



REFLEX

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Registration is now open for the:

- IARMJ Asia Pacific Regional Conference -

“MIGRATION AND PROTECTION:

Managing the clash of international law and domestic sovereignty”

Legislative Council Chamber, Parliament Buildings, Wellington, New Zealand

14-16 November 2018

Members, Associate Members and those wishing to attend as observers are warmly invited to register now for the conference. Flights and hotels will never be cheaper, so please do visit <https://www.iarlj.org/regional-chapters/asia-pacific-chapter> and register at the early-bird subscription rates.



From the Editor...

WHEN THE WATERS RUN DEEP

Turbulent times and the Rising Waves of Human Migration
in the Asia Pacific Rim

Even laws cannot evade the constancy of change. Laws evolve through time as society and circumstances vary. Laws and their application which may have been essential years back may dissolve to irrelevance in the present time.

Yet, despite its seeming impermanence, the law retains its core value – the *rule of law*. While we live in chaotic times, we adhere to the rule of law – we nurture it – we let it grow, let it flow, to be as dynamic and resilient as the ebbing and rising of the waves... otherwise, in its absence, there will be an endless ocean of troubled waters.

The Asia Pacific region has more water than land boundaries compared to other regions where migration movements have embedded their footprints. Figuratively speaking, these porous frontiers between States in our region have opened floodgates to mixed marriages, creating conflicting issues of nationality resulting in risks of statelessness.

Ironically, our water boundaries can be seen as a *boon* or a *bane*. A *boon* in that they encourage economic trade through labor migration... or a *bane* when their porosity is exploited by human trafficking through maritime channels.... And, of course, water is a bane in terms of natural causes such as monsoon rains and floods in refugee camps.

These concepts of water and the dynamics of the rule of law in migration movements are some of the issues we intend to tackle in the upcoming Asia Pacific regional conference, come November. With most State countries in the region being territories defined by water borders, the gathering intends to serve as a platform for harmonising and bridging the gap between international law obligations and national state protection through redefining and revisiting refugee law, migration law and human rights law vis-a-vis state obligations.

The issues are not by-products of one's imagination but rather one's assessment of the regional landscape as we see it today – do we allow our ships of state to drift without direction or, worse, to sail back... or do we cruise forward and allow reason and the rule of law to be our moral compass regardless of the changing of the tides?

These things said, we look forward to welcoming you onboard at the Wellington Conference.

Maria Josefina G. San Juan-Torres, editor

From The President...

Dear colleagues and friends,

It is more than two years since the Seoul conference and it is timely to look at how far we have come since that defining moment when we formed the Asia Pacific Chapter to better reflect the diversity of our region.

First, and very pleasingly, our membership has grown significantly in the past two years. We now have members from 11 countries in the Asia Pacific region and we continue to maintain a warm dialogue with judges in several others, where local considerations might make formal membership difficult.

Second, a major aspiration has been realised in the expansion of the Association to encompass wider migration concerns. Our part of the world experiences many migration-related challenges which raise issues of human rights and the rule of law, but which are not amenable to solution through traditional protection mechanisms. As I write, climate change continues to alter our lives. Heavy rains in Laos have destroyed a dam, flooding thousands of homes with 5 *billion* cubic metres of water. Many are feared dead and many thousands are homeless. At the same time, in Japan, the worst heatwave in decades has killed over 80 people and hospitalised over 35,000. All while Japanese rescue services battle 40 degree summer heat to save people from floods and landslides which have killed more than 220 people. Forced displacement through natural disasters is very much a reality.

There are also significant issues with human trafficking, slavery, statelessness and migration through poverty in our region. Increasingly, these are issues with which judges and decision-makers are grappling and the Association is right to have broadened its mandate to assist with solutions and support. And it is not only judges who work in the immigration and protection spheres who need to understand the issues.

Picture, for example, a judge in a criminal court. A young woman is charged with stabbing a man to death. She is an illegal immigrant from a poor country who has evaded the police for several months before being caught working in a brothel. She refuses to talk or to mount a defence and simply wants to plead guilty. To a busy criminal court judge, it might just be another case and she is remanded in custody for sentencing. But, to a judge familiar with the indicia of human trafficking, however, justice might well require a closer look at her predicament and the reasons for her actions. Issues of duress or self-defence may be involved and yet she may well fear harm to her family overseas if she speaks. There will be language and cultural barriers and there may be a life-long fear of officials. A well-informed judge might consider a referral to a legal aid lawyer experienced in human trafficking and sexual abuse cases, various expert reports and a deferral of any plea.

There has never been a more important time for us to upskill ourselves. In a world of ever-hardening views about ‘migrants’, it is judges who need to uphold the rule of law, hold law enforcement officers and officials to account and ensure that human rights – those precious, fragile protections – are respected. That upskilling is what we hope the Asia Pacific regional conference in Wellington, in November, will deliver.



Martin Treadwell
President

RECENT JUDICIAL DECISIONS AND DEVELOPMENTS IN PROTECTION LAW IN THE REGION

Japan

We do not have a copy of the decision to hand yet, but there has been a significant decision issued by the Tokyo District Court.

