

Out with the ‘Old’, in with the ‘New’: Challenging Dominant Regulatory Approaches in the Field of Human Rights

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Abstract

Mainstream doctrinal and theoretical thinking in international human rights scholarship still adheres to ‘old governance’ regulatory approaches. This is despite the reality of transnational corporations’ (TNCs) increasing involvement in ‘new governance’ architectures in the field of international human rights as regulatory actors and agents of change. ‘Old governance’ approaches are distinguished by statist, positivist regulatory dispositions: they typically position TNCs as violators of human rights; assume a hierarchical relationship between state and society; couple regulation with governments while presuming the state to be the ideal regulator; and, consequently, emphasize power and legal accountability as normative concerns and predominant vehicles for social change. The present article critically reflects on the conceptual, practical and normative implications of this ‘old governance’ bias for contemporary thinking about corporations and human rights under conditions of economic globalization. On the basis of these analyses, the article takes first steps on the path to further theoretical development of a new governance theory for business and human rights. It does so by outlining the importance of new governance perspectives for better evaluating the role that corporate actors actually assume in the field, and what this may mean for these norms’ protection.

1 Introduction

‘[T]he world is a much more poly-centric place than it was in 1945 ...’, observed Philip Alston 15 years ago, writing about *Non-State Actors and Human Rights*.¹ ‘[S]he who

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¹ Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005) 3, at 4.

sees the world essentially through the prism of the “state” will be seeing a rather distorted image as we enter the twenty-first century’.²

Alston captures what was couched at the turn of the century as a paradigm shift in doctrinal thinking about human rights.³ According to this dominant narrative, the mounting power of non-state actors – particularly transnational corporations (TNCs) – and their increasing involvement in human rights violations, have laid down the challenge of ‘re-imagining . . . the nature of the human rights regime and the relationships among the different actors within it’.⁴

The act of ‘re-imagining’ in the context of business and human rights primarily demanded a departure from the classical statist paradigm underpinning international human rights law (IHRL) – and international law more broadly – so as to extend its purview to TNCs and recognize them as legal personalities. This departure would qualify TNCs as violators of IHRL, thereby making them accountable alongside sovereign states for human rights abuses.⁵ In fact, these narratives contend, it is only by overcoming existing doctrinal constraints and imposing hard legal human rights obligations on TNCs that contemporary aspirations to ensure broader accountability can be effectively met.⁶

IHRL scholars’ and practitioners’ growing attention to TNCs, and their corresponding efforts to address the challenges posed to human rights by corporate actors, have thus often been couched in paradigm-shifting rhetoric. This rhetoric characterizes the main legal instruments developed under the purview of IHRL to cope with TNCs and the doctrinal commentary thereon; and primarily involves the increasing backpedalling from a tapered articulation of human rights as individual protections from the abusive power of *states*. And yet, such efforts to depart from classical statist understandings of IHRL have not been accompanied by extensive attempts from within the international legal community to interrogate whether the broader *regulatory approach* of IHRL is still relevant for this regime under conditions of economic globalization. IHRL scholars and practitioners continuously adhere, in other words, to international legal positivist, state-centric regulatory dispositions, that are emblematic of international legal jurisprudence more broadly.

This article undertakes a deconstructive task in critically reflecting on the dual statist and legal positivist prisms of international human rights practice and scholarship, and

² *Ibid.*

³ See, e.g., A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 1.

⁴ Alston, *supra* note 1, at 4; see also Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005) 37. TNCs became a subject of concern in international law several decades earlier in the context of their involvement in foreign direct investments. Around the turn of the century, international legal focus was increasingly directed towards their involvement in human rights violations such as the role of Royal Dutch Shell in the torture and killing of Nigerian protestors (see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)), or the involvement of apparel companies in employing workers in sweatshops (see, e.g., Cavanagh, ‘The Global Resistance to Sweatshops’, in A. Ross (ed.), *No Sweat: Fashion, Free Trade, and the Rights of Garment Workers* (1997) 39).

⁵ Rodley, ‘Non-State Actors and Human Rights’, in S. Sheeran and Sir N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) 523, at 523; Clapham, *supra* note 3, at 1.

⁶ Alston, *supra* note 1, at 6.

their implications for contemporary thinking about human rights norms under conditions of economic globalization. The article begins by first analysing what it terms the 'old governance' structure of prominent legal tools devised or enlisted in recent decades to address corporate involvement in human rights violations (Section 2). This analysis centres on the regulatory assumptions of the proposed Business and Human Rights Treaty, the Alien Tort Statute and the UN Guiding Principles on Business and Human Rights. As will be argued, the governance approach underlying these legal tools has certain characteristic features. This approach conceptualizes TNCs predominantly as *violators* of human rights and thus as regulatory *objects*; it frames the relationship between state and society as hierarchical; and perceives positive law as the essential vehicle for instigating social change.⁷ These legal instruments thus embody a certain vision of the relationships between TNCs and human rights and between TNCs and the state; a vision that considers both sets of relationships as one-dimensional and dialectic.

These three regulatory tools do not reflect, however, the full landscape of regulatory measures that have developed in the field of human rights in recent decades. In parallel to these, TNCs also became increasingly involved in the field of human rights via their participation in private transnational regulatory regimes. Employing the term 'new governance' to describe these regimes, a corresponding growing body of literature in political science has theorized TNCs' involvement therein as examples of TNCs' *regulatory* functions and roles. New governance theories, introduced and discussed in the latter half of Section 2, offer a different lens for understanding what regulation is and what practices and actors it involves; how control is exercised in contemporary societies; and how various configurations of ordering bring about social change in diverse areas of human activity. Their regulatory lens thus accounts for the fact that TNCs, despite their private character, often assume *public* functions and wield public power. In the field of human rights, much like states, they therefore assume a complex role as both violators *and* norm-generators and enforcers.

The extant reality of TNCs' complex involvement in the field of human rights, and the conceptual framework offered by new governance approaches to understand these roles as *regulatory* ones, have not, however, always been seriously recognized, acknowledged and engaged with by international human rights scholars (Section 3). This lack of engagement is manifest in three interdependent scholarly domains. First, 'traditional' doctrinal scholarship often marginalizes the issue of business and human rights altogether, to focus almost exclusively on states and international institutions. Second, doctrinal commentary and debates which do focus on business and human rights as a specific sub-field of IHRL do not rupture the boundaries of state-centric, legal positivist thinking either, but rather direct their predominant attention to TNCs as *objects* of regulatory control. Underpinning this focus is often a normative standpoint which either expresses scepticism towards the actual potential of TNCs

⁷ Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', 54 *Current Legal Problems* (2001) 103; Levi-Faur, 'Regulation and Regulatory Governance', in D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (2011) 3.

to effectively observe their own conduct as regards human rights norms; or, alternatively, ultimately considers the private character of TNCs as fundamentally different from that of the state as an inherently public entity. Finally, even human rights theorists – whose main thrust is to move beyond the restricted ambits of doctrinal studies, to examine more broadly and principally the meaning and rationale of human rights – often remain tethered to positivist models of law and power in which the state continues to be the central reference point. International human rights scholarship is still very much eclipsed, therefore, by an old governance bias that impedes the development of a full-fledged theory of business and human rights.

Taken together, these analyses suggest the merits of considering the potential of pursuing a new governance approach to human rights as a lens for better understanding and critically reflecting on TNCs' part in the generation, institutionalization and enforcement of human rights norms. A preliminary discussion on the value of such an approach is therefore launched in Section 4, as a modest first step on the path to further theoretical development of a new governance theory for business and human rights. In a nutshell, a new governance prism would permit moving away from the dichotomous discourse of whether corporate actors are 'good' or 'bad' for human rights, which naturally flows from old governance sensibilities; and expands the scope of exploratory avenues and normative thinking in the field, so as to better evaluate both the opportunities and perils afforded by decentralized regulatory architectures. It accordingly facilitates a reappraisal of the structure and potential of international law to respond to the involvement of TNCs in the field of human rights, not only as violators but also as regulatory agents.⁸

2 Two Regulatory Paradigms: Old and New Governance

A *The Old*

As TNCs became the 'driving agents of the global economy',⁹ their growing influence on social spheres beyond the economic became an increasing cause for concern for states, human rights lawyers, activists, non-governmental organizations (NGOs), workers and consumers worldwide.¹⁰ This concern triggered increasing civil society activism,¹¹ transnational litigation¹² and, importantly, the promulgation of legal frameworks targeted at 'subjecting business to the mandate of international human rights law'.¹³

⁸ This article's research agenda thus corresponds with what Deva *et al.*, 'Editorial, Business and Human Rights Scholarship: Past Trends and Future Directions', 4 *Business and Human Rights Journal (BHRJ)* (2019) 201, at 208, identify as 'the political role of corporations'.

⁹ Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', 44 *Virginia Journal of International Law* (2004) 931, at 933.

¹⁰ *Ibid.*, at 934.

¹¹ J. A. Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006), at 7–29.

¹² Primarily via the U.S Alien Tort Statute, 28 U.S.C. § 1350.

¹³ Deva and Bilchitz, 'The Human Rights Obligations of Business: A Critical Framework for the Future', in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect?* (2013) 1, at 2.

The need to develop such frameworks palpably arose out of the limited ability of the traditional model of human rights to address the problem of TNCs. Not only are corporate actors disregarded by international human rights treaties as duty-bearers of legal obligations;¹⁴ but also, this regime's 'lack of transnationalization'¹⁵ effectively means that TNCs can easily 'avoid national regulation through their mobility and flexibility of structure and organisation'.¹⁶ The need to address the role of TNCs as violators of human rights in international law hence primarily called for a departure from the classical statist, legal positivist paradigm underpinning it.

Attempts at this departure bred the creation or enlisting of several legal instruments to specifically target the relationship between TNCs and human rights under the purview of IHRL. But whilst these recognize the need to diverge from a limited understanding of human rights exclusively as individual protections from the abusive powers of *states*, they are still predicated on 'old governance' regulatory structures which do not question the adequacy of IHRL's regulatory approach in the context of dealing with TNCs. These legal tools thus continuously position TNCs almost exclusively as *violators* of human rights; assume a hierarchy between state and society; conceptually pair regulation with governments and legal enforcement; and view positive 'hard' legal obligations as the essential vehicle for instigating social change, and the state as the most competent and normatively desirable regulatory actor.

