

## REGIONALISM AND INTERNATIONAL CRIMINAL LAW: THE UNITED NATIONS AND REGIONAL ORGANISATIONS – PARTNERS IN SECURITY?

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### ***I INTRODUCTION***

This paper explores the theme of a future regional criminal jurisdiction within the broader context of the partnership between the United Nations (UN) and regional organisations in peace and security. Specifically, the paper addresses and draws conclusions on four sub-themes. It first examines the evolution of the "security-criminal" dichotomy in terms of threat perception of states before addressing the position of new actors in the context of the "security-order" dichotomy. It then deals with recent developments in the global-regional partnership under the UN Charter. Finally, the paper explores the promise of regional criminal jurisdiction specifically in the Pacific region.

The doctrinal evolution in security and criminal law precepts, the *entrée* of new actors onto the political scene and the changes under way in the UN-regional partnership carry direct implications for regional stability in the Pacific. Unique as a region in certain respects, the Pacific nonetheless is exposed to the same broad security concerns and threats that attend other more strategically important regions. The

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Pacific must, therefore, adapt and keep pace with the globally-concerted response of the UN and all its regional partners.

## ***II THE CRITICAL DISTINCTION: "INTERNATIONAL SECURITY" AND "INTERNATIONAL LAW AND ORDER"***

The international community operates on the basis of two principal elements: political actors and their threat perceptions.

The first three centuries of the modern "European" age (early 16<sup>th</sup> to early 20<sup>th</sup> centuries CE<sup>1</sup>) were characterised by the concept of the sovereign nation-state as the political actor and inter-state aggression as the principal threat. The juridical basis of the nation-state was laid down at the outset at Westphalia in 1648, and the first regional war-avoidance system was devised some time later at Vienna in 1815, involving regular consultations for peace in the Concert of Europe.

The first cut at a multilateral collective security system at Versailles in 1919 was short-lived, but it introduced the international organisation as a new actor in the international community. The second cut, formulated at San Francisco in 1945, adopted a global collective security system that remains the theoretical foundation of the international community today.

Since the mid-20<sup>th</sup> century, however, both the political and security environments have become more complex. Furthermore, new actors have entered the international community: the civil society, the private sector and parliamentarians.

In addition, the threat perception has multiplied. Inter-state aggression has declined, but new threats have arisen concomitantly with – and largely as a result of – the process of globalisation that has forced countries and cultures so abruptly together. As the world

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1 In this paper, the Christian calendar is adopted for ease of reference. In deference to inter-cultural sensibilities, the term Common Era (CE) is employed. At some stage in the future, the international community would benefit from a commonly agreed universal calendar.

transforms from an international community (of states) to some form of global community (of peoples), the question arises: whether the response to some of these new threats is to be regarded as an issue of "national security" protecting sovereign nation-states or one of "global law and order" to be dealt with by the global community. Are certain acts of wrongdoing in today's world, in short, to be seen as prompting in response "international war" or a "global police operation"?

The UN Secretary-General's High-level Panel on Threats, Challenges and Change of 2004 (HLP Report)<sup>2</sup> identified six "threat clusters" which the international community faced in the early 21<sup>st</sup> century. In addition to inter-state aggression, the threat of internal instability of member states has arisen, and four "new threats" also have now to be addressed: socio-economic stress, the proliferation of weapons of mass destruction (WMD), terrorism and transnational crime.<sup>3</sup>

The HLP Report, however, had recommendatory status only, addressed to the Secretary-General. For his part, the Secretary-General submitted his own report to the UN General Assembly in early 2005.<sup>4</sup> The current official statement by the international community, however, the 2005 World Summit Outcome Document, was considerably less clear and specific than the HLP Report:<sup>5</sup>

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2 United Nations (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).

3 HLP Report, above n 2, 12.

4 UN Secretary-General "In Larger Freedom – Towards Development, Security and Human Rights for All" (21 March 2005) A/59/2005, available at <<http://www.un.org/largerfreedom/contents.htm>> (last accessed 23 November 2006).

5 UNGA Resolution 60/1 "2005 World Summit Outcome" (24 October 2005) A/RES/60/1, para 7 [2005 World Summit Outcome].

We believe that today, more than even before, we live in a global and interdependent world. No State can stand wholly alone. We acknowledge that collective security depends on effective cooperation, in accordance with international law, against transnational threats.

