

# **8th Annual Ethel Benjamin Commemorative Address**

## **“Looking Outwards”**

**By the Hon Justice Susan Glazebrook  
Court of Appeal**

**Dunedin, 5 April 2004**

It is a pleasure to be here to join in the celebrations for the 125<sup>th</sup> anniversary of the Otago District Law Society. It is apt that the 8<sup>th</sup> Annual Ethel Benjamin address is to be given at this time and I am honoured to have been asked to present it and therefore to be able to pay tribute to that amazing woman. I would like to congratulate the Otago Women Lawyers' Society and the New Zealand Law Foundation on their initiative in organising this annual lecture. It is important to have an occasion each year to celebrate the past and reflect on the future.

I thought I would take as my theme today that of “looking outwards”. I think it vital to take the time to look outwards periodically to the world beyond these shores as it broadens the perspective and lessens the tendency towards insularity. It is also a fitting theme for an address to commemorate New Zealand's first woman barrister and solicitor whose considerable struggle for acceptance certainly challenged the legal profession to look outwards and, as a result I am sure you will all agree, enriched the practice of law in New Zealand.

I was fortunate in my time in practice to have been able to look outwards frequently as I was involved over the years in a lot of cross-border work. This enabled me to work with lawyers and clients from around the world. I am sure I was a better lawyer as a result. I was also fortunate in having indulgent partners at my law firm who encouraged me to become involved in a number of international legal organisations. One of those organisations was the Inter-Pacific Bar Association or IPBA. This is an organisation of business lawyers working in the Asia-Pacific region.<sup>1</sup> I was the President in 1998 and had the experience (and I use that word advisedly) of organising the annual conference in Auckland that year. The conferences moved

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<sup>1</sup> For further information on the IPBA see <<http://www.ipba.org>>.

from jurisdiction to jurisdiction and this of course gave opportunities for travel to exotic (and not so exotic) locations. I must admit that convincing both my partners and others that I was going to Hawaii for work certainly honed my advocacy skills.

Valuable as the formal sessions of the annual conferences were, I think the informal contact with those from other jurisdictions was even more valuable. What strikes you often are the similarities as much as the differences and you can learn from both. Seeing how and why things are done in another jurisdiction can help you to understand and therefore respect differences. It can also help you to understand why things may be done a particular way here but also to realise that the way we do things may not be the only way and that there are other legitimate points of view.

When I became a judge I thought I would necessarily become less outward looking. Obviously there would still be the need to have an outward looking focus in looking to the jurisprudence of other jurisdictions but the actual human contact with those in other jurisdictions may, I thought, be less frequent. This has not turned out to be the case. We have frequent visits from distinguished jurists from overseas, often of course sponsored by the universities and the Law Foundation. We are lucky too to have had recently a number of international legal and judicial conferences in New Zealand, with no doubt many more to come, including the International Bar Association conference later this year in Auckland. There is also the opportunity to attend relevant conferences and undertake programmes offshore, to the extent the business of the Court allows.

I intend to concentrate today, however, not on the wider theme of the usefulness of international contact but on some aspects of New Zealand's place in the Asia-Pacific, particularly its role with regard to human rights in the region. I am sure Ethel, if I can be so bold as to call her that, would have approved. I think that it is especially important in times where there are legitimate concerns about international security to reflect on the reasons for international human rights law and to understand why it is even more relevant in times of stress than in more secure times.

The reason I have chosen this topic is because over the last two years I have been a member of the Advisory Council of Jurists for the Asia-Pacific Forum of National

Human Rights Institutions. I have told them that they have to think of a title that is a bit less of a mouthful, although I have also urged them to avoid those successions of acronyms the United Nations so loves but which often mean little to outsiders.

You will also have noticed no doubt that this is hardly a role that my background in practice as a tax and finance lawyer prepared me for. When I tell you, however, that my doctoral thesis was on crime and criminal justice in France during the French Revolution you will see that wide swings in topic have been a bit of a hallmark of my career. My present role as a judge suits me very well as it enables me to indulge these tendencies in my everyday role.

Anyhow back to the Asia-Pacific Forum. This was established in 1996 and receives the bulk of its funding from the UN Office of the High Commissioner for Human Rights. The Forum is dedicated to supporting the establishment and development of national human rights institutions that fulfil at the least the minimum standards set out in what are called the Paris Principles.<sup>2</sup> These were endorsed in 1993 by the United Nations General Assembly. The Paris Principles require human rights institutions to be independent from government and autonomous, and to have sufficient resources, adequate powers of investigation and a broad mandate based on universal human rights standards. The Forum currently has 12 full member institutions from the region that fulfill those criteria<sup>3</sup> and a number of associate member institutions who are working towards fulfillment of the criteria. The New Zealand Human Rights Commission was a founding member of the Forum.

