THE LIMITS OF BUSINESS AND HUMAN RIGHTS SCHOLARSHIP: A TWAIL PERSPECTIVE AND MOVING TOWARDS AN IDEOLOGICAL STRUGGLE

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ABSTRACT

In 2014, the UN Human Rights Council (UNHRC) set up a working group which was tasked with drafting and negotiating a binding international legal instrument to regulate the activities of transnational corporations. This was a breakthrough moment for scholars and advocates of Business and Human Rights (BHR), as it would mean corporations across the globe could be held liable for human rights violations. This breakthrough is a result of decades of scholarship and activism, which is why it is important to fully understand how we have arrived at this point in the history of human rights. In furtherance of this, it is also critical to point out the direction in which BHR scholarship must evolve in the future.

This thesis aims to trace and review the development of BHR scholarship and then offer a critical analysis from the perspective of the Third World Approaches to International Law (TWAIL). In doing so, this thesis will breakdown the historical evolution of the BHR scholarship and explain how the mainstream accounts fail to acknowledge the colonial link to the BHR issues. In the end, this thesis will explain that the BHR scholarship has defined the contours of the discipline in a way that it seeks to solve legal problems. In this context, this thesis will use the TWAIL perspective to illustrate how BHR also extends to an ideological struggle.

LIST OF ABBREVIATIONS

BHRRC – Business and Human Rights Resource Centre

BHR - Business and Human Rights

CSDDD – Corporate Sustainability Due Diligence Directive

CSR – Corporate Social Responsibility

EC – European Commission

EIC – East India Company

EU – European Union

FLA – Fair Labour Association

HRB – Human Rights and Business

IACtHR – Inter-American Court of Human Rights

ICC - International Criminal Court

ICJ – International Court of Justice

ICL – International Criminal Law

IHRL – International Human Rights Law

ILO – International Labour Organisation

IMF – International Monetary Fund

LOC – Logic of Capital

LON – League of Nations

MIL – Modern International Law

MNCs – Multi-National Corporations

OECD – Organisation for Economic Cooperation and Development

OEIGWG - Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights

SAI – Social Accountability International

SRSG - Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises for Business and Human Rights

TWAIL – Third World Approaches to International Law

UCC – Union Carbide Corporation

UCI – Union Carbide India

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

UNGPs – United Nations Guiding Principles on Business and Human Rights

UNHRC – United Nations Human Rights Council

VOC – Dutch East India Company

WTO – World Trade Organisation

WWI – First World War

WWII – Second World War

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INTRODUCTION

In 2023, an investigation by the New York Times revealed that migrant children were employed to work in several factories across the USA.[1] Many of these children, employed to stitch tags, bake bread, debone chicken, process milk and do other manual labour, came to the USA without any parents.[2] Any layman would be curious about how and why the richest country in the world needs migrant children, to do these jobs. This case becomes even more baffling when we find that these children worked in factories that supplied bread and dinner rolls for Walmart, the richest corporation in the world, based on income. In fact, as of 2018, Walmart was named the tenth richest entity in the world, making it richer than major countries like Russia, India, Mexico, Australia, South Korea and many others. Again, any common man would be bewildered when told that migrant children who came to the USA without their parents, were making dinner rolls for the tenth richest entity in the world. Unfortunately, most multi-national corporations (MNCs) across the globe, irrespective of their wealth and income, commit human rights violations. In fact, most violations can be traced to MNCs in developed countries.[3] Apple continues to source cobalt from vendors who use children for mining, in the Democratic Republic of Congo.[4] Toyota and Volkswagen – two of the richest corporations in the world – have been sourcing material from the Uyghur region of China, where issues like forced labour have been persistent.[5] It is prudent to ask a simple question, "How do we fix this global order,

[1] USA: Investigation reveals migrant children working in factories across the US in violation of child labour laws; incl. co. comments' (25 February 2025, Business & Human Rights Resource Centre) <https://www.business-humanrights.org/en/latest-news/usa-investigation-reveals-migrant-children-working-in-factories-across-the-us-in-violation-of-child-labour-laws-incl-co-comments/> Accessed: 13 June 2025

[2] Ibid.

[3] Subhan Ullah, Kweku Adams, Dawda Adams and Rexford Attah-Boakye, 'Multinational corporations and human rights violations in emerging economies: does commitment to social and environmental responsibility matter?' (2021) 280 Journal of Environmental Management 1, 5-6

[4] 'Protesters worldwide claim that Apple is complicit in human rights violations in the DRC and Gaza; co. did not respond' (20 October 2024, Business & Human Rights Resource Centre) <https://www.business-humanrights.org/en/latest-news/protesters-apple-complicit-human-rights-violations-drc-and-gaza/> Accessed: 13 June 2025

[5] 'Report traces links between major car brands' supply chains & companies linked to alleged abuses in Uyghur region' (8 February 2023, Business & Human Rights Resource Centre) Accessed: 13 June 2025

where rich corporations, regularly commit human rights abuses?" This question has become more pressing with each passing year, especially when we note that – as of 2018 - 69 of the richest entities in the world were corporations and not governments. Furthermore, 157 out of the top 200 richest entities, by income, were also corporations and not countries.

The answer to our question is being addressed by scholars of the unique discipline of 'Business and Human Rights' (BHR). The purpose of this thesis is to trace and review the historical evolution of the BHR scholarship and analyse the key developments over the years. The thesis will turn to the Third World Approaches to International Law (TWAIL) and use that perspective to understand some frailties in the BHR scholarship. In doing so, this thesis will point out how the current mainstream narration of the history of BHR fails to acknowledge the colonial roots of Modern International Law in general, and BHR in particular. The primary argument offered here is that, often ideas, norms, rules, and principles of Modern International Law (MIL) were developed to further specific interests of the colonial empires. The MIL scholarship fails to acknowledge this dark history of the discipline, thereby presenting itself as neutral, but that is not the case. Similarly, mainstream narratives in BHR do not acknowledge the historical relation of BHR with colonialism. This thesis follows a simple structure and is divided into five chapters. Chapter 1, 2 and 3 are dedicated to mapping the historical evolution of the BHR scholarship, which is divided into four eras, as described below:

(i) First Generation (1900 till 1970s)

(ii) Second Generation (1970s – 1998)

(iii) Third Generation (1998 – 2014)

(iv) Fourth Generation (2014 – *present)*

Chapter One introduces the emergence of the BHR scholarship as recorded by some mainstream scholars. This chapter covers the first and second generation BHR scholarship and

focuses on various material developments that moulded the BHR scholarship. This chapter will explain how various instances of corporate abuse of human rights led to an increase in activism, advocacy and academic discussions. The global discourse on corporate responsibility vis-à-vis human rights led to a variety of different responses from all relevant stakeholders, including states, MNCs, civil society, and international institutions. Towards the end, this chapter will briefly discuss the main development that dominated the third and fourth generation scholarship, i.e., the emergence of key legal questions that defined the contours of BHR scholarship in the 21st century. The most important question that scholars have been trying to answer since the turn of the century, is with respect to the nature of an international legal instrument to govern BHR issues.

Chapter Two will focus on the BHR scholarship that emerged in the Third Generation. This chapter looks at the ideas and work of John Ruggie, the architect of the famous UN Guiding Principles on Business and Human Rights (UNGPs). This soft law instrument, adopted by the UN, created voluntary obligations for corporations with respect to their human rights responsibilities. In creating the UNGPs, Ruggie argued for a pragmatic approach where corporations did not have any direct legal obligations under International Human Rights Law (IHRL). In essence, he argued that the current framework of International Law did not permit the creation of direct legal obligations for corporations, and there was no political support for the same. This stance taken by Ruggie will be analysed towards the end of the chapter.

Chapter Three will analyse the fourth-generation scholarship, which focused on critiquing the UNGPs and arguing in favour of a binding BHR treaty. This chapter will shed light on how the consultation phase undertaken by Ruggie to develop the UNGPs, was influenced more by business community had more influence as compared to stakeholders that pushed the human rights interests. Finally, this chapter will look at the ongoing treaty process and various

arguments made in favour of the binding nature of the treaty, which would create direct legal obligations for corporations, and depart from the voluntary framework of the UNGPs.

Chapter Four explains the basic TWAIL argument about the colonial roots of MIL. This chapter will explain how the MIL was developed to further specific colonial interests and emphasise will be placed on how this narrative is ignored from the mainstream accounts by western scholars. This logic will be traced from the 16th century till the beginning of the post-war era, and emphasis will be placed on how MIL developed various languages to promote colonial interests. For instance, the mandate system will explain how the language of development was used as a guise for sustaining the colonial interests of the European powers. Similarly, this chapter will also explain how the project of globalisation was presented as utilitarian but hid ulterior motives of the west to expand the reach of capital.

Chapter Five will conclude this thesis by analysing the pitfalls of the BHR scholarship from the TWAIL perspective. This chapter presents the key arguments of the thesis, i.e., the BHR scholarship must acknowledge the colonial history of the discipline, and by doing so address its issues not merely as legal problems but also as an ideological struggle. First, this chapter will shed light on the sense of continuity in the way human rights have been abused since colonial times, and that trend continues in different forms even today, especially in countries that are former colonies. Second, this chapter will assess the conversation about human rights as a counter hegemonic paradigm, an idea which makes human rights the priority over business interests. Following this logic, Aragao and Roland refer to their discipline as 'Human Rights and Business' (HRB)[6], which is also how this thesis will address its discussions from hereon.

