REGIONAL INTERVENTION IN SOLOMON ISLANDS

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According to an Australian Strategic Institute Report Solomon Islands, a country in the South Pacific, was branded a failing neighbour.[1] The 1998 – 2000 crises in Solomon Islands created instability, lawlessness and insecurity. The institutions of government were weak in providing adequate services and an effective police force to maintain law and order. There were mixed reactions from both the local and international community in terms of the direction which Solomon Islands as a sovereign state would take. The pillars of democracy in terms of governance were gradually being traumatized.

With the campaign of the United States and its allies against terrorism due to the September 11 tragedy there was an assumption that countries that were branded "failed or failing states" could become springboards for terrorism.[2] Consequently, Solomon Islands declining condition of decline into anarchy after 2000 due to the 1998 civil unrest became an issue of much concern for neighbouring countries, particularly Australia. It was against this background that the Australia-led intervention took place in 2003 to restore law and order as well as strengthen state legitimacy.

This paper will consider whether the presence of the Regional Assistance Mission (RAMSI) is mutual in achieving Solomon Islands national interest as well as that of Australia, particularly in regard to security. It argues that the current legal framework providing for RAMSI's presence in Solomon Islands does not adequately address partnership nor adequately cater for the Solomon Islands national interest. It begins with a brief background, and then traces the legal framework for intervention. Later, the scope and content of the Agreement between Solomon Islands and RAMSI will be outlined and the discussion focuses on the partnership between RAMSI and the Solomon Islands Government (SIG). The relationship between *The Facilitation of International Assistance Act 2003* (No. 1 of 2003) and the *Constitution* will be discussed along with international relations issues. Finally, I will reflect on particular cases and implications that arise under the current legal framework.

BRIEF BACKGROUND

The civil unrest in Solomon Islands started towards the end of 1998. It was due to long term socio-economic and political issues, which led to the formation of Guadalcanal militancy known as the Isatabu Freedom Movement (IFM) in 1998. Consequently, violence and chaos occurred on Guadalcanal. This was exacerbated by the formation of a Malaita paramilitary group referred to as the Malaita Eagle Force (MEF) in 1999 and when the Royal Solomon Islands Police side with. On 5 June 2000 the state apparatus was undermined following an attempted coup by the MEF and members of the Royal Solomon Islands Police who supported them. Therefore, state legitimacy was threatened.

Subsequently, there was tremendous effort to resolve the civil unrest. This led to the signing of the Townsville Peace Agreement (TPA) on October 15, 2000, which brought an end to violence between IFM and MEF. While the TPA brought an end to violent conflict it also committed the Solomon Islands

Government to facilitate development projects on Guadalcanal and Malaita, to finance demands of aggrieved citizens who were affected by the crisis, and to provide for the disarmament of militants.

Unfortunately, despite the TPA's attempt to address the causes of the civil unrest, in reality it could not. The responsibilities and expectations were placed on an inherently weak and incapable state. Hence, the state was incapable of implementing the TPA. By 2001 the state had been "hijacked" by non-state groups and individuals who at times corroborated with government officials to loot the government's finances. Even the dateline for the surrender of arms continued to be postponed, thus the widespread possession of arms remained source of insecurity and lawlessness.

As a result of an inherent weak state, the government of Solomon Islands was incapable of handling the declining law and order situation. Subsequently, Sir Allan Kemakeza, Prime Minister of Solomon Islands in April 2003 requested Australian assistance. A meeting was held between the governments of Australia and Solomon Islands on the 4th – 6th June 2003 to discuss the issue of Australian assistance. Later, the Australian Government made an offer outlining the scope of and requirements for its assistance. Such a decision was influenced by the continuing violence and the dysfunctional state in Solomon Islands, plus Australia's concerns about the threat of terrorism.

INTERVENTION

International law as embodied in the United Nation's Charter is clear on the use of force. Under Article 2 (4) it provides: "All member states 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." This prohibition is supported by Article 2 (7), which forbids intervention in matters that fall essentially within the "domestic jurisdiction". However, the Charter provides for two exceptions and that is: a) right of self-defense (Art. 51) and b) to maintain or restore international peace (see Art. 39, 41 & 42).The intervention in Solomon Islands by Australia and its regional counterparts was patently not an act of self-defence. The declining law and order situation in Solomon Islands was an internal affair. The existence of militants and criminals in the country did not pose a danger for a possible armed attack on Australia and its regional counterparts. This is because in the modern terrorist scenario it is seldom direct attack that is the major concern. However, terrorists just do not operate that way. They also engage with criminals to smuggle drugs, arms and illegal workers. These activities usually take place in dysfunctional states. For example, countries such as Afghanistan and Colombia are well known for illegal drug supply. Hence, the existence of criminals who continue to destabilise the state of Solomon Islands and institutions is a security threat.[3] Such concern was indicated by Prime Minister of Australia when he stated: "Too often we have seen rogue and failed states become the base from which terrorists and transnational criminals' organise their operations. [Hence] the best thing Australia can do ... was to take remedial action and take it now."[4] Both terrorism and transnational crime span national boundaries and are multi dimensional and organised in natured. Criminal and terrorists regularly engage in strategic alliances to provide goods and services such as the exchange of drugs for arms or provide money laundering opportunities.[5]

While Solomon Islands began to show signs of a so-called "failed state" even after the signing of the TPA in October 2000, reaction from the international community to intervene was slow. One reason for such slow reaction would be because of the norms of traditional international law. That is, the principles of non-intervention, respect for state sovereignty, and equality among states. A state is recognised under international as sovereign despite being considered as failing. State sovereignty is closely linked with the principles of the prohibition of the use of force and of non-intervention.

