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DEALING WITH INTERNATIONAL CRIME AT THE REGIONAL LEVEL

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I INTRODUCTION

In the international system today there are some discernable trends that are having a significant influence upon the behaviour of states and individuals along with a substantial impact on the role and position of international law as a regulatory force. This paper intends to look specifically at two of the more prominent trends: first, the ever-increasing integration activities among states; and, secondly, the development of an international criminal justice system.

Integration among states is not a new phenomenon in the international system, but the expanding breadth and depth of cooperative measures is bringing about changes in the way the international system is organised and how these structures are understood by international law. Similarly, attempts by the international community to develop an international criminal justice system have a long history, but only in more recent years have any concrete measures come into place. These two particular trends are

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N Boister and A Costi (eds) *Regionalising International Criminal Law in the Pacific* (NZACL/ALCPP, Wellington, 2006)

not wholly unrelated. In effect, one of the main factors behind the evolution of an international criminal justice system is the recognition that international criminal activity has a severe cross-border impact and some form of collective response among states is needed. The same basic ideas account for the increase in cooperation arrangements among states as responses are found to the range of challenges that exist.

The development of an international criminal justice system has, for the most part, concentrated on the universal level, as demonstrated by the creation of the International Criminal Court (ICC) and the emphasis on the ability of states to exercise universal jurisdiction over certain crimes. There have been ad hoc developments with a regional aspect to them, as evidenced by the International Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone, which possess a jurisdictional mandate that encompasses more than a single state. However, as William Burke-White has noted, regional arrangements in the system of international criminal justice remain "unexplored and underdeveloped".[1]

This paper intends to make a contribution to the consideration of regional arrangements in the international criminal justice system by exploring the tensions that exist between regional and universal approaches to matters affecting the international system, and how these impact approaches to international law, which in turn have influenced attitudes towards international criminal law. The view being asserted here is that regional arrangements possess a myriad of characteristics that place them in a unique position for effectively furthering a system of international criminal justice that is responsive and relevant to the varying needs and desires that exist in the international system.

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1 William W Burke-White "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration" (2003) 38 Tex Intl LJ 729, 730.

II REGIONALISM AND INTERNATIONAL ORGANISATION

For the purposes of this paper, a regional arrangement is understood as a grouping of three or more states, occupying a geographically contingent space, that have formally agreed (either politically or legally) to work together through the sharing of resources (widely understood) for the purposes of addressing and dealing with matters of common concern to the geographic area. While the matters of concern facing a regional arrangement may have global implications, the methods chosen to address these matters will be limited to a certain set of states in a certain location. Increased integration among states through various organisational models has become more and more prominent in the international system. Very little can be achieved or dealt with on a purely unilateral basis and regional arrangements are prominent examples of the forms of cooperation that occur among states.[2]

In general, there has been a tendency towards favouring a universal view of the international system. This tendency manifests itself in the pursuit of global organisations, such as the United Nations (UN), for developing institutional structures where state behaviour is carried out. The emphasis given to the League of Nations and the UN in the 20th century demonstrates the prominence and appeal of the universal approach to international organisation. In this pursuit for universal coverage and application, regional arrangements in the international system are viewed with suspicion based on the fear that they represent a threat to universal coherence. Regional approaches, it is believed, will lead states to develop competing blocs that will eventually threaten global peace. This is undoubtedly a very simplistic exposition of international organisation, but still one that has had significant

2 See Michael Schulz, Fredrik Söderbaum and Joakim Öjendal "Introduction: A Framework for Understanding Regionalization" in Michael Schulz, Fredrik Söderbaum and Joakim Öjendal (eds) *Regionalization in a Globalizing World: A Comparative Perspective on Forms, Actors and Processes* (Zed Books, London, 2001) 1, 1-16.

influence in understanding the international system and the role of international law.[3]

Unfortunately, there tends to be a belief that a choice must be made between either universal or regional approaches in matters of international organisation. Placing universal and regional approaches to international relations in essentially mutually exclusive positions is not useful for understanding the dynamics of international organisation. A more appropriate approach is to manage the competing claims of universal and regional approaches in order to draw upon the beneficial aspects of each for addressing matters facing the international system. In this respect, Inis Claude rightly assessed in 1964 that discussions about regional or universal approaches should not be about making a definitive choice, but rather should be seen as a process to be managed, and this "requires an intelligent evaluation of the merits and demerits of the opposing tendencies which has not been notably present in the management of the shifting balance between regional and universal approaches to international organization."[4]

In looking at the positive qualities in a regional approach, it is asserted here that regional arrangements have demonstrated the potential for being more conducive for interaction among states in addressing common issues. Typically, the states in a region will possess common history, traditions and cultures and characteristics that give rise to greater levels of cooperation and interaction, something that is clearly lacking at the global level.[5] Commonly, the

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3 For a background on this discussion which remains pertinent today, see Inis L Claude *Swords into Ploughshares: The Problems and Progress of International Organization* (3 ed, Random House, New York, 1964) ch 6.