The most recent response to TNCs in IHRL, driven by a number of states and strongly supported by civil society,¹⁷ was launched by the Human Rights Council in 2014 in the form of a resolution calling for the development of 'an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.¹⁸ The resulting Draft Business and Human Rights Treaty (hereinafter 'Draft Treaty') was preceded by a previous attempt to internationally regulate corporate involvement in human rights violation in the early 2000s, namely, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human

¹⁴ Both the International Covenant on Civil and Political Rights 1966, 999 UNTS 171, and the International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 address exclusively states. The Human Rights Treaty Bodies accordingly take the view that it is the state's role to protect individuals from the violation of their rights by private entities. See references to The Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8; and Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999); The Right to Adequate Food (Art 11), UN Doc E/C.12/1999/5, para. 15, brought in De Schutter, 'Towards a New Treaty on Business and Human Rights', 1 *BHRJ* (2015) 41, at 44.

¹⁵ Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts', 29 *European Journal of International Law (EJIL)* (2018) 581, at 583.

¹⁶ Zerk, *supra* note 11, at 1.

¹⁷ See the Treaty Alliance, available at www.treatymovement.com/about-us (last visited 9 October 2020).

¹⁸ UN Human Rights Council, Resolution on Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (Bolivia (Plurinational State of), Cuba, Ecuador, South Africa, Venezuela (Bolivarian Republic of): draft resolution, A/HRC/26/L.22/Rev.1, 25 June 2014, para. 1 (hereinafter "TNC Resolution").

Rights (hereinafter ‘Draft Norms’).¹⁹ Yet, despite ‘[bearing] in mind the progressive development of this issue’,²⁰ the regulatory approach of the Draft Treaty and of its supporters does not progress beyond that of its earlier counterpart, and remains tethered to a dual statist and legal positivist old governance prism.

Like the Draft Norms, the overall aim of the Draft Treaty is to establish a ‘specialized’ ‘hard’ legal framework that would ‘[articulate] and [specify] States’ human rights obligations . . . in relation to the complex realm of business and human rights . . .’, so as to remedy the lack of accountability of TNCs under international law.²¹ The Draft Treaty thus designates states as the primary duty-bearers with respect to the protection and promotion of human rights norms within their jurisdiction.²² In doing so, it remains faithful to the pre-existing hierarchical, state-oriented, regulatory regime in international law, according to which TNCs as *non-state* actors are subject to the coercive and central power of the state, and remain *objects* of regulatory control. This regulatory standpoint not only assumes the state to have the sole capacity to command-and-control, but also presupposes its effectiveness in doing so as the ideal and only legitimate regulator of international legal obligations.²³ Private corporations, on the

¹⁹ An earlier attempt to regulate corporate conduct in the early 1990s was the Draft United Nations Code of Conduct on Transnational Corporations. See the UN Code, UN Doc. E/1990/94, 12 June 1990. The UN Code, however, was not motivated by a concern for human rights per se, but rather framed within NIEO efforts to promote the right to development and global economic equality. Several years after its failure, the institutional locus of debate on TNCs was relocated to the UN Commission on Human Rights that worked to establish the Draft Norms. UN Sub-Commission on the Protection and Promotion of Human Rights, United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev (hereinafter ‘Draft Norms’). For a detailed history of international law’s influence on private corporations, see D. Lustig, *Veiled Power: International Law and the Private Corporation, 1886–1981* (2020); see also Bair, ‘Corporations at the United Nations: Echoes of the New International Economic Order?’, 6 *Humanity* (2015) 159; Deva, ‘Alternative Paths to a Business and Human Rights Treaty’, in J. L. Cernic and N. Carillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (2018) 13, at 15, describes these three attempts as three high tides ‘pushing for some kind of binding international norms for TNCs’.

²⁰ TNC Resolution, *supra* note 18.

²¹ Macchi, ‘A Treaty on Business and Human Rights: Problems and Prospects’, in J. L. Cernic and N. Carillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (2018) 63, 73. See also the Open-Ended Intergovernmental Working Group (OEIGWG) Chairmanship Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (16 July 2019), art. 2, available at <https://bit.ly/2NiMSZl> (hereinafter ‘OEIGWG Chairmanship Revised Draft’). In the context of the Draft Norms, see Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?’, 10 *ILSA Journal of International and Comparative Law* (2004) 493, at 500.

²² See OEIGWG Chairmanship Revised Draft, *supra* note 21, Preamble. See also Draft Norms, *supra* note 19, norms 17 and 19. The Draft Norms sought to impose direct non-voluntary duties on TNCs corresponding to those of states, and to subject them to direct monitoring by the United Nations. See *ibid.*, norm 16, and the commentary delineating possible enforcement mechanisms of the Norms directly by international bodies: Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003.

²³ Lustig, ‘Three Paradigms of Corporate Responsibility in International Law’, 12 *Journal of International Criminal Justice* (2014) 593. In the context of the Draft Treaty, this position is heavily supported by the ‘biggest civil society network involved in the debate’: Macchi, *supra* note 21, at 73.

other hand, are conceptualized almost exclusively as miscreant agents which require directing and constraining in the public interest. Their relationships with human rights and with the state, by this view, are one-dimensional and adversarial.

The same governance approach underlies jurisprudence under the US Alien Tort Statute (ATS) which was enlisted in recent decades to cope with the problems posed by TNCs, and considered by international human rights lawyers – at least up until the US Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.* – an important legal tool in confronting corporate involvement in human rights violations.²⁴ The ATS is often considered a decentred regulatory mechanism which provides individual right-bearers with a 'bottom-up claim to fairness' in the administration of IHRL.²⁵ Nevertheless, it primarily features old governance qualities in seeking to anchor corporate accountability in legally binding duties, and to subject TNCs to the coercive rule of American courts.²⁶ The legal strategy at its heart seeks to mobilize the American legal system in order to enforce international standards by policing and sanctioning corporate complicity in human rights violations in foreign states whereby the local law cannot be effectively evoked.²⁷ Like the Draft Treaty, then, ATS jurisprudence presupposes the state's significance as direct enforcer, and advocates 'hard' adversarial legal frameworks for effective regulation. It centres on TNCs' ethically questionable character as private actors, marking them as necessary objects of regulatory scrutiny.

Moreover, the adversarial nature of the claims set in motion by ATS plaintiffs, the accusatorial environment of the court and the legal procedure's ultimate goal of establishing TNCs' legal accountability all innately position TNCs and civil society on opposing sides. This characteristic is inherent in the legal mechanism of ATS claims as being based on a rights discourse. As such, ATS litigation entails a 'trump quality',²⁸ framed competitively as a zero-sum game in which one side's loss is the other's gain. The regulatory approach implicit in this legal mechanism is therefore not one which perceives governance as a learning process in which TNCs may engage in open communication to find mutually beneficial solutions. Rather, under the purview of this

²⁴ Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility', 38 *Law and Society Review* (2004) 635, at 638–639. The Alien Tort Statute, 28 U.S.C. § 1350, sought, at its genesis, to extend American jurisdiction and grant foreign citizens who were victims of piracy, violations of safe conduct passes and infringements on the rights of ambassadors subject-matter jurisdiction permitting them to bring civil suits provided they could obtain territorial jurisdiction over the defendant. See Branson, 'Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation', 9 *Santa Clara Journal of International Law* (2011) 227, at 230. In *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), the Supreme Court ultimately ruled that the ATS does not apply to corporate conduct occurring outside US territory, thus foreclosing most ATS litigation on corporate accountability. See Kontorovich, 'Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends', 89 *Notre Dame Law Review* (2014) 1671, at 1673.

²⁵ Broecker, 'Alien Tort Statute Litigation and Transnational Business Activity Investigating the Potential for a Bottom-Up Global Regulatory Regime' (ILJ Emerging Scholars Paper No. 16, 2010), at 66.

²⁶ Shamir, *supra* note 24, at 638.

²⁷ *Ibid.*, at 637.

²⁸ Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', 89 *Minnesota Law Review* (2004) 342, at 378–379.

legal instrument, TNCs' agency is limited to compliance, with no opportunity for dialogue or negotiation with various other societal actors.

The UN Guiding Principles on Business and Human Rights (UNGPs) endorsed by the Human Rights Council in 2011 reflect, to some extent, a different regulatory approach in the role that they ascribe to TNCs, at least procedurally.²⁹ The drafting process of the UNGPs, that is, was guided by the Special Representative to the Secretary-General's (SRSG) objective of securing the procedural engagement of a wide range of stakeholders in the UNGPs' formulation. In incorporating TNCs in the norm-generating process, the SRSG had thereby embraced, at least partially, their role as regulatory partners.³⁰ However, the substantive content of the UNGPs and the structure of obligations they support as a whole still reflect a hierarchical and centralized regulatory attitude which is aligned with the doctrinal framework of IHRL. Specifically, the UNGPs divide human rights obligations between states and corporate actors hierarchically, underscoring the role of governments as the exclusive regulators with legal *obligations* to protect human rights, whilst TNCs – as private 'economic organs'³¹ – merely hold subsidiary *responsibilities* to respect human rights norms.³² The regulatory premise of this framework perceives a tension between the traits of traditional public regulatory agents in international law on the one hand, and TNCs' private nature on the other. States, which both violate *and* regulate human rights norms, are therefore obliged to perform their latter role also in the context of corporate conduct. TNCs, however, are only evaluated in terms of their impact as private actors and are positioned exclusively as violators and regulatory objects.³³

The UNGPs do not account, therefore, for any de-facto *public* functions that TNCs already assume in the active shaping, diffusion or institutionalization of human rights norms *via* their economic endeavours.³⁴ According to this regulatory logic, in the

²⁹ The initiative of the UNGPs was led by John Ruggie who was appointed in 2005 as a Special Representative to the Secretary-General to identify human rights standards for TNCs and improve their accountability for human rights violations.

³⁰ United Nations Human Rights Office of The High Commissioner, Frequently Asked Questions about the Guiding Principles on Business and Human Rights (2014), available at www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf. This choice was arguably underpinned by Ruggie's own regulatory assumptions, acknowledging a 'newly emerging public domain that is no longer continuous with the system of states': Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors, and Practices', 10 *European Journal of International Relations* (2004) 499, at 519.

³¹ Ruggie, Protect Respect and Remedy: A Framework for Business and Human Rights, A/HRC/8/5, 25 February 2015, available at <https://bit.ly/3pcw1EM>.

³² This may well be a product of instrumental considerations to gain the consensus of states and NGOs, and the doctrinal impossibility of imposing 'hard' legal obligations on corporations. Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment', 14 *Journal of Human Rights* (2015) 162, at 165–167.

³³ As one scholar points out, '... the international treaty initiative and the UN Guiding Principles deploy different regulatory techniques for *legally* binding corporations to international human rights standards': Augenstein, 'Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union', 9 *Global Policy* (2018) 254, at 256.

