



# Emancipating the Mind in the New Era

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*Coalition for Peace and Ethics Intervention and Input to U.N. Special Procedure, business and human rights; Essays and Articles by CPE Members and Invited Contributors on Cuban economic and political reform*

***Volume 15 Issue 3 (Winter 2020)***

***Interventions, Delivered Inputs, Articles and Essays by CPE Members and  
Invited Contributors on issues of business and human rights, and on  
aspects of Cuban economic and political reform:***



# Emancipating the Mind in the New Era

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(Larry Catá Backer and CPE Members, editors)



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## **Contents Vol. 15(3)**

***Interventions and Delivered Inputs of the Coalition for Peace & Ethics  
related to Business and Human Rights ; Articles and Essays by CPE  
Members and Invited Contributors on Issues of Cuban Economic and  
Political Reform***

### **A. Introduction**

Coalition for Peace & Ethics Interventions and Inputs related to Business and Human Rights; Articles and Essays by CPE Members and Invited Contributors on Issues of Cuba

Larry Catá Backer

451-452

### **B. Conference Questions**

1. "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"

Coalition for Peace & Ethics

Prepared by Larry Catá Backer

453-464

2. Short Reflections on the U.N. Working Group's July 2020 Report to the General Assembly: "Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action"

Larry Catá Backer

465-474



## **C. Essays and Other Contributions**

1. The Right of Political Resistance in the Cuban Constitution  
Lenay Martha Álvarez Vega 475-482
2. La Intermediación en el empleo: la entidad empleadora en la inversión  
extranjera en Cuba/ Intermediating Cuban Employment Relationship: The  
Employment Entity on Foreign Investment  
Lenay Martha Álvarez Vega 483-500
3. Policy as an Oscillation with the Illusion of Progress in the United States,  
China, and Cuba  
Larry Catá Backer 501-512

**\* \* \***

# A. Introduction

## **Introduction: *Coalition for Peace & Ethics Interventions and Inputs related to Business and Human Rights; Articles and Essays by CPE Members and Invited Contributors on Issues of Cuba***

**CPE Volume 15(3) (Larry Catá Backer and Coalition for Peace & Ethics Special Issue editors)**

For this last issue the Coalition for Peace & Ethics is delighted to include Inputs delivered by the Coalition for Peace & Ethics to the UN Working Group for Business and Human Rights and on the Working Group's Report to the UN General Assembly on business and Human Rights in conflict zones. In the first, "Elites have to get out of the way"; Coalition for Peace & Ethics Input to the "UNGPs +10: Toward a Decade of Global Implementation," CPE emphasizes what it views as some of the great impediments toward the realization of the goals and objectives of the United Nations Guiding Principles for Business and Human Rights and their challenges for the second decade of its existence. In the second, Larry Catá Backer suggests some of the challenges along with valuable insights, of the developing position of the UN Working Group respecting the responsibilities of business enterprises in conflict zones.

The essays included in this issue all touch on Cuban economic and political reform. For this issue, CPE is delighted to introduce Lenay Martha Alvarez Vega, whose two contributions add much to current discussions about contemporary issues that are of great relevance to the continuing reform in Cuba. The first of her contributions, "The Right of Political Resistance in the Cuban Constitution," is the English translation of an essay previously published. It considers sensitive and unexplored

issues of political rights within the structures of Cuban Marxist-Leninism. Her second contribution is provided both in the original Spanish and also in an English translation. It is entitled “La Intermediación en el empleo: la entidad empleadora en la inversión extranjera en Cuba/ Intermediating Cuban Employment Relationships: The Employment Entity on Foreign Investment,” touches on one of the more troublesome issues within Cuban Marxist Leninism--the issue of labor intermediation. Intermediation, the use and abuse of placement and employment agencies as an intermediary between workers and employers, serves an important role in Marxist Leninist states where the state assumes that role, but the possibilities of abuse of the practice, and additional forms of abuse possible especially as the private sector opens up must be considered.

The third contribution, Larry Catá Backer’s “Policy as an Oscillation With the Illusion of Progress in the United States, China, and Cuba,” considers issues of reform within the political-economic systems of three quite different states. It then drills a little deeper in the context of Cuban economic reforms announced near the end of 2020. It suggests the way that ideological constraints may well substantially affect the scope of discretion available to officials seeking to implement the announced reforms, and the difficulties of breaking away from established patterns of thinking about and implementing reform.

We hope our readers find the proceedings and essays of some use. We also hope that readers who are interested will also consider listening to the interviews. In many ways they provide a window onto the realities of the pandemic at a point when global actors were only coming to realize its scope and the challenges the pandemic posed.

Larry Catá Backer  
CPE Members  
CPE 15(3) Editors





## **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"**

**Coalition for Peace & Ethics  
Prepared by  
Larry Catá Backer**

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

**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.<sup>1</sup> 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,<sup>2</sup> 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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<sup>1</sup> 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))

<sup>2</sup> 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),<sup>3</sup> 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 (UNWBG) 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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<sup>3</sup> 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).



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.<sup>4</sup>

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.<sup>5</sup>

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<sup>4</sup> 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/UNGPsBizHRsnxt10.aspx].

<sup>5</sup> UN Working Group for Business and Human Rights, “Written inputs: UN Guiding Principles on Business and Human Rights at 10;” available

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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[[https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnex  
t10-inputs.aspx](https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnex%20inputs.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.<sup>6</sup>

**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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<sup>6</sup> 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 20<sup>th</sup> 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.

**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.

**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

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

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!

\* \* \*

## B. Interventions and Inputs

### **Short Reflections on the U.N. Working Group's July 2020 Report to the General Assembly: "Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action"**

**Larry Catá Backer**  
**For the Coalition for Peace & Ethics**

One of the more challenging issues that confronted the process of drafting (and then applying) the UN Guiding Principles for Business and Human Rights, centered on the duty of states to protect--and more relevantly the responsibilities of companies to respect--human rights in conflict zones (as well as in weak governance zones).<sup>1</sup>

The problem of business operation in conflict (and weak governance) zones remains a key issue for framing the business, legal, political, economic, and societal risks of operating in the face of conflict or in the absence of the state. It was therefore with great anticipation that I read the UN Working Group for Business and Human Rights Report to the UN General Assembly "Business, human rights and conflict-affected regions: towards heightened action."<sup>2</sup>

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<sup>1</sup> Discussed in more detail at Larry Catá Backer, "Corporate Social Responsibility in Weak Governance "Zones," *Santa Clara Journal of International Law* 14(1):297-332 (2016).

<sup>2</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises, Report: "Business, human rights and conflict-affected regions: towards heightened action," A/75/212 (21 July 2020); available [<https://undocs.org/en/A/75/212>] (hereafter the "Working Group Report").



The Report's focus is quite specific and quite pragmatic:

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises clarifies the practical steps and outlines practical measures that States and business enterprises should take to prevent and address business-related human rights abuse in conflict and post-conflict contexts, focusing on heightened human rights due diligence and access to remedy.<sup>3</sup>

This approach is laudable. And the UN Working Group handled the task with great competence, considering the complexities of the issues and the severe space limitations for its report. For that they are to be congratulated. The Report provides a welcome framework for considering the issues, especially in the narrowly focused context of traditionally defined conflict zones.

The purpose of these reflections is to provide the Working Group, and those who read the Working Group Report, with an analysis from the perspective of an outsider to the Working Group Report's preparation or content. It is followed by the Working Group Report's Recommendation.

1. Paragraphs 9-12 of the Working Group Report make it quite clear that the focus of the report is on conflict zones, and especially those to which it might be asserted that international humanitarian law applies. It more delicately connects that focus with the architecture and institutions of international criminal law built around the Rome Statute and the International Criminal Court. Indeed, the scope of responsibility is rather narrow--it applies where conventional humanitarian law may apply in cases of state to state conflict.<sup>4</sup> First there are areas in which there remains a sometimes lively dispute about the status of territory between states and non-state actors. As likely action may center on territory in which sovereign title is contested among states.

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<sup>3</sup> Ibid., Summary.

<sup>4</sup> Ibid., ¶ 9.

Moreover the linkage to the architecture of the Rome Statute and the International Criminal Court system produces its own challenges. Man important consideration in this context is that there are several states that have rejected the architecture and institutions of the ICC, and others that appear to use membership in that community strategically to suit their interests. That presents a sometimes more delicate balancing for enterprises caught between competing pressures in the construction and application of their due diligence. It also changes the focus of human rights due diligence by centering humanitarian law principles (flowing by and through states) to the activities of enterprises. The issue of the effective transfer of sovereign responsibility in that context is assumed but not justified. It suggests a movement by the Working Group toward embrace of a principle (with respect to which there is no consensus) that at least in these contexts enterprises will be treated as sovereign instrumentalities though not necessarily as sovereign instrumentalities whose conduct produces liability to the states whose instrument they are assumed to be.

2. It follows that the Working Group Report's advice works best in the conventional and increasingly old fashioned situations of in which conflict is bound intimately to territory. Yet increasingly conflict occurs outside of the traditional limits, and well beyond the scope for which international humanitarian law was created. Law, of course, tends to be focused on the past and very late to the present. That insight is most telling here. While there remain traditional conflicts (and the territorial spaces within which their existence is confined); increasingly the territorial boundaries of conflict become harder to define. To the extent they are defined by law they miss the point of modern warfare--one that no longer respects the niceties of territory. A classic example: a conflict zone in region A may produce terrorist (one off) attacks in Territories B and C which are otherwise conflict free as those terms are conventionally defined.

3. Moreover, it is not clear that there ought to be a sharp division--one developed arbitrarily through the construction of legal categories--that separate conflict from weak governance zones. There may be no traditional conflict in a large portion of province B, for example, yet because of the power of criminal gangs, the state authorities may have very little power to assert effective control over that part of Province B. And yet that is

where Company C operates. No state wants to admit that it lacks effective control over parts of its territory. And that is as true in the heart of Salerno Italy and the portions of Chicago, as it may be in areas of Mexico. And yet, areas of weak governance, like those of traditional conflict, ought to trigger the sort of heightened responsibility for enterprises--and the assertion of a more pro-active duty, by states. In both weak governance and conflict zones the basic insight of the Report ought to apply: "Businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics."<sup>5</sup>

4. It is not clear that the Working Group expects far too much of non-state armed groups. The sensibilities of armed struggle from the perspective of the Anglo-European conception of war, rather than that of wars of liberation or more traditional struggles within the context of developing and post-colonial states might have been more forcefully recognized. But here the Working Group faced a challenge from which there was no easy way out. On the one hand they argue--quite correctly--that business must understand armed non-state groups<sup>6</sup> and that business must develop some sort of accountability (post hoc) based engagement strategy.<sup>7</sup> And business ought to strive to remain impartial.<sup>8</sup> This is a particularly ironic suggestion in light of the necessary partiality of business developed by the Report in ¶ 43.<sup>9</sup> Yet the outlines for this strategy was constructed from out of engagements with all stakeholders other than such armed groups themselves. Indeed the use of strategic consultation<sup>10</sup> in the preparation of the Working Group Report was essential to its focus, scope, legitimacy, and

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<sup>5</sup> Working Group Report, *supra*, ¶ 43.

