

EDITORIAL

Business and Human Rights in Latin America: An Introduction to the Special Issue

Humberto Cantú Rivera^{1*} , Danielle Anne Pamplona²  and Ulf Thoene³ 

¹Professor at the School of Law and Social Sciences and Director of the Human Rights and Business Institute of the University of Monterrey, Mexico

²Professor and Director of the Human Rights Clinic at the Pontificia Universidade Católica do Paraná, Brazil

³Associate Professor, Universidad de La Sabana, Colombia

*Corresponding author. Email: humberto.cantu.r@gmail.com

I. Introduction

In his landmark 1967 novel *One Hundred Years of Solitude*, Gabriel García Márquez wrote about the ‘Banana Massacre’, where plantation workers that had been striking against the United Fruit Company to improve their working conditions were killed by the military. Despite being an event depicted in a magic realism novel, this example also shows some of the characteristics of Latin America, where colonialism, the close relationship between business and governments, and the incessant fight to protect people from human rights abuses, often converge not just in literature, but in real life. Indeed, Latin America is marked by contradictions between very progressive domestic human rights frameworks and increasing levels of social inequality and poverty; by being part of global value chains while also having an important percentage of informal economy; and by promoting the development of rules and practices without a sufficiently strong rule of law and fragile democracies. To some extent, as the land of magic realism, the business and human rights field in many cases is a real-life example of the nuances and complexities of the region, where progress and challenges are frequently intertwined.

Yet, for all the difficulties and shortcomings that the region faces, it has made important contributions to the field of business and human rights, not just at the regional level, but globally. This introduction to the special issue serves to point to some of them, while also exploring the role of Latin America as a test field for global standards, as a source of business and human rights standards, and as a place that provides important experiences in relation to access to remedy.

II. Latin America and its Contributions to the Business and Human Rights Field

Despite the inherent contradictions existing in Latin American societies in relation to human rights, the region has made important contributions to the development of the business and human rights field, even before the field was termed as such (or even existed). Beginning with the negotiations of a New International Economic Order¹ in the 1970s,

¹ General Assembly, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201 (1 May 1974).

several Latin American States quickly positioned themselves behind the push to re-define the global economic order, with some of them even leading at times the efforts to develop a Code of Conduct for Transnational Corporations.² That involvement resulted – as explored by Perrone in this issue – from the historical suspicion regarding foreign investors, but also from a desire to stop transnational corporations from acting as agents of foreign governments. This opposition, much more focused on the global economy and on relevant concepts such as self-determination, control over natural resources and development, coincided with important movements in the human rights sphere. But perhaps the most visible contributions have appeared in the era of the UN Guiding Principles on Business and Human Rights (UNGPs), with a triple focus on norms, practices and justice.

From a regional perspective, the Inter-American Human Rights System has systematically addressed the responsibility of States for its omissions in regulating and preventing human rights violations by non-State actors, including businesses.³ While the well-known *Velásquez Rodríguez* judgment⁴ was the cornerstone to define the State due diligence obligations *vis-à-vis* third parties (on which the duty to protect is certainly based), the Inter-American Commission on Human Rights had already briefly addressed the role of the State in relation to business enterprises for their involvement in human rights violations, and specifically in the efforts to try to stop a strike that was underway by Coca-Cola workers in Guatemala.⁵

Several decades later, these initial pronouncements have been followed by an increasing focus on business and human rights issues, where not only has the Inter-American Commission on Human Rights published a thematic report⁶ on Inter-American standards in the field (in addition to numerous other references in resolutions and other reports),⁷ but also the Court has been making systematic references to the UNGPs in its judgments. The context also reveals the regional nuances within which such pronouncements are made, notably the perpetual struggle of indigenous peoples' rights to consultation and consent in the context of development projects,⁸ the issue of health and safety standards in the workplace,⁹ the issue of privatization of public services,¹⁰ forced labour amounting to modern slavery,¹¹ and even the informal economy.¹² Across these elements, one characteristic stands out: the value of norms as the foundation for progress in this field and in the region. Indeed, if there is one conclusion that can be drawn from the activities of the Inter-American System, it is that any reference to the UNGPs and other international standards are contextualized in relation to State obligations set forth in the American

² Christy Thornton, *Revolution in Development: Mexico and the Governance of the Global Economy* (Berkeley: University of California Press, 2021).

