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LEGAL CAPACITY IN PACIFIC ISLAND COUNTRIES

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I INTRODUCTION

The purpose of this paper is to present an overview of the capacity of the countries of the South Pacific to deal with international crime. The paper also raises the possibility for regionalising a response to transnational and international criminal activity by use of a private law analogy. The presumption of territoriality of criminal law could be reversed in order to allow criminality to be prosecuted in a manner similar to that of a transnational tort.

II GOVERNMENT CAPACITY TO DEAL WITH INTERNATIONAL CRIME

The answer to the question whether the countries of the South Pacific have the capacity to prepare legislation to deal with international and transnational criminal activity, to process it and to enforce it, is a mixed one. In short, these countries both have the capacity and they do not have the capacity.[1]

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1 Much has been written about good governance and the rule of law in the Pacific region. See, for example, Neil Boister "Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" in Geoff Leane and Barbara von Tigerstrom (eds) *International Law Issues in the South Pacific* (Ashgate, Aldershot, United Kingdom, 2005) 35, 46: "[a] more compelling argument for a regional response is the link made between external threats and the manifest internal problems of PICs [Pacific island countries]. Threats to sovereignty and

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

All the countries have a written entrenched constitution of a western European type and an established legal system, and all are viable. All function on a regular basis and, to varying degrees, in a manner predictable by non-local observers.

In the present context, the question of capacity, therefore, needs to focus on the functioning of the systems rather than on the systems themselves. It is useful in answering the question to have a comparator. An historical one, and a good starting point for a consideration of legal capacity, is a 1979 report by Dr George Barton on the legal capacity of the Pacific island countries (PICs).[2]

A The Situation in 1979

The Barton Report was prepared for the Commonwealth Secretariat to provide a basis for regional initiatives which would strengthen legal capacity in the region. Eight countries[3] of the South Pacific were visited and reported upon. The Report considered the availability of legal personnel in law-related fields; it covered the administration of state law, legislative drafting and the judiciary. The Report noted a substantial lack of legal staff in most of those countries and very high mobility of law staff, both expatriate and local.[4] Also

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stability, such as land disputes, economic disparities, ethnic tensions, and failures of governance and the rule of law, encourage penetration of the region by transnational crime. The Forum [Pacific Islands Forum] acknowledged this in the 2000 Biketawa Declaration by linking good governance and security. In particular, relative immunity from law enforcement makes developing states attractive bases for criminals to use for provision of illicit goods and services to areas where the risks are higher. Governments may prove unwilling or unable to suppress these activities." See also Helen Hughes "The Pacific is Viable!" (2004) 53 Issue Analysis 1, 10-11, available at <http://www.cis.org.au/IssueAnalysis/ias53/IA53.pdf> (last accessed 6 November 2006).

2 G P Barton *Legal Resource Needs In Small States (Commonwealth Pacific Jurisdictions)* (Commonwealth Secretariat, London, 1979), reproduced in (1999) 30 VUWLR 599.

3 The Cook Islands, Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

4 Barton, above n 2, 603. In some countries, there was only one lawyer providing all government services.

noted was the great importance of custom within the legal systems, particularly in relation to family matters and land.[5]

Of the countries surveyed, Fiji was the one with the best developed legal system, supplemented by a large number of lawyers in private practice. Samoa too had a significant number of lawyers in private practice.

Law reporting was limited and access to legislation was difficult or, in some cases, impossible. There was only one Pacific law school at the time, in Papua New Guinea (PNG). The Report regretted the absence of a law school within the University of the South Pacific.[6]

In 1979, a common feature of the systems was that the higher positions in the law field were held by expatriate lawyers.[7] That is much less the case now. However, a number of the superior courts of PICs still have expatriate judges, particularly in the final courts of appeal. In 1979, there was an almost total lack of locally qualified international lawyers; that situation is little different today.

B The Current Situation

The infrastructure has improved markedly since 1979, but the resource need has increased as a consequence of external pressures. In an endeavour to obtain some data on the current situation, access was obtained to the Pacific Islands Law Officers' Meeting (PILOM) reports for 2003, 2004 and 2005.[8] The country reports to PILOM are

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5 Barton, above n 2, 603.

