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**RESEARCH HANDBOOK ON POLITICS OF INTERNATIONAL HUMAN RIGHTS LAW:
GOVERNANCE, DISTRIBUTIVE JUSTICE AND INTERNATIONAL POLITICS**

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Ch. 16 The relevance of governance and multi-level governance to the study of human rights: Insights from business and human rights

Claire Methven O'Brien

Abstract

This chapter explores and supports the relevance of the idea of governance to the study of human rights. The business and human rights field emerged in response to concerns over the adequacy of human rights norms and institutions in addressing the social and environmental impacts of global market integration. Because business and human rights stems from and addresses transnational and market-based dynamics, relationships and actors, it confronts state-centric framings of human rights, and demands inquiries beyond two-level (national/international) analysis. This makes relevant the theoretical framing of “governance”, by contrast to the prior notion of “government”. More specifically, understanding of business and human right systems and phenomena are deepened with reference to governance and multi-level governance theory, according to which authority, legitimacy and social steering capacities are dispersed across multiple spatial, technical, overlapping and competing “jurisdictions” beyond the nation state and incorporating market actors. The chapter illustrates this by exploring how multi-level governance framing informs the study of the “national human rights system” and its interaction with business and human rights norms and actors. Concluding, it reflects on implications for broader human rights scholarship.

KEYWORDS: Business and human rights; governance; multi-level governance; regulation; regulatory pluralism; multilevel governance

The relevance of governance and multi-level governance to the study of human rights: Insights from business and human rights

1. Introduction

This chapter explores and supports the relevance of the idea of governance, and multi-level governance, as a related theoretical construct, to the study of human rights, taking point of departure in the field of business and human rights. Because business and human rights stems from and addresses transnational and market-based dynamics, relationships and actors, it necessarily confronts state-centric framings of human rights and demands inquiries beyond two-level national-international analysis. This makes relevant the theoretical framing of “governance”, by contrast to the prior, territorially-bounded and self-evidently state-focused notion of “government”. More specifically, understandings of business and human right systems and phenomena are deepened with reference to multi-level governance theory, which recognises that authority, legitimacy and social steering capacities may be dispersed across multiple spatial, technical, overlapping and competing “jurisdictions” beyond the nation state and incorporating market as well as public actors. In turn, governance and multi-level governance approaches can reveal forms of power, sites of contestation and domination, that are obscured on conventionally state-centric analyses of human rights norms, institutions, compliance and implementation.

First, the chapter briefly situates the field of business and human rights historically and with reference to studies in international human rights law and policy more broadly (Section 2). Next, in section 3, the chapter defines ‘governance’, as applied in socio-legal and related disciplines, in contrast to the idea of ‘government’ and highlighting some of its motivating concerns and parameters. Section 4 discusses multi-level governance theory, a construct that builds on the basic governance concept, but adapts it to the complex regulatory and market settings, such as European Union and wider global economy. It further considers ten insights distilled from multi-level governance theory highlighting some of their implications for the study of business and human rights, and human rights more broadly. As a case study demonstrating the difference these insights can make in practice, section 5 considers the notion of the “national human rights system” and shows how its perimeter and elements are characterised more completely and dynamically by

applying a multi-level governance approach. Concluding, the chapter reflects on some of the further implications and potentials of working with the idea ‘governance’ for human rights research and scholarship.

2. Business and human rights: origins and characterisation of the field

Business and human rights has emerged as a distinct field within the broader domain of international human rights, policy and practice. It owes its origins to political expressions of concern at the social and environmental impacts of global market integration; related disparities in economic and political power and the inadequacies of international human rights norms and institutions, as well as national legal and political regimes, in addressing these.¹

Historically, international human rights instruments and institutions have situated the state as principal guarantor of the dignity and fundamental freedoms of the individual, correspondingly adjudicating governmental, rather than private actors’, human rights infractions. Instead of direct assessment of commercial entities’ conduct or the imposition on them of sanctions or penalties for human rights abuses as such, human rights courts have addressed private actors indirectly, for instance, via states’ positive obligations to protect human rights against abuses by non-state actors.²

The writing of this chapter has been partly funded by the Danish Ministry of Foreign Affairs, administered by the Danida Fellowship Centre, under Project ‘Realising the SDGs: The role of responsible business.’ Parts of this chapter draw on Claire Methven O’Brien and Jolyon Ford, “Business and human rights: from transnational market dynamics to domestic institutionalisation and back again”, 37(3) *Nordic Journal of Human Rights, Special Issue* (2019), 216-233; and Claire Methven O’Brien, John Ferguson and Marisa McVey, “National Action Plans on Business and Human Rights and Experimentalist Governance” 23 *Human Rights Review* 71–99 (2022).

¹ See e.g. Craig Scott (ed), *Torture as Tort* (2001, Hart); Beth Stephens, “Amorality of Profit: Transnational Corporations and Human Rights”, *Berkeley Journal of International Law* 20 (2002), 45; International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Geneva: International Council on Human Rights Policy, 2002).

² See further, Claire Methven O’Brien, *Business and Human Rights. A Handbook for Legal Practitioners* (Strasbourg: Council of Europe, 2019), The “state duty to protect” under the UNGPs and Council of Europe Recommendation, p.25 et seq.; Gabrielle Holly and Claire Methven O’Brien, “Human rights due diligence laws: Key considerations. Briefing on Civil Liability for Due Diligence Failures” (DIHR, 2021), available at: <https://www.humanrights.dk/publications/human-rights-due-diligence-laws-key-considerations>;

Nonetheless, since the 1990s, in a context of increasing and accelerating transboundary flows,³ intensifying financialisation⁴ and fears about the consequences of regulatory competition⁵ and ‘social dumping’,⁶ business and human rights advocacy campaigns, new norms, governance initiatives and litigation have sought to extrude human rights norms into the sphere of market relations and to find ways to control and compensate for business-related human rights abuses, in particular those implicating multi-national enterprises⁷ and global value chains.⁸ The United Nations (UN) “Protect, Respect, Remedy” Framework and Guiding Principles on Business and Human Rights (UNGPs)⁹ have served as important reference points in this endeavour. Soft law standards that draw on the principles and substantive content of existing international and regional human rights treaties, the UN Framework and UNGPs are being slowly assimilated into and given

³ David Held et al, ‘Globalization’, (1999) *Global Governance* 483.

