



# **Human Rights Law Clinic Papers 2018**

## **THE ROHINGYA CRISIS: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS**

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To: Ruby Axelson, Global Rights Compliance LLP

Submitted by: Thomas Thrower

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## **Abbreviation Glossary**

ACTIP – the ASEAN Convention Against Trafficking in Persons, Especially Women and Children

ASEAN – Association of Southeast Asian Nations

ATS – Alien Tort Statute

CEDAW – the Committee on the Elimination of All Forms of Discrimination against Women

CESCR – the Committee on Economic, Social and Cultural Rights

CMW – the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

CRC – the Committee on the Rights of the Child

HRC – Human Rights Committee

HRW – Human Rights Watch

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

IHRL – International Human Rights Law

ILO – International Labour Organization

INGO – International Non-Governmental Organization

MNC – Multinational Corporation

NCP – National Contact Point

OECD – the Organisation for Economic Co-operation and Development

TIP – Trafficking in Persons

# 1. Introduction and Background

Within Rakhine State, Myanmar the Rohingya face murder, rape, destruction of property, the risk from indiscriminate firing of weapons and planting of landmines, disappearances, torture and other cruel and inhuman treatment, including attacks on places of worship and other religious intolerance, all leading to large-scale forced displacement.<sup>1</sup> The situation has been described as ‘crimes against humanity’<sup>2</sup> and ‘a textbook example of ethnic cleansing.’<sup>3</sup> The only option for many Rohingya has been to flee the country, either north into the Cox’s Bazar region of Bangladesh or south to Thailand. Since the passing of a citizenship law in 1982, the Rohingya have been left stateless, adding further complications upon reaching their destinations.

Their statelessness leaves them vulnerable to modern slavery violations as without documentation it is difficult to obtain legal work or employment, leaving them susceptible to forced labour and trafficking. Empirical research carried out by Rijken et al found that ‘many of the consequences of being stateless are at the same time, found to be known external root causes for human trafficking.’<sup>4</sup> Further to this, the three states where most of the Stateless Rohingya settle are areas with a major risk of exposure to slavery.<sup>5</sup> This memorandum will first establish the type of modern slavery violations the Rohingya face in each of the three states. It will then move to look at the legal avenues that can be pursued for violations in international law, before moving on to look at domestic actions that can be sought against multi-national corporations.

## 1.1. Myanmar

Myanmar is one of the only states in the world that still has a serious issue with forced labour used by the State. In 1996 the International Labour Organisation’s (ILO) Commission of Inquiry reported that:

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<sup>1</sup> UNHRC, Twenty-seventh special session 5 December 2017 ‘Situation of human rights of Rohingya Muslims and other minorities in Myanmar’ (8 December 2017) A/HRC/RES/S-27/1, page 2.

<sup>2</sup> Ibid.

<sup>3</sup> Zeid Ra’ad Al Hussein, UNHCHR, ‘Address to the 36<sup>th</sup> session of the HRC in Geneva’ (11 September 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E>> accessed 26 March 2018.

<sup>4</sup> Conny Rijken et al. *The Nexus between Statelessness and Human Trafficking in Thailand* (WLP 2015) page 14.

<sup>5</sup> They all rank within the top 20: Myanmar 9<sup>th</sup>, Bangladesh 10<sup>th</sup> and Thailand 20<sup>th</sup>, Walk Free Foundation, ‘Global Slavery Index 2016’ (2016) <<https://www.globalslaveryindex.org/index/#>> accessed 26 March 2018.

the Government of Myanmar, far from acting to end the practice of forced labour, is engaged actively in its promotion, so that it is today an endemic abuse affecting hundreds of thousands of workers who are subjected to the most extreme forms of exploitation, which all too frequently leads to loss of life.<sup>6</sup>

In the 21 years since this report was handed down it appears that little has changed. In a 2015 follow up report the ILO found that Article 359 of the Myanmar Constitution still allowed forced labour in 'duties assigned by the Union in accordance with the law in the interest of the public.'<sup>7</sup> This report also indicated that there was evidence of forced labour in areas of ongoing civil unrest, making a particular mention of Rakhine State.<sup>8</sup> The US State departments 2017 Trafficking in Persons (TIP) report shared these criticisms of the Myanmar government, indicating a risk of forced labour for ethnic minorities and that 'the government remained largely inactive.'<sup>9</sup> The report also documents government officials complicity in 'the facilitation of the smuggling and exploitation of Rohingya migrants.'<sup>10</sup> International non-governmental organisations (INGOs) and investigative journalists also reflect these criticisms, laying most of the blame at the feet of the military.<sup>11</sup> Those who have not fled are being placed within what many consider to be concentration camps, where Rohingya are at an increased risk of exposure to forced labour.<sup>12</sup> This casts serious doubts on plans to resettle the Rohingya in Myanmar, as one activist put it "the people who fled to Bangladesh lived in the open air prison for almost three decades, now it looks like they will be sent to

<sup>6</sup> *Myanmar (Case No 029)* (31 October 1996) Report of the Commission of Inquiry <[http://www.ilo.org/dyn/normlex/en/f?p=1000:50012::NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2508280,en:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:50012::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2508280,en:NO)> accessed 26 March 2018.

<sup>7</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, Direct Request Observation of Myanmar adopted 2015 (105<sup>th</sup> Session of the International Labour Conference, 2016).

<sup>8</sup> Ibid.

<sup>9</sup> US Department of State, *Trafficking in Persons Report* (US Department of State Publication, June 2017) page 107.

<sup>10</sup> Ibid.

<sup>11</sup> See Amnesty International, 'Briefing: Myanmar forces starve, abduct and rob Rohingya, as ethnic cleansing continues' (*Amnesty International*, February 2018) ASA 16/7835/2018, page 5; Fortify Rights, 'Myanmar: Investigate Forced Labor of Rakhine Buddhists in Western Myanmar' (*Fortify Rights*, 15 March 2016) <<http://www.fortifyrights.org/publication-20160315.html>> accessed 26 March 2018, and Aubrey Belford and Soe Zeya Tun, 'Forced Labor shows back-breaking lack of reform in Myanmar military' (*Reuters*, 2 July 2015) <<https://www.reuters.com/article/us-myanmar-rohingya-forcedlabour/forced-labor-shows-back-breaking-lack-of-reform-in-myanmar-military-idUSKCN0PC2L720150702>> accessed 26 March 2018.

<sup>12</sup> See Al Jazeera, 'Rohingya: Silent Abuse' (*Al Jazeera*, 9 August 2017) <<http://www.aljazeera.com/programmes/aljazeeraworld/2017/07/rohingya-silent-abuse-170730120336898.html>> accessed 26 March 2018; Laignee Barron, 'Internment as Myanmar plans new camps for scattered Rohingya' (*IRIN News*, 19 September 2017) <<https://www.irinnews.org/news/2017/09/19/internment-fears-myanmar-plans-new-camps-scattered-rohingya>> accessed 26 March 2018, Arakan Times, 'Myanmar authorities and Na Ta La push Rohingya in dilemma' (*Arakan Times*, 16 May 2017) <<http://www.arakantimes.org/2017/05/16/myanmar-authorities-and-na-ta-la-push-rohingya-in-dilemma/>> accessed 26 March 2018.

concertation camps".<sup>13</sup> Clearly the biggest perpetrators of forced labour offences in Myanmar are the army and government, and this is where the focus of a legal analysis will be based. Multi-nationals frequently employ the Myanmar Military for security, and there is the possibility to hold these corporations to account for their role in modern slavery violations.

