

HUMAN RIGHTS DEVELOPMENT: Convergence, Divergence or Parallelism?

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***Presenter's personal views, not necessarily reflecting those of the institution for which she works.**

Harvard SPH – Jindal Summer School



INTRODUCTION





**“Human Rights and Human Development
are overlapping and mutually
reinforcing”**

(UNDP, HDR 2000)

Is that assertion is true?

- **Partly true:**
 - **Significant “subject matter overlap”**
 - **But not necessarily mutually reinforcing**
 - **Overall a story of divergence, occasional convergence**
 - **Despite the apparent overall compability of the aims, HR and dev, continue to operate in parallel**
 - **It is also a long account of what some international lawyers might call ‘parallelism’**

Proposition:

- **HR and dev are fundamentally compatible**
- **But persist along parallel tracks**
- **Claims of mutual reinforcement: overused, unfounded**
- ***As communities we do not even speak the same language:***

The language of development

“Outcome: The extent to which the operation’s major relevant objectives were achieved or are expected to be achieved efficiently. The rating has three dimensions: relevance of objectives, efficiency and efficacy. Efficacy: the extent to which the project achieved or is expected to achieve a return higher than the opportunity cost of capital and benefits at least cost compared to alternatives. The efficacy dimension is generally not applied to adjustment operations .

The language of development (as understood by a traditional human rights lawyer)

“ The text inside the speech bubble is a parody of Amharic, using various symbols like diamonds, squares, and circles. It appears to be a play on words related to human rights and development. The text ends with the English phrase 'applied to adjustment operations'.

applied to adjustment
operations

The language of human rights

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

(Article 2, UDHR)

The language of human rights (as heard by a traditional development practitioner)



As such:

- **Alston's 2005 "ships in the night" metaphor still holds**
- **True engagement needs fundamental change from both sides**
- **HR community has moved some (indicators, metrics)**
- **Dev. community has not as much (HR principles integrated)**

Complex relationship between HR and dev.: 5 vectors:

- **1. Law and policy divergence**
- **2. Elements of convergence**
- **3. Metrics and operational tools**
- **4. Challenges**
- **5. Opportunities**



1. LAW AND POLICY DIVERGENCE



Differences

Economics

- **Focus on preferences**
- **Prioritize free markets**
- **Emphasize competition**
- **Market will correct itself**
- **HR are impractical**
- **Economic Growth**
- **Consequentialist (results)**
- **Positive science**

Human Rights

- **Focus on rights**
- **Prioritize values**
- **Infuse market with considerations of fairness, equity, well being**
- **HR violations are often rooted in political decisions not just resource scarcity**
- **Deontological (norms)**
- **Normative**

What are HUMAN RIGHTS?

- **Set of indivisible and interdependent entitlements inherent to all human beings without discrimination**
- **Place focus on governments' obligations owed to individuals and groups within their jurisdiction or 'effective control'**
- **Guaranteed by law in the UN Charter, treaties, custom, general principles, domestic law**
- **Based on principles of equality/non discrimination accountability/rule-of-law, participation and empowerment**

Sources of Human Rights Obligations

UN Charter

UN human rights treaties

Regional human rights treaties

Thematic human rights treaties (ILO, UNESCO)

Customary international law

General principles of international law

Domestic legal frameworks human rights protection (constitutions)

Customary or Informal law protection of human rights norms

What is DEVELOPMENT?

- **Economic growth / GNP?**
- **Expanding markets / trade?**
- **Human development?**
- **Social development?**
- **Removal of unfreedoms?**
- **Increase of capabilities**
- ***Evolving***
- ***Now concerned with process and outcome***

Source of development norms:

- **Development goals (MDGs, SDGs)**
- **Development frameworks (WB CDF)**
- **Development and aid effectiveness agendas (AAA)**
- **Declarations (Millennium Decl, Paris Decl, RtD Decl)**
- **Bilateral and multilateral agency strategies and policies**
- ***NOT TREATIES!***