What was the response of world leaders to such new transnational threats?<sup>6</sup>

We recognize that we are facing a whole range of threats that require our urgent, collective and more determined response. ... We therefore reaffirm our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace and security, and human rights are mutually reinforcing, that no State can best protect itself by acting entirely alone, and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter.

Thus, despite the commendable precision and courage of the HLP Report in reaching a consensus among eminent persons from both North and South, the governmental leaders of the world were unable to agree on identifying the new threats with the same level of precision. The resulting confusion among policy-makers thwarts our collective ability to respond "effectively and efficiently".

Of the six threat clusters identified by the HLP Report, which are to be recognised as traditional national security threats and which are to be recognised as crimes under national or international criminal jurisdiction? Under the UN Charter, only the first (inter-state aggression) is explicitly recognised as a formal violation of its legally binding provisions. However, the Charter also empowers the Security Council to determine, under binding authority, what might constitute a "threat to international peace and security".<sup>7</sup> In the past two decades, the Security Council has engaged in extensive self-empowerment, interpreting its implied powers to determine a threat to the peace in an

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6 2005 World Summit Outcome, above n 5, paras 69, 72.

7 Charter of the United Nations (26 June 1945) 59 Stat 1031, art 39.

expansive manner: nuclear proliferation,<sup>8</sup> terrorism,<sup>9</sup> (selected) unconstitutional overthrows of government,<sup>10</sup> small arms trade,<sup>11</sup> fragile or "collapsing" states,<sup>12</sup> "very numerous killings"<sup>13</sup> and even possibly socio-economic stress such as a global health epidemic.<sup>14</sup> Under this approach, these threats are, or may in the future be, seen by the Security Council as international security issues.

With the advent of the International Criminal Court (ICC), however, genocide, war crimes and crimes against humanity are treated as matters of individual criminal jurisdiction: national in the first instance and international in the second.<sup>15</sup> Aggression will be added once a legally binding definition is agreed upon by the state parties to the Rome Statute of the International Criminal Court (Rome Statute).<sup>16</sup>

Thus, the world is now required for the first time to address a potential action that could, simultaneously, be handled as an international security threat under Article 39 of the UN Charter, which requires a military collective security response, and an international crime under Article 5 of the Rome Statute, which may require individual prosecution. This overlap between "security" and "legal

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8 UNSC (31 January 1992) Presidential Statement S/23500. See also UNSC Resolution 1540 (28 April 2004) S/RES/1540/2004.

9 Many resolutions since UNSC Resolution 1377 (12 November 2001) S/RES/1377/2001.

10 UNSC Resolution 841 (16 June 1993) S/RES/841/1993; UNSC Resolution 1132 (8 October 1997) S/RES/1132/1997.

11 UNSC Resolution 1467 (18 March 2003) S/RES/1467/2003.

12 UNSC Resolution 733 (23 January 1992) S/RES/733/1992.

13 UNSC Resolution 918 (17 May 1994) S/RES/918/1994.

14 UNSC Resolution 1308 (17 July 2000) S/RES/1308/2000.

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

16 Rome Statute, above n 15, arts 5(2), 121 and 123.

order" will require extensive political insight for the international community to see it through.

### ***III NEW ACTORS IN THE CONTEXT OF THE SECURITY-ORDER DICHOTOMY***

What kind of "new actors" may come within this potential "jurisdictional overlap"? In short, they are individuals, groups and corporations. Let us examine each of the HLP Report's six threat clusters in turn.

#### ***A Inter-state Conflict***

If aggression is committed, the act will be regarded as a matter of state responsibility under the UN Charter. It could also be seen as a leadership crime by individual leaders of the aggressor state under the Rome Statute.

#### ***B Internal Conflict (National or Regional)***

Once an unstable national or regional situation is determined by the Security Council to constitute a threat to international peace and security under Article 39 of the UN Charter, the same situation arises as with inter-state conflict. The international community has followed a long, if tortuous and complicated, route in criminal jurisdiction since the "bizarre" action of the Security Council in 1993,<sup>17</sup> with a variety of "jurisdictional types" in pursuing the task of prosecuting alleged war criminals.