## 1.2. Bangladesh

The refugee camps in the Cox's Bazar region contain the majority of the Rohingya who have fled Myanmar, with nearly 700,000 arriving in the region between August 2017 and February 2018.<sup>14</sup> The camps represent a serious risk of exposure to forced labour. The International Organisation for Migration report that trafficking rings are expanding as the camp expands and individuals are 'recruited with false offers of paid work... often deprived of sleep, made to work more hours than was agreed, not allowed to leave their work premises and not allowed to contact their family'.<sup>15</sup> There are reports that parents have been selling their children into bonded labour,<sup>16</sup> whilst others have arranged marriages for their children to protect them from forced labour and trafficking.<sup>17</sup> The UK's House of Commons International Development Committee stated that the risk of being drowned at sea fleeing to Bangladesh is 'perhaps matched by the risk of being trafficked into modern slavery'.<sup>18</sup> The Rohingya's lack of identification places them at 'risk of indefinite detention',<sup>19</sup> which increases vulnerability to trafficking due to an 'inability to receive aid and work legally'.<sup>20</sup> Bangladesh's potential violations are different to Myanmar's in that they are not acts committed by the State, i.e. exposing individuals to modern slavery offences, but in failing to take effective measures to prevent Rohingya from being trafficked into slavery.

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<sup>13</sup> Al Jazeera, 'Myanmar, Bangladesh sign Rohingya return deal' (*Al Jazeera*, 23 November 2017) <<https://www.aljazeera.com/news/2017/11/myanmar-bangladesh-sign-rohingya-return-deal-171123103014940.html>> accessed 26 March 2018.

<sup>14</sup> Ibid.

<sup>15</sup> IOM, 'UN Migration Agency Warns of Trafficking, Labour Exploitation, Sexual Abuse of Rohingya Refugees' (*IOM*, 14 November 2017) <<https://www.iom.int/news/un-migration-agency-warns-trafficking-labour-exploitation-sexual-abuse-rohingya-refugees>> accessed 27 March 2018.

<sup>16</sup> Katie Arnold, 'Traffickers prey on lost Rohingya children in Bangladesh camps' (*Reuters*, 8 November 2017) <<https://www.reuters.com/article/us-bangladesh-rohingya-children-traffick/traffickers-prey-on-lost-rohingya-children-in-bangladesh-camps-idUSKBN1D8015>> accessed 27 March 2018.

<sup>17</sup> Ibid.

<sup>18</sup> International Development Committee, *Bangladesh and Burma: the Rohingya crisis* (HC 2017-19, 504) page 5.

<sup>19</sup> Ibid, page 81.

<sup>20</sup> Ibid, page 82.

### 1.3. Thailand

Thailand has a widespread forced labour problem within its fishing industry and this directly affects Rohingya fleeing Myanmar. A Human Rights Watch (HRW) report found widespread cases of; excessive working hours, exploitative payment systems, debt bondage, a lack of occupational safety and health protections, constant surveillance and unlawful detention, threats, intimidation, violence and executions for attempting to escape, alongside the lack of a right to form or lead a labour union.<sup>21</sup> The report indicates that many of the measures taken by the Thai government are failing to address the issue. Pink cards, required for migrant workers, are often given to trafficking victims, however these are often in Thai. There is further problems as boat captains often retain workers' pink cards making trafficking victims vulnerable to arrest if they flee.<sup>22</sup> Thai legislation does not allow for migrant workers to change employers without the permission of their current employers.<sup>23</sup> Thailand's chief system for monitoring is a port in port out process which has several fundamental failings, these include: migrant workers often not being interviewed; boat captains often acting as the translator, when they are interviewed;<sup>24</sup> investigators often assuming that workers have copies of their own contracts, required by law, when they do not.<sup>25</sup> The US 2017 TIP report reflects the views of the HRW report stating the Thai government 'did not aggressively prosecute and convict officials complicit in trafficking crimes, and official complicity continued to impede anti-trafficking efforts.'<sup>26</sup> It reports victims of trafficking being sent to detention facilities rather than specialised centres, and found a local NGO reporting victims of forced labour had been prosecuted.<sup>27</sup> The focus of violations against Thailand will be a failure of the State to properly combat TIP, whilst actions against multi-nationals who have a connection with forced labour in Thailand through their supply chains can also be explored.

## 2. International Instruments

International law has three key terms relating to 'Modern Slavery'; slavery, forced labour, and trafficking. Each has a UN instrument covering them,<sup>28</sup> despite this these terms are used

<sup>21</sup> HRW, *Hidden Chains: Rights Abuses and Forced Labor in Thailand's Fishing Industry* (HRW 2018).

<sup>22</sup> Ibid, pages 40-44.

<sup>23</sup> Ibid page 46, see also Thailand Department of Employment, Form WP.8 (ตพ.8), section 3.5.

<sup>24</sup> Ibid pages 6-7 and n9 page 389.

<sup>25</sup> Ibid page 52.

<sup>26</sup> n9 page 388.

<sup>27</sup> Ibid page 390.

<sup>28</sup> See the 'League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414' (The Slavery Convention) for Slavery; the 'ILO, *Forced Labour Convention C29*, 28 June 1930, C29' (the Forced Labour Convention) for forced labour and



interchangeably within the discourse on modern slavery. The Slavery Convention has no monitoring body and has gained less significance due to Article 8, a prohibition on slavery, of the International Convention on Civil and Political Rights (ICCPR).<sup>29</sup> It has been observed that the Human Rights Committee (HRC) and ILO monitoring mechanisms have a 'tacit understanding that the coverage of their standards is virtually identical in spite of minor variations in wording.'<sup>30</sup> This is helpful as only labour organisations, such as trade unions, member states, or the ILO governing body can bring complaints to the ILO monitoring mechanism.<sup>31</sup> This understanding means UN human rights instruments can be used to bring cases against offending states.

Myanmar are not a signatory to the ICCPR which precludes the use of Article 8 to find any violations relating to the Rohingya within Rakhine State. Neither Bangladesh nor Thailand are signatories to the Optional Protocol which rules out the option of bringing a communication to the HRC for these states' violations under Article 8. Further to this the HRC has spent little time clarifying the scope of Article 8.<sup>32</sup> However, several other UN human rights monitoring mechanisms have read modern slavery violations into the scope of their conventions. The Committee on Economic, Social and Cultural Rights (CESCR) in their interpretation of Article 6, the right to work, of the International Convention on Economic, Social and Cultural Rights (ICESCR), have indicated that it requires 'States parties to abolish, forbid and counter all forms of forced labour.'<sup>33</sup> All three states focused on in this research are signatories to the ICESCR, however none are signatories to the 2013 Optional Protocol meaning no complaints can be brought to CESCR.<sup>34</sup> Alongside this the two state reports produced by CESCR were disappointingly quiet on the matter of forced labour, failing to even mention the issue in Thailand's.<sup>35</sup> The Convention on the Elimination of All Forms of

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the 'UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000' (the Trafficking Protocol) for TIP.