Governing frameworks: qualitative differences

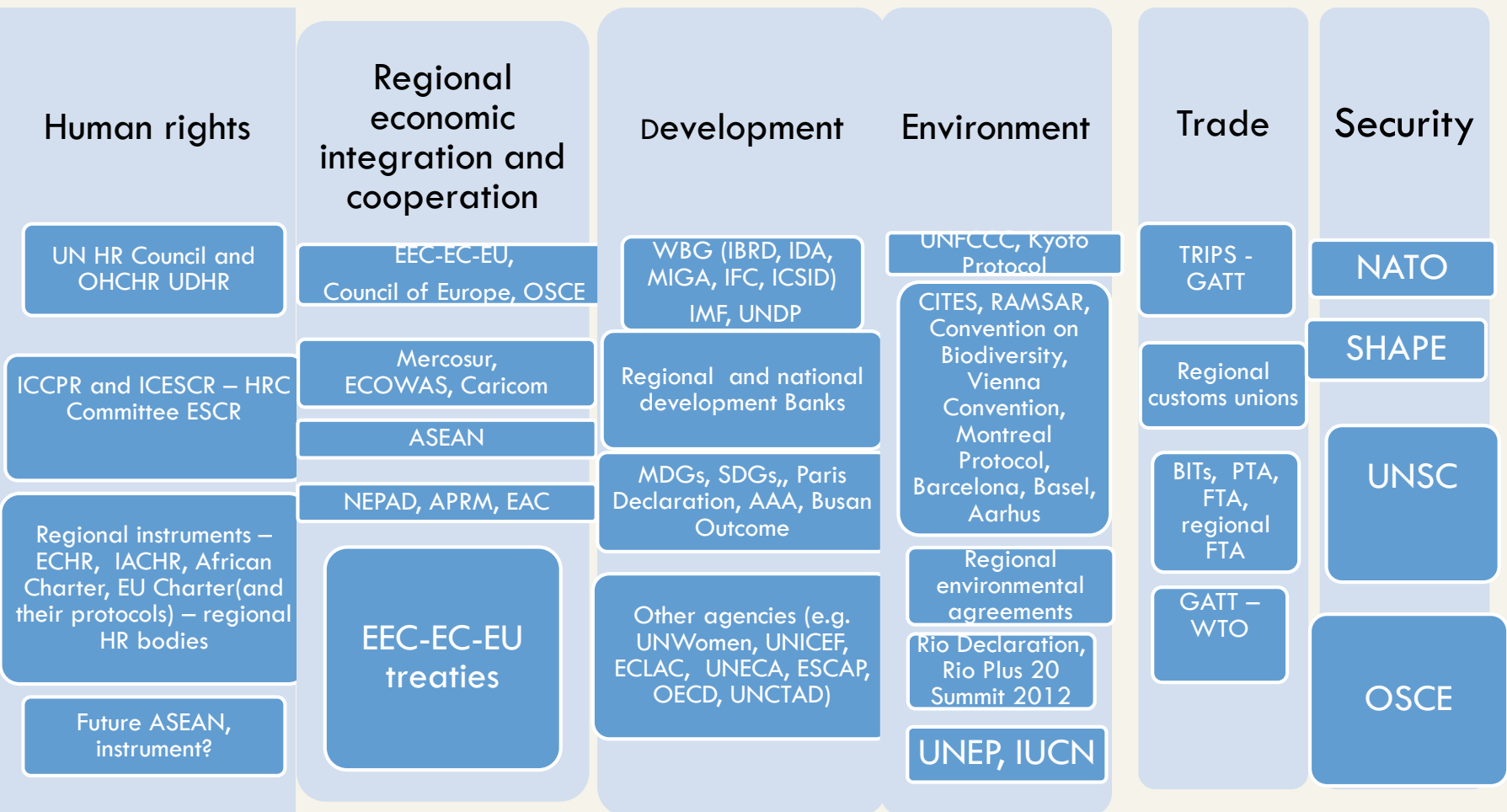
HR

- * **Public international law and binding international treaties**
- * **HARD LAW & LEGALLY BINDING**
- * **Retrospective view of harm**
- * **Non-compliance**
- * **individualistic**
- * **Vertical application (states -citizens)**

DEV

- * **Goals, frameworks, action agendas**
- * **SOFT & NOT LEGALLY BINDING commitments**
- * **Prospective**
- * **Programmatic, strategic**
- * **incremental change**
- * **Collective**
- * **Horizontal (state-state)**

FRAGMENTATION OF INTERNATIONAL LAW





**EXAMPLE OF THE
MDGS / SDGS**



MDGs (2000)

- **8 development goals with corresponding targets and indicators:**
 1. Eradicate extreme poverty and hunger
 2. Achieve universal primary education
 3. Promote gender equality and empower women
 4. Reduce child mortality
 5. Improve maternal health
 6. Combat HIV/AIDS, malaria and other diseases
 7. Ensure environmental sustainability
 8. Develop a global partnership for development

ORIGIN: MDGS

- **Millennium Declaration 2000**
- **UN Summits**
 - **Copenhagen 1995 Social Development**
 - **2005 UN World Summit (follow up to Millennium Summit)**
- **Organizing goals: ending poverty as a global norm; confirm the human condition as ethical concern; human development; poverty & empowerment research (World Bank 2000)**
- **Driving policy motivation: countering the “Washington Consensus”**

Significance of the MDGs

- 1. Internationally agreed poverty reduction goals, targets; wide political consensus; maybe more aid**
- 2. Global compact & accountability benchmarks**
- 3. Some influence on national development plans**
- 4. Improved statistics, monitoring, cross-country comparisons, evidence-based policy-making**
- 5. Harness the power of numbers, & simple ideas, to mobilise public opinion & political will**
- 6. Challenge to “Washington Consensus” policies**

HR criticisms of MDGs

- 1. **Absence of human rights (esp CPR): no legal accountability, not obligations based**
- **Despite HR in MD, HR NOT REFLECTED IN MDGS**
- 1. **Neglected areas: decent work, gender equality and gender-based violence, social integration including minority rights, democratic governance, pro-poor growth, water & sanitation**
- 2. **Technocratic, not focused on discrimination or social transformation**
- 3. **Focus on “average” progress: MDGs can be achieved at the expense of the poorest**
- 4. **Do not address growing inequalities within and between countries**
- 5. **No way to ensure DNH**

2015 17 SDGs + 169 targets

- **Goal 1** End poverty in all its forms everywhere
- **Goal 2** End hunger, achieve food security and improved nutrition+ promote sustainable agriculture
- **Goal 3** Ensure healthy lives and promote well-being for all at all ages
- **Goal 4** Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
- **Goal 5** Achieve gender equality and empower all women and girls
- **Goal 6** Ensure availability and sustainable management of water and sanitation for all
- **Goal 7** Ensure access to affordable, reliable, sustainable and modern energy for all
- **Goal 8** Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
- **Goal 9** Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
- **Goal 10** Reduce inequality within and among countries
- **Goal 11** Make cities and human settlements inclusive, safe, resilient and sustainable
- **Goal 12** Ensure sustainable consumption and production patterns
- **Goal 13** Take urgent action to combat climate change and its impacts*
- **Goal 14** Conserve and sustainably use the oceans, seas and marine resources for sustainable development
- **Goal 15** Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
- **Goal 16** Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
- **Goal 17** Strengthen the means of implementation and revitalize the global partnership for sustainable development

HR-related requirements of SDGs; must

- **Be based on Agenda 21 and the Johannesburg Plan of Implementation.**
- **Fully respect all the Rio Principles.**
- **Be consistent with international law.**
- **Build upon commitments already made.**
- **Contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields.**
- **Not divert focus or effort from the achievement of the MDGs**
- **Include active involvement of all relevant stakeholders, as appropriate, in the process.**

