

The Year in Review

Volume 52 *International Legal Developments*
Year in Review: 2017

Article 30

January 2018

International Human Rights

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Recommended Citation

Sara Blackwell et al., *International Human Rights*, 52 ABA/SIL YIR 437 (2018)
<https://scholar.smu.edu/yearinreview/vol52/iss1/30>

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International Human Rights

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Human Rights

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UCHE U. EWELUKWA, CLAUDIA FELDKAMP, SAMANTHA ROWE, AND
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I. Introduction

This article highlights important developments in 2017 in the fields of international human rights, corporate social responsibility, and business and human rights. Developments included are the following: U.S. and Canadian litigation on business and human rights, uptake of the U.N. Principles on Business and Human Rights by private parties and the banking sector, the Canadian Justice for Victims of Corrupt Foreign Officials Act, a significant ICSID decision pertaining to business and human rights, human rights developments in Indonesia, and the European Court of Justice's recent landmark decision on asylum seekers.

II. U.S. and Canadian Litigation on Business and Human Rights

A. INTRODUCTION

The right to a remedy is a key principle of international law,¹ and one that is particularly important in the business and human rights context. The United Nations Guiding Principles on Business and Human Rights (UNGPs), which were endorsed by the U.N. Human Rights Council in 2011, recognize a remedy as indispensable where human rights have been negatively impacted by business. The UNGPs provide guidance on the State duty to *protect* human rights, the corporate responsibility to *respect* human rights, and the right to a *remedy* in situations of corporate human rights abuse.²

* The Committee Editors are Professor Cindy Galway Buys, Southern Illinois University School of Law, and Professor Constance Wagner, Saint Louis University School of Law. Sara Blackwell, Advisor at Shift, and Heather Cohen, Litigation Counsel at the HIV & AIDS Legal Clinic Ontario, wrote Section II. Professor Uche U. Ewelukwa Ofodile, University of Arkansas School of Law, wrote Section III. Claudia Feldkamp, Counsel, Fasken, Martineau, wrote Section IV. Mark Du, City of New York Administrative Hearing Officer/Judge, wrote Section V. Mali Torres and Samantha Rowe, Debevoise & Plimpton, wrote Section VI.

1. *The Factory at Chorzów (Ger. v. Pol.)*, Judgement, 1928 P.C.I.J. (ser. A) No. 17, at 29.

2. UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

438 THE YEAR IN REVIEW

[VOL. 52]

According to the commentary to the UNGPs, “[e]ffective judicial mechanisms are at the core of ensuring access to remedy.”³ Where host State judiciaries are weak, corrupt, or otherwise fail to provide justice when negative business impacts have occurred, it is vital that victims are able to access remedy through home State courts.⁴ Recognizing the important role of home State judiciaries, this article summarizes 2017’s key business and human rights cases across the United States and Canada and highlights potential developments to watch for in 2018.

B. U.S. LITIGATION

Litigation in the United States around human rights violations that have taken place abroad hit a notable roadblock in 2013 with the U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum*.⁵ There, the Court held that there is a presumption against the extraterritorial application of the Alien Tort Statute (ATS),⁶ which has been used since 1980 by U.S. lawyers seeking remedies for victims of negative human rights impacts that have occurred outside of the United States.⁷ While the *Kiobel* ruling has resulted in significant legal barriers for lawyers who wish to use the ATS for abuses abroad, the Court did clarify that the presumption against extraterritorial application of the ATS can be overcome when legal claims “touch and concern the territory of the United States . . . with sufficient force.”⁸

Since 2013, numerous lawsuits have aimed to clarify for the human rights and legal communities: (1) what the *Kiobel* “touch and concern” holding precisely means, and (2) whether corporate actors can be held accountable under this limited jurisdiction. In 2017, two cases discussed each of these areas, and 2018 developments are likely to provide further insight into what access to remedy will look like in a post-*Kiobel* world in the context of negative corporate impacts on people.

1. *Al Shimari v. CACI et al.*

Although originally filed in 2008 and connected to lawsuits filed even earlier, the *Al Shimari v. CACI* case has gained renewed post-*Kiobel* significance as an important test case for clarifying the “touch and concern” doctrine and situations in which the ATS may still be used for human rights violations that occurred outside of the United States.⁹

3. *Id.* at 28 (Commentary to Principle 26).

4. “Host State” refers to the jurisdiction in which a particular business activity is taking place, while “home State” refers to the jurisdiction in which that business is headquartered. *Host State*, OREGONLAWS.ORG, (2007), https://www.oregonlaws.org/glossary/definition/host_state; *Home State*, USLEGAL.COM, (2018), <https://definitions.uslegal.com/h/home-state/>.

5. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

6. 28 U.S.C. § 1350 (2012).

7. *See Filártiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

8. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, slip op. at 14 (Apr. 17, 2013).

9. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 439

This federal lawsuit was brought by the Center for Constitutional Rights on behalf of four Iraqi citizens against, among others, U.S.-based CACI International Inc. (CACI)¹⁰, which was contracted by the U.S. government to provide interrogation services at the Abu Ghraib prison in Iraq.¹¹ Asserting that the company “directed and participated in illegal conduct, including torture,” at the prison.¹² The lawsuit was brought, in part, under the ATS for claims arising from violations of U.S. and international law.¹³ Despite a motion by CACI to dismiss the case in the aftermath of *Kiobel* and numerous dismissals at the lower court level, the case has been repeatedly reinstated by the U.S. Court of Appeals for the Fourth Circuit.¹⁴ Specifically, the court held that the presumption against extraterritoriality was overcome “because CACI is a US corporation; its employees who allegedly mistreated Abu Ghraib prisoners were US citizens; CACI’s actions were at a US military facility operated pursuant to a contract with the U.S. Government; and CACI managers allegedly gave tacit approval for the mistreatment.”¹⁵

In the lawsuit’s most recent developments, U.S. District Court Judge Brinkema reaffirmed on June 28, 2017, that the plaintiff’s claims for torture including cruel, inhuman, degrading treatment, and war crimes meet the “touch and concern” test and can proceed under the ATS.¹⁶ On September 22, 2017, Judge Brinkema then declined a request by CACI to dismiss the case, and it will now be judged on the merits.¹⁷

While the final outcome of the *Al Shimari v. CACI* case remains to be seen, repeated rulings that there is jurisdiction for the case to proceed in the federal courts has sent an important signal that, post-*Kiobel*, there may still be an avenue for some plaintiffs to use the ATS in gaining access to remedy for human rights-related claims. The case has also helped clarify what elements must be satisfied to pass the “touch and concern” test, which is key for human rights litigators going forward.

10. The case was originally brought against CACI International Inc., L-3 Services Inc., and Timothy Dugan (a former CACI employee), but the latter two were dismissed as defendants in 2008. *Al Shimari v. CACI et al.*, CTR. FOR CONSTITUTIONAL RIGHTS para. 2, <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>.

11. *Id.*

12. *Id.*, para. 1.

13. *Id.*

14. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

15. John Bellinger, *Two New ATS Decisions: Fourth and Eleventh Circuits Split on Whether Claims Against CACI and Chiquita “Touch and Concern” the Territory of the United States*, LAWFARE para. 3 (July 27, 2014), <https://www.lawfareblog.com/two-new-ats-decisions-fourth-and-eleventh-circuits-split-whether-claims-against-caci-and-chiquita>.

