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LAW REFORM POTENTIAL IN THE PACIFIC AREA

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Introduction

The proposition that there is law reform potential in the Pacific area would need to be assessed against the conditions of the Pacific of today, the priorities and challenges that call for response, and in light of the diversity in the law reform experience of the Pacific. There are marked contrasts between the established and comparatively well-resourced law reform institutions in Australia and New Zealand, on the one hand; and the much less developed, often *ad hoc* arrangements in the smaller Pacific island States, on the other. The advantages of capacities and resources does not make the task of law reform any less challenging for the larger jurisdictions; nor does it necessarily follow, for the small countries, that there must be relegation of the law reform process or that there are no real choices or alternative opportunities. Under these circumstances it is not easy, at least for the purposes of this paper, to provide a general measure for assessing broad potential based on the prospects of any one methodology or law reform agenda. However, given the changes occurring in the Pacific and the legislative programmes and initiatives being developed and ongoing in the region, there may be need to assume a broad outlook of the function of law reform and its machinery and to ask how they might best respond to these changes.

In part in order to better manage a rather large topic, I propose to take the perspective of the small Pacific island jurisdictions. It is important that we gain some understanding of how the process of law reform is being conducted in the smaller countries, of their concerns and the challenges they face. We should also look at current activities in the development of laws and cooperative measures in the region that could suggest useful options for the future. In this connection I observe of the topic for our consideration that it seems to make an interesting connection between law reform, as normally understood in its traditional domestic setting, and law reform as a process with potential in the broader non-domestic environment of the Pacific area. It seems worthwhile examining this connection to see how current trends and developments in the Pacific region might offer scope for practical activities and for greater Pacific cooperation in law reform. I do so in the context of a Pacific region that is already substantially influenced and affected by the forces of global change and by events and decisions taken by others elsewhere, whether by regional authorities or by the wider international community.

The Pacific area

The better known face of the Pacific area is the poster vision of remoteness, tranquility and exotic wonders. There is fair basis for such a vision, taken by country or as a whole,

for the area is quite incomparable in its natural and cultural diversity and uniqueness. May it remain unique.

What is less known, perhaps not always clearly appreciated, is the array of substantial, very serious issues now confronting individual countries and which challenge the Pacific region as a whole. There is serious environmental degradation everywhere in the region, for instance. The oceans and its resources are under severe stress. Climate change, sea level rise in particular, threatens communities and their livelihood. Climate related disasters occur, across the region, with alarming frequency and growing intensity. Long-term sustainable development efforts in all aspects is a major preoccupation, and rightly so; and much more needs to be done to ensure economic improvement and trade competitiveness. Fundamental issues raised in independence constitutions (land, custom, traditional authority, ethnic and immigrant communities) remain unresolved. Regional security, the spread of HIV/AIDS and transnational organised criminal activity are major regional concerns. Political instability and law and order problems, wherever they occur in the region, as in recent times, have urgent and serious implications for all countries. These are the issues that form the reality of our region today, and the context in which we should assess the potential for law reform in the Pacific.

Many of these issues were before the leaders of the sixteen Pacific Island Forum countries¹ at their annual meeting when they last gathered in Auckland in August 2003. Interestingly, it appears from the communiqué² of the meeting that the review and development of legislation, including model legislation, is an ongoing and seemingly prominent activity in the current work programme of the region. At this meeting in Auckland, Pacific leaders considered, for instance, amongst other issues of importance, the progress of model legislation in connection with economic and trade issues; how strategies of the regional intervention to restore law and order in the Solomon Islands, including supporting legislation, were being implemented; progress on implementing the declarations on Law Enforcement Cooperation³ in the development of a regional framework, including model legislation, to address terrorism and transnational crime; progress on regional model weapons control legislation; and the implementation of legislation for the control of foreign fishing vessels. Some aspects of this legislative work will be referred to later in this paper.

Law reform structures in small island States

Readily available published information on law reform is limited or altogether lacking. However, it seems that legislation for the establishment of law reform agencies have been passed in the following small island States: Papua New Guinea (1975); Fiji (1979);

¹ Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

² Forum Communiqué, 34th meeting of the Pacific Islands Forum, Auckland, New Zealand, 14-16 August 2003.

³ 1992 Honiara Declaration on Law Enforcement Cooperation; 2002 Nasonini Declaration of Forum leaders.

Vanuatu (1980); Solomon Islands (1994); and Samoa (2002). There is record⁴ of existence of the Law Reform Committee of Tonga, but no other information seems available.