Critiques of the SDGs

- ❑ **Over-inclusive, long list**
- ❑ **Impossible to achieve**
- ❑ **Vague and aspirational**
- ❑ **Contradictory: growth $>$ $<$ redistribution**
- ❑ **Insufficient focus on absolute poverty**
- ❑ **SDGs want to reduce inequality, while leaving the wealth and power of the global 1 percent intact.**
- ❑ **No solving problem of poverty without challenging the pathologies of accumulation and global inequalities**
- ❑ **Toothless: no accountability (same as MDGs)**



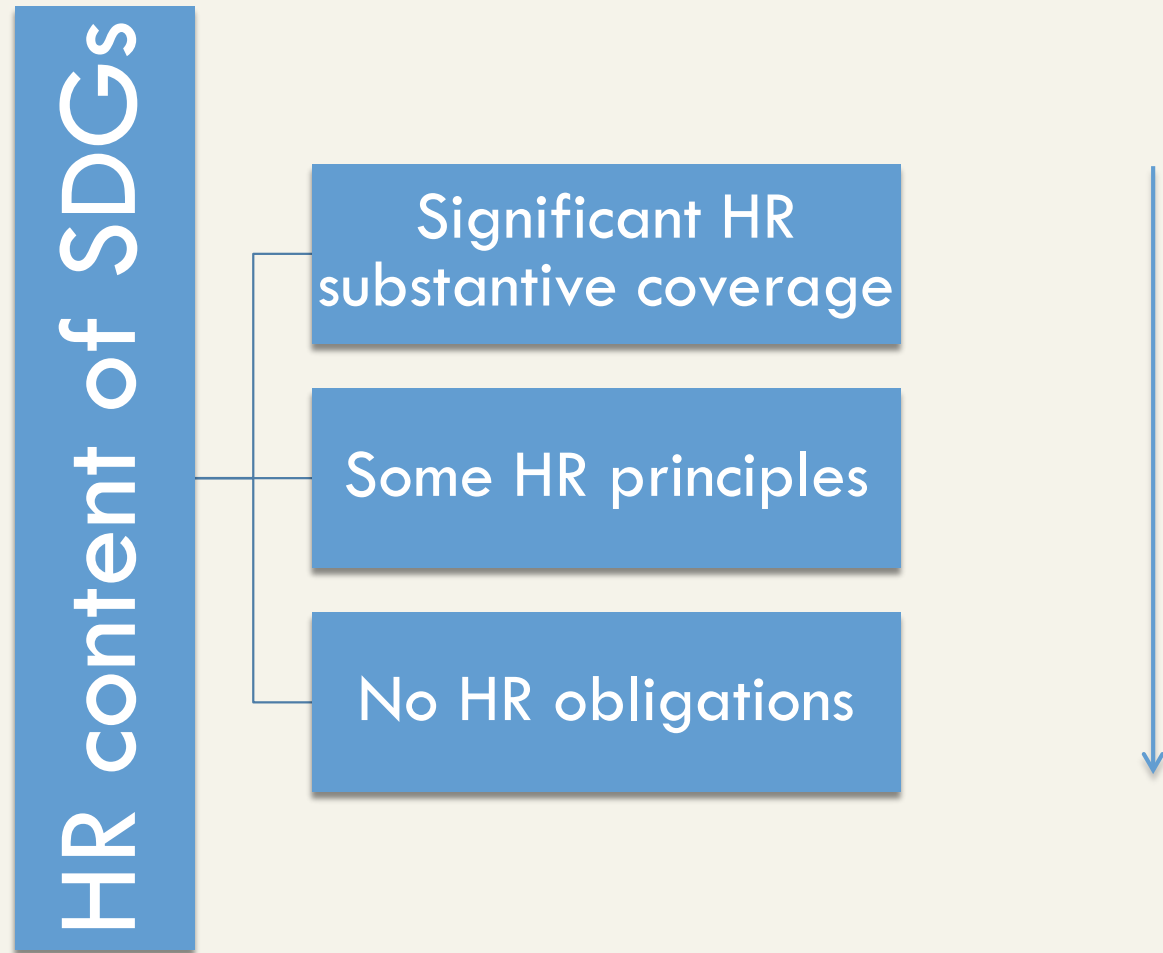
SDGs more “HR friendly” than MDGS BUT:

- Few references to HR in SDGs –Declaration / Vision
- No general reference to HR obligations
- No free-standing HR goal among 17 Goals
- No substantive inclusion of HR in the Goals themselves
- Some references to HR in Targets
 - Target 1.4 on women’s equal rights to economic resources;
 - Target 4.7 by 2030 ensure all learners acquire knowledge and skills needed to promote sustainable development, including among others through education for sustainable development and sustainable lifestyles, human rights;
 - Target 5 .6 ensure universal access to sexual and reproductive health and reproductive rights a;
 - Target 5.a undertake reforms to give women equal rights to economic resources;
 - Target 8.8 protect labour rights

HR critiques of SDGs, like HR critiques of MDGs revisited?

- Participation?
 - Better experience elaborating the SDGs (crowdsourcing, my World)
 - Content of SDGs: Goal 16 : access to justice
- Equality / inclusion?
 - Goal 5 – inclusive and equitable education
 - Goal 8 – inclusive ec. growth
 - Goal 16 – inclusive institutions
 - Goal 11 – make cities inclusive
 - Goal 16 – peaceful and inclusive societies
- Accountability?
 - Goal 16-accountable institutions

CONCLUSION: HR content of SDGs





2. ELEMENTS OF CONVERGENCE



BUT THERE ARE OVERLAPS!