6 Barton, above n 2, 613. There is now a law school within the University of the South Pacific: it was established in 1994. The graduates from that law school have made a significant difference to the number of lawyers available in PICs.

7 Barton, above n 2, 612.

8 The Pacific Islands Law Officers' Meeting (PILOM) is an annual event hosted each year by the law officers of a country in the region. PILOM is an informal organisation. The meetings are not open to the public and the reports presented and documentation generally are confidential to the participants. Access to specific documents of a meeting is often available on a restricted basis, upon request to the government law office of a participating state.

not uniform in coverage. Nor is every country present at each meeting of PILOM. However, reading those reports provides some data for nine of the countries[9] of the region. A summary of the data relevant to present purposes provided by those reports is presented here.

In general terms, the indication is that the staffing situation is, in terms of numbers, much better in the law offices of the countries than it was in 1979. The data also indicates that there is a shortage of lawyers and that a number of positions are held by expatriates whose salary is paid by international aid.

Fiji indicated a staff complement of 20-24 for the work of the Attorney-General and prosecutions and legislative drafting; this number included on average four expatriate lawyers. PNG reported having 80 public service lawyers in 2004. Samoa mentioned an establishment in the Attorney-General's office of 20 lawyers with up to three vacancies and three expatriate lawyers. The Cook Islands stated three lawyers in government service.[10]

In the bigger countries over the last five years, a typical rate of legislating is 20 statutes per year. In the smaller countries, the number is lower. In all countries, amending statutes and finance legislation represents an important part of the legislative activity. In the period 2003-2004, a substantial number of the new statutes – in most countries about six – were related in one way or another to counter-terrorism measures. There were, for instance, statutes dealing with extradition, financial transactions reporting, banking, mutual assistance in criminal matters and proceeds of crimes.

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9 The Cook Islands, Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

10 Niue and Tokelau each have three lawyers in public service and none in private practice. In New Zealand, the ratio of lawyers to population is 1:400. Of those lawyers, ten per cent are employed in the public sector either with central or local government. There are 83 lawyers in the Crown Law Office and 36 in the Parliamentary Counsel's Office. Information provided in 2006 by the New Zealand Law Society, Crown Law Office and the Parliamentary Counsel's Office.

The role of international support for law work is significant and in this context the prime sources of aid are Australia and New Zealand. There is also a number of volunteers from Australia and New Zealand and elsewhere who assist with the provision of government legal services and the staffing of the people's lawyers' offices.[11] The drafting of legislation is typically dealt with by an expatriate or on the basis of regional or international model laws.

Some countries report a serious backlog of cases in the superior courts. Other countries highlight a serious concern about the demands and processes of treaty implementation in domestic law, treaty reporting and treaty ratification processes.

Law reporting and the consolidation of legislation have been undertaken in a number of PICs in the last two or three years.[12] In every case, those initiatives[13] have been externally funded.

Numbers of police per head of population are lowest in PNG with a ratio of approximately 1:1000. The next lowest are Solomon Islands and Fiji, with approximately 1:500. At the higher end are the Cook Islands and Tuvalu with a ratio of 1:200, and Tonga with a ratio of 1:300.[14]

In respect of state legal services – and here the intention is to capture the expenditure for the Attorney-General's Department, State Prosecutions, the Police, Parliamentary Counsel's Office and any

11 In some countries (for instance, Kiribati and Tuvalu), there is a relatively high proportion of lawyers in the Public Solicitor's Office: in Kiribati, nine in the Attorney-General's Office and five in the People's Law Office. Such proportions raise interesting issues about equilibrium in the context of litigation.

12 Fiji, Vanuatu and Kiribati.

13 General access to law is not always affected by these endeavours because the availability of the statute books is not widely known and, when known, purchase possibilities may be limited.

