

**'ASIPELI 'AMINIASI KEFU**

**PEACE AND SECURITY CRISES IN THE PACIFIC:  
FORMALISING THE PACIFIC ISLANDS FORUM'S  
PEACE AND SECURITY FRAMEWORK**

**LLM RESEARCH PAPER**

**LAWS 509 INTERNATIONAL LAW: PEACE AND PROSPERITY?**

**LAW FACULTY**

**VICTORIA UNIVERSITY OF WELLINGTON**

**2005**

K26 KEFU, A.A. Peace and security crises in the Pacific.

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## ABSTRACT

The Pacific region is no longer the peaceful and secure region most people thought it was. Peace and security crises are recent, they are likely to reignite and, there are potential crisis situations brewing around the region. The region however is not another Africa or South America. Added to this is the Pacific Islands Forum's peace and security framework which has no legal status and has gaps in its armour. Moreover, peace and security crises have severe results on small Pacific communities, particularly due to their brutality, potential to collapse governments and the complexity of the causes of conflicts. Current political climate within the Forum supports regionalism, and there is an emerging United Nation's willingness to share its universal responsibility to address international peace and security with regional organisations. It could therefore be an opportune time for the Forum States to consider formalising the Forum's peace and security framework. The objective of such formalisation is to have an organisation to drive regional responses to traditional security threats, early and effectively, and most importantly with legality and legitimacy. The formalised Forum could be based on the concept that States' sovereignty now involves a responsibility to protect its own citizens, and also citizens of others, from genocide, war crimes, ethnic cleansing and crimes against humanity. Moreover, the Forum could be a guardian for international humanitarian law and human rights law during non-international armed conflict in the Pacific. Furthermore, the Forum would have the power to resort to the use of force but as a very last resort, and more importantly, as a deterrent for instigators of unwanted wide scale conflict. This may hopefully assist Forum Leaders in achieving their vision of a region of "peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives".

**WORD COUNT:** The text of this paper (excluding title page, abstract, table of contents, footnotes and bibliography) comprises approximately 14,982 words.

International Law-Peace and Security-Regionalism

## I INTRODUCTION

The Pacific region is no longer the peaceful and secure region most people thought it was. Non-traditional security threats, such as climate change, rising sea levels, unlawful fishing, trans-national crime, globalisation pressure and infectious diseases are the main threats occupying the attention of Pacific States.<sup>1</sup> However it is the traditional security threats, such as armed conflict and coup d'états, which warrants more consistent regional attention. Although peace and security crises in the form of armed conflict are unfortunately not new to the Pacific region there are, however, some concerning features.<sup>2</sup> First, peace and security crises are more recent, with Bougainville from 1989-1998, Solomon Islands from 1998-2003 and Fiji in 2000. Secondly, although these recent conflicts have subsided, they have potential to break out again. Thirdly, there are potential crises in the political tensions in Tonga, the inter-tribal fighting in the Highlands Province of Papua New Guinea and, the political instability in Vanuatu.

Peace and security crises in the Pacific however do not equate to doom and gloom at the level of other regions.<sup>3</sup> Nevertheless once they occur they do have profound effects on Pacific countries with their vast area, small economies of scale and very limited resources. On a regional level they threaten the region's reputation and international clout, thus detrimentally affecting foreign investment opportunities, tourism and participation in international organisations.<sup>4</sup> The Pacific States have thus recognised that a peaceful and secure region is a cornerstone of guaranteeing economic and social development.<sup>5</sup>

The Pacific Islands Forum, the pre-eminent regional organisation in the Pacific region, has attempted to establish a framework for a regional response to peace and security crises. The author suggests it can be strengthened. One option available is to formalise the Pacific Islands

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<sup>1</sup> John Henderson "The Impact of the International Setting on Regional Security in the Pacific" (Forum Regional Security Committee, Auckland, 15 June 2005) 2.

<sup>2</sup> 1980: Santo Rebellion in Vanuatu; 1987: self-determination movements by the indigenous Kanak people in New Caledonia; 1987: two successive military coups in Fiji.

<sup>3</sup> Contrast Ben Reilly "The Africanisation of the South Pacific" [2000] 54(3) Australian Journal of International Affairs 261.

<sup>4</sup> Michael Powles "Making Waves in the Big Lagoon: The Influence of Pacific Island Forum Countries in the United Nations" [2002] La Revue Juridique Polynésienne 59, 73-74.

<sup>5</sup> Twenty-Third South Pacific Forum Communiqué, (Honiara, Solomon Islands, 8-9 July 1992), Annex, para 2.

Forum's peace and security framework, giving the Forum a legal mandate to respond to crises, in a more timely and effective way, with legality and legitimacy.

In Part II of this paper the three recent peace and security crises will be analysed to illustrate how they provoke international law concerns, and also briefly discuss some situations that potentially can become a peace and security crisis. The Pacific Islands Forum and its regional peace and security framework will then be briefly outlined and analysed. The question of why formalisation of the Forum's peace and security crisis is an option for effective regional response to peace and security crisis will then be presented. In Part III the relevant international law issues the Forum could face relating to peace and security will be identified and analysed. In Part IV formalisation of the Forum's peace and security framework will be discussed by suggesting the Forum's legal mandate, and the minimum peace and security purposes, principles and powers, including suggestions for the administrative set-up and establishing a Forum Response Force.

It is not the intention of the author to argue that this is the only way forward. The objective is to stimulate discussion that a more stronger and effective mechanism is needed to deal with the threats to the Pacific's peace and security situation. It is not the scope of this paper to deal with security in its broad context. The paper will rather focus on responding to traditional peace and security crises within the region.

## **II PEACE AND SECURITY IN THE PACIFIC**

### **A Recent Peace and Security Crises**

#### **1 Papua New Guinea: Bougainville Secession**

In May 1989, armed conflict based on secession objectives broke out in the Papua New Guinea (PNG) island of Bougainville between the Papua New Guinea Defence Forces (PNGDF) and a group known as the Bougainville Revolutionary Army (BRA). The BRA was a pro-independent group that was created by disgruntled Bougainvillean landowners who were



refused a greater share of earnings from a copper mine located in the centre of the island that accounted for 40% of PNG's exports and around 20% of the PNG government's revenue.<sup>6</sup> The landowners also were refused compensation for loss of land and environmental pollution caused by the mine's operations. These grievances originated from pre-decolonisation days when Bougainville, who is ethnically and geographically separate from PNG, sought separation from PNG with the UN. The armed conflict was complicated when Bougainvilleans opposed to the pro-independence movement formed the Bougainville Resistance Force (BRF).

The armed conflict lasted for a decade. During the conflict "human rights violations, including extrajudicial executions, "disappearances", ill treatment and arbitrary arrests and detention" occurred at an "alarming rate".<sup>7</sup> In 1997 the UN Special Rapporteur on extrajudicial, summary and arbitrary executions reported that human rights violations were committed by all sides of the conflict.<sup>8</sup> This included a naval blockade denying essential goods and medicine, burning of villages, destruction of plantations, torture, lootings, kidnapping, rape and murder.<sup>9</sup> During his visit, the Special Rapporteur received reports that between 1991 and 1995, at least 64 persons were believed to have been extra-judicially executed by the PNGDF.<sup>10</sup> Foreign States were also reported to have provided weapons to each side.<sup>11</sup> The regional community, however, ignored the conflict because it was considered a domestic matter. Repeated attempts to negotiate a formal ceasefire failed.

In 1997 the PNG Government was feeling the heat of the conflict and decided to engage overseas mercenaries to crush the BRA. This led to widespread political opposition and a change of policy for negotiation with the BRA to end the conflict. The New Zealand government was thus approached to facilitate the peace talks. In January 1998 a "permanent and irrevocable ceasefire" was agreed at Lincoln University. In 2001 a comprehensive peace

<sup>6</sup> United Nations Observer Mission in Bougainville (UNOMB) <<http://www.un.org>> (last accessed 23 May 2005)

<sup>7</sup> Amnesty International "Papua New Guinea: Bougainville: the Forgotten Human Rights Tragedy" 26 February 1997 <<http://web.amnesty.org>> (last accessed 2 October 2005).

<sup>8</sup> Report by the Special Rapporteur on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995, UN document E/CN.4.1996/4/Add.2, para 33. [UN Special Rapporteur Report]

<sup>9</sup> UN Special Rapporteur Report, above n 8, para 28-33.

<sup>10</sup> UN Special Rapporteur Report, above n 8, para 50.

<sup>11</sup> UN Special Rapporteur Report, above n 8, para 34. Australian helicopters were used by the PNG Government. and weapons and support were received by the BRA from supporters in the Solomon Islands.

agreement known as the Bougainville Peace Agreement was signed. The Agreement provided for: the political autonomy of Bougainville with its own elected government and legislature; the option to hold a referendum for independence from PNG within 15 years; and, the disposal of all weapons held by militias. The United Nations (UN) was requested to monitor the implementation of the Agreement. In June 2005 Bougainville held its first formal elections under the Agreement, and elected a former rebel leader Joseph Kabui as its first President. The UN mission was ended in the same month, and was hailed by the UN as a model for peace building.<sup>12</sup>

Although the conflict has been resolved and a clear path has been set for Bougainville, there are still signs today that some Bougainvilleans still prefer to use military means to obtain complete independence from PNG. This was illustrated in the recent report that former Fijian soldiers are in Bougainville providing military training.<sup>13</sup> Moreover, some Bougainvilleans remain suspicious of the sudden death of Francis Ona, the long time rebel who did not recognise the peace agreement. Ona died a couple of weeks after the Bougainville elections.

Another concern for PNG, apart from Bougainville, is its high level of lawlessness and, the apparent violence of police officers against children.<sup>14</sup> There is also concern about the growing deterioration of political institutions and dysfunctional politics in Papua New Guinea.<sup>15</sup> In 2004, Australia and PNG launched the Enhanced Cooperation Programme (ECP) to strengthen law and order, border and transport security, and the public sector.<sup>16</sup> Australia provided the Programme as a response to “growing instability” in PNG, and it was deemed essential for Australia’s fight against terrorism. The ECP involved the deployment of more than 200 Australian Federal Police to work with the PNG Police. The Programme however was thwarted when the PNG Supreme Court ruled that the agreement providing immunity for

<sup>12</sup> ABC Radio Australia “UN hails Bougainville peace model” 7 July 2005 <<http://www.abc.net.au>> (last accessed 8 July 2005)

<sup>13</sup> ABC Radio Australia “Controversy escalates over Fijian soldiers in PNG” 25 November 2005 <<http://www.abc.net.au>> (last accessed 28 November 2005)

<sup>14</sup> Human Rights Watch *Making Their Own Rules: Police Beatings, Rape, Torture of Children in Papua New Guinea* [2005] 17(8)(C) Human Rights Watch 24 <<http://www.hrw.org>> (last accessed 4 October 2005)

<sup>15</sup> Hugh White and Elsin Wainwright *Strengthening Our Neighbour: Australia and the future of Papua New Guinea* (Australian Strategic Policy Institute, Canberra, 2004) 29-30.

<sup>16</sup> Department of Foreign Affairs and Trade, Government of Australia, “Papua New Guinea – Enhanced Cooperation Program (ECP) July 2004 <<http://www.dfat.gov.au>> (last accessed 4 October 2005)

Australian officers was unconstitutional.<sup>17</sup> Australia subsequently withdrew its police officers. At the time of writing negotiations are underway to rekindle the project. PNG is also receiving more security related attention from the region following the triple bombings in Bali in October 2005.<sup>18</sup>

## 2 *Solomon Islands: State of Lawlessness*

In 1998 various groups of the indigenous people of the island of Guadalcanal in the Solomon Islands began a targeted campaign to displace from Guadalcanal settlers from the neighbouring island of Malaita. The Guali uprising initially consisted of various groups of militants who eventually united under the banner of the Isatabu Freedom Movement (IFM). Thousands of Malaitan settlers were assaulted, their property confiscated and, were forced from their homes and plantations. Inter-marriage families were forcefully split. The Malaitans flocked to the capital Honiara and either set up refuge or boarded crowded ships to return to Malaita. In 1999 the Malaitans responded by establishing organised militia which became known as the Malaita Eagle Forces (MEF). The MEF was also supported by the Royal Solomon Islands Police Service, which 75% of its officers were Malaitans.<sup>19</sup> The MEF began counter strikes against the IFM, and eventually took control of the capital Honiara, while the IFM controlled rural Guadalcanal.

The conflict was brutal. It was riddled with “abductions, torture, rape and killings, forced displacement, looting and burning down of homes”.<sup>20</sup> A total of 24,597 people were displaced from rural Guadalcanal, and 10,712 people were displaced from the capital Honiara, making a total of 35,309 displaced civilians from the 60,275 Guadalcanal population.<sup>21</sup> Businesses and homes were permanently destroyed both in urban and rural areas. The militants

<sup>17</sup> *Special Reference by the Morobe Provincial Executive* [2005] PGSC 1 <<http://www.paclii.org>> (last accessed 4 October 2005).

<sup>18</sup> ABC Radio Australia “Indonesia bombings highlight security concerns for PNG, Fiji” 3 October 2005; “Former PNG defence chief says raises security concerns” 3 October 2005 <<http://www.abc.net.au>> (last accessed 4 October 2005).