The Law Reform Commissions of Papua New Guinea and Fiji appear to be the only commission-models that are functioning, although both seem to have experienced periods of dormancy from time to time. The Solomon Islands Law Reform Commission was initially active from 1995 until the departure of its first chairman some years ago.⁵

Vanuatu does not seem to have taken steps to bring its institution into existence. Samoa, likewise, has not taken the final steps to formally establish its Law Reform Commission. Instead, Samoa now finds it necessary, largely because of the costs, to continue to review the options.

Various modes of contact and cooperation have been worked out on a bilateral basis as between the law reform authorities in island States and their counterparts in Australia and New Zealand⁶. A further opportunity for contact and for the exchange of views is offered by conferences such as this and through the participation of law reformers from the island countries in meetings of the respective law reform institutions of Australia and New Zealand. As between the island States themselves there does not appear to be any organised arrangement for regular contact among personnel or for the exchange of information. In view of the significant law reform activities that goes on in the region (as will be touched on in the course of this paper), the observation to be made is whether some organised system for the better spread and sharing of information among the law reform authorities of the Pacific as a region might be in order.

Samoa, a typical example

The conditions of a particular country like Samoa might be looked at to see how a small island jurisdiction copes with the demands of law reform. In large measure the situation there would mirror that of several other small countries of the region that do not have formal law reform institutions.

At the moment, and since the time of modern administration in the country, all law reform and law revision work is undertaken in and by the Office of the Attorney General which, in addition to the constitutional responsibilities of the Office, incorporates the functions that would normally be carried out in other countries by a separate or independent Solicitor-General, Director of Public Prosecutions and Parliamentary Counsel.

Samoa is informed of the work and achievements of the law reform agencies elsewhere in the Pacific, especially in Australia, New Zealand and on occasion make use of this work.

⁴ *Law Reform in the Commonwealth; law reform proposals and their implementation*, Issue 2: July 1983, p.95

⁵ In a recent radio interview, the President of the Solomon Islands Bar Association (Mr Gabriel Suri) called for the reactivation of the Law Reform Commission, given its important role in the processes for access and understanding of the law through proper study and consultation with the community at large.

⁶ See, for instance, the paper by Justice G N Williams, Queensland Law Reform Commission, on Law Reform: Cooperation and Coordination, 25 August 1996.

It is aware of the merits of a having an independent specialist body. Indeed, one of the key outcomes of a recent project for the strengthening of justice systems in Samoa was for a law reform commission-type model to be established, as was done under the Samoan legislation of 2002. However, considering especially the available resources, the authorities are taking time to arrive at a realistic assessment of the comparative advantages, and to be certain that for a small jurisdiction the commission-model is the right way to go. Particular attention is being given to the rate of acceptance of law reform commission recommendations (the “strike rates”) in these other Pacific countries and the all important issue of implementation of recommendations. Equally, consideration is being directed to the likely implications, for Samoa, of instituting a new system that, with all its independence, technical and professional methodology and expertise (almost certain to be drawn largely from abroad), may find difficulty in developing the necessary instinct and sensitivity to the conditions of a very traditional country and to the policy and legislative requirements of its Government.

The law reform institution envisaged for Samoa would be a modest stand-alone Commission consisting of a full time Commissioner, part-time Commissioners and a small team of researchers/lawyers. The problem, however, is that the budget estimates for the new institution would amount to almost two-thirds of the total budget for the Office of the Attorney General. For much less, a strengthened, perhaps a more specialised component within the Office of the Attorney General to concentrate on law reform work could be provided for. This is something of a dilemma and the matter is apparently still under consideration.

While the Office of the Attorney General seems to manage the regular work flow, it nonetheless needs to supplement its efforts through assistance from outside, especially in connection with the large and technically complicated issues. There is, in fact, a long tradition of assistance from New Zealand, and today also from Australia. In the past fifty or so years faculty members of the Law School of Victoria University have been engaged as advisers and consultants by the Samoan Government on a range of law development and law revision activities. Samoa has been honoured by the counsel and services of many distinguished faculty members, including, to name just a few, the chairman of this session, the Rt Hon Sir Ivor Richardson, who undertook the review and drafting of the fiscal and tax legislation, Dr George Barton, QC a survey of the legal system and resources and the late Professor Colin Aikman who devoted several years to Samoa in his pioneering work on the Constitution.