³ Nicolás Carrillo Santarelli, 'La promoción y el desarrollo de la protección de los derechos humanos frente a abusos empresariales en el sistema interamericano' in Humberto Cantú Rivera (ed.), *Derechos humanos y empresas: Reflexiones desde América Latina* (San José: IIDH, 2017).

⁴ I/A Court H.R., *Case of Velásquez Rodríguez v Honduras*. Merits. Judgment of 29 July 1988. Series C No. 4.

⁵ IACHR, Resolution 32/81 (*Marcelino Santos Chajón et al*), 25 June 1981.

⁶ IACHR, *Business and Human Rights: Inter-American Standards*, 2019.

⁷ See, for example, IACHR, *Compendium on Economic, Social, Cultural and Environmental Rights: Inter-American Standards*, 2021.

⁸ I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v Ecuador*. Merits and Reparations. Judgment of 27 June 2012. Series C No. 245.

⁹ I/A Court H.R., *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 15 July 2020. Series C No. 407.

¹⁰ I/A Court H.R., *Case of Vera Rojas et al v Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 1 October 2021. Series C No. 439.

¹¹ I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 20 October 2016. Series C No. 318.

¹² I/A Court H.R., *Case of the Buzos Miskitos (Lemoth Morris et al) v Honduras*. Judgment of 31 August 2021. Series C No. 432.

Convention on Human Rights. As such, both the Commission and the Court use the UNGPs as an interpretive tool that serves to modulate the existing State human rights obligations, thereby inserting them into the ever-growing Inter-American *corpus juris*.

In terms of practice, the region has also been particularly active on several fronts, but its contributions should be understood in terms of testing the viability of global trends instead of measured in relation to concrete outputs. A first area where such a contribution can be observed is in testing the potential of public policies to advance the UNGPs. At the time of writing, three Latin American States (Colombia, Chile and Peru) have developed National Action Plans to implement the UNGPs; and yet, several other countries have also demonstrated the fragile structure and capacity of such instruments to generate actual change in State and business practices, starting with the complexity of finding common ground among governments, businesses, civil society organizations and other relevant stakeholders to adopt and implement them. Furthermore, the institutional deficiencies, the constant transition in governments and the general centralization of decision-making and capacity around such issues highlight not just the inadequacy of some policy models for implementation in fragile democracies, but also the relevance of ensuring that these policies respond to national and regional realities and necessities, and that they are adapted to the specific contexts in which they have to be implemented.

Business practice is another key parameter in this area, where contrary to other regions of the world, the transition from corporate social responsibility to risk-based due diligence, even in corporate discourse, is still at a very preliminary stage.¹³ Despite some recent efforts around diversity and inclusion¹⁴ and the increasing relevance of ESG criteria,¹⁵ arguments against this transition include an insufficient understanding or guidance on the issue by governments and other actors, the high levels of informality in Latin America and their responsibility for negative human rights impacts, the responsibility of small- and medium-sized enterprises as a result of their lack of capacity around human rights issues, and even that human rights are the exclusive responsibility of the State. Furthermore, human rights tend to be categorized within 'ethical' business conduct, instead of being recognized as a pre-condition to doing business, or even as part of the risks that need to be managed by a responsible corporate actor. Indeed, it may point to the complexity of adapting a traditionally State-focused notion to other non-State actors, especially in a region that has gone through numerous instances of gross human rights violations. Yet, it also reveals that even after 11 years of their adoption, there continues to be a need to further disseminate the UNGPs and the logic underpinning them, and to push for a smart mix of measures that clearly contemplates regulatory standards, and not just voluntary efforts.¹⁶ Within this context, it will be paramount to push for a serious reflection on what

