Carleton University

Department of Law and Legal Studies

Course Outline

Course: LAWS 4209B – Topics in Business Law: Business and Human

Rights

TERM: Fall 2021

PREREQUISITES: LAWS 2908, 0.5 credits from LAWS 2201 or LAWS 2202, and

fourth-year Honours standing

CLASS: Day & Time: Wednesdays 11:35 AM – 2:25 PM (Ottawa time)

Room: This course will be offered online (Zoom)

INSTRUCTOR: Jean-Michel Marcoux

CONTACT: Office: N/A

Office Hrs: Fridays 11:00 AM – 12:00 PM (Ottawa time, via Zoom)

Telephone: N/A

Email: jeanmichel.marcoux@carleton.ca

CALENDAR COURSE DESCRIPTION

Examination of a selected advanced topic in business law. The topics of this course may vary from year to year and are announced in advance of registration.

COURSE DESCRIPTION

The activities of corporations can have a profound impact on a wide range of internationally recognized human rights. In addition to a more traditional focus on labour conditions in global supply chains, there is a need to take into consideration how business entities can affect the right to health, the right to water and freedom of expression, among others. Seeking to hold corporations accountable for human rights violations also requires an understanding of the distinct obligations and responsibilities of States and business enterprises, as well as how human rights issues are addressed in various areas of law. This seminar is divided into three sections. First, it provides an overview of actors, international initiatives and concepts that relate to business and human rights. Second, it examines developments that have emerged at the national level in various jurisdictions, including corporate due diligence laws and forced labour legislation. Third, it explores different avenues to address business and human rights in international law, including efforts to negotiate a formal treaty and the elaboration of rules on business and human rights arbitration.

This course is a real-time, online course where the instructor and students meet via web conferencing tools, at scheduled days and times. The instructor and students share information, ideas and learning experiences in a virtual course environment. Participation in synchronous courses requires students to have reliable, high-speed internet access, a computer (ideally with a webcam), and a headset with a microphone.

Each class of the seminar typically includes three components:

- 1. A brief introduction of the topic by the instructor (15 minutes);
- 2. A reading presentation and a discussion led by a team of two or three students (45-60 minutes); and
- 3. A guided discussion led by the instructor or an invited speaker (60-75 minutes).

Zoom session in this course will be recorded and made available only to those within the class. Recording sessions enables access to students with internet connectivity problems. If students wish not to be recorded, they need to leave their camera and microphone turned off (except for evaluation purposes). You will be notified at the start of the session when the recording will start, and Zoom will always notify meeting participants that a meeting is being recorded. It is not possible to disable this notification. Please note that recordings are protected by copyright. The recordings are for your own educational use, but you are not permitted to publish to third party sites, such as social media sites and course materials sites. You may be expected to use the video and/or audio and/or chat during web conferencing sessions for participation and collaboration. If you have concerns about being recorded, please email me directly so we can discuss these.

By the end of this seminar, you will be able to:

- apply fundamental concepts in the analysis of business and human rights issues;
- understand major developments in the field, both in national law and international law;
- critically engage with the arguments made by various authors in the field; and
- research a specific business and human rights topic and elaborate a clear argument by relying on relevant scholarly references and primary sources (e.g., legislation, international instruments and cases).

REQUIRED TEXTS

All mandatory readings are available via ARES (a link is available on Brightspace). You are expected to read all mandatory readings to participate in discussions and to post reflections on Brightspace. Mandatory readings typically represent around 50 pages for each class.

Additional resources are included for each class on Brightspace. While they are not mandatory,

they include primary sources that can be used as illustrative cases when preparing reading presentations. I will also rely on these additional resources during the guided discussion for each class.