Increasingly, in more recent times, the smaller countries are resorting to and drawing assistance from the legislative development work of specialist regional agencies like the South Pacific Regional Environment Programme (SPREP) which is based in Apia, Samoa (for legislation on environmental issues); the Forum Fisheries Agency (FFA) based in Honiara, Solomon Islands (for fisheries related legislation); the Pacific Community (SPC) based in Noumea, New Caledonia (for legislation on health and social issues, and others); and the Forum Secretariat based in Suva, Fiji (for legislation on trade and economic issues, and others). Following regional studies and consultations these agencies work to develop model legislation (usually with associated programmes for the

monitoring of implementation) on a variety of subjects within their programme areas or specialisation. SPREP, for instance, has produced model legislation on marine pollution prevention and several small countries, including Samoa, have adopted the model with changes to suit local conditions.

The circumstances of a small country like Samoa would be fairly typical of that pertaining in other small countries. It is also worthwhile looking at the broader situation in the region to consider the general background and some of the law revision and law creation work being undertaken.

Regional agenda

The School of Law of the regional University of the South Pacific (USP), which is based in Port Vila, Vanuatu, does not teach law reform as a subject. However, the concept underlies the course on current developments in Pacific law which is taught in the fourth year. The Law School maintains collections of the reports from the law reform commissions in Australia and New Zealand and those of the smaller island countries that produce such reports, and students have access to this material⁷. All sixteen of the Pacific Island Forum States are partners in the development of the USP Law School. It would seem appropriate and highly beneficial to all concerned to ensure that the Law School collection of this material is as comprehensive as possible and kept up to date, perhaps supplemented by occasional visits and lectures from interested law reform commissions and agencies of the region.

There are a number of basic issues that would require the attention of Governments and their law reform machinery in almost every small island State: examination of the mass of imperial laws that were introduced during the periods of political dependency, and consideration of whether they reflect the present needs of the country; examination of the relationship between the written laws, both introduced and locally enacted, and the unwritten customary law and common law; and in the case of a country like Vanuatu, examination of the relationship between the English introduced laws and the French introduced laws, both of which are theoretically of equal validity. And there is always the huge problem and outstanding need in many countries of the revision and reprint of statutes. Much work has been done, including the review and amendments to constitutions, but much more remains to be carried out.

Constitution-making in the Pacific was part and parcel of independence. Not only did constitutions register the fact of independence, they also established the framework for the exercise of public power.⁸ For many Pacific island States, the process for the making of constitutions, and their implementation, represented the first real exercise in national politics. Australia and New Zealand have been close partners in the process, for many academic lawyers and other consultants to Pacific Governments have come from

⁷ Information per Professor Don Paterson, Emeritus Professor of Law, School of Law, USP, Port Vila, Vanuatu, February 2004.

⁸ Yash Ghai, *Constitution Making and Decolonisation, Law, Government and Politics in the Pacific Island States*, 1988, Institute of Pacific Studies, USP

Australia and New Zealand.⁹ Many such consultants remain engaged in the important work for the review and reform of the constitutional provisions¹⁰.

Everywhere the constitution-making process raised a large agenda. Customary land, language and traditions were high on the list of concerns. Individual countries faced particular concerns, as some still do, with immigrant populations or decentralisation issues or other issues. The incorporation of customary values and practices and the accommodation of traditional authorities in the constitution was the most difficult and complex.¹¹ They are issues that have fundamental influence on the organisation of traditional communities and the behaviour of family units and individuals and remain difficult and complex for the respective small island States. Increasingly, especially with the movement of island peoples to the metropolitan areas, they would be some of the issues that are being transported to Australia and New Zealand. How these issues, and the manifested problems having root in such issues, are handled in individual States have important implications for others in the Pacific. I would note in this connection that the decisions of the superior Courts of island States, invariably comprising senior Judges from Australia and New Zealand, on some of these issues, in addition to resolving particular disputes within the State, also have far reaching significance in their contribution to the growth and development of an important corpus of Pacific law and as vital material for the universities in Australia and New Zealand and at USP in the training of Pacific lawyers and other citizens.¹²

Clearly, there are issues that must be reformed and resolved by and within each country. But there would also be others capable of a broader response such as those relating to general commerce and regional trade and the environment. There is, in fact, considerable work being carried out at the regional level that contributes directly to the efforts of Governments at the national level to review and update their laws, and to assist Governments, especially with the more complex and technical types of legislation. We should look at some instances of this regional work.

Regional cooperation for law reform

A significant range of activities is being undertaken in the region for the development of legislative frameworks and for the review and general reform of the law as part of and in order to support various social, trade and economic development programmes. They are activities that would be impossible for any one country to manage, and which need to be carried out on the basis of the active partnership and collaboration that exists in the Forum structure of the region. They are activities that would have little prospect in their practical effect and implementation without clear and strong political mandate. Some of

⁹ I.L.M. Richardson, Advising on overseas law reform, *VUW Law Review*, 1978 Vol. 9 No. 4, 1978, p. 385

¹⁰ e.g., the 1995/1996 Constitution Review Commission on the Constitution of the Fiji Islands, chaired by Sir Paul Reeves .

