

BEYOND THE SOUTHERN CROSS — INTERNATIONAL COUNTER- TERRORISM INITIATIVES FROM A PACIFIC PERSPECTIVE

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La tragédie du 11 septembre 2001 porte témoignage de l'importance qu'il convient d'accorder à la lutte contre le terrorisme, et l'urgence qui s'y attache puisqu'il s'agit maintenant d'une priorité devenue l'affaire de tous. En effet, et c'est là sans doute l'une des conséquences du phénomène de la mondialisation, plus aucun pays ne peut aujourd'hui prétendre, ne pas être concerné à des degrés divers.

Cependant, l'auteur souligne comme l'avait fait Mme Hélène Clark, Premier ministre de la Nouvelle-Zélande lors de la cérémonie d'ouverture de la Table Ronde du Pacifique sur le Contre-terrorisme (Pacific Roundtable on Counter-Terrorism) qui s'est tenue les 10 et 14 mai 2004 à Wellington, que l'adoption des règles tendant à lutter contre le terrorisme et leur mise en œuvre, restent en pratique extrêmement difficiles pour les petits Etats insulaires du Pacifique.

L'explication de ce phénomène tient à d'évidentes difficultés financières que rencontrent ces Etats mais aussi au manque de moyens humains disponibles.

En cela, leur situation reste, au sein de la communauté internationale, quelque peu particulière de telle sorte que des mesures de coercition qui pourraient être prises à leur encontre par les principales puissances mondiales pour les contraindre à mettre en œuvre des pratiques de lutte contre le terrorisme, peuvent apparaître totalement décalées.

Par ailleurs, si la communauté internationale ignore les problèmes internes que connaissent les petits Etats insulaires du Pacifique, il ne fait alors pas de doute que l'instabilité politique prédominera dans cette région.

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Cet article met l'accent sur le devoir qui incombe aux organismes internationaux qui chaque fois qu'ils sont en possession d'informations sur les particularités et les spécificités inhérentes à ces petits Etats, de les communiquer aux nations les plus puissantes. Ce ne sera qu'une fois ce préalable satisfait que la communauté internationale pourra alors efficacement envisager quelles mesures pratiques peuvent être mises en œuvre pour contraindre le cas échéant les petits Etats insulaires de satisfaire à leurs obligations internationales.

À l'appui de son exposé, l'auteur rappelle quelques exemples de lois et d'initiatives locales qui ont été mises en œuvre pour lutter contre le terrorisme dans le Pacifique. Elle démontre également que quand bien même quelques petits Etats du Pacifique ont introduit un arsenal juridique pour lutter contre le terrorisme, il reste toujours nécessaire de leur apporter aide et assistance pour qu'ils puissent réellement se conformer aux obligations internationales qui en découlent.

En guise de conclusion, l'auteur souligne que si beaucoup de choses ont d'ores et déjà été entreprises dans les Etats du Pacifique, il n'en reste cependant pas moins vrai que la communauté internationale doit encore faire beaucoup de choses pour eux.

The tragedy of 9/11 proved that terrorism has to be countered as a matter of priority. The impact of globalisation has meant that no country can refrain from addressing the issue. However, this paper shows that adopting international incentives to counter terrorism can be very difficult for small developing Pacific Islands due to their lack of economic and human resources. Therefore, particular heed must be paid to their unique position.

Coercion from world powers must be discouraged. If the international community ignore the islands' domestic problems, then political instability will dominate the region. This paper shows that regional bodies with knowledge of island peculiarities should present these issues to the stronger nations. Only then can the international community take action in addressing those issues.

Particular examples of legislation implemented to counter terrorism in the Pacific are examined to demonstrate the local initiatives taken. This paper finds that although various island states in the Pacific have introduced counter-terrorism laws, there is still a need of support and assistance for them to fully conform to their international obligations. This paper concludes that while there is still much work to be done by Pacific Islands, equally there remains much to be done for them.

I INTRODUCTION

The traditional image of many Pacific Island Countries (PIC) has been one of beautiful islands, peaceful people, and a benign environment.¹ However, as globalisation has increased, these islands

1 Opening Address to Pacific Roundtable on Counter-Terrorism by Rt Hon Helen Clark <<http://www.beehive.govt.nz>> (last accessed 13 August 2005). Note that the focus of this paper is to focus on the smaller developing countries of the South Pacific.

have been confronted with new fears - including terrorism. Yet, a number of commentators have criticised fears of a terrorist threat in the Pacific as being rather overstated.² It has been argued that such threats are profoundly unlikely in small, predominantly Christian countries where everyone knows exactly what their neighbour does.³ Nevertheless, following the events of 9/11 the international community has voiced its objective that all nations to be united in common endeavour to combat terror internationally, collectively and domestically. This voice of the new millennium promises 'security' and 'prosperity'. However, the extent of sacrifice necessary to reap such benefits by small PIC or whether the states are outside the scope of developing any reciprocal relationship with the international community remains doubtful. Through international unity in support of combating terror, do the obligations of these small PIC now extend 'beyond the Southern Cross' to join an overwhelming global enterprise?

This paper will examine the implementation of counter-terrorism legislation by PIC and their responses to international counter-terrorism demands. The attributes of PIC give rise to issues and circumstances that many developed nations do not encounter. Not only are many of them constantly facing financial struggles and limited resources, but also to a large extent, their legislation in the past has been heavily influenced by local circumstances. International objectives have rarely been an issue. This article therefore emphasises the practical, political, and legal implications faced by these islands as a result of international initiatives to counter terrorism.

The paper will first consider whether PIC are a potential target for terrorism. This issue involves a discussion of globalisation and its particular impacts and ramifications on small developing PIC. Second, the paper addresses the impact of international obligations and collective commitments on the response by PIC to combat terror. The focus will be on a number of Resolutions that have been adopted by the United Nations (UN). At the regional level, reactions from the Pacific Islands Forum (Forum) will be noted. Assistance from New Zealand to enable developing islands to effectively comply with their obligations is examined. Third, how governments are beginning to counter terrorism on the domestic front will be discussed in detail through particular examples – Samoa, Kiribati, Niue, and Tokelau.⁴ The legislation and legal systems of these islands have been chosen for analysis to provide comparative data. While these islands share many common characteristics, there are few differences that affect the initiatives they have independently taken to counter terrorism. For instance Samoa is considered the larger, and the more self-sufficient of the islands discussed. Kiribati, on the other hand, has introduced counter-terrorism legislation but faces struggles in giving effect to it. Its position, heavily reliant on aid and outside support, can be

2 Christopher Richer "Security Cooperation in the South Pacific: Building on Biketawa" (2004) 8 JSPL 1, 6.

3 Richer, above n 2, 6.

4 The study is limited also for the fact that there are not many examples of counter-terrorism legislation in the developing Pacific region.

compared to that of Samoa.⁵ Finally, Niue and Tokelau differ from their neighbours. Unlike Samoa and Kiribati, they are not UN members. Therefore, their limited position in the international community makes for an interesting discussion. This paper concludes by summarising the positive and negative aspects of small islands in the Pacific countering terrorism, and determines whether the sacrifices for international protection exceed their capacity.

II GLOBALISATION AND SMALL PIC

The preliminary question is whether PIC are immune from terrorist threats. The trend towards globalisation would suggest the answer is no.