<sup>6</sup> *Ibid.*, ¶ 58.

<sup>7</sup> *Ibid.*, ¶ 59.

<sup>8</sup> *Ibid.*, ¶ 60.

<sup>9</sup> The Working Group Report ¶ 60 declares: "This highlights one of the biggest misconceptions of business when operating in a conflict-affected environment. Businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics."

<sup>10</sup> On strategic consultation, see, e.g., Rob Manwaring, "Unequal Voices: 'Strategic' Consultation in South Australia," *Australian Journal of Public Administration* 69(2):178-189 (2010); Gilat Levy, "Anti-Herding and Strategic Consultation," *European Economic Review* 48(3):503-525 (2004);

objectives.<sup>11</sup> The good intentions of the Report here stand in danger of failing to produce a workable set of tools that can actually be extracted from the elegance (and it is elegant) theoretical strategic framework proposed

5. The gender lens was particularly lamentable.<sup>12</sup> The lamentation does not arise from the Working Group Report's intentions (which were both necessary and well stated) nor its efforts to translate intention to (corporate) action. The problem was the way in which the gender lens (as it sometimes does precisely because of the sensitivity of the topic in context--in this case the context of a United Nations system riven with quite different views of the practical expression of both gender and its lens), "ghosts" (that is, erases) the state. It does so in three respects. The first is the failure to acknowledge the complicity of international organizations, including the United Nations itself, in perpetrating acts of violence directly primarily against women in places where UN security forces have been deployed. The second is to fail to call the state to account for its own failures of duty to protect human rights, especially when the gender lens is applied. The third is its failure to acknowledge the special obligation of state owned enterprises in the context of the application of the gender lens--a remarkable failure given the recent centering of state owned enterprises in the Annual Business and Human Rights Forum, and because these enterprises are discussed in the context of captive businesses in the very next section of the Report. Here, effectively, almost the entire burden of the gender lens is shifted from the public to the private sector. And that is a great pity.

6. The Working Group Report is to be commended for its initial effort at providing a framework for approaching responsible exit.<sup>13</sup> Particularly important is the recognition of the challenge for so-called captive businesses.<sup>14</sup> The Working

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<sup>11</sup> Working Group Report ¶ 57 notes: "The Working Group convened a consultation with business and humanitarian organizations to identify potential good practices that could be transferred from their practice to the business and human rights field."

<sup>12</sup> Working Group Report, *supra*, ¶¶62-63.

<sup>13</sup> *Ibid.*, ¶ 65 ("The first step is therefore to anticipate and plan a clear exit strategy in advance. This will allow the business to identify and assess the impacts of disengagement with affected people, including business partners and communities, and to develop mitigation strategies.").

<sup>14</sup> *Ibid.*, ¶¶ 66-71.

Group notes the contradiction in their own approach to the issues of captive business but then delegates its resolution to the enterprises themselves--no longer as autonomous collectives, but as pieces of a much larger geopolitical puzzle that requires them to behave for the benefit of others. That contradiction involves the use of captive business for post conflict peace building and restorative justice<sup>15</sup> while at the same time noting that they may be subject to irresistible pressure from human rights violating combatants (including the state)<sup>16</sup> and should they depart cause human rights harms to employees and other left behind.<sup>17</sup>

The issues of exit, though, ought to involve more than just a humane withdrawal, and persistent presence sensitive to human rights concerns. There may well be circumstances where withdrawal, however humane, will produce more severe human rights, environmental and sustainability consequences than a decision to stay. It is in those circumstances--again--that enterprises ought not to be left to their own devices. Rather these are precisely the context in which home states, often pushed by the human rights community to "do something" have something quite significant to do. It is the exploration of that "to do" arising from a salutary interlinking of First and Second Pillar obligations that remains to be fleshed out in a way that makes sense. Yet again however, the state disappears. Here, however, some of the insights from the discussion of captive businesses may be useful, though in the end in both cases, support arising from state duty ought to have a greater bearing on the due diligence for which enterprises are burdened with responsibility.

7. In fairness, one cannot say that the Working Group is unaware of the role of home states (though they remain less willing to acknowledge the robust and quite profound role of host states). That awareness, however, kicks into high gear in the context of finance and in the larger context of post conflict issues.<sup>18</sup> The Working Group's heart is in the right place--but here, especially, its aspirational character is hard to avoid.<sup>19</sup> (Of

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<sup>15</sup> Ibid., ¶ 71.

<sup>16</sup> Ibid., ¶ 70.

<sup>17</sup> Ibid., ¶ 68.

<sup>18</sup> Working Group Report, *supra*, ¶ 79.

<sup>19</sup> Ibid., ¶¶ 78, 80 and focus on the issues around the civil war in Syria.

course, one wonders why examples of actions in the wake of the fall of the Soviet Union in Eastern Europe in the 1990s might not have served the Working Group in the context of this discussion.

8. The Report's consideration of issues of access to justice ought to be welcomed by anyone committed to the emerging "harm principle" of business and human rights. Harm requires redress, and one ought not to be too fussy about the form of that redress as long it is acceptable. But that is an impossible principle to apply. There can be no neutrality respecting remedy where, especially in the context of business and human rights, remedy is inexorably tied to accountability to the collective as well as to the individuals directly harmed and where remedy is understood in its relationship to those harmed (the disempowering term *victim* is not used by CPE )<sup>20</sup> as only one (small?) part of the larger prevention-mitigation-remediation project at the heart of the Third Pillar. One is grateful that the report, at note 70, took the time to mention the OHCHR Accountability and Remedy Project--a valuable source of the sort of practical tool which were a core objective of the Working Group's Report.

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<sup>20</sup> The Coalition for Peace & Ethics has maintained that the development and use of the term "victim" contributes to the disempowerment of individual rights holders. It detaches remedy from rights and vests the former in the hands of either public officials or non-governmental collectives in ways that strips the individual rights holder of autonomy- The irony of course is that the move to systems of reifying the legal category "victim" itself can produce human rights harms." See discussion in Larry Catá Backer, "On the Victimization of International Law and the Ethos of the Treaty Project in Article 1," *Emancipating the Mind in the New Era: Bulletin of the Coalition for Peace & Ethics* 14(2):191-195 (2019).

## Working Group on the issue of human rights and transnational corporations and other business enterprises, Report: “Business, human rights and conflict-affected regions: towards heightened action, “A/75/212 (21 July 2020)

### VII. Conclusions

100. The Guiding Principles provide clarity on what is expected from business and States in conflict-affected areas. What is now required is more decisive action to integrate business and human rights into peace and security frameworks.

101. Alongside conflict minerals is a trend towards general mandatory human rights due diligence regulations. Both underscore the importance of the advisory role of States in conflict-affected markets, as well as the need for robust policy coherence, including in development finance and reconstruction

102. This expansion of mandatory due diligence means that the issue of business in conflict-affected regions should gain traction faster, including an expectation of heightened due diligence. The lessons learned of implementing conflict minerals regulations across multiple jurisdictions offers insights transferable to a broader set of policy issues in conflict-affected regions. The process exemplifies a point made in the 2011 companion report on State policies. States are more inclined to adopt policies which do not put their own businesses at an unfair disadvantage. Multilateral standard setting is likely critical to ensuring that States move forward in the fulfilment of the State duty to protect human rights in conflict settings.

103. Therefore, States should consider, and business should support, the establishment of a multilateral and multi-stakeholder forum to share and build on existing practices in the context of conflict and peacebuilding. This could also be an opportunity to consider an international agreement clarifying risks, prohibited activities and modes of liabilities with respect to business in conflict or other high-risk situations, such as clarifying the types of gross human rights abuses that are prohibited.

### VIII. Recommendations

104. To States:

- Home and host States should use their key policy tools and levers to ensure that business engages in conflict-sensitive heightened due diligence when operating in conflict-affected areas. This may include linking access to export



credit, investment approvals and access to investment finance, to demonstrable heightened human rights due diligence.

- Embassies and investment-related and trade-related functions should provide conflict-sensitive advisory services and tools to the private sector, including to small- and medium-sized enterprises, to assist them in respecting human rights in conflict-affected settings.
- States should develop appropriate guidelines for business engagement in peacebuilding settings to ensure that businesses operate with respect for human rights and conflict-sensitivity.
- States should encourage multilateral institutions dealing with peace and security issues to promote business respect for human rights through the proactive engagement of business actors in peace and security processes that concern them.
- States should ensure that transitional justice mechanisms include all actors, including economic actors, and ensure that the role of business is fully considered within such mechanisms, consistent with core principles of transitional justice such as accountability, reparations and guarantees of non-repetition, as essential parts of effective remedy.
- States must actively pursue cross-border investigations and prosecutions of international crimes committed by corporate actors as part of a commitment to access to effective remedy.
- States, under the auspices of the United Nations or other international processes, should develop guidelines for human-rights based engagement with armed non-State actors.
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#### 105. United Nations

- The United Nations, in particular its peacekeeping, peacebuilding and mediation pillars, should develop a strategy on business, peace and security that embraces the Guiding Principles as a foundational component.
- The United Nations should ensure that an appropriate level of awareness is incorporated into its peace and security pillar on the issue of business, human rights and conflict, including by disseminating information about news, tools and research both within and outside the United Nations system, and by organizing regular awareness-raising sessions for staff and Member States.
- The United Nations should establish robust interagency cooperation to ensure that all its entities confronted with a business presence in their operations in conflict-affected contexts do not work in isolation and share existing knowledge with the United Nations system.
- The United Nations peace and security pillar should strengthen its own knowledge and capacity and develop, in cooperation with relevant entities within and outside the United Nations system, basic tools and specific guidance notes and thematic briefs, for peacekeepers, mediators and peacebuilders.

106. Businesses should:

- Seek advice from embassies and investment and trade-related functions to receive conflict-sensitive advisory services and tools to assist them in respecting human rights in conflict-affected settings.
- Engage in heightened human rights due diligence that incorporates tools from atrocity prevention and conflict prevention to augment their existing due diligence frameworks.
- Develop operational-level grievance mechanisms that have a conflict-sensitive approach.
- Commit to active engagement with local communities and groups in conflict and post-conflict settings.
- Ensure that a gender-responsive approach is used to develop heightened human rights due diligence and in grievance, remedy and transitional justice mechanisms.
- Actively participate in truth and reconciliation processes and provide reparations and guarantees of non-repetition as part of their commitment to building peace.



## C. Essays

### The Right of Political Resistance<sup>1</sup> in the Cuban Constitution

Lenay Martha Álvarez Vega<sup>2</sup>

*(...) they want to regulate the forms of evil, and curing it in its manifestations; when it must be cured at its base (...) We would say to politics: Wrong, but console! Because who consoles never errs!*<sup>3</sup>

Moved by the sharpness of the economic-social scenario the Cuban people live, after only two years of a constitutional process where we saw the mobility of the government decision; however, we know that probably that Cuban government mobility never affected its base, which is the main issue of Cuban people have, and, what led us to writing this essay.