16. *Id.*

17. Rachel Wiener, *A Suit Over Abu Ghraib Getting to ‘What Actually Happened’*, WASH. POST, Sept. 22, 2017, para. 2, *available at*, https://www.washingtonpost.com/amphtml/local/public-safety/abu-ghraib-contractor-treatment-deplorable-but-not-torture/2017/09/22/4efc16f4-9e3b-11e7-9083-fbffd6804c2_story.html.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

440 THE YEAR IN REVIEW

[VOL. 52]

2. *Jesner v. Arab Bank, PLC*

While the U.S. Supreme Court refrained in its *Kiobel* decision from ruling on whether or not the ATS can be used to bring claims against corporate actors, this question squarely came back to the Court in 2017 with *Jesner v. Arab Bank*.¹⁸

In this case, Israeli and other non-U.S. victims of terrorist attacks and their families have accused Arab Bank, which is headquartered in Jordan, of financing and facilitating various terrorist organizations involved in the attacks.¹⁹ After the plaintiffs originally brought a federal suit in New York, where the bank has a U.S. branch, the defendant moved to dismiss the case based on the decision against corporate liability under the ATS by the U.S. Court of Appeals for the Second Circuit.²⁰ This motion to dismiss was based on the argument that, because the U.S. Supreme Court had avoided answering the legal question of corporate liability under the ATS in its own *Kiobel* decision, the Second Circuit ruling on this precise legal question remained precedent.²¹ The New York district court dismissed the ATS claims, and the case was affirmed on appeal.²²

The plaintiffs then brought the case to the U.S. Supreme Court, where oral arguments took place on October 11, 2017.²³ Counsel for the plaintiffs asserted (among other arguments) that the ATS can be used to hold corporations liable because nothing in the statute's legislative history can be interpreted as restricting its application to non-corporate defendants, particularly because the possible plaintiff class under the ATS was clearly limited in the statute (applying only to torts against "aliens").²⁴ In addressing the *Kiobel* test, the plaintiffs argued that Arab Bank routed foreign transactions in U.S. dollars through the bank's New York branch, thereby meeting the "touch and concern" doctrine, whereas Arab Bank argues that this connection is tenuous and the question of corporate liability need not be reached.²⁵

A ruling on *Jesner* is anticipated by mid-2018, when the fate of ATS litigation as a tool in facilitating corporate accountability in the United States for human rights abuses abroad may well be determined.

18. *In re Arab Bank, PLC.*, 808 F.3d 144, (2d. Cir. 2015) *cert. granted*, 137 S.Ct. 1432 (2017).

19. *Id.* at 147.

20. *Id.* at 148.

21. *Id.*

22. *Id.* at 151.

23. LII SUPREME COURT BULLETIN, <http://www.law.cornell.edu/supct/cert/16-499> (last visited Apr. 9, 2018).

24. Amy Howe, Argument Preview: Corporate Liability and the Alien Tort Statute (Oct. 4, 2017), <http://www.scotusblog.com/2017/10/argument-preview-corporate-liability-alien-tort-statute/>.

25. *Id.*

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 441

C. CANADIAN LITIGATION

2017 has been an important year for access to remedy in Canada. While there have been some setbacks, the overall trend is towards justice.²⁶ Although the sample size is still relatively small and no case has yet to be decided on the merits, foreign victims of corporate human rights abuses may begin to see Canada as a forum for justice.²⁷ Outlined below are two Canadian cases concerning remedy for corporate human rights abuses committed abroad. They highlight that some of the usual issues victims face in such cases (e.g., *forum non conveniens*, duty of care) may no longer be the barriers they once were to litigating these claims in Canada.

1. *Garcia v. Tahoe Resources Inc.*

Garcia v. Tahoe Resources Inc. concerns allegations that private security personnel employed at the Escobal mine in Guatemala shot and injured Adolfo Agustin Garcia and six other Guatemalan individuals during a protest on April 27, 2013.²⁸ The mine is owned by Canadian company Tahoe Resources Inc. through its wholly owned subsidiaries.²⁹ On June 18, 2014, the seven plaintiffs filed suit for damages against Tahoe in the Supreme Court of British Columbia.³⁰

Tahoe admitted the Court's jurisdiction but brought an application for *forum non conveniens*, arguing that Guatemala was the more appropriate forum for the case.³¹ In 2015, the Honourable Madam Justice Gerow agreed with Tahoe and stayed the action.³² The plaintiffs appealed to the British Columbia Court of Appeal, which rendered its decision in January 2017, granting the appeal. The Honourable Madam Justice Garson delivered the opinion for the Court.³³ She held that Guatemala was not the most appropriate forum for the dispute due to three factors: "(1) the limitation period for bringing civil suits in Guatemala; (2) the Guatemalan discovery procedures for civil suits; and (3) the risk of unfairness in the Guatemalan justice system."³⁴

The Court explained that the expiry of the limitation period for bringing suit in Guatemala,³⁵ as well as limitations in Guatemala's civil discovery procedures,³⁶ meant that Guatemala would not be the best forum for the

26. Christopher Burkett & Kevin Coon, *Door Still Open? Canada as Safe Harbour for Multinational Human Rights Litigation*, LEXOLOGY (Nov. 13, 2017) <https://www.lexology.com/library/detail.aspx?g=6fb57a2d-2d14-4673-befc-d9885bebc36>.

27. *Id.*

28. *Garcia v. Tahoe Res., Inc.*, 2017 BCCA 39, ¶¶ 1, 22 (CanLII), <http://canlii.ca/t/gx49k>.

29. *Id.* ¶ 1.

30. *Id.*

31. *Id.*

32. *Garcia v. Tahoe Res., Inc.*, 2015 BCSC 2045 (CanLII), <http://canlii.ca/t/gm0pn>.

33. *See Garcia v. Tahoe Res., Inc.*, 2017 BCCA 39, (CanLII), <http://canlii.ca/t/gx49k>.

34. *Id.* ¶ 48.

35. *Id.* ¶ 96.

36. *Id.* ¶ 80.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

442 THE YEAR IN REVIEW

[VOL. 52]

case. The Court also clarified the test for unfairness in a foreign judiciary, which “is whether there is a real risk of an unfair process in the foreign court.”³⁷ In its analysis, the Court made clear that the question is not the “‘capability’ of the alternate forum to provide justice,” but rather “the ‘likelihood’ that the alternate forum would provide justice.”³⁸

Tahoe appealed the decision to the Supreme Court of Canada, which, on June 8, 2017 refused to hear the case,³⁹ tacitly approving the decision of the British Columbia Court of Appeal. The case is now clear to proceed to trial.⁴⁰ With the jurisdictional hurdles out of the way, *Garcia v. Tahoe Resources Inc.* could be one of the first decisions on the merits in a transnational torts case in Canada.