However, according to the International Commission on Intervention and State Sovereignty (ICISS) the traditional view on sovereignty is being modified. For example, ICISS Report aims at strengthening

sovereignty as well as improving the capacity of the international community to react decisively when states are either unable or unwilling to protect their own people.[6] The view on sovereignty as being modified has important consequences for the Pacific Region generally. This is because the traditional sensitivities to the sovereignty issue can be put aside, at least as far as necessary, so that internal issues of member states could be addressed effectively.[7]

Today, the traditional view on sovereignty has changed because of the spill over effects of events in one country on neighbouring states and on regions as a whole. Security issues are no longer confined to national boundaries. Internal problems of one state can harm the security interests of another state. The spill over effect of the Boungainville crisis in the form of guns, refugees and the gun culture into the Solomon Islands is an example.[8] The type of security threats faced by South Pacific countries and their geography make them vulnerable to the spread of conflict.

This is further exacerbated due to the existence of weak states and political institutions. Generally, states in the South Pacific region a considered as weak because of their limited ability to maintain social control, ensure societal compliance with official laws, preserve stability and cohesion, encourage societal participation in state institutions, provide basic services, manage and control the national economy, and retain legitimacy. For Solomon Islands, such weakness was exacerbated by the conflict that started in 1998 and 5th June 2000 attempted coup. Due to weak states the South Pacific region is at risk to trans-national crime, terrorism, flow of drugs, weapons and refugees.[9]

The 9/11 tragedy and the Bali bombing focused further impact on international and regional security. Subsequently, Australian policy shifted to terrorism and the potential for failed states to become targets of terrorist groups. Therefore, the issue in Solomon Islands became a security concern for Australia. The Prime Minister of Australia stated *"failed states present a dangerous breeding ground for crime and terrorism."*[10] Crime apart from terrorism was a highly relevant factor in influencing the decision to intervene because the state of Solomon Islands no longer had the capacity to provide peace and security. Therefore, when the request was made in April 2003 by the Government of Solomon Islands for assistance, Australia immediately responded with an offer to assist.

Based on the request made by the Solomon Islands Government, the proposal for an Australian led regional assistance mission was discussed and later endorsed by the Forum Foreign Affairs Ministers Meeting on 30th June 2003 in Sydney, Australia. An Agreement between the Solomon Islands, Australia and regional countries to assist in the restoration of law and order and security was also signed. Later, the Agreement was transformed into domestic law to give effect to terms of the Agreement.

AGREEMENT

The 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 was signed on the 24th May 2003. The Agreement recognised the need for cooperation between members of the Pacific Islands Forum.

Member countries of the Forum who are signatories to the Agreement were to provide police, armed forces and associated personnel as a deployed Visiting Contingent to Solomon Islands. Article 3 of the Agreement provided for the Visiting Contingent as follows:

> ...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.

The duration of assistance under the Agreement would be for such a period as the Government of Solomon Islands and the Assisting Countries might mutually agree on. The Agreement gives the Assisting Countries the right to withdraw all or any of their members at any time. However, a significant withdrawal of members other than for the purpose of rotation, would take effect after consultation with the Government of Solomon Islands.[11] In addition, the Government of Solomon Islands at any time might request in writing withdrawal of the Visiting Contingent from Solomon Islands.[12]

Under the Agreement the head of the Visiting Contingent would be person nominated by the Government of Australia, in consultation with the Government of Solomon Islands. The Visiting Contingent was to have sole responsibility for the internal command, control, discipline and administration of members of the Visiting Contingent.[13] In addition, the Agreement stipulated that members of the Visiting Contingent and the Assisting Countries shall have immunity from criminal and civil proceedings in Solomon Islands courts.[14]

The Agreement further provided that the most senior Australian Police Officer of the participating police force was to be the head of the Participating Police Force (PPF) and at the same time be appointed a Deputy Commissioner of the Solomon Islands Police Force. Other members of the PPF could be appointed to the Solomon Islands Police[15] but they could not be required to make an oath or affirmation of allegiance and are subject only to the orders of and instructions from the head of the PPF or the Commissioner of the Solomon Islands Police Force in consultation with the head of the PPF.[16]

The then Governor General of Solomon Islands Sir John Laply, on the advice of cabinet, formally requested Australia for assistance on the 4th July 2003. Subsequently, the Agreement became incorporated as part of an enacted Act of Parliament referred to as *The Facilitation of International Assistance Act 2003* (No.1 of 2003), which was passed and gazetted on the 23rd July (see Legal Notice No: 61 of 2003). The endorsement of the proposal for an Australian led regional assistance mission was made in accordance with the Biketawa Declaration. Under the Declaration it provides for a regional response to crisis (see section 3, Biketawa Declaration). The mission was also endorsed by the UN Security Council and the UN Secretary General.