The new Cuban Constitution, approved 10 April 2019,<sup>4</sup> was only the beginning of the changes will likely be touching

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<sup>1</sup> The distinguished Cuban Professor at Law Luis Alberto Pérez Llody in his article named Political Resistance as a Fundamental Right. Reflections regarding the Centenary of the Mexican Constitution; he refers this category as "(...) an attitude for questioning the ways in which political power is exercised and law is realized." Available [[http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S1870-21472016000200004](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-21472016000200004)].

<sup>2</sup> Ms. Alvarez Vega is a Cuban lawyer (University of Orient 2009) who is currently pursuing her LLM degree at Penn State Law. She has worked as legal advisor for different Cubans companies, and particularly in the foreign investment area. She worked as Legal Director of the 100% Cuban capital company Química Internacional S.A, Cuban partner of joint ventures of the Cuban chemical sector. In addition, she has advised startup of entrepreneurs, and Non-Agricultural Cooperatives in Cuba about the execution of its businesses. She might be contacted at [[marthalena1986@gmail.com](mailto:marthalena1986@gmail.com)].

<sup>3</sup> José Martí, "La América, New York" (April of 1884), Jose Marti's *Complete Works* Tome XV.1. COVID-19 in Europe.

<sup>4</sup> See Cuban Constitution, April 10, 2019. Available <https://www.gacetaoficial.gob.cu/es/constitucion-de-la-republica-de-cuba-proclamada-el-10-de-abril-de-2019>.

Cuban people who are residing in the country; however, nobody knows when these changes will take place.

Cuban Constitution set out the historical right of political resistance. One more time it is intentionally placed within the political grounds of the Cuban government; but, during the Constitutional debate it look likes it was not important to Cuban people because we could not find their analysis on this point. Other "more relevant constitutional issues" were launched by the Cuban government for discussion, and once again the Cuban citizen lost his compass.

The right of political resistance is inherent us, becoming inalienable to every citizen from a country. Although, it is part of the so-called "human rights." Given its importance the political resistance right is often used as a political tool by the empowered government.

### **The Other side of the coin: right of political resistance in Cuba?**

The Cuban Constitution establishes by article 4 the following:

"Cuban citizens have the right to fight by all means, including armed struggle, when no other means are possible, against anyone who tries to overthrow the political, social and economic order established by this Constitution."<sup>5</sup>

It looks like an innocent article, but is one of the most important of the Constitutional text. It is the ground to change whatever government does not satisfying the interests and well-being of its people. But, most people in Cuban unknown the relevance of that, and for who knows it – such as lawyers, professors, and other professionals or not- is better writing about issues other countries have than looking and solving his little finger foot's issue.

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<sup>5</sup> These words are comparable with the predecessor Constitution of 1976, although with slight changes of form – because the before Constitution listed it by article 3 and the actual Constitution by article 4 - slightly intentional as the last pronouncement of a whole article about the defense of the homeland, the consequences of its betrayal and the Cuban "irrevocable socialist system."

What beautiful words are "it is necessary to change what must be changed" ... But it is a big lie when Cuban people cannot do that. This phrase is grounded on the "right of political resistance".<sup>6</sup> Although, tightly, its interpretation and concretion in the Cuban Constitution moves away from its nature, and becomes another form of Cuban government politics.

The Cuban Professor at Law LUIS ALBERTO PÉREZ LLODY distinguishes three dimensions<sup>7</sup> in which the right of resistance has historically been manifested, such as:

1. "*Resistance, sensu stricto, in its most primary form, as "natural right", innate to being. Semantically it is usually used for referring the idea that resistance implies, v.gr. the violence with people can oppose to an invader or a dictatorship. Understanding the phenomenon of dictatorship, according to this context, leads to a consequence of the institutional crisis of the State, a rupture between the idea of law and power.*"<sup>8</sup>

2. "*As an ethical form of externalization of conduct.*" The subjective dimension of rights places the individual at the center of attention in his particular relationships, and, above all, when he is involved with political power because he acts by controlling it. There is in its contents an action that is manifested when the good of freedom is threatened in conditions of political

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<sup>6</sup> Pérez Llody in his analysis of the Mexican Constitution states that the right of resistance after modernity was incorporated into the human rights regime; however, from the positivist criterion its usefulness was denied, exterminating its development and turning its essence into politics rather than legal.

<sup>7</sup> See Pérez Llody, Luis Alberto: Political Resistance as a Fundamental Right. Reflections regarding the Centenary of the Mexican Constitution. Available [http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S1870-21472016000200004](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-21472016000200004).

<sup>8</sup> This author concludes that resistance is in itself a subjective, non-arbitrary, contentious quality, an attitude capable of operating under adverse circumstances that describe situations of social injustice and economic oppression where political repression or tyranny acts as the most visible element, trigger of the state of popular discontent as the first evaluative instance of the negative precedent. Such a phenomenon manifests itself independently of the will of the legislator. In politics, his notion is identified, in an incontrovertible way, with "the preservation of the institutions considered as legitimate".

oppression, which is equivalent to placing at risk an essential budget of the moral life. The way in which resistance is conceived in the public space, in terms of the limit of his own performance, becoming a test of ethics in political action."

3. "*As a fundamental right.*" It is consistent with the recognition of the constitutional text.

Furthermore, JUAN IGNACIO UGARTEMENDIA ECEIZABARRENA<sup>9</sup>, in his article, "The Law of Resistance and its Constitutionalization" points out that "beyond its conceptual ambiguity, the right of resistance *latu sensu* comprises the whole range of behaviors whose common denominator is the confrontation with state power, either to question its legitimacy or the justice of their actions in specific cases. According to its importance, it must be located in the field of rights and guarantees of the Democratic Constitution, the supreme law that governs the exercise of public power."<sup>10</sup>

Both professors at law tell us that although the right of resistance can be understood in different ways, it is clear that (1) it generates conflict from the citizen to their government, and, (2) it has constitutional scope.

The first one is a default response of the human being when he feels deprived, subjugated or restricted respect his rights or duties a government must be guarantee. The second one is regarding the recognition of their rights a democratic government offers its people; but it begs a question: is not the people who appoint their government and endorse their Constitution?

The Cuban Constitution incorrectly recognizes as a right of resistance only the action of the one who fights against anyone who tries to overthrow the entire system forged by the

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<sup>9</sup> Eceizabarrena Ugartemendia, Profesor Titular de Derecho Constitucional y de la Unión Europea (Facultad de Derecho, UPV/EHU), acreditado como Catedrático (ANECA). Cátedra Jean Monnet de la UE.

<sup>10</sup> See Eceizabarrena Ugartemendia, Luis Ignacio: "The Law of Resistance and its Constitutionalization," [El derecho de Resistencia y su 'constitucionalización'], *Revista de Estudios Políticos (Nueva Época)* 103:213-245 (1999).

Cuban government. Furthermore, the majority of us who reside in Cuba voted for it.

Law cannot be understood as politics tool or viceversa, although the law is the political will of the economically empowered classes. However, there must be a supreme law to put limits to empowered classes 's managing. The Constitution guarantees a balance between the empowered classes desires and actions and people's rights, which cannot be affecting by those desires and actions.

Noticed here is the fragment taken from our Apostle (ut supra), part of his essay called "The Future Slavery", where he exposes by preceding a social economic formation that he did not know, more because of his high common sense he qualifies they want to regulate forms of evil that is to legitimize its strength.

We had to reach out the Cuban Constitution of 1940, where the right of resistance was crystallized before nowhere else. Its context, by itself, speaks of the democratic pressure of which the right of resistance was a very concrete result.

Title I "Of the Nation," established that "Cuba is an independent and sovereign State organized as a unitary and democratic Republic, "for the enjoyment of political freedom," social justice, individual and collective well-being, and human solidarity."<sup>11</sup>

Title IV Section One, regarding "Fundamental Rights" found that "the inhabitants of the Cuba Republic have the right to assemble peacefully and without arms, and to march and associate for all the lawful purposes of life, according to the law, with no limitations other than those essential to ensure the public order."<sup>12</sup>

That supreme law also lay down is unlawful the formation and existence of contrary political organizations respect to regime of the democratic representative government

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<sup>11</sup> See Article 1 of the Cuban Constitution 1940. Available <https://pdba.georgetown.edu/Constitutions/Cuba/cuba1940.html#:~:text=Art.,dimanan%20todos%20los%20poderes%20p%C3%BAblicos.>

<sup>12</sup> *Idem.* Article 37.



of the Republic, or that attempt against the fullness of national sovereignty.

In addition, set out “the legal, governmental or any other provisions that regulate the exercise of the rights this Constitution guarantees, will be null if they diminish, restrict or adulterate them.

More important, “the adequate resistance to the protection of individual rights previously guaranteed is legitimate.”<sup>13</sup>

Noticed is the right of resistance was included into Constitution of 1940 within the title of fundamental rights; these rights among others- such as political freedom- were protected by the Constitution, - that is why up to now it is recognized as the most prosperous and democratic Constitution Cuban people have had.

This Constitutional text allowed Fidel’s team and others to fight Batista’s government during the 50’s and, a posteriori, they got the victory. Of course, it answered that’s why after Fidel’s government the Constitutional right of political resistance was completely changed, not for Cuban people instead to keep safe the Cuban government.

The Cuban political, social and economic system does not pretend to have changes in the future, which is the political will of the government, not of the people. Employing the political resistance right by Cuban people, we should estimate the ends of the Cuban system imposed, for six decades, which is reversed in the economy of a whole country, and in a social system of muddy, wormy and rottenness ...

Jose Martí wrote in his work referenced above the following:

Spencer fears, not without ground, since the action of the state becomes so varied, active and dominant, it would impose burdens on the part of the working nation for the benefit of the Páupera part (...) From being a servant of himself, man would become a servant

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<sup>13</sup> *Idem*. Article 40.

of the State. From being a slave of the capitalists, as he is called now, he would go on to be a slave of the civil servants.

Moreover, he defined slave as "anyone who works for another who has dominion over him (...)".

It worth to recall the Doctor Calviño 's popular slogan "Drawing Your Own Conclusions", which ends each session of his "Vale la Pena" program.

The reality of anyone who intends to remain in Cuban territory, is that the society must need an imperative change; one step towards progress, a move away from the evils caused by the "civil service system" so much questioned, and is continuously professed by the Cuban government to be the idealized dream of the individual; however, it has resulted only for a few. Let us reminder what the special subject of the first sentence is: "Cuban people".

We are the people, the citizens of this Cuban country, those who are legitimated to exercise our rights. We are the actors in every such process ... We decide the future of our Cuba: the future Slavery or the Antagonistic Present: A capable, sovereign and dissident people with the fire extinguishing solutions offered by the underpinned, but in crisis, Cuban political system.

