



Human Rights for People's Sovereignty

How to Govern Over Transnational Corporations?

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Introduction

Human rights have become important terms of reference in a growing number of policy areas, including business. That's great, but so what? A term of reference only means "language". For many people human rights are indeed only human rights language – a sort of global moral Esperanto for something that could also be said otherwise.

Human rights, of course, are neither language nor morals, but rights – a special type of rights with a unique political function.

In 1995 FIAN International clarified its positions on the fundamentals of human rights – including the question of duty-bearers – in its publication "Economic Human Rights – Their Time has come". In this publication FIAN emphasized that human rights and States obligations are two sides of the same coin and that economic, social rights are not another language for development or dignity. It treated the related human rights obligations in a way coherent to those of civil and political rights. FIAN emphasized in particular that States – with their separate and joint conduct – are the exclusive duty-bearers under human rights. As in legal terms a violation of a right is a breach of a duty-bearer's obligation under this right, this position on duty-bearers means that a human rights violation is always an act or omission by States. This has informed FIAN's case-work, campaigns and human rights education since then. From States' protect- and fulfil-obligations it is obvious that human rights have profound implications for third parties including business enterprises. "Economic Human Rights – Their Time has come" called the harm done by third parties to essential goods to be protected and fulfilled by States under a human right - a "crime against human rights".

In those years, FIAN International did not see the need to further elaborate on these basic conceptual issues. Times, however, have changed. Parts of the corporate sector are reaching out to human rights in a public relations bid trying to subvert them in their efforts towards "global redesign". A few circles in academia try to establish a doctrine of human rights – that could eventually play into corporate hands. And for social movements and civil society groups the campaigns around the human rights treaty on TNCs and other business enterprises, an initiative undertaken by the Human Rights Council in 2014, serve- as a catalyst for renewed debates about the nature and purpose of human rights. In this new context I was asked to put together a compilation of articles out of FIAN's International Secretariat to explain its concerns – and the reasons why FIAN International calls on the people to be on their guard against the corporate capture of human rights. What is at stake is people's sovereignty. Human rights today are human rights beyond borders – within a framework of international solidarity and the solidarity between people and peoples. When we relate to people's sovereignty, we refer to people as the governing sovereigns nationally and internationally. How can such governance be realized – in particular when it comes to governing over transnational corporations and an emerging transnational capitalist class? Addressing these questions requires some reflection about the legitimacy of States' conduct. Providing elements for such a reflection is the purpose of this publication.

Chapter 1 provides the background and introduces some fundamentals about human rights and the broad challenges posed by the task of regulating powerful TNCs. In Chapter 2 the relation between human rights and people's sovereignty is considered. Chapter 3 deals with the need to safeguard human rights against four subtle (and sometimes rude) ways of undermining them. Chapter 4 addresses some key misconceptions about human rights with eight questions. Moreover it shows why the notions of crime and tort have to be based on human rights. Chapter 5 looks at corporate impunity and corporate crime with a human rights lens: As regulation of TNCs is implied by human rights, a wrongful act of a corporation has to be addressed – and punished – by the States individually and jointly. Chapter 6 calls for a disciplined use of human rights terminology – for political reasons. Chapter 7 recalls the political history of the issue over the past 70 years and warns of corporate capture of human rights.

The seven chapters circle around the same topics with different perspectives. The resulting overlap should be welcome for a deeper understanding of the matters at stake.

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Chapter 1: The role of human rights in the regulation of TNCs.

1.1 Some difficulties in regulating TNCs

1.1.1 What do we mean by a TNC?

A TNC is a business enterprise or a group of enterprises operating under a joint business plan, controlled by a “coordination center” (“the brain”). The company where the coordination center is based is called parent company. This description includes the supply chain – as long as it is controlled by the TNC – as a part of the TNC, even if this control is not exercised via ownership or holding controlling shares of the supply chain company, but simply because the supply chain totally depends economically for its output and/or input on “the brain”.

1.1.2 What do we mean by “regulating TNCs”?

Regulating a company means setting and enforcing rules in law or decrees by States individually or jointly. In particular, regulating a company is not to be confused with “self-regulation” or “ethical codes” or gentlemen agreements. States enforce the regulation both against the company’s managers and the company (de-licensing) or its assets (fines).

1.1.3 Difficulties for a State in regulating big business in general

Even national big business is difficult to regulate, as soon as such regulation goes against the interests of a business. Big business may sit in the respective ministries or parliament and fund the related people (revolving doors, institutional corruption, general corruption). Moreover big business (in combination with business-controlled media) can influence public opinion against the State seeking to regulate.

Technically speaking, however, no business is “too big to be governed” as long as the State has the tools for enforcement in hand – police and/or military control over its territory including the big business. Very often the problem is not the States’ inability to regulate, but their unwillingness to do so.

1.1.4 Difficulties for a State in regulating TNCs

A TNC is a company or group of national companies spread over different States. For TNCs, the general difficulties mentioned in 1.3 are compounded by various additional difficulties:

- (i) If the State seeking to regulate depends on foreign direct investment in certain sectors, it can be blackmailed by the TNC by
 - a. threatening to remove its investments, or relocate them (although this may include heavy cost to the TNC);
 - b. threatening the State via bilateral investment treaties and investor state dispute settlement.

- c. launching media and political campaigns against the regulating State to scare off other foreign direct investment.
 - d. Playing States against each other (race to the bottom).
- (ii) National Regulation may be difficult to enforce on a part of a TNC, because
 - a. In persecuting responsibility for breach of regulation the investigation may have to include those parts of the TNC operating abroad (and in particular “the brain”)
 - b. In enforcing a judgment the regulating State may neither have effective control over the managers responsible who reside abroad, nor control over assets of the TNC. Moreover it can only delicense those parts of the TNCs in its own country.
 - c. The regulation has to be accepted and integrated by the “brain”, which is extraterritorial to the State.

1.1.5 World government or obligatory international cooperation?

With a view to these difficulties two solutions come to mind:

(i) World State

Almost nobody currently wants a world government, although some governments may aspire to be one. Such a government would need a world state (United States of the World), military control over each country, a world police, a world constitutional court and a world parliament. While certain international institutions could be helpful in governing over TNCs a world government is no solution: It would totally override the concept of people’s sovereignty and be far removed from local realities. It would be hard to control by the people and would run the risk of extreme concentration of power. It would lack understanding of all the different cultures by those governing. Questions of representation - in particular for minorities – would be very challenging.

Global governance, despite its seemingly innocent title, is often only a euphemism for self-serving activities of political actors setting standards, channel global monetary and investment policies, or undertaking military interventions without legitimate multilateral and democratic processes and hence without legitimacy.

(ii) Obligatory international cooperation of States under the primacy of human rights

Multilateral and international democratic processes usually go through States and their people’s participation, processes that do not exclude smaller or less powerful States but act on the basis of standards benefitting in particular the less powerful States - and the peoples in all States. These processes follow a model initially envisaged for the UN (whose Charter is superior to all other

international treaties), but side-lined by some birth-defects of the UN – and for the last 30 years by the casino capitalist investment regime. This regime has established not only a shadow banking system, but also “shadow international law” - commercial and investment law undermining and sidelining the UN and the concept of obligatory international cooperation of States based on human rights (See 1.2.3 basics of international law).

1.2 How can international law help regulating TNCs?

1.2.1. Regulation of TNCs

To regulate TNCs means to control, direct or govern TNCs according to obligatory rules that are enforced by States individually and jointly under the rule of law. Regulation is not done by “encouragement” of TNCs. Letting TNCs set and perhaps implement their own standards is no regulation, even if TNCs pretend it is (“self-regulation”). Regulation of TNCs also includes measures to dismantle and delicense TNCs.

1.2.2 National: Law – adjudication, sources of law, enforcement

All law is rules that should be enforced by States individually and jointly.

Enforcement is by the executive, police, law enforcement agencies. For domestic law there are various layers of national courts to adjudicate wrongdoings. The sources of the law for the courts are legislation, customary law, general principles of law, sometimes (in those States where international law is directly applicable) international treaties. If there are conflicts between the applicable laws, human rights and fundamental (constitutional) rights have the primacy before the other laws. There are various areas of domestic law: public law (administrative law, constitutional law, criminal law, tax law ...) and private law (civil law, commercial law, labour law). While cases of damage are usually dealt with in private law between the parties, in breaches of law that affect the legal order as such, States persecute and punish the wrongdoer (sometimes in addition to a civil case brought by a possibly damaged party.) Civil law has a focus on compensation, rehabilitation, satisfaction - criminal law on punishment. The regulation of TNCs needs both.

In most States companies cannot be persecuted under criminal law – only managers can. This is unsatisfactory whenever the crime is not the fault of an individual, but of the entity.

In TNC cases we have situations where the parent company abroad affects the legal order of a State without the State being able to introduce criminal procedures against that company.

1.2.3. Basics of international law

International law is also divided in international public law and international private law. International public law traditionally regulates all legal issues

between States and with IGOs. Private international law governs private transactions that cross international borders.

International law is highly fragmented: International criminal law, commercial law (some parts corresponding to international private law and some to international public law), the law of the sea, humanitarian law, human rights law, environmental law etc.. The primacy for human rights law helps to overcome conflicts caused by this fragmentation.

The key sources of international law are

- International treaties
- International custom as general practice accepted as law
- General principles of law

International treaties generate international law only for those States that are parties to such treaties, because they adopt and ratify the treaty.

The most important Court (and judicial branch of the UN since 1945) to adjudicate international public law is the International Court of Justice (ICJ, in The Hague): Here States can sue States for breaches. Individuals or non-state entities cannot sue before the ICJ. Enforcement of judgments is through the UN Security Council that can declare economic sanctions.

States are the “subjects” of international law – along with IGOs. Only States can generate international treaty law via international treaties and custom.

The enforcement mechanisms of international law are very different from domestic law and weak. Enforcement of domestic law is ultimately done by force of the State (police, law enforcement authorities). Permissible use of military force against a wrongdoing State in international law is extremely limited. International law is essentially law between equals, whereas domestic law is essentially hierarchical. Instead international law enforces by different matters, such as sanctions. Sanctions are problematic measures, if they hit the affected population more than their wrongdoing State. They are prohibited if they include embargoes of goods and services essential to meet core obligations in economic, social and cultural human rights.

There are no international enforcement agencies: The ICJ cannot enforce – only the UN can via the Security Council. And then enforcement consists at most in economic sanctions against the violating State. Normally judgments of the ICJ have an impact, because the subjects of IL are only 190 or so States, so a small group of “peers”. Strictly speaking, it is peer pressure plus economic sanctions that make international law work (sometimes).

1.2.4. International criminal law

Another important court is the International Criminal Court (ICC, Rome, since 2002). It adjudicates international criminal law. Only States can sue. And only individuals can be sued. The crimes that can be dealt with by the ICC are listed in the so called “Rome Statute”, mainly genocide, crimes against humanity, war

crimes and aggression. Enforcement: States can volunteer to imprison the convicted individuals.

If the ICC is to be used for regulating TNCs, various features would have to be changed:

- (i) There must be a possibility to sue TNCs, not only individuals
- (ii) The list (or interpretation) of crimes in the mandate of the ICC would have to include specific crimes of TNCs
- (iii) A system must get established how a sentence against a TNC can be enforced and which kind of sanctions would be imposed.

Another option could be to leave the ICC as it is and establish instead an International Criminal Court for TNCs, as a remedy of last resort, when national and other international procedures have been exhausted.

Both approaches would mean a “revolution” in international criminal law, as its scope is at the moment very restrictive, largely excluding for example ecological, economic, social, or cultural issues pertinent to TNCs. A treaty on TNCs and other business enterprises could open the door in this direction.

While symbolically the possibility to bring emblematic cases to an international criminal court can have an important preventive effect and set a strong political sign against TNC perpetrators, currently the ICC (and hence also an ICC for TNCs) still face severe challenges regarding effectiveness. In fact, in the past months a number of African States renounced their membership in the ICC. Furthermore for grass root victims to bring their case to a revised ICC would still require considerable capacities and resources. If a judgment is obtained, its effectiveness still depends on States’ willingness to enforce it.

1.2.5 Rights of TNCs based on international treaties

International public law deals with States and IGOs. There are some international treaties that mention the rights or obligations of individuals or entities to be enforced by States – in particular in trade and investment law and in human rights law. The classic function of the treaty, however, is rather to harmonize the respective rights and obligations in the domestic law of the various States parties and not to establish rights or obligations of individuals or entities in international law. Sometimes treaties give entities the right to take legal action in a foreign domestic court of a State Party. TRIPS (Trade-Related Intellectual Privilege Rules) is an example: If a State refuses to take such a case or deals with it in a way contrary to TRIPS this could generate a dispute - not between the suing company and the State, but between the States involved. The settlement and its enforcement are done according to the GATT 1994 rules (now revised by the WTO): A State has to bring a complaint. Possible enforcement is by removing benefits under the GATT – as with all other interstate disputes in GATT. This can be a powerful enforcement tool. TRIPS does not give companies rights under international law. It gives private entities rights in the domestic legal systems of the States Parties. If these rights are denied or infringed by the respective State, it is a State that enters into dispute on this matter in international law – not the company. If there is close

cooperation of the company with that State (perhaps its home state of the company), for practical purposes this is not far from the company itself entering into the dispute under international law.