4 Claude, above n 3, 109.

5 See generally Howard S Levie "Some Constitutional Aspects of Selected Regional Organizations: A Comparative Study" (1966) 16 Colum J Transnatl L 15; Ellen Frey-Wouters "The Prospect for Regionalism in World Affairs" in Cyril E Black and Richard A Falk (eds) *The Future of the International Legal Order: Trends and Patterns* (vol 1, Princeton University Press, Princeton, 1969) 463, 553-554.

relatively small geographical area involved with a regional arrangement allows for a more efficient allocation of resources and delegation of tasks when it comes to problem-solving procedures.[6] The directives of regional arrangements are likely to compel a greater level of compliance among the member states since the supervisory bodies created will possess greater legitimacy because they will be seen as possessing a greater understanding of the local situation.[7] The inability of a universal arrangement to fully comprehend or consider the unique circumstances and needs of the region results in action by the universal entity being seen as outside interference or as the imposition of models inappropriate to the localised circumstances. Regional arrangements also have a limited sphere of concern in addressing issues regarding the one region. Universal bodies have to account for global issues which will mean certain parts of the world, at any given time, will be marginalised. As regional arrangements have an ongoing presence in the region, this works to ensure a continued interest in the problems facing the region; it is not possible for attention to be shifted elsewhere or for problems to be ignored. Overall, the existence of regional arrangements increases the possible range of options available to address particular problems and the presence of a regional arrangement can ensure a lasting commitment to the issues and problems facing the region.[8]

In contrast to these positive observations on a regional approach, there are negative factors to consider.[9] The propinquity of beliefs and

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6 See L Ronald Scheman "The OAS and the Quest for International Co-operation: American Vision or Mirage" (1981) 13 Case W Res J Intl L 101.

7 A H Robertson and J G Merrills *Human Rights in the World* (3 ed, Manchester University Press, Manchester, 1992) 223-224.

8 Hilaire McCoubrey and Justin Morris *Regional Peacekeeping in the Post-Cold War Era* (Kluwer Law International, The Hague, 2000) 212 and 224.

9 See Joseph S Nye "The Future of Regional Institutions" in Cyril E Black and Richard A Falk (eds) *The Future of the International Legal Order: The Structure of the International Environment* (vol 4, Princeton University Press, Princeton, 1972) 425, 433-436.

values among states and societies in a region is not a given and in some cases the proximity of states may actually be the source of deep-seated antagonisms and continued conflict.[10] Within regions, the actual commitment of the member states is not always as deep as may be perceived because states might use regional or universal institutions selectively depending upon individual needs. If there is a regional superpower, there is a possibility of one state manipulating the regional arrangement in the pursuit of its own self-interested goals, leading to smaller states preferring the wider global arrangements.[11] Regional arrangements may not possess, or have access to, the necessary resources and knowledge that would be available within a universal body.[12] There is also a fear that the creation of a number of regional blocs could easily threaten world peace as the regional arrangements may engage in political, military or ideological rivalry leading to animosity and possibly conflict, resulting in the breakdown of international organisation.

The factors above will exist in varying degree depending upon the circumstances of a particular region. None of the above negative features are critical to the pursuit of international organisation along regional lines. There is substantial evidence demonstrating that regional arrangements have a propensity for furthering normative standards among, and within, states that have impacted the overall process of governance in a region. The development of the European Union in economic and social matters demonstrates the potential regional arrangements have in international organisation and governance.[13] In the promotion and legal protection of human rights and democracy, regional arrangements in Europe and the Western

10 Christoph Schreuer "Regionalism v. Universalism" (1995) 6 EJIL 477, 479.

11 McCoubrey and Morris, above n 8, 54.

12 Schreuer, above n 10, 479.

13 For an overview, see Martti Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, The Hague, 1998); Enzo Cannizzaro (ed) *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague, 2002).