14 The New Zealand ratio is approximately 1:500. Some interesting data on these matters can be found in a report prepared for a regional security meeting in May 2001: R Anere and others *Security in Melanesia* (Pacific Islands Forum Secretariat, Suva, 2001).

lawyers in Foreign Affairs – it is difficult to get uniform data because the appropriation Acts of the various countries deal with these matters in different ways. Given that difficulty, there are nevertheless some indications that can be taken from the figures. In 2004-2005, the country with the highest percentage expenditure on state legal services was Samoa, which allocated 11 per cent of national budget (then being 30 million *tala* or approximately US$11 million). The lowest percentage expenditure in that same year was Fiji, which allocated four per cent (Fiji$50 million or about US$30 million). At the small state level, and showing that there is perhaps no direct correlation between the population numbers and the percentage expenditure, were the Cook Islands with seven per cent and Tuvalu with 4.3 per cent of their national budget respectively. A separate question is what the actual expenditure on state legal services is in each of the countries in a specific year. In some countries, it would be below budget.

C Legislative and Executive Capacity

The legislative and executive capacity can be considered at a number of different levels: the national, the regional and the international.

1 National law-making

At the national level, several questions arise. One relates to the preparation of legislation. That involves consideration both of drafting capacity and legislative process.

(a) Law proposals

Model laws come from various sources: international, regional and, sometimes, voluntary bodies. These are of great assistance, and some of them are available without cost to states that wish to adopt them.[15]

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15 Some of the merits and problems of model laws are discussed later in this book: see Dr Olympia Bekou "Regionalising ICC Implementing Legislation: A Workable Solution for the Asia-Pacific Region?" chapter 6; Treasa Dunworth "The International Crimes and International Criminal Court Act 2000 (NZ): A Model for the Region?" chapter 7; Shennia Spillane "Possibilities and Pitfalls: Regionalising Criminal Law in the Pacific Islands Forum" chapter 10.

However, in practice, most model laws come as an aspect of aid, if not for the drafting of the model law itself,[16] then typically by the provision of a consultant on a short-term contract to implement the model law within a particular national context.

(b) Legislative drafting

There is a strong feeling that legislative drafting requires a specific capacity which is generally not available in the PICs. This is probably a misconception; any legally qualified person should be able to draft legislation with ease.[17] The misconception, however, holds substantial sway both within PICs and international organisations. Therefore, one of the most common forms of international aid for the legislatures of developing countries is the provision of legislative drafters. The drafters come usually for a short term and on highly lucrative contracts. They inevitably bring with them not only their expertise, but also the biases and their ingrained understandings of the system within which they were trained.[18]

(c) Legislative process

The legislative process itself is, in many cases, relatively straightforward and typically recognisable as one based on the processes of one of the metropolitan states. The processes do work when required. A practical matter is, however, the understanding the members of the legislature have of what is involved. This is frequently difficult because the subject-matter is remote from their every day experience and, further, there is often the question of language – the

16 In all cases, it has probably been drafted by an international consultant paid from aid monies.

17 Legislative drafting is a compulsory subject for the LLB programme at the University of the South Pacific.

18 These are perhaps the "surgeons" of the legal profession. They are prepared to take risks (that perhaps a young local lawyer is unwilling to take) and do the dramatic things that are necessary for a change in the law. Major law reform in a number of the PICs has followed not only the availability of a consultant law draftsperson, but it has also been coincident with the fulfilment of an international aid project which requires legislation.

legislation is promoted in English, but the vernacular and the language of the legislature are different things.

(d) Implementing the law

Once a law is in place, another question of capacity arises, that is, the ability to administer or enforce it. This is clearly an area where many PICs have insufficient administrative support to guarantee the enforcement of the legislation and, accordingly, where cooperation between states is very important. In some areas, this enforcement deficit has led to a preference for administrative processes over judicial processes.

There are courts, but frequently they do not operate expeditiously. In some cases, the lack of a readily available judicial officer of a superior court means that, for matters of urgency, an administrative process is to be preferred to a judicial process.

