

CONFORMING TO UNITED NATIONS COUNTER-TERRORISM INITIATIVES: THE CASE OF NIUE

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I INTRODUCTION

Niue is a small island in the South Pacific. It is a self-governing state in free association with New Zealand. It has full international capacity, but it is not a member of the United Nations (UN).¹ Because of its limited resources, Niue frequently takes advantage of its rights under its free association agreement with New Zealand to call on the latter to assist it in the conduct of its international relations. The existence of this "partnership" explains in part the close cooperation between Niue and New Zealand on foreign affairs and Niue's support for many of New Zealand's international initiatives.

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1 Niue was formally annexed to New Zealand in 1901, as part of the Cook Islands, but was made a separate administration in 1904, with its own Resident Commissioner and Island Council. In 1960, the first Niue assembly was established, with an elective representative from each of the villages. On 19 October 1974, Niue attained the status of self-government in free association with New Zealand. The estimated population of Niue is no more than 1500. The country is heavily reliant on aid from large developed states – particularly New Zealand. Niue faces serious difficulties in catering for its domestic legal needs. Arguably, this difficulty is increased when faced with international demands. Therefore, in order to deal with international requests, domestic issues inevitably suffer.

Counter-terrorism is one area of international criminal law where there has been close cooperation between the two states and, more widely, within the international community, especially following the adoption of UN Security Council Resolution 1373 in September 2001.² In 2006, Niue proceeded to enact a counter-terrorism Bill (CTB) package based on UN instruments and on model laws from the Pacific Islands Forum (Forum), even though Niue is only a Forum and not a UN member.

The focus of this paper is on how the criminal law measures mandated by the UN Security Council impact on small island states that are non-UN members. In the case of Niue, particular factors to be considered are its special relationship with New Zealand, its membership of the Forum (of which most members are also UN members) and its obligation to respect general norms of international law. The paper does not consider the specific difficulties involved in implementing the CTB package.³ Instead, accepting that the project

2 UNSC Resolution 1373 (28 September 2001) S/RES/1373/2001. This Resolution calls on states to work together to combat terrorism. Generally, the Resolution recognises terrorism as a global problem which, if it is to be eliminated, requires cooperative action at national, regional and international levels. It obliges United Nations (UN) members to create a prescribed legal framework in their national laws and institutions to combat terrorism. See Curtis Ward "Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council" (2003) 8 *Journal of Conflict Security Law* 289, 295. Following the events of 11 September 2001 and in response to UN Security Council Resolution 1373, New Zealand enacted the Terrorism Suppression Act 2002 (NZ). This Act's procedural and substantive provisions implement key elements of the Resolution into New Zealand law. For example, it provides for the definition of a terrorist act, criminalises terrorist activities, outlines criminal penalties for the commission of terrorist activities and sets forth procedures for the designation of terrorist entities. See Alex Conte "Crime and Terror: New Zealand's Criminal Law Reform since 9/11" (2005) 21 *NZULR* 635, 637-638; Alberto Costi and Thomas J Haidon "The Terrorist Entity Designation Process under the Terrorism Suppression Act: In the Executive We Trust?" (Paper presented to the Third Annual Conference on the Primary Functions of Government: The Executive, Wellington, 25 November 2005).

3 For general discussion on the practical, political and legal implications faced by Pacific island countries as a result of international initiatives to counter terrorism, see Rebekah Plachecki "Beyond the Southern Cross – International Counter-

has been burdensome, the paper looks at the reasons *why* the Niue government proceeded to deal with it. The Bills in the CTB package will first be identified before addressing the question why Niue (a non-UN member) proceeded to enact the CTB package. Various contextual arguments for Niue's compliance with UN Security Council Resolution 1373 will be drawn. In summarising the findings of this paper, the conclusion will state that Niue does have a moral and political obligation to support international counter-terrorism objectives.

II THE COUNTER-TERRORISM BILL PACKAGE

The CTB package comprises eight Bills in total.⁴ The Bills concern: proceeds of crime,⁵ financial transactions reporting,⁶ mutual assistance in criminal matters,⁷ terrorism suppression, transnational crime,⁸ extradition,⁹ immigration,¹⁰ aviation offences¹¹ and banking.¹²

Terrorism Initiatives from a Pacific Perspective" (2006) 12 RJP 55; (2005) 11 NZACL Yearbook 55.

