



COALITION FOR
PEACE AND ETHICS

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Working Group on the issue of human rights and
transnational corporations and other business enterprises
Palais des Nations
1211 Geneva 10
Switzerland

Re: Response to Call for Inputs Connecting the business and human rights and anti-corruption agendas

To the Members of the Working Group:

CPE, founded in 2006, is an independent, non-partisan, research and information focused collective. CPE serves as an institutional environment for an ideology free, non-partisan and independent investigation, analysis, scrutiny, research, inquiry, examination, and practice of peace and ethics. To that end, CPE encourages and supports boundary-pushing, multi- and interdisciplinary research that advances an understanding of issues relating to peace and ethics studies, including issues of constitutional governance, globalization, public and private economic activities and their social, cultural, economic, religious and political impacts. CPE also serves as a forum for the discussion of issues of peace and ethics as they affect individuals, governments, religion, business, and other organizations. Among its current projects are a deep engagement with the effort to elaborate an international instrument on business and human rights, the engagement of Marxist-Leninist systems with UN human rights norm making, and the further elaboration and development of the UNGP.

The Coalition for Peace and Ethics (CPE) refers to the “[Multi-stakeholder Consultation and Call for Inputs](#)”¹ document circulated in January 2020. CPE understands that in its report to the 44th Session of the Human Rights Council (June 2020), the Working Group on Business and Human Rights will seek to clarify how corruption involving the private sector impacts rights holders in terms of corruption being linked to, causing or contributing to human rights abuses. We further understand that the object of the Working Group’s examination centers on the way in which the “business and human rights agenda” (understood as articulated in the UN Guiding Principles for Business and Human Rights (UNGPR)) and “anti-corruption efforts” relate to each other. The goal of the Working Group, as we understand it, is to demonstrate how the two “agendas” can reinforce each other to further “policy coherence” (an important principle of the UNGPR, and, perhaps more importantly, what that move toward coherence “implies for government, civil society[...-] and business action. But more than the, the Working Group means to “address how the anti-corruption field can be further strengthened and aligned with the “Protect, Respect and Remedy” pillars of the UN Guiding Principles.” In addition to a consultation held 6 February 2020 at the Palais des Nations, the Working Group requested “written inputs from all stakeholders to inform the drafting of the report to the Human Rights Council by 21 February 2020” guided by ten questions it posed in its “[Multi-stakeholder Consultation and Call for Inputs](#)” document.²

¹https://www.ohchr.org/Documents/Issues/Business/WG/Call/Final_call_for_inputs_Consultation_WG_BHR_25th_session_EN.pdf.

² Ibid.

The following inputs offered by CPE are organized around the ten questions posed by the Working Group. Each question is reproduced below followed by our input.

1. What are the key areas where corruption causes, contributes or is linked to human rights abuses and negative impacts for right holders? Are there key sectors or key areas where corruption leads to human rights abuses with a business nexus (For example in particular actors or in specific areas such as large-scale land acquisitions or government procurement)?

Kofi Annan, in his foreword to the 2003 UN Convention Against Corruption, noted: “Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.” (p. iii) The CPE notes that a certain level of sloppiness contributes to the current discussion about corruption in general, and more specifically about its application to the principles, duties, responsibilities and remedial obligations of state and other actors within the UNGP framework. It is therefore necessary to unpack the concept of corruption before one can, with any degree of confidence, apply it to the discussion of the duties and responsibilities of states and other actors engaged in economic activity.

Corruption as a Moral or Legal Concept/Construct:

Before one can engage in any substantive discussion of alignment, nexus, relation or coherence, it is necessary to identify the aspect of the concept of corruption that the Working Group intends to use—and to be transparent about that choice. The failure to be clear *ab initio* may produce ambiguity substantial enough to impede clarity in the construction and implementation of policy. To start, it might be worth considering whether, for purposes of the Working Group’s objectives, it is necessary to determine whether it is premising its analysis on *corruption as a moral concept or as a legal concept*.

If the analysis is grounded on *corruption as a moral concept*, the premise necessarily requires a further identification of the specific ideological, political, or cultural baseline to which the morality adopted is tied. That moral baseline ought then to be identified (and defended). In that light CPE believes it useful to recall that the origins of the word corruption are intensely contextual. CPE suggests the value of recalling that the origins of the word lie in notions of spoliation, of putrefaction, of spiritual contamination, depravity, seduction, bribery, and wickedness. Yet it is more than that as a moral matter—corruption also touches on what is hidden, the opaque, the unseen advantage that is unseen and thus the commission of a fundamental deceit against the social order. One enters here a world of dishonesty and of breaking the taboos on the basis of which society is (or interpersonal relationships are) organized. Corruption is the way in which a community identifies its taboos, and the fundamental threat that they pose for the social order. It is in this context that one can understand the centrality of notions of integrity and accountability built into legal instruments (e.g., UN Convention Against Corruption (2004), Art. 1 (c)), but one that then is related only to those moral judgments to which all consenting parties agree around notions of the “illicit acquisition of personal wealth” (Ibid., Preamble).