According to news reports, on 5 July 2018 the Tokyo District Court issued a judgement obliging the Immigration Bureau to grant refugee status to a claimant from Sri Lanka whose refugee application had been rejected despite an earlier successful lawsuit. The claimant was represented before the Court by the

respected human rights lawyer Shogo Watanabe, whose work in the field of refugee law in Japan over many years is well known.

The claimant, a Tamil, had applied for refugee status and was denied in the same year, 2006. He sought review of the decision from the Osaka District Court, which ruled in his favour in March 2011, stating that he met the refugee criteria as of 2006. As a result of the Osaka Court's cancellation of the 2006 Immigration Bureau rejection, the claimant's 2006 refugee application went back to square one, to be decided by the Immigration Bureau afresh. The Immigration Bureau, however, again denied his application in December 2011, stating that the circumstances in Sri Lanka had changed since 2006 with the internal war ending in 2009. It held that the claimant therefore no longer had a well-founded fear of persecution as at December 2011.

The claimant took this second rejection to the Tokyo District Court, which found the earlier Osaka court's findings of fact on the claim were binding on the Immigration Bureau, thus it should instead have examined the applicability of the cessation clause of the 1951 Convention. The Tokyo District Court acknowledged the declaratory nature of refugee status determination (that it is not required by the 1951 Convention that the person is formally recognised as a refugee and that, if all other requirements are met, he/she is a refugee from the moment they leave their country). The Tokyo District Court also concluded on the facts that the claimant's refugee status, found in 2006, could not cease to be recognised in December 2011.

As this decision will have implications for all similar cases (including future cases), the Immigration Bureau is currently considering whether to appeal the decision.

Until we have a translation of the decision, there is a reference to the judgment in the 5 July 2018 *Japan Times* article by Sakura Murakami:

["Tokyo Court Defies Justice Ministry in Ordering Asylum for Sri Lankan Man"](#)

This is, we believe, the first time that the declaratory nature of refugee status has been recognised by the Japanese courts. It is an important decision and we hope to be able to bring you a full translation of the judgment shortly.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

1. IARMJ Americas Chapter Conference

From August 01, 2018 until August 05, 2018
At [Georgetown Law Center](#), Washington DC

2. IARMJ European Chapter Conference

From 13-14 September 2018 (workshops on 12 September)
At [Monastery of San Nicolò l'Arena in Catania, Sicily](#)

3. An Inspirational Career – Keynote Lady Hale

Lady Brenda Hale, President of the Supreme Court of the United Kingdom, The Right Hon the Baroness Hale of Richmond DBE

21 September 2018

[Cordis Hotel, Auckland & Live Web Stream](#)

Fee: From \$625

“A unique opportunity to hear from Lady Hale and an unprecedented line-up of speakers, all in one room, in one event. Speakers will share their stories, and discuss the drivers and issues that shaped their lives and their careers. Looking back, to help you move forward, offering their insights and best advice in a fast-paced challenging world. This is a remarkable once-in-a-lifetime event that will not be repeated and should not be missed.”

IN THE LIBRARY

The following new texts and reports are noted:

[Global Study on Smuggling of Migrants 2018](#)

UN Office on Drugs and Crime (UNODC), June 2018

Presents detailed information about key smuggling routes, the profiles of smugglers and smuggled migrants, the modus operandi of smugglers and the risks that smuggled migrants face. [7.8MB]

[Global trends: forced displacement in 2017](#)

UN High Commissioner for Refugees (UNHCR), June 2018

68.5 million people had been driven from their homes across the world at the end of 2017, including displacement from Democratic Republic of the Congo, South Sudan and Myanmar.

[International Religious Freedom Report for 2017](#)

U.S. State Department, May 2018

Covers most countries, discussing government policies violating religious beliefs and practices of groups, religious denominations and individuals.

[Peoples under Threat 2018](#)

Minority Rights Group, June 2018

Identifies minorities most at risk of genocide, mass killing or violent repression.

[The Rule of Law in Pakistan and The Rule of Law in Afghanistan](#)

World Justice Project, May 2018

Two reports based on surveys which capture the experiences and perceptions of citizens in areas of government accountability, bribery and corruption, crime, access to justice.

[Smart Phones for Refugees: Tools for Survival, or Surveillance?](#)

Peace Research Institute Oslo (PRIO), June 2018

Some European governments have made use of the digital traces of refugees e.g. social media profiles, geo-tracking. This brief report discusses this practice and outlines some of the questions that it raises.

[UNHCR Projected Global Resettlement Needs 2019](#)

UN High Commissioner for Refugees (UNHCR), June 2018

Provides detailed regional and country information on the 1.4 million refugees identified as needing to be resettled in third countries in 2019. [15.5 MB]

COUNTRY INFORMATION UPDATE

A selection of news articles and media reports that you may have missed over the past few months.

[India's Strategic Expansion in the Pacific Islands](#)

The Diplomat, 13 June 2018

"As India's politico-military orientation is adjusting to the change in the United States' Command structure and geostrategic orientation from the Asia-Pacific to Indo-Pacific, the region of Pacific Islands will get more strategic attention from India."