¹¹ Yash Ghai, p.39

¹² see, for example, *Attorney General v. Saipa'ia Olomalū* , 1982, Court of Appeal of Samoa, Cooke P, Mills and Keith JJ (reported in *VIC Law Review*, 1984, vol. 14, No. 3, p. 275); *Republic of Fiji v. Prasad*, 2001, Court of Appeal of Fiji, Casey P; Barker, Kapi, Ward and Handley JJ (reported in *Oxford University Commonwealth Law Journal*)

these were noted earlier in the context of the material submitted for the review and direction of Pacific leaders at the annual gatherings of the Pacific Islands Forum.

There are two aspects of this regional work that merits consideration. First, there are issues mandated by the political leadership of the region and acknowledged as of common benefit and value to all countries (to foster, for instance, a sound environment for investment and trade) and to preserve traditional knowledge. Second, there are legislative activities being spawned by pressure from international organisations including the United Nations and the Financial Action Task Force. There are important policy and legal implications flowing from each that should be examined. I look first at a sampling of the regional mandated work.

Intellectual property rights

The Forum Secretariat in Suva is presently undertaking work on two broad areas of Intellectual Property Rights (IPR) and trade related legislation.¹³ The work on IPR is aimed at assisting members with legislative reforms through the review and updating of legislation, or the enactment of new IPR laws; and secondly in the protection of traditional knowledge. Priority is being given to help countries organise their to copyright, patent and trademark laws as part of an agreed Regionally Focused Action Plan, with political mandate from the meeting of Forum Economic Ministers in 2000. The rationale for this work comes from the recognition that a good IPR system promotes a confident environment for investment and trade and also to comply with international obligations under World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO). Only five¹⁴ of the small island countries have modern copyright laws, while others either do not have copyright laws, or use laws of their metropolitan partners. Niue, for instance, adopts the law of New Zealand, and Kiribati that of the United Kingdom. Most of the small countries are at various stages of drafting and reviewing of patent and trademarks laws.

Traditional knowledge

There has been concern in recent years over the increasing exploitation of the region's traditional knowledge and genetic resources for commercial gain mainly by foreign investors and that, in the absence of agreed international standards or convention, steps ought to be taken in the Pacific to protect this resource. In 1999 Forum Trade Ministers mandated the Forum Secretariat to work with other regional organisations on the development of legal mechanisms for protection of traditional knowledge. Cooperative work with the Pacific Community (SPC) produced a regional legal framework, including a model law for the protection of traditional knowledge and cultural expressions (songs, dances, chants, art, and other forms). The model law has been endorsed by both Culture Ministers and Trade Ministers of the Forum region. Related work is ongoing, in cooperation with SPREP, to develop a framework for the protection of traditional

¹³ I am grateful to the Forum Secretariat for the information relating to the regional activities on IPR, traditional knowledge and trade related legislation.

¹⁴ Fiji, Palau, Papua New Guinea, Tonga and Vanuatu (though legislation in Tonga and Vanuatu are not yet in force).

knowledge relating to biodiversity. This work aims also to produce model provisions for member countries to consider and adopt as necessary.

Trade related legislation

The Forum Secretariat is now working to develop trade related legislation made necessary by recent regional trade integration initiatives in the region and as a result of international obligations under multilateral trade rules of the World Trade Organisation (WTO). In 2001, the region entered into the Pacific Island Countries Trade Agreement (PICTA), a free trade agreement that came into force in 2003. A separate economic cooperation agreement (the Pacific Agreement for Closer Economic Relations or PACER) was also entered into in 2001 between the Forum island countries on the one hand and Australia and NZ on the other, and came into force in 2002. PACER aims to improve trade facilitation in the smaller island countries in support of free trade under the PICTA. The legislation framework and model/s being developed will help identify areas for reform in domestic legislation or new legislation to be enacted. Legislative reforms being targeted include in particular: review of customs laws to give effect to tariff reductions; new tax systems and laws to introduce, for example, value added tax; and trade facilitation laws relating to customs (valuation), quarantine and technical standards.

Commercial and business environment

There has also been recognition that weak private sector development and a declining level of private investments are among the major challenges for many Pacific island States. While recent reform efforts in some Pacific countries have directly or indirectly attempted to address these problems to varying degrees, much remains to be done to achieve progress in developing the private sector in island countries.

