

POSSIBILITIES AND PITFALLS: REGIONALISING CRIMINAL LAW IN THE PACIFIC ISLANDS FORUM

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I INTRODUCTION

The Pacific Islands Forum (Forum) is a regional inter-governmental organisation founded in August 1971, formerly known as the South Pacific Forum until a name change in October 2000. It comprises 16 independent and self-governing states: Australia, Cook Islands, Fiji, Kiribati, Federated States of Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The annual meeting of Forum leaders is the Forum's pre-eminent decision-making body. Its administrative arm is the Forum Secretariat, which is chiefly responsible for ensuring the implementation of decisions made by Forum leaders, other Forum ministerial meetings and key Forum bodies.

The Forum was established in response to specific political and economic concerns among leaders of the newly-independent Pacific island states in the 1970s, and the early work of the Secretariat focused strongly on economic and trade cooperation. The Forum's agenda has, however, broadened significantly since its creation in 1971.

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This paper first sets out the development of the Forum's mandate to undertake regional¹ legal cooperation in respect of transnational crime and some of the work that has been done in that regard by the Secretariat to date before assessing the results achieved so far. The paper then highlights recent developments, particularly the adoption of the Forum's Pacific Plan,² which proposes a new era in thinking about, and moving toward, deeper regionalism in the Pacific. In this light, the paper finally seeks to identify from the Forum experience some notions about what might work and what might not, and some ideas to think about, in exploring the possibilities for regionalising criminal law in the region.

II CONCEPTIONS OF REGIONAL SECURITY AND LAW ENFORCEMENT: DEVELOPMENT OF THE FORUM'S MANDATE

Certain issues of regional security were part of the Forum's very genesis, which was tied up at least in part with the original member states' concerns about nuclear testing in the region. Regional security in a general sense has been on the agenda of the Forum since at least 1981.³ Nevertheless, in the early years, the "Forum Island Countries"

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- 1 In this paper the terms "region" and "regional" indicate the Pacific islands region, comprising Pacific Islands Forum (Forum) member states and, potentially, the other non-independent territories which make up the Pacific region.
 - 2 Forum Secretariat "The Pacific Plan for Strengthening Regional Cooperation and Integration" (Pacific Islands Forum, Suva, 2005), reproduced in Pacific Islands Forum "Kalibobo Roadmap on the Pacific Plan" (Annex A to the Thirty-Sixth Pacific Islands Forum Communiqué PIFS(05)12, Madang, Papua New Guinea, 25-27 October 2005) [Pacific Plan], available at <<http://www.forumsec.org>> (last accessed 17 November 2006).
 - 3 At the Forum annual meeting in 1981, leaders discussed "a resolution on the question of regional security" and, as a result, their communiqué "noted the importance of the maintenance of peace and stability (security) in the region and called on member Governments to give their attention to this important issue." "Forum Communiqué" (Twelfth South Pacific Forum, Port Vila, Vanuatu, 10-11 August 1981) 2, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

(FICs)⁴ remained understandably protective of their newly-gained sovereignty, including the development of their legal systems, and it would take a little longer before regional cooperation on criminal matters became a real prospect.

In 1987, following the coup in Fiji and the attempted hijacking of an Air New Zealand aircraft, Forum leaders agreed to establish a system of information exchange on international developments affecting regional security. They also agreed that "a regional response to terrorism was appropriate to counter this emerging threat" and established a working group to develop such a response.⁵ This was the beginning of a programme of work related to transnational crime which developed over the next few years. For instance, in 1990, Forum leaders noted that "many aspects of law enforcement ... such as drug related crimes, extradition and customs could be addressed more effectively at the regional level."⁶ It was around this time that the information exchange mechanism created in 1987 evolved into the Forum Regional Security Committee (FRSC), which continues to exist.

The culmination of this early work was the Honiara Declaration on Law Enforcement Cooperation (Honiara Declaration) issued by Forum leaders in 1992, which remains to this day the key framework for the Forum's engagement in transnational criminal law matters. Forum leaders declared that "the potential impact of transnational crime was a matter for increasing concern to regional states" and that "there was a need for a more comprehensive, integrated and

4 "Forum Island Countries" (FICs) is an expression used within the Forum and the Secretariat, and in this paper, to describe Forum member states exclusive of Australia and New Zealand.

5 "Forum Communiqué" SPEC(87)-OR.10 (Eighteenth South Pacific Forum, Apia, Western Samoa, 29-30 May 1987) para 18, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

6 "Forum Communiqué" SPFS(90)16 (Twenty-First South Pacific Forum, Port Vila, Vanuatu, 31 July-1 August 1990) para 24, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

collaborative approach to counter these threats."⁷ The Honiara Declaration largely focused on commitments to develop and enact new or improved national legislation on transnational crime matters such as extradition, proceeds of crime, mutual assistance in criminal matters, money-laundering and illicit drugs. Also highlighted was the need to address training in these areas and to enhance cooperation between the Forum and the regional customs and police organisations.