There are exceptions to this general state of affairs: One human rights treaty and a large number of investment treaties:

The key human rights treaties establish rights of individuals without necessarily mentioning how they can sue. It is commonly understood that individuals should eventually be able to sue their own States and perhaps others under the respective domestic law on human rights grounds. Often this is not properly implemented by States: Many if not most States claim that international human rights law, unless it has become transformed into constitutional or other domestic law, is not a sufficient ground to sue a State, but can only be used as additional argument in a claim based on constitutional rights or other national law.

The European Human Rights Convention (through its Protocol 11 of 1998), however establishes the rights of persons to sue a State before a European Court. Even corporations have standing to sue a State before the European Court. 1.2.5.2 ISDS (Investor State Dispute Settlement)

Bilateral Investment Treaties (BITs) often establish the right of investors to use ISDS to sue states. In domestic private administrative law it is common practice that firms who entered into a contractual relationship with a State can sue the State (and vice versa). The BITs establish a mechanism for “settling disputes” that emulates the role national administrative courts. The context, however, is very different. While a TNC can sue the state nationally and internationally, a State can only use its own domestic legal system to sue. It should also be noted, that national competitors of a TNC have to deal with national administrative courts, while TNCs have no obligation to use these national procedures but can use the ISDS (which, of course, is not available for national companies).

Formally speaking ISDS are not courts under international law – for most practical purposes, however, they act like very special courts: Judges are often corporate lawyers, sometimes nominated by the World Bank. Proceedings are secretive.

Enforcement in ISDS is by awards – penalties on the “wrongdoing” States: States can never win a case in an ISDS – they can only not lose it. States that were “sentenced” by the ISDS have little chance to escape paying the awards (sometimes billions), because the awards can be enforced in any other country where the victimized State has assets.

1.2.6. Can new international law obligations of TNCs help with regulation?

Imposing new obligations usually invites the demands for additional rights. We have seen that TNCs have some procedural (but not substantive) “rights” in international law – most notoriously in investment law with the ISDS. We could turn around the argument saying that TNCs have recently obtained powerful new rights. Hence there must be new obligations. For those who want to roll

back the rights of corporations in international investment law and abolish in particular the ISDS, it may be difficult to use ISDS as an argument to put new IL obligations on TNCs, as this could legitimize these rights of TNCs in IL. Only if we believe that ISDS should exist, but function differently, would it make sense to use ISDS as an argument to advance new obligations of TNCs in IL.

1.2.6.1 States are not corporations.

International law obligations regulating TNCs would have to be of a different nature than those carried by States. International law is law between equals and States sovereignty has to be respected. TNCs must not be dealt with like States. A World Court has been proposed by the “Swiss initiative”. TNCs would have the option to accept its jurisdiction, just like States have the option to accept the jurisdiction of an international court. This is probably not what we understand under “regulation of TNCs”. An alternative could be to have a World Court on TNCs where States or individuals could sue after exhaustion of domestic legal systems. In the respective Statute, home States of TNCs would have to transfer jurisdiction over TNCs to this court. In this context, States would essentially lose their rule-making powers over TNCs under their jurisdictions. For very serious crimes this could probably be acceptable, but for general regulation, it will be a loss of State sovereignty.

Sometimes arguments are made as to the size of TNCs economies and those of States – and the power of TNCs, as if States were some sort of business enterprise. States, however, are not corporations. States are meant to rule for the Common Good and to administrate the law including commercial law. Corporations are licensed by States to do business within a certain legal framework. While the misuse of State powers for vested interests has been and continues to be a fact – this does not blur the clear categorical distinction between both types of entities. People have made gains in the past against States that were an expression of feudal or capitalist rule. Parts of the corporate sector now attempt to roll back these gains and even capture policy making spaces of States. With a view to such corporate policies, any risk that the political status of TNCs be increased as a consequence of international law obligations of TNCs must be avoided. This could be done by avoiding a sweeping “State-like” set of obligations on TNCs. Instead a clear set of obligations in international criminal law could be defined for TNCs.

1.2.6.2. Enforcement of international law obligations against TNCs

We want to see TNCs regulated, and the regulation enforced under international law. One option is to establish a regime to impose economic sanctions on criminal TNCs, high financial fines, measures excluding them from certain benefits or services of States or the international system. TNCs could be banned from certain fields of operation, could be disintegrated into different independent firms. A State or IGO breaching such a ban or not cooperating with enforcement would be seen in breach of international law.

It must be understood that such an approach would give great powers to a Court and also the risk of misuse. How sure can we be that an international court is of higher quality, less corruptible etc. than national courts? Such a

Court could even be seen as an element of a “world government” essentially by-passing States or abolishing the final jurisdiction of States over their territories.

From a pragmatic viewpoint: As long as most States do not even establish criminal liability of companies in domestic law, we need good arguments to believe in their willingness to establish corporate criminal liability in international law. Special efforts by the people will be necessary in this direction to enhance the development of corporate criminal law in all sectors.

What would be the means of enforcement of TNC obligations in IL, if exorbitant direct powers of an international court are to be avoided? Who would implement delicensing, seizure of assets or other economic sanctions? It would have to be States in cooperation via their domestic systems. An international court receiving complaints could tell States what to do, but not force them to do so. It would act more like a commission that could establish that a TNC has probably committed a wrongdoing in IL and request certain States to jointly remedy this situation by regulating or sentencing the TNC. Is this what we mean by enforcing an IL obligation of a TNC?

1.2.7 International regulation of TNCs without international law obligations of TNCs.

There are means to internationally regulate TNCs without putting IL obligations on TNCs. A treaty could formulate obligations on TNCs that States parties would impose in their domestic legal systems, but obligate States to cooperate in a well-defined way. These obligations, although part of the treaty, would not be international law obligations on TNCs, but simply joint standards of States to be implemented in regulating TNCs.

The details on obligations are less interesting than the question of enforcement of such obligations. A cooperative system could in fact be implemented. A commission could be established by the treaty that would be empowered to receive complaints by States or individuals and come to a first assessment of the alleged wrongdoing of the TNC compared with the standards set in the treaty. The commission could then request certain States to jointly adjudicate the matter, and remedy this situation by regulating or sentencing the TNC. States would have an international law obligation from the treaty to cooperate with the commission and other States involved. If States refused to cooperate with the commission as required by the treaty sanctions could be taken against them. Still, adjudication and enforcement of judgments against TNCs would essentially be done by varying groups of States, hence States retain a large part of their sovereignty in this field, and the people will be closer to these various national courts, than to one global court.

Cooperative adjudication, investigation and sentencing of a TNC by a group of States could mean establishing a new “panel” of judges for each case or set of cases. In addition the State or victims should have the choice to go for such Commission procedure cum panel or directly sue the parent company in all States involved.

Such an approach would avoid the difficulties mentioned above with the structure of IL and the risk of enhancing the political and legal standing of TNCs. It would also break the logic of globalization: Such logic would argue that economic globalization implies the need for globalization of justice. Globalization of justice, however, would further distance the people from justice and disempower them even more. A response would neither necessarily be a return to national economies, nor to isolated domestic legal systems. Instead it could mean economic and judicial systems cooperating on the basis of people's sovereignty and solidarity – and eventually imply deglobalisation into a new form of people's internationalism.

This would clearly put TNCs where they belong – below the community of States and regulated appropriately by them in cooperation - according to the nature of the TNC and the circumstances of the case.

1.3. The function of human rights in the context of TNCs and other business

1.3.1. Lack of regulation – inability or unwillingness?

Why have States so far not regulated TNCs accordingly? Have they been unable or unwilling? The claim is made that some weaker States may have been unable, some others have been unwilling. Let us recall that regulation means not only setting the rules, but also enforcing them.

The retaliation from the TNC could be to relocate investment from the regulating country. And the retaliation from the home States of the TNCs could be economic or even military threat of destabilization. Withdrawal of TNC investment can cause heavy suffering for the people. But if peoples are not willing to take these risks, they give up their sovereignty. It should, however, be noted that disinvestment can be costly for the TNC so that it can often be an empty threat. If those States where TNCs (or their parts) are registered or have substantive business joined hands, they can certainly regulate a TNC.

A major role is played not by inability, but by the unwillingness of States to regulate, in particular the refusal of the home States to regulate “their” TNCs. Many States sometimes claim “inability”, where in reality they are unwilling to regulate. Exaggerating the powers of TNCs is also not helpful in this context, because it is a cheap excuse for States not to regulate where they could.

1.3.2. The purpose of human rights and how it is linked to people's sovereignty.

People access to productive resources, to adequate food and water, people need security against others, participation in the life of society and its governance, and many other “goods” that are essential for people's wellbeing. In a humane values system, essential goods are universal. This means people do not only want no harm done to their essential goods or to those of other

people: They also do not want other people and peoples to live deprived of these essentials, but insist that these essentials be fulfilled.

Essential goods therefore give rise duties with a view to realizing these intentions in their communities and societies. In order to prevent a situation of occasionally violent defense of one's own and other people's essential goods people generated mechanisms to settle disputes over these duties – and if necessary enforce duties. Eventually a form of societal management developed with elaborate political structures monopolizing the use of force, the administration of duties in the form of law - and the generation of policies – the State. Often in there were States imposed on people by a class of foreign invaders as a means of oppression. There have been, however, also other types of States, essentially growing out of the cooperation of sovereign people constituting their States under the condition that these would protect and fulfil – and of course respect – people's essential goods. In these States the people would remain the sovereign – and not the State itself as an oppressive tool in the hands of ruling classes. Expressions of people's sovereignty are the obligations they put on their States: States have to protect people against harm done to their essential goods by others – and, of course, States themselves also must not do such harm. These two types of obligations that sovereign people put on their States are called protect-obligations, resp. respect-obligations. States protect-obligations imply a duty of States to provide legal remedy mechanisms against harm done by others. The third type of States obligations is the fulfil-obligation - the duty to restore to their essential goods those people who are deprived of them.

The highest expression of people's sovereignty is that they hold their States to account for breaches of these obligations. People claim that their States meet their obligations to respect, protect and fulfil essential goods. It is, however, the mentioned element of legal remedy that turns these claims into rights – human rights.

When sovereign people constitute their States, they do so by obligating the State with a view to their essential goods. And they control the State by establishing accountability and legal remedy for breaches of these obligations. It is on human rights that the legitimate law made by States and the community of States is built. In this manner human rights establish, obligate and control States.

The content of human rights are the essential goods that must be respected, protected and fulfilled by States, jointly and separately, and the legal remedy for breaches of these obligations. In common language the word "right" is also used for the normative content of a right. This is short, but logically unsatisfactory and leads to confusion, as we will see. It is for this matter, that we have carefully developed the ingredients of human rights and their political purpose.

Human rights, of course, exist before the States that sovereign people establish and before the law making of the related national assemblies and States – otherwise human rights could not establish these States.

This shows that there are two types of law: The law made by human beings (usually in the context of States via legislation or case-law) is called “positive law”. The law not made by human beings, is essentially “supra-positive law”, as it is above positive law, establishing, obligating and controlling the powers of States as law-makers, judges and enforcers. States human rights obligations are supra-positive law. Human rights leave States some discretion when it comes to putting positive legal duties on non-state actors – as long as the resulting positive law remains consistent with States human rights obligations.

The protect-obligation of the State implies obligations of other actors not to do harm to the human right content in question. Often the harm done by “other actors” and in particular TNCs to such content is not any type of harm that could be remedied by compensation alone. Severe harm by TNCs and other non-state actors to people’s essential goods ought to have been prevented by the States under their protect-obligation. If States fail to do so they *prima facie* have to be seen in breach of this human rights obligation and therefore as violating human rights. The harm done to human rights content by non-state actors affects the legal orders of States as such - and therefore such actors deserve punishment. Acts that should entail punishment by States are called crimes.

The use of force against non-state actors is in the end only justified on the basis of States’ human rights obligations. People might claim that a certain conduct of TNCs should be outlawed and that States should jointly and separately legislate and intervene to this effect. This claim ultimately has to be argued on the basis of human rights content and the impact of TNCs on this content. For this matter some people may be tempted to call the obligations they want to see enforced on TNCs “human rights obligations”. Ultimately, however, all law is only justified on the basis of States’ human rights obligations and the impact that various actors have on human rights content. If this simple fact was seen as a sufficient ground for calling the legal obligations of TNCs or any other non-state actors “human rights obligations” then the whole law would consist of human rights obligations. This, however, would upset the purpose of human rights to establish, obligate and control the powers of States. In the current context the focus must be on States’ jointly regulating TNCs and on human rights obligations as a tool to bring States to the point of doing just that – in line with people’s sovereignty.

1.3.3 Various ways how human rights language has been used in the TNC issue.

The international regulation of TNCs has been attempted in the UN context for some 40 years now, most of the time without special reference to human rights. During the last 20 years, however, reference to human rights has become increasingly frequent. During the last 10 years, even TNCs themselves use human rights language, and try to pose as human rights defenders and even claim human rights for themselves. The corporate class has a tradition of capturing, watering down and subverting concepts and language of the people – development, sustainability, environment, participation, partnership. Will human rights be next? Care needs to be taken that the link between human

rights and people's sovereignty is always kept in mind, and that human rights keep their cutting edge.

1.3.3.1. Calling the damage resulting from TNCs action a human rights violation.

Let us first clarify this for any right (not only human rights) and recall what is meant by a right: A rights requires rights-holders and duty-bearers. The duty-bearers have a set of obligations under this right – and the rights-holders should have recourse mechanisms to obtain remedy, if the duty-bearers breach these obligations. In these circumstances, a breach of an obligation under a right is called “a violation of the right”.

For this matter a violation of a right is always an act or omission in breach of an obligation under this right. Therefore damage can never be a violation of right, but can be its consequence. And as human rights are rights, this is also true for human rights. This fact is independent of the question who the duty-bearers under human rights are, States only or also TNCs and others.