EVALUATION

Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

Assignment	Weight	Due Date
Reading presentation	15%	TBA (see below)
Reflections posted on Brightspace	15%	December 3 rd , 11:59 PM
Research plan	20%	October 8 th , 11:59 PM
Research paper	40%	December 10 th , 11:59 PM
Class participation	10%	Every class

Reading Presentation

From Week 3 to Week 13, each class will include a presentation of the *mandatory readings* by a team of two or three students. The reading presentation serves three objectives: 1) summarizing the content of the mandatory readings; 2) critically assessing the arguments made by the author(s) by identifying their strengths and their weaknesses; and 3) launching a discussion with the participants in the seminar. With a view to facilitating discussion with the participants and further illustrating the issues related to the topic, students are invited to consider the *additional resources* that have been added to Brightspace for each class.

The presentation should last for a total of 45 to 60 minutes (depending on the number of students involved). A Doodle link will be available on Brightspace to establish the schedule of the reading presentations after the first class. You are required to complete the Doodle survey by Wednesday, September 15th, 5:00 PM. The final schedule of the reading presentations will be uploaded and announced on Brightspace by the following day.

The reading presentation will be graded according to the following criteria: 1) ability to summarize the main issues of the mandatory readings; 2) capacity to critically engage with the content of the mandatory readings; 3) concise nature of the presentation; and 4) ability to generate discussion among the other participants in the seminar.

Reflections Posted on Brightspace

From Week 2 to Week 13, a discussion will be added to Brightspace after each class (see the module entitled "Discussions"). You are required to post three short reflections throughout the term, either by starting a new thread under a discussion or by leaving a reply to a thread started by another student. Each reflection should demonstrate your understanding and critical engagement with the *mandatory readings* of a specific class. Therefore, you are required to explicitly refer to mandatory readings in your text, by at least providing the name of the author(s) and the year of the publication you are referring to in parentheses.

Each reflection must be around 400 words. Moreover, each reflection must relate to a different class (i.e., you cannot post two reflections for the same class). All reflections must be posted on Brightspace by December 3rd, 11:59 PM.

The reflections will be graded according to the following criteria: 1) references to mandatory readings; 2) depth of the reflection; and 3) concise nature of the reflection.

Research Plan

You are required to write a research plan on a topic related to business and human rights from a legal perspective (broadly understood). The research plan will allow you to write a research paper of 3,500 words (see below). Please select a topic that you will be able to cover within this limit. The research plan should include four components: 1) a brief presentation of the topic; 2) a research question; 3) a summary of the argument that you will develop in the research paper; and 4) a preliminary bibliography of at least seven scholarly references (academic books, chapters in a collection of essays or peer-reviewed journals).

The research plan should include a maximum of 750 words (excluding footnotes and the bibliography). References should be included by using the *Canadian Guide to Uniform Legal Citation*, 9th edition (McGill Guide). A useful summary of the guide was prepared by the University of Calgary and can be found here: https://library.ucalgary.ca/c.php?g=255284&p=1703088. The research plan must be uploaded in a Word document (.docx) on Brightspace by Friday, October 8th, 11:59 PM. I will provide written feedback on each research plan by Friday, October 22nd.

The research plan will be graded according to the following criteria: 1) references to the literature; 2) appropriate scope of the research question; 3) structure of argumentation; 4) concise nature of the research plan; and 5) choice of references included in the preliminary bibliography.

Research Paper

After considering comments provided by the instructor, you are required to prepare a research paper on a topic related to business and human rights from a legal perspective (broadly understood). The research paper should recall the research question and provide a clear argument that is supported by scholarly references.

The research paper should include a maximum of 3,500 words (excluding footnotes and the bibliography). References should be included by using the *Canadian Guide to Uniform Legal Citation*, 9th edition (McGill Guide). A useful summary of the guide was prepared by the University of Calgary and can be found here: https://library.ucalgary.ca/c.php?g=255284&p=1703088. The research paper must be uploaded in a Word document (.docx) on Brightspace by Friday, December 10th, 11:59 PM.

The research paper will be graded according to the following criteria: 1) references to the literature; 2) appropriate scope of the research question; 3) structure of argumentation; 4) depth of the analysis; 5) concise nature of the research paper; and 6) choice of references included in the bibliography.