[6] Daniel M. Aragao and Manoela C. Roland, 'The Need for a Treaty: Expectations on Counter-Hegemony and the Role of Civil Society' in Surya Deva and David Bilchitz (eds.), 'Building a Treaty on Business and Human Rights: Context and Contours' (Cambridge University Press, 2017) 152-153

I. A BRIEF HISTORY OF BUSINESS AND HUMAN RIGHTS

On 3rd December 1984, there was a gas leak at a factory in Bhopal, India which led to the death of 7000 people within days, and around 15,000 people some years later. Additionally, more than 100,000 people have suffered chronic illnesses because of the tragedy across generations.[7] The scale of suffering remains immeasurable, but the greater catastrophe was the legal mess created in the aftermath, which failed to redeem the victims in any way. The factory in question was of Union Carbide India (UCI), which was an operationally controlled subsidiary of Union Carbide Corporation (UCC), a chemical company headquartered in the USA. UCI had virtually no assets of value in India, which could be liquidated to pay damages to the victims.[8] Moreover, the victims could not take their claim to the USA as the courts there, relinquished jurisdiction on the ground of *forum non conveniens*.[9] In India, UCC claimed that UCI was a separate legal entity, so the assets of the former could not be used to pay for damages. Eventually, the Indian government agreed on a settlement of 470 Million US Dollars, a measly amount compared to the original demand of 3 Billion US Dollars. The settlement amount was not enough to even cover the basic medical costs of each victim. [10] This entire ordeal showcased the inadequacy of both domestic laws and international law to deal with such unique situations, where MNCs needed to be held accountable for gruesome violations. This tragedy is also testament to the unwillingness of MNCs to prevent violations on their own account. One reason for this unwillingness is the position taken by business leaders and scholars, in the early years of the 20th century, in that the only purpose of businesses is to maximise profits for

[7] India: Clouds of Injustice – Bhopal Disaster 20 Years On (Amnesty International, 7 March 2024) p. 1 <https://www.amnesty.org/en/documents/asa20/015/2004/en/> Accessed: 12 December 2024

[8] Robert McCorquodale, 'Business and Human Rights: Elements of International Law' (Oxford University Press, 2024) 1

[9] "The US District Court dismissed the claim in May 1986 on the ground of forum non conveniens (i.e. that a US court was not the appropriate forum to consider the case as the damage occurred in India and the victims were in India)"
Robert McCorquodale, 'Business and Human Rights: Elements of International Law' (Oxford University Press, 2024) 2

[10] Ibid. 2-3

shareholders. This sentiment was echoed by the likes of Berle and Friedman, who argued that corporations had no social responsibilities, except maximising profits for shareholders. Surya Deva calls this time period the 'business *or* human rights' era.[11]

(i) Second Generation of HRB Scholarship – Activism, Advocacy and Reactions

The second of the four eras, that Deva refers to comes about in the 1970s. Around this time the Berle[12] and Friedman[13] stance was critiqued, and the realm of HRB began to emerge as a distinct field of scholarship and advocacy. This was reflected in a series of international efforts to regulate corporations. In 1973, the UN Economic and Social Council appointed a Group of Eminent Persons to study the impact of transnational corporations on economic development and international relations.[14] In 1976, the Organisation for Economic Co-operation and Development (OECD) released the Guidelines for Multinational Enterprises, a soft law instrument which addressed corporations that operated from or in the OECD countries. The OECD guidelines called for corporations to conduct business responsibly and in line with both domestic laws and international standards.[15] Even the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) in 1977, which provided guidance to MNCs on *"(...) social policy and inclusive, responsible and sustainable workplace practices"*.[16]

[11] Surya Deva, 'From 'Business or Human Rights' to 'Business and Human Rights': What Next?' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 2

[12] Adolph A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049

[13] Milton Friedman, 'Capitalism and Freedom' (Chicago University Press, 1962)

[14] Ibid. 3

[15] Erika George, 'Global Policy Initiatives to Regulate Business Responsibility and Human Rights' (Oxford University Press, 2021) 69; *see also* OECD Guidelines for Multinational Enterprises, 3 (2011), http://www.oecd.org/daf/inv/mne/ 48004323.pdf.

[16] Staff - International Labour Organisation, 'What is the ILO MNE Declaration?' (2 April 2024, ILO) <https://www.ilo.org/resource/other/what-ilo-mne-declaration> Accessed: 19 April 2024; s*ee also* International Labour Organisation, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)

These developments did not materialise in isolation but were inspired by the material events across the globe. This is how Deva points to the key feature of this era, in that, new standards and rules were being developed by relevant stakeholders including states, international organisations, corporations, industry associations, and civil society organisations. These developments by relevant actors were spurred by material events, the public reaction to them and the public discourse that followed in the form of advocacy, activism and academic scholarship.[17] One of the best examples of this shift in behaviour, rules and standards of the aforementioned actors, is the expansion of the idea of Corporate Social Responsibility (CSR), in response to public outrage and legal issues that arose against companies that committed human rights violations. Ruggie explains that several key cases ignited public outcry and extracted a response from MNCs in the form of policy changes, some of which are explained below.

During the 1970s, Ken Saro-Wiwa – a social rights activist, and writer - spearheaded protests against the oppression of the Ogoni people, and the destruction of people's livelihood as well as the environment, caused by western oil companies, in the Niger delta of Nigeria. [18] These protests gained international coverage, and things came to a boil in 1995 when Saro-Wiwa was unlawfully executed on false charges of murder. This incident sparked widespread outrage in the international community. Moreover, suggestions were made at the time, that the execution was pushed for by Shell and years later evidence supporting the same surfaced, with witnesses testifying to instances of bribery by Shell to aid the execution.[19] Similarly, around this time in

[17] Florian Wettstein, 'The History of 'Business and Human Rights' and its relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 24-25
[18] Ibid.
[19] Andy Rowell, 'Ogoni 9: 24 years after their execution, court told by key witness: "Yes Shell bribed me." - Oil Change International' (11 October 2019, Oil Change International) <https://oilchange.org/blogs/ogoni-9-24-years-after-their-execution-court-told-by-key-witness-yes-shell-bribed-me/> Accessed: 30 May 2025

the 70s and 80s, the engagement of many MNCs with the apartheid regime in South Africa, ignited conversations about the role of corporations in human rights violations.[20]

Ruggie points to the landmark Nike case that made waves around the globe, especially when Times Magazine published the iconic picture of a twelve-year old Pakistani boy stitching Nike footballs. During the 1970s, Nike became one of the first major brands to outsource production to countries like Indonesia, China, South Korea etc. The low wages and abusive working conditions of factory workers came to light, which sparked protests across the globe, and the matter came to a boil in the 1990s with the 'International Nike Day' protests, which saw protests in twenty-eight U.S. states and twelve countries.[21] Like many companies in similar situations, Nike responded by saying that these are not their factories, hence not their concern. But the widespread criticism across various forums compelled Nike to acknowledge their responsibility in the matter. Nike responded by expanding the scope of its social responsibility. They developed internal codes, standards and verification schemes applicable on offshore vendors, to monitor any labour concerns.[22] Several apparel brands like Nike came together to pioneer multi-stakeholder initiatives to regulate labour standards. Examples of such initiative include the establishing of the Fair Labour Association (FLA), and the development of an accreditation system for vendors, by Social Accountability International (SAI). In wake of similar such developments, the social audit industry began to emerge.[23]

Another crucial moment was the Yahoo case from China when Shi Tao, a journalist based out of Beijing used his Yahoo email account to send an article about democracy and the Tiananmen Square massacre to a New York based website. The key point was that the Chinese authorities,

[20] Florian Wettstein, 'The History of 'Business and Human Rights' and its relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 25
[21] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 38-39
[22] Ibid. 88
[23] Ibid. 88-89

who wanted to prosecute Tao, could not do so because they needed access to Tao's account. But Yahoo provided the requisite information to the authorities which led to the conviction and imprisonment of Tao.[24] Yet again, as Ruggie points out, this incident caused international outrage. In the backdrop of the increasing number of such cases of human rights issues caused by corporations, civil society also went beyond just activism and began defining the contours of HRB as a discipline, and a distinct field of human rights. Wettstein explains that this reaction by the global civil society began materialising in the 1990s. For instance, Amnesty International was among several NGOs that created specialised focus groups for HRB. Then, in 2002 Chris Avery created the Business and Human Rights Resource Centre (BHRRC), an organisation that has become an authoritative source for information, thematic news, academic research, and a hub for legal activism through factual reporting, and analytical briefings.[25] These developments resulted in the institutionalisation of the HRB movement, for both academics and activists.[26]

The analysis of this second generation of HRB scholarship shows that some key features of HRB as a discipline emerged during this period of time. First, it was a time of increased public discourse on the human rights issues emerging from business operations around the globe. Second, public discourse spurred reactions from the aforementioned actors in the form of new rules and standards to govern their behaviour. Third, the response of International Organisations, to the growing public discourse, came through international legal instruments. Fourth, another example of advocacy and activism forging change among other actors is found when MNCs expanded the scope of Corporate Social Responsibility (CSR).[27] Fifth, this time

[24] Ibid. 47-48
[25] 'About Us - Business & Human Rights Resource Centre' (1 June 2025, Business & Human Rights Resource Centre) <https://www.business-humanrights.org/en/about-us/> Accessed: 1 June 2025
[26] Florian Wettstein, 'The History of 'Business and Human Rights' and its relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 27
[27] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 19

period marked the abandonment of the Friedman stance of separating businesses from any form of social responsibility. Finally, while the increased academic discourse, activism, and related critiques of corporate behaviour were somewhat fragmented and focused on isolated incidents, the common sentiment about increasing corporate responsibility prevailed. In sum, the analysis of these material events, shows that the second era of HRB scholarship was characterised by the increased scrutiny of corporations, especially MNCs, vis-à-vis their responsibility towards human rights. The increased scrutiny served as the foundation for scholars, activists, and lawyers to ask the fundamental question that HRB seeks to answer today, i.e., what are the legal gaps in domestic and international laws that allow corporations to commit human rights violations, without any repercussions, and how do we address these gaps?

(ii) Third and Fourth Generation of HRB Scholarship - The Emerging Legal Questions

Although, the second generation of HRB scholarship was marked by fragmented critiques that focused on isolated incidents, this time period led to the crystallisation of the fundamental legal question that HRB as discipline seeks to answer, i.e., how do we address the gaps in domestic and international law frameworks that allow businesses to commit human rights violations. In this context, the third and fourth generation of HRB was focused on specific legal questions, about the nature and framework of a legal instrument that can address the concerns of HRB. According to Deva, during the second generation, the boiling point was reached with the Bhopal tragedy which became a watershed moment for the HRB movement. This tragedy led to the emergence of legal scholarship that was pointed and focused specifically on the human rights obligations of corporations. Another important development that caused global outcry, was the execution of Nigerian playwright and activist Ken Saro-Wiwa. This brings us to the third era of HRB, which began in the 1990s, and was characterised by consolidated efforts to

create an international legal framework to address the issue of human rights abuses committed by corporations.

