

# Advancing together

RULE OF LAW UPDATES AND PERSPECTIVES



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LexisNexis® Capital Monitor's editorial team prepares the Advancing Together, Rule of Law Updates and Perspectives from the Asia Pacific bulletin.

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**SIMON WILKINS**  
**MANAGING DIRECTOR**

LexisNexis Australia



## A message from Simon

Hello and welcome to the June edition of Advancing Together.

It's a joy to publish this rule of law digest – it serves as a reminder for us here at LexisNexis to take stock of the great work that we do in fulfilling our guiding mission to advance the rule of law, and also to consider the wider successes and struggles in Asia Pacific on that front.

And, as always, it's been a busy few months here with numerous rule of law projects on the go.

In the last six months we've made great progress in our work with the Fiji Judicial Department and are proud to say that the Laws of Fiji have now become freely available through a website for the people of Fiji for the first time ever. We have been working on this project for almost two years with the Office of the Attorney-General and it was a great achievement to finally announce that it was complete. We were able to digitise over 30 years' worth of paper legislation (about 30,000 pages) and we are now looking at how we can enhance the current digital versions with more annotations and improvements to the website.

Closer to home, our work with the Australian Human Rights Commission on the Human Rights and Technology Project is continuing. A second whitepaper, [co-authored with the World Economic Forum on Artificial Intelligence, Governance and Leadership](#), was published in early 2019.

This was followed by a symposium, run jointly by UTS, the World Economic Forum and the Australian Human Rights Commission with 65 invited experts and senior decision-makers attending from across government, industry, civil society and academia.

The aim was to discuss some of the issues raised by the paper on leadership, governance and regulation in the context of artificial intelligence, and our Executive Director, Corporate and Emerging Markets, Myfanwy Wallwork, facilitated a workshop on what a potential Responsible Innovation Organisation might look like.

The Australian Human Rights Commission Project Team is currently drafting a Discussion Paper, due to be published early in the second half of 2019. The Discussion Paper will include draft proposals that will then be tested via public consultation activities in the second half of 2019. [Further information can be found on the Project subsite, tech.humanrights.gov.au, where you can sign up for regular updates.](#)

We will continue striving to advance the rule of law around Australia, the Asia Pacific region and indeed the world. The next edition of Advancing Together will be published in December, and in the interim you can follow us on social media ([LinkedIn](#), [Facebook](#) and [Twitter](#)) to keep in touch with our projects and updates.

We hope you enjoy the read.




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## The importance of the rule of law for water governance in Australia and the Indo-Pacific



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### Introduction

The rule of law is a foundational and integral element to sustainable water governance in Australia and internationally.

The Australian Water Partnership (AWP) is an Australian Department of Foreign Affairs and Trade (DFAT) funded international cooperation programme that focuses on enhancing sustainable water management in the Indo-Pacific region.

The AWP brokers Australian water experts to respond to requests for assistance from country governments and international organisations.

A key element of AWP's work is supporting activities that contribute to the rule of law associated with water planning, allocation, compliance and management. The Australian water reform experience has shown that empowered institutions established by legislation and guided by strategies, policies and plans to implement water reform, allocation and compliance are an essential part of the governance framework for sustainable water management.

### Key water governance building blocks aligned to rule of law principles

The importance of four key water governance building blocks aligned to rule of law principles are evident in AWP's portfolio of activities across the Indo-Pacific: i) establishment of a law to regulate the management of water; ii) a national water plan or strategy outlining a process for implementing the water law; iii) guidance on implementation of the strategy and law; and iv) development of capable institutions to enact and ensure compliance with the law.

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***Establishing a water law***

Often, the establishment of legislation outlining the rules under which water resources will be allocated and managed, is an essential initial step towards undertaking water reforms. Although in Australia water is predominantly legislated through the States, we still have the Water Act 2007 which provides the legislative framework for ensuring that our largest multi-jurisdictional water resource – the Murray-Darling Basin – is managed in the national interest.

As an Indo-Pacific example, Nepal is transitioning from central government rule to a federation including provinces and local government. This requires redesign of its national policies, institutions and legislation across all sectors including water. The Government of Nepal is therefore developing a new water policy and Water Act.

AWP Partners are supporting the Government of Nepal through sharing water reform experiences, expertise and technologies, and assisting in the development of the water policy and Water Act. The result of this ongoing work will be a legislative framework for undertaking basin planning in the country, ensuring the development of water resources is undertaken strategically and sustainably.

***Developing a national water strategy***

Water legislation is often underpinned by a national water strategy or major basin plan that articulates a process for implementing the law. The strategy needs to be evidence-based and the importance of understanding the water resources base; its extent, condition, trends and threats is critical. In Australia, the Water Act 2007 requires the development of the Murray-Darling Basin Plan to provide a strategic pathway for integrated and sustainable management of water resources in the Basin.

In May 2017, the Lao PDR National Assembly passed the National Law on Water and Water Resources. The law requires a National Water Strategy to be developed to provide a coordination framework to address the priority national water sector challenges of the country.

AWP Partners are working with government counterparts in Lao PDR to develop the strategy to ensure it guides the development of



**Murray-Darling Basin**

river basin management plans in all river basins, as well as promote shared economic, social and environmental outcomes across all sectors of Laos society.

***Providing guidance on implementation***

Guidance on how to implement aspects of a water law and strategy is often provided, either in the form of regulations, decrees, policies or similar instruments.

In Vietnam, the national Government is promoting reform of the rural water and irrigation sectors and in 2017 promulgated a Law on Hydraulic Work, which regulates the formulation of strategies and master plans for irrigation. As part of implementation of the new Law, the Ministry of Agriculture and Rural Development is developing manuals on practical ways to ensure compliance with the Law.

