B. Interventions and Inputs

"Elites have to get out of the way"; Coalition for Peace & Ethics Input to the U.N. Working Group Project "UNGPs +10: Toward a Decade of Global Implementation"

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This Intervention and Input was delivered to the U.N. Working Group for Business and Human Rights in response to a request for input. It is divided into two sections. Section 1 includes a short background to the Coalition for Peace & Ethics input in response to the U.N. Working Group for Business and Human Rights in furtherance of their celebration of the tenth anniversary of the endorsement of the U.N. Guiding Principles for Business and Human Rights, "Next Decade 10+: Toward a Decade of Global Implementation." Section 2 includes the CPE input submitted to the Working Group

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1. Introduction: The UN Working Group Call for Input

In the West, humans, and their institutions, are sometimes obsessed with the magical quality of the passage of time. *Time, of course, IS magical*, in the sense that it signals first a thrusting toward vigor that then progresses toward an inevitable rigidity and a decline preceding death and its re-incarnation as memory.[1] Every life, every effort, every endeavor, within the realities constructed through this obsession, is both marked by time, and doomed to a cycle of initial vigor and eventual decline, irrelevance, and oblivion (or more delicately put, toward ascent to a more eternal space of memory or joinder with a higher power).

Indeed, since among western societies it is sometimes not though impious to embrace the core principle that human life is the measure of all things,[2] it is appropriate to gauge the passage of institutional time by the expected lifetime of the humans who are responsible for its formation. Though the lifespan of institutions (including states, enterprises, and other social structures) may exceed the span of a human life many times over, it is the span of a human life that gives value to such long-lived expressions of the collective humanity from out of which it is spawned, nourished, and used. The same applies to ideas, and to principles on which human organizations are incarnated, and to all structures through which humans are trained to "see the world" they believe they make.

The rhythm of such measures, of course, are also creatures of the systems invented by humans to count such things. Since the Enlightenment (and its more abrupt expression in the revolutionary transformations in France after 1789), the way that many humans count is based on systems of

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[1] Historical cyclicity is an ancient and powerful concept, much considered in the West especially since the time of Abd ar Rahman ibn Khaldun, *The Muqaddimah: An Introduction to History* (Franz Rosenthal, ed; Princeton University Press, 1967 (1377))

[2] The notion has come down from an insight attributed to Pythagoras , who it is said "proclaimed that "Of all things the measure is man, of existing things that they exist and of non-existing things that they exist not." Sextus Empiricus, *Against the Mathematicians* (R.G. Bury, trans.; Loeb Classical Library Harvard University Press, 1935-49 (original 210 CE), Book VII: Against the Logicians; Concerning Truth ¶ 60

10. The English counted for a while based on systems of 12, and the Americans still do. But there is an elegance (at least for those nourished on the principles of Enlightenment counting) to 10 that adds significance to measuring the passage of times in blocks of 10, and in multiples of 10 (centuries, millennia, epochs, etc.). That rhythm, then, also produces the temporal spaces within which it is possible to take the measure of a thing.

It is no surprise, then, that one has reached such a period of *magical signification* in the evolution of the life (vigor, decline, death, transfiguration into memory or progeny) of the *United Nations Guiding Principles for Business and Human Rights*. Aaaahh, but not exactly for the UNGP, rather signification attaches here not to the principles themselves but to a rhythm that is a function of the year in which the UNGP were endorsed by an authenticating body--the UN Human Rights Council. Not just that, of course, for the spawning also produced a living memory of the event--the Working Group for Business and Human Rights.

To mark that passage of time, and to enhance its signification certain rituals are necessary. Those are the means through which both the thing itself is celebrated, but also the means by which those who tend it assert their power over it (the role of a Nietzschean priesthood),[3] and one can better prepare for the inevitable passage of the signification itself (young and expanding, middle aged and stable, old and in decline, preparing to make way for what comes next). The traditional ritual for such passages involve a collective celebration whose trajectories are well managed by those who have taken for themselves (or have been given) authority to care for (in this case) the institution of the UNGP.

And so it is that the

> UN Working Group on Business and Human Rights (UNWG) launched a new global project, 'Business and human rights: towards a decade of global implementation." Also known as "UNGPs 10+ / Next Decade BHR," the project is centred around the

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[3] Discussed in the context of international relations in Larry C. Backer, "The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment," *Penn St. Int'l L. Rev.* 21:509 (2003).

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upcoming tenth anniversary of the *UN Guiding Principles on Business and Human Rights* (UNGPs), the global authoritative framework on business and human rights that was unanimously endorsed by the UN Human Rights Council in June 2011. The project is taking stock of practice to date, identifying gaps and challenges, and developing a vision and roadmap for scaling up implementation of the UNGPs over the course of the next decade.[4]

The Call for Input is thus an important marker for the measurement of the UNGP, and for its placement within its own life cycle. One gets that sense, of course, from the way that the Call for Input is framed. One might learn as much from the questions posed as from the answers to be harvested, and thus harvested, processed, packaged and refined for public consumption.

The guidance for inputs center on five key projects: (1) bettering UNGP implementation; (2) identifying (and avoiding) failures and the work left to be done; (3) identifying people and institutions (as well as narratives and ideas) that continue to stand in the way of preferred progress; (4) a barely concealed effort to reorient the UNGP from centering economic activity in human rights to the of human rights as the language of (the currently best candidate for supplanting the UNGP) sustainability and climate change ; and (5) the evolution of data driven measures to which the enterprise might be reduced. From these, it is presumed, that the Working Group will seek to develop a 2nd Ten Year Plan for the UNGP. Let us hope it measures up.

The members of the Coalition for Peace & Ethics (CPE) are delighted now to share CPE's input provided to the Working Group. A listing of those inputs that the Working Group deemed worthy of inclusion in its web page may also be accessed.[5]

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[4] U.N. Working Group for Business and Human Rights, Business and human rights –towards a decade of global implementation Open Call for Input," Web project page available [https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx].

[5] UN Working Group for Business and Human Rights, "Written inputs: UN Guiding Principles on Business and Human Rights at 10;" available

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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 public administrative agencies, whose sensibilities and ideologies, and whose working style they ought to adopt, and only then as vehicles for the production of wealth; 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, especially with respect to their own wealth creating activities. None of this is helpful.

[https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10-inputs.aspx].

2. "Business and human rights – towards a decade of global implementation" CPE Response to the UN Working Group Call for Input

The Input that follows is organized according to the list of questions provided by the Working Group.[6]

Question 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;

* 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

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6 The Working Group's questions are available [https://ohchr-survey.unog.ch/upload/surveys/593896/files/Fullsetquestions.pdf].

* 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 effort 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.

Question 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 20th century terms;

* 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 public administrative agencies, whose sensibilities and ideologies, and whose working style they ought to adopt, and only then as vehicles for the production of wealth; 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, especially with respect to their own wealth creating activities. None of this is helpful.

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

CPE Believes that the crucial insight that can be gleaned from the first decade of the existence of the UNGP is this: *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 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.

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 Question 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 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

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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.

Question 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

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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 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.

Question 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!

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