2. *Araya v. Nevsun Resources Ltd.*

While the most recent, relevant decision in this case occurred in 2016, an appeal was argued in 2017.⁴¹ *Araya v. Nevsun Resources Ltd.* is the first mass tort claim for modern slavery to proceed in a Canadian court and it represents the first time that a Canadian court has permitted a suit against a corporation for alleged violations of customary international law.⁴²

The case was filed in the British Columbia Supreme Court in 2014 by three Eritrean men against Canadian mining company, Nevsun Resources Ltd., for the alleged use of slave labor at Nevsun’s Bisha mine in Eritrea.⁴³ Additional claims were filed in 2016 and 2017.⁴⁴ The plaintiffs brought suit under customary international law, both “on their own behalf and as a representative action on behalf of all Eritrean nationals who were forced to work at the Bisha mine from September 2008 to the present.”⁴⁵

In 2016, Nevsun brought a series of applications seeking to dismiss the claims on the grounds of *forum non conveniens*, justiciability, and denying that the claims could proceed as a class action.⁴⁶ The Honourable Justice Abrioux permitted the action to proceed, finding against Nevsun on its jurisdictional and non-justiciability arguments, but ruling against the plaintiffs with respect to the representative nature of the action, concluding that it could not continue as a class proceeding.⁴⁷

37. *Id.* ¶ 115.

38. *Id.* ¶¶ 121-24.

39. *Tahoe Res., Inc. v. Garcia*, 2017 SCC 35114 (CanLII), <http://canlii.ca/t/h463x>.

40. *Canadian Centre for International Justice (CCIJ)*, *Tahoe Resources (Canada/Guatemala)*: Overview, <https://www.ccij.ca/cases/tahoe/>.

41. The decision of the British Columbia Court of Appeal was released in November 2017 after the deadline for this publication. The appeal was dismissed. *See Araya v. Nevsun Res. Ltd.*, 2017 BCCA 401 (CanLII), <http://canlii.ca/t/hnspq>.

42. *Canadian Centre for International Justice (CCIJ)*, *Nevsun Resources (Canada/Eritrea)*: Background, <https://www.ccij.ca/cases/nevsun/>.

43. *Id.*

44. *Id.*

45. *Araya v. Nevsun Res. Ltd.*, 2016 BCSC 1856, ¶ 4 (CanLII), <http://canlii.ca/t/gv11z>.

46. *Id.* ¶ 6.

47. *Id.* ¶ 575.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 443

An appeal of this decision was heard in September 2017.⁴⁸ While the decision has yet to be released, the British Columbia Court of Appeal's decision in *Garcia v. Tahoe Resources Inc.*,⁴⁹ discussed above, suggests that the Court may be disposed to rule in the plaintiffs' favor.

D. CONCLUSION

Access to justice for victims of corporate human rights violations remains rare.⁵⁰ But as articulated by the UNGPs, the courts have an indispensable role to play in rectifying this shortcoming.⁵¹ Where rule of law in host States is weak, thus limiting access to justice, home State judiciaries are particularly important in ensuring that victims of corporate abuse receive remedy. The two home States covered in this article, the United States and Canada, are important jurisdictions to follow for the development of creative legal arguments regarding business responsibility for human rights abuses. In both regional and global contexts, they are crucial for a for victims' voices to be heard and for businesses to be held accountable for their impacts.

III. Influence of the U.N. Guiding Principles on Business and Human Rights

A. PRIVATE INITIATIVES

In 2017, the U.N. Guiding Principles on Business and Human Rights (UNGPs) continued to see an uptake among businesses and investors. Of particular note, this year saw the launch of an Investor Alliance for Human Rights, the release of the first stand-alone human rights report by a major multinational company, and the continuing efforts of the Thun Group of Banks to operationalize the UNGPs in the financial context.

1. *The Investor Alliance for Human Rights*

The Investor Alliance for Human Rights (IAHR) was launched in October 2017, "to provide a collective action platform to facilitate investor advocacy on a full spectrum of human rights and labor rights issues."⁵² The objectives of the IAHR are to: "[b]uild a collective action platform that allows for the quick mobilization of a broad group of investors to advocate on urgent

48. *Nevsun lawsuit (re Bisha mine, Eritrea)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <https://www.business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea> (last visited Apr. 9, 2018).

49. *Garcia v. Tahoe Res., Inc.*, 2017 BCCA 39 (CanLII), <http://canlii.ca/t/gx49k>.

50. See, e.g., Amnesty Int'l, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, AI Index POL 30/001/2014 (Mar. 7, 2014), available at <https://www.amnesty.org/en/documents/pol30/001/2014/en/>.****

51. *Id.*

52. *Investor Alliance for Human Rights*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, <http://www.iccr.org/investor-alliance-human-rights>.

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

444 THE YEAR IN REVIEW

[VOL. 52]

business and human rights issues.”⁵³ Alliance members will “address both critical policy challenges, and emergent human rights risks arising from corporate operations and supply chains;” “[c]oordinate strategies with relevant stakeholders that can help amplify investor efforts;” and “[e]xpand the current shareholder engagement agenda on human rights.”⁵⁴ Participation in the Alliance is open to all interested institutional investors.

2. *The Coca-Cola Company*

On October 9, 2017, The Coca-Cola Company (Company) released its first stand-alone human rights report.⁵⁵ The report explicitly references the UNGPs as an authoritative global standard and states that the Company will continue to focus on three components of the UNGPs necessary in a corporate context: a policy commitment to respect human rights; a due diligence process to identify, prevent, and mitigate adverse human rights impact; and a process to enable the remediation of the adverse human rights impact.⁵⁶ The report discusses the Company’s revised human rights policy (to be launched December 10, 2017), access to remedy, salient human rights risks, and supply chain matters.⁵⁷

3. *Vattenfall – A Human Rights Risk Assessment in Colombia*

In November 2017, Swedish energy firm Vattenfall published the report of its “first” analysis of human rights risks of sourcing from Colombia.⁵⁸ Vattenfall is reportedly the first European utility company to conduct such a risk analysis.⁵⁹ The report, which references the UNGPs, follows a 2016 study by an independent third-party that showed that Vattenfall’s most significant human rights risks lie in the sourcing of fuels and other goods and services from high risk countries.⁶⁰ The report focuses on four areas of human right risks: Workers’ Rights (Occupational Health and Safety and Freedom of Association), Displacement and Land Restitution in the Internal Armed Conflict, Involuntary Resettlement, and Environment and Communities.⁶¹

53. Julie Wokaty, *ICCR launches new Alliance to amplify global investor influence on human rights*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY (Oct. 18, 2017), <http://www.iccr.org/iccr-launches-new-alliance-amplify-global-investor-influence-human-rights>.

54. *Id.*

55. The Coca-Cola Company, *The Coca-Cola Company’s Human Rights Report 2016-2017* (Oct. 9, 2017), <http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/human-and-workplace-rights/Human-Rights-Report-2016-2017-TCCC.pdf>.

56. *Id.* at 2-3.

57. *Id.* at 8.

58. VATTENFALL, *A HUMAN RIGHTS RISK ASSESSMENT IN COLUMBIA* (Nov. 2017), https://business-humanrights.org/sites/default/files/documents/vattenfall_coal_sourcing_report_2017_0.pdf.

59. *Id.*

60. *Id.* at 4.