⁴ Gerald Epstein, *Financialisation and the World Economy* (Edward Elgar 2002); Stefanie Hiss, ‘The Politics of the Financialization of Sustainability’, *Competition and Change* 17(3): 234-247.

⁵ William Olney, ‘A race to the bottom? Employment protection and foreign direct investment,’ (2013) *Journal of International Economics* 91(2) 191-203.

⁶ International Labour Conference 85th Session 1997, Report of the Director-General, ‘The ILO, standard-setting and globalization’, available at: <https://www.ilo.org/public/english/standards/realm/ilc/ilc85/dg-rep.htm>.

⁷ Peter Muchlinski, *Multinational Enterprises and the Law* (3rd edition, Oxford University Press 2021).

⁸ Stefano Ponte, Gary Gereffi and Gale Raj-Reichert, *Handbook on Global Value Chains* (Edward Elgar 2019); International Labour Conference, 105th session, 2016, Report IV. Decent Work in Global Supply Chains, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf.

⁹ UNHRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights’ (2008) UN Doc A/HRC/8/5; UNHRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’’ (21 March 2011) UN Doc A/HRC/17/31, Annex, adopted by the UN Human Rights Council; UNHRC ‘Human Rights and Transnational Corporations and Other Business Enterprises’ HRC Res. 17/4 17th session UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011; hereafter UNGPs).

legal effect via national and regional enactments,¹⁰ public policies,¹¹ corporate¹² and civil society¹³ praxis and litigation.¹⁴

International human rights scholarship, like national constitutional rights law and theory,¹⁵ has often applied a state-centric¹⁶ logic or ‘methodologically nationalist’ paradigm¹⁷ which tends to conceal, rather than illuminate, critical interdependencies between state and market power, capacities and regulation, or to ignore the commercial realm altogether.¹⁸ Relatedly, human rights studies often assume a two-level ontology comprising the national and the inter-state planes, whereby private, technological or hybrid public-private systems that transect or transcend these planes¹⁹ are obscured along with their conditioning effects on governments or other public actors.²⁰

¹⁰ Such as national due diligence laws, and European Union legislation on conflict minerals, non-financial reporting: see further Claire Methven O’Brien, “Business and Human Rights in Europe: A decade in review”, *European Yearbook of Human Rights* (2021).

¹¹ Such as the OECD Guidelines for Multinational Enterprises and business and human rights national action plans. See respectively: Kari Otterburn and Axel Marx, ‘Seeking remedies for corporate human rights abuses: What is the contribution of the OECD National Contact Points?’ Ch. 11 in Axel Marx et al, *Research Handbook on Global Governance, Business and Human Rights* (2022, Edward Elgar); Claire Methven O’Brien, John Ferguson and Marisa McVey, “National Action Plans on Business and Human Rights and Experimentalist Governance” *Human Rights Review* (2021).

¹² See e.g. Benjamin Grama, ‘Company-Administered Grievance Processes For External Stakeholders: A Means For Effective Remedy, Community Relations, or Private Power?’ 39(1) *Wisconsin International Law Journal* (2022).

¹³ David Birchall, ‘The role of civil society and human rights defenders in corporate accountability’, Ch. 20 in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (2020, Edward Elgar).

¹⁴ Ekaterina Aristova and Ugljesa Grusic (eds) *Civil Remedies and Human Rights in Flux* (Hart 2022).

¹⁵ Frances Olsen, ‘The Family and the Market: A Study of Ideology and legal Reform’, (1983) 96 *Harvard Law Review*, 1496.

¹⁶ Julia Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World, 54(1) *Current Legal Problems* 103-147.

¹⁷ Andreas Wimmer and Nina Glick Schiller, “Methodological nationalism and beyond: nation-state building, migration and the social sciences” (2002) *Global Networks* 2 (4), 301–334.

¹⁸ This critique is also levelled at some strands of international political economy scholarship: J Copley and A Moraitis, ‘Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation’, (2021) *New Political Economy*, 26:3, 490-508.

¹⁹ A. Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (2017, Routledge).

²⁰ Cf e.g. Steven Jensen, Stéphanie Lagoutte & Sébastien Lorion, ‘The Domestic Institutionalisation of Human Rights: An Introduction,’ (2019) *Nordic Journal of Human Rights*, 37:3, 165-176; Rainer Grote, Mariela Morales Antoniazzi and Davide Paris, *Research Handbook on Compliance in International Human Rights Law* (2021, Edward Elgar). Where a third, regional level human rights system is acknowledged, mainstream scholarship has been critiqued for assuming the operation of a top-down international-regional hierarchy, whereas the reality has been more dynamic: Alexandra Huneeus and Mikeal Rask Madsen, ‘Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems’ *International Journal of Constitutional Law* 16 no. 1 (2018):136; Başak Çalı, Mikael Rask Madsen, and Frans Viljoen, ‘Comparative Regional Human Rights: Defining a Research Agenda’ *International Journal of Constitutional Law* 16 no. 1 (2018):128.

As noted, the field of BHR responds to labour and social activism around threats to human rights that stem from decisions and actions by commercial actors. BHR advocacy proceeds via transnational activist networks, campaigns and litigation.²¹ BHR standards and initiatives target transnational activities such as the extraction, processing, trading and retail of commodities, from diamonds to timber, footwear and apparel, for example²²; abuses of migrant workers²³; government procurement from global supply chains²⁴; and, more recently, human rights abuses in the online domain.²⁵ BHR thus embraces the nation state, but also refers to ‘private’ and hybrid sources of transnational law and governance²⁶ and framework conditions defined by international and transnational²⁷ trade, taxation and investment regimes. BHR scholarship explores how to extend human rights norms and accountability to liminal actors such as international development and financial institutions,²⁸ and the institutionalisation of human rights within business organisations and relationships, for instance, via the UNGPs’ envisaged process of human rights due diligence, that may be constituted within the frame of national law but have effects beyond domestic jurisdictions.²⁹ BHR thus aligns with and reinforces strands of human rights literature

²¹ Chris Johnick and Louis Bickford, ‘The role of civil society in business and human rights’ and Christine Kaufmann, ‘Holding multinational corporations accountable for human rights violations: litigation outside the United States’, in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights. From Principles to Practice* (2016, Routledge).

