-freedom-of-religion-or-belief-forb-in-the-workplace> accessed 07 August 2022.

[120]Nargis Yeasmeen, 'Corporate Social Responsibility and Right to Education' (2014) 19 IOSR Journal of Humanities and Social Sciences 77.

[121]'Freedom of Association and CSR: Remarks of Jim Baker, ICFTU, to OECD Conference on Corporate Social Responsibility' (*OECD*, 19 June 2001) <https://www.oecd.org/corporate/mne/1898226.pdf> accessed 19 June 2022.

[122]Ibid.

[123]Australian Human Rights Commission, 'Corporate Social Responsibility & Human Rights' (*Australian Human Rights Commission*, 2008) <https://humanrights.gov.au/our-work/corporate-social-responsibility-human-rights> accessed 19 June 2022.

rights issues.[124] Consequently, this will 'eliminate wiggle room within a corporation's expectations of compliance'.[125] As such, the relation between the two can be described as that of '*wheels to a chariot*', where CSR acts as the *wheels* for achieving the larger objective of corporate accountability (and not merely a responsibility/respect) for human rights impact akin to the *chariot*.

IV. THE TWO CONCEPTS ARE NOT DISTINCT ANYMORE: DEVISING A TWO-FOLD FRAMEWORK AND NOT A BHR TREATY

Before considering the possibilities of devising a two-fold framework instead of a legally binding treaty, the authors suggest a straitjacket definition of CSR which depicts the convergence with BHR. It is unnoticed that the convergence of CSR and BHR has garnered significant criticism. Ramasastry and Wettstein, renowned scholars, for example, have remarked that '[c]an advocates ask for more?'[126] in terms of compliance with CSR and BHR initiatives, and the need for 'improving self and coregulation process' respectively.[127] The authors opine that there is a need for the incorporation of several dimensions in the definition of CSR, given that we have demonstrated how the two terms are not different. For such a task, the authors list the core

[124]Kristin, 'The Difference Between Corporate Social Responsibility and Business and Human Rights' (*College of Law*, 19 October 2012) <https://www.law.wvu.edu/the-business-of-human-rights/2012/10/19/the-difference-between-corporate-social-responsibility-and-business-and-human-rights> accessed 19 June 2022.
[125]Ibid.
[126]Wettstein (n 10).
[127]Ramasastry (n 11) 252.

elements of CSR: environmental, social, voluntariness, economic, and stakeholder dimensions,[128] and suggest the following:

> *Corporate Social Responsibility is a sensitising concept, which considers the virtues of a business entity, be it moral minimalism or legal obligation. With an unfettered approach, CSR can be precisely considered as not a "purely" voluntary concept. Like wheels to a chariot, there should be a commitment by the shareholders and the society to foster respect for social, economic, and environmental issues. Today, CSR leaves the "traditional comfort zone of voluntariness" and converges with Business and Human Rights, a pluralistic concept. Not only this, but the duty of 'doing no harm' should also endeavour for a trajectory that fosters sustainability, regulate human rights impact, threatens concerns, respect the two pillars – employees and the community, and symptomatically, calls for the evolution of society.*

Considering the virtues of CSR and BHR in the above definition, the authors opine that while BHR is a broad concept, CSR is a broader concept. CSR is precisely a practice that works with the idea of the law and streamlines the evolution of the society when converging with human rights obligations.

In the existing literature, an attempt has been made to devise a BHR treaty and a framework. However, there is a lack of formula to encapsulate both CSR and BHR conversely into the framework. Therefore, the authors seek to devise a two-fold framework that accommodates the facets of both CSR and BHR, instead of a universal treaty. At this particular juncture, the authors cite the reasons for our contrary contentions *vis-à-vis* the universal "BHR" treaty, and accordingly, we use an illustrative trajectory to devise the two-pronged

[128]Richard E. Smith, 'Defining Corporate Social Responsibility: A Systems Approach for Socially Responsible Capitalism' (2011) Master of Philosophy Theses 9.

approach. The following claims make a case against a "sole" BHR universal legally binding treaty:

The problem of ratification: Across most jurisdictions, the constitutional system and the corresponding jurisprudences hold primacy. Due to this very fact, the jurisdictions are obligated to ratify the treaty.[129] A possibility thus lies that the treaty may remain an abstract proposition. A similar instance of the same is evident in the acceptance of the human rights resolution proposed by the IGWG 2014, where out of 47 members, only 20 supported the same.[130] Whilst this is not an instance of the treaty, a cue can be taken to see the diversity in acceptance.

