

# The Year in Review

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## International Human Rights

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## International Human Rights

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## **International Human Rights**

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### **I. Introduction**

This article highlights important international and national developments in 2018 in the fields of international human rights and business and human rights.

### **II. International Developments**

#### **A. DRAFT UN TREATY ON BUSINESS AND HUMAN RIGHTS**

The “Zero Draft,” a draft UN treaty on business and human rights, was discussed during the fourth session of the Open-ended Intergovernmental Working Group (OIWG), held in Geneva, in October 2018. An annex concerning a National Implementation Mechanism was also presented. While the treaty is drafted so as to be legally binding on States and not businesses, a reference to businesses’ responsibility to respect human rights is contained in the preamble.<sup>1</sup>

A 2014 UN Human Rights Council resolution mandated the OIWG to create a binding instrument that regulates “activities of transnational corporations and *other business enterprises*,” however, a footnote adds that “other business enterprises” means those of “a transnational character in

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\* The Committee Editor is Professor Constance Z. Wagner, Saint Louis University School of Law. Corinne Lewis, Partner, Lex Justi, wrote Section II.A. Constance Wagner and Caroline Renner, J.D. 2019, Saint Louis University School of Law, wrote Section II.B. Sophie Pouget, President of Committee for Refugee Relief (France), wrote Section II.C. Daniel L. Appelman, Partner, M&H, LLP, wrote Section II.D. Claudia Feldkamp, Counsel, Fasken, Martineau, wrote Section III.A. Elena Ateva, Attorney, White Ribbon Alliance, and Arzu Rana Deuba, Founder, Safe Motherhood Network Federation (Nepal), wrote Section III.B. Shekinah Apedo, J.D. 2019, Western Michigan University Cooley Law School, wrote Section III.C. Federica Dell’Orto Hadar, Attorney, and Judith L. Wood, Partner, Law Offices of Judith L. Wood, wrote Section III.D. Tschika McBean, Human Rights Officer for Baha’is of the United States, wrote Section III.E. Mark Du, City of New York, Administrative Judge, wrote Section III.F.

1. Zero Draft Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* art. 1, July 16, 2018, UN HUMAN RIGHTS COUNCIL [hereinafter Zero Draft].

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their operational activities, and does not apply to local businesses” registered under domestic law.<sup>2</sup> States and civil society organizations have faulted the OIWG’s work for excluding businesses that are not carrying out transnational operations. While the Zero Draft covers “any *business activities* of a transnational character,”<sup>3</sup> this wording was criticized during the session<sup>4</sup> and remains inconsistent with the UN Guiding Principles on Business and Human Rights (UNGPs) coverage of “all business enterprises, both transnational and others.”<sup>5</sup>

Additionally, participants noted that the Zero Draft defines “business activities of a transnational character” as “for-profit economic activity,”<sup>6</sup> which excludes State-owned enterprises from the treaty’s ambit.<sup>7</sup> Moreover, the scope of human rights under the treaty—“all international human rights and those rights recognized under domestic law”<sup>8</sup>—engendered concern that because States have ratified different human rights treaties and have different national laws, divergent and inconsistent interpretations and implementation of the treaty could arise.<sup>9</sup>

The Draft stated that the courts of the State where the acts or omissions occurred or where the alleged perpetrator is domiciled shall have jurisdiction; and States are to take steps to ensure that criminal, civil, and administrative liability is available under domestic law for violations of human rights.<sup>10</sup> But some delegations objected to the requirement that States provide for universal jurisdiction under their national laws for crimes.<sup>11</sup> Concerns were also raised that the provision on business enterprises’ liability for harm caused by a subsidiary or a supplier is contrary to the doctrine of separate legal personality.<sup>12</sup>

Although Article 9 of the Zero Draft on prevention reflects developments in human rights due diligence, such as the French law,<sup>13</sup> it was criticized for being aligned with neither the UNGPs’s nor the OECD’s due diligence

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2. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 1 (June 26, 2014).

3. Zero Draft, *supra* note 1, art. 3, ¶ 1.

4. Luis Gallegos, (Chair-Rapporteur), *Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶¶ 35 – 36, 73, U.N. Doc. A/HRC/40/48 (Jan. 2, 2019).

5. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 1, 14, (2011) [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

6. Zero Draft, *supra* note 1, art. 4, ¶ 2.

7. Gallegos, *supra* note 4, ¶ 14.

8. Zero Draft, *supra* note 1, art. 3, ¶ 2.

9. *See* Gallegos, *supra* note 4, ¶ 15.

10. Zero Draft, *supra* note 1, art. 5, ¶¶ 1, 10.

11. Gallegos, *supra* note 4, ¶¶ 18, 70.

12. *Id.* ¶ 80.

13. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Order], Legifrance, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>.

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standards.<sup>14</sup> Moreover, some delegations and NGOs expressed their desire that a Committee, to be created under Article 14, not just receive reports and provide observations and recommendations, but also receive, review, and issue binding decisions on complaints.<sup>15</sup>

Numerous requests were made at the session for increased clarity and precision in the Draft's language and for inclusion of additional protections, including for women and human rights defenders.<sup>16</sup> "Minorities" are also not mentioned in Articles 9(2)(g) and 15(5), as well as other groups of persons that receive particular attention due to heightened risks of human rights violations from business activities, in contrast with the UNGPs' inclusion of this group.<sup>17</sup>

A revised treaty will be prepared by the end of June 2019 to enable the OIWG to hold direct substantive intergovernmental negotiations.<sup>18</sup>

**B. CORPORATE HUMAN RIGHTS DUE DILIGENCE**

On July 26, 2018, the Working Group on Business and Human Rights presented its report on corporate human rights due diligence (Report) to the UN General Assembly.<sup>19</sup> In 2011, the UN Human Rights Council had unanimously endorsed the Guiding Principles on Business and Human Rights, which was the first "globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address" adverse human rights impacts on people resulting from globalization and business activity.<sup>20</sup> The Guiding Principles impose on business enterprises the responsibility to respect human rights and explicitly require them to exercise human rights due diligence "to identify, prevent, mitigate and account for how they address impacts on human rights."<sup>21</sup> The goal of such due diligence is to prevent adverse impacts and human rights violations, which can be achieved by using four core components, including identifying and assessing actual or potential adverse human rights impacts; integrating findings from impact assessments

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14. Gallegos, *supra* note 4, ¶ 58.

15. *Id.* ¶ 86.

16. *See, e.g., id.* ¶¶ 46, 56, 74, 90.

17. *Guiding Principles, supra* note 5, at 5 – 6, 14.