²² MSI Integrity and Duke University, ‘The new regulators? Assessing the landscape of multi-stakeholder initiatives’, <https://msi-database.org/data/The%20New%20Regulators%20-%20MSI%20Database%20Report.pdf>.

²³ Andrew Crane et al., ‘Confronting the Business Models of Modern Slavery’ (2021) *Journal of Management Inquiry*.

²⁴ Claire Methven O’Brien and Olga Martin Ortega, ‘Human rights and public procurement of goods and services’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (2020, Edward Elgar).

²⁵ Claire Methven O’Brien, Rikke Frank Jørgensen and Benn Finlay Hogan, ‘Tech Giants: Human Rights Risks and Frameworks’ (December 15, 2020), available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768813.

²⁶ E.g. Sorcha MacLeod and Rebecca DeWinter-Schmitt, ‘Certifying Private Security Companies: Effectively Ensuring the Corporate Responsibility to Respect Human Rights?’ (2019) *Business and Human Rights Journal*, 4 (1), 55-77. More generally see: A Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017); Jean-Christophe Graz and Andreas Nölke (eds), *Transnational Private Governance and its Limits* (Routledge 2008).

²⁷ ‘Transnational’ law may be defined as including ‘all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories’: Philip Jessup, *Transnational Law* (Yale University Press, 1956), 2; cited in Peer Zumbansen, *Transnational Law: Theories and Applications*, Ch.1 in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (OUP 2021), at 3.

²⁸ Sope Williams-Elegbe, ‘Human rights in the context of public procurements financed by the World Bank,’ in Olga Martin-Ortega and Claire Methven O’Brien (eds), *Public Procurement and Human Rights* (2019, Edward Elgar); Motoko Aizawa, Daniel Bradlow and Margaret Wachenfeld, ‘International Financial Regulatory Standards and Human Rights: Connecting the Dots’, *Manchester Journal of International Economic Law* 15 (1), 2018.

²⁹ Ken McPhail and Carole Adams, ‘Corporate Respect for Human Rights: Meaning, Scope, and the Shifting Order of Discourse’ (2016) *Accounting, Auditing & Accountability Journal* 29(4) 650–78; Robert McCorquodale et al ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’,

in international relations and political science that highlight the significance of the transnational plane and its interface with domestic and international human rights norms and institutions.³⁰ BHR studies should also confound a conventional state-market dichotomy, and investigate social ordering around human rights principles amongst businesses, community and associative formations as well as by state actors.³¹

3. Government and governance: definitions and genealogy

Governance can be defined as the exertion, by governmental but also by other actors, of intentional efforts at social ordering or steering.³² It is thus a broader concept than either government or regulation,³³ and one that casts a wider net in recognising actors, capacities and resources than does a state-centric lens. Government, in this context, connotes a directive, top-down intervention by public actors who seek to achieve the realisation of or conformity with their aims by subjects, who may be other public or private actors, through hierarchical rule backed by coercive power. Government assumes, hence, a unitary bureaucracy possessing somewhat accurate knowledge of societal conditions; a substantial degree of social uniformity; compliance with enacted rules by social and market actors; and the availability of adequate resources to support oversight and enforcement mechanisms.³⁴ The of “command and control” regulation, taking the form of detailed legislative schemes backed by statutory enforcement agencies and powers, is one embodiment of the governmental paradigm.

(2017) *Business and Human Rights Journal* 2(2), 195–224; cf. Marisa McVey, John Ferguson and François-Régis Puyou, “Traduttore, Traditore?” Translating Human Rights into the Corporate Context. *J Bus Ethics* (2022).

³⁰ Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998, Cornell University Press).

³¹ Wolfgang Streeck and Philippe Schmitter, “Community, Market, State-and Associations? The Prospective Contribution of Interest Governance to Social Order” (1985) 1(2) *European Sociological Review* 119–38.

³² Cf. Levi-Faur’s definition of governance, as ‘an interdisciplinary research agenda on order and disorder, efficiency and legitimacy all in the context of the hybridization of modes of control that allow the production of fragmented and multi-dimensional order *within* the state, *by* the state, *without* the state, and *beyond* the state’: David Levi-Faur, ‘From ‘Big Government’ to ‘Big Governance’?’ in *The Oxford Handbook of Governance*, ed. David Levi-Faur (Oxford: OUP, 2012).

³³ Black suggests that regulation is defined as the ‘sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification’: Julia Black, ‘Critical Reflections on Regulation’, *Australian Journal of Legal Philosophy* 26 (2002).

³⁴ John Braithwaite and Peter Drahos (2000) *Global Business Regulation*. OUP; B Guy Peters, ‘Steering, rowing, drifting or sinking? Changing patterns of governance’(2011) *Urban research & Practice* (4): 5-12.

Parallel to globalisation, efforts were made in some jurisdictions to substitute governmental with other modalities of regulation, for instance, via policies favouring “deregulation”, privatisation and “new public management”, sometimes referred to metaphorically as a movement from “rowing” to “steering”³⁵ and, at an extreme, captured in the ideal of the “night watchman state”.³⁶ While the causes of this trend were diverse, in many instances ideology was a factor.³⁷ During the 1970s and 1980s, market mechanisms found political favour while national and international actors attributed economic problems to over-reliance on, or intrinsic failures of, centralised government planning.³⁸

Yet at the same time new transnational environmental, security and technological challenges faced by societies in this period also triggered the rise of supranational institutions and an associated dispersal of authority “upwards to the supranational level, downwards to subnational jurisdictions, and sideways to public/private networks”³⁹. Given the limited mandates and resources of such entities, this encouraged, amongst others, the growth of public-private partnerships, while international organizations “increasingly orchestrated new forms of authority involving non-state actors”,⁴⁰ for instance, via policy networks. A further consequence was the transnationalisation of policy domains. In 1997, Slaughter observed, the state was “disaggregating into its separate, functionally distinct parts. These parts - courts, regulatory agencies, executives, and even legislatures are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order”.⁴¹

In this context, the idea of “new governance” emerged to refer “to a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal

³⁵ David Osborne and Ted Gaebler, *Reinventing government: how the entrepreneurial spirit is transforming the public sector* (1992, Basic Books), 35.

³⁶ Admos Chimhowu, David Hulme and Lauchlan Munro, ‘The ‘New’ national development planning and global development goals: Processes and partnerships’ (2019) *World Development* 120, 79.