To understand that meaning, however, is to accept that the concepts around which the meaning of corruption is constructed are all terms of judgment intimately connected to the moral, ethical, political, and cultural systems within which such judgments are both possible and sensible. Specific acts are corrupt only

if they are socially identified and socially condemned. To indulge in such core judgment premises without exposing the moral system within which such judgments are made is to expose the efforts that follow to challenge for their legitimacy (as well as their relevance to societies that may not share the same set of cultural taboos from which such judgment springs). The usual difficulty of the sort of engagements that the Working Group is undertaking starts with the failure to be transparent with respect to the basic premises that animate (and color) its analysis. CPE believes that if the Working Group has the courage to adopt a specific ideological, moral, political, or cultural baseline, for the engagement of corruption under the UNGP as a moral project, then it should have the courage to make those explicit; and that explicit adoption ought to be in writing.

Corruption as a Legal Concept/Construct:

More likely would be to start any analysis and engagement from the *concept of corruption as a legal concept*. Yet legality here itself poses certain conceptual issues that may be ignored in the report, but which will likely impede its value among stakeholders.

The first goes to the locus of legality. That requires an identification of centering the notion of legal corruption within domestic legal orders, or within transnational public or private legal orders. The state remains at the center of corruption. And yet to the extent that the definition and scope of corruption must be rationalized in the face of global production, its conceptual heart tends to move up to international organizations as expressed in international law and norms. At the same time, to the extent that its implementation must bend to the logic of global production, its operationalization must be delegated to public and private enterprises and their governance orders (justified through the jurisprudence of compliance and accountability, and monitored through data driven measurable ratings and accountability systems).

The second touches on the breadth of the legal concept of corruption. While a moral concept of corruption may ultimately point to deviation from any of the core principles of communal organization, especially where these emerge from *structural bias* or exercises of discretionary acts (the unstated assumption of which likely drives much of the discursive rhetoric of human rights in economic activity), corruption as a matter of law (of states, of international public actors or of private actors to which regulatory authority may be delegated or otherwise exercised) tends to focus on bribery (derived ultimately from and connected with concepts of theft and deception). The OECD Convention on Combating Bribery focuses specifically on bribery of foreign officials in international transactions. This echoes the approach of many leading states following the pattern of the American Foreign Corrupt Practices Act. But it also extends the reach of legal corruption to money laundering, to the extent that bribery is a predicate offence for the application of domestic money laundering legislation. On the other hand, the UN Convention Against Corruption focuses on bribery and embezzlement of and by public officials, trading in influence, abuse of functions, and illicit enrichment as the conceptual catch-all category (UNCAC, arts. 15-20). It likewise seeks to bring within the sanction of law bribery in the private sector, embezzlement, money laundering, and concealment (Ibid., arts. 21-24). To these the by now quite popular legal cloak of augmented obligation to obey the state and its officials, in the form of the increasingly popular public crime of “obstruction of justice” is also embedded to ensure not just that corruption is suppressed by that its infrastructure can also be reached by the state without much trouble (Ibid., art. 25).

It follows, then, that any effort to align the UNGP regimes (that is with respect to the state duty to protect, on the one hand, and the corporate responsibility to respect on the other) must then focus on three key sets of actors and contexts.

The first is rationalization of the object of corruption efforts. The conventional approach would be to focus on actors. Traditionally those must center on public officials. But increasingly it may also sweep within its regulatory framework key private actors. Unresolved remains whether the objects are limited to *people* (that is corrupt officials, corrupt corporate or other individuals), whether the framework of corruption ought to extend to *institutions*, or whether the touchstone of corruption ought to be *actions or activities* that society deemed bad enough to warrant suppression. Thus, for example, it is possible to speak to the corruption of the state itself, or its administrative (or legislative/judicial) apparatus and to seek to hold the institution accountable, in the same way that it has become more acceptable to hold a corporate or other business (with autonomous legal personality) liable for the acts undertaken by people. At the same time, it may be even more effective to move from a focus on people (the lowest level of the actualization of corruption) to the economic transactions which are, after all, at the operative heart of the UNGP. The focus on acts rather than on individuals or institutions would certainly require some deviation from traditional pathways to law and norm making; at the same time it would recognize that the operative or structural heart of corruption lies in the system rather than in the institutional edifice within which it is “housed.” CPE recognizes, however, that such a project of reconceptualization may be well beyond the mandate of the Working Group. In any case, the starting concept makes a tremendous difference for creating systems of accountability that ties corruption (the predicate) to the consequences (a violation of human rights law or norms).

The second is the policy objectives of corruption alignment within a UNGP framework. CPE would suggest two core objectives that ought to be at the heart of any analysis undertaken by the Working Group. The first touches on the *need to preserve the integrity of the state*. It has now long been a fundamental premises of international financial institutions, for example, that corruption is a serious threat to the integrity of developing states. At its limit, it threatens sovereignty and necessitates the devolution of governance power either to other states, to international actors, or to the private sector. The OECD’s Risk Awareness Tool for Multinational Enterprises³ suggests the pragmatic consequences for business of the resulting weak governance societies. It was a subject of early and intense consideration by John Ruggie as SRSG in 2006 (See, the contribution of OIE, ICC and BIAC, *Business and Human Rights: The Role of Business in Weak Governance Zones* (2006)).⁴ And it is now embedded in the construction of National Action Plans (through for example UNGP GP 7; see Danish Institute for Human Rights, *NAPS*;⁵ and generally *Corporate Social Responsibility in Weak Governance Zones*.⁶

Policy objectives may also touch on the *need to preserve the integrity of the market* within which both legal and social norms operate effectively within the Protect, Respect and Remedy Framework. This policy objective tends to exist in the shadow of the state-and-institution-centric approaches of UN and public bodies when confronted with the issue of corruption, as well as of the application of the UNGP. And yet,

³ OECD (2006); <https://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>.

