

# БІЗНЕС І ПРАВА ЛЮДИНИ: ПИТАННЯ ЮРИДИЧНОЇ ПРАКТИКИ

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## CHALLENGES AND OPPORTUNITIES FOR DEVELOPING THE HUMAN RIGHTS AND BUSINESS FIELD IN BRAZIL AND LATIN AMERICA: A IUS CONSTITUTIONALE COMMUNE

### Introduction

States have international obligations to protect human rights, assumed through the ratification of treaties. This obligation to protect implies care, including in relation to the conduct of third parties. This is the post-World War II configuration, forged in the face of the failure of states to protect their own populations. Before that, the protection of human rights was considered only as a domestic matter.

The development of the globalised economy, the decolonisation process of the 1960s and the need to seek new markets have forged a new form of exploitation of the countries of the global south. States became involved in bilateral investment agreements, guaranteeing financing for works and activities that would boost their economic development. As entering those agreements, States failed, however, to establish guarantees for the protection of the human rights of their citizens, with terrible consequences to this day.

On the path to promoting development, economic activities exploit natural resources and people. To protect the rights of its citizens, the state may be in breach of investment agreements. Disputes are resolved in arbitration tribunals that are based on the agreements signed, not on international rules for the protection of human rights.

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The negative impacts that economic activities can have on human rights are even more visible in times of crisis, when it is necessary to bring together the efforts of all actors to address an economic, social or health problem. This is not different in Latin America and in Brazil. The new health crisis caused by the pandemic of COVID-19 poses enormous challenges for States, businesses and individuals. States must organise themselves to protect their populations from contagion, while not abusing their rights to privacy and freedom; they must provide their populations with vaccines, while maintaining the financial conditions to maintain other public policies. Companies face the challenges of maintaining profits, while protecting their workers by providing masks and alcohol gels, facing a reduction in the workforce and observing a decrease in consumption. People, especially the poor, face a drastic fall in their income due to government measures restricting movement.

On the other hand, the pandemic also provides us with the opportunity to observe problems and propose solutions. The Brazilian Executive Branch have adopted conducts that violate human rights; denying science and discouraging preventive measures against the contagion of the virus, all this under the justification that it was necessary to maintain economic activity. We also observed companies that did not respect signed contracts, that dismissed people *en masse*, that transferred the negative impact of the pandemic to the weakest part of their business relationships. These conducts reflect the absence of adequate state regulation to demand companies to act otherwise.

Such conduct by States and companies has worsened the terrible conditions in which people would already be if only the pandemic had imposed its impacts on them. The actions of states and companies have worsened these impacts and lead to reflection on the urgent need for a new configuration of state-individual-businesses relations.

The relationship between these violations, the lack of effective mechanisms to address them and the *Ius Constitutionale Commune* for Latin America (ICCAL) must be made. It is intended to demonstrate that the ICCAL presents a rationale capable of providing a basis for conduct that leads to more satisfactory responses in the fight against human rights violations committed by private entities.

## I. Some Background

The world had the chance to observe the negative impacts on rights derived from economic activities when hit by the 2008 financial crisis. Instead of using momentum to generate legislative changes that could respond better another crisis in the future, governments have helped those who helped creating chaos. Despite the profits that companies directly involved with the causes of the crisis continued to make, there was no radical change in the system that would allow them to be held accountable for negative impacts. The absence of companies' accountability is also the harsh reality in Brazil.

The present text aims at correcting what it identifies as a historical mistake made by the countries of the global south in the 1970s, when they failed to act in an internationally

coordinated manner, with terrible and persistent consequences for Latin America. In the 1970s, the United Nations discussed the drafting of a Code of Conduct for Transnational Corporations,<sup>1</sup> and in the early 1980s, driven – among other things – by the flow of investments to developing countries, these very countries adopted conducts that were not harmonized among themselves. This caused, at least, the rejection of the Code of Conduct mentioned. Moreover, these investments and the way in which they were regulated led to the normalization of the idea that relations between economic activities and states should reflect strong regulation for state conduct on the one hand, but only voluntary adoption measures for companies.

This somewhat unequal relationship is built on a contractual framework – bilateral investment contracts – that establishes protective rules for investors and a specific forum for settling disputes, the arbitration courts. This structure allows investors to protect their investments, including against constitutionally legitimate claims by states.<sup>2</sup> Far from trying to explain how these structures are put into operation in this text, we merely wish to point out their existence and the difficulty for states to impose domestic rules that protect their citizens when faced with the power of investors – that is, even when they want to implement rules that protect human rights, states encounter obstacles imposed by the structures created to enable investments to be received. This path, trodden in the 1960s and 1970s, was paved by other situations that led to the transnational activity of companies, the outsourcing of their production and the exponential increase in profits. The consequence of this is the increase in the economic power of such private entities, to the detriment of the political power exercised by States. Gradually, it becomes clear that such economic activities can engage in human rights abuses without there being domestic or international mechanisms that can hold them accountable.

This problem is not new or unknown, on the contrary, in 1972 the then president of Chile, Salvador Allende, made a well-known speech<sup>3</sup> at the UN General Assembly, accusing the US telephone company ITT of using its economic power to influence the country's politics, which proved true after the coup he suffered. At Chile's request, in 1975, the UN, through the Economic and Social Council and with the support of the Commission on Transnational Corporations, created the Centre for Transnational Corporations with the mandate of drafting a Code of Conduct on Fair and Responsible Investment Practices. Meanwhile, in the reality that most violently affects people, the cases in which transnational

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<sup>1</sup> Draft United Nations Code of Conduct on Transnational Corporation 1983, accessed July 20, 2021, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891>.