18. *Fourth UN Intergovt. Working Group Session on Proposed Business & Human Rights Treaty*, BUS. & HUMAN RIGHTS RESOURCE CENT. (Oct. 15, 2018), <https://www.business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/fourth-un-intergovt-working-group-session-on-proposed-business-human-rights-treaty-15-19-oct-2018>.

19. U.N. Secretary-General, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/73/163 (July 16, 2018).

20. *Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practice*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

21. *Id.*

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across relevant company processes; and communicating on how impacts are being addressed.<sup>22</sup>

The Report “highlights key features of human rights due diligence and why it matters; gaps and challenges in current business and Government practice; emerging good practices; and how key stakeholders,” including governments and investors, can contribute to enhanced due diligence.<sup>23</sup> The Report notes that some large corporations have started to develop good practices for such due diligence, but most businesses are unaware of their responsibility under the Guiding Principles or are unable or unwilling to implement such due diligence.<sup>24</sup> To close this gap, it will require “concerted efforts by all actors.”<sup>25</sup> The Report recommends that businesses “just get started,” that investors “require effective human rights due diligence by companies they invest in,” and that governments “use all available levers,” including legislation and policy initiatives, to advance human rights due diligence as part of standard business practice.<sup>26</sup>

The Working Group also developed two “companion notes” that were annexed to the Report. Using a frequently asked questions format, Companion Note I provides further background on the rationale for, components of, and relationship to legal risk management of human rights due diligence.<sup>27</sup> This Note also connects the due diligence requirement of the Guiding Principles with the OECD’s Due Diligence Guidance for Responsible Business Conduct, as well as various sector-specific guidance on this topic.<sup>28</sup>

Companion Note II provides steps that a business should take to approach due diligence and also provides an overview of tools and resources.<sup>29</sup> Importantly, the Note recognizes that due diligence looks different for each organization based on the sector, business model, geographical location, and operating context.<sup>30</sup> The key first step is identifying the potential adverse impacts to determine what steps the entity should take. The Note also identifies steps that the entity should take in the process of human rights due diligence—some of which are steps that any entity would or should take in adopting any business practice—such as identifying enablers and potential blockers within the organization, ensuring that management is on board, engaging stakeholders, and conducting training on key internal functions for

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22. *Id.*

23. *Id.*

24. *See id.*

25. U.N. Secretary General, *supra* note 19, ¶ 92.

26. *Id.* ¶¶ 93 – 94.

27. *Companion Note I to the Working Group’s 2018 Report to the General Assembly (A/73/163)*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, 1 (Oct. 16, 2018), <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf>.

28. *Id.* at 6 – 9.

29. *Companion Note II to the Working Group’s 2018 Report to the General Assembly (A/73/163)*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, 1 (Oct. 16, 2018), <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>.

30. *Id.*

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human rights.<sup>31</sup> The Note recognizes that the components of an entity's human rights due diligence will change over time, as the risk and issues facing that entity evolve.<sup>32</sup> The Note contains practical advice and recommendations for implementing a successful human rights due diligence program, regardless of the size of the organization.<sup>33</sup> This advice includes a discussion of building and exercising leverage,<sup>34</sup> transparency and meaningful reporting,<sup>35</sup> and integrated stakeholder engagement.<sup>36</sup>

Companion Note II also includes a special focus on the role of business lawyers in the context of human rights due diligence.<sup>37</sup> Such due diligence may be a difficult task for business lawyers who are not used to identifying and analyzing human rights risks; environmental risks and standards; and labor rights and standards.<sup>38</sup> It can also be difficult for lawyers, and other business professionals, to understand that all companies have such potential risks regardless of size or sector. The Note suggests that it would be positive to change from corporate lawyers analyzing human rights issues as a niche service to having lawyers function as "wise counselors" who practice human rights risk management "in line with the Guiding Principles as a core element" of their practice.<sup>39</sup> Companion Note II provides a list of resources for business lawyers to use for such purpose.<sup>40</sup>

C. INTERNATIONAL DEVELOPMENTS ON THE DUTY TO RESCUE AT SEA

In 2017, the number of forcibly displaced people in the world increased by 2.9 million, reaching a total of 68.5 million people.<sup>41</sup> While migratory routes across the Mediterranean are still chosen to reach Europe, the number of deaths in the Mediterranean has constantly dropped with 4,713 fatalities in 2016; 3,009 in 2017; and 2,063 from January to November 2018.<sup>42</sup> But recent tensions on the interpretation and implementation of the international duty to rescue persons in distress-at-sea show the need for a stronger framework to ensure the safety of migrants choosing the Mediterranean route to Europe.

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31. *Id.* at 3 – 4.

32. *See id.*

33. *Id.* at 7.

34. *Id.* at 15.

35. *Companion Note II, supra* note 29, at 12.

36. *Id.* at 10 – 11.

37. *Id.* at 19.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Global Trends: Forced Displacement in 2017*, UN REFUGEE AGENCY, 2 (2018), <http://www.unhcr.org/5b27be547.pdf>.

42. *Missing Migrants Project*, INTERNATIONAL ORGANIZATION FOR MIGRATION, [http://missingmigrants.iom.int/region/mediterranean?migrant\\_route%5B%5D=1376](http://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376) (last visited Nov. 21, 2018) (estimates as of Nov. 21, 2018).

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On June 9, 2018, the *Aquarius*, a boat chartered and operated by two French non-governmental organizations, reached the Italian territorial sea and, following instructions from the Italian Maritime Rescue Coordination Center, proceeded to the rescue of 629 people, including 7 pregnant women, 11 children, and 123 unaccompanied minors from Eritrea, Ghana, Nigeria, and Sudan.<sup>43</sup> On June 11, 2018, Italy decided to close its ports calling on the *Aquarius* to dock in Malta.<sup>44</sup> Malta immediately refused and Spain then stepped up to offer “safe harbor” to the rescue ship.<sup>45</sup> These diplomatic tensions resulted in the suspension of all rescue ship missions in the Mediterranean between June 28 and July 8, 2018, which resulted in an estimated 300 fatalities.<sup>46</sup>

These events show that front line countries, and particularly EU Member States such as Italy, are challenged by their legal duty to rescue people at sea. International obligations regarding rescue-at-sea are governed by international conventions, particularly the 1974 International Convention for the Safety of Life at Sea and the 1982 UN Convention on the Law of the Sea.<sup>47</sup> Accordingly, shipmasters have the obligation to carry out certain duties to ensure the safety of life at sea and the integrity of search-and-rescue (SAR) services.<sup>48</sup> Respectively, the country responsible for operations in the area is responsible for disembarking persons rescued-at-sea.<sup>49</sup> If the rescued-at-sea are refugees or asylum-seekers, international conventions applicable to refugees apply, imposing on the country responsible for the rescue-at-sea to provide a place of safety to these persons.<sup>50</sup>

Until now, front line countries were considered solely and entirely responsible for providing safety to persons rescued-at-sea. In 2012, the European Court of Human Rights, in its first case on interception-at-sea, it considered that Italian authorities sent twenty-four people rescued-at-sea to Libya, originally from Somalia and Eritrea, without allowing them to claim asylum in Italy, and consisted of inhumane and degrading treatment, thus exposing the rescued-at-sea people not only to the risk of ill treatment in Libya but also in their home countries in case of repatriation.<sup>51</sup>

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43. *Spain to Accept Disputed Migrant Ship Aquarius*, BBC NEWS (June 12, 2018), <https://www.bbc.com/news/world-europe-44441386>.