Globalisation is "a process which projects social, political and economic activities across frontiers, and from one region to another."⁶ International organisations such as the World Trade Organisation and the UN are working to achieve the attractive benefits that globalisation offers such as security and prosperity. Not only world powers, but also developing countries and small islands have to cooperate to make global objectives a reality. Consequently, some of the PIC have been playing an increasingly important role in UN proceedings and all independent PIC are now UN members.⁷

The concern arises, however, that the impacts of globalisation on small islands are different to those on larger nations. It is often believed that although domestic sovereignty is limited because of globalisation, most developed countries benefit from the reciprocity of trade and diplomatic relations. However, it may be queried whether the international benefits could ever outweigh the disadvantages when it comes to small developing islands. The international community has arguably been biased by the demands from the more powerful nations. Unfortunately, these larger nations often have limited knowledge of the local conditions faced by small PIC. Therefore, unless the superpowers aim to work with the PIC, as opposed to for them, the needs of the islands remain substantially ignored, resulting in intense and "ubiquitous political impacts."⁸

A Consequences

Various unique complications for the weaker PIC arise from globalisation, especially after 9/11. First, financial pressures to conform to international expectations strain their economies and inhibit

5 Samoa is richer in necessary human resources than Kiribati.

6 Globalisation, Governance and Guns <<http://taylorandfrancis.metapress.com/media/3D325D0E12CQYGA14FTX/Contributions/V/N/J/VNJDAKA2R8PKDNR5.pdf>> (last accessed 24 July 2005). For further discussion on globalisation see also Maryann Cusimano Love "Globalisation, Ethics, and the War on Terrorism" (2002) 16 *Notre Dame J.L. Ethics & Pub.Pol'y* 65,66.

7 Michael Powles "Making Waves in the Big Lagoon: The Influence of Pacific Island Forum Countries in the United Nations" (2002) 2 *Revue Juridique Polynésienne* 59.

8 Jeff Archer "Globalisation and the Alleged Demise of the Sovereign State" (2004) 8 *JSPL* 1.

development in local governance systems. The islands are forced to depend on stronger nations for assistance. While assistance and funding may be freely offered, small islands may be in a position where assistance is not a choice but an offer that cannot be refused. Further, for the sake of globalisation, PIC may be losing their sovereignty, not for reciprocity, but by becoming simply prone to more "bureaucratic bungling."⁹ There is also the argument made that in regard to small developing islands, the notion of 'terrorism' may be a convenient "mask for [both Australia and New Zealand] to increase a military role."¹⁰ Third, it is arguable that responding to counter-terrorism objectives inhibits the development of policy dealing with environmental vulnerabilities. Many small PIC have considered the threat of terrorism to be of little relevance in comparison to the frequent occurrences of local threats of nature such as hurricanes and cyclones.¹¹ Consequently, it is arguable that the islands should be devoting their time and resources to combat economic and environment security concerns and improve responses to local emergencies, while leaving terrorism off the agenda.¹² Finally, many small Pacific Islands would seem a last resort for a terrorist group, as there is no easy escape and very limited technological resources.¹³ Hence, travel and communication services would be cumbersome for a terrorist network.

Considering these issues, it is not unreasonable to draw the conclusion that globalisation has the potential to increase the financial and political vulnerabilities of the islands. It is arguable that the trend to globalisation could result in the long-term dependency of PIC on larger nations. As one writer put it, following 9/11, "unhappily, the Pacific Islands region may be about to be nudged a little more away from the periphery and a little more toward the centre of a new, and more dangerous, global system."¹⁴ While globalisation is not a new concept, the impact today on small PIC is that any possible local benefit is becoming more remote.

B Effects

Despite its disadvantages, globalisation is a reality. It is now acknowledged that the actions of one Pacific Island can never be truly localised, but can affect other nations, especially other islands in geographic proximity. The New Zealand Ministry of Foreign Affairs and Trade have predicted

9 Globalisation, Governance and Guns <<http://taylorandfrancis.metapress.com/media/3D325D0E12CQYGA14FTX/Contributions/V/N/J/VNJDAKA2R8PKDNR5.pdf>> (last accessed 24 July 2005).

10 Peter Cozens *Engaging Oceania with Pacific Asia* (Centre for Strategic Studies: New Zealand, Wellington, 2004) 35.

11 Cozens, above n 10, 35.

12 Cozens, above n 10, 35.

13 Cozens, above n 10, 36.

14 Richard Herr "The Pacific Islands Region in the Post-Cold War Order: Some Thoughts from a Decade Later" (2002) 2 *Revue Juridique Polynésienne* 47, 57.

that terrorists could target PIC as "staging points to commit crimes in other parts of the world."¹⁵ This is particularly relevant after Australia's support of the United States of America's invasion of Iraq. There have been concerns that a weak state might provide a surrogate target for a terrorist group whose 'real' target is the island state's friend or ally - that could "rope the Pacific Island region into the conflict."¹⁶ Further, pressure to conform to global objectives is evident as serious risks to trade and tourism arise where there is non-compliance with international transport security measures.¹⁷ This can be seen particularly with the United States enforcement of new maritime security procedures, mandated by the International Maritime Organisation under amendments to the International Convention for Safety of Life at Sea. The new procedures greatly restrict the United States dealing with trade ships from unsecured ports.¹⁸

For the reasons mentioned it could be concluded that no nation can escape the obligations and pressures of globalisation. Therefore, governmental response and legislative action are a corollary to global demands. However, lack of response in the past to counter terrorism has left many islands in the Pacific region a potential target. It has been argued that the PIC region has "been ideal for the growth of trans-national crime, money laundering, illegal immigration, arms smuggling, drug trafficking, and of course, terrorism."¹⁹ The small islands are, therefore, in need of all-new legislative action plans as well as outside assistance.²⁰ Island countries with a capacity to assist others recognise their special responsibilities in this regard.²¹ Perhaps PIC are beginning to accept the notion that prevention is better than cure when it comes to combating terrorism. If these islands are targets, tighter customs and criminalisation of terrorism are but reasonable expectations of them.

III RESPONSES BY PIC

Despite the political and practical pressure arising from globalisation, the question must now be addressed, at what level do legal obligations arise to counter terrorism. Are PIC committed to international obligations imposed by the UN Charter and/or are they obliged to conform to any regional agreement that requires the implementation of counter-terrorism legislation? The existence

15 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005). Perhaps the 1985 Rainbow Warrior incident continues as a reminder for New Zealand that no nation can be truly free from security threats.

16 Cozens, above n 8, 36.

17 Thirty-Fifth Pacific Islands Forum <http://www.forumsec.org.fj/news/2004/August/Aug_09.htm> (last accessed 24 July 2005). See discussion under Niue.

18 Example of how weaker islands are detrimentally affected is discussed later in this paper. See 'Niue'.

19 Richer, above n 2, 2.

20 Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

21 This will be discussed further under 'Assistance'. See: Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

of these two channels of influence in the Pacific region, as well as the advantages and disadvantages that flow from them will now be addressed. An examination of assistance from the international community to help islands respond to their obligations will then follow.

A Commitments and Obligations

1 International Responses – The United Nations

The United Nations plays an important role in strengthening legal approaches to terrorism. Accordingly, it has adopted various resolutions condemning acts of terrorism.²²

The UN was founded in 1945 following tragic world war events. It was seen as a necessary move to restrain world violence. Its members adopted the United Nations Charter (the Charter) in the same year. One of the purposes of the Charter is to maintain peace and security.²³

The Security Council (SC) and the General Assembly (GA) are two of the principal organs of the UN. The GA consists of all member states and makes non-binding decisions on a wide range of issues, while the SC's competence is limited to the maintenance of peace and security, yet it can make binding decisions. The SC Resolutions that followed 9/11 are binding on all UN members.