<sup>2</sup> Jena Martin Amerson, "The End of the Beginning?: A Comprehensive Look at the U. N.'s Business and Human Rights Agenda from a Bystander Perspective," *Fordham Journal of Corporate & Financial Law* 17, no. 4 (2012): 877, accessed July 20, 2021, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1314&context=jcfl>.

<sup>3</sup> An extract of the speech with some explanations can be found at Robert Alden, "Mr. Allend Follows outline of Speech," *The New York Times*, December 5, 1972, <https://www.nytimes.com/1972/12/05/archives/allende-at-un-charges-assault-by-us-interests-chilean-president.html>.

corporations are involved in rights violations, often taking advantage of their economic power, have only increased. There are many of them, well explored by literature.<sup>4</sup>

Indeed, history has shown that there is enormous pressure for people to settle for self-regulatory measures, such as the Global Compact and the Guiding Principles on Business and Human Rights (GPs), approved in 2011 by the Human Rights Council. In fifty years of debate, only voluntary measures have been achieved.

The GPs hand states obligations related to human rights protection, but there is an expectation that companies will also contribute. It is a call for all actors in society who are in a position to contribute to avoid or mitigate the risks to people's basic rights. Thus, it is to be expected that large companies will act alongside states, providing that states have a real will to protect human rights. This expectation stems from the level of trust placed in companies,<sup>5</sup> but also from the current normative framework related to human rights and business activity, the GPs, which are the global system response for challenges countries may face when regulating businesses activities. They give countries guidance on what to do about their own activities and relations with business, but also indicate businesses what are the best practices and the need to conduct themselves accordingly with its content, regarding the impact they might have on human rights. Despite the actions of the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) to disseminate the GPs and to ensure that they were internalized via National Action Plans (NAP), Brazil has yet to draw up its own. The UNWG visited the country in late 2015 aiming "to assess the efforts made to prevent and address adverse human rights impacts of business-related activities, in line with the GPs."<sup>6</sup> Six months later a comprehensive Report on the visit was published with a number of recommendations for the government, companies and civil society, addressing multiple issues pertaining to business and human rights in the country.<sup>7</sup> Among the recommendations issued to the government was the need for the adoption of a National Action Plan, wrought in accordance with the group's guidelines.<sup>8</sup>

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<sup>4</sup> Danielle Anne Pamplona, "Das violações de direitos humanos e do envolvimento de grandes corporações," in *Empresas e Direitos Humanos*, eds. Flávia Piovesa, Virgínia P Soares Inês and Marcelo Torelly (Editora Jus Podivm, 2018), 171–84; "Human Rights: Is it Any of Your Business?" (Amnesty International, April 2000), <https://www.amnesty.org/download/Documents/HRELibrary/sec010222008eng.pdf>; Sera Mirzabegian, "Big Tobacco v Australia: Challenges to Plain Packaging," *Business and Human Rights Journal* 4, no. 1 (2019): 177–84; Joana Nabuco and Leticia Aleixo, "Rights Holders' Participation and Access to Remedies: Lessons Learned from the Doce River Dam Disaster," *Business and Human Rights Journal* 4, no. 1 (2019): 147–53.

<sup>5</sup> This is what the Edelman Trust Barometer indicates: in Brazil, companies are considered competent and the population's trust in them reaches 64% of those interviewed. Edelman Trust Barometer 2020, <https://www.edelman.com.br/estudos/edelman-trust-barometer-2020>.

<sup>6</sup> UN, Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil – Resolution, A/HCR/32/45/Add.1* (12 May 2016), 3.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, 61.

Despite efforts recognized by the Report, it was clear that the country still had a long way to move forward if it was to settle firm standards for corporations acting within its territory.

Moreover, in 2017, under the Universal Periodic Review, The Netherlands, Paraguay and Sierra Leone recommended the development of a national action plan on Business and Human Rights in line with the GPs to prevent development projects from violating the rights of traditional populations, indigenous peoples and workers and causing damage to the environment, and to ensure effective reparations with meaningful consultations with affected communities.

During the Seminar “Business and Human Rights: progress and challenges,” held also in 2017, Dante Pesce, member of the UNWG, affirmed that it was “obviously quite evident to note that the implementation [of the recommendations of the UN WG] has been slow and weak, less than expected.”<sup>9</sup> In the same sense, the report from the non-governmental organization Conectas Human Rights Brazil has analysed the recommendations against State conduct three years after the visit. The conclusions were not promising. Of the twenty-one recommendations addressed to the State, seven were not fulfilled, five were subject to setbacks, six could not be analysed because either fell out of the report’s scope or there was no information available. Only two recommendations had satisfactory answers, one related to transparency of processes at the National Development Bank and the other, related to efforts to the implementation of a National Action Plan.

The need for the state to implement a regulatory framework and to make companies aware of the GPs is well established but all those movements involving the UNWG, the UPR process and the NGOs report has not led to the creation of a NAP. Instead, by the end of 2018, National Guidelines on Business and Human Rights were published. This is a skewed response to the UNWG’s recommendation to prepare a National Action Plan. It is since then the only piece of legislation on the issue produced in the country. Besides that, the only other relevant document produced by the state was a Resolution issued in December 2020, where the Ministry of Economy, through its Investment National Committee,<sup>10</sup> paving the way for the elaboration of an Action Plan on Responsible Business Conduct.