Other declarations in the intervening years have reinforced the Honiara Declaration and built on it, while member states have also articulated their desire to place these issues in perspective within a broader conception of regional security. The 1997 Aitutaki Declaration articulated such a view, establishing principles for cooperation based upon an integrated approach to regional security and the recognition of the links between security, governance and development.⁸ In 2000, the "Biketawa" Declaration introduced a regional mechanism for responding to conflicts and crises in member states, sending a significant signal about Forum member states' readiness for more regional involvement to help address domestically-based security threats.⁹ Finally, the 2002 Nasonini Declaration on Regional Security (Nasonini Declaration) was issued by Forum leaders in response to the international security environment following the events of 11 September 2001.¹⁰ It reaffirmed the Honiara

7 South Pacific Forum "Declaration by the South Pacific Forum on Law Enforcement Cooperation" (Attachment to the Twenty-Third South Pacific Forum Communiqué SPFS(92)18, Honiara, Solomon Islands, 8-9 July 1992) para 1 [Honiara Declaration], available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

8 South Pacific Forum "Aitutaki Declaration on Regional Security Cooperation" (Annex 2 to the Twenty-Eighth South Pacific Forum Communiqué SPFS(97)13, Rarotonga, Cook Islands, 17-19 September 1997), available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

9 Pacific Islands Forum "'Biketawa' Declaration" (Attachment 1 to the Thirty-First Pacific Islands Forum Communiqué, Tarawa, Kiribati, 27-30 October 2000) para 2, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

10 Pacific Islands Forum "Nasonini Declaration on Regional Security" (Annex 1 to the Thirty-Third Pacific Islands Forum Communiqué PIF(02)8, Suva, Fiji,

Declaration in strong terms and added a particular set of commitments about member states' response to international terrorism.

III IMPLEMENTATION OF THE DECLARATIONS: THE FORUM'S WORK

The Forum Secretariat has undertaken a wide range of activities over the years to help member states implement their commitments under the Honiara Declaration, including legislative development, training and capacity-building as well as the establishment of networks and databases aimed at maximising coordination of regional activities in this area. Such work is often undertaken in cooperation with specialised regional institutions, international organisations and donor countries. The scope of the Secretariat's work is largely defined through its Pacific Regional Security Technical Cooperation Strategy (Technical Cooperation Strategy).

One of the most significant areas of practical activity has been the development and implementation of regional model legislation in specific areas prioritised in the Honiara and Nasonini Declarations. The aim of doing so has not only been to help fill a shortfall in legal drafting capacity in the region by providing the legislation itself, but to use regional models to harmonise legislation between jurisdictions and, in that way, make legal cooperation between FICs easier and more effective. Subjects on which the Forum Secretariat has coordinated or worked with others on the development of regional model laws include extradition, mutual legal assistance, proceeds of crime,¹¹ transnational organised crime, terrorism, weapons, drugs and sexual offences. The Secretariat has been mandated to develop a regional model law on electronic crime and will commence work on

15-17 August 2002) paras 7-9, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

11 The regional model laws on mutual assistance in criminal matters and on proceeds of crime were developed by a sub-committee of the Pacific Islands Law Officers' Meeting (PILOM). The Commonwealth and Forum Secretariats jointly coordinated the drafting of the model law on extradition, which was subsequently endorsed by PILOM.

this soon. In 2006, Forum member states also agreed that a working group be convened to review, develop and update regional customs legislation.

This work has been supported by related efforts in implementation, capacity-building and information-sharing, often in close consultation with donor countries and international organisations operating in the region. The Secretariat works to create opportunities for training, mentoring, secondments and technical assistance for law enforcement officials.

An important part of the Secretariat's role is to reduce duplication and maximise the effectiveness of legal and law enforcement assistance in the region by acting as a hub for coordination of activities among the regional specialised law enforcement agencies (police, immigration, customs) and among external partners, and between these groups. The Forum has established specific mechanisms for regional coordination, such as the annual meeting of the Forum Regional Security Committee, the (law enforcement) regional events calendar and the technical assistance and training needs databases.

Beyond the strict confines of criminal law and law enforcement, the Forum Secretariat is also seeking to support efforts to facilitate greater information-sharing and coordination in the legal sector more generally. While the key bodies for collaboration between Pacific judges and attorneys-general – the Pacific Judicial Conference (PJC) and the Pacific Islands Law Officers' Meeting (PILOM) – are not Forum bodies, the Forum is committed to maintain their roles in regional legal development. It is also seeking to actively support the interest shown by directors of public prosecutions in creating a mechanism for collaboration and information-sharing between them at a regional level.