[Italy's far-right League plans census of Roma community](#)

DW [Deutsche Welle], 19 June 2018

Interior Minister Matteo Salvini "announced his plans to draw up a 'register' of the Roma community". Those who are deemed to be foreign could be deported, but the Minister has said that Italian Roma would "unfortunately" be allowed to stay. Meanwhile, in Ukraine, [attacks against Roma encampments](#), and the [reported lack of police intervention](#) has increased fears among the Roma population.

[Thailand issues arrest warrant for London-based Facebook user](#)

Benar News, 14 June 2018

The warrant was issued for a Thai woman "who allegedly used Facebook to spread false information about the junta,... During the past few months, rights groups have raised alarms over a series of legal moves across Southeast Asia where legislators are expanding existing regulations by invoking the proliferation of fake news online to introduce stricter laws."

[Under the Radar: Minorities pose threat to Iranian stability](#)

Global Risk Insights, 18 June 2018

The diversity of ethnic groups and religions present in Iran belies its stereotype as a homogeneous Shia Persian state. This report discusses some of the more significant minorities in Iran, and examines the potential problems they could pose for the state.

[Vanuatu plans cyber crime law to target Facebook 'false claims'](#)

Asia Pacific Report, 26 June 2018

"Vanuatu Prime Minister Charlot Salwai, the Minister responsible for Telecommunications, has informed Parliament that a cyber crime bill currently being developed will address the increasing issues and concerns regarding social media, especially Facebook."

ELECTION WATCH

Recent Elections:

COLOMBIA (PRESIDENT)

Ívan Duque, the conservative candidate with ex-president Alvaro Uribe's backing, won the presidential runoff election with 53.9% of the vote following a divisive campaign. Duque promises to modify the most contentious components of the peace deal with FARC.

[Colombia president-elect vows to unite nation, alter peace deal](#)

Reuters, 17 June 2018

[Iván Duque wins election to become Colombia's president](#)

Guardian, 18 June 2018

TURKEY (PRESIDENT AND PARLIAMENT)

Recep Tayyip Erdogan won 52.5% of the vote in the 2018 Turkey presidential election. The ruling AK Party in coalition with MHP secured a majority in Turkey's parliamentary election. The immediate impact of Erdogan's victory is that he will preside over a brand new presidential system of the Turkish government. President Erdogan will also assume major new powers under Turkey's new constitution. Changes which were endorsed in a referendum last year are due to come into force after the election. They include power for the president to directly appoint top public officials, power to intervene in Turkey's legal system and power to impose a state of emergency.

[Turkey election: Erdogan wins re-election as president](#)

BBC News, 25 June 2018

[Turkey elections 2018: everything you need to know](#)

The Guardian, 18 June 2018

THE CLOSING WORD

This issue features an article by Lili Song on refugee status determination systems in some of the key island states of the South Pacific. It is an important (but usually poorly understood) part of our region and Ms Song sheds light in areas where there are few, if any, other ready sources of information.

Ms Song lectures in human rights law and public international law at the University of the South Pacific. The core of her research is refugee law and policy in the Asia Pacific region. She has further research interests in a range of issues relating to Chinese law, the law of the sea, law and development, human rights, and international dispute settlement. She also researches human rights issues in China such as the protection of trafficked persons and the right to leave and return. In 2013-14, she conducted fieldwork in Kachin State, Myanmar and Yunnan Province, China on ethnic Kachins displaced by the armed conflict in Myanmar and she maintains a strong interest in forced migration on the Chinese-Myanmar Border. She holds law degrees from New Zealand and China and is qualified to practice law in China. She worked as a lawyer in Shanghai prior to her academic career. She is a member of the Asian Pacific Refugee Rights Network.

Ms Song's article is reproduced here with the kind permission of the author herself and the Editorial Panel of RefLaw, the refugee law website maintained by the University of Michigan Law School, at www.reflaw.org, where it first appeared.

Refugee Status Determination by South Pacific Island States: Legal Overview, Recent Developments, and a Brief Critique

Lili Song

In late January 2017, 21-year-old Iranian Loghman Sawari landed at Nadi International Airport, Fiji.¹ He hoped to apply for refugee status in Fiji, but several days after his arrival, while he and his lawyer were driving to Suva to file his asylum application, Fijian police officers stopped them, took Sawari to Nadi airport, and deported him back to Papua New Guinea (PNG).²

The case of Sawari is a reminder of the need for attention on refugee protection in South Pacific Island States (SPICs).³ SPICs are usually known as far-flung tropical holiday paradises, rather than destinations for asylum seekers. In most SPICs, the number of asylum seekers remains relatively small; however, because of the opening and re-opening of Australian offshore processing centers on PNG and Nauru, large numbers of asylum seekers have been forcibly transferred to those countries since 2001.⁴ Furthermore, however small the number of asylum seekers in other SPICs may be, available protection could make a life or death difference for each individual who does seek asylum there. This article aims to provide an introductory overview of the legal framework for refugee status determination (RSD) in SPICs, with a particular focus on PNG, Nauru, Fiji, and Vanuatu.