2 Regional law

At the regional level, there are several organisations. None has supranational authority of the kind presented by the European Union. The regional capacity, therefore, comes down to the willingness of the individual countries to act together. The Pacific Islands Forum (Forum) is basically just that – a forum for discussion of matters of common interest, both within the region and between the region and the rest of the world.[19]

The Forum has no supranational power. It has, however, a substantial secretariat and is heavily involved in diplomatic matters concerning PICs and the relationship of the states in the region with the outside world. Areas where it may be expected there would be useful examples for regional endeavour are customs tariffs, bio-security, shipping and fishing. In none of these is there a uniform

19 The Forum was founded in August 1971 on the initiative of Fiji. It was known as the South Pacific Forum until a name change in October 2000. Historical information on the Forum is available at <http://www.forumsec.org> (last accessed 1 December 2006).

system of law, although there have been many endeavours and many commitments to achieving some commonality.[20]

The European Union analogy is an interesting one, and one mentioned at the time of the writing of the Pacific Plan,[21] but there is in fact no comparison between the role of the Forum[22] and that of the European Union. The ideas in the Pacific Plan indicate political goals that may be concretised by future joint action. The European Union can legislate for the members, but, despite that, in the criminal law field, the endeavours have been limited to evidence requests[23] and

20 Successful examples include the following treaties: South Pacific Nuclear Free Treaty Zone (Treaty of Rarotonga) (6 August 1985) 1445 UNTS 177; [1986] NZTS No 7; Treaty on Fisheries between the Governments of Certain Pacific Islands and the Government of the United States of America (South Pacific Tuna Treaty) (2 February 1987) [1988] NZTS No 32; 26 ILM 1053.

21 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).

22 There is a number of collaborative arrangements in Europe relating to criminal activity that might be able to be replicated or adapted to Pacific needs: the European Anti-Fraud Office (OLAF), Europol, Eurojust and the European Judicial Network. Interpol operates both in Europe and the Pacific. The Pacific members of Interpol are American Samoa (United States), Australia, Timor-Leste, Fiji, the Marshall Islands, Nauru, New Zealand, Papua New Guinea and Tonga. Regional coordination is through the Asia-South Pacific Sub-directorate at its headquarters in Lyon, France. Pacific non-members use an Interpol member office (for instance, Interpol Suva) or liaise through the Pacific Transnational Crime Coordination Centre (PTCCC). The PTCCC has its central office at the same Suva address as Interpol Suva and the Australian Federal Police. Note also SPLawEnforcementXtraNET, which is a specific South Pacific network for police coordination. See also John McFarlane "Regional and International Cooperation in Tackling Transnational Crime, Terrorism and the Problems of Disrupted States" in Peter Cozens (ed) *Engaging Oceania with Pacific Asia* (Centre for Strategic Studies, Wellington, 2004) 55.

23 See Council Press Release (EC) "European Evidence Warrant (EEW): Council Reached a General Approach" (1 June 2006) 10081/06 Presse 168, on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters.

arrest warrants.[24] Even in those areas, it is possible to discern concerns from some quarters that this has already gone too far – in other words, there may not be strong support within the European Union for any extension of criminal law initiatives.[25]

3 International law

At the international level, a number of PICs are members of the United Nations (UN) and that membership requires compliance with UN norms and resolutions. For the countries of the Pacific that are members of the UN, the UN is, therefore, the possible source of a uniform law. Additionally, several PICs are party to UN treaties though they are not UN members, thereby creating universality among PICs. The Forum, although a regional body, actively encourages the compliance of PICs with UN and other international initiatives.[26]

It should also be noted that many of the countries of the Pacific are members of the Commonwealth and would typically, therefore, comply with agreed Commonwealth initiatives. Three countries in the Pacific are part of the French state[27] and, to that extent, their laws can be made uniform by the effect of the French legislation.

For the PICs which are parties to the Cotonou Partnership Agreement,[28] Article 8(4) of that Agreement expressly recognises

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24 See Council Framework Decision (EC) 2002/584/JHA on the European arrest warrant and surrender procedures between Member States [2002] OJ L 190/1.

25 See, for example, "Justice by Majority" (10 June 2006) *The Economist* 55: "[n]obody is about to swap their national legal system for a brand new EU one. All are willing to recognise each other's legal proceedings in serious cases. But in between a host of practical problems arise in deciding which rules and standards are mutually acceptable. Hence the question: how do you resolve disputes when countries have different degrees of trust in judges, prosecutors and policemen?"