IV MIXED RESULTS

In the Forum's work on regional approaches to security and transnational crime, there have undoubtedly been successes. In particular, effective systems have been built for cooperation and

coordination between member states' police, customs and immigration agencies, for the articulation of shared needs and priorities by these groups and their integration into the Forum's priorities and work programme. Mechanisms for regional cooperation in certain priority areas have been established and are working well, such as the recent establishment of a regional working group on border management issues. Several pieces of model legislation have been produced – some of them very good. Also, training and assistance of numerous types have been provided to officials of member states with Forum support.

However, the Secretariat and member states acknowledge that the record of achievement is a mixed one. In the early years, Forum leaders commended progress in the implementation by member states of their Honiara Declaration commitments. By 1996, they were recognising the need "to examine ways to take forward the objectives of the Honiara Declaration more effectively."¹² Leaders expressed their concern over the lack of progress in implementing the Honiara Declaration in 1997, 1998 and 2001.¹³ They set deadlines of first 2000 and then 2003 for all member states to have enacted the legislative priorities of the Declaration, but neither target was achieved.

Enactment of the Forum-produced model legislation by member states has been disappointing, notwithstanding the fact that in-country drafting and implementation assistance is offered by the Secretariat and other organisations. It was suggested by one member state, at the 2006 Forum Regional Security Committee meeting, that the Forum Secretariat needs to be more "proactive" in pushing member states to

12 "Forum Communiqué" SPFS(96)10 (Twenty-Seventh South Pacific Forum, Majuro, Marshall Islands, 3-5 September 1996) para 37, available at <<http://www.forumsec.org>> (last accessed 25 November 2006).

13 "Forum Communiqué" SPFS(97)13 (Twenty-Eight South Pacific Forum, Rarotonga, Cook Islands, 17-19 September 1997) para 24; "Forum Communiqué" SPFS(98)14 (Twenty-Ninth South Pacific Forum, Pohnpei, Federated States of Micronesia, 24-25 August 1998) para 62; "Forum Communiqué" PIFS(01)12 (Thirty-Second Pacific Islands Forum, Republic of Nauru, 16-18 August 2001) para 38. All are available at <<http://www.forumsec.org>> (last accessed 27 November 2006).

pick up its model legislation, given that key regional bodies and Forum leaders have identified these issues as regional priorities. At the same time, member states need to take responsibility for their legislative action (or inaction), and the Secretariat is conscious that "pushing" a particular legislative agenda on a reluctant or disinterested member state is likely to be neither welcome nor effective. There are undoubtedly competing pressures faced by FICs. While the Secretariat can do more to focus the attention of national governments on their regional commitments, it cannot provide the political will necessary in-country.

Cases such as this one demonstrate the problem of "disconnect" between declarations of regional priorities and the priorities identified and acted upon at the national level. That is a very real issue for the Forum across the board, and one that needs to be frankly discussed and addressed for real progress to be made.

The Forum Secretariat has also taken perhaps more time than it should to recognise and "operationalise" the importance of high-level support needed for the *implementation* of criminal laws. Shiny new laws are of little use if they sit on a shelf once enacted and individuals working in the country's justice system do not know they exist or how to use them. The Secretariat has conducted regional and in-country workshops for law enforcement personnel focusing on its model legislation and is working on a more consistent and strategic approach to implementation support. This, of course, assumes national pick-up of the model legislation as a starting point; an area which remains weak.

On the task of ensuring regional coordination of assistance to FICs, success has similarly been mixed. Sometimes, there is good coordination between the programmes of partners and donors, often because of communication facilitated through the Forum. In other cases, activities of donors and partners overlap with and even duplicate each other, while the governments of the member states are often not consistent or coherent in articulating their own priorities and participating in regional mechanisms. No doubt, the Forum Secretariat could improve its work on this, but there are also limits on how far it

can control the decisions of others when their commitment to regional coordination is weak. There is a need for much better coordination within the region if regional governments and their external partners want to see the most efficient regional cooperation in criminal matters.

V BRAVE NEW WORLD? THE PACIFIC PLAN

In a much-publicised Forum initiative in October 2005, Forum leaders endorsed the Pacific Plan for Strengthening Regional Cooperation and Integration (Pacific Plan).¹⁴ The concept of the Pacific Plan emerged from a review of the Forum conducted by an "Eminent Persons' Group" in 2003 at the request of Forum leaders. The document as adopted represents the product of an extensive process of development and consultation over a two-year period.

In essence, the Plan recognises that small size and isolation pose particular challenges to FICs and aims to identify where the region can gain the most by sharing resources, adopting joint or harmonised governance measures and aligning policies. It mandates action on a range of measures aimed at deepening the level of regional cooperation, and which may start momentum toward regional *integration* in certain areas.

The regional initiatives identified in the Pacific Plan fall under four broad headings:¹⁵ economic growth, sustainable development, good governance and security. They are also divided according to priority into three categories:¹⁶ matters for immediate implementation; matters which might be agreed in principle, but which require more developing; and, a third category of initiatives which require further analysis and consideration before they can be supported.