Hemisphere have been able to foster agreement amongst states and implement institutional machinery to apply these norms in forms well advanced from the UN.[14] In these cases, regional arrangements have demonstrated an ability to mediate between the universal goals and objectives for governance and organisation and the particular needs and concerns that exist in domestic societies. As governance evolves beyond the state and the matters of concern facing society exist well beyond territorial limits, regional arrangements should be given the attention they deserve.

III INTERNATIONAL LAW AND REGIONALISM

Regionalism, although a fact of life, is often seen as being contrary to the universal aspirations and desires of general international law and has, therefore, been marginalised in understandings of international law.[15] The prevailing belief has been that regionalism will lead to a fragmentation of the rules and principles and result in differing applications and standards of legal conduct. These fears were clearly prominent during the 20th century as substantial efforts were made towards developing universal systems for world organisation. From the League of Nations to the UN, international law has attempted to back the idea of a single, universal system, while at the same time deal with the reality of state behaviour and the existence of regional arrangements.

During the drafting of the UN Charter, the debate over a universal approach or possible regional approaches to international organisation was the subject of intense discussion. The compromise that resulted in the final version of the Charter demonstrates the overall lack of

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14 Richard Burchill "The Role of Democracy in the Protection of Human Rights – Lessons from the European and Inter-American Human Rights Systems" in David P Forsythe and Patrice C McMahon (eds) *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press, Lincoln, 2003) 137-156.

15 International Law Commission "Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law – Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi" (13 April 2006) A/CN.4/L.682, paras 195-196.

coherence in dealing with the position of regional arrangements in international law. Regional arrangements are given direct attention in Chapter VIII dealing with the relationship between regional arrangements and the UN Security Council in the maintenance of peace and security. Article 52 states that "[n]othing in the present Charter precludes the existence of regional arrangements ... for dealing with such matters relating to the maintenance of international peace and security … ." Paragraph two of the same provision mentions that members "shall make every effort" to use regional arrangements before referring the matter to the Security Council. In paragraph three, the Security Council is to encourage the use of regional arrangements in dealing with peace and security matters. While Article 52 appears to give a prominent role to regional arrangements in the maintenance of international peace and security, Articles 53 and 54 can be interpreted as limiting the potential for regional arrangements to take action. The two provisions state that no action by regional arrangements in the maintenance of peace and security is allowed without the approval of, and the need to notify, the Security Council. Even though it appears that the UN is given a clearly superior position to regional arrangements in Chapter VII, the finer points of this relationship have been disputed.[16]

While the Charter attempts to place the UN in a superior position to regional arrangements, there is also a concession to political realities in Article 51 on the right to self-defence, where it is stated that "[n]othing in the Charter shall impair the inherent right of individual or collective self-defence." The reference to collective self-defence recognises the role played by arrangements such as the North Atlantic Treaty Organisation (NATO). Even though NATO clearly appears to be a regional arrangement for the maintenance of peace and security, it has not defined itself as such. Instead, it has declared itself

16 Philippe Sands and Pierre Klein *Bowett's Law of International Institutions* (5 ed, Sweet & Maxwell, London, 2001) 151-152; Christine Gray "The Use of Force and the International Legal Order" in Malcolm D Evans (ed) *International Law* (Oxford University Press, Oxford, 2003) 589, 615-616.

a "unit" for collective self-defence under Article 51. Even though Article 51 does set out a prominent role for the Security Council in any act of self-defence, the reference to the "inherent" nature of this right limits the ability of the Security Council to regulate state action, either individual or collective, in this regard.[17]

A further mention in the Charter to regional arrangements, albeit again not directly, comes in Article 56, where the member states pledge to uphold the human rights purposes articulated in Article 55 through joint and separate action. This leaves it open for groups of states to create their own regional arrangements for the promotion and protection of human rights in line with UN action in this area, a matter discussed further below. What is often seen as the final word in the Charter for confirming the universal and dominant position of the UN comes in Article 103:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail.

This provision is commonly interpreted as ensuring the dominance of the universal approach. However, depending upon the situation, there is no logical reason to give absolute primacy to the UN Charter in all inter-state affairs.[18] International lawyers tend to focus on Chapter VIII of the Charter. However, Chapter VIII only concerns itself with the maintenance of international peace and security and it is not a catch-all provision for general international law. Article 103, likewise, does not give absolute primacy to the universal approach as it only involves obligations under the Charter, which does not contain the full range of extant international legal obligations.