⁴ <https://www.business-humanrights.org/sites/default/files/media/bhr/files/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

⁵ <https://globalnaps.org/ungp/guiding-principle-7/>.

⁶ Larry Catá Backer, “*Corporate Social Responsibility in Weak Governance Zones*,” *Santa Clara Journal of International Law* 14:297 (2016); <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1205&context=scujil>.

the system of globalization on which the UNGP (and anti-corruption legalities) is itself founded on the ordering premise of markets. Markets, in turn, can preserve their integrity only through regimes of transparency, and operated on the basis of full, free and equally available information. Hiding information or acting out of the sunlight of disclosure produces a corruption of the market structure itself. More than that, free markets are grounded in the requirement that all actors “play by the rules,” that is on the basis of a principle of full equality among participants. That is also undermined by corruption in any of its senses. Corruption in both senses produce legal risk as well as social risk with significant implications for the human rights of vulnerable populations.

Corruption erodes trust in government and undermines the social contract. This is cause for concern across the globe, but particularly in contexts of fragility and violence, as corruption fuels and perpetuates the inequalities and discontent that lead to fragility, violent extremism, and conflict. Corruption impedes investment, with consequent effects on growth and jobs. Countries capable of confronting corruption use their human and financial resources more efficiently, attract more investment, and grow more rapidly. (Transparency International, [World Bank Needs to Strengthen its Anti-Corruption Work](#)).⁷

And yet critical actors continue to perceive the threat solely in institutional terms. What is required, as stated by World Bank President Jim Yong Kim in 2018, are “measures to follow every dollar [the World Bank lends]” ([World Bank Will Track own Funds as “Corruption is Everywhere”](#)).⁸ To make that work, however, it may be necessary to extend accountability measures beyond IFI lending, and to measure corruption by more than the occurrence of corrupt transactions.

The third prong of any effort to align corruption regimes and the UNGP touches on implementation, and specifically on transparency and on governance as the operational focus of alignment. The UNGP is framed around both conceptions. First, the UNGP relies heavily on transparency as an accountability mechanism. At the same time, its normative principles point to an idealized (aspirational) conception of the institutional actors to which either a duty to protect or a responsibility to respect human rights are recognized. Together, the UNGP point to a system in which the normative ideals are enforced through transparency and accountability mechanisms that are in turn the dependent on the functioning of vibrant regulatory governance systems (discussed in Larry Catá Backer, [Theorizing Regulatory Governance Within Its Ecology](#))⁹ or in the internationally protected structures of lawful domestic legal orders. Second, those transparency, accountability and governance regimes operate in quite distinct ways for states (and their duty to protect) and enterprises (and their responsibility to respect). For states, the emphasis is on governance and governance cultures; for enterprises the focus is on transparency and compliance cultures (with a baseline premise of risk aversion for actions that may negatively impact the human rights of rights holders (including the enterprise itself). This brings one back to the fundamental approach of legal conceptions of corruption around actors-actions, and usually tried to bribery and public and private

⁷https://www.transparency.org/news/pressrelease/world_bank_needs_to_strengthen_its_anti_corruption_work_says_transparency.

⁸<https://www.occrp.org/en/daily/7980-world-bank-will-track-own-funds-as-corruption-is-everywhere>.

⁹Larry Catá Backer, “Theorizing Regulatory Governance Within its Ecology: The Structure of Management in an Age of Globalization,” *Contemporary Politics* 24(5):607-630 (Special Issue 2018). pre-publication version at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783018.

institutions. At its most pragmatic level, then, this may suggest that at least initially, the alignment of corruption and the UNGP will require a close reading of the principles and parameters of corruption as a legal enterprise, and of the substantial differences in approaches between the state and the enterprise.

It is only after the Working Group makes the conceptual base from which it sees and organizes the world clear can one with any confidence provide a response to the questions posed in ways that will be meaningful to the Working Group. In the absence of that clarity, CPE can suggest the following as a pathway to an answer to the question:

First, with *respect to the state*, the key areas where corruption causes, contributes or is linked to human rights abuses, includes every area of public activity where the rights, privileges or dignity of people are affected, directly or indirectly. As such, the UNGP DEMAND, as a baseline duty of states under their paramount obligation to protect human rights, that they take all necessary measures to develop systems that can prevent, mitigate and remedy corruption. More specifically, the state must undertake strong measures to prevent, mitigate and remedy corruption in the context of public discretionary administrative action. It is at the level of administrative decision making, more than any other space, that the sort of corruption occurs that has the greatest impact on the dignity, lives and human rights of individuals, and especially of the most vulnerable sectors of society. Reference is also made to Anne Peters, *Corruption and Human Rights* (2015)¹⁰ with respect to the conceptualization of corruption as a human right, and a consideration of the question of whether so conceived it ought to be so treated.¹¹

Second, with respect to the enterprise, the key areas where corruption causes, contributes or is linked to human rights abuses, must be divided into two quite distinct sectors. One is centered on internal operations. These touch on the human rights consequences for internal actors within global production to the extent of an enterprises control or influence. This requires the extension of the concepts of human rights due diligence in a manner that is compatible with the internal monitoring and accountability systems of an enterprise, but which adds a well-defined (and assessable) list of specific conduct that goes to corruption and that causes human rights harms. The other is centered on external effects of operations. These touch on well understood aspects of UNGP application—e.g., vulnerable populations, women and children, indigenous groups, and issues of sustainability (as those might be embraced by an enterprise). The nature of human rights due diligence would be different in application from those developed for internal monitoring and accountability systems. But it is also one that requires the definition of specific conduct acts against specific and identifiable individuals or groups, and which can then be assessed.