61. *Id.*

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 445

4. *Declaration of German Businesses on Climate Change*

In November 2017, fifty-two major and medium-sized businesses in Germany adopted a Declaration calling on the German government to take steps to ensure that Germany's and the EU's climate targets are met.⁶² In the Declaration, the businesses called on the German government to: (i) implement the Climate Action Plan 2050 as a reform programme for Germany; (ii) further develop the emissions trading scheme through supplementary measures in order to promote investment security in Germany and the EU; (iii) develop a comprehensive low-carbon strategy for the transport sector; and (iv) push to bring Germany's and the EU's long-term climate target needs in alignment with the goals of the Paris Agreement prior to the U.N. climate summit in 2020.⁶³ Specifically, the Declaration called on the German government to “enact decisive and efficient measures to promote the attainment of the national emissions target for 2020.”⁶⁴

A. THE BANKING SECTOR

1. *The Thun Group of Banks – Second Discussion Paper*

In January 2017, the Thun Group of Banks launched a second discussion paper exploring the implications of the UNGPs for corporate and investment banks.⁶⁵ The second discussion paper focused on Principle 13 (“The responsibility to respect human rights”) and Principle 17 (“human rights due diligence”) of the UNGPs.⁶⁶ The discussion paper addresses, *inter alia*, the bank's connections to adverse impacts, due diligence obligations for banks, and preventing and mitigating adverse impacts.⁶⁷ While the participation of the Thun Group of Banks in efforts to operationalize the UNGPs has been welcomed, some of the conclusions reached in the discussion paper have drawn wide criticisms.⁶⁸ For example, the Thun Group of Banks concluded:

62. Adidas et al., *Ensuring innovation and reliable investment conditions: The next German government must make climate policy a top priority*, (Nov. 7, 2017) <https://www.business-humanrights.org/sites/default/files/documents/20374.pdf>.

63. *Id.* at 2.

64. *Id.*

65. The Thun Group of Banks, *Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context* (2017), https://www.static-ubs.com/global/en/about_ubs/ubs-and-society/how-we-do-business/sustainability/thun-group/_jcr_content/par/linklist/link_1049671906.0763186343.file/bGluay9wYXRoPS9jb250ZW50L2RhbS9zdGF0aWMvZ2xvYmFsL2Fib3V0X3Vicy9jb3Jwb3JhdGVfcmVzcG9uc2liaWxpdkHkvdGh1bi1nem91cCBkaXNjdXNzaW9uLXBhcGVyLnBkZg==/thun-group%20discussion-paper.pdf.

66. *Id.* at 5.

67. *Id.*

68. See Letter from United Nations Working Group on Business and Human Rights to Thun Group Members (Feb. 23, 2017), http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

446 THE YEAR IN REVIEW

[VOL. 52]

Under UNGP 13, a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients' operations because the impact is not occurring as part of the bank's own activities (. . .). The provision of certain financial products and services may, however, be directly linked to adverse human rights impacts under UNGP 13b.⁶⁹

This conclusion, which suggests that banks can only “contribute to” human rights impacts through their own direct activities, but not through the activities of their clients, was specifically criticized by the U.N. Working Group on Business and Human Rights.⁷⁰

2. *The U.N. Office of the High Commission for Human Rights – Position Paper on Banks' Responsibility*

On June 12, 2017, the U.N. Office of the High Commission for Human Rights (OHCHR) published a position paper on the application of the UNGPs in the context of the banking sector.⁷¹ In the position paper, the OHCHR addressed three important questions. First, it asked “[w]hich factors would influence whether a bank is (a) causing or contributing to an impact and (b) having a direct link to an adverse impact via a business relationship, in the context of the banking sector?”⁷² Second, it asked “[w]here a bank has contributed to an adverse impact through its finance, what are the differentiated responsibilities of the bank and the company or vehicle leading the project to provide for or cooperate in remediation under Guiding Principle 22?”⁷³ Third, it asked “[h]ow should the responsibilities of banks to ‘establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by their operations’ under Guiding Principle 29 be interpreted with regard to adverse impacts that a bank may cause or contribute, or those to which the bank may have a direct link through its finance?”⁷⁴

C. CANADA: JUSTICE FOR VICTIMS OF CORRUPT FOREIGN OFFICIALS ACT (SERGEI MAGNITSKY LAW)

On October 18, 2017, the Canadian Parliament formally passed the “Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky

69. *Id.* at para. 7.

70. *Id.*

71. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, OHCHR RESPONSE TO REQUEST FROM BANKTRACK FOR ADVICE REGARDING THE APPLICATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN THE CONTEXT OF THE BANKING SECTOR (June 12, 2017), <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

72. *Id.* at 3.

73. *Id.* at 10.

74. *Id.* at 14.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 447

Law).⁷⁵ In November, the government promulgated the *Justice for Victims of Corrupt Foreign Officials Regulations* to give effect to the law.⁷⁶

The law authorizes the Canadian government to freeze assets and impose visa bans on officials from Russia and other nations considered to be guilty of human rights violations.⁷⁷ Even more importantly, the law effectively prevents Canadian businesses from dealing with foreign nationals who are “responsible for, or complicit in, extrajudicial killings, torture, or other gross violations of internationally recognized human rights.”⁷⁸ Section 6 (“Duty to Determine”) imposes on a specified entity an obligation to “determine on a continuing basis whether it is in possession or control of property that it has reason to believe is the property of a foreign national who is the subject of an order or regulation” under the statute.⁷⁹ Entities identified in the legislation include: authorized foreign banks, as defined in Section 2 of the *Bank Act*, in respect to their business in Canada or banks to which that Act applies; cooperative credit societies, savings and credit unions and *caisses populaires* regulated by a provincial Act and associations regulated by the *Cooperative Credit Associations Act*; foreign companies, as defined in subsection 2(1) of the *Insurance Companies Act*, in respect to their insurance business in Canada; companies, provincial companies and societies, as those terms are defined in subsection 2(1) of the *Insurance Companies Act*; fraternal benefit societies regulated by a provincial Act in respect to their insurance activities and insurance companies and other entities engaged in the business of insuring risks that are regulated by a provincial Act; companies to which the *Trust and Loan Companies Act* applies; trust companies regulated by a provincial Act; and loan companies regulated by a provincial Act.⁸⁰

IV. ICSID Decision on Business and Human Rights

In early 2017, the International Centre for Settlement of Investment Disputes (ICSID) tribunal released its award in *Urbaser S.A. v. The Argentine*

75. Bill S-226: An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the Special Economic Measures Act and the Immigration and Refugee Protection Act, 4. (2017). Assented to Oct. 8, 2017. 42nd Parliament. 1st Session. Retrieved from the Parliament of Canada website: <http://www.parl.ca/DocumentViewer/en/42-1/bill/S-226/royal-assent>.

76. Justice for Victims of Corrupt Foreign Officials Act: Justice for Victims of Corrupt Foreign Officials Regulations. (2017). SOR/2017-233. Retrieved from the Government of Canada website: <http://laws-lois.justice.gc.ca/PDF/SOR-2017-233.pdf>.

77. *Id.*; Bill S-226: An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the Special Economic Measures Act and the Immigration and Refugee Protection Act, 4. (2017). Assented to Oct. 8, 2017. 42nd Parliament. 1st Session. Retrieved from the Parliament of Canada website: <http://www.parl.ca/DocumentViewer/en/42-1/bill/S-226/royal-assent>.

78. *Id.* § 4(2)(a).

79. *Id.* § 6.