The mentioned National Guidelines (NG) have never been discussed with civil society and expressly mentions that they are only voluntary measures. Some of the measures on the Guidelines are already binding for companies through other domestic legislation. That is the case, for instance, of the clause that requires companies to practice equal pay regardless of gender, sexual orientation, ethnicity, race, origin, religious, physical appearance and disability or of the demands regarding anti-corruption measures and environmental sustainability commitments. To affirm that already mandatory measures are voluntary only serves to create confusion and to equip the malicious ones with instruments that allow them not to live up to what is expected of them.

<sup>9</sup> Interview, *Conectas Human Rights*, December 12, 2017, video, <https://youtu.be/FzByoGo71NM>.

<sup>10</sup> Resolution no. 2, December 22, 2020, CONINV, accessed February 10, 2021, <https://www.in.gov.br/en/web/dou/-/resolucao-coninv-n-2-de-22-de-dezembro-de-2020-296044638>.

State has not moved the agenda in order to raise corporate awareness about the theme and how their conducts can be especially harmful during the health crisis. In this sense, most companies sought financial relief from the government and pressed very hard for the economy to be opened, pushing for economic activities not to be affected by measures to prevent and contain the virus, despite what the scientific community warned and the population's requests.

Very little has been done by the government to raise awareness about the relations between businesses and human rights. Companies still largely ignore the GPs and when times come to raise to the challenges of a crisis, they have turned themselves to their specific needs related to profit.

The NG establishes that companies must monitor respect for human rights in their supply chain which is aligned with long lasting pledges from civil society but, since it is included in a list of voluntary measures, it does not stand a good chance of being followed by companies. And this is where the legislation falls short from the most recent discussion on the field: the fact that monitoring should be mandatory. This is not a claim with grounds only from civil society, it is a claim brought up by companies themselves.<sup>11</sup> It is useful for society to dispose of such a tool in order to access company's efforts to understand its risks as it is for companies to rely on such a tool in order to impact on its liability. The NG's provision on supply chain is a sole indication that companies should monitor it. It also states that companies have the responsibility not to violate workers, consumers and communities' rights and to accomplish that it must devise a risk control plan and tackle its impacts. Companies must avoid negative impacts on human rights caused by their activities and, also in this case, domestic legislation already provides for the duty and for the penalties. There are a few provisions that relate to labor rights of direct employees and all of them are already part of other domestic legislation that can be enforced with actual sanctions to companies. For instance, the NG requests companies to respect the right of association and union affiliation and the right to receive benefits as the weekly rest. These are rights for which there are corresponding duties in legislation in Brazil, in other words, nothing has been added by the Decree.

Very little of what is in the NG is not already in domestic legislation. Whatever novelty cannot be enforced since it is expressly conceived as a voluntary measure.

The voluntary nature of the decree lies in the discussion of how far one can advance on human rights protection when companies can decide what measures to implement, when to implement and to what extent to implement them.<sup>12</sup> The fact that the country still faces

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<sup>11</sup> As the research carried out by the Alliance for Corporate Transparency, at the end of 2019, has recently showed. To know more: <https://www.allianceforcorporatetransparency.org/database/>.

<sup>12</sup> This discussion is well known on Business and Human Rights literature. Björn FASTERLING, "Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk," *Business and Human Rights Journal* 2, no. 2 (2016): 225–47; George BRENKERT, "Business Ethics and Human Rights: An Overview," *Business and Human Rights Journal* 1, no. 2 (2016): 277–306.

human rights violations connected to businesses activities even after major disasters is a clear sign that needed measures have not been taken seriously.<sup>13</sup> The volunteer measures are not a novelty, but it was expected that Brazil would use the NG to try to enforce some of its regulations. And the fact that voluntary measures are not enough is clear as economy growth came to a stall in the past years and businesses became more aggressive to assure past levels of profit disfavouring labour protection. Although businesses are trusted to rise to the challenges – and COVID-19 is the greatest one so far in the century-, given the opportunity to act in a voluntary way, they have not lived up to it. This is the case of many companies in Brazil, which continued to operate despite the risks increased by the virus<sup>14</sup> granting no or little support for workers.<sup>15</sup>

The bottom line is that the National Guidelines present no innovation regarding duties of the state or companies' responsibilities; it falls short from presenting a text that can be immediately enforced and implemented leading to different results from those achieved so far by binding regulation already in place. One can wonder why any effort was put into such a legislation.

## II. Framing the Problem

States have an important role to play in curbing corporate human rights abuses and ensuring that victims get responses. It is through domestic regulation that it can demand respect for human rights, as suggested by Pillar I of the GPs. From the GPs it follows that states have obligations regarding human rights, including when their violation comes by the hands of third parties. The burden falls on states even though we recognize that many times there is no room for domestic regulation on issues touching corporate activity. The very possibility of a state regulating business activities raises the question of states competing for investment. It is really tricky to think that a state has a duty to protect but has no regulatory space that allows him to move without suffering the consequences for this.