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<sup>17</sup> During the crisis in Somalia in the early 1990s, the Security Council accorded the Secretary-General discretion to arrest unnamed leaders of the United Somali Congress (USC) (UNSC Resolution 837 (6 June 1993) S/RES/837/1993). The Secretary-General's Special Representative announced the arrest warrant of USC leader General Aidid. A hotel raid in October 1993 by United States Task Force rangers resulted in 24 arrests and detentions on an offshore island (not including Aidid). Following the death of 18 United States force personnel and the abrupt switch in United States policy, the Security Council essentially terminated its Somali mission and the arrests (UNSC Resolution 885 (16 November 1993) S/RES/885/1993).

The ad hoc, special or hybrid criminal tribunals of recent years have prosecuted individuals. Milosevic and others have been tried by the International Criminal Tribunal for the Former Yugoslavia, and Kambanda and others by the International Criminal Tribunal for Rwanda.<sup>18</sup> These two ad hoc tribunals are subsidiary organs of the Security Council itself, and it has been queried whether it is legally permissible or at least politically appropriate for the Council, as a political body, to establish such judicial organs.

Hybrid courts also operate. The Special Court for Sierra Leone is currently trying former Liberian President Charles Taylor.<sup>19</sup> The UN-Cambodia mixed tribunal, the Extraordinary Chambers in the Courts of Cambodia, comprises 13 international and 17 Cambodian judges to adjudicate over alleged crimes committed during the Khmer Rouge rule of the Democratic Kampuchea.<sup>20</sup>

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18 UNSC "Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 2001" (25 May 1993) S/RES/827/1993; UNSC "Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994" (8 November 1994) S/RES/955/1994. Arrest warrants were issued by the Special Prosecutor in both cases. In Rwanda, the advancing rebel army (now government) of Rwanda rapidly detained suspects. In the former Yugoslavia, however, no force mission (including the UN) has been charged with finding and detaining those suspects still at large (such as Mladic and Karadzic).

19 "Statute of the Special Court for Sierra Leone" annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) art 1 <<http://www.sc-sl.org>> (last accessed 25 November 2006). In June 2006, the Security Council, acting under Chapter VII of the UN Charter, noted the decision of the Special Court's President to transfer Charles Taylor to The Hague (UNSC Resolution 1688 (16 June 2006) S/RES/1688/2006).

20 The establishment of the UN-Cambodia hybrid tribunal was approved, not by the Security Council, but by the General Assembly: Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic

At present, three other "jurisdictional routes" are being pursued as well. The trial of the former Iraqi President Saddam Hussein (plus seven co-defendants) was conducted by a national court.<sup>21</sup> In direct contradistinction, the ICC has recently commenced the trial of its first defendant.<sup>22</sup> Finally, six countries have enacted legislation adopting the principle of universal jurisdiction, which empowers them to prosecute, within their national courts, any individual suspected of having committed a war crime anywhere.<sup>23</sup>

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Kampuchea (13 May 2003), approved by UNGA Resolution 57/228B (22 May 2003) A/57/228B/2003. Delays in establishing the Extraordinary Chambers resulted in most Khmer Rouge leaders dying before it commenced operations, most notably Pol Pot. Another leader, Ta Mok, arrested in 1999, died in custody in July 2006. Nuon Chea remains under indictment.

- 21 The tribunal was established in December 2003 by the then Coalition Provisional Authority, and approved in August 2005 by the Iraq Transitional National Assembly. No UN authorisation has been given, nor is there any UN involvement (the retention of the death penalty has further complicated matters). The United States Embassy in Baghdad operates a "Regional Crimes Liaison Office" to "assist" the court.
- 22 Thomas Lubanga Dyilo, a former rebel leader in the Democratic Republic of Congo, was served with a warrant of arrest in March 2006. Lubanga was named by the International Criminal Court (ICC) Special Prosecutor, not by the Security Council. The Council, however, has recently approved the arrest under ICC jurisdiction of leaders in the Darfur (Sudan) crisis. This is a significant development, given the reservations over the ICC of three P-5 Security Council members (China, Russia and the United States). Some 240 petitions from the United Kingdom were laid with the Special Prosecutor for alleged war crimes by British troops in Iraq, but the Prosecutor dismissed all the claims on various grounds.
- 23 Belgium, Germany, Spain, South Africa, Australia and New Zealand. Belgium convicted some Belgian nuns of genocide committed in Rwanda. Spain issued an arrest warrant for former Chilean President Augusto Pinochet. Belgian courts have received numerous private petitions to arrest various world leaders. For New Zealand, see later in this book Treasa Dunworth "The International Crimes and International Criminal Court Act 2000 (NZ): A Model for the Region?" chapter 7.



