

**HUMR 5133 Business and Human  
Rights**

Lecture 2

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**Legal strategies**

**The integrated perspective on regulation  
and selected measures**

**Duties, prevention and remedies**

## Legal strategies for regulating business behaviour

### Outline

1. Hard law vs soft law
2. Indirect obligation vs direct obligation
  - Do non-state actors have human rights obligations – can non-state actors *abuse* human rights?
3. UNGP
4. Direct vs implicit abuse of human rights by companies
5. Preventive approaches
  - Due diligence
  - National plans of action
  - OECD National Contact Point
5. ESG Investing
6. Remedies (Redressive approaches)
7. The integrated theory of regulation (Deva)

# Soft law and hard law distinction

Hard law – treaties, conventions, case law

1. Soft law" covers such elements as:
  - Resolutions and Declarations of the UN General Assembly and other international authoritative law-making bodies
  - Includes statements, codes of conduct, codes of practice, principles
  - Plans of Action (national and international action plans)
2. Fill a space in the absence of treaties
3. Usually strong support despite its non-binding nature
4. May reflect interpretative struggles to expanding or delimit human rights protection
5. Remains a field of controversy and ambiguity, but is playing an important argumentative role in human rights work and discourse:
  - General comments, advisory opinions
  - May play an important role when states are reluctant to sign up to legally binding commitments (conventions), still want to support a course of action in a field (business, development)
6. Soft law may influence the hard law in future – *lege ferenda* argument; the *hardening* of soft law
7. Recommendations and declarations – first step towards a treaty-making process which builds on the principles expressed by soft law
8. Soft law may also lead to changing practices of states and then create customary international law (the UDHR)?

## Direct vs Indirect Enforcement of Human Rights obligations

- What are indirect and direct indirect enforcement of human rights obligations?

### Discussion

- Do non-state actors have direct human rights obligations?
- Can non-state actors violate human rights?
- What is the role of the State?

“The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant **legal gap** in State practice “