80. *Id.* § 2.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

448 THE YEAR IN REVIEW

[VOL. 52]

Republic,⁸¹ the first tribunal to accept jurisdiction over a human rights-based counterclaim. Two aspects of this decision are of relevance to the role of corporate social responsibility (CSR) in international investment. First, the tribunal has made it easier to meet the jurisdictional requirements for ICSID human rights-based counterclaims.⁸² Second, the tribunal, while ultimately rejecting the counterclaim on its merits, determined that an investor could be liable for human rights violations in an investment dispute and opened the door a crack for CSR to ground a human-rights based counterclaim.⁸³

The claimant investors (the “Claimants”) were shareholders in a company, Aguas Del Gran Buenos Aires S.A. (AGBA), that had won a concession (the AGBA Concession) to provide water and sewage services in the Province of Buenos Aires, Argentina.⁸⁴ The AGBA Concession was part of a privatization program to expand drinking and sewage services in the country by leveraging the technical knowledge and financial capacity of foreign companies.⁸⁵ In January 2002, in the midst of a financial crisis, Argentina adopted emergency measures, including freezing service tariffs.⁸⁶ The Claimants initiated the claim under the Spain-Argentina bilateral investment treaty⁸⁷ (BIT), arguing that these emergency measures “drastically and definitively impacted the economic-financial equation of the AGBA Concession,”⁸⁸ thereby violating the terms of the BIT. In its counterclaim,⁸⁹ Argentina argued that the Claimants violated their “obligations under international law based on the human right to water” when they failed to make investments to expand water and sanitation services.⁹⁰

In asserting jurisdiction over the counterclaim, the tribunal made two findings that potentially make it easier for host states to bring human-rights based counterclaims in the future. First, in considering whether the counterclaim had a sufficient connection to the Claimants’ originating claim,

81. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*, ICSID Case No ARB/07/26, Award, Dec. 8, 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

82. *Id.* ¶ 21.

83. *Id.* ¶ 36.

84. *Id.*

85. *Id.* ¶ 41.

86. *Id.* ¶¶ 71-75.

87. Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Arg.-Spain, Oct. 3, 1991, 1537 U.N.T.S. No. 1-26689, available at [https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20\(1991\)%20\[english%20translation\]%20UNTS.pdf](https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20[english%20translation]%20UNTS.pdf).

88. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*, ICSID Case No ARB/07/26, Award, Dec. 8, 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

89. Argentina filed a counterclaim based on Article 46 ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*, ICSID Case No ARB/07/26, Award, Dec. 8, 2016, ¶¶ 1110-1155, available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

90. *Urbaser* ¶ 36.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 449

the tribunal took a different position from previous awards⁹¹ by asserting that factual links “would be sufficient to adopt jurisdiction over the counterclaim as well.”⁹² A legal connection was not necessary. According to the tribunal, the connection between the claims was established by a “manifest” factual link: “the same investment, or the alleged lack of sufficient investment, in relation to the same Concession.”⁹³

Second, the tribunal rejected the Claimants’ position that a human rights claim was beyond its competence.⁹⁴ According to the tribunal, a human rights counterclaim is not automatically excluded from the scope of a tribunal’s jurisdiction when it is properly brought forward based on the terms of the BIT and the respondent presents a *prima facie* case.⁹⁵

In considering the merits of the counterclaim, the tribunal did not accept the Claimants’ core position that international law only imposes binding human rights obligations, including the human right to water, on States, not private parties.⁹⁶ But, while corporations may be subject to international law, the tribunal did not agree that the Claimants had a positive obligation to guarantee the human right to water.⁹⁷ The tribunal only found a “negative” obligation on private parties not to act in a way which “destroys” the human right to water.⁹⁸ There was no corresponding “positive” obligation in international law for corporations to provide safe and clean drinking water and sewage services.⁹⁹ The Claimants and Argentina may have been working toward the same objective—to provide water and sanitation services to residents—but the Claimants were providing these services pursuant to the contractual terms of the AGBA Concession, not pursuant to a human rights obligation derived from the human right to water.¹⁰⁰

91. *Saluka Invs. BV v. Czech Republic*, Partial Award, Mar. 17, 2006, available at <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>.

92. *Urbaser* ¶ 1151.

93. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*, ICSID Case No ARB/07/26, Award, Dec. 8, 2016, at ¶1151, available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

94. *Id.* ¶ 1152.

95. *Id.* ¶ 1153.

96. *Id.*

97. *Id.* ¶1157.

98. International human rights treaties including the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and General Assembly resolutions including United Nations’ General Assembly Resolution, July 28, 2010 (64/292, CUL-185), impose a positive obligation on States to guarantee the right to safe and clean water and sanitation and a corresponding “negative” obligation on private parties not to act in a way which “destroys” any rights or freedoms which States are required to protect. *International human rights law, Legal framework*, RULAC.ORG, (Jan. 31, 2017), <http://www.rulac.org/legal-framework/international-human-rights-law>.

99. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*, ICSID Case No ARB/07/26, Award, Dec. 8, 2016, at ¶1196 available at https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

100. *Id.* ¶ 1205.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

450 THE YEAR IN REVIEW

[VOL. 52]

The tribunal suggested that CSR, specifically the U.N. Guiding Principles on Business and Human Rights, is a potential source of positive human rights obligations for corporations: “[I]nternational law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce,”¹⁰¹ which standard “includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation.”¹⁰² According to the tribunal, this CSR “standard” is insufficient to require corporations to “put their policies in line with human rights law.”¹⁰³ Instead, the task is “contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.”¹⁰⁴ Having introduced CSR as a potential source of positive obligation, the tribunal did not consider whether companies that do integrate human rights into their operations assume a positive performance obligation that attaches international human rights obligations to the company or whether the Claimants had done so here.¹⁰⁵ Nonetheless, by invoking CSR in the investment context, the tribunal opened up the possibility of such analysis in the future.

V. Human Rights Developments in Indonesia

Long touted as a democratic success story in a region where authoritarian governments remain the norm, Indonesia in 2017 appeared to be confronting an undercurrent of Islamic fundamentalism and ethno-nationalism with the enfranchisement of a population still deliberating the role of religion in society.¹⁰⁶ The departure of President Suharto’s military government in 1998 created space for civil society, but the vacuum was partly filled by well-organized forces of political Islam. The political clout of groups like the Islamic Defenders Front (FPI) has only grown stronger as they gained experience and influence with further political liberalization.¹⁰⁷ Mainstream politicians have begun to acknowledge, if not accommodate, the demands of these groups.¹⁰⁸ Consequently, in 2017, groups like the FPI, which advocates implementing Sharia law in the archipelago, have grown bolder in deploying their organizational heft and exerting pressure on an

101. *Id.* ¶ 1195.

102. *Id.*

103. *Id.*

104. *Id.*

105. See Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations, Human Rights, and the Urbaser Standard, Breaking New Ground?* ISSN 1868-1778, (May 12, 2017), <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20144.pdf>.

106. Vedi Hadiz, *Deep-Rooted Problems with Democracy in Indonesia*, *THE NEW LENS INTERNATIONAL*, (Oct. 22, 2017), <https://international.thenewslens.com/article/81572>.