³⁷ Ibid.

³⁸ Ibid; World Bank (1983) ‘World Development Report. OUP’, New York, cited by Chimhowu, Hulme and Munro supra.

³⁹ Lisbet Hooghe and Gary Marks, *Multi-level governance and European integration* (2001, Rowman & Littlefield), 4.

⁴⁰ Grainne de Búrca, Robert Keohane and Charles Sabel, ‘New modes of pluralist global governance’ (2013), *New York University Journal of International Law and Politics*, 45:734-735.

⁴¹ Anne-Marie Slaughter, ‘The Real New World Order’ *Foreign Affairs* (1997):184.

mechanism of traditional command and control type legal institutions”⁴². Often found in domains framed by soft law standards, this new governance was identified as involving “actors other than classically governmental actors, or indeed the absence of any traditional framework of government” and “approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature” than conventional regulation.⁴³ Across institutional settings, new governance regimes were said to emphasise the “accommodation and promotion of diversity... the importance of provisionality and revisability – in terms of both problem definition and anticipated solutions” and “the goal of policy learning”.⁴⁴ To illustrate, in the European Union, the “Open Method of Coordination” (OMC) sought to promote coordination and convergence amongst Member States towards commonly agreed policy goals, in the absence of relevant legal obligations, via peer exchange, dialogue and review, reporting against standardised metrics as a basis of benchmarking to promote their achievement, and National Action Plans (NAPs).⁴⁵ In the context of the OMC and elsewhere, an observed tendency was towards “regime complexes”⁴⁶ or “distributed networks”⁴⁷ understood as non-hierarchical governance arrangements that include “states, sub-state units, international organizations, civil society organizations, private actors, and others”, as an “ad hoc” response to uncertainty or “unusual circumstances”.⁴⁸

Such developments prompted scholars to reflect on the legitimacy of new institutions and mechanisms of governance, given that they could not lay claim to be representative or enjoy delegated authority in conventional governmental terms. Here, ideals of deliberative rationality entered play as a “promising model for democratizing the complex, pluralist systems of

⁴² Grainne de Búrca and Joanne Scott, ‘Introduction’ in G de Búrca, and J. Scott (eds) *New Governance, Law and Constitutionalism*, in *Law and New Governance in the EU and the US* (2006, Hart), 2.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 3.

⁴⁵ Mark Dawson, *New governance and the transformation of European law: Coordinating EU social law and policy* (2011, Cambridge University Press); Egidijus Barcevičius, Timo Weishaupt and Jonathan Zeitlin, (eds), *Assessing the open method of coordination institutional design and national influence of EU social policy coordination* (2014, Palgrave Macmillan).

⁴⁶ Ruggie, J. (2020) ‘The social construction of the UN Guiding Principles on Business and Human Rights’. In: Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business*, supra, 68.

⁴⁷ *Id.*, p.80.

⁴⁸ Grainne de Búrca, Robert Keohane and Charles Sabel (2013) supra, 726; see also Robert Keohane and David Victor, ‘The regime complex for climate change’ (2011) *Perspectives on Politics*, 9; John Ruggie (2002) ‘The Theory and Practice of Learning Networks’, *Journal of Corporate Citizenship*, 5: 27-36.

governance”⁴⁹. Amongst US-based scholars, many accounts referred back to pragmatism and Dewey’s “democratic experimentalism”⁵⁰ while in Europe, connections were explored to the work of Habermas and Luhmann, amongst others.⁵¹ Likewise, new governance entailed the need for critical reflection on prevailing concepts of accountability⁵² and on the concept of law itself, providing one stimulus for the period’s growing scholarly interest in legal pluralism.⁵³

4. Multi-level governance

Multi-level governance terminology, though applied more widely,⁵⁴ originated in analyses of the European Community where it was used to describe multi-layered processes of decision-making, action and influence, within and across supranational and national legal and policy frameworks. In contrast to institutionalist or inter-governmental theories of European integration,⁵⁵ such processes were observed to be influenced by multiple institutional prerogatives and considerations.⁵⁶ Informed by the above insights, multi-level governance theory,⁵⁷ one amongst a broader cast of pluralist regulatory approaches,⁵⁸ hence seeks to accommodate all actors, capacities and relationships entailed by the contemporary governmental, market and social environment, including transnational networks of ownership, control, production and financing, specialised and scientific knowledge-based forms of authority, as well as traditional bureaucracies, businesses and civil society at the domestic level.

⁴⁹ Gregory Shaffer, ‘Transnational Legal Ordering and State Change’, in *Transnational Legal Ordering and State Change*, Gregory Shaffer (ed) (2012), p4.

⁵⁰ John Dewey, *The public and its problems* (1927, Holt); Michael Dorf and Charles Sabel, ‘A Constitution of Democratic Experimentalism’, (1998) *Columbia Law Review*, 98(2): 267-473.

⁵¹ For example, Gunther Teubner ‘Substantive and Reflexive Elements in Modern Law’ (1983) *Law and Society Review*, 17: 239; Christian Joerges and Jurgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology’ (1997) *European Law Journal* 3, 273-299.

⁵² Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) *Regulation and Governance*, 2: 137-164.

⁵³ Gunther Teubner, ‘Global Bukowina: Legal Pluralism in World Society’, in Gunther Teubner (ed) *Global Law without a State* (1996), 3-31; see further Paul Schiff Berman, ‘Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative’ in Paul Schiff Berman (ed) *The Oxford Handbook of Global Legal Pluralism* (2020, OUP), 1-36.

⁵⁴ See e.g. Gerd Winter (ed) *Multilevel Governance of Global Environmental Change* (Cambridge University Press 2006).

⁵⁵ Liesbet Hooghe and Gary Marks, ‘Grand theories of European integration in the twenty-first century’ (2019) *Journal of European Public Policy* 1113.

⁵⁶ Gary Marks, ‘Structural Policy in the European Community’ in Alberta Sbragia (ed) *Europolitcs: Institutions and Policy-Making in the “New” European Community* (1992, Brookings); Liesbet Hooghe, *Multilevel Governance and European Integration* (2011, Rowman and Littlefield).

⁵⁷ See e.g. Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford University Press 2004).

⁵⁸ Christine Parker, ‘The Pluralisation of Regulation’, (2008) *Theoretical Inquiries in Law* 9(2), 349-369.