<sup>19</sup> Amnesty International “Solomon Islands: A forgotten conflict” August 2004, 7 <<http://www.amnesty.org>> (last accessed 2 October 2005). [AI Solomon Islands Report]

<sup>20</sup> AI Solomon Islands Report, above n 19, 1.

<sup>21</sup> Jon Fraenkel *The Manipulation of Custom: From Uprising to Intervention in the Solomon Islands* (Victoria University Press, Wellington, 2004), 21, 56. [Fraenkel]

did not only target each other, but people from other provinces were subjected to “thefts, harassment and extortion”.<sup>22</sup> Militants who were seriously injured and were recovering in medical centres were attacked and killed by enemy militants, followed by the deprivation of medical supplies.<sup>23</sup> There were also reports of random shooting into public meetings.<sup>24</sup> The IFM and MEF also frequently tortured their captives or hostages.<sup>25</sup> With the collapse of the main law enforcement agency, the security of civilians in the Solomon Islands was at the whim of the ethnically divided militants.

In June 1999 the Commonwealth Envoy, Sitiveni Rabuka, the former Fijian Prime Minister and 1987 military coup leader, successfully negotiated the Honiara Peace Accord. However it was not fully observed by the militants and fighting continued.<sup>26</sup> The government at the time led by Bartholomew ‘Ulufa’alu requested the Australian government to provide armed police support. Australia refused this request on the basis of their arms length policy regarding the Pacific.<sup>27</sup>

In June 2000 the MEF overthrew the already weakened ‘Ulufa’alu government because of its failures, and the desire to have a government to meet militant demands. Once the Mannaseh Sogavare-led government was appointed it managed to establish a 90-day ceasefire. Negotiations for peace then proceeded despite continuing sporadic incidents of violence. According to Fraenkel the militants opted for negotiations due to “the offer of peace dividends”, “conflict weariness” and the realisation of the “futility of full scale civil war”.<sup>28</sup> The negotiations culminated in the Townsville Peace Agreement in October 2000 which crystallised the government’s policy of providing “justice before peace”. The government however made great strides in paying out “peace dividends” to all sides of the conflict, enacting legally

<sup>22</sup> Fraenkel, above n 21, 87-89. In response to MEF violence towards Western Province people, Malaitans were subject to violence in Western Province, and some islands made secessionist declarations.

<sup>23</sup> AI Solomon Islands Report, above n 19, 14-16.

<sup>24</sup> AI Solomon Islands Report, above n 19, 17.

<sup>25</sup> AI Solomon Islands Report, above n 19, 18-22.

<sup>26</sup> Fraenkel, above n 21, 71-72.

<sup>27</sup> Tarcisius Tara Kabutaulaka “Australian foreign policy and the RAMSI intervention in Solomon Islands” [2005] 17(2) *The Contemporary Pacific* 283, 286. [Kabutaulaka I]

<sup>28</sup> Fraenkel, above n 21, 105.

dubious blanket amnesty legislation and re-establishing a military police to restore national security and reign in the fighting militant factions.

The Agreement however was flawed in not ensuring complete disarmament of militants and, its non-inclusion of some militant factions and fighting in other parts of the State. The government's new policy eventually split the IFM and the MEF into smaller factions that fought each other both in Guadalcanal and Malaita. This multi-party conflict accelerated lawlessness, especially in rural Guadalcanal and Malaita, to the point where resolution was beyond domestic resources. In 2001 the Solomon Islands government again requested assistance to Australia and New Zealand. Both countries however offered advice and financial support but did not deploy much needed police and military personnel.<sup>29</sup>

In December 2001 the scheduled four-yearly elections took place despite initial hesitation by the government. The results returned a new government under Sir Allan Kemakeza, a former cabinet minister who was dismissed on corruption charges. Despite attempts to revitalise the previous ceasefire, the new government had lost control of the economy, security forces and territory, and thus had little hope of resolving the conflict.<sup>30</sup> The government was therefore forced to look for international assistance, for a third time.

On 5 June 2003 Kemakeza met the Australian Prime Minister and negotiations commenced on deploying an Australian-led foreign intervention. Australia however insisted that the Pacific Islands Forum mechanisms should be utilised. After endorsement was given by the 16 State members of the Pacific Islands Forum under its Biketawa Declaration, the Solomon Islands Governor General formally requested assistance followed by unanimous endorsement by the Solomon Islands parliament. A Status of Forces Agreement (SOFA) was then signed by the Solomon Islands government with the governments of Australia, Fiji, Samoa, Tonga, New

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<sup>29</sup>Tarcisius Tara Kabutaulaka "Failed State" and the War on Terror: Intervention in Solomon Islands" [2004] 72 Asia Pacific Issues 1, 3. [Kabutaulaka II]

<sup>30</sup>Fraenkel, above n 21, 164.

Zealand and Papua New Guinea giving rise to the Regional Assistance Mission to the Solomon Islands (RAMSI).<sup>31</sup> Article 2 of the SOFA provides that:<sup>32</sup>

The Assisting States may deploy a Visiting Contingent of police forces, armed forces and other personnel to Solomon Islands to assist in the provision of security and safety to persons and property; maintain supplies and services essential to the life of the Solomon Islands community; prevent and suppress violence, intimidation and crime; support and develop Solomon Islands institutions; and generally to assist in the maintenance of law and order in Solomon Islands.

In July 2003 the first deployment of troops, police and civilian officials arrived in the Solomon Islands. The arrival of RAMSI was "significant and positive", as "law and order" was re-established, and the Government's finances began to "stabilize".<sup>33</sup> RAMSI's arrival effectively ended the lawlessness in the Solomon Islands with faction leaders surrendering themselves and their weapons almost immediately. By November 2003 more than 3,700 weapons (including 660 high-powered military weapons) were surrendered to RAMSI, and between 24 July and December 2003, 733 people were arrested on 1,168 charges, including a serving Minister.<sup>34</sup> The rule of law was prioritised and institutional reform initiated along with economic revival.

The success of the initial stages however, seems to be thawing. This seems to arise from the new challenges RAMSI is facing during the final nation building stages. Investigating high-level corruption is sensitive.<sup>35</sup> Shifting political alignments threatens RAMSI's state invitation. A legal challenge has been filed against the status of RAMSI in the Solomon Islands courts.<sup>36</sup> There are doubts about the constitutionality of the facilitating legislation.<sup>37</sup> Ethnic tension and

<sup>31</sup> Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua new Guinea, Samoa and Tonga Concerning the Operations and Status of the Police and Armed Forces and other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security, May 2003 <<http://www.dfat.gov.au>> (last accessed 2 October 2005). [RAMSI SOFA]

<sup>32</sup> RAMSI SOFA, above n 31, art 2.

<sup>33</sup> Hon Laurie Chan, Minister of Foreign Affairs, Solomon Islands "Statement to the 58<sup>th</sup> Session of the United Nations General Assembly", 1 October 2003 <<http://www.un.org>> (last accessed 23 May 2005).

<sup>34</sup> Kabutaulaka II, above n 29, 5.

<sup>35</sup> Elsin Wainwright "How is RAMSI faring? Progress, challenges and lessons learned" *Strategic Insights*, (Australian Strategic Policy Institute, Canberra, 2005) 5-8. [Wainwright]

<sup>36</sup> Wainwright, above n 35, 6.

<sup>37</sup> Joseph D. Foukona "Regional Intervention in Solomon Islands" [2005] 9(1) *Journal of South Pacific Law* <<http://www.paclii.org>> (last accessed 12 October 2005).

security concerns still exist.<sup>38</sup> One constructive criticism of RAMSI is that it has focussed too much on state building and not on the role of civil societies in Solomon Islands plural society.<sup>39</sup> This criticism seems to reflect that leading up to RAMSI there was a lack of detailed preparation and appreciation of these important issues. There is also a fear that there may be increasing dependency on RAMSI because the Solomon Islands as a people are not engaged fully in nation-building.<sup>40</sup> Finally, the escalating financial costs and constant personnel juggling for governments that support RAMSI may change political will and commitments.

### 3 *Fiji: Third Coup*

On 19 May 2000 a group of armed men led by a Fijian businessman named George Speight (a.k.a. Ilikina Naitini) forcefully took over the Fijian parliament. The newly elected Prime Minister Mahendra Chaudhry and around 36 people, including members of his Cabinet and the People's Coalition, were taken hostage. Chaudhry and his son were assaulted by Speight's men, and some hostages were temporarily denied food and medication. Speight declared the 1997 Constitution abrogated and appointed a new government to ensure supremacy for the indigenous Fijians. Supporters of the coup and opportunists rioted, looted and burned down hundreds of businesses and homes owned by the Indo-Fijian population. The violence also reached towns and villages where Indo-Fijian farmers were robbed of their crops, cattle and valuables.

On 29 May the President, the late Ratu Sir Kamisese Mara, "stepped aside" as Head of State of Fiji after being advised by the then Fijian Police Commissioner that the police force could not guarantee the nation's safety and, that the military wanted to abrogate the 1997 Constitution because it lacked the provisions to resolve the situation. The President did not agree but could not do anything but move aside together with the Constitution. The head of the military, Commodore Frank Bainimarama, then issued emergency decrees purporting to abrogate the Constitution, and which effectively established a military government under

<sup>38</sup> Hon Kaliopate Tavola, (Minister for Foreign Affairs and External Trade (Fiji)), Maiava Iulai Toma and Greg Urwin *Mission Helpem Fren A Review of the Regional Assistance Mission to Solomon Islands* (Forum Secretariat, Suva, 2005) para 12. [Forum RAMSI Review]

<sup>39</sup> Kabutaulaka I, above n 27, 283.

<sup>40</sup> Kabutaulaka I, above n 27, 299.

martial law. The military government negotiated with Speight for the release of the hostages while law and order deteriorated around the country. In July an agreement that purported to grant conditional amnesty for Speight and his supporters was reached. On 14 July, after 56 days of forced entrapment, the hostages were released. A new Interim Civilian Government was then appointed with a new President and new Prime Minister.

After the hostages were released the rebels failed to meet the conditions of their being granted amnesty, and were eventually arrested and charged with treason. Supporters of the coup instigated further violence but were effectively subdued by the authorities. In November some soldiers temporarily took over the Queen Elisabeth Barracks and aimed to remove Bainimarama and free the coup leaders held in custody. Three soldiers were taken hostage and killed. A military counter attack successfully returned the barracks to military hands. The soldiers involved in the mutiny were arrested and handed over to military custody. Five of those soldiers involved in the mutiny were beaten to death by some military troops.

In February 2001 the Fijian Court of Appeal declared that the 1997 Constitution was not lawfully abrogated during the 2000 coup, and was still the supreme law of the land, and that the Interim Civilian Government's existence was thus unlawful.<sup>41</sup> After initial opposition to the Court of Appeal decision the Interim Government agreed to hold elections in August 2001. Members of the Interim Civilian Government were subsequently formally elected as the government, however there were political disputes concerning the makeup of the Cabinet that was resolved by the Supreme Court.<sup>42</sup>

Today Fiji is still recovering from the aftermath of the 2000 coup. The men who carried out the coups, along with the identified supporters have been prosecuted and sentenced, however some remain at large.<sup>43</sup> The soldiers who carried out the mutiny have also been dealt with in the courts.<sup>44</sup> The recovery process has however been stained by the Government's

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<sup>41</sup> *Republic of Fiji Islands v Prasad* [2001] FJCA 2 <<http://www.pacii.org>> (last accessed 3 October 2005).

<sup>42</sup> *In re the President's reference, Qarase v Chaudhry – Decision of the Court* [2004] FJSC 1 <<http://www.pacii.org>> (last accessed 4 October 2005).

<sup>43</sup> *Seniloli v State* [2004] FJCA 46 <<http://www.pacii.org>> (last accessed 3 October 2005).

<sup>44</sup> Pacific Islands Report "Nine Fiji mutineers get early prison release" 21 June 2005 <<http://pidp.eastwestcenter.org>> (last accessed 23 June 2005).



introduction of the "Promotion of Reconciliation, Tolerance and Unity Bill" before the Fijian Parliament.<sup>45</sup> The Bill establishes a Commission with the power to grant amnesty to those who committed politically motivated acts during the 2000 coup.<sup>46</sup> This has divided the population. Sir Geoffrey Palmer, the former Prime Minister of New Zealand and constitutional academic and lawyer was reported to view the Bill as a "recipe for disaster".<sup>47</sup> More troubling is the military's opposition to the Bill and its statement that they have "no qualms in removing a government that will bring back chaos".<sup>48</sup> The Australian government has also expressed its concern about the Bill directly to the Fijian government, and the Fijian government is reported to have agreed to make amendments.<sup>49</sup> The Bill has been read twice in the Fijian Parliament and is now before the Select Committee and is expected to be re-submitted to the Fijian Parliament towards the end of 2005.

It is safe to say that the ethnic division in Fiji is still rife, and social and political reconciliation is still beyond the horizons. The aim to bring to justice all persons directly responsible for the 2000 coup remains unachieved, and it is troubling that those suspected held, or are still holding high political office and social ranks. The continued favouring of the indigenous population and marginalisation of non-Fijians are embers that may ignite further racial violence. All Fijians, and the region, will again brace themselves for any further unrest after the upcoming elections in early 2006.