PARTNERSHIP

The intervention in the Solomon Islands is quite unique. Unlike other interventions in countries such as Kosovo, Ruwanda, Iraq, Afghanistan, etc which were either due to humanitarian grounds or the threat to international security, the Solomon Islands case was based on consent. According to Wainwright the intervention in the Solomon Islands "...is clearly the optimal of situations; governments do not often consent to such an intrusion on their sovereignty".[17] However, under customary international law a foreign military force or any aspects of it can only be in the territory of another state if that state consents.

Solomon Islands' request for assistance to help resolve its law and order problem attracted a regional response. Its consent along with the *Facilitation Act* allowed for the Australian-led regional intervention. The *Facilitation Act* provided for the terms and conditions of admission of the visiting contingent. It does not explicitly provide for the size and duration of stay of the visiting contingent, which provides an element of uncertainty. Due to no clear exit strategy there is already complain that the engagement of visiting contingent personnel as technical advisers is too short. Some worked for only four months,[18] which implies minimal utility in terms of capacity building.

In reference to the Biketawa Declaration, Australia formulated the strengthening assistance package. The approach would be on a cooperative effort or partnership between Solomon Islands and forum member countries with Australia and New Zealand to lead. Parliament endorsed and approved this cooperative effort by enacting the *Facilitation of International Assistance Act 2003* (No. 1 of 2003). However, neither the enabling Act nor the Agreement clearly stipulate how this cooperative effort or partnership would operate in practice, despite portrayals of the Australia-led intervention as an act of philanthropy – *helping out a mate*.[19] The notion of partnership is important in relation to building local capacity to strength the state. State administration could only be managed and sustained adequately if local capacity is developed. This can be done through an equal partnership with RAMSI. Solomon Islanders can benefit from the partner they talk to, learn from, argue with and complain about. The partner at the end of the day is called a friend. By having an imported police force, army and technical advisers partnering with local personnel much could be achieved in terms of developing local capacity if there is partnership. With a clear partnership guideline RAMSI would know precisely how it should engage with local personnel as they work to develop strategies to restore civil order, rebuild the economy and state institutions.[20]

Cooperative effort would not work practically because Solomon Islands' is a weak state. It does not have the capacity to engage on an equal basis with the Australian-led intervention mission to reflect a true partnership arrangement. The *Facilitation Act* does not explicitly provide how a cooperative effort would be achieved on an equal playing field. Instead, the *Facilitation Act* provides more concession for the Australian-led regional mission than Solomon Islands. While the intervention is a regional response and is seen as in partnership with Solomon Islands practically it is questionable.

Take the deployment of armed forces and the participating police force for example. Under the Agreement and the *Facilitation Act*, which are virtually identical, provide armed forces, police and personnel who are members of the visiting contingent are to be deployed to Solomon Islands.[21] They are to have similar powers as the Royal Solomon Islands Police officers appointed under the Police Act[22] and they are to use such force as is reasonably necessary to achieve a public purpose.[23] Members of the Participating Police Force and the Armed forces shall work cooperatively with the Solomon Islands Government.[24] How the cooperative effort would be achieved is ambiguous because there is no provision in the*Facilitation Act* expressly outlining it.

According to section 4 (b) of the *Facilitation of International Assistance Act 2003* (No. 1 of 2003) the visiting contingent shall also consist of *"other individuals notified by the assisting country to the Ministry responsible for foreign affairs"*. This indicates that 'other individuals' make up the civilian component of the visiting contingent. Unfortunately, The *Facilitation Act* is not clear on how the 'other individuals' should work within a government department, agency or the legal and judicial system of Solomon Islands. Instead, under section 19 it stipulates "*...the visiting contingent shall have sole responsibility for the internal command, control, discipline and administration of the personnel of the visiting contingent"*. Again the term *'internal command'* is unclear, especially how it would be applied in practice.

Furthermore, under the current Agreement between Solomon Islands and the visiting contingent the most senior Australian Police Officer shall be head of the Participating Police Force (PPF).[25] The head of the PPF would at the same time be appointed a Deputy Police Commissioner of Solomon Islands. Members of the PPF may be appointed to the Solomon Islands Police Force.[26] Under article 5 (4)(a) it further provides:

> Members of the Participating Police Force are subjected only to the orders of, and instructions from: i) the head of the Participating Police Force; and ii) where appointed to the Solomon Islands Police Force, in consultation with the head of the Participating Police Force.