This section distils ten insights from contributions to the multi-level governance literature concerning the character of governance within the complex contemporary legal, economic and political context, illustrating in the process how these bear on the field of BHR and wider human rights research.

i) Dispersed authority

Authority and resources have dispersed across society in recent decades.⁵⁹ Aside from state powers and capacities vesting in supra- and sub-national entities, non-state actors, including private transnational industry groupings, define and enforce standards over many policy areas.⁶⁰ State laws and institutions do not have a monopoly on the rule systems and normative orderings that ‘regulate’ behaviour in society, and which can impact on enjoyment of human rights. These plural and sometimes hybrid regulatory orderings in turn ‘regulate’ state governance systems, not just vice versa.⁶¹ Completeness, in the study of the determinants of enjoyment of human rights, therefore entails extending the scope of inquiry beyond nation-states and their formal institutions.

ii) Proliferation of jurisdictions, spheres or spaces in which governance occurs

Relatedly, there has been a proliferation of spheres of authority in which governance occurs. Hence ‘jurisdictions’ are often functional and specific, frequently overlap, and are potentially competing,⁶² by contrast to the classical, state-centric conception of general, complete and territorially-based jurisdiction.⁶³ BHR, and human rights ‘institutionalisation’ thus needs to occur across and through these multiple jurisdictions, if it is to be effective, as well as via the traditional mechanisms of state legislature, executive and judiciary, and all such spheres need to be

⁵⁹ Ian Bache and Matthew Flinders, ‘Themes and Issues in Multilevel Governance’ in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (2004, Oxford University Press).

⁶⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Oxford University Press, 2000). See also Guy Peters and Jon Pierre, ‘Multi-level Governance and Democracy: A Faustian Bargain?’ in Ian Bache and Matthew Flinders (eds) *Multi-level Governance* (2004 Oxford University Press), 75.

⁶¹ John Braithwaite and Peter Drahos, *supra*.

⁶² Consider e.g. the multiple state and private governance initiatives aiming to support or enforce human rights in global value chains (see MacLeod and Dewinter-Schmitt, *supra*.) or in the domain of sustainability certification (Elizabeth Bennett, ‘The efficacy of voluntary standards, sustainability certifications and ethical labels’, Ch.9 in Axel Marx et al, *Research Handbook on Global Governance, Business and Human Rights*, *supra*).

⁶³ Gary Marks and Liesbet Hooghe, ‘Contrasting Visions of Multi-level Governance’, in Ian Bache and Matthew Flinders, *supra*; also Liesbet Hooghe and Gary Marks, ‘Types of Multi-level Governance’, *European Integration Online Papers* 5(11), 20 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302786 accessed 7 October 2019.

acknowledged, considered and studied in analysing BHR and human rights implementation and systems. Moreover, technical and scientific jurisdictions, whether economic and financial, bio-medical, defense- or energy-related, environmental or technological, need to be acknowledged as domains with significant potential to contribute to realisation, as well as curtailment, of human rights.

iii) Plural cast of actors involved in 'governance'

A corollary of the preceding two characteristics is that governance often proceeds via loose, ad hoc agglomerations of disparate actors, as well as through conventional hierarchical structures involving formal state power.⁶⁴ Commercial and other non-state actors are involved in, and may be essential to, the design or delivery of public policy objectives. They have even been said to be “ubiquitous in efforts to internalize transnational spill-overs in the absence of authoritative coordination,”⁶⁵ a self-evident point in the case of BHR. Regulatory capitalism scholarship shows how state, civic and market sources and systems of governance interpenetrate and coexist in various configurations.⁶⁶ This plurality is replicated at the international level,⁶⁷ and between levels in ways that show the national-regional-international construct as sometimes misleading. As a result, public authorities can influence the behaviour of businesses or other social actors other than via interventions by formal state agencies, for instance, by convening thematically-based networks.⁶⁸

iv) No ceiling or necessary structure of governance levels

Multi-level governance theory also highlights that there is no upper limit to the number of or necessary structure to the different ‘levels’ or planes on which governance takes place. This contrasts with the classical conception of international human rights law as functioning along a national-international axis. It also substitutes a multiplicity of ‘diagonal’ interconnections for the notion of vertically “nested” levels of rule-making. It is aptly illustrated by BHR literature on the

⁶⁴ Manuel Castells, ‘The Information Age’ (n 80 above), 208, 500-2; Braithwaite and Drahos (supra). See generally Rodney Hall and Thomas Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002); David Held and Anthony McGrew (eds), *Governing Globalisation* (Polity 2002); Michael Barnett and Raymond Duvall (eds) *Power in Global Governance* (2005, Cambridge University Press).

⁶⁵ Marks and Hooghe, ‘Contrasting Visions of Multi-level Governance’, supra, 23-4.

⁶⁶ John Braithwaite, *Regulatory Capitalism* (Edward Elgar, 2008), 1.

⁶⁷ See e.g. Paul Schiff Berman, supra.

⁶⁸ Braithwaite and Drahos, supra, 13.

role of certification systems in global value chains,⁶⁹ on state-owned enterprises,⁷⁰ and in the virtual domain, for example⁷¹: governance activity in these contexts co-exists and often interacts with, but is not subsumed by, norm making, oversight and enforcement via state-based systems.

v) *Multi-scalarity of governance*

Governance norms and initiatives address multiple geographical scales, in step with variations in the (usually but not exclusively) territorial reach of policy externalities,⁷² a point illustrated, for instance, by the nascent human rights literature on cities climate diplomacy.⁷³

vi) *Reciprocal communication among different governance levels*

Pluralised orderings entail that communication and articulation is reciprocal between and across different governance levels and systems. Moreover, interactions between levels do not have any necessary structural pathways so that, for example, private transnational entities may interact directly with supranational public authorities, without state-level interlocutors, and vice versa.⁷⁴

vii) *A continuing role for states*

Recognition of actor plurality does not exclude a significant continuing role for formal state rules and institutions. This may be seen, for instance, in the increasing tendency towards enactment of BHR norms in legislation of different kinds, on corporate human rights due diligence, and non-financial reporting, for example.⁷⁵ At the same time, transnational and non-state or hybrid governance processes can still be constrained by formal barriers and jurisdictional limits: the institutional ‘grip’ often remains strong.⁷⁶

⁶⁹ Axel Marx, ‘Legitimacy, Institutional Design, and Dispute Settlement: The Case of Eco-Certification Systems’ (2014), *Globalizations*, 11:3, 401-416.