In 1998, the UN sub-commission on Promotion and Protection of Human Rights authorised a working group to draft the 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (draft norms).[28] The draft norms aimed to create a binding legal framework for corporations. This would mean that corporations would have legal obligations vis-à-vis human rights and in case of violations could be held liable for the same. But the draft norms were never adopted as they created similar legal obligations for corporations, as states had under IHRL. There was not much political support for such a radical restructuring of the IHRL jurisprudence, resulting in the rejection of the draft norms. This rejection ushered in the most critical legal debate concerning HRB, i.e., whether an international instrument should attach direct and binding responsibility on corporations, through an international legal instrument which would be adopted by the UN. This period was characterised by a multi-stakeholder approach to HRB scholarship, where opinions of different actors including state, corporations, civil society, and academics were considered to create an international legal instrument. This discourse was pushed by John Ruggie, primarily in his capacity as the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises for Business and Human Rights (SRSG). It was in this capacity that Ruggie developed the UN Guiding Principles on Business and Human Rights (UNGPs).[29] Eventually, in June 2011 the UN Human Rights Council (UNHRC) unanimously endorsed the UNGPs.[30] Another important feature of this period was the discourse around the nature of the UNGPs. The primary question in this regard was whether

[28] Florian Wettstein, 'The History of 'Business and Human Rights' and its relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 28
[29] Ibid. 12
[30] The United Nations Human Rights Council, 'Human Rights and Transnational Corporations and other Business Enterprises' (A/HRC/RES/17/4, Dated – 6 July 2011)

the UNGPs would follow a similar approach as the UN Draft Norms, where the new instrument would attempt to create direct legal obligations for corporations. Ruggie took the route of voluntary obligations for corporations and came up with the 'Respect, Protect, and Remedy' framework. Under the 'respect' framework, corporations are required to respect existing human rights laws and frameworks by implementing due diligence mechanisms and striving to avoid any human rights violations while carrying out their business operations. The voluntary nature of the UNGPs was only with respect to corporations. The 'protect' and 'remedy' framework emphasised the direct legal obligations thrust upon states under existing IHRL. Here, states were required to protect its citizens from any human rights violations and also provide effective remedies for any violations that may occur. The key difference between the nature of obligations for states and corporations, respectively, is that for the former, there is legal liability attached to their obligations. Therefore, a failure to abide by the mandate of existing IHRL would have legal implications. On the other hand, for corporations, their responsibilities are voluntary in nature, and failure to abide by the UNGPs would not accrue any legal liabilities. During this period, Ruggie's contributions to HRB scholarship and the UNGPs, together, were the most significant development in the history of HRB. This is why Ruggie's ideas will be discussed in detail in subsequent chapters.

The final era began in 2014 when the UNHRC created a working group which was given the responsibility to create a binding international legal instrument – in the form of a HRB treaty – which would regulate the activities of transnational corporations across the globe.[31] As is evident from the mandate of the working group, an attempt is being made to create a binding legal instrument which would create direct legal obligations for corporations. This is a significant departure from the voluntary nature of the UNGPs framework, which only made

[31] The United Nations 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, Dated – 14 July 2014)

states directly responsible, and therefore liable, for human rights violations. Another important feature of this period is the scathing critique offered by scholars like Surya Deva and David Bilchitz, against the UNGPs framework and also against Ruggie's ideas. Primarily, the critique is directed towards the voluntary nature of responsibilities for corporations, and the lack of any direct legal obligations against corporations for committing human rights violations. As of today, the HRB treaty is still being negotiated, but the conversations about HRB have been amplified in this period. Therefore, this era will also be discussed in greater detail in consequent chapters.

II. THE THIRD GENERATION OF HRB SCHOLARSHIP - DIAGNOSING THE LEGAL PROBLEM IN HRB

The aim of this chapter is to map the critical legal debates that dominated the third and fourth generations of HRB scholarship and evaluate the critical legal question that became the focus of HRB scholarship. While the need for an international legal instrument was agreed upon, the third and fourth generation of HRB scholarship debated the nature of such an instrument. Some argued that we need an instrument that creates binding legal obligations for corporations under IHRL, while others suggest voluntary obligations for corporations. While mapping this debate, this chapter will take evaluate the academic contributions of prominent scholars. This chapter will begin by looking at the first instances of this debate emerging before the UN when the Draft Norms were being formulated. Next, attention will be given to the contributions of John Ruggie and his narrative of how the UNGPs were formulated. Here, the critical analysis will revolve around the process, arguments, narrative and justifications given for the UNGPs framework, which established a framework of voluntary obligations thrust upon corporations. In this context, the arguments in favour of a binding legal instrument will be assessed.

During the late 1990s, an important development took place that set the stage for legal debates that continue even today. During this time, the material developments of the past few decades culminated in consensus across the globe on the need for an international instrument set the stage for legal scholars to begin debating legal issues that would define the contours of a HRB framework in International Law. One of the most important questions, that was debated across the third and fourth generation of HRB scholarship, was, whether corporations should have binding legal obligations under IHRL and by virtue of that made a subject of IHRL, bearing duties and responsibilities. The debate began in 1998 when the UN sub-commission on Promotion and Protection of Human Rights authorised a working group led by David Weisbrodt to draft the ‘Norms on the Responsibility of Transnational Corporations and Other

Business Enterprises with Regard to Human Rights' (UN Draft Norms).[32] The UN Draft Norms attempted to create legal obligations for corporations, with respect to human rights and stated, *"(...) within their respective spheres of activity and influence, transnational corporations and other business enterprises 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."*[33] The draft norms created direct legal obligations for corporations under International Human Rights Law (IHRL), a step which would restructure the existing IHRL jurisprudence. The foundation of International Law stands on the traditional definition of a 'subject'. According to Crawford, *"(...) a subject of international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims."*[34] As noted above, across most of the 20th century, corporations had little to nothing to do with human rights, even at a moral level, let alone a legal obligation under IHRL. Under this accepted definition of subjects of IHRL, legal obligations are created only for states and only they can be held responsible for violations. This traditionally accepted jurisprudence was challenged by the UN draft norms by making corporations the subject of IHRL and creating obligations for them, within their sphere of influence. This restructuring of the IHRL jurisprudence by the draft norms was considered radical at the time and was one of

[32] Florian Wettstein, 'The History of 'Business and Human Rights' and its relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), 'Research Handbook on Human Rights and Business (Cheltenham: Edward Elgar, 2020) 28

[33] U.N. Sub-Commission on the Promotion and Protection of Human Rights – Working Group on the Working Methods and Activities of Transnational Corporations, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003)

[34] James Crawford, 'Brownlie's Principles of Public International Law' (8th Ed., Oxford University Press, 2019) 386

the main reasons why they were rejected by the UN Human Rights Commission (later the UN Human Rights Council).[35]

(i) Just Business by John Ruggie

The primary aim of this chapter is to analyse the key ideas of John Ruggie, who was appointed as the SRSG in 2005. Ruggie is one of the most prominent figures in the discipline of HRB, because in the capacity of SRSG, he was the driver of conversations around the legal issues presented by the emergence of HRB. This period in the third-generation scholarship ushered in a new wave of efforts to develop an international law instrument after the UN rejected the draft norms. Therefore, Ruggie's ideas and marquee works are critical to analysing the evolution of HRB scholarship in this time period from the beginning of the 21st century till 2014.

In 2013, Ruggie published his marquee book titled *'Just Business: Multinational Corporations and Human Rights'* where he traced the development of the UNGPs. He starts his book by identifying the legal issue that HRB as a discipline presented. He posits that the legal and regulatory framework governing Multi-National Corporations (MNCs) against human rights violations are fragmented.[36] The debates around HRB gained ground, amongst legal scholars, around the 1990s when liberalisation of trade, privatisation, and globalisation gained momentum around the world, which resulted in MNCs having a greater ability to operate globally.[37] Ruggie refers to the UN Conference on Trade and Development (UNCTAD) study which showed that 94 percent of all national regulations related to foreign direct investment (FDI) were modified between 1991 to 2001 to further facilitate them.[38] In this global order, the

[35] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 76
[36] Ibid. 25
[37] Ibid. 17-18
[38] Ibid. 17-18; *see also* UNCTAD, World Investment Report 2002 (New York: UNCTAD, 2002) 7

three main actors, i.e., states, MNCs and civil society reacted in certain ways. The MNCs were not prepared to handle the risks of causing or contributing to human rights violations through their activities. Governments were unable or unwilling to enforce domestic laws protecting human rights against businesses. Advocacy groups began organising campaigns against MNCs and their operations which caused human rights violations. Naturally, questions were asked by academics and activists alike, regarding the gap in the existing legal and regulatory frameworks, to keep the actions of MNCs in check. Bringing the focus back to MNCs, Ruggie explains the importance of globalisation in their expansion and thereby also the global supply chain. The expansion of MNCs into new markets across the globe contributed to the various governance and regulatory challenges vis-à-vis HRB.[39] He uses the example of the Bhopal gas leak in 1984, and the human rights violations by Shell in Nigeria, among others to illustrate this point.[40] Issues like these caused public pressure on the companies which allowed the ascendency of corporate social responsibility (CSR) as an important part of their policies and they evolved rapidly over the years.[41] Eventually, Ruggie shifts the focus from explaining how he diagnosed the problem to looking for solutions. In sum, the key problem was the lack of any effective regulatory frameworks and governance by the actors involved, i.e., the governments and MNCs. For instance, the emergence of CSR as a voluntary mechanism was not enough in addressing the varied human rights issues across the globe.

In response to these challenges, for Ruggie, the aspiration was to offer a way to conceptualise and operationalise corporate accountability through an international legal instrument. He goes on to explain the various legal routes that were contemplated during this stage. Crucially, he discussed the treaty route which would directly bind corporations with legal obligations, but this route presented a very unique challenge. The challenge here is that, traditionally, treaties

[39] Ibid. 38
[40] Ibid. 41-46
[41] Ibid. 18-19

under International Law address states as their subject, thereby creating legal obligations for states alone.[42] Corporations are not traditionally considered subjects of International Law, yet some proponents at the time proposed that a treaty route could be taken which would make corporations the primary subjects and create legal obligations for them as private actors.[43] Ultimately, this approach was rejected for various reasons, that Ruggie cites. First, there was a lack of any political support to this idea from states.[44] Second, developing countries, despite suffering from corporate abuses, were hesitant because they relied on foreign investment for their economic growth. On the other hand, even developed countries, where corporations were headquartered, opposed strong global regulations.[45] Third, Ruggie re-emphasised the fact that IHRL applies to states, not private actors, and it was difficult to create political consensus to create a new category of legal principles to apply legal rules under IHRL on private actors.[46] Fourth, he says that even if political consensus was achieved, there was the issue of jurisdiction, vis-à-vis remedies in a court. In a world where legal liabilities were attached to corporations under IHRL, he asks if we would need a HRB tribunal to be set up. He was also suspect of whether reliance could be placed on the International Criminal Court (ICC), or the International Court of Justice (ICJ) to step in.[47] Finally, he explains that a treaty would require broad, universal rules, but corporate human rights challenges often needed context-specific solutions.[48] At this point, Ruggie moves on to explaining why the UNGP framework was the best route. This framework used the Protect, Respect and Remedy formula, where firstly states were bestowed with the obligation to protect people from human rights violations committed

[42] Ibid. 78
[43] James Crawford, 'Brownlie's Principles of Public International Law' (8th Ed., Oxford University Press, 2019) 386
[44] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 79-80
[45] Ibid. 80-81
[46] Ibid. 81
[47] Ibid. 78
[48] Ibid. 83-84

by private actors.[49] Secondly, corporations were required to respect human rights, where they are not responsible for protecting human rights – like states in IHRL - but must not contribute to violations and should actively manage risks through due diligence processes.[50] Thirdly, victims of corporate-related human rights abuses must have access to effective, accessible, and legitimate remedies—whether through judicial, administrative, or non-judicial mechanisms.[51]