Many commercial and business laws in the Pacific are outdated. They were historically patterned after laws of countries with very different institutional frameworks and capacities, and as such do not operate as intended in smaller countries with weaker institutions and do not achieve the economic objectives for which they were created. Such laws do not always provide for the constraints that are common to most island countries such as remoteness and small market size. The fear is that in an internationally competitive environment, the constraints also serve as a disincentive for foreign direct investment in light of the more attractive options available in many other countries.

To help attract foreign investment the Pacific Islands Forum Economic Ministers Meetings (FEMM) since 1999 have progressively taken steps to bring the commercial legal environment in Pacific island countries in line with modern international practices. At the 2003 FEMM, Pacific Ministers endorsed in principle a programme of technical assistance from the Asian Development Bank (ADB) that will tackle the task. The programme illustrates importance of careful planning, and the value of regional effort.

The programme aims to improve the legal business environment in the Pacific islands to support the development of a strong and dynamic private sector, including improved corporate and public governance, and increased productivity and investment. A

necessary first step is to reform the legal and regulatory framework in individual countries in support of private sector development.

The methodology and activities of the technical assistance programme are comprehensive, and are to be carried out in two phases. The first will produce a detailed diagnostic study of the key legal aspects of the business environment (identification of key impediments to private sector development, analysis of legal roots of identified issues and supporting institutions, options for reform); and a recommended package of legal reforms (new laws and regulations, revisions to current laws and regulations, and the repeal of inappropriate laws and regulations) submitted to the Government for action. The second phase will complete the implementation of a selected set of key reform measures recommended in the first phase.

Additionally, there will be a regional workshop involving relevant stakeholders from the country under study, as well as representatives from all other Pacific island countries. The Forum Secretariat will play an essential coordinating role. The workshop will enable participants to deepen their understanding of, and capacity to analyse, the economic incentives underlying successful legal institution; exchange views on progress made in the implementation of the programme, and the lessons learned during project implementation; and identify related economic problem areas that require legal reforms, and determine a reform agenda for the future.

A principal aspect of implementation, namely, the cost and financing of the programme will be borne by grants from the ADB, although each participating country will need to contribute to financing of the implementation phase.

Requirements of international community

As noted, significant activities requiring the change and reform of laws are taking place in the Pacific as a result of the influence or pressure from the international community. There is no shortage of law reform and law making requirements in this area. Today, Pacific countries are facing severe challenge in drafting and organizing all manner of legislation on issues relating to international terrorism, money laundering, drug smuggling, small arms weaponry¹⁵, and other issues, arising from international commitments and requests from a variety of sources including the United Nations, World Bank and IMF, and the Financial Action Task Force. It would be fair to say that the regional legislative agenda has grown to a point that the external demands are becoming quite onerous for member States, especially the smaller ones. Although the demands for the reform and for new laws are often accompanied by offers of expert advice and legislative drafting assistance, the additional requirements for training of counter-part personnel and of monitoring and implementation measures over an extended period of time do add to the burden.

¹⁵ Philip Alpers and Conor Twyford, *Small Arms in the Pacific*, 2003, *Occasional Paper No.8, Small Arms Survey*; Tuiloma Neroni Slade, *The Magnitude and Scope of Illicit Trafficking in Small Arms and Light Weapons: The Experience of the Pacific Islands Forum Region*, 2001, a paper to the UN Asia Pacific Regional Disarmament Conference, Wellington, NZ

Security Council and terrorism

There is special significance in the requirements of Resolution 1373¹⁶ of the Security Council which established the Counter Terrorism Committee (CTC). Following the terrorist attacks on the United States on 11 September 2001, the Security Council adopted resolution 1373 which declares international terrorism a threat to “international peace and security”. The Security Council took this action under Chapter VII of the UN Charter, and resolution 1373 therefore imposes binding obligations on all member States of the United Nations. The involvement of the Security Council in the counterterrorism effort of the UN is a new development. Hitherto international terrorism was largely in the hands of the General Assembly through the work of its Sixth (Legal) Committee. Since 2000 the Sixth Committee had been trying to develop a comprehensive convention on international terrorism.

Resolution 1373 does not attempt to define terrorism. But it requires all States to take steps to combat terrorism and to become a party to the twelve international terrorism conventions and protocols as soon as possible. In doing so it creates uniform obligations for all 191 member States of the United Nations, thus going beyond the existing international conventions and protocols binding only those States that are parties to them. This is an unprecedented step for the Security Council.