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## C. Essays

### **La Intermediación en el empleo: la entidad empleadora en la inversión extranjera en Cuba**

**Lenay Martha Álvarez Vega<sup>1</sup>**

La intermediación no es un término novedoso ni propio de este siglo, aunque transita por ser reconocida como institución del Derecho del Trabajo que se imprime en las novísimas relaciones de trabajo del siglo XXI.

Ya desde el año 1933 la Organización Internacional del Trabajo (en siglas OIT) se había pronunciado conforme a este flagelo, mediante la adopción de sendos Convenios como el Convenio No. 96 relativo a las agencias de colocación<sup>2</sup>, y para el año 1997, el Convenio No. 181<sup>3</sup>.

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<sup>1</sup> Abogada cubana graduada con título de oro en la Universidad de Oriente (2009). Con estudios avanzados en materia de Derecho del Trabajo en Cuba. Actualmente cursa un programa de maestría en Penn State Law. Ha trabajado como asesora empresarial en diferentes sectores en Cuba y en particular en el sector de la inversión extranjera. Durante el periodo 2015-2016 promovida a Directora Jurídica de la sociedad mercantil de capital 100% cubano Química Internacional S.A, socio cubano de las empresas mixtas del sector de la química. Ha asesorado a titulares de emprendimiento y Cooperativas No Agropecuarias en Cuba en la ejecución de sus negocios. Contacto: [marthalena1986@gmail.com](mailto:marthalena1986@gmail.com).

<sup>2</sup> El Convenio 96/1933 de la OIT relativo a las agencias retribuidas de colocación, en el artículo primero define "las agencias retribuidas de colocación con fines lucrativos": *"...Son agencias retribuidas de colocación con fines lucrativos, toda persona, sociedad, institución, oficina u otra organización que sirva de intermediario para procurar un empleo a un trabajador o un trabajador a un empleador, con objeto de obtener de uno u otro un beneficio material directo o indirecto..."*

<sup>3</sup> El Convenio No. 181/1997 consagra el principio de que la intermediación privada en el mercado del trabajo es una actividad legítima, en tanto se modifican de manera drástica los criterios que se aplicaban a la intermediación privada en el mercado del trabajo.

Curiosamente Cuba no es signataria de ninguno de estos Convenios. Sin embargo, existe intermediación en la relación de trabajo en la isla, con mayor peculiaridad en la dimensión de la inversión extranjera; aunque el legislador cubano no reconozca su existencia, direccionándola -a su conveniencia- para salvaguardar el “sistema irrevocable socialista” cubano.

La intermediación en Cuba yace marcada por la inexistencia de un vínculo legal directo entre el empleado y el beneficiario del trabajo, que describe al inversionista extranjero. El contrato de trabajo se suscribe entre la agencia empleadora y el trabajador, en tanto esta queda obligada a “garantizar” los derechos del trabajador y “velar” porque se cumplan las obligaciones por este emanadas. Al mismo tiempo, la intermediaria suscribe un contrato mercantil con el inversionista extranjero.

En Cuba, toda modalidad de inversión extranjera que se pretenda debe negociar con la entidad empleadora, es un requisito sine qua non para consolidar el negocio. Las empresas extranjeras no están autorizadas a contratar trabajadores, aun y cuando sean trabajadores extranjeros provistos por el propio inversionista. En consecuencia, la entidad empleadora a través de un contrato mercantil para proveer fuerza de trabajo establece con el inversionista los “términos de trabajo y derechos” de sus futuros empleados.

#### **A. Inmersos en la Ley No. 118/14 Ley cubana de Inversión Extranjera**

¿Quiénes son los intermediadores bajo la ley cubana de inversión extranjera? ¿Acaso está protegido jurídicamente el trabajador en la relación de trabajo intermediada? ¿Cuáles son las garantías que posee el trabajador en esta relación de trabajo? ¿Por qué la relación de trabajo en la inversión extranjera debe ser intermediada?

Estas como otras interrogantes nos direccionan a conocer las particularidades de la intermediación en la inversión extranjera en Cuba, debiendo evaluar a priori los siguientes:

*Entidad empleadora:* entidad cubana con personalidad jurídica facultada para concertar con una empresa mixta o de

capital totalmente extranjero, un contrato mediante el cual facilite a solicitud de esta los trabajadores necesarios, quienes conciertan sus contratos laborales con dicha entidad.<sup>4</sup>

*Contrato de Suministro de Fuerza de Trabajo:* el concertado entre la entidad empleadora y la empresa, por escrito, con el objetivo de que trabajadores de la primera presten servicios en la segunda.<sup>5</sup>

*Pago de los servicios:* Cuantía que se paga por los servicios de suministro de la fuerza de trabajo.<sup>6</sup>

*Contratados:* cubanos residentes en el territorio nacional y extranjeros residentes permanentes en la República de Cuba, que formalizan su relación de trabajo mediante contrato con la entidad empleadora para prestar sus servicios en las empresas; así como los extranjeros no residentes permanentes en el país que se contratan para cubrir determinados cargos de dirección superior o de carácter técnico de alta especialización.<sup>7</sup>

*Intermediación o subcontratación*<sup>8</sup>: Categoría no definida, ni reconocida por el legislador cubano.

<sup>4</sup> Ver artículo 2 inciso i) del Capítulo II Del Glosario, de la Ley No. 118/14 Ley de la Inversión Extranjera de la República de Cuba.

<sup>5</sup> Ver artículo 3 inciso e) de la Resolución No. 33/2020 Sobre Régimen Laboral en la Inversión Extranjera, del Ministerio de Trabajo y Seguridad Social (MTSS).

<sup>6</sup> Ídem, inciso f). A los efectos de esta norma quien paga por el servicio de Suministro de Fuerza de Trabajo es el inversionista extranjero, aunque el artículo 16 establezca que este pago se acuerda entre ambas partes: la entidad empleadora y la empresa (extranjera).

<sup>7</sup> Ver artículo 3 inciso c) de la citada Resolución No. 33/2020. Entiéndase que la entidad empleadora es intermediaria además en la contratación de los trabajadores propios de la parte extranjera, es decir, es la parte extranjera quien provee a estos trabajadores, por cuanto la entidad empleadora no gestiona ningún servicio al respecto; no existe tal suministro de fuerza de trabajo, ni capacitación de estos trabajadores, sin embargo, es un mandato legal que para trabajar en cualquiera de las formas de inversión extranjera (Empresa Mixta, 100 % extranjera y Contratos de Asociación Económica) se recurra al filtro de la entidad empleadora.

<sup>8</sup> La OIT, en la reunión No. 85 de 1997 adoptó lo que más tarde se traduciría en Convenio sobre las agencias de empleo privadas y la recomendación a dicho Convenio, lo cual modificaría el Convenio No. 96/33 desfasado. Se define por “trabajo en régimen de subcontratación” cuando el trabajador en régimen de subcontratación es puesto a disposición de la

A pesar que el sistema legal cubano no reconoce existe intermediación en la relación de trabajo<sup>9</sup>, la entidad empleadora en la inversión extranjera es una intermediaria, si bien estatal<sup>10</sup>.

La relación de trabajo en Cuba en la inversión extranjera es meramente triangular-característica propia de la intermediación - entre la agencia empleadora, el trabajador, y la empresa; cual constituye la forma de inversión extranjera que resulte: Empresa Mixta, de capital 100% extranjero o Contratos de Asociación Económica.

Es imperativa la ley cubana cuando establece *“Los cubanos residentes en el territorio nacional y extranjeros residentes permanentes en la República de Cuba, para prestar servicios en la empresa, deben establecer previamente su relación de trabajo con una entidad empleadora.”*<sup>11</sup> No deja opción para que exista un vínculo directo entre el inversionista extranjero y su empleado.

La ley cubana además dispone las funciones para la entidad empleadora<sup>12</sup>. Llama la atención la de “seleccionar y suministrar” al personal que presta los servicios a las empresas; toda vez no es lo que sucede en la práctica y se denota en la contratación del personal extranjero para ocupar cargos de alta especialización. Por supuesto, como intermediaria, se limita solamente a entregarle y recibir de este los formularios

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empresa usuaria por un subcontratista o un intermediario. El intermediario designa a una persona física o jurídica que pone a disposición de una empresa usuaria trabajadores en régimen de subcontratación, sin adquirir formalmente la calidad de empleador de esos trabajadores. Sin embargo, hasta la fecha la OIT no ha publicado este proyecto de Convenio.

<sup>9</sup> No sólo la intermediación en Cuba se manifiesta en el campo de las relaciones de trabajo como forma de intervención del estado en el empleo mediante la figura de la entidad empleadora sino además en el Derecho Internacional Privado, pero no es objeto del presente.

<sup>10</sup> El Convenio No. 96/33 de la OIT, desfazado, refrendaba a este tipo de agencias en una época en la que prácticamente todas las agencias de colocación eran entidades públicas.

<sup>11</sup> Ver artículo 4.1 de la Resolución No. 33/2020 del MTSS.

<sup>12</sup> Ver Resolución No. 33/2020 del MTSS y sus antecesoras. Disponible en <https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-69-extraordinaria-de-2020>

requeridos como parte del proceso de contratación. Respecto al trabajador nacional no ocurre distinto.

Otra de sus funciones es pagar el salario al trabajador por la prestación de su servicio en la empresa. La entidad empleadora realiza el pago del salario a su personal en “pesos cubanos” teniendo en cuenta la complejidad, condiciones de trabajo y requisitos adicionales de los cargos que desempeñan.<sup>13</sup>

Dato interesante es que la empresa debe deducir este pago por concepto de salario en MLC (moneda libremente convertible) o CUC y la empleadora lo paga al trabajador en pesos cubanos, lo cual resulta de la multiplicación del monto que paga el inversionista extranjero por 2 y en la Zona Especial de Desarrollo del Mariel, en siglas ZEDM, por 10.<sup>14</sup>

En palabras del propio Ministro de Comercio Exterior, Rodrigo Malmierca Díaz, en Mesa Redonda por el ordenamiento monetario que tendrá lugar a partir del próximo 1ro de enero, lo ilustramos de la siguiente manera: *“Supongamos que por el trabajador en cuestión se pagaba 500 dólares, los que se convertían por dos...”*<sup>15</sup>.

Acorde con ello un trabajador cobraba 1000 CUP o su equivalente, 40 CUC al mes, que significarían 40 dólares por mes. Aquellos que trabajaban en la ZEDM entonces percibían 5000 CUP al mes (500x10).

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<sup>13</sup> Ídem.

<sup>14</sup> Hasta diciembre de 2020, mayormente los más de 40 000 trabajadores empleados en modalidades de inversión extranjera en Cuba recibían por concepto de salario, lo que el inversionista pagaba por la utilización de su fuerza de trabajo a la empleadora en MLC multiplicado por 2, lo cual se devengaba en pesos cubanos (CUP). Solo para aquellos que trabajaban en la Zona Especial de Desarrollo del Mariel (ZEDM) esta base se multiplicaba por 10.