(ii) Debate on a Binding Legal Instrument

While talking about the treaty route, Ruggie refers to the UN draft norms proposal and says that it was rejected because it sought to bind corporations with direct responsibility under IHRL. According to Ruggie, the political climate at the time, was not conducive to such a proposal, which would alter the fundamental legal framework of IHRL. It is in this context, that he says, *"(...) my stipulation of what should be done was intended to be broadly consistent with existing international law rather than to advocate for new legal standards that would either trigger an inconclusive debate or be ignored altogether—and in my judgment, those would have been the inevitable outcomes."*[52] On the one hand, the merit of Ruggie's argument is understandable, especially considering what the discipline of HRB needed at that time. There are certain rules and standards of Int'l Law which govern the discipline. Everyone, including and especially political actors, respects them which makes the proposal by Ruggie more prone to acceptance, which is exactly what happened with the adoption of the UNGPs. On the other hand, Ruggie's stance seems extreme, and David Bilchitz criticises it. He says that Ruggie's

[49] Ibid. 97-99
[50] Ibid. 112
[51] Ibid. 113-114
[52] Ibid. 98

stance ended up erecting barriers to discourage future treaty efforts rather than simply leaving the option open to future developments.[53]

Having taken note of Ruggie's arguments, I must offer my perspective to these observations. First, just for the sake of argument I accept Ruggie's stance that it is theoretical and political impossibility to advocate for new legal standards, because doing that would trigger an *"inconclusive debate or be ignored altogether".*[54] The simple question I ask in opposition to Ruggie's stance, is whether Int'l Law is static or dynamic in nature? Since Int'l Law is dynamic and always evolving, then what conditions need to be met to step outside the current legal framework and advocate for and then create new legal standards. For any new legal framework to become a reality it naturally requires material events which would rupture the very foundation of International Law jurisprudence. Ruggie's stance suggests that such a rupture cannot come about, which is why he opted for the UNGPs being consistent with the existing international law, instead of advocating for new legal standards. His stance suggests that material events cannot rupture jurisprudence and cause the formation of new legal standards. Fortunately, this type of rupture has happened before in the history of International Law, when International Criminal Law (ICL) emerged as a separate discipline. In fact, before the First World War (WWI), the state was the only subject of International Law, therefore at the end of a war, violations of International Law such as war crimes were punished as against the state who committed those violations. But the horrors of the 'Great War' caused the then International actors, primarily the victors, to make an exception to the rule here. Therefore, the war crimes committed by the Germans were punished by penalising the state, and also by putting individuals, who committed specific crimes, on trial. This led to the famous 'Leipzig

[53] David Bilchitz, 'A Chasm between 'is' and 'ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in David Bilchitz and Surya Deva (eds.), 'Human Rights Obligations of Business: Beyond The Corporate Responsibility To Respect?' (Cambridge University Press, 2013)
[54] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 98

Trials' where various military officers were tried for crimes committed during the war. The main point to understand here is that one of the most fundamental rules of International Law was departed from at this point in history, and that is how we created space for the vast realm of ICL. Without this rupture in the structure of International Law, we would not have the Rome Statute, the International Criminal Court and numerous tribunals which successfully tried individuals for committing International crimes. Material events of great significance such as WWI were behind this rupture in Int'l Law jurisprudence. Similarly, the history of HRB that has been traced in the chapter above, is testament to the simple fact that many significant material events were the epicentre of and drivers of the HRB movement, which culminated in the demand for an international legal instrument before the UN. Even today, the scholarship of HRB is driving a similar movement which can cause a rupture in the structures of International Law, by advocating for a change that would see MNCs as private entities be made responsible for any violations of human rights. In this context, the assertion made by Ruggie, that new legal standards were not a possibility cannot be accepted.

Second, the aforementioned acceptance of Ruggie's stance was only for argument's sake. But there is a fundamental flaw with Ruggie's justification when he concluded that the idea of making MNCs directly responsible for their human rights violations cannot be supported by the existing framework of Int'l Law. This idea, that an MNC can be taken to a human rights court for violating human rights, is presented as some radical thought that is beyond the scope of the current Int'l Law framework. This is perhaps because Ruggie did not venture beyond the UN human rights system, while making his conclusion. Across the length and breadth of Ruggie's book, which details his experience of how he formulated the UNGPs, there is no reference to the well-established regional human rights systems in the Americas, Africa and Europe and their human rights courts. When we venture beyond the UN human rights system, it becomes clear that his conclusion is flawed. There are several examples of human rights

violations committed by corporations have been brought before a human rights court. Granted, these cases are adjudicated by courts by virtue of the principle of state responsibility, and states are held liable for actions committed by corporations. But there is ample evidence available which suggests that corporations that violate human rights, can become a concern of IHRL. For instance, Orozco-Henríquez a former President of the Inter-American Commission on Human Rights, explains that the Inter-American Court of Human Rights (IACtHR) has upheld its commitment to human rights by adapting to the growing abuses committed by corporations.[55] He says that there was an institutional willingness to seek accountability from corporations for their excesses. This is why, the court extended the concept of state responsibility to include the investigation and prosecution of corporations that violate human rights, under the American Convention on Human Rights. In simple terms, there is a critical evolution of the IACtHR jurisprudence, that has made actions of corporations subject to the IHRL. When the American Convention came into being, 'state responsibility' was the dominant legal principle of the system. This meant, states had a duty to not infringe upon the human rights of the people. At the same time, if and when corporations violated human rights, the duty of states to 'protect' people from such violations.[56] Under the state duty to protect people from human rights violations, the IACtHR developed the idea that states would have to investigate and prosecute any corporations that committed human rights violations.[57] Smart refers to the 1988 judgment of the IACtHR of *Velásquez Rodríguez v. Honduras,*[58] explaining that this was the first case, where the IACtHR, first expanded the scope of state obligations to include human rights violations by third-party actors.[59] Since then, Smart explains that the IACtHR has

[55] Jesús Orozco-Henríquez, 'Corporate Accountability and the Inter-American Human Rights System' (2016) 57 Harvard International Law Journal 48, 48
[56] Ibid. 49
[57] Ibid. 50-51
[58] Velásquez Rodríguez v. Honduras, (Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No. 4)
[59] Sebastián Smart, 'Expanding and Contracting the UN Guiding Principles: an Analysis of Recent Inter-American Human Rights Court Decisions' (2024) 16 Journal of Human Rights Practice 342, 344

developed this particular stance and upheld the idea that states must *'prevent, investigate, punish, and redress'* any corporations that commit human rights violations.[60] In this context, Smart argues that even the legal framework is focused on a state-centric approach, which only makes corporations indirectly liable for any human rights violations. But the commitment of the IACtHR to a human rights centric interpretation, and the aforementioned development of jurisprudence, can be a stepping stone towards building a legal framework which makes corporations directly responsible for human rights violations.[61] On similar lines, Orozco-Henríquez argues that the natural effect of the stance taken by the IACtHR is that domestic laws are tightened by states, that would make corporations directly liable for human rights violations. Furthermore, he argues that even though the IACtHR cannot legally make corporations directly responsible for human rights violations, the creative interpretations of the IACtHR have provided an avenue for victims. But at the same time, he believes the legal system must develop beyond the current framework, pointing towards the natural next step of creating binding obligations for corporations through appropriate international law instruments.[62]

[60] Ibid. 344
[61] Ibid. 348-349
[62] Jesús Orozco-Henríquez, 'Corporate Accountability and the Inter-American Human Rights System' (2016) 57 Harvard International Law Journal 48, 52

III. THE FOURTH GENERATION OF HRB SCHOLARSHIP – MOVING TOWARDS A HRB TREATY

In pursuance of one of the important objectives of this thesis, i.e., mapping the HRB scholarship and debates, we move to the fourth and last generation. This generation is characterised by two distinct features. First, scholars offered their criticism for the UNGPs framework and the process that went into drafting them. Second, the debates that are discussed extensively by Ruggie, about the nature of an international legal instrument, are taken forward. Here, several scholars begin critiquing Ruggie's stance of a voluntary legal framework for corporations and argue in favour of a treaty which would create binding legal obligations. This chapter reviews some of the most important criticisms offered in regard to these two issues.

(i) Pitfalls of the UNGPs

David Bilchitz and Surya Deva, in their book *'Human Rights Obligations of Business - Beyond the Corporate Responsibility to Respect',* offer a broad range of critiques to the UNGPs framework and also to the process of its development undertaken by Ruggie. The book, edited by Bilchitz and Deva offers perspectives from a variety of scholars, who analyse the UNGPs from different angles.

At the very outset, Bilchitz and Deva author a sharp critique of the 'Protect, Respect, and Remedy' framework. First, they point out that the UNGP re-emphasises the state duty to protect people from human rights violations committed by corporations. The fundamental problem that HRB as a discipline had identified, was that corporations operated in many different states across the globe and that created ambiguities about which state would have the duty under

IHRL.[63] Unfortunately, these ambiguities have not been addressed adequately under the UNGPs. The question of extra-territoriality was answered ambiguously by the UNGPs, effectively leaving the questions it sought to address, unanswered. Under the UNGPs, states are neither required nor prohibited under IHRL to regulate the extraterritorial activities of companies domiciled within their territory and/or jurisdiction.[64] This stance cannot be accepted, especially when 'home' states of MNCs are bound to act where 'host' states lack the capacity or willingness to regulate actors in their territorial bounds.[65] These ambiguities impact the 'Remedy' framework too, because when the home state is unable/unwilling to provide remedies, there is effectively no recourse for victims.[66] Recalling our discussion about the Bhopal tragedy, the fundamental problem was that the home country, i.e., the USA was absolved of any responsibility when clearly the parent company from the USA was culpable. In turn, the parent company, whose actions directly resulted in a tragedy of incalculable proportions, suffered no consequences.