### *C Weapons of Mass Destruction*

In the light of concerns over WMD possession by terrorist groups heightened by exposure of the Abdul Qadeer Khan network,<sup>24</sup> the Security Council became seized with the matter of WMD acquisition by non-state actors. It has resolved to control the illicit WMD trade by imposing binding obligations on all UN member states.<sup>25</sup> No individual, however, has been named by the Security Council.<sup>26</sup>

### *D Terrorism*

In response to concerns over terrorism in the late 1990s, the Security Council introduced targeted sanctions against individuals and associated groups, and established a subsidiary committee (the 1267 Committee) to monitor the sanctions.<sup>27</sup> The Council identified Usama bin Laden as such an individual and the Taliban and Al Qaeda as associated groups. It called upon member states to supply the names of individuals and groups suspected of similar involvement. The names of 372 individuals or groups were supplied to the 1267 Committee by the United States, prompting concerns over a lack of due process. Security Council Resolution 1390 called for an update of the "1267 list" on the basis of "relevant information provided by Member States and regional organizations."<sup>28</sup>

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24 Pakistani nuclear scientist Abdul Qadeer Khan acknowledged complicity in transferring sensitive nuclear and missile technology from Pakistan to, or through Libya, Iran and North Korea.

25 UNSC Resolution 1540, above n 8.

26 Abdul Qadeer Khan, in fact, was extended an official pardon by the President of Pakistan. He was never charged with any criminal act although he currently lives under house arrest.

27 UNSC Resolution 1267 (15 October 1999) S/RES/1267/1999.

28 UNSC Resolution 1390 (28 January 2002) S/RES/1390/2002. Independently of the UN list, both the United States and the European Union maintain a broader list of "foreign terrorist organisations".

### ***E Transnational Crime***

The issue of transnational crime per se (narcotics and other illicit trade, money-laundering, human trafficking, etc) has been seen as of a different order from the above threat clusters. As a result, transnational crime has been left largely to the national and international police jurisdictions. The issue of "blood money", the illegal trading in diamonds in order to finance violent conflicts, has, however, come within the purview of the Security Council. The Kimberley Process, by which the international community regulates the diamond trade through an identification procedure, has been endorsed by the UN General Assembly.<sup>29</sup>

### ***F Socio-economic Threats***

These issues have to date been left off the Security Council's agenda, being seen as longer-term issues of "structural conflict prevention" falling within the purview of the Economic and Social Council (ECOSOC) and the new Peacebuilding Commission.<sup>30</sup> In the 21<sup>st</sup> century, it may well be that issues such as health, poverty, food and water security, deforestation, fossil fuel production and climate change and, as a consequence of these, environmental and socio-economic refugees may exert sufficient pressure on the political stability of the international community that the Security Council is obliged to regard them as "security issues" and deal with them under Chapters VI or VII of the UN Charter.

The question arises, though, whether in these issues there will also be scope for international criminal action against individuals, groups or corporations. To date, acts of wrongdoing by such actors have been subject, if at all, to either civil or criminal litigation within the national courts of the countries concerned – however complicated the overlapping jurisdictions of venue, flag ship or victim might become. Cases in point include the actions of corporations engaged in the oil

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29 UNGA Resolution 55/56 (29 January 2001) A/RES/55/56.

30 2005 World Summit Outcome, above n 5, paras 97-110.

industry held to be criminally negligent,<sup>31</sup> although other kinds of cases might also be envisaged. Could such actions in the future become subject to international criminal jurisdiction, either at a regional or a global level?

#### **IV RECENT DEVELOPMENTS OF THE GLOBAL-REGIONAL PARTNERSHIP UNDER THE UN CHARTER**

The partnership between the UN and regional organisations in peace and security is governed by Chapter VIII of the UN Charter. The Charter recognises the existence of regional arrangements and agencies and establishes a framework for their operational relationship with the UN.<sup>32</sup> Essentially, there is a dichotomy in the relationship between pacific settlement measures and enforcement measures.