AWP Partners are assisting in the development of two of these manuals which are focussed on establishing pricing/charging mechanisms for at least partial cost-recovery (e.g. operations and maintenance) to ensure the ongoing sustainability of irrigation systems.

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*As an Indo-Pacific example, Nepal is transitioning from central government rule to a federation including provinces and local government. This requires redesign of its national policies, institutions and legislation across all sectors including water.*

### **Developing capable institutions**

Capable institutions are needed to enact water related laws, strategies and guidance. The institutions' compliance role is critical, and it must be empowered to act when compliance requirements are not met. Financial and human resources, and technical capacity are essential and are often complemented by legislated authority to ensure compliance. In Australia, the Murray-Darling Basin Authority is empowered by the Water Act 2007 to oversee water resource planning, allocation and compliance in the Murray-Darling Basin.

Much of AWP's work is focussed on strengthening the capacity of individuals and institutions to deliver sustainable water management. This ranges from technical training – e.g. hydraulic modelling training in Myanmar – to on-the-job training – e.g. working together on advice on water related legislation in Nepal – and a focus on the next generation of water leaders – e.g. Young Water Professional Programs in Myanmar and the Pacific.

### **Benefits of adopting rule of law principles in water governance**

Not only does the rule of law provide the foundations for water related laws, strategies, policies, regulations and plans; it also protects and works interdependently with human rights. In the context of sustainable water management, the rule of law enables the human right to water.



There is much debate in the literature about the right to water, primarily fuelled by the fact that until only recently access to water was not explicitly mentioned in the UN Declaration of Human Rights as a right. This however changed in 2010 when the UN General Assembly included the right to water and sanitation as a human right. The right to life and a standard of living adequate for health and wellbeing can only be achieved if access to water of a quantity and quality that supports these rights is secured. This notion is well aligned with the Sustainable Development Goal's global vision of 'leave no one behind' and 'realize the human rights of all' particularly as it relates to SDG 6 - 'Ensure availability and sustainable management of water and sanitation for all'.

As outlined in this article, one essential approach to achieving the SDG vision, and SDG 6, is through establishing key water governance building blocks that draw on the principles of rule of law to ensure water is managed equitably, efficiently and is environmentally sustainable. ●



## Time for regional powers to start planning for climate change mitigation throughout the Pacific



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Climate change is having a drastic and irreversible impact upon the lives of Earth's inhabitants. There is perhaps no more evident example of this phenomena than in the populated low-lying islands, reefs and atolls of the South Pacific. Covering more than 15 percent of the Earth's surface with a combined population of just over 10 million, Pacific Island Countries (PICs) remain some of the world's most diverse, geographically isolated and vulnerable nations.

The 2018 Intergovernmental Panel on Climate Change Special Report claimed that the mean sea-level rise by the end of this century could be between 0.26 and 0.87 metres higher than current levels, depending on the rise in temperature within the same timeframe. Critically for PICs, rising sea-levels have the capability to completely inundate already low-lying countries. For example, the World Risk Index 2018 placed Vanuatu and Tonga first and second respectively as the most at-risk nations on the planet.<sup>1</sup>

Rising sea waters are rendering some previously populated islands uninhabitable due to a reduction in fertile land and contamination of fresh water sources. Second-order consequences are therefore inevitable and include long-term economic issues due to falling Gross Domestic Product (GDP), the loss of tourism, and emigration caused by climate change. Compounding these problems is the potential for eventual statelessness in the long-term, resulting in losses not only of territory but possibly even claims to essential ocean resources within Exclusive Economic Zones (EEZ).

<sup>1</sup> Bündnis Entwicklung Hilft and Institute for International Law of Peace and Armed Conflict (2018). World Risk Report 2018. [online] Aachen: Bündnis Entwicklung Hilft. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/WorldRiskReport-2018.pdf>

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Bonriki Airport, South Tarawa, Kiribati

The necessity of cooperation and coordination throughout the region on the issue of climate change has never been greater. In 2014, Kiribati became the first nation to buy permanent land in a foreign country (Fiji) to ensure food security and possibly house its future displaced population.<sup>2</sup> Small Island Developing States (SIDS) throughout the region, however, are often struck by poor institutional capacity, economic issues, a lack of critical infrastructure, limitations of resources, and a shortage of official personnel to meet such coordination requirements.<sup>3</sup> It therefore falls on regional powers, namely Australia and New Zealand, to coordinate mitigation operations throughout the Pacific.

Rising sea-levels will become a practical dilemma for many PICs, with a population forced to migrate as a result of climate change requiring both international protections and diplomatic strategies if they are to co-exist with a neighbouring island or continental nation. These protections and strategies may be present under international legal regimes such as the United Nations Law of the Sea (UNCLOS).<sup>4</sup>

If an EEZ were to be renegotiated between two merging nations under UNCLOS, precedential cases would compel a process in which commons such as ocean fisheries would be divided under the equidistance principle. The vast majority of cases delineating EEZs in UNCLOS have favoured a process in which the equidistance principle has been followed. If a neighbouring island nation were to accommodate a migrating population, there may be a shift of its EEZ maritime boundary and a potential for conflict over critical

fishing resources. As such, this shift in long-standing maritime boundaries would decimate the economic position of the migrating nation and induce potential for conflict with host nations over critical resources.