When Ruggie showed an unwillingness to address the issue of extra-territorial obligations, Bilchitz and Deva exclaimed that, Ruggie had avoided taking a stand on the most contentious issues presented by the HRB discourse. Similarly, they critique the 'Respect' framework for not addressing another contentious issue, i.e., the obligations of corporations for their subsidiaries in different parts of the world, and also for their vendors and/or suppliers from across the globe.[67] Bilchitz and Deva go over the basic structure of the 'Respect' framework and explain corporations must have a *'policy commitment to meet their responsibility to respect*

[63] David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in David Bilchitz and Surya Deva (eds.), 'Human Rights Obligations of Business: Beyond The Corporate Responsibility To Respect?' (Cambridge University Press, 2013) 13-14
[64] Ibid. 14
[65] Ibid.
[66] Ibid.
[67] Ibid. 15

human rights'.[68] They should also create due diligence mechanism *'to identify, prevent, mitigate and account for how they address their impacts on human rights'.*[69] Under the UNGPs framework, a company should consistently conduct due diligence not only for its own operations but also for activities that may be directly connected to its operations, products, or services through its business relationships. While the term 'business relationships' covers the supply chain, it remains unclear whether it also applies to subsidiaries and vendors that are not direct suppliers but lie deeper in the supply chain. This is a great let down because when we recall the advent of globalisation since the 1990s, one of the main issues presented by this phenomenon was that of the expansion of MNCs, deepening of supply chains, and the emergence of subsidiaries. The Bhopal tragedy is the best illustration of the inability and unwillingness of MNCs to monitor subsidiaries and their actions. In sum, the questions that were raised in wake of tragedies such as the one in Bhopal, remained unanswered. [70]

Bilchitz and Deva offer a critique against the process that Ruggie undertook as the SRSG. They explain that Ruggie adopted a 'consultative process', which involved a multi-stakeholder approach. Unfortunately, Ruggie did not pay heed to calls from civil society for him to engage with victims of corporate human rights abuse.[71] Furthermore, in line with a commitment to a multi-stakeholder approach, during the consultation phase the SRSG was advised by various actors including academics, civils society. But the business sector had greater proximity to SRSG, thereby exerted much greater influence on the outcome. Bilchitz and Deva claim that several flaws of the UNGPs can be attributed to this simple fact, about the influence of the

[68] The United Nations 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)
[69] Ibid.
[70] Robert McCorquodale, 'Business and Human Rights: Elements of International Law' (Oxford University Press, 2024) 6
[71] David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in David Bilchitz and Surya Deva (eds.), 'Human Rights Obligations of Business: Beyond The Corporate Responsibility To Respect?' (Cambridge University Press, 2013) 10

business community in the SRSG.[72] Another point of criticism directed towards the SRSG is that he suggested that self-regulation and compliance with human rights, ultimately lies in the self-interest of corporations. Deva says that this framework is like a 'social license to operate', without which they would not be able to conduct their businesses effectively.[73] But Deva asserts that compliance with human rights norms should be a non-negotiable precondition for doing business, rather than becoming a matter of expediency, only being relevant when it might impact (adversely or positively) the bottom line of companies.[74]

Deva alludes to the domination of business interests in the UNGPs, which is reflected in various aspects of the process of creating the UNGPs. For instance, Ruggie explains that the language employed in the UNGPs is similar to the terminology used by businesses. An example is how the UNGPs used the word 'impact' instead of 'violations' clearly reflects the preference given to business interests.[75] In essence, the people who died because of the gas leak in Bhopal, and the children who were forced to stitch Nike balls in Pakistan were all, victims of 'adverse impact' of corporate activity. They are not victims of human rights abuse, according to the UNGPs. The net effect of using such neutral language is that it dilutes the gravity of the human rights problems caused by business operations and takes the focus away from the victims of human rights violations.[76]

Furthermore, Deva explains how the interests and voices of human rights were sidelined or 'taken lightly' within the entire consultation and 'consensus building' phase. Deva explains this argument by re-emphasising the fact that the UNGPs were supposed to be a consensus as a the result of a consultative process between opposing interests, i.e., business interests and human

[72] Ibid. 8-9
[73] Ibid. 13
[74] Ibid.
[75] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in David Bilchitz and Surya Deva (eds.), 'Human Rights Obligations of Business: Beyond The Corporate Responsibility To Respect?' (Cambridge University Press, 2013) 79-80
[76] Ibid. 91-92

rights interests, respectively.[77] Deva argues that in this process, the voice of NGOs, and civil society was not taken seriously. The numerous detailed reports and submissions given by these stakeholders did not make a mark in the final draft. On the other hand, *"(...) favourable views of companies, business organisations, states and academics were splashed all over the media to paint dissenting voices as an insignificant minority, differences were summarily dismissed and people mooting such ideas were shunned."*[78] Additionally, one of the most important stakeholders, representing human rights interests, were victims of corporate human rights abuse. But the SRSG made a conscious decision to not include them in the consultation stage.[79]

These arguments made by Deva show that, the human rights interests and voices were either ignored, supressed or systemically excluded from the consultation stage and eventually the framework of UNGPs. This severely undermines the credibility of the UNGPs, which is supposed to represent a consensus between the interests of corporations on the one hand and the interests of victims, NGOs, and civil society among other stakeholders in the human rights paradigm.

(ii) The Treaty Route

The frailties of the HRB framework have an intimate connection with Ruggie's refusal to entertain direct legal obligations for corporations. The debates in the fourth-generation scholarship, naturally, moved towards an attempt to create a binding legal framework for MNCs. This transition is in the works, with many scholars advocating for this legal framework. Surya Deva, a former member of the UN working group on Business and Human Rights,

[77] Ibid. 82-83
[78] Ibid. 83-85
[79] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in David Bilchitz and Surya Deva (eds.), 'Human Rights Obligations of Business: Beyond The Corporate Responsibility To Respect?' (Cambridge University Press, 2013) 79-80

currently serves as the UN Special Rapporteur on the Right to Development. In his works, he has continually advocated for the treaty route which would create direct obligations for MNCs. Most importantly, in 2014, at its 26th session, the UNHRC adopted resolution 26/9 by which it decided *"to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."*[80] The OEIGWG is currently working with relevant stakeholders to draft a HRB treaty. Thus far, three drafts have been tabled after intense negotiations, and a final treaty should become a reality any time soon.[81]

The most important question to ask at this stage is what the treaty framework looks like at the moment. Some unique features emerge from the third revised draft prepared by the OEIGWG. Article 3 of the draft specifies that the treaty applies to all business activities, both domestic and transnational, covering all internationally recognized human rights, binding on the States Parties.[82] Under Article 5, states are given three-fold obligations, i.e., to protect victims, to investigate all human rights abuses covered under this and to take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment.[83] Elaborating on state obligations, Article 6 mandates that states regulate businesses effectively and also require businesses to conduct human rights due diligence.[84] Moving to the obligations of corporations, Article 8

[80] UNHRC, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights' (A/HRC/RES/26/9, Dated – 14 July 2014)
[81] 'BHR Treaty Process - OHCHR and Business and Human Rights' (Office of the High Commissioner of Human Rights) <https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process> Accessed: 10 June 2025
[82] Article 3, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (OEIGWG Chairmanship Third Revised Draft, Dated - 17.08.2021)
[83] Ibid., Article 5
[84] Ibid., Article 6

requires state parties to create domestic legal systems which ensure civil and criminal liability for human rights violations by businesses and individuals respectively. Furthermore, businesses can be held liable not only for their direct actions but also for abuses linked to their operations through entities managed or controlled by them.[85] Article 9 addresses questions about jurisdiction, stating that courts of a state party must establish jurisdiction over cases of human rights violations when the alleged abuse occurred within the state's territory, when the natural or legal person accused of the abuse is domiciled within the state, when the abuse occurred in a location where the state has jurisdiction in accordance with international law, and other specifications. The article also prohibits state parties from declining jurisdiction on the basis that another forum is more appropriate, i.e., the principle of *forum non conveniens*.[86] Additionally, in situations where no other effective forum is available that guarantees a fair trial, courts in states parties are mandated to exercise jurisdiction if the claim has a sufficiently close connection to the state.[87] Recalling the discussion on the Bhopal case, a key problem identified by HRB scholars was the deflection of responsibility with the use of legal principles such as '*forum non conveniens'* and loopholes in jurisdiction laws. This treaty is an attempt to fill that void and create uniform legal standards to hold corporations directly responsible. This treaty ditches the idea of voluntariness propagated by Ruggie and the UNGPs and creates clear legal obligations for corporations and state parties respectively. The concerns about accountability are also addressed through the monitoring mechanism established under Articles 14-16.

[85] Ibid., Article 8; *see also* Business and Human Rights Centre, 'Summary: Third Revised Draft of the Binding Treaty on Business and Human Rights' (7 April 2025, Business and Human Rights Centre) <https://www.business-humanrights.org/en/big-issues/governing-business-human-rights/summary-third-revised-draft-of-the-binding-treaty-on-business-and-human-rights/> Accessed: 7 April 2025
[86] Ibid., Article 9
[87] Ibid.

In line with these observations, it would be prudent to take note of some arguments made in support the HRB treaty. Penelope Simons makes an obvious point and says that a binding instrument would ensure consistent legal standards that are applied across the globe.[88] Another point emphasised by Simons is that the treaty will have to work at the state level and ensure that states develop domestic legal frameworks. I understand that this framework would rectify a problem posed by the UNGPs framework, i.e., the separate expectations levied against corporations and states. Here, the states were expected to reinforce human rights obligations and protect its people from violations by corporations. On the other hand, the expectations from TNCs were different under the 'Respect' framework, where they were required to voluntarily respect human rights while conducting their business operations. On the other hand, the treaty framework would create uniform legal standards for states and corporations. This would mean that the aspirations of the international instrument would not be fragmented but rather strive for a symbiotic relationship between the two main actors where they work towards similar goals. Backer also offers an important argument in support of a HRB treaty which also counters one of the most important criticism of the treaty route. When Ruggie was developing the UNGPs he rejected the treaty route by saying that it simply was not practical considering the political opposition against it and claimed that the only practical solution was a soft law instrument in the form of the UNGPs. Backer counters it by saying that this is a pessimistic stance and posits that a HRB treaty is indeed a practical solution, and very much realistic. He argues that a treaty by its very nature would give flexibility to states in implementing the legal standards of the treaty into their domestic laws. There are some positive signs that point to growing political consensus, first being the obvious establishment of the open-ended intergovernmental working group. Furthermore, it is important to note that the initiative for the

[88] Penelope Simons, 'The Values-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises' in Surya Deva and David Bilchitz (eds.), 'Building a Treaty on Business and Human Rights: Context and Contours' (Cambridge University Press, 2017) 77

treaty has been led by third world states and resisted by the global north. But progress is being made to bring developed states on board and broad political consensus is being achieved.[89]

[89] Sikho Luthango, 'Where next for a business and human rights treaty?' (20 March 2025, Critical Takes on Corporate Power) <https://www.criticaltakes.org/human-rights/what-next-for-a-un-treaty-on-business-and-human-rights/?utm_source=chatgpt.com> Accessed: 6 April 2025

IV. DISTORTING HISTORY AND THE TWAIL PERSPECTIVE

"The road to the future, it is said, winds its way through the past."[90]
- B.S. Chimni

This quote by Professor B.S. Chimni captures an essential feature of the Third World Approaches to International Law (TWAIL). In simple terms, the TWAIL scholarship often attempts to understand the history of Modern International Law (MIL) from the perspective of the global south or the third world, as we know it. Chimni explains that, as the process of de-colonisation gained strength in second half of the 20th century, third world scholars found a collective voice in making a path-breaking critique of MIL. Scholars began to challenge the parochial and celebratory history of MIL, often written and championed by western scholars.[91] One consequence of such views becoming the mainstream, is the ignorance and wilful denial of historical context that laid the foundation of a discipline of emancipation. This ignorance in turn whitewashes the discipline, presents it as neutral and erases the history of many peoples, and nations. In this context, one of the most important aims of TWAIL scholars is to expose how the mainstream ignores the colonial roots of MIL. Scholars like Anghie explain how the historical development of International Law, dating as far back as the 16th century, was linked to the interests of colonialism.[92] While the TWAIL scholarship has developed in many different ways and explored different methods of critiquing MIL from the global south's perspective. Nevertheless, for the purpose of this thesis, the focus will be on the TWAIL argument about how mainstream narratives about the history of MIL have impacted HRB scholarship. This chapter will focus on explaining the basic TWAIL argument about the colonial nature of MIL, showing that the present HRB scholarship follows a template similar to mainstream narration of the history of MIL, i.e., wilfully ignore the colonial roots of the discipline. First, this chapter

[90] B.S. Chimni, 'The Past, Present and Future of International Law: a Critical Third World Approach' (2007) 8(2) Melbourne Journal of International Law 499, 499-500
[91] Ibid. 500
[92] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 2-3

will trace the arguments made by the likes of Chimni and Anghie, to explain how rules, norms and principles of International Law have historically been developed to further the interests of colonial empires. Second, this chapter will look at how the colonial nature of International Law, has been sustained through various mechanisms, even in times after the second world war. For instance, Anghie explains how the colonial interests of the global north have been promoted under the guise of globalisation.