▣ YET DISTINGUISH:

- Significant substantive overlap AND**
- Systematic efforts to integrate human rights principles or even obligations into development policy**

AREAS of CONVERGENCE

- **Substantive, subject matter coverage of development**
 - focus on poverty
 - inclusion
 - social sectors: health, education, social protection
 - water, food, nutrition
 - institutional reform and governance
 - situations of conflict and state fragility
 - cultural heritage
- **Development activities targeting particular groups**
 - Women
 - Children
 - Persons with disabilities
 - Indigenous Peoples

***NATURE* of CONVERGENCE – 3 levels**

- **1. Subject matter overlap: VERY STRONG**
 - **Because of increase in expansion of development activities into soft sectors and areas of human and social development**
- **2. Principles: SIGNIFICANT**
 - **Transparency, access to info, participation, consultation**
 - **Inclusion, equity, non-discrimination**
 - **Free Prior and Informed Consent (Indigenous Peoples UN DRIP)**
- **3. Obligations: LITTLE**
 - **OECD DAC AOPP 2008**
 - **Accra Agenda for Action (15 c) 2008**
 - **Busan Partnership for Development (para 11- HR commitments) 2011)**

General *RATIONALES* for pursuing convergence?

- Normative (do no harm / ethical values)
- Instrumental (sustainability and ownership; better governance; economic growth; economic returns on ESCR investments)
- Intrinsic (constitutive / Sen)

Instrumental rationales – “value added”

- **“Better” development outcomes**
- **More sustainable results**
- **Better risk mitigation**
- **Do no harm – less harm = less cost**
- **Legitimacy = good for business!**
- **Social license to operate**
- **Long-term financial returns**
- *But what is the empirical evidence for these instrumental arguments?*
- *Hathaway / Simmonds – does HR treaty ratification make any difference?*

Normative rationales - “value change”

HRBA (UNDG 2003 Common Understanding)

Explicit linkage to rights

Accountability

Participation

Equality and non-
discrimination

Inclusion

Attention to the most
vulnerable /
discriminated groups

A range of rationales / justifications exists

- ▣ **Different development actors and agencies have different operating modalities, mandates, organizing principles, internal rules, policies and procedures**
- ▣ **This results in**
 - **different emphasis in justifications**
 - **different approaches (HRBA etc)**
 - **different operational applications**
- ▣ **Often a combination of rationales and justifications**



Different donor approaches to integrating human rights in development

HR as primary goal

HR as implicit outcome

Human Rights-based Approaches

Human rights consider constitutive of the goal of development, leading to a new approach to aid and requiring institutional change.

Human Rights Mainstreaming

Efforts to ensure that human rights are integrated into sectors of existing aid interventions (e.g., water, education). This may include “do no harm” aspects.

Human Rights Dialogue

Foreign policy and aid dialogues include human rights issues, sometimes linked to conditionality. Aid modalities and volumes may be affected in cases of significant human rights violations.

Human Rights Projects

Projects or programmes directly targeted at the realization of specific rights (e.g. freedom of expression) specific groups (e.g. children) or in support of human rights organizations (e.g. in civil society).

Implicit Human Rights Work

Agencies may not explicitly work on human rights issues and prefer to use other descriptors (“protection” “empowerment” or general “good governance” label). The goal, content and approach can be related to other explicit forms of human rights integration rather than “repackaging.”