The two recent international disputes delineating maritime boundaries in reaction to changing baselines or political situations include the *Bay of Bengal*<sup>5</sup> case and the 2018 Timor Sea Treaty. In the former, International Tribunal for the Laws of the Sea (ITLOS) maintained consistency in its jurisprudence by motivating the parties to delimit a boundary that would achieve an 'equitable result', considering any relevant circumstances and avoiding outcomes that would result in significant disproportions. The latter case of the 2018 Timor Sea Treaty between Timor-Leste and Australia, however, shows the difficulty in reaching such an 'equitable result' in the face of political tension over significant resources. Under the innovative Annex V compulsory conciliation method<sup>6</sup>, the two nations sought to consolidate a permanent maritime boundary that would delineate access to oil and gas resources in the Greater Sunrise Area (GSA). The eventual 2018 Conciliation Agreement<sup>7</sup> represented a high point in diplomacy under UNCLOS. However, aside from a shared upstream revenue agreement<sup>8</sup> and areas of exclusive jurisdiction<sup>9</sup>, the Agreement delegated questions of resource development to a politically fallible Development Plan by GSA Joint Venturers.

*Rising sea-levels will become a practical dilemma for many PICs, with a population forced to migrate as a result of climate change requiring both international protections and diplomatic strategies.*

<sup>2</sup> Caramel, L. (2019). Besieged by the rising tides of climate change, Kiribati buys land in Fiji. [online] the Guardian. Available at: <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>

<sup>3</sup> Daniel K. Inouye Asia-Pacific Center for Security Studies (2015). Regionalism, Security & Cooperation in Oceania. [online] Honolulu: APCSS, p.90. Available at: <https://apcss.org/wp-content/uploads/2015/08/Regionalism-Security-Cooperation-Oceania.pdf>

<sup>4</sup> 1982 Convention on the Law of the Sea, 1833 UNTS 2 (UNCLOS).

<sup>5</sup> Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) ITLOS, Judgement of 14 March 2012 at [83].

<sup>6</sup> 1982 Convention on the Law of the Sea, 1833 UNTS 2, Annex V (UNCLOS).

<sup>7</sup> 2018 Conciliation Agreement; "Treaty Between Australia And The Democratic Republic Of Timor-Leste Establishing Their Maritime Boundaries In The Timor Sea" accessible at: <https://dfat.gov.au/geo/timor-leste/Documents/treaty-maritime-arrangements-australia-timor-leste.pdf>

<sup>8</sup> Ibid, Article 2(2).

<sup>9</sup> Ibid, Articles 3, 10.



The experience of Timor-Leste showcases that while possible, boundary delimitation methods under UNCLOS represent only half the challenge. Resource certainty is, as exemplified, contingent upon the commercial stature of a government. These factors could pose significant challenges for dissolving island states, with potential re-delineation of territorial boundaries amplifying political tension in deciding access to rich fishing resources in the EEZ. As such, the following critical changes to international law must be implemented and accorded pro-actively.

Under the Montevideo Convention, a nation requires a permanent population, defined territory and recognised government<sup>10</sup>. Fully or partially flooded nations, therefore, may not qualify and lose their status as sovereign countries with displaced populations that have little to no rights or refugee status under international law. This may induce a loss of any claim to an EEZ<sup>11</sup> measured from the territorial baseline of a sovereign nation, and therefore losing rights to fishing resources, the largest revenue stream for Pacific Islanders. A special regime needs to be set up under UNCLOS

*Fully or partially flooded nations, therefore, may not qualify and lose their status as sovereign countries with displaced populations that have little to no rights or refugee status under international law.*

<sup>10</sup> Montevideo Convention on Rights and Duties of States, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934); Article 1.

<sup>11</sup> 1982 Convention on the Law of the Sea, 1833 UNTS 2, Article 55, 57 (UNCLOS).

for states governing flooded territories in line with minimum governance structures, much like the exception that was carved out for archipelagos such as the Federated States of Micronesia in their 'unitary nature'<sup>12</sup> of shared resources. This would maintain a nation's exclusive rights to its EEZ despite the loss of physical territory, ensuring the longevity of their economies through imperative access to fisheries.

Protections under international refugee law may be a useful pathway for a small island nation such as Kiribati to extend regimes and protections under the Refugee Convention. Currently, binding legal protection is limited under the Convention itself, constrained by a definition of a 'refugee' that excludes any 'climate change' basis in the nexus for a well-founded fear. However, when read with the 2018 Global Compact on Refugees that recommends 'predictable and equitable burden and responsibility-sharing' for mass migration, a policy blueprint for multilateral action may be substantiated. Utilising these principles, PICs can underline proactive diplomacy involving negotiations with neighbouring islands for shared territory, fishing resources and ultimately, continuation of their sovereignty.

The internationally recognised definition of 'refugee' is unlikely to be revised soon to include climate change refugees. This, however, may be mitigated by state borne policies that implement the principles of the 2018 Global Compact to create specialist visas for agriculturally-skilled migrants towards rural labour shortages. Australia's Regional Sponsored Migration Scheme is one such framework already in place that could be expanded upon to include a fast-track visa program for those in the Pacific fleeing climate change. Additionally, New Zealand's 2017 climate change refugee visa program proposal<sup>13</sup> needs to be explored by Australia and adopted by New Zealand as the need for such programs is clearly growing.

The time for stopping or reversing climate change has undeniably and regrettably passed. While the international community must still reduce carbon emissions, meet goals as agreed upon in international agreements such as The Kyoto Protocol and The Paris Agreement, and set their minds to preserving the environment rather than exploiting it, we must now also concentrate on mitigating current and future issues posed by climate change, particularly rising sea-levels, and aid those most impacted by it. ●

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<sup>12</sup> 1982 Convention on the Law of the Sea, 1833 UNTS 2, Articles 47-48 (UNCLOS).

<sup>13</sup> New Zealand Office of the Minister of Foreign Affairs (2017). Pacific climate change-related displacement and migrations: A New Zealand action plan. Wellington: Ministry of Foreign Affairs and Trade.