(i) Colonialism and the Historical Development of International Law

Martti Koskenniemi notes that if anyone begins studying the history of MIL through mainstream accounts, there is a noticeable silence on the role of colonialism in shaping international law doctrines.[93] Yet, mainstream accounts present MIL as a sanitised system of universality and neutrality.[94] On similar lines, Chimni explains that the mainstream narrative on the history of MIL, mostly authored by western scholars, erases the historical facts that International Law performed imperial functions.[95]

In this context Anghie explains, through historical accounts, how the fundamental ideas, values, and principles of International Law were developed to further the interests of the colonial project. He backs up the claim by dissecting the works of Francis Vitoria, which coincided with the Spanish colonial expansion into the "new world". In this time, one question that lawyers of the age were faced with was whether the Spanish empire could lawfully "take possession" of the new lands found.[96] In answering this question, Vitoria began re-conceptualising the contours of the idea of "sovereignty". He opposed the prevailing sentiment, one also

[93] Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) Rechtsgeschichte–Legal History 152, 174-175
[94] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 2
[95] B.S. Chimni, 'The Past, Present and Future of International Law: a Critical Third World Approach' (2007) 8(2) Melbourne Journal of International Law 499, 499-500
[96] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 16

championed by Christopher Columbus, i.e., the Indians were uncivilised, did not have law and order as prevalent in Europe. Therefore, the Spanish had a moral obligation to civilise the Indians by "taking possession" of the Indians' territory.[97] Vitoria, on the other hand, argued that the Indians were civilised, which made them sovereign and therefore subject to the universal natural law or *jus gentium* applicable in Europe.[98] Anghie explains that this grant of sovereignty is deceptive, because the clever interpretation and reinvention of the law on sovereignty meant that the universal natural laws and norms - as defined by the Spanish - were now applicable on the Indians. In case the Indians violated the Spanish norms on trade, and missionaries, the colonisers had the divine right to go to war and colonise the Indians.[99] In sum, Anghie gives evidence to the fact that the fundamental concept of sovereignty was developed to further the interests of a colonial regime.[100] Traditional accounts of MIL conceal this dark history of the discipline, by which it presents the current frameworks as neutral, which is certainly not the case.[101]

Similar connections can be found across the history of MIL, and the same is true for Hugo Grotius, who, just like Vitoria developed legal norms in the service of a colonial empire. In 1609, Grotius formulated the idea of *mare liberum* or the 'free seas', in direct response to a legal dispute involving the Dutch East India Company (VOC).[102] The VOC had captured a Portuguese ship which led to a legal and political dispute. Grotius attempted to justify the actions of the VOC, by developing the concept of 'free seas' and 'free trade'. He argued that every nation has the right to freely travel to other nations, and to trade with it. Furthermore, the

[97] Ibid. 16-18
[98] Ibid. 20-21
[99] Ibid. 21-23
[100] Ibid. 29
[101] Ibid. 30
[102] Martine Van Ittersum, 'Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615' (Brill Academic, 2005) xix-xxii

sea must be seen as common property - not subject to exclusive sovereign claims.[103] Development of this jurisprudence, was in line with the VOC's political need to interfere with the Portuguese monopoly over sea routes.[104]

Chimni uses a similar method of investigating colonial history to prove a link between the development of legal principles of MIL and the needs of a colonial empire. He explains how the British developed the idea of extra-territoriality - which is now a well-defined concept of MIL - in the interest of the British empire during their colonial encounter in semi-colonies like Japan, China, and the Ottoman Empire.[105] The British had a unique relationship with these semi-colonies in that they were not stripped of their sovereignty in entirety, as would be the case with a typical colony. Instead, these semi-colonies were penetrated by imperial capital, trade and political influence, but maintained juridical independence.[106] The semi-sovereign status of these states meant the British could not use territorial jurisdiction – as they could in their colonies – to impose a lopsided legal regime to maintain an oppressive, extractive trade relationship. To circumvent this situation, and to maintain their exploitative economic relation with the semi-colonies, a form of legal imperialism[107] was introduced through capitulation agreements[108] that allowed for the invention of the principle of extra-territorial jurisdiction as

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[103] Peter Borschberg, 'Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)' IILJ Working Paper 2005/14, History and Theory of International Law Series, 9-15

[104] Ibid. 33-34

[105] B.S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' (2022) 35 Leiden Journal of International Law 29, 31

[106] 'Semi-Colonies', Oxford Reference - Dictionary in Sociology (Oxford University Press, 2025) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110810105822954> Accessed: 30 April 2025

[107] "Legal imperialism is the extension of a state's legal authority into another state and limitation of legal authority of the target state over issues that may affect people, commercial interest, and security of the imperial state. Extraterritoriality was quintessential legal imperialism; it extended Western legal authority into non-Western territories and limited non-Western legal authority over Western foreigners and their commercial interest."
Turan Kayaoğlu, 'Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China' (Cambridge University Press, 2010) 6

[108] "The term capitulations in international law refers to the capitulations regime: that is, the system of treaties concluded by certain States which conferred the privilege of extraterritorial jurisdiction within their boundaries on the subjects of another State."
Christine Bell, 'Oxford Public International Law - Capitulations' (July 2009, Max Planck Encyclopedia of International Law) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e260#:~:text=1%20The%20term%20capitulations%20in,the%20subjects%20of%20another%20State.> Accessed: 30 April 2025

an exception to the rule of territorial jurisdiction.[109] This invention was a necessity for the colonial powers, so they could provide a conducive legal environment for their private companies to operate in the semi-colonies.

(ii) Continuity of Legal Imperialism in a Neo-Colonial World

Anghie moves forward in history and talks about how the interests of colonialism informed the nature, structure and function of international institutions that were created in the 20th century.[110] In this context, he refers to the mandate system which was devised to provide internationally supervised protection for the peoples of Africa, Ottoman Empire and the Middle East, who were previously controlled by Germany. This system was created because these peoples and nations were deemed incapable of self-government.[111] In simple terms, some states from the League of Nations (LON), were mandated to administer these territories on behalf of the LON.[112] Anghie explains that, in essence, this system was created so that colonial structure of economic exploitation in these regions could be maintained. The mandate system was packaged in a way that it appeared to be liberating the non-Europeans from the clutches of an imperial power, i.e., Germany. But the system actually sought to protect and preserve the exploitative economic relationship between the Europeans and Non-Europeans.[113] The mandate system was conceptualised and operationalised through the League of Nations, and this fact immediately raises questions about the legitimacy and character of an International Institution.

[109] B.S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' (2022) 35 Leiden Journal of International Law 29 31
[110] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 119
[111] Ibid. 116
[112] Ibid. 141-143
[113] Ibid.

In the context of the mandate system, Anghie makes a critical point vis-à-vis the language employed by the European colonisers to justify their actions. At the very outset, Anghie explains that the imperial project was always connected to the economic gains that the colonial relationships gave to the European states and their companies.[114] He explains that the mandate system was established with the main purpose to promote the "well-being and development" of the dependent people. Unfortunately, this language was used to justify and mask the ugly truth about the economic exploitation of the non-Europeans.[115]

At this stage it is worth taking a brief detour in history, to understand how the political system of a colony was set up in a manner which maximised the economic gains that the coloniser and its affiliated companies received from the exploitation of the colonies and its people. The example of India as a British colony is studied extensively and best explains how an exploitative relationship was established by the colonisers, using legal imperialism. Habib would agree with Anghie when he finds that the European powers took up the colonial endeavour to find more resources and new markets to sustain the ever-growing need for profits of the industries.[116] In simple terms, the colonial endeavour was purported by the colonisers by conquering more lands and imposing their laws onto them, which established an exploitative economic relationship between India and Britain.[117] This how KN Chaudhari describes the 'Mercantile Age' of 18th century India, when the East India Company (EIC) *"established its political supremacy in the sub-continent and attempted to enforce an exclusively monopolistic trade between Britain and India."*[118] The British began their colonial project through military conquests, and followed that with legal imperialism, where they established laws and

[114] Ibid. 142-143
[115] Ibid.
[116] Irfan Habib, 'Capitalism in History' (1995) 23(7) Social Scientist 15
[117] Shashi Tharoor, 'Inglorious Empire: What the British Did to India' (Hurst Publication, 2017) 27
[118] K.N. Chaudhari, 'Foreign Trade and Balance of Payments (1757-1947)' in Irfan Habib, Dharma Kumar, and Tapan Raychaudhuri (eds.), 'The Cambridge Economic History of India Vol.2', (Cambridge University Press, 1983)

implemented unique policies, which were geared towards creating an exploitative and monopolistic trade relation between India and Britain.[119] Through a form of legal imperialism, the British were able to extract cheap raw materials for manufacturing industries in Britain, and then also use India as a market for the goods produced by those industries. The most important step in establishing this monopolistic relationship, was the systemic destruction of local industries, which were far superior to the British manufacturers at a time before the colonisers arrived.[120] The key argument to be understood from both Tharoor's and Chaudhari's analysis is that, the oppressive, and monopolistic relationship between the coloniser and the colony is always solidified through legal and political institutions. Whenever a coloniser introduced laws in their colonies, it was geared towards the interests of capital, thereby the interests of the coloniser state and its companies. Dadabhai Naraoji's examination of the impact specific trade policies and laws had on India and its increasing poverty, shows a direct link to the British prioritising the interests and profits of their industries.[121] The inference from Naraoji's analysis is similar to Chaudhari's. It is that after the plunder of colonies, or even semi-colonies, operated smoothly, because the colonisers solidified this oppressive economic relationship by imbedding their ideas of law, and legal institutional frameworks in the colonies. Even in semi-colonies, where the latter had some level of autonomy, colonial powers took their laws and courts with them and imposed their ideas of justice onto the native population, which were geared towards the interests of the colonial endeavour.[122]