Donor Policy Approaches to Integrating Human Rights in Development Cooperation

Source: OECD DAC 2006 Study Piron & O’Neil

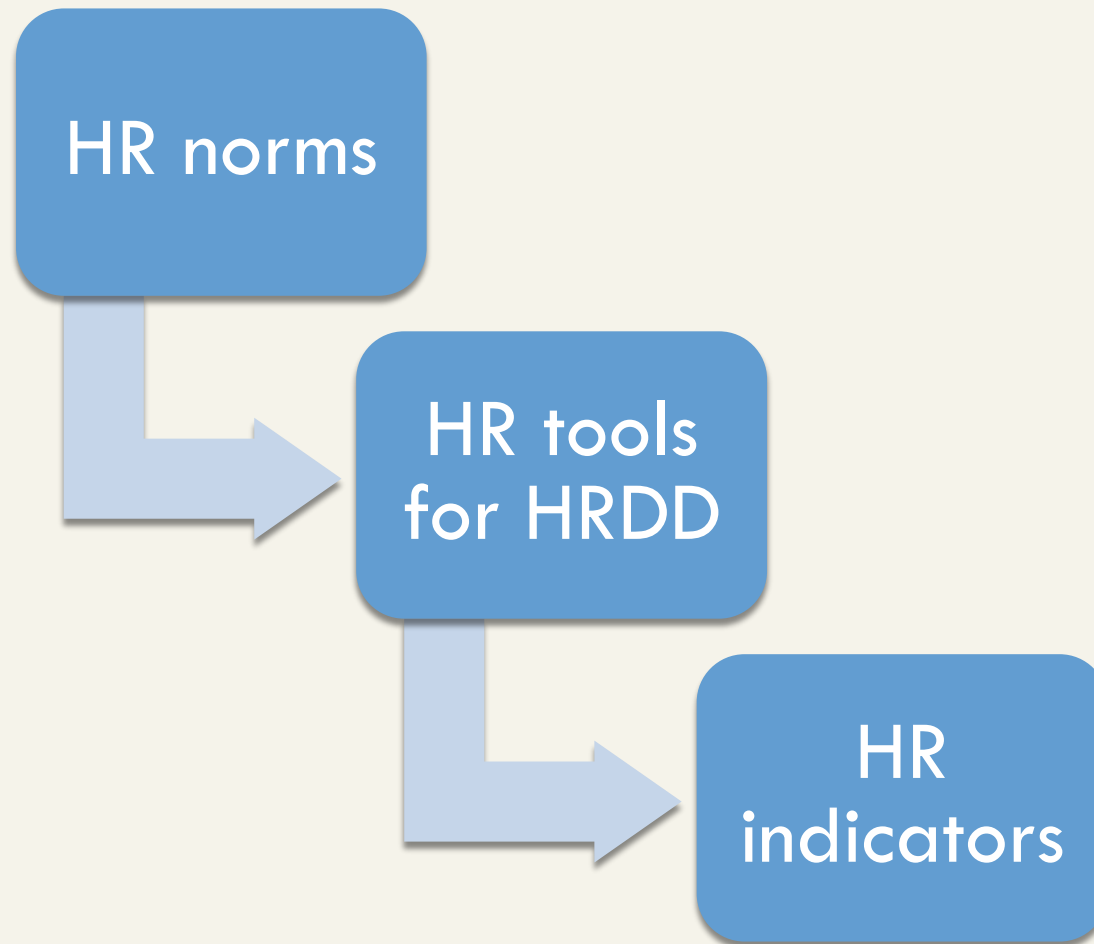


3. METRICS AND OPERATIONAL TOOLS

THE “NUTS AND BOLTS” OF CONVERGENCE

- **Lawyers are good at setting norms and building systems, less good at the “how”**
- **Beyond the divergence of legal and policy frameworks**
- **Or the efforts to pursue integration**
- **Or even the elements of convergence that exist**
- **The true rapprochement is required at the level of operational tools and metrics**
- **HR community has made much progress**

Elements of HR metrics



HRDD asks

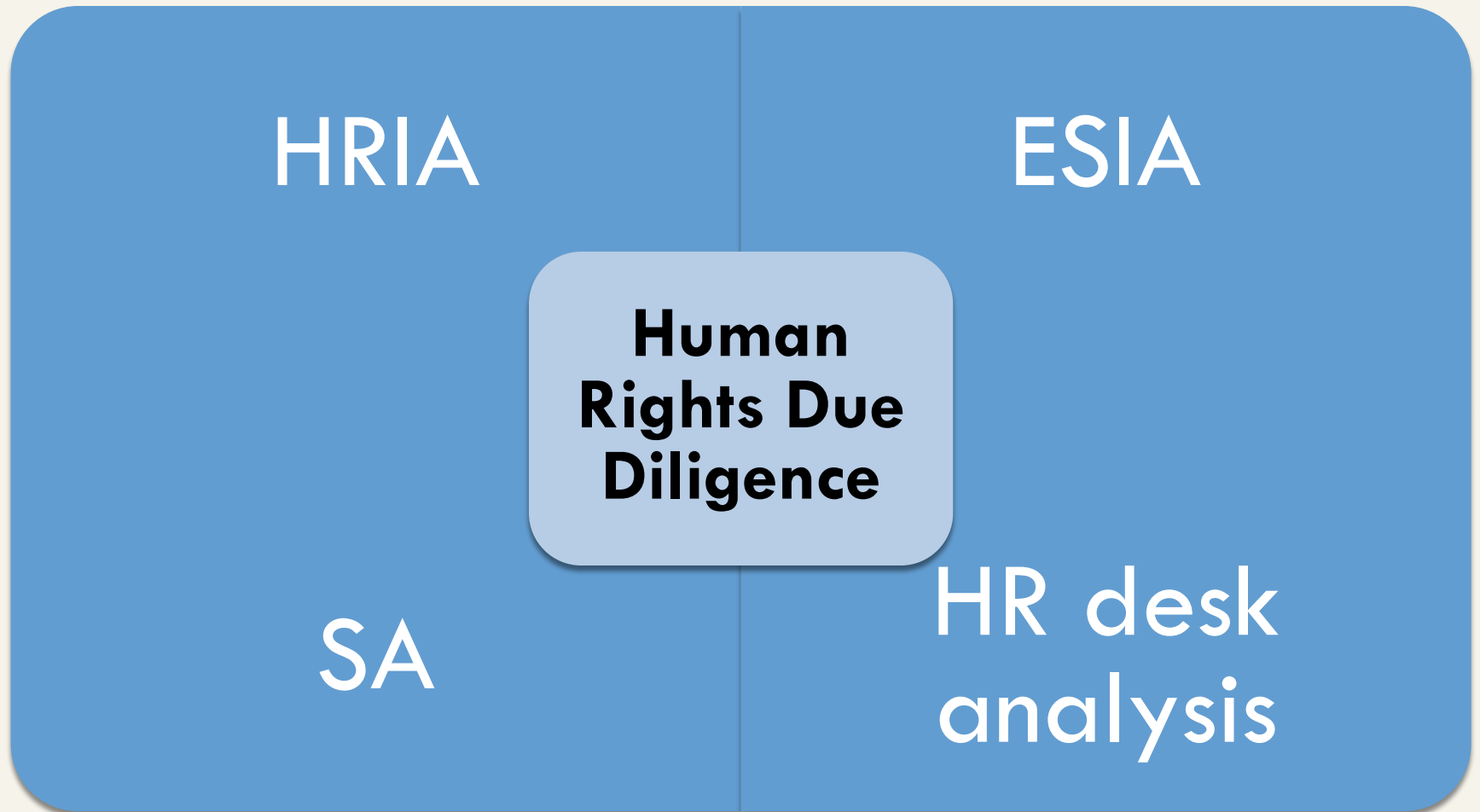
“How does the project, policy or intervention affect HR?”



Why are metrics important to the context of HR and development?