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17 Claude, above n 3, 108-109; Gray, above n 16, 617.

18 Inter-American Institute of International Legal Studies *The Inter-American System: Its Development and Strengthening* (Oceana, Dobbs Ferry, New York, 1966) 3.

The area of human rights protection provides the clearest demonstration of the tensions that exist between universal and regional approaches. During the drafting of the UN Charter, attempts to promote regional approaches to human rights protection were rejected on the basis that this would bring into question the universality of human rights and would deviate from the purposes of the UN.[19] However, following the adoption of the Charter, any consensus on a universal approach to human rights protection broke down. It was possible to generate sufficient, but not universal, agreement on the Universal Declaration of Human Rights (UDHR).[20] However, attempts to generate universal legal measures failed to materialise for almost 20 years. A direct result of the inability to gather sufficient agreement on the matter of human rights at the universal level was the creation of regional institutions which now exist in well developed forms in Europe, Africa and the Western Hemisphere. These regional developments all reflected a desire among groups of states to develop human rights instruments applicable to their particular circumstances. These efforts were not seen as competing with the universal movement, but as a direct response to the failure to generate sufficient levels of agreement at the universal level. At the same time, these regional approaches have all situated themselves within the universal system for the promotion and protection of human rights through an expressed commitment to the UDHR.

However, for many years, the regional and universal approaches remained distinctly separate and the institutional structures that evolved did so in isolation from each other. It was not until the mid-1980s that the UN began discussing the role played by regional

19 See generally Burns H Weston, Robin Ann Lukes and Kelly M Hnatt "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 Vand J Transnatl L 585; Karel Vasak "Introduction" in Karel Vasak (ed) *The International Dimensions of Human Rights* (vol 2, Greenwood Press, Westport, Connecticut, 1982) 451.

20 UNGA Resolution 217 (III) (10 December 1948).

arrangements in the promotion and protection of human rights,[21] eventually recognising that regional arrangements complement, rather than compete with, the international system.[22] In the 1993 Vienna Declaration and Programme of Action, there was the important recognition that:[23]

> Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection.

The regional arrangements that exist for the promotion and protection of human rights do not purposely try to undermine the universal system. Instead, they should be seen as a conscious effort to ensure that the standards of international human rights law are realised and appropriately applied to the particular circumstances found in the societies of the respective region. Regional arrangements have also worked to ensure the development of international human rights law into areas where there has been no substantive agreement at the universal level.[24] The development of regional arrangements in the field of international human rights has not seriously weakened the international system. It has been a positive development for furthering the normative and institutional elements of international human rights protection.[25]

In recent years, the UN has been much more amenable to regional arrangements in general. The change in attitude has been driven by events in the international system demonstrating the limitations of the

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21 UNGA Resolution 154 (4 December 1986) A/RES/41/154.

22 UNGA Resolution 167 (18 December 1990) A/RES/45/167.

23 UN World Conference on Human Rights "Vienna Declaration and Programme of Action" (12 July 1993) A/CONF.157/23, para 37.

24 For example, the Council of Europe has adopted the only existing international legal instrument on minority rights: Framework Convention for the Protection of National Minorities (1 February 1995) ETS No 157; 34 ILM 351.

25 Weston, Lukes and Hnatt, above n 19, 588.

UN and the prominence of regional arrangements in dealing with various issues.[26] In the report of the Secretary-General's High-level Panel on Threats, Challenges and Change (HLP Report), there is extensive recognition of the role played by regional arrangements in a variety of activities ranging from human rights and peace-keeping to environmental protection.[27] The HLP Report took a very clear stand on the importance of regional arrangements as a "vital part of the multilateral system" that does not contradict the efforts of the UN.[28] At the 2005 World Summit, the importance of engaging with regional arrangements more actively was recognised, along with support for creating stronger and more constructive relationships between the UN and regional arrangements.[29]

The more receptive approach of the UN towards regional arrangements will require a change in attitude towards these arrangements in international legal thought. As noted, in international legal scholarship, there has been a tendency for regionalism to be seen as leading to a lowering of standards or contributing to fragmentation in the international system. What is not recognised sufficiently is that regional arrangements are an integral part of the international system and equally constrained by universal international law. Attention to regionalism is more about ensuring that universal international law appropriately responds to the diverse conditions that exist in the world, not to detract from it. As Robert Jennings has explained:[30]

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26 McCoubrey and Morris, above n 8, 214.