## Complex tapestry of factors to underpin Australia's future nuclear diplomacy



**Dr. Timothea Turnbull**

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In 2020, the [Treaty on the Non-Proliferation of Nuclear Weapons](#)<sup>1</sup> (NPT) turns fifty. [Under article VI](#) of the NPT, states are committed to pursuing nuclear disarmament – the elimination of all nuclear weapons. Progress has been slow in achieving the NPT's foundational intent, although [steps have been made incrementally](#)<sup>2</sup> over five decades that include limiting the number of weapons in existence, and curbing the number of nuclear weapon states overall. In contrast to the incremental logic of the NPT, the most promising avenue to eliminating nuclear weapons lies in a more radical approach with the 2017 [Treaty on the Prohibition of Nuclear Weapons](#)<sup>3</sup> (TPNW) that will enter into force when [50 states have](#)<sup>4</sup> ratified or acceded to it. The [current tally is 23](#)<sup>5</sup> and growing fast. While the NPT is a pledge to continue to seek means to eradicate nuclear weapons, the TPNW proposes a ban on them.

*The guiding logic of the NPT is the principle of deterrence – the carefully regulated presence of nuclear weapons keeps recalcitrant states in check.*

Progress on the NPT relies on nuclear weapons states to set the pace for progress towards disarmament. The guiding logic of the NPT is [the principle of deterrence](#)<sup>6</sup> – the carefully regulated presence of nuclear weapons keeps recalcitrant states in check. Eradicating weapons could create instability, so incremental steps are preferred. In contrast, the TPNW was [championed by non-nuclear weapon states and civil society](#)<sup>7</sup> who negotiated and adopted the Treaty without the nuclear weapons states. Their objective was to lay out a blueprint to achieve a nuclear weapons free world, thereby setting the path forward and creating pressure on nuclear weapons states to take concrete steps. [While the TPNW does not seek to replace the NPT](#)<sup>8</sup>, it does look to push for progress from a different logic, that of [the humanitarian consequences if nuclear weapons were to be used](#)<sup>9</sup>.

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The vital role played by civil society in the negotiation and signature of the Treaty in 2017 was recognised with the awarding of the Nobel peace prize to the [International Campaign to Abolish Nuclear Weapons \(ICAN\)](#)<sup>10</sup>, founded in Melbourne in 2007.

## Australia

Where does Australia sit and is this likely to change after Federal election is held in May 2019? Australia's high profile as an advocate for the NPT since the 1970s has not been replicated for the TPNW. Australia did not negotiate or sign the TPNW. [This is in stark contrast with Australia's proud track record on nuclear diplomacy](#)<sup>11</sup>, as an important mediator between the nuclear superpowers during the Cold War and an innovative actor during the Comprehensive Nuclear-Test-Ban Treaty (CTBT). Two notable features of Australian disarmament diplomacy explain this absence. First, [Canberra's preference for incrementalism](#)<sup>12</sup>, or 'pragmatism' as it is often described in the public sphere. Second, Canberra's careful calibration with strategic allies, notably in Washington. This may change, however, depending on the outcome from the May 18th Federal election. The TPNW has featured in the campaign, promoted by the Australian Greens and by the Australian Labor Party (ALP). While the [Greens are a natural ally for the TPNW](#)<sup>13</sup>, the ALP stance — [as announced during the December 2018 National Conference](#)<sup>14</sup> — in support of the Treaty was more of a surprise. Since then, a growing list of [Labor candidates have publicly added their support](#)<sup>15</sup> to a future signature and adoption of the TPNW. Support exists at the local level as well, with [city councils pledging support](#)<sup>16</sup>. Whether or not Australia will reverse its stance is very much an open question. Australia's future nuclear diplomacy will be shaped by more than the result of the election in May. [The ALP's commitment to signing the Treaty is conditional](#)<sup>17</sup> on 'ensuring an effective verification and enforcement mechanism'



and 'working to achieve universal support'. Depending on whether the ALP sees these conditions as prerequisite for signature, or consequences of the entry into force of the Treaty, the ALP pledge may look like either a fast track to action or a further case for incrementalism.

Whether or not Canberra takes the high road on the eradication of nuclear weapons is still very much up in the air, with a complex tapestry of factors at play. The most likely conditions under which Australia would become a champion for the TPNW are if public pressure aligns with a sympathetic government, and if such a move was deemed to not jeopardise relations with the US. Of these, [the signals from the US State Department](#)<sup>18</sup> indicate that this is the least likely to eventuate in the near term. ●

<sup>1</sup> <https://www.un.org/disarmament/wmd/nuclear/npt/>

<sup>2</sup> <https://www.armscontrol.org/act/2018-06/features/npt-50-successes-challenges-steps-forward-nonproliferation>

<sup>3</sup> <https://www.un.org/disarmament/wmd/nuclear/tpnw/>

<sup>4</sup> <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F79323AB2589ABC6C125825D004DF71F>

<sup>5</sup> <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>

<sup>6</sup> <https://www.armscontrol.org/print/8481>

<sup>7</sup> <https://ihl-databases.icrc.org/ihl/full/TPNW>

<sup>8</sup> <https://www.sipri.org/commentary/blog/2019/npt-and-tpnw-compatible-or-conflicting-nuclear-weapons-treaties>

<sup>9</sup> <http://www.reachingcriticalwill.org/disarmament-fora/hinw>

<sup>10</sup> <http://www.icanw.org/>

<sup>11</sup> <https://johnmenadue.com/richard-butler-nuclear-disarmament-australias-profound-and-cynical-failure/>

<sup>12</sup> <https://dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/nuclear-issues/Pages/australia-and-nuclear-weapons.aspx>

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<sup>15</sup> <http://www.icanw.org/au/candidates/>

<sup>16</sup> <http://www.icanw.org/au/cities/>

<sup>17</sup> <https://www.icanw.org/campaign-news/australian-labor-party-commits-to-joining-nuclear-ban-treaty/>

<sup>18</sup> <https://www.state.gov/t/isn/rls/rm/2018/287082.htm>

## Is the international refugee regime legitimate in Southeast Asia?



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**E**arlier this year, Thailand almost returned an 18-year-old woman to Saudi Arabia, the country she was fleeing, despite having a tourist visa and onward ticket to Australia. Rahaf al-Qunun planned on claiming asylum once she arrived in Australia but was detained by Thai authorities in transit. She made her plight public through Twitter, and with the help of the United Nations High Commissioner for Refugees (UNHCR), Thailand abandoned plans to forcibly return her to Saudi Arabia.