The idea of setting up an Advisory Council of Jurists was first mooted by the Forum in 1997 and it was formally approved in 1998. The Council's mandate is to provide advice on the interpretation and application of relevant international human rights standards as they apply to member states. The Council can only advise, however, on matters referred to them by the Forum or by a national institution that is a member of the Forum.

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<sup>2</sup> General Assembly Resolution 48/134 of 20 December 1993, annex *National institutions for the promotion and protection of human rights* A/RES/48/134.

<sup>3</sup> The current Forum membership includes independent national human rights institutions from Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, the Philippines, Republic of Korea, Sri Lanka and Thailand.

The Council first met in 1990 in Rotorua under the capable presidency of our own Dame Silvia Cartwright, before she became Governor-General. It has so far considered four references – two when Dame Silvia was President, on child pornography and the death penalty – and two since I have been a member of the Council. In 2002 the reference was on trafficking (considered at the annual conference in New Delhi) and this year, at the annual conference in Kathmandu, the Council considered a reference on terrorism and human rights. Next year the meeting heads for Mongolia and perhaps a reference on torture. You will see therefore that I still manage to get to fascinating conference venues.

The process followed for the references to the Council is for the Forum to decide on what is to be referred. It then set out specific questions it wants answered. A background paper is prepared for the consideration of the jurists. The jurists meet for two days in conjunction with the annual meeting of the Forum and produce a report for presentation to the Forum meeting. I can tell you that the timeframe is in itself a challenge, although we do have two months after the meeting to finalise our report. It is a very rewarding (and humbling) experience, however, to work with eminent jurists from around the region.

The Council's reports answer the particular questions set in the reference but they also make recommendations as to further action. All of the reports done so far by the Council are available on the Forum website<sup>4</sup> and the Forum members report to each meeting on the progress made in their jurisdictions in implementing those recommendations.

The Asia-Pacific region is the only major region of the world that has not adopted a regional human rights instrument. One of the main reasons for this is the diversity of the region as defined in the United Nations system. The region covers an area that ranges from Syria to the Solomon Islands. It includes all major religions and has diverse social systems, cultures and ethnic groupings. It is likely, therefore, that any regional human rights instrument is some way off.<sup>5</sup>

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<sup>4</sup> See <<http://www.asiapacificforum.net>>.

<sup>5</sup> See the discussion in: New Zealand Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2ed, 2003) at 79-80. The *Handbook* notes that, despite the difficulty

In the meantime, the Forum and the Advisory Council fulfil an important function. They have their roots in the region and can concentrate on the issues of particular relevance to the region, having regard to the situation of the various States in that region. I think it is important that the work of the Forum and the Council becomes more widely known and that is one of the reasons for choosing to talk about them today.

I would like now to move on to say a bit more about the two topics that have been referred to the Council while I have been a member so you can get more of an idea of what has been done so far.

The first meeting I attended was in November 2002 in New Delhi and the reference, as I said earlier, was trafficking. Until December 2000 the term “trafficking” had never been precisely defined in international law. In particular, the factors distinguishing trafficking from people smuggling had been difficult to identify. This changed with the finalisation of the Trafficking Protocol to the United Nations Convention Against Transnational Organized Crime. The Protocol came into force on Christmas Day last year.<sup>6</sup> The definition of trafficking in that Protocol talks of the threat or use of force, deception or fraud or the abuse of power in relation to a person for the purpose of exploiting that person. It also talks of payments made to those having control over others, which is particularly relevant to children with respect to payments made to parents or guardians. In the case of children, exploitation alone is sufficient to be deemed trafficking.<sup>7</sup>

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in realising a regional human rights charter, there has nevertheless been progress in regional human rights networking and co-operation in recent years, both through the Asia Pacific Forum and also through annual workshops for the promotion and protection of human rights in the Asia-Pacific region held under the mandate of the United Nations Commission on Human Rights. These gatherings have, since 1990, been attracting a growing number of country delegations, national institutions and NGO representatives from around the region. Participating countries (around 40) have concluded that a gradual approach to building regional arrangements offers the best prospects for making progress and that its foundation should be technical co-operation aimed at national capacity building. A practical framework has been agreed on which focuses on national human rights institutions, human rights education, national plans of action and promotion of economic, social and cultural rights and the right to development.

<sup>6</sup> See <[http://www.unodc.org/unodc/en/trafficking\\_convention.html](http://www.unodc.org/unodc/en/trafficking_convention.html)> for a summary of the Trafficking Protocol, which, as of 22 March 2004, had 117 signatories and 50 parties.