non-discrimination laws

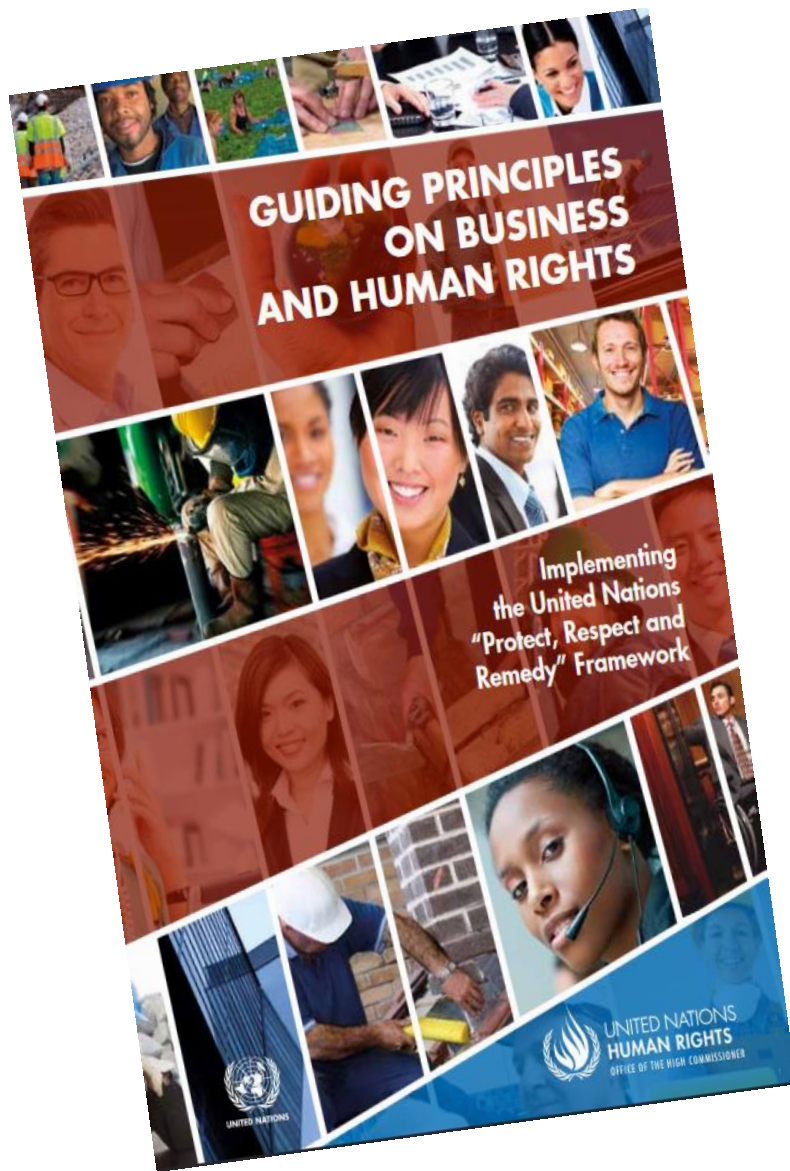
labour laws

environmen

property

privacy

anti-bribery, corruption



## The basic model

The UNGPs encompass **three pillars** outlining how states and businesses should implement the framework:

- The state duty to **protect** human rights
- The corporate responsibility to **respect** human rights
- Access to **remedy** for victims of business-related abuses

THREE PILLARS of the UN GUIDING PRINCIPLES



# Pillar I

- The state has a duty to **protect** against human rights abuses by third parties, including business enterprises, through
  - regulation,
  - policymaking
  - investigation
  - enforcement (of human rights)
- If state do not protect – they will breach their human rights duties to protect
- Yet; there is no clear extra-territorial obligation on states(?), but the UNGP encourages states to monitor, and rise expectation

## The State in business?

### The State-owned businesses

4. States should take **additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State**, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

#### *Commentary*

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime.

**Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations.**

Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.



## Pillar II

- Companies have a “corporate responsibility” to **respect** human rights
- Businesses must act with due diligence to avoid infringing on the rights of others and to address negative impacts with which they are involved
- Know and show vs. shame and blame
- Due diligence, and risk analysis of human rights impact (HRIA)



# UNGP on business duty to *respect* human rights

## UNGP 11.

### Business enterprises should respect human rights

- avoid infringing on the human rights of others
- address adverse human rights impacts with which they are involved

#### *Commentary*

- **RESPECT ...** "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations
- Does not diminish State obligations
- it exists over and above compliance with national laws and regulations protecting human rights.
  
- **ADVERSE HUMAN RIGHTS IMPACTS** requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation
- Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights
  
- Business enterprises should **NOT UNDERMINE STATES' ABILITIES TO MEET THEIR OWN HUMAN RIGHTS OBLIGATIONS**, including by actions that might weaken the integrity of judicial processes

## Legal strategies of businesses

Preventive approaches:

Avoid adverse effects

**Due diligence**

Due diligence: Components of human rights due diligence:

- ✓ Commit
- ✓ Asses
- ✓ Adapt
- ✓ Collaborate
- ✓ Measure, report and communicate

A due diligence human rights 'risk analysis' of negative impact on people working in supply chains and surrounding communities

Purpose of DD: Prevent, mitigate, remedy



## Pillar III

Addresses a shared responsibility:

- **The state:** responsibility to provide access to remedy through judicial, administrative, and legislative means
- **The company:** responsibility to **prevent and remediate** any infringement of rights that they contribute to

## **UNGP – Access to remedy**

Foundational principle

### Principle 25

“States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means.....access to effective remedy”

### Remedy

- apologies
- restitution,
- rehabilitation
- financial or non-financial compensation and punitive sanctions guarantees of non-repetition

# Measure, report and communicate

## Remedies – in case of breaches of human rights

- The bureaucratic challenge, capacity, competence: how, and by whom?
- Measure the efforts made to reduce, prevent and remedy negative impact
- Report the extent to which these measures have been successful (to whom? (“internally and externally to all personnel, business partners and other relevant parties”; GP 16)
- Identify stakeholders and create a communication plan
- Communicate regularly, openly, and honestly about the risks and challenges

## Redressive legal approaches

- Remedy: correction of something wrong or defective
  - procedural (remedial mechanisms)
  - substantive (remedies or compensations)

## Human rights remedies

- Grievance mechanisms
  - Access to legal and non-judicial mechanisms (GP 25)
  - State-based judicial grievance mechanisms (GP 26)
  - State-based non-judicial mechanisms (GP 27; eg. NHI)
  - Non-state based mechanisms (GP 28-30)
- Should be legitimate, accessible, predictable, rights-compatible, equitable, and transparent