14 "Forum Communiqué" PIFS(05)12 (Thirty-Sixth Pacific Islands Forum, Madang, Papua New Guinea, 25-27 October 2005) para 3, available at <<http://www.forumsec.org>> (last accessed 27 November 2006).

15 Pacific Plan, above n 2, para 4.

16 Pacific Plan, above n 2, para 13.

There are about 20 immediate priorities in the Pacific Plan, some of which are of particular relevance to the law and justice sector:

- regional support to consolidate commitments to key institutions such as audit and ombudsman's offices, leadership codes, anti-corruption institutions and departments of Attorneys-General, including through judicial training and education;
- enhancing the harmonisation of traditional and modern structures and values, including strengthening of traditional courts and development of models for land ownership, tenure and use;
- pursuit of the Technical Cooperation Strategy to enhance regional security and combat transnational crime;
- upgrading and extension of national and regional statistical information systems and databases across all sectors, including judicial information and technology services; and,
- support for the ratification of international and regional conventions and agreements in priority areas, such as human rights, security and anti-corruption, and for meeting obligations undertaken in doing so.

The inclusion of these initiatives for immediate implementation in the Pacific Plan is designed to concentrate the minds and resources of the Secretariat, Forum member states and external partners on their achievement. However, the development and implementation of specific activities to achieve the Pacific Plan initiatives remain significant challenges which will require not only dedicated effort by the Secretariat, but further input from member states' governments and other stake-holders.

In addition, some more bold legal initiatives were raised by various stake-holders during the consultation process on the Pacific Plan and were included for further analysis and consideration:

- expanding judicial training and education through PILOM, the PJC, national law societies and the University of the South Pacific (USP) Law School;
- creating a register of regional judges and public prosecutors to serve on appellate or trial courts in different countries;
- harmonising court structures, names, jurisdictions and procedures; and,
- creating a regional final court of appeal.

With regard to these "category three" initiatives, the Pacific Plan requires the Forum Secretariat to analyse them further over the medium term, in consultation with all stake-holders, to present more considered recommendations about their value and feasibility.

It is still early and it is hard to predict how far the Pacific Plan may be developed and in what directions. Expectations within the region are considerable. Of course, there is the implication inherent in the Pacific Plan that it may move Forum member states towards, at some time in the future, the emergence of a comprehensive regionalism – a Pacific community of some type. The Plan is undoubtedly a first step in that kind of thinking, albeit a fairly cautious one.

In the specific area of regional criminal law, the Pacific Plan does not strike out far into new territory. The immediate priority is implementation of the existing regional strategy, which is really a way of saying "do what you are already doing, but devote more resources and do it better". This, at least, partly indicates an assessment by the Forum that regional criminal law and law enforcement is an area where regional cooperation needs more work, and perhaps the region is not yet ready for more ambitious integration. But it is also, perhaps in part, a result of the fact that those driving the development of the Pacific Plan were not experts in the fields of law or transnational crime and had other priorities on their minds.

At the same time, the very nature of the Pacific Plan itself and the suggestion of regional integration of criminal justice and courts in the "category three" initiatives open a window to think outside the box.

The concept of a regional treaty on transnational crime with a regional criminal court, proposed by Neil Boister in 2005,¹⁷ is an example of some of the more ambitious thinking already emerging in the region. The concept of a regional "financial intelligence unit" was mooted several years ago (although eschewed in favour of national units), and there has been talk from time to time about the creation of a regional forensic facility. Other ideas like a regional anti-terrorism arrangement and a regional law reform commission are discussed below.

The high profile the Pacific Plan has taken on as a fundamental blueprint for regional development provides an unprecedented opportunity to use it as a vehicle for garnering high-level support and resources towards the achievement of regional goals. While its first iteration has been endorsed by Forum leaders and published, the Pacific Plan is not "finished". Forum leaders and the Secretariat acknowledge that the consultation process undertaken to develop the Pacific Plan, while extensive, was incomplete. They have strongly stressed that the Plan is and should be a "living document". To this end, the Pacific Plan is subject to a process of annual review. There is undoubtedly scope for additional input from participants in the criminal justice system in the region, and other experts, to ensure the Pacific Plan gives consideration to new or better regional approaches to criminal law issues.

VI WHAT WE HAVE LEARNED – POSSIBILITIES AND PITFALLS

At a time when the Pacific Plan is encouraging ambitious thinking about regionalising criminal law, it is worth reflecting on what can be learned from the Forum's efforts to date. In that sense, some broad observations come to mind which will probably not be news to those who know the Pacific islands well, but are worth putting on paper nonetheless.

17 Neil Boister "New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" (2005) 9(2) J Sth Pac L <<http://www.paclii.org/journals/fJSPL/vol09no2/1.shtml>> (last accessed 18 November 2006).

A Be Realistic – It's a Long Road ...