- **THEY RELATE TO THE “HOW”**
- **Critical to making the instrumental case - ‘value added’**
- **Link development data and HR obligations**
- **Connect normative and empirical**
- **Demonstrate feasibility of HR considerations in policy**
- **Illustrate budget and policy implications of HR**
- **Support “do no harm”**
- **Supports accountability of governments and dev. actors.**

HRDD: can be carried out using different tools depending on context



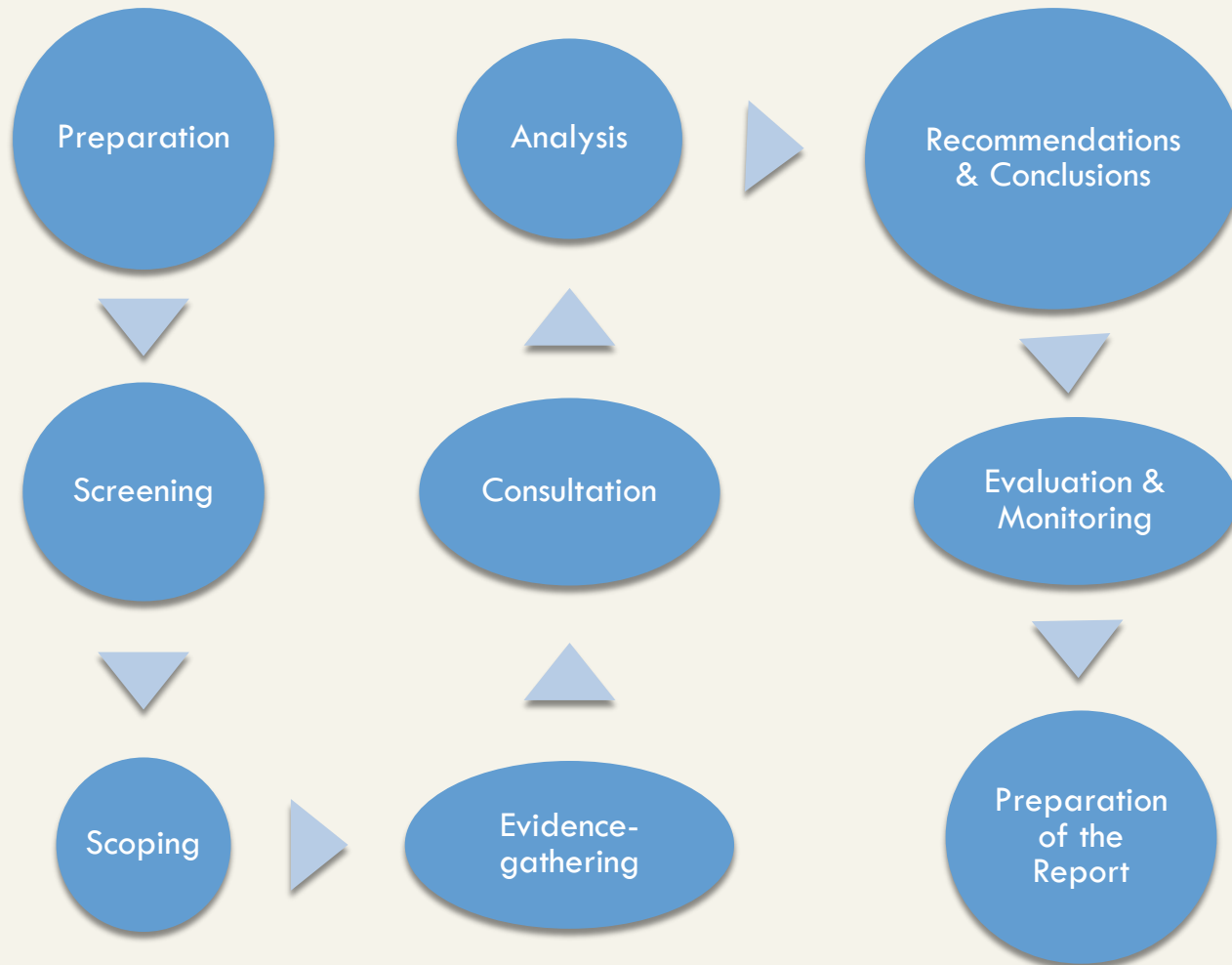
Human Rights Impact Assessments

- **Human Rights Impact Assessment (HRIA) is an instrument or process for examining policies, legislation, programs and projects to identify and measure their effects on human rights.**
- **HRIAs provide a reasoned, supported and comprehensive answer to the question of “how does the project, policy or intervention affect human rights?”**
- **NB: assumes legitimate use of HR as a baseline for assessment**