³⁴ In this sense, I find problematic claims according to which the UNGPs as a whole reflect a polycentric governance approach. See, e.g., *ibid.*

absence of state-based hard law or its effective implementation, a 'governance gap' is created, which the UNGPs attempt to fill by demanding that TNCs act not unlike responsible individuals in refraining from abusing human rights. Regardless of their non-binding nature, then, the UNGPs ultimately embody and reinforce a legal positivist distinction between law and what is captured by new governance theories as the private exercise of public governance. The UNGPs thus reiterate the governance approach of international law's doctrine of subjects, whereby 'regulation' is commensurate with state-made law, and corporate action is a mere manifestation of a 'civic duty' to 'respect'.

B *The New*

The three regulatory tools thus far described do not reflect the full landscape of regulatory measures that have been developed in the field of human rights in recent decades. Parallel to legal instruments formulated broadly within the purview of IHRL to rein in TNCs, the latter also became gradually involved as regulatory actors in the field via their participation in pluralized, decentred regulatory architectures.³⁵ Such initiatives proliferated from the mid-1990s as part of an intricate matrix of regulatory regimes shaping and shaped by corporate conduct in the transnational arena, often involving alliances with governmental actors, IGOs and civil society.³⁶ Despite differing in scope and architecture, they are all predicated on TNCs' often voluntary allocation of resources towards formulating and implementing schemes that mould the environmental, labour and human rights standards tied to their global productions.³⁷

Such regimes all share some basic features that have been theorized by a corresponding body of literature developed in political science, as instances of 'new governance' regulation. These features relate to what new governance paradigms capture as TNCs' *regulatory* functions in the field of human rights. The reference to these

³⁵ Vogel, 'The Private Regulation of Global Corporate Conduct', in N. Woods and W. Mattli (eds), *The Politics of Global Regulation* (2009) 151, at 151, uses the term 'civil regulation'.

³⁶ Lustig, *supra* note 23; These were preceded by relatively centralized versions of 'public codes of conduct' during the 1970s such as: OECD Guidelines for Multinational Enterprises (1967) 15 ILM 969; ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy, November 1977, (1978) 17 ILM 422; and the United Nations Global Compact, available at <https://www.unglobalcompact.org/> (last visited 18 February 2021). See Teubner, 'Self-Constitutionalizing TNCs? On the Linkages of "Private" and "Public" Corporate Codes of Conduct', 18 *Indiana Journal of Global Legal Studies* (2011) 617, at 618–619.

³⁷ Zerk, *supra* note 11, ch. 6; Bartley, 'Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry', 14 *Research in Political Sociology* (2005) 211, at 212; Lim and Tsutsui, 'The Social Regulation of the Economy in the Global Context', in K. Tsutsui and A. Lim (eds), *Corporate Social Responsibility in a Globalizing World* (2015) 1. Another framework which diverges in its regulatory assumptions regarding TNCs is international investment law. International investment agreements often treat TNCs as litigants on a par with states, investing them with regulatory power and as potential partners in the governance of human rights. See, e.g., Cotula, 'Rethinking Investments Contracts through a Sustainable Development Lens', in E. Blanco and J. Razzaque (eds), *Natural Resources and the Green Economy* (2012) 13, for an analysis of investments contracts as a tool for public policy.

functions embodies a conceptual understanding of TNCs' role in the design and administration of human rights, namely, their participation in agenda setting, the drafting of norms, their role in monitoring and implementation and the enforcement of behaviour.³⁸ This conceptual analysis is grounded in a broad and nuanced interpretation of 'regulation' as encompassing 'all mechanisms of social control' including those 'which are not the products of state activity, nor part of any institutional arrangement'.³⁹ It refers to the promulgation of 'prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors'.⁴⁰ Contrary to 'command-and-control' old governance, a new governance approach envisages regulation as an iterative, dynamic, experimental learning process,⁴¹ in which non-state actors' agency is no longer limited to choosing whether or not to comply.⁴² This lens thus shifts emphasis from questions on the *subject* of legal accountability, towards the way change occurs within social and legal systems.⁴³ It accounts for 'the dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors',⁴⁴ and for the ways in which they are empowered to participate in numerous stages of the social ordering process.⁴⁵

In the context of TNCs' regulatory functions in the field of human rights, these are operationalized through numerous techniques such as soft-law, contractual norms, information gathering, benchmarking, or institutionalized consensus-building, to name but a few;⁴⁶ and involve various regulatory structures including collaborations with governments or civil-society, and the reallocation of regulatory power between public and private actors;⁴⁷ the use of information-based practices; legitimacy-based authority (as opposed to legal-based);⁴⁸ and a regulatory focus on aspects concerning behaviour,

³⁸ Sheehy, 'Private and Public Corporate Regulatory Systems: Does CSR Provide a Systematic Alternative to Public Law?', 17 *University of California Davis Business Law Journal* (2016) 1, at 33; Catá Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All', 38 *Fordham International Law Journal* (2015) 457.

³⁹ R. Baldwin, C. Scott and C. Hood, *A Reader on Regulation* (2012), at 4.

⁴⁰ Levi-Faur, *supra* note 7, at 6.

⁴¹ Ford, 'New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation', 2010 *Wisconsin Law Review* 441, at 445–447; Lobel, *supra* note 28, at 399–402.

⁴² Lobel, *supra* note 28, at 376–377. TNCs are, therefore, as put by Braithwaite and Drahos in their comprehensive study, 'actors which regulate while being regulated themselves': J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 10.

⁴³ Sarra, 'New Governance, Old Norms, and the Potential for Corporate Governance Reform', 33 *Law and Policy* (2010) 576.

⁴⁴ Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State', in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145, at 145.

⁴⁵ Abbot and Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit', 42 *Vanderbilt Journal of Transnational Law* (2009) 501, at 521.

⁴⁶ Ford, *supra* note 41.

⁴⁷ Shaffer, 'Theorizing Transnational Legal Ordering', 12 *Annual Review of Law and Social Science* (2016) 231.

⁴⁸ Black, "'Says Who?'" Liquid Authority and Interpretive Control in Transnational Regulatory Regimes', 9 *International Theory* (2017) 286.

integrity of messages and performance.⁴⁹ New governance paradigms thus capture a much broader set of practices which could be regarded as characteristic of the regulatory environment of the international human rights regime, and therefore challenge the understanding of hard law, formal regulation as the exclusive venue for social change.

Examples of such regimes abound. Prominent infrastructures include self-regulation in which 'the regulator is also the regulatee';⁵⁰ 'meta-regulatory' schemes which typically involve national regulation of corporate self-regulation;⁵¹ and other 'regulatory hybridizations' or cooperative frameworks such as multi-stakeholder initiatives.⁵² According to new governance paradigms, these various structures should not be conceptualized as dichotomous to government regulation. Rather, they are best understood as different 'typologies of social control' that may be placed on a continuum 'with pure forms of self-regulation and government regulation at opposite ends'.⁵³

The most conspicuous form of self-regulation in the context of TNCs and human rights are unilateral codes of conduct in which TNCs design and enforce human rights standards within their global supply chains.⁵⁴ These codes are often deployed to guide not only the behaviour of the self-regulating corporation, but also that of all other entities with whom the self-regulating corporation maintains commercial relationships. Codes of conduct are thus understood to function, by new governance paradigms, as a conduit through which TNCs regulate other actors, as well as the field of human rights itself, where the latter is often left 'unregulated' due to the absence of state regulation or its effective enforcement.⁵⁵

⁴⁹ Levi-Faur, *supra* note 7, at 9–10, lists several more aspects.

⁵⁰ *Ibid.*, at 8.

⁵¹ *Ibid.*, at 11. There are several examples of these in the human rights arena. Some are classic meta-regulatory structures in which the state is the 'indirect regulator of internal control systems': C. Parker, *The Open Corporations, Effective Self-Regulation and Democracy* (2014), at 15. One example is the California Transparency in Supply Chains Act, Cal. Civ. Code § 1714.43 (West 2012), that aims to ensure that corporations provide their consumers with information enabling them to differentiate between businesses according to the responsible management of their supply chains, and 'reward companies that proactively work to eradicate slave-labor and human trafficking'. See California Senate Judiciary Committee Bill Analysis SB 657 (Senator Ellen M. Corbett, Chair, 2009–2010 Regular Session) (21 April 2009), available at <https://bit.ly/3rMhbX3>. Other examples resemble 'enforced self-regulation', i.e. state regulation which forces firms to 'introduce self-regulatory programmes that meet certain standards and goals set by the government and that can be publicly enforced'. See Parker and Braithwaite, 'Regulation', in M. Tushnet and P. Cane (eds), *The Oxford Handbook of Legal Studies* (2012) 119. These may include the UK Modern Slavery Act 2015, c. 30; The Netherlands Child Labour Due Diligence Act 2019, Staatsblad 2019, 401; or the French Loi no. 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Duty of Vigilance Act of 27 March 2017) *Journal officiel de la République Française* (28 Mars 2017), in which most enforcement duties and costs are internalized by the corporation, forcing it 'to establish its own independent compliance administration'.

⁵² Levi-Faur, *supra* note 7, at 11.

⁵³ Gunningham and Rees, 'Industry Self-Regulation: An Institutional Perspective', 19 *Law and Policy* (1997) 363, at 366.

⁵⁴ Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 443, at 531; Gunningham and Rees, *supra* note 53, at 365, termed this 'social self-regulation'.

⁵⁵ V. Hauffer, *A Public Role for the Private Sector* (2013), at 29: 'International standard setting fills in the gaps where national regulatory systems conflict or remain silent. Where governments do not govern, the private sector does ...'.