- 4 There were also the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2004 enacted under the United Nations Act 1946 (Niue) for the purposes of applying UNSC Resolution 1267 (15 October 1999) S/RES/1267/1999 UNSC Resolution 1333 (19 December 2000) S/RES/1333/2000 and UNSC Resolution 1373, above n 2. This paper, however, only focuses on the Bills introduced in 2006.
- 5 This Bill is an amendment to the Proceeds of Crime Act 1998 (Niue).
- 6 This will be a new Act consistent with the closing of offshore banking facilities.
- 7 This Bill is an amendment to the Mutual Assistance in Criminal Matters Act 1998 (Niue).
- 8 This will be a new Act.
- 9 This Bill will repeal the existing extradition law (Extradition Act 1965 (Niue)), which is based on the New Zealand law of 1965 and introduced to Niue by s 320 of the Niue Act 1966, and set up a new simplified extradition system which reflects the UN model law. See UN Office on Drugs and Crime "Model Law on Extradition" (2004), available at <http://www.unodc.org/pdf/modellaw_extradition.pdf#search=%22extradition%20model%20law%20un%22> (last accessed 29 November 2006).

The CTB package, therefore, covers a board range of issues, from specifically criminalising terrorism and terrorism-related offences to indirectly discouraging terrorism generally. Other Bills which might seem not to be particularly relevant to combating terrorism, such as banking, nevertheless underwent consequential reforms because of the importance of the banking processes to the tracking and control of funds that could be used for terrorist purposes.

The CTB package has been a huge endeavour for Niue to deal with. The limited number of lawyers and legal resources has made it especially difficult for Niue to cope with the project. Nevertheless, Niue has reformed its counter-terrorism laws in the above mentioned areas and the CTB package is currently before the Niue Assembly and is in the process of becoming law.

III ARGUMENTS FOR NIUE'S COMPLIANCE WITH UN SECURITY COUNCIL RESOLUTION 1373

Niue is small in size and population with limited financial and human resources. Also, Niue's infrastructure would make it very difficult for a terrorist network to succeed as communication and travel are unreliable. More importantly, for the purposes of this paper, Niue is not a UN member. This paper suggests various answers to the question of why Niue sought to enact the CTB package.

10 The current law may be found in the Entry, Residence and Departure Act 1985 (Niue). In a number of respects, it is inadequate to deal with the administrative demands created by international criminal activities.

11 This Bill is an amendment to the Aviation Crimes Act 1973 (Niue).

12 The present law on banking is found in three statutes: the Niue Act 1966, the Banking Act 1986, and the Niue Bank Act 1994. These statutory provisions overlap and are inconsistent in some respects. The Bill aims to remove the inconsistencies, systematise the legislation and meet contemporary international requirements for the monitoring of banking.

A Relationship with New Zealand

1 Part of the realm

As mentioned in the introduction, Niue is a state in free association with New Zealand and, therefore, forms part of the Realm of New Zealand.¹³ A state wishing to remain part of the Realm is expected to accept certain standards – standards which are basically those of New Zealand. For example, the privilege of New Zealand citizenship raises the expectation that the benefiting state will conform to certain requests by the New Zealand government.¹⁴ Hence, being part of the Realm places a strong moral and political obligation on Niue to

13 Niue is not part of New Zealand. Therefore, there is no *legal* obligation on New Zealand to ensure that Niue complies with UN demands. Likewise, unless it can be said that UNSC Resolution 1373, above n 2, is customary international law, Niue does not have a legal obligation to comply with UN demands. The obligation is moral and political only and is reflected through the contextual arguments raised in this paper. It is submitted that UNSC Resolution 1373 is not generating an instant custom. Although dealing with a different Security Council resolution, by analogy, the International Court of Justice supports this view: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 58, paras 117-127 and 133. See also *Beverly Overseas SA v Privredna Banka Zagreb* (28 March 2001) Swiss Federal Court Case No 4C.172/2000 <<http://www.bger.ch>> (last accessed 1 December 2006), which concerned a contract claim by an entity incorporated in the British Virgin Islands against a Croatian bank for the payment of a promissory note (governed by Swiss laws) it had obtained from a company that had sold weapons to the Republic of Croatia in 1992. Before the Swiss courts, the Zagreb bank argued that the contract was void as conflicting with morals as the original arms deal violated UNSC Resolution 713 (25 September 1991) S/RES/713/1991, which imposed an arms embargo on the former Yugoslavia. The Swiss Federal Court stated that the Resolution was irrelevant in the determination of the lawfulness of the contract as Switzerland was not, at the time, a UN member. However, the Court rejected the plaintiff's action on the ground that supply of arms to the parties to the conflict in the former Yugoslavia offended the Swiss public order, which was the same as the universal public order. It concluded that the parties were involved in immoral business. The case illustrates the motivation, even of non-UN members, to integrate modern trends of international law into domestic law when they arise from UN action.