⁷⁰ Larry Cata Backer, ‘Human rights responsibilities of state-owned enterprises’, Ch. 11 in Surya Deva and David Birchall, *Research Handbook on Human Rights and Business*, supra.

⁷¹ E.g. Gereffi, Ponte and Raj-Reichert and Methven O’Brien, Jørgensen and Finlay Hogan, supra.

⁷² Marks and Hooghe 2004, supra, 15-16.

⁷³ Florian Koch (2021) *Cities as transnational climate change actors: applying a Global South perspective*, *Third World Quarterly*, 42:9.

⁷⁴ Peters and Pierre, supra, 75.

⁷⁵ Methven O’Brien, “Business and Human Rights in Europe: A decade in review”, *European Yearbook of Human Rights* (2021), supra.

⁷⁶ Peters and Pierre, supra, 78. Competition-law based objections to the use of social certification in the public procurement context (A Sanchez Graells, ‘Public Procurement and ‘Core’ Human Rights: A Sketch of the EU Legal Framework’ in Olga Martin-Ortega and Claire Methven O’Brien (eds), *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer* (Edward Elgar, 2019); or indeed the entire regime of the

viii) *The significance of context*

Governance activities and relationships coalesce around issues of political, economic, social or cultural concern. Formal structures do not necessarily constrain or explain the nature of outcomes observed. Consequently, an holistic integration across and amongst different governance processes cannot be presumed; rather, dedicated measures are required to promote their articulation. Studies of institutionalisation of human rights, in the BHR sphere and generally, should therefore heed contingent contextual factors that shape the character, content and limits of governance activities, for instance, deriving from the particular industrial-technological domain, commodity value chain, or specific manifestation of labour-capital relations they address. A context-sensitive BHR and human rights scholarship contrasts with approaches that idealise and project upon governance domains a uniformity they do not possess. Likewise, it is distinct from inquiries that exclude market actors, relations and power from the researcher's view.

ix) *Heterarchical relations drive governance as much as hierarchy*

Yet social ordering does not arise always or only as a result of coercion, threat, exploitation or domination. Coordination and exchange may be driven by their promised benefits, and actors' interdependence.⁷⁷ Negotiation and cooperation, rather than rule enforcement, can be the defining feature of governance relationships between actors.⁷⁸ Governance matrices are not necessarily planned or formally mandated, yet their compliance patterns are often as determinate as those flowing from direct government interventions,⁷⁹ even if *de facto* power differences bear more significance than in the setting of a formal bureaucracy.⁸⁰ BHR and human rights studies need, then, to test rather than assume the interrelations amongst the cast of governance actors.

x) *Governance constellations are inherently dynamic*

EU General Data Protection Regulation may be seen to illustrate this point: Kimberly Houser and Gregory Voss, 'GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?', 25 Rich. J.L. & Tech. 1 (2018-2019).

⁷⁷ Peters and Pierre, *supra*, 79.

⁷⁸ Thus, the binding quality of legal norms and mechanisms may, in some contexts, be unimportant for compliance prospects and patterns: Jolyon Ford, 'Bridging the Governance Gap' (n20), 9.

⁷⁹ Mark Bovens, Paul 't Hart, Guy Peters 'Analysing governance and failure in six European states', in Mark Bovens, Paul 't Hart, Guy Peters, *Success and Failure in Public Governance. A Comparative Analysis* (Edward Elgar 2001), 12.

⁸⁰ *Ibid*, 84.

Finally, multi-level governance recognises the inherently dynamic character of society and economies. Change is not, for instance, restricted to reallocating pre-existing rule-making or enforcement functions between nested jurisdictions in the same structural scheme.⁸¹ Rather, the reality is one of a continuously shifting kaleidoscope of criss-crossing governance constellations. This aptly describes the range of public, private and hybrid schemes and normative orders relating to BHR, as observable for instance, in the field of conflict minerals,⁸² and non-financial reporting regulation.⁸³

5. Applying a multi-level governance lens to the ‘national human rights system’

Applying a multi-level governance lens thus extends human rights’ analytical horizon and expands its ontology, by admitting market as well as non-state actors, and hybrid domains, while connecting human rights more resolutely to evolving framings in wider socio-legal and political science. At the same time, however, a multi-level governance lens can deepen and develop understanding of state-based human rights institutions and processes by showing where and how they interface with other societal elements and dynamics. This section aims to illustrate this, and hence the value of a multi-level governance approach, by showing how it alters or ‘tweaks’ the depiction of the ‘national human rights system’.⁸⁴ Generally, as described above, BHR investigates state-based regulation of business activities and their human right impacts. Applying a multi-level governance lens to BHR and its interface with the national human rights system however shows how this dynamic interaction re-draws the perimeter of the national human rights system; changes the cast of actors comprising it; and alters qualitatively the activities undertaken within it. The analysis is organised around four discrete axes: (i) new business-directed activities by national human rights actors; (ii) the enrolment of new actors in the national human rights system; (iii) the involvement of market actors in domestic institutionalisation of human rights; and (iv) national components of transnational BHR governance initiatives.

(i) New business-directed activities by national human rights actors

⁸¹ Marks, *supra*.

⁸² Nicola Dalla Via and Paolo Perego, ‘Determinants of Conflict Minerals Disclosure Under the Dodd–Frank Act’ *Business Strategy and the Environment* 27, 773–788 (2018).

⁸³ Olga Martin Ortega, ‘Transparency and human rights in global supply chains. From corporate-led disclosure to a right to know,’ Ch. 5 in Axel Marx et al, *Global Governance, Business and Human Rights* (2022, Edward Elgar).

⁸⁴ Stephanie Lagoutte, ‘The Role of State Actors within the National Human Rights System’, *Nordic Journal of Human Rights*, 37(3), 2019, 177-194.