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<sup>45</sup> Fiji Times Online "MPs walk out of House" 3 June 2005 <<http://www.fjitime.com>> (last accessed 3 June 2005) Fiji Times Online "Opposition to the Unity Bill tells its own story" 3 June 2005 <<http://www.fjitime.com>> (last accessed 3 June 2005).

<sup>46</sup> Promotion of Reconciliation, Tolerance and Unity Bill 2005, s 5(1)(e) <<http://pidp.eastwestcenter.org>> (last accessed 22 May 2005).

<sup>47</sup> Fiji Times Online "Recipe for disaster" 23 June 2005 <<http://www.fjitime.com>> (last accessed 23 June 2005).

<sup>48</sup> Fiji Times Online "Army watches Bill's progress" 1 June 2005 <<http://www.fjitime.com>> (last accessed 1 June 2005); Fiji Times Online "Officers have a right to be there" 3 June 2005 <<http://www.fjitime.com>> (last accessed 3 June 2005); Radio New Zealand International "Fiji military commander calls on state institutions to uphold the rule of law" 8 July 2005 <<http://www.rnzi.com>> (last accessed 9 July 2005); Radio New Zealand International "Fiji military commander says Reconciliation Bill is the work of warped minds" 11 July 2005 <<http://www.rnzi.com>> (last accessed 12 July 2005); Pacific Islands Report "Qarase says Fiji 'Unity' Bill will be reviewed" 13 July 2005 <<http://pidp.eastwestcenter.org>> (last accessed 15 July 2005).

<sup>49</sup> ABC Radio Australia "Fiji reportedly agrees to amend coup amnesty bill" 30 September 2005 <<http://www.abc.net.au>> (last accessed 4 October 2005).

At the time of writing Tonga is on the verge of political transition. Following a six week industrial action, the first ever in Tonga, by aggrieved civil servants relating to recent government salary restructuring, political reformists wanting to end the Tongan King's control of the Executive Government have demanded that political reform be implemented by 5 December 2005. During the strike there were sporadic acts of violence that included ransacking of government schools<sup>50</sup>, burning of government vehicles and a royal home, and also protests and skirmishes outside the King's royal residence in Auckland<sup>51</sup>. Most government services were suspended, and a few operated on skeleton staff. Tonga thus presented a picture that it was starting to collapse.<sup>52</sup> Instability is therefore likely to be sourced from "inequalities of wealth, the prevalence of injustice, and the weakness of political accountability".<sup>53</sup> Proposals for political reform are now a constant topic of discussion, and the momentum is escalating.<sup>54</sup> It remains to be seen how this transition will take place in the next few days, and more importantly, in the next generation.

Other potential crises are developing in the Highlands Province of Papua New Guinea where in 2004 inter-tribal fighting, allegedly driven and armed by politicians, has moved from bows and arrows to high powered assault weapons, increasing the death rate "exponentially".<sup>55</sup> In Vanuatu, political manoeuvrings resulted in further political instability during 2004. This

<sup>50</sup> Matangi Tonga Online, "Students smash Tonga College as Govt removes striking principal and head tutor" 17 August 2005 <[www.matangitonga.to](http://www.matangitonga.to)> (last accessed 27 August 2005).

<sup>51</sup> Angela Gregory "Protests turns ugly at royal residence" (22 August 2005) *The New Zealand Herald*, Auckland, A3, Nick Venter "It's no picnic for Tonga strikers" (23 August 2005) *The Dominion*, Wellington, A6.

<sup>52</sup> Nick Venter "King's old house burns to ground" (24 August 2005) *The Dominion*, Wellington, A3; "Royal plea at strike demo" (26 August 2005) *The Dominion*, Wellington, A3; "The Crumbling Kingdom" (27 August 2005) *The Dominion*, Wellington, E1.

<sup>53</sup> I.C. Campbell "Tongan Development and Pacific Island Security Issues" in Jim Rolfe (ed) *The Asia-Pacific: A Region in Transition* (Asia-Pacific Center for Security Studies, Honolulu, 2004), 335, 337.

<sup>54</sup> Matangi Tonga Online "PDP calls for elected Prime Minister" 11 August 2005 <<http://www.matangitonga.to>> (last accessed 17 August 2005); Matangi Tonga Online "Lopeti pushes for Tongan Constitutional Review" 3 February 2005 <<http://www.matangitonga.to>> (last accessed 17 August 2005); Lopeti Senituli "Basic Proposal for an Alternative Structure of Government for Tonga (Draft 4)" 30 August 2002 <<http://www.planet-tonga.com>> (last accessed 6 June 2005); William Clive Edwards "Proposal for Constitutional Changes to Provide for a Democratically Elected Government for the People of Tonga" 27 July 2005 <<http://planet-tonga.com>> (last accessed 13 September 2005); Matangi Tonga Online "Laki Niu starts new protest at Pangai-Si'i on Monday" 16 October 2005 <[www.matangitonga.to](http://www.matangitonga.to)> (last accessed 18 October 2005).

<sup>55</sup> Karin von Strokirch, Karin "Political Reviews: The Region in Review: International Issues and Events, 2004 [2005] 17(2) *The Contemporary Pacific* 416, 424. [von Strokirch]

included repeated changes of governments and allegations of bribery and forgery among politicians. Such instability has the potential to spark further violence between ethnic groups, particularly between the ethnic groups of the Tongoans and Tannese; and also further threats of coup d'états from the Police, and mutinies in the Vanuatu Mobile Force.<sup>56</sup>

In summary, peace and security crises in the Pacific are likely to be predominantly non-international armed conflicts, rather than international. The recent non-international armed conflicts had the same features of suffering and destruction as other armed conflicts around the world, although with less intensity. The results however, were serious as they impacted on small States, not used to, nor able to deal with such conflicts. More importantly, although these crises have subsided, there is opportunity for armed conflict to break out again in any of these three countries, along with a few others.

What then does the Pacific Islands Forum have set up to address future peace and security crises?

## **B The Pacific Islands Forum**

### *1 Historical Background*

The challenges of a vast geography, cultural diversity, small economies of scale and limited resources, unites 16 states of the Pacific region, who are self-governing, to pursue regional cooperation under the Pacific Islands Forum (the Forum).<sup>57</sup> The Forum was first set up in 1971, and was initially known as the South Pacific Forum. It changed its name in 1999 due to the inclusion of Palau from the North Pacific.<sup>58</sup> The Forum does not have a "formal

<sup>56</sup> von Strokirch, above n 55, 423; Anita Jowitt "Political Reviews: Melanesia in Review: Issues and Events, 2004: Vanuatu" [2005] 17(2) *The Contemporary Pacific* 456, 457-458.

<sup>57</sup> The present members of the Forum are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. New Caledonia, French Polynesia, Timore-Leste and Tokelau attended the 2005 Forum in Papua New Guinea as Observers.

<sup>58</sup> Thirtieth South Pacific Forum Communiqué, Koror, Republic of Palau, 3-5 October 1999, para 5.

constitution” and technically therefore has no legal personality in international relations.<sup>59</sup> Decisions of the Forum are based on the principle of the “Pacific Way” which is based on “unanimous compromise”, where everyone sacrifices something for the overall benefit of the whole, and all decisions are made by consensus.<sup>60</sup> In October 2005 the 36<sup>th</sup> Forum Leaders’ Meeting held in Papua New Guinea adopted a new “Agreement Establishing the Pacific Islands Forum” which finally established a formal status to the Forum along with its own rules and procedures.<sup>61</sup> The Agreement however is still open for signature of the Forum States.

The Forum was established as a result of dissatisfaction by the independent Pacific Island States, at the time, with the pre-eminent regional organisation of the time, the South Pacific Commission (the Commission).<sup>62</sup> The Commission was set up by the colonial powers of the region in 1947 in order to look after the “welfare of their holdings”.<sup>63</sup> The role of the island States in the triennial meeting of the Commission was only advisory relating to the projects implemented by the powers in the region. Another cornerstone policy of the Commission was the restriction of discussion of issues with political implications.

In August 1971 the first meeting of the Forum was held in Wellington with representatives from the Cook Islands, Fiji, Nauru, Tonga and Western Samoa, with New Zealand and Australia as observers. New Zealand and Australia became full members in the next meeting in 1972, held in Canberra, on the grounds that they would provide significant funding and a more recognisable voice on the international stage for the small Pacific Island States.<sup>64</sup> Since 1971 the Forum Leaders have met annually in each Member State in the last 33 years usually based on alphabetical rotation.<sup>65</sup>

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<sup>59</sup> Eric Shibuya “The Problems and Potential of the Pacific Islands Forum” in Jim Rolfe *The Asia-Pacific: A Region in Transition* (Asia Pacific Center for Security Studies, Honolulu, 2004), 105. [Shibuya]

<sup>60</sup> Shibuya, above n 59, 103.

<sup>61</sup> Thirty-Sixth Pacific Islands Forum Communiqué, Papua New Guinea, 25-27 October 2005, para 6. [2005 Forum Communiqué]

<sup>62</sup> Shibuya, above n 59, 103.

<sup>63</sup> The colonial powers were: the United States, France, the Netherlands, the United Kingdom, Australia and New Zealand. The Commission is now known as the Secretariat for the Pacific Community (SPC).

<sup>64</sup> Shibuya, above n 59, 105.

<sup>65</sup> The 37<sup>th</sup> Pacific Islands Forum Meeting will be held in Tonga in 2005.

The Agenda of the Forum Leader's meeting is prepared by the Forum Officials' Committee a couple of days prior to every Forum Leaders' Meeting.<sup>66</sup> There are three stages to Forum meetings. First, the Forum Leaders go on a Retreat where the hard issues are constructively discussed on an informal basis. This is followed by the formal Plenary Meeting. At the conclusion of the Plenary Meeting, a Post-Forum Dialogue meeting is held between representatives of the Forum and senior Ministers and officials of 12 States and regional organisations.<sup>67</sup> The objective of the Dialogue is to allow the Forum, as a collective of Pacific States, to consult a wider international audience on a bilateral basis.

A level below the Forum Leaders' Meeting, regional security matters are dealt with at the ministerial level by the Forum Foreign Affairs Ministers Meeting (FFAMM). Further down at the officials' level, regional security is dealt with by the Forum Regional Security Committee (FRSC). The FRSC is the working committee on regional security, and meets annually to coordinate law enforcement activities and regional security issues. The FRSC also receives reports from other regional security based organisations such as the Pacific Immigration Directors' Conference, the Pacific Islands Chief of Police Conference, the Pacific Islands Law Officers Meeting, the Pacific Immigration Directors Conference and the Oceania Customs Organisation, including observers, such as the Commonwealth Secretariat.

The Forum is supported by the Pacific Islands Forum Secretariat (Forum Secretariat) which is located in Suva.<sup>68</sup> The Forum Secretariat is headed by a Secretary-General.<sup>69</sup> Within

<sup>66</sup> FOC comprises senior representatives from all Forum members, and is the governing body of the Forum Secretariat. FOC also approves the Budget and Work Programme of the Forum Secretariat in a separate meeting.

<sup>67</sup> Canada, China, the European Union, France, India, Indonesia, Japan, South Korea, Malaysia, Philippines, United Kingdom and United States.

<sup>68</sup> The Forum Secretariat was established in 1972 under a multi-lateral agreement, and was initially a Trade Bureau known as the South Pacific Bureau for Economic Co-operation: Second South Pacific Forum Communiqué, Canberra, 23-25 February 1972. [1972 Forum Communiqué]

<sup>69</sup> Mr Greg Urwin, a former diplomat of the Australian Government, is the current Secretary General, and took office in January 2004 for a three-year term. He is the first non-Pacific islander to be appointed Secretary-General. Previous Secretary-Generals have been from Tonga, Papua New Guinea, Tuvalu and Kiribati.

the Forum Secretariat there are four Divisions.<sup>70</sup> The Forum's budget is apportioned on the basis of one third each to Australia, New Zealand and the Islands as a group responsible for the remaining one-third.<sup>71</sup> Regional security is handled by the Secretariat's Political, International and Legal Affairs Division, which also deals with law enforcement cooperation, legal, and political matters. The Division is headed by a Director and supported by three advisers that deal with legal, political and international issues, respectively, plus law enforcement consultants.

In the Forum Meeting in 2003, held in Auckland, the Forum Leaders agreed to carry out a review of the Forum and its Secretariat in order to advance regional cooperation and integration.<sup>72</sup> A Forum Eminent Persons Group (Forum EPG) was appointed by the Forum Leaders and their findings and recommendations were released in April 2004.<sup>73</sup> The security aspects of the review are dealt with below.

### 3 *The Forum and Regional Peace and Security*

So far as the Forum is concerned, security in the Pacific context is seen in its wider meaning, which includes both traditional and non-traditional security threats. Regional peace and security was first raised in relation to the threat of Communism in the 1970s. Forum members however have always steered clear of intervening or discussing internal peace and security crises. These matters were taboo based on the respect for the principles of state sovereignty, non-intervention and equality of nations. The rise of peace and security threats and crises, which threatens the region's security, as broadly defined, has however forced the Forum to change its stance to an extent.

The Forum first attempted to establish regional peace and security cooperation when it adopted the "Aitutaki Declaration on Regional Security Cooperation" (Aitutaki) in its 1997

<sup>70</sup> The four divisions are: Development and Economic Division; Trade and Investment Division; Political, International and Legal Affairs Division; and the Corporate Services Division.