26 The influence of United Nations instruments on non-members is discussed later in this book by Rebekah C Plachecki "Conforming to United Nations Counter-terrorism Initiatives: The Case of Niue" chapter 9.

27 French Polynesia, New Caledonia and Wallis and Futuna.

28 Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its

drugs and organised crime as matters of significance or concern for the PICs and the European Union jointly to address. Regional cooperation on arms control, drug-trafficking, organised crime, money-laundering, bribery and corruption is also confirmed in Article 30 of the Cotonou Partnership Agreement.

Finally, all of the PICs that are not part of France have inherited the common law rules on treaties and on international law as part of domestic law. This means that, unless specifically excluded by legislation, the common law rule that customary international law is a source of domestic law is part of the domestic law of each country.

D An Overview

The result of the survey shows that the legal systems of PICs are, in general, beginning to operate much more like those of their models than was the case 20 or 30 years ago. This reflects the increasing local tolerance of the law, which is being led by the judges and also by the local populace who, by using the courts in their private suits, are showing confidence in, or a need for, the state legal system.

This effective operation is to a large extent made possible by the outside world. The support comes in a variety of forms: constant provision of training sessions abroad and at home for law personnel; continual exhortations about good governance and the rule of law; workshops for public servants, lawyers, judicial officers and police; extensive contact with legal systems abroad by regular travel to conferences and workshops; the availability of aid money; and also, the provision of foreign personnel by way of administrative assistance aid. Good governance programmes and the establishment of the rule of law are often pursued with an almost evangelical fervour by external agencies.[29]

Members States, of the Other Part (Cotonou Agreement) (23 June 2000) [2000] OJ L317/3, available at <http://www.acpsec.org/en/conventions/cotonou/accord1.htm> (last accessed 1 December 2006).

29 The parallels with religion may be of more than passing interest. Christianity succeeded in the South Pacific, both rapidly and to the point of being integrated

The support for central government has often been at a cost to the traditional leaders, and this has flowed from the economic strength of the centre with its jobs, amenities and individual freedom. The net result is the weakening of custom.[30]

Focus on the centre was also the pattern of the colonial powers in establishing their position in the South Pacific communities.

The colonists of the 19th century suffered communication and transport difficulties, but they were concerned with criminal law and the maintenance of public order. The judges and administration travelled widely within their domain. Typically, the colonial powers let custom be; their concern was with public order and with the commercial or strategic integrity of the colony. The land was typically left under custom, as often were marriage, divorce and adoption; the dispensation of justice at the lowest levels was by courts staffed by local lay judges. The independent states of the second half of the 20th century started the same way, but globalisation began strengthening the centre.[31]

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into and, in some areas, indistinguishable from local custom. It is at least arguable that this rapid achievement was because the religious customs and traditions in place were not opposed to, or dramatically different from, the new religion. Law is taking much longer to gain hold – already several times longer – and it has not yet achieved the thorough-going nature or the strength that Christianity had achieved by the late 19th century.

30 If in the future religion weakens and if custom weakens, will that strengthen the position of law? Certainly, the decline in religiosity and the weakening of custom outside of the village setting are coming at a time when the law is gaining strength. The law has a different aspect from religion and custom: it is materialistic, it is impersonal and it is individualistic in its focus. Why is the rule of law advancing? Is it because of the external support for it or because of the increase in secularism in the PICs? Or is it the weakening of custom as a result of the centralising of government? Internationalism has probably weakened the churches in many island communities, and has increased the external support for the rule of law and thence for central government.

31 One possible result of this progressive transfer of power to central government is that the land will be left as a memory (locked in a past situation) rather than as life or as an asset. Villages (if they continue to exist) will require state support to ensure public order. That will require more money at the centre – which will, in

In pre-colonial times, custom ruled and governance was totally, or largely, decentralised. In the colonial period, custom continued, but government was established as a centralised entity for all administrative purposes. In the post-colonial period, the independent states took over the colonial system and, with better communications, typically entrenched it.

