

Proposal for an ILA Committee on Business and Human Rights

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Introduction

1. The proposal seeks to establish a new Committee of the International Law Association (ILA) on Business and Human Rights (the Committee) aimed at studying the evolving law in this field and contributing to the further development of international law addressing business and human rights through developing common principles, general guidelines and concrete proposals. The Committee would build on previous activities of the ILA in this field, in particular the work of the Committee on International Civil Litigation and the Interests of the Public (2004-2012) which drafted the Sofia Guidelines on Best Practices on International Civil Litigation for Human Rights Violations in 2012¹ and the Study Group on Business and Human Rights (2012-2018) which suggested the establishment of a Committee on Business and Human Rights.²

2. The purpose of the proposed ILA Committee on Business and Human Rights would be to study and analyse developments in international, transnational and domestic legal systems with regards to state and corporate obligations in the field of human rights and business and concerning access to remedies and justice of victims of human rights violations in the context of business activities. While it would focus on a broad range of legal questions in diverse legal disciplines, the Committee's main focus would be on the perspective of rights-holders affected by business activities of multinational corporations and in international value chains and production networks.

Topic

3. Human rights violations involving business activities occur on a daily basis in all parts of the world. At the same time, an increasing number of companies seem to embrace principles of responsible business conduct (RBC), environmental, social, and (good) governance (ESG) or human rights and environmental due diligence. It remains an open question if these developments will lead to actual changes in business models and production chains or whether the respective activities of companies mostly amount to lip-service and ticking-the-box-exercises.

4. The impact of multinational enterprises and transnational business activities on national sovereignty, public policies, human rights, and the environment has been the subject of discussions in international law and practice for many decades. Examples include the attempt of the UN Commission on Transnational Corporations to develop a Code of Conduct on

¹ ILA Resolution 2/2012.

² ILA Resolution 8/2018.

Transnational Corporations in the 1970s and 1980s³ or the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights drafted by the UN Subcommission on the Promotion and Protection of Human Rights in 2003.⁴ However, despite these efforts, there is currently no generally agreed set of international law norms addressing the responsibility of companies vis-à-vis human rights.

5. Instead of continuing attempts to develop binding norms, the Human Rights Council endorsed the United Nations Guidelines on Business and Human Rights (UNGPs) in 2011. The UNGPs established the “Protect, Respect, Remedy” Framework developed by the late John Ruggie, Special Representative of the UN Secretary General for Business and Human Rights. While they do not create new international obligations, they interpret human rights obligations of states, summarise good business practices concerning human rights and develop standards for access to remedies. Since their adoption, the UNGPs have become the focal point and main reference framework of the debate on corporate responsibility concerning human rights. More than 30 states have adopted National Action Plans on Business and Human Rights or included a “Business and Human Rights” chapter in their Human Rights national action plans. Almost 20 additional states are in the process of developing such a plan.⁵

6. While the UNGPs are themselves non-binding, developments at the national level in a number of jurisdictions led to processes of increased legalisation and juridification of the field of human rights. Notably, national laws requiring transparency with regards to modern slavery⁶, responsibility with regards to child labour⁷ or general human rights and environmental due diligence⁸ are starting to appear. The most recent project in this regard is the EU Draft Directive in Corporate Sustainability Due Diligence.⁹ While these laws are measures of national legislation processes, they are nevertheless based on international law standards and may contribute to its implementation.

7. Another noteworthy development are lawsuits against multinational companies in their home countries or other jurisdictions of the Global North. Starting with cases litigated on the basis of the US Alien Tort Claims Act in the 1990s and 2000s and on tort law in English courts in the 2010s, such lawsuits can contribute to effective remedies and access to justice for victims of human rights violations. However, these lawsuits also raise a number of private international law questions including jurisdiction, applicable law, burden of proof and other procedural obstacles. While these aspects have been discussed in the literature extensively and were also the subject of the ILA Sofia Guidelines on Best Practices on International Civil Litigation for Human Rights Violations, recent developments including the emergence of human rights due diligence laws and international law instruments raise new questions.