¹³ For instance, out of the 30 largest Brazilian corporations, an analysis in 2020 of 73 different corporate documents showed that only 11 mention human rights due diligence. See Centro de Direitos Humanos e Empresas (FGV CEDHe) e Clínica de Direitos Humanos PUCPR, *Palinha #6. Qual o compromisso das maiores empresas operando no Brasil com os direitos humanos?*, https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/30910/FGV%20CEDHE_Palinha%20%236.pdf?sequence=1&isAllowed=y (accessed 7 October 2022).

¹⁴ See, for example, PWC, *Diversity & Inclusion Benchmarking Survey: South America Data Sheet*, 2021, <https://www.pwc.com/gx/en/services/people-organisation/global-diversity-and-inclusion-survey/south-america-report.pdf> (accessed 7 October 2022); Patrick O'Neill, 'Inclusion is Good Business in Latin America', *Forbes*, 2021, <https://www.forbes.com/sites/forbesagencycouncil/2021/09/22/inclusion-is-good-business-in-latin-america/?sh=10018666f78b> (accessed 7 October 2022).

¹⁵ See, for example, Ruti Smithline et al, 'ESG in Latin America and the Rise of the Social Pillar', *Latin Lawyer*, 2022, <https://latinlawyer.com/guide/the-guide-corporate-compliance/third-edition/article/esg-in-latin-america-and-the-rise-of-the-social-pillar> (accessed 7 October 2022).

¹⁶ RBCLAC Project, *Raising the Ambition - Increasing the Pace in Latin America and the Caribbean: Regional Road Map for the Next Decade of the Guiding Principles on Business and Human Rights*, 2021, <https://empresasyderechoshumanos.org/wp-content/uploads/2021/12/LAC-roadmap-ENG-roadtesting-version.pdf> (accessed 7 October 2022).

type of normative measures are necessary to respond to local realities, and that are culturally and legally adequate for Latin America.¹⁷

Finally, in terms of justice, the region has also made relevant contributions in terms of using the UNGPs as an interpretive standard, in testing the recent legal developments in European jurisdictions, and in advancing complex legal questions through strategic litigation at the domestic level. Regarding the use of the UNGPs as an interpretive standard, several Latin American judiciaries have been at the forefront, with courts of different levels and in different jurisdictions¹⁸ using the UNGPs as a basis to interpret domestic and international legal standards. This is relevant because it shows the potential of advancing non-legal elements included in the UNGPs, such as human rights due diligence, through other traditional legal mechanisms. Indeed, through strategic litigation (but also general judicial analysis), different courts have found an analogy between human rights due diligence and other legal tools, facilitating a constructive interpretation on the responsibilities of business enterprises to take adequate measures to prevent impacts on human rights. Some of these decisions also address complex legal questions that are currently being debated in the context of the treaty negotiations, offering a glimpse into how they could be implemented if the instrument was eventually adopted. Another important contribution is the ongoing effort to test the capacity of the recent legal developments on human rights due diligence in Europe, where some cases are being used precisely to test the feasibility of access to justice through transnational civil litigation. While the initial efforts in this regard remain *sub judice*, the focus clearly revolves around identifying the strengths and weaknesses of these recent developments, while highlighting the need for home States of transnational businesses to take measures that lead to respect of human rights and the environment in their global operations.

While the contributions highlighted here may be less perceptible than other concrete outputs, they concentrate on testing the efficacy of global developments, while also highlighting the need for reflection on the avenues to promote business respect of human rights and appropriation of global standards, so that they are responsive to local and regional realities.