2. Given the areas discussed in the question above, what are the ways States should address the issue of corruption which has a connection to business-related human rights abuses? For example, how can States address the twin duties of both promoting anti-corruption as well as implementation of the UN Guiding Principles through

¹⁰ Anne Peters, *Corruption and Human Rights*, Basel Institute on Governance (2015); https://www.mpil.de/files/pdf4/Peters_Corruption_and_Human_Rights20151.pdf.

¹¹ “Corruption means that administrative or political decisions by government authorities are bought rather than made on the basis of lawfulness in procedures formally envisaged for that purpose. Corruption follows the unofficial laws of the market, thereby circumventing the rule of law. Because corruption is thus the antithesis to the rule of law, and because the rule of law in turn is a necessary condition for the respect of human rights, then corruption – in a very general sense – constitutes the negation of the idea of human rights. Hence, there not only exists a nexus, but even almost a tautology.” Peters, *supra*. P. 9.

their national action plans, anti-corruption strategies, and overall desire for policy coherence in areas such as responsible business conduct, trade and investment promotion, access to justice, etc.?

This question produces two pathways to analysis. The first is an endogenous approach which internalizes the analysis from the state outward. The second is an exogenous approach that starts with the enterprise (or the market) and works itself backwards to (and into) the state.

The endogenous approach focuses on public governance. This approach is relatively easily aligned with the principles around which anti-corruption legalities are being built. But it also requires the state to examine itself—and to correct its own deficiencies. CPE notes with regret that there may be altogether too many instances where states, in an effort to distract accountability from within its own operations, seek to shift focus to the obligations or responsibilities of other actors, notably enterprises. This bad habit, born of convenience, is to be lamented. For the Working Group that presents a conundrum. As a creature of the state system embedded within its apex multilateral organization, the Working Group is in no position to challenge or undermine the state. On the other hand, the CPE acknowledges with gratitude the efforts of the Working Group to nudge states toward a more public self-assessment through its gentle project of National Action Plans. Whatever its failings (see, e.g., Larry Catá Backer, [Moving Forward the UN Guiding Principles for Business and Human Rights](#)),¹² NAPs may be the most fruitful way of encouraging (and guiding) states toward an alignment of human rights and corruption agendas.

The exogenous approach focuses on private law and governance. Its essence is attached to the premise that public objectives may be best embedded in transnational production through the delegation of authority to develop and operate governance systems through regimes of private law overseen by enterprises. Under an exogenous approach, the State should be encouraged to develop substantial normative objectives and then hold enterprises responsible for their attainment. That, in essence is the logic of the current generation of “Supply Chain Due Diligence”¹³ and “Modern Slavery” laws.¹⁴ That, of course, augmented by the methodologies of disclosure.

3. Are there areas where States should extend existing anti-corruption policy and regulations to encompass requirements for businesses to also respect human rights (e.g. in extending export credit and other forms of trade and investment support, in providing government procurement contract)?

This question does not touch on “extension” (the ostensible thrust of the question) so much as it concerns the alignment of systems of rewards and punishments for conformity to expectations of appropriate behavior to human rights and corruption. Again, one cannot approach this question without noting that it is generally the State (and not the enterprise) that is the source of much of the problem in this area. CPE regrets that the Working Group may be put in a position where it must focus on the enterprise within the equation of threats to human rights through corruption without emphasizing the central role of states not just in making law but also in corrupting legal systems by its own behaviors, lack of accountability, and

¹² Larry Catá Backer, “Moving Forward The U.N. Guiding Principles For Business And Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind them All,” *Fordham International Law Journal* 38(2):457-542 (2015). ; <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2382&context=ilj>.

¹³ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>.

¹⁴ E.g., Australia, Modern Slavery Act 2018; No. 153, 2018; <https://www.legislation.gov.au/Details/C2018A00153>.

impunity for conduct that effectively reduces the integrity of the state and thus negatively impacts any viable effort to manage the corruption aspects of enterprise human rights impacting activity. CPE does not mean to suggest that the enterprise is somehow less embedded in webs of corruption; rather it notes that an uneven focus will skew any remedial effort that seeks to use the mechanisms of legality to discipline bad conduct with negative impact on human rights holders.

What the question suggests is the value of data driven systems of compliance built around the development of blacklists and whitelists that reward and punish enterprises as a function of their compliance with quite specific measures of behavior tied to corruption-human rights protective objectives. CPE notes that certain key States, including the People's Republic of China, have begun to set up such systems for the management of the conduct of enterprises. These Social Credit Systems can serve as the basis for the management, at a national or international level, of the human rights affecting conduct of enterprises tied to corruption (for a discussion, see, e.g., Larry Catá Backer, *Next Generation Law: Blacklists and Social Credit Regimes in China; And an Algorithm to Bind them All*).¹⁵ That is PRECISELY the thrust of the question posed—any system which is geared around the dispensation of rewards or punishments for specified activities is a social credit system. Of course, the Working Group will have to determine the extent to which such social credit systems, data driven governance, adopted at the national or international level might itself avoid human rights negative consequences. Those human rights effects will be measured differently in the United States, China, and among the Member States of the European Union. Even more variation in response to the imposition and human rights effects of Social Credit Systems will likely emerge after consultation with developing states. Still. The proposal by the Working Group to move toward international human rights-corruption related social credit systems is valuable.