From the above mentioned article which is enforced by the *Facilitation Act* it is clear that the PPF members are answerable to the head of the head of the PPF. On that basis, one could argue that this demonstrates a two parallel accountability and liability systems: - the Police Commissioner (also chief of national security), and the most senior Australian Police Officer, who is the Deputy Police Commissioner of the Solomon Islands and is in control of all the PPF, is ultimately answerable to Canberra.

In addition, article 8 (1)&(2) of the Agreement between Solomon Islands and the Australia led intervention gives authority to the Participating Armed Forces (PAF) and the Participating Police Force (PPF) to detain and disarm or take into custody a suspect. The article does not clarify how the PAF and PPF will work in partnership with the Royal Solomon Islands Police (RSIP) in regard to the detention, disarmament and taking into custody of suspect(s) alleged to have committed a crime. Due to lack of clear outline on how PAF and PPF should work in partnership with RSIP there have been allegations of inconsistencies in terms of how the PAF, PPF and RSIP detain, disarm or take into custody a suspect.[27] The then Police Minister, MichaelMaena claims that the gap in partnership is widening.[28]

One could argue that the current legal framework that is responsible for the deployment of the visiting contingent does not adequately provide a clear guideline or outline on how a cooperative effort or partnership should be achieved. On that basis, attention could be drawn to the Papua New Guinea Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea, Port Moresby, 30 June 2004 which was later enforced by the *Enhanced Cooperation Between Australia and Papua New Guinea Act 2004* (No. 8 of 2004) to illustrate my point.

In PNG the current legal framework provided for the deployment of officials and police to work in partnership with the Government of Papua New Guinea.[29] The Act provided a framework for a commitment by Australia and Papua New Guinea to address core challenges in governance, law and order, justice, financial management, economic and social progress, as well as capacity in the public service. Article 5 provides that "Australia in consultation with the Government of Papua New Guinea deploy Australian designated persons[30] to work in government department and agencies, and the legal and judical system of Papua New Guinea".[31] There is no doubt that this arrangement is remarkably similary to the Solomon Islands, where Australian public servants have been inserted in top administrative posts related to police, justice, finance and the prisons.[32]Despite such similarity, the legal framework surrounding the intervention in Papua New Guinea clearly gives a guideline on how Australian designated persons should work. For example, under Article 5 (2) of the Joint Agreement on the Enhanced CooperationBetween Australia and Papua New Guinea it states *"Designated Persons appointed to a position or office within a government department, agency or the legal and judicial system of Papua New Guinea shall exercise the relevant powers and duties of that position or office"*.[33] Moreover, Australian lawyers deployed to work in the legal and judical system of Papua New Guinea must satisfy the provisions of the*Lawyers Act 1986* and the Lawyers Admission Rules 1990.[34] In order to be appointed as Attorney General, a designated person must satisfy the *Lawyers Act 1986*, the Lawyers Admission Rules 1990 and the *Attorney General Act 1989*.[35] With regard to the Assisting Australian Police Force (AAPF) the Enhanced Cooperation Between Australia and Papua New Guinea Agreement expressly provides that AAPF shall exercise the same powers as the Papua New Guinea Police[36] but this shall be done in partnership with the Royal Papua New Guinea Constabulary (RPNGC).[37] Also Articles 3 and 4 of the Agreement require that the AAPF comply with the lawful directions, organisational strategies and effective control of the Royal Papua New Guinea Constabulary (RPNGC). On this basis, it can be argued that the legal framework providing for intervention in Papua New Guinea is clearer in terms of the line of operation for the AAPF and the RPNGC in order to achieve the purpose set out in Article 2 Enhanced CooperationBetween Australia and Papua New Guinea Agreement.[38]

CONSTITUTION V FACILITATION ACT

At this juncture it is important to look at the relationship between the written Constitution of Solomon Islands and the *Facilitation of International Assistance Act 2003* (No. 1 of 2003), which legitimizes the Australian led regional mission to intervene to restore law and order and strengthen state institutions. The *Facilitation Act* states in section 24 (1) that the Act is subjected to the *Constitution* but shall have effect notwithstanding any other law of Solomon Islands. This signifies that the enabling Act cannot override the *Constitution*.

The legality of the *Facilitation Act* depends on its consistency with the *Constitution*. As stipulated under section 2 of the *Constitution*: *"The Constitution is the supreme law and if any other law is inconsistent with this Constitution, that other law shall, to the extent of inconsistency, be void"*. The enactment of the *Facilitation Act* is in compliance with the *Constitution*. Generally, there is consistency between the Act and the *Constitution*. However, certain provisions in the Act need closer observation. First, is the immunity provision in the *Facilitation Act*.[39] Is it constitutional? On face value the immunity provision appears consistent with the *Constitution*. However, there will be complications in a situation where a member of the Visiting Contingent may have contravened certain fundamental rights provisions. Under the *Facilitation Act* it is not clear what would happen in a situation where members of the Visiting Contingent breach human rights principles entrenched in the written *Constitution*. On the other hand, the written *Constitution* under section 18 (1) deals with a situation whereby there is a violation of human rights. Under that provision it stipulates:

> ...if any person alleges that any of the [human rights provisions] of this Constitution has been, is being or is likely to be contravened in relation to him for, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

Section 18 (1) of the *Constitution* provides for an aggrieved party who alleges a violation of his/her human rights as guaranteed under the Constitution to apply to the High Court for redress. The High Court has original jurisdiction to determine such a matter.[40] Section 83 of the Constitution further states that the High Court has jurisdiction to hear constitutional questions regarding an application regarding the contravention of any provisions of the Constitution other than the human rights provisions in Chapter II.