<sup>15</sup> Consúltase sitio web:  
 [http://www.cubadebate.cu/noticias/2020/12/21/como-influira-el-ordenamiento-monetario-en-la-inversion-extranjera-video/#anexo-1471699].

Con el nuevo ordenamiento se prevé aplicar el coeficiente de 24 para multiplicar por el monto que el inversionista paga por el trabajador. El Ministro de Comercio Exterior refirió en mesa redonda que ahora esa base puede ser inferior para evitar la inflación, es decir que el dinero que pague el inversionista extranjero por ese trabajador disminuya, y que esto puede resultar beneficioso tanto para el trabajador como para la inversión extranjera. Esto último lo ponemos a análisis del lector.



Pero, ¿qué tajada recibía la empleadora de esa “base imponible” (\$500)? La ley establecía que las “*entidades empleadoras...reciben un valor que no exceda el 20 % de lo pactado en CUC por concepto de salario a los trabajadores*”, cuya finalidad es cubrir los gastos de la gestión de estas entidades para garantizar el suministro de la fuerza de trabajo calificada que implica su “reclutamiento, selección, formación y desarrollo”, así como un margen de utilidad.<sup>16</sup>

Entonces, la empleadora obtiene mayor ganancia que el trabajador que presta el servicio. En la misma medida, la agencia empleadora está estructurada como empresa lo que significa que cuenta con varios trabajadores<sup>17</sup>, y medios económicos para el desarrollo del trabajo. Pero ¿cuáles son esos gastos que la entidad empleadora obtiene por reclutar, seleccionar y desarrollar al personal? Si la empresa<sup>18</sup> además viene obligada a capacitar al trabajador.

Nótese que la ley dota de relevancia el empleo y función de la entidad empleadora respecto al trabajador, en lugar de protegerse a este. ¿Qué garantías entonces tendrá un trabajador en esta relación de trabajo? Si la empleadora se limita solo a hacer el pago, porque hasta los documentos requeridos para ejecutarlo (nóminas) los confeccionan los “contratados”<sup>19</sup> de la empresa. La agencia empleadora se convierte, por tanto, en lastre tanto para el inversionista extranjero como para el trabajador. ¿Por qué entonces su empleo es mandatorio?

Estamos de acuerdo en que exista una estructura para el suministro de fuerza de trabajo, pueda ser estatal o privada, para aquellos inversionistas que lo requieran ya que Cuba es un mercado desconocido. Pero, una vez que tal agencia concluya su encargo y el inversionista pague por este servicio, esta relación mercantil concluye. Se establecería entonces por vía expedita un

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<sup>16</sup> Consúltase la Resolución No. 920 de 2014 del Ministerio de Economía y Planificación. Derogada por la vigente Resolución No. 2 de 2021 del propio organismo, donde se establece que la Resolución No. 33/2020 establece que el pago por el suministro de fuerza de trabajo se acuerda entre la agencia empleadora y la empresa.

<sup>17</sup> En algunos casos pueden ser hasta mayores en plantilla que las propias formas de inversión extranjera, lo cual es un absurdo.

<sup>18</sup> Entiéndase la forma de inversión extranjera que resulte: Empresa Mixta, de Capital 100% extranjero o Contratos de Asociación Económica.

<sup>19</sup> Ver concepto *ut supra*.

Contrato de Trabajo entre el inversionista extranjero y el trabajador. De manera que, la empresa extranjera deba acogerse a las regulaciones en materia de contratación laboral del país, lo cual resultara efectivo en aras de proteger las garantías laborales del trabajador.

Por tanto, la función de la agencia empleadora en Cuba, no solo corresponde a la intermediación sino además a la *Tercerización*<sup>20</sup>; otro de los flagelos que permea las relaciones de trabajo del siglo. Estos trabajadores nunca llegan a ser empleados de la empresa, sino que permanecen en la empleadora, que es quien les paga. Entonces, si el inversionista extranjero decide sustituir a un trabajador la empleadora que desconoce su historial de trabajo, y en la mayoría de los casos al propio trabajador, está en la obligación de hacerlo.

Mario de la Cueva nos dice que “la intermediación es una actividad innoble, porque se comercia con el trabajo del hombre, para no decir con el hombre mismo.”<sup>21</sup> De esta manera el autor mexicano considera la intermediación como tráfico humano, ya que en su conceptualización se trata al trabajador como mercancía.

Es recurrente la interrogante de que estos flagelos sean parte de la dirección del “Sistema Socialista cubano”, el mismo que siempre ha condenado sus manifestaciones.

Se deja a análisis del lector otras interrogantes ¿será conveniente continuar cargando este peso en las espaldas del trabajador cubano? Si bien un trabajador de esta área obtiene beneficios que no obtienen el resto de los trabajadores en Cuba, es también sujeto del Código de Trabajo cubano. ¿Por qué entonces se limita su salario? ¿por qué intermediar su relación de trabajo? Si hoy en la mayoría de las empresas estatales y formas de gestión privadas cubanas, los trabajadores “no tienen límite” para percibir su salario o participación. La respuesta es sencilla.

Por último, hemos analizado que las agencias empleadoras son estructuras estatales empresariales que

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<sup>20</sup> También conocido como ‘Outsourcing’

<sup>21</sup> DE LA CUEVA, Mario: El nuevo derecho mexicano del trabajo.

cuentan con plantilla de trabajadores, ¿pero, qué actividad realizan?

Continuando la imposición de la agencia empleadora en la inversión extranjera en Cuba no será posible cumplimentar el llamado a preservar las “conquistas del sistema” ...No podemos continuar recargando a unos pocos y alivianar a unos cuantos...

## **B. Material consultado:**

### 1. Convenios de la OIT:

- Convenio No. 96/1933 disponible en:  
[\[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX\\_PUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:CON,es,C096,/Document\]](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,es,C096,/Document)
- Convenio No. 181/1997 disponible en:  
[\[https://www.ilo.org/dyn/normlex/es/f?p=NORMLEX\\_PUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312326\]](https://www.ilo.org/dyn/normlex/es/f?p=NORMLEX_PUB:12100:0::NO::P12100_INSTRUMENT_ID:312326)

2. Ley No. 118 Ley de la Inversión Extranjera de la República de Cuba y normas complementarias, emitida el 29 de marzo de 2014 (última fecha de actualización 7 de febrero de 2020). Disponible en [\[https://www.gacetaoficial.gob.cu/es/algunas-legislaciones-cubanas\]](https://www.gacetaoficial.gob.cu/es/algunas-legislaciones-cubanas)

3. Mesa Redonda por el Nuevo Ordenamiento Monetario. Disponible en [\[http://www.cubadebate.cu/noticias/2020/12/21/como-influi-ra-el-ordenamiento-monetario-en-la-inversion-extranjera-video/#anexo-1471699\]](http://www.cubadebate.cu/noticias/2020/12/21/como-influi-ra-el-ordenamiento-monetario-en-la-inversion-extranjera-video/#anexo-1471699)

4. Resolución No. 920 del 8 de diciembre de 2014 del Ministerio de Economía y Planificación. Disponible en [\[https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-53-extraordinaria-de-2014\]](https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-53-extraordinaria-de-2014)

5. Resolución No. 14 del 3 de julio de 2018 Reglamento sobre Régimen Laboral en la Inversión Extranjera,

del Ministerio de Trabajo y Seguridad Social de la República de Cuba. Disponible en  
[<https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-38-extraordinaria-de-2018>]

6. Resolución No. 33 del 25 de noviembre de 2020 Sobre Régimen Laboral en la Inversión Extranjera, del Ministerio de Trabajo y Seguridad Social de la República de Cuba. Disponible en [<https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-69-extraordinaria-de-2020>]

7. Resolución No. 2 del 13 de enero de 2021 del Ministerio de Economía y Planificación. Disponible en [<https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-4-extraordinaria-de-2021>]

## **Intermediating Cuban Employment Relationships: The Employment Entity on Foreign Investment**

**Lenay Martha Alvarez Vega<sup>22</sup>**

15 December 2020

Intermediation, the use and abuse of placement and employment agencies as an intermediary between workers and employers, is not a new concept nor is it typical of this century, although it is being recognized as an institution of Labor Law imprinted on the brand-new work relationships of the 21st century.

The International Labor Organization (ILO) had ruled since 1933 about this potentially damaging practice, through the adoption of two Conventions such as Convention No. 96 relative to employment agencies<sup>23</sup>, and Convention No. 181<sup>24</sup> in 1997.

Curiously, Cuba did not sign any of these agreements. However, Cuban employment relationships on the foreign investment area are imprinted by intermediation; although the Cuban rule maker has determined a new brand to design and

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<sup>23</sup> The ILO Convention 96/1933 relative to paid placement agencies, in the first article defines "paid placement agencies for profit purposes": "... They are paid placement agencies for profit purposes, every person, society, institution, office or other organization that acts as an intermediary to procure a job for a worker or a worker for an employer, in order to obtain from one or the other a direct or indirect material benefit ... "

<sup>24</sup> Convention No. 181/1997 establishes the principle that private intermediation in the labor market is a legitimate activity, while the criteria applied to private intermediation in the labor market are drastically modified.

"distinguish" it from its manifestation of the capitalism, directing it- at its convenience- to safeguard the Cuban "irrevocable socialist system".

Intermediation in Cuba is characterized by the lack of a legal nexus between the employee and the company. The employment contract is signed between the intermediary agency and the worker, insofar as the latter is obliged to guarantee the rights of the worker and ensure that the obligations arising from the latter are fulfilled. At the same time, the intermediary should sign a commercial contract with the foreign investor.

Any sort of foreign investment in Cuba must be negotiated with the employing entity, it is a *sine qua non* requirement to get the business. Foreign companies are not authorized to hire workers, even if the own foreign investor provides them. Consequently, the employing entity, through a commercial contract to provide workforce, establishes with such investor the "terms of work " to his future employees.

### **The Cuban Foreign Investment Law**

Who are the intermediaries under Cuban Foreign Investment Law? Will the worker be protected on this employment relationship? What about the guarantees the worker has? Why should the Cuban employment relationship in the foreign investment area be mediated?

To address these issues and identify how the intermediation in Cuba foreign investment is, first, we must evaluate the following:

*Employing entity:* Cuban entity with legal personality empowered to enter into a contract with a mixed company or wholly foreign capital, by means of which it provides the necessary workers at its request, who conclude their employment contracts with said entity.<sup>25</sup>

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<sup>25</sup> See article 2 subsection i) of Chapter II of the Cuban Foreign Investment Law Glossary.