III. The Special Issue

One of the key motives behind the first special issue with a regional focus of the *Business and Human Rights Journal* (BHRJ) was the need to explore and present to an anglophone audience an analysis of some of the current discussions and developments that are taking place in Latin America. For that purpose, a call for abstracts was issued in 2020, followed by a workshop where invited papers were presented and commented upon by peers and scholars alike. Some of those papers were further invited to be submitted for the special issue, where they went through a rigorous peer review process overseen by the three guest editors. The current issue is therefore the result of an intensive editorial process involving numerous parties, including the BHRJ's editors-in-chief, scholars from different regions with knowledge about the ongoing situation in Latin America, and certainly, a group of authors who through tireless efforts and numerous back-and-forth with the guest editors and other

¹⁷ Humberto Cantú Rivera and Danielle Anne Pamplona, 'La primera década de los Principios Rectores sobre las empresas y los derechos humanos: entre impresionismo y claroscuros' in Humberto Cantú Rivera and Danielle Anne Pamplona (eds.), *A una década de los Principios Rectores sobre las empresas y los derechos humanos* (Ciudad de México: Tirant Lo Blanch, 2022).

¹⁸ Courts in Argentina, Colombia, Peru, Brazil and Mexico have made reference to the UNGPs in their judgments, continuing the trend developed by the Inter-American Court of Human Rights. Some judgments are highlighted in the 'Developments in the Field' piece by Cantú Rivera and Barboza López.

parties alike have led to the culmination of this special issue. The three guest editors take this opportunity to acknowledge and thank all the parties involved for their time and contribution in making this special issue a reality.

The Latin American region has traditionally been a regular participant and contributor to the development of international human rights law, and also an important laboratory to test global initiatives and standards. Within those traits, one key element that has been pushed forward has been that of access to remedy, where different constitutional, civil, criminal and administrative remedies have been put to test, particularly in relation to business-related human rights violations. These three themes emerge across the different contributions to this special issue, where authors explore the role of Latin America in relation to the business and human rights field.

Latin America as a Test Field for Global Business and Human Rights Standards

Throughout its history, Latin America has been an important actor in the development of international human rights law; however, despite its different contributions, it has also been a test field for different human rights standards. The same can be said about the global business and human rights agenda and its impact in the region, where the region's specificities put to test the feasibility of many global initiatives. This is explored in several pieces of the special issue, starting with Guarnizo's approach to the marketing of ultra-processed food and beverages to Latin American children, where after a clear delineation between State duties and business responsibilities, she addresses the existing challenges for their implementation within the Latin American context. This agenda, which has been particularly visible in the work developed by UNICEF after the adoption of its Child Rights and Business Principles in 2012, is especially relevant considering the obesity rate in the region, but also a recent legislative trend to promote front-of-package labelling and other tactics to dissuade the purchase of ultra-processed food and beverages across the region. In addition to this, Merino's piece on Chinese policies and corporate practices in Latin America highlights the important yet contentious role of Chinese FDI in the region's economy, but also how accountability and transparency regulations adopted in China have an impact in Chinese companies' overseas operations, particularly with regard to indigenous peoples. Finally, Treviño Lozano addresses sustainable public procurement in Latin America, as another key development in the business and human rights field that poses a challenge for Latin American governments, as the notion of sustainability in the region is intrinsically linked to environmental concerns, without adequately contemplating their social and human rights dimensions. This, of course, leads to a reflection on the needs to ensure that sustainability practices, and particularly public procurement, go beyond its traditional focus on environmental protection, to include the human dimension within its concerns. As a test field for global business and human rights standards, the regional specificities in terms of law and governance reflect some of the challenges that have to be overcome to promote a more responsible business conduct in Latin America, but also point to the necessity of facilitating a regional appropriation and translation that responds to the realities on the ground.