The codification of human rights norms by TNCs and their formalization as a practice therefore confer powers and duties on actors in the field, so as to establish a normative order which defines and limits individuals' human rights conditions. Codes of conduct help establish transnational 'systems of control beyond the state', with no necessary 'recourse to the authority and sanction of government'.⁵⁶ Regardless, therefore, of how sweeping the impacts that codes of conduct have on human rights conditions are, the distinct analytical lens offered by new governance paradigms accounts for the ways in which TNCs assume public functions that either supplement or supplant those of the state, by partaking in the development and enforcement of human rights norms through self-regulation. Thus, codes of conduct might prove more successful in guaranteeing healthy working environments or the provision of a minimum wage, and less successful in securing freedom of association or collective bargaining; but in either case, it is the corporate actor which assumes a central role in shaping and enforcing these norms, a role often more influential than that of the state itself.⁵⁷

Co-regulation, or multi-stakeholder initiatives, are other prominent regulatory structures through which TNCs assume public functions in the generation and enforcement of human rights norms.⁵⁸ Examples include the Fair Labor Association (FLA);⁵⁹ the Extractive Industry Transparency Initiative;⁶⁰ the Ethical Trading Initiative;⁶¹ the Bangladesh Accord on Fire and Building Safety;⁶² and the International Code of Conduct for Private Security Service Providers (ICoC).⁶³ Positioned at mid-way between self-regulation and command-and-control, these governance structures feature 'regulatory arrangements [that] are grounded in cooperative techniques and the legitimacy of the regime rests at least partly on public-private cooperation'.⁶⁴

⁵⁶ Lehmkuhl, 'Control Modes in the Age of Transnational Governance', 30 *Law and Policy* (2008) 336, at 337.

⁵⁷ For an empirical account of the effects of codes of conduct on human and labour rights, see e.g. Barrientos and Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems', 28 *Third World Quarterly* (2007) 713.

⁵⁸ Baumann-Pauly *et al.*, 'Setting and Enforcing Industry-Specific Standards for Human Rights: The Role of Multi-Stakeholder Initiatives in Regulating Corporate Conduct', in D. Baumann-Pauly and J. Nolan (eds), *Business and Human Rights: From Principles to Practice* (2016) 107, conceptualizes multi-stakeholder initiatives as serving a governance function by setting and enforcing standards among competitors in a particular industry.

⁵⁹ See Fair Labor Association, available at www.fairlabor.org/ (last visited 9 October 2020). The FLA's purpose is to find sustainable solutions to systematic labour issues by providing support and guidance for companies, holding them accountable to the Association's Code of Conduct and conducting external assessments.

⁶⁰ Extractive Industries Transparency Initiative, available at <https://eiti.org/> (last visited 9 October 2020).

⁶¹ Ethical Trading Initiative, available at www.ethicaltrade.org/ (last visited 9 October 2020).

⁶² Bangladesh Accord on Fire and Building Safety, available at <https://bangladeshaccord.org/> (last visited 9 October 2020). For an analysis of The Bangladesh Accord on Fire and Building Safety as a case study of a new governance mechanism in the field of human rights, see Frost, 'Transnational Corporations as Agents of Legal Change: The Role of Corporate Social Responsibility', 5 *Cambridge Journal of International and Comparative Law* (2016) 502.

⁶³ International Code of Conduct Association (ICoCA), available at www.icoca.ch/ (last visited 9 October 2020).

⁶⁴ Levi-Faur, *supra* note 7, at 10.

In the FLA, for example, participating stakeholders all assume equal roles in decision-making processes.⁶⁵ Partaking in the 'legislation' of the Initiative's Code of Conduct, in the implementation of its constitutive norms and in the process of remedying deficiencies, TNCs therefore become active participants in processes considered to be the 'functional equivalents' of law-making, adjudication and enforcement in the field of human rights⁶⁶ – or, put otherwise, in processes of a jurisgenerative quality.⁶⁷ Similarly, the governance structure of the ICoC comprises representatives of three pillars: government, industry and civil society,⁶⁸ which all took part in the standard-setting process as well as in ongoing oversight.⁶⁹ More broadly, the regulatory techniques through which multi-stakeholder initiatives are operationalized often include a combination of standard-setting or the drafting of a code;⁷⁰ reporting, monitoring or performance assessment;⁷¹ certification;⁷² capacity building; and enforcement.⁷³ These governance structures pluralize authority and blur the public–private division of regulatory power. Within these structures, TNCs' agency is not limited to decisions on whether or not to comply with externally imposed regulation. Instead, TNCs operate in these structures as norm-generating subjects, whereby their expertise and

⁶⁵ Baumann-Pauly *et al.*, 'Industry-Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy Assessments of the Fair Labor Association and the Global Network Initiative', 143 *Journal of Business Ethics* (2017) 771, at 779.

⁶⁶ Shaffer, *supra* note 47, at 236.

⁶⁷ See Robert Cover as discussed in Schiff Berman, 'A Pluralist Approach to International Law', 32 *Yale Journal of International Law* (2007) 309, at 327.

⁶⁸ See ICoCA, Board of Directors, www.icoca.ch/en/board-directors (last visited 9 October 2020).

⁶⁹ For an elaborate account of the operation of the ICoC, see Buztau, 'The Emergence of the International Code of Conduct for Private Security Service Providers', in D. Baumann-Pauly and J. Nolan (eds), *Business and Human Rights: From Principles to Practice* (2016) 161.

⁷⁰ In the FLA, participating companies commit to maintaining the principles and policies delineated in the Code of Conduct to improve working conditions across their supply chains. See FLA Code of Conduct, available at www.fairlabor.org/sites/default/files/fla_code_of_conduct.pdf (last visited 9 October 2020). The same applies in the ICoC: ICoC Code of Conduct, available at www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf (last visited 9 October 2020).

⁷¹ Companies' commitments in the FLA are assessed and monitored periodically through an independent process in which violations of the Code of Conduct are evaluated in relation to general weaknesses in companies' practices and governance, and applied to develop long-term strategies for progressively improving employment practices, whilst harnessing the companies themselves as agents of change. See Fair Labor Association, Sustainable Compliance Methodology, available at www.fairlabor.org/sites/default/files/sci-factsheet_7-23-12.pdf (last visited 9 October 2020).

⁷² In the FLA, companies are accredited for a period of three years once they are found to fulfil the FLAs' requirements, including adopting and communicating workplace standards, training staff to assess and remediate non-compliance issues, conducting internal assessments and providing workers with confidential reporting channels. Accreditation is renewed following an evaluation of compliance. See Fair Labor Association Accreditation, available at www.fairlabor.org/accreditation (last visited 9 October 2020).

⁷³ In the ICoC, the complaints process begins in the company's internal grievance mechanism; where it does not offer effective remedies, a review is performed by the ICoC Secretariat. See Buztau, *supra* note 69. The FLA has a third-party complaint mechanism. See Fair Labor Association, Third Party Complaint Procedure, available at www.fairlabor.org/sites/default/files/3pc_factsheet_english_0.pdf (last visited 9 October 2020). See also, e.g., Final Report, Third Party Complaint: Delta Apparel (Honduras) (27 August 2018), available at www.fairlabor.org/sites/default/files/documents/reports/final_report_delta_honduras_aug_2018.pdf (last visited 9 October 2020).

resources are drawn on within a collective endeavour, to materially shape the human rights conditions of individuals, often on a global scale.

These instances of transnational private regulation, and the theoretical lens which understands these instances as forming a continuum of regulatory tools rather than as dichotomous to law, have not attracted the attention of international human rights scholars. It is perhaps unsurprising that the international legal practice developed to cope with TNCs in the field of human rights has not significantly moved away from state-centric, legal positivist regulatory dispositions, given the more principled reluctance of states to progress towards recognizing TNCs as international legal subjects. What is intriguing, however, is that the scholarship which has developed in parallel and *in response* to the mounting involvement of TNCs in human rights violations has too often remained tethered to conceptual frameworks which do not consider the public regulatory functions that corporations have increasingly come to assume in this field. In other words, international human rights scholars are not, in principle, precluded from engaging with theoretical frameworks – such as new governance paradigms – that provide alternative understandings of the role TNCs assume in the field of human rights. And yet, as analysed in what follows, they typically do not.

3 The Old Governance Bias of Human Rights Scholarship

The disregard of new governance prisms is manifest in three areas within international human rights scholarship. First, international human rights textbooks that are based on traditional doctrinal scholarship, and which constitute the main literary corpus through which IHRL is taught, typically allocate relatively narrow sections to the relationship between TNCs and human rights. Second, the parameters of discussion within the doctrinal sub-field of business and human rights are also significantly influenced by an old governance bias. These discussions are predominantly framed around the tension between TNCs as regulatory objects and human rights, or preoccupied with the viability and effectiveness of hard legal frameworks in establishing TNCs' legal accountability. Third is the old governance bias of theorists and philosophers of human rights. Whereas human rights theories seek to rigorously enquire into the nature and rationale of human rights, or to provide robust explanatory frameworks for how these norms evolve and become institutionalized, they, too, are predominantly informed by the regulatory assumptions of the practice and doctrinal commentary thereon.

A Doctrinal Scholarship

1 Traditional

Discussions on corporations and human rights feature marginally in general IHRL textbooks.⁷⁴ Etymologically, these textbooks refer to TNCs typically and not

⁷⁴ See, e.g., P. Alston and R. Goodman, *International Human Rights: The Successor to International Human Rights in Context* (2013) (the chapter on 'Non-State Actors and Human Rights' is 51 pages out of 1542 pages, and the section on TNCs is only 36 pages long); O. De Schutter, *International Human Rights Law*

unintentionally as *non-state* actors; a cognisant choice that is meant to distinguish the role assumed by TNCs vis-à-vis human rights from the unique and pivotal role of the state in this regime.⁷⁵ Furthermore, in terms of the content of these limited discussions, sections on TNCs and human rights are habitually located, within IHRL textbooks, under 'challenges',⁷⁶ or 'current issues'.⁷⁷ The focus of traditional doctrinal scholarship in this context is, therefore, on what this scholarship implicitly views as 'transient' risks posed to human rights by TNCs' commercial operations; and on the accompanying absence of positive, hard law obligations in international law to respond to these risks.⁷⁸ This framing reflects a regulatory approach which mirrors that of the praxis, according to which the state and its coercive power – employed through laws backed by sanctions – are assumed to be the backbone of regulation. Its underlying ideology envisages a hierarchical relationship between the state and other social actors, in which policy is formed unilaterally by the state, only to be complied with by social actors, or otherwise be coercively enforced.⁷⁹ The regulatory process, accordingly, is not grounded in horizontal social interactions, but is rather vertically constructed top-down.⁸⁰ The unequivocal answer to novel challenges to human rights norms, this literature contends, is either the imposition of positive international legal obligations on governments to subject TNCs to measures that would give effect to human rights, or the direct imposition of international obligations on TNCs themselves.⁸¹

Understandably perhaps, the governance approach of traditional scholarship remains faithful to that of the international praxis, in light of its aim to provide a descriptive account of this praxis. Insofar as the plethora of regulatory initiatives involving

(2014) (five pages are dedicated to TNCs, out of 1040); R. K. M. Smith, *International Human Rights Law* (2018) (12 pages are dedicated to non-state actors and four to TNCs, out of 417 pages); D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) (17 pages are dedicated to the responsibilities of non-state actors and six to TNCs); D. Moeckli et al., *International Human Rights Law* (2018) (dedicating 23 to non-state actors and human rights and three pages to TNCs); S. Sheeran and Sir N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (2014) (23 pages are dedicated to non-state actors and four to TNCs).