14 See Part III A 4 Kirk-Henry Exchange of Letters 1973.

comply with New Zealand's national standards as well as the obligations binding New Zealand on the international plane.

New Zealand is a UN member. It is, therefore, subject to the obligations imposed by Article 2 of the UN Charter.¹⁵ This must necessarily impact on Niue because of its "partnership" with New Zealand.¹⁶

2 *Niue Constitution Act 1974*¹⁷

Section 6 of the Constitution Act 1974 (Niue) provides that "[n]othing in this Act ... shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of Niue." Section 8 goes on to say:

Effect shall be given to the provisions of sections 6 and 7 of this Act, and to any other aspect of the relationship between New Zealand and Niue which may from time to time call for positive co-operation between New Zealand and Niue after consultation between the Prime

15 Article 2(6) of the UN Charter will impact vicariously on New Zealand: "[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." However, this is by no means an absolute obligation on New Zealand (individually) to ensure that members of the Realm comply with UNSC Resolution 1373, above n 2. At the most, this is a moral and political obligation.

16 See Niue Constitution Act 1974 (NZ). See also the Kirk-Henry Letters, which state that the relationship between the Cook Islands and New Zealand is one of partnership. Rt Hon Norman Kirk, Prime Minister of New Zealand to the Hon Albert Henry, Premier of the Cook Islands. Hon Albert Henry, Premier of the Cook Islands to the Rt Hon Norman Kirk, Prime Minister of New Zealand [1973] 1 AJHR A-10 [Kirk-Henry Letters]. Niue has a similar relationship with New Zealand suggesting the same principles apply. This is consistent with Halavaka ke he Monuina – An Arrangement between the Government of New Zealand and the Government of Niue for a Programme of Strengthened Cooperation 2004-2009 (30 October 2004) para 2.1.

17 This Act was passed by the New Zealand Parliament to implement the self-determination decision of Niue to become a state in free association with New Zealand. It is law in both New Zealand and Niue. In Niue, it is heavily entrenched as part of its written constitution.

Minister of New Zealand and the Premier of Niue, and in accordance with the policies of their respective Governments; and, if it appears desirable that any provision be made in the law of Niue to carry out these policies, that provision may be made in the manner prescribed in the Constitution, but not otherwise.

This Act suggests a responsibility of New Zealand for Niue and cooperation between New Zealand and Niue. Perhaps these sections provide in part a reason for Niue's compliance with international counter-terrorism demands. Section 6 is apparently ambiguous, and it is framed negatively. It may signal that New Zealand is responsible for (that is, controls) Niue's foreign affairs and defence. Alternatively, it may indicate that New Zealand has a duty to assist Niue in these matters if requested. It is the latter interpretation that is consistent with current practice.¹⁸

Nevertheless, that ambiguity, combined with section 8 and the clear requirement for collaboration and cooperation between the two states at the highest level, supports the view that there is a constitutional basis for Niue's acting in conformity with New Zealand's policies in relation to counter-terrorism.

3 *United Nations Act 1946*

Section 2(1) of the United Nations Act 1946 (Niue) provides that:¹⁹

If, under Article 41 of the Charter of the United Nations the Security Council of the United Nations calls upon the Government of New

18 See on this point, but with reference to the Cook Islands, Alex Frame "The External Affairs and Defence of the Cook Islands – The 'Riddiford Clause' Considered" (1987) 17 VUWLR 141. See also Alison Quentin-Baxter "Pacific States and Territories: Cook Islands" in *The Laws of New Zealand* (Butterworths, Wellington, 2001) Vol 20, para 30.

19 This Act is currently being amended. This legislation, which was formerly New Zealand law, applying to Niue as a New Zealand colony, is since Niue's self-determination in 1974 also the law of Niue. Thus, the Act needs to be read subject to the Niue context. The first part of s 2(1) would remain unchanged – the UN cannot call on Niue as it is not a UN member. However, the Niue Cabinet is the regulation-maker in the place of the New Zealand Governor-General.

Zealand to apply any measures to give effect to any decision of that Council, the Cabinet of Ministers of Niue may from time to time make all regulations as appear to it to be necessary or expedient for enabling those measures to be effectively applied.

While this section does not put an onus on the Niue government, it represents a statutory recognition of Niue's conventional duty to make regulations that give effect to UN initiatives – including UN Security Council Resolution 1373.