Although terrorism has always existed, it has played its part dramatically on the world stage since 9/11. Terrorism, hijacking, and external interference with difficult internal problems are today seen as the most likely immediate security threat.²⁴ Consequently, the SC adopted Resolution 1535 on 26 March 2004. This Resolution reaffirms other Resolutions such as Resolutions 1373, 1377, and 1456 concerning threats to international peace and security caused by terrorism. Such Resolutions play a pivotal role in the international cooperation in the prevention of terrorism.

First, SC Resolution 1373 of 28 September 2001 calls on states to work together to combat terrorism.²⁵ This Resolution is one of the most comprehensive and far-reaching resolutions adopted in the history of the SC.²⁶ Generally, the Resolution reflects recognition of terrorism as a global problem, which if it is to be eliminated, requires cooperative action at the national, regional, and international levels.²⁷ Particularly relevant is that it obliges UN members to create a prescribed legal

22 United Nations Involvement <<http://www.globalpolicy.org/empire/terrorwar/un/unidex.htm>> (last accessed 11 August 2005).

23 United Nations Charter (24 October 1945), art 1(1).

24 Cozens, above n 10, 35.

25 United Nations Security Council Resolution 1373 (28 September 2001) S/RES/1373 (2001).

26 Curtis Ward "Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council" (December 2003) 8 JCSL 289, 295.

27 United Nations Security Council Resolution 1373 (28 September 2001) S/RES/1373 (2001).

framework in their national laws and institutions to combat terrorism.²⁸ Even though "there is no clear definition of terrorism, each country must decide within its legislation on the underlying criminal acts to which Resolution 1373 is applicable."²⁹ Moreover it compels states to refrain from providing financial and logistical support to terrorist networks.³⁰ States are required to:³¹

criminalise the provision and collection of funds for terrorism, and must have appropriate mechanisms for the expeditious freezing of funds and assets related to terrorist activities. States must also prohibit anyone within their territories, directly or indirectly, from making funds available for the benefit of persons who commit or attempt to commit or otherwise facilitate the commission of acts of terrorism.

Furthermore, Resolution 1373 creates a committee of the Council [the Counter-Terrorism Committee (CTC)] to monitor state action in conformity with the Resolution.³² States are "required to report on actions taken by them to implement the measures mandated by Resolution 1373."³³ "In compiling their reports, states are asked to demonstrate, concisely and clearly, the legislative and executive measures they have in place or contemplate to give effect to Resolution 1373." Consequently, this can be an onerous responsibility especially for states with limited finances and resources like the PIC.³⁴

SC Resolution 1377 then followed on 12 November 2001 as a result of a meeting at the level of foreign ministers. At the meeting, the SC unanimously adopted this new Resolution to call on countries to take urgent steps to put into effect SC Resolution 1373.³⁵ It further declared that acts of international terrorism constitute one of the most serious threats to international peace and security in the 21st century.³⁶

SC Resolution 1456 was adopted on 20 January 2003. It urges members to become party to all relevant international conventions and protocols relating to terrorism, to assist each other to

28 Ward, above n 26, 292.

29 Ward, above n 26, 293.

30 United Nations Involvement <<http://www.globalpolicy.org/empire/terrorwar/un/unindex.htm>> (last accessed 11 August 2005).

31 Ward, above n 26, 293.

32 United Nations Involvement <<http://www.globalpolicy.org/empire/terrorwar/un/unindex.htm>> (last accessed 11 August 2005).

33 Ward, above n 26, 295.

34 Ward, above n 26, 295.

35 United Nations Security Council Resolution 1377 (12 November 2001) S/RES/1377 (2001).

36 United Nations Security Council Resolution 1377 (12 November 2001) S/RES/1377 (2001).

continue to combat terror, and to cooperate closely to implement the sanctions against terrorists and their associates.³⁷

(a) Impact of the United Nations

While SC Resolutions are binding, they are only enforceable at the international level.³⁸ Nevertheless, the UN remains an effective regime to counter terrorism as serious ramifications can arise from a member's non-compliance.³⁹ Any refusal by a nation to give effect to Resolution 1373 would become evident through the reporting required by members to the CTC. So far no such refusal has occurred.

Further, the UN is obliged to ensure that states which are not members of the UN act in accordance with its principles so far as "may be necessary for the maintenance of international peace and security."⁴⁰ In the context of countering terrorism, it is at least arguable that this obligation could imply a duty on stronger nations to assist their neighbours who are non-UN members to give effect to Resolution 1373.⁴¹

(b) Effects on PIC

Although the obligations posed by the UN are gradually being achieved, it is not without burden. There is a degree of frustration among PIC that international counter-terrorism standard-setting fora have not sought any input from them – resulting in new counter-terrorism standards that make few, if any, allowances for the implementation challenges they face.⁴² Their limited resources have meant that many have struggled to respond to the international counter-terrorism agenda.

Therefore, because UN members are bound to give effect to SC Resolutions, it is important that the CTC consider the financial and other practical difficulties countries may face by taking a:⁴³

37 United Nations Security Council Resolution 1456 (20 January 2003) S/RES/1456 (2003).

38 Therefore there is no means to actually force a country to comply. See United Nations Charter (24 October 1945), art 2(7).

39 Such include: being expelled from the United Nations (United Nations Charter (24 October 1945), art 6), or the exercise of enforcement measures under the United Nations Charter (24 October 1945), ch VII.

40 United Nations Charter (24 October 1945), art 2(6).

41 For example NZ as a stronger nation in the Pacific has entered into an: Agreement with the United Nations Concerning the Provision of Operational Assistance to the Territories for whose International Relations New Zealand is Responsible (17 July 1970) 737 UNTS 316. It applied to the Cook Islands, Niue, and Tokelau who are not UN members. See also 'Niue' and 'Tokelau' discussed below.

42 Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

43 United Nations Security Council: "Threats to International Peace and Security Caused by Terrorist Acts" <<http://www.mft.govt.nz/speech/pastspatches/speeches2004/4mar04.htm>> (last accessed 24 July 2005).

proactive role in consultation with member states in evaluating the implementation of Security Council Resolutions 1373, focussed and directed at increasing and improving the capacity of States, particularly small island developing States, in the fight against terrorism.

However, for the needs of small Pacific Islands to be adequately addressed by the CTC, they first need to be voiced, ideally through a collective regime. A regional body – the Forum - has therefore stepped in. The UN Charter recognises and allows its members to develop regional arrangements for such purposes provided that "such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."⁴⁴

2 *Regional Responses – The Forum*

The Forum is a regional body and includes many PIC.⁴⁵ Increased security cooperation in the Pacific region was an inevitable consequence of the 9/11 tragedy. Therefore, members of this Forum have collectively condemned terrorism. It is their goal to "fight against terrorism by all means possible, consistent with human rights and the rule of law"⁴⁶ The Forum mandate extends from:⁴⁷

Regional trade and economic issues, to law enforcement and security... As a regional grouping, the Pacific Islands Forum has generally been a success, and has achieved a number of significant accomplishments in its time.

The work of the Forum to combat terror is an interesting initiative as it is committing its members to the international obligations imposed by the UN but at the regional level.⁴⁸ In their effort to give effect to SC Resolution 1373, the leaders of the Forum expressed their political commitment to global counter-terrorism efforts through the adoption of the Nasonini Declaration on Regional Security (Nasonini Declaration) in August 2002.⁴⁹ This Declaration committed Forum members to two primary goals: First, to implement UN Conventions, SC Resolutions, and Financial

44 United Nations Charter (24 October 1945), art 52 (1).

45 Conflict Prevention and the South Pacific <http://www.pcr.uu.se/publications/Wallensteen_pub/PacificConflictPrevention041213.pdf> (last accessed 24 July 2005). Members include: 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.