⁷⁵ Alston, *supra* note 1, at 3–4.

⁷⁶ Moeckli et al., *supra* note 74, at 557; Sheeran and Rodley, *supra* note 74, at 137.

⁷⁷ Smith, *supra* note 74, at 402; Alston and Goodman, *supra* note 74, at 1461.

⁷⁸ Alston and Goodman, *supra* note 74, at 1464–1468, focus on corporate violations of human rights in the extractive industries and in information technology.

⁷⁹ *Ibid.*

⁸⁰ Rodley, *supra* note 5, at 540: 'While it is therefore clear that business enterprises, notably those acting transnationally, have no direct legal responsibility under IHRL, there is every reason to focus on the responsibility of the state of the (parent) corporation to ensure that the latter does not become an accomplice to human rights abuses'.

⁸¹ See, e.g., Alston and Goodman, *supra* note 74, at 1467:

For human rights proponents, the growth of corporate power raises the question of how to ensure that the activities of transnational corporations in particular are consistent with human rights standards and of how to promote accountability when violations of those standards occur. In principle, the answer is straightforward. The human rights obligations assumed by each government require it to use all appropriate means to ensure that actors operating within its territory . . . comply with national legislation designed to give effect to human rights.

TNCs in the field of human rights are considered by states themselves to be beyond the scope of international human rights law, then the marginal treatment they receive in IHRL textbooks is arguably coherent. Be that as it may, this old governance bias results in a failure to account for the full range of regulatory phenomena that have actually characterized the field of human rights for some time now. One might therefore critically reflect in this context on the relationship between practice and scholarship, and on the role of scholarship in perpetuating the limitedness of the practice, especially in light of the particularities of the doctrine of sources in international law. Namely, if scholarship is considered a subsidiary means for determining the rules of international law, then the influence of its old governance bias on the progressive development of the practice itself should not be discounted. ‘Ordinary publicists’, as dubbed by Sandesh Sivakumaran, can indeed ‘contribute to the emergence of new ideas’, especially when such authors are also members of expert groups.⁸² The ways in which substantive issues are approached by scholars and teachers have a meaningful impact on ‘students’ views on the subject ...’.⁸³ Importantly, international legal scholarship has a ‘law-making potential’, as Gleider Hernández notes, ‘that is exercised through cognising, structuring, and apprehending legal materials’.⁸⁴ In this context, scholarship may therefore play a prescriptive role in driving the re-demarcation of disciplinary boundaries to include transnational private regulation within their scope, as instantiations of international law.

2 Business and Human Rights

Old governance regulatory dispositions are characteristic also of the sub-field of doctrinal scholarship which centres *in particular* on business and human rights.⁸⁵ Contrary to ‘traditional’ scholarship, the starting point of business and human rights literature is indeed the overshadowing of the ‘traditional preoccupation of human rights law with protecting individuals against the oppressive power of the “public” and “territorial” state’, by ‘concerns about the human rights impacts of “private” power ...’.⁸⁶ Business and human rights scholars thus acknowledge and engage with the centrality of the corporate actor in the field of human rights, and indeed often concede to the misfit between the state-centric structure of IHRL and global business operations. And yet, these scholars often rely on the very statist regulatory assumptions which they purport to vigorously challenge.

⁸² Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’, 66 *International and Comparative Law Quarterly* (2017) 1, at 10.

⁸³ *Ibid.*, at 30.

⁸⁴ Hernández, ‘The Responsibility of the International Legal Academic, Situating the Grammarian Within the “Invisible College”’, in J. d’Aspermont *et al.* (eds), *International Law as a Profession* (2017) 160, at 162.

⁸⁵ Early manifestations are recognizable in monographs and edited volumes published around the turn of the century in response to the mounting involvement of non-state actors in human rights violations, and which do not centre strictly on TNCs. See, e.g., Clapham, *supra* note 3; Alston, *supra* note 1. Since then, the field has developed, and established as well a dedicated Business and Human Rights Journal.

⁸⁶ Augenstein and Kinley, ‘When Human Rights “Responsibilities” become “Duties”: The Extra-Territorial Obligations of States that Bind Corporations’, in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 271, at 271.

Specifically, this scholarship typically considers the state the 'ideal authority to regulate international legal obligations within and between states',⁸⁷ and thus continues to focus on international legal instruments which ascribe the state the direct role of legislator and enforcer, marginalizing those in which states assume an indirect role as orchestrators or coordinators. This focus is arguably driven by this scholarship's 'quest for [corporate] *accountability*',⁸⁸ and its coinciding scepticism towards TNCs' potential to effectively monitor and constrain their own behaviour; or, alternatively, by this scholarship's functional separation between the role of private and public actors in society.⁸⁹ Regardless, however, of the normative impetus driving and shaping modern business and human rights legal writing, the fact remains that its prominent focal point continues to be the legal instruments devised under the purview of the UN to 'address the human rights impact of business'.⁹⁰ These include, most notably, the UNGPs and the Draft Treaty, the latter of which – as discussed earlier – indeed constitutes a paradigmatic example of an old governance regulatory instrument.⁹¹

⁸⁷ Lustig, *supra* note 23, at 595. For an early example, see Clapham, *supra* note 3, at 28 (specifically recognizing the possibility of moving towards a new governance paradigm, but offering, alternatively, a different approach which emphasizes TNCs as possible *objects* of the law: 'My approach retains as a starting point the principles and rules of public international law with its origins in the law-making power of the nation-state. . . . I recognize the importance of non-state actors and their influence without suggesting that they have achieved the role of law-maker'). More recently, see Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability', 14 *Journal of Human Rights* (2015) 237, at 238 (recognizing 'how the quest for accountability shapes a very different narrative for BHR, which takes it more into the realm of binding law, state-sponsored oversight, and the importance of access to remedy as a measure of corporate accountability. As a result, at the current juncture, the [business and human rights] BHR movement is drifting further away from [corporate social responsibility] CSR and the role of companies as voluntary and affirmative contributors to human rights realization'); Bilchitz, 'The Necessity for a Business and Human Rights Treaty', 1 *BHRJ* (2016) 203, at 204 (according to which the current debate about the Draft Treaty should centre on the reasons for such a treaty, rather than contemplating the difficulties associated with its achievement. The implicit regulatory assumption is that the archetypical statist regulatory tool – the international treaty – and the state as its promulgator and enforcer, is undoubtedly the proper mechanism through which to order the field of human rights).

⁸⁸ Ramasastry, *supra* note 87, at 238 (emphasis added). See also several years earlier, Clapham, *supra* note 3, at 196.

⁸⁹ I thank an anonymous reviewer for this point.

⁹⁰ Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights', *Human Rights Law Review* (2014) 133, at 133–34. See also Ramasastry, *supra* note 87, at 238 (on instruments which centre on 'law and enforcement of the law as a key construct').

⁹¹ See, e.g., Cernic and Carillo-Santarelli (eds), *supra* note 19 (centring on the Draft Treaty); Bilchitz and Deva, *supra* note 13, at 2 (aiming to fill the gap in scholarship regarding whether the 'GPs adequately address the challenges that arise in considering the relationship between business and human rights'). In the European context, A. Bonfanti (ed.), *Business and Human Rights in Europe, International Law Challenges* (2019), focuses on European legislation and case law, which can be 'considered the European responses to the legal challenges posed at international-law level on B&HR ...'. Indeed, the book's methodology follows the three-pillar structure of the UNGPs, which ultimately embodies an old governance regulatory approach. Other regulatory instruments are mentioned as providing corporations with 'authoritative guidance', but not discussed in the context of the public functions TNCs assume by partaking in them. Macchi, 'Right to Water and the Threat of Business: Corporate Accountability and the State's Duty to Protect', 35 *Nordic Journal of Human Rights* (2017) 186, focuses on the UN Treaty Bodies which obviously

The scholarly debate on these instruments is thus predominantly confined to the governance approach underpinning them. Its main preoccupation is the extent to which these instruments succeed in binding TNCs and establishing their legal accountability.⁹² For example, the debate on the Draft Treaty typically centres on whether TNCs' legal accountability can be better achieved through *states'* obligations to enforce TNCs' respect for human rights (and the difficulties that this route poses);⁹³ or whether *direct* international legal obligations on TNCs are required.⁹⁴ Comparisons between the Draft Treaty and the UNGPs similarly focus on which of the two proves more adequate in binding TNCs to human rights standards – an international instrument, or the implementation of international standards within states' own domestic law. Whilst the two ostensibly involve two different regulatory layers – the national and international – they nevertheless share the same assumptions regarding the role of the state, and uphold the public–private dialectic in which the functions of TNCs are distinct from those of the law-making and enforcing state.⁹⁵

Still very much defined by statist sensibilities, this scholarship often articulates an implied distinction in kind – rather than degree – between formal legal regulation as the dominant venue for social change, and 'voluntarism'.⁹⁶ By distinguishing law

centre on the regulatory role of states; Jägers, 'Sustainable Development Goals and the Business and Human Rights Discourse: Ships Passing in the Night?', 42 *Human Rights Quarterly* (2020) 145, despite adopting a social constructivist approach which recognizes that '[normative], institutional, and behavioral change cannot be attributed to self-interest or coercion through formal legal regulations alone' (*ibid.*, at 148–149), still focuses both on states as agents of change and the ultimate regulatory actors through which such change takes effect, and on the UNGPs as the framework the content of which is commensurate with the business and human rights discourse.

⁹² Even in the context of a normative discussion, the focus is on how to establish the case for *binding obligations* on TNCs. See, e.g., Bilchitz, 'A Chasm between "Is" and "Ought?": A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles', in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect?* (2013) 107. See also, e.g., Symposium: Soft and Hard Law on Business and Human Rights, 114 *American Journal of International Law Unbound (AJIL Unbound)* (2020) 163, which, too, centres on the 'soft law' versus 'hard law' debate.

⁹³ See, e.g., Macchi, *supra* note 21.

⁹⁴ In favour of direct obligations, see, e.g., Carrillo-Santarelli, 'A Defence of Direct International Human Rights Obligations of (All) Corporations', in J. L. Cernic and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (2018) 33. See contra Van Ho, "'Band-Aids Don't Fix Bullet Holes": A Defence of a Traditional State-Centric Approach', in J. L. Cernic and N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (2018) 111.

