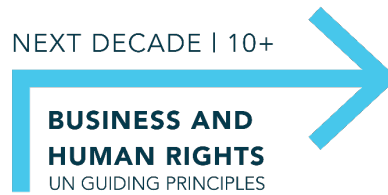


Input to the UNGPs 10+/ Next Decade BHR project



## *Business and human rights – towards a decade of global implementation*



COALITION FOR  
PEACE AND ETHICS

Coalition for Peace & Ethics

Submitted by Larry Catá Backer

W. Richard and Mary Eshelman Faculty Scholar Professor of Law and International Affairs,  
Pennsylvania State University | 239 Lewis Katz Building, University Park, PA 16802

1.814.863.3640 (direct) || lcb11@psu.edu

To the Members of the UN Working Group for Business and Human Rights  
Geneva, Switzerland:

Greetings. The Coalition for Peace and & Ethics submits the following as its contribution to the Working Group's call for inputs relating to its project described above. The Inputs are organized around the six questions posed by the Working Group in its Website portal for submitting Input.

1. Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built on?

The last decade has brought much progress, progress on which at least some stakeholders can build for their own ends and the ends of the fulfillment of the full promise of the UNGPs:

- \* The use of the NAPs to expose the failures of states to live up to their duties;
- \* The development of robust markets in standards against which corporate human rights due diligence and compliance might be measured;

2 October 2020

- \* A refinement of prevention-mitigation-remedy as a basic engine of human rights proportionality analysis;
- \* The use of the UNGP to (at last) develop a transnational tort law of human rights (as opposed to the less progressive use of the UNGP as a veil for the convergence of business with the administrative instrumentalities of states;
- \* The refinement of the ideologies of markets as the most efficient means of ensuring the embedding of human rights (and eventually sustainability) in economic activities and the encouragement of the convergence of macro-economic policies and human rights; and
- \* The maintenance of a (still small) space where those who do not drive policy can secure a marginal voice in the global dialogue in the further development of business, human rights and sustainability under the umbrella of the UNGP; it is noted however, that even here there remains a willingness to "ghost" small NGOs (of little political or relational consequence) and even more tragic to "ghost" small and developing states that stand in the way of the "greater good" originating elsewhere, which detracts substantially from this small positive).

This is a paltry listing of progress, if one is to measure progress by “things.” The greatest accomplishment of the last ten years has been something quite remarkable: the rise of human rights due diligence and the universalization of the Second Pillar as the foundation for the regulation of economic activity, and the protection of individuals, collectives and others against loss from human rights (and now sustainability related) harms. That this was done for perhaps the wrong reasons (state avoidance of its own duty to protect human rights) does not change the result. In the efforts to legalize the Second Pillar obligations of enterprises, the Working Group has managed to orchestrate a consensus, built with the critical aid of European norms and sensibilities (and with it its dangers as well, particularly that of senseless bureaucratization), around the legitimacy of human rights due diligence as the fundamental means for the realization of human rights and sustainability sensitive economic activities. And with that, as well, the Working Group has contributed to the embrace of data driven governance, of the normative power of ratings based administration, applicable now to enterprises, and perhaps in the future to states as well. The future lies in mandatory human rights due diligence regimes.

## 2. Where do gaps and challenges remain? What has not worked to date?

The gaps and challenges remain formidable, though the character of that challenge is less in appearances (which are becoming more refined and respectable (in a Victorian sense)) than in the realities of moving forward the human rights project which itself respects the human rights of those who would participate. These challenges can be easily listed:

- \* The state and its insistence that its sovereignty be understood in 20<sup>th</sup> century terms;

2 October 2020

- \* The state and their increasing willingness to use capacity (its definition and its absence) as a means of producing systems of human rights imperialism (of projections of national ideals whether or not dressed up in international norms);
- \* The state and their collective relationship to international law;
- \* The state and their collective failures to develop coherent and coordinated approaches to their duty to protect human rights;
- \* The state and sovereign immunity; the state and their ability to deflect attention from their failures (as states) with respect to human rights, by a hyper-focus on the legalization of the second pillar corporate responsibility to respect;
- \* The bureaucratization of economic transactions and the use of human rights principles to transform the nature of and incentives toward economic risk taking;
- \* The failure to quantify human rights in an economic context; and
- \* The continued embrace of the notion that human rights and sustainability are exogenous to the "business" of business.

Taken together and reduced to a single insight the great gap and challenge that remain is inherent in the stubborn determination made during the course of the first ten years after the endorsement of the UNGPs that (a) enterprises ought to be treated as profit making public administrative agencies, whose sensibilities and ideologies, and whose working style they ought to adopt; and (b) that the state somehow remains aloof from the practice and implementation of human rights and sustainability objectives other than as a source of law and in the case of “leading” states, of lecturing others. None of this is helpful.

3. What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

Elites have to get out of the way. This is both a quite visible but also well hidden (in plain sight) obstacle. At some point during the past decade it became unavoidable to wonder (aloud in my case) about what appeared to be the obsessive drive to introduce into the development of human rights under the UNGP its management on the basis of Leninist principles. One cannot avoid but to notice (as has become normal it seems in the West) the constitution (or perhaps the self-constitution) of a vanguard element whose core of leadership controls (or better put) manages the construction and elaboration of a legitimate and authoritative narrative.