Brazil today is one of those countries that also lack the political will to impose itself before companies, but much can be attributed to the fear of losing investments, which

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<sup>13</sup> This is also pointed in UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, Version 1.0 (1 December 2014), [https://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf).

<sup>14</sup> Check Conectas at <https://www.conectas.org/noticias/greve-entregadores-precariizacao-trabalho-aplicativos>; FIDH Press Release, April 29, 2020, <https://www.fidh.org/pt/americas/brasil/brasil-pandemia-afeta-desproporcionalmente-as-comunidades-afetadas>, but there are also cases of businesses pressing the government not to apply measures to contain the spread of the virus, such as closing stores or reducing the number of people served.

<sup>15</sup> Conectas.org and Business and Human Rights Resource Centre joint initiative, with other organizations, pointed out that rural workers kept delivering food for millions of Brazilians during the pandemic under conditions involving lack of protective equipment, absence of labor rights and exploitation of their labor forces, see *Cem dias de pandemia: as ações da Conectas para defender a democracia e os direitos dos mais vulneráveis*, <https://www.conectas.org/noticias/cem-dias-de-pandemia-as-acoes-da-conectas-para-defender-a-democracia-e-os-direitos-dos-mais-vulneraveis>.

leads to economic consequences that have repercussions in elections. These situations might explain why Brazil would have passed a legislation that literally adds nothing to protection already existent.

It is necessary to find a narrative that contributes to the rapprochement of Latin American countries so that they can rediscover similarities in the challenges they face in relation to entrepreneurial activities and, hopefully, build a path together that leads to a range of solutions that are more efficient than those currently being presented.

One might ask why it is so hard for states to act according to international law of human rights. The text identifies the obstacles to holding corporations accountable, both domestically and internationally, either where the violation occurs; the country where the parent company is headquartered; and the international environment.

In the place where the violation occurs, the lack of corporate accountability can occur due to lack of institutions; lack of political will; lack of technical capacity or lack of legislation attributing responsibility. The impossibility of holding transnational corporations accountable in the country where the parent company is headquartered may be due to the alleged lack of extraterritorial jurisdiction or due to corporate structures.

In turn, transnational corporations cannot be held liable in the international environment because they are not recognised as subjects of international law for this purpose; because there is no binding instrument that imposes obligations on them; because there are no sanctions; because there is no court with jurisdiction over them. Each of these problems has its own nuances and developments. Once the problems have been established, it will be necessary to understand the theoretical framework from which a solution is to be extracted.

There is plenty of room for other proposals that can encourage victims of human rights violations. The possibility explored here is centred on the search for the strengthening and realisation of human rights through the use of the theory called *Ius Constitutionale Commune for Latin America (ICCAL)* in the belief that it can lay the foundations for a proposal that can be applied in the region.<sup>16</sup>

The genesis of the problems faced today in the business and human rights (BHR) field in Latin America lies in the need for investment, the legal protection of investors and the lack of room for domestic regulation leading to the weakening of the State in the face of economic activity. ICCAL pledges and allows for the strengthening of the State, and it comes in the rescue of the structure capable of confronting economic power.

### **III. The Opportunity Presented by ICCAL**

The ICCAL–*Ius Constitutionale Commune for Latin America* is a theory developed by Armin von Bogdandy, Mariela Morales Antoniazzi and Flavia Piovesan in the Max Planck

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<sup>16</sup> I first discussed ICCAL in the face of state fragility in an article published in Portuguese. Section IV, with slight changes, is in Danielle Pamplona, “Um projeto comum para América Latina e os Impactos de Empresas em Direitos Humanos,” *Revista Brasileira de Políticas Públicas* 9, no. 2 (2019): 287–302.

Institute for Comparative Public Law and International Law that seeks the transformation of the social and political realities in Latin America in order to create the necessary conditions to strengthen democracy, the rule of law and human rights.<sup>17</sup> From the point of view of the negative impacts that businesses present on human rights, the problem lies in the voluntariness of the current measures that seek to respond to the challenges imposed by this relationship – businesses and human rights – and the political inability of some States to provide adequate responses in their domestic environment. But the solution to voluntariness, which is the adoption of binding instruments, such as an international treaty, is something that is not firmly on the horizon.<sup>18</sup> The question is: is there another way to avoid, minimise or enable liability for human rights violations by business? The article argues that ICCAL is the theory that opens up a possibility insofar as – unlike other theses that seek to respond to the fragmentation of law at the international level with the need for the creation of a supranational structure<sup>19</sup> – it advocates the strengthening of states, not the further weakening of them. In this sense, the first ICCAL central element “... is to address the profound structural deficiencies in many countries, often due to weak institutions, which lead to insecurity, impunity or corruption.”<sup>20</sup> The idea here defended is in accordance with the Strategic Plan of the Inter-American Commission on Human Rights for the period 2017–2021, which expressly stated that:

The hemisphere presents rates of poverty, extreme poverty and profound social gaps that limit access to opportunities in conditions of equity for all person, particularly for the most vulnerable populations. The protection of and respect for ethnic groups, particularly in cases of macro-projects for development and extraction; challenges with the implementation of the duty to consult with indigenous and tribal peoples in a prior, free and informed manner and to guarantee their participation in all decisions regarding any intervention that impact their territories.<sup>21</sup>

<sup>17</sup> Rodolfo Arango, “Fundamentos del Ius Constitutionale Commune en América Latina: Derechos Fundamentales, Democracia y Justicia Constitucional,” in *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, ed. Armin von Bogdandy, Héctor Fix-Fierro, Mariela Morales Antoniazzi (Inst Max Planck de Derecho Público Comparado y Derecho Internacional; Instituto de Investigaciones Jurídicas, México, 2014), 26–28.