As of 28 June 2018, six SPICs are parties to the 1951 *Convention relating to the Status of Refugees* (the 1951 Convention) and the 1967 *Protocol relating to the Status of Refugees* (the 1967 Protocol): PNG, Nauru, Fiji, Samoa, Solomon Islands, and Tuvalu.⁵ Of these six SPICs, PNG, Fiji, and Nauru have domestic legal provisions on RSD; Samoa had previously developed a bill on RSD but it was never adopted;⁶ in Solomon Islands, both the Immigration Bill 2011 and the Passport Bill 2012 reference refugee status determination, but an explicit refugee status determination act has not come into being yet.⁷ In addition, Vanuatu, which is not a party to the 1951 Convention or the 1967 Protocol, introduced legal provisions on RSD in 2010.⁸ The rest of the SPICs do not have legal provisions on RSD as of 28 June 2018.⁹ The respective legal framework for RSD in PNG, Nauru, Fiji, and Vanuatu is discussed below.

¹ *Fiji Lawyer Fears for Deported Asylum Seeker's Life*, Radio New Zealand (Feb. 3, 2017), <https://perma.cc/6ZLC-G789>; Michael Gordon, "Escape from Manus Island: Iranian refugee seeks asylum in Fiji", *The Sunday Morning Herald* (Jan. 28, 2017), <https://perma.cc/89XY-ZNHD>.

² Radio New Zealand, *supra* note 1; *Statement from the Attorney-General*, The Fijian Government (Feb. 3, 2017), <https://perma.cc/2RCD-DLSZ>.

³ For the purpose of this article, the term "SPICs" refers to the twelve member states of the University of the South Pacific (USP), namely Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, as well as Papua New Guinea and the Federated States of Micronesia, both of whom have close relations with USP member states.

⁴ See Elibritt Karlsen, *Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: a Quick Guide to Statistics and Resources*, Parliament of Australia (Dec. 19, 2016), <https://perma.cc/5USU-Q4HA>; See also UNHCR *Statistics: The World in Numbers 2016*, UNHCR (counting refugees, asylum seekers, and stateless people in each country around the world, with notably few in Fiji and none recorded in the Solomon Islands or Vanuatu).

⁵ Convention relating to the Status of Refugees, July 28, 1951, U.N.T.S. 189, <https://perma.cc/C6SV-RZAT>.

⁶ U.N. High Commissioner for Refugees, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 2nd Cycle, 25th Session – The Independent State of Samoa*, 2015, <https://perma.cc/T7B4-4AZY>.

⁷ *Solomon Islands Immigration Bill 2011*, E.g. §§ 7(2), 90(2)(a)(iii), <https://perma.cc/U6FH-623S>; *Solomon Islands Passport Bill 2012*, § 15(b), <https://perma.cc/V9NS-KTNM>.

⁸ U.N. High Commissioner for Refugees, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Vanuatu*, <https://perma.cc/4H9K-6WVJ>.

⁹ See Table 1 provided at the end of the article.

Papua New Guinea

PNG gained independence from Australia in 1975.¹⁰ PNG has a land area of 462,840 sq. km with a population of about 8 million.¹¹ Although PNG did not become a party to the 1951 Convention and the 1967 Protocol until 1986, it has a history of hosting West Papuan refugees from Indonesia since the mid-1980s.¹² Additionally, the PNG National Court of Justice discussed the principle of non-refoulement already in 1985, finding that “any determination of the ‘refugee’ status of the applicants is a matter for the determination of the executive government, not the court.”¹³ The court also found that the principle of non-refoulement, if incorporated into PNG law, would be contrary to provisions of the Migration Act at that time.¹⁴

On 17 July 1986, PNG acceded to the 1951 Convention and the 1967 Protocol.¹⁵ In 1989, four short sections dealing with refugees were inserted into Section 15 of the PNG Migration Act 1978 by way of the Migration (Amendment) Act 1989, with further amendments made in 2015.¹⁶ Of additional relevance is PNG’s Migration Regulation 1979, which was amended in 2013 and 2014 to reflect and elaborate Section 15 in the PNG Migration Act.¹⁷

Under PNG law, the Minister responsible for immigration has the power to determine who qualifies as a refugee.¹⁸ To qualify as a refugee in PNG, a person must satisfy the criteria under Section 14(1) of the amended Migration Regulation and must not satisfy any of disqualifying and exclusionary criteria outlined in Section 14(2) of the same regulation.¹⁹ The criteria under Section 14(1) generally reflect the criteria required by Article 1A(2) of the 1951 Convention.²⁰

Section 14(2), however, contains grounds for exclusion which go beyond the exhaustive list of grounds set out in the Refugee Convention.²¹ For example, the PNG criteria exclude any person who has during their stay in a processing centre, “exhibited a demeanor incompatible with a person of good character or standing.”²² Furthermore, neither the amended Migration Act nor the Migration Regulation contains any provision on non-refoulement or provides for judicial review of the Minister’s decision.²³ Instead, Article

¹⁰ *Papua New Guinea Country Profile*, BBC (Jan. 14, 2018), <https://perma.cc/7RE6-NBTM>.

¹¹ *Id.*

¹² B. Martin Tsamenyi, “Papua New Guinea’s Accession to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees” (1989) IJRL 180-198, 182; *West Papuan Refugees in PNG Urged to Register*, Radio New Zealand (Nov. 7, 2017), <https://perma.cc/KC T9-456J>; Convention relating to the Status of Refugees, *supra* note 5.