The Pacific Plan is "long-term" in its outlook (at least ten years) and envisages incremental, step-by-step progress toward greater regional cooperation and, ultimately, integration. Those charged with steering the implementation of the Pacific Plan realise that regional integration is a huge proposition in any terms, and particularly so for Forum member states at this point in their history and development. While the initiatives for the first three years focus on strengthening regional support to national priorities, the Plan anticipates that realising more ambitious ideas about regional integration is going to take longer.

Those outsiders who think regional integration should move faster, on the basis that it makes good sense (and it does), tend to forget – or perhaps just to gloss over – the fact that post-colonial independence and meaningful participation in the global community of nations is less than a generation old in the Pacific region. The move from traditional communities to colonies to independent modern nation-states has been an incredibly speedy one for FICs, certainly compared to the hundreds of years taken in the gestation of modern European states. For some countries, particularly in Melanesia, a sense of nationhood and national identity is still struggling to emerge in circumstances of huge internal ethnic diversity. The move to ambitious forms of regional integration, involving concepts like merging legal systems under regional courts, would be another heady jump. It is understandable that FICs remain protective of their sovereignty and circumspect about fast radical change.

It should be recognised that regional cooperation is already happening. Jurisdictions in the region have been "sharing" judges for several years, including through a register of appellate judges managed by the Forum Secretariat. Increasingly, other legal personnel are moving and working around the region through ad hoc arrangements. Comprehensive mechanisms now exist and are growing for exchange of law enforcement information and expertise and criminal intelligence.

Further regional integration in the field of criminal law makes sense in the Pacific and it most probably will happen. However, it will not happen overnight. Good ideas for regionalisation have to be considered in a realistic time-frame, which may mean ten, 20 or, in some cases, even 50 years.

B ... But the Time to Start Is Now

Recognising that the region is but a few steps down a long road, there are reasons why this is an ideal time for more thinking and debate on regionalising transnational criminal law.

As the discussion of the Pacific Plan in this paper indicates, Forum member states have made a new commitment to regionalism, creating an opportunity to research, dialogue, test the boundaries and make suggestions and propositions about regionalism. Academics, civil society groups and other stake-holders in the region can, and should, make this discussion a live one. Through the Forum, at least, there is a policy emphasis on new ideas for regionalism and a vehicle through which political minds can be focused on such ideas.

In addition to the Pacific Plan and the momentum it is creating for regionalism, this is also a moment in history when there is a massive global focus on transnational crime and, correlatively, an unprecedented level of external focus and resources for related work in the region. Criminal justice initiatives which have real buy-in by the Pacific islands and have clear benefits for them are highly likely to attract support and resources from external partners.

C Whose Law? Be Aware of the Limits of the Law

Law (at least the inherited western kind) still has limited importance in the Pacific, and it does not necessarily have the power that those from outside expect it should. In proposing a regional treaty regime and a court for transnational crime, Boister argued that "formal regional treaty obligations would ... make a difference to compliance, because they would be formally binding and there would be a greater expectation of conforming behaviour and more serious consequences

flowing from non-compliance."¹⁸ This is not as true as one might like it to be in the Pacific.

Externally imposed sanction regimes applied to the Pacific islands in recent years have shown that "big sticks" can be effective in areas where they can be enforced and they directly hurt the islands. Examples include the International Maritime Organization's International Ship and Port Facility Security Code (ISPS Code)¹⁹ for port security and the Financial Action Task Force's²⁰ money-laundering "blacklists". In these cases, where shipping trade and financial services were threatened by non-compliance, most member states were diligent and relatively swift in meeting their obligations. However, the real question is whether threats from outside are the best way to promote legal development in small under-resourced island nations.

In any case, evidence suggests it is highly unlikely that Pacific jurisdictions would impose such hard sanction regimes on each other. Regional-level decision-making in the Pacific, both in the Forum itself and in other arenas, generally operates on the principle of consensus, not enforcement and sanction. While this is often seen from outside as a weakness, it is a well-established principle of regional relationships ("the Pacific way") and one which cannot be dismissed. This being said, some influential voices in the region are beginning to argue that this will need to change if the Pacific Plan's vision for regional integration is to be realised.

18 Boister, above n 17.

19 The International Maritime Organization's International Ship and Port Facility Security Code (ISPS Code) contains mandatory security-related requirements for governments, port authorities and shipping companies. See <<http://www.imo.org>> (last accessed 27 November 2006).

20 Financial Action Task Force (FATF) is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money-laundering and terrorism financing. See <<http://www.fatf-gafi.org>> (last accessed 27 November 2006).

A related issue is the relevance for transnational crime of customary law and justice norms and processes in FICs, and their interaction with laws and justice systems inherited from colonial powers. New frameworks for dealing with transnational crimes are not necessarily entering a legal vacuum. Considering traditional laws and law enforcement methods may well be relevant to establishing the most appropriate and effective methods of dealing with some transnational and international crimes, especially those which manifest themselves at the community level, such as drugs and corruption. This is a line of inquiry worthy of further study.