44. *Id.*

45. *Id.*

46. *Monthly Trend Report: Covering Mixed Migration to, through & from North Africa*, MIXED HUB REPORT (Sept. 30, 2018), <http://www.mixedmigrationhub.org/wp-content/uploads/2018/10/MHUB-Trend-Bulletin-September-2018-1.pdf>.

47. Int'l Maritime Org. [IMO], International Convention for the Safety of Life at Sea, 1974, ch. V, reg. 33 (Nov. 1, 1974), <https://www.ifrc.org/docs/idrl/I456EN.pdf>; U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, art. 98, ¶ 1, (entered into force Nov. 16, 1994).

48. *Id.*

49. *Id.*

50. Convention Relating to the Status of Refugees, art. 33, ¶ 1, *opened for signature* July 28, 1951, U.N.H.C.R. (entered into force Apr. 22, 1954).

51. *Hirsi Jamaa v. Italy*, App. No. 27765/09, 38 (Eur. Ct. H.R. Feb. 23, 2012).



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Just as shipmasters have the obligation to provide SAR services, states have the obligation to ensure that people rescued-at-sea are disembarked in a place of safety.<sup>52</sup> But in the EU, the tension between front line and other EU Member States is aggravated by the Dublin Regulation<sup>53</sup> providing that the EU Member State responsible for processing asylum requests is usually the first EU Member State in which the person arrives (often Italy or Greece). Therefore, the country responsible for operations has both the obligation to provide a place of safety and also to examine asylum requests with all the legal obligations attached to it.<sup>54</sup>

To prevent further disputes over rescues that put lives at risk, a coordinated European response is being discussed on an international legal mechanism of disembarkation. In June 2018, UNHCR and IOM issued a joint proposal for a regional cooperative arrangement ensuring predictable and responsible disembarkation and subsequent processing of persons rescued-at-sea.<sup>55</sup> The joint proposal proposes to share the responsibility of disembarkation between all the countries across the Mediterranean, and suggests a comprehensive approach to ensure the safety of migration routes.<sup>56</sup> It provides measures facilitating collaboration and cooperation between countries in the region to better implement the international norms already in place. The implementation of this proposal will test the capacity of the EU to deal with the migration issue in a collaborative approach.

**D. INTERNATIONAL CRIMINAL COURT CLAIMS OF CRIMES AGAINST  
HUMANITY BY THE MYANMAR MILITARY INVOLVING THE  
ROHINGYA MINORITY**

2018 was the twentieth anniversary of the adoption of the Rome Statute, the treaty authorizing the establishment of the International Criminal Court (ICC).<sup>57</sup> The ICC is the first permanent international court with the authority to hold accountable those who commit war crimes, crimes against humanity, genocide, and crimes of aggression.<sup>58</sup> But jurisdictional limitations written into the Rome Statute as political compromises have

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52. See *Monthly Trend Report*, *supra* note 46.

53. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, 2013 O.J. (L 180) 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN> (also called Dublin III Regulation).

54. *Id.*

55. *Proposal for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons Rescued-at-sea*, UN REFUGEE AGENCY (June 27, 2018), <https://www.unhcr.org/partners/eu/5b35e60f4/proposal-regional-cooperative-arrangement-ensuring-predictable-disembarkation.html>.

56. *Id.*

57. *Rome Statute of the International Criminal Court*, U.N. Doc A/CONF.183/9 (July 17, 1998), [https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/rome\\_statuteng1.pdf](https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/rome_statuteng1.pdf).

58. *Id.* art. 5, ¶ 1.

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prevented the Court from addressing some of the world's most horrific human rights abuses.<sup>59</sup>

The Rome Statute permits the Court to address crimes only when they are referred to the Court's Prosecutor (i) by a State Party (a state that has ratified the Statute), or a state not a party to the Statute that accepts the Court's jurisdiction;<sup>60</sup> (ii) by the Prosecutor acting on her own initiative following an investigation of crimes committed in the territory of, or by, a national of a State Party;<sup>61</sup> or (iii) by the UN Security Council, in the case of crimes committed in a country that has not ratified the Statute.<sup>62</sup> Members of the Security Council have frequently exercised their veto powers to prevent referrals of non-State Parties to the Court.<sup>63</sup>

These constraints on the ICC's jurisdiction to address human rights violations in countries that have not ratified the Rome Statute were tested in 2018 by the atrocities perpetrated against the Rohingya minority in Myanmar.<sup>64</sup> Myanmar is not a party to the Statute and will not submit voluntarily to the Court's jurisdiction.<sup>65</sup> In addition, the UN Security Council will not refer Myanmar to the Court because of opposition from China.<sup>66</sup>

Given these obstacles and the dire situation of the Rohingya, the ICC's Prosecutor sought to begin a preliminary inquiry into possible charges of crimes against humanity against officers of the Myanmar military using a novel procedure and a novel theory. The novel procedure was to ask the Pre-Trial Chamber for an advisory opinion on the matter of her jurisdiction based on a single sentence in the Statute: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility."<sup>67</sup> The novel theory was that the jurisdictional requirements of the Statute were satisfied because one element of the crime (crossing a border in the crimes

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59. . See, e.g., Ionel Zamfir, *International Criminal Court Achievements and Challenges 20 years After the Adoption of the Rome Statute*, EUROPEAN PARLIAMENT RES. SER. (July 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS\\_BRI\(2018\)625127\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf).

60. *Rome Statute of the International Criminal Court*, *supra* note 57, art. 13, ¶ a, art. 12, ¶ 2.

61. *Id.* art. 13, ¶ c.

62. *Id.* art. 13, ¶ b.

63. See, e.g., Edith M. Lederer, *UN Chief Calls for Syria Referral to International Court*, AP NEWS (Jan. 26, 2018), <https://www.apnews.com/24e1d609e7944e37a17f1b7abb0af>.