"One-Size-Does-Not-Fit-All" Issue: On a bare perusal of the denial to accept the treaties, resolutions, and Ruggie's elucidation on the existence of gamut and diverse multinational corporations, it is evident that there exists the issue of "one-size-fits-all".[131] Therefore, a universal treaty that is similarly binding on all corporations is an abstract proposition.

The problem of "Responsibility to Respect" (No direct application to the corporates & no strict liability): Thankfully, the BHR treaty recognises that the human rights violations should be prevented. But unfortunately, the duty is vested solely on the states, and this provides corporates with a leeway to take a careful and easy backstep under the guise of interpretation of the threshold of responsibility. This issue is not catered to by the treaty. The authors shall demonstrate while devising a two-fold framework that this problem can be remedied whilst keeping the responsibility intact.

[129]The Constitution of United States, 1789 art 2 s 2(2); The Constitution of India, 1950 arts 73 and 253.
[130]IGWG 2017 (n 63).
[131]Professor John Ruggie, 'The corporate responsibility to respect human rights' (2010) World Petroleum Council: Official Publication 31.

Regulating the remedy in case of violations at a universal stage: The universal treaty confers a duty on the state to rectify and remedy the violations by corporates.[132] But the issue which arises is the problem of subjectivity. Say, the state might use the realm of tortious liability to remedy the impact. This does not provide for, *inter alia*, how the states should address these issues, what should be the compensation, and what could be the possible legal implications. Eradicating the issue of subjectivity at such a universal level is largely untenable.

Implementational challenges: Whilst the legally binding treaty provides for the state's duty to ensure implementation of the convention efficaciously,[133] it lacks the accountability of the business sector. This is for the reason that it does not shift its focus to businesses, and confers a duty upon the state to regulate the same. Moreover, the binding treaty asks for the submission of annual reports.[134] However, any consideration of a lack of smooth ground of execution is virtually absent.

The listing of the core elements in the treaty: It is imperative to note that the legally binding treaty (if promulgated as proposed and advocated in the existing literature) largely remains an empty structure for safeguarding human rights. For instance, the treaty does not cater to the issue of a human rights violation by tech companies while exchanging private data.[135] Thus, there is a need to list down the business-related human rights impact, to the least and provide for the

[132]Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, Human Rights Council, 16 July 2018.
[133]Ibid.
[134]Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 2018, s III art 14.
[135]Sebastian Smart, 'The Case For and Against a Binding Treaty on Business and Human Rights' (*Global Partners Digital*, 2 April 2019) <https://www.gp-digital.org/should-civil-society-working-on-digital-issues-support-a-binding-treaty-on-bhr/> accessed 05 August 2022.

corresponding remedy, legal mechanism available, and compensation for the violation by corporations.

The lack of interrelation with the facets of "CSR" and the misconceptions still exists: This issue is derived from a logical and observational perception. The authors believe that the focus lies solely on devising a BHR treaty, which does not cater to the CSR issues explicitly. Neither the convergence in its present form nor the belief that BHR and CSR have been converged already but there exists grey area (as discussed above) are catered to.

On closer inspection, therefore, the authors argue that a treaty is not the most viable option. This is for two explicit reasons: *one*, it fails to recognise the convergence and the "wheels and chariot like" relation that exists between CSR and BHR; and *two*, the implementation and procedural problems existing with the proposal of a universal BHR treaty. Thus, the authors suggest that the below laid down two-fold mechanism is a more viable and tenable course of action. This mechanism, in the authors' opinion, would be efficacious in adjudicating the matter of the debate between CSR and BHR.

Thus, the two-fold mechanism that the authors suggest is: *one*, conceiving an international framework which lists down the trajectory that needs to be followed using Schutter's ideology as an illustration; and *two*, using the framework as the threshold, fabricating a domestic framework (legislation) which gratifies the concerns of CSR and BHR, and the direct application of reconciling accountability of the corporates. The same can be done using the EU engagement as an illustration. We attempted to undertake both the aspects of "duty" (primary contention) and "responsibility to respect" or "shall prevent violations" (alternative derivation of the contention) while devising the framework.

A. Step 1: A Straitjacket Framework Calling for Implementation Under the Virtue of "International Customary Law" Using Schutter's Ideology as an Illustration

The first prong of the approach is a straitjacket framework which should be necessarily complied with by all states and corporations under the virtue of CIL. In the words of Schutter,[136]

> A framework convention is one which defines general obligations of the result, while leaving a broad margin of appreciation to states regarding the means of implementation as well as the speed at which to adopt the measures required.

More concisely, a framework convention delineates the legally binding broad requirements by the supreme authority (herein, the UN, for instance). Subsequently, the states, as per their understanding and needs, decide on the content of the measures. For this instrument, Schutter provides for a three-fold argumentation in favour of such convention:[137] *One,* this is very well in tie with the states' duty to safeguard human rights and prevent corporates from violating them. *Two,* the framework is akin to the policy coherence and aims to create mutual synergies. And *three,* it accelerates 'collective learning and the gradual convergence on certain practices that, at the level of implementation, have proven their effectiveness'.