1.3.3.2. Claiming that TNCs have human rights obligations and violate human rights.

Do TNCs have human rights obligations? Then they would violate human rights, if they breach these obligations. This fact is a mere matter of definition in law. TNCs, however, are private actors. If they harm human rights content to a significant extent, they commit crimes or offenses - even if these crimes cannot be found in positive law yet, because States have not yet legislated to this effect. It is, however, this separate and joint failure of States that breaches human rights obligations and is tantamount to a human rights violation – and not the harm done by TNCs to essential goods protected by human rights. This is not intellectual ticking for law students or a play with words, but has great political importance. There are some scholars and CSOs who believe that it is advantageous to allocate human rights obligations to TNCs and similar private actors, not only to States in order not to be “States-centric”. Law, however, is “states-centric” by definition. So their proposal amounts to accepting non-legal human rights obligations by non-State duty-bearers. This would pull the plug on human rights as the foundations of law – and reduce human rights to their mere content along with some ethical duties. Moreover it pulls the plug on the sovereign people's political project that historically gave rise to human rights - to build law nationally and internationally on human rights. This exactly may be the purpose of such proposals, at least for some of the proponents who are known to advocate corporate capture and the “moralisation” of human rights¹.

There are other proponents who may act in good faith – sometimes on the basis of very bad experience with States violating human rights by failing to protect and fulfil essential goods. The sovereign people, however, know very well that law is not always good, that good laws are not necessarily enforced,

¹ On moralisation, see chapter 3

and that States do not automatically protect them. It is exactly because they know it, that they have brought forward human rights and their political purpose. There is no way around constructing or reconstructing States and the community of States on the basis of human rights and people's sovereignty.

TNCs (and all of us) have no human rights obligations – but all the obligations we do have are all ultimately implied by human rights: The States' human rights obligations imply that they arguably have to outlaw a certain type of conduct by third parties as offenses or crimes - in order to protect essential goods as they must. What if they don't? Does it help to insist that there are obligations to avoid harm to essential goods or to help protecting them? In order to become effective such obligations have to be cast in law. For this to happen States have to be coerced to do so – by human rights. It is no help to call these third-party obligations "human rights obligations" – this does not make them positive law. What it does is to mix up categories of law that should not get mixed up for the reasons mentioned above: Supra-positive law on States on the one hand – and positive law which States and their community have to use to regulate individuals and firms.

Sometimes it is argued that human rights obligations should relate not only to States but to all powerful actors. And some TNCs are very powerful actors, indeed. More than ten years ago it was calculated that 37 of the biggest 100 economies (and 2 of the biggest 50 economies) in the world are TNCs not countries. The increasing incidence of corporate capture is another indicator for the power of TNCs. Would it help to extend human rights obligations to TNCs? Would this regulate them? Who can regulate them? Should they "regulate" themselves, as is currently proposed by vested interests? If we agree that regulation has to be done by legitimate powers emanating from the people, we are left with States – not with oppressive States, but with States obligated and controlled by the sovereign people. What is needed then is to expand such powers of States, their individual and joint powers to enforce human rights. Instead of working in silos or leaving global issues to IGOs without real accountability, States have to get their act together and cooperate in order to regulate TNCs. This implies that States increase the liability of companies and regulate them under domestic law including criminal law. Even that has often not yet happened. If States consistently refuse to do so internally and ignore to cooperate externally in line with their extraterritorial human rights obligations they allow for corporate crimes and therefore violate human rights.

In 1.3.2 it was indicated that human rights obligations are meant to establish, obligate and control the powers of the State. Human rights are essentially about the legitimacy of States, about States' joint and separate obligations and about their limits. Human rights are a means to get the States moving on what only States can do. Should human rights become a means to get TNCs moving on "what only TNCs can do"? Do we want to say that States, even in cooperation, cannot regulate TNCs? That TNCs can only be "regulated" by themselves? Then what about people's sovereignty? Have States become superfluous, except to act as a "police-force" at the service of TNCs – and as a means to extract taxes from the people to facilitate the profits of TNCs? Should the people in future start electing the TNC managers for the biggest TNCs to

give them at least some “democratic” legitimacy in what they do? Alas, TNCs are ultimately governed by shareholders and owners and their interests.

Expanding human rights obligations to TNCs would put TNCs on a similar footing as States. Can we expect that TNCs limit their own powers? And if not, then who will do that? It is the States, based on human rights, implementing their human rights obligations, including their extraterritorial obligations and the obligation to cooperate for human rights. And it is these human rights beyond borders that are urgently needed, as we know that currently many States systematically violate human rights in this area – and some even refuse to acknowledge any problem with this joint failure to regulate TNCs.

Extending human rights obligations to TNCs “according to their sphere of influence” would not add to the pressure on States to do what only they can and must do. On the contrary: It would diffuse and betray the purpose of human rights to establish, obligate and control the powers of States. Moreover big business would feel legitimate to claim a seat at the table of governments when new law or policies are created, arguing that this is necessary for them to meet the “human rights obligations of TNCs”. These political results are the opposite of what could be called the regulation of TNCs. In fact such weakening of human rights is implied (and possibly intended) by corporate policies that led to the Global Compact and the “Business and Human Rights” sector of the UN Human Rights system. Here many TNCs can “smooch” with human rights, showing good intentions. Nevertheless they react sharply as soon as the issue of their international regulation by States comes up.

To sum up: The importance of human rights lies not in the description of essential goods to be respected, protected and fulfilled under the law, but in the very function of human rights as establishing, obligating and controlling the powers of States to begin with. By using for TNCs the concept of human rights obligations that is an essential ingredient to the notion of States and their community, TNCs are put in a similar category as States and their community. This provides TNCs with political legitimacy. TNCs must not have powers to set up standards, and courts, or enforce judgments as this is the prerogative of the sovereign people through their States. The constitutional function and political purpose of human rights would be lost if human rights were simply treated as rights that everybody has towards everybody else whenever they fit. TNCs can ultimately be regulated by States individually and jointly, but States cannot ultimately be regulated by themselves, but only by the people, if necessary by revolution. This makes quite a difference. And it is here – at the juncture between the sovereignty of the people and the legitimacy of States – where human rights are placed. It should be clear that TNCs must urgently be put under positive law obligations regulating them. These obligations must not be called “human rights obligations”, as they are of a different nature. Faced with their territorial and extraterritorial protect-obligations against TNC crimes, States have to set up the respective national and international legal mechanisms to regulate TNCs. As TNCs are by their nature operating in various countries, international mechanisms are particularly important.

1.3.3.3 Blaming and shaming TNCs by using human rights language

Human rights are not language, but a concept of central importance to people's sovereignty and the legitimacy of States. Still there is the feeling by some that – in the context of blaming and shaming TNCs – it may help to call the crimes of TNCs human rights violations.

Let us assume that we deal with a situation where a TNC has harmed human rights content. Blaming and shaming TNCs for such a crime will certainly impact on some TNCs, and will also help pushing States towards regulating them. The question is, whether and how human rights should be referenced in this context. Blaming and shaming is essentially a moral methodology. It has nothing to do with regulation unless and until clear demands on States are made, what they had to do (or had to have in place) in the situation at hand to prevent the respective TNC crime, which regulatory instruments were missing or not applied. At that point the issue of States obligations should come up, in particular the protect-obligation, but also the question whether the States collude with the criminal TNC. It is here where human rights should be referred to.

The question whether a TNC did harm to a human rights content or not, is important, of course – both for identifying the TNC's act as a crime and for calling related breaches of States protect-obligations violations. Normally you recognize a crime against human rights when it happens, and there is no need to look into the books. Nevertheless reference to human rights content in treaty law can help. Content has been described and interpreted by States in some detail in the context of human rights law. Human rights law is the positive law meant to describe, implement and enforce human rights. If a TNC harms an essential good so that the same action would be called a human rights violation if committed by a State, then the TNC's action is a crime against human rights. For this matter it makes sense, if harm is created by a TNC, to take the human rights content as one indicator for a TNC's crime: Why should a TNC be allowed to do something that a State (or group of States) must not do?

Using the word "human rights violation" in order to put moral blame and shame on an act of a TNC should be avoided. The term "crime against human rights" points to the related States' violations of human rights in the background. And it is here where the analysis and political struggle for human rights should start. Use of human rights only in a moral strategy supports the reduction of human rights to mere moral "aspirations". This has been used as a disruptive strategy against human rights by some governments, in particular against economic, social and cultural rights (see chapter 7 below). It is sometimes claimed that "human rights are a global moral consensus". Human rights, however, are not moral values, but law, supra-positive and often positive law.

1.3.3.4 Human rights abuses, offenses and crimes against human rights

Some two decades ago TNCs started to be looked at with a human rights lens. Human rights organisations, lawyers and many others held that TNCs do not have human rights obligations and hence cannot violate human rights, but they wanted to link human rights to the harm done by TNCs. Amnesty International,

the International Commission of Jurists and others started calling such harmful action a human rights abuse. This term is now widely used. The term human rights offense by TNCs has also come up.

Much of the public (including human rights organisations) have had an understanding of human rights that concentrated almost exclusively on the respect-obligation and overlooked protect- and fulfil-obligations and economic, social and cultural rights. This was in line with neoliberal fundamentalism.

Meanwhile the notion of corporate crimes and impunity were brought up by civil society in the context of TNCs. A search started how this crime/impunity work could be properly linked up to the human rights concept.

1.3.3.5 Using human rights in calling TNCs to account for their crimes.

For some people, crimes are what you can read in the criminal codes. For this matter, TNCs will normally simply deny that what they did was a crime. Human rights are useful by showing that harm was done to an essential good, as these have been interpreted in human rights law as human rights content.

There have been attempts by some scholars to claim that human rights law creates positive human rights obligations for TNCs. This is in general not held to be true. In human rights law no intention can be seen to do so. There are obligations implied in human rights law, however, to make the respective crimes by TNCs illegal in positive law. Moreover additional civil and administrative laws have to be legislated and used by States to protect human rights against TNCs. Some of these scholars claim that there is immediate “horizontal effect” of positive human rights law establishing human rights obligations of people towards each other. For the reasons given above, this might not be a wise strategy. Whatever interpretation is chosen on doctrinal issues, States have to make TNCs liable under criminal and other law, establish the respective courts, and open up the possibility of remedy for victims. For this matter such a short-cut will not be an added value to the legal fact that States are under a protect-obligation to do so. And if States don’t comply, it is here, where the term human rights violation is appropriate – but very rarely used. People have to address the human rights violations of States linked to their failures to regulate TNCs. And they must not hesitate to call this failure of States a violation of human rights.

1.3.3.6 Calling States to account for the human rights violation of failing to regulate TNCs and hence allowing the crimes of TNCs.

States that refuse to protect (either by direct intervention or by establishing legal liability) the essential good of a people, a community or an individual against TNCs allow for the crimes of TNCs. Such States’ refusals are violations of human rights. The violations occur as long as the governments refuse to regulate TNCs and hence breach their protect-obligations. Like other human rights violations, they entail responsibilities for the States from their wrong-doings. These responsibilities (and the respective measures to be taken) depend on the harm that has occurred by TNC crimes after the time that the States were aware of their breaches. Each crime and the related harm add to

the responsibility of each State involved. And it is proper to say that in each TNC-crime against human rights, each State involved carries co-responsibility. Each time a TNC crime against human rights occurs with impunity, such a State is co-responsible under human rights.

So far, the concept of human rights violations has not been used much in this sense – even though protect-obligations are part of the reasons, why the people create States to begin with. If States do not perform in a major area that is crucial for human rights content at home and abroad, this is a serious issue for the legitimacy of States' powers. Hence States must urgently be taken to account for violations refusing to protect people's essential goods against the crimes of TNCs.

Many States support TNC crimes not only indirectly (by failing to protect), but directly by colluding with the TNCs. This can happen by creating legal provisions that facilitate crimes by TNCs, by failing to implement existing laws of protection, or by using the powers entrusted to them by the people (police force, military) to oppress people protesting TNC crimes. All of these measures breach States respect-obligations. With such measures States retrogress from the modern notion of a State of the people, for the people, and by the people (no matter which class), as envisaged by the human rights revolutions – and they risk to return to the concept of State as an expression of class-rule.

1.4 Conclusion

Human rights can be important tools in the struggle to regulate TNCs. In this context, human rights have to keep their cutting edge. TNCs are striving for direct participation in public governance (see chapter 7). The activities generated at the UN and in civil society around "Business and human rights" (sometimes with corporate support) are amazingly silent on the need for international TNC regulation, and the related extraterritorial obligations that States have. All too often only essential goods are meant when the words human rights are used. These goods are important, yes, but they are human rights content not human rights. Parts of CSOs and academia seem to have forgotten the origin and purpose of human rights. This will be welcomed by those TNCs that try to prevent international regulation. In order to keep the cutting edge of human rights it is necessary to use the term human rights sparingly – and only where appropriate.

The question whether TNCs should be regulated by additional obligations in international law or not has nothing to do with the question whether TNCs have human rights obligations. The second question is doctrinal on the notion of human rights, the first one requires an assessment of opportunities and risks in a legal strategy for regulating TNCs given the current state of the world.

In everything we do, we have to be aware of the drive of powerful parts in the corporate world to make direct TNC governance legitimate. What is at stake together with the regulation of TNCs is the future of human rights.

This is a broad platform where most of us can converge – and this is urgent.