Returning to Anghie's discussion on the mandate system and its purpose of promoting the "well-being and development", the key point he emphasises is that the language of 'development' was employed to create and justify a unique legal regime that implicitly,

[119] Shashi Tharoor, 'Inglorious Empire: What the British Did to India' (Hurst Publication, 2017) 28-30
[120] Ibid. 29-33
[121] Dadabhai Naoroji, 'Poverty and Un-British Rule in India' (Swan Sonnenschein & Co., 1901) 203-219
[122] B.S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective', Leiden Journal of International Law (2022) 29-31

protected the economic interests of the colonisers.[123] The historically exploitative relationship, similar to one in India as described above, had to be sustained, but could not use an explicit regime of legal imperialism. Therefore, this time, the mandate system used the language of economic progress, and development, which appeared to be technical and neutral but was a vessel to further the interests of the colonial regime.[124] The mandate system laid the foundation for the language of development to be presented as neutral and an objective good. The mandate system was also fundamental to the creation of a unique 'science of development' which would later become the 'development economics' that defined the nature and functions of various International Financial Institutions (IFIs). Anghie's analysis shows that the contemporary concept of 'development economics' within IFIs is not neutral. Instead, it is a continuation of colonial governance through international law and institutional expertise.[125] What appears today as neutral, scientific, technical, and apolitical policy advice, is actually the legal and intellectual descendant of colonial practices designed to discipline and transform non-European societies.[126] In essence, the spirit of the mandate system, i.e., promoting colonial interests but packaging it as 'development and well-being' of the non-Europeans, has continued even in the time after the Second World War (WWII). Anghie illustrates this fact, by going back in time to the Bretton Woods Conference, 1944 which led to the establishment of the two major IFIs, i.e., the World Bank and the International Monetary Fund (IMF) and also laid the foundation for the creation of the General Agreement on Trade and Tarriff (GATT) which would later birth the World Trade Organisation (WTO).[127] This conference was led by Harry Dexter White and John Maynard Keynes of the USA and the UK, respectively. On paper, the agenda of the conference was to establish a new economic order for the post-war era. But the USA had an

[123] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 158
[124] Ibid. 264
[125] Ibid.
[126] Ibid. 261-264
[127] Ibid. 258

explicit intention to become the primary controlling authority of this new economic order. Steill, who gives a detailed account of what exactly materialised at the conference, explains that even though the stated purpose of the conference seemed utilitarian, there were several hidden agendas that White wanted to pursue. For instance, for White, the IMF was meant to *"reduce, dramatically and perpetually, barriers to international trade and the associated capital flows."*[128] In simple terms, the conference was a stepping stone towards rapid globalisation which would allow free flow of capital across states and new markets. Anghie explains that this motive of the IMF – to promote free flow of capital and globalisation of the free market - was shared by the other two IFIs, i.e., the World Bank and the WTO as well.[129] Unfortunately, the project of globalisation was tailored to the needs of the developed global north, the former colonial powers, and was an extension of the colonial order. Anghie concludes that, as a result, globalisation has not yielded positive results for most of the developing world in the global south. Instead, the push for globalisation bears resemblance with the kind of economic relationship that was perpetuated first through legal imperialism and then the mandate system.[130]

It is worth substantiating Anghie's point with David Held's analysis on how the idea of globalisation has been critiqued. First, Held explains that the process of globalisation was a strategic ideological construction to push specific interests, which were tied to the neo-liberal project of the time, to create a global free market.[131] The need for globalisation, and a global free market had a direct co-relation with the imperial interests of the western capitalist class.[132] From a historical point of view, there is a sense of continuity here, which is reflected in Marxist

[128] Benn Steill, 'The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order' (Princeton University Press, 2014) 152
[129] Antony Anghie, Sovereignty, Imperialism, and International Law (Cambridge University Press, 2005) 246
[130] Ibid. 268-269
[131] David Held and Anthony McGrew, 'The Great Globalization Debate: An Introduction' in David Held and Anthony McGrew (eds.), 'The Global Transformations Reader An Introduction to the Globalization Debate' (2nd Ed., Polity Publications, 2003) 4-5
[132] Ibid. 5

ontology. The logic here is that capitalism – by its very nature - is inherently expansionist and driven by the need to exploit new markets in order to sustain profits. In this view, capitalism that emerged in Europe, during the colonial era, could only survive by constantly extending the reach of capitalist social relations across the globe. The formation of the MIL order is therefore seen as a neo-colonial process through which western capitalist powers tried to expand their reach, find new markets and exploit them for profit.[133] Second, Held emphasised that the steady increase in globalisation in the post-war period is directly linked to the growth in economic inequalities between the global north and the global south. The former colonisers, who are dubbed as the global north have benefited exponentially from the advent of globalisation, as compared to the global south.[134] Another adverse consequence of globalisation is best explained by Milanovic, in his seminal study on the increasing gap between the 'haves' and 'have nots'. In his study, Milanovic explains that the colonial encounter widened the income equality between countries, and with the advent of globalisation and the neo-liberal order around the 1980s, the wealth inequality within countries grow significantly.[135] Milanovic busts the liberal myth that, globalisation led to a positive outcome by shrinking income equality between countries.[136] While, this may be true, Milanovic explains that this is only a half-truth. He gives a clearer picture by explaining that even though some countries in the global south experienced economic up-turn because of globalisation, it also led to an increase in inequality within countries. Essentially, the inequality gap between the 'haves' (the rich) and the 'have nots' (the poor) increased both in the global south and the global north.[137] In sum, Milanovic provided empirical evidence to the famous adage, 'the rich get richer, and poor get poorer'.[138]

[133] Ibid. 5; *see also* Kees Van der Pijl, 'Transnational Classes and International Relations' (Routledge, 1999)
[134] David Held and Anthony McGrew, 'Globalization/Anti-Globalization: Beyond the Great Divide' (2nd Ed., Polity Publications, 2008) 119-121
[135] Branko Milanovic, 'The Three Eras of Global Inequality, 1820–2020 with the Focus on the Past Thirty Years' (2024) 177 World Development 1, 16-18
[136] Ibid.
[137] Ibid.
[138] Percy Bysshe Shelley, 'A Defence of Poetry' (1821, Poetry Foundation)

In simple terms, the project of globalisation which was pushed first by the IFIs was not neutral in intent or outcome. Instead, globalisation represented an attempt to sustain the logic of capitalism and its inherent need for expansion, and in turn also preserve the long-established colonial relationship between Europe and the non-Europeans. First, the colonial empires employed a method of legal imperialism to establish an exploitative relationship. Second, the mandate system used the language of 'development' as a guise to sustain an exploitative relationship. Finally, the project of globalisation was certainly not neutral as it was presented to be. Instead, it provided a cover for the post-war effort to expand the reach of capital and sustain the economic divide between the global north and the global south. In this context, recalling the discussions on the historical evolution of HRB, we find that globalisation is seen as major culprit in various issues that the discipline seeks to tackle. Ruggie admits that the human rights issues which are caused by deep and complex supply chains are so because of rapid globalisation.[139] But he does not acknowledge the complicated relationship of globalisation with the above stated neo-colonial context. The HRB scholarship is broadly guilty of similar infractions, where the colonial context is ignored from the broader discussion, and this point will be further illustrated in the consequent chapter.

[139] John Ruggie, 'Just Business: Multinational Corporations and Human Rights' (W.W. Norton Company, 2013) 11

V. LESSONS FROM THE TWAIL PERSPECTIVE FOR THE HRB SCHOLARSHIP

This final chapter will juxtapose the TWAIL perspective and the historical evolution of the HRB scholarship. In doing so, this chapter will focus on some flaws in the mainstream HRB scholarship's narrative and then point out what direction the discipline should move towards in the future.

(i) The Lost History of HRB

In the preceding chapters, to trace the history of HRB scholarship, the simple method used was to take note of and analyse how established scholars like Ruggie, Wettstein, McCorquodale, Deva etc. narrated the evolution and historical development of HRB as a discipline. From that narration, the material events that shaped HRB and its legal issues, began around the 1970s, but this is simply not true, when we consider the colonial history of MIL, as explained by TWAIL scholars. The most critical takeaway that emerged from the TWAIL perspective is that the mainstream narration of the history of MIL, does not acknowledge the colonial roots of the discipline. The masking of a colonial past makes MIL as a discipline appear neutral, when that is not the case. The mainstream HRB scholarship, when narrating the history of its discipline, is guilty of the same sin.

When this thesis recounted the mainstream narration of HRB history, the key events analysed were from the post-war era. But if one were to use the TWAIL method of analysing colonial history to understand the problem of HRB, we will find that corporate abuse of human rights is not a modern-day problem, but a historic issue. Without understanding the centuries long history of corporations abusing human rights of the non-Europeans, we cannot comprehend the modern-day problems of HRB. Recalling our discussion on how corporations have become

richer and stronger than most countries in the world, we find that this is not a modern phenomenon. Chimni explains that the colonial project of all major European powers was realised through corporations - such as the Dutch East India Company, the British East India Company, etc. - which had powers similar to many nation-states of the time.[140] These MNCs of the time, committed human rights excesses to further their business interests on a regular basis. Hochschild recounts the excessed committed by Belgium in Congo, to extract rubber from the region. The Belgians tortured their slaves with *chicotte*, a type of whip and beating were often fatal.[141] The stories of Léon Fiévez – the Commissioner of Équateur in the Congo free state - are beyond horrifying. He requisitioned food from natives and burned their crops to cause a famine. He also carried out mass murder and extermination of any local resistance to the Belgians, to assert political dominance. Any villages that were unwilling or unable to supply rubber and food, were looted and burned.[142] He had also instructed his soldiers to not waste bullets on the natives, and instead severe their heads or hands and show them as proof of a kill.[143] But Fiévez's techniques worked well for the Belgian industries, as he was able to "cut costs" through his "innovative" methods and "efficiently" produce the highest quantity of rubber out of all the regions.[144] These gruesome human rights violations were geared towards an economic goal, and that is the harsh reality of Congo even today. Kara explains that today, the cobalt mining in Congo bears similarity to the slave-trading which was prevalent a few centuries prior.[145] Veronika Kusumaryati explains how Freeport, a US-based mining company, is operating in West Papua, Indonesia and using the colonial logic to further its economic