The authors, to an extent, concede to the argumentation elucidated by Schutter. However, today, a more cogent and succinct version of the framework convention is required. On closer inspection, the authors have devised the following suggestions, which makes it very well in a tie with the idea behind CSR v. BHR debate. *Stricto sensu*, the

[136]Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights 32, 33.
[137]Ibid.

framework convention needs to undergo a conceptual, procedural, and implementation transmutation. Dealing with the required reformations:

Firstly, on a bare perusal of the ideology, it is evident that the framework lacks an indirect application to the corporation, let alone the direct application. Instead, it seems like a reiteration of the state's duty to regulate corporate-related human rights violation. Thus, the framework should focus on the duty of the corporate. The authors argue that through states, there should a set of certain duties in relation to the BHR, which makes corporates liable directly for the violations if any.

Secondly, an issue that the convention may remain an abstract proposition still exists. However, human rights form part of the CIL irrespective of the ratification of the several instruments related to this saga.[138] BHR also forms an intrinsic facet of the international customary law.[139] Thus, irrespective of the ratification of the customary law, it is considered as an intrinsic constituent of the domestic legal regime, unless contradictory the domestic laws, and is given effect by the judiciary.[140] This would allow the Convention/framework to be given due effect.

Thirdly, a framework convention lists only the broad requirements.[141] The authors, on the contrary, believe that instead of broad elements, there must be a straitjacket format and guidelines including the core elements, which, symptomatically, provides for a smooth ground of execution.

[138]D'Amato, Anthony, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (2010) Faculty Working Papers 88.
[139]See, for detail, Part 2(B) of this paper.
[140]Prabhash Ranjan, 'How India has approached customary international law' *The Indian Express* (11 January 2022) <https://indianexpress.com/article/opinion/columns/how-india-has-approached-customary-international-law-7716742/> accessed 04 February 2023.
[141]Schutter (n 136).

Fourthly, Schutter has identified that there will be budgetary constraints due to the economic and social condition of a state.[142] But the purpose of juxtaposing the issue vis-à-vis a framework convention is to avoid the problem of "one-size-does-not-fit-all", and confer the states the liberty to reconcile corporate accountability as per one's need.

Fifthly, this convention explicitly lacks the convergence of BHR and CSR. For this, a need is evident to formulate the content in a manner which considers the facets of both the concepts. For instance, whilst regulating BHR impact, there must be a duty to prepare annual reports, contributions, and remedy therein.

Lastly, there is a lack of smooth ground for implementation of the framework. For this, the authors suggest that once the framework is ready, in adherence to the same, the states should follow their national framework according to their conditions and history of human rights violation. Following this, the national framework must be sent to the adjudicating i.e., the supreme authority, where it must be assessed in a multi-tiered manner considering the conditions of that particular state. The above process must be circumscribed under the guise of "reasonable time" as decided by the supreme authority,[143] which is indeed subjective and would warrant further scrutinization. Resultantly, it must be either accepted or sent back for amendments. Additionally, the remedy by the state and by the supreme authority should be encapsulated succinctly there itself.

[142]Ibid.

[143]Mallika Tamvada, 'Corporate social responsibility and accountability: a new theoretical foundation for regulating CSR' (2020) 5(2) International Journal of Corporate Social Responsibility 1.

Generally speaking, this would synergise the trajectory towards both the BHR regulation and the convergence of CSR and BHR, the very idea of this paper.

B. Step 2: Formation of the Domestic Framework

From a domestic framework perspective, at this juncture, the authors propose a two-fold national system: *one*, to strengthen the state's duty for ensuring that corporate "shall *safeguard*" human rights and not only "*prevent*" human rights violations; and *two*, a legislative trajectory that fortifies both CSR and BHR policies, and paves the way for a succinct convergence between the two.

The state has a duty to protect human rights, and it constitutes an intrinsic part of international human rights law regime.[144] Impliedly, the state needs to ensure that the non-state actors do not commit such violations. For instance, Principle 1 of the UN Guiding Principle provides that the state can take any measure to ensure that non-state actors do not violate human rights.[145] Principle 3 entails comprehensive regulatory and policy functions for the state to ensure compliance.[146]

Here, private actors have "negative" obligations towards human rights. To transform this, a strengthening of the state's duty with the inclusion of strict compliance mechanisms would aid in the protection. Undoubtedly, it is undeniable that states and corporates are two different entities.[147] Due to this, it is difficult to ensure a check on the private actors. However, a strong mechanism under the virtue of framework and guiding principle can eradicate the misconceptions.