64. Krishnadev Calamur, *The World Isn't Prepared to Deal With Possible Genocide In Myanmar*, ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/international/archive/2018/08/rohingya/568618/>.

65. Verena Hözl (Yangon), *Rohingya genocide: Will Myanmar Generals face ICC Justice?*, DW (Nov. 9, 2018), <https://www.dw.com/en/rohingya-genocide-will-myanmar-generals-face-icc-justice/a-45450020>.

66. *Id.*

67. *Rome Statute of the International Criminal Court*, *supra* note 44, art. 19, ¶ 3; see also, International Criminal Court [ICC], *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Office of the Prosecutor, ¶ 52 (Apr. 9, 2018) ICC-RoC46(3)-01/18-1, [https://www.icc-cpi.int/CourtRecords/CR2018\\_02057.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf).

against humanity's crime of deportation)<sup>68</sup> occurred in part on the territory of a State Party, Bangladesh.<sup>69</sup> The Pre-Trial Chamber agreed and granted the Prosecutor permission to begin the preliminary investigation.<sup>70</sup>

The Pre-Trial Chamber's ruling that the alleged deportation of victims from a non-State Party to the territory of a State Party satisfied the jurisdictional requirements of the Rome Statute is a decision of first impression. The Prosecutor's request seeking an advisory opinion from the Pre-Trial Chamber on that question, or on any question, is also unprecedented.<sup>71</sup> In addition to the fact that the Pre-Trial Chamber's ruling paves the way for ICC involvement in the Myanmar situation by means of a preliminary investigation, its acceptance of the Prosecutor's request for an advisory opinion in and of itself may set an important procedural precedent that enables the Court to overcome in future cases some of the jurisdictional barriers otherwise posed by the Statute.<sup>72</sup>

### III. National Developments

#### A. CREATION OF THE CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE

On January 17, 2018,<sup>73</sup> the Government of Canada announced its intention to establish a Canadian Ombudsperson for Responsible Enterprise (CORE) and with it, a multi-stakeholder Advisory Body on Responsible Business Conduct. The CORE will have a mandate to investigate allegations of human rights abuses related to the business operations of Canadian companies abroad, while the Advisory Council is tasked with advising the Canadian government on further development of its laws and policy around Business and Human rights, including advising the government on the CORE's mandate and operating procedures.

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68. *Rome Statute of the International Criminal Court*, *supra* note 44, art. 7, ¶ 1(d).

69. *Id.* art. 12, ¶ 2(a) (“[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred . . .”).

70. International Criminal Court [ICC], Pre-Trial Chamber, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ¶ 72 (Sept. 6, 2018) ICC-RoC46(3)-01/18-1, [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_04203.pdf).

71. See Alex Whiting, *Process as well as Substance Is Important in ICC’s Rohingya Decision*, JUST SECURITY (May 15, 2018), <https://www.justsecurity.org/56288/process-substance-important-iccs-rohingya-decision/>.

72. See *id.* (for a discussion of the procedural significance of the decision).

73. *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, GLOBAL AFFAIRS CANADA (Jan. 17, 2018), [https://www.canada.ca/en/global-affairs/news/2018/01/the-government\\_ofcanadabringingleadershiptoresponsiblebusinesscond.html](https://www.canada.ca/en/global-affairs/news/2018/01/the-government_ofcanadabringingleadershiptoresponsiblebusinesscond.html).

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The CORE replaces the CSR Counsellor, in place since 2009,<sup>74</sup> which focused on early prevention and resolution of disputes between companies and communities and assisting Canadian companies in effectively incorporating CSR guidelines, including the United Nations' *Guiding Principles on Business and Human Rights*<sup>75</sup> and sector-specific CSR guidelines into their operations. The Ombudsperson is supposed to play a complementary role to Canada's National Contact Point (NCP).<sup>76</sup>

The Canadian government has promoted the announced CORE as part of a strengthened government approach to the oversight of Canadian companies operating overseas. While there remain several unknowns, including critical details on the CORE's operating procedures, the government is citing certain changes as reflective of its shift in approach. First, the Ombudsperson will be able to initiate independent fact-finding even in the absence of a complaint and will also be able to engage in collaborative fact-finding. Second, the Ombudsperson will be making recommendations, albeit non-binding, to the complainants and companies. These recommendations can include a public apology, mitigation measures, and changes to corporate policies. Third, the CORE will be required to report publicly throughout the investigation and during the period of implementation of recommendations.

Importantly, as well, in contrast to the CSR Counsellor, which was focused exclusively on the mining, oil, and gas sectors, the CORE's scope will be multi-sectoral and include the garment sector in the first year and expand to other business sectors in subsequent years after the Ombudsperson takes office. What has not changed is the sanction for non-participation or lack of cooperation. As was the case for the CSR Counsellor under Canada's 2014 CSR Strategy, the CORE can recommend denial or withdrawal of trade advocacy services or financing from Canada's Export Development Agency either as an interim measure or final recommendation.<sup>77</sup>

The creation of the Ombudsperson is controversial. While it has been eagerly anticipated by many in the NGO community, others, including industry players, have expressed concerns about the Ombudsperson's

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74. *Canadian CSR Ombudsman to Replace CSR Counsellor*, CANADIAN MINING J. (Apr. 1, 2018), <http://www.canadianminingjournal.com/features/canadian-csr-ombudsman-replace-csr-counsellor/>.

75. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

76. The NCP will continue in its role, among other things, to resolve issues through mediation related to the implementation of the OECD Guidelines for Multi-National Enterprises.

77. *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, GLOBAL AFFAIRS CANADA (Nov. 14, 2014), [https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced\\_CS\\_Strategy\\_ENG.pdf](https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf).

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capacity to effectively address what are complex transnational human rights allegations, and the Ombudsperson's ability to provide expeditious remedies where necessary.<sup>78</sup> The success of the Ombudsperson will ultimately depend as much on the Ombudsperson's ability to successfully leverage and manage relationships across governments (internationally and domestically), within communities, and with both industry and civil society, in addition to the mechanisms of the office. The ability of the Advisory Council to meaningfully advance Canada's approach to responsible business conduct, too, will depend in part on whether, as heralded by the government, its creation has initiated "a new era of cooperation between government, business and non-governmental organizations to ensure greater respect for human rights."<sup>79</sup>

**B. NEPAL'S SAFE MOTHERHOOD AND REPRODUCTIVE HEALTH RIGHTS ACT**

In October 2018, the House of Representatives of Nepal passed the Safe Motherhood and Reproductive Health Rights Act, 2018 (the Act).<sup>80</sup> This marks years of transition in Nepal's modern history from a monarchy to a multi-party democracy set up to protect the rights of all people. A necessary precursor to the Act was the adoption of the new Constitution of Nepal in 2015.<sup>81</sup> Article 35 of the Constitution defines the right to health to include the right to free basic and emergency health services,<sup>82</sup> and Articles 38 and 39 define the rights of women and children.<sup>83</sup> The Constitution also defines the rights of marginalized classes of citizens, specifically guaranteeing their right to health.<sup>84</sup>

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78. See, e.g., Mora Johnson, *The Promise and Limitations of the New Canadian Business and Human Rights Ombudsperson*, MORA JOHNSON LAW (Jan. 26, 2018), <https://www.morajohnsonlaw.ca/blog/2018/1/26/the-promise-and-limitations-of-the-new-canadian-business-and-human-rights-ombudsperson>.