27 UN Secretary-General "A More Secure World: Our Shared Responsibility – Report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change (2 December 2004) A/59/565 [HLP Report], available at <http://www.un.org/secureworld/report2.pdf> (last accessed 23 November 2006).

28 HLP Report, above n 27, para 272.

29 UNGA Resolution 60/1 "2005 World Summit Outcome" (24 October 2005) A/RES/60/1, para 170.

30 Robert Jennings "Universal International Law in a Multicultural World" in Maarten Bos and Ian Brownlie (eds) *Liber Amicorum for the Rt Hon Lord Wilberforce* (Clarendon Press, Oxford, 1987) 39, 41-42.

> [T]he first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as valid and applicable in *all* countries, whatever their cultural, economic, socio-political, or religious histories and traditions. … [T]his is not to say, of course, that there is no room for regional variations, perhaps even in matters of principle … . Universality does not mean uniformity. It does mean, however, that such a regional international law, however variant, is part of the system as a whole, and not a separate system, and it ultimately derives its validity from the system as a whole.

In short, regional arrangements should not be perceived as a threat to international law. Instead, they should be seen as a complementary way of ensuring international law adequately addresses – and has relevance to – the diverse societies of the world as they grapple with the challenges they face individually and collectively.

IV REGIONALISING INTERNATIONAL CRIMINAL LAW

As stated above, Burke-White has observed that the regional level of analysis has been underdeveloped and unexplored in the evolution of international criminal law. In the discussions surrounding the Rome Statute of the International Criminal Court (Rome Statute),[31] it appears the issue was not even considered as an area of importance. It is unfortunate that the regional level of analysis has so far been neglected as a regional approach to international criminal law would go a long way in making the system of international criminal justice effective and relevant to a wide range of diverse societies in the world. As regional developments in the field of international human rights law have shown, the system as a whole benefits from a combination of universal and regional approaches, and the latter do not necessarily detract from its overall effectiveness.

The current approach to international criminal law revolves around the potentially universal scope of the ICC, which complements the

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31 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999.

primary focus on individual states exercising universal jurisdiction over certain international crimes. Relying on states to ensure effective enforcement over international criminal matters, even with universal jurisdiction, is optimistic at best, but rather unrealistic in actual practice. Even though there is significant international rhetoric on the importance of overcoming impunity and ensuring those responsible for violations of international criminal law are brought to justice, individual states often have little interest in pursuing these crimes unless there is some immediate and direct impact upon their own self-interest. The idea of universal jurisdiction is very appealing conceptually, albeit far from robust in application. This form of jurisdiction is permissive; there is no obligation to exercise it. Therefore, whether or not a state actually takes any action will depend on a number of considerations directly related to the self-interested priorities of the state.[32]

The ICC provides an answer to this problem through the practice of complementarity, allowing for jurisdiction if a state is either unwilling or unable to act with respect to the core crimes contained in the Rome Statute.[33] While this may appear to provide sufficient oversight, it will remain a selective process as the ICC will only be able to deal with the most high-profile cases.[34] There is the further ability of the UN Security Council to make references to the ICC,[35] but it is beyond any doubt that this will be a politically motivated process, dependent upon the interests of the permanent members.

Much of the discussion about international criminal law and justice focuses on core crimes; those crimes contained in the Rome Statute, the commission of which is accepted as the basis for the exercise of

32 For discussion, see Antonio Cassese "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 JICJ 589-595.

33 Rome Statute, above n 31, art 17.

34 Fausto Pocar "The Proliferation of International Courts and Tribunals: A Necessity in the Current International Community" (2004) 2 JICJ 304, 308.

35 Rome Statute, above n 31, art 13(b).

universal jurisdiction by individual states. There is no doubt that these core crimes involve the most heinous forms of behaviour and it is in the interest of the international system that those responsible are held accountable. The ICC represents a major step in dealing with these crimes as it now provides a permanent institution with the jurisdictional reach to deal with offenders, as well as providing significant elaboration as to the particular elements of the core crimes.[36] However, even within the Rome Statute, there are significant limitations upon the institution's ability to address international criminal behaviour. Article 8(1) limits the jurisdiction of the ICC over war crimes as it can only deal with those "committed as part of a plan or policy or as part of a large-scale commission of such crime." More isolated events involving actions that fall under the category of war crimes will not engage the ICC. Furthermore, states can opt out of the jurisdiction of the ICC over war crimes for a period of seven years after ratification.[37] Violations of Common Article 3 of the Geneva Conventions will not engage the jurisdiction of the ICC in times of "internal disturbances or tensions, such as riots, isolated and sporadic acts of violence."[38] In circumstances where there exists significant instability within a state that results in uprisings and conflicts against those in power, there is the strong possibility that serious violations of human rights and humanitarian law may occur. However, this provision will allow governments to attempt to classify any insurrection as "isolated and sporadic acts of violence" escaping the jurisdiction of the ICC.