*Workforce Supply Contract:* The one agreed by writing between the employing entity and the company, to provide workers by the former for the latter.<sup>26</sup>

*Payment of services:* Amount paid for the workplace supply services.<sup>27</sup>

*Workers Hired:* Cubans residing as well as foreigners' permanent residents in the Republic of Cuba, who formalize their employment relationship through a contract with the employing entity to provide their services to the companies; as well as foreigners who are not permanent residents in the country who are hired to fill certain positions of superior management or of a highly specialized technical nature.<sup>28</sup>

*Intermediation or subcontracting:* Category not defined, nor recognized by the Cuban rulemaker.<sup>29</sup>

Cuban legal system does not recognize the intermediation in its employment relationships. According to the foregoing, the employer entity for foreign investment in

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<sup>26</sup> See article 3 subsection e) of Regulation No. 33/2020 About Labor Regime in Foreign Investment, issued by Cuban Labor and Social Security Minister (MTSS). available <https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-69-extraordinaria-de-2020>.

<sup>27</sup> *Idem*, subsection f). Of course, for the purposes of this rule, the person who pays for the Labor Force Supply service is the foreign investor, although article 16 establishes that this payment will be agreed between both parties: the employing entity and the (foreign) company.

<sup>28</sup> See article 3 subsection c) of the aforementioned Regulation No. 33/2020. The employing entity becomes also an intermediary to hire workers provided by the foreign investors. In other words, the employing entity does not manage any service in this regard. There is no such supply of labor force, nor training of these workers; however, the foreign investor has to pay for this service because the Cuban law imposes the use of the employing entity.

<sup>29</sup> The ILO, at meeting No. 85 of 1997, adopted what would later become the Convention on private employment agencies and the recommendation to that Convention, which would modify Convention No. 96/33 out of date. It is defined as "subcontracted work" when the subcontracted worker is made available to the user company by a subcontractor or an intermediary. The intermediary designates a natural or legal person who make subcontracting workers available to a user company, without formally acquiring the status of employer of those workers. However, until now the ILO has not published this draft Convention.

Cuba is an intermediary, but a state one, because it is only exercised by an "authorized" government entity.<sup>30</sup>

The employment relationship in Cuban foreign investment area is merely triangular between the employing agency, the worker, and, the company. The company will be the form of the foreign investment applied: joint ventures, 100% foreign capital or Economic Association Contracts.

The Cuban law is imperious establishing that "Cubans residing in the national territory as well as foreigners permanently residing in the Republic of Cuba, to provide services in the company, must previously establish their employment relationship with an employer entity."<sup>31</sup>

It does not leave any choice to be a bilateral one between the foreign investor and the worker. Nor for a natural person to manage this service, as provided by the ILO.

The Cuban law also provides the functions of the employing entity.<sup>32</sup> It is noteworthy that "select and supply" staff that provides services to companies is listed; since it is not what happens in practice; one example of this, it is when hiring of foreign personnel to occupy highly specialized positions. In this case, the employment agency only does deliver and receive from those workers the required forms as part of the hiring process. However, the foreign investor must pay for the workforce service, even though the employment entity has done nothing. Regarding the Cuban worker's hiring process occur the same thing.

The employment agency also has to pay the hired worker.<sup>33</sup> Cuban law establishes that the employing entity makes the payment to its employees in "Cuban pesos" (CUP) taking into account the complexity, working conditions and additional requirements of the positions they hold.

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<sup>30</sup> The outdated ILO Convention No. 96/33 endorsed this type of agency at a time when practically all employment agencies were public entities.

<sup>31</sup> See article 4.1 of Regulation No. 33/2020 of the MTSS.

<sup>32</sup> See Regulation No. 33/2020 and its predecessors; available <https://www.gacetaoficial.gob.cu/es/gaceta-oficial-no-69-extraordinaria-de-2020>.

<sup>33</sup> See *Ibid*.



One interesting fact is that the company must pay for the workforce service<sup>34</sup> to the employment entity in MLC (freely convertible currency), and, the employment agency makes the payment the hired workers in Cuban pesos, which reaches multiplying the amount got from the foreign investor by 2. However, that amount is multiplied by 10 in the Mariel Economic Development Zone (ZEDM).<sup>35</sup>

The Cuban Foreign Trade Minister, Rodrigo Malmierca Diaz, explained it in easiest way in a roundtable for the monetary changes that will take place next January 1: *"Suppose that the worker in question was paid \$ 500 (dollars), those who were converted by two..."*.<sup>36</sup>

Following this example, a person working in foreign investment area get 1000 CUP (Cuban pesos), which would mean \$ 40 (dollars) per month. Those who worked at the ZEDM then received 5000 CUP per month (500x10).

The question is what do the slice the employment agency receive from that "taxable base" (\$ 500)? The Regulation No. 920<sup>37</sup> of 2014 issued by the Cuban Economy and Planning Ministry established that the "employing entities ... receive a value that does not exceed 20% of what was agreed in CUC for workers' salaries", whose purpose is to cover expenses of the

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<sup>34</sup> This payment is all included applying to the worker wages as well as the workforce service.

<sup>35</sup> Until December 2020, most of 40,000 workers employed in foreign investment modalities in Cuba received as wages, what the investor paid for the use of their workforce to the employer in MLC multiplied by 2, which it was accrued in Cuban pesos (CUP). Only for those who worked in the Mariel Special Development Zone (ZEDM) this base was multiplied by 10.

<sup>36</sup> See site: <http://www.cubadebate.cu/noticias/2020/12/21/como-influira-el-ordenamiento-monetario-en-la-inversion-extranjera-video/#anex-1471699>.

With the new regulation, it is expected to apply the coefficient of 24 to multiply by the amount that the investor pays for the worker. The Cuban Foreign Trade Minister said in a roundtable that may be that base will be lower to avoid inflation, that is, the money paid by the foreign investor for that worker decreases, and that this can be beneficial for both the worker and the investment foreign. We put this last part for the reader's "analysis".

<sup>37</sup> Repealed by the Regulation No. 2 of January 13, 2021, of the Cuban Economy and Planning Minister. With the validity of Regulation No. 33/2020, payment for the supply of workforce is agreed between the employing entity and the company (article 16).

management of these entities to guarantee “the supply of the qualified workforce” that implies its “recruitment, selection, training and development”, as well as a profit margin.

Therefore, the employment agency earns more money than the worker who performs the work in the company. It is important you know that the employment agency is structured as an enterprise significantly with a lot of workers, who have to their reach many resources; even, this type of structure would be greater in staff than the company, which is irrational.

Moreover, how much the employment agency spends to recruit, select and develop staff? Because the Cuban law also requires that the company train “their workers”.

The Cuban law places the employment agency at the center of this relationship, instead of protecting the worker. So, what guarantees could a worker have in this employment relationship? Usually, the employment agency only makes payment, even the paperwork required to execute the payment (payroll) are made by the company's “hired workers.”<sup>38</sup>

There is no doubt that the employing agency becomes a burden for both the foreign investor and the worker. Then, why the use of the employment agency in Cuba foreign investment becomes mandatory?

We agree that there may be an employment agency, which may be state or private entity, for those investors who require the workforce supply because Cuban market is unknown. According to, when agency concludes its commission as well as the investor pays for that service, their relationship ends. Therefore, a direct link would be established between the foreign investor and the worker.

The role of Cuban employing agency not only match to intermediation, but also to *Outsourcing*, which is another of the scourges affecting labor relations of this century. These workers never become workers of the company. Thus, if the foreign investor wants to substitute a worker, the employment agency is obliged to do so.

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<sup>38</sup> See definition *ut supra*.

MARIO DE LA CUEVA, Mexican author, in his work *The New Mexican Labor Law* points out that "intermediation is an ignoble activity, because it deals with the work of man, not saying with man himself." He considers intermediation as human trafficking, since in its conceptualization the worker is treated as a commodity.

A question is recurrent when this kind of scourge is part of the leadership of the "Cuban Socialist System", who always have condemned the manifestation of these scourges.

It begs questions: will it be convenient to continue carrying this weight on the Cuban worker's back? In spite of, this worker is highly rewarded in comparison with the rest of the workers in Cuba; however, they also are subject to the Cuban Labor Code. Why their remuneration is restricted? Why their employment relationship is in-between? Nowadays, in most state companies and private management enterprise in Cuba, workers have no "limit" to receive their wages or participation. The answer is simple.

Finally, the employing agencies also have workers, but what about their work? With the obligation to use the employing agency on foreign investment in Cuba, it will not be possible to fulfill the call to preserve the "successes of the Cuban system" ... You cannot do overweight on a few people to relieve a lot of them...

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## C. Essays

### **Policy as an Oscillation With the Illusion of Progress in the United States, China, and Cuba**

**Larry Catá Backer<sup>1</sup>**

This short essay centers on the issue of political oscillation and systemic integrity on the character of policy choices (as oscillations or “progress” and the effects of using system tools in new and innovative ways on the fundamental ideology and operating forms of systems. Just as policy oscillates within constraints framed by systems--so that what appears as progress might be better understood as oscillations among plausible positions within ideological boundaries--the use of the operating rules of the system can also bring oscillations in the character (and thus the underlying ideology) of the system in which they are used. “Law, like politics, and the constitution of states, exists simultaneously as fabricated for public consumption, and as arranged for private advancement. In this sense, Jean-François Lyotard reminds us that a ‘subject, [which] is whatever constitutes itself,’ grows fangs.”<sup>2</sup>

As the American elections of 2020 suggested--once one gets through the utterly banal commentary that accompanies it--states work hard to provide the illusion of progress where in reality each operates within a quite narrow band of policy choices, toward the edges of which they oscillate as context and

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<sup>2</sup> Larry Catá Backer, “Foreword: Constituting Nations--Veils, Disguises, Masquerades,” *Penn State Int’l L. Rev.* 20(2):329, 330 (2002).

circumstance dictates. The Americans have just undergone a series of oscillations, first toward American exceptionalist universalism from 1993 through 2016 and then toward American singular universalism in the period that began in 2016, and which will likely remain a potent policy baseline through the first term of the incoming Biden (and more likely Harris) administration.

Those oscillations leave intact American exceptionalism, to be sure (though the source of irritation among its subordinate units globally appears from different vectors depending on whether one must endure Americans as the embodiment of the “*universal person*” or Americans as the embodiment of the “*perfected global individual*”). But the oscillation provides enough difference to permit embrace of the illusion of change. Now one must prepare (again) for that “other face” of American domination led by those elites whose extraordinary grumpiness at having themselves kicked out of power in 2016 (for a little while) will require readjustment internationally (after a short period of revenge taking), one no less intent on getting its own way than the one that will be abandoned (for a little while) after January 2021 (though not its substance).

For 2020, that path toward a managed oscillation requires the marketing techniques of television--one starts with a political replication of “*The Bachelorette*”<sup>3</sup> and ends with a segment of a banal lawyer drama discussed by a group of people whose greatest assets are their celebrity. We then move back to a four year run of *Survivor*.<sup>4</sup> But then the performance of American democracy is now instructed by its television shows, which better reflect current values and cultural norms than

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<sup>3</sup> The “*Bachelorette*” is a romance reality show, produced by ABC in which a woman, the star of the series, selects the bachelor with whom she would like to pursue a relationship. The process takes many episodes involving contests and interviews through which she (and the audience sometimes) participate in winnowing down the initially large number of bachelor contenders to two from which she selects one. Here the object is to win favor. See ABC Webpage, “*The Bachelorette*,” available [<https://abc.com/shows/the-bachelorette>].