79. *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, *supra* note 73.

80. See Safe Motherhood and Reproductive Health Rights Act, 2018 (unofficial translation available on file with the authors).

81. See NEPAL CONST., [http://constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal\\_English\\_-with-1st-Amendment\\_2\\_0.pdf](http://constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal_English_-with-1st-Amendment_2_0.pdf) (official English translation by the Ministry of Law, Justice and Parliamentary Affairs of Nepal).

82. *Id.* art. 35.

83. *Id.* arts. 38 – 39.

84. NEPAL CONST. arts. 40 – 42, *amended by* NEPAL CONST. (First Amend.), 2016. (Art. 40 defines the rights of the Dalit minority; Art. 41 defines the rights of senior citizens; Art. 42 defines the rights of "the economically, socially or educationally backward women, Dalit, indigenous nationalities, Madhesi, Tharu, Muslims, backward classes, minorities, marginalized communities, persons with disabilities, gender and sexual minorities, farmers, labourers, oppressed or citizens of backward regions and indigent Khas Arya" including their right to "special opportunities and benefits in . . . health.").

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The new Act enumerates the following fundamental human rights related to family planning: pregnancy, childbirth, and the postpartum period.<sup>85</sup> Article 19 of the Act defines the right to privacy of information and documents related to the reproductive health of a woman and the services and consultations provided to her.<sup>86</sup> The right to confidentiality of information related to the healthcare of a person seeking reproductive health services is further specified in Article 4.<sup>87</sup> Articles 11, 12, and 16 define the right to information and consent.<sup>88</sup> The law provides for the right to information about reproductive health.<sup>89</sup> It requires consent for family planning, contraception, and abortion, while prohibiting the use of force, threat, grooming, or greed.<sup>90</sup> The Act also provides prohibition against discrimination based on origin, religion, tribe, caste, sex, community, occupation, profession, sexual orientation, physical or health condition, disability, marital status, pregnancy, belief, affected by any disease or risk to it, reproductive health morbidity, personal relations, or any other factor (Art. 18). In addition, Article 28 of the Act stipulates that services should be adolescent and disability-friendly.<sup>91</sup>

The Act includes protection for safe motherhood and newborn health (Arts. 5 – 14), safe abortion (Art. 15),<sup>92</sup> and reproductive health morbidity (Arts. 20 – 21).<sup>93</sup> It further guarantees budget allocations to support the application of the law (Arts. 22 and 23)<sup>94</sup> and creates criminal and civil liability for offenses (Arts. 25 – 27).<sup>95</sup>

There is a general prohibition against identifying the sex of the fetus during pregnancy and termination of pregnancy is prohibited after such identification (Art. 17).<sup>96</sup> The law protects children's rights by ensuring that each child is registered at the facility where they were born and is issued a birth certificate with their name on it (Art. 9).<sup>97</sup> Maternity leave is provided to women after childbirth, as well as to women who experience stillbirth or neonatal loss (Art. 13).<sup>98</sup>

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85. *See id.*

86. *See* NEPAL CONST., *supra* note 81, art. 19.

87. *Id.* art. 4.

88. *Id.* arts. 11 – 12, 16.

89. *Id.* art. 38.

90. *Id.*

91. *Id.* art. 28.

92. *See generally* Rachel Rebouche, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 3 – 4 (2011) (for background information on the long road to legalization of abortion in Nepal).

93. NEPAL CONST., *supra* note 81, arts. 20 – 21.

94. *Id.* arts. 22 – 23.

95. *Id.* arts. 25 – 27.

96. *See* Sarmila Shrestha, *Laws and Policies on Reproductive Health Rights with Particular Reference to Judicial Response through Public Interest Litigation in Nepal*, 4 NJA L.J. 133, 135 – 36 (2010) (citing male preference attitudes and sex-selective abortions).

97. NEPAL CONST., *supra* note 81, art. 9.

98. *Id.* art. 13.

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The Act confers a responsibility on healthcare institutions to record the number of maternal deaths, stillbirths, and abortions (Art. 9).<sup>99</sup> It provides for the right of women to receive services and care for reproductive morbidity, including risk mitigation measures after surgery (Art. 20).<sup>100</sup> Further, it specifically prohibits stigma associated with reproductive morbidity, by prohibiting divorce, banishment, or displacement from the home due to a woman's reproductive health morbidity (Art. 21).<sup>101</sup>

**C. U.K. LITIGATION INVOLVING A STATE'S DUTY TO PROTECT  
TRAFFICKED REFUGEES**

Legal victories<sup>102</sup> in the United Kingdom (U.K.) have set precedent for protecting noncitizen victims of trafficking in 2018. In June, the Court of Appeal ruled in favor of a fifteen-year-old Vietnamese boy who was identified as a victim of trafficking, deciding that the Government did not comply with the obligation of protecting trafficked persons under Article 4 of the European Convention on Human Rights (ECHR). *R-TDT v. SSHD*<sup>103</sup> is the first case in the U.K. to hold the State accountable for breaching its duty to provide protective measures.<sup>104</sup>

In September 2015, the Appellant and fifteen other males were found by police in the back of a truck and detained by immigration authorities.<sup>105</sup> He was assumed to be over eighteen and was not given an age or assessed as a potential victim of trafficking. In October, the Appellant met with an attorney, who perceived him to be underage and a trafficking victim.<sup>106</sup> He told the attorney that his date of birth was December 5, 1999.<sup>107</sup> The attorney informed the U.K. Home Office and initiated proceedings for judicial review.<sup>108</sup> Within two weeks, the High Court reviewed the case and

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99. *Id.* art. 9.

100. *Id.* art. 20.

101. See, e.g., Payal Shah, *Uterine Prolapse and Maternal Morbidity in Nepal: A Human Rights Imperative*, 2 DREXEL L. REV. 491 (2010) (discussing uterine prolapse as an example of severe morbidity that has been addressed by the Nepal Supreme Court as a human rights violation in the groundbreaking case of Prakash Mani Sharma v. Gov't of Nepal, Writ No. 064 (2008) (SC) para. 48)).