But whether an aggrieved party can bring an action against a member of the Visiting Contingent who is alleged to violate any of the constitutional provisions is an issue for debate. Members of the Visiting Contingent are completely immune from legal proceedings in Solomon Islands courts and tribunals.[41] Whether this immunity is covers acts commit during official and unofficial times is uncertain. This is because section 17 (1) of the*Facilitation Act* stipulates immunity to cover actions of members of the visiting contingent taken in the course of, or incidental to, official duties. In regard to actions of members of the visiting contingents taken outside of official time, the *Facilitation Act* is unclear.

Another ambiguity regarding the relationship between the *Constitution* and the *Facilitation Act* is the interpretation of section 19 (4) of the *Constitution*. That section stipulates:

> In relation to any person who is a member of a disciplined force that is not a disciplined force of Solomon Islands and who is present in Solomon Islands in pursuance of arrangements made between the Government of Solomon Islands and another Government or an international organisation, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of [Chapter 2 regarding Fundamental Rights and Freedoms].

Section 19 (4) could be interpreted as giving the *Facilitation Act* further legitimacy in terms of its relation with the *Constitution*. But then one needs to question whether the *Facilitation Act* is a disciplinary law because section 19 (1) defines disciplinary law as “a law regulating the discipline of any disciplined force”. Looking at the *Facilitation Act* it seems to be more than a disciplinary law. It regulates the work of the Australian led visiting contingent and does not focus primarily on regulating the discipline of the visiting contingent.

Furthermore, another issue is regarding the accountability and liability of the Participation Police Force to Deputy Police Commissioner. Under the current Agreement between Solomon Islands and the visiting contingent the most senior Australian Police Officer shall be head of the Participating Police Force (PPF).[42] The head of the PPF would at the same time be appointed a Deputy Police Commissioner of Solomon Islands. Interestingly, the Agreement and the *Facilitation Act* both do not stipulate that the most senior Police Officer must resign before being appointed as a Deputy Police Commissioner of Solomon Islanders. On that basis, if the senior Police Officer takes up office as Deputy Police Commissioner without resigning then it can be argued that the Officer is *‘serving two masters’* – Canberra and SI Government.

In addition, members of the PPF may be appointed to the Solomon Islands Police Force.[43] Under article 5 (4)(a) it further provides:

> Members of the Participating Police Force are subjected only to the orders of, and instructions from: i) the head of the Participating Police Force; and ii) where appointed to the Solomon Islands Police Force, the Commissioner of the Solomon Islands Police in consultation with the head of the Participating Police Force.

From the above article, it is clear that the PPF members are answerable to the head of the head of the PPF. On that basis, one could argue that this demonstrates a two parallel accountability and liability systems: - the Police Commissioner (also chief of national security),[44] and the most senior Australian Police Officer, who is the Deputy Police Commissioner of the Solomon Islands and is in control of all the PPF, is ultimately answerable to Canberra. By having a parallel system within a sovereign nation one could question its constitutionality.

INTERNATIONAL RELATIONS

The intervention of the Regional Assistance Mission in Solomon Islands is legitimate. This legitimacy derives from the enactment of the *Facilitation of International Assistance Act 2003* (No. 1 of 2003). While the *Facilitation Act* provides for an intervention it is important that the sovereignty of Solomon Islands must be maintained. Sovereignty has nothing to do with autarchy or economic self-sufficiency. It is a legal concept as expressed in Article 2 (1) of the United Nations Charter. By having respect for sovereignty it means a country’s domestic laws and foreign relations are exclusively decided by its own parliament and government, which are elected by and responsible to the people.[45] The then Solomon Islands Minister for Peace, Unity and Reconciliation realised the importance of the sovereignty issue when he expressed “[sovereignty is a] very, very sensitive matter”.[46]

The *Facilitation Act* was drawn up not in Honiara but in Canberra and Wellington. It was drafted with the guidance of the Australian Attorney General’s Department. This was followed with three detailed briefing papers for Solomon Islands parliamentarians, setting out proposals for a Comprehensive Package of Strengthened Assistance to the country.[47] Australia insisted that the *Facilitation Act* must be passed in a form that is acceptable to Australia.[48] Attorney General Daryl Williams of Australia warned that

assistance would require solid legal foundation for the operation of foreign forces.[49] Hence, the Act was passed by the Solomon Islands Parliament on the 17 th July 2003 without any modification and became law but whether the enactment was made with a clear conscience or under pressure is subject to debate.