The principle of non-refoulement – that a state will not return a refugee to a territory in which their lives or freedom would be threatened – is a core principle of the international refugee regime. A regime that is made up of the 1951 Refugee Convention and the UNHCR. Thailand, like most other countries in Southeast Asia,

*Thailand, like most other countries in Southeast Asia, has not ratified the Refugee Convention that obliges states to abide by this principle. Yet the UNHCR has offices in Thailand and throughout Southeast Asia, where it conducts protection work for the international refugee regime.*

has not ratified the Refugee Convention that obliges states to abide by this principle. Yet the UNHCR has offices in Thailand and throughout Southeast Asia, where it conducts protection work for the international refugee regime. The contrast is puzzling, as it suggests that the work of the UNHCR is accepted and thus seen as legitimate by Southeast Asian countries, yet the Refugee Convention has failed to garner regional support. This raises questions about the legitimacy of the international refugee regime in Southeast Asia.

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*I argue that in Southeast Asia the international refugee regime is perceived as credible, at best, but not legitimate. If perceived as legitimate, the international refugee regime – both the UNHCR and the Refugee Convention – would share the same normative ideals with states and enjoy natural and unchallenged compliance.*

I argue that in Southeast Asia the international refugee regime is perceived as credible, at best, but not legitimate. If perceived as legitimate, the international refugee regime – both the UNHCR and the Refugee Convention – would share the same normative ideals with states and enjoy natural and unchallenged compliance. As merely credible, however, the international refugee regime enjoys compliance only when it is in the state's interests, or when it at least causes no harm to the state's interests.

Take for example the UNHCR's work in Thailand. It operates in the country based on courtesy from the Government and without legal grounds. The Thai Government runs refugee camps and allows the UNHCR to focus on refugee status determination. However, it does not allow the UNHCR to conduct refugee status determination for Laotian-Hmong or Burmese groups outside of these camps. Thailand generally considers refugees outside camps as illegal immigrants and, as such, **they are at constant risk of harassment, arrest and detention, regardless of their UNHCR certificates. Refugees are often asked for money to secure their release once detained**<sup>1</sup>. Though Thailand does allow the UNHCR to administer and register refugees, it has restricted its role,

making it difficult for the UNHCR to fulfil its protection mandate.

Consider also the role of the UNHCR in Malaysia, where the Government began a trial program offering Rohingya refugees the right to work. This was temporarily paused when the Government heard that the UNHCR was issuing more identity cards than it had done previously. It would appear, then, that cooperation with the UNHCR is based more on state interest, or at least the minimisation of harm to state interest, rather than on shared norms.

We can see this also with the Refugee Convention. There are only three signatories to the refugee Convention in Southeast Asia: Cambodia, East Timor and the Philippines. As mentioned, the main principle of the Convention is non-refoulement, which is also enshrined in the Convention Against Torture (CAT). While Thailand has not signed the Refugee Convention it has ratified the CAT, obliging it to the principle of non-refoulement. In relation to al-Qunun's case, Thailand's Immigration Police Chief said that **'... we are the Land of Smiles, we will not send anyone to their death'**<sup>2</sup>. However, **Thailand has deported persecuted Uighurs back to China, where they face credible threats of torture**<sup>3</sup>.

Malaysia, on the other hand, which has not ratified the Refugee Convention or the CAT, refused China's requests to deport Uighurs back to China. Uighurs, like the majority of Malaysia, are Muslim. This seems to support the claim that Southeast Asian countries do not view the UNHCR or the Convention as legitimate as cooperation is not required, natural or consistent. Rather, cooperation generally occurs when it is in the state's interests, or when it at least causes no harm to the state's interests.