46 United Nations Security Council: "Threats to International Peace and Security Caused by Terrorist Acts" <<http://www.mft.govt.nz/speech/pastspeeches/speeches2004/4mar04.html>> (last accessed 24 July 2005).

47 Richer, above n 2, 2.

48 Members should agree to comply with any declarations as a matter of good faith See the Pacific Islands Forum Secretariat Vision Statement:<<http://www.forumsec.org.fj/>> (last accessed 16 February 2006).

49 Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

Task Force recommendations, and second, to have law enforcement cooperation backed by a strong common legislative base.⁵⁰

Action at the regional level actually proves to be an effective and advantageous means to combat terror as it incorporates international incentives into a realistic action plan. While the Forum urges its members to conform to the requirements of the Nasonini Declaration, they allow consideration for local circumstances and are active to respond to their difficulties through practical assistance.⁵¹ Although, like any other collective regime, enforcement of any commitment made at the regional level is difficult, it would seem ironic for a Forum member not to comply with its goals, given that any such non-compliance could jeopardise that member's access to aid.

B Assistance

The developing islands in the Pacific region have seriously limited finances and resources. Many of them are in need of special consideration when it comes to achieving international objectives. Consequently, over time, compromises have been made to enable weak islands to conform to international expectations. Evidence of such compromises will be examined through the collective work of the Forum. Following this, practical and financial support from New Zealand as a stronger neighbour in the Pacific will be addressed.

1 The Pacific Islands Forum

As a result of the Nasonini Declaration, model laws have been initiated to assist small developing Pacific Islands to implement counter-terrorism legislation. Consequently, teams of drafters have been directed to assist with adapting model laws to each Pacific region.⁵² The model laws are designed so that they may be adapted to fit the local circumstances of small developing islands. They can be tailored to each individual country, taking into account their unique needs and legal systems. However, the extent of practical benefits this regime hopes to achieve through the 'adaptability' of its model laws is subject to criticism.⁵³

Other assistance the Forum has provided includes being a spokesperson to the UN. It has observer status at the UN, thus representing the Pacific community internationally. Given many of the small developing islands in the Pacific would not otherwise be able to state their point of view and be heard, the benefits of having an 'international voice' are immense.

50 Opening Address to Pacific Roundtable on Counter-Terrorism <<http://www.beehive.govt.nz>> (last accessed 13 August 2005).

51 Such assistance includes organising funding, legal support and legal drafting assistance when new laws are necessary.

52 Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

53 This is discussed further below. See particularly Kiribati and Niue Part IV.

Finally, the Forum provides relevant training to facilitate the move to legal reform. For instance it assisted in hosting a seminar to provide education on Legislative Drafting for Anti-Money Laundering and Combating the Financing of Terrorism.⁵⁴

Despite the work thus far, countering terrorism requires on-going effort and commitment. The Forum must not stop but must continue to act and enhance its position as the "most important intergovernmental body in the region."⁵⁵ Especially after the events of 9/11, the view has strengthened that cooperative action is needed, and there is no better time to act than now.⁵⁶

2 *New Zealand*

New Zealand deserves discussion as it is one of the large and most developed nations in the Pacific and has (along with Australia)⁵⁷ taken on a protector and leadership role to many PIC.⁵⁸

New Zealand is a UN member and has ratified all twelve UN anti-terrorism Conventions.⁵⁹ New Zealand's identity in not only the international sphere, but also in the Pacific community, is constantly getting stronger.⁶⁰ New Zealand's defence strategy includes assisting in the maintenance

54 Pacific Islands Forum Group <<http://www.un.int/nauru/pifstatement18.pdf>> (last accessed 20 July 2005).

55 Richer, above n 2, 11.

56 Richer, above n 2, 11.

57 Both the United States and Australia have also provided assistance to PIC. "Along with the United States and New Zealand, Australia support will be given to the Secretariat of the Pacific Islands Forum to establish an expert working group to develop a regional framework which will include model legislation and in-country legislative drafting assistance, to deal with terrorism." Media Release 19 December 2002 Further Assistance to Combat Terrorism and Transnational Crime in Pacific Region: <http://www.ausaid.gov.au/media/release.cfm?BC=Media&ID=7304_1979_6206_812_9561> (last accessed 16 February 2006). Australia has also been a source of funding to PIC with weaker economies in efforts to combat terror. However, details of Australian and United States aid will not be discussed in this paper.

58 New Zealand's assistance to most PIC merely stems out of a moral duty rather than a legal one. However, in respect of Tokelau and Niue, the obligation (to a certain extent) is legal. As Tokelau is still currently part of NZ, NZ is legally responsible for its security. See: Agreement with the United Nations Concerning the Provision of Operational Assistance to the Territories for whose International Relations New Zealand is Responsible (17 July 1970) 737 UNTS 316. As for Niue, (although Niue is self-governing) NZ still assumes responsibility for its defence: Constitution Act 1974 (Niue), s 6.

59 A list of the 12 Conventions are set out in Appendix Two. In 2005, a new Convention (International Convention on the Suppression of Acts of Nuclear Terrorism 2005) was adopted. However, although New Zealand has signed it has not yet ratified; the Convention is not yet in force.

60 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

of security in the South Pacific, providing assistance to Pacific neighbours, and contributing global security and peacekeeping through participation in the full range of UN operations.⁶¹

Following 9/11, New Zealand has played a particularly active role in assisting Pacific Island countries increase their counter-terrorism capabilities.⁶² The New Zealand government has established various national security teams, among them a fraud team and a South and West Pacific police liaison post in Fiji. Further, the Pacific Security Fund was set up in 2003. The Fund has implemented projects in "aviation security, port and shipping security, customs processes, immigration, counter-terrorism, and legislative drafting."⁶³ New Zealand contributes NZ \$3million per year to this Fund for counter-terrorism and security related training and technical assistance projects.⁶⁴ Further, the Fund allowed New Zealand to host a Pacific Roundtable on Counter-Terrorism in 2004. This took note of the "current and imminent counter-terrorism obligations; canvassed the impediments to Pacific Island country implementation; and reviewed current and future capacity-building programmes."⁶⁵

As a further practical gesture, the New Zealand Ministry of Foreign Affairs and Trade has drawn the UN's attention to the various challenges small developing islands face when it comes to implementing new legislation and the difficulties in meeting reporting requirements of the CTC.⁶⁶ Hence, New Zealand has encouraged the UN and the CTC to find a solution to reduce the burden. Consequently, a practical option has since arisen for consideration - that is whether the load of reporting could be shared by Pacific Islands collectively through a 'regional reporting' regime.⁶⁷

New Zealand also is a member of the Forum and therefore works to support and achieve its objectives. New Zealand as a stronger nation in the Pacific has the subsidiary goal not only to

61 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

62 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

63 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

64 United Nations General Assembly 59th Session, 6th Committee, Item 148: Measures to Eliminate Terrorism <<http://www.mft.govt.nz/speech/pastspeeches/speeches2004/19oct04a.html>> (last accessed 24 July 2005).

65 United Nations General Assembly 59th Session, 6th Committee, Item 148: Measures to Eliminate Terrorism <<http://www.mft.govt.nz/speech/pastspeeches/speeches2004/19oct04a.html>> (last accessed 24 July 2005).

66 United Nations General Assembly 59th Session, 6th Committee, Item 148: Measures to Eliminate Terrorism <<http://www.mft.govt.nz/speech/pastspeeches/speeches2004/19oct04a.html>> (last accessed 24 July 2005).