107. *Id.*

108. *Id.*

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 451

otherwise moderate government to adopt illiberal policies contrary to human rights responsibilities in a multi-ethnic country.¹⁰⁹

The rise of the FPI and its influence on human rights norms was most evident in the Jakarta municipal election in April 2017.¹¹⁰ Former provincial Governor Basuki Tjahaja Purnama, better known as “Ahok,” campaigned against former education minister Anies Beswedan in a contest that devolved into a referendum about the political legitimacy of a politician’s mere identification as a non-Muslim ethnic Chinese sitting governor.¹¹¹

In summary, Ahok, a Christian of ethnic Chinese descent, had the misfortune of being recorded opining about a political opponent’s use of Quran verses as campaign literature.¹¹² The FPI and Hizb ut-Tahir, an Islamic organization that rejects democratic governance, wasted no time in mobilizing large public demonstrations in Jakarta and other major cities, inciting the masses for a perceived slight to Islam and demanding the outright imprisonment or, in some cases, death of the incumbent governor.¹¹³ Then-candidate Beswedan, a political novice and moderate, availed himself of the outpouring of the pent-up resentment many Indonesians felt towards ethnic Chinese or Christian minorities and deftly deployed this emerging political force to victory by rebranding his candidacy as a defense of the Islam and “Pribumi,” a loaded term of identification that excludes people of non-Austronesian ancestry from an Indonesian “nation.”¹¹⁴

While this could be merely construed as the usual rough and tumble of electoral politics, Ahok was also charged by government prosecutors in the North Jakarta District Court for violating Indonesia’s vaguely written blasphemy laws dating back to 1965, ostensibly under pressure from mass mobilization from FPI.¹¹⁵ Human rights advocates in Indonesia note the government has only enforced the blasphemy law a handful of times since its passage, but the majority of instances were within the years of political liberalization.¹¹⁶ The decision of the five-judge panel referenced very little legal doctrine or reasoning to support Ahok’s conviction and primarily cited the outsized political public demonstration as evidence of Muslims being “offended” and also the testimony of Islamic scholars as “expert”

109. *Id.*

110. *Id.*

111. *Id.*

112. Vedi Hadiz, *Deep-Rooted Problems with Democracy in Indonesia*, THE NEW LENS INTERNATIONAL, (Oct. 22, 2017), <https://international.thenewslens.com/article/81572>.

113. Nithin Coca, *The Fall of Ahok and Indonesia’s Future*, THE DIPLOMAT, (April 21, 2017), available at <https://thediplomat.com/2017/04/the-fall-of-ahok-and-indonesias-future/>.

114. Nurul Fitri Ramadhani, *Anies’s ‘pribumi’ speech sparks debate, ‘racist’ comments on social media*, THE JAKARTA POST, (Oct. 17, 2017), at National 1, available at <http://www.thejakartapost.com/news/2017/10/17/aniess-pribumi-speech-sparks-debate-racist-comments-on-social-media.html>.

115. Joe Cochrane, *Christian Governor in Indonesia Found Guilty of Blasphemy Against Islam*, N.Y. TIMES, at A10, (May 10, 2017), available at <https://www.nytimes.com/2017/05/09/world/asia/indonesia-governor-ahok-basuki-tjahaja-purnama-blasphemy-islam.html>.

116. *Id.*

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

452 THE YEAR IN REVIEW

[VOL. 52]

witnesses.¹¹⁷ Ahok was ultimately sentenced to two years in Cipinang Penitentiary, which also houses rapists and murderers.¹¹⁸

Indonesia's ambiguous 1965 anti-blasphemy law and a 2008 anti-pornography law that criminalizes "homosexual activity" all but ensure that future elections will feature the same political maneuver to silence ethnic and religious minorities through the legal system.¹¹⁹ Human rights advocates have consistently pointed out that Indonesia's ambiguous private morality laws amount to a failure to fulfill human rights obligations under international law, as their potentially unlimited scope deprives people of any guidance on their application.¹²⁰ Moreover, while Indonesia has a highly comprehensive constitution that enshrines protections for religious speech and also does not criminalize homosexuality; increasingly in 2017, the district courts and prosecutors apparently find no conflict between the constitutional provisions protecting religious and political speech and the blasphemy laws or anti-pornography law used to arrest members of the LGBT community.¹²¹ Even more troubling was that the prosecutors requested two years of probation for Ahok's penalty, but this was overruled by the court on its own motion in favor of a two-year jail sentence, ostensibly to quell the restless masses.¹²²

The empowerment of political Islam has notably influenced elected officials to crackdown on Indonesia's LGBT community. While being LGBT in and of itself is not a crime, the 2008 Anti-Pornography Law served as a pretext to raid known places of gathering for the LGBT community, including certain public saunas, swimming pools, and health clubs.¹²³ On April 30, 2017, over fourteen individuals in Surabaya were arrested as suspects for engaging in "pornographic" activities, though the allegations are unclear as to what specific actions brought the suspects within the scope of the law.¹²⁴ Shortly thereafter, on May 21, 2017, the Jakarta police raided the Atlantis Spa and arrested 141 individuals, while only bringing charges against ten for "organizing a sex party."¹²⁵ The following day, West Java

117. Joe Cochrane, *'Rot at the Core': Blasphemy Verdict in Indonesia Dismays Legal Experts*, N.Y. TIMES, at A6-12, (May 12, 2017), <https://www.nytimes.com/2017/05/11/world/asia/indonesia-blasphemy-governor-jakarta-ahok.html>.

118. *Id.*

119. *Id.*

120. *Id.*

121. Jeffrey Hutton, *Gay Man Speaks on Indonesian Intolerance from Jakarta Prison*, THE NEW LENS INTERNATIONAL, (Oct. 23 2017), <https://international.thenewslens.com/article/81715>.

122. Joe Cochrane, *'Rot at the Core': Blasphemy Verdict in Indonesia Dismays Legal Experts*, N.Y. TIMES, at A6-12, (May 12, 2017), <https://www.nytimes.com/2017/05/11/world/asia/indonesia-blasphemy-governor-jakarta-ahok.html>.

123. Jeffrey Hutton, *Gay Man Speaks on Indonesian Intolerance from Jakarta Prison*, THE NEW LENS INTERNATIONAL, (Oct. 23 2017), <https://international.thenewslens.com/article/81715>.

124. *Indonesia: Release Gay Men at Risk of Torture*, HUMAN RIGHTS WATCH (Apr. 13, 2017, 7:00 PM), <https://www.hrw.org/news/2017/04/09/indonesia-release-gay-men-risk-torture>.

125. Andreas Harsono, *Indonesia: Police Raids Foster Anti-Gay Hysteria*, HUMAN RIGHTS WATCH (June 2, 2017, 12:01 AM), <https://www.hrw.org/news/2017/06/02/indonesia-police-raids-foster-anti-gay-hysteria>.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 453

police Chief Anton Charliyan announced plans to create a task force to identify and punish LGBT individuals.¹²⁶ Social media-crazed Indonesia appears to have further aggravated the sensationalistic elements of the sweep and, arguably, this has led to reports and subsequent arrests of individuals suspected of being members of the LGBT community.¹²⁷

The Indonesian police have not only stepped up raids on places LGBT expect to gather but have also canceled events featuring LGBT individuals, often in outright collaboration with Islamic groups.¹²⁸ In January 2017, a sports and cultural event in the province of South Sulawesi was canceled by the police after the Islamic Congregation Forum complained to police the event violated “religious values.”¹²⁹ The police responded by detaining 600 suspected LGBT individuals involved with the event planning prior to the start of the three-day event.¹³⁰