<sup>71</sup> 1972 Forum Communiqué, above n 68, 2.

<sup>72</sup> Thirty-Fourth Pacific Islands Forum Communiqué, Auckland, New Zealand, 14-16 August 2003, para 58-61.

<sup>73</sup> Sir Julius Chan, Bob Cotton, Dr. Langi Kavaliku, Teburoro Tito Maiava Iulai Toma *Pacific Cooperation: Voices of the Region The Eminent Persons' Group Review of the Pacific Islands Forum, April 2004* (Forum Secretariat, Suva, 2004). [EPG Forum Review 2004]

meeting in the Cook Islands.<sup>74</sup> Aitutaki was the first regional statement on proactively dealing with peace and security crises.<sup>75</sup> The aim of Aitutaki was “to further strengthen the region’s security environment”.<sup>76</sup> The Forum Leaders expressed their commitment to “dialogue on political and security issues” based on the members collectively dealing with political and security issues and situations.<sup>77</sup> The Forum Leaders agreed that a regional approach to security was required and, that the practice of good governance, sustainable development and international cooperation would improve regional security. The Leaders also recognised the need to eliminate “causes of conflict”, and use peaceful means to resolve conflicts including customary practices. Practical cooperation was also called for. Aitutaki also laid the foundation for regional response using “preventive diplomacy” and the “the region’s disciplined forces”, and tasked the FRSC to administer regional responses.<sup>78</sup>

The second attempt by the Forum was instigated in August 2000 in a special meeting of the FFAMM convened in Apia. This meeting was done “in response to approaches from members for an opportunity to discuss developments in the region’s security environment relating to the Fiji and Solomon Islands crises”.<sup>79</sup> In opening that meeting the Samoan Prime Minister clarified that “existing Forum arrangements do not prescribe a process for implementing a Forum response” to security crises, and explained that:<sup>80</sup>

In a sense the studied procrastination of the Forum in not having in place an effective response mechanism is rooted on our long held belief that we were blessed with a truly tranquil region. It was admittedly a comforting vision and such was the depth of this complacency that the earlier coups in Fiji were somehow viewed as having a special and palatable Pacific flavour and were therefore considered merely aberrations to the otherwise underlying peaceful and serene nature of our traditional societies.

<sup>74</sup> Aitutaki Declaration on Regional Security Cooperation, Annex 2 to the 1997 Forum Communiqué. [Aitutaki Declaration]

<sup>75</sup> Aitutaki Declaration, above n 74, para 2.

<sup>76</sup> Twenty-Eighth South Pacific Forum Communiqué, Rarotonga, Cook Islands, 17-19 September 1997, para 22.

<sup>77</sup> Aitutaki Declaration, above n 74, paras 9-10.

<sup>78</sup> Aitutaki Declaration, above n 74, paras 11-14.

<sup>79</sup> Thirty-First Pacific Islands Forum Communiqué, Tarawa, Republic of Kiribati, 27-30 October 2000, para 7. [2000 Forum Communiqué]

<sup>80</sup> Hon Tuilaepa Sailele Malielegaoi, Prime Minister of Samoa, Opening Statement (Forum Foreign Affairs Ministers Meeting, Apia, 10 August 2000) <<http://www.forumsec.org.fj>> (last accessed 9 October 2005).

The result of that meeting was the formal condemnation of the May 2000 coup in Fiji and the welcoming of the (temporary) cease-fire in the Solomon Islands. This was only the second time a meeting of the Forum had ever discussed and made a statement concerning any security crises within a Forum member's borders. The first was in 1997 in relation to the Bougainville conflict but that was only to note the progress in achieving peace.<sup>81</sup> The Ministers then established a working group to draft principles and options for consideration at the next meeting of the Forum Leaders.

In October 2000 the Forum Leaders met in Kiribati. High on the agenda were the crises in Fiji and the Solomon Islands. The Forum highlighted the shift in the Forum members' ideology that a response to security crises was required when it stated in its communiqué that:<sup>82</sup>

The Forum expressed grave concern that, since its last meeting in Palau in 1999, the region's security environment had become more unstable. Leaders recognized the urgent need to address some of the fundamental causes of political instability in the region associated with ethnic tensions, socio economic disparity, lack of good governance, land disputes, and erosion of cultural values, all of which required deeper understanding and action.

During their Forum Retreat at Biketawa Atoll the Leaders agreed on a set of principles, courses of action and guidelines to use when the Forum may respond to a crisis within the borders of a Forum State. These were compiled in what became known as the Biketawa Declaration (Biketawa).<sup>83</sup>

#### 4 *The Forum's Aitutaki and Biketawa Declarations*

Aitutaki had set the platform for regional security cooperation; however it was Biketawa that gave the Aitutaki principles some practical substance for a proactive regional security response. The noble Aitutaki principles – regional approach, good leadership, averting causes of conflict, peaceful resolution of conflict, practical cooperation and regional intervention –

<sup>81</sup> Stewart Firth "A Reflection on South Pacific Regional Security, mid-2000 to mid-2001" [2001] 36 *The Journal of Pacific History* 277, 278. [Firth]

<sup>82</sup> 2000 Forum Communiqué, above n 79, para 8.

<sup>83</sup> 2000 Forum Communiqué, above n 79, Attachment 1. [Biketawa Declaration]



were moulded to form Biketawa. The Forum Leaders however were still unwilling to fully embrace the Aitutaki principles and erode some of their sovereignty.

In Biketawa the Forum Leaders, first, emphasised their adherence to the principles of “non-interference in domestic affairs of another member state”. Any Forum response to any domestic crisis must therefore be by consent of the concerned government. The Forum Leaders then went on to express their commitment to the principles of: good governance; liberty of the individual under the law; and upholding democratic processes and institutions.<sup>84</sup> Moreover, the leaders recognised the: importance and urgency of equitable economic, social and cultural development; importance of respecting and protecting indigenous rights and cultural values, traditions and customs; vulnerability of member States to threats to their security and the importance of cooperation among members when such threats arise; importance of averting the causes of conflict and of reducing, containing and resolving all conflicts by peaceful means.<sup>85</sup>

The Forum Leaders went on to recognise that action must be taken “in time of crisis” or “in response to members’ request for assistance”, and that such action however should be taken on the basis of collective response to crisis.<sup>86</sup> Forum response to a security crisis may therefore be instigated in two ways. First, the Forum may respond if it determines a situation amounts to a security “crisis”. As set by Aitutaki, “security” is seen in its broad context, involving political, economical, environmental and social crises. Secondly, the Forum may respond when a Forum State requests Forum assistance. Any regional response to a crisis was to take account of principles which included: consultation with national authorities; credibility of personnel involved; coherent and consistent strategy; continuity and conclusiveness of process; cooperation with other organisations; sufficient degree of consensus by all involved; and, cost-effective responses.<sup>87</sup>

The Forum Leaders therefore accepted that they must “constructively address difficult and sensitive issues” including underlying causes of tensions and conflict. They recognised the

<sup>84</sup> Biketawa Declaration, above n 83, clause 1(i)-(iii).

<sup>85</sup> Biketawa Declaration, above n 83, clause 1(iv)-(vii).

<sup>86</sup> Biketawa Declaration, above n 83, clause 2.

<sup>87</sup> Biketawa Declaration, above n 83, Annex.

important and prevalent causes of conflict to be ethnic tension, socio-economic disparities, lack of good governance, land disputes and erosion of cultural values. The Forum was thus prepared finally to face the sensitive issues which traditionally were ignored and considered outside the scope of the Forum. However, such willingness to respond seems to be still subject to consent of the concerned State.

On the administrative side, the Forum Leaders charged the Secretary General of the Forum to implement Biketawa and its four step process. When a situation arises, the Secretary-General, first, must consult the Forum Chair. From there the Secretary-General then assesses the situation and makes a judgment on the significance of the development. Before any proactive action is taken, the Secretary General must consult the Chair of the Forum, and other Forum Leaders, as may be feasible, to get approval to initiate further action. Secondly, the national authorities are consulted regarding assistance available from the Forum. Thirdly, the Secretary-General must then advise and consult the Forum Foreign Ministers. Based on these consultations the Secretary General must then carry out specified actions. Fourthly, if these measures do not mitigate or resolve the crisis, the Secretary General may then convene a meeting of the Forum Leaders to consider options, including "targeted measures".

RAMSI was the first time Biketawa was used by the Forum. Biketawa was utilised a second time at the 2004 Forum Meeting held in Samoa when the Forum leaders approved the Pacific Regional Assistance to Nauru (PRAN), after that country suffered severe economic crisis.<sup>88</sup> The Forum leaders recognised that the Nauru crisis "threatened its security and national stability". The 2005 Forum Meeting noted the assistance that was provided for Nauru.<sup>89</sup>

In summary, the Pacific Islands Forum is in reality just a forum where the independent Pacific Island States, together with their more powerful traditional neighbours, Australia and New Zealand, meet to discuss common issues and agree on regional cooperation based on consensus. The Forum's security framework is, however, a recent development, in recognition

<sup>88</sup> Thirty-Fifth Pacific Islands Forum Communiqué, Apia, Samoa, 5-7 August 2004, para 26.

<sup>89</sup> 2005 Forum Communiqué, above n 61, para 13.

that a regional approach to peace and security concerns is vital for achieving the Forum's more pressing economic and social goals.

What then are the grounds to justify formalising the Forum's peace and security framework?

### *C Why Formalise the Forum's Peace and Security Framework?*

#### *1 Lack of Legal Status for Aitutaki and Biketawa*

Although Biketawa was seen as ground-breaking for the Forum by finally giving itself a mechanism to deal with peace and security crises that occur within borders of Forum members, there are some identifiable shortfalls. First, Biketawa is a political instrument, not a legal one with binding powers over the Forum States. This is a direct victim of the Forum's informal status. Since 1971 the Forum has been operating without a formal constitution and so its commitments are merely political, rather than legal, which would make commitments obligatory.

Secondly, the Forum in reality does not have a leading role in peace and security matters.<sup>90</sup> In the Bougainville conflict Australia and New Zealand pressed for the peace talks. The first peace agreement in the Solomon Islands was brokered by Envoy sent by the Commonwealth Secretariat. Presently, the regional framework can only be fully implemented with Australian and, or New Zealand support. If it suits these States to respond, then a response will be made. We have seen above that RAMSI is an Australian intervention under the banner of the Forum. When the Solomon Islands government was after external assistance, it approached Australia, not the Forum. A formalised framework would place the Forum in an authoritative seat to require all Forum States to respond, rather than the other way round.

Thirdly, the lack of legal status is politically disadvantageous to Australia and New Zealand. A formalised regional organisation that would take a leading role in regional peace

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<sup>90</sup> Firth, above n 82, 279.

and security would repel claims of neo-colonialism and intervention made against Australia and New Zealand. It could avoid any Forum response from being influenced by the national interest of the dominating State. It could also legitimise action that may be seen as unilateral initiatives. Moreover, a Forum response could be a regional response, with prominent roles shared by all Forum States. In May 2005 an Eminent Persons Group, set up by the Forum, reviewed RAMSI and recommended that RAMSI has to be seen to be a regional exercise and that more "Pacific representation in both policing and civilian component should be strengthened where possible".<sup>91</sup>

## 2 *Gaps in Biketawa's Armour*

There seems to be gaps in Biketawa's armour. This was clearly raised by the Forum EPG convened to review the Forum. According to the Forum EPG there was "widespread agreement that regional effort on trans-national and regional security crisis need to be harnessed effectively", however they understandably did not detail the shortfalls or what was fully required.<sup>92</sup> The author identifies the following features.

First, regional response under the Biketawa Declaration ignores two possible scenarios in traditional peace and security crises. The first scenario is when armed conflict escalates to the point where there is no functioning government to issue the invitation for regional assistance. The Solomon Islands conflict went close to this scenario as the militants gained a stranglehold on the near failed government. The second scenario is when a government refuses to issue an invitation although there are clear signs of a peace and security crisis. The Bougainville conflict took nearly a decade before seeking the assistance of the Australians and New Zealanders to assist in negotiating a ceasefire and after atrocities were committed by each hostile party.

Secondly, Biketawa does not clarify what targeted measures are available. They are left to be discussed and agreed upon when diplomatic measures fail. The absence of a clear expression in Biketawa seems to provide no legal basis for the type of measures the Forum can

<sup>91</sup> Forum RAMSI Review, above n 38, para 10.

<sup>92</sup> EPG Forum Review 2004, above n 73, 23.

invoke. This uncertainty could create legal issues as to the Forum's power to invoke "targeted measures". A Forum State may criticise the legality of any "targeted measures" the Forum Leaders may impose. This could thus tarnish Forum legitimacy.