⁹⁵ The only context in which the notion of an equal standing between states and TNCs is implied is in the context of claims supporting *binding obligations* for corporations. See, e.g., Bilchitz, *supra* note 87; Bilchitz, *supra* note 92.

⁹⁶ See, e.g., Ramasastry, *supra* note 87, at 238, presents an understanding of the field of business and human rights as 'contextually and conceptually different from CSR in its aims and ambitions'. New governance prisms recognize these two discourses as merely focusing on different regulatory instruments to affect social change.

Similarly, Jägers, *supra* note 91, at 158, whilst recognizing that 'it is increasingly acknowledged that the dichotomy between hard and soft law is fading', still notes that '[the] BHR discourse differs fundamentally from what is commonly known as Corporate Social Responsibility (CSR)'.

from voluntary corporate involvement so as to conceptually disregard the latter as a form of 'regulation' or 'governance', the legal strands of this literature largely downplay the concept of regulation as a collective endeavour, and the viability of TNCs' role therein as de-facto regulatory partners rather than compliers.⁹⁷ Decentralized instruments involving TNCs are accordingly disregarded as *regulatory tools*, but rather often conceptualized as second-tier methods, insufficient for the taming of TNCs. This scholarship falls short, in other words, of fully appreciating and contemplating new governance theorizing of corporate involvement in decentralized regimes in terms of their contribution to processes of social ordering as norm-generating and norm-institutionalizing subjects.⁹⁸ According to the business and human rights narrative, the absence of hard legal regulation thus results in a 'governance gap' or regulatory void.⁹⁹

Doctrinal literature undoubtedly centres on important questions. However, these questions nevertheless orient the field in a particular way, the practical implications of which will be considered in this article's final section. Beyond its meaning for the

Augenstein, *supra* note 33, at 257: 'In terms of content while all four NAPs . . . made an explicit commitment to the UNGPs, they focus heavily on past actions and voluntary measures (such as awareness raising or training) at the expense of exploring forward-looking and regulatory options'. Whilst Augenstein recognizes Open Method Coordination between *states* as a 'governance framework', and that 'easy juxtapositions of "hard" law *versus* "soft" law . . . are misleading' (*ibid.*, at 261), he does not seem to apply the same regulatory logic when it comes to thinking about TNCs themselves.

Cernic, 'Fundamental Human Rights Obligations of Corporations', in A. Hrast (ed.), *Collected Papers of the 4th IRDO International Conference, Social Responsibility and Current Challenges* (2009) 59, distinguishes between 'three levels of legal sources . . . from where fundamental human rights obligations derive' (emphasis added) (*ibid.*, at 60). Voluntary norms thus, according to Cernic, 'do not create legal, but at most moral obligations' (*ibid.*, at 63). This lens reiterates a distinction in kind between hard law and voluntary norms.

Discussions about the need to establish binding obligations for TNCs, such as in Bilchitz, *supra* note 92, reiterate the centrality of formal legal regulation for inducing social change.

⁹⁷ See, e.g., R. McCorquodale, *International Law Beyond the State: Essays on Sovereignty, Non-State Actors and Human Rights* (2011), at 215–39; Deva, *supra* note 19, at 30, for example, indeed recognizes the need for 'both sets of regulatory tools', but does not acknowledge in this Chapter their widespread existence, nor does he contemplate what this means in terms of TNCs' regulatory functions.

⁹⁸ There are, of course, some outliers. Addo, *supra* note 90, at 146, concedes the importance of revisiting the 'traditional focus on States', especially 'in the age of globalization where non-State actors have gradually assumed roles often associated with governmental institutions'. Addo, however, does not elaborate therein what this would actually mean in practice or in theory. Jägers, 'Will Transnational Private Regulation Close the Governance Gap?', in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect?* (2013) 295, indeed shifts attention to new governance regimes. The main thrust of his chapter, however, seems to be how private regulatory regimes shape TNCs' behaviour, rather than on how TNCs shape human rights norms via these regimes. Seck, 'Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights', 49 *Canadian Yearbook of International Law* (2011) 51, engages with the meaning and implications of TNCs' regulatory functions.

⁹⁹ Ramasastry, *supra* note 87. See also Augenstein, *supra* note 33, at 257: 'Relatedly, the vast majority of state actions listed under pillar one are confined to "soft" measures such as state guidance, awareness raising, and training initiatives While important, such measures are not sufficient to address well-documented protection gaps in the legal framework governing business and human rights'

practice, this old governance bias has also permeated theoretical scholarship in the field, thus giving rise to additional effects on *normative* thinking therein.

B *International Human Rights Theories*

The concept of human rights has been a focal point in political and legal discourse for several decades, but it was only relatively recently that philosophers have awakened to the need to rigorously enquire into the nature and rationale of human rights, almost in tandem with scholars' lamenting over the end of the human rights' utopia.¹⁰⁰ Evolving against the backdrop of a widespread praxis, this theoretical corpus – which includes both 'political' and 'legal' theories of human rights – sought to construct the meaning of human rights from within their functions within this praxis,¹⁰¹ so as to illuminate the *idea* underlying these norms, and to define the kind of objects they are and what duties they impose (and on whom).¹⁰² The main thrust of this theoretical literature thus goes beyond its descriptive and explanatory goals, as it endeavours to establish the normative basis of this 'last utopia'.¹⁰³ In parallel, international relations (IR) theories of human rights have evolved as a response to the realist school and challenged its positivist assumptions to provide an elaborate empirical account of how human rights norms evolve and become institutionalized. Posing different research questions from those of legal or political theorists, IR theories focus on the role of non-state actors and transnational advocacy networks in the diffusion, implementation and enforcement of norms, as 'providing the missing link to explain how, why, and when international actors such as states comply with these norms'.¹⁰⁴

Taken together, all three strands of theoretical thinking (political, legal and IR theories) seek to provide a more descriptively accurate and exhaustive account of the functions that human rights norms perform in reality, and how these functions materialize. The frameworks of their analyses, however, remain nourished and informed by the regulatory assumptions of positive IHRL and doctrinal scholarship.

The starting point for political and legal theories of human rights is their rejection of the assumptions underlying moral theories, of an independent moral idea that the international doctrine and practice embody.¹⁰⁵ Critiquing moral theories for failing to

¹⁰⁰ S. Moyn, *The Last Utopia: Human Rights in History* (2011); Koskeniemi, *Human Rights: So 90s?*, Lecture hosted by the Oxford Martin Programme on Human Rights for Future Generations (4 March 2014), available at www.youtube.com/watch?v=9hFdZRYZhkg.

¹⁰¹ Cruft, Liao and Renzo, 'The Philosophical Foundations of Human Rights: An Overview', in R. Cruft, S. M. Liao and M. Renzo (eds), *Philosophical Foundation of Human Rights* (2015) 1, at 6.

¹⁰² J. Griffin, *On Human Rights* (2008), at 1; C. R. Beitz, *The Idea of Human Rights* (2009), at xi. 'Legal' and 'political' thus share the same objectives and basic methodology of constructing the meaning of human rights from within their functions within the practice. They differ, however, in what they consider this 'praxis' to be. Whereas 'legal' theories consider only international human rights law, 'political' theories have a broader vision of the 'praxis' as including also global political discourse.

¹⁰³ With reference to Moyn's title, *supra* note 100.

¹⁰⁴ Dos Reis and Kessler, 'Constructivism and the Politics of International Law', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 349; See also M. E. Keck and K. Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics* (1998).

¹⁰⁵ Given that moral theories of human rights are ideal-type theories which do not purport to remain faithful to the international practice of human rights, their analysis is less relevant for the arguments advanced in this article and thus remains beyond its scope.

exhaustively account for the full range of phenomena relevant to the subject matter of their theory,¹⁰⁶ legal and political theorists call, alternatively, for an understanding of human rights that coincides with the specific objectives and features of the international human rights regime.¹⁰⁷ The empirical and descriptive dimensions of their theories thus purport to provide an understanding of human rights norms which echoes the contemporary practice and the essential features it attributes to the rights it acknowledges.¹⁰⁸ More importantly, they seek to provide theoretical tools to critically examine and evaluate this regime, thus aspiring to explain the normative force of human rights.¹⁰⁹

Both legal and political theories largely fall short, however, of providing a concept of human rights which accounts for the diversity of roles played by these norms in the international arena, and for the diversity of actors and regulatory structures involved in these norms' generation and institutionalization. In the context of legal theories, Patrick Macklem for example defines the nature of international human rights 'in terms of their capacity to monitor the structure and operation of the international legal order'.¹¹⁰ The purpose of these norms, claims Macklem, as does Allen Buchanan, is to mitigate the exercises of power which have been legally validated by international law. Put crudely, they are conceptualized as band-aids to the deficiencies of our own making, serving to normatively legitimize an international legal order that could otherwise hardly be vindicated. As Allen Buchanan articulates: '[having] a system of international legal human rights is a necessary condition for the existing international order to be justifiable, because without a system of international legal human rights the strong rights of sovereignty that the international order confers on states would be morally unacceptable'.¹¹¹ Legal theories are thus of interest precisely because of their aim to account for 'normative role that they [human rights] play in the structure and operation of international law'.¹¹² Rather than offering an ideal theory, they aim to provide a descriptively adequate based theoretical explanation of what role human rights *actually* perform in international legal practice.

Legal theories are understood, however, in strictly legal positivist, statist terms. The human rights praxis which they account for and proceed to analyse and justify only considers those instruments and actors which have been developed under the

¹⁰⁶ Raz, 'Human Rights Without Foundations' (University of Oxford Faculty of Law, Legal Studies Research Paper Series, Working Paper No. 14/2007, 2007), at 8–9.

¹⁰⁷ Beitz, *supra* note 102, at xii; P. Macklem, *The Sovereignty of Human Rights* (2015), at 13; A. Buchanan, *The Heart of Human Rights* (2014), at 3 (the methodological thesis of the book is that 'any assessment of the moral status of human rights practice must acknowledge the importance of international human rights law in the practice').

¹⁰⁸ Raz, *supra* note 106, at 8.

¹⁰⁹ Beitz, *supra* note 102; Macklem, *supra* note 107, at 18–26.

¹¹⁰ Macklem, *supra* note 107, at 1.

¹¹¹ Buchanan, *supra* note 107, at 44.