[140] B.S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' (2022) 35 Leiden Journal of International Law 29, 36
[141] Adam Hochschild, 'King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa' (Houghton Mifflin Company, 1999) 138-140
[142] Ibid. 253-258
[143] Ibid. 84
[144] Arthur Conan Doyle, 'The Crime of the Congo' (Gutenberg Project, 1909) 48-49
[145] Siddharth Kara, 'Book Excerpt: It is the Blood of the Congo that is Powering our Tech Boom' (19 August 2023, Down to Earth) <https://www.downtoearth.org.in/mining/book-excerpt-it-is-the-blood-of-the-congo-that-is-powering-our-tech-boom-91258> Accessed: 11 June 2025

interests. Through legal instruments like contracts of work, Freeport gained sovereign-like powers over people of West Papua. Freeport's is committing innumerable human rights abuses against Papuans and is justifying their operations using the language of "economic progress" and "development".[146]

Ghana is another example of how colonial-era extraction and exploitation has evolved into modern neocolonial exploitation. During British rule, cocoa, gold, were extracted primarily for the European markets, and human rights abuses were a mainstay of these extraction operations. Ntewusu argues that Ghana's colonial and post-colonial experiences share a common thread, i.e., human rights abuses committed to facilitate resource extraction in the gold mining industry.[147] Ajiola makes a similar argument, by showing that even today cocoa production is regulated by the Cocoa Marketing Board, a colonial institution set up, by the British, as a 'weapon of economic exploitation' that impoverished farmers.[148] The harsh reality is that empirical evidence points to the simple fact that the human rights issues – like child labour, forced labour, torture etc. – that underpinned the British colonial extraction, persist even today and the fair revenue remains elusive for the natives, so much so that the economic exploitation is far worse, today than ever before.[149] Fakhri argues that during the colonial era, European powers established extractive economic structures and supply chains that made these colonies dependent on the export of 'primary commodities' such as agricultural goods, and raw materials. This system has persisted even in neo-colonial times, and prevented countries from

[146] Veronika Kusumaryati, 'Freeport and the States: Politics of Corporations and Contemporary Colonialism in West Papua' (2021) 63(4) Comparative Studies in Society and History 881

[147] Samuel A. Ntewusu, 'Colonialism, Neocolonialism and Gold Mining in Ghana: A Social Justice and Common Good Perspective' (2012, Pontifical Academy of Social Sciences) < https://www.pass.va/en/publications/studia-selecta/studia_selecta_10_pass/ntewusu.html> Accessed: 14 June 2025

[148] Felix Ajiola, 'Colonial Capitalism and the Structure of the Nigerian Cocoa Marketing Board, 1947-1960' (2020) 26(1) Lagos Notes and Record 71, 71-73

[149] Marta Furlan, 'Forced Labor and Child Labor in Ghana's Cocoa Sector' (Free The Slaves, 2024); *see also* Michael Ehis Odijie, 'Manifestations of Neo-Colonialism in the Cocoa Sector of West Africa' (26 June 2023, Viewpoints) <https://blog.g20interfaith.org/2023/06/26/manifestations-of-neo-colonialism-in-the-cocoa-sector-of-west-africa/> Accessed: 14 June 2025

diversifying their economies, making them dependent on primary commodity trade, even for subsistence. These colonial-era structures persist under the guise of "free trade," as global south countries remain chained to unequal trade relationships, reliant on volatile commodity markets.[150]

There are countless other examples of countries that are still stuck in the same exploitative economic relationships that were the feature of the colonial era. An entire thesis can be dedicated to that research, but the key takeaway for us is that the colonial LOC and its interests are being pursued and justified under the guise of “free trade”, “globalisation”, “economic growth" etc. Anghie’s point about the continuity of colonial structures is true for the HRB scholarship. Therefore, it is prudent that research is conducted into these issues, and these conversations must be an integral part of the HRB scholarship moving forward.

(ii) Moving towards an Ideological Struggle

The HRB scholarship across the third and fourth generation was focused on answering the key legal questions of the discipline. Unfortunately, there are two key problems with this approach. First, the HRB scholarship has not acknowledged the long colonial history of human rights abuses committed by corporations, as illustrated in the preceding section. The legal questions that were framed by third and fourth generation scholarship, were based on the modern history of HRB that began in the 1970s, according to the mainstream narrative. This omission of centuries long history of HRB in unacceptable. Only after a thorough evaluation of the true history of HRB that dates back to colonial times, can HRB scholarship frame the correct legal questions to solve a human rights problems.

[150] Michael Fakhri, ‘A History of Food Security and Agriculture in International Trade Law, 1945–2017’ (2020) New Voices and Perspectives in International Economic Law 55, 57-62

Second, as a result of not acknowledging the colonial history of HRB, the mainstream focuses on solving legal questions, when HRB is more than just a tussle between global business laws and IHRL. Recalling our discussion on the intimate relationship of colonialism and the Logic of Capital (LOC), it is noticed that this relationship is not just prevalent during colonial times.[151] Anghie's analysis on the continuity of colonial interest being pursued through the language of development provides one of the most important conclusions of this thesis, i.e., HRB is not just a legal problem but an ideological tussle between the LOC and human rights. One of the latest examples of this tussle is the Omnibus package of the European Commission (EC). In 2024, the EU passed the Corporate Sustainability Due Diligence Directive (CSDDD), which aimed to ensure companies identify, prevent, and remedy adverse human rights and environmental impacts across global value chains.[152] In February 2025, the EC launched the so-called Omnibus Package, in an attempt to roll back some of the obligations that the Directive would impose on companies.[153] The package rolled back mandatory due diligence obligations of corporations and restricted it to direct suppliers. Therefore, corporations are absolved of any human rights obligations vis-à-vis violations deeper in their supply chain, which is precisely where the most grave violations take place. Furthermore, the package removes civil liability of corporations in cases of human rights violations.[154] The CSDDD aimed to create direct legal obligations for corporations, which was a step in the right direction, but the Omnibus package is setback for the human rights paradigm. The most interesting part about this ordeal is the justification given by the EC for cutting back on human rights protections. The EC emphasised that the package was aimed to "foster a favourable business environment" so that Europe could "boost competitiveness and unleash growth". The European Union (EU) is "recalibrating some

[151] Irfan Habib, 'Capitalism in History' (1995) 23(7) Social Scientist 15, 15-17
[152] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 OJ L
[153] 'Omnibus Package' (1 April 2025, European Commission) <https://finance.ec.europa.eu/news/omnibus-package-2025-04-01_en> Accessed: 14 June 2025
[154] Ibid.

EU rules in a growth-friendly manner" which will help achieve policy goals in a more "cost-effective manner".[155] This language employed by the EC sounds familiar to what Anghie called the language of 'development'. In the previous section, when the continuity of exploitative economic relationship between the global south and the global north is illustrated, the evidence also points to the fact that those relationships are justified through modern LOC expressed through the language of "development", "free trade", "economic growth" and other related ideas.

These observations mean that the HRB scholarship cannot ignore the simple fact that the discipline is more than just a legal tussle, it is also an ideological struggle. The Omnibus package creates a legal framework which undermines the human rights effort, but the tools used to do so are not just legal in nature. The package employed normative ideas and used the LOC and its language to benefit the corporations, and the capitalist class of the global north. The TWAIL critique of MIL and its methods will be instrumental in furthering the human rights cause against the LOC. Several scholars recognise that HRB is not just a legal issue, but a broader ideological struggle. For instance, Aragão and Roland explain that the hegemony of the neoliberal capitalism, as an ideology, is embedded in MIL frameworks, and also in the nature of various IFIs. This hegemony has historically furthered the interests of large MNCs and continues to do so. In response, they believe that a HRB Treaty would help build a normative framework that is positioned as a counter-hegemony to the LOC.[156] Similarly, Leader says that *"(...) there is a need to remedy the policy incoherence between current modes of international governance in matters of trade, finance and investment on the one hand, and our norms and standards for labour, the environment, human rights, equality and sustainability*

[155] 'Questions and Answers on Simplification Omnibus I and II' (26 February 2025, The European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_25_615> Accessed: 21 May 2025

[156] Daniel M. Aragao and Manoela C. Roland, 'The Need for a Treaty: Expectations on Counter-Hegemony and the Role of Civil Society' in Surya Deva and David Bilchitz (eds.), 'Building a Treaty on Business and Human Rights: Context and Contours' (Cambridge University Press, 2017) 152-153

on the other."[157] For Leader coherence through human rights can be achieved in two ways. First, the HRB treaty would seek to incorporate human rights values and language into various legal frameworks governing business activities, such as corporate, investment, and trade laws. However, it does so without significantly altering the foundational principles of these laws. The integration is superficial, allowing pre-existing priorities - like shareholder interests - to remain dominant. Consequently, human rights considerations may be acknowledged but are often secondary to business objectives.[158] Second, he advocates for a stricter model which would require fundamental restructuring of legal frameworks to prioritize human rights norms consistently across all areas of business law. It calls for a re-evaluation of core principles, such as redefining directors' fiduciary duties to balance profit motives with human rights obligations. This approach ensures that human rights are not just an add-on but are central to business decision-making processes.[159]

Leader, Aragão and Roland have a similar view of the human rights paradigm, i.e., it can be an alternative to the hegemony of the LOC, that defines the current world order. Although, some scholars like Baxi would argue that IHRL and its system accommodates and pursues the interests of the LOC. The perspective put forth by Leader, Aragão and Roland does not paint the reality of the human rights paradigm. Instead, their perspective is an expectation from the human rights paradigm as it has the potential to present itself as a 'utopia' or 'counter-hegemony' to the current neo-liberal world order. In this context, reference must be made to the second model of coherence proposed by Leader, because that it offers a roadmap to breaking the hegemony of LOC through human rights. Leader's second model seeks to fundamentally restructure the contours of global business laws in all realms, be it trade, investment, finance,

[157] Sheldon Leader, 'Coherence, Mutual Assurance and the Rationale for a Treaty' in Surya Deva and David Bilchitz (eds.), 'Building a Treaty on Business and Human Rights: Context and Contours' (Cambridge University Press, 2017) 79
[158] Ibid. 80
[159] Ibid. 81

etc. By restructuring these legal regimes, he wants human rights to become the priority as against the LOC and business interests. Leader proposes an ambitious task, but one could argue that it can be realised because the foundation for this has been laid down by TWAIL scholars. The first step towards restructuring any legal regime is to question it and break down its foundations. The TWAIL scholarship has problematised fundamental concepts of MIL including sovereignty, free trade, jurisdiction etc. Using the TWAIL method of analysing historical context, the fundamental ideas, norms, and principles of global business laws can be problematised and restructured to prioritise human rights. But to achieve that, the HRB scholarship must make colonialism an important part of the conversation and expand the scope of the discipline beyond just legal issues, and turn to historical, normative, and ideological debates.

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