BHR has triggered national human rights actors to embark on business-directed activities that contribute to domestic institutionalisation in new ways, as demonstrated by the example of BHR national action plans (NAPs). Since 2011, the EU, Council of Europe, OECD, G20 and UN have called for business and human rights NAPs to promote UNGPs implementation.⁸⁵ Following guidance from international and other human rights actors,⁸⁶ more than twenty countries have adopted BHR NAPs with others in preparation.⁸⁷ Many NAPs are based on BHR national baseline assessments (NBA) that test the alignment of local laws and policies with the UNGPs⁸⁸; identify gaps in national regulatory frameworks⁸⁹; and provide a platform for monitoring and evaluation, while some NAPs commit to measuring changes in corporate conduct.⁹⁰

NAP development is usually led by central government entities, for instance, foreign affairs, justice or business ministries. However, NAPs development has also involved awareness-raising, capacity building and exchanges between business and civil society actors, including on a transnational basis,⁹¹ through multi-actor and cross-sector dialogues convened by government but also non-governmental actors. In terms of their content, BHR NAPs express policy aims or commitments in areas including corporate non-financial reporting and human rights due diligence, state- and non-stated-based BHR grievance mechanisms, public purchasing, international trade and investment rules. Some governments have convened meetings to share good practices with other states or help them develop NAPs or other BHR policies or used international development assistance to this end. Some advocate for adoption of NAPs via the United Nations Universal Periodic Review (UPR) process or other international human rights mechanisms. Almost all BHR NAPs explicitly address business conduct extraterritorially; some indeed give greater emphasis to

⁸⁵ Claire Methven O'Brien et al, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' [2016] *Business and Human Rights Journal*, 117; Claire Methven O'Brien, John Ferguson and Marisa McVey, "[National Action Plans on Business and Human Rights and Experimentalist Governance](#)" 23 *Human Rights Review* 71–99 (2022).

⁸⁶ See further: <https://globalnaps.org/resources/>.

⁸⁷ See further: <https://globalnaps.org/country/>.

⁸⁸ Of 21 states with NAPs, 6 conducted an NBA before developing a NAP: Methven O'Brien, Ferguson and McVey.

⁸⁹ Danish Institute for Human Rights and International Corporate Accountability Roundtable, 'Annex B. The National Baseline Assessment (NBA) Template. Road-testing Version, June 2018' available at: <https://globalnaps.org/wp-content/uploads/2018/06/dihr-icar-national-baseline-assessment-template-june-2018-road-testing-version.pdf>.

⁹⁰ Germany's NAP, for example: <https://globalnaps.org/country/germany/>.

⁹¹ John Ferguson, Claire Methven O'Brien, Marisa McVey and Daniel Morris, 'Securing Sustainable and Accountable Business in Europe: The role of National Action Plans on Business and Human Rights (NAPs)' Workshop Report, Edinburgh, 5 June 2018, available at: <https://globalnaps.org/resources/>.

transnational than to national corporations, and human rights harms in global supply chains than to local impacts.

Put in multi-level governance perspective, domestication of international BHR norms i.e. the UNGPs can hence be seen to rely, still, on traditional state human rights actors, while also prompting their enmeshment with a new range of public, private and hybrid actors, on a value-chain and sector-basis, nationally and internationally, in a constellation of vertical, horizontal and ‘diagonal’ interactions, while also pushing the application of human rights norms to diverse new commercial fields.

(ii) Enrolling new government actors in the national human rights system

In addition, BHR also draws new government and market actors into the frame of the national human rights system, as can be briefly illustrated with reference to two examples. Export credit agencies (ECAs) are implicated in many projects linked to human rights abuses.⁹² Following UNGPs and OECD guidance that address ECAs,⁹³ various ECAs, such as Sweden Export Credit Corporation (SEK) and Export Credit Guarantee Board (EKN) now apply elements of human rights due diligence.⁹⁴ Secondly, development finance institutions (DFIs) also embody the partial enrolment of new national government bodies to the national human rights implementation machinery. The German BHR NAP, that its DFIs’ grievance procedures should extend to human rights complaints linked to the activities of businesses they support.⁹⁵ Denmark’s DANIDA analyses potential human rights-related risks for development financing of business projects and access to finance is based on buyers’ and exporters’ compliance with ILO principles.⁹⁶

⁹² See e.g. Amnesty International UK, ‘A History of Neglect. UK Export Finance and Human Rights’ (2013) available at: https://www.amnesty.org.uk/files/doc_23288.pdf.

⁹³ Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, [TAD/ECG(2012)5], adopted by the Council of the OECD, 6 April 2016: <https://www.business-humanrights.org/sites/default/files/documents/TAD-ECG%282016%293.pdf>.

⁹⁴ Government Offices of Sweden, *Action Plan for Business and Human Rights* (2015), available at: <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>, p.24; for further examples see <https://globalnaps.org/issue/export-credit/>

⁹⁵ The Federal Government of Germany, ‘National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020’ (2016), 20, available at: <https://mk0globalnapsvllfq4.kinstacdn.com/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf>.

⁹⁶ Danish Government, ‘Danish National Action Plan on Business and Human Rights’ (2014), available at <http://em.dk/publikationer/2014/31-03-14-danish-national-action-plan>, 28. A description of how applicant businesses will comply with the UNGPs is requested from pre-qualified tenderers and forms part of the tender evaluation. For further national examples see <https://globalnaps.org/issue/development-finance/>.

(iii) Involving market actors in domestic institutionalisation of human rights

The UN Framework and UNGPs define a corporate ‘responsibility to respect’ human rights applicable to all business enterprises regardless of size, sector or location⁹⁷ to be operationalised within individual corporations via a process of human rights due diligence.⁹⁸ On this normative pretext, some countries have started to conclude national multi-stakeholder sectoral BHR agreements. In the Netherlands, for instance, ten such sector-specific “covenants” have been developed since 2011, with support from the Dutch Social and Economic Council (SER).⁹⁹ These agreements have addressed the garment and textile, banking, gold, insurance, natural stone, food, pension funds, metals, floriculture and forestry sectors;¹⁰⁰ they have moreover been generally developed on a multi-stakeholder basis while companies adhere to their terms on a voluntary basis. In content, the agreements address both domestic human rights issues (such as low wages, health and safety) and transnational ones, for instance, relating to cocoa, palm oil and gold. Implementation of some such agreements is supported by Independent Monitoring Committees.¹⁰¹

(iv) Domestic components of transnational BHR governance initiatives

Fourthly, BHR has prompted the establishment of national mechanisms as part of transnational BHR governance schemes that contribute to domestic and transnational human rights institutionalisation. The OECD *Guidelines for Multinational Enterprises*, for example, are a soft law instrument, since 2011 aligned with the UNGPs, and which commit adhering states and their respective MNEs to uphold standards of responsible business conduct. The OECD Guidelines also require adhering states to establish National Contact Points (NCPs)¹⁰² for “undertaking

⁹⁷ Supra, n.11.