<sup>29</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>30</sup> Lee Swepston, 'Forced and compulsory labour in international human rights law' (2014) ILO Working Paper <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_342966.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf)> accessed 29 March 2018, page 15.

<sup>31</sup> see ILO, *Constitution of the International Labour Organisation*, 1 April 1919, Article 26, see also ILO, 'The Complaints Procedure' <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/image/wcms\\_088451.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/image/wcms_088451.pdf)> accessed 29 March 2018.

<sup>32</sup> It's only comments came at para 7.5 *Faure v. Australia* (31 October 2005) CCPR/C/85/D/1036/2001 and had no discussion on the scope of article outside of one on the exemption article 8 para 3(c)(iv).

<sup>33</sup> CESCR 'The Right to Work General Comment No. 18' (6 February 2006) E/C.12/GC/18

<sup>34</sup> UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: adopted by the General Assembly*, 5 March 2009, A/RES/63/117 Article 1.

<sup>35</sup> CESCR 'Consideration of reports submitted by States parties under article 16 and 17 of the ICESCR, Initial reports of States parties due in 2000: Bangladesh' (4 August 2017) E/C.12/BGD/1 paras 34-36 and CESCR 'Consideration of reports submitted by States parties under articles 16 and 17 of the ICESCR, Initial and second periodic reports of States parties: Thailand' (10 October 2013) E/C.12/THA/1-2, there is no State report on Myanmar.

Discrimination against Women<sup>36</sup> and the Convention on the Rights of the Child<sup>37</sup> have articles relating to TIP. Thailand has ratified both treaties as well as their Optional Protocols allowing for the Committee to hear communications against them. Meanwhile Bangladesh and Myanmar have ratified the treaties but have either not ratified the Optional Protocols, in Myanmar's case, or have made declarations refusing to recognise the ability for the committee to receive communications relating to their state, as Bangladesh has done. The memorandum will now shift to an assessment of Thailand's potential breaches.

## 2.1. Convention on the Elimination of All Forms of Discrimination against Women

Article 6 requires states to take '*all appropriate measures...* to suppress all forms of traffic in women and exploitation of prostitution of women' (emphasis added).<sup>38</sup> The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) has expanded on this further in General Recommendation No. 19 explaining:

Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity... Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.<sup>39</sup>

Thailand is failing to adequately tackle these problems. These failings include; Thailand's legislation, which requires employer permission to change employment and gives migrants no right to form unions;<sup>40</sup> documentation, where victims have signed forms in foreign languages and do not retain copies of their contracts;<sup>41</sup> and in government investigators, who fail to interview victims or allow captains to be translators.<sup>42</sup> Thailand is also recognised

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<sup>36</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 6.

<sup>37</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 35.

<sup>38</sup> n36.

<sup>39</sup> CEDAW 'General recommendation No. 19: Violence against women' (1992), paras 14 and 16.

<sup>40</sup> see n21 and n23.

<sup>41</sup> n22.

<sup>42</sup> n24.

as having a vast commercial sex industry,<sup>43</sup> which CEDAW acknowledges as a major concern. However, the HRW report and US TIP report did not mention this issue in relation to the Rohingya. There is also the issue of violators not being prosecuted and victims being punished and held in detention facilities.<sup>44</sup> CEDAW's 2017 Concluding Observation on Thailand's state report recognises that there is much to be done to meet requirements to combat TIP under Article 6.<sup>45</sup> Despite the Concluding Observation making no specific reference to the Rohingya, it can be seen that the calls from CEDAW to ensure victims are exempt from liability<sup>46</sup> and to ensure that those involved in trafficking and sexual exploitation are punished<sup>47</sup> are directly relevant to the situation of Rohingya women in Thailand. There have been no communications decided on merits in relation to Article 6,<sup>48</sup> yet the Concluding Observation and General Comment provide substantial direction on potential violations of Article 6. Thailand's failure to address these issues as shown in the HRW report and US state departments report on TIP suggest there is a possibility of a violation of Article 6 should a Communication be brought to CEDAW.

Article 11 of the Convention focuses on the right to work, and most of its content relates to eliminating discrimination in the work place. Despite this, CEDAW has shown that forced labour may be incorporated under this article and has informed some states that they need to monitor 'working conditions... with a view to preventing forced labour of women'.<sup>49</sup> Whilst CEDAW have not received any communications relating to forced labour under Article 11, and it is unclear whether a violation would be found under this article, this is still a potential avenue for accountability for modern slavery violations against the Rohingya.

## 2.2. Convention on the Rights of the Child

Article 32 states that children have the right 'to be protected from economic exploitation and from performing any work that is likely to be hazardous',<sup>50</sup> Article 34 calls on states 'to protect the child from all forms of sexual exploitation and sexual abuse',<sup>51</sup> and Article 35

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<sup>43</sup> n9, page 391.

<sup>44</sup> see n26 and n27.

<sup>45</sup> CEDAW 'Concluding observations on the combined sixth and seventh periodic reports of Thailand' (24 July 2017) CEDAW/C/THA/CO/6-7, paras 24-27.

<sup>46</sup> Ibid, para 25(d).

<sup>47</sup> Ibid, paras 25(e) and 27(c).

<sup>48</sup> The only case that has been brought relating to article 6 was declared inadmissible as the author provided no evidence, as far as the Committee were concerned, as to why her article 6 rights had been violated *N v. the Netherlands* (12 March 2014) CEDAW/C/57/D/39/2012.

<sup>49</sup> CEDAW 'Concluding observations, on the combined sixth and seventh period reports of the Dominican Republic' (30 July 2013) CEDAW/C/DOM/CO/6-7.

<sup>50</sup> n37, Article 32.

<sup>51</sup> Ibid, Article 34.

requires states to prevent 'the sale or traffic in children for any purpose or in any form'.<sup>52</sup> The Committee on the Rights of the Child (CRC) has expanded on this noting that these articles must be read in conjunction with Article 20,<sup>53</sup> which calls on States to provide special protection for unaccompanied children, noting that 'undocumented, stateless, unaccompanied or [those] separated from their families, are particularly vulnerable... [to] trafficking, sexual exploitation, economic exploitation, child labour'.<sup>54</sup> States are required to take measures to specifically protect stateless children, and it is unclear if Thailand has taken any measures to protect Rohingya children. CRC, echoing CEDAW, calls on states to ensure 'adequate legislation... be passed and effective mechanisms of enforcement be established with respect to labour regulations and border crossing'.<sup>55</sup> Again this suggests the legislative and investigative failures of the Thai state<sup>56</sup> would amount to violations of the Convention. CRC has already expressed concerns with the lack of 'comprehensive measures' to protect children from violations of their rights in relation to Thailand's sex tourism industry.<sup>57</sup> Although this concluding observation was silent on child labour in Thailand's fishing industry, the HRW report did document several cases of this.<sup>58</sup> There has been no communications to CRC relating to these articles, but there is a pending communication involving Spain where Article 35 has been invoked.<sup>59</sup> This focuses on removal of children from their country of residence to another, so is unlikely to provide any insight into Article 35's relation to violations of Rohingya children's rights in Thailand's fishing industry. Despite this lack of clear guidance, the presence of child forced labour in the Thai fishing industry, combined with the failings of the authorities to take effective legislative measures and investigations into this area suggests that Thailand may be in breach of Articles 32, 34, and 35.