### 3 *'Serious Harm' Features in Recent Crises*

Non-international armed conflicts in the Pacific, although of low intensity compared to armed conflicts around the world, could pose a serious regional peace and security threat because it has severe repercussions on small and fragile island communities directly and, also to the region in its efforts to maintain a reputation of stability for investment opportunities and much needed tourism activity.<sup>93</sup>

This was evident in Fiji and the Solomon Islands. Looters and militants attacked undefended businesses and homes. Expatriates and tourists were harassed and assaulted for money. Extortion was practiced on banks, businesses and the government.<sup>94</sup> Moreover, in the Solomon Islands, peace negotiators were murdered, "extraordinarily barbaric acts of retribution" was committed against villagers, and captives were tortured and subjected to inhumane treatment.<sup>95</sup> The defilement of the dead was practiced in the Solomon Islands. Furthermore, there were severe injuries and suffering inflicted with machetes and home-made or high powered guns stolen from government armouries. In Bougainville there were reports of extrajudicial killings and disappearances, and firing into crowds.

Moreover, government officials and politicians either supported or encouraged the violations that occurred. In the Solomon Islands politicians and police officers supported the hostile parties.<sup>96</sup> In Fiji, politicians, social leaders and soldiers supported the coup. These persons not only ignored the rule of law but also their own fellow citizens. They were clearly corrupted by prejudice, customary loyalties and greed. In such a situation hope for domestic redemption and resolution was unreal. The only viable option is hope for some external

<sup>93</sup> von Strokirch, above n 55, 422.

<sup>94</sup> Fraenkel, above n 21, 152.

<sup>95</sup> Fraenkel, above n 21, 154-157.

<sup>96</sup> Kabutaulaka II, above n 29, 6; Fraenkel, above n, 64.

intervention. Although the atrocities inflicted in these conflicts, particularly in the Solomon Islands and Fiji, have been dealt with through national judicial systems, the shortfall is some may have escaped justice, especially those who masterminded the respective crises.<sup>97</sup>

Finally, Pacific conflicts are based on complex interaction of various factors and so early and cohesive response could avoid the crisis quickly escalating into a humanitarian concern. In 2000 Professor Ron Crocombe reported that:<sup>98</sup>

The main instances of overt conflict in the Pacific in the past 20 years have involved a combination of ethnic tensions (whether among Pacific Islanders, or between Islanders and immigrants), land disputes, economic disparities, and a lack of confidence in government's ability or willingness to solve the problems. These elements usually co-exist before a security breakdown occurs.

Dr. Ratuva however believes that those are the "obvious factors" which ignores the "more subtle, more complex and equally important ones", and suggests that:<sup>99</sup>

Political stability is not an isolated phenomenon driven purely by political forces – it is also shaped and driven by social, economic and cultural factors in complex ways. Thus national security must be an inclusive concept encompassing a variety of issues which impinge on people's sense of safety and welfare, state stability, community survival and sustenance of society generally.

Both Crocombe and Ratuva agree that conflicts in the Pacific are always most likely to be multi-dimensional, and so attempts to prevent, resolve and re-build have to be equally multi-dimensional. The complexities of Pacific non-international armed conflicts are therefore likely to quickly heighten armed conflict to intense levels once initiated, and can also prolong it making resolution challenging. Timely action is therefore of the essence. This can be provided

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<sup>97</sup> Wainwright, above n 35, 5.

<sup>98</sup> Ron Crocombe "Enhancing Pacific Security" (Forum Regional Security Committee Meeting, Port Vila, 13-15 July 2000) 3.

<sup>99</sup> Dr. Steven Ratuva "Pacific Islands States Security Issues" (Forum Regional Security Committee Meeting, Auckland, 15 June 2005) 2.

by a framework that drives and legalises appropriate regional response, rather than reliance on the political will of States.

#### 4 *Developing Forum Regionalism*

The regional political climate is providing an opportunity for the Forum to formalise regional peace and security. In 2001 the Forum members signed the Pacific Agreement on Closer Economic Relations (PACER) and the Pacific Island States Trade Agreement (PICTA), illustrating a regional intention and effort to form an economic community. PACER and PICTA success would depend on a peaceful and secure region, so effective regional peace and security cooperation would be imperative.

In April 2004 the 16 Forum Leaders met in Auckland to consider the Forum EPG's Review of the Forum. The Forum EPG recommended a vision statement, which was adopted by the Forum Leaders and released in the form of the Auckland Declaration. The vision is:<sup>100</sup>

Leaders believe the Pacific can, should and will be a region of peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives. We treasure the diversity of the Pacific and seek a future in which its cultures, traditions and religious beliefs are valued, honoured and developed. We seek a Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights. We seek partnerships with our neighbours and beyond to develop our knowledge, to improve our communications and to ensure a sustainable economic existence.

After the 2005 Forum in PNG the Forum Leaders agreed to "adopt a new Agreement Establishing the Pacific Islands Forum" which "establishes the Pacific Islands Forum as an intergovernmental organisation at international law", and updates the Forum's purpose and functions to reflect the vision and directions taken under the Pacific Plan".<sup>101</sup> The Pacific Plan was adopted by the Forum Leaders in 2005 as the Kalibobo Roadmap, based on four pillars of economic growth, sustainable development, good governance and security for the Pacific

<sup>100</sup> The Auckland Declaration, Pacific Islands Forum Special Leaders Retreat, Auckland, 6 April 2004.

<sup>101</sup> 2005 Forum Communiqué, above n 61, para 6.

through regionalism.<sup>102</sup> The security aspect of the Roadmap however focuses on addressing non-traditional security threats. These developments have laid the foundation that would allow the formalisation of the Forum and its mechanisms, particularly for peace and security as a foundation for economic prosperity and social development.

## 5 *United Nations Recognition*

There seems to be a shift in thinking in the universal body to engage the regional organisations to share the UN's responsibility to maintain international peace and security.<sup>103</sup> In September 2004 the UN Secretary General presented a report to the UN General Assembly on "Cooperation between the United Nations and regional and other organisations", which included the Forum.<sup>104</sup> Following that report, in November 2004 the UN General Assembly passed a resolution noting the developments in the Forum, and called for further and continued cooperation and support from the UN.<sup>105</sup> In particular, it called for contributions to the Biketawa Trust Fund, and training on "preventive diplomacy and post-conflict resolution".

In September 2005, the UN General Assembly adopted the 2005 World Summit Outcome where the World Leaders supported a stronger relationship between the UN and regional organisations, and to expand consultation and cooperation through formalised agreements.<sup>106</sup> The World Summit Outcome was then supported by the Security Council when it expressed its determination to cooperate with regional organisations under Chapter VIII of the UN Charter.<sup>107</sup> The Forum, as the pre-eminent regional organisation, should therefore equip itself with the necessary framework and tools to work with the UN, particularly on international peace and security matters on a regional level.

<sup>102</sup> 2005 Forum Communiqué, above n 61, Annex A.

<sup>103</sup> Kennedy Graham "A 'global-regional security mechanism': an emerging vision of global security?" [2005] 6 *New Zealand International Review* 2, 4.

<sup>104</sup> UNGA Report "Cooperation between the United Nations and regional and other organizations: Report of the Secretary-General" (1 September 2004) A/59/303. [UN Cooperation Report]

<sup>105</sup> UNGA Resolution 59/20 (8 November 2004) A/RES/59/20.

<sup>106</sup> UNGA Resolution 60/1 (16 September 2005) A/RES/60/1 para 170. [World Summit Outcome]

<sup>107</sup> UNSC Resolution 1631 (17 October 2005) S/RES/1631 (2005) para 1.



In summary, there is an opportunity now to formalise the mandate of the Forum concerning peace and security matters based on a number of factors. First, the Forum's security framework does not have any legal status that would drive timely and effective regional response and, its peace and security framework has significant gaps. Moreover, peace and security crises in the Pacific provoked serious international law concerns because they involved violations of human rights laws and international humanitarian laws. Furthermore, the Forum, as a gathering, is considering a formalised arrangement. More importantly, the UN is moving towards addressing international peace and security on a regional level with the Forum.

What then are the international law issues that a formalised regional peace and security body could face?

### *III INTERNATIONAL LAW ISSUES*

#### *A Dealing with States' Sovereignty*

Since peace and security crisis in the Pacific are likely to be non-international armed conflicts, regional responses would undoubtedly interfere with a State's sovereignty, unless the State invites such a response. This means the foremost legal issue the Forum may face is negotiating with the sensitive international law principles of States sovereignty and non-intervention.

##### *1 Humanitarian Intervention*

Thirteen Forum States are full members of the UN, and are therefore bound by the United Nations Charter (the UN Charter).<sup>108</sup> Although the other three are not members of the UN, the UN security framework is the benchmark to gain international legitimacy and support.<sup>109</sup> The UN emphasises the principle of state sovereignty under article 2(1) of the UN

<sup>108</sup> Charter of the United Nations (26 June 1945) 59 Stat 1031; 145 UKFS 805. [UN Charter]

<sup>109</sup> Cook Islands, Federated States of Micronesia and Niue are not members of the UN.

Charter by stating that the UN is based on the "sovereign equality" of all its Members. This is supported by the principle of non-intervention in article 2(7) in the following terms:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The UN principles of States sovereignty and non-intervention are based on traditional international law which provides that States are regarded as equals regardless of their resources and size. These principles ensure that international relations can be conducted in an orderly and stable international environment, and with certainty.

These principles however have been challenged, particularly in the context of traditional peace and security crises that involves the use of force. The emergence of the concept of "humanitarian intervention" provides "intervention ... to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state".<sup>110</sup> The Economic Community of West African States' (ECOWAS) intervention in Liberia's civil war in 1990 was a humanitarian response after 5,000 people were killed and 500,000 fled for safety during Liberia's civil war. The ECOWAS intervention in Sierra Leone in 1997 was also based on humanitarian grounds after the cease fire that had ended a six year civil war collapsed. That previous conflict had resulted in a high number of casualties and refugees, and destruction of the country's infrastructure.

Thirdly, the North Atlantic Treaty Organisation (NATO) air offensive in Kosovo in 1999 was a response to Serbian atrocities. Russia and China however objected to NATO justifying its actions on humanitarian grounds as this was not recognised in the UN Charter, nor was it part of customary international law.<sup>111</sup> Russia's and China's view illustrate that there is disagreement about "whether there is a right of intervention, how and when it should be

<sup>110</sup> Malcolm Shaw *International Law* (5ed, Cambridge University Press, Cambridge, 2003) 1045. [Shaw]

<sup>111</sup> Thomas M. Franck *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, London, 2002) 167. [Franck]

exercised, and under whose authority".<sup>112</sup> When referring to the UN Charter there certainly is no express or implied provision that would support "humanitarian interventions".<sup>113</sup>

## 2 The Emerging Principle of the "Responsibility to Protect"

The shortfalls of the principle of humanitarian intervention however have led to a re-characterisation of the concept of States sovereignty. This emerged with the report of the International Commission on Intervention and State Sovereignty (ICISS) which created the principle of the "responsibility to protect".<sup>114</sup> This principle highlights that "[t]here is a necessary re-characterization" of State sovereignty "from *sovereignty as control* to *sovereignty as responsibility* in both [a States] internal functions and external duties". State sovereignty was thus "re-characterized" to mean that States have, first, the responsibility for the "protection of its people", and secondly, "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".<sup>115</sup>

The responsibility to protect "embraces three specific responsibilities" to: (i) prevent the breakout of armed conflict by addressing the "root causes" of conflict; (ii) react to situations of "compelling human need with appropriate measures"; and, (iii) rebuild by providing "full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt".<sup>116</sup> The ICISS also admirably sets out the framework for invoking military intervention under the responsibility to protect.<sup>117</sup>

<sup>112</sup> Gareth Evans and Mohamed Sahnoun "The Responsibility to Protect" [2002] *Foreign Affairs*, 99, 99.

<sup>113</sup> Jutta Brunnee and Stephen J Toope "The Use of Force: International Law After Iraq" [2004] 53 *ICLQ* 785, 800. [Brunnee and Toope]

<sup>114</sup> International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001), <<http://www.idrc.ca>> (last accessed 23 November 2005). [ICISS Report]

<sup>115</sup> ICISS Report, above n 114, XI.

<sup>116</sup> ICISS Report, above n 114, XI.

<sup>117</sup> ICISS Report, above n 114, XII-XIII.

The principle was supported by the UN Secretary-General's High-level Panel on Threats, Challenges and Change when they were of the view that "States not only benefit from the privileges of sovereignty but also accept its responsibilities", and that it is clear that State sovereignty "clearly carries with it the obligation of a State to protect the welfare of its own people and meet its obligations to the wider international community".<sup>118</sup> This new characterisation of State sovereignty has therefore created "conditional sovereignty", where States must hold true to their political commitments.<sup>119</sup> In the recent World Summit, the World's leaders embraced the concept as it applies to the protection of citizens from genocide, war crimes, ethnic cleansing and crimes against humanity, and stated their willingness to resort to the collective use of force if citizens are not protected from such atrocities.<sup>120</sup> This indicates that the concept has attained the status of customary international law, but only in relation to certain international crimes. A fundamental shift in international law has therefore occurred where "people are more important than State sovereignty".<sup>121</sup>

In summary, States' sovereignty is challenged by the principles of humanitarian intervention and the responsibility to protect. Humanitarian intervention however is not a principle supported by the different forms of international law. The "responsibility to protect" concept however seems to have attained customary international law status in relation to the most serious international crimes. This means States have accepted that its internal functions are now subject to external supervision by other States if they cause serious harm. On that basis regional intervention may result, which may include the use of force without the invitation of the State concerned. For the Pacific region, non-international armed conflicts provide an opportunity for justified intervention if a crisis involves the threat or commission of serious international crimes.