67 However, a decision on whether this should be accepted has not yet been made. See: United Nations General Assembly 59th Session, 6th Committee, Item 148: Measures to Eliminate Terrorism <<http://www.mft.govt.nz/speech/pastspeeches/speeches2004/19oct04a.html>> (last accessed 24 July 2005).

accept, but also to enhance the Forum's coordination of anti-terrorism initiatives.⁶⁸ Because of its relative geographic proximity, New Zealand has been active in assisting its neighbours to increase their counter-terrorism capabilities.⁶⁹

Smaller developing islands look to New Zealand and often depend on it for both legal and financial assistance. There is therefore a question whether New Zealand is 'paying the price' of globalisation in the Pacific. The responsibility New Zealand has or feels⁷⁰ for its neighbours is perhaps placing a heavy toll on its government and economy. Yet, despite this concern, it is arguably accepted that New Zealand's interests are not at stake but rather being benefited. New Zealand's initiating support to small developing islands does not have a one-sided effect but has created a reciprocal relationship. One example of such reciprocity was confirmed in 2003, when New Zealand provided a legal drafter to assist preparation of model counter-terrorism legislation for Pacific Forum countries.⁷¹ As a result of that assistance Minister Phil Goff expressed the view that: "the more robust that border control, law enforcement and regulatory regimes are throughout the Pacific, the less likely it is that terrorist or criminal activities in the region will flow over into New Zealand."⁷² Therefore, assisting weaker neighbours to fight trans-national crime and terrorism arguably enhances New Zealand's own domestic security measures.

In conclusion, willingness by the Forum and New Zealand to provide assistance has opened the door for counter-terrorism strategies to emerge. Particularly, a web of new counter-terrorism legislation is now spinning around the globe.

IV EXAMPLES OF COUNTER-TERRORISM LEGISLATION IN PIC

Before 2002, counter-terrorism legislation was rare in the law books of PIC.⁷³ However, after 9/11 domestic requirements changed, and as discussed, countries have been urged to implement new counter-terrorism legislation due to the new Security Council Resolutions. However, it must be

68 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

69 The 'War on Terrorism' and Security Cooperation in the Pacific <<http://www.otago.ac.nz/otagofps/fps2004/pdfs/Nabers/pdf>> (last accessed 24 July 2005).

70 This feeling of responsibility could stem from the United Nations Charter (24 October 1945), art 2(6) discussed above. See 'International Responses – The United Nations'.

71 New Zealand Expertise to Help Draft PI Counter-Terrorism Legislation <<http://www.beehive.govt.nz>> (last accessed 24 July 2005).

72 New Zealand Expertise to Help Draft PI Counter-Terrorism Legislation <<http://www.beehive.govt.nz>> (last accessed 24 July 2005). Eg: New Zealand has also provided assistance to Niue in off-shore banking and immigration laws.

73 Refer 'tables' in appendix 1 and 2. Although Conventions may have been ratified before 9/11, significant response by governments to specifically counter terrorism came after 2001.

queried whether Pacific Islands have coped with the pressure to conform to change, or whether despite assistance, their governments have become entangled in legislative reform, which was unpredicted by the international community. This question should be borne in mind throughout this chapter as the legal frameworks of Samoa, Kiribati, Niue and Tokelau are considered.

Samoa, Kiribati, Niue, and Tokelau provide examples of efforts to combat terror on the domestic forefront. These islands have been chosen to provide a 'comparative' perspective. All these islands share the common goal to counter terror domestically, but they have either taken different approaches or are at different stages in the process.⁷⁴

This paper will discuss each island in turn and its efforts to combat terror. As will become apparent, all of these islands (except Tokelau) have implemented various Acts in response to counter-terrorism demands. Their legislation will be analysed to determine whether it has the potential to adequately combat terror or whether further action is necessary.

A Samoa

Samoa is an independent state in Polynesia and is a member of the UN. Samoa recognises that achieving peace and security requires cooperation and multilateral joint effort.⁷⁵ Samoa therefore believes that the UN remains uniquely suited to the pursuit and coordination of global initiatives to attain this objective.⁷⁶ As a member of the Forum, Samoa is also committed to the Nasonini Declaration. A discussion of Samoa's relevant Acts follows.⁷⁷

1 Samoa Prevention and Suppression of Terrorism Act 2002

This Act was implemented as a consequence of 9/11 and more significantly was required for Samoa, as a UN member, to give effect to SC Resolution 1373. It is "an Act to provide for the prevention and suppression of terrorism and to give effect to Samoa's international treaty obligations and for related purposes."⁷⁸

74 There are tables (see appendix 1 and 2) outlining their progress and different positions in the international community. While the primary focus of this paper is to analyse legislation implemented in the Pacific region after the 9/11 tragedy, the tables note any domestic counter-terrorism action before 2001.

75 Samoa 58th Session of the United Nations General Assembly <<http://www.un.org/webcast/ga/58/statements/samoen030926.htm>> (last accessed 11 August 2005).

76 Samoa 58th Session of the United Nations General Assembly <<http://www.un.org/webcast/ga/58/statements/samoen030926.htm>> (last accessed 11 August 2005).

77 Samoa has enacted a Money Laundering Act 2000. However, that Act was implemented before Samoa made terrorism an offence within its domestic law. While it mentions the prohibition of money laundering in regard to terrorism committed in a foreign country, it does not make it an offence in the domestic context. That shortfall has been dealt with in the next Act for discussion – the Prevention and Suppression of Terrorism Act 2002 sections 20-22.

78 Prevention and Suppression of Terrorism Act 2002 (Samoa).

The Act is divided into nine parts. First, preliminary matters are dealt with. This includes an interpretation section; it is notable that neither 'terrorist' nor 'terrorism' is defined within the interpretation section. Rather, the approach of the Act, through Parts II – VII, is to create offences associated with terrorism. These include terrorist bombing, hostage taking, crimes against internationally protected persons, unlawful seizure of an aircraft or ship, and financing of terrorist acts.⁷⁹ This is not an exhaustive list of offences. In addition, Part VIII deals with the arrest and extradition of suspected foreign terrorists.⁸⁰ Section 24 (in that Part) provides that:⁸¹

For the purposes of this Part a terrorist act shall include any offence provided for under this Act or an offence determined by the Supreme Court to be equivalent to any offence provided for under this Act.

Therefore the Court has a wider discretion to determine a terrorist act than a strict reading of the offences listed in Parts II – VII.

Part VII which deals with the financing of terrorist acts also indicates that the list of offences is not always exclusive. Section 20 makes it an offence to finance terrorist acts, which include not only acts, which constitute an offence under the Act,⁸² but it is an offence also:⁸³

[t]o carry out any other act intended to cause death or bodily injury to any person not taking an active part in the hostilities of armed conflict, where the purpose of such act, by its nature or context, is intended to intimidate a population, or to compel a State or Government or an International Organisation to do or to abstain from doing an act.

This subsection recognises that further terrorism offences exist outside those defined specifically. However, it remains unclear why the legislature would have limited the Act's application for the purposes of financing terrorism. Perhaps it could have provided a definition for 'terrorist acts' generally, in addition to those specifically set out as offences in the Act.

Samoa has not become party to all of the terrorism Conventions.⁸⁴ It is arguable that perhaps it would have been easier for Samoa to become party to them before the Act was implemented, as the relevant Conventions could then have simply been incorporated into domestic law. This would have relieved the legislature from having to enact separate definitions for all of the offences listed - terrorist-bombing, hostage taking etc. That way time and expense in drafting could have been

79 Accordingly, this Act applies (in relation to proceeds of crimes) notwithstanding the Money Laundering Act 2000 (Samoa).