While Resolution 1373 is directed at terrorist financing, it also requires or urges other steps by States against terrorists, their organisations and supporters. States are urged, for example, to update laws and to bring terrorists to justice, improve border security and control traffic in arms, cooperate and exchange information with other States concerning terrorists and provide judicial assistance to other States in criminal proceeding. The work programme of the CTC is in three stages: first, to ensure legislation in member States are in place covering all aspects of the resolution, and there is a process for adhering to the twelve international terrorism conventions and protocols; second, a focus on the executive machinery to mount and coordinate counterterrorism activity, and cooperation on bilateral, regional and international levels; and third, focus on the implementation of the legislation and executive machinery to bring terrorists and their supporters to justice. Extensive consultations had been carried out by the CTC or on its behalf with UN and other international organisations and with regional and sub-regional organisations, including those of the Pacific, to ensure their assistance and cooperation.

Resolution 1373 requires that all States shall criminalise the willful financing of terrorist acts and ensure that terrorist acts are established as serious criminal offences in their own domestic law. Steps taken by each member State to implement Resolution 1373 are required to be reported to the CTC. The report, in a stipulated format, is assessed and commented on by the CTC, often with requests by the Committee for more specific information or further action.

As of April 2003, the CTC had received reports covering the first phase from all 191 member States, except three (two small African States, and one small Pacific island State). The reports are varied in both quality and length, largely reflecting the different

¹⁶ Security Council Res. 1373, 28 September 2001.

levels of capacity and resources available to States. Since then a large number of States, including many of the Pacific States, have submitted their second reports.

Samoa and Security Council Resolution 1373

Samoa has submitted two reports to the CTC. Its experience would illustrate, at least for a small country, the immense amount of work that had to be undertaken to respond to Resolution 1373, and the demands for international cooperation against terrorism. In a short space of time, Samoa became a party to one of the international conventions (it was already a party to several others, and considering adherence to others); enacted the Prevention and Suppression of Terrorism Act 2002; and prepared a range of amending legislation in respect of related subjects like the proceeds of crime, mutual assistance in criminal matters and extradition. New authorities (a financial intelligence unit, and a transnational crime unit) and coordinating committees involving senior personnel of many Ministries were established, and steps were taken to set up a computerised database and other electronic processes for the Government customs and immigration services.

Implications of Security Council counter-terrorism action

With the full authority of Chapter VII of the UN Charter the Security Council has acted as though it has power to legislate, or at least to set the framework by which members of the United Nations are required to legislate, certain criminal laws. This action of the Security Council was not viewed by States as controversial, and probably to be expected given the horrendous circumstances of September 11. It helped that the Security Council had avoided controversy by not defining terrorism. Also, the killing of innocent non-combatants, hostage-taking and other acts generally considered terrorist, along with aiding and abetting them with financing, were already criminal in the laws of almost all States. The real question was, and remains, whether these laws, especially the laws against the financing of terrorist acts, can or will be effectively enforced, either within national systems or through international cooperation.

Already there is debate whether the Security Council action under Resolution 1373 amounts to the creation of a new international crime of terrorism. It is an interesting proposition. It does seem to be the case that the framework for Resolution 1373 legislation has been determined by the CTC of the Security Council, and that there appears to be broad acceptance of this. Whether, however, there is broad acceptance of a new international crime of terrorism might be another matter. In the negotiations of the Rome Statute that established the International Criminal Court (ICC) a significant number of States pushed for terrorism (and also drug trafficking) to be included as a crime within the jurisdiction of the ICC. However, there was no consensus, in part because there was no suggestion that terrorism had become established in international customary law as an international crime. In any event, as has been pointed out,¹⁷ it would be a major departure for the Security Council if compared to other Chapter VII actions as, for instance, in the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). When the Security Council created the ICTY and ICTR it used its Chapter VII authority to restore and maintain international

¹⁷ Kenneth S. Gallant, Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, *Villanova Law Review*, 2003, vol. 48, No.3, 793

peace and security by giving the Tribunals jurisdictions over crimes that it believed already existed in international customary law.

How the Security Council will act in the future, and how it will act in the further implementation of Resolution 1373 must remain to be seen. It is clear though that the Security Council had acted as though it does have legislative authority to create criminal law, if the creation of that law would lead to restoration and maintenance of international peace and security.

Implications for the reform of domestic law

The Security Council has a powerful mandate and the weight and binding authority of Chapter VII behind it. So far, it seems to have received overwhelming support from virtually all member States. How long this cooperative spirit will last and whether the CTC can sustain it, are the big challenges. The critical point may well be crossed as the CTC shifts focus from foundational arrangements (of domestic legislation and executive machinery in place in national systems) to monitoring what domestic action States are actually taking to combat terrorism (whether States are bringing terrorists to justice or providing safe havens).