<sup>118</sup> UN Secretary-General's High-level Panel on Threats, Challenges and Change *A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change* <<http://www.un.org>> (last accessed 25 November 2005) para 29.

<sup>119</sup> Anne-Marie Slaughter "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform" [2005] 99 *AJIL* 619, 628.

<sup>120</sup> World Summit Outcome, above n 106, paras 138 and 139.

<sup>121</sup> Brunnée and Toope, above n 113, 801.

## **B The Use of Force**

### **1 Universal Prohibition**

One of the core purposes of the UN is to maintain international peace and security.<sup>122</sup> The UN's Security Council holds the "primary responsibility for the maintenance of international peace and security".<sup>123</sup> Under article 2(4) of the UN Charter the use of force is prohibited in the following terms:<sup>124</sup>

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The prohibition of use of force however has two exceptions. First, article 51 of the UN Charter provides a state or a collective of states the "inherent right of individual or collective self-defence" if subjected to armed attack. State or collective self-defence however expires when the Security Council has "taken measures necessary to maintain international peace and security".

Secondly, under Chapter VII of the UN Charter, the Security Council has the authority to direct the use of force once it determines that a dispute or situation amounts to a "threat to the peace, breach of the peace, or act of aggression".<sup>125</sup> After making such a determination the Security Council may make recommendations, or impose enforcement action. The latter may consist of economic sanctions, or the use of force in order to "maintain or restore international peace and security".<sup>126</sup> Military action authorised by the Security Council then falls on the Member States undertaking to make available to the Security Council under special agreement "armed forces, assistance, and facilities, including rights of passage".<sup>127</sup> The sanctions made by

<sup>122</sup> UN Charter, above n 108, art 1(1).

<sup>123</sup> UN Charter, above n 108, art 24(1).

<sup>124</sup> UN Charter, above n 108, art 2(4).

<sup>125</sup> UN Charter, above n 108, art 39.

<sup>126</sup> UN Charter, above n 108, arts 41 and 42.

<sup>127</sup> UN Charter, above n 108, art 43.

the Security Council are binding on all UN Member States.<sup>128</sup> The Security Council is therefore the pre-eminent executive body that deals with international peace and security on a universal level.

During the years of the Cold War the Security Council was handicapped by the polarisation of ideologies between East and West, and the veto became a political weapon. This led to the General Assembly adopting the "Uniting for Peace" Resolution (the Resolution) which provided the Assembly the ability to consider international peace and security matters when the Security Council failed to do so.<sup>129</sup> The resolution allowed the Assembly to authorise, recruit, and deploy military force necessary to allow it to fulfil its mission.<sup>130</sup> The Resolution was used to send peacekeeping troops during the Suez crisis of 1956, and enforcement action in the Congo in 1960. Concerns of the constitutionality of the resolution was put to rest by the International Court of Justice when a majority opined that it was lawful for the Assembly to exercise the UN's responsibility for maintaining international peace and security when the Security Council was unable to do so.<sup>131</sup> The General Assembly therefore is another limb to the universal security framework, but it can only be utilised in the event of the Security Council not exercising its powers fully.

Due to the prevalence of non-international armed conflicts in the post-Cold War years the Security Council has responded in practice by determining that internal armed conflicts may threaten international peace and security when they involve the denial of self-determination, civil wars, widespread abuse of human rights, or they have consequences of destabilizing neighbouring states or draw in outside powers.<sup>132</sup> This was clearly done in the conflicts in the former Yugoslavia, Somalia, Rwanda, and Iraq's suppression of the Kurdish population.

<sup>128</sup> UN Charter, above n 108, art 48.

<sup>129</sup> UNGA Resolution 377 (V) (3 November 1950).

<sup>130</sup> Franck, above n 111, 37.

<sup>131</sup> *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 163.

<sup>132</sup> Hilaire McCoubrey and Nigel D. White *International Organizations and Civil Wars* (Dartmouth: England, 1995) 39. [McCoubrey and White]

## 2 Use of Force by Regional Organisations

Under the universal peace and security framework, regional organisations can only use force when the Security Council delegates its enforcement powers under Chapter VII of the UN Charter to regional organisations, pursuant to Chapter VIII of the UN Charter. The delegation of powers by the Security Council may require the regional organisation to act against its own members or a non-member.<sup>133</sup> Regional organisation that may be used under Chapter VIII must have mandates to deal with international peace and security matters on a regional level.<sup>134</sup> This is especially important if a Security Council delegation to use enforcement action is outside the ambit of the constituent instrument of a regional organisation.<sup>135</sup> Sarooshi however reasonably suggests that in such situations the Security Council could delegate Chapter VII powers expressly to States with provision to use mechanisms of regional organisations, in order to allow States to choose how to implement the Security Council direction.<sup>136</sup> Regional organisations are also required to have a mandate for the pacific settlement of disputes which should always be utilised at the initial stages of a conflict.<sup>137</sup>

In order for a delegation to be lawful there must be three conditions. First, there must be specification of a clear objective.<sup>138</sup> Secondly, the Security Council will supervise the regional organisation's action under the delegation. Thirdly, the regional organisation must "at all times" fully inform the Security Council of peace and security "activities undertaken or in contemplation".<sup>139</sup>

One issue that has clearly occupied regional organisations has been obtaining authorisation of the Security Council for any enforcement action. On a strict reading of the UN Charter, authorisation seems to be a prerequisite for regional use of force. However, the ECOWAS interventions in Liberia and Sierra Leone, and NATO's intervention in Kosovo,

<sup>133</sup> Danesh Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press, Oxford, 1999) 251. [Sarooshi]

<sup>134</sup> UN Charter, above n 108, art 52(1).

<sup>135</sup> Sarooshi, above n 133, 252-253.

<sup>136</sup> Sarooshi, above n 133, 283.

<sup>137</sup> UN Charter, above n 108, arts 52(2) and 52(3).

<sup>138</sup> UN Charter, above n 108, art 53.

<sup>139</sup> UN Charter, above n 108, art 54.

illustrate that authorisation can be obtained retroactively. In the Liberian conflict ECOWAS resorted to enforcement action without the Security Council's authorisation. The Security Council however commended ECOWAS through a Presidential Statement after a ceasefire was negotiated.<sup>140</sup> In the Sierra Leone conflict ECOWAS sent troops without the Security Council's authorisation, nor objection. The conflict however deteriorated and ECOWAS became fully engaged in it. It was not until 1999 that the Security Council approved ECOWAS' use of force in Sierra Leone.<sup>141</sup> In the Kosovo crisis NATO bombing divided and paralysed the Security Council, although it did consider a draft resolution that condemned and called for immediate cessation of NATO action, which was overwhelmingly defeated.<sup>142</sup> The Security Council did eventually issue a resolution after NATO action was successful, but managed only to welcome the ceasefire, and authorised Member States and relevant international organisations to establish a security presence in Kosovo.<sup>143</sup>

In summary, the universal security framework prohibits the use of force, unless for individual or collective self-defence, or under Security Council authorisation. Such authorisation may also be given in the case of non-international armed conflict if the Security Council deems it a threat to international peace and security. For regional organisations, prior Security Council authorisation is required before it implements any enforcement action against a State. The regional organisation however may use enforcement action if it is invited to do so by the government of the State concerned, in which case authorisation may be obtained *ex post facto* from the Security Council. Retroactive authorisation may also be provided for enforcement action depending on how the Security Council views the circumstances of the crisis, however, as we have seen above with humanitarian intervention, this is an avenue that is too wide and may be open for abuse, and more importantly seriously risks the harmony in international relations. Intervention however based on the responsibility to protect may likely to be less problematic legally and politically.

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<sup>140</sup> Franck, above n 111, 156. The peace plan however failed and ECOWAS then went to the Security Council to seek authorisation for use of force, and also assistance. This was provided by the Security Council and by 1996 the civil war ended.

<sup>141</sup> UNSC Resolution 1270 (22 October 1999) S/RES/1270, para 7.

<sup>142</sup> Franck, above n 111, 169.

<sup>143</sup> UNSC Resolution 1244 (10 June 1999) S/RES/1244/1999 paras 2 and 7.



## C *Non-international Armed Conflicts*

Since armed conflict in the Pacific will be non-international nature, another legal issue for the Forum is responding to breaches of the law of armed conflict, or what is now known as international humanitarian law (IHL). IHL establishes legal thresholds as to when international humanitarian law is applicable, and thus, external response justifiable.

### 1 *The Parameters of International Humanitarian Law*

International humanitarian law applicable to non-international armed conflicts consists, first, of article 3 common of the four 1949 Geneva Conventions (common article 3), which protects those taking no active part in the conflict or made *hors de combat*, from inhumane treatment, discrimination, or murder.<sup>144</sup> It applies to each party of the non-international armed conflict. It is drafted in very broad language, and is considered a ‘Convention in miniature’ or a ‘microcosm’ of the four Geneva Conventions applied to non-international armed conflict.<sup>145</sup> Common article 3 thus provides for “elementary considerations of humanity”, applicable in all armed conflicts.<sup>146</sup>

The protection of States’ sovereignty however limited common article 3’s application. States were reluctant to apply common article 3 to domestic affairs because of its wide ambit.<sup>147</sup> Moreover, insurgents are not given “prisoner of war” status, and are not protected from being prosecuted for taking up arms. Common article 3 does not provide for a “grave breaches” regime which makes it mandatory for States parties to enact domestic legislation to prosecute or extradite any person who breaches core criminal provisions, although it was provided for

<sup>144</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, art 3 [Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, art 3 [Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 3 [Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 3 [Geneva Convention IV]. The four conventions came into effect on 21 October 1950.

<sup>145</sup> Lindsay Moir *The Law of Internal Armed Conflict* (Cambridge University Press, London, 2002) 31. [Moir]

<sup>146</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 218.

<sup>147</sup> Moir, above n 145, 34.

international armed conflict.<sup>148</sup> The culminating consequence of these features was that common article 3 was not fully observed in most non-international armed conflict that occurred after it came into force in 1950. The trend was characterised as “an almost universal phenomenon” because it was “not yet generally accepted and applied”.<sup>149</sup>

Secondly, in response to the shortfalls of common article 3, Additional Protocol II was adopted in 1977 to develop and supplement common article 3, but avoid “modifying its existing conditions of application”.<sup>150</sup> Additional Protocol II covers new ground compared to common article 3. It provides in detail obligations during non-international armed conflict for humane treatment of prisoners and non-combatants<sup>151</sup>, including the wounded, sick and shipwrecked<sup>152</sup>. It also provides for extra protection of the civilian population by prohibiting the destruction of “objects indispensable for survival”, “works and installation containing dangerous forces”, “cultural objects and places of worship”, and prohibits “forced movement of civilians”.<sup>153</sup>

Additional Protocol II however outlines situations which are excluded from its application.<sup>154</sup> Additional Protocol II does not apply to “internal disturbances and tensions”, and “isolated and sporadic acts of violence”. Moreover, it sets a high threshold before it is applied to non-international armed conflicts.<sup>155</sup> Furthermore, Additional Protocol II is intended to be independent, and not substitute, the threshold of common article 3.<sup>156</sup> In other words, common article 3 basically applies to all non-international armed conflict, while Additional Protocol II is applicable once its high threshold is satisfied.

<sup>148</sup> Geneva Convention I, above n 144, arts 49 and 50; Geneva Convention II, above n 144, arts 50-1; Geneva Convention III, above n 144, arts 129-30; Geneva Convention IV, above n 144, arts 146-7. For example, New Zealand legislated for “grave breaches” in the Geneva Convention Act 1958.

<sup>149</sup> Moir, above n 145, 67.

<sup>150</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609, art 1(1) [Additional Protocol II]. Additional Protocol II came into force on 7 December 1978.

<sup>151</sup> Additional Protocol II, above n 150, art 4. Added prohibition of collective punishments, terrorism, slavery, pillage and threats, and expanded on penal prosecutions.

<sup>152</sup> Additional Protocol II, above n 150, arts 7 to 12.

<sup>153</sup> Additional Protocol II, above n 150, arts 13 to 17.

<sup>154</sup> Additional Protocol II, above n 150, art 1(2).

<sup>155</sup> Additional Protocol II, above n 150, 18, art 1(1).

<sup>156</sup> International Committee of the Red Cross, Commentary on Additional Protocol II <<http://www.icrc.org>> (last accessed 27 October 2005)

The effect of the high threshold is that it proved impossible for the provisions of Additional Protocol II to be applied to most conflicts.<sup>157</sup> Additional Protocol II also disregards the scenario that non-international armed conflict may occur between two non-governmental groups. This is most likely to be a drafting overlap, however it was a significant as conflicts between organised groups within the borders of a state was regular, like in the Solomon Islands crisis. Like common article 3, Additional Protocol II does not have a "grave breaches" regime for non-international armed conflict.<sup>158</sup>

Thirdly, the Rome Statute of the International Criminal Court adopted in 1998, finally criminalised the breach of international humanitarian law applicable to non-international armed conflicts,<sup>159</sup> despite significant opposition at the Rome Conference<sup>160</sup>. Article 8 of the Rome Statute criminalises as war crimes the violations of common article 3, Additional Protocol II and customary international humanitarian law applicable to non-international armed conflict.<sup>161</sup> This has paid some dividends for the international community. The Security Council has referred the conflict in the Darfur region of the Sudan to the International Criminal Court (ICC).<sup>162</sup> Moreover, the ICC has issued warrants against Ugandan rebels and government soldiers for numerous atrocities committed in Northern Uganda.<sup>163</sup>

Article 8 is only concerned with the war crimes committed as "part of a plan or policy", or "part of a large-scale commission".<sup>164</sup> Moreover, only the "serious violations" of the war crimes committed during non-international armed conflict will be dealt with. This high bar will mean that those charged with war crimes are likely to be the politically and militarily powerful,

<sup>157</sup> Moir, above n 145, 120. These were the non-international armed conflicts in Angola, Namibia, Mozambique, Somalia, Afghanistan, Sri Lanka, Haiti and Nicaragua.