Generally, the Solomon Islands Attorney General had very limited contribution in regard to the content of the *Facilitation Act* when it was drafted. The only substantive input from the AG on the Act was in regard to commenting on its consistency. Consequently, the content of the *Facilitation Act* provides tax concession to RAMSI and blanket immunity. This indicates that the Act was more to the advantage of Australia and the regional assistance mission. On the other hand, it reflects a policy gap. It is indicative of *'the way we are and the way they are'*. This begs the question of why there is a policy gap. Obviously Australia has the policy capacity to manipulate how RAMSI is to operate. For Solomon Islands, both the AG and the Solomon Islands Government or legislature does not have the capacity.[50] The presence of the policy gap still remains even after 18 months of RAMSI's operation in Solomon Islands.

Let us look at the Intervention Task Force Report November 2004, The Cabinet Report December 2004 and The Parliamentary Foreign Relations Report to justify the above contention. Generally, all the three reports are indicative of this policy gap because there is not much critical analysis. Take the Task Force Report for example. After reviewing RAMSI's first year of performance it recommended "...continued full implementation of all provisions of the Facilitation Act".[51] There was no suggestion for amendment. For the Cabinet Report it supports RAMSI's operation but suggest Solomon Islanders to take the leading role in strengthening key institutions and RAMSI leave as soon as possible. The Parliamentary Foreign Relations Report seems to be a much better report but again falls short of being critical and analytical.

In regard to the content of the *Facilitation Act* the major concessions for RAMSI are indicative of this policy gap. These major concessions involve allowing for complete freedom of movement, exemption from all customs and immigration regulations and immunity from prosecution under domestic laws.[52] Under international relations such concessions are normal. As mentioned by the Attorney General Daryl Williams "it is normal practice for the members of a visiting contingent to be accorded immunity from local jurisdiction for actions related to official duties."[53] However, the concession giving complete immunity is a fundamental issue that affects the enforcement of domestic laws and the sovereign jurisdiction of Solomon Islands.

There is lack of compromise on the issue of immunity in Solomon Islands unlike in the case of Papua New Guinea whereby the courts have concurrent jurisdiction in regard to criminal matters. For example, Article 8 (1) of The Enhanced Cooperation Between Australia and Papua New Guinea Agreement[54] stipulates a concurrent criminal jurisdiction over Designated and Related Persons with respect to offences committed within the territory of Papua New Guinea and punishable by the law of Papua New Guinea. Article 8 (2) provides:

> (a) Australia shall have the right to exercise exclusive jurisdiction over Designated and Related Persons subject to Australian law with respect to offences punishable by Australian law but not by Papua New Guinea law.

In a situation where Australia does not have exclusive jurisdiction or the primary right to exercise jurisdiciton the Agreement states that the parties must agree to a request by the other party to consult in order to determine the exercise of jurisdiction in a particular case.[55] Under Article 8 it also provides for team work between Australian and Papua New Guinea authorities in carrying out of investigations and proceedings into offences and in the collection and production of evidence.

By making reference to the *Enhanced Cooperation Between Australia and Papua New Guinea Agreement Act* one could be able to conclude that the Papua New Guinea the Government actually stood out strongly

against a complete immunity provision. Whereas in Solomon Islands the state was weak, therefore it lacked the capacity to be critical and upfront in order to ensure compromise on the issue of immunity. The Australian Foreign Minister when comparing the intervention Solomon Islands and Australia's involvement in PNG stated that *"The Solomon Islands Government ... was on the precipice of becoming a failed state. Papua New Guinea is not in anything like the situation that Solomon Islands was in"*.[56]

Regardless of Solomon Islands situation as a failing state this does not negate its legal capacity as a sovereign state under international law. The International Commission on Intervention and State Sovereignty Report 2001[57] clearly shows that while sovereignty is important under international law the international community can intervene if a state cannot respect the sovereignty of another state or is not responsible to respect the dignity and basic rights of its people. Kofi Annan had a similar view when he expressed "We can not stand aside when gross and systematic violation of human rights is taking place".[58] For the Solomon Islands despite its situation, there is no evidence to justify that it has violated the sovereignty of other states or it no longer respects the dignity and basic rights of its citizens. The only possible scenario, which could be argued as an indication that the state of Solomon Islands would no longer respect the dignity and basic rights of its citizens, is when its police force compromised with militants.

Furthermore, the immunity provision in the *Facilitation Act* makes the courts to have no jurisdiction and the laws to be unenforceable against RAMSI. Hence, the question of sovereignty could be raised but this must be made in reference to the written Constitution to determine whether the immunity provision is valid. In the case of *Tu'itavaka v Porter* 24/1989 the plaintiffs challenged the *Diplomatic Relations Act 1971* as inconsistent with Clause 4 of the Constitution of Tonga, which stipulates equality before the law. The Court held the Act was valid. The approach taken by the court was interpreting the Constitution in its entirety to determine the context and purpose of the provisions. This would seem to be the approach which Courts in the South Pacific would take in determining whether an immunity provision is inconsistent with the Constitution. However, the immunity provision contested in the *Tu'itavaka* case is to do with diplomatic immunity instead of immunity of armed forces, police and civilians who are part of an intervening force. Hence, a distinction could be made on that basis.