Chapter 2: Human Rights as Cornerstones of People's Sovereignty

2.1 Human Rights are the foundation of people's sovereign law

People's sovereignty is the sovereignty of the population, "the people", in a territory – in particular the common people as contrasted to the 1 percent rich. Under people's sovereignty the States (from local government to the international community) in their various forms) have no existence of their own, but are generated by people and peoples and are controlled by them. In particular, the common people are superior to the States - and to those classes that could try to control them (and the State).

States could be defined in the widest sense as institutions to administer the law for a certain purpose. For the people this purpose is the protection and fulfilment of the goods cherished by them – the essential goods. When constituting the State, the sovereign people make it duty-bound to these goods. They also introduce elements of control so that the people can hold the State accountable under these duties. This means they relate these goods and related States obligations to a right by adding the concept of legal remedy. The constitutional law emanating from the people is therefore built on rights over the State - human rights. Human rights therefore have a fundamental role in constitutional law. As constitutional law is superior to all other law, human rights impact on the rest of the law as supra-positive law².

Human rights must not be confused with natural rights or natural law. Since the times of the Greek Stoic philosophers European philosophy and theology saw natural law as a universal system of rules and principles that guides human conduct and applies to all nations and people. In natural law any human being or entity could be a duty-bearer. The purpose of natural law was to identify "true law" by essentially looking at "true goods" and the obligations implied by them for the different duty-holders. This true law would then also include natural rights emerging from "the nature of man". Natural rights agree with human rights in contrasting with positive law. Moreover both agree on many essential goods. Nevertheless natural rights and human rights are fundamentally different.

Natural rights remained largely philosophical. In various circumstances, natural law was used to justify various different anti-democratic types of "States" – including absolutism and monarchy.

² On supra-positive law, cf. Chapter 1, page16

Human rights emerged in a revolutionary and constitutional context about people's sovereignty (1776 and 1789) putting an end to monarchic and feudal rule. They came as supra-positive constitutional law emanating from the people. This sovereign law background is essential to human rights: Human rights give rise to States constituted by the people as the true sovereign. From now on positive law was meant to be derived from a constitution with the help of human rights under the control of the people – the common people, not the rich. These distinctive features need to be clear for human rights to be the cornerstones of people's sovereignty and the related sovereign law.

The realization of human rights in law since then has been a constant struggle. The concept of people's sovereignty clashed with the rich (the old and the new ones) and their plots to shape the State and the law in their interests to the detriment of the common people. Despite their reference to human rights those first modern constitutions did not recognize the rights of women, of workers, of foreigners, or of future generations. People had to continue struggling for their sovereignty and against oppressive States.

How can human rights best be used by the people in today's struggles? These are struggles for people's sovereignty against States unduly influenced by megabanks and other corporations. How can transnational corporations be governed over by a community of largely disjoint nation States? Human rights analysis sees many States as human rights violators, simply because these States do not implement their human rights obligations that require regulating transnational business.

Human rights have become a threat for business. So the corporate sector reacts: Many corporations (and some governments) would therefore like to reduce human rights to natural rights, or even morals, depriving them of their constitutional or even legal status and making them politically useless for people's sovereignty. In sovereign law the very notion of crime, offense, abuse can only be derived from States obligations to protect (and fulfil) human rights contents: Only human rights can give States the legitimacy to criminalize acts of persons. Even if the State has not made a certain conduct criminal, the people can do so by calling such conduct a crime against human rights. At the same time people must not hesitate to address states as violators of human rights, if they don't take protective action against such conduct – or even collude with it.

2.2 Human Rights in National/Constitutional Law

In line with human rights as sovereign law, human rights law has become part of national constitutional law – as basic rights. Constitutional law almost exclusively refers to States obligations.³ Constitutional rights and human rights directly obligate only the State. How can people then make use of constitutional rights against corporations? In many countries the State can be sued not only for State action against your constitutional rights, but also for

³ There are some exceptions in a few countries that make some constitutional rights binding to persons and corporations – for example in the area of labor rights.

State omissions - failing to protect or fulfil constitutional rights, for example failing to protect against a corporation. Even though such a case is formally brought against the State (not against the corporation), the constitutional court could nevertheless give remedy (if the State breached a protect-obligation), and order a lower court to make the corporation stop the harm and provide compensation.

2.3 Human Rights in International Law

International law is essentially law between States. In the context of the UN Charter and the subsequent Universal Declaration of Human Rights and the Human Rights Conventions, human rights became constitutional in international law. Hence the primacy of human rights in international law: The UN Charter stipulates for itself supremacy over all treaties – and human rights and international cooperation are key concepts in the UN Charter.

Human Rights treaties have two purposes: (i) states bind each other to realise specific human rights in their domestic legal systems (in particular their constitutions) and (ii) states bind each other to cooperate in the realization of human rights. (Many OECD countries oppose that cooperation is binding).

The European and American human rights systems do not see persons as duty-holders under human rights, but follow the general approach of constitutional rights: They see the States not only under a respect-, but also a protect- and fulfil-obligation versus human rights. The UN treaty bodies and UN Charter system have developed the “States obligations to respect, protect, and fulfil” in the 1990s in detail. This is required by the sovereign law view of human rights.

2.4 Conclusions for the struggle for sovereignty

Both in national and international law, human rights duty-bearers are States. We must not deviate from human rights as sovereign law – but instead further sharpen their political and constitutional cutting edge. People have to take human rights in their hands in the struggle for sovereignty. People must not be confused by morals or natural rights when dealing with human rights. For the sake of political clarity and effectiveness, the distinction between States and corporations in sovereign law has to remain clear: States have human rights obligations. Corporations have duties that are derived from the States’ human rights obligations: If these duties are not met, corporations offend or abuse human rights, or commit a crime against human rights.

Chapter 3: Let us safeguard people’s human rights

In order for human rights to meet their political function they must be safeguarded against four tendencies: Depolitization, legal positivism, moralisation, and alienation. We will now take a closer look at each of them and see how they are linked.

3.1 Depolitization

The concept of human rights is highly political – and in fact essential for the notion of a legitimate state based on the sovereignty of the people. The control of TNCs has a lot to do with the sovereignty of the people and the legitimacy of government. For this matter we need to be careful in order to keep the cutting edge of human rights and avoid political risks that emerge from careless use of the concept.

Human rights are emanating from the people. This does not mean that people make human rights. People do generate human rights law (directly or by representation) as positive law. Human rights are supra-positive law, however. While there are different religious or philosophical views on the origins of human rights there seems to be agreement that there is no exclusive access for anybody to supra-positive law on the notions of governance and States, but that human rights evolve with the people under the influence of their needs, their reasoning and their spiritual experience – and their struggles. It is interesting to note that human rights came up in politics in the 18th century at a moment when the prior absolutist monarchic government was challenged by the people. A legitimate state was now seen as a product of the people to ensure their human rights: Government of the people, by the people and for the people: (i) The people is the sovereign not the king, (ii) There is equality before the law – no privilege (discrimination) for classes, gender etc., (iii) The people entrusts the State with its powers (and a monopoly of powers) – only to the extent that the State ensures human rights. For this matter human rights have often been central to the constitutions that establish States.

The UN Charter establishes the international political order as emanating from the peoples: “We, the Peoples of the United Nations, ...”. This political order is then seen as a community of sovereign nations and their states – based on human rights and the duty to cooperate for peace and for people’s protection and wellbeing. The UN Charter has a constitutional role in modern international law. This is reflected in its key reference to human rights (just as in national constitutions) and its primacy over other treaties. The peoples bestow their States with the powers to cooperate internationally (whether inside or outside the UN) – under the special proviso of human rights. Cooperation between states is an obligation under the UN Charter, but it is an obligation that is owed to individuals as a matter of human rights – and is an example of States’ obligations beyond borders. The international community of sovereign peoples recognizes international cooperation and interaction – and hence the community of States - as legitimate only as long as this cooperation is in line with the purpose of the UN Charter including human rights.

International law is therefore hierarchical with human rights of constitutional character. The primacy of human rights law over commercial law is a test case

for legitimate cooperation of States. Another test case is the fact that IGOs as international states authorities and expressions of international cooperation are bound by human rights and therefore have to be exposed to legal action of affected individuals whose human rights were violated by the IGO, just as national authorities have to be.

This unfolding political order is now threatened by global corporate rule. The “Global Redesign Initiative” (launched by the World Economic Forum in 2010 and implemented expeditiously in the international arena) is an attempt to replace the international rule of governments by the rule of big TNCs. These TNCs have understood that some legitimacy would advance their purposes. For this matter they have been penetrating into the UN system – with the support of some OECD governments and the collusion of UN officials. Multistakeholderism⁴ first surfaced 1992 at Rio Conference on Environment and Development. The UN was then opened up to the corporate sector through the Global Compact 1999. The corporate sector made its entrance into the UN human rights system since 2005 in the process around “business and human rights”. In order to protect the foundations of human rights, it is important that people have a clear idea what human rights are.

3.2 Legal positivism

When you ask an expert at the UN or in a CSO about certain human rights or obligations, there is a good chance that this person will pull out a document or cite a certain convention, treaty, constitution, legislation, court ruling, guidelines and say – that’s it. Such experiences may turn social movements away from human rights, even if - in reality - they have been struggling for them.

What then are human rights? Are they morals? Are they law? What is human rights law? These are a lot of questions that need answers. Human rights, morals and law essentially deal with duties. What we call a “duty” is what one party owes another. What we call “rights” arises when one party is meant to be able to “force” another party to meet certain duties that the other party (the “duty-bearer”) owes the first party (the “beneficiary” of the duty).

The relation between law and morals is complex. For our discussion it may suffice to consider only the formal difference that duties in law should be enforced, while moral duties are not meant to be enforced. Moral duties therefore do not give rise to rights, as rights are a means for the beneficiary of the respective duties to get them enforced. As human rights are rights, the respective duties are meant to be enforced and are legal obligations. In particular they are not voluntary and not moral duties. We call them “human rights obligations”.

⁴ Multistakeholderism is an attempt to make participation of the corporate sector in policy making processes legitimate.

Where do legal obligations – the law - come from? We call “positive law” the law that is made by human beings (mostly States) through legislation, treaties, and other states procedures, be it national law or international law. It is called positive, not because its content is good, but because it is at the “disposition” of the law-makers. Human rights obligations are not generated by the State, but emanate directly from the people – together with the State - and establish, obligate and control the powers of the State. For this matter, human rights obligations are not made by States or national assemblies. Whether or not these obligations inspire obligations in human rights law depends on a political process and – usually – struggle. We call the law where we find human rights “supra-positive law”, because it is superior to the States and to positive law.

Human rights are rights in supra-positive law: They are inalienably linked to the individuals (in community) as the basic constituents of the people and then provide the legal framework for the State. It is no coincidence that human rights appear first of all in the context of constitutions – with a view to the legitimate role of States. A State is legitimate only to the extent that it derives its powers from the people as the sovereign – and that its powers are regulated by human rights and the related States obligations.

Positive human rights law is created by constitutional assemblies, legislation, treaties, court decisions, etc. that regulate how States (separately and jointly) have to deal with human rights. Its purpose is essentially to create tools (implements, implementation) to facilitate the enforcement of human rights. The descriptions of human rights content and obligations in positive human rights law are to be seen with this purpose in mind: These descriptions do not generate human rights obligations, but try to interpret them in human rights law order to facilitate the working of the respective mechanisms/courts – and most importantly to create mechanisms to enforce human rights.

The distinction between human rights as supra-positive law and human rights law is crucial – but sometimes overseen: Many people see the French Déclaration des Droits de l’Homme et des Citoyens as the first document on human rights – even though it only refers to the rights of males. When women in those days raised the issue that women have human rights just as man do, this was rejected and deliberately not included. So here were women’s human rights in super-positive law. But the French National Assembly interpreted human rights in a way that excluded women’s human rights from human rights law in France in those days.

There is a school of thought that holds that nothing can be law that States have not generated or agreed to. This school of thought, called legal positivism, welcomes human rights law, but it rejects human rights, because it rejects any type of law other than positive law. In particular it rejects the supra-positive law of human rights legitimating, instructing and limiting the powers of States. For legal positivism human rights are rights granted by States – via the proper human rights law codified in legislation. Positivist lawyers thereby give States the license to freely decide about their “human rights obligations”, as they see these as obligations in positive law – made and (if convenient) withdrawn by States. This subverts the notion of human rights.

The identification of human rights law with human rights can be welcomed by any illegitimate State, because it now has the defining power on human rights. Now the States “establish, obligate and control human rights” rather than the other way around.

As positivism denies human rights as law, it accepts human rights only as “morals”. As mentioned above, moral duties cannot give rise to rights, by the very meaning of what a right is – something that should be enforceable on the duty-holder. Talking about human rights as morals undermines the sovereign law based on human rights as supra-positive law. For a positivist a state that violates human rights without breaching human rights law would not act illegally, but only immorally. This makes a difference when it comes to the people taking back the powers from the State for example in a revolutionary context. Violent action is not justified in the context of immoral acts, but only for illegal acts. Hence there could be no human rights justification for violent resistance or revolution against a State, no matter how many human rights violations that State commits. So the American and French revolutionaries would have erred, basing their revolutionary action on human rights. Legal positivism is therefore the perfect setup for oppressive States. All of this is hidden behind the seemingly innocent identification of human rights with human rights law.

3.3 Moralization

3.3.1 Confusing a legal good with a right – and a deficiency with a violation

Law is essentially about obligations. There are lots of obligations. Some of them relate to certain “goods” – and require that these be respected, protected and fulfilled. For human rights obligations these goods are certain qualities of human life that are of evident importance for everybody like freedom from torture, political participation, adequate food etc.. Human rights obligations are States obligations to respect, protect, or fulfil such essential goods. And the related human right is a relationship between a human being and the States, as will be discussed in detail below.