¹³ *Application by Ireeuw, Wawar, Ap, and Wakum*, [1985] PGNC 7; [1985] PNGLR 430 (13 Dec. 1985), <http://www.paclii.org/fj/cases/FJHC/2017/519.html>.

¹⁴ *Id.*

¹⁵ “Convention relating to the Status of Refugees: Status as at: 17-06-2018”, available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en.

¹⁶ *Migration Act 1978*, [PNG], § 15 (amended by *Migration (Amendment) Act 1989*), <https://perma.cc/M2U5-PFJB>; *Migration (Amendment) Act 2015*, [PNG], §§ 15B, 15F, <https://perma.cc/4HMB-K6DW>.

¹⁷ *Migration Regulation 1979*, [PNG], <https://perma.cc/BA73-7F8E>; *Migration (Amendment) Regulation 2013*, [PNG], http://www.paclii.org/cgi-bin/sinodisp/pg/legis/sub_leg/mr2013289/; *Migration (Amendment) Regulation 2014*, [PNG], <https://perma.cc/YK4H-MJZ5>.

¹⁸ *Migration Act 1978*, [PNG], § 15A, *supra* note 16.

¹⁹ *Migration (Amendment) Regulation 2013*, [PNG], §§ 14(1)-(2), *supra* note 17; *Migration (Amendment) Regulation 2014*, [PNG], *supra* note 17.

²⁰ *Id.* at § 14(1)(c) (allowing the Minister to find a non-citizen a refugee if he or she “is outside of the country of his or her nationality and is unable or owing to such fear, unwilling to avail himself or herself of the protection of that country; or does not have a nationality and being outside his or her country of former habitual residence is unable, or, owing to such fear, is unwilling to return to it”).

²¹ *See id.* at § 14(2); *See also* UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. 189, art 1F, <http://www.refworld.org/docid/3be01b964.html>.

²² *Migration (Amendment) Regulation 2013*, *supra* note 17, at § 14(2)(h).

²³ *Id.*; *Migration Act 1978*, *supra* note 16.

15(4) of the amended Migration Regulation provides that the Minister “must not re-open a decision for further consideration after his decision is made,” effectively preventing appeals.²⁴

Nauru

Nauru is a one-island nation northeast of Australia with a population of around 10,000 people and a land area of 21 sq. km.²⁵ It became independent in 1968 from Australian administration.²⁶ Nauru became a party to the 1951 Convention and the 1967 Protocol on 28 June 2011,²⁷ the year before it signed an agreement with Australia to reopen the Australian offshore asylum processing center in Nauru.²⁸

In 2012, Nauru passed its Refugees Convention Act, which was amended annually from 2014 to 2017.²⁹ Section 3 of this act defines refugee as “a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol”,³⁰ and Section 4 of this act expressly recognizes Nauru’s obligation of non-refoulement under the 1951 Convention and the 1967 Protocol as well as other relevant international treaties.³¹ Applicants may apply for recognition as a refugee to the Nauruan Secretary for Justice and Border Control, who makes the first instance decision.³² The Nauruan Refugees Convention Act provides for a Refugee Status Review Tribunal, which is empowered to conduct merits review of the Secretary’s decision.³³ Furthermore, the applicant has the right to appeal the decision of this Review Tribunal to the Nauruan Supreme Court on a point of law in accordance with article 43(1) of the Nauruan Refugees Convention Act.³⁴ It must also be mentioned that, on 24 July 2018, Nauru announced the first members to its Court of Appeal, which is expected to be fully functional by October 2018.³⁵

The Nauruan Constitution contains no provision on a court of appeal. Prior to March 13, 2018, the applicant could further appeal against a negative decisions by the Nauruan Supreme Court to the High Court of Australia by virtue of a 1976 bilateral treaty between Nauru and Australia and statutes of the respective parliaments.³⁶ On December 12, 2017, Nauru quietly terminated this bilateral judicial appeal arrangement with a 90-day notice period.³⁷ Although Nauru has since announced a plan to establish a Court of Appeal and passed a Court of Appeal Act in May 2018,³⁸ such Court of Appeal has not been set up as of 28 June

²⁴ *Migration (Amendment) Regulation 2013*, *supra* note 17, at § 15(4).

²⁵ *Nauru Country Profile*, BBC, Feb. 20, 2018, <https://perma.cc/N6S5-C6EE>.

²⁶ *Id.*

²⁷ “Convention relating to the Status of Refugees: Status as at: 17-06-2018”, *supra* note 15.

²⁸ See Alison Rourke, “Australia to deport boat asylum seekers to Pacific islands”, *The Guardian*, Aug. 13, 2012, <https://perma.cc/E2RV-DCTD>.

²⁹ *Republic of Nauru Refugees Convention Act 2012*, [Nauru], <https://perma.cc/MRE8-2V5U>; See Reflaw.org for the Refugees Convention (Amendments) from 2014-2017.

³⁰ *Refugees Convention Act 2012*, *supra* note 29, at § 3.