4. How can anti-corruption compliance and human rights due diligence be better coordinated within companies as part of an overall approach to responsible business conduct? What are examples of good practice?

CPE appreciates the intention behind the question of coordination of human rights due diligence and anti-corruption compliance programs. The difficulty, however, is one of misalignment. Corruption regimes align with international obligations in the way that human rights norms align with the duty of states under international law. Beyond a generalized normative unity under international law, the legal duty of states under human rights law and corruption law are in the first instance always limited by the reach of the domestic legal order as constrained by the overarching constitutional order within which legitimate state action may be undertaken. In both cases, the alignment of specific actions that constitute both corruption and human rights violations under national law may vary, and vary widely, from state to state. While it is the obligation of international organs and their instrumentalities, like the Working Group, to urge both alignment and harmonization corresponding to an eventual identity between international norms and national law, that is at this point in time merely a duty (on the part of the Working Group) and an aspiration (under the ideological premises of international law).

In contrast, while Pillar 2 human rights due diligence regimes are developed as a single source compliance framework adaptable to a variety of country specific scenarios, anti-corruption compliance guidelines are necessarily tied to the particular national context in which they may apply. For some states that might mean

¹⁵Larry Catá Backer, "Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China," *USC Interdisciplinary Law Journal* 28(1):123-172 (2018); <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/28-1-Backer.pdf>.

that the state of a company's "nationality" may apply irrespective of where the enterprise operates (the case with the US Foreign Corrupt Practices Act), and otherwise it may apply within the national territory of a state (e.g., Russian Federal Anti-Corruption Law No. 273; and [Compliance Guide](#)).¹⁶ As a consequence, it may be unhelpful to speak as if there were alignment possible between a non-existent uniform approach to anti-corruption internal monitoring systems and the more uniform system of UNGP human rights due diligence. What that means, effectively, is that the UNGP human rights due diligence system may serve as the framework around which country specific systems anti-corruption monitoring with human rights effects may be added. But that requires that enterprises be mindful of all of the different normative variation in corruption standards and their application to their operations. Once that is developed, it may be possible to develop potentially complex systems of due diligence in which anti-corruption protocols are embedded. Perhaps, the most useful thing the Working Group might devote themselves to is the establishment of a clearinghouse for corruption standards and expectations with human rights effects and then top encourage international public or private organizations to begin to develop the appropriate toolkits to help enterprises internalize these systems. The possibility of alignment is suggested as well in the OECD Guidelines for Multinational Enterprises by aligning private law-based governance regimes.

All the same some alignment is possible because of the linkages between human rights due diligence approaches and those underlying corporate anti-corruption compliance programs (see, e.g., Jones, Day White Paper, 2018, built around compliance with the US Foreign Corrupt Practices Act; see also the OECD [Anti-Corruption Compliance Handbook for Business](#) (2013)).¹⁷ These include setting the tone at the top, risk assessment throughout corporate operations, standards and policies to address risks, communication and training, third party due diligence, programs of rewards and punishment for compliance, monitoring, the power of compliance officers and departments, and remediation processes. It is around the procedural framework that one can begin the process of aligning and then bringing corruption sensibilities into the systems for human rights due diligence—and also the sensitivities for human rights complaint activities with anti-corruption processes.

Moreover, it may also be possible to link the normative requirements of human rights with specific acts of corruption, at least to the extent that such are specifically prohibited by the law of the domestic legal order in which such acts occur—specifically and usually bribery.

In practice, what is most often affected are social rights, especially by petty corruption. For example, corruption in the health sector affects the right of everyone to the highest attainable standard of health (Article 12 ICESCR); in the education sector, the right to education (Article 13 ICESCR) is at issue. But also, the classical liberal human rights may be undermined by corruption: If a prisoner has to give the guard something in return for a blanket or better food, then the prisoner's basic right to humane conditions of detention (Article 10 ICCPR) is affected. If – as most observers tend to think – the current surge in human trafficking is made possible and facilitated primarily by corruption that induces police and border guards to look the other way, then this affects the human right to protection from slavery and servitude (Article 18 ICCPR). (Peters, *supra*, p. 11).

¹⁶ <https://www.ganintegrity.com/portal/compliance-quick-guides/russia/>.

¹⁷ <https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>.

Again, it is important to emphasize that this connection may be the subject of corporate responsibility under Pillar 2, but may not trigger application of Pillar 1 state duty to the extent that either the legal construction of corruption or the domestication of international human rights, p

5. How does corruption and corrupt activities impact the ability of victims to seek access to an effective remedy (both judicial and non-judicial)? What measures can States and companies take to address these challenges?