A last flurry by custom occurred in the 1990s. The provincial government cases of Solomon Islands in the 1990s, the Fiji coups ostensibly perpetrated in the interests of the indigenous people, the Village Fono Act 1990 of Samoa and events in New Caledonia are a few examples.[32]

The movement of government has been inexorably towards the centre and towards the rule of law.

E Conclusion

In the 21st century, there has come the pressure of international trade (the World Trade Organization), aids, environmental and bio-security concerns, global warming, international crime, migration and counter-terrorism movements.[33] Now, the balance is shifting (in

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turn, weaken the villages and encourage urban migration. There will be more public servants as the leaders of the future.

32 Note in particular the difficulties of provincial and local government in Solomon Islands: see *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1; CA-CAC003 of 1997 (11 July 1997).

33 The last 30 years have seen the countries of the South Pacific subjected to the requirements of international trade, international security, environmental protection, good governance, the "Westminster" system and international human rights. Along the way have been the promoters of cheap passport systems, offshore banking, audio-text revenues, top-level domain name revenues, logging, fishing, internet gambling, international medical schools and the like. And along with all that have come the experience and potential of mass tourism, mass telecommunications and the aspirations of national airlines.

viability) against custom. Custom is least vulnerable where it is entrenched as a body (or as rules) in the constitution.[34]

The international community, therefore, must continue its support unless it decides to change its priorities. The international community will have to pay for infrastructure development and the slow fostering of governance according to its preferred model.

Aid donors now face a long-term commitment to the region because, in most places, custom is either seriously weakened or it has been marginalised.[35] The people with customary high status are increasingly not within the state power elite. However, the state system, although often formally operative, is unable to fill the social order and social welfare requirements which become evident as a result of the marginalising of custom. For the same formative reasons, the checks and balances of the new social ordering system are not fully functional. Central government is, therefore, typically subject to controls which, if at all, operate only at the political level.

In formal terms, legal capacity exists in PICs. In practical terms, it is not fully exploited, not only because of lack of resources, but perhaps also for cultural reasons – for lack of will.

Therefore, a focus on governance at the level of institutions faces a hard task: the institutions in themselves are good,[36] often excellent

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34 See, for instance, the situation of customary land in Fiji (art 6(b) of the Constitution (Amendment) Act 1997), Samoa (Part IX of the Constitution of the Independent State of Samoa 1960) and Niue (Art 33 of the Niue Constitution Act 1974), or the position of custom in Tuvalu (preamble to the Constitution of Tuvalu). The full text of the constitutional instruments of the various PICs are available at <http://www.paclii.org/> (last accessed 1 December 2006).

35 In power terms, if custom is operating in isolated and limited circumstances, it is irrelevant to mainstream politics or internationalisation.

36 See Australian Agency for International Development (AusAID) *Pacific 2020: Challenges and Opportunities for Growth* (Commonwealth of Australia, Canberra, 2006) [Pacific 2020], available at <http://www.ausaid.gov.au/publications/pdf/pacific2020.pdf> (last accessed 17 November 2006). Pacific 2020 comments on governance and institutions (chapter 6). Under the epigraph "Variable standards of governance have produced at their worst instability,

and better than those of the aid donors. The functioning is a different matter: local attitudes would need to change to meet external goals. Power holders often operate the state institutions the way that they would be operated if customary.

It may be 30 years too late to eliminate this discrepancy by reforming the institutions to reflect local ways, needs and understandings. If it is, it is submitted that, rather than emphasising institutions to strengthen the rule of law, focus should be placed on the development of laws and on making the laws accessible. Leaving aside the question of the cultural aspects of law, most Pacific islanders could not access their law even if they wished to do so.

The last word on capacity is that of the New Zealand Prime Minister to the 14th Annual Conference of the Australia-New Zealand Society of International Law:[37]

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violence, corruption and a breakdown of the democratic process", it is stated: "The Pacific 2020 background papers all highlighted the poor performance of institutions as an important barrier to growth. This does not mean that various organisational structures are deficient. Rather, more broadly, it means that the basic 'rules of the game' that affect economic activity are not conducive to growth" (at 55). Mauritius is presented in Pacific 2020 as an exemplar for PICs (at 22-23