<sup>7</sup> Article 3 defines trafficking as follows:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other

The main victims of traffickers are women and children and, arguably, the main destination is the sex trade, although trafficking takes place also to provide domestic or sweatshop workers or other forced labour (including criminal activity) and in some cases for trade in human organs.<sup>8</sup> The problem is rife in many of the Forum countries, both internally and between countries, with some countries serving as countries of origin, transit and destination for trafficked people.

We have not been immune in New Zealand. There have been instances of Thai women, for example, trafficked to New Zealand and forced to work in the sex trade. There have also been instances of sweatshops staffed by trafficked workers. Often such women will be working to pay off so-called travel and accommodation debts that just end up getting bigger and bigger. In 1999 the Human Rights Commission set up a 'safe house' programme to assist Thai women to escape prostitution in New Zealand. One woman had money returned through the Disputes Tribunal that had been cheated from her after she paid around \$6000 to traffickers believing she would be found work in a New Zealand restaurant but instead discovered, on arrival, that she was required to work as a prostitute.<sup>9</sup>

Just to put some more flesh on the bones, I would like to recount a story of a trafficked young girl. This comes from a book given to me while I was at the Forum

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forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

<sup>8</sup> See Commission on Human Rights *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on Trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44* E/CN.4/2000/68 (29 February 2000).

<sup>9</sup> See the Human Rights Commission website at <<http://www.hrc.co.nz>>.

conference in New Delhi by an organisation that helps trafficked children.<sup>10</sup> The book is a simple publication which describes the work of the organisation but it mainly lets the children speak for themselves by providing a selection of stories.

I have chosen the story of a girl identified by her initial, K. This, in fact, is one of the less harrowing stories in the book. K came from a small West Bengali village. Her family consisted of two young brothers and her father who was a village priest. The father became ill and was diagnosed with cancer and this obviously put a major financial strain on the family. A family friend offered to get K work in Calcutta with a good family so that she would be able to support her own family. K went with the friend and was taken to Calcutta where she was put into the care of an elderly woman. She was given something to eat and she remembers nothing more until she woke to find herself in Mumbai. There she was put to work as a prostitute expected to service over 20 customers a day. This came to an end eventually after a raid on the brothel by the police. She had been hidden behind a false wall but took the risk of banging on the wall during the raid. Rescue came too late for K, however, as she was already HIV positive. The heartbreaking part for me was the narrator recording that K is sure that the drugs she had been given since her rescue will cure her and that she will have a brighter future. She was then only 16 years old.

Similar stories abound, often coupled with graphic tales of rape, violence, intimidation and lack of attention to basic needs, including medical care. The situation is not necessarily better for the trafficked women and girls after rescue. Often they will find themselves the subject of prosecution for prostitution while their traffickers go free. This is sometimes because of the corruption of officials but more often probably because of the difficulty of prosecution, including the difficulty of cross border prosecutions and that of persuading the trafficking victims to testify. Someone once said that the trouble with prosecuting traffickers and people smugglers was that the evidence had legs and frequently used them.

There is also the problem of reintegration of trafficked women and children back into society. Many of the girls whose stories were in the book said that, even in cases where their families were willing to take them back, they felt more comfortable

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<sup>10</sup> Roma Debabrata (ed) *Analysing the Dimensions: Trafficking and HIV/AIDS in South Asia* (STOP (Stop Trafficking Oppression and Prostitution of Children and Women), 2002).

staying with others who had had the same type of experiences they had. Where adult victims are concerned, many in fact had made a positive decision to escape their previous lives. Some of those do not necessarily wish to be rescued from prostitution but they do want their situation to be improved by ensuring, for example, proper payment and medical care. The solutions, therefore, are not straightforward.

The Advisory Council in its report noted that the root causes of trafficking lie in poverty and social injustice and in particular gross gender discrimination. It also recognised, however, that the new international laws targeted specifically at trafficking provide important tools for combating trafficking. To give substance to this we urged all member States to ratify the Protocol on Trafficking and I note that New Zealand was one of the first States to do so. We also urged States to implement the Protocol even before ratification and to ensure the proper enforcement of existing laws to combat trafficking. This has to be coupled with measures to ensure that the victims of trafficking will come forward to testify. Finally we exhorted States to ensure that the human rights of victims of trafficking were secured, including their right to self-determination.<sup>11</sup>

Writing reports of course only takes us so far. This is not to diminish the importance of bringing a problem into the open. A problem that is not known about is a problem that can be ignored. It is, however, action that is needed now. I know that the Forum members are determined to facilitate that action to the extent they can and that the report, coming as it does from a group of jurists from the region, will help them in that task.