In the autonomous region of Aceh, which has operated under a Sharia-based legal system since October 2015, there has been a rise of public beatings and floggings of individuals suspected of being LGBT.¹³¹ Arguably, Aceh is beyond the jurisdictional writ from Jakarta, but it remains within the territorial jurisdiction of the Indonesian state, and permitting humiliating public floggings may be considered a breach of U.N. Convention Against Torture.¹³² Public floggings in 2017 have already topped 500.¹³³ Two gay men were convicted and sentenced to eighty-five public lashings on May 23.¹³⁴ While public flogging imposed under the Sharia laws are not unusual in Aceh *per se*, the arrest, convictions, and sentencing of the two men here were notably the result of a vigilante group forcibly entering the private homes of the two individuals and dragging them to the police station.¹³⁵

Finally, with the empowerment of political Islam, the Indonesian government, though at times leveraging the public religious sentiment for political ends, has also started to recognize the need to contain it. Nonetheless, the means taken to control or neutralize the perceived threat are not encouraging for human rights. The Indonesian government passed an amendment to Law 15/2003 Eradication of Terrorism allowing the government to strip suspected terrorists of their citizenship and criminalize “speech, thought, behavior or writings” that could lead to “actions which

126. *Id.*

127. *Id.*

128. Kyle Knight, *Indonesian Police, Anti-LGBT Islamists Restart Sinister Collaboration*, HUMAN RIGHTS WATCH (Jan. 23, 2017, 2:50 PM), <https://www.hrw.org/news/2017/01/23/indonesian-police-anti-lgbt-islamists-restart-sinister-collaboration>.

129. *Id.*

130. *Id.*

131. Andreas Harsono, *Public Floggings in Indonesia Top 500*, HUMAN RIGHTS WATCH (Oct. 24, 2017 4:33 PM), <https://www.hrw.org/news/2017/10/24/public-floggings-indonesia-top-500>.

132. *Id.*

133. *Id.*

134. *Indonesia: Stop Public Flogging of Gay Men*, HUMAN RIGHTS WATCH (May 19, 2017, 8:00 PM), <https://www.hrw.org/news/2017/05/19/indonesia-stop-public-flogging-gay-men>.

135. *Id.*

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

454 THE YEAR IN REVIEW

[VOL. 52]

adversely impact other people or communities.”¹³⁶ Such expressions could potentially lead to twelve years of imprisonment.¹³⁷ Other provisions permit the police to detain terrorism suspects in unspecified locations for up to six months (in contrast to the one day allowed for suspects for any other crimes).¹³⁸

President Jokowi, himself in the crosshairs of the forces of political Islam, has vacillated between burnishing his own Muslim (and non-ethnic Chinese) credentials and putting the brakes on this movement. In July 2017, despite Jokowi’s reputation as a moderate or liberal politician, the Administration enacted Perppu No. 2, a regulatory decree in lieu of legislation, authorizing the government to ban, without judicial recourse, any organizations deemed to be “undesirable.”¹³⁹ Perppu No. 2 was framed as a defense of Indonesia’s state ideology of “pancasila against the forces of radical Islam.”¹⁴⁰ The hyper-nationalism used to legitimize Perppu No. 2 may also prove problematic over time as military figures have since been speaking out against forces of liberalism, communism, radical Islam, or any other organizational force that may be perceived to “threaten” pancasila or national unity.¹⁴¹

Indonesia has come a long way since its military dictatorship days and the human rights violations attendant to that regime. Nevertheless, the authoritarian government had papered over many unresolved social and civil rights issues that were kept under wraps, and this past year has seen many of these forces come to the fore, resulting in the enforcement of illiberal laws, such as the 1965 Anti-blasphemy law and 2008 Anti-Pornography Law, that have been dormant for years.

VI. European Court of Justice Case on Mandatory Relocation Quotas for Asylum Seekers

In 2015, Slovakia and Hungary brought individual cases before the European Court of Justice (the ECJ), seeking the annulment of Council Decision (EU) 2015/1601 of 22 September 2015 (Decision 2015/1601), which implemented an emergency plan aimed at relocating 120,000 irregular migrants from Greece and Italy to other EU Member States.¹⁴²

136. Andreas Harsono, *Indonesia: Counterterrorism Law Changes Threaten Rights*, HUMAN RIGHTS WATCH (July 12, 2017, 8:45 PM), <https://www.hrw.org/news/2017/07/12/indonesia-counterterrorism-law-changes-threaten-rights>.

137. *Id.*

138. *Id.*

139. Editorial, *Perppu’s slippery slope*, THE JAKARTA POST, July 14, 2017, at Academia 1, at para. 4, *available at* <http://www.thejakartapost.com/academia/2017/07/14/editorial-perppus-slippery-slope.html>

140. *Id.*

141. *Id.*

142. Council Decision 2015/1601, art. 1 and 4, 2015 O.J. (L 248) 80 (EU), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601>.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 455

The ECJ also allowed Poland to intervene in support of the annulment.¹⁴³ In a landmark ruling on September 6, 2017, the ECJ dismissed Slovakia and Hungary's complaints and held that the European Union can require its Member States to accept asylum seekers from other EU countries.¹⁴⁴

A. THE EUROPEAN UNION RESETTLEMENT SCHEME

Over 1.7 million irregular migrants have arrived in the European Union from across the Mediterranean since 2014, of whom over one million landed in Greece and almost 620,000 in Italy.¹⁴⁵ In 2015, the European Council adopted Decision 2015/1601, which provided for 120,000 asylum seekers to be relocated from Greece and Italy—which have struggled to deal with such a massive inflow of migrants—to nations across the European Union.¹⁴⁶ Of these 120,000 asylum seekers, the resolution provided that 802 would be relocated to Slovakia, and 1,294 to Hungary.¹⁴⁷

The resettlement scheme was based on the principle of solidarity and fair sharing of responsibility between the EU Member States.¹⁴⁸ The legal basis for Decision 2015/1601 is found in Article 78(3) of the Treaty on the Functioning of the European Union (the TFEU), which allows the Council to adopt provisional measures when faced with a state of emergency “characterised by a sudden inflow of nationals of third countries.”¹⁴⁹

Decision 2015/1601 derogated from the general EU rules on processing illegal immigrants—found in the Dublin III Regulation—according to which Italy and Greece are responsible for examining applications for international protection as the first EU port of entry.¹⁵⁰ The size of each country, GDP, and number of refugees already present were the main

143. Court of Justice of the European Union Press Release 91/17, (Sept. 6, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cpf1170091.en.pdf>.

144. Joined Cases C-643 & C-647/15, *Slovak Republic v. Council*, CURIA ECLI:EU:C:2017:631, (Sept. 6, 2017), ¶¶ 151-156, 171-174, 190-191, 195-197, *available at* <http://curia.europa.eu/juris//document/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1752453>.

145. The UN Refugee Agency, *Mediterranean Situation*, , OPERATIONAL PORTAL: REFUGEE SITUATIONS, <https://data2.unhcr.org/en/situations/mediterranean> (last visited Jan. 26, 2018).

146. Council Decision 2015/1601, art. 1 and 4, 2015 O.J. (L 248) 80 (EU).

147. *Id.* Annex 1-2.

148. The Treaty on the Functioning of the European Union, art. 80, 2007 O.J. (C 326) 49, *available at* <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments.html>.

149. *Id.* art. 78(3).