<sup>18</sup> The activities of the UN Working Group that is currently in charge of the process of drafting a treaty on business and human rights are not unknown, nor is the fact that this process could take decades to reach its conclusion. On the progress of the work, see Adoración Guamná, “De documento del elementos al draft 0: apuntes jurídicos respecto del posible contenido del proyecto de instrumento vinculante sobre empresas transnacionales y otras empresas con respecto a los derechos humanos,” *Revista de Direito Internacional* 15, no. 2 (2018): 84–114.

<sup>19</sup> Anderson Vichinkeski Teixeira, “Um direito sem estado? Direitos humanos e a formação de um novo quadro normativo global,” *Revista de Direito Internacional* 10, no. 2 (2013): 87–101.

<sup>20</sup> Armin von Bogdandy et alii. “Ius Constitutionale Commune en America Latina: A Regional Approach to Transformative Constitutionalism,” *MPIL Research Paper Series* (2016): 4, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2859583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859583).

<sup>21</sup> See: Plan estratégico 2017–2021 de la CIDH, available at <http://www.oas.org/es/cidh/mandato/PlanEstrategico2017/default.asp>.

The aim here is for Latin American countries to agree on the content of the rights, including what the Inter-American Court of Human Rights says about them. Once this content has been established, it is necessary to address which is the possibility of using ICCAL instruments to address some of the challenges encountered.

The challenges in the country where the violations occur and where the parent company is located concern domestic law and the importance of the ICCAL lies in its concern to foster dialogue. What the Court decides must be applied in the different countries and it can, for example, indicate the need for laws to be passed or it can use the language of the GPs to establish some conduct for companies – as it has already done in the case of *Povos Kaliña y Lokono v. Suriname*.<sup>22</sup>

Furthermore, the lack of a binding instrument could be circumvented by documents produced by the Interamerican System other than Court decisions. They might be used demonstrate the constitution of a constitutional law that is common to the region. This is the case, for instance, of the report of the Inter-American Commission on Human Rights “Towards a comprehensive policy for the protection of human rights defenders”<sup>23</sup> that already recognizes that businesses also act in a veiled manner to promote legal actions against human rights defenders, community leaders and indigenous peoples with the intention of criminalizing and stigmatizing them.<sup>24</sup>

A 2014 Resolution<sup>25</sup> of the Organization of American States (OAS) recognizes that companies, regardless of their size, sector of activity, context or structure, have the responsibility to respect human rights in their activities, regardless of states’ capacity to fulfil their obligations in the matter. The resolution calls on Member States to disseminate the GPs as widely as possible and to encourage constructive dialogue between business, government and civil society, and other social actors, to implement the principles. It further requests the Permanent Council to promote the exchange of good practices and experiences in the promotion and protection of human rights in the business world.

A 2015 special session on the Promotion and Protection of Human Rights in the Area of Business was held in the Permanent Council when a report was presented on the social responsibility of business in the area of human rights and the environment in the

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<sup>22</sup> Case decided by the Inter-American Court of Human Rights in 2015, where the extractive company was expressly mentioned in the topic in which the Court establishes the conducts for rehabilitation of the territory where its activities were carried out. See: *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015 (Merits, Reparations and Costs), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_309\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf).

<sup>23</sup> Inter-American Commission on Human Rights. Report OAS/Ser.L/V/II.124, 07/03/2006, 46, [https://cidh.oas.org/pdf%20files/DEFENSORES%20PORTUGUES%20\(Revisada\).pdf](https://cidh.oas.org/pdf%20files/DEFENSORES%20PORTUGUES%20(Revisada).pdf).

<sup>24</sup> Penelope Canan and George W. Pring, “Strategic Lawsuits against Public Participation,” *Social Problems* 35, no. 5 (1988): 506–19.

<sup>25</sup> OAS, *Promoción y Protección de los Derechos Humanos en el Ámbito Empresarial*, AG/RES. 2840 (XLIV-O/14). Adopted at the second plenary session held on 4 June 2014.

Americas.<sup>26</sup> In the year 2016, a Resolution for the Promotion and Protection of Human Rights<sup>27</sup> emphasizes that due to the reference made to the 2030 Agenda to the UN Guiding Principles, regional financing and development mechanisms, especially the Inter-American Development Bank, should support efforts for its implementation. Requests the IACHR “a study on Inter-American standards on business and human rights based on an analysis of conventions, jurisprudence and reports emanating from the Inter-American system, which can serve as an input to Member States’ efforts in various national and international initiatives in the area of business and human rights.”<sup>28</sup>

Finally, it urges the Inter-American Juridical Committee to compile good practices, initiatives, legislation, jurisprudence and challenges that can be used as a basis to identify alternatives for addressing the issue. Thus, in 2017, the Inter-American Juridical Commission publishes the study with a Resolution<sup>29</sup> and a Report<sup>30</sup> on companies and human rights, stating that business and human rights differ from Corporate Social Responsibility, the latter not recognizing obligations to corporations.