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<sup>52</sup> Ibid, Article 35.

<sup>53</sup> CRC 'General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6, para 51.

<sup>54</sup> CMW & CRC 'Joint general comment No. 4 (2017) of CMW and No. 23 (2017) of CRC obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (16 November 2017) CMW/C/GC/4-CRC/C/GC/23, para 39.

<sup>55</sup> Ibid, para 52.

<sup>56</sup> see n23-n27.

<sup>57</sup> CRC 'Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Thailand' (17 February 2012) CRC/C/THA/CO/3-4, para 29.

<sup>58</sup> n21, pages 40, 78, 109.

<sup>59</sup> CRC 'Table of pending cases before the CRC'

<<http://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>> accessed 7<sup>th</sup> April 2018, see Spain 13/2017.

### 2.3. The Association of Southeast Asian Nations' (ASEAN) Convention against Trafficking in Persons

ASEAN's declaration on Human Rights<sup>60</sup> is widely criticised as being fundamentally flawed.<sup>61</sup> However, the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)<sup>62</sup> is a much more promising instrument. Enough ASEAN member states ratified ACTIP for it to enter force on 8<sup>th</sup> March 2017, faster than any other ASEAN instrument.<sup>63</sup> All other ASEAN instruments are heavily criticised for their limitations based on culture, history and other socioeconomic factors, however ACTIP does not have these limitations.<sup>64</sup> Both Myanmar and Thailand have ratified the convention, meaning it is directly applicable to Rohingya in these States.

ACTIP defines trafficking in a manner consistent with international law, incorporating both forced labour and slavery into its definition.<sup>65</sup> There is one major shortcoming, however, with ACTIP's definition of trafficking, in that it only applies to trans-national trafficking, not that which occurs within states.<sup>66</sup> This obviously limits the application of the Convention in relation to the non-transnational forced labour being imposed by the Myanmar military, but is still applicable to Rohingya who have been trafficked into Thailand. Article 5 of ACTIP requires TIP to be criminalised, whilst Article 6 requires participation in an Organised Criminal Group to also be criminalised. Article 11(1)(a) requires states to 'establish comprehensive policies, programmes and other measures: to prevent and combat trafficking in persons'.<sup>67</sup> Thailand, appears to be in violation of Article 11(1)(a) due to their failure to investigate properly,<sup>68</sup> which would be expected of a 'comprehensive' policy to combat trafficking in persons.

<sup>60</sup> ASEAN, *ASEAN Human Rights Declaration*, 18 November 2012.

<sup>61</sup> HRW, 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration' (19 November 2012) <<https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>> accessed 7<sup>th</sup> April 2018.

<sup>62</sup> ASEAN, *ASEAN Convention Against Trafficking in Persons, Especially Women and Children*, 22 November 2015.

<sup>63</sup> ASEAN, 'ASEAN Welcomes Entry into Force of ACTIP' (8 March 2017) <<http://asean.org/asean-welcomes-entry-into-force-of-actip/>> accessed 8<sup>th</sup> April 2018.

<sup>64</sup> Rantya Yursan, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' [2017] 8 AsianJIL 258, 273-274.

<sup>65</sup> The full definition reads 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery...' ACTIP article 2.

<sup>66</sup> n62, Article 3.

<sup>67</sup> Ibid, Article 11(1)(a)

<sup>68</sup> see n23-27.

ACTIP has one further major deficit, its lack of monitoring mechanisms. ACTIP has no obligation for State parties to report, nor does it have any institution which can conduct monitoring investigations or hear cases.<sup>69</sup> This is obviously a significant deficit in terms of accountability for modern slavery violations against the Rohingya. Yursan in his initial assessment of ACTIP acknowledged there are mechanisms to hold member states accountable under the Convention. Yursan points to 'binding third-party mechanisms, such as international arbitration and adjudication',<sup>70</sup> however the issue here is that all parties must agree to these proceedings. This could be possible as States may wish to avoid international exposure. Yursan also indicates that there is the potential to use 'the means of dispute settlement provided in the 2010 Protocol to the ASEAN Charter of Dispute Settlement'.<sup>71</sup> However this is again unlikely to be used as it requires another ASEAN member state to make a complaint,<sup>72</sup> and other human rights mechanisms which allow for a similar procedure display just how infrequently this is used<sup>73</sup>. Currently ACTIP is unlikely to be of use in bringing a case against those exposing the Rohingya to modern slavery violations, however as the convention is growing rapidly there is a chance that an effective monitoring mechanism will be introduced shortly.

### 3. Domestic Action Against Multi-National Corporations

With options in international law currently limited to bringing a communication against Thailand it is necessary to turn to other mechanisms of accountability. The domestic legal systems in Myanmar, Bangladesh and Thailand are failing to adequately protect the Rohingya, and therefore are not suitable avenues. However, an alternative avenue exists in states whose courts are exploring methods of accountability of multi-national corporations for their role in human rights abuses. There are two broad approaches. First, the USA and Canada have explored accountability for violations of customary international law by multi-nationals. Second, the UK and Netherlands have both explored using domestic tort law to hold multi-nationals accountable for tortious claims. There are also specific instruments aimed at modern slavery and human rights violations by corporations. These are the UN

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<sup>69</sup> n64, 285.

<sup>70</sup> Ibid, 281.

<sup>71</sup> Ibid.

<sup>72</sup> ASEAN, *Protocol to the ASEAN Charter on Dispute Settlement Mechanism*, 8 April 2010, Article 1(a).

<sup>73</sup> The European Court of Human Rights, for example, has only delivered 5 judgements on inter-state cases in its entire history. ECtHR, 'Inter-State Applications' (*ECtHR*, 1 January 2018) <[https://www.echr.coe.int/Documents/InterStates\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf)> accessed 27 April 2018.

Guiding Principles on Business and Human Rights,<sup>74</sup> the UK's Modern Slavery Act,<sup>75</sup> and the Organisation for Economic Co-operation and Development (OECD) Guidelines for multinational enterprises.<sup>76</sup> These have had mixed success in holding multi-nationals accountable for their actions in relation to human rights violations.