³ Commission on Transnational Corporations, Report on the Special Session (7-18 March and 9-21 May 1983) Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II.

⁴ Subcommission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2.

⁵ <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>

⁶ California, UK, and Australia Modern Slavery Acts.

⁷ Wet zorgplicht kinderarbeid (Netherlands) of 2017, Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit of 2021 (Switzerland).

⁸ Loi de Vigilance of 2017 (France), Lieferkettensorgfaltspflichtengesetz of 2021 (Germany) and Apenhetsloven of 2021 (Norway).

⁹ European Commission, Proposal for a Directive on corporate sustainability due diligence and annex (2022).

8. Finally, there has been a significant increase and diversification of the public international law framework in the field of business and human rights. In this context, the negotiations on a Legally Binding Instrument on Business and Human Rights which are ongoing in the Human Rights Council since 2014¹⁰ are the most obvious and apparent topic requiring further study and discussion. In addition, other soft law instruments such as the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy have recently been revised and updated. Furthermore, regional human rights courts and treaty bodies mandated with the oversight of global human rights treaties have also further developed their interpretation of human rights obligations of states in the field of business activities.

9. The multifaceted developments at the national, regional and international level give rise to an emerging multilevel, transnational and pluralist legal framework concerning corporate responsibilities in the fields of human rights and environmental protection which raises a number of pertinent questions ranging from issues concerning general public international law (state responsibility, scope of jurisdiction, extraterritorial obligations), human rights law and private international law as well as questions of constitutional, criminal, administrative, civil, corporate and competition law at the domestic level. Addressing these questions is of significant relevance not only for governments and international organisations, but also for private companies and organisations of civil society.

10. In light of the above, the International Law Association is in a unique position to provide a forum for the scholarly debate and analysis of these questions thanks to its broad mandate encompassing public and private law, its global reach including countries of the Global North and Global South and its diverse membership which combines academics and practitioners, which therefore allows a variety of perspectives to be heard.

Previous ILA Work

11. The International Law Association has been (directly and indirectly) studying and monitoring the development of international, domestic and transnational law in the field of business and human rights for a number of years. As a starting point, an ILA Committee on International Civil Litigation and the Interests of the Public, chaired by Professor Catherine Kessedjian, adopted the *Sofia Guidelines on Best Practices on International Civil Litigation for Human Rights Violations* in 2012, with a clear focus on the use of transnational civil litigation to redress human rights violations. The adoption of such guidelines took place only a year after the UNGPs and therefore could not have fully incorporated their impact on the topic studied.

12. In response to the adoption of these Sofia Guidelines, and to further refine the understanding of the international legal implications of such an instrument, the ILA established a Study Group on Business and Human Rights in 2012 with a mandate to identify issues of international law in connection with the implementation of the UNGPs and issues that might pose a barrier to their effective implementation by States and business enterprises. As noted in its 2014 working session report, the initial focus of the Study Group was relatively unclear, with different

¹⁰ Human Rights Council, Resolution 26/9 of 14 July 2014.

approaches and topics suggested for discussion, a situation that would evolve throughout the years as the global conversation around business and human rights started to gain traction. The Study Group noted with interest the initial discussions around the negotiation of a treaty on business and human rights, and took steps to intervene before other UN bodies, including before the Committee on Economic, Social and Cultural Rights in relation to its preparation of a General Comment on State obligations in the context of business activities.

13. The Study Group issued its final report in 2018 and recommended the establishment of an ILA Committee, suggesting focusing on questions such as extraterritorial jurisdiction, the simultaneous duties of States under different international law regimes, the need for ‘model laws’ to articulate corporate duties, the challenges in access to remedy and the implications of climate change for business and human rights. However, that initiative was not pursued.

14. In 2022, Humberto Cantú Rivera and Catherine Pédamon wrote a White Paper on Business and Human Rights in the context of the celebrations of the 150th anniversary of the ILA which mapped the state of the art of the field and identified the challenges ahead. A comparison of the report of the Study Group and the White Paper reveals that the Business and Human Rights agenda has grown significantly in the last couple of years, in particular with regards to legal instruments at different levels.