80 Accordingly, this Act applies notwithstanding the Extradition Act 1974 (Samoa).

81 Prevention and Suppression of Terrorism Act 2002, s 24(2) (Samoa).

82 Prevention and Suppression of Terrorism Act 2002, s 20(1)(a) (Samoa).

83 Prevention and Suppression of Terrorism Act 2002, s 20(1)(b) (Samoa).

84 See Appendix 2 for the 12 recognised terrorism Conventions.

avoided. Further, despite the legislation reflecting many ideas included in the terrorism Conventions (which would suffice for compliance with SC Resolution 1373), further action is needed to bring Samoa as a UN member into compliance with SC Resolution 1456.

2 *Samoa Immigration Act 2004*

The Samoa Immigration Act 2004 is an Act "relating to the entry into, and presence in, and the departure and removal from Samoa of aliens and certain other persons."⁸⁵

For security and the responsibility to counter terrorism, tighter restrictions on immigration have been put in place. Most significant for the purpose of this paper, is Part 6 dealing with prohibited immigrants. It is now illegal for a person to enter or remain in Samoa if they have "been involved with the commission of an act which constitutes an offence under the Money Laundering Prevention Act 2000 or the Prevention and Suppression of Terrorism Act 2002 or like statutes."⁸⁶ Persons in breach of the Act are prohibited immigrants and the Minister has the power to order a deportation of such person.⁸⁷ Therefore this Act is solely in the interests of protecting Samoa and its people. This is a rare example of an Act relating to counter-terrorism having a significant local focus. Once deportation is ordered, Samoa is relieved from the responsibility to prosecute the offender within its borders. Further, where the operator of a ship or aircraft brings a person associated with illegal terrorism into Samoa, the Act empowers the government to demand from that operator costs and expenses sufficient to deport the prohibited immigrant.⁸⁸ Therefore, Samoa is also relieved of financial detriment.

3 *Future Counter-Terrorism Objectives*

In 2003, Samoa participated in a UN meeting to discuss Samoa's position in regard to additional strategies to combat terror collectively and domestically through further legislation. The Prime Minister and Minister of Foreign Affairs and Trade of Samoa at this meeting, expressed Samoa's continuing commitment to reform and modernise its legal system to support international objectives:⁸⁹

States must be determined in their national and collective efforts to combat terrorism in all its forms. For Samoa, I reaffirm our strong support for the relevant Security Council resolutions against terrorism. These resolutions provide clear signal of our determination to suppress terrorist activities, including

85 Immigration Act 2004 (Samoa).

86 Immigration Act 2004, s 30(1)(h) (Samoa).

87 Immigration Act 2004, s 32 (Samoa).

88 Immigration Act 2004, s 31(3) (Samoa).

89 Samoa 58th Session of the United Nations General Assembly <<http://www.un.org/webcast/ga/58/statements/samoen030926.htm>> (last accessed 11 August 2005).

training, international movement and financing. In this area, Samoa continues to align its domestic policies and legislation with the work of the Counter Terrorism Committee, as well as participate actively in the regional security measures undertaken in the Pacific region.

Samoa has been able to deal with international demands without too much internal detriment. This is because unlike the other islands to be discussed it is generally self-sufficient. It has local lawyers and institutions to assist with legal drafting and technological advice. However, because Samoa is better equipped with technology and other modern resources, it attracts more outsiders – eg tourists and possibly terrorists. Hence the need for Samoa to continue in its efforts to counter terrorism as a matter of priority is not unrealistic.

B Kiribati

Kiribati⁹⁰ is part of Micronesia. It is both a UN and Forum member. Kiribati is a developing country with limited resources. The government, therefore, recognises its vulnerability to terrorism as the nation has little capacity to develop any effective counter measures.⁹¹ The President of Kiribati, in his speech to the UN General Assembly recognised the challenges Kiribati faces. Kiribati nevertheless acknowledged the importance of complying with UN Resolutions.⁹²

Our limited resources and technical capacity are already committed to providing for the basic and essential social and economic needs of our rapidly growing population thus placing severe constraints on our ability to progress compliance. Having said that, I wish to note that, with technical assistance from our development partners, we have made progress in enacting some important legislation relating to terrorism and trans-national crime.

The current laws relating to countering terrorism are as follows.

1 Kiribati Extradition Act 2003

The purposes of this Act are to codify the law relating to the extradition of persons from Kiribati and to facilitate the making of requests for extradition by Kiribati to other countries and to enable Kiribati to carry out its obligations under extradition treaties. This Act criminalises terrorism whether by act or omission.

90 Formerly known, as the Gilbert Islands.

91 Statement by His Excellency Anote Tong Beretitini (President) of the Republic of Kiribati at the 59th Session of the United Nations General Assembly <www.un.org/webcast/ga/59/statements/kireng040928.pdf> (last accessed 12 August 2005).

92 Statement by His Excellency Anote Tong Beretitini (President) of the Republic of Kiribati at the 59th Session of the United Nations General Assembly <www.un.org/webcast/ga/59/statements/kireng040928.pdf> (last accessed 12 August 2005).

In section 4, 'terrorist offence' is defined as either an "offence within the scope of a counter-terrorism Convention" listed in subsection (4), or an offence falling in scope of a separate criteria set out by the Act itself. The Conventions listed cover offences dealing with aircraft,⁹³ airports,⁹⁴ and civil aviation,⁹⁵ internationally protected persons,⁹⁶ taking of hostages,⁹⁷ nuclear material,⁹⁸ maritime navigation,⁹⁹ the continental shelf,¹⁰⁰ plastic explosives,¹⁰¹ terrorist bombings,¹⁰² and financing terrorism.¹⁰³ However, these offences are merely listed as 'extradition offences' and the Act does not actually incorporate the Conventions into domestic law.¹⁰⁴ Further, the Conventions would not cover every terrorist offence. For example attack on water supply and attacks using certain types of modern non-lethal weapons would not be covered. Thus, the Conventions do not provide an exclusive list of terrorist offences and consequently the legislature saw fit to add the further 'general' offence of terrorism to cover the deficit.¹⁰⁵

93 Convention on Offences and Certain Other Acts Committed on Board Aircraft (14 September 1963) 704 UNTS 10106 and Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970) 860 UNTS 12325.

94 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (24 February 1988) 1589 UNTS A-14118.

95 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (23 September 1971) 974 UNTS I-14118.

96 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (14 December 1973) 1035 UNTS I-15410.

97 International Convention against the taking of Hostages (17 December 1979) 1316 UNTS I-21931.

98 Convention on the Physical Protection of Nuclear Material (3 March 1980) 1456 UNTS I-24631.

99 Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation (10 March 1988) 1678 UNTS I-24004.

100 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (10 March 1988) 1678 UNTS I-29004.

101 Convention on the Marking of Plastic Explosives for the Purposes of Detection, signed at Montreal on 1 March 1991.

102 International Convention for the Suppression of Terrorist bombings, adopted by the General Assembly of the United Nations on 9 December 1997.

103 International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations on 9 December 1999.

104 At the time the Act was implemented, Kiribati was not party to any of the mentioned Conventions. Hence, they could not ratify them. However, in 2005 Kiribati became party to five of the terrorism Conventions. See appendix 2.