It goes further:

For this reason, companies have the obligation to respect, protect and enforce human rights in the same way that States must do, for which it is necessary for them to be aware of international norms not only on business but also on human rights. Thus, companies have a duty to respect human rights, which implies both the obligation to refrain from infringing on the human rights of third parties, and the need to address the negative consequences on human rights in which they are involved.<sup>31</sup>

Today, the topic of business and human rights is carried out by the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA) created in 2017. And it could not be otherwise, since:

The Latin American region has been characterised by a high degree of social exclusion and inequality, compounded by democracies in the process of consolidation. The region is still living with reminiscences of the legacy of authoritarian and dictatorial regimes, a culture of violence and impunity, a low density of rule of law and a precarious tradition of respect for human rights in the domestic sphere.<sup>32</sup>

<sup>26</sup> OAS, Segundo Informe. Responsabilidad social de las empresas en el campo de los derechos humanos y el medio ambiente en las Américas, OAS/Ser. CJI/doc.449/14 rev.1 Q, 24 Feb 2014.

<sup>27</sup> OAS, Promoción y Protección de Derechos Humanos, AG/RES. 2887 (XLVI-O/16.) Adopted at the second plenary session held on 14 June 2016.

<sup>28</sup> Ibid, par. 4.

<sup>29</sup> OAS, Regulación consciente y efectiva de las empresas en el ámbito de los derechos humanos, OAS/Ser. Q, 232 (XCI-O/17) de 9 marzo 2017.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Flávia Piovesan, “Ius Constitutionale Commune latinoamericano en derechos humanos e impacto del Sistema Interamericano: Rasgos, potencialidades y desafíos,” in *Ius Constitutionale Commune en América Latina. Textos básicos para su comprensión. Coleção Constitucionalismo Contemporâneo*, eds.

This demonstrates that the Inter-American system is not alienated from the problem affecting the Latin American region. However, it is necessary to find ways to strengthen states so that it can convey the idea of the rule of law and respect for human rights, identifying ways to unblock the role of states vis-à-vis this “new” international actor. ICCAL makes it possible to outline a solution that is more appropriate to the current moment, fostering coordinated conduct among Latin American countries. The importance of applying ICCAL is due to the fact that different States have different responses to violations in their domestic systems. Some responses are better than others. Therefore, when ICCAL encourages the emergence of standards for the region, it is in fact a guide for the interpretation of different national norms and to foster strengthening of weaker States. It preaches the need for the content of rights to be harmonized among different states and that they must be strengthened, as they are the first response to rights abuses.

The need to adopt coordinated conduct is more evident in the face of the relationship of economic dependence established globally, in which some states cannot fulfil their commitments related to economic, social and cultural rights if they cannot count on some cooperation. It is essential to reflect on the responsibility of states to act beyond their territories to ensure that rights are realized.

To achieve this objective, it is necessary to understand that Latin American countries share common hurdles and that ICCAL provides the needed tool to foster a joint effort. It is necessary to introduce the elements, characteristics and objectives of ICCAL in order to assess whether they allow a viable proposal to be extracted for the problem presented.

Firstly, it is relevant to clarify that ICCAL is formulated from a legitimate concern for those excluded from the educational, economic, political and legal system in the countries of the region which are also the victims of human rights violations. The construction of the theory starts from a very clear objective that is to promote state conducts, specifically the Judiciary. As ICCAL aims to prevent and mitigate human rights violations, regardless of who is the violator, it fits the aims of the field of business and human rights. In this sense, among the objectives of the ICCAL is to ensure, at the regional level, the implementation of decisions and the fulfilment of central promises of post-authoritarian government constitutions. When Latin American states, after authoritarian regimes, commit to the implementation of human rights, they do not make any reservations about who is violating them. On the contrary, it is already well established in international law that the responsibility of States is to respect, protect and guarantee human rights. Thus, if a violation of a human right occurs from the State’s action or omission, although caused by the third entity, the state will respond. On the other hand, the elements of ICCAL are the openness of constitutions and the common discourse of comparative constitutional law in the service of democracy. In this sense: “Many rulings that, in the old paradigm,

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Armin von Bogdandy, Mariela Morales Antoniazzi, and Ferrero Eduardo Mac-Gregor (Instituto de Estudios Constitucionales del Estado de Querétaro. Max Planck Institute for Comparative Public Law and International Law. México, 2017), 553.

seem like questionable judicial activism, are seen in the context of the new paradigm as proper to the judiciary in a constitutional democracy, gradually helping to implement the new constitutional project.”<sup>33</sup>

Thus, this new constitutional project requires attention to a content that does justice to the desires of society, starting with the prohibition of granting less protection than previously established. ICCAL stands out in forging the content of human rights, demanding that the different states engage in constant dialogue to achieve the best for a given historical moment. Yet, from another perspective, the relevance and success of ICCAL is given to its defence of the essential role of the State: “No author promoting Latin American common law advocates a public law that does not recognise a central role for state institutions. But it is also argued that these are not enough: the guarantee and development of these principles requires an open state and strong international institutions.”<sup>34</sup>

Herein lies the core convergence with the genesis issue of the BHR discussions, which is the existence of fragile states. ICCAL seeks to strengthen the state insofar as it is primarily responsible for the implementation of internationally recognised human rights. Stronger states in the global south, in a joint effort, enable a significant increase in respect for human rights, especially with regard to their capacity to deal with economic power. And this state strengthening is exactly what ICCAL is all about: “Progress on human rights requires the building of strong institutions, changes in political culture and transformations in social and economic structures.”<sup>35</sup> In the same vein, one of ICCAL’s objectives is to achieve the strengthening of international institutions:

But this should not lead to a global or regional state, <...> the new universalism that serves as a pillar for the concept of a Latin American common law in a universalism that point out that the state understood as a national constellation should disappear. The state remains a central element in this vision of the new public law <...> but in interaction with the international system.<sup>36</sup>

It does not mean that state or sovereignty would disappear, but yes would be transformed into concepts adjusted to contemporary transnational dynamics. There are three key concepts to understand ICCAL. First, inclusion. The new public law should combat exclusion from all social systems (health, education, economy, work and politics), which is fully in line with the objectives of business studies and human rights. Another concept is legal pluralism. To discuss the relationship between international and domestic law, ICCAL rejects the answers of monism and dualism and proposes that the different legal systems relate to each other in a normally stable manner, despite their normative

<sup>33</sup> Armin von Bogdandy, “Ius Constitutionale Latinoamericanum. Aclaración conceptual,” in *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, ed. Armin von Bogdandy, Héctor Fix-Fierro, and Mariela Morales Antoniazzi (Inst Max Planck de Derecho Público Comparado y Derecho Internacional; Instituto de Investigaciones Jurídicas, México, 2014), 19.

<sup>34</sup> *Ibid.*, 9.

<sup>35</sup> *Ibid.*, 24.

<sup>36</sup> *Ibid.*, 12.

independence and the conflicts that may arise. Joint and fruitful work is the rule and serious conflicts are the exception. The third concept that must be grasped for the understanding of ICCAL is the dialogue between the courts and between them and other actors. It was once possible for courts to decide on the basis of their authority, without offering much justification or arguments for their conclusions. Today, it is necessary to have sufficient argumentation for the parties to understand the reasons that lead to a certain decision; there is a process of convincing other actors. A national court can invalidate a decision by the Inter-American court and vice versa. This is why justification is essential to allow dialogue and the conviction that the decision adopted is not arbitrary. In addition, it is necessary that the parties involved in the dialogue, interested in fulfilling the same agenda, understand its meaning: “The concept of dialogue does not require harmony, but it only works if the parties are involved in a common project. In the absence of acceptance of this premise, there is only interaction, but not dialogue.”<sup>37</sup>

It is possible to find encouragement in the jurisprudence of the Inter-American Court to argue that the region is in a position to realise rights.<sup>38</sup> Thus, the characteristics of ICCAL, its elements and objectives, seem to fit what is intended in fostering the evolution of studies in BHR. The intention is to illuminate one of the possibilities that open up when seeking to build common human rights content and foster the harmonious conduct of states in the region in relation to economic activities based in other states.

## VI. Final Remarks

Identifying that Latin America suffers from the need to receive investments, the special protection granted to investors, and the consequent reduction of the regulatory space of States, the text proposes to use the ICCAL to propose a solution.

The proposal is based on the possibility that states in the region can strengthen their capacity to dialogue among themselves and with the Inter-American System about the content and meaning of human rights. The cohesion around the meaning and content of rights will allow for coordinated action, taking advantage of the creation of a common law to guide their conduct and decisions in the international environment as well.

The ICCAL is based on the different decisions of the Inter-American Court that recognise the role of companies in the occurrence of certain human rights violations and on other manifestations of other bodies of the system. By recognizing the existence of this common right, states can use an instrument that will strengthen their decisions to

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<sup>37</sup> Armin von Bogdandy, “Ius Constitutionale Latinoamericanum. Aclaración conceptual,” in *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, ed. Armin von Bogdandy, Héctor Fix-Fierro, and Mariela Morales Antoniazzi (Inst Max Planck de Derecho Público Comparado y Derecho Internacional; Instituto de Investigaciones Jurídicas, México, 2014), 15.

<sup>38</sup> Sergio García Ramírez, “La ‘navegación americana’ de los derechos humanos,” in *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, ed. Armin von Bogdandy, Héctor Fix-Fierro, and Mariela Morales Antoniazzi (Inst Max Planck de Derecho Público Comparado y Derecho Internacional; Instituto de Investigaciones Jurídicas, México, 2014), 492.

address the demands of economic power in a manner that is coherent and consistent with their international human rights commitments.

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**Данієлла Анна Памплона. Виклики та можливості розвитку прав людини і бізнес-сфери в Бразилії та Латинській Америці: теорія спільного конституційного проєкту для Латинської Америки (A *Ius Constitutionale Commune*)**

**Анотація.** У своїй статті бразильська професорка Данієль Енн Памплона описує роль спільного конституційного проєкту для Латинської Америки (ICCAL) у зміцненні інвестиційного потенціалу країн Латинської Америки, зміцнення спроможності латиноамериканських держав

і бізнесів поважати та захищати права людини. ICCAL – це новітня теорія, розроблена Арміном фон Богданді, Марієлою Моралес Антоніаці та Флавією Піовесан в Інституті порівняльного публічного права і міжнародного права імені Макса Планка, яка прагне сприяти трансформації суспільних і політичних реалій у Латинській Америці задля створення необхідних умов для зміцнення демократії, верховенства права та прав людини. Нинішня ситуація у регіоні характеризується низкою викликів, що мають різноплановий характер: високі показники бідності, глибокі соціальні розриви, які обмежують доступ до можливостей, особливо для найбільш уразливих верств населення; етнічним групам і корінним народам не забезпечено захист та повагу при реалізації макропроектів, наприклад, у сфері видобувної промисловості, відсутність норм і практик про обов'язок компаній щодо проведення широких консультацій із корінними та племінними народами та гарантування їхньої участі в усіх рішеннях щодо будь-якого втручання, що впливає на їхні території.