More importantly, for the purposes of this discussion, is the fact that the ICC's jurisdiction is limited to a narrow range of crimes; the Rome Statute does not address itself to the full range of international criminal activity. This is not to undermine the importance of the ICC as an integral part of the evolving system of international criminal

36 Nigel White *The United Nations System: Toward International Justice* (Lynne Reiner, Boulder, 2002) 212-213.

37 Rome Statute, above n 31, art 124.

38 Rome Statute, above n 31, art 8(2)(d).

justice, but mainly to recognise the fact that the crimes under the jurisdiction of the ICC are not the most prevalent forms of international criminal activity that are a concern for states. Too often, the core crimes contained in the Rome Statute are seen as representative of the entire system of international criminal law, thus resulting in a misconception of international criminal activity and international institutional responses.[39] It is the criminal activity commonly placed under the heading of "treaty crimes" that is most prevalent in the world today and of wider concern to states. These crimes include areas such as corruption, counterfeiting, drug-trafficking, human trafficking, terrorist activities and environmental damage. In order to effectively address these forms of criminal activity, cooperation among states is absolutely necessary as the acts in question are not confined to the borders of states either in terms of their planning and operation or in the impact they have upon societies. The international, or transnational, aspects of these crimes will have a universal element as the acts are not confined to one state and the matters involved fall within areas of global concern. However, in addressing these types of criminal activity, the regional level provides a number of advantages. The concerns of the region about particular types of crime can more easily be translated into binding norms backed up by institutional machinery; something that is much more difficult at the universal level. As the needs and concerns of the region evolve, the institutional machinery for dealing with criminal activity will be able to more easily adapt to the changes that are occurring in the surrounding context. And the proximity of states allows for a better use of resources and coordination in taking action.

Directly leading on from the belief that regional institutions such as criminal tribunals would be more responsive to the pressing needs of the region is the issue of legitimacy and acceptability of international institutions among domestic societies. When international institutions address themselves to issues commonly associated with domestic governance, it is crucial that they are not perceived as external forces

39 Neil Boister "Transnational Criminal Law?" (2003) 14 EJIL 953, 975.

being imposed upon a society. There needs to be some sense of connection and ownership among the societies concerned. The international criminal tribunals that have been created to date have all suffered from a legitimacy crisis. The Nuremberg and Tokyo tribunals were widely perceived as "victor's justice" and the ICTY and ICTR have also been seen as biased against the local communities involved.[40] Any element of international or supranational authority will be open to criticism that it lacks legitimacy. In the European Union example, even though the deep integration project has evolved over a 50-year period, local communities and national governments still see it as a foreign force imposing its will with no regard for local concerns and circumstances. This problem will be compounded in cases where the source of authority is even more distanced and detached from the locality, as may, in many situations, be the case with the UN.

Regional arrangements on the whole will possess a greater degree of legitimacy when dealing with matters that directly impinge upon issues of governance, as they will emanate from agreements based on the region and will involve individuals from the region. One of the main reasons behind the Caribbean Court of Justice was to "[e]mpower regional jurists to give effect to regional standards and values as the laws of the region are interpreted and applied."[41] Governments and people will likely be more inclined to follow the directives of a regional arrangement since the supervisory bodies that exist will be seen as having ideally a greater participation by locals and greater understanding of the local conditions, thereby ensuring the needs and wants of the society are effectively accounted for.[42] Ensuring high levels of acceptance and legitimacy for an international

40 See Burke-White, above n 1, 736-737.

41 Remarks of Sir Denys Byron CJ, quoted in Derek O'Brien "The Caribbean Court of Justice and Reading Down the Independence Constitutions of the Commonwealth Caribbean: The Empire Strikes Back" [2005] EHRLR 607, 608.

42 James N Rosenau "Governance in the Twenty-first Century" (1995) 1 Global Governance 13, 16.

criminal tribunal is crucial to enable it to work effectively. If a criminal tribunal is seen as something being imposed from outside, it is unlikely societies or governments will fully cooperate in its workings; they might even feel that their own people are being unjustly prosecuted.