There are other concerns: for instance, that the implementation of Resolution 1373 should not be used as an excuse to infringe on human rights. Successive UN High Commissioners (Mary Robinson and the late Sergio Vieira de Mello¹⁸) have urged the CTC to appoint an expert on human rights to assume responsibility for monitoring State's compliance with human rights norms in the area of counterterrorism.

Whatever the implications for law creation at the international level, what is clear about Resolution 1373 is its direct and widespread impact on law making at the domestic level. The influence of foreign and international rules and models on domestic systems has been a growing phenomenon and certainly is not new. However, by any measure, the use of Chapter VII powers in this instance and the import of the actions taken by and through the CTC to implement Resolution 1373 are quite unprecedented. Domestic policy and legislative changes are being sought to conform to a pre-determine framework and taken under circumstances that may be viewed as under direct influence, if not pressure, of a powerful Security Council (and, yes, a less-than-fully-representative Security Council at that) or through other influential Governments or regional authorities, and often under stipulated or narrow time frames. In these circumstances, it may well be asked whether the law making power has not truly moved further away from the State. From the law reform perspective, it may also be asked whether the process of law making risks losing some of the valued traditions and requirement for due time for reflection, proper study and for domestic debate.

However, Resolution 1373 needs also to be seen in the light of the horrors of September 11 and the enormous challenge of responding to the immediate threat of widespread terrorism in the environment of a globalised world. It was essential for the international community to be united in its response, and to do so as promptly and as effectively as it

¹⁸ Statement to the Counter-Terrorism Committee of the Security Council, 21 October 2002.

could. In that sense the experience of Resolution 1373 is an illustration of the motivation of the international community and of its determination and the potential of its ability to act together in close cooperation and in coordinated fashion in the face of a common global challenge.

Effective international cooperation is vital to the implementation and realisation of international objectives. I should like to concentrate my final remarks on the International Criminal Court, paying particular attention to some of the issues that would be required of member States pursuant to the regime of cooperation and judicial assistance under the ICC Statute and through domestic implementation legislation.

International Criminal Court

The establishment of the International Criminal Court (ICC) is part of a broader momentum in the 1990s towards the revival and development of international criminal law. Its existence today represents the acknowledgment of the need for international criminal justice and for a permanent Court to administer it.

The Court was created under the Rome Statute of 1998 which came into effect on 1 July 2002. To date the Statute has been signed by 139 countries and ratified by 92 six of which are from the Pacific: Australia, Fiji, Marshall Islands, Nauru, New Zealand and Samoa.

The Court's jurisdiction is limited to the crimes of genocide, crimes against humanity and war crimes. When ongoing work has been completed and there is agreement on a definition of aggression, the Court will also have jurisdiction over the crime of aggression. The threshold is high, for all these are the most serious crimes of concern to the international community. They are crimes acknowledged in the Statute as having deeply shocked the conscience of humanity and which threaten the peace, security and well-being of the world, and must not go unpunished. As declared in the Preamble to the Statute, the States Parties have affirmed their determination to "put an end to impunity and thus to contribute to the prevention of such crimes." The jurisdiction of the Court extends only to natural persons, who must be over 18 years at the time of the alleged commission of a crime, and not States or corporations.

The Court's jurisdiction is complementary to that of national courts, and is structured on the premise acknowledged in the Statute of the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The complementarity principle ensures the primacy of national systems of law and of national courts, and would mean that the national court has the primary responsibility for the prosecution of crimes that fall within the jurisdiction of the ICC. The ICC will act only if the national court is unable or unwilling to act to bring transgressors to justice. The ICC is therefore a court not of first, but of last resort.

State cooperation

The ICC needs to rely substantially on the willingness of States and of international organisations to provide support and to assist it in its work. This is especially true with respect to information and material of importance and relevance to the investigation of crimes and the prosecution of cases, and the arrest and surrender of persons alleged to have committed crimes under the ICC Statute.

Unlike the national courts, the ICC does not have at its disposal the powers and apparatus of the State legal and law enforcement system to enforce its orders and decisions. The assistance of States parties, as well as of other States and international organisations, will therefore be of the utmost importance to the proper functioning of the ICC.

The regime of international cooperation and judicial assistance under the ICC Statute was carefully worked out. It is one of the most important and complex parts of the Statute in its legal structure and implications, and for the interaction between the Court and States. There is a general requirement for the States Parties, in accordance with the Statute, to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. This provision is fundamental and would need to be given full and practical effect. Equivocation will seriously compromise the ability of the Court to achieve what it is supposed to achieve. It is therefore vital that the Court be accorded the most effective cooperation and assistance possible.