Підхід ICCAL щодо проблем бізнесу і прав людини ґрунтується на різних рішеннях Міжамериканського суду, які визнають роль компаній у здійсненні негативного впливу на права людини, але водночас чітко артикулюють зобов'язання держав і бізнесу в сфері прав людини у термінах Керівних принципів прав людини. Як пояснює авторка, потенційна роль ICCAL полягає у тому, що він може стати практичним посібником для тлумачення різних національних норм і сприяння зміцненню слабших держав. Він також може зміцнити діалог між державами регіону та з Міжамериканською системою захисту прав людини. Згуртованість навколо значення та змісту прав людини дасть змогу державам і компаніям більш ефективно координувати дії у напрямі просування прав людини.

**Ключові слова:** права людини; зобов'язання у сфері прав людини; бізнес і права людини; Латинська Америка; Міжамериканська система захисту прав людини.

### **Даниэлла Анна Памплона. Вызовы и возможности развития прав человека и бизнес-сферы в Бразилии и Латинской Америке: теория общего конституционного проекта для Латинской Америки (A Ius Constitutionale Commune)**

**Аннотация.** В своей статье бразильская профессор Даниэлла Анна Памплона описывает роль общего конституционного проекта для Латинской Америки (ICCAL) в укреплении инвестиционного потенциала стран Латинской Америки, укрепления способности латиноамериканских государств и бизнеса уважать и защищать права человека. ICCAL – это новейшая теория, разработанная Армином фон Богданди, Мариэль Моралес Антониацци и Флавией Пиовесан в Институте сравнительного публичного права и международного права имени Макса Планка, которая стремится способствовать трансформации общественных и политических реалий в Латинской Америке для создания необходимых условий для укрепления демократии, верховенства права и прав человека. Нынешняя ситуация в регионе характеризуется рядом вызовов, имеющих разноплановый характер: высокие показатели бедности, глубокие социальные разрывы, которые ограничивают доступ к возможностям, особенно для наиболее уязвимых слоев населения; группам и коренным народам не обеспечено защиту и уважение при реализации макропроектов, например, в сфере добывающей промышленности, отсутствие норм и практик об обязанности компаний по проведению широких консультаций с коренными и племенными народами и обеспечения их участия во всех решениях в отношении любого вмешательства, влияет на их территории.

Подход ICCAL по проблемам бизнеса и прав человека основывается на различных решениях Межамериканского суда, которые признают роль компаний в осуществлении негативного

воздействия на права человека, но одновременно четко артикулируют обязательства государств и бизнеса в сфере прав человека в терминах Руководящих принципов прав человека. Как объясняет автор, потенциальная роль ICCAL заключается в том, что он может стать практическим пособием для толкования различных национальных норм и содействия укреплению слабых государств. Он также может укрепить диалог между государствами региона и с Межамериканской системой защиты прав человека. Сплоченность вокруг значения и содержания прав человека позволит государствам и компаниям более эффективно координировать действия в направлении продвижения прав человека.

**Ключевые слова:** права человека; обязательства в области прав человека; бизнес и права человека; Латинская Америка; Межамериканская система защиты прав человека.

**Danielle Anne Pamplona. Challenges and Opportunities for Developing the Human Rights and Business Field in Brazil and Latin America: A *Ius Constitutionale Commune***

**Abstract.** In her article, Brazilian professor Daniela Ann Pamplona describes the role of the Joint Constitutional Project for Latin America (ICCAL) in strengthening the investment potential of Latin American countries, strengthening the capacity of Latin American countries and businesses to respect and protect human rights. ICCAL is the latest theory developed by Armin von Bogdandi, Mariela Morales Antoniazzi and Flavia Piovesan at the Max Planck Institute for Comparative Public Law and International Law, which seeks to promote the transformation of social and political realities in Latin America to create the necessary democratic conditions. and human rights. The current situation in the region is characterized by a number of multifaceted challenges: high poverty rates, deep social gaps that limit access to opportunities, especially for the most vulnerable; Ethnic groups and indigenous peoples are not protected and respected in the implementation of macro-projects, such as mining, the lack of norms and practices on the obligation of companies to consult widely with indigenous and tribal peoples and to ensure their participation in any decision to intervene affects their territories.

ICCAL's approach to business and human rights is based on various Inter-American Court rulings that recognize the role of companies in adversely affecting human rights, but at the same time clearly articulate the human rights obligations of governments and businesses in terms of the Human Rights Guidelines. As the author explains, the potential role of ICCAL is that it can be a practical guide for interpreting different national norms and helping to strengthen weaker states. It can also strengthen dialogue between countries in the region and with the Inter-American Human Rights System. Cohesion around the meaning and content of human rights will allow states and companies to more effectively coordinate and coordinate actions to promote human rights.

**Keywords:** human rights; human rights obligations; business and human rights; Latin America; Inter-American system of human rights protection.

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