³¹ *Id.* at § 4. Sec 3 further defined the Refugees Convention and the Refugees Protocol as the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* respectively.

³² *Id.* at §§ 5(1), 6(1).

³³ *Id.* at §§ 11, 31(1); See also *Secretariat, the Government of the Republic of Nauru*, <https://perma.cc/K273-23ZQ>.

³⁴ *Refugees Convention Act 2012*, *supra* note 29, at 43(1).

³⁵ <http://nauru-news.com/nauru-announces-court-appeal/>.

³⁶ Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (opened for signature 6 Sept 1976, entered into force 21 Mar 1977) 1216 UNTS 151; Nauru (High Court Appeals) Act 1976 (Australia), <https://www.legislation.gov.au/Details/C2008C00339>; Appeals Act 1972 (Nauru), http://ronlaw.gov.nr/nauru_lpms/files/acts/2fc99a20bddfb15b168b259a47400ec9.pdf. For more discussion on the Nauru-Australia judicial appeal arrangement, see Gregory Dale, *Appealing to Whom? Australia's 'Appellate Jurisdiction' Over Nauru* (2007) 56 ICLQ 641-658.

³⁷ Michaela Whitbourn, “Asylum seekers in limbo as Nauru scraps appeals to High Court of Australia”, *The Sydney Morning Herald*, <https://www.smh.com.au/national/asylum-seekers-in-limbo-as-nauru-scraps-appeals-to-high-court-of-australia-20180402-p4z7e2.html>.

³⁸ Nauru Court of Appeal Act 2018, http://ronlaw.gov.nr/nauru_lpms/files/acts/641872e1c48b1735dbe7fe413a46bf02.pdf.

2018. As commentators have pointed out,³⁹ Nauru's failure to establish a replacement appeals mechanism upon the termination of the Nauru-Australia judicial appeal arrangement deprives refugees in Nauru the option to challenge negative decisions made by the Nauruan Supreme Court.

Fiji

Fiji is an archipelagic country with a land area of 18,274 sq. km and a population of about 900,000.⁴⁰ It gained independence from Britain in 1970.⁴¹ Fiji became a party to the 1951 Convention and the 1967 Protocol on 12 June 1972.⁴² However, it was not until 2003, with the passage of its Immigration Act, that Fiji finally enacted provisions governing RSD into its domestic law. The Fijian Immigration Act provides a definition of a refugee that is essentially the same as the definition under Article 1A(2) of the 1951 Convention.⁴³

An application for refugee status can be made to an immigration officer,⁴⁴ and the Permanent Secretary responsible for immigration is empowered to make the first instance decision.⁴⁵ Section 41(2) of the Fijian Immigration Act provides a number of grounds for exclusion from refugee status that go beyond the exhaustive list of grounds set out in Articles 1D, 1E and 1F of the 1951 Convention.⁴⁶ For example, a person would be excluded from refugee protection in Fiji they are "at present receiving protection and assistance from a third country or international agency in the Fiji islands."⁴⁷

The applicant can appeal against the Secretary's decision to the Minister responsible for immigration.⁴⁸ Although Fiji's Immigration Act does not specify whether the Minister's decision on RSD is subject to judicial review, the High Court of Fiji answered this question in the negative in *Arfaoui v Director of Immigration*.⁴⁹ Here the court determined that the applicant, whose appeal was rejected by the Minister, did not have a right to appeal the decision to the court.⁵⁰

Vanuatu

Vanuatu is not a party to the 1951 Convention or the 1967 Protocol.⁵¹ However, it introduced a section to deal with refugees, i.e. Part 9 entitled "Determination of Refugee Status", in its Immigration Act 2010.⁵² In the same year, Vanuatu offered to host an Australian offshore processing center.⁵³ The Vanuatu

³⁹ Eg. Maria O'Sullivan, Nauru's Renunciation of Appeals to the High Court – Lawfulness and Implications, Castan Centre for Human Rights Law, <https://castancentre.com/2018/04/05/naurus-renunciation-of-appeals-to-the-high-court-lawfulness-and-implications/>; Melissa Clarke, Justice in Nauru curtailed as Government abolishes appeal system, The Australian Broadcasting Corporation, <http://www.abc.net.au/news/2018-04-02/nauru-now-without-court-of-appeal/9609524>.

⁴⁰ *Fiji Country Profile*, BBC, Jan. 4, 2018, <https://perma.cc/4ACV-CEE2>.

⁴¹ *Id.*

⁴² "Convention relating to the Status of Refugees: Status as at: 17-06-2018", *supra* note 15.

⁴³ *Immigration Act 2013*, [Fiji], § 38, <https://perma.cc/CQ5R-XKZG>; See also UN General Assembly, *Convention Relating to the Status of Refugees*, *supra* note 21.

⁴⁴ *Immigration Act 2013*, *supra* note 38, at § 39(1).

⁴⁵ *Id.* at §§ 41(1) (noting the act requires that the Permanent Secretary "...must, when determining a claim, be guided by the provisions of the Refugee Convention").

⁴⁶ *Id.*

⁴⁷ *Id.* at § 41(2)(v)(e).

⁴⁸ *Id.* at §§ 43(1)(c), 44(1).