Another aspect of the limits on law is that implementation capacity has to be built alongside legal frameworks. As noted above, the Forum has learned the hard way that a formal document, like a well-drafted regional treaty or even a good law based on model legislation, is only a very beginning. Support must be given so that everyone involved understands, accepts and can apply the rules created – particularly police, lawyers, judges, bureaucrats and citizens. This requires, first, that the laws are appropriate and realistic and, secondly, that a strategy which includes training, resources and public awareness to make new laws work, be devised. A good law cannot be the only element in legal reform; nor should it always be the first step.

D Respect Relative Priorities: Fish and Rice

Another crucial element of considering more ambitious regional activity regarding criminal law is sensitivity to the very large number of demands which inundate the often tiny governments of FICs on a daily basis. Transnational crime is an issue for the Pacific, but not the only issue or the most pressing one.

While officials working in the field of criminal justice attend Forum meetings and agree to take action on issues such as terrorism, money-laundering and electronic crime, they return home with the difficult task of "selling" these commitments to political "masters" consumed with other matters directly related to the immediate problems of their constituents: the "fish and rice" issues. Education, disease, fisheries, economic and environmental survival remain

consuming and immediate problems in need of attention from small and under-resourced governments and bureaucracies. Regional agreements to act on transnational crime, even if they are important, often have a less clear connection to the immediate viability of these nations and their people, not to mention the longevity of their governments.

As Boister noted in a 2004 paper, development of a regional response to transnational crime has not arisen from strong evidence of actual damage caused to FICs by transnational crime. Rather, it has been motivated largely by powerful partners' concerns about the threats to themselves posed by weak legal frameworks and law enforcement in the island countries, accompanied by a fairly generic argument about potential harm to FICs.²¹ The regional agenda is also driven by imperatives to comply with onerous international obligations which FICs had little or no active role in creating. In this context, it is understandable that issues like fisheries management, climate change, health and education take a higher place in the minds and in-trays of under-resourced ministers and bureaucrats than transnational crime. The latter do not have apparent ill-effects on their own people; in fact, some of them even bring in benefits to local economies (such as tax havens and passport sales).

This is not to say that pursuing better regional approaches to criminal law is not worthwhile. As a cautionary note, however, those who seek to do so, particularly larger partners with their own motivations, must show respect and sensitivity to the limited resources and relative priorities facing the FICs. Attempts to put in place new laws and institutions to address threats such as terrorism may also be more successful if linked with appropriate actions to address security

21 Neil Boister "Regional Cooperation in the Suppression of Transnational Crime in the South Pacific: Threat Assessment by the Pacific Forum" (ANZSIL Annual Conference, 2004 Conference Proceedings, Canberra, 18 June 2004), available at <<http://www.law.anu.edu.au/anzsil/Conferences/2004%20Conference%20Proceedings/boister.pdf>> (last accessed 27 November 2006).

problems posing more direct threats to the FICs. Some suggestions on that front are made below.²²

E Need to Know: Close the Information Gap

It has been well observed by the Forum Secretariat and its member states, as well as a number of academics, analysts and other commentators, that the lack of data on actual criminal activities in the region remains a major shortcoming. Rob McCusker, from the Australian Institute of Criminology, has noted that "the level, range and quality of information on transnational crime in the Pacific Islands region are, in terms of availability, quality, and reliability, variable."²³

Of course, this means that the credibility of claims of major threats to the islands from transnational crime remains questionable. As he goes on to say:²⁴

Evidence of transnational crime *per se* in the Pacific Islands is often obtained from one common point of reference, that of drug trafficking [T]he extent of such transshipment remains unclear ... [and] the existence and/or movement of illicit drugs in and/or through the region does not necessarily indicate full ranging transnational crime *per se*.

Weak data is a problem across many sectors in the Pacific. This is recognised in the Pacific Plan, which contains a specific initiative on improving statistical services. On the matter of transnational crime specifically, the FRSC agreed in 2005 to establish a Data Collection Working Group, which has been charged with developing a strategy to improve the collection and analysis of data relevant to transnational crime in the region. This is a work still in progress. While

22 See Part VII Regionalising Criminal Law: Some Ideas for Further Analysis.

23 Rob McCusker "Transnational Crime in the Pacific Islands: Real or Apparent Danger?" (2006) 308 Trends & Issues in Crime and Criminal Justice 1, available at <<http://www.aic.gov.au/publications/tandi2/tandi308.pdf>> (last accessed 16 November 2006).

24 McCusker, above n 23, 4.

establishment of the Group is a positive development, it is clear that making real progress will be a challenge.