150. *See* Regulation No. 604/2013 of the European Parliament and of the Council, art. 13(1), 2013 O.J. (L 180) 31 (EU), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656666/dublin-III-regulation-v1_0.pdf. The Dublin III Regulation is the EU law that determines the Member State responsible for processing an application for asylum seekers claiming international protection under the Geneva Convention within the European Union.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

456 THE YEAR IN REVIEW

[VOL. 52]

criteria for determining each EU Member State's relocation quota.¹⁵¹ Other factors such as family, cultural, or social ties that an asylum seeker may have to a specific country were also taken into account to facilitate the migrant's integration in the country of destination.¹⁵²

Although the resettlement scheme in Decision 2015/1601 is mandatory as a matter of EU law, (1) a Member State has the right to reject an asylum seeker where there are reasonable grounds for regarding the person as a threat to public order or national security,¹⁵³ and (2) Member States were required to indicate, at regular intervals, the number of persons that could be relocated to their territory swiftly, with a view to eventually achieving their full relocation quota by September 26, 2017.¹⁵⁴ The resettlement mechanism also provided for a set of complementary measures that sought to enhance the efficiency and capacity of Greece and Italy's asylum systems, namely the provision of operational and financial support.¹⁵⁵

B. THE CASE AGAINST MANDATORY RELOCATION QUOTAS

Slovakia and Hungary alleged that the procedure that resulted in the adoption of Decision 2015/1601 was unlawful and did not comply with key requirements.¹⁵⁶ They submitted that Decision 2015/1601 derogated from the normal EU rules on processing illegal immigrants and was tantamount to a legislative measure.¹⁵⁷ The decision was therefore invalid because the European Council failed to follow the relevant legislative procedure.¹⁵⁸ They argued further that the contested decision was not provisional, as required by Article 78(3) TFEU, and that its period of application (twenty-four months) was excessive.¹⁵⁹

Slovakia also contended that Decision 2015/1601 did not satisfy the conditions under Article 78(3) of the TFEU because the immigration inflow could not be deemed sudden and there was no link between the state of emergency and the inflow of immigrants into Greece, which had failed to implement its asylum policy efficiently for a long time.¹⁶⁰

151. Council Decision 2015/1601, Recital 25, 2015 O.J. (L 248) 80 (EU), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601>.

152. *Id.* Recital 34.

153. *Id.*, art. 5(7).

154. *Id.* arts. 5, 13.3. ****

155. *Id.* art. 7, 10.****

156. Joined Cases C-643 & C-647/15, *Slovak Republic v. Council*, CURIA ECLI:EU:C:2017:631, (Sept. 6, 2017), ¶¶ 151-156, 171-174, 190-191, 195-197, *available at* <http://curia.europa.eu/juris//document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1752453>.

157. *Id.* ¶¶ 47-55.

158. *Id.*

159. *Id.* ¶¶ 85-87.

160. *Id.* ¶¶ 104-109.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

INTERNATIONAL HUMAN RIGHTS 457

Slovakia and Hungary further argued, *inter alia*, that the resettlement scheme was not appropriate, necessary, nor proportionate.¹⁶¹ In this regard, as an intervener, Poland reasoned that the imposition of binding quotas has a disproportionate effect on countries which are, like itself, “‘virtually ethnically homogenous’ and whose population are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory.”¹⁶²

Hungary also submitted that the resettlement scheme infringed the Geneva Convention because (1) it deprived asylum seekers of the right to remain in the country in which they had lodged their request for international protection while the application is pending, and (2) the applicants may be relocated to a country with which they have no particular connection.¹⁶³

C. THE ECJ’S DECISION

The ECJ rejected all of the arguments made against Decision 2015/1601. Most notably, it held that the Council was not only fully entitled to implement a mandatory redistribution of asylum seekers between Member States,¹⁶⁴ it was in fact *required* to give effect to the principle of solidarity and fair sharing of responsibility between the Member States, including the financial implications, which applies when the European Union common policy on asylum is implemented.¹⁶⁵ In response to Poland’s argument regarding the lack of cultural or linguistic ties between the asylum seeker and the county of destination, the ECJ held that “considerations relating to the ethnic origin of applicants for international protection cannot be taken into account because they are clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union.”¹⁶⁶ Lastly, the ECJ noted that because migrants are not entitled to choose which country would be responsible for processing their asylum applications under Decision 2015/1601, they must have the right to an effective remedy against the relocation decision, in order to ensure respect for their fundamental rights.¹⁶⁷

The ECJ’s decision made headlines around the globe. Its significance lies in the fact that the Court has allowed the European Council to adopt a fundamentally different approach towards the distribution of responsibility for asylum seekers among EU Member States, which derogates from the

161. *Id.* ¶¶ 209-210, 225-233, 262-265, 279-281.

162. Joined Cases C-643 & C-647/15, *Slovak Republic v. Council*, CURIA ECLI:EU:C:2017:631, (Sept. 6, 2017), ¶ 302, *available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1752453>.

163. *Id.* ¶¶ 315-320.

164. *Id.* ¶ 246.

165. *Id.* ¶ 252.

166. *Id.* ¶ 305.

167. *Id.* ¶ 336.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

458 THE YEAR IN REVIEW

[VOL. 52]

“first safe country” principle established under Dublin III, whereby migrants must apply for asylum in the Member State in which they arrive. Even though the quotas were provisional, it has been reported that they are likely to become a long-term mechanism in the forthcoming reform of Dublin III.¹⁶⁸ Conversely, the ECJ’s decision may have a detrimental impact on the Dublin III reform negotiations. By ruling in favor of the European Council, the ECJ may have fueled “bad blood” between the Central Eastern European member states, which strongly contested the scheme, and Brussels.¹⁶⁹

Notwithstanding the ECJ’s support, implementation of the relocation scheme has been far from successful. Less than a quarter of the 120,000 migrants covered by Decision 2015/1601 have been resettled from Italy or Greece to other EU countries.¹⁷⁰ As noted by the ECJ in its ruling, the small number of relocations can be explained, in particular, by the lack of cooperation on the part of certain EU countries.¹⁷¹ As of November 2017, Hungary, for instance, had not filled any of its mandatory relocation quotas.¹⁷² As a result, the European Commission is currently pursuing infringement procedures against Hungary as well as Poland and Czech Republic.¹⁷³ Whether these proceedings will lead to any meaningful sanction is yet to be seen.

168. Anna Triandafyllidou, *The case of the ‘Emergency Relocation Quotas’*, OPEN DEMOCRACY (Oct. 25, 2017), <https://www.opendemocracy.net/anna-triandafyllidou/case-of-emergency-relocation-quotas>.

169. See *Opposition from Eastern Europe threatens to Scupper Refugee Reforms*, THE ECONOMIST, (Nov. 9, 2017), available at <https://www.economist.com/news/europe/21731162-eu-struggling-build-coherent-asylum-system-opposition-eastern-europe-threatens>.

170. Commission Fact Sheet on Managing the Refugee Crisis, Relocation: EU Solidarity between Member States, (Nov. 2017), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf [hereinafter *Commission Fact Sheet*].

171. Joined Cases C-643 & C-647/15, *Slovak Republic v. Council*, CURIA ECLI:EU:C:2017:631, (Sept. 6, 2017), ¶ 223, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1752453>.

172. Commission Fact Sheet on Managing the Refugee Crisis, Relocation: EU Solidarity between Member States, (Nov. 2017), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf [hereinafter *Commission Fact Sheet*].

173. European Commission Press Release IP/17/2103, Relocation: Commission Moves to Next Stage in Infringement Procedures Against the Czech Republic, Hungary and Poland (Jul. 26, 2017).

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