Class Participation

Given that the seminar primarily relies on discussions among participants, attending virtual sessions is mandatory throughout the entire term. In addition to attending classes, you are required to actively participate in the discussions led by students and by the instructor. Careful consideration of the mandatory readings that are assigned for each class greatly contributes to an active participation in these discussions.

Class participation will be graded according to the following criteria: 1) frequency of interventions; and 2) relevance of interventions. Moreover, unjustified absence from a class will be penalized, following a 2% deduction of the final grade for each class missed (maximum of 10%).

LATE PENALTIES AND REQUESTS FOR EXTENSIONS

The granting of extensions is determined by the instructor who will confirm whether an extension is granted and the length of the extension. For requests for extensions lasting less than 7 days, please complete the form at the following link and submit it to the instructor prior to the assignment due date: https://carleton.ca/registrar/wp-content/uploads/self-declaration.pdf.

Extensions for longer than 7 days will normally not be granted. In those extraordinary cases where extensions lasting longer than 7 days are granted, the student will be required to provide

additional information to justify the longer extension (up to a maximum of 14 days).

Unjustified late submissions of the research plan and the research paper will be penalized, following a 2% deduction of the final grade for each day. Also, please note that no extension will be granted for the reading presentation and reflections posted on Brightspace.

SCHEDULE

Week 1 (September 8th): Introduction

Presentation of the syllabus; scope of human rights violations; obstacles to business accountability; business and human rights from a legal perspective.

Mandatory readings:

• Aftab, Yousuf and Audrey Mocle. Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy (Toronto: LexisNexis, 2019) at 19-52.

PART I - FOUNDATIONS OF THE ANALYSIS

Week 2 (September 15th): Actors Involved in Business and Human Rights

Doodle survey for reading presentations must be completed by September 15th, 5:00 PM

Overview of actors involved in business and human rights (states; business enterprises; NGOs; communities; workers; consumers; financing agencies; and intergovernmental organizations); relations of power; different perspectives on governance.

Mandatory readings:

- Ruggie, John Gerard. "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5.
- Cutler, A. Claire. "Transnational Business Civilization, Corporation and the Privatization of Corporate Governance" in Christopher May, ed, *Global Corporate Power* (Boulder: Lynne Rienner Publishers, 2006) 199.
- Jochnick, Chris. "Shifting Power on Business and Human Rights: States, Corporations and Civil Society in Global Governance" in César Rodríguez-Garavito, ed, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 129.

Invited speaker: Emily Dwyer, Canadian Network on Corporate Accountability (TBC)

Week 3 (September 22nd): International Initiatives from 1970 to 2011

New International Economic Order; United Nations Centre on Transnational Corporations; OECD Guidelines for Multinational Enterprises; UN Guiding Principles on Business and Human Rights; "hard law" vs "soft law".

Mandatory readings:

- Simons, Penelope and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 79-122.
- Ruggie, John Gerard et al. "Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations" (2021) Bus & Human Rights J (forthcoming).

Additional resources:

- OECD Guidelines for Multinational Enterprises
- UN Guiding Principles on Business and Human Rights

Week 4 (September 29th): State Obligations and Corporate Responsibilities

State extraterritorial obligations; UNGP Pillar 1 and Pillar 2; General Comment No 24.

Mandatory readings:

- Methven O'Brien, Claire. "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal" (2018) 3 Bus & Human Rights J 47.
- López, Carlos. "The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?" in Surya Deva and David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 58.

Additional resources:

 UN Economic and Social Council, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.

Week 5 (October 6th): Responsibility, Accountability and Remedy

Research plan must be submitted by October 8th, 11:59 PM

Corporate social responsibility vs business and human rights; UNGP Pillar 3; grievance mechanisms; National Contact Points; communication procedures at the United Nations.

Mandatory readings:

- Ramasastry, Anita. "Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability" (2015) 14 J Human Rights 237.
- Buhmann, Karin. "Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Methods, Findings and Outlook" (2018) 36(4) Nordic J Human Rights 390.