Nevertheless, there is some evidence of success in data collection, such as the processes which have been put in place by the Pacific Immigration Directors' Conference and the Oceania Customs Organisation to collect and analyse immigration and customs data respectively at the regional level. The establishment of the Pacific Transnational Crime Network, with its Pacific Transnational Crime Coordination Centre located in Suva, represents another capacity for collaboration and information-sharing at the regional level.²⁵

In line with the Pacific Plan and the FRSC's data collection initiative, it would be a positive step to see more regional resources directed into the collection and analysis of empirical information to support the realistic and objective study of security threats facing the region. New initiatives could then be better targeted to – or at least take equal account of – the real threats and priorities faced by FICs, as opposed to favouring those tied to the security of regional neighbours and global friends.

VII REGIONALISING CRIMINAL LAW: SOME IDEAS FOR FURTHER ANALYSIS

In light of the experiences of the Forum outlined above, and the considerations drawn from them by the author, some suggestions may be ventured about ways to pursue regional integration to better combat transnational crime.

25 The Pacific Transnational Crime Network (PTCN) is made up of an increasing number of transnational crime units (TCUs), with TCUs currently operating in Fiji, Samoa, Tonga, Vanuatu and Papua New Guinea. The Pacific Transnational Crime Coordination Centre (PTCCC) acts as a regional storage and analysis facility to serve all Pacific nations, comprising membership of the Pacific Islands Chiefs of Police Conference. The PTCCC has rotated in excess of 20 law and border enforcement officers from Pacific island states, with a high number of this group being drawn from countries that do not have a TCU resident.

A Linking Issues of Concern

One suggestion would be to link issues of concern to well-resourced partners with those of priority concern to the island countries. For example, FICs have expressed their interest in the establishment of schemes for labour mobility between themselves, Australia and New Zealand to create employment opportunities and remittance incomes for their populations. This remains an issue of some debate within the Forum. However, rather than cite the weaknesses in FICs' governance as obstacles to greater labour mobility, the metropolitan members could take the approach of linking increased labour mobility to regional agreements for enhanced law enforcement on identity crimes, immigration and border controls. Such an idea may be useful in shifting the discussion from one of petition and rejection to one aimed at establishing a partnership of mutual benefit.

B Issue-by-issue Approach

Another suggestion may be to take an issue-by-issue approach rather than tackling regional integration of transnational criminal law comprehensively (all at once). This would logically start in areas where there is evidence of real danger or damage to island communities themselves. This also may differ from country to country. Subject to the need for more empirical information noted above, drugs and small arms spring to mind as potential starting points. Corruption is another transnational crime of major concern to FICs, on which some but relatively little action has taken place to date.²⁶ Once regional laws and mechanisms are seen to be feasible and beneficial in such areas, others may follow.

²⁶ It is worth noting that the Pacific Plan, above n 2, para 13, has identified supporting regional initiatives on anti-corruption as an immediate priority. The Australian Agency for International Development (AusAID) has also indicated in its 2006 White Paper Australia's intention to significantly increase the focus on combating corruption in developing its cooperation programmes in the region. AusAID *Australian Aid: Promoting Growth and Stability – A White Paper on the*

C Process

Alternatively, it may be a matter of starting with process: where the island countries see that they need assistance from outside the region. Projects addressing these types of challenges have already been tackled by regional agencies, such as the Disaster Management Project being undertaken by the Pacific Islands Chiefs of Police.

Regional arrangements for extradition and mutual assistance in criminal matters have been mooted by Forum member states and model laws were developed in the 1990s. It may be an opportune time to revisit this agenda in consultation with member states. Perhaps this time the Secretariat will go beyond consideration of harmonised national laws, toward establishing a regional arrangement or framework to address both legal and practical aspects of criminal justice cooperation between Forum member states.

Another opportunity of this type may lie in the field of counter-terrorism. Exercise "Ready Pasifika", a New Zealand-led counter-terrorism simulation conducted in 2005-2006 in cooperation with the Forum, led to discussions by participants on a possible regional arrangement which would facilitate speedy and targeted assistance from Australia or New Zealand in the case of a terrorist incident in the region. Although some island countries were more enthusiastic than others, smaller jurisdictions, in particular, saw this as more realistic than trying to set up significant, expensive and specialised government infrastructures in each island jurisdiction in order to meet international obligations and to deal with the remote possibility of a terrorist attack in their territory. Discussions on this issue are ongoing, but again, it will be interesting to see whether this type of arrangement gets off the ground and what sort of precedent it may create for using regional processes to deal with transnational crime threats.