On the other hand, the RAMSI intervention code named the Operation Helpem Fren (Help a Friend) has a mandate to address law and order problem and to help rebuild the state institutions.[59] This meant one of the priorities of the intervention is to strengthen the state apparatus and promote good governance. On that premise, one could argue that the integrity of the state was not threatened by the intervention. State integrity remained intact. Therefore, sovereignty would not be an issue. However, since RAMSI's task is not only to restore law and order but also ensure good governance in principle, RAMSI should have some form of accountability or transparency to the people. Under the current legal framework it seems impossible because they are immune from being held accountable under domestic laws by the courts.

Frankly, for Papua New Guinea the Joint Enhanced Cooperative Agreement does provide for compromise in terms of the applications of laws and the jurisdiction of the courts. For Solomon Islands the *Facilitation Act* does not. Provisions in the *Facilitation Act* provide for the respecting of Solomon Islands laws but the extent of their application remains in doubt.[60] There is an inadequacy in balancing whose laws to apply in certain situations in order to reflect a true spirit of partnership. Currently, while it can be said that the Australian led regional mission is a cooperative or partnership effort in practice it is unrealistic because there is no legal framework governing how this should be in effect.

The current legal framework does not adequately provide for realistic partnership or cooperation. At this stage the Australian led regional mission has much more bargaining power in the name of partnership. Solomon Islands is a puppet in the shadow, which can not say much because it is inherently weak unless the current legal framework is amended to ensure compromise and a level playing field. Untill that is done

Australia will continue to dictate the agendas for cooperative or partnership assistance.

CASES AND IMPLICATIONS

Since the arrival of RAMSI in July 2003 there is now a constitutional case filed against acts that were alleged to have been carried out by some Australian Federal Police (AFP) officers who are part of the Participating Police Force. The aggrieved party is John Makasi and he is suing RAMSI for the breach of his constitutional rights. Makasi was questioned after an Australian police officer, Adam Dunning, was shot dead on 22 December 2003. He claimed during interrogation there was heavy handed treatment by Australian personnel and he was forced to urinate in front of them.[61] Under the Constitution Makasi could apply to the High Court for redress.

The actions of the AFP that were alleged to have breached Makasi's constitutional rights were taken during the course of their official duties. This is covered under the immunity provision in the *Facilitation Act*. Therefore, the issue would be who should be held liable. Under the Facilitation Act the AFP officers are answerable to their commander -- in this case, the Deputy, Commissioner. So what we have are two parallel accountability/liability systems: - the Police Commissioner (and also chief of national security), and this separate person, who is the Deputy Police Commissioner, who is in control of all the PPF, and is ultimately answerable to Canberra. However, RAMSI has decided to waive the immunity from suit. Therefore, the case will now go before the High Court.[62]

CONCLUSION

In short, the intervention by consent in Solomon Islands is made legitimate by virtue of the *Facilitation of International Assistance Act 2003*. However, the legal framework that provides legitimacy for the intervention does not sufficiently provide a clearly defined guideline on how a cooperative effort or partnership could be achieved between the visiting contingent, the Royal Solomon Islands Police and the Government of Solomon Islands. Even though Australia would like to label the operation as 'cooperative intervention', in reality Australia is running the show.

The current legal framework provides concessions for RAMSI without clear guidelines on how they should be accountable and transparent to the people of Solomon Islands in terms of their operations. Already there are gaps surfacing in regard to the 'cooperative intervention' package. Capacity building would be an example. Therefore, the Facilitation Act should be amended in order to provide a clear legal framework to ensure there is a true spirit of partnership.

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[3] Elsina Wainwright, 'Responding to state failure – the case of Australia and Solomon Islands' (2003) 57(3) *Australian Journal of International Affairs* 485.

[4] The Socialist Equality Party (Australia) 'Oppose Australia's colonial style intervention in Solomon Islands', *World Socialist Web Site*, 3 July 2003. <http://www.wsws.org/articles/2003/jul2003/solo-j03.shtml>(Last accessed 8/3/05).

[5] http://www.st-andrews.ac.uk/academic/intrel/research/ cstpv/pdffiles /APCSS%20-%20crime%20terror%20contin.pdf

[6] See International Commission on Intervention and State Sovereignty (hereinafter ICISS), *The Responsibility To Protect* (2001) p 75 <www.dfait-maeci.gc.ca/iciss-ciise/pdf/commission-report.pdf> (1st April 2005).

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[8] Elsina Wainwright, above n3, p 488.

[9] Christopher Richter, above n 7.

[10] Editorial Board 'Behind the Solomons Intervention: Australia stakes out its sphere of influence in the Pacific', *World Socialist Web Site*, 15th August 2003. <http://www.wsws.org/articles/2003/aug2003/solo-a15.shtml> (last access 10/3/05).