105 See Extradition Act 2003, Part I s 4(2) (Kiribati).

2 *Kiribati Proceeds of Crime Act 2003*

Money laundering "is a process in which assets obtained or generated by criminal activity are moved or concealed to obscure their link with the crime."¹⁰⁶ Terrorism can be funded from the proceeds of crime, and "perpetrators must find ways to launder the funds in order to use them without drawing the attention of authorities."¹⁰⁷ The Proceeds of Crime Act 2003 creates the offence of money laundering for Kiribati. The scope of this legislation is analogous to the International Convention for the Suppression of the Financing of Terrorism 1999. However, Kiribati did not become party to the Convention until 2005. Given the Act was made with knowledge of this Convention's existence it is unusual that the government chose to enact the legislation without implementing the Convention.¹⁰⁸

3 *Future Counter-Terrorism Objectives*

Compared to Samoa, Kiribati, recognising its limited resources, relies heavily on support from the Forum to assist with further domestic measures to combat terror. However, the extent to which the model laws developed by the Forum have assisted is debatable. This is because the development of laws is merely the first step; putting the legislation into practical effect involves further effort. In assessing action needed to fully comply with UN obligations the President of Kiribati in 2004 declared that:¹⁰⁹

The progress made so far has resolved primarily around the introduction of legislation. We recognise that this is but the beginning of the process. The implementation and enforcement of the legislation enacted will pose an immense challenge. In this respect we will continue to count on the assistance and support available from the international community.

Provision of on-going practical and financial support to cover technological costs and the provision of technicians and other trained people are necessary for Kiribati to succeed in securing the country against terrorism – thereby giving effect to laws implemented. Although the Forum

106 The IMF and the Fight Against Money Laundering and the Financing of Terrorism <<http://www.imf.org/external/np/exr/facts/aml.htm>> (last accessed 13 August 2005).

107 The IMF and the Fight Against Money Laundering and the Financing of Terrorism <<http://www.imf.org/external/np/exr/facts/aml.htm>> (last accessed 13 August 2005).

108 Although the Extradition Act 2003 (Kiribati) defines a 'terrorist offence' as any act or omission within scope of the International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations on 9 December 1999, that does not mean Kiribati has given effect to that treaty generally in regard to its local domestic structure. The application of the treaty is confined to defining an 'extradition offence' for the purposes of the Extradition Act 2003 (Kiribati) only. See n 104.

109 Statement by His Excellency Anote Tong Beretiteni (President) of the Republic of Kiribati at the 59th Session of the United Nations General Assembly <www.un.org/webcast/ga/59/statements/kireng040928.pdf> (last accessed 12 August 2005).

acknowledges Kiribati's needs, the concern arises that heavy reliance on outside support creates dependence.

C Niue

Niue has the most unusual situation of all the islands discussed so far. It is smaller with fewer inhabitants and is not a UN member.

1 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2004

These Regulations were enacted for the purpose of giving effect to UN Security Council Resolutions including resolution 1373 of 2001. Every person who contravenes or fails to comply with these regulations commits an offence and is liable under the United Nations Act 1946.¹¹⁰

Before discussing why Niue made these regulations, it must first be clarified how Niue obtained the power to make them given they derive from a New Zealand statute. The answer in the context of these regulations is simple. Before Niue became independent, the United Nations Act 1946 (NZ) was extended to the island by virtue of section 4. Since autonomy in 1974, all existing New Zealand law (that applied to Niue) automatically became Niue law, hence, enabling the government to make regulations now under that Act.

And, why should Niue be implementing counter-terrorism legislation based on SC Resolutions, given it is not a UN member? The United Nations Act 1946 makes regulation-making discretionary.¹¹¹ It is likely that despite its non-membership to the UN, simply by being a member of the Forum, Niue is (or at least feels) obliged to support its objectives – namely those of the Nasonini Declaration. Also, Niue (being in free association with New Zealand) is likely to support New Zealand government initiatives.¹¹² New Zealand continues to have responsibilities for Niue's defence.¹¹³ This is another means to ensure that Niue, even as non-UN member, adheres to UN principles necessary for international security.¹¹⁴

2 Maritime Security Regulations 2004

Unlike the United Nations Sanctions Regulations 2004, the Maritime Security Regulations had an extremely awkward implementation. Although the model laws developed by the Forum¹¹⁵ were

110 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2004, reg 13 (Niue).

111 The United Nations Act 1946, s 2(1) (NZ).

112 Constitution Act 1974, ss 6, 7, 8 (Niue). And see also: Halavaka Ke He Monuina of 2004.

113 Constitution Act 1974, s 6 (Niue).

114 See United Nations Charter (24 October 1945), art 2(6).

115 Discussed earlier under 'Assistance'.

used to assist in developing these Regulations, there was a separate problem. To be able to use them in the first place required hurdles to be overcome. Not only did the government lack power to use the model laws through making regulations (as there was no Maritime Security Act), but they were also under time pressure to conform to international maritime security objectives.¹¹⁶ This pressure was due to the United States restricting a ship's access if in the course of its passage it docked at unsecured ports (for instance Niue). In order for shipping traffic to not be disrupted, Niue had to comply with security measures. Therefore, given Niue had no maritime law under which to make regulations, the Niue government could either transform the International Ship and Port Security Code into an Act dealing with maritime security offences, or alternatively, pass a new Act with the sole purpose of empowering the making of maritime security regulations. The government decided on the latter, as the first option would have been extremely time consuming.¹¹⁷ A simple 'empowering' Act¹¹⁸ could be passed with ease, leaving all substantive issues to be covered under regulations.

While a solution was discovered, the difficulties to conform to international objectives cannot be ignored. While the model laws eventually assisted, initial burdens Niue faced were something the Forum had not considered. Further, the effect of this law was simply to satisfy written requirements as opposed to practically having a positive impact on countering terrorism.

3 *Aviation Offences Act 82 of 1973*

Although this is a pre-9/11 law, it deals with issues related to countering terrorism, such as hijacking and extradition. This Act is the incorporation of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the Tokyo Convention on Offence and Certain Other Acts Committed on Board Aircraft, into domestic law.¹¹⁹ This incorporation was possible, as New Zealand had previously signed these Conventions binding Niue.¹²⁰

116 Maritime security procedures were to come into force around the world on 1 July 2004 as nations put into place new measures, mandated by the International Maritime Organisation under amendments to the International Convention for Safety of Life at Sea (SOLAS), along with the new International Ship and Port Security Code, which apply to passenger ships, and cargo ships, that are engaged in international voyages: The Pacific Responds to Maritime Security Challenge <http://www.spc.int/Maritime/maritime_security.htm> (last accessed 25 August 2005).

117 This is because each section and offence it dealt with would be subject to the formal procedures of Assembly and Select Committee debate.

118 See: Niue Island General Laws Amendment Act 2004.

119 Aviation Offences Ordinance 82 of 1973 (Niue).

120 See Aviation Crimes Act 1972 (NZ).

The Act also makes reference to the Extradition Act 1965 (NZ) for application in Niue. However, the Extradition Act 1965 (NZ) has since been repealed so ideally the Niue Act must be amended as difficulties arise in having interaction with a New Zealand law that no longer exists.

When Niue became a state in free association with New Zealand, New Zealand law applicable to Niue, ceased to be subject to New Zealand amendments. However, finding and accessing the New Zealand law (namely the Extradition Act 1965), as it existed at 1974 requires considerable effort. Consequently, adapting model laws (developed by the Forum) is not always going to be as simple as hoped. Because of the confusion with inherited legislation, to be able to benefit from a model law would first require extensive and time-consuming research. As a result, Niue is currently in a process of making a new Extradition Act – another expense. Inherited legislation therefore continues to have an unfortunate impact on current and future legal decisions.