Under Article 52(2), regional agencies are given discretion to take initiatives in settling disputes between states within their region, without advance reference to the UN Security Council. Indeed the Council is enjoined, under Article 52(3), to encourage such action. However, under Article 53(1), the Council shall, "where appropriate", utilise such regional agencies for enforcement action "under its

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31 In 1967, for example, the oil tanker *Torrey Canyon* spilled some 120,000 tonnes of crude oil onto the Cornwall coast in the United Kingdom. The United States company, Union Oil, had chartered the ship to British Petroleum. Costs of £750,000 were awarded against the company under British law. In 1978, the *Amoco Cadiz* spilled 200,000 tonnes onto the coast of Brittany, France, incurring damages of US\$282 million (including legal fees). In 1989, the *Exxon Valdez* spilled only 39,000 tonnes onto the Alaskan coast, but caused the greatest amount of environmental damage, incurring a United States court fine of US\$125 million. In 1984, Union Carbide and its Indian subsidiary (UCIL), which had experienced a chemical gas spill at a plant in Bhopal, India, resulting in 15,000 fatalities and 500,000 injuries, reached an out-of-court settlement that was affirmed by the Supreme Court of India.

32 The distinction between a regional arrangement and a regional agency has never been formally defined: see Waldemar Hummer and Michael Schweitzer "Article 52" in Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (OUP, Oxford/New York, 1995) 679-722. In practice, a regional agency is regarded as a "regional organisation" which has UN member states as its constituent elements, a legal personality and a standing secretariat, although there exist discrepancies even from this general description.

authority". No such action shall be taken without the authorisation of the Council.

With the financial strangulation of the UN in the 1990s and the refusal of member states to contribute stand-by forces for a quick and effective deployment, the UN was unable to fulfil all its peace mission objectives. Stepping in to fill the power vacuum, a number of regional and sub-regional organisations took enforcement initiatives to stabilize conflict situations between 1990 and 2005.<sup>33</sup> In some cases, requests were issued by the host country. In others, the organisation intervened without the consent of the host country and without Security Council authorisation. In the latter situations, the UN Charter is, strictly speaking, being violated.

The argument for such unauthorised enforcement action by regional agencies is both political (the fear of a UN Security Council veto thwarting any action) and humanitarian (the imperative of saving lives). The argument against is legal (the universality and integrity of the Charter must be respected) and political (without respect for the Charter, international legitimacy will erode). The debate is finely balanced. In its work on the "responsibility to protect", the Independent Commission on Intervention and State Sovereignty suggested, inter alia, that "some leeway" might be accorded to regional organisations in taking initiatives for enforcement action.<sup>34</sup> Yet, the HLP Report concluded that, despite the strain on its doctrinal provisions from the "new threats" and "new actors", the UN Charter remained relevant to the times and did not require doctrinal change. The World Summit of September 2005 concluded similarly. The

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33 For instance, the Economic Community of Western African States (ECOWAS) in Liberia and Sierra Leone; the Southern African Development Community (SADC) in Lesotho; the Community of Independent States (CIS) in Georgia and Tajikistan; and, the Pacific Islands Forum (Forum) in Solomon Islands.

34 International Development Research Centre (IDRC) (Canada) *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (IDRC, Ottawa, 2001) 54, available at <<http://www.idrc.ca/openebooks/960-7/>> (last accessed 25 November 2006).

situation, therefore, remains that no regional organisation may undertake enforcement action without advance authorisation of the UN Security Council.

That remains the current doctrinal basis of the security partnership between the UN and regional organisations. Apart from doctrine, the UN and regional organisations have been moving to strengthen the security partnership in an institutional and operational sense. Since 1994, the UN Secretary-General has convened six high-level meetings with heads of regional organisations designed to streamline the operational partnership. Since 2003, the Security Council has convened three similar meetings.<sup>35</sup>

The number of partners participating in the high-level meetings has grown from ten at the first meeting to some 23 at the sixth. However, only about six or seven of these are genuinely regional organisations and an additional five or six are sub-regional. The remaining ten or so are best described as transnational or cross-regional organisations or UN specialised or associated agencies.<sup>36</sup>

Notwithstanding this confusion, regional organisations are becoming engaged in peace and security issues in their own regions,<sup>37</sup>

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35 At its second such meeting, the Security Council adopted its first resolution on the subject. UNSC Resolution 1631 (17 October 2005) S/RES/1631/2005 called, inter alia, for a report by the Secretary-General on opportunities and challenges facing the partnership, which was submitted to the third Council meeting in July 2006: UN secretary-General "A Regional-Global Security Partnership: Challenges and Opportunities – Report of the Secretary-General" (28 July 2006) A/61/204-S/2006/590. It identified the two principal challenges as "clarification of roles" and capacity-building of the regional organisations.