[11] Article 3 (2) 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.

[12] Article 3 (3), ibid.

[13] Article 4 (2), ibid.

[14] Article 10 (2), ibid.

[15] Article 5 (2), ibid.

[16] Article 5 (4), ibid.

[17] Elsina Weinwright, above n 3.

[18] See Robert L. Iroga 'Maina Claims gap in RSIP and RAMSI deepens', *Solomon Star* (Solomon Islands) 2 February 2004, 2.

[19] Socialist Equality Party, above n 4.

[20] See Solomon Islands Intervention Task Force 'A Review Report on the First Year Performance of the Regional Assistance Mission to Solomon Islands (RAMSI) 24th July 2003 – 23 July 2004', Nov. 2004.

[21] See section 4 (1) (a) and (b) Facilitation of International Assistance Act 2003 (No. 1 of 2003).

[22] Chapter 110.

[23] See section 7 (1) & (2), ibid.

[24] See articles 5(5) & 6 (3) Agreement between Solomon Islands, Australia, New Zealand, Fiji, PNG, Samoa and Tonga concerning the operation 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.

[25] Article 5 (1), ibid.

[26] Article 5 (2), ibid.

[27] The Makasi case is one example.

[28] Robert L. Iroga, above n 18.

[29] See Schedule Article 2, Enhanced Cooperation Between Australia and Papua New Guinea Act 2004 (No. 8 of 2004).

[30] "Designated Person means any person notified by Government of Australia to the Papua New Guinea Department of Foreign Affairs and Immigration" Schedule Article 1, ibid.

[31] See Schedule, Article 5, above n 29.

[32] Will Marshall 'Australia's next neo-colonial intervention begins in Papua New Guinea', *World Socialist Web Site*, 23 December 2003. <http://www.wsws.org/articles/2003/dec2003/pang-d23.shtml> (Last accessed 5/3/05).

[33] See Schedule, above n 29.

[34] Sections 6, 7(2) & 8, ibid.

[35] Section 7(1), ibid.

[36] Schedule, Article 3(7), ibid.

[37] Schedule, Article 3(8), ibid.

[38] Article 2 provides "Australia may, in consultation with the Government of Papua New Guinea, deploy police and other personnel to Papua New Guinea to work in partnership with the Government of Papua New Guinea to address cores issues in Papua New Guinea in the areas of governance, law and order, justice, financial management, economic and social progress as well as capacity to public administration including the Royal Papua New Guinea Constabulary" - see Schedule, above n 29.

[39] See section 17 (1), above n 21.

[40] See section 18 (2), Constitution of Solomon Islands.

[41] See section 17 (1), above n 21.

[42] Article 5 (1), above n 11.

[43] Article 5 (2), ibid.

[44] See section 43, above n 40.

[45] See Anthony Coughlan 'The Nation Station, Sovereignty and the European Union' (Paper prepared for distribution at the Annual General Meeting of The European Alliance of EU-Critical Movements(TEAM) in Prague, Czech Republic, 9-10 March 2002). <http://www.spectrezine.org/europe/Coughlan.htm> (Accessed 29/2/05).

[46] Bob Briton 'Regional disquiet over Solomons deployment', *The Guardian*, 23 July 2003. < http://www.cpa.org.au/garchve03/1147solomons.html> (Accessed 3/3/05).

[47] Will Marshalls & Peter Symonds 'Solomon Islands parliament approves Australian – led military take-over', *World Socialist Web Site*, 23 July 2003. <http://www.wsws.org/articles/2003/jul2003/solo-j23.shtml>(Accessed 2/3/05).

[48] Will Marshall 'Solomon Islands bullied into accepting Australian led military intervention', *World Socialist Web Site*, 12 July 2003. <http://www.wsws.org/articles/2003/jul2003/solo-j12.shtml>(Accessed 3/3/05).

[49] Bob Briton, above n 46.

[50] See Solomon Islands Government Policy Statement on the Offer by the Government of Australia for Strengthened Assistance to Solomon Islands 2003. Honiara, 2003.

[51] Solomon Islands Intervention Task Force, above n 20.

[52] See ss 11, 15, 16 17, above n 21.

[53] Bob Briton, above n 46.

[54] See Schedule, above n 29.

[55] Schedule, article 8 (2)(b), Ibid.

[56] Will Marshall, above n 32.

[57] See ICISS, above n 6.

[58] Kofi A Annan, 'Two Concepts of Sovereignty' *The Economist* (USA) 18 September 1999.

[59] See Solomon Islands Intervention Task Force, above n 20.

[60] See section 19, above n 21.

[61] 'Australian Officers shamed Solomons suspect', *Pacific Magazine and Island Business*, 20 January

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[62] 'RAMSI in Court', *Post Courier*, 22nd-24th April, 2005. <http://www.postcourier.com.pg/20050422/pacific.htm> (Accessed 3rd May 05).

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