### 3.1. The USA and Canada's approach, violations of customary international law

The Alien Tort Statute allows for American Court to hear claims brought on the basis of a violation of the Law of Nations.<sup>77</sup> Prior to the case of *Kiobel*<sup>78</sup> the Statute was considered to be one of the clearest avenues for holding multi-nationals to account for their contribution to human rights abuses. *Kiobel* did not rule out the possibility of bringing a case but significantly narrowed the application of the Statute, only allowing cases to be brought that 'touch and concern the territory of the United States.'<sup>79</sup> The activity in *Kiobel* took place outside of the United States and the only connection with the United States was a mere corporate presence.<sup>80</sup> There has been confusion in the interpretation of 'touch and concern' in the Divisional Courts.<sup>81</sup> Academics have suggested that whilst *Kiobel* rules out cases where both the claimant and defendant are foreign nationals, it does not confirm what other situations may still be covered by the statute.<sup>82</sup> The case of *Jesner v. Arab Bank PLC* has confirmed that actions cannot be brought under the Alien Tort Statute against foreign corporations.<sup>83</sup> The Court held that 'absent further action from Congress it would be inappropriate for courts to extend ATS [Alien Tort Statute] liability to foreign corporations.'<sup>84</sup> This limits the use of the Alien Tort Statute to US corporations only.

As *Kiobel* and *Jesner* have not ruled out bringing action against American corporations, it is necessary to explore the case of *Doe I v. Unocal*.<sup>85</sup> This case defined the

<sup>74</sup> UNHRC 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' 17<sup>th</sup> Session (21 March 2011) A/HRC/17/31.

<sup>75</sup> Modern Slavery Act 2015.

<sup>76</sup> OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011) Chapter 4.

<sup>77</sup> Alien Tort Statute 1789 (United States) 28 USC section 1350.

<sup>78</sup> *Kiobel v Royal Dutch Petroleum Co* 569 US \_ (17 April 2013).

<sup>79</sup> *Ibid*, 1669.

<sup>80</sup> *Ibid*.

<sup>81</sup> Some have interpreted to mean a test established in *Morrison v. National Australia Bank Ltd* 561 U.S. 247 (2010) which focused on the meaning of Congress enacting the legislation. See *RJR Nabisco Inc. v. European Community* 579 U.S. \_ (2016), *Doe v. Nestle* 136 U.S. (2017), and in Judge Royce Lamberth's denial of a motion to dismiss in *Doe v. ExxonMobil*. Whilst this approach was rejected in *Adhikari v. Kellogg Brown & Root Inc.* No. 15-20225 (5<sup>th</sup> Cir. 2017).

<sup>82</sup> See Paul David Mora, 'The Alien Tort Statute After *Kiobel*: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains' [2014] ICLQ 699 and Julian G Ku, '*Kiobel* and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute' [2013] AJIL 835.

<sup>83</sup> *Jesner et al v. Arab Bank PLC* 584 U.S. \_\_\_\_ (2018)

<sup>84</sup> *Ibid*, 19.

<sup>85</sup> *Doe I v. Unocal Corporation* 395 F. 3d (9<sup>th</sup> Cir, 2002).

Alien Tort Statute in relation to forced labour, confirming that it amounted to a violation of the Law of Nations.<sup>86</sup> It established a four stage test to see whether or not the claim was bared by 'a non-jurisdictional, prudential doctrine based on the notion that the courts of one country will not sit in judgement on the acts of the government of another, done within its own territory.'<sup>87</sup> First, there must be an international consensus on the matters and facts of the claim. Second, the implication of hearing the case on US foreign relations must be considered, in *Unocal* the court found the Government condemning Myanmar's human rights violations meant hearing the case would have no effect to foreign relations. Third, there has to be a continued existence of the government. Finally, it must be in the public interest to pursue the case.<sup>88</sup> This test is unlikely to pose any problems to modern slavery violations against the Rohingya as it only applies to acts of foreign governments. Of the violations focused on in this research the only ones that are an act of foreign government are those carried out by the Myanmar military, which the case of *Unocal* established will not fall foul to this test. The Alien Tort Statute is still available to pursue claims against multi-nationals, despite this being on a much narrower scale, as confirmed by the case of *Jesner*. The only way the Alien Tort Statute can be used to find accountability for modern slavery violations against the Rohingya is if the corporation connected to said violations is based within the US.

In the Court of Appeal for British Columbia the preliminary hearing of *Araya v. Nevsun Resources* focused on whether claims can be brought under customary international law against Canadian multi-nationals. The case once again involved forced labour used by the army who the defendants had employed, this time in Eritrea.<sup>89</sup> As this was a preliminary hearing the only assessment concerned whether the case would be bound to fail, meaning it could not proceed to trial. Justice Newbury acknowledged that 'in pursuing claims under Customary International Law, the plaintiffs face significant legal obstacles, including states' legitimate concerns about comity and equality and the role of the judiciary...'<sup>90</sup> However she rejected that arguments of Nevsun, and found that she could not reject the claim as bound to fail. Justice Newbury also rejected the argument that allowing the claim would 'bring the entire system of international law crashing down.'<sup>91</sup> Justice Newbury sighted Raponi's argument that international law is in a state of flux and that transnational law is developing to

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<sup>86</sup> Ibid, 946.

<sup>87</sup> Ibid, 953-958.

<sup>88</sup> Ibid, 958-960.

<sup>89</sup> *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401.

<sup>90</sup> Ibid [196] (J Newbury).

<sup>91</sup> Ibid.



address human rights violations not properly addressed by the international mechanisms.<sup>92</sup> This case is awaiting trial, and it is again worth noting that this is only a preliminary hearing decision and not a decision on the merits. The ability to use this avenue as a method of accountability for modern slavery violations against the Rohingya is dependent on the outcome of this case.

### 3.2. The UK and Netherlands' approach, bringing claims in domestic tort law

Both Dutch and UK courts have pursued accountability via domestic tort law, rather than reading customary international law into their jurisdiction. This has one overwhelming advantage: the ability to hold parent companies registered in the same State as the Court liable for violations caused by their subsidiaries. This is especially useful in supply chain violations, the most likely connection between multi-nationals and the violations suffered by the Rohingya.

The legal foundation for making such a claim in the UK originates in *Chandler v. Cape*.<sup>93</sup> Palombo has sighted this case as an 'alternative to piercing the corporate veil' in response to the narrowing of the Alien Tort Statute by *Kiobel*.<sup>94</sup> The case involved asbestos inhalation by a worker, and established 4 examples where a duty of care may arise to a subsidiary's worker from the parent company: first where the parent and subsidiary are in a relevant aspect the same, and are therefore treated as the same company; second where the parent company has superior knowledge of some aspect of health and safety; third where the subsidiary's system of work is unsafe and the parent company knew or ought to have known; and finally that it is not necessary to show that the parent company is in the practice of intervening in health and safety policy.<sup>95</sup> It is unclear whether Palombo's alternative route is a viable one, due to the fact parent companies create subsidiaries for the purpose of limiting liability.

The case of *Lungowe v. Vedanta* suggests this method of pursuing tortious claims for human rights violations is a viable alternative to the closed method of the ATS. In *Vedanta* the parent company had established a group human rights policy, in line with the UN Guiding Principles on Business and Human Rights, which created a duty of care under *Chandler*.<sup>96</sup> A

<sup>92</sup> Ibid [197] (J Newbury), see also Sandra Raponi, 'Grounding a Cause of Action for Torture in Transnational Law' in Craig Scott (ed) *Torture as Tort: Comparative Perspectives in the Development of Transnational Human Rights Litigation* (Hart Publishing, 2001).