CPE appreciates the question for the power of the judgment behind it, but wonders all the same about its purpose. In a context, including that of the UNGP, in which all political power emanates from and is centered in the state, it is unclear what answer can be expected from a question like this other than that the level of corruption of a state is in part effectively measured by its effects on access to justice. But this is not a profound or revelatory insight. It is in fact well known. The problem embedded in the question is effectively the problem of corruption by the state and its organs.

Where the state tolerates corruption, and where the level and characteristics of corruption might affect either the administration of justice through the office of the prosecutor, or the courts, then the short and decisive answer to the question is that access to justice would be denied. In that context the state can take no action that is not itself tinged with the very corruption that brought about the cutting off of access to justice. Corruption is not a piety that can be excised by some sort of magical rhetorical expression or the excising of one or more organs of state that are inextricably tied together by both constitutional principle and political culture. To suggest otherwise is to provide merely as potion that deceives its drinkers into a false sense of serenity. That ought not to be the work of the Working Group. Rather, CPE suggests that the Working Group develop toolkits for measuring corruption and then to provide stakeholders with viable methods to engage in political action internally and to seek alternative venues for the vindication of rights.

The implications for companies are clear, but likely to misalign with the agendas of states and non-governmental organizations tied to notions of state superiority as guarantors of human rights even when the state itself exhibits substantial cultures of corruption. Where companies operate in environments of corruption (the triggering standards for which must be developed by or through the Working Group in harmony with UNGP principles), then enterprises must seek to make available non-state non-judicial remedies, or otherwise make it possible for individuals to seek vindication in another forum. Neither of these paths is easy, and neither has elicited much interest in development by the Working Group. CPE believes that is a pit, but one for which rectification is possible.

6. Are there ways in which victims of business and human rights related abuses used anti-corruption mechanisms to seek remedies for human rights abuses?

CPE appreciates the concern, expressed through this question, for those persons who have seen their rights violated as a result of conducts defined as “corruption”. This question, however, has been framed in such a way as to leave two basic interrogatives unanswered.

The first one of those interrogatives concerns the category of rights this question refers to. One would assume that, in mentioning “human rights related abuses”, the reference would be to human rights considered as an indivisible, interrelated, interdependent whole. This, however, would only be an assumption. As such, it would lend the side to the possibility to divide the broader concept of human rights into separate classes and categories. From the division of that which is indivisible, interdependent and

interrelated, to the prioritization of certain categories or groups of rights over others there is a very short step. And a step that would furthermore be very easy to make. If made, that step could ironically bring us back in time to an era when the general consensus about “corruption” considered the phenomenon useful to “grease the wheels” of private markets in economically underdeveloped countries.

The second interrogative concerns the subjects from which inputs are solicited. This question has without doubt been motivated by a genuine concern about rights protection. Yet, the only subjects that enjoy an objective possibility to provide answers are anti-corruption institutions, and non-governmental organizations whose mandate relates to the nexus between corruption and human rights abuses. Within the first category of actors, one could further distinguish between state-based, non-state based, and multi-lateral anti-corruption institutions. Due to existing differences in the institutional organization of nation-states, the mandate of some of those actors – and the mechanisms they have created – excludes private enterprises, as well as certain categories of state-owned economic entities. The mandate of other actors involves measuring, assessing and ranking the perceptions of corruption held by members of the business community, more than the creation and the operation of anti-corruption mechanisms as such. Besides, it is not clear that those who have suffered abused of their rights as a result of corruption have the possibility to access those actors, and available anti-corruption mechanisms.

Within the second category of actors, an important distinction to be made would concern the ownership and the design of projects and programs conducted by non-governmental organizations, as well as the existence of a social and institutional environment conducive to at least an operational autonomy. Any answer to this question, therefore, would have to start by mapping existing state-based, non-state based, domestic and multilateral anti-corruption institution and mechanism, and by conducting a global surveys on NGOs, with the goal to analyze issues in the project ownership, design, and implementation.

It is only at this stage that one might, perhaps, begin to shed a clear light on this extremely important question.

On a more pragmatic level, and in constructing legal or normative standards through which liability for corruption may be aligned with the vindication of human rights, it may be necessary for the Working Group to consider a number of process and remedial oriented issues.

First, it may be necessary to construct alternative or variation in standards depending on whether the predicate corruption aligned with breaches of human rights is defined in law or is otherwise an extra-legal normative standard without a basis in the civil or criminal law of a state. The same, of course, will be true with respect to the human rights which have been breached. Where both the form of corruption and the human rights breached are normative (e.g., soft law, or actionable under private law arrangements by enterprises responsible for human rights and corruption compliance), then it may be necessary to develop toolkits and other methodologies consonant with the development of Second Pillar UNGP responsibility to respect. Helpful here might be to encourage non-binding mechanisms such as the Specific Instance facility under the PECD Guidelines for Multinational Enterprises.

At the other extreme, where both the form of the predicate corruption and the human rights breached are subjects of a domestic legal order, then it is necessary to align domestic law to the normative expectations of corruption as a moral enterprise and the UNGP as a private law (societal license) standard. In this case, it may be useful for the Working Group to re-target the focus of its excellent National Action Plan process

to ensure that States undertake their duty to protect, the focus (made clear as a theme of the 2019 Forum), and their duty to provide effective remedy under the Third UNGP Pillar, to the issue of rationalizing, *in law*, the relationship between corruption (as a predicate offence or element of liability) and the breach of a legally actionable claim for violation of human rights. In mixed cases, the problems of aligning legal and extra-legal standards may produce challenges.