## **State-based judicial mechanisms**

### **GP 26**

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers

## **State-based non-judicial mechanisms**

### **GP 27**

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms

- mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes
- National Human Rights Institutions, OECD National contact points

## The responsive theory of regulation – How can companies be held accountable?

- The essence of responsive regulatory theory
  - Regulation of business behaviour is responsive to company structure
  - Business structure will be conducive to different forms of regulation of business behaviour
- Arey and Braithwaite. *Responsive Regulation: Transcending the Deregulation Debate*. OUP. 1992:
  - The enforcement pyramid – a hierarchy of sanctions and a hierarchy of regulatory strategies



# Pyramid of sanctions



# The Pyramid of Responsive Regulation

- If enterprises are motivated to self-regulation – a strategy based on punishment will be less needed, and effective
  - it is more expensive to administer than persuasion
- Persuasion as a baseline, punishment as an option of last resort
- Persuasion is the dominant and preferred strategy – punishment for ‘cheaters’

# Factors influencing choice of regulation strategy

Choice and effectiveness of strategy depend on

Mode of interaction of the economic agents - study the ***motivation and objectives*** of companies, and the interacting agents (government, civil society, workers)

- Instrumental rationality
- Rhetorical action
- Argumentative rationality
- Institutionalization and habituation

Regulators should be attentive to how effectively corporations are regulating themselves (self-regulation) before escalating sanctions (cf. the Pyramid)

# The Pyramid – social condition

The tripartite model suggested by Ayres and Braithwaite:

- The **regulator** (state), the firms and an independent/credible **watchdog** a **public interest group** (as a “powerful deterrent”): checking power, checks and balances
  - Who are the PIGs?
  - The NCP?
  - A NI of HR?
  - Transparency international etc

# The RR Pyramid – is *Enforced self-regulation* (ERF)

- ESG is when a company is expected to carry out regulation, but it may do so on its own regulatory scheme – “home-made”
- It must be transparent – if not accepted by the overall Regulator (state) – revisions required
- This presupposes a “checking procedure” (a Regulatory agency), and the existence of PIGs
- Inspection group and monitoring: like a shuttling exercise rather than a “partnership” between the Regulator and the firm
- A non-uniform, but tailor-made regulatory mechanisms? More commitment?
- Better than uniform schemes?
- Deva – the strength of the ESR lies in the commitment of the company: BUT: Are ethical norms, and human rights internalised and institutionalised?

# The Pyramid, tripartism, and ERF – useful but weaknesses

To refrain from deterrence (by forced regulation) as long as companies cooperate (by self-regulation, and avoids unethical behaviour)

- Statement: ineffective in making companies responsive to human rights abuses!

Why? Discuss

# Why?

- Too much faith in the regulatory motives and commitments of the company (the self-regulator)
- MNCs – consist of a network of companies, subunits, subcontractors and they face different challenges and not likely to operate uniformly on a set of regulations
- ESR is based on “self-persuasion” and not deterrence: If a conflict arises between a company’s profit-maximising demands and ethical – HR behaviour, the former will prevail
- The Pyramid is risky – it does not ensure compliance, and only a strategy that include deterrence (danger of punishment) is robust
- Who are to be persuaded to comply with essential ethical demands like health, safety and environment? The top management? The subsidiaries? Unclear
- Will the ESR make it easier not to take stronger, and more robust requirements – represented by selected IHRL – seriously?
- The model rests on self-monitoring, but how independent are these internal audits?

# Integrated theory of regulation: An alternative

Responsive regulation is progressive in line with the pyramid

**Integrated** regulation is horizontal: cumulative and coordinated

- Main point: the regulation of business from a human rights perspective is demanding and require **both persuasion and sanctions** (legal enforcement)
- Profit maximization is legitimate, but so strong that without responsible – legal human rights regulation, it will not help securing rights
- Unprincipled pursuit of profits may do considerable social harm



# The Integrated Framework of Regulation

The framework – coordinated action

- Persuasion and sanction
- Multiple forms of regulation
  - rely on non-legal tools and non-state institutions, not just formal law – much can be achieved outside law;
  - and informal mechanisms: shaming and blaming; Knowing and showing; discourse fora
- Law alone cannot bring about desired changes in corporate behaviour