I now move to this year's reference on terrorism and human rights, an issue that is of course very topical. At the meeting in Nepal an interim report of the Advisory Council was presented to the Forum meeting and that is available on the website.<sup>12</sup> A final report which is much more detailed and which will include recommendations aimed at individual Forum members will be completed within the next few months.

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<sup>11</sup> See Advisory Council of Jurists *Consideration of the issue of Trafficking: Final Report 2002* 5-8 <[http://www.asiapacificforum.net/jurists/trafficking/Final\\_Report.pdf](http://www.asiapacificforum.net/jurists/trafficking/Final_Report.pdf)>.

<sup>12</sup> See <<http://www.asiapacificforum.net/jurists/terrorism/interim.htm>>. The final report, when completed, will also be available on the website.



Implementation measures will be discussed at the next meeting of the Forum later this year in Seoul.

The first thing our interim report made clear is that terrorism, particularly where it is aimed at civilians, is in itself a gross breach of human rights and never justifiable, whatever the motive.<sup>13</sup> Equally, however, I would say that to meet breaches of human rights with further breaches of human rights not only diminishes moral authority but is likely in the long run to be counter-productive. It is instructive in this regard to listen to the words of the President of the Supreme Court of Israel. These appear in a judgment, with which the other eight members of the Court agreed, that related to interrogation techniques using physical means. The judgment essentially held that these were not legal. After referring to the security situation in Israel, President Barak said:

Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>14</sup>

The UN Security Council has recognised the importance of ensuring that international human rights standards are met when taking measures to combat terrorism.<sup>15</sup> The Advisory Council endorsed that approach. It pointed out that the international human rights law and standards were designed to be interpreted in an evolving context and that they are flexible enough to meet the current security challenges.

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<sup>13</sup> See for example the comments in Security Council Resolution 1269 (1999) *On the responsibility of the Security Council in the maintenance of international peace and security*; S/RES/1269. The Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security. Article 25 of the UN Charter makes compliance with Security Council Resolutions mandatory.

<sup>14</sup> *Public Committee against Torture v Israel* HCJ 5100/94, 6 September 1999. In that case the Court declared that the necessity defence contained in Israel's Penal Law could not serve as a basis of authority for such interrogations but might nevertheless be available as a defence if an investigator was later criminally indicted. In the Court's view, the authority to interrogate using physical force raised questions that must be determined by the legislative branch. In another case President Barak said (*Marcus v Minister of Defense* HCJ 168/91 45(1)PD 467, 470-471):

Even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on the recognition that it is fighting for values that deserve protection. The rule of law is one of these values.

<sup>15</sup> Security Council Resolution 1456, *High Level Meeting of the Security Council: Combating Terrorism*, 20 January 2003; S/RES/1456 (2003).

The Council, in its interim report, therefore expressed its concern about a widening gap between commitment to international human rights standards and their implementation in national laws and administrative practices related to counter-terrorism measures.. We drew attention to a number of disturbing trends in the region, including:

- detention for prolonged periods without criminal charges being laid and with no opportunity for timely judicial review of the legality of the detention,
- detention without notification to family (in some cases amounting effectively to disappearances),
- the targeting of minority groups solely on the basis of ethnic or national origin or religious or political persuasion,
- the misuse of anti-terrorism legislation to stifle legitimate political dissent and other fundamental freedoms,
- the erosion of rights of due process, including the presumption of innocence,
- the grant of immunity from prosecution for public officials or the military who are guilty of gross violations of human rights,
- the proliferation of special tribunals to deal with terrorism offences, thereby undermining the right to a fair and public hearing by an independent and impartial tribunal, and
- the promulgation of counter-terrorism measures by executive decree without adequate, or in some cases any, Parliamentary scrutiny.

In New Zealand's latest round of post September 11 anti-terrorism legislation most of the provisions that human rights groups had been concerned about were removed or modified during the Select Committee process. This is significant as, in my view, countries like New Zealand should lead by example in this area. We must remember, too, that draconian laws have the potential to be used against everyone and not just against terrorists. History has shown in other countries and in other contexts that complacency in this area is misplaced. It is the human rights of all New Zealanders that are at stake.

I end with some thoughts on why it is important for New Zealand to be involved in groups like the Forum. The first of course is just good world citizenship. New Zealand has cause to be proud of its involvement over the years in international affairs and in particular with human rights initiatives. There are also, however, more selfish reasons. The promotion of human rights in the Asia-Pacific region, and particularly economic and social rights, can only be of benefit to the region and therefore to New Zealand. It is easy too for New Zealanders to become complacent and to forget why the protection of human rights is important. Looking outwards to countries in the world where human rights are less secure can guard against that tendency and renew the determination that is required to bring about a common understanding and universal respect for the human rights of all people.