Second, the use of anti-corruption mechanisms to vindicate breaches of human rights poses some issues where the object is to provide a legal remedy.

The first of these touches on issues of *causation*. The Working Group would be advised to seek guidance on the use and development of legal standards of causation that are compatible with the baseline legal structures of most states. The difficulty here, of course, will be to develop a legal standard for determining the extent of the connection between corruption and human rights wrongs that are direct and significant enough to serve as a legal basis for either determining liability or in shaping remedy. The challenge is exacerbated where, as is likely in many cases, the connection between acts of corruption and human rights breaches are *indirect*.

The second of these touches on the issue of *sovereign immunity*. Where the predicate corruption is undertaken by an official, the issue of sovereign immunity must be confronted. It is not enough to assume that the application of civil or criminal penalties against an official will be sufficiently broad to bring within its ambit any actions for indirect liability (once the causation issue is resolved). And even if broad enough, sovereign immunity may make either action against an official, or recover, impossible. The Working Group is advised to consider the evolving jurisprudence of sovereign immunity and to seek its further modification to make any alignment useful for those who seek to vindicate their rights, especially against public officials.

The third touches on issues of *reliance*. Reliance is related to causation but touches on an altogether different analysis. It seeks to align responsibility (and liability) with a legal determination of the measures that ought to have been undertaken by rights holders to protect their rights. The Working Group is advised to consider both the development of principles of reliance in law and to gather groups of experts to formulate principles that may serve to guide states and their judicial apparatus in the application of principles of reliance in cases where corruption is the predicate to human rights violations.

The fourth touches on issues of *remedy*. The issue has two parts. The first concerns the object of remedy. Where corruption serves as a predicate to breaches of human rights by enterprises, it appears that both the enterprise (and/or its agents) as well as the actors who are liable for corruption, might be liable. The Working Group might be advised to consider the application of principles of tort (e.g., joint and several liability) to broaden the scope of liability. At the same time, the issue of the liability of agents is an area that has remained underexplored by the Working Group, and hardly mentioned within the UNGP. In the context of corruption predicate human rights violations, those issues may become important. Their importance focuses not just on the protection of rights holders, but also on the protection of the human rights of agents, especially where issue of duress may be involved.

7. Are there areas where there should be greater policy alignment, in terms of seeking reforms, that will benefit both the business and human rights and anti-corruption agendas such as in areas including public procurement, whistleblower protection, beneficial ownership reform, conflict of interest legislation for public officials and legislators, etc.

CPE appreciates the attention of the Working Group to the importance of policy alignment. And yet it cannot avoid noticing how this question frames policy alignment as limited to “seeking reforms” only, and to seeking those reforms in a limited number of areas.

The question assumes that institutional reform is automatically conducive to a greater policy alignment. The causal relationship between institutional reform and a better alignment of the policy designed and implemented by national states, however, is a mere hypothesis, rather than established fact. This hypothesis is often based on the implicit premise that institutional reform must involve the transplanting of “foreign” models of institutions and mechanisms, or at least conforming of domestic institutions and mechanisms to a set of institutions and mechanisms created in the abstract. Political science and comparative law have challenged this premise on logical, theoretical and methodological grounds. The recent history of parts of the Eurasian continent had amply demonstrated how the transplanting of institutions, mechanisms and practices can often produce political and social externalities on a local and regional scale.

The approach to institutional reform and policy alignment based on institutional transplants however is and remains the prevailing approach. It is within the limits of such a broad consensus that inputs have to be provided. If, for the sake of advancing the “business and human rights agenda”, and “the anticorruption efforts” one shared and supported this consensus, then the questions to ask would be entirely different.

Those questions would concern the criteria and the rationale behind the choice – or alternatively the design – of “models” to be presented for adoption or transplantation by nation-states, private enterprises, and civil society. Equally important would be the set of values those models would incarnate, and the semantic and conceptual content of those values.

The notions of “human rights” and “corruption” are notions that exist transversal to the realms of morality, law and politics. These notions have been the object of contestation, because they embody the core values shaping domestic and transnational law-making and governance processes. Any remaking of those notions would therefore lead to a gradual remaking of each one of the norms, institutions and practices they have produced.

8. How can/should states, private sector and civil society work to better coordinate anti-corruption and business and human rights agendas to prevent harms along both dimensions through collective action, multi-stakeholder platforms.

This question starts from the assumptions that coordination of the anti-corruption and business and human rights agendas is either a possibility of state and non-state actors (“*How can* states, private sector and civil society”) or that such multi-stakeholder coordination is expected from the Working Group (“*How should*”). Each one of those assumptions, however, has widely different implications.

If the Working Group believes that states, private sector and civil society have effectively achieved some degree of coordination, and they are capable (they “can”) work to better that coordination, then the Working Group assumes that these actors already share a common anti-corruption and business and human rights agenda, and each one of them is furthermore willing to work together to prevent harm, through the formats (“collective action, multi-stakeholder platforms”) envisaged by the Working Group. The question

of “how” then becomes a question related to the fine-tuning of the activities and/or mechanisms introduced by existing collective actions and multi-stakeholder platforms.