36 See generally Kennedy Graham and Tania Felício *Regional Security and Global Governance* (VUB Press, Brussels, 2006). The lack of clarity over the nature and definitional role of regional arrangements and agencies, and their constitutional relationship with the UN, has become an obstacle to progress in strengthening the UN-regional partnership for peace and security.

37 The distinction needs to be drawn between those regional organisations engaging in genuine regional collective security (focusing on their own member states' territorial jurisdictions) and those that are acting on behalf of the UN "out of area" in other regions (such as the European Union in Africa).

and this phenomenon is almost certain to increase. The challenge exists, therefore, to clarify their constitutional relationship with the UN and to develop a genuine foundation of comparative advantage between them and the UN rather than simply paying lip service to the phrase.

Meanwhile, regional organisations will inevitably perceive the threats to their regional peace and security in a different manner from that of the global perceptions as identified, for example, in the HLP Report.

Table 1. Incidence in Regional Threat Perception (2006)

Nature of Threat to Regional Peace and Security (Perception of Region)							
	Inter-state Aggression	Inter-state Instability	Inter-region Instability	Terrorism	WMD Proliferation	Organised Crime	Socio-economic Instability
<i>North</i>							
North America	D	D	A	A	A	B	D
Europe	B	C	A	A	A	B	C
<i>South</i>							
Sub-Saharan Africa	B	A	C	C	D	D	A
Arab World	C	A	A	B	C	D	B
Asia	A	C	C	B	C	C	C
Pacific	D	B	D	C	D	C	A
Caribbean/Latin America	C	C	C	C	C	B	B

Key: A = primary threat; B = significant threat; C = modest threat; D = minor threat.

The table above gives an idea of how different regions are judged to perceive the severity, for their own region, of each of the HLP Report's six threat clusters.<sup>38</sup>

The above considerations pertain to issues of security. The question remains of which actors and which threats might become relevant to the possibility of regional criminal jurisdiction. Such a development is most likely to occur in those regions whose threat perceptions are most acute in relation to terrorism and organised crime. They are essentially the Americas (both North and South) and Europe.

#### *V THE PROMISE OF REGIONAL CRIMINAL JURISDICTION IN THE PACIFIC REGION*

Might the Pacific region benefit from developing a regional criminal jurisdictional competence?

To date, the Pacific has not developed a far-reaching approach to integration in general, and certainly not developed the legal dimension of such integration. Two declarations of the Pacific Islands Forum (Forum) are relevant:<sup>39</sup>

- the 1992 Honiara Declaration on Law Enforcement Cooperation,<sup>40</sup> in which Forum leaders initiated a regional

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38 The judgments entered in the table are those of the author alone. No official exercise has been undertaken that illustrates the regional variation in threat perception. The judgment rests on an analysis of the patterns of statement by regional leaders and resolutions of regional organisations.

39 Another document, the "Biketawa" Declaration, is oriented towards regional "security" rather than regional "law and order". Forum leaders "recognised the need, in time of crisis or in response to members' request for assistance, for action to be taken on the basis of all members of the Forum being part of the Pacific Islands extended family" (Pacific Islands Forum "'Biketawa' Declaration" (Attachment 1 to the Thirty-First Pacific Islands Forum Communiqué, Tarawa, Kiribati, 27-30 October 2000)).

40 South Pacific Forum "Declaration by the South Pacific Forum on Law Enforcement Cooperation" (Attachment to the Twenty-Third South Pacific Forum Communiqué, Honiara, Solomon Islands, 8-9 July 1992).

effort to combat transnational crime, particularly drug-trafficking and money-laundering; and,

- the 2002 Nasonini Declaration on Regional Security,<sup>41</sup> where Forum leaders recalled their 1991 concerns about possible threats to the region from criminal activities – in their view, "scope existed to strengthen regional law enforcement cooperation."