Mandate

15. The proposed ILA Committee on Business and Human Rights would build on ILA’s past activities in the field and develop them further. In light of the dynamic development and fast changes in the field, studying pertinent legal developments at various layers of governance, systematically analysing and criticising them and developing proposals for new legal principles is highly desirable. More concretely, the ILA Committee would study and analyse developments in international, transnational and domestic legal systems with regards to state and corporate obligations in the field of human rights and business and access to remedies and justice for victims of human rights violations in the context of business activities. The focus would be on human rights in the broadest sense, including questions of environmental responsibilities and obligations built on the right to a clean, healthy and sustainable environment.

16. The Committee will focus on five fields of study:

- International norms, in particular the Legally Binding Instrument currently under discussion, but also regional human rights instruments, other treaties aiming at establishing corporate responsibility and formally non-binding norms such as international soft law standards, in particular the newly revised OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.
- Regional and domestic legislation concerning corporate responsibility in the field of human rights, including Human Rights Due Diligence such as the Draft EU Directive on Corporate Sustainability Due Diligence and other national laws, in addition to other potential avenues to promote preventive and corrective practices in the context of business activities.

- Remedies in domestic legal systems including civil law cases and respective rules of private international law, as well as constitutional, administrative or criminal law remedies.
- Relationship between international law of business and human rights and other fields of international law such as international trade and investment agreements, international environmental law (including climate change), Sustainable Development Goals, etc.
- International and domestic private law related to commercial activities and corporate governance, including corporate law and instruments of corporate finance as well as model clauses for international contracts such as the ABA's Model Contract Clauses for Human Rights

17. Each of these areas of the law will be studied, critically analysed and compared with other fields of law. The value-added of an ILA Committee on Business and Human Rights would be the systematization of existing legal standards and practice that should inform ongoing normative developments at the international, regional and national levels. Based on the study of the law and legal developments, the Committee will draft, discuss and adopt proposals for international and domestic legal instruments and make them available to interested parties and institutions. So far, scholarly work or legal practice have focussed on particular legal developments (specific national jurisprudence, adoption of domestic laws or the developments of international legal instruments). What is missing is a holistic overview identifying common principles and challenges which would enable the ILA to contribute to coherence and clarity in a field of law which transcends the classic boundaries of public and private international law and of domestic and international law and is best understood as a transnational and pluralist legal regime.

18. The Committee will also monitor and analyse relevant state practice to assess if such practice contributes to subsequent practice under Article 31 of the Vienna Convention on the Law of Treaties or if certain legal principles emerge as (regional) customary law or general legal principles. In addition, the Committee will study activities of companies and business associations to determine examples of best practice.

19. An ILA Committee would be uniquely placed to study and propose development in international law in the field of business and human rights as it would encompass public and private international law, include the perspectives of practitioners and scholars and have a global reach. This would distinguish the ILA Committee also from relevant academic networks such as the Global Business and Human Rights Scholars Association which only comprises of scholars, UN bodies such as the Working Group on Business and Human Rights which operates based on a mandate by the Human Rights Council or the Interest Group on International Business and Human Rights of the European Society for International Law whose members are mainly based in Europe.

Work Plan and Outcomes

20. The Committee aims at a six-year work plan consisting of the following steps:

Year	Topic to be analysed	Outcome
1 (2024)	Access to remedy for corporate human rights abuses in domestic legal systems	---
2 (2025)	Domestic and regional legislation on corporate responsibilities in the field of human rights	Committee report on legislation and access to remedy
3 (2026)	International and domestic law related to commercial and corporate governance	---
4 (2027)	Business and human rights and its relationship with other fields of international law	Committee report on business and human rights within international law and its role in shaping corporate governance
5 (2028)	International norms regulating business activities and their impact on human rights (I)	---
6 (2029)	International norms regulating business activities and their impact on human rights (II)	Principles on human rights duties and responsibilities in the context of business activities

The above-mentioned sequence should not blur the fact that most topics are interrelated and that the work of the Committee will be partly conducted in parallel streams. In particular, the question of remedies is relevant in all aspects of the work of the Committee and will therefore not be limited to year 1. The sequence (starting with domestic and moving to international law) is based on the anticipated development of norms in the field. It is likely that the years 2024-2026 will see an increase of domestic laws while it remains unclear when an international treaty will be concluded.