What does this mean? Consider a situation where persons enjoy a specific essential good. States respect this good, if they do not harm it. States protect it, if they do their best to prevent others from harming it. In situations where persons cannot enjoy a specific good, i.e. if the good is deficient for them, States have to provide the respective essential good or – as the case may be - facilitate the persons’ attainment of resources to enjoy it. Altogether then, under a specific human right, States have the human rights obligations to respect, protect, and fulfil the respective essential good. This good is then also called the content of the right.

If a State harms content, it breaches its respect-obligation. If a state fails to protect content against being harmed by a third party, it breaches its protect-obligation. If a state fails to facilitate or provide the content, where it is deficient, it breaches its fulfil-obligation, unless it was unable to do so despite

its best efforts. (Similarly for protect obligations). These breaches are called “human rights violations” and should be remedied by respective mechanisms of the State, such as courts - upon complaint by the rights-holding persons and/or by unilateral action of the State. It is important to note that a violation is not a situation of deficiency of the respective human rights content, but is always an act or omission by a State.

We called “human rights content” an essential good - a quality of life – that States have to respect, protect and fulfill under a human right. For this matter, these objects could also be called human rights goods. Few people use the words human rights content⁵, but everybody talks about them - using the words human right – skipping the word content. Here we have a problem: Two different notions are meant by the same words. Is a human right a good or a right? It is a right. Then why do we use the term right also for human rights content? Because it is shorter. For such “homonyms”⁶ we usually find the intended meaning from the context. In our case this “double talk”, however, gives rise to further confusion: What is a violation of a human right? Is it something that harms the content resp. a situation where the rights content is deficient? A violation of a right is a breach of a human rights obligation. A human rights violation is always an act or omission by a State - not a situation of deficiency in a human rights good or an act of harm done by a third party.

A deficiency in the human rights content is sometimes called a violation of human rights: Hunger, for example, indicates a deficient essential good (deficient access to food), but is not necessarily a human rights violation: Hunger can be the result of violations (and very often is), but sometimes even the best governments in the world will be unable to prevent cases of hunger. In such cases there is no human rights violation involved here.

So using the words human right where human rights content is meant has a consequence: The term “Violation of human rights” is sometimes used, where a deficiency in human rights content is meant. With this language, human rights violations “lead to” human rights violations. Wow. Hold it. This is not only confusing, but counterproductive, as it trivializes human rights and distracts from the real issue: An analysis of States’ breaches of obligations – and how these obligations can be enforced by the rights holders. Human rights violations are not acts or omissions of States that “lead to violations”, but are rules meant to prevent damage to the content (respect- and protect-obligations) and to put an end (via fulfil-obligations) to deficiencies in human rights goods. We can go on using human rights as a homonym, but we should know what we are doing: When are we talking about a right and when about a good?⁷ Often we are not, and shoot our own foot by trivializing human rights.

⁵ The formally correct legal term is human rights content. The term essential good is substantial and less formal than “content” and reminds is that we deal with a “legal good” or “juridical good”.

⁶ A homonym is a word with various meanings.

The consequences of confusion are considerable: Talking about goods instead of rights (but using the rights language) makes rights in reality disappear. We are talking no longer about law and legal obligations and legal remedy, but only about essential goods. How nice for the duty-bearers. Moreover there should be no confusion who are the duty-bearers and the rights holders under human rights. Nevertheless, such confusion is created. The rights-holders are human beings, as the name already tells us. Corporations are not human beings and cannot have human rights. Nevertheless there have been attempts to equip corporations with human rights.

3.3.2 Attributing human rights obligations to third parties such as TNCs?

Another type of moralization is linked to the question whether business enterprises, your neighbor, you and I are duty-bearers for human rights. This issue comes up in particular in the context of TNCs: Do (powerful) third parties have human rights obligations? If they do, they can violate human rights. If they do not, they cannot. Again the issue is subtle, but important.

Human rights are meant to establish, obligate and control the powers of States. Hence it is the State that has obligations towards the people. If States fail systematically and severely, they become illegitimate, the people have the supra-positive right to rebel against tyranny and oppression and to take powers back in their own hands, and reshape the state. It is clear in this context that human rights deal with obligations of States. How about obligations of others, so called “third parties”?

Human rights obligate lawmakers to create positive law, and have it adjudicated and enforced it in order to protect and fulfil the human rights content. What, if the State fails to generate and implement the required positive law to meet its protect and fulfill obligations in a particular case? In such a situation, although not illegal under positive law a third party may harm human rights content in a way that ought to be outlawed by States under their human rights obligations. Here we should not hesitate to call this a crime or offense against human rights. In line with its human rights obligations the States have to turn such crimes and offenses against human rights into crimes and offenses under criminal, civil or administrative law as soon as possible. It is questionable to emulate human rights language (to abuse for to violate, offense/crime for violation) creating a slightly different language for what are indeed different concepts. What is useful for human rights is to specify the human rights contents and the breaches of States protect-obligations that may facilitate acts or omissions by a TNC that harm these goods: This leads to concrete political demands and campaigns to implement human rights by introducing or changing positive law and addressing the malfunctioning of states authorities. The states authorities should be made liable in human rights courts for the damage created by their failures to protect. And certainly the impunity for crimes must end.

⁷ For the sake of clarity – and to protect the term violation - this publication uses the term human rights content, or human rights good or (essential) good and avoids the word “right” as a homonym.

Human rights are crucial to keep the State doing their jobs. It is both useless and counterproductive to apply human rights to third parties. Trying to address TNCs with human rights concepts means barking up the wrong tree. What counts is not whether the duty of the TNC is a human rights obligation, but whether this duty is enforceable. This, however, depends on States having implemented their human rights protect-obligations in positive law. Hence States are the trees to bark up with human rights. Of course, it is important to directly address third party offenses and crimes. In cases where these offenses and crime are not laid down yet in the respective positive law, we can then crimes or offenses, if they are implied by States human rights obligations of States. States are useless for the people, if they do not generate the law that people want and that human rights imply. Barking up the wrong tree with human rights, however, is counterproductive, because it distracts attention from the real human rights issue in these contexts (states protect-, fulfil-obligations), and because it waters down and misuses human rights language, dealing with TNCs using essentially the same language as with States thereby raising TNCs' political status and bringing them closer to the sphere of "government" – as historically and conceptually human rights provide legitimacy, instruction and limitations to States. This is very much in line with the political strategies followed by the corporate sector and its allies promoting multistakeholderism and "public-private partnership" as "Global Redesign". Academics and CSOs should be careful not to damage the fundamentals of human rights by supporting such mistaken "innovative approaches" – even if they are rewarded by corporate funding and a seat at the table of "multi-stakeholder governance".

Addressing third parties as duty-bearers in human rights is counterproductive also because it results in the omnipresence of human rights terminology and thereby trivializes human rights. It introduces a "violations' inflation" and is – in essence – disguised moral talk. It is a name-and-shame strategy misusing human rights as "strong language". Such strategies may have an impact - just as individual charitable action may have an impact in a context of States breaching their fulfil-obligations - but they do not address the human RIGHTS of the persons affected and victimized. It is moralization: It is concerned with - say - TNCs taking into consideration human right content, while in order for a human right to be implemented the need is to stop the impunity for crimes against human rights. This, however, requires positive law outlawing such crimes. Hence we have to invoke this human rights obligation of the States in order to get human rights implemented. And this will be facilitated by documenting and attacking the related offences and crimes of third parties – without calling them violations or abuses of human rights.

A human rights doctrine that fails to distinguish clearly between States and corporations can harm human rights – and people's sovereignty, can disempower States and empower TNCs: States are bound by human rights obligations and are accountable to the people, while corporations are licensed by states, subordinated to States and accountable under the legal systems of States. Current attacks on human rights as "state-centered" sound well in the ears of those in the corporate sector who intend to further weaken the State and advance corporate rule..

It is an illusion to hope that the rhetoric edge of using human rights language on corporations will make corporations weaker and hold them to redress. The only way to make corporations accountable is to regulate them under positive law in international cooperation. And this is what States have to do under their human rights obligations. Judges could take daring decisions on the bases of supra-positive law, but in the end it is the States executives – individually and in cooperation with other States – that have to enforce these judgments. And it is here where the concept of human rights is essential as it is intimately related to the legitimacy of government. Nothing is gained by ignoring this essential fact. Such ignorance at worst raises the status of corporations to the level of (co-)governments (see above); at best it “only” diverts attention from states’ protect-obligations to regulate or dismantle corporations, and hence from the essential field of activity.

Table 1: Types of obligations around human rights

<i>Area of Law</i>	<i>Duty bearer</i>	<i>Term for breach of obligation</i>
Supra-positive law	States and States authorities	Violation
Positive law <ul style="list-style-type: none"> - Human rights law - Other positive law 	States and States authorities All persons and entities	Violation Crime, offense, abuse

3.4 Alienation

Depolitization, legal positivism and moralisation are both a reason for – and a sign of people’s alienation from their human rights: Human rights have a crucial political function for people’s sovereignty. Depolitization therefore alienates people from human rights. Both legal positivism and moralisation deny human rights the powers of law. Positivism says that law is only what States have made law, separately or jointly.). It identifies human rights with human rights law – and thereby abolishes human rights as something owned by the people not by the states – and hence alienates people from their rights. Alienation takes place when a right is confused with its content. Nowadays a lot of human rights law is international law. As a consequence people see human rights mainly in the international sphere. Moreover, for some States human rights became a tool in foreign policy. International law is far from the people, even though it is positive law generated (also) by their own States. Given the importance of human rights for the legitimacy of States and the respective constitutional role of human rights, this focus on international law may come as a surprise. International human rights law provides interpretations of human rights obligations agreed between States – and sometimes also implementing mechanisms. These interpretations and mechanisms can be helpful to fight situations of national oppression. Nevertheless this should not lead to the impression that human rights law is essentially international law. Such a view would overlook the importance of national human rights law as embedded in

constitutions and legislations – and is another source of alienation between the people and their human rights.

Human rights have become increasingly mistaken for human rights law and hence dominated by international lawyers and academics. Along with human rights institutions came “the experts”. The confusion of human rights and human rights law led to the impression that human rights are granted by states (as human rights law is) or created by “human rights experts”. Moreover some of these experts are distanced from the people. These tendencies further alienate people from their human rights.

A painful source of alienation is the sobering experience of social movements that even the most elaborate descriptions in human rights law are of little use as long as administrations and lawyers are not trained accordingly, and can ignore human rights law with impunity because their supervisors and governments do not care and because there are no courts addressing people’s complaints about violations. Creating legal descriptions of human rights without establishing legal enforcement mechanisms to be used by the rights-holders is like building cars without wheels. The issue is to get wheels to the car so that human rights can move.

The issue of alienation is unacceptable - as if human rights could go on without the people, thanks to lawyers, experts and academics. Human rights emanate from the people and cannot survive without people owning them, caring for them, struggling for them.

If the people are not alert, the traps in the field of human rights are overlooked. These are essentially political traps that could be used by vested interests to weaken human rights - and eventually do away with them.

Chapter 4: Crime, tort and the violation of human rights

Eight questions and a conclusion on human rights in the field of business enterprises

Over the past decades, TNCs and other business enterprises have gained powers that evoke the use of human rights in order to regulate business and to stop impunity for harm inflicted by business corporations. Impunity results largely from lacking corporate criminal law and a proper understanding of corporate crime. Similar gaps exist in the law of torts. Human rights may indeed be needed to fill these gaps – but how? Starting from the historical understanding that the purpose of human rights is to establish, obligate and control the powers of States, it has been suggested to use human rights to make States develop a new understanding of crimes for corporations. The gaps are then filled by a more refined understanding of criminal law, the law of torts and

administrative law in the context of States human rights obligations. Alternatively it has also been suggested to apply human rights to corporations in a way very similar to their application to States. In this understanding human rights law obligations are held not only by States, but by big business entities / all entities / everybody in relation to their spheres of influence in the respective situation.

Human rights have emanated – and continue to emanate – from the struggles of the people. Corporate capture of people’s concepts – and their subsequent domestication and alienation from the people are well-known corporate public relations phenomena. Unfortunately even human rights run risks in this context.

Business has discovered human rights in the same way that business discovered corporate social responsibility – largely as a means to avoid the legal regulation of business, and as a tool to capture states’ spaces of governance. The following questions and answers try to promote conceptual clarity about human rights and assess the advantages and risks of the suggestions mentioned.

4.1 What is a right?

Human rights run the risk of being watered down to norms or even to moral standards. Against this background it is necessary to insist that human rights are first of all rights. Hence the question “What is a right?” Here is an answer: A right is a relation between a rights-holder and a duty-bearer so that:

- There is a “content” (a good, a procedure, an asset, a quality of life etc.).
- There is a set of “obligations under this right” that the duty-bearers have to meet so that the rights-holders can obtain the content of the right.
- The obligations under the right are legal obligations in the sense that they should be enforced by States.
- If duty-bearers fail to meet their obligations, then the rights-holder should be able to take legal action to make duty-bearers comply with their obligations.

4.2 What is a violation of a right?

A violation of a right is a duty-bearer’s breach of its obligations under this right, i.e. a failure of the duty-bearer to comply with one of more of its obligations under this right. A violation of a right is therefore always an act or omission of the duty-bearer. In particular it is NOT a deficiency in the rights object. Such deficiency can (but need not) be a result of a violation. Examples follow below under question 4.