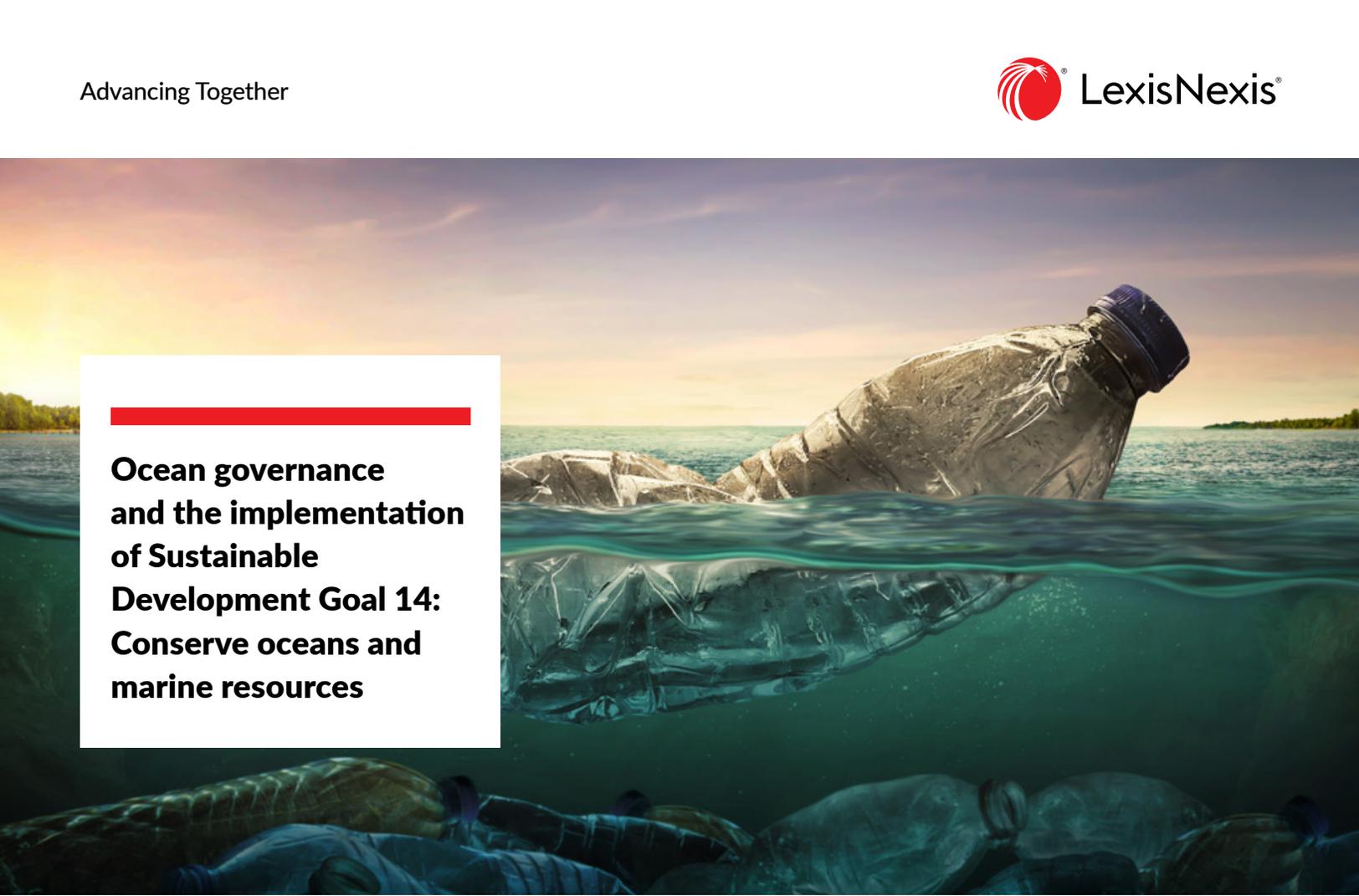
The distinction matters. Rahaf al-Qunun was arguably saved from forcible return because her plight was made public. With the world watching, Thailand cooperated with the UNHCR and al-Qunun was resettled in Canada. But not everyone is afforded the same fate, not least the Uighurs whom Thailand deported back to China and the Laotian-Hmong who cannot access the UNHCR's refugee status determination. All refugees should be entitled to the same protection without discrimination. For as long as the international refugee regime is not perceived as legitimate by Southeast Asia, protecting refugee rights remains a constant struggle for the UNHCR in the region. ●

<sup>1</sup> <https://asylumaccess.org/wp-content/uploads/2013/08/Urban-refugees-in-Thailand.pdf>

<sup>2</sup> <https://www.abc.net.au/news/2019-01-07/saudi-woman-seeking-australia-avoids-deportation-bangkok/10693516>

<sup>3</sup> <https://www.nytimes.com/2015/07/10/world/asia/thailand-deports-uighur-migrants-to-china.html>

The first two could also be sourced from: <https://www.unhcr.org/457ed0412.pdf> (pg. 18-19)



**Ocean governance and the implementation of Sustainable Development Goal 14: Conserve oceans and marine resources**



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Oceans are a mess – a dumping ground for pollutants from plastics to dissolved carbon emissions and nutrient runoff. International shipping, through its ballast water, is a vector for deadly invasive species such as jellyfish, crustaceans and red algae. Fish stocks are threatened by overfishing, eutrophication and the die back of kelp, sea grasses and coral reefs, all vulnerable to the extremes of heat waves, pollution and acidification, accentuated by climate change. Increasing impact of severe storms and rising sea levels are seeing ‘Climate Change’ refugees escaping submerged habitats<sup>1</sup>.

*International shipping, through its ballast water, is a vector for deadly invasive species such as jellyfish, crustaceans and red algae.*

All these threats impact the economy, society and the environment in areas of human health, water, agriculture, food security, tourism, and fisheries.

The tragedy is lack of accountability – needed is political will, as well as cohesive policy and programme support at local, national and international levels. Oceans require a wide range of management plans to deal with a vast scope of issues including climate change, securing fish stocks, and managing pollution, from large marine ecosystems (LMEs), to sea waters around Small Island Developing States (SIDS), to busy harbours like Sydney’s in Australia.

<sup>1</sup> International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise (Vidas, Davor; Freestone, David; McAdam, Jane - Feb 2019)

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### What role does SDG 14 play?

**Sustainable Development Goal 14** is the sustainability goal for oceans with specific targets and indicators to reach by 2030<sup>2</sup>. Multiple stakeholders from global institutions – such as the United Nations (UN)<sup>3</sup>, International Maritime Organization (IMO), and International Atomic Energy Agency (IAEA) – as well as grass-roots organisations, businesses and national, regional and local governments all have a part to play to ensure that, in line with the norms and standards of human rights underpinning the **2030 SDG agenda**, no one is left behind.




Furthermore, evidence and data in ocean science are key to managing the oceans. This was highlighted by UN Secretary General Antonio Guterres in his foreword to the **UN SDG Report 2018**<sup>4</sup>.

### Action plans to reach SDG 14

Listed below are the numerous examples with SDG 14 targets in the Asia Pacific Region.

#### **Comprehensive Ocean Governance Plan (All SDG 14 targets).**

The Ocean Pathway initiative, in collaboration with the United Nations Framework Convention on Climate Change<sup>5</sup>, is increasing action in priority areas impacting or impacted by ocean and climate change in the Asia Pacific Region. Through The Tuvalu Coastal Adaptation Project, implemented by the United Nations Development Programme (UNDP), the Government of Tuvalu in 2017 is actioning measures to shore up the Country's coastal defence.

**More marine protected areas (14.2 & 14.5).** As of January 2018, 16 percent (or over 22 million square kilometres) of marine waters under national jurisdiction (waters 0-200 nautical miles from shore) were covered by protected areas - double the 2010 coverage level. Also, marine key biodiversity areas (KBAs) have increased from 30 percent in 2000 to 44 percent in 2018<sup>6</sup>.

**Sustainable fishing quotas (14.4, 14.6 & 14.7)** to end Illegal, Unreported and Unregistered fishing (IUU), Indonesia's Tuna fishing industry (the largest in the world) has moved from unsustainable purse seine fishing to accountable, sustainable, certified "Indonesian Pole and Line" fishing. Using satellite technology to track 2,000 fishing vessels to stop illegal fishing, this has resulted in doubling the Indonesian fishing industry's catch, generating jobs, prosperity and an increased amount of fish for the local community. In Australia, a traceable, certifying system flags sustainable fish to consumers.

**Less pollutants going into the water (14.1, 14.3)** through collection and treatment of waste water and plastic waste. Companies in Australia are starting to trace plastic (via block chain systems) to minimize its use in packaging, and single use plastics are increasingly prohibited as awareness grows. Shocked by ocean pollution after sailing solo around the world in 1987, Ian Kiernan set up Clean Up Australia Day. Today, in partnership with the United Nations Environment Programme (UNEP), this grass roots initiative has gone global; involving 35 million people and 48,792 projects in 130 countries. Globallast was set up by the UNDP, Global Environmental Facility (GEF), IMO, Global Industry Alliance (GIA) and major maritime companies to address aquatic invasive species carried in ships' ballasts. It has become a model for partnerships to support the conservation of oceans.

<sup>2</sup> <https://sustainabledevelopment.un.org/sdg14>

<sup>3</sup> UN agencies relating to Ocean Governance include: - Fisheries and Aquaculture Department of FAO, Ocean and Water Governance Programme of UNDP, Marine Environment Division of IMO, Intergovernmental Oceanographic Commission of UNESCO, Section for Small Islands and Indigenous Knowledge of UNESCO.

<sup>4</sup> <https://unstats.un.org/sdgs/report/2018>

<sup>5</sup> <https://cop23.com.fj/the-ocean-pathway/>

<sup>6</sup> Source: Report of the Secretary-General, **The Sustainable Development Goals Report 2018**

*At sea, tougher regulations on shipping fuel will be enforced by 2020, and the IMO has challenged shipping to cut its emissions by half by 2050 through switching to electric, methane, and natural gas-powered vessels.*

**Reduction of carbon emissions and resultant acidification (14.3)**<sup>7</sup>, by switching to clean affordable energy. Aligned with the 2015 Paris Agreement, this includes pricing carbon emissions, removing fossil fuel subsidies, and advancing battery technology. At sea, tougher regulations on shipping fuel will be enforced by 2020, and the IMO has challenged shipping to cut its emissions by half by 2050 through switching to electric, methane, and natural gas-powered vessels.

**Planned relocation under International Law for Climate Refugees.**

As sea levels rise<sup>8</sup>, Islanders and those living on the coast, are facing an uncertain future. Under the UN Refugee Convention, climate change does not qualify as a just cause for refugee status (see footnote 1). Although this is not a specific SDG 14 target, its inclusion here points to the interconnectedness of the SDGs.



Barnacles growing on plastic lighter found at Chowder Bay, Sydney Harbour, Australia (April 2019) Photo JF



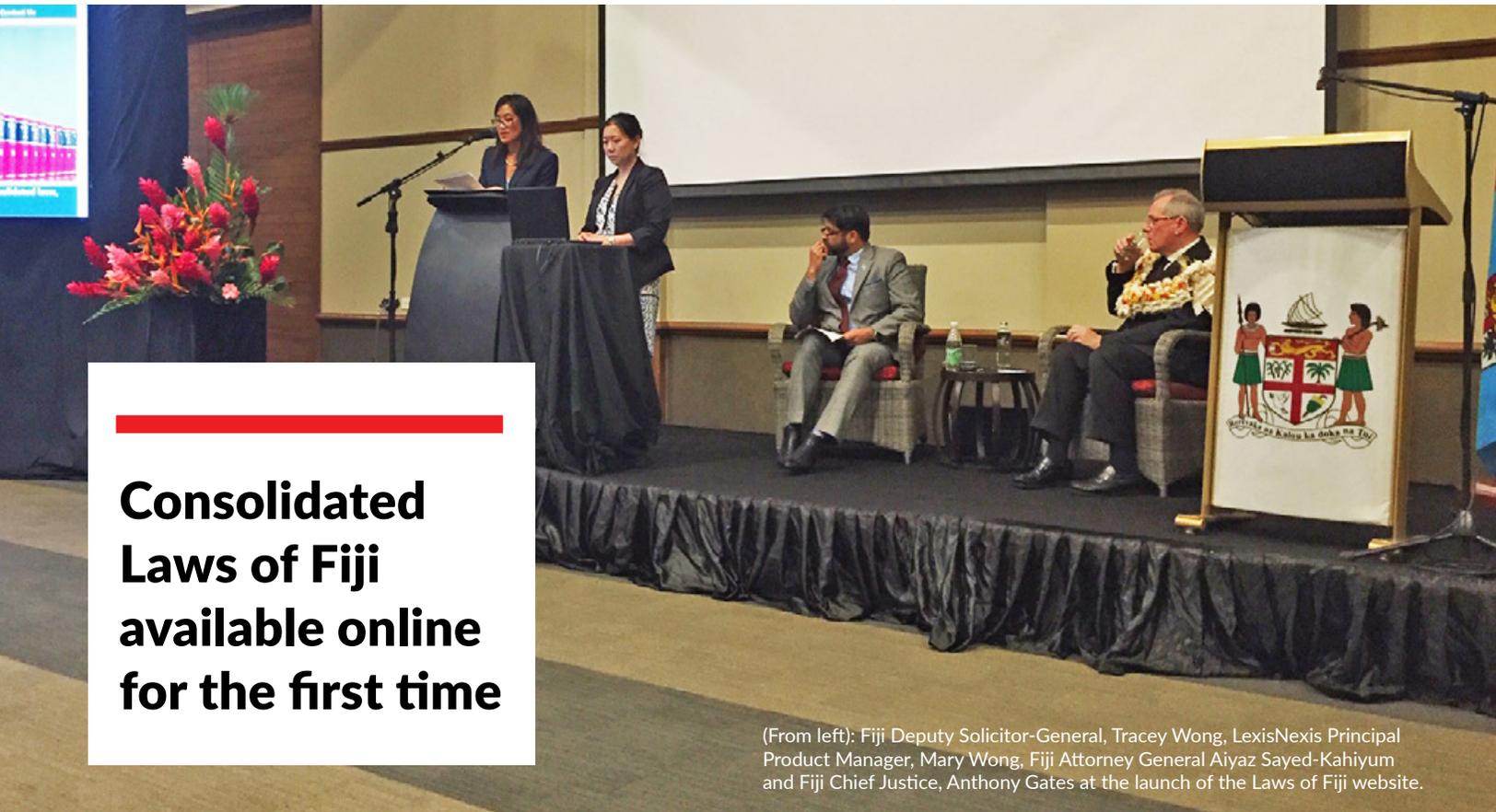
Child in Tuvalu circa 2015 at the time of the Paris Climate Summit

**International Law (14.C)** such as the United Nation Convention on the Law of the Sea (UNCLOS) provides countries with a legal framework for the conservation and sustainable use of oceans and their resources.

SDG 14 is a compelling framework for sustainable oceans through to 2030. Time is running out. The SDGs are a common language for all of us to act and inspire change without delay. ●

<sup>7</sup> Studies at open ocean and coastal sites around the world show that current levels of marine acidity have increased by about 26 per cent on average since the start of the Industrial Revolution. (Source: Report of the Secretary-General, Op. cit.)

<sup>8</sup> The two major causes of global **sea level rise** are thermal expansion caused by warming of the ocean and increased melting of land-based ice, such as glaciers and ice sheets. (NOAA Fact Sheet <https://oceanservice.noaa.gov/facts/sealevel.html>)



**Consolidated  
Laws of Fiji  
available online  
for the first time**

(From left): Fiji Deputy Solicitor-General, Tracey Wong, LexisNexis Principal Product Manager, Mary Wong, Fiji Attorney General Aiyaz Sayed-Kahiyum and Fiji Chief Justice, Anthony Gates at the launch of the Laws of Fiji website.

In March 2019, the new **Laws of Fiji** website was launched, providing free online access to the full text of the Fijian Constitution, over 370 Fijian Acts and 884 subsidiary laws. To maximise the percentage of the population able to access and understand Fiji's Constitution, it is available in English, Hindi and iTaukei (Fijian). All other instruments are available in English.

The site was launched at an event at the Grand Pacific Hotel in Suva, attended by the Acting President, Chief Justice Anthony Gates, and the Acting Prime Minister and Attorney General Aiyaz Sayed-Khaiyum.

As part of its mission to Advance the Rule of Law, LexisNexis has been working with the Office of the Attorney General since 2015 to consolidate 20 years of amendments to Fijian legislation. In the 18 months between commencing the project and printing the first 20-volume set of the Laws of Fiji in 2016, 15 LexisNexis staff members spent the equivalent of 500+ staff days digitising, updating and proof-reading more than 30,000 pages of content.

*As part of its mission to Advance the Rule of Law, LexisNexis has been working with the Office of the Attorney General since 2015 to consolidate 20 years of amendments to Fijian legislation.*

The creation of a public access website marks the latest phase in the project. The site is optimised for use on smartphones, particularly the Chrome for Android mobile browser as Android has approximately 90% of the market share<sup>1</sup>.

The World Justice Project<sup>ii</sup> publishes an annual Rule of Law index of 126 countries around the globe, using data from 110,000 expert and household surveys. The Index is based on 8 key metrics, including 'Open Government', the first indicator of which is the publishing of laws and information about legal rights<sup>iii</sup>.

<sup>1</sup> See, for example, statistics gather by statcounter on Mobile Operating System Market Share Fiji for March 2018 to March 2019: <http://gs.statcounter.com/os-market-share/mobile/fiji>

<sup>ii</sup> World Justice Project Rule of Law Index 2019: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>. Note that Fiji is not indexed as part of the project.

<sup>iii</sup> <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law/open-government-factor-3>

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(from left): LexisNexis Executive Director Corporate and Emerging Markets, Myfanwy Wallwork, Fiji Attorney General Aiyaz Sayed-Kahiyum and Fiji Chief Justice, Anthony Gates at the launch of the Laws of Fiji website

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In a year in which the index showed the scores for more than 60 countries going backwards, driven by rising authoritarianism, issues relating to criminal justice and deterioration of the open government indicators, it is remarkable that Fiji has taken this step to empower its population.

LexisNexis is also the publisher of the Fiji Law Reports, in conjunction with the Judicial Department of Fiji and the United Nations Development Programme, with funding from the European Union. The law reports are available in print and on Lexis Advance and Lexis Red, allowing lawyers visiting remote islands to access legal materials on their tablets without transporting multiple books. 🌐

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