<sup>4</sup> “*Survivor*” is a reaty based television series produced by Paramount and distributed through CBS, in which a group of diverse individuals are located to a site (which varies from show to show) during the course of which they compete in challenges and are selectively voted off the game until one winner emerges. Here the object is to undermine and destroy competitors through fragile alliances and subterfuge. See CBS webpage, “*Survivor*,” available [<https://www.cbs.com/shows/survivor/>].

whatever comes out of the pious mouths and impious actions of those who once led but must now compete within the political framework of mass entertainment.

Still both have proven useful and extraordinarily influential--they served as the template for the construction of the Chinese Leninist variation that is much in evidence in the world today, especially through Chinese international universalism in international public organizations and Chinese private Leninist (communist) internationalism through the Belt and Road Initiative. Communist internationalism does present differently and thus the oscillations acquire a somewhat different character than their American "twin." The oscillations tend to focus on two things, the first is the character and functioning of the core of leadership within a vanguard party and the other the extent to which there is an identity between the vanguard (and its objectives) and the functioning of society over which it has authority. One end tends to produce a "reform and opening up" and "emancipating the mind" as the equivalent to the American universal person (but here with Chinese characteristics); China dominant but in the world. The other tends to "put the Party at the center" and suspicion of the "black hand of foreign interference" that is the equivalent of the American perfected global individual; China dominant but alongside the world.

These are important oscillations and worthy of some measure of monitoring and response. But most other states have tended to take their cues from the way that dominant states perform (and frame) politics. That is the case with Cuba. Since the disappearance of its last great Soviet master state (having undergone much longer oscillations among imperial masters, first Spain, and then the United States and lastly the Soviet Union, an oscillation that also merits substantial study for the mark it left on Cuban, even Marxist Leninist) political classes) Cuban leaders have carefully oscillated between two quite predictable policy poles to suit time and context.

In the case of Cuba the oscillation tends to focus on the great peculiarity of the Cuban political economic model--its relationship to markets and thus to the way it engages with its non-state sector. When times are good, or when there is fear of outside (e.g., US threats to overwhelm the state as was the case



during the last years of the Obama Administration), the state oscillates toward a rejection of markets and of the autonomy (strictly controlled) of the private sector. In crisis however--during the period after the loss of their imperial master in the 1990s, and in the shadow of pandemic now, Cuban policy oscillates toward a greater tolerance of markets and of the autonomy of the private sector (controlled but less strictly and a greater willingness to look the other way--e.g. as a strategically lax enforcement policy).

Communist-run Cuba will allow farmers, private traders and food processors to engage in direct wholesale and retail trade as long as farmers meet government contracts, state media reported on Friday. The government will also loosen some price controls and delegate others to local officials' discretion. The measures do away with the state's monopoly on produce distribution and sales and are part of a series of policy changes in the sector approved by the Council of Ministers amidst a growing food crisis. Similar market-oriented reforms were adopted by the Communist Party a decade ago after a lengthy popular discussion, then reversed in 2016 with little explanation.<sup>5</sup>

Thus the oscillation. And again the misreading. People (especially talking heads and other analysts) will see in this or project onto it some of trend line toward some sort of progress that will produce transformation. It will not. It is an oscillation that is both measured and designed to produce that sort of illusion. These align with a number of pother policies announced in the last several months--all designed to take the burden off that state in a context in which the state is unable (temporarily) to bear it, but which preserves the fundamental structures so that as necessary, a reversion may be attempted.

Still even controlled oscillation never brings us back to the same place but rather like the oscillation of a pendulum moves use to a place different enough that other possibilities--within systemic constraints--may become apparent. And it is in the taking advantage of those that really interesting statecraft

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<sup>5</sup> Marc Frank, '[Cuba loosens state monopoly on food sales amid crisis](https://www.reuters.com/article/cuba-economy-reform-idUSL1N2HS132)' Reuters 6 Nov. 2020); available [https://www.reuters.com/article/cuba-economy-reform-idUSL1N2HS132].

follows. And that is where the challenge and opportunity lies in systems of these kinds--not just in imperial systems like those of the United States and China, but in subaltern systems like that of Cuba. Oscillations stress the structures within which they occur. In ordinary terms, they pose a risk to the integrity of the system and its smooth operation. Pushing structural elements of systems to their limits eventually breaks them. One wonders whether that is the case in the United States since 2000 and in China since 2013, and in Cuba since the 1990s. In each of those cases factions push the limits of structural flexibility by deploying structural elements.

The history of the Roman Republic reminds us that any constitution, even that of a venerable republic, can be transformed without the benefit of an amendment. Such a transformation may so reshape a republic that it begins to function as a monarchy in everything but name. But the political transformation of a polity can be masked. The most easily fashioned mask consists of the forms of the superseded political systems. Totalitarian dictatorships can masquerade as democracies by maintaining democratic institutions, such as legislatures and judiciaries, which are under the control of the ruling group. The early Roman Empire retained the institutional forms of the Republic even as power was transferred to the imperial household.<sup>6</sup>

The vanguard factions of the three states have learned much about the use of systemic tools to undermine the ability of opposing factions to govern and to advance their own interests. These lessons have no ideology; nor do the tools developed by the factions holding authority in each regime (or through their societal networks and narrative spinning organs). That creates an interesting set of parallel movements. On the one hand, the policy oscillations of states continue to swing within the borders of system constraints, and each swing continues to suggest linear progress (toward some goal) or the embrace of the correct alignment of policy and ideology.

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<sup>6</sup> Larry C. Backer, Race, "The Race," and the Republic: Re-conceiving Judicial Authority After *Bush v. Gore*, *Catholic University Law Review*. 51:1057, 1060 (2002).

That is the most interesting question--whether contained policy oscillations will also produce stresses on the form of government through which the oscillations are managed. As each of these states utilizes its structural mechanics (litigation, information management through platforms and news media), party organization and discipline, and societal control levers) to advance factional interests, it is to the long term effects of the utilization of these tools on the character of the political economic model that is worth serious consideration. The evolution of political tools all bear watching as the global New Era continues to reveal its characteristics. This is certainly an old political story, but one the lessons of which require retelling, especially at stress points in historical development--as are now occurring in the US, China, and Cuba (my three examples of a wider phenomenon). "Now the corruptions attending each of these governments are these; a kingdom may degenerate into a tyranny, an aristocracy into an oligarchy, and a state into a democracy. Now a tyranny is a monarchy where the good of one man only is the object of government, an oligarchy considers only the rich, and a democracy only the poor; but neither of them have a common good in view. "<sup>7</sup>

In the United States the stress toolkit has become more sophisticated with a greater potential for destabilization. Some that come to mind: (1) an overtly political press sector that then seeks to both project its power in politics as an autonomous actor while claiming constitutional privilege for its role in civic life (the New York Times and New York Post were interesting examples); (2) platforms overseen by private sector institutions and individuals with a substantial power to shape narratives and perceptions by their control of platform inputs and outputs (including notoriously Twitter and Facebook); (3) the increasing and accelerating trend toward judicialization of administrative decision making and the parallel trend of subjecting political decision-making to the discretionary limitations of administrative organs ; (4) the use of state security organs for investigations (from the end of the Obama administration through that of Mr., Trump and likely going forward); (5) the utility of impeachment as a juridico-political

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<sup>7</sup> Aristotle, *Politics* (William Ellis, trans., original publication London: JM Dent & Sons, 1912; Project Gutenberg June 5, 2009 [EBook #6762] (before 322 B.C.)); available [https://www.gutenberg.org/files/6762/6762-h/6762-h.htm#link2HCH0032] at Book III, Chp. VII.

tool; (6) the use and misuse of the executive order (tied of course to its counter thrust, the judicialization of administrative decision making No. 3 above); and (7) the legitimization of essentialist and reductionist politics.

In China the stress toolkit centers on the mechanics of vanguard working style. Unlike the United States, China has recently experienced the instability that is produced when the system is used against itself and is more conscious, in this case of avoiding the instability of the 1960s. Outside the Communist Party apparatus--(1) the administration of consultative democracy, especially through United Front and the Chinese Peoples' Political Consultative Conference (CPPCC) organs; (2) the role of the National People's Congresses at the national and provincial levels.; and (3) deviation Within the CPC apparatus--(1) democratic centralism, communist internationalism, (2) anti-corruption campaigns; (3) core leadership principles; (4) rectification campaigns and purges.

In Cuba the stress toolkit is simpler but no less potent. These include the relationship between the state and party apparatus; the mechanics and abuse of the consultation process; and the abuse of bureaucratic process (beyond the usual tolerable levels, at least from a historical perspective). The rest is endemic--corruption, risk aversion, and paralysis driven by the high cost of mistakes treated as ideologically sensitive. The risk in Cuba is different as well--distortion threatens not just the Part's working style but the viability of the Party as well. The recent oscillations in the Cuban economic-political model, culminating in the reforms announced in the Autumn of 2020 provide a good illustration of the point.

One of the great markers of the Cuban political economic model was its tight control of the non-state sector. Though much of the propaganda directed toward the hopeful and gullible masses in liberal democratic states (and especially its intelligentsia) was carefully drafted to suggest (but not declare) an embrace of market and market oriented principles, the reality has been much more aligned with the quite clear strictures of the Cuban Communist Party's (PCC) political economic model adopted during its 7th PCC Congress in 2016. The conceptual blueprint for the Cuban political economic model has been widely distributed in the form of its *Conceptualización del modelo económico y social Cubano de*

*desarrollo socialista: Plan nacional de desarrollo económico y social hasta 2030: Propuesta de vision de la nación, ejes y sectores estratégicos*<sup>8</sup> and its embrace of central planning (along with the fundamental distrust of markets as an economic-political ordering mechanism) as the operative form of macroeconomic and politically driven planning has been advanced strenuously even in the face of challenges.<sup>9</sup>

But the collateral effects of the COVID-19 pandemic has produced a challenge of a substantially different character for the Cuban political-economic model and its conceptual basis elaborated in its *Conceptualización del modelo económico y social Cubano*.<sup>10</sup> The economic effects of the pandemic has affected key sectors of Cuban economic planning through 20230. The most acute effects have been felt in the tourist sector; but that direct effect has produced substantial secondary effects as well. The absence of tourism affects not only direct employment and investment, but it also affects business (state and non-state sector) dependent on tourism, from house renting to dining to guides, trinket sales and the more importantly the domestic sale of "signature" Cuban products (liquor, cigars, art, etc.).

While the pharma sector has benefited, the economic rather than the political benefits of medical research that is COVID related has yet to be assessed. The same is true of Cuba's medical internationalism. While the political benefit of the provision of medical staff outside of Cuba has brought some positive political benefits, it is not clear that the overall economic effects have been enough to dent the shortfalls from other economic sectors (and this is particularly the case where some of the provision of medical services may have been done at reduced at no cost to the recipient territory).