Additional resources:

- Communication Procedure Bombardier 12 March 2021
- Communication Procedure Bombardier 12 May 2021

PART II – NATIONAL FRAMEWORKS

Week 6 (October 13th): Canadian Initiatives in the Extractive Sector

Canadian mining companies abroad; Canadian CSR strategies (2009 and 2014); failed Bill C-300; UN Human Rights Committee; Canadian Ombudsperson for Responsible Enterprise.

Mandatory readings:

- Seck, Sara L. "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Int'l L 51.
- Cohen, Miriam. "Doing Business Abroad: A Review of Selected Recent Canadian Case-Studies on Corporate Accountability for Foreign Human Rights Violations" (2020) 10(4) Int'l J Human Rights 1499.
- Keenan, Karyn. "Canada's New Corporate Responsibility Ombudsperson Falls Short of its Promise" (2020) 5 Bus & Human Rights J 135.

Additional resources:

- Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad
- Order in Council 2019-1323

Invited speaker: Sheri Meyerhoffer, Canadian Ombudsperson for Responsible Enterprise

Week 7 (October 20th): Extraterritorial Human Rights Violations in Domestic Courts

Barriers to judicial remedies in home countries; Alien Tort Statute in the United States; Nevsun Resources Ltd v Araya.

Mandatory readings:

- Curran, Vivian Grosswald. "Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations" (2017) 17 Chicago J Int'l L 403.
- Baxi, Upendra. "Nevsun: A Ray of Hope in a Darkening Landscape?" (2020) 5 Bus & Human Rights J 241.

Additional resources:

• Nevsun Resources Ltd v Araya, 2020 SCC 5.

Week 8 (October 27th): Reading Break

No class.

Week 9 (November 3rd): Mandatory Reporting on Non-Financial Issues

Mandatory reporting on non-financial issues; Conflict Mineral Rules; UK Modern Slavery Act; Bill S-216 in Canada.

Mandatory readings:

- Ewing, Anthony P. "Mandatory Human Rights Reporting" in Dorothy Baumann-Pauly and Justine Nolan, eds, *Business and Human Rights: From Principles to Practice* (New York: Routledge, 2016) 284.
- Mantouvalou, Virginia. "The UK Modern Slavery Act Three Years On" (2018) 81(6) Modern L Rev 1017.

Additional resources:

• UK Modern Slavery Act, 2015 Chapter 30

Week 10 (November 10th): Corporate Due Diligence Legislation

Business and human rights due diligence; France's corporate duty of vigilance act; EU Parliament Resolution.

Mandatory readings:

• Smit, Lise et al. "Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard" (2021) 25(6) Int'l J Human Rights 945.

• Quijano, Gabriela and Carlos Lopez. "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?" (2021) Bus & Human Rights J (forthcoming).

Additional resources:

 EU Parliament Resolution of 10 March 2021 with Recommendation to the Commission on Corporate Due Diligence and Corporate Accountability

PART III – INTERNATIONAL LAW

Week 11 (November 17th): International Investment Law and Human Rights

Unbalanced nature of international investment agreements; provisions in investment agreements; references to the UNGPs in investment arbitration; contributory fault; Urbaser v Argentina; Canadian model treaty 2021.

Mandatory readings:

- Choudhury, Barnali. "Investor Obligations for Human Rights" (2020) 35 ICSID Rev 82.
- Krajewski, Markus. "A Nightmare of a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty Application" (2020) 5 Bus & Human Rights J 105.

Additional resources:

Canadian model treaty (2021)

Week 12 (November 24th): Rules on Business and Human Rights Arbitration

Arbitration and dispute settlement; investment arbitration vs human rights arbitration; The Hague Rules on Business and Human Rights Arbitration; issues regarding applicable law and enforceability.

Mandatory readings:

• Blair, Cherie et al. "The Medium is the Message: Establishing a System of Business and Human Rights through Contract Law and Arbitration" (2018) 35(4) J Int'l Arb 379.