¹¹² Macklem, *supra* note 107, at 18 (emphasis added). Cf. Buchanan, *supra* note 107, at 86: 'the most basic function of the international legal human rights system . . . is to provide a set of universal standards, in the form of international law, whose primary purpose is to regulate the behavior of states towards individuals under their jurisdiction ...'.

purview of the UN system and their domestic legal implementations.¹¹³ The concept of human rights that they accordingly develop is inextricably tied to the state–individual relationship.¹¹⁴ As such, legal theories largely fail to consider the changes that the international legal order has undergone in recent decades to incorporate a wide range of decentralized structures, and ‘[the] transition [within international law] to alternative legal frameworks in which the state is but one regulator amongst others’.¹¹⁵ Adhering, in their analyses of the nature of human rights or of their practice, to the notion of a state-centred international legal order, they overlook the increasing influence and involvement of other, non-state actors, in the structuring and operation of international law.¹¹⁶

Political theories encounter the same obstacle. Relating more broadly to the role human rights assume within global political discourses, political theories consider human rights to be a social phenomenon whose meaning derives from the way it is engaged by its participants.¹¹⁷ These include ‘a heterogenous group of agents, including the governments of states, international organizations, participants in the process of international law, economic actors, such as business firms, members of nongovernmental organizations and participants in domestic and transnational political networks and social movements’.¹¹⁸ Surprisingly, however, human rights are still narrowly defined by political theorists as protections of individuals’ interests that set limits to the sovereignty of *states*,¹¹⁹ and are therefore understood as requirements which apply in the first instance to states’ political institutions, and as matters of international concern.¹²⁰ According to this understanding of human rights, the correlative obligations that these protections of individuals’ interests spur are to be guaranteed primarily through states’ internal laws and policies. Political conceptions therefore construct the concept of human rights and their functions as parasitic on the Westphalian paradigm, thereby undertaking a legal positivist approach to human rights which, like legal theories, does not account for the breadth of phenomena constituting the praxis.

This old governance bias of legal and political theories sets limits to the conceptions of human rights that they develop. First, this bias restricts their conception of the identity of the ‘duty-bearer’ or enforcer of human rights to one which stands in tension with the developing view of private actors’ obligations in the field. Given the immense economic and social clout of private actors and the erosion of public–private

¹¹³ Buchanan, *supra* note 107, at 5–6, rather than defining the practice provides a list of the instruments and processes it includes, which consists exclusively of state-centric legal tools.

¹¹⁴ Human rights thus assume ‘sovereignty-constraining roles’: *ibid.*, at 69.

¹¹⁵ Lustig, ‘Beyond Sovereignty: International Human Rights as Experience’, 15 *Jerusalem Review of Legal Studies* (2017) 89, at 97.

¹¹⁶ *Ibid.*, at 93.

¹¹⁷ Beitz, *supra* note 102, at 8–12.

¹¹⁸ *Ibid.*, at 8.

¹¹⁹ J. Rawls, *The Law of Peoples* (2001); Raz, *supra* note 106; Beitz, *supra* note 102, at 106–109.

¹²⁰ Beitz, *supra* note 102, at 8–13; Raz, *supra* note 106, at 9–10; Rawls, *supra* note 119. In this latter sense, states’ failure to fulfil their human rights obligations gives motive for actions by external agents.

boundaries, the narrow conceptualization of human rights as limits on state sovereignty is left wanting. Namely, it overlooks how the role of human rights has by now surpassed the individual–state relationship, to function also as limits on paramilitary groups, or as barriers to the commercial exploitation of post-colonial societies for profit. Within the contemporary decentralized regulatory environment, human rights function not only as *limitations* on state sovereignty, but also as *standards* for the proper conduct of businesses, as *guidelines* for private security companies and as *benchmarks* for the operations of international and non-governmental organizations. Political theories' conception of human rights hence fails to reflect the diverse functions that human rights norms perform both in legal practice and in the public normative discourse of global politics.¹²¹

Subsequently, in defining human rights vis-à-vis the *positive* legal obligations they impose, legal and political theories disregard the plurality of conduits through which human rights norms are generated and institutionalized within new governance regulatory structures. If human rights are implicitly framed as *granted* by governments (by virtue of states' enactment of positive IHRL), their existence would presumably be conditioned on governments' ability to uphold the interests protected by these rights.¹²² Nevertheless, in a world characterized by changing structures of power, and by horizontally – alongside hierarchically – configured relations, human rights are not merely granted by states but are also constituted from below.¹²³ They are conjured, diffused, promoted, protected and enforced by agents other than states, so that the ability to identify the specific actor that is the author of human rights norms in a given setting is challenged.¹²⁴

Interestingly, it is exactly these types of processes that the theoretical lens and methodology of IR theories attempt to capture. These theories empirically investigate how 'the institutional structure of the delivery of human rights actually functions at both the local and the global level'.¹²⁵ They analyse the impact of international human rights norms on domestic politics, and how they lead to changes in domestic practices, behaviours, identities and political agendas.¹²⁶ Importantly, then, IR theorists have succeeded in looking past state compliance with international treaties, to recognize and assert the imperative roles of actors *other than the state* in mobilizing for human

¹²¹ Raz, *supra* note 106; Beitz, *supra* note 102. For a critique of Macklem's theory, see Lustig, *supra* note 115.

¹²² Macklem, *supra* note 107, at 18: 'Understanding international human rights as legal concepts starts with the premise that international law, not moral theory or political practice, determines their existence'.

¹²³ Stammers, 'Social Movements and the Social Construction of Human Rights', 21 *Human Rights Quarterly* (1999) 980, at 1004–1007.

¹²⁴ Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective', 38 *Journal of Law and Society* (2011) 50.

¹²⁵ Turner, 'Sociology of Human Rights', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 82, at 95.

¹²⁶ See, e.g., Risse and Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in T. Risse, S. C. Ropp and K. Sikkink (eds), *The Power of Human Rights, International Norms and Domestic Change* (2009); B. A. Simmons, *Mobilizing for Human Rights, International Law in Domestic Practices* (2012); R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

rights and in sustaining domestic changes in human rights policies and practices.¹²⁷ For example, IR literature exposes the extent to which human rights treaties not only influence the national legislative priorities of governmental actors, but also help potential rights claimants to imagine themselves as such, thereby encouraging them to pressure governments into realizing their (claimants') demands.¹²⁸ This analysis emphasizes the importance of social movements and the role of ordinary citizens in 'the diffusion of values for the protection of individual rights'.¹²⁹

Ostensibly, then, the regulatory approach of IR theories seems to converge with a new governance understanding of the regulatory landscape of the field. In having come to terms with the disaggregation of the state,¹³⁰ with the substantial role of agents of change from within and outside of it in the generation, diffusion and enforcement of human rights norms¹³¹ and with the intricate social interactions impacting the promotion of human rights, IR theorists have indeed seemingly transcended the state-centric, legal positivist underpinnings of realist approaches to international law and relations.

IR theories have, nonetheless, remained faithful to the question of why *states* comply with IHRL, despite purporting to fully account for how this regime functions and instigates change.¹³² The state, therefore, remains their main unit of analysis, whereas the regulatory role of non-state actors is only understood to be relevant insofar as it affects the behaviour of states. Subsequently, IR theories' recognition of non-state actors is interestingly limited in scope. Also, whilst the impact of ordinary citizens, NGOs and transnational advocacy networks in mobilization processes – for example 'The Boomerang Pattern',¹³³ or the 'Sandwich Effect'¹³⁴ – has been readily acknowledged, the impact of TNCs in these processes, their role in human rights regulation and its significance for the instigation of social change, remain underexplored. To the extent that TNCs are examined, it is largely in their capacity as targets to be pressured into compliance by civil society actors and organisations.¹³⁵ TNCs are thus conceptualized in this context, much like in doctrinal scholarship, primarily through their role as violators of human rights norms.

¹²⁷ The 'spiral model', for example, suggests that the work of advocacy networks in raising moral consciousness, and empowering and legitimating claims of domestic opposition groups, is indispensable for processes of social change in the field of human rights. See Risse, Ropp and Sikkink (eds), *supra* note 126. Likewise, Simmons, *supra* note 126, explores the impact of IHRL on domestic practices, emphasizing three mechanisms through which this impact is exerted: actors in the executive, in the judiciary and in civil society.

¹²⁸ See, e.g., Simmons, *supra* note 126, at 135–148.

¹²⁹ *Ibid.*, at 139.

¹³⁰ A. M. Slaughter, *A New World Order* (2004).

¹³¹ Tsutsui and Smith, 'Human Rights and Social Movements: From the Boomerang Pattern to a Sandwich Effect', in D. Snow *et al.* (eds), *The Wiley Blackwell Companion to Social Movements* (2018) 586.

¹³² Dos Reis and Kessler, *supra* note 104.

¹³³ The term describes the process by which individuals or groups bypass their state and turn to international allies to pressure their state into compliance. See Keck and Sikkink, *supra* note 104.

¹³⁴ The term describes how national governments are pressured to comply with human rights norms both from above by global institutions, and from below by grassroots movements. See Tsutsui and Smith, *supra* note 131.

¹³⁵ See, e.g., Keck and Sikkink, *supra* note 104.

In assuming an old governance regulatory environment to be the backbone of international human rights law and practice, IR theories therefore remain agnostic to TNCs' potential to function as norm entrepreneurs and enforcers in the field of human rights. Their commitment to investigating the influence of positive international regimes on the diffusion and institutionalization of human rights norms in domestic settings thus limits our understanding of the ways in which international human rights norms make a difference in the world.

To sum up thus far, the above analyses in Section 3 have revealed a tension between the dominant regulatory approaches underpinning the doctrine and theory of IHRL and the alternative regulatory prisms of new governance theories and architectures. Indeed, practitioners and scholars of human rights have endeavoured, in recent decades, to keep abreast of the regulatory changes that the field has undergone, and to attend to the novel challenges that these changes entail. The emerging field of business and human rights strove to make headway by encroaching on the state-centric boundaries of the international human rights regime, and to recognize TNCs as objects of the law.¹³⁶ And yet, notwithstanding these efforts, human rights lawyers fail to interrogate whether the broader *regulatory approach* of IHRL is still relevant for this regime under conditions of economic globalization. In sustaining a view of transnational private regulation as a 'field of action that exists outside the law',¹³⁷ they quell TNCs' profound involvement in structuring and shaping the human rights agenda as regulatory agents within contemporary regulatory environments. The statist, international legal positivist approach of human rights law and lawyers, it has been argued, perhaps inadvertently reproduces the difficulties that they have set out to overcome, by continuing to '[filter the corporate personality] through the persona of the state'.¹³⁸

These analyses therefore suggest the merits of contemplating the potential of pursuing a new governance approach to international human rights law and theory, so as to analytically 'render visible the activities of transnational corporations ...'.¹³⁹ Whilst the elaboration of a full-fledged 'new governance theory' of business and human rights is undoubtedly a momentous project, and as such beyond the scope of this article, the following part nevertheless takes some cautious preliminary steps on the path to this theory's much-needed development. It airs some modest insights regarding the implications of such an approach for contemporary human rights practice and theory, and for future exploratory avenues in the field.