4.3 What is a human right?

Here is a short and rather formal answer capturing what is crucial in our context: A human right is a right with all human beings as rights-holders, and States as duty-bearers. The content of a human right is an essential good to be protected and fulfilled by law. These essential goods are sometimes identified with human rights – but goods are not rights (see question 1). The obligations under a human right are to respect, protect, and fulfil the related content – and these obligations are incumbent on States as the duty-bearers. The States obligations to respect, protect, and fulfil the content (and the respective remedy mechanisms for victims) establishes and controls States.

4.4 What is a violation of a human right?

“Violation of human rights” is often used in a way that no longer refers to human rights as rights – and therefore contributes to watering down the concept of human rights. Here are some examples:

4.4a. Does a person with a broken arm suffer a violation of human rights?

Physical integrity is an essential good and hence a human rights content. And having a broken arm means, physical integrity is lacking. A violation of a right, however, is not a deficiency in the content, but a breach of somebody else’s obligations under this right. Hence a person with a broken arm does not suffer a violation of human rights.

4.4b A woman fell off a ladder and broke her arm. Does this violate her human rights?

In this example the broken arm is not only a situation that the person experiences, but there is some action that impacted on the person’s physical integrity. This action is not a violation of a right, because there are no obligations involved: A person does not have an obligation not to fall off a ladder. So no obligation was breached, and hence no right violated.

4.4c A woman fell off the ladder and broke her arm, because a man kicked away the ladder⁸. Now is this finally a violation of human rights?

No, this would simply be called a crime of the man victimizing the woman, but it is not a violation of a human rights – unless the act of the man can be attributed to a State, for example when the man is a policeman or prison guard on duty. Moreover the act is certainly a tort because the woman is entitled to compensation for the harm suffered and should be able to sue the man accordingly⁹.

4.4d If a man kicks away the ladder and this breaks the woman’s arm, where is the violation of human rights, if any?

⁸ “Kicking away the ladder” is the title of Ha-Joon Chang’s book and is also the image he uses for the policies of the Global North to maintain domination over the Global South.

⁹ A tort is the unlawful infliction of harm not related to a breach of contract. The law of tort is the part of civil law dealing with tort.

The case is clear, if the act of the man can be attributed to the State. If this is not the case, there may essentially be two types of situations that could relate to violations of human rights:

- (i) A policeman watches the man kicking away the ladder and breaking the woman's arm, but does not intervene, although he could. This omission to protect is attributable to the State. With the omission of the policeman the State breaches its protect-obligation and thereby violates human rights. (In short it is sometimes said that the policeman violated human rights, because what he did can be attributed to the State.)
- (ii) A person breaks the arm of another person and hence commits a crime. But this other person is an indigenous person and the State has no law saying that breaking the arm of an indigenous person or a person of African descendant (or of a slave) is a crime. Or perhaps it does, but no court will convict a person from the dominant society for breaking the arm of such a person. Then these failures of the State to provide or enforce such laws are violations of human rights: The States fail to meet their obligation to protect a person against such harm. Moreover these violations can sometimes even be seen as facilitating the crime at hand. There are good grounds to assume that this is the case with the persistent denial of (some) States to address corporate crimes.

4.5 Why are States singled out as duty-bearers for human rights? Are human rights not also directed to other powerful entities (or to everybody) and not only the State?

The State is the only entity that appears in the definition of "right" (see the answer to question 1 above). The powers of establishing and enforcing positive law emanate from the people and constitute the State. They do not make a State "gradually different" from big business, but categorically different. The State is the crucial entity for the notion of law and for any right. Human rights are the modern interface between the people's essential goods on the one hand, and on the other hand the entities they jointly establish, obligate and control in order to rule – the legitimate States and their community.¹⁰

Human beings therefore need specific rights that address the well-functioning or even legitimacy of States. This is the political purpose of human rights. If human rights were no longer targeted exclusively to States, they would lose their political purpose. They would stop legitimating, instructing and limiting the powers of States (as the entities that legislate, adjudicate and enforce laws). There is no category of law that could replace human rights law in this function. The legitimacy of law making, judging and enforcement is then no longer bound exclusively to the legitimate State controlled by the citizens for public interest,

¹⁰ In 3.1 above (p.26) it was underlined that human rights are constitutional for a legitimate community of States: Human rights establish, obligate and control such a community.

but could as well be performed, by corporations, or by feudal lords calling themselves States.¹¹ Corporations are by nature not controlled by the people, but by their shareholders for private interest within the limits of a legal framework.¹² If the difference between corporations and States with a view to human rights was gradual according to their respective spheres of influence, then “governance” would turn into a joint effort of powerful entities, including corporations and States.

The State itself in its key function would then be privatized. This would complete the agenda for direct capitalist (corporate) rule. This agenda started in the 1970s with agitation against mixed economies that included State-run enterprises (first step: privatization), then proceeded to tying states’ regulatory hands in the context of forced trade and investment agreements and ISDS (second step: deregulation, from the 1990s onwards) and now intends to move via “multi-stakeholder fora” to direct corporate rule (third step: dismantling the legitimate, democratic State itself)¹³. Human rights obligate States to regulate corporations. For this matter States have to (jointly and individually) rule over corporations.

States are central for law and public interest. Those who call this “state-centric” should tell whom they want to see administering justice. Corporations? Everybody? Nobody? There is nothing State-centric about maintaining that States provide the only legitimate government. There must be a specific type of law that allows citizens to make or keep the State legitimate, and to instruct and limit the powers of the State. Human rights provide this exclusive legal category.

4.6 How are crimes, tort and human rights related? In general: When is an act a crime?

By definition an act is a crime, when it should be punished by a State. How do we find out what a State should punish? Some would say: The penal code will tell us, as it describes the conduct that is to be punished by States. This answer is not satisfactory, as it does not provide any substantial justification, why this conduct should be outlawed in the penal code. This brings us to the foundations of States – and hence to human rights. States must not punish arbitrarily, but need a legal base – and eventually a constitutional basis for doing so. In most modern States this base is provided essentially by human rights. As the State has to protect essential goods against impairment by others, it must also punish such impairments in order to deter and hence prevent acts against essential goods and thereby protect these goods.

If a non-state actor harms human rights content this is a crime. Conversely – if an act is a crime, so that the State has to punish, the basis for punishment must come from human rights – only human rights can instruct a State to punish

¹¹ L’État, c’est moi” is a famous dictum of Louis XIV, king of France.

¹² Feudal kings derived their legitimacy from “the grace of God” not from the people.

¹³ Cf. the Global Redesign Initiative promoted by the WEF

legitimately. So, all crimes are related to human rights. If we want to name a specific human rights content (say access to food) that is protected by the respective notion of criminality, we could refer to “crimes against the human right to food”. While in general, the simple reference to crime should be sufficient, the link to human rights content could be made, if States refuse to recognize an act harming a human rights content to be a crime, as is not unusual when it comes to corporate crimes. At the same time, in such a situation the State must be accused of violating human rights. States are indeed crucial here, and it is not an act of grace by a State to protect against corporate harm, but a human rights obligation.

The term “violation” seems simply to visualize some violent act, while failure to protect is not an act, but inactivity – while the destructive act is carried out by the corporation. This must not misguide us to use the term violation for this distractive corporate act. Nor must we provide a false focus on respect-obligations when we talk about violations of human rights. States failures to protect and fulfill are human rights violations as well.

Traditionally criminal law has been considered applicable only to individuals, not to legal entities. Since the 1990s, however, this has been changing. France, for example, amended its criminal law in 2006 so that legal entities can be held accountable to any offence. International corporate criminal law has also been discussed. In the negotiations that set up the International Criminal Court in 1998, some States had suggested to include corporations in the jurisdiction of the Court, but did not succeed at that moment.

4.7 Reserving protect – and fulfil-obligations in human rights law to States is accepted, but why not put respect-obligation in human rights law on corporations and other private entities or individuals?

The obligations of corporations to respect human rights contents are already implied by the States’ human rights obligation to protect these goods – so there is no need to replicate these obligations by introducing corporations into human rights law. Corporate respect-obligations, however, are obligations in criminal law or the law of tort as explained above – even if they may not have been made explicit in the criminal code and the law of tort yet. Similarly criminal law will include some corporate obligations to protect- and fulfil human rights contents. The breach of these obligations is a crime and – as the case may be - a tort. For a number of other reasons it is counter-productive to call these respect-obligations “human rights obligations” and the breaches “violations”:

(1) Operating the respect-protect-fulfil classification is not always easy. What will remain in practice is that corporations are seen as having obligations in human rights law similar to States. Corporations could use this to claim participation in policy-spaces in order to meet these obligations. This promotes the very corporate capture that needs to be fought. (2) The proposal blurs the

distinction between violations and crimes – and between States and other entities. (3) It ignores the fact that third party harm to essential goods are already taken care of in the notion of crime. (4) It confuses human rights law and criminal law. (5) It focuses violations on breaches of respect-obligations – and thereby tends to overlook States protect- and fulfil-obligations. Implementation of States' protect-obligations in human rights law, however, is urgently needed to regulate TNCs and generate the necessary positive corporate criminal law. (6) Last, but most importantly, it betrays the political purpose of human rights: Establishing, obligating and controlling States and their community.

4.8 It is sometimes claimed that the inclusion of corporations as duty-bearers in human rights law would facilitate litigation against them. Is this true?

Before looking at litigation, let us look at the use of human rights in blaming and shaming corporations. The term “crime” or - if necessary - “crime against human rights” is as strong a term of disapproval as “human rights violation”, if not stronger – and it is legally correct. There is no “publicity advantage” here in using the term “violations”. In blaming and shaming, the use of human rights does not consist in attacking the corporations verbally with human rights language, but in using human rights to establish and justify the notion of corporate related crime. We must not misuse the term human rights violations for blaming and shaming corporations, as this means weakening human rights and ignoring their political purpose. Moreover, blaming and shaming are not substitutes for legal remedy. Access to justice requires the possibility to litigate before courts. Ultimately, access to justice and the judiciary altogether are tools in the hands of the State to meet its human rights obligations, including the protection of people against harm done by corporations.

Litigation before courts depends on the respective legal systems, common law, civil law etc.. So a short answer to the question in the title can only be rather general. Let us look first at domestic law: If the legal system of a State complies with its protect-obligations in human rights law, the law of tort is sufficiently developed in relation to harm done to human rights contents and the harmed persons (or persons on their behalf) could take legal action to obtain compensation. If corporate criminal law was sufficiently worked out and compliant with human rights, the State prosecutor would take action or victims could bring the case themselves before a criminal court as private prosecutors, if it is in the list of crimes open for private prosecution – or they could take action under civil law. If corporate criminal law or the law of tort are not sufficiently developed in compliance with States protect-obligations, the victims could go eventually to the Supreme Court on human rights grounds to address this breach of States protect obligations. The Supreme Court could call on the legislature to fill the gap in criminal law or the law of tort – and/or make a judgment itself that could possibly settle the matter for the time being.

If TNCs and business had obligations in national and international human rights law, victims and judges could apply human rights against corporations in a law of tort case. In countries where international human rights law is directly applicable in domestic cases, courts could apply international human rights law in addition. Ultimately the interpretation of human rights law against the corporation in such a case is up to the Supreme Court. What is the difference to the first approach to legislation? Now it is claimed that corporations can already be sued on the basis of human rights law alone. Fine, but what will happen with such a case will largely depend to what extent the legal system is compliant with the States human rights protect-obligations. If it is, then corporate criminal law and the law of tort could be used. If it's not, then human rights law would have to be used against the State to fill the gaps and make the law compliant. Certainly human rights arguments can be used also without claiming corporate obligations under human rights law. The link remain important: Human rights law can be applied in a criminal case to interpret the notion of crime in the sense of States protect-obligations in human rights law. In terms of litigation, too, there are good grounds for leaving human rights obligations where they belong – with the States.

In international human rights law this is similar – except that there is no Supreme Court, but possibly international human rights courts and international criminal courts. Suing a TNC before an international human rights court will not result in any punishment for the TNC (unless it is turned into a criminal court, and then the law is international corporate criminal law). International human rights courts do not punish, as they are traditionally courts among equals. Human rights courts have no enforcement jurisdiction. They do not put States Presidents behind bars – nor do they seize States assets. Human rights courts direct States to address their wrongdoings, but rarely provide direct effective remedy to the victims. This does not diminish the importance of human rights courts and their judgments. These can lead to access to justice in the respective State's legal system. Whether or not this happens will depend on a number of variables, not the least on the respective social movements and general public.

As the aim is to end impunity and ensure effective remedy for the victims, bringing TNCs before international human rights courts does not help. On the contrary, bringing TNCs a Human Rights Court raises the standing of TNCs as these courts are traditionally courts among States. The appropriate instrument would be an international corporate criminal court or the expansion of the jurisdiction for the International Court of Justice to legal entities (and an expansion of the list of crimes covered). Such a court would then be in a position to punish TNCs and other business and keep them in a subordinate position towards the Community of States as is required by the sovereignty of peoples. A proper mandatory cooperation (established by treaties) among domestic legal systems, however, may in general be the better option, so that only a certain limited set of international crimes remains for the international court.

Putting human rights law obligations on corporations (rather than only on States) and suing corporations directly along these lines alone does not

facilitate remedy for victims, nor can it address impunity any better than corporate criminal law or the law of tort. When it comes to stopping corporate impunity, there is no way around positive criminal law and a human rights compliant law of torts. States carry human rights obligations to provide such law.