<sup>93</sup> *David Brian Chandler v. Cape Plc.* [2012] EWCA Civ 525.

<sup>94</sup> Dalia Palombo, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil beyond Kiobel v. Royal Dutch Shell' [2015] 4 Br. J. Am. Leg. Studies 453.

<sup>95</sup> n93, [80].

<sup>96</sup> *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528.

seven-stage test was used to establish this.<sup>97</sup> This test established that it was possible Vedanta had effectively taken control of the subsidiary's process and that there was therefore a duty of care established.<sup>98</sup> Meaning the case could proceed to trial. However, the case of *Okpabi v Royal Dutch Shell* dealt a major blow to pursuing multi-national accountability.<sup>99</sup> This claim related to an oil spill by Shell's Nigerian subsidiary. *Okpabi* saw the *Vedanta* seven-stage test applied again, which commentators have now indicated makes it settled law.<sup>100</sup> In the application of the test the Court found that there was no possibility that Shell had effectively taken control of its subsidiary's activities and therefore there was no real issue to be tried. In his judgment Lord Justice Simon indicated that the purpose of the corporate veil is to mitigate responsibility and accountability.<sup>101</sup> This suggests that this method of accountability for modern slavery violations against the Rohingya is only possible if the creation of the subsidiary fails to properly construct the corporate veil. This indicates that there are very rare and specific circumstances, which Lord Justice Simon lays out,<sup>102</sup> where a parent company will be liable for the actions of its subsidiary. A tortious claim under domestic UK law cannot be relied upon as a method of accountability for modern slavery violations against the Rohingya, aside from in the unlikely event that the specific circumstances establishing a duty of care arise.

The Court of Appeal of The Hague decided the case of *Akpan v. Royal Dutch Shell*, again concerning a Nigerian oil spill. The Dutch Court held that there was not sufficient proximity between RDS and its subsidiary, and that there was no duty of care owed. However, in a departure from the approach of the UK courts, the Court of Appeal of The Hague, decided it could decide on tortious violations by RDS' Nigerian subsidiary under Nigerian Law. This is done under article 7(1) of the Dutch Code of Civil Procedure, regarding plurality of defendants. This means cases can be brought together against sufficiently close parties, and even when the case against RDS was rejected this did not prevent the application of article 7 to the Nigerian subsidiary.<sup>103</sup> The Court did this by arguing the doctrine *forum non conveniens* no longer applies in international law.<sup>104</sup> Provided that there is a close enough link between the claim against a Dutch parent company and its subsidiary,

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<sup>97</sup> Ibid [83].

<sup>98</sup> Ibid [88].

<sup>99</sup> *Okpabi and others v. Royal Dutch Shell and Other* [2018] EWCA Civ 191.

<sup>100</sup> Peter Hood and Julianne Hughes-Jennett, 'Update on the responsibility to respect and parent company liability: what the Court of Appeal's judgement in *Okpabi and others v Royal Dutch Shell Plc* and another means for UK multinationals' (Oxford University Business Law Blog, 8 March 2018) <<https://www.law.ox.ac.uk/business-law-blog/blog/2018/03/update-responsibility-respect-and-parent-company-liability-what-court>> accessed 10 April 2018.

<sup>101</sup> n99 [196] (Simon LJ).

<sup>102</sup> Ibid [196-197] (Simon LJ).

<sup>103</sup> *Friday Alfred Akpan v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.* (2013) C/09/337050 [4.6-4.7].

<sup>104</sup> Ibid [4.6].

it appears that there is a strong likelihood that a case can be taken to the Dutch courts. The Dutch courts form a clear route to find accountability for modern slavery violations against the Rohingya, using the domestic law of the State where the violation takes place. This will have the most effect in relation to violations in Bangladesh and Thailand where there exist specific laws against forced labour and trafficking.

## 4. Soft Law and Non-Judicial Avenues

The two main soft law instruments that relate to modern slavery violations are the UN Guiding Principles on Business and Human Rights and the UK's Modern Slavery Act. Both instruments call on or require business to produce reports and statements indicating what they are doing to fight against the violation of human rights or modern slavery. Whilst the Modern Slavery Act creates three clear criminal offences,<sup>105</sup> these are unlikely to be of use in relation to violations against the Rohingya as they only apply to offences committed within the UK. The act also creates a duty to report on supply chain investigation, however this is easily distinguishable and the act does not create any monitoring mechanisms, leading commentators to be sceptical of it resulting in any success.<sup>106</sup> Both fall short in providing an avenue for remedy under the systems themselves, and as Ireland argues 'tackling modern slavery requires more than reporting and transparency requirements.'<sup>107</sup> Both instruments strongest use in bringing a case appears to be in forming a duty of care under domestic tort law. In 2011 the OECD Guidelines for multinational enterprises added a human rights chapter calling on enterprises to 'respect human rights, which means they should avoid infringing on the human rights of other and should address adverse human rights impacts with which they are involved.'<sup>108</sup> It calls on enterprises to assess the human rights impact of their business operations and relationships even if they do not directly contribute to these impacts; as well as calling upon them to use their influence to leverage adverse impacts in their supply chain.<sup>109</sup>

The crucial difference between the OECD Guidelines and the other soft law instrument is its requirement for member state governments to set up National Contact Points (NCPs). The main role of NCPs is to 'further the effectiveness of the Guidelines by undertaking... resolution of issues that may arise from the alleged non-observance of the

<sup>105</sup> n76, s1, s2 & s4.

<sup>106</sup> Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8(3) *Global Policy Volume* 15.

<sup>107</sup> Rose Ireland, 'Rights and Modern Slavery: The Obligations of States and Corporations in Relation to Forced Labour in Global Supply Chains' (2017) 6 UCL J. L. and J. 100, 117.

<sup>108</sup> n77, Chapter 4, point 1.

<sup>109</sup> Ibid, points 2-5 and commentary page 33, para 43.

guidelines in specific instances.’<sup>110</sup> Specific instances are non-judicial measures which offer ‘good offices and facilitate access to consensual and non-adversarial procedures.’<sup>111</sup> Obviously these are not binding mechanisms and require all parties to agree to the preceding’s, despite this they have been relatively successful. In 2016, only 25 percent of NCP specific instances were concluded with no agreement due to a refusal to engage, whilst an agreement was reached by parties in 60 percent of them.<sup>112</sup> Since the human rights chapter was added to the OECD Guidelines half of specific instances have been on human rights, with another 30 percent relating to employment.<sup>113</sup>

There has been some academic criticism for the specific instances mechanism, summarised by Nyombi and Mortimer’s argument that they ‘only act as mere moral initiatives, which means that they are not a major deterrent to MNCs bent on human rights or environmental abuses.’<sup>114</sup> This is short sighted view and ignores the pressure consumers can place on enterprises complicit in human rights violations. There is specific evidence of this in the backlash to several reports linking forced labour of Myanmar refugees on Thai fishing vessels to products being consumed in the UK and US.<sup>115</sup> The OECD’s report also cites several cases of the success of NCPs, including but not limited to: a case where a business took measures to prevent its security products being re-exported from Bahrain; a company took steps to prevent their product being used for lethal injections,<sup>116</sup> and a windfarm being moved so as not to interrupt indigenous peoples Reindeer herding routes.<sup>117</sup> NCP specific instances represent an ability to highlight businesses role in contributing to modern slavery violations of the Rohingya. And whilst there may be some instances where this falls on deaf ears, the examples of market pressure in relation to forced labour in the supply chains of seafood products and previous NCP specific instances success, suggests

<sup>110</sup> OECD, National Contact Points <<http://mneguidelines.oecd.org/ncps/>> accessed 12 April 2018.