D Regional Law Reform Commission

There may also be merit in considering an approach which goes beyond the declaratory nature of present regional commitments, but does not challenge sovereignty in the way regional treaties and courts would. There has been some limited discussion to date about the potential benefit of establishing a regional law reform commission for the Pacific islands.²⁷ At present, Fiji and Papua New Guinea are the only FICs with functioning law reform commissions.²⁸ Resourcing such a body is likely to be difficult for other jurisdictions, especially the smaller ones. At the same time, there is a clear and significant need in the region for more dedicated resources for the review of laws and drafting of updated and new laws on crime as well as other issues. A regional law reform commission would be a way of pooling resources and marshalling scarce expertise to provide legal review and drafting services to island jurisdictions at their request – perhaps with donor assistance, either partially or completely on a user-pays basis – without the burden of establishing and maintaining at least 14 national institutions. While the primary interest of Forum member states in a regional law reform commission would probably lie in its ability to provide country-by-country assistance on national priorities, it is logical that such a body could also consider legal issues of regional interest. It could further assist with national legislative responses and, at the same time, promote regional harmonisation of laws, greater regional cooperation and even integration where a case for it would

27 Peter MacFarlane and Chaitanya Lakshman "Law Reform in the South Pacific" (2005) 9(1) *J Sth Pac L* <<http://www.paclii.org/journals/fJSPL/vol09no1/3.shtml>> (last accessed 27 November 2006).

28 Law reform institutions have also been created by law in Samoa, Vanuatu and Solomon Islands, but the one in Vanuatu was never established and the one in Samoa was established, but has never operated. Solomon Islands passed legislation establishing a law reform commission in 1994, but the body does not presently operate; work is now underway to re-establish it, with the assistance of the Regional Assistance Mission to Solomon Islands (RAMSI), although the challenges of establishing a national commission have quickly become apparent. See MacFarlane and Lakshman, above n 27. See also a discussion of the author with RAMSI's Legal Policy Adviser, June 2006.

become apparent. The regional law reform commission idea is one which the Forum Secretariat will be developing further, under the auspices of the Pacific Plan.

E Sub-regional Integration

Finally, one idea which does not often get mentioned in this area, but is attracting some consideration in the work on the Pacific Plan more generally, is the possibility of sub-regional integration, either as a first step toward full regional integration, or in its own right.

The Forum's Secretary-General has commented that "even regionalism's best friends would have to conclude that the factors which keep us apart remain easily as strong as those which draw us together."²⁹ The 14 FICs are not homogenous in their legal systems, in their priorities and capacities or in the major threats facing them. Terrorism is a more real threat to a country like Fiji, with a large tourist industry, than it is to small isolated atolls with little trade or tourism beyond the region. Controlling illegal guns is clearly a major issue for Papua New Guinea and Solomon Islands, but perhaps less so for other countries. Drugs pose a broader threat, but even there, the level and nature of threat vary in different Pacific jurisdictions.³⁰ In this regard, sub-regional arrangements for integration of criminal justice frameworks and institutions – and for that matter, legal frameworks and institutions more generally – may sometimes be more appropriate, and have more chance of success, than attempting to secure agreement on regional priorities and initiatives from all Forum member states at once. This is already happening of its own accord in small ways – for example, recently Kiribati and Nauru signed an

29 Greg Urwin, Secretary-General, Forum Secretariat "The Current State of the South Pacific" (Australian Institute of International Affairs' (AIIA) National President's Forum, Parliament House, Sydney, 14 July 2006) para 4, available at <http://www.aiaa.asn.au/national/4_urwin_current_state_south_pacific.html> (last accessed 27 November 2006).

30 For an overview of transnational crime in the region, see in this book Andreas Schloenhardt "Drugs, Sex and Guns: Organised Crime in the South Pacific" chapter 8.

agreement to share the services of a single chief justice, and it is possible this arrangement may extend in time to Tuvalu. At the more general political level, there is already one sub-regional organisation – the Melanesian Spearhead Group – as well as semi-formal fora for cooperation between the United States-aligned Micronesian states.

The concept of dividing the region still further may seem odd to some, given the small number of countries and total population in the Forum membership already. Nevertheless, the region is geographically extremely far-flung, diverse in political and legal systems and also in the size and composition of its economies. For that matter, the region is also varied in the strength and nature of countries' genuine commitment to regionalism. In both practical and political terms, sub-regional integration is worth thinking about as a starting point, if not an alternative outcome, on some transnational crime issues.

VIII CONCLUSION

Regionalising criminal law in the Pacific region is not a new concept. However, it is now more topical than ever given the global security environment and the momentum for regionalism created by the Pacific Plan. The Forum's experience to date suggests that possibilities exist for enhancing regionalism in combating transnational crime, including through regional legal frameworks and institutions. At the same time, the potential pitfalls are real and avoiding them requires that regionalism be pursued over the long term, in appropriate and holistic ways as well as with the genuine needs and priorities of FICs at the centre.

For its part, the Forum Secretariat is committed to continuing to explore how best to support and serve Forum member states toward deeper regional integration in this and other fields, as their interests and desires dictate. Where we will all end up cannot yet be completely known, but it is more than likely we will be there together: to this end, regionalism is both inevitable and valuable, and these questions worthy of further attention.