Conclusion:

States are systematically violating human rights by failing to regulate TNCs and other business. This will not change by introducing human rights terminology on TNCs and other business. The only approach that can regulate TNCs and other business is to make States comply with their protect- (and respect-) obligations under human rights law and introduce the necessary corporate criminal law, law of tort and administrative law.

Human rights are indeed needed to fill these legal, mental and political gaps. Basically the function of human rights in this context is fourfold:

- (i) Human rights allow us to address corporate crimes as they guide us in the notion of crime as harm to goods protected by human rights.
- (ii) We are forced to address the underlying breaches of States protect-obligations in human rights law as systematic human rights violations. We are not asking States to do us a favor and legislate, but we address the States as human rights violators, if they do not make corporate criminal law, the law of torts, and administrative law compliant with human rights.
- (iii) Human rights instruct States about the notion of corporate crimes. Human rights can and must be used to overcome the current mental and legal limitations of the concept of crime – and link crime to human rights via States protect-obligations: Crime is defined as what States have to punish under their protect-obligations in human rights law. This can guide the construction of corporate criminal law and also open up the use of the law of tort against business.
- (iv) States' extraterritorial human rights obligations guide the mandatory cooperation of States' legal systems in the investigation, persecution and sanctioning of corporate crimes of transnational nature, the seizure of company assets and the provision of compensation for the victims.

Introducing obligations for business in human rights law (instead of criminal law and the law of torts) and the respective violations terminology, however, would undermine human rights, and promote corporate rule: In the field of law it leads to confusion between legal categories and undermines the purpose of human rights to establish, obligate and control the powers of States and their community. In politics, it diffuses political responsibility and upgrades business enterprises, in particular big business, then being dealt with as actors similar to States with only gradually different human rights obligations. These effects would be in line with the very corporate capture and Global Redesign Initiative

that need to be fought on human rights grounds – and distract from the real issue of regulating TNCs in criminal law, administrative law and the law of torts.

Chapter 5: How to fight corporate impunity with human rights

5.1 Crimes and impunity

The word impunity refers to the absence of punishment for corporate activities of a particularly harmful nature.

Who carries out punishment? The media? Public opinion? The victims by revenge? While all of this is certainly possible in a vague sense, this is not what we call punishment in law. In general it can be said that in law, acts that deserve punishment are called crimes. Different States (and international law, in particular) restrict the notion of crimes to acts that exceed a certain threshold of punishment. Be this as it may - such law in essence emanates from the people and is laid down, adjudicated and enforced. If a State consistently fails to punish crimes it may be considered illegitimate and people will have to replace such a State by a new one.

In any event, in law punishment is to be carried out by states – individually and jointly.

Why then is there impunity? There are a number of reasons:

- 1) States have not made these harmful corporate activities crimes in domestic or international criminal law.
- 2) Even though the harmful activity is prohibited by criminal law, this law is not enforced.

In order to stop impunity we have to make use of the law – get States to outlaw such corporate activities – and make sure that States enforce the law.

5.2 Human rights in the context of harm done by corporations

If States don't have positive criminal law covering the respective harm or don't enforce it, human rights have to come in. Human rights legitimize, instruct, and limit the powers of the State. Human rights emanate from the people. The purpose of the State is to implement and enforce human rights. If States do not meet their purpose, people can legitimately take these powers back – and establish another State. Human rights therefore are an indicator for the legitimacy of a State. States can turn illegitimate by becoming a tool of

oppression in the hands of a ruling class. The instruction and limitations of States powers is enshrined in the obligations put on States through human rights, in particular the obligations to respect, protect and fulfil human rights contents.

States have obligations – territorial and extraterritorial ones – to protect people against activities by third parties that harm their essential goods, i.e. their qualities of human life that are the objects to be legally protected and fulfilled under human rights. Essential goods have ethical consequences, but that is another story than impunity. Stopping corporate impunity means making the States punish the corporation.

This process starts with bringing the States individually and jointly to the point of making such acts part of criminal law. If States have properly functioning human rights systems and constitutional systems, States could be taken to court and the court would order them to close this gap in criminal law. Similarly we could use human rights to address States who fail to enforce law. In any event we can call States that fail in these obligations “violators of human rights”. The human rights of people who suffer harm from corporations, because States breach their protect obligations and allow corporations to commit crimes with impunity – are constantly violated.

5.3 Crimes and the related human rights violations

The term human rights violation always refers to States breaching their human rights obligations, not to corporations committing crimes that harm people’s essential goods – i.e. their enjoyment of human rights goods: It is important to distinguish crime from violation because we need to distinguish corporations from states. States carry legitimate powers to create and enforce the law, powers mandated by their peoples based on human rights. Corporations do not carry legitimate powers by the people (but are trying to capture them). Corporations are not meant to create and enforce law, are not expressions of their peoples.

There are intricate systems to control States powers, because the state is law-maker, judge and enforcement agency. Even though these state powers are separated, much is needed to make the States function properly. This is the political function of human rights. For corporations, by comparison, it is comparatively simple to make them function properly: States separately and jointly legislate and enforce accordingly – and there is no other way.

5.4 A human rights “reform” promoting corporate capture

Some scholars want to react to States’ failure to meet human rights obligations, by putting human rights obligations on corporations – in national or international law. They talk about overcoming “state-centrism” and replacing it by “polycentrism” and “multi-stakeholder governance”. It is telling that such

ideas are vigorously promoted by those who helped to open UN doors for corporate capture. The Global Redesign Initiative of the World Economic Forum provides the blueprint. The purpose behind the argument that states are no longer capable of providing policy responses to the major global crises – and therefore have to involve corporations – is obvious, given the fact that the regularity powers of states (individually and through the UN) have been systematically eroded by the corporate sector itself via “neoliberal” policies. And this attack is extended even in the field of constitutional law through ISDS mechanisms: The purpose is corporate capture and corporate rule. What corporations do not want is being regulated in criminal, administrative or civil law. Diminished state power and increased corporate power as a reason for a modifying the human rights concept of sovereign law can even be heard even from some CSOs and some scholars. It plays into the hands of the corporate capture initiative.

Such a modification does not help us to stop impunity: The question is still, how the people will get States to punish corporations. The only difference is that these “reformers” now call a “violation of human rights”, what could have been called a “crime against human rights” before – and what should be an offense in criminal law and punished. Or do they honestly believe that reference to “corporate human rights violations” (rather than corporate crimes) will provide such an added value in blaming and shaming corporations that they will voluntarily stop their crimes? If this was the case, criminal law could be abolished and we could all start blaming and shaming criminals as human rights violators.

This is not only useless, it also carries a heavy cost, for a number of reasons: It blurs the roles of states and corporations by expecting from them the implementation of human rights - something only States can legitimately do. It increases the status of corporations, as legitimacy comes from human rights. It diffuses responsibility - and disconnects States from their exclusive link to human rights.

5.4 Human rights contents, corporate crimes and the need to address States for related human rights violations

Sometimes it is said that reference to human rights helps to describe what we mean by corporate crime. And that it is therefore helpful to refer to international human rights law in the context of TNCs. In most situations of impunity, however, the crime is so obvious that there is no need to draw on international human rights law to make people understand that such behavior should be punished. For more subtle situations of crimes language like “crime against human rights (goods)” could be used – and then reference can be made to States obligations to protect and respect such goods.

The harm done by corporations to people and Mother Earth is sometimes “balanced” against the benefits of the respective corporate conduct for “development, employment economic growth”, as if this could justify the harm

done. In such situations reference not only to crimes but to crimes against human rights will be useful, as it will strengthen the legal and political position of the victims.

There is no way around fighting for legitimate states and for their obligatory interstate cooperation in order to make them effectively meet their human rights obligations. There is no conceptual or political shortcut – but there are traps. Let us not forget that, when an obligation is put on a corporation that is punishable it is not an obligation in human rights law, but in criminal law – national or international. For corporations and other third parties, there is no place in international human rights law, given the nature of human rights as establishing, obliging and controlling the powers of States and their community.

It is sometimes said that States are no longer in a position to protect people against corporations. In many, if not most, cases, this is not true. And for the community of States it is certainly false. Before we come to the importance of legal and judicial cooperation, we have to face an even more fundamental problem: In reality many States do not only fail to protect people against harm by corporations, even though they could – they in fact collude with these corporations. This collusion is tantamount to a violation of human rights. The key issue to stop impunity is identifying such violations as states actions (in respect obligations) or states inaction (in protect obligations), and attacking them in public as human rights violations. Using the same term simply for the harmful conduct by corporations leaves us speechless, when it comes to breaches of States protect- and fulfil-obligations.

In order to be successful, we have to confront the current risks that the term “violation” becomes trivialized by simply denoting a deficient human rights content or harm done by somebody to somebody else’s enjoyment of human rights goods. The required analysis of states obligations and hence the politically constructive attitude could vanish behind a mere recounting of corporate or even individual crimes. This trivialization gives up the nature of human rights as rights: In order to keep the cutting edge of human rights, it must be clear that breaches of protect obligations are violations of human rights, even though the State in this case does not interfere directly with the human rights contents of the victims. The State seemingly does no harm. It just stands by and watches. In doing so, however, the State fails in its obligations towards the victims – and hence violates their rights. It is here where the violation of human rights occurs – not in the corporate crimes falsely renamed violations.

The breaches of protect-obligations (lack of proper legislation, corruption, failing enforcement of protective law) provide by inaction the framework for corporations to commit crimes with impunity. In situations where such crimes could have been prevented or are not addressed in law, the affected persons should be entitled to compensation and satisfaction both from the criminal company and from the violating State. In a situation where impunity provides an invitation for such crimes, the respective States are violators of human rights and responsible for this particular situation. Even though the harmful act is not an act of the State, the harm can be addressed to all States involved and these

States carry responsibilities in each such instance. Our terminology and concepts should remain clear: Corporate crimes on the one hand – and on the other hand impunity resulting from States committing human rights violations allowing or facilitating such crimes.

5.5 Obligatory cooperation of national jurisdictions, international jurisdiction

Increased international cooperation can help to stop impunity for TNCs. It is for this matter that we need a treaty that makes this cooperation effective, whenever necessary. Cooperation has to be obligatory in the fields of investigating, adjudicating, enforcing laws and judgments. Failure to cooperate has to be seen as a violation of human rights as it breaches territorial or extraterritorial protect obligations and obstructs justice. Cooperation can take place as cooperation between various domestic legal systems. Here the corporation has no duties in international law only in national law.

In a given situation, there are always certain States that have a real handle on the corporation to enforce judgments and punish. Let us call these States “home States”. So this notion of home State does not satisfy itself with the place where the TNC or parent company is registered. Instead it looks for those States that have bases for regulation in the sense of Maastricht Principles 25c: A home State to a TNC is any State where a TNC is rooted in the sense of being registered, headquartered or having substantive business activity.

While home States separately and jointly can wield power over TNCs– and hence regulate, the dilemma here is that home States have an economic incentive not to do so. Good national judges, of course, do not cede to economic advantages for their countries, and fears of bias may be exaggerated. How about bringing the corporation – after exhaustion of cooperative national law procedures - before an international criminal court for corporations? Perhaps one could expect that the bias of judges can be reduced in such a court compared to the national procedures involving home States. The enforcement of judgments would again have to be done by home States, as they are the only ones that have a handle on the corporation and can punish. The bias of the home States will probably remain, but if they have to carry out a judgment of an international court, this bias cannot play out so easily and it will be difficult for them to avoid execution of such a judgment.

In order to move forward to overcome impunity, all States should acknowledge in their legal systems that corporations have obligations under national criminal law. So far only a few States have done so. The number, however, is increasing. Perhaps a Treaty should promote such progress.

International criminal law for corporations still has to be generated. International criminal law for individuals is largely restricted to most severe crimes. This should be seen in the context that national criminal law for individuals is usually well developed. As this is not the case for corporations, steps in the direction of strengthening domestic criminal law are needed.

International jurisdiction must not replace national jurisdiction but complement it. In a context of TNCs we would expect that the range of corporate crimes covered in international corporate criminal law would cover the most severe crimes, but nevertheless extend further than with individual crimes. Can obligatory legal and judicial cooperation of home states be effective? Is there experience with other conventions in similar situations (such as the 2000 UN Convention on Transnational Organized Crime)? Would international jurisdiction enhance or impede the enforcement of judgments by the home states? These are some questions that require careful thought.

Chapter 6: Stop the inflation of violations

6.1 Getting the rights language right.

A “right” can mean two different things. First of all it means a relation between rights-holders and duty-bearers and a mechanism for rights-holders to enforce the duties of duty-holders relating to the rights object. This object is whatever the right provides a claim to: The right to just working conditions, for example has as its object “just working conditions”. The right itself describes the object, of course, but also the rights-holders and duty-bearers, the obligations of the duty-bearers and the procedures for legal remedy.

Few people say “rights object”: We simply say right – and we assume that people know from the context, what is meant. Similarly we say human right, and again this can mean both: the human right as a relation, and the human rights object.

6.2 Human rights have to truly orient criminal and civil law.

Human rights emanate from the people, establishing, obligating and controlling the powers of the States and their community: Therefore the duty-bearers under human rights are States.

The human rights obligations of States are “to respect, protect and fulfil the essential goods. This means rights-holders must be able to sue States before their Constitutional Courts not only for the harm they do to people’s essential goods, but also for their failures to protect these goods (say - against corporations) and to fulfil them (say – access to land in an agrarian reform).