If the Working Group instead believes that states, private sector and civil society are expected to increase their coordination (“How should states...”), then the Working Group admits that:

- (a) not each one of these actors is part of a broader consensus about the necessity to build stronger connections between the anti-corruption and business and human rights agendas. The question then becomes one about what impedes reaching such a consensus, and around what baseline such a consensus should be formed and why. Values, again, are important, and the basic set of values that inspire the efforts of the Working Group should be made explicit;
- (b) even though states, private sector and civil society agree on the need to coordinate their action, they may lack the capacity, the resources or the “know how” to do so. This question would then become a question about which one of those actors is better entitled to receiving the resources they need, from whom, and based on what considerations. Additionally, one may wonder about the necessity to design and introduce mechanisms to monitor the effective and efficient use of resources allocated to one or more of these actors.

In any case, this question has the potential to highlight the existing differences in approach to both anti-corruption efforts and business and human rights protection. Hypothetical answers to those questions would likely be divided along the competing lines of an approach that sees the state as the key actor promoting and leading collective action and multi-stakeholder mechanisms, versus an approach with the private sector at its core, with the state and civil society playing an ancillary role.

9. What role should international financial institutions, and investors play in exerting leverage to ensure both prevention of corruption but also business respect for human rights?

This question involves two widely different categories of actors. Investors are – presumably – private investors, and can therefore be subsumed under the category of “private sectors”. Alternatively, these actors can be included within the category of “state”, and thus this question could be answered together with question 8.

In thinking about international financial institutions, consideration about the role they play in weaving the threads of the economic, social, cultural, and political construction of communities should form a central concern. Equally important are their internal governance mechanisms, and their embeddedness across domestic and transnational contexts. Attributing to international financial institution the role of merely “exerting leverage” seems however to be reductive. These multilateral organizations are already actively engaged in norm-making. Their norm-making role could therefore promote a stronger, more effective coordination of the efforts of state, business, and civil society.

Lastly, CPE notes that there are substantial areas where stronger policy alignment is not only desirable but also readily attainable. One area that has been studied involves the alignment of the criminal law with the public and private law of finance and investment. Thus, for example, it has been suggested for states that have a strong programs of sovereign investment and lending (for example, through Sovereign Wealth

Funds or credit mechanisms) align its due diligence mechanisms for lending and investment including corruption-human rights based protocols with the structures developed by the justice or similar ministry to protect against breaches of legal standards for corruption (e.g., Larry Catá Backer, *Chinese Strategies to Combat Corporate Corruption*).¹⁸

10. How can United Nations bodies such as OHCHR and the UN Office on Drugs and Crime, work more closely together to address the human rights impacts of corruption?

Any meaningful coordination of the anti-corruption and business and human rights agenda has to start at the multilateral level, and then cascade down to the level of state and non-state actors. In this respect the role of United Nations bodies is essential. This is a question about institutional design, because it relates to achieving – at minimum – a closer coordination between two existing agencies of the United Nations. Questions about institutional design are not easy to answer, because they will always involve considerations about mandate, resources, established procedures and lines of authority.

If one were to answer this question remaining within the format and logic of United Nations bodies, there might be three distinct ways to work more closely together to forge a stronger nexus between the anti-corruption and business and human rights agenda:

- (a) leveraging the work and expertise of UNDOC and creating a division within this agency. This solution would have the obvious disadvantage of requiring efforts, to coordinate the action of such a hypothetical division, with the action of the OHCHR. A similar solution, involving the OHCHR, would pose a similar disadvantage
- (b) appointing a special rapporteur for anti-corruption and business and human rights. This solution would, ideally, allow for a better coordination of efforts. But, it would also require addressing some of the limitations that are currently associated with this figure, its mandate, powers, and activities
- (c) creating an inter-agency or inter-governmental Working Group on anti-corruption and business and human rights. This hypothetical solution would pose the risk of duplicating existing functions and procedures. Without doubt, it would also require a stronger coordination among existing agencies and bodies.

Each one of these three different solutions would be compatible and coherent with the governance structure of the United Nations and involve the challenges – but also present the opportunities – typical of institutional design. Some of these opportunities, however, would be well worth reaping. Among them, the most important opportunity concerns the adoption of a clear baseline, one that explicitly stated the ideological, moral, ethical, political and cultural premises that infuses the concepts of “corruption”, “anti-corruption” and “business and human rights” with their current meaning.

¹⁸ Larry Catá Backer “Chinese Strategies to Combat Corporate Corruption: From a “Two Thrust Approach” to a “Two Swords One Thrust Strategy” of Compliance, Prosecutorial Discretion, and Sovereign Investor Oversight in China,” *International Lawyer* 52(1):1-45 (2019); Prepublication version https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037287.

CPE appreciates the opportunity to comment on this important project of the Working Group. We have every confidence that the Working Group will move its project forward in ways that will align with the core principles and objectives of global anti-corruption efforts undertaken within and to the necessary extent furthering the great principles of human rights (in general) and the UNGP framework in particular. We welcome the recognition by the Working Group of the strong alignments between the good governance principles, respect for open, fair, transparent, and fair markets, and the core principles of the UNGP that themselves strongly underline the utility of good governance and respect for open, free, and fair engagements between all of the key stakeholders whose interactions produce sustainable and rights respecting advances of the human condition for all inhabitants of the globe that advance respect for international values within the national and cultural contexts in which it must be embedded.

CPE thanks Larry Catá Backer and Flora Sapio for taking the lead in producing these inputs. We welcome any feedback and constructive engagement.

Sincerely

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