<sup>158</sup> Bruno Simma and Andreas L. Paulus "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" [1999] 93 AJIL 302, 310. In *The Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)(2 October 1995) IT-94-1-AR72 (Appeals Chamber, ICTY) para 84, the ICTY Appeals Chamber held customary international law had not yet established that breach of common article 3 amount to "grave breaches".

<sup>159</sup> Rome Statute of the International Criminal Court (17 July 1998) (Reproduced in the Schedule to the International Crimes and International Criminal Court Act 2000 (NZ)) arts 12-14, 17. [Rome Statute]

<sup>160</sup> Mahnoush Arsanjani "The Rome Statute of the International Criminal Court" [1999] 93 AJIL 22, 32.

<sup>161</sup> Rome Statute, above n 159, arts 8(2)(c) and 8(2)(e).

<sup>162</sup> UNSC Resolution 1593 (31 March 2005) S/RES/1593 (2005) para 1.

<sup>163</sup> Human Rights Watch "ICC Takes Decisive Step for Justice in Uganda" (14 October 2005)

<<http://www.hrw.org>> (last accessed 31 October 2005).

<sup>164</sup> Rome Statute, above n 159, art 8(1).

and the core leaders behind the commission of war crimes. Article 8 however does not apply to “situations of internal disturbances and tensions” and “isolated and sporadic acts of violence”, or other acts of a similar nature.<sup>165</sup> Moreover, it does not apply to situations where States use force to “maintain or re-establish law and order”, or, to “defend the unity and territorial integrity of the State”.<sup>166</sup> Again, the principle of States’ sovereignty was influential in reaffirming the parameters of external supervision and responses.

Fourthly, customary international humanitarian law provides a significant body of legal principles applicable to non-international armed conflict. The International Committee for the Red Cross (ICRC) has recently conducted an authoritative study that has identified a list of customary international humanitarian law applicable to both international and non-international armed conflict.<sup>167</sup> According to the ICRC study, customary international humanitarian law applicable to non-international armed conflict includes Additional Protocol II, plus the “widespread, representative and virtually uniform” States’ practice, *opinio juris*, and treaty law not yet universally ratified but “sufficiently supported by affected States”.<sup>168</sup>

In summary, international humanitarian law applicable to non-international armed conflict has established parameters for external involvement. External involvement in domestic affairs is not permitted by IHL when the excluded situations exist. It should be understood that within these excluded situations, both national and international human rights law are applied to stop State highhandedness, however it would take very serious violations of human rights law to warrant external responses. IHL and human rights law therefore provide a window for regional responses during non-international armed conflict. The Forum would therefore have to

<sup>165</sup> Rome Statute, above n 159, art 8(2)(d) and 8(2)(e).

<sup>166</sup> Rome Statute, above n 159, art 8(3).

<sup>167</sup> Jean-Marie Henckaerts “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” [2005] 87(857) *International Review of the Red Cross* 175, 189. [Henckaerts]

<sup>168</sup> Henckaerts, above n 167, 181-183. According to the ICRC study, customary IHL comprises of rules concerning: the distinction between civilian objects and military objectives, prohibition of indiscriminate attacks; proportionality of attack; precautions in attack; precautions against the effects of attack; protection of humanitarian relief personnel and objects; protection of civilian journalists; prohibition of attack of protected zones; the denial of quarter; access to humanitarian relief; deception; respect of cultural property; use of poison or poisoned weapons; use of biological weapons; use of chemical weapons; use of expanding bullets; use of exploding bullets; use of landmines; use of incendiary weapons; and use of blinding laser weapons.

make accurate determinations as to when IHL and human rights laws are violated at a serious level to provoke a regional response.

#### **D Regional Organisations' Practice**

Regional organisations were established mainly for two reasons. First, the Cold War inclined states to form regional institutions mainly for defence purposes.<sup>169</sup> Secondly, decolonisation produced independent states that were committed to complete independence.<sup>170</sup> We have seen above the practice of ECOWAS and NATO, however, due to the restraints of space, the following brief analysis will be limited to the constitutions and practice of the regional organisations which, according to Simma, "the literature unanimously confers the status of regional arrangements or agency" under Chapter VIII of the UN Charter.<sup>171</sup>

##### *1 Organisation of American States*

In 1890 states of the American continent formed the Commercial Bureau of American Republics which later evolved into the Pan American Union. In 1948 the Union was succeeded by the Organisation of American States (OAS) consisting originally of 21 member states.<sup>172</sup> Fourteen other States later joined. The OAS Charter has provisions for pacific settlement of disputes and collective security.<sup>173</sup> The OAS has been involved in assisting the UN in discussions of security incidents relating to Guatemala in 1954, the Dominican Republic in 1960-5 and Cuba in 1960-2.<sup>174</sup>

The OAS is unfortunately an example of when larger States using regional organisations to benefit its own national foreign policies. In 1965 the United States (US) sent troops to the

<sup>169</sup> Bruno Simma (ed) *The Charter of the United Nations: A commentary* (Oxford University Press, Oxford, 1994) 1168. [Simma]

<sup>170</sup> Shaw, above n 110, 1168.

<sup>171</sup> Simma, above n 169, 699.

<sup>172</sup> Organisation of American States "The OAS and the Inter-American System" <<http://www.oas.org>> (last accessed on 8 April 2005).

<sup>173</sup> Charter of the Organisation of American States, ch V and VI <<http://www.oas.org>> (last accessed on 8 April 2005).

<sup>174</sup> Simma, above n 169, 700.

internal conflict in the Dominican Republic to protect US citizens; however the US troops resorted to force which effectively benefited one of the hostile parties. The OAS later sent an Inter-American-Force at the invitation of the hostile parties in order to administer a ceasefire agreement. The OAS force however was dominated by the US and to some it was seen as a continuation of the unlawful intervention by the US.<sup>175</sup> In 1989 the US again resorted to unilateral intervention, this time in Panama, justifying its actions under article 51 of the UN Charter and also article 21 of the OAS Charter. The intervention however was condemned internationally and also by the OAS.

At the end of the Cold War however the climate changed mainly due to growth of democratically elected governments.<sup>176</sup> The OAS was involved in monitoring the Nicaraguan elections in Haiti in 1989 and in Haiti in 1990, and the conflict in El Salvador. In 1991 it adopted the Declaration of Santiago where the OAS Council is to be convened immediately if democratic process or power is interrupted.<sup>177</sup> On that basis it became involved in after the elected governments in Haiti, Peru and Guatemala were overthrown. The most serious decision was the threat of economic sanctions against Haiti.

## 2 *The League of Arab States*

The LAS came into existence in 1945. In 1952 the Joint Defence and Economic Cooperation Treaty came into force which established a collective security and defence system for the LAS. The LAS has proposed reforms which includes adjustment of its collective security system and provisions of pacific settlement of disputes, but these reforms have yet to come into force.<sup>178</sup>

The LAS provides an example of a regional organisation that resorted to force without authorisation of the Security Council. The LAS involvement in 1976 in the Lebanon civil war

<sup>175</sup> McCoubrey and White, above n 132, 248.

<sup>176</sup> Antonio Handler Chayes and Abram Chayes *Planning for Intervention: International Cooperation in Conflict Management* (Kluwer Law International, The Hague, 1999) 22. [Chayes and Chayes]

<sup>177</sup> OAS General Assembly Resolution 1080 (5 June 1991) XX1-0/91 <<http://www.oas.org>> (last accessed 28 November 2005).

<sup>178</sup> Simma, above n 169, 701.

was a mixture of both peacekeeping duties and also enforcement action. This was mainly due to the dominance of Syria in the LAS troops sent and its policy of supporting pro-Syrian factions fighting in the civil war. The LAS involvement was ended in 1982 when the Lebanese government withdrew their consent for the LAS presence in Lebanon; however Syria remained and became heavily involved in the conflict.

### 3 The African Union

In 1963 32 African states formed the Organisation of African Unity with its own dispute settlement procedures. In 1999 the OAU became the African Union (AU) and one of its many objectives is to promote peace, security and stability in Africa.<sup>179</sup> In July 2002 the AU adopted the Protocol for the Establishment of the AU Peace and Security Council, and came into force in December 2003.<sup>180</sup> On 16 March 2004 the AU Peace and Security Council (AUPSC) held its first meeting, and on 25 May 2004 it was officially launched. The AUPSC is a permanent decision-making body for the prevention, management and resolution of conflicts. United Nations experts assisted the AU in drafting the PSC Protocol.<sup>181</sup> The objectives of the AUPSC is to: promote peace, security and stability in Africa; anticipate and prevent conflicts; promote and implement peace-building and post conflict reconstruction activities; coordinate and harmonise combating of terrorism; develop a common defence policy; and promote and encourage democratic principles.<sup>182</sup>

Before the AUPSC was established, the AU was involved in most of the major conflicts in Africa since 1990, including Somalia and the Congo however intervention has mainly been through preventive diplomacy.<sup>183</sup> In Rwanda it tried to assemble an African peace keeping force however it failed due to lack of support from the western powers.<sup>184</sup> After the establishment the AUPSC, the AU became much more involved in the security situations around Africa, including Angola, Burundi, Central African Republic, the Democratic Republic of Congo,

<sup>179</sup> The Constitutive Act of the African Union, art 3(f) <<http://www.africa-union.org>> (last accessed 8 April 2005).

<sup>180</sup> African Union Protocol for the Establishment of the Peace and Security Council, art 2, <<http://www.africa-union.org>> (last accessed 8 April 2005) [AUPSC Protocol].

<sup>181</sup> UN Cooperation Report, above n 104, para 5.

<sup>182</sup> AUPSC Protocol, above n 180, art 3.

<sup>183</sup> Chayes and Chayes, above n 176, 20.

<sup>184</sup> Chayes and Chayes, above n 176, 21.

Ethiopia and Eritrea, Ivory Coast, Liberia, Sierra Leone, and the Sudan.<sup>185</sup> The crisis in the Darfur region of the Sudan where the Arab Janjaweed militia have basically attacked the ethnic African civilian population, has occupied most of the time of the AUPSC. Despite a ceasefire that was successfully negotiated and peace agreements, the situation continued to deteriorate. It was not until late October 2004 that a peacekeeping force, consisting of troops and police officers, were sent in to reinforce the African Union Mission to the Sudan (AMIS). AMIS continues to provide peacekeeping duties, and the AU has managed to take parties to their seventh round of peace talks.

In summary, it seems that in the post-Cold War era with an enlivened Security Council, regional organisations are proactive in dealing with peace and security matters within their respective regions. This is quite clear in the turbulent regions of Africa and South America. This confirms the realisation that regional peace and security could be more effectively dealt with on a regional level, and also to avoid decisions on regional matters being determined by the national interests of the five permanent members of the Security Council.

What then could a formalised peace and security framework look like for the Forum?

#### **IV FORMALISING THE FORUM'S PEACE AND SECURITY FRAMEWORK**

##### **A Legal Mandate**

In order for the Forum to address regional peace and security the obvious first step is to give it a legal mandate to do so. As mentioned above, its present mandate is based on political expressions, and utilisation of the Forum's peace and security mechanism depends largely on Australian and New Zealand political will. With a formalised mandate, the Forum could therefore have a leading role in order to impose positive obligations on States not only to respond, but to respond early and effectively. A Forum driven response could also ensure a

<sup>185</sup> AU Peace and Security Council Communiqué (13 April 2004) PSC/PR/Comm. (V); AU Peace and Security Council Communiqué (25 May 2004) PSC/AHG/Comm. (IX) <<http://www.africa.union.org> (last accessed 28 November 2005).



truly regional response, and avoid international political flak for larger States who are likely to 'foot the bill'.

Under the UN Charter, the Forum could be moulded as a Chapter VIII regional organisation, with a mandate to deal with regional peace and security, rather than a defence-pact. The Forum is already in existence with a growing membership from all over the Pacific region. Its original and present mandate was not intended as a defence pact. Since Aitutaki and Biketawa were adopted, the Forum now has a core objective to establish regional cooperation on security, as broadly defined. Moreover, the limited military capacity of Forum States, and the non-existence of threats within and from outside the region renders a defence pact unrealistic.

The new Forum agreement, if it doesn't have such a provision, could therefore expressly provide for the Forum the legal mandate to be responsible for situations that amount to a threat or breach of peace and security in the region. The Agreement could also provide that the peace and security resolutions of the Forum are legally binding on all Forum States.