The challenge follows: how one can lead without making cynics of those at the wrong end of these power-influence-dominance relationships. The consequences are important though hidden to some extent behind the good manners and aspirations of others. Those on the wrong end of “things” will comply because they must, but the important work of naturalizing key principles

2 October 2020

and outlooks (one of the great positives of the UNGP project and its administration from Geneva) will be diminished as marginal actors will perform for rewards to whatever current master controls pathways to advantage.

This is a lesson that has yet to be learned. In the face of perceptions of capture, spheres of resistance tend to emerge, and emerge with a vigor eventually equal to that of the forces they oppose. One is already apparent--the effort to construct a Marxist-Leninist alternative to the UNGP project (or, that is to say, to the Western vanguard basic line about the elements and construction of the UNGP project) through the Belt and Road Initiative. Others are no doubt emerging. What to do? Engage! Engage with those who do not agree; engage with those who think differently, and confront the relentless movement toward an orthodoxy that reflects elite Western European and North American sensibilities. That requires rethinking the way in which consultations are undertaken, and the way that contributions (like this one) will be valued.

4. What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

Systemic or structural challenges are fairly straightforward and may be listed: (1) the political and forms of capacity building; (2) the fundamental need to eliminate free riding from the UNGP and sustainability projects; and (3) the developing of market responses to failures of sustainability are three.

These three, in turn, require realization of the difficulty of the task of developing rigorous and quantitative measures. It is too late in the day to decry any movement toward quantitative measures as opening a doorway to compromising either sustainability or human rights. The very concession of a global cause of action for human rights torts built into the Draft International Business and Human Rights Instrument as well as in the drafts circulating on EU Mandatory Human Rights Due Diligence suggest that quantification is already well embraced--except as a matter of building regulatory systems (almost unconsciously in the manner of the European economic bureaucracies that were abandoned in the 1970s and 1980s; we have been through this before) within which to embed corporate economic planning and decision making. That latter objective, of course, touches on a conversation that is avoided though worth having--the meaning and role of markets in the construction of globalization (something the basic principles of which have changed substantially since 2016 in the West, and which now speak to fracture of consensus among those with the power to impose their views).

In the context of sustainability and--as important, climate change--a similar state of affairs remains unauthorized and unacknowledged. First, the rise of plausible global tort standards for climate change has a plausible likelihood of advancing regimes of quantification and thus of proportionality in this field (as well as other sustainability related actions). That becomes important when increasingly business confronts the need to balance the value of advancing one set of human rights or sustainability objectives against the harm it causes to others. The

2 October 2020

stumbles in meeting the COVID challenge has made this clear. Second, the development of quantitative measures for embedding the economic costs of climate, sustainability and environmental harms can be developed and that development is key to reducing one of the great incentives toward the neglect of sustainability, human rights and climate change--its character as an object of economic free riding. Responsibility must be reflected in the quantification of the costs and value of production rather than in the lofty abstractions and principles applied by random administrative agencies in uncoordinated and perhaps sometimes shortsighted ways.

5. In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?

Actionable and measurable targets as a basis for the question ought to give one pause, if only for the assumptions that are deeply embedded within that choice of approach. But no matter. Concrete measures:

- (1) standardization and quantification of human rights and sustainability (including climate change) harms (a nice project for accountants and social scientists);
- (2) the development of a data driven social credit system that produces human rights and sustainability ratings of all economic actors and to which are attached substantial rewards and punishments;
- (3) the development of a global system of local, regional, and international bodies capable of hearing and producing an opinion about the conformity of states and enterprises to their obligations under the UNGP; while it could be modeled on the OECD NCPs a generation of experience has evidenced that state based mechanisms do not work well except as vehicles for the advancement of state based policies; that is great for states but not for the project of human rights and sustainability;
- (4) encourage a smart mix of legalization and market measures to advance UNCP SDG objectives; to that end making them measurable (again) is a necessary predicate to moving toward the accountability objectives built into this question but one that is transparent, fair, and evenly applied);
- (5) place accountability at the center of the UNGP--but that means developing data based metrics for holding the entire edifice to account--from the Working Group, to states, to enterprises, to NGOs and other collective bodies involved in the advancement of the UNGP project;
- (6) Engage in a realistic self-assessment of the costs of current efforts and projects against their expected benefit; this is not meant to return us to the quaint cost-benefit analysis popular with governments in the 1970s; rather it suggests that under the guise of capacity building and the elaboration of "cost is no object" systems and programs, the

2 October 2020

UNGP project is (un?)consciously shutting most of the objects (people, collectives, developing states, indigenous peoples, etc.) out of the process; neither sustainability nor the UNGPs ought to be an elite project and operationalized as a function of wealth and power; and

(7) the Working Group ought to more pro-actively explore the human right to wealth creation (something that our Chinese and US colleagues have in their own ideologically contingent ways correctly been advocating for a long time); not that the right to wealth creation ought to be centered, but certainly it ought not to be dismissed in the construction of UNGP and sustainability (including climate change) programs.

(8) Big data and big data analytics must be confronted as both a challenge to the UNGP project and as an important tool for accountability, compliance and norm making.

6. Is there other information relevant to the UNGPs 10+ project that you'd like to share?

Congratulations on a decade of work. We should all be proud of the tremendous energy, dedication, and fidelity to the ideals of the UNGP and later the SDGs that the collective work of those involved. We ought as well to be grateful for the tremendous progress that has been made under their dedicated and valuable leadership. On to the second decade of this important work!

The Coalition for Peace & Ethics hopes that this input may serve the Working Group and contribute to the success of its project.

Sincerely

Larry Catá Backer  
For the Coalition for Peace & Ethics