102. Diane Taylor, *Modern Slavery Ruling May Lead to More Victims Getting Leave to Remain*, GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/law/2018/feb/14/modern-slavery-ruling-may-lead-to-more-victims-getting-leave-to-remain>.

103. *R (on the app. of TDT, by his litigation friend Tara Topteagarden) v. Secretary of State for the Home Dept.*, [2018] EWCA (Civ) 1395 [hereinafter *R-TDT v. SSHD*].

104. May Bulman, *Home Office Broke Law by Failing to Protect Child Trafficking Victim, Court Rules in Landmark Case*, INDEPENDENT (June 19, 2018), <https://www.independent.co.uk/news/uk/home-news/child-trafficking-home-office-victim-protection-breach-court-appeal-a8406781.html>.

105. *R-TDT*, EWCA (Civ) 1395, [1(1)].

106. *Id.*

107. *Id.* [1(2)].

108. *Id.*

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granted him temporary admission.<sup>109</sup> On the same day, the Home Office released him from detention without informing his representatives and ignored the attorney's prearranged accommodation with a local agency.<sup>110</sup> Litigation was continued in the youth's absence, alleging the State breached its duty under Article 4 by not protecting him from being re-trafficked.<sup>111</sup>

In *Rantsev v. Cyprus and Russia*,<sup>112</sup> the European Court of Human Rights (ECHR) determined that *trafficking* falls within the scope of Article 4. In order for a positive obligation to emerge, it must be demonstrated that the State knew, or should have known, of conditions that rise to *credible suspicion* that an individual had been, or was at genuine and impending danger of, being trafficked.<sup>113</sup> *Rantsev* clarifies that Articles 2 – 4 of ECHR involve a procedural responsibility for State authorities to investigate potential trafficking.<sup>114</sup> The obligation to investigate is not dependent upon the victim's complaint, rather, once the authorities are aware of the matter, they must act.<sup>115</sup> Together with the mandate to investigate, the State must provide assistance when a "competent authority" has "reasonable grounds" to suspect a person has been deprived of their right to life or subjected to inhumane treatment.<sup>116</sup>

In *R-TDT-v-SSHD*, the Court identified threshold tests for the *protective duty* under ECHR Article 4 and the *investigative duty* under the Council of Europe Trafficking Convention and Directive 2011/36/EU.<sup>117</sup> The protective duty has a *credible suspicion* standard and the investigative duty has a *reasonable grounds* standard.<sup>118</sup>

The issue on appeal involved *credible suspicion* and whether the Vietnamese minor was at direct risk of being re-trafficked.<sup>119</sup> Lord Justice Underhill determined the threshold was crossed when the minor's attorney communicated to the Home Office her concerns about the minor's age and his account of travelling to the U.K. from Russia.<sup>120</sup> The minor met the psychological indicators of a trafficked victim, as evaluated by the Refugee Council, described in the Home Office procedures.<sup>121</sup> The court also noted that the high statistics of Vietnamese boys trafficked to the U.K. for labor

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109. *Id.* [1(6)].

110. *Id.* [1(7)].

111. *R-TDT*, EWCA (Civ) 1395, [1].

112. *Rantsev v. Cyprus & Russia*, App. No. 25965/04 (Eur. Ct. H.R. Jan. 7, 2010).

113. *Rantsev*, 25965/04 ¶ 286.

114. *Id.* ¶ 288.

115. *Id.*

116. Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101) 1, 8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=EN>.

117. *R-TDT*, EWCA (Civ) 1395, [31].

118. *Id.*

119. *Id.* [76], [77].

120. *Id.* [78].

121. *Id.*



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exploitation was sufficient evidence to raise *credible suspicion*.<sup>122</sup> The central criticism was that even if the Appellant were an adult, if he was found to be a potential trafficking victim, the Home Office should not have released him without implementing protection to prevent re-trafficking.<sup>123</sup>

*R-TDT v. SSHD* sets a new standard of practice for the U.K. Secretary of State for the Home Department to assess the potential risk of an individual being re-trafficked.<sup>124</sup> And, it asserts credible suspicion when the individual is a member of a class that is frequently trafficked.<sup>125</sup> This case reveals the systemic failure of protecting trafficking victims, namely refugees, and the necessity of judicial authorities to right government wrongs.

D. EROSION OF WOMEN'S RIGHTS IN U.S. IMMIGRATION CASES  
INVOLVING ASYLUM SEEKERS

Worldwide, women continue to suffer from discrimination, and they are often denied the opportunity of being equal to men in all aspects of daily living. The recent decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) reinforces the wrongful belief that domestic violence and violence against women are private matters.<sup>126</sup>

The Executive Office of the United Nations High Commissioner for Refugees (UNHCR) addressed the need for special training on gender-related issues<sup>127</sup> and called upon states to adopt a gender-sensitive interpretation of the 1951 UN Refugee Convention and its 1967 Protocol. It also referenced its 2002 “Guidelines on International Protection: Gender Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.”<sup>128</sup> To properly evaluate the claims of women, one must be receptive to the issue of gender discrimination and inequality. To receive asylum in the United States, applicants need to meet the definition of “refugee;”<sup>129</sup> an applicant qualifies as a refugee if he is unable or unwilling to return to his home country because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The category of Particular Social Group (PSG) has never been exactly defined. Neither the U.S. Immigration and Nationality Act nor the 1951 UN Refugee Convention define PSG. The most relevant

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122. *Id.*

123. *R-TDT*, EWCA (Civ) 1395, [84], [86].

124. *Id.* [41].

125. *Id.* [47].

126. *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>.

127. Executive Committee of the High Commissioner's Programme, *Conclusion on Protection from Sexual Abuse and Exploitation No. 98 (LIV)-2003*, UN REFUGEE AGENCY (Oct. 10, 2003), <https://www.unhcr.org/excom/exconc/3f93b2c44/conclusion-protection-sexual-abuse-exploitation.html>.

128. *Id.*

129. 8 U.S.C. § 1101(a)(42).

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interpretation of PSG in the United States was given in the Board of Immigration Appeals' (BIA) decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), where the Board held that a particular social group is composed of members who share a common immutable characteristic, such as sex, color, kinship ties, or past experience that a member either cannot change or that is so fundamental to their identity or conscience of the member that he or she should not be required to change it.<sup>130</sup> This standard remained unchanged for many years, until more restrictive PSG requirements were introduced.<sup>131</sup>

With regard to domestic violence, one of the most significant decisions was *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), where the BIA specifically recognized domestic violence based asylum claims and held that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group.<sup>132</sup> But this changed in 2018 when the BIA and the U.S. Attorney General (AG) issued a number of decisions significantly limiting PSGs. Specifically, in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), the AG overruled the precedent established in *A-R-C-G-*, and found that in *A-R-C-G-*, the BIA did not accurately apply the Board's precedents regarding social distinction and particularity and that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."<sup>133</sup> By so ruling, the AG made it less likely that a woman victim of violence and discrimination who is persecuted because of her gender will win asylum on the merits.