The demands of international justice cannot be applied without attention being given to the more localised conditions and attitudes. This does not mean that the enforcement of international criminal activity becomes bogged down in relativist claims as to what is right or wrong; it merely asserts that the effective enforcement of international criminal law requires a balance between international standards of justice and localised perceptions as to how justice should be pursued. There is growing recognition of this need to balance universal concerns with more localised attitudes, as demonstrated by the hybrid tribunals established for Kosovo, Timor-Leste, Cambodia and the internationalised tribunal for Sierra Leone.[43] The development of these tribunals was driven by concerns for legitimacy and the need to engage the local populace in the provision of justice. While the ability of these tribunals to deliver this has been mixed, it is certainly a step in the right direction.

A further factor in favour of regional tribunals concerns resources. The creation of any international institution is a costly affair which states have to bear responsibility for. The ICTY and ICTR have shown the extensive costs involved in the prosecution of international crimes, leading to a sense of "tribunal fatigue" within the UN.[44] Regional tribunals do not alleviate the concerns over funding, but they provide the possibility for a more cost-efficient system. The location of a regional tribunal lessens the costs involved in carrying out

43 On the hybrid tribunal model used in Timor-Leste, see later in this book Alison Ryan "The Special Panels for Serious Crimes of Timor-Leste: Lessons for the Region" chapter 5. On hybrid tribunals generally, see Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations" (2006) 22 NZULR 213.

44 Laura A Dickinson "The Promise of Hybrid Tribunals" (2003) 97 AJIL 295, 308.

prosecutions as legal teams and witnesses do not need to travel great distances. The process for collecting evidence is also facilitated by the locale of the tribunal. A regional tribunal is also well placed to assist national jurisdictions in the prosecution of international crimes, providing support and expertise that may not be available at the state level, but that exist through a regional pooling of resources. A great use of regional arrangements in other areas of international activities has resulted from the limited resources available in the international system. International criminal law is no different and, in fact, it is one area in the international system where resources are the most stretched and where cooperation in the pooling of resources is essential.

V THE FUTURE OF REGIONAL INTERNATIONAL CRIMINAL TRIBUNALS

If the international system is serious about its commitment to international criminal justice, the provision of international criminal justice at a regional level needs at the least to be explored. So far, action at the universal level has indicated serious shortcomings in addressing even minor breaches of international criminal law.[45] For the reasons set out in this paper, the regional level generally, and more particularly in the case of international criminal law, provides a range of benefits and opportunities. Regional arrangements have already demonstrated the ability to foster a greater level of normative agreement among states, which in turn has resulted in the creation of regional institutional structures for dealing with matters of common concern. As the problems facing society and the processes of governance for addressing these problems expand well beyond the discrete territorial boundaries of individual states, cooperative efforts among groups of states are becoming more necessary.

The tendency in international law to focus primarily on the universal needs to give way to the political realities and potential benefits that characterise the role of regionalism in the international system today. There are legitimate concerns about the proliferation of

45 White, above n 36, 216.

tribunals dealing with criminal matters, but these should not be obstacles to thinking about innovative ways in dealing with the problems we face today. As the example from human rights demonstrates, it is difficult to achieve deep levels of agreement among states at the universal level leading to the formation of regional arrangements. This has resulted in a lack of organisation and cooperation among the institutions, but it has not translated into any lowering of standards.

The development of international criminal law is still at an early stage, which would allow regional tribunals to be integrated into the system effectively, lessening fears about inconsistency and fragmentation. The proliferation of tribunals should not be seen as being detrimental to the wider system as it will provide the necessary tools for addressing problems of international crime. Undoubtedly, there will be numerous complications in the creation of more tribunals. However, if the idea of regional tribunals is pursued in a systematic fashion, through a contextual approach that takes into account other already established tribunals, then the various complications which may arise can be addressed effectively. As with international human rights law, the proliferation of institutions is open to criticism. At the same time, the creation of further institutions makes a substantial contribution to an overall strengthening of the system.[46] If the system of international criminal justice is to serve the interests of justice, it is imperative international law provides institutional structures that uphold universal principles while adequately addressing local circumstances. Regional tribunals can make a serious contribution towards balancing these interests for the benefit of the region and the wider international system.

46 Pocar, above n 34, 307.