### ***B Peace and Security Purposes***

The Forum could, at the least, have the following purposes or objectives. First, promote peace and security throughout the region. At the moment it is mostly the civil societies and international organisations that are in the forefront of pushing for peace and security in the region. The Forum could be more active however at the grassroots as it has the wider network in the region. It could capacitate and support institutions that could provide a long lasting solution.

Secondly, monitor and address in a timely manner potential threats that may lead to future peace and security crises. The Bougainville conflict was sown when Bougainville pleas for separation from PNG before independence went unheeded. The Solomon Islands conflict had also been brewing for generations since colonisation, and coups in Fiji are a direct result of the deeply embedded ethnic issues. The Forum must address these underlying causes of conflict

more emphatically. Giving it a legal mandate to do so should hopefully drive more impetus. A reinforced Political, International and Legal Affairs Division in the Forum Secretariat with more personnel who are experts, at the least, in peace and security matters, such as conflict prevention, conflict resolution, defence strategies and crisis management.

Thirdly, facilitate and use preventive diplomacy to vigorously pursue peace where crises have occurred. The Forum States are rich with distinguished political, religious, cultural and academic personnel who could be engaged as monitors, negotiators, mediators or eminent person groups. Resolutions of the Forum on peace and security crises would not only be legally binding on States, but is likely to have significant clout on individual citizens who may be involved in the conflict. A regional voice could put considerable pressure on, for example, insurgents. This was evident in the immediate surrender of the militia in Solomon Islands when RAMSI arrived.

Fourthly, the Forum could coordinate, direct or delegate any regional response to a crisis especially regional response involving police and military forces. Lastly, the Forum could facilitate and monitor peace building efforts, in particular addressing the core causes of the conflict to ensure a non-repeat of the conflict. The Forum has already indicated a readiness to utilise customary practices of reconciliation that is a significant part of Pacific cultures. These practices are still utilised to this day, and have a profound way of at the very least putting down weapons, opening dialogue and hopefully heal deep historical wounds.

### ***C Peace and Security Principles***

The following could be the guiding principles for the Forum in dealing with peace and security crisis. First, there could be a priority for regional unity and solidarity on addressing peace and security. International mechanisms can only work if there is political will. Once that foundation is secured, regional action should become automated. Forum members must recognise they have to act collectively because a threat to one is a threat to all, and that no one nation can deal on its own with the modern threats to peace and security.

Secondly, and the most important, Forum States could embrace the emerging concept of the responsibility to protect, not only its own citizens, but also the citizens of fellow Forum States who are unable or unwilling to do so. Although the protection of States sovereignty was a core basis of the formation of the Forum, and continues to influence Forum activity, the growing interdependence of States has worn the defences of this traditional boundary considerably. One argument against the application of the concept in the Forum States is that, for small Forum States, in some aspects, it could be beyond their resources. However, resources to protect citizens can be boosted with foreign aid from States, international organisations and civil societies. Another opposing argument is that the concept could directly contradict embedded culture. Culture however, is a living practice, and its practitioners can change it if it would be more advantageous.

It would therefore be in the interests of the Forum States to embrace and accept this re-conceptualisation of States sovereignty. First, and foremost, it could ensure the core principles outlined by Aitutaki and Biketawa will be observed and protected by national governments. They include good governance, fundamental human rights and freedoms, democratic process and institutions, the rule of law, sustainable development and indigenous rights. Secondly, the principle is now a customary international law principle. We have seen examples of the atrocities the principle seeks to avoid in the displacement of more than 35,000 people from their homes during the Solomon Islands conflict. Could it happen again? It may soon, or, it may in the next generation. These ethnic disputes are deeply rooted and have to be addressed effectively early. The ethnic tension in Fiji also has potential to escalate to atrocities, again, if not addressed effectively early. The situation in Bougainville is also still fizzling with the discovery that militants are being trained. In order to respond effectively, the Forum Members must therefore accept that regional response is justified if they are unable, or unwilling to protect their citizens from atrocities.

Thirdly, Forum Leaders have always believed that there are more constructive steps achieved from talking rather than fighting. Resorting to use of force should always be a last option. Moreover, it takes time for conflicts to break-out and so diplomatic means should be fully utilised for conflict prevention. Once conflict breaks out the damage is nearly always

irreversible, and it would be especially felt in the small Forum States. It would also be particularly relevant for the Pacific as most States have basically a limited technical law enforcement and military capability to suppress insurgency. Peaceful settlement of disputes or crisis is therefore of utmost importance.

Fourthly, after every crisis there is a healing process and the concept of the Pacific Way is ideal to provide the healing process. Nearly all the Pacific cultures have their own way of dealing with forgiveness, reconciliation and rebuilding. These traditional means should be utilised as most threats to peace and security can be dealt with effectively at the grassroots level, whether it be political, social, economic, environmental or political. However, as we have seen in Fiji, nation building should also include the administration of justice, where those who have violated national and international law are not allowed to escape with impunity. Denying justice would only amount to rekindling the emotions that founded conflict.

#### *D Forum Powers*

Depending on the circumstances of the situation a regional response could then be authorised by the Forum. The authorised action could include pacific settlement of disputes through preventive diplomacy, which includes the actions under Biketawa. These include a press release representing the view of Forum States on the situation; creating a Ministerial Action Group; deploying a fact finding mission; convening and deploying an eminent persons group; third party mediation; and support institutions or mechanisms. A peace and security mandated Forum could thus be seized of the developments in Tonga, Papua New Guinea and Vanuatu, and at the least, adopt a resolution encouraging national institutions to pacify matters.

If a situation however warrants the deployment of peacekeeping personnel this has to be implemented at the invitation of the Forum State concerned, and in the absence of a formal government, the agreement of the hostile parties. Since crises in the Pacific would mainly be widespread lawlessness, it is vital that civilian police officers be a significant part of the peacekeeping forces. However, like RAMSI, a military force could also be deployed to play a supporting role, and for insurgents to know there is a military presence that could be used. On a

deterrent level, the availability of regional forces could make potential coup instigators, militants, revolutionaries and gangs really think about their intentions. It would also provide assurance to the peoples of the region that regional assistance is readily available when required, even if their own governments are unable or unwilling to protect them. For convenience and to speed-up deployment of peacekeeping forces, Forum States could consider signing a multilateral Status of Forces Agreement that would allow Forum authorised forces to be present within Forum States and carry out peacekeeping duties.

The question then arises as to whom the Forum would support when a response force is deployed. From a legal perspective a Forum force would have to support the government as it is the government who was the contracting party that is the source of its existence. From a moral perspective, the Forum however must protect the innocent and those suffering in the conflict. Kabutaulaka questions RAMSI's support of Kemakeza in Solomon Islands when Kemakeza himself had supported militants during the conflict, and only called for intervention when that relationship deteriorated.<sup>186</sup> These are difficult issues which will only depend on the circumstances of the crisis. The solution however could be Forum responses must be invited by the State, however, once there, a neutral stance on the conflict should be maintained with the primary aim of ending the violence and, to bring the hostile parties to sit around the mat and address the core problems now rather than later. A peace and security mandated Forum should therefore focus its efforts on conflict prevention and nation building.

In the rare situation where a conflict escalates to a stage where the use of force is warranted, the Forum must respond decisively. This would likely to happen when there is wide scale violation of IHL during non-international armed conflict. Both the Bougainville and Solomon Islands conflicts could have benefited from an early regional response. Developments in Tonga, the PNG Highlands and Vanuatu could be closely monitored with strategies planned, rather than waiting for those States to come calling for assistance when conflict breaks out. If force is required and a Forum States' invitation is not given or not forthcoming, Security Council authorisation must be sought before intervention is carried out. Security Council authorisation must be unambiguous, and the Forum must recognise that the Security Council

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<sup>186</sup> Kabutaulaka I, above n 27, 300.

maintains supervisory rights throughout any crises. The Forum must regularly report to the Security Council on the enforcement action taken or contemplated. Intervention should not be incremental. Intervention should be decisive and forceful, not in the military sense, but more in appearance.

The exigencies of the situation however, may require regional intervention initially without Security Council authorisation. In the context of Pacific crises, it is likely that most peace and security crises could initially involve widespread lawlessness. Such a scale could already significantly threaten the sovereignty of the Forum State. We have seen in the Solomon Islands that there were acts that amounted to ethnic cleansing through the displacement of Malaitans from Guadalcanal, and also crimes against humanity with the murder, rape and attack on innocent civilians. In Bougainville it was the same but on a prolonged scale. In Fiji, the Indo-Fijian population were targeted, and if Speight was allowed to govern, it was more than likely the Indo-Fijians could have received worse treatment. It is therefore available for the Forum to resort to the use of force before obtaining Security Council authorisation, on the basis of the responsibility to protect. Security Council authorisation could then be obtained retroactively at the first opportunity after the enforcement action is implemented.

#### *E Administration*

The exercise of the Forum's peace and security mandate could be assigned to the Forum's Forum Regional Security Committee, to sit as a formalised body, mostly at officials, or Ministerial level and, exercising their duties in accordance with mandates from their respective national governments. Due to the emphasis on consensus, all full members of the Forum should be represented, and State should hold one vote each. Decisions should be made on consensus, however, if there are is no consensus then a vote is taken. A simple majority is required for procedural matters, and other matters require two-thirds majority. The FRSC's agenda could be left for the States, other than the concerned State, to agree on by consensus. A State therefore must persuade the other States not to include an issue if it opposes regional response on the issue. It could therefore be the responsibility of the Secretary-General to identify agenda items from developments around the region. The chairmanship of the FRSC

could rotate half yearly based on the alphabetical order of States. Meetings could be convened at least half yearly in order to remain abreast with developments.

Secretariat support obviously could be provided by the Forum Secretariat; however the relevant Division with the Secretariat could consist of dedicated officers to closely monitor and analyse peace and security threats and developments. Technical advice from military, police and legal should be maintained. Civilian expert advice based on grassroots issues such as culture, religion, environment, gender and youth should also be available.

#### *F Forum's Response Forces*

In relation to establishing an enforcement arm for the Forum, the idea of a Pacific military or police force has been discussed in the Forum for years now.<sup>187</sup> The author however suggests that Forum States could commit themselves by declaring a minimum number of police, military, health and professional personnel they would put on stand-by for the Forum to call on in times of crisis.

First, it is less costly as the logistics of maintaining such a force in one place for an indeterminate period. Secondly, it is more logical to keep scarce personnel in their home States where they are most needed, but they can remain on stand-by for regional duty. Thirdly, a mixture of both military and civilian membership in the force is more relevant to Pacific crises. RAMSI's use of police led intervention with military backup should be the precedence. Finally, regional law enforcement organisations, such as the Pacific Islands Chiefs of Police, and Forum militaries, regularly train together.<sup>188</sup> A common training programme on responding to peace and security situations could therefore be provided to all the Forum States' personnel. In a time of crisis these stand-by personnel would only need to gather at an agreed launching point, be briefed on the situation, and get deployed as a collective force under one command.

<sup>187</sup> Fergus Hanson "Promoting a Pacific: A Functional Proposal for Regional Security in the Pacific Islands" [2003] 4 Melbourne Journal of International Law 254; Sean N Kikkert "A South Pacific Police Force?" [2004] 8(2) Journal of South Pacific Law and Christopher Richter "Security Cooperation in the South Pacific: Building on Biketawa" [2004] 8(2) Journal of South Pacific Law <<http://www.paclii.org>> (last accessed 28 November 2005)

<sup>188</sup> New Zealand Police "NZ helps to develop common policing standards for Pacific" (19 August 2005) *TEN-ONE* 7.

## V CONCLUSION

This paper has presented a Pacific region with a precarious peace and security situation. Recent peace and security crises in Papua New Guinea, Fiji and the Solomon Islands illustrate the situation. These crises however have not been fully resolved. Bougainvilleans have been recently discovered to be still receiving military training. Fiji is processing legislation that would provide opportunity to provide amnesty for the 2000 coup instigators, which will definitely tarnish already weakened ethnic relations. The success of RAMSI in the Solomon Islands is slowing down, but ethnic tension remains. Situations in Tonga, the Highlands Province in Papua New Guinea and Vanuatu are also potential crisis situations.

It has also been suggested that a formalised peace and security framework for the Forum is an available option for Forum States to strengthen regional response to crises based on existing factors. The Pacific Islands Forum's peace and security framework lacks binding legal status that would enforce positive obligations to respond to peace and security crisis in a timely manner. It also does not provide for certain scenarios of conflicts, nor clarifies what targeted measures the Forum can invoke. Humanitarian atrocities were committed in the recent crises, such as the displacement, attacks and inhuman treatment of civilian populations. The regional political climate supports regionalism. The United Nations is prepared to call on regional organisations to share its responsibility to deal with international peace and security. In a formalised Forum, Forum States could embrace the responsibility to protect concept, and accept that the use of force should be a last resort, although it can be utilised on the basis of a responsibility to protect when there are massive violations of IHL and human rights laws.

In conclusion, peace and security issues are unlikely to disappear because they are man made. Forum States must establish a peace and security mechanism that requires regional action, but also action that is timely, effective, legal and legitimate, on a constant and permanent basis. Establishing and appropriately equipping a Pacific Islands Forum with a formalised regional peace and security framework could make the vision of the Forum Leaders in 2004 to have a region of "peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives" more realistic.



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