More recently, the Pacific Plan<sup>42</sup> has been seen as a conduit for more creative thinking on regionalism, but its content to date does not stress any strengthening of criminal jurisdiction. In terms of the HLP Report's six threat clusters, various considerations are relevant. While the risk of inter-state conflict is minimal, significant developments could occur (and have occurred) in the Pacific with respect to the other five threat clusters.

#### *A Intra-state Instability*

Potential crimes against humanity are relevant with respect to military action in the region. The Pacific is not exempt from such hazards as its recent history demonstrates: Solomon Islands (2004-2006); Papua New Guinea (Bougainville, 1990-2001); Fiji (1987, 2000, 2006); Vanuatu (1980); and, Tonga (the "Republic of Minerva", 1971). Further political tension and possible conflict in the future could arise with regard to self-determination issues in New Caledonia and French Polynesia. In most contemporary cases, troops are now deployed as regional mission forces, and so the issue of national-regional criminal jurisdiction would become relevant. Host countries

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

42 Forum Secretariat "The Pacific Plan for Strengthening Regional Cooperation and Integration" (Pacific Islands Forum, Suva, Fiji, 2005), available at <<http://www.forumsec.org.fj>> (last accessed 17 November 2006). This document was endorsed by Forum leaders in October 2005: Pacific Islands Forum "Kalibobo Roadmap on the Pacific Plan" (Annex A to the Thirty-Sixth Pacific Islands Forum Communiqué, Madang, Papua New Guinea, 25-27 October 2005).



and the regional public need to be reassured that due process and respect for human rights will prevail (through the help of appropriate criminal jurisdiction structures and procedures) in the future maintenance of regional peace and security.

### ***B Socio-economic Actors***

Various foreign corporations might be engaged in crimes of fishery over-exploitation, coral reef degradation and greenhouse gas emissions. Several arrests and criminal charges on illegal fishing have been successfully brought in the past, and it is likely that this will recur.

### ***C Weapons of Mass Destruction***

Security Council Resolutions 1373<sup>43</sup> and 1540<sup>44</sup> are required to take national effect through implementing legislation. At present, the small Forum island countries are receiving assistance in this from the two larger metropolitan Forum states. The question arises whether any transgression of WMD non-proliferation law by regional non-state actors would automatically become an issue for UN Security Council action as a "security" issue or whether it might more appropriately be handled through regional criminal jurisdiction.

### ***D Terrorism***

The Pacific has experienced some terrorist activity already – at least in the sense of the nationals of one Forum member state (Australia) being targeted (Bali, 2002 and 2005). It is possible that future incidents will occur within the region itself since many Australian tourists visit Fiji and Vanuatu. The difficulty that arises in respect of regional criminal jurisdiction is that such regional activity highlights the political dilemma of different foreign policies (such as the Iraq invasion of 2003). The 2011 Rugby World Cup is to be held

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43 UNSC Resolution 1373 (28 September 2001) S/RES/1373/2001.

44 UNSC Resolution 1540, above n 8.

in New Zealand; the implications for security and "law and order" are obvious.

### ***E Transnational Organised Crime***

By definition, this issue is directly relevant to the question of regional criminal jurisdiction. In the Pacific, actions involving passport fraud,<sup>45</sup> human and narcotics trafficking and corruption are all relevant to future preventive and remedial action.

## ***VI CONCLUSION***

The following points may be drawn from the above analysis:

- the dichotomy between "security" and "law and order" in dealing with international criminal actions is not clearly delineated in the current international political and legal framework – this lack of clarity thwarts progress in dealing with such issues;
- a range of new actors (individuals, groups, corporations, parliamentarians) have appeared on the international political and legal scene in recent decades – and the international community is struggling to determine the most effective ways of enabling them to be legitimate participants;
- a lack of clarity in defining and identifying "regional organisations" for the purpose of partnering with the UN in international peace and security (and, by extension, in criminal jurisdiction) further impedes decisive and insightful action; there is a need to address the twin challenge of a "clarification of roles" and "capacity-building" for the global-regional partnership to function effectively – part of this clarification will involve a clearer judgment of what should be seen as a "regional security issue" or a "regional criminal issue"; and, finally,

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<sup>45</sup> For instance, the Tongan Protected Persons' Passport, Kiribati Investors' Passport and the Nauru Investors' Passport.

- the Pacific region, despite its unique characteristics, is not different from other regions in needing to address the issue of regional criminal jurisdiction – with a view to ensuring "law and order" within its jurisdictional zone.