21. Since all topics will not necessarily be analysed in exactly one or two years, the Committee may decide to begin with the certain parts of its work programme earlier and work simultaneously on more than one topic. Due to the diversity of the topics not all members of the Committee will have the same amount of knowledge and expertise on each topic. It is therefore envisaged that the study and analysis of individual topics will not necessarily involve all Committee members. However, the Committee officers will ensure that each topic is studied and analysed by a group which encompasses different regional backgrounds and professional backgrounds.

22. It is proposed that the Committee develops a set of *ILA Principles on Human Rights Duties and Responsibilities in the Context of Business Activities*, that serve to reflect the evolution in the understanding of the question since the adoption of the UN Guiding Principles on Business and Human Rights in 2011 and point towards a better integration of human rights considerations in international (and other) legal instruments addressing business activities.

23. In addition to the development of these principles and the adoption of its Reports the Committee also plans to host two conferences in cooperation with academic institutions in Latin America, Africa or Asia. The Committee will also offer its members the opportunity to publish work leading to the Committee Reports or research conducted in the context of the Committee's

activities on an open-access blog. Finally, the Committee also aims at disseminating its work and outcomes through Vlogs and other alternative formats suitable to social media to reach a broad audience.

Co-Chairs

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Carolina Olarte-Bácares is currently the Ambassador of Colombia to the Kingdom of The Netherlands. Agent of Colombia before the International Court of Justice, Member of the Permanent Court of Arbitration. Former Dean and Associate Professor, Law School, Pontificia Universidad Javeriana, Bogota, Colombia. PhD in International Law University Paris 1 Panthéon- Sorbonne, Master of research in international law, Robert Schuman University, Strasbourg. Lawyer, Pontificia Universidad Javeriana, Law School, Bogota. Independent Consultant in international law, investment arbitration, human rights, and business and human rights, and external consultant for diplomatic representations in Colombia on matters related to diplomatic privileges and immunities. Founding member of the Colombian Academy of International Law (ACCOLDI), Board Member of the Global Business and Human Rights Scholars Association, and of the Latin American Academy on Human Rights and Business.

Humberto Cantú Rivera

Professor at the Faculty of Law and Social Sciences and Director of the Human Rights and Business Institute of the University of Monterrey (Mexico). He holds a LL.D. from Université Panthéon- Assas Paris II. He is a member of the Editorial Board of the Business and Human Rights Journal and of the review *Droits fondamentaux*, the founding Director of the Latin American Academy on Human Rights and Business, and a Vice-president of the Global Business and Human Rights Scholars Association. He is also a Senior Fellow of the Nova Centre for Business, Human Rights and the Environment, has been a visiting researcher at the University of Oxford's Bonavero Institute of Human Rights, and visiting professor at universities from Colombia, Brasil, Germany, France and the United States of America. He has published widely on business and human rights and has extensive experience working with and advising States, international organizations, businesses and civil society on business and human rights in international, regional and domestic standard-setting processes and in the implementation of responsible business conduct standards.

Markus Krajewski

Markus Krajewski is Professor of Public and Public International Law at the University of Erlangen-Nürnberg (Germany). He is qualified to practice law in Germany and holds a Dr. jur. from the University of Hamburg. He is author of five books and numerous articles on international economic law, human rights, and European external relations law. He has been visiting lecturer at universities in various European countries, Brazil, Chile, and the United States. He is spokesperson of the Research Center for Human Rights Erlangen-Nürnberg and

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