⁴⁹ *Arfaoui v Director of Immigration*, [2017] FJHC 519 (14 July 2017), <http://www.paclii.org/fj/cases/FJHC/2017/519.html>.

⁵⁰ *Id.*

⁵¹ "Convention relating to the Status of Refugees: Status as at: 17-06-2018", *supra* note 15.

⁵² *Immigration Act 2010*, [Vanuatu], http://www.paclii.org/cgi-bin/sinodisp/vu/legis/num_act/ia2010138/.

⁵³ Paul Maley, "Vanuatu Offered to Host Asylum-Seeker Centre", *The Australian* (June 16, 2011), <https://www.theaustralian.com.au/news/nation/vanuatu-offered-to-host-asylum-seeker-centre/news-story/8ffea76723859fa3e0deb29b196afbab?sv=e0134b8f549bd89bf2e247f4bc6988df>.

Immigration Act was subsequently amended in 2013, 2014, and 2016.⁵⁴

According to the Vanuatu Immigration Act, an application for refugee status must be made to the Principal Immigration Officer,⁵⁵ who makes the first instance decision.⁵⁶ Like in Fiji, in Vanuatu the applicant may appeal against the decision by the Principal Immigration Office to the Minister responsible for immigration.⁵⁷ Unlike in Fiji, Vanuatu's RSD statute explicitly provides for judicial review: the applicant may further appeal against the decision by the Minister to the Supreme Court of Vanuatu.⁵⁸

Section 65 of the Vanuatu Immigration Act also provides the criteria for RSD in Vanuatu. The Immigration Act essentially adopts the definition of a refugee in Article 1A(2) of the 1951 Convention.⁵⁹ However, as noted by UNHCR in 2013,⁶⁰ the grounds for exclusion from refugee status in Section 65(2) go far beyond the exhaustive list of grounds those set out in Article 1 sections D, E and F of the 1951 Convention. For example, Vanuatu excludes applicants who have been criminally convicted in another country of an offence and sentenced to either death or a term of imprisonment of two years or more.⁶¹ Most notably, Vanuatu stipulates that travel through any third country in which the applicant has the right to enter and reside automatically disqualifies the applicant from refugee status.⁶²

On top of its extensive exclusion grounds, Vanuatu also creates separate categories of "prohibited immigrants," which allow for an exception to its statutory prohibition against non-refoulement. While section 73(1) of the Vanuatu Immigration Act expressly prohibits refoulement of refugees, section 73(2) provides an exception to the prohibition of refoulement in the case of a prohibited immigrant.⁶³ Section 50 of the Immigration Act contains an extensive list of prohibited immigrants in Vanuatu, including anyone who "breaches a condition of his or her visa," "is wanted in another country by the relevant authorities in that country in relation to the commission of an offence in that country," "arrives in Vanuatu as a stowaway," "is in the process of being deported from or has been asked to leave any other country," or is "a member of the family of a prohibited immigrant, unless the Principal Immigration Officer declares in writing that the member is not a prohibited immigrant."⁶⁴

Sections 73(2) and 50 thus make it possible for Vanuatu to refoule persons who should not be refouled under the Refugee Convention and Protocol. But, because Vanuatu is not yet a party to the Refugee Convention or Protocol, it is not bound by provisions of these instruments. However, scholars have argued that the principle of non-refoulement has become a principle of customary international law and thus binds all States.⁶⁵ Besides, Vanuatu is a party to the Convention against Torture (CAT).⁶⁶ Given that the

⁵⁴ See *Vanuatu Immigration Act 2010: amending texts*, International Labour Organization, <https://perma.cc/6PHC-4LAB> (listing the Act's amending texts in 2013, 2014, and 2016).

⁵⁵ *Immigration Act 2010*, *supra* note 47, at § 64(1).

⁵⁶ *Id.* at § 66.

⁵⁷ See *id.* at § 71(2).

⁵⁸ *Id.* at § 71A.

⁵⁹ *Id.* at §§ 65(1)(a)-(b).

⁶⁰ U.N. High Commissioner for Refugees, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Vanuatu* (June 2013), <http://www.refworld.org/docid/51b829460.html>.

⁶¹ *Immigration Act 2010*, *supra* note 47, at § 65(2)(d).

⁶² *Id.* at § 65(2)(j).

⁶³ *Id.* at §§ 73(1)-(2).

⁶⁴ *Id.* at § 50.

⁶⁵ E.g., Cathryn Costello & Michelle Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, NETH. Y.B. OF INT'L L. 273, 323 (2015); *But see e.g.*, Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in Erika Feller, Volker Türk & Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ¶¶193-216 (Cambridge University Press, 2003).

⁶⁶ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, U.N.T.S. 1465, <https://perma.cc/VQ3D-XB3W>.

Immigration Act contains no expressly prohibition of refoulement in accordance with the CAT, the rather wide coverage of section 50 may lead to refoulement of a refugee who cannot be refouled under the CAT. As of 28 June 2018, there is no report of cases brought in accordance with Section 71A (appeal to Supreme Court against the decision of the Minister) of the Vanuatu Immigration Act.