*4 Kirk-Henry Exchange of Letters 1973*²⁰

An argument can also be made based on an analogy between the relationship of New Zealand with the Cook Islands and that with Niue. Both the Cook Islands and Niue are defined as self-governing states in free association with New Zealand.²¹

The Kirk-Henry Letters were exchanged between the governments of New Zealand and the Cook Islands on the constitutional relationship between the two countries. The Letters indicate that the relationship is one of partnership and requires cooperation. The Letters also suggest that the privilege of New Zealand citizenship entails certain expectations that the Cook Islands government should meet. It is arguable that such expectations could include minimum security standards and compliance with international protection measures:²²

[T]he bond of citizenship does entail a degree of New Zealand involvement in Cook Islands affairs. This is reflected in the scale of New Zealand's response to your country's material needs; but it also

20 Kirk-Henry Letters, above n 16.

21 On the concept of free association, see Tony Angelo "To Be or Not To Be ... Integrated, That is the Problem of Islands" (2002) 8 RJP 87; (2001) 7 NZACL Yearbook 87, 90-92. See also UNGA Resolution 742 (VIII) (27 November 1953) and UNGA Resolution 1541 (XV) (15 December 1960).

22 Kirk-Henry Letters, above n 16. See also Cook Islands Constitution Act 1965 (NZ).

creates an expectation that the Cook Islands will uphold, in their laws and policies, a standard of values generally acceptable to New Zealanders.

Indicatively, the same expectations should apply for Niue, which is also in free association with New Zealand and benefits from New Zealand citizenship. Thus, the Kirk-Henry Letters set a standard for the relationship between New Zealand and Niue which provides another related reason for compliance with UN Security Council Resolution 1373.

B Pacific Islands Forum

Niue is a member of the Forum. In their effort to give effect to UN Security Council Resolution 1373, Forum leaders expressed their political commitment to global counter-terrorism efforts through the adoption of the Nasonini Declaration on Regional Security (Nasonini Declaration) in August 2002.²³ The Nasonini Declaration committed Forum members to two primary goals: first, to implement UN conventions, Security Council resolutions and Financial Task Force recommendations; and, secondly, to have enforcement cooperation backed by a strong common legislative base.²⁴

Although, like any other collective regime, enforcement of any commitment made at the regional level is difficult, it would seem ironic for a Forum member not to comply with its goals. Further, non-compliance could jeopardise that member's access to aid from Australia or New Zealand (which are also Forum members) or from a non-Forum donor.

Thus, declarations made by regional organisations, although not legally binding on their members, entail a moral and political

23 Pacific Islands Forum "Nasonini Declaration on Regional Security" (Annex 1 to the Thirty-Third Pacific Islands Forum Communiqué, Suva, Fiji, 15-17 August 2002).

24 Rt Hon Helen Clark "Opening Address to Pacific Roundtable on Counter-Terrorism" (10 May 2004) <<http://www.beehive.govt.nz>> (last accessed 13 November 2006).

obligation for signatories to comply as a matter of good faith. Niue, as it appears, has responded to the Nasonini Declaration by reforming its counter-terrorism laws in accordance with the CTB package.

C Respect for International Law

Another reason for Niue's ready support for regional action on international decisions rests in its respect for the principles of international law and the will of the international community.

It is clear that UN Security Council Resolution 1373 was intended, *inter alia*, to oblige UN members to legislate the provisions of the International Convention for the Suppression of the Financing of Terrorism,²⁵ which had not yet achieved universal support.²⁶ However, as Niue is neither party to that Convention nor is it a UN member, Security Council Resolution 1373 had no legal consequences for Niue, except perhaps in the speculative argument that states enacted anti-terrorist financing legislation, not because of the Charter or treaty obligations *qua* the Convention, but because they thought it binding custom.²⁷

Resolutions of the Security Council are not *per se* rules of international law, but the government of Niue undoubtedly would give great importance to such instruments. In this particular context, the facts are clear that compliance with principles of international law in any general sense was not the reason for Niue's actions. Beyond doubt, the particular regional relationship with New Zealand, and to a lesser extent, the wider Pacific regional relationship, provided the impetus for Niue's response.

25 UNGA Resolution 54/109 (9 December 1999) A/RES/54/109.

26 See Eric Rosand "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism" (2003) 97 AJIL 333, 334.

27 There is little evidence for this argument, except, ironically, Niue's own practice in enacting the CTB package, precisely because it was not under any UN Charter or treaty obligation to do so.

IV CONCLUSION

This paper has suggested reasons for Niue's decision (as a non-UN member) to conform to UN Security Council Resolution 1373. A number of possibilities explains why Niue felt obliged to implement (or reform) its counter-terrorism legislation. That obligation, however, is not legal, but moral and political. Such obligation is reinforced through Niue's relationship with New Zealand and its membership in the Forum.