<sup>111</sup> OECD, Specific Instances <<http://mneguidelines.oecd.org/specifcinstances.htm>> accessed 12 April 2008.

<sup>112</sup> OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017) <<http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 12 April 2018, page 26.

<sup>113</sup> OECD, *Cases handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises* (2017) <<http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>> accessed 12 April 2018.

<sup>114</sup> Chrispas Nyombi and Tom Mortimer, ‘Regulating multinational corporations: what are the limitations in existing international initiatives?’ [2018] Int T.L.R. 21, 32.

<sup>115</sup> Robin McDowell et al, ‘AP Investigation: Slaves may have caught the fish you bought’ (*Associated Press*, 25 March 2015) <<https://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html>> accessed 12 April 2018 and Ian Urbina, ‘Sea Slaves’: The Human Misery that Feeds Pets and Livestock’ (*New York Times*, 27 Jul 2015) <<https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>> accessed 12 April 2018.

<sup>116</sup> n111, page 28.

<sup>117</sup> n112.

this is a potential avenue for accountability for modern slavery violations against the Rohingya.

## **5. Conclusions**

The Rohingya face a high risk of exposure to modern slavery. Their statelessness makes them vulnerable to trafficking and limits the protections that they are owed. There are many potential avenues to seek accountability for the violations that the Rohingya face, however most are not possible. The international institutions where there is possibility of taking a communication of a violation are CRC and CEDAW, but these are limited to only bringing claims relating to Thailand. There appears to be an indication that Thailand is not doing enough to protect Rohingya as per the State's responsibilities under both of the relevant conventions. This, of course, is limited to violations occurring in relation to women and children, who are both particularly vulnerable in Thailand.

All other legal avenues appear to currently be in a state of flux and require further clarification to clearly say that they provide an avenue for accountability for modern slavery violations. The ASEAN Convention on TIP is still without a complaints mechanism, and whilst there are promising signs there is as of yet no immediate plans to establish one. The ability to pursue accountability of multi-nationals in the USA has been drastically limited. The Courts of Canada and the UK are in a state of flux over this area and require a Supreme Court decision for clarity. The Netherlands meanwhile provides a much more promising option for a judicial solution to accountability for modern slavery violations. There is also the non-judicial avenue of the OECD NCPs, often overlooked by academics but provides an option for multi-national corporations to be made aware of their role in modern slavery violations against the Rohingya.

## Bibliography

### Table of Cases

Faure v. Australia (31 October 2005) CCPR/C/85/D/1036/2001

N v. the Netherlands (12 March 2014) CEDAW/C/57/D/39/2012

Myanmar (Case No 029) (31 October 1996) Report of the Commission of Inquiry  
<[http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:::NO:50012:P50012\\_COMPLAINT\\_PR  
OCEDURE\\_ID,P50012\\_LANG\\_CODE:2508280,en:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:::NO:50012:P50012_COMPLAINT_PR<br/>OCEDURE_ID,P50012_LANG_CODE:2508280,en:NO)> accessed 26 March 2018

Adhikari v. Kellogg Brown & Root Inc. No. 15-20225 (5<sup>th</sup> Cir. 2017)

Doe v. Nestle 136 U.S. (2017)

Doe I v. Unocal Corporation 395 F. 3d 932 (9<sup>th</sup> Cir, 2002)

Jospeh Jesner et al. v. Arab Bank Plc. 137 S.Ct. 1432 (2017)

Kiobel v Royal Dutch Petroleum Co 569 US \_ (17 April 2013)

Morrison v. National Australia Bank Ltd 561 U.S. 247 (2010)

RJR Nabisco Inc. v. European Community 579 U.S. \_ (2016)

Araya v. Nevsun Resources Ltd., 2017 BCCA 401

Friday Alfred Akpan v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd. (2013) C/09/337050

David Brian Chandler v. Cape Plc. [2012] EWCA Civ 525

Lungowe and others v. Vedanta and KCM [2017] EWCA (Civ) 1528

Okpabi and others v. Royal Dutch Shell and Other [2018] EWCA Civ 191

### Table of International Treaties, Convention and other UN Documents

ASEAN, *Protocol to the ASEAN Charter on Dispute Settlement Mechanism*, 8 April 2010

— —, *ASEAN Human Rights Declaration*, 18 November 2012

— —, *ASEAN Convention Against Trafficking in Persons, Especially Women and Children*, 22 November 2015

OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011)

CEDAW 'General recommendation No. 19: Violence against women' (1992)

— — 'Concluding observations, on the combined sixth and seventh period reports of the Dominican Republic' (30 July 2013) CEDAW/C/DOM/CO/6-7

— — 'Concluding observations on the combined sixth and seventh periodic reports of Thailand' (24 July 2017) CEDAW/C/THA/CO/6-7

CESCR 'The Right to Work General Comment No. 18' (6 February 2006) E/C.12/GC/18

— — ‘Consideration of reports submitted by States parties under articles 16 and 17 of the ICESCR, Initial and second periodic reports of States parties: Thailand’ (10 October 2013) E/C.12/THA/1-2

— — ‘Consideration of reports submitted by States parties under article 16 and 17 of the ICESCR, Initial reports of States parties due in 2000: Bangladesh’ (4 August 2017) E/C.12/BGD/1

CMW & CRC ‘Joint general comment No. 4 (2017) of CMW and No. 23 (2017) of CRC obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’ (16 November 2017) CMW/C/GC/4-CRC/C/GC/23

CRC ‘General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (1 September 2005) CRC/GC/2005/6

— — ‘Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Thailand’ (17 February 2012) CRC/C/THA/CO/3-4

League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414

ILO, *Constitution of the International Labour Organisation*, 1 April 1919

— —, *Forced Labour Convention C29*, 28 June 1930, C29

ILO Committee of Experts on the Application of Conventions and Recommendations, Direct Request Observation of Myanmar adopted 2015 (105<sup>th</sup> Session of the International Labour Conference, 2016)

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

— — *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

— —, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

— —, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000

— —, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: adopted by the General Assembly*, 5 March 2009, A/RES/63/117

UNHRC ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ 17<sup>th</sup> Session (21 March 2011) A/HRC/17/31

— —, Twenty-seventh special session 5 December 2017 ‘Situation of human rights of Rohingya Muslims and other minorities in Myanmar’ (8 December 2017) A/HRC/RES/S-27/1

## Table of Domestic Legislation

### UK

Modern Slavery Act 2015

International Development Committee, *Bangladesh and Burma: the Rohingya crisis* (HC 2017-19, 504)