⁹⁸ See further Claire Methven O’Brien and Sumithra Dhanarajan, ‘The corporate responsibility to respect human rights: a status review’, “The corporate responsibility to respect human rights: A status review”, *Accounting, Auditing and Accountability Journal*, 29 (4), (2016), 542-567.

⁹⁹ Dutch Ministry of Foreign Affairs, ‘National Action Plan on Business and Human Rights’, available at <https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

¹⁰⁰ SER, Agreements on International Responsible Business Conduct, <https://www.imvoconvenanten.nl/en/agreements>.

¹⁰¹ SER, Dutch Banking Sector Agreement, available at <https://www.imvoconvenanten.nl/en/banking>.

¹⁰² OECD Guidelines for MNEs, available at: <http://mneguidelines.oecd.org/ncps/>; see further <https://globalnaps.org/issue/oecd-national-contact-points-ncps/>.

promotional activities, handling enquiries and contributing to the resolution of issues” relating to the Guidelines,¹⁰³ including through conciliation or mediation.¹⁰⁴ A further example concerns the governance of private military and security contractors (PMSCs).¹⁰⁵ The *Voluntary Principles on Security and Human Rights* (VPs)¹⁰⁶ are a transnational multi-stakeholder initiative to guide extractive industry firms on the use of host-state security forces and private contractors. A related initiative, the International Code of Conduct for Private Security Providers (ICoC) was developed by a multi-stakeholder initiative convened by the Swiss Government.¹⁰⁷ Subsequently, the Swiss government developed guidance for states in their implementation¹⁰⁸ and Switzerland passed legislation to enforce these norms domestically.¹⁰⁹ In addition, a primary vector for ‘institutionalising’ the VPs and ICoC is via their incorporation into framework agreements and individual contracts for the provision of security services. This demonstrates how BHR norms rely on national institutionalisation as well as transnational governance networks for their implementation; “domestic institutionalisation”, then, proceeds not just via legislation or other public law means but also via private law, in this sense, beyond the state.

6. Conclusion

In 2005, human rights scholarship was criticised by Philip Alston for a ‘purism’ that reinforced the “assumption that that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve”, and which marginalised the international human rights regime from “the most vital challenges confronting global governance”.¹¹⁰ BHR and

¹⁰³ By 2017, 46 NCPs had been established in 48 adhering states.

¹⁰⁴ See further: Kari Otterburn and Axel Marx, ‘Seeking remedies for corporate human rights abuses: what is the contribution of OECD National Contact Points?’, Ch11 in Axel Marx et al, *Research Handbook on Global Governance, Business and Human Rights*, supra; Andreas Rasche, ‘The UN Global Compact and the OECD Guidelines for Multinational Enterprises and Their Enforcement,’ Ch. 9 in Ilias Bantekas and Michael Ashley Stein (eds), *The Cambridge Companion to Business and Human Rights Law* (2022, CUP).

¹⁰⁵ Sorcha MacLeod and Rebecca Dewinter-Schmitt (n65).

¹⁰⁶ International Code of Conduct Association (ICoCA), <https://www.icoca.ch/>.

¹⁰⁷ *Voluntary Principles on Security and Human Rights*, <https://www.voluntaryprinciples.org/>.

¹⁰⁸ ‘Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict’, adopted 17 September 2008.

¹⁰⁹ *Federal Act on Private Security Services provided Abroad* (2013), available at: <https://www.eda.admin.ch/eda/en/home/foreign-policy/security-policy/bundesgesetz-ueber-die-im-ausland-erbrachten-privaten-sicherheit.html>.

¹¹⁰ Philip Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’ in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press 2005), 3.

the application of concepts of governance and multi-level governance to the study of human rights, this chapter has shown, provide important responses to that critique.

BHR focuses centrally on human rights in the commercial rather than the state-bureaucratic sphere. BHR attaches human rights responsibilities to business actors; facilitates consideration of system-level effects on human rights of trade, investment and tax regimes, amongst others; while it foregrounds the role of governments as business regulators and market players, as well as multi-stakeholder and associational rule-making, monitoring and oversight of business activities sectorally and on thematic as well as territorial bases. The concept of governance, and multi-level governance theory specifically offers an extended ontology and thus a better empirical ‘fit’ with the BHR governance constellation. BHR and multi-level governance approaches, taken together, can de-centre ‘domestic institutionalisation’ and the national human rights system and hence help to reveal rights-holders, abuses, human rights processes and institutions as situated within and conditioned by a broader, more pluralised socio-economic governance constellation comprising business actors along with bureaucracies, and the operation of market-based ordering, besides hierarchical state rule.¹¹¹

As a caveat, if BHR and the multi-level governance lens highlight, on one hand, social capacities and sites for institutionalisation of human rights associated with a proliferation of jurisdictions, rising complexity and public-private hybridity in regulation, they simultaneously shine light on new spaces that are likely susceptible to domination and the subversion. Multi-level governance framings, then, can help researchers to see a broader range of power asymmetries, resource disparities and patterns of human rights abuses, even if they offer no immediate or complete solutions for them.¹¹² It is important that theorists remain therefore careful and frank to observe shortcomings in legitimacy and accountability associated with multi-level governance formations; not all patterns of social ordering after all are ‘equal’. Indeed, in this respect, human rights norms and approaches offer an essential supplement to, and metric to assess the performance of multi-level governance arrangements. At the same time, the mapping and acknowledgment of pluralistic

¹¹¹ See e.g. Claire Methven O’Brien and Rebekah Wilson, ‘Private equity and children’s care homes: a socially responsible investment?’, OpenGlobalRights 12 May 2022, <https://www.openglobalrights.org/private-equity-and-child-care-homes-a-socially-responsible-investment/>.

¹¹² See further, Julia Black, ‘Constructing and contesting legitimacy’, *supra*.

or multi-nodal governance relationships, where they do exist, and enhancing knowledge of the structure of things, should ultimately serve to support political agency, social mobilisation and the cause of human emancipation.