¹³⁶ Alston, *supra* note 1.

¹³⁷ Shamir, 'Capitalism, Governance and Authority: The Case of Corporate Social Responsibility', 6 *Annual Review of Law and Social Science* (2010) 531, at 532.

¹³⁸ Cutler, 'Private International Regimes and Interfirm Cooperation', in R. B. Hall and T. J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (2009) 23, at 32.

¹³⁹ *Ibid.*, at 35.

4 Conclusion: Considerations of a New Governance Approach to Business and Human Rights

A Implications for the Human Rights Practice

What then, would taking TNCs' regulatory role seriously mean for the international human rights practice? A true distancing from the statist and legal positivist structure of IHRL would require a reconsideration of the extent to which the regulatory attitude underpinning this structure contributes to the current stalemate in the business and human rights debate.¹⁴⁰ As already acknowledged by human rights practitioners and scholars themselves, the current instruments which have become the focus of debates neither garner sufficient support from states nor do they truly overcome issues of enforcement in the transnational arena.¹⁴¹

Arguably, then, a convergence of new governance sensibilities with IHRL would first require directing attention to the empirical and normative claims of new governance scholarship regarding the effectiveness of different forms and structures of transnational private regulation. A convergence, in this context, would require accepting the ultimate aim of human rights practice and scholarship as the starting point of discussion, whilst incorporating new governance insights to think about the spectrum of possible ways to accomplish this aim. Contrary to what is often implied in the context of discussions on 'corporate social responsibility' or 'voluntarism', such a convergence would by no means demand relinquishing the fundamental goal of human rights' protection and promotion; nor would it require disregarding the role of the state within the human rights edifice. Rather, it would mandate a consideration of the extensive empirical and normative findings of new governance scholarship regarding which regulatory architectures have more potential to actually lead to transformative social change, and, importantly, why they have such potential.¹⁴² A new governance approach to human rights would rely on *these* considerations as the basis for policymaking in the field, rather than relying on predetermined categorizations of actors according to their legal subjectivity. Such an approach might also therefore entail a shift of focus within the human rights praxis from states' direct role as legislators, promulgators and enforcers of human rights norms, to their role as coordinators and orchestrators, working in tandem with TNCs. The adequacy or legitimacy of governance structures would not be judged by reference to a priori normative conventions

¹⁴⁰ See Nowak and Januszewski, 'Non-State Actors and Human Rights', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 113, at 116–117:

[I]nternational human rights law has very modestly responded to the changing circumstances in the real world with its myriad of potent participants . . . despite the fact that over the last 50 years an impressive and diverse corpus of modern human rights law has developed, this plethora of norms seems, with a few exceptions, to apply only between the individual and the state.

¹⁴¹ See, e.g., Deva, *supra* note 19.

¹⁴² For example, new governance literature sheds light on how hard law positive legal regimes often provoke opposition on TNCs' part rather than engendering their cooperation and collaboration. They thus have limited capacity to instigate change in the field of human rights. See, e.g., Shamir, *supra* note 24; Levi-Faur, *supra* note 7 (detailing six shortcomings of command-and-control regulation).

apropos the importance of the state in administrating human rights, but rather by reference to these structures' effectiveness in solving the problems which led to their creation.

Importantly, from a conceptual standpoint, a new governance lens for IHRL that would accept transnational private regulatory regimes as *practices of international law* would 'extend legal validity to exercises of power that are not the sovereign power of states'.¹⁴³ Practices, according to a constructivist lens, 'can be identified not through the examination of any single blueprint'—such as that provided by international law's doctrine of sources—but rather 'through the analysis of changing patterns of shared expectations, processes, and behaviour'.¹⁴⁴ Extending validity to the exercise of private power turns the spotlight to concerns which transcend those currently attracting the primary focus of human rights lawyers in the context of business and human rights; primarily, to those related to the democratic deficits associated with the privatization of law.¹⁴⁵

Such concerns are particularly paramount at present in light of the expansion in form of TNCs' regulatory roles in the field of human rights, most potently that of information and communication technology companies in shaping and enforcing individuals' rights such as those to privacy and freedom of speech.¹⁴⁶ These are particularly interesting instantiations of transnational private regulation which would go unaccounted for as forms of governance by old governance paradigms, despite having disturbing democratic implications beyond those concerning human rights per se. The extension of validity to TNCs as 'subjects of power' would signify a veritable recognition of their political role, public functions and authority, which would, in turn, bust open the door for considering which norms should apply so as to legitimize this exercise of public power and mitigate its undemocratic effects. Such a conceptual move, it is submitted, transports us squarely into the realm of global administrative law (GAL) as the body of norms which addresses the phenomenon of global governance. This move thus facilitates productive discussions on the intersections between this body of public norms and TNCs' private commercial operations.¹⁴⁷

¹⁴³ Lustig, *supra* note 114, at 97.

¹⁴⁴ Mertus, 'Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application', 32 *New York University Journal of International Law and Politics* (2000) 537, at 557.

¹⁴⁵ As aptly put by Cutler, *supra* note 137, at 24:

Very basically, the democratic, formalistic, and legalistic associations of authority with states and the public sphere obscure the growing authority of private institutions, actors, and processes. As a consequence, efforts to hold private institutions accountable in any democratic way are bound to flounder, for that which goes unrecognized is difficult to regulate.

For scholarship which has recognized this aspect, see, e.g., Lustig and Benvenuti, 'The Multinational Corporation as "The Good Despot": The Democratic Costs of Privatization in Global Settings', 15 *Theoretical Inquiries in Law* (2014) 125; De Burca, 'New Governance and Experimentalism: An Introduction', 2010 *Wisconsin Law Review* 227, at 235.

¹⁴⁶ See, e.g., Shadmy, 'The New Social Contract: Facebook's Community and Our Rights', 37 *Boston University International Law Journal* (2019) 307; Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131 *Harvard Law Review* (2018) 1598.

¹⁴⁷ See, e.g., the concerns raised by Butler, 'The Corporate Keepers of International Law', 114 *AJIL* (2020) 189 (Butler's ideas in general coincide with the arguments advanced herein).

The extension of GAL norms to TNCs' regulatory operations would direct attention to their decision-making processes, thereby opening new exploratory avenues regarding the relationships between private, or allegedly 'apolitical' actors, and human rights. The administration of GAL principles which 'focus on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review'¹⁴⁸ would require TNCs to promote not only substantive human rights norms, but also due process norms in order to enhance the 'input legitimacy' of their regulatory functions. The latter may potentially enrich stakeholder participation and democratize the relationship between TNCs and the communities within which they operate, particularly in the context of commercial operations in the jurisdiction of states who fail to enforce human rights. From both a conceptual and practical standpoint, the acknowledgment of, and extension of validity to, TNCs' private regulatory role thus should not signify a form of succumbing to the private interests of TNCs at the expense of human rights norms. Rather, in accounting for the reality of this phenomenon, it would enable putting a normative 'price tag' on TNCs' preference and power to self- or co-regulate.

B Implications for Human Rights Theories

The adoption of a new governance prism for the practice of human rights may also lend some coherence to human rights theories which proceed from this practice, and enable further avenues for normative thinking in the field.

At present, both legal and political theories conceptualize human rights not only by reference to their substantive content (e.g. freedom of expression), but also by reference to the institutional structures whose presence determines the existence of these rights. These theories' reliance on positive IHRL as constituting the entirety of the international human rights praxis thus breeds a particular view of human rights as norms which apply only to *states*. Interestingly, such an understanding of the nature of human rights is in disjunction with contemporary doctrinal efforts to bring TNCs under the umbrella of IHRL and conceptualize them as violators of human rights norms, and thus as objects of the law. Insofar as human rights are theorized exclusively as restriction on the state, arguably one cannot simultaneously speak coherently of TNCs as violators of these norms in the way that human rights lawyers aim to do. In other words, the old governance bias of human rights doctrine which nourishes the theory ends up obstructing the former's efforts to move away from its traditional constraints.

Taken at its best light, a new governance paradigm would thus offer some consistency between contemporary theorizing of human rights and doctrinal discussions of business and human rights. Such a paradigm would also be more faithful to legal and political theorists' object of constructing a human rights theory from the concrete roles these rights play in international legal and political life. In providing an alternative reading of the human rights praxis that is congruent with bottom-up accounts of

¹⁴⁸ Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15, at 28.

how legal norms are constructed and mobilized, and of how they are experienced by those whose interests they are meant to protect, new governance theorizing of human rights would afford discursive, methodological and normative tools to understand the nature of these rights more broadly as protections of individuals' interests which apply to exercises of power and public functions, regardless of the private character of the regulatory actor in question.

From this standpoint, human rights would be theorized as performing more diverse functions within the international legal and political arena, and their scope widened. Not only may they be justified as mitigating the set of harms created by international law's distribution of sovereign power, but also as moderating those generated by international law's failure to formally recognize other sources of power. The ways in which international law 'organizes global politics into an international legal order'¹⁴⁹ incorporates choices about the identity of participants in this legal order. International law and lawyers, in this sense, paradoxically participate in the endurance of human rights harms not only by investing states with international legal personality, but also indirectly, by *not* acknowledging non-state actors' de-facto legal 'subjectivity'. In tethering the concept of international law strictly to the concept of sovereignty, the legal theory of human rights overlooks this aspect of the international legal regime and its consequences for human rights norms. A new governance prism embracing a more fluid conception of human rights as mitigating social power disparities would arguably rectify this oversight and contemplate ways to address it.

Finally, new governance IR theorizing of human rights would call for exploratory avenues which investigate the involvement of TNCs in the transnational expansion of human rights norms; their role in the adaptation of human rights norms to local institutions and meanings; as well as their influence on the social construction of human rights consciousness at the grassroots level, and the formation of non-legal forms of human rights claims.¹⁵⁰ These exploratory avenues may result in more holistic understandings of how human rights norms make a difference in the world, which in turn may feed back into a theory of what they are, and eventually influence the development of practices in the field.

¹⁴⁹ Macklem, *supra* note 107.

¹⁵⁰ See, e.g., Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108 *American Anthropologist* (2006) 38.