Latin America as a Source of Business and Human Rights Standards

Another key theme that can be observed in the special issue is how Latin America, through its experiences and institutions, contributes to a global discussion on the responsibilities of businesses in the field of human rights. One relevant element is the topic of State-owned enterprises (SOEs), which is particularly important in the region due to the historical,

symbolic and economic role that public companies play in Latin America. In that regard, Schönsteiner's piece on *Inter-American Elements for a Systemic Approach to State-Owned Enterprises Human Rights Obligations* addresses the shortcomings and lack of clarity in the UNGPs on the topic and highlights how a systemic approach that uses governance and regulatory tools is necessary to improve respect for human rights. Furthermore, in *Bridging the Gap between Foreign Investor Rights and Obligations*, Perrone addresses the specific challenges to the idea of international investment law, and particularly the divide between investment protection and the responsibility of foreign investors. To a large extent, as the author explains, Latin American States resisted the idea of Investor-State Dispute Settlement as it was being shaped, instead favouring that foreign investors were subjected to domestic laws and courts, and that they have correlative international obligations. Finally, an important systematization of Latin American scholarship on business and human rights is offered by Blanco and Betta, where they aim to provide an assessment of the state of the field and how regional characteristics shape Latin American scholarly contributions. While regulatory developments have not been at the forefront of the regional agenda on the topic, through its institutions and practices, Latin America has contributed to refine the understanding of complex issues in the field, which is also particularly reflected in the scholarship produced on business and human rights.

Latin America and its Experiences on Access to Remedy

Another important theme that appears in the special issue is the Latin American experience on access to remedy, notably through shorter, 'Developments in the Field' (DiF) pieces. Velásquez-Ruiz and Olarte-Bácares offer a particularly interesting glimpse of the Colombian transitional justice process and its relationship with the business and human rights field, focusing on the production of collective memory as a fundamental component of transitional justice, and the role of corporate actors in that regard. Their contribution facilitates the understanding of the implications of the third pillar of the UNGPs in post-conflict societies, and also presents an interesting analysis of the need for truth and memory as elements to promote non-repetition. A second DiF piece by Garrido Alves, Arantes Prata and Manfredini touches upon one of the most complex cases in recent Latin American history, the Samarco case, where a dam collapsed in 2015, resulting in severe impacts on human rights and the environment. Beyond the ongoing complexities of the case, the authors focus on a simplified indemnification system that was created to repair the damages suffered by the victims, and analyse its lawfulness and actual capacity to fulfil the State obligation of providing effective remedies for victims of human rights violations. Finally, Cantú Rivera and Barboza offer a review of some recent judicial developments by domestic courts in the region, which point to the increasing use of an existing preventive duty found in domestic laws that is to some extent analogous to human rights due diligence, and the effects it has on other procedural aspects, such as the reversal of the burden of proof. Through this piece, the authors illustrate how some Latin American courts are making important contributions to the global business and human rights debate through the use of more traditional methods found in civil and criminal codes, a particularly relevant view considering the ongoing negotiations to develop international, regional and domestic legal instruments on business and human rights. To a large extent, the development and use of constitutional or other *ad hoc* judicial mechanisms to address business and human rights cases signify a departure from civil litigation, while offering lessons in terms of the potential of using different forms of remedy and going beyond mere compensation for victims.

IV. Conclusion

The inherent contradictions and complexities of the business and human rights field in Latin America and the manifold and innovative contributions and challenges to the safeguarding of human rights in the region yield immense analytical purchase. As explained above, the intention of this special issue is to shed light on some of the nuances and recent developments of this field in the region, in an effort to highlight its role – and to a large extent, that of the Global South – in testing and contributing to the evolution of international human rights law and practice, particularly in relation to the role and activities of business enterprises. The contributions included in this collection highlight the necessity to translate and adapt global standards to regional, national and local realities, and the importance of ensuring multilateral dialogue and decision-making that facilitate the creation of rules and practices capable of positively transforming the reality of those who are more vulnerable to the negative impacts of business activities.

Conflicts of interest. The authors declare none.