It is fundamental that attorneys adopt a creative approach when dealing with PSGs regarding abused women. In spite of *Matter of A-B-*, PSGs can still viably be proposed and upheld if they are cognizable under the BIA's test of immutability, particularity, and social distinction as established in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).<sup>134</sup> Additionally, while *Matter of A-B-* affects PSGs, many domestic violence cases can also be presented and based on political opinion or imputed political opinion. Numerous women may be persecuted because their attackers intend to punish them for an imputed political opinion of opposition to female subjugation, or because the victim opposed practices that discriminate on the basis of gender, or on the basis of their feminist beliefs. Linking a respondent's persecution to an imputed political opinion is subject to significant discretion, but an argument may be made that for purposes of asylum, a political opinion does not need to be manifested expressly and can instead be nonverbally communicated. The respondent is not required to act on her political opinion, which can be imputed by the persecutors. A

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130. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

131. See *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008).

132. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388 (B.I.A. 2014).

133. *Matter of A-B-*, *supra* note 126 at 320.

134. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

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woman victim of domestic violence can often be found to have the imputed political opinion that ‘men do not have the right to dominate’ and it can be argued that she showed her political opinion by fleeing the country. It is crucial to avoid “circular” PSGs, i.e., a PSG primarily based on the past harm suffered. In *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011) for example, the court found that the PSG of “women subjected to rape as a method of government control” did not qualify because the applicant was circularly defined by the persecution suffered.<sup>135</sup> If the harm defines the social group, the PSG is not cognizable. In the light of *Matter of A-B-* and existing case law, it appears that to make gender-based asylum claims successful, it is vital to elaborate PSG definitions tied with political opinions.

E. BLASPHEMY LAWS AND HUMAN RIGHTS VIOLATIONS OF  
RELIGIOUS MINORITIES IN YEMEN

Enshrined in the International Covenant on Civil and Political Rights<sup>136</sup> and the Universal Declaration of Human Rights<sup>137</sup> is the idea that freedom of expression and the freedom of religion are integral to sustaining human rights. Therefore, domestic laws that criminalize these inherent human rights, such as blasphemy laws, are fundamentally inconsistent with international human rights law. Generally, blasphemy is defined as oral and written assertions that offend religious beliefs, practices, or a deity.<sup>138</sup> For example, Article 194(1) of the Penal Code of Yemen criminalizes “whoever publicly broadcasts (i.e., communicates) views including ridicule and contempt of religion, in its beliefs, practices, or teachings.”<sup>139</sup> Further, Article 195 provides for a weightier punishment “if Islam is the religion or doctrine that is the subject of ridicule, contempt, or belittlement.”<sup>140</sup>

Evidently, Yemen’s Penal code favors one religion over others and punishes those who attempt to freely express their views. Notably, the term “views,” as employed in Yemen’s Penal Code, is not limited to ridicule and contempt of religion; the vague language used in the Penal Code leaves religious minorities unprotected and subject to arbitrary persecution. The

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135. *Kante v. Holder*, 634 F.3d 321, 326 (6th Cir. 2011).

136. International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 17.

137. G.A. Res. 217 (III) A, art. 18, Universal Declaration of Human Rights (Dec. 10, 1948).

138. See Joelle Fiss & Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World’s Blasphemy Laws: Abbreviated Version*, UNITED STATES COMMISSION ON RELIGIOUS FREEDOM 1 (July 2017), <https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf>.

139. *Blasphemy and Relatable Laws in Selected Jurisdiction*, LAW LIBRARY OF CONGRESS 1, 44 (Jan. 2017), <https://www.loc.gov/law/help/blasphemy/blasphemy.pdf> (quoting Presidential Decree of Law 12-1994, al Jarida al Rasmiyya, vol. 19, 12 [Oct.] 1994, <http://www.wipo.int/edocs/lexdocs/laws/ar/ye/ye007ar.pdf> (in Arabic) archived at <https://perma.cc/DQG9-FHGF>).

140. *Id.* at 44.

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case of Mr. Hamed Kamal bin Haydara<sup>141</sup> exemplifies how human rights are violated under this pretext.

On December 3, 2013, Mr. Haydara was arrested in Shabwa province, Yemen, but he was not officially charged until January 8, 2015.<sup>142</sup> The official indictment charging Mr. Haydara included religious practices that were deemed violations of domestic laws.<sup>143</sup> For example, Mr. Haydara was charged with offering literacy classes that followed a curriculum that is incompatible with Islam and was prepared by the Bahá'í Universal House of Justice<sup>144</sup> in Israel. Further, during the initial months of his unlawful incarceration, Mr. Haydara suffered torture by electrocution<sup>145</sup> and daily beatings, which resulted in his loss of hearing and debilitating health. In response, the UN Human Rights Council issued a resolution<sup>146</sup> calling for the release of all Bahá'í prisoners.<sup>147</sup>

Despite the urging of the UN, on January 2, 2018, Mr. Haydara was sentenced to death in absentia; his offense, communicating with the House of Justice.<sup>148</sup> Moreover, the human rights abuse suffered by Mr. Haydara is a departure from the obligations found in the Convention on Civil and Political Rights, which Yemen acceded to on February 9, 1987.<sup>149</sup> Significantly, it is important to underscore that even though Mr. Haydara's case was adjudicated under Houthi rebel authority, non-state actors, especially those with some level of territorial control, are still subject to international obligations that protect human rights.<sup>150</sup>

#### F. LOSS OF HUMAN RIGHTS IN CAMBODIA

2018 saw the rule of law regress in Cambodia when Prime Minister Hun Sen dismantled all remaining institutional checks on executive power by deploying the state's powers, armed forces, and legal system to eliminate political challengers. Cambodia's governmental institutions and civil society were rebuilt from scratch by the UN following genocide under Pol Pot's

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141. *The Case of Hamed Bin Haydara*, BAHÁ'Í INT'L COMMUNITY (Jan. 18, 2018), <https://www.bic.org/situation-in-yemen/Case-Hamed-Bin-Haydara-March-2017>.

142. *Id.*

143. *Id.*

144. See THE UNIVERSAL HOUSE OF JUSTICE: AN OFFICIAL WEBSITE OF THE BAHÁ'Í FAITH, <https://universalhouseofjustice.bahai.org/> (last visited Nov. 12, 2018).