Human rights therefore imply obligations for corporations: The legal obligation of States to protect human rights objects implies an obligation for a corporation not to harm human rights objects (even if this obligation is not yet written down in law). This is usually an obligation both in criminal, civil and administrative law.

Should the obligations derived (for corporations and persons) from human rights be called human rights obligations, too? This has its pros and cons. It risks destroying the political function of human rights: To establish, obligate and control the powers of States and their community. This is a con. What is the pro? It is the explicit link to human rights. But is this really a pro? It would make the whole body of law “human rights law”: In fact, all the obligations in law must ultimately be derivable from human rights. This can be understood as follows: An obligation should be enforced by States (individually and jointly). States’ use of powers, however, is conditional on human rights. Human rights are constitutional for States. They establish, obligate and control the powers of States and their community. Hence ultimately human rights decide over the legitimate use of states (enforcement) powers – and hence over legal obligations.

If we want to be coherent with usual practice, we would say that obligations derived from human rights are obligations in criminal law or the law of torts. There are good grounds, of course, to underline the link to human rights, whenever necessary. So we can talk about crimes and torts against human rights whenever we feel that these crimes and torts have not yet been properly addressed: No matter how we call these obligations of third parties: We have to insist that criminal law and the law of torts is in line with States human rights obligations and that these are implemented in the generation, adjudication and enforcement of law.

6.3 Violations of human rights.

Some people talk about “human rights violations” with three distinct meanings:

- (i) The human rights object is deficient/lacking (“no access to adequate food”).
- (ii) The human rights object gets harmed, impaired or nullified by a person, state or company (“person is beaten up by her neighbor”).
- (iii) States do not meet their duties under this human right. (States do not provide social security, or do not provide free education, or do not protect against corporate land grabbing.)

Using the same word for three different things can be funny – but is usually more confusing than funny.

Clarity would increase, if not all these situations would be called violations, but if we used different words for different things. Picking up the situations above, one could simply say:

- (i) Lacking access to adequate food is a human rights deficiency.
- (ii) Beating up one’s neighbor is a crime.¹⁴ The respective rowdy is a criminal.

¹⁴In less obvious situations we could call it a crime (or offense) against human rights. Human rights abuse is a much used term here (but rather weak).

- (iii) Denying social security is a human right violation. States X,Y,Z are human rights violators.

6.4 Why is this politically important?

The strategy of some States has been to insist that economic, social, cultural rights are not human rights, but only “aspirations”. Their intention is obvious: If economic, social and cultural rights were no rights, then States would not be actionable by their people to – say – establish social security, provide free education or prevent companies from preying on their lands. Many Western States – and their companies - could live easily with violations terminology as long as this merely refers to deficiencies and harm. They would argue: “Freedom from hunger and from evil corporations can be seen as aspirations of good people – not more. Let them be called human rights violations, why not? Let these enthusiastic people use the word violation for these deficiencies and crimes. As long as there is no risk for us to get sanctioned, so what?” Corporations do not care much about strong language. And if people create a violations’ inflation, the real meaning and value of the term violation will lose currency and clarity. Confusion is created and people are distracted from the only thing that ultimately counts in terms of human rights: Enforcement. Only if States can be brought to the point of sanctioning corporate crimes, will these crimes stop. Bringing States to this point is the function of human rights (as these obligate the States accordingly).

There is also another reason why violations terminology should not be used for every type of harm done to human rights content: In the liberalist view, human rights are only seen as a defense against harm done by States to human rights content. So for them a human rights violation is always a breach of a respect-obligation. One of the achievements in the development of human rights over the past 30 years was the stronger emphasis on States protect- and fulfil-obligations on the same justiciable footing as States respect-obligations. These achievements could get lost, if violations were seen as “harm done – no matter by whom”. This is yet another reason, why harm done by corporations should not be termed a violation, but straight away be addressed as a crime and tort.

Finally, if the same terms were used for companies and States, the categorical distinction between States and companies would be undermined. This has to do with the related loss of the political function of human rights: Big companies would differ only gradually from States. This has nothing to do with any new status of TNCs in international (human rights) law. The reason for the upgrading of companies implied by using terms meant for States and largely identified with States is political: Human rights have been constitutional and legitimating for States. If this is transferred to companies, it will give them a legitimacy bonus. We must not forget the corporate political strategies such as Multi-stakeholder-ism, Public-Private Partnerships and the Global Redesign Initiative: Corporations want to be policy makers, and rule makers (in order to better promote their business models). If we want to use human rights to stop that,

we have to show TNCs their place – and that is not on par with states, let alone with the people.

6.5 Conclusion:

Human rights are precious tools in the hands of the sovereign people. So let us try to get things clear – at the historic moment where the people set out to govern over corporations with the help of human rights. We are invited to become aware of the political reasons behind a careful use of legal concepts and the political risks of plastering over them with the same violations language.

Chapter 7: Corporate capture of human rights?

7.1 1948-1992: The early history of human rights at the UN

While the Universal Declaration of 1948 had a coherent approach to human rights, the Western States split the envisaged comprehensive Human Rights Covenant into two treaties – on civil and political rights (ICCPR) and on economic, social and cultural rights (ICESCR) and reduce the standing of the ICESCR. The USA did not even ratify the ICESCR and never accepted that economic, social and cultural rights (ESCR) are rights – but only saw them as “aspirations”. The simple reason: Human rights as rights would, for example, force the State to make business liable for acts that harm the enjoyment of economic, social and cultural rights.

7.2 1992-2000: From outright rejection to dangerous embrace

In the UN system, the strategy of the USA had been for many years to try to avoid any mention, for example, of the right to food in international documents. During the 1990s the State Department of the USA changed its strategy (but unfortunately not yet its position): It now accepted economic, social and cultural rights as “language”, but insisted on “state’s voluntarism”, and on guidelines instead of treaties. Such guidelines could eventually be used to reduce economic, social, and cultural rights to mere “aspirations” and “recommendations for good practice” – fully in line with the mentioned tendencies in parts of the corporate sector and the State Department. If human rights turned to “aspirations”, then human rights obligations in international treaties would turn to mere “expectations”. Human rights would have lost the potential to generate national law and international treaty regimes that would interfere with the corporate agenda. This would not only make human rights language safe for corporate public relations strategies – and it would be the end of human rights.

In previous parts the conceptual traps and confusion in terminology was discussed. It should be clear how these weaknesses facilitate the tactical subversion of human rights: Every situation of deficiency now becomes a “human rights violation”. Every act of severe harm turns from a crime to a violation of human rights. This “inflation” sidelines the true meaning of human rights and makes related States obligations disappear – in particular the protect- and fulfil-obligations that provide a constant threat to the corporate agenda. Such tendencies take the political heat off the States – and help the enemies of economic, social and cultural rights.

7.3 2000: The Global Compact

With the Global Compact the UN Secretary General opened up the UN to the corporate sector. The Compact integrated human rights into the “Corporate Social Responsibility efforts” of the corporate sector. In the Global Compact corporations subscribed to human rights essentially as moral values. Moreover this “subscription” itself mimicked States’ procedures when entering a human rights treaty. In reality, corporations have legally no choice but to accept the human rights obligations of the States they operate in. Contrary to this simple fact the Global Compact allowed corporations to pose as “responsible political actors” to protect and fulfil human rights. This opened up a great PR potential for the corporate sector. At the same time it turned human rights away from their constitutional role for States and the international community – reducing them to “best practice” for any responsible powerful actor. In this context the legitimacy that States derive from human rights began to be transferred to companies.

In 2008 it was suggested (by two former UN rapporteurs) that business should enter international human rights treaties just like States and that an international human rights court should be created whose jurisdiction could be accepted by both TNCs and States. The State as an expression of people’s sovereignty and public interest on the one hand and the TNC on the other as an expression of shareholders’ profit interests would have the same standing.

7.4 2011: Business and Human Rights

In the UN human rights system, the topic of “TNCs and other business enterprises” was entrusted in 2005 to a key architect of the Global Compact as “Special Representative of the Secretary General”. He involved the corporate sector into “multi-stakeholder negotiations” on what became in 2011 the Guiding Principles on Business and Human Rights. This approach gave the sector undue influence. The result is telling: No progress is made in terms of judicial remedy, no focus on TNCs, extraterritorial obligations are largely missing. Various grievance mechanisms are introduced aiming at out of court settlements. Grievance mechanisms for the victims are inadequate: Obviously, the required measures to protect human rights against corporations have to

include preventive legal regulation, criminal persecution and full compensation for the victims under the law of torts.

The Guiding Principles refer to a “corporate responsibility to respect human rights”. This sounds like corporate social responsibility – and that’s what the Principles detail: Policy commitments of corporations, remediation and due diligence. Policy commitments and remediation are of little help to the victims in terms of protecting them. Due diligence could make a difference, if put in a framework of criminal and civil liability. This framework is largely missing. States have not yet created the appropriate corporate criminal and tort law – that would be triggered whenever corporations harm whatever is protected by human rights. Instead of cooperating with States efforts to establish this liability – the corporate sector along with the Principles tries to prevent it and replace it by a host of voluntary measures that amount to a lot of hot air about “respecting human rights”.

In the context of “Business and Human Rights”, new types of human rights CSOs have emerged that cooperate with business on mediation, auditing, studies. Some of them deal both with the “human rights violations” of Business and of States, as if Business and States were the same or only gradually different.

7.5 2014: The Treaty process

In 2014 the UN Human Rights Council started a process towards a human rights treaty on TNCs and other business enterprises in order to move beyond the Principles. The corporate sector saw this as a threat – for three reasons: (i) The initiative has not been undertaken in a multi-stakeholder fashion involving the corporate sector – but simply by States agreeing amongst each other – threatening the multi-stakeholder approach the corporate sector had hoped was established in the field of human rights issues linked to business (ii) The content of the Treaty was also seen as a threat, as now States could get together to create internationally agreed binding criminal and tort law making TNCs and other business liable. And (iii) the resolution was not taken by consensus, but by majority, therefore destroying some States’ strategies to establish and maintain a veto-right in the Human Rights Council.

Some CSOs and movements are confused by lax language on “human rights violations by TNCs”. For others, however, this position is indeed a position on horizontal effect – and they are supported by some lawyers holding this view.

Paradoxically there is yet another risk emerging - judging from the ongoing corporate capture of policy spaces: The day could come when big corporations would not even oppose being bound in an international “human rights treaty” in a similar way as States are – as long as they are not regulated in international and national criminal law and the law of torts. The reason for such a new corporate policy, in line with the “dangerous embrace” mentioned above, is that such a step could advance their capture of human rights – and destroy the political function of human rights as establishing, obligating and controlling the

powers of States and their community. Human rights would now legitimate the rule of TNCs and task them in a similar way as States.

Against this background the policy of civil society organisations, social movements and academia should be clear: Carefully avoid any approach that could facilitate the corporate capture of human rights. And insist on the political function of human rights as the interface between people's sovereignty and the States.

Chapter 8 Conclusion

The risks discussed in this publication have various roots. We see public relations strategies of parts of the corporate sector to promote human rights content – while at the same time confronting any attempt to be internationally regulated by States implementing their protect-obligations under human rights. Moreover there are “academic innovators” who find it useful to write papers and books in order to overcome “deficiencies” of the human rights concept. And finally there are some CSOs and Social Movements that indirectly support these tendencies – often with best intentions.

In civil society there are two types of initiatives. There are first of all those CSOs and movements that do not even think of approaching the regulation of TNCs with human rights as rights, i.e. eventually before courts, but simply use human rights content as means for blaming and shaming. For them it is important that they can point to “TNC violations of human rights”, if this seems to promise some added value for the situation of the victims at hand. They would go along with human rights as “values” for TNCs to hold them “accountable” – which in reality means nothing more than morally accountable.

Finally there are those CSOs and movements who are frustrated by years of experience with States' failures to regulate, allowing impunity or even colluding with TNCs and other business in doing harm. These CSOs have started to believe that it is futile to call on States protect-obligations – or on these alone – and one might be better off putting TNCs and other business enterprises directly under human rights obligations – and not only under obligations in other areas of law that are implied by human rights law. In the end, however, this boils down to the question of courts, where these rights should be realized: If there are no criminal, civil or administrative courts where victims can find legal remedy for the harm done to them by business enterprises, then there must be human rights courts that should provide this legal remedy – so they believe.

Reference to human rights contents can be made in any criminal, civil or administrative court – at least if States have properly implemented their human rights obligations – including their extraterritorial ones. No matter, however, which sort of court we go to, the court will have to have its judgments enforced

by States executives, and if these fail to cooperate, nothing will happen. In order to put an end to such failures, States must be under an exclusive regime of obligations – enforceable by the people. Providing these obligations is the true purpose of human rights.

The idea of a “great court” that would finally do justice to human rights contents and put an end to impunity needs this exclusive regime on State obligations, as even independent courts are established and maintained by States, individually and jointly: The separation of powers does not mean that courts live outside the States system (nationally or internationally) in some ideal world of eternal justice with judgments enforced by fiat.

Such illusions are dangerous, because either they eventually give up the idea of legal remedy– or give in to corporate anti-State propaganda and accept some sort of “law-making” and governance of the corporate sector. This would betray people’s sovereignty.

These illusions are also misleading. They distract people from the real issues, the analysis and implementation of States separate and joint territorial and extraterritorial obligations under human rights. This, however, is the need of the hour: To establish States and international relations based on people and not on corporate interests - and to construct governments by the peoples internationally and to prevent corporate rule. There is no way around this task.

“Human rights, of course, are neither language nor morals, but rights – a special type of rights with a unique political function: Human rights establish, obligate and control the powers of States and their community.”