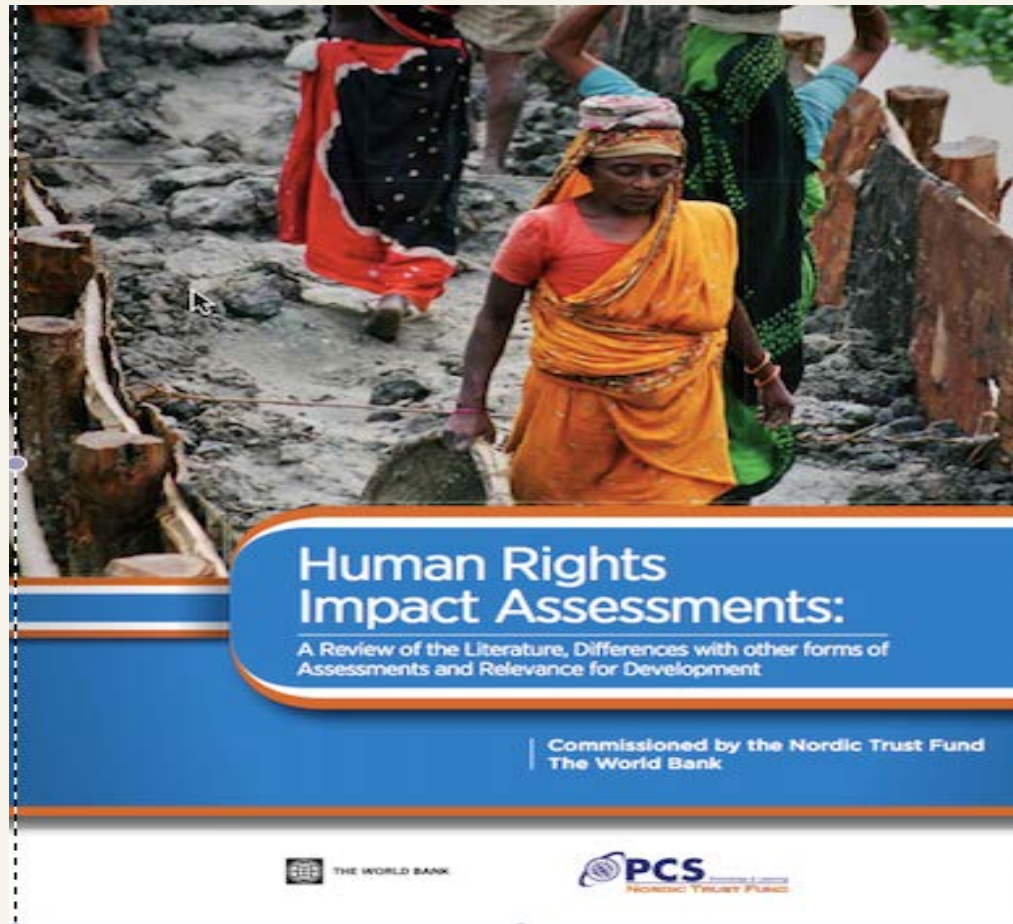
Purpose and uses of HRIA

- **Basic purpose: help prevent negative effects and to maximize positive effects.**
- **Increasing demand for various actors to undertake HRIAs before adopting and implementing policies, projects, agreements and programs.**
- **Part of a growing effort by the human rights community to operationalize the relevance of human rights; advance an understanding of the ways in which public policies and development projects affect the enjoyment of people's rights.**

9 Steps of HRIA



HR assessment WB project 2013





IFC Sustainability Framework

**POLICY AND PERFORMANCE STANDARDS ON
ENVIRONMENTAL AND SOCIAL SUSTAINABILITY
ACCESS TO INFORMATION POLICY**

Effective January 1, 2012

IFC 2012 Sustainability Policy and HR

- **IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights. This responsibility means to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to. Meeting this responsibility also means creating access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances.**

IFC and human rights due diligence (fn 12 of PS 1)

- 12. In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business**

IFC Guide to HRIA



The image shows the header and navigation menu of the IFC Guide to HRIA website. The header features a dark grey background with a red and grey wavy graphic. The title "GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT" is displayed in white. Logos for IFC, the United Nations, and the International Labour Organization are in the top right. The navigation menu includes "ABOUT THE GUIDE", "GUIDE TO HRIAM", "RESOURCES", "COMMUNITY", and "SIGN IN". The main content area has a "WELCOME" section with a video demo link, followed by a quote from John Ruggie and a list of links: "ABOUT THE GUIDE TO HRIAM - IN BRIEF", "ABOUT THE GUIDE TO HRIAM - IN DETAIL", and "WHAT ARE HUMAN RIGHTS?".

IFC
International
Finance
Corporation

UN
United Nations

IL
International
Labour
Organization

GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT

[ABOUT THE GUIDE](#) [GUIDE TO HRIAM](#) [RESOURCES](#) [COMMUNITY](#) [SIGN IN](#)

WELCOME

[Video demo](#)

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[WHAT ARE HUMAN RIGHTS?](#)

"I am pleased to join the International Business Leaders Forum, the International Finance Corporation, and the United Nations Global Compact in welcoming you to the revised Guide to Human Rights Impact Assessment and Management (HRIAM) online tool.

Having companies assess the actual and potential human rights impacts, through their own activities and through their business relationships, are a critical component of human rights due diligence, enabling companies to know and show that they are meeting their responsibility to respect human rights. I hope that companies will find this Guide useful in doing so"

John Ruggie
The former UN Secretary-General's Special Representative on Business & Human Rights



HUMAN RIGHTS INDICATORS

Defining human rights indicators

- **Criteria to assess human rights realization, both qualitatively and quantitatively**
- **Assess validity from a human rights perspective**
- **Measure compliance with human rights norms**
- **Link data with human rights obligations**

Examples of HRI

Structural HRI:

capture acceptance, intent, commitment

- **Right to adequate housing** – ratification of the ICESCR
- **Right to education** - time frame and coverage of the plan of action to implement compulsory primary education free of charge for all
- **Right to work:** existence of a domestic bill of rights in the constitution or other forms of superior law protecting workers; adoption of labor laws

Process HRI

State's efforts, through its implementation of policy measures and programmes of action (eg budget).

- **Right to social security:** percentage of targeted population groups under public programmes;
- **Right to fair trial:** human rights complaints received and the proportion redressed;
- **Right to health:** proportion of schoolchildren educated on health and nutrition issues

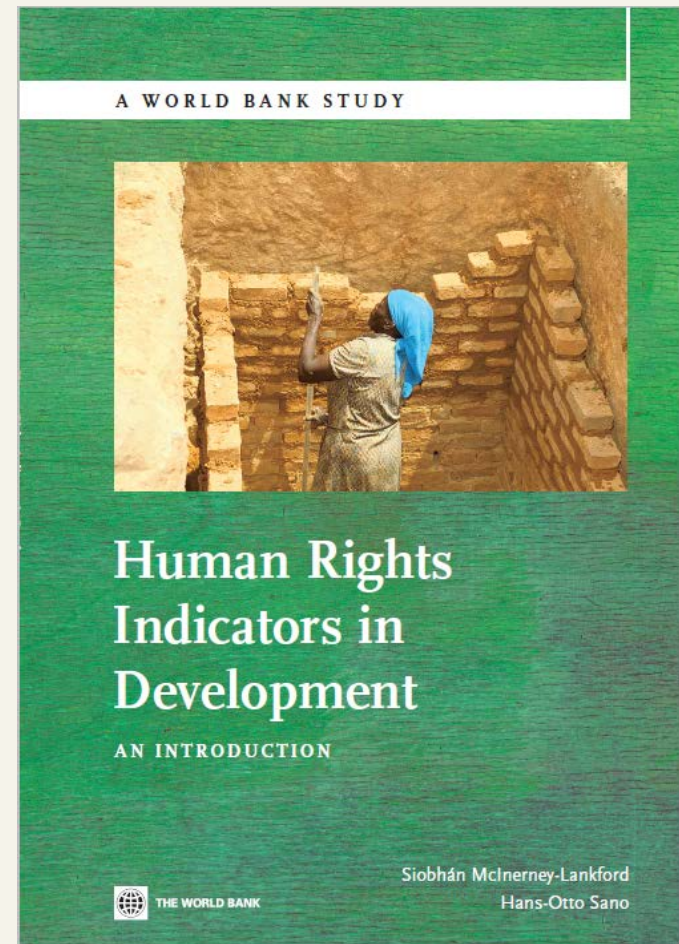
Outcome HRI:

individual and collective attainments reflecting the enjoyment of a human rights

- **Right to food:** per capita availability of food grains
- **Right to liberty and security of person:** number of persons reported to be arbitrarily deprived of their liberty at the end of the reference period.
- **Right to social security:** proportion of labour force participating in social security scheme(s)

World Bank Human Rights Indicators Project

- Begun as partnership with the DIHR in 2005-2010
- Explored different types of indicators / their uses
- Explored relevance of HR for development
- Typology of OHCHR indicators framework used, combined with 3 level conceptual understanding of interface of development & HR
- Not prescriptive, no assessment, ranking etc.
- Not applied, remained a general analysis
- Begin to explore the “how” – human rights methodology in development



Significance of HR Indicators for development

- **Key to any integration of HR in development**
- **Essential link between the international human rights *law* and development policy & programs**
- **Tools to address the methodological challenge**
- **Connect statistics / data with norms - empirical**
- **Potential to introduce accountability for human rights in development processes and outcomes**
- **“Do no harm”**
- **Integral to human rights due diligence and HRIA**

CONSTRAINTS for HRI AT 3 LEVELS

STRUCTURAL LEVEL

- *Uneven ratification of HR treaties
 - *Issues with treaty monitoring
- *Coherence within HRL
- *Separate frameworks
 - *Politicization
- *Ranking / naming and shaming

PROCESS, POLICY AND OPERATIONAL LEVEL

- *Legal, political, institutional constraints
 - *Entry points in instruments, analysis
- *Subjectivity (despite claims of objectivity)
 - *Causality (multidirectional)

PRACTICAL, OUTCOME LEVEL

- *HR Data demand
 - *Dearth of data
 - *Capacity
- *Coop. national HR and Statistical agencies

□ 4. CHALLENGES

Challenges

- ❑ **Legal and regulatory disconnects persist**
- ❑ **Lack of international policy coherence (same MS, different approaches)**
- ❑ **Fragmentation of PIL**
- ❑ **Resistance to accountability**
- ❑ **Institutional capacity limitations – knowledge gap**
- ❑ **Professional incentives lacking – slow process**
- ❑ **Weakness of operational tools and guidance**
- ❑ **Lack of empirical evidence**
- ❑ **Lack of clarity around WHY**

Why is rel. HR & dev still so contentious?

- **Connects financing with HR norms**
- **Addresses power dynamics within and between countries**
- **Raises issues around sovereignty, independence, colonialism, global power imbalances**
- **Contrasts the world of PIL and binding treaties with that of programmatic goals, soft law**
- **Pits law and economics against one another**
- **Lawyers vs. development economists (first slides)**



□ 5. OPPORTUNITIES

OPPORTUNITIES FOR COMPLEMENTARITIES

Seymour and Pincus (2008)

- **Need for constructive dialogue between rights-based and economic approaches**
- **Each addresses the shortcomings of the other**
- **Inherent complementarity**
 - ▣ **Both prioritize the individual**
 - ▣ **Economists should be concerned with negative consequences of growth: HR can help align the tools of economics with international law**
 - ▣ **HR perspectives should consider practical implications and business choices and difficult choices about resources or different rights claims: economics can help pursue HR realization more effectively**

CHALLENGES YIELD OPPORTUNITIES FOR HR LAWYERS

- **When asked “why HR?”**
- **Opp. to develop a better narrative**
- **Go beyond the bland assertions of convergence, mutual reinforcement and the inevitable “we’re doing it already”**
- **Be clear about the rationales (“why?”) , objectives (“what?”)**
- **Be able to answer “what is the value added?”**
- **Explain what HR brings to development that is better and different**

Human rights key contribution: ACCOUNTABILITY – esp. legal AS LAWYERS EXPLAIN CLEARLY THAT:

- **Rights imply duties; correlatives**
- **Human rights law imposes legal obligations**
- **Human rights law introduces legal accountability; answerability**
- **Makes entitlements (e.g. ESCR) the subject of legal obligation**
- **Introduces a measure of legal accountability for process and outcomes**
- **A/C as public justification: (a) reasonable, objective evidence; (b) alternatives examined; (c) transparency and participation; (d) direct or indirect discrimination; (e) minimum levels ensured; (f) independent review**

Legal grounds for promoting convergence in international law

- **IT'S THE LAW!**
- **Convergence around obligations same DEV. PARTNERS have same HR OBLIGS; SHARED OBLIGATIONS**
- **Structural considerations underpinning international law**
 - UN Charter obligations
 - VCLT: presumption against conflict
 - Avoidance of 'fragmentation in international law'
 - ILC proposal for 'systemic integration'
- **Convergence around principles derived from human rights law**
 - Accountability, Participation, Inclusion, Non-discrimination
 - Do no harm
 - Duty to cooperate
- **INTERNATIONAL POLICY COHERENCE**



Thank you

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