145. *Situation of the Bahá'ís in Yemen*, BAHÁ'Í INT'L COMMUNITY (Mar. 22, 2018), <https://www.bic.org/statements/situation-bahais-yemen>.

146. Human Rights Council Res. 36/31, Human Rights, Technical Assistance and Capacity-Building in Yemen, U.N. Doc. A/HRC/RES/36/31 (Sep. 29, 2017).

147. *Id.* ¶ 7.

148. *The Case of Hamed Bin Haydara*, *supra* note 141.

149. *Convention on Civil and Political Rights: Status*, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec) (last visited Oct. 29, 2018).

150. S.C. Res. 2140, ¶ 9 (Feb. 26, 2014); *see also* S.C. Res. 2216, ¶ 8 (Apr. 14, 2015).

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Khmer Rouge regime.<sup>151</sup> Modern Cambodia was born in 1993 with the creation of the United Nations Transitional Authority in Cambodia (UNTAC).<sup>152</sup> UN Security Council Resolution 745 tasked UNTAC with establishing a government that safeguarded human rights, rule of law, and free and fair elections.<sup>153</sup>

Until 2018, Hun Sen maintained the semblance of protecting human rights. But the campaign strategy wielded by the state in the election held on July 29, 2018, to ensure political dominance for the Cambodian People's Party (CPP), uprooted the human rights infrastructure.<sup>154</sup> The government detained local journalists and expelled members of the foreign media. Kem Sokha, a former president of the Cambodian National Rescue Party (CNRP), the only credible political opposition, was jailed under charges of "treason."<sup>155</sup> Opposition lawmakers fled the country. The government filed a lawsuit against the CNRP seeking its dissolution for what amounted to basic political campaigning.<sup>156</sup> In November 2017, Cambodia's Supreme Court granted the government's petition and 118 CNRP candidates were banned from participating in the election.<sup>157</sup>

Independent newspaper Phnom Penh Post was forcibly sold to an investor with close ties to the Cambodian government in May 2018 after receiving an invoice for unpaid taxes.<sup>158</sup> Under a new media Code of Conduct promulgated by Cambodia's National Election Commission, journalists were forbidden from "publishing or broadcasting news that affects national security, political and social stability" or "broadcasting news leading to confusion and confidence loss in the election."<sup>159</sup> In June 2018, the Commission threatened prosecution of anyone calling for a boycott of the elections.<sup>160</sup>

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151. Brad Adams, *Cambodia's Dirty Dozen*, HUMAN RIGHTS WATCH (June 27, 2018), <https://www.hrw.org/report/2018/06/27/cambodias-dirty-dozen/long-history-rights-abuses-hun-sens-generals>.

152. *Id.*

153. S.C. Res. 745 (Feb. 28, 1992).

154. Prak Chan Thul & Amy Sawitta Lefevre, *Cambodian PM's Party Claims Election Rout, Opposition Sees 'Death of Democracy'*, REUTERS (July 29, 2018), <https://www.reuters.com/article/us-cambodia-election-idUSKBN1KK01C>.

155. Prak Chan Thul, *Cambodian Government Files Lawsuit to Dissolve Main Opposition Party*, REUTERS (Oct. 6, 2017), <https://www.reuters.com/article/us-cambodia-politics/cambodian-government-files-lawsuit-to-dissolve-main-opposition-party-idUSKBN1CB0U1>.

156. *Id.*

157. Samrang Pring, *Cambodia: July 29 Elections Not Genuine*, HUMAN RIGHTS WATCH (July 25, 2018), <https://www.hrw.org/news/2018/07/25/cambodia-july-29-elections-not-genuine-0>.

158. *Id.*

159. Human Rights Council, Rep. of the Special Rapporteur on the Situations of Human Rights in Cambodia, ¶ 70, U.N. Doc. A/HRC/39/73/ Add. 1 (Sept. 7, 2018), <https://undocs.org/A/HRC/39/73>.

160. See Mech Dara, *Regulator 'Not Forcing' Vote Texts*, PHNOM PENH POST (June 21, 2018), <https://www.phnompenhpost.com/national/regulator-not-forcing-vote-texts>.

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In the final months, Cambodian active duty military personnel began actively campaigning for the CPP.<sup>161</sup> Police organized rallies in shows of force and instructing the population who to vote for. Rallies were widespread, despite military personnel being banned from participating in political activities under relevant law.<sup>162</sup> Hun Sen began hinting towards violence and chaos should the opposition prevail.

In an election that was neither free nor fair, the CPP took every seat in parliament. The National Election Committee revealed that 8.4 percent of ballots or 594,843 votes cast were deliberately spoiled over a lack of genuine choice.<sup>163</sup> Kem Sokha remained under house arrest with charges of “treason” still pending.<sup>164</sup> The United States and European Union had suspended election aid and election monitoring assistance, and proposals have been raised in legislatures in Europe and the United States for financial sanctions against members of the regime and curtailing of foreign aid.<sup>165</sup>

UNTAC involved forty-six UN members in rebuilding Cambodia and produced a constitution that literally restates the Universal Declaration of Human Rights.<sup>166</sup> The UNHCR maintained an office in Phnom Penh following withdrawal of UNTAC in 1993 and regularly renewed its mandate with the Cambodian government by advising, cooperating, and implementing human rights. The 2018 elections took place in plain sight of the UNHCR, with troubling implications for future international human rights projects.

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161. Samrang, Pring, *Cambodia: Military, Police Campaigning for Ruling Party*, HUMAN RIGHTS WATCH (July 12, 2018) <https://www.hrw.org/news/2018/07/12/cambodia-military-police-campaigning-ruling-party>.

162. Preah Reach Kram No. CS/RKM/1197/005 (Nov. 16, 1997), art. 9.

163. Prak Chan Thul, *Spoilt Cambodian Ballot Papers Seen As Protest Over ‘Sham’ Elections*, REUTERS (July 30, 2018), <https://www.reuters.com/article/us-cambodia-election-spoilt/spoilt-cambodian-ballot-papers-seen-as-protest-over-sham-election-idUSKBN1KK184>.

164. Meas Sokchea, *Court to Decide Kem Sokha Fate*, PHNOM PENH POST (Nov. 5, 2018), <https://www.phnompenhpost.com/national/court-decide-kem-sokha-fate>.

165. Joshua Kurlantzick, *Cambodian Politics Enters its Post-Election Phase*, COUNCIL ON FOREIGN RELATIONS (Sept. 10, 2018), <https://www.cfr.org/blog/cambodian-politics-enters-its-post-election-phase>.

166. 1993 CONST. Cambodia, art. 31.