One concrete measure of support now being widely advocated, by major Governments as by the non governmental community, is the enactment of clear and strong implementing legislation among member States. Implementing legislation is required to set the domestic legal and procedural framework for carrying out the State's cooperation obligations and to deal with important practical issues, including: the definition and adoption of ICC crimes into domestic law; arrest and surrender of persons; and assistance and cooperation in the investigation of offences. A number of key States in Europe and in the Commonwealth of Nations, including Australia¹⁹ and New Zealand²⁰ and have enacted such legislation. However, many more of the States Parties, including the small island States of the Pacific, would need to undertake this task. The task is not an easy one, judging by the models that now exist. The legislation in both Australia and New Zealand appear quite comprehensive and cover a range of matters that enable and facilitate assistance and cooperation with the ICC, as well as substantive criminal law and constitutional law issues. With the necessary adaptations they could be models for others to consider.

Concluding thoughts

Of necessity this is a selective and generalised survey of the potential for law reform and related activities in the Pacific area. But it is one that offers the basis for some general thoughts.

¹⁹ International Criminal Court Act 2002 (ICC Act) and International Criminal Court (Consequential Amendments) Act 2002; see also Gillian Triggs, Implementation of the Rome Statute for the International Criminal Court: a quiet revolution in Australian law, 2003, a paper at the Twilight Seminar, Institute for Comparative and International Law, University of Melbourne.

²⁰ International Crimes and International Criminal Court Act 2000

The discrepancy in available capacities and resources is relative, for there is concern on both sides of the fence about the modesty of resources being invested in law reform in all Pacific countries. The absence of institutions and resources in small island States is not a total dilemma, for there are other available options and also opportunities for cooperation and assistance. There is much to learn from the larger and established institutions on the fundamentals: in particular, of the need for thorough research and consultations; the exposure to the ideas of experts and others; and of engaging the general public. There are many more of the educated population in all island countries today who need to be engaged on many contemporary issues, including those of freedom of expression, youth, gender and the environment. The absence of resources does not mean the acceptance of tokenism of ill-funded, under-staff make-do arrangements.

Nonetheless, the circumstances of the smaller countries (unlikely to be altered in any dramatic form in the near future) are such that the consideration of new forms of partnerships might be warranted. Instead of two small jurisdictions each undertaking a major programme of, say, implementation legislation to support the ICC, might it be more effective, cost and time-wise, for both jurisdictions, especially if neighboring countries, to share the same programme (clearly with room for adaptation)? Might some of the law reform work of the island States, or some specific aspect of it, from time to time be 'contracted' out to one of the more established law reform commissions? Perhaps some capacity for law reform related research or training might be considered for the University of the South Pacific, possibly in connection with the regional work on the development of model legislation.

It is difficult to assess from my distance whether the law reform authorities of the Pacific, including Australia and New Zealand, are engaged or at least contributing to the considerable amount of law creation work being undertaken in the region. Their experience and expertise would be of immense value to the regional effort, quite apart from the opportunities for professional networking, and it would seem most desirable that they be involved. A laudable feature of the regional legislative work is the ready recognition being given to the need for clear and appropriate legislative frameworks to underpin the agenda for regional development. The engagement of institutional law reform machinery can only add to strengthening the recognition given to the role of law in development.

It is understandable that the law development and legislative work of the region is being centred around the issues of immediate concerns for regional security, the environment, economic development and trade. And it may be that there are mandate-limits to the involvement of the law reform agencies. Yet, there are other broader issues such as international terrorism and support for the international criminal justice system that are either now on the Pacific regional agenda, or potentially for the regional agenda, that would seem to warrant the attention of all regional law reform agencies.

Modernisation of the law is a fundamental operational principle for law reform. The Pacific constitutions need to be looked at in this connection, in part to check on the

progressive development of particular constitutional provisions like those relating to the electorate and to human rights. The desire for improved provisions for the better expression and protection of human rights has been raised from time to time on a Pacific-wide basis, and will continue to be raised. It is a matter that calls for attention, clearly with the most careful regard to the cultural sensitivities and the traditional nature of Pacific societies, but also with regard to the fact that the Pacific is one of those few areas of the world not yet governed by any international or regional framework instrument or arrangement on human and cultural rights. There cannot be any question today as to the place of international standards in any process of modernisation. In a highly internationalised world, it is the way of our time.