### USA

Alien Tort Statute 1789 (United States) 28 USC section 1350

## Bibliography

Al Jazeera, 'Rohingya: Silent Abuse' (*Al Jazeera*, 9 August 2017)

<<http://www.aljazeera.com/programmes/aljazeeraworld/2017/07/rohingya-silent-abuse-170730120336898.html>> accessed 26 March 2018

— —, 'Myanmar, Bangladesh sign Rohingya return deal' (*Al Jazeera*, 23 November 2017)

<<https://www.aljazeera.com/news/2017/11/myanmar-bangladesh-sign-rohingya-return-deal-171123103014940.html>> accessed 26 March 2018

Amnesty International, 'Briefing: Myanmar forces starve, abduct and rob Rohingya, as ethnic cleansing continues' (*Amnesty International*, February 2018) ASA 16/7835/2018

Arakan Times, 'Myanmar authorities and Na Ta La push Rohingya in dilemma' (*Arakan Times*, 16 May 2017) <<http://www.arakantimes.org/2017/05/16/myanmar-authorities-and-na-ta-la-push-rohingya-in-dilemma/>> accessed 26 March 2018

Arnold K, 'Traffickers prey on lost Rohingya children in Bangladesh camps' (*Reuters*, 8 November 2017) <<https://www.reuters.com/article/us-bangladesh-rohingya-children-traffick/traffickers-prey-on-lost-rohingya-children-in-bangladesh-camps-idUSKBN1D8015>> accessed 27 March 2018

ASEAN, 'ASEAN Welcomes Entry into Force of ACTIP' (8 March 2017)

<<http://asean.org/asean-welcomes-entry-into-force-of-actip/>> accessed 8<sup>th</sup> April 2018

Barron L, 'Internment as Myanmar plans new camps for scattered Rohingya' (*IRIN News*, 19 September 2017) <<https://www.irinnews.org/news/2017/09/19/internment-fears-myanmar-plans-new-camps-scattered-rohingya>> accessed 26 March 2018

Belford A and Zeya Tun S, 'Forced Labor shows back-breaking lack of reform in Myanmar military' (*Reuters*, 2 July 2015) <<https://www.reuters.com/article/us-myanmar-rohingya-forcedlabour/forced-labor-shows-back-breaking-lack-of-reform-in-myanmar-military-idUSKCN0PC2L720150702>> accessed 26 March 2018

Bellinger J, and Wang A, 'Jesner v. Arab Bank: The Supreme Court Should Not Miss the Opportunity to Clarify the "Touch and Concern" Test' (*Lawfare*, 10 October 2017) <<https://www.lawfareblog.com/jesner-v-arab-bank-supreme-court-should-not-miss-opportunity-clarify-touch-and-concern-test>> accessed 10 April 2018

CRC 'Table of pending cases before the CRC'

<<http://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>> accessed 7<sup>th</sup> April 2018



The European Court of Human Rights, for example, has only delivered 5 judgements on inter-state cases in its entire history. ECtHR, 'Inter-State Applications' (*ECtHR*, 1 January 2018) <[https://www.echr.coe.int/Documents/InterStates\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf)> accessed 27 April 2018

Fortify Rights, 'Myanmar: Investigate Forced Labor of Rakhine Buddhists in Western Myanmar' (*Fortify Rights*, 15 March 2016) <<http://www.fortifyrights.org/publication-20160315.html>> accessed 26 March 2018

Hood P, and Hughes-Jennett J, 'Update on the responsibility to respect and parent company liability: what the Court of Appeal's judgement in *Okpabi and others v Royal Dutch Shell Plc* and another means for UK multinationals' (Oxford University Business Law Blog, 8 March 2018) <<https://www.law.ox.ac.uk/business-law-blog/blog/2018/03/update-responsibility-respect-and-parent-company-liability-what-court>> accessed 10 April 2018

HRW, 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration' (19 November 2012) <<https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>> accessed 7<sup>th</sup> April 2018

— —, 'Burma: Scores of Rohingya Villages Bulldozed' (*HRW*, 23 February 2018) <<https://www.hrw.org/news/2018/02/23/burma-scores-rohingya-villages-bulldozed>> accessed 26 March 2018

— —, *Hidden Chains: Rights Abuses and Forced Labor in Thailand's Fishing Industry* (HRW 2018).

ILO, 'The Complaints Procedure' <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/image/wcms\\_088451.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/image/wcms_088451.pdf)> accessed 29 March 2018

IOM, 'UN Migration Agency Warns of Trafficking, Labour Exploitation, Sexual Abuse of Rohingya Refugees' (*IOM*, 14 November 2017) <<https://www.iom.int/news/un-migration-agency-warns-trafficking-labour-exploitation-sexual-abuse-rohingya-refugees>> accessed 27 March 2018

Ireland R, 'Rights and Modern Slavery: The Obligations of States and Corporations in Relation to Forced Labour in Global Supply Chains' (2017) 6 UCL J. L. and J. 100

LeBaron G and Rühmkorf A, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8(3) *Global Policy Volume* 15.

McDowell R, et al, 'AP Investigation: Slaves may have caught the fish you bought' (*Associated Press*, 25 March 2015) <<https://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html>> accessed 12 April 2018

Nyombi C, and Mortimer T, 'Regulating multinational corporations: what are the limitations in existing international initiatives?' [2018] *Int T.L.R.* 21

OECD, National Contact Points <<http://mneguidelines.oecd.org/ncps/>> accessed 12 April 2018

— —, Specific Instances <<http://mneguidelines.oecd.org/specificinstances.htm>> accessed 12 April 2008

— —, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017) <<http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 12 April 2018

— —, *Cases handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises* (2017) <<http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>> accessed 12 April 2018

Palombo D, 'Chandler v. Cape: An Alternative to Piercing the Corporate Veil beyond Kiobel v. Royal Dutch Shell' [2015] 4 Br. J. Am. Leg. Studies 453

Raponi S, 'Grounding a Cause of Action for Torture in Transnational Law' in Scott C (ed) *Torture as Tort: Comparative Perspectives in the Development of Transnational Human Rights Litigation* (Hart Publishing, 2001)

Rijken C et al, *The Nexus between Statelessness and Human Trafficking in Thailand* (WLP 2015)

Swepton L, 'Forced and compulsory labour in international human rights law' (2014) ILO Working Paper <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_342966.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf)> accessed 29 March 2018

US Department of State, *Trafficking in Persons Report* (US Department of State Publication, June 2017)

Urbina I, 'Sea Slaves': The Human Misery that Feeds Pets and Livestock' (*New York Times*, 27 Jul 2015) <<https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>> accessed 12 April 2018

Walk Free Foundation, 'Global Slavery Index 2016' (2016) <<https://www.globalslaveryindex.org/index/#>> accessed 26 March 2018

Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar, End of mission Statement (1 February 2018)

Yursan R, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' [2017] 8 AsianJIL 258

Zeid Ra'ad Al Hussein, UNHCHR, 'Address to the 36<sup>th</sup> session of the HRC in Geneva' (11 September 2017)