4 *Future Counter-Terrorism Objectives*

Niue currently has Bills before the Assembly dealing with money laundering. These derive from international models.¹²¹

D Tokelau

Tokelau, is currently a colony. Tokelau is analogous to Niue in that it too is not a UN member. However, unlike Niue, Tokelau itself has not yet developed any counter-terrorism legislation pursuant to UN obligations. Given Tokelau is still currently under New Zealand rule, New Zealand could extend counter-terrorism laws to them.¹²² The United Nations Act 1946 and its Regulations are applicable to Tokelau.¹²³ However, legislation developed specifically to counter terrorism by New Zealand following 9/11, namely the Terrorism Suppression Act 2002, does not extend to Tokelau. Why Tokelau was not included is not known.¹²⁴ New Zealand, as a UN member should

121 In April 2006 Niue passed the Companies Act 2006 as a final step in the process of closing its off-shore banking.

122 New Zealand can extend its statute law to Tokelau if it expressly makes its law applicable to Tokelau. See Tokelau Act 1948, s 6 (NZ).

123 See United Nations Act 1946, United Nations (Afghanistan) Regulations 2001, s 3 (NZ) and United Nations Sanctions (Democratic Republic of the Congo) Regulations 2004, s 3 (NZ).

124 There is very little information on the discussions that took place prior to the enactment. The most likely reason is that legislating would be deferred to the Tokelau authorities. This is because of the government policy that Tokelau will be self-governing as part of its decolonisation process. Further the Act was passed by Parliament while sitting under urgency on 10 October 2002. For information regarding the secrecy of the Terrorism Suppression Bill, see: Isabel Jenner "More of the same? The process and substance of the Terrorism Suppression Bill analysed in its historical context" (2002) 1 NZSLJ 147. It is arguable that because of its hasty implementation, extension of the Act to Tokelau was not a matter of priority. However, the Act has recently undergone review and it is not impossible for the New Zealand legislature to consider application to Tokelau if they considered its scope relevant for extension to the islands.

ensure its non-member neighbours (especially its own territory) comply with all UN principles necessary for global security.¹²⁵

However, it is arguable that perhaps New Zealand sees Tokelau as a place where there is 'little need' for counter-terrorism laws. Unlike Niue, Tokelau has very limited tourism, no airport, and no international ships dock there. However, Tokelau has recently discussed a trade link with American Samoa (which is a territory of the United States). A new cargo ship may be used to carry goods and passengers between the two destinations.¹²⁶ Therefore, inevitably there will be need for the ship to obtain security clearance in Tokelau if the new trade link goes ahead. Hence, maritime laws will need to be reformed to comply with the US requirements. Further, although Tokelau is not an independent member of the Forum (and is therefore not committed to the Nasonini Declaration), if Tokelau becomes a state in free association with New Zealand, then membership to the Forum would follow.¹²⁷ One could then easily predict that Tokelau itself will have a much heavier onus to comply with international objectives.

V CONCLUSION

This research paper has pointed out some of the difficulties PIC face when it comes to conforming to international objectives – namely, implementing counter-terrorism measures. Financial and practical resources are limited thereby making it difficult to prioritise international demands on the same scale as local ones. However, major countries of the region and the Forum are assisting the smaller states to overcome the barriers. However, despite assistance, for some islands, conforming to international objectives is still extremely difficult. Further, whether the assistance is beneficial to these islands – helping them implement laws they themselves would choose, or whether they are merely unnecessary victims of globalisation remains debatable. As the threat of terrorism continues, and even increases, unity in the Pacific is not an unrealistic expectation. Only if the islands continue to unite in common endeavour through collective action can worldwide uniformity succeed. Countering terrorism has now made its appearance in the law books of various Pacific nations. However, this is only the beginning – all Pacific Islands, both large and small, continue to owe tribute to this global enterprise as an on-going endeavour. Therefore, a new phenomenon has emerged for the Pacific Islands with an impact which extends beyond their borders, and truly beyond the Southern Cross.

125 See United Nations Charter (24 October 1945), art 2(6).

126 Pacific Islands Report – Tokelau seeks Trade Link with American Samoa <<http://pidp.eastwestcenter.org>> (last accessed 27 October 2005).

127 Currently Tokelau (as part of NZ) has observer status with the Forum and it is therefore not required to comply with any declaration – namely the Nasonini Declaration.

APPENDIX ONE¹²⁸

	Samoa	Kiribati	Niue	Tokelau
UN Member	Yes	Yes	No	No
PIF Member	Yes	Yes	Yes	No ¹²⁹
Legislation giving effect to SC Resolution 1373	Yes	Yes	Yes	No ¹³⁰
Further legislation necessary	Yes	Yes	Yes	Yes

128 Shows the status of the following islands in the international community. It provides a reference to see whether they are in compliance with SC Resolution 1373 or whether further action is necessary.

129 NZ acts on their behalf.

130 New Zealand has implemented counter terrorism law (Terrorism Suppression Act 2002) but its application did not extend to Tokelau. See Tokelau Act 1948 s 6 (NZ). Further, although the United Nations Act 1946 (NZ) and its Regulations apply to Tokelau, this is insufficient to adequately counter terrorism in regard to SC Resolution 1373.

APPENDIX TWO¹³¹

Note: * Means the Island became Party before 9/11.

- Means the Island is not a party.

	Samoa	Kiribati	Niue	Tokelau ¹³²
Convention on Offences and certain Other Acts committed on Board Aircraft signed at Tokyo on 14 September 1963.	*Ratified 1998	–	*Ratified 1973 ¹³³	–
Convention for the Suppression of Unlawful Seizure of Aircraft done at the Hague on 16 December 1970.	*Ratified 1998	–	*Ratified 1973 ¹³⁴	–
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 24 February 1988.	*Ratified 1998	–	–	–

131 Shows the progress that the following Islands have taken in respect of conforming to SC Resolution 1456 – that is to become party to terrorism Conventions. There are 12 recognised Conventions. However, recently this year a new Convention concerning nuclear terrorism was established. It is inevitable that the international community will add this to the list as the 13th Convention when the Convention comes into force.

132 If NZ did not expressly exclude Tokelau when it signed any Convention after 1979, then the Convention automatically extends to Tokelau. Further, unless NZ expressly extended the Convention to Niue then Niue would not become a party. NZ has expressly excluded Tokelau when it signed all of the terrorism Conventions mentioned (except the latest Convention: International Convention on the Suppression of Acts of Nuclear Terrorism 2005). Also, except for the International Convention against the taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979, NZ has not expressly included Niue.

133 New Zealand Signed for Niue. See Aviation Crimes Act 1972 (NZ).

134 New Zealand signed for Niue. See Aviation Crimes Act 1972 (NZ).

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 23 September 1971.	*Ratified 1998	–	*Ratified 1973 ¹³⁵	–
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.	–	Accession 2005	–	–
International Convention against the taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.	–	Accession 2005	*1980 ¹³⁶	–
Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.	–	–	–	–
Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation, done at Rome on 10 March 1988.	Became party ¹³⁷	–	–	–
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.	–	–	–	–

135 New Zealand signed for Niue. See Aviation Crimes Act 1972 (NZ).

136 New Zealand signed expressly for Niue in 1980.

137 Date of signature or ratification is unavailable.

Convention on the Marking of Plastic Explosives for the Purposes of Detection, signed at Montreal on 1 March 1991.	*Ratified 1998	–	–	–
International Convention for the Suppression of Terrorist bombings, adopted by the General Assembly of the United Nations on 9 December 1997.	–	Accession 2005	–	–
International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations on 9 December 1999.	Ratified 2002	Accession 2005	–	–
Latest Convention: International Convention on the Suppression of Acts of Nuclear Terrorism 2005. ¹³⁸	–	Signed 2005	–	¹³⁹ –

138 No signatories to this Convention have yet ratified it.

139 New Zealand has not expressly excluded Tokelau so perhaps the Convention applies to Tokelau. See footnote 132.