• Ahn, Keon-Hyung and Hee-Cheol Moon. "An Introductory Study on the Draft Hague Rules on Business and Human Rights Arbitration" (2019) 29(3) J Arb Studies 3.

Additional resources:

• The Hague Rules on Business and Human Rights (2019)

Week 13 (December 1st): An International Treaty on Business and Human Rights

All reflections must be posted on Brightspace by December 3rd, 11h59 PM

Work of the Open-ended Working Group and negotiation process; link with anti-corruption agreements; a feminist approach to the business and human rights treaty; international treaty vs UNGPs.

Mandatory readings:

- Simons, Penelope. "The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically" in Surya Deva and David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017) 48.
- Bantekas, Ilias. "The Emerging UN Business and Human Rights Treaty and its Codification of International Norms" (2021) 12 George Mason Int'l L J 1.
- Awori, Sanyu et al. "A Feminist Approach to the Binding Instrument on Transnational Corporations and Other Business Enterprises" (2018) 3 Bus & Human Rights J 285.

Additional resources:

Legally Binding Instrument – Second Revised Draft (2020)

Week 14 (December 8th): Conclusion

Research paper must be submitted by December 10th, 11:59 PM

Summary of the seminar; next steps in business and human rights.

Mandatory readings:

No mandatory readings

COVID-19 PREVENTION MEASURES

All members of the Carleton community are required to follow COVID-19 prevention measures and all mandatory public health requirements (e.g. wearing a mask, physical distancing, hand hygiene, respiratory and cough etiquette) and <u>mandatory self-screening</u> prior to coming to campus daily.

If you feel ill or exhibit COVID-19 symptoms while on campus or in class, please leave campus immediately, self-isolate, and complete the mandatory <u>symptom reporting tool</u>. For purposes of contact tracing, attendance will be taken in all classes and labs. Participants can check in using posted QR codes through the cuScreen platform where provided. Students who do not have a smartphone will be required to complete a paper process as indicated on the <u>COVID-19 website</u>.

All members of the Carleton community are required to follow guidelines regarding safe movement and seating on campus (e.g. directional arrows, designated entrances and exits, designated seats that maintain physical distancing). In order to avoid congestion, allow all previous occupants to fully vacate a classroom before entering. No food or drinks are permitted in any classrooms or labs.

For the most recent information about Carleton's COVID-19 response and required measures, please see the <u>University's COVID-19 webpage</u> and review the <u>Frequently Asked Questions</u> (<u>FAQs</u>). Should you have additional questions after reviewing, please contact <u>covidinfo@carleton.ca</u>

Please note that failure to comply with University policies and mandatory public health requirements, and endangering the safety of others are considered misconduct under the Student Rights and Responsibilities Policy. Failure to comply with Carleton's COVID-19 procedures may lead to supplementary action involving Campus Safety and/or Student Affairs.

ACADEMIC ACCOMMODATIONS

Academic Accommodation

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

Pregnancy obligation

Write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For accommodation regarding a formally-scheduled final exam, you must complete the Pregnancy Accommodation

Form.

Religious obligation

Write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details <u>click</u> here.

Academic Accommodations for Students with Disabilities

The Paul Menton Centre for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or pmc@carleton.ca for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first inclass scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (if applicable).

Survivors of Sexual Violence

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and where survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit: https://carleton.ca/equity/sexual-assault-support-services

Accommodation for Student Activities

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation will be provided to students who compete or perform at the national or international level. Write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist: https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf

Plagiarism

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence. More information on the University's Academic Integrity Policy can be found at: https://carleton.ca/registrar/academic-integrity/.

Accommodation for Student Activities

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who compete or perform at the national or international level. Please contact your instructor with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. Read more here: https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf.

For more information on academic accommodation, please visit: https://students.carleton.ca/services/accommodation/.

Department Policy

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations: https://carleton.ca/law/student-experience-resources/.