[144]Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2014) 427–526.
[145]Guiding Principles (n 57).
[146]Ibid.
[147]Bilchitz (n 52) 208.

Some of the instances which the state can strengthen are as follows: the imposition of mandatory human rights due diligence and impact assessments mechanisms. And for encapsulating the adherence, there should be transparency through external audits and verifications, independent monitoring, and review cycle.[148] This caters the main requirement of transforming "responsibility to respect" to "duty to safeguard", and alternatively, realising the responsibility through a checks and balances system, which in case of non-adherence, may be subjected to legal implications. BHR is just a small part of CSR; all CSR activities have human rights initiatives and the commitments are too vague and do not propose specific instructions for business entities as how to meet human rights obligations.[149]

These legal implications and regulations, now form the second part of this domestic framework considering the threshold of the universal framework. These are: devising legislation in a manner which encapsulates both CSR and BHR, caters to their convergence, and national action plans. India and the EU, both sets peculiar thresholds for this contention.

India provides for a gamut of national legislations for regulating human rights violations. With much more strong compliance and implication policy, the national legislations may prove to be of much relevance in regulating BHR facets. This will, resultantly, also converge the CSR facets, through a CSR policy like India provided under the Companies Act 2013 and Voluntary Guidelines, among others. Also, since the conception that CSR is a purely voluntary practice is a misconception, the same must be inherently amended in the legislation and CSR policies. Not only this, but India has also commenced the development of a National Action Plan. The intent, i.e. 'the vision of India's NAP stems from the Gandhian principle of trusteeship that defines that the purpose of business is to serve all stakeholders', if followed coherently,

[148]Harrison (n 50).
[149]Wettstein (n 11).

would allow for the safeguarding.[150] However, the authors opine that there must be an explicit intersection with CSR as well, which the plan currently lacks.

Further, taking the cue from the EU CSR strategy and other measures, which provides for depreciation in the problem of voluntariness, there must be the extension of it as a threshold for the domestic frameworks. The adoption of Step 1 and Step 2 would allow for the convergence and pave the way for preventing corporate-related human rights violations.

V. CONCLUSION

It can be seen in this article that business and human rights, as a concept, has largely remained a product of misconceptions, and there is an urgent need to inspire humans to act as 'stewards of the living earth'. The authors have found that the relationship between CSR and BHR is like that of "wheels to a chariot". As such, they are not entirely distinct terms in terms of their behaviour and content, and there exists no mandate to converge them explicitly. This is primarily for two reasons: *one*, the misconception of considering CSR as a "purely" voluntary concept and BHR as an obligation; and *two*, that the elements of CSR and BHR differ substantially. However, the same, as demonstrated, does not hold true. The BHR issues are similar to CSR issues in legal nature and content. Thus, there exists a need to change the conception that in the case of CSR, business entities should comply with the regulations which are not binding, while in BHR, obligations have to be strictly complied with.

Since this is a misconception, the authors found a need (a gap, to say the least) to devise a straitjacket definition of CSR (given that it

[150]Namit Agarwal, 'India's Business and Human Rights National Action Plan' (*Institute for Human Rights and Business*, 14 April 2020) <https://www.ihrb.org/other/governments-role/commentary-indias-national-action-plan> accessed 28 July 2020.

remains a broader concept per our analysis) that includes BHR and accordingly lay down a framework that ensures that the impact of human rights violation is reduced significantly or at least, the concerned corporations are held accountable. This is done by taking two steps in terms of devising a universal framework convention under the virtue of international customary law and juxtaposing the same with a domestic framework which is an assortment of national legislations and national action plans. The authors further, separately, vehemently suggest that there should be an explicit recognition of the CSR policies through a BHR perspective, and vice-versa. This is an essential requirement today, because rendering an amount of the net income of the corporate every year is no implication, as an example, and contrarily, it paves for an umbrella and blind protection to the corporations under the garb of lack of accountability. Thus, a need to engage an intersection becomes imperative.

All in all, there is a need to not only strengthen the states' duty to ensure that non-state actors do not violate human rights, but a need also exists to directly implicate the non-state actors and reconcile their accountability, and not provide any umbrella protection to them by virtue of their negative obligation(s). Undertaking such a change only at an international level is not the most viable option, and hence, there must be a juxtaposition of the cycle at both the national and international levels. With this, the authors opine that if the silent spring, at this very juncture, is not converted to a loquacious spring, then the water will break open the tank. Symptomatically, the world will become a pool of corporate-related human rights violations. To prevent this, it is important to take a stab at understanding the concept of BHR through a CSR perception, taking them together.