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<sup>8</sup> *Conceptualización del modelo económico y social Cubano de desarrollo socialista: Plan nacional de desarrollo económico y social hasta 2030: Propuesta de visión de la nación, ejes y sectores estratégicos*; available [<http://www.thecpe.org/wp-content/uploads/2016/05/Conceptualizacion-del-modelo-economico-PCC-Cuba-2016.pdf>].

<sup>9</sup> See, Larry Catá Backer, "Central Planning Versus Markets Marxism: Their Differences and Consequences for the International Ordering of State, Law, Politics, and Economy," *Connecticut Journal of International Law* 32(1):1-47 (2017).

<sup>10</sup> *Conceptualización del modelo económico y social Cubano de desarrollo socialista*, supra.

When one adds difficulties in remittances from abroad and the increasing financial requirements on the state to provide for food, water, and services scarcities, the pressure on the Cuban state--again one that has banked on central planning and a tightly controlled non-state sector--has become enormous. In response, Cuba has begun--officially--to adopt a number of reforms (discussed in the recent Conference of the Association for the Study of the Cuban Economy (ASCE)).<sup>11</sup> Part of the reforms are meant to make a little easier the ability of non-state sector businesses to obtain materials and funds.<sup>12</sup>

One of the more interesting developments has been the much trumpeted decision by the state to eliminate one of the key structures for the control of the private sector--the requirement that all private activity be licensed, coupled with the control of the sort of economic activity that could be licensed (e.g., if there is no license for an activity, it may not be undertaken except by state organs). The system of private activity licensing in its current forms is at least a decade old and closely tied to the *Lineamientos* (Guidelines) which were developed by the PCC to chart a pathway to reform (which after 2016<sup>13</sup> was to be further constrained by the principles of the

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<sup>11</sup> "Destrabando" the Cuban Economy: An Assessment of Reforms and the Road Ahead" and the Carlos Díaz Alejandro Lecture--"Racism with Equality? Measuring Racial Inequality in Cuba, 1980-2010"; Today's Program for the Conference Cuba From the Castros to COVID," Law at the End of the Day (14 August 2020); available [https://lbackerblog.blogspot.com/2020/08/destrabando-cuban-economy-assessment-of.html]. See also José Antonio Alonso and Pavel Vidal on "La Reforma Económica en Cuba: Atrapada en el Medio" (Working Paper Foro Europa-Cuba; November 2019)," Law at the End of the Day (17 December 2020); available [https://lbackerblog.blogspot.com/2019/12/jose-antonio-alonso-and-pavel-vidal-on.html].

<sup>12</sup> Andrea Rodríguez, "Economy Tanking, Cuba Launches Some Long-Delayed Reforms," ABC News (6 August 2020); available [https://abcnews.go.com/International/wireStory/economy-tanking-cuba-launches-long-delayed-reforms-72212581] ("the government last month announced that it would allow private restaurants to buy wholesale for the first time. Ministers also announced that private business people could sign contracts to import and export goods through dozens of state-run companies with import/export licenses.").

<sup>13</sup> *Lineamientos de la política Económica y social del Partido y la Revolución para el período 2016-2021*; available [http://www.granma.cu/file/pdf/gaceta/Lineamientos%202016-2021%20Versi%C3%B3n%20Final.pdf]. The *Lineamientos* are a moving

*Conceptualización del modelo económico y social Cubano.*<sup>14</sup> It was meant to retain effective state control of the non-state sector will effectively devolving operational tasks (at the lowest levels of consumer goods and services) to individuals. The licensing system proved difficult to enforce and resulted in substantial "work around" tolerated by the state but often subject to campaigns against abuse, wealth accumulation, corruption, etc.

My very brief observations:

(1) there is a wide gulf between announcement and rolling out, which is nebulously planned for the future and in (slow?) stages;

(2) it is not clear how much regulatory impediments will be built into the new structures for private sector operation (if the model of foreign investment is any guide, the bureaucracy around this reform may be formidable. . . and expensive);

(3) it is not clear what sectors of the economy will be roped off from private sector permitted activities;

(4) the ability of foreigners to invest in the private sector enterprises is not clear;

(5) the nature of aggregations of capital or labor that may take advantage of the reforms has not been specified with any clarity, the official suggested that small enterprises and labor Coops would be the focus;<sup>15</sup> and

(6) the extent of monitoring and approval of specific activities has yet to be determined (that is the extent to which

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target; they have been modified several times since its initial version to reflect changes. They can serve as a barometer of official taste (aspirational of course) for change.

<sup>14</sup> *Conceptualización del modelo económico y social Cubano de desarrollo socialista*, supra. See also "Under Cover of the Sonic Weapons Attack: The Cuban Private Sector as Collateral Damage as Cuba Retreats Toward Central Planning)," *Law at the End of the Day* (24 December 2017); available [https://lcbackerblog.blogspot.com/2017/12/under-cover-of-sonic-weapons-attack.html].

<sup>15</sup> On Cuban labor cooperatives, see, e.g., Larry Catá Backer, "The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba," 33 *Northwestern Journal of International Law & Business* 33:527 (2013).

the newly opened private sector must still report on its business planning, pricing, and sales models to obtain approval before they can proceed) though it is clear that there will be monitoring and approval processes imposed.

As is most Cuban economic reforms, it is the detail rather than the broad statements that merit substantial attention. The broad statements serve political ends; the details serve economic ends--and it remains to be seen the extent to which the reforms remain, in their details, consistent with the *Conceptualización del modelo económico y social Cubano*.<sup>16</sup> However, it is this connection with the ideological foundations of the Cuban political-economic model, as well as the strong connection between quite specific patterns of implementation and the reform announcements that will be missed by many who treat these reforms as if they were being announced by the Government in Paris rather than in Havana.

Taken together one might consider that the great changes in leadership (or their failure to change), those events by which systemic and policy changes are judged and measured may be less useful in recognizing and gauging either. Policy changes express the plausible; but the techniques to push that oscillation beyond its traditional limits affects not just the amplitude of oscillation but also the integrity of the system. Or better put it transforms not just policy but the normative premises and working style of the system itself. Thus it might be more useful to judge great changes in a political-economic model not by the obvious, changes in policy that are predictable and in line with factional lines. Instead changes to the mechanics of a system by using its methods against itself provide a better basis for measuring change.

Now may be the time to get those measuring sticks out - -not to judge changes in the policies of these three states, but to measure the way that these policy changes evidence the more profound oscillation in the character of the political-economic model. And those oscillations are best gauged, not by social scientists and their invocations of the deities of data and analytics, but by watching carefully the way that politics imitates popular culture and the way that popular culture

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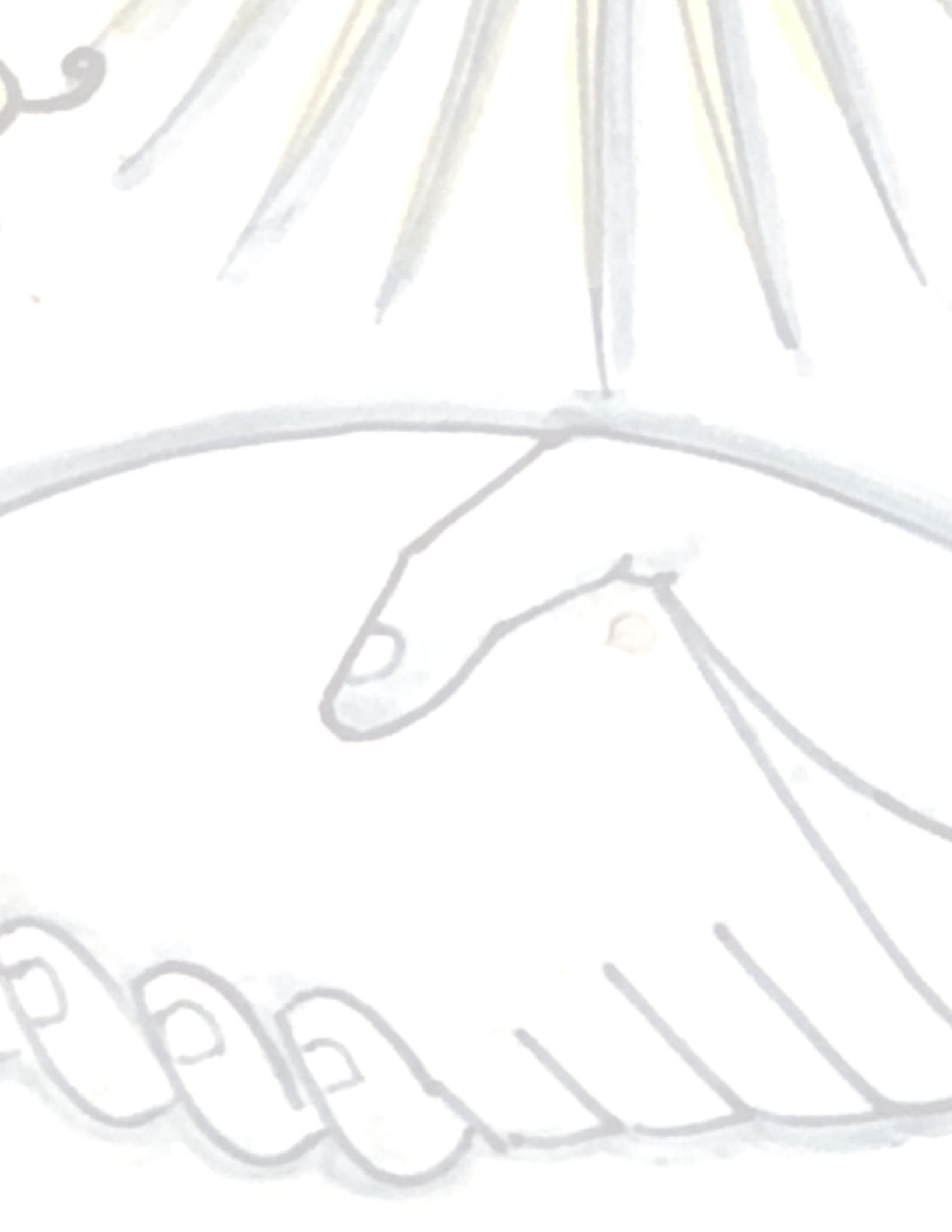
<sup>16</sup> *Conceptualización del modelo económico y social Cubano de desarrollo socialista*, supra.



mimics politics in a dialectic that is more revealing than any model produced through the reductionism of modelling.

This is not a new phenomenon, certainly, but technology has made its creation and diffusion far more pervasive and powerful. In China, Cuba, and the United States, it is to television rather than the televised performances of political actors (the term is deliberately used in all its senses here) from which one ought to extract the politics of a state. That is what the American election of 2020 teaches (as well as its run up) reminds us today; China and the Cubans follow with national characteristics.

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# EMANCIPATING THE MIND IN THE NEW ERA

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