Brief Critique

As demonstrated above, in SPICs, laws relating to RSD have developed especially in recent years. Such development has probably, to a certain extent, been driven by Australia's policy of offshore processing of asylum-seekers. Two of the four SPICs that recently introduced new RSD provisions in their domestic law system, namely PNG and Nauru, host Australian offshore processing centres. Vanuatu approached Australia about the possibility of hosting such a centre in the same year it introduced RSD provisions into its immigration law, raising the question of whether such introduction was made to pave the way for Vanuatu's attempt to host an Australian offshore processing centre. Incidentally, the Solomon Islands, which has not introduced RSD provisions in its domestic law but whose Immigration Act 2012 and Passport Act 2012 make reference to a Refugee Status Determination Act, also repeatedly offered to host an Australian offshore asylum-seeker processing centre.⁶⁷

The development of new RSD laws should be welcomed because it fills a legislative gap in the relevant SPICs and supposedly helps enhance transparency of RSD process in the relevant SPICs. On the other hand, besides developing laws relating to RSD, the SPICs should carefully consider the legal and ethical issues relating to Australia's practice of offshore asylum processing and the role they are playing and should play in such practice. For example, the PNG Supreme Court's ruling that the Australian offshore processing centre on PNG's Manus Island is unconstitutional illustrates the wider and deeper legal issues the SPICs may need to deal with in relation to hosting Australian offshore processing centres.

Relevant domestic laws in PNG, Fiji, and Vanuatu, as they currently stand, contain provisions that are significantly inconsistent with the 1951 Convention and the 1967 Protocol. And, while laws in PNG and Fiji contain no express prohibition of refoulement of refugees, Vanuatu's Immigration Act 2010 allows extensive exceptions to non-refoulement beyond the Refugee Convention and Protocol. Only Nauru and Vanuatu allow judicial review of executive decisions on RSD. The SPICs should consider reviewing and amending these provisions that are inconsistent with relevant international standards.

Looking forward, one issue of relevance to the law of refugee status in the SPICs is forced migration caused by climate change. In November 2016, government representatives from the PICs met in Suva, Fiji for the inaugural regional meeting on refugee protection in order to "strengthen regional cooperation to address the growing challenge of refugee populations".⁶⁸ A year later in November 2017, Fiji's Attorney General told media the country was developing a legal framework to help climate change refugees.⁶⁹ In the same month, New Zealand, one of the major influencers and biggest aid providers in the SPICs, announced that it was considering creating an experimental humanitarian visa category for Pacific islanders displaced by climate change.⁷⁰ Traditionally, the SPICs tend to have a united front on climate change issues. It is interesting to see how the issue of climate change induced displacement will play into their law of refugee status.

⁶⁷ Rowan Callick & Paul Maley, "Solomon Island Asylum-Seeker Solution Well Advanced", *The Australian* (May 31, 2011), <http://www.theaustralian.com.au/national-affairs/solomon-island-asylum-seeker-solution-well-advanced/news-story/b421372e352501e4116f7f13e1530ad6>.

⁶⁸ Fiji Hosts Regional Meeting on Refugee Protections, the Fijian Government (Nov. 30, 2016), <http://www.fiji.gov.fj/Media-Center/Press-Releases/FIJI-HOSTS-REGIONAL-MEETING-ON-REFUGEE-PROTECTIONS.aspx>.

⁶⁹ Jess Shankleman, "A Tiny Island Prepares the World for a Climate Refugee Crisis", *Bloomberg* (Nov. 14, 2017), <https://perma.cc/7VY5-BQV4>.

⁷⁰ "New Zealand Wants to Take Lead on Climate Change, Minister to Tell Conference", *New Zealand Herald* (Nov. 9, 2017), <https://perma.cc/948P-GE4C>.

Table 1

	Party to RC	Relevant Domestic Law	First Instance Decision-Maker	Appeal	Judicial Review
Papua New Guinea	Y 1986	Migration Act 1978 Migration (Amendment) Act 1989 Migration (Amendment) Act 2015 Migration Regulation 1979 Migration (Amendment) Regulation 2013 Migration (Amendment) Regulation 2014	Minister responsible for immigration	N	N
Nauru	Y 2011	Refugee Convention Act 2012 Refugee Convention Regulations 2013 Refugees Convention (Amendment) Act 2014 Refugees Convention (Amendment) Act 2015 Refugee Convention (Validation and Amendment) Act 2016 Refugees Convention (Amendment Act) 2017	Secretary for Justice and Border Control	Y	Y
Fiji	Y 1972	Immigration Act 2003, Pt 6	Permanent Secretary responsible for immigration	Y	N
Vanuatu	N	Immigration Act 2010, Pt 9	Principal Immigration Officer	Y	Y
Tuvalu	Y 1986	N	N	N	N
Samoa	Y 1988	N	N	N	N
Solomon Islands	Y 1995	N	N	N	N
Tonga	N	N	N	N	N
Kiribati	N	N	N	N	N
Federated States of Micronesia	N	N	N	N	N
Cook Islands	N	N	N	N	N
Marshall Islands	N	N	N	N	N
Niue	N	N	N	N	N
Tokelau	N	N	N	N	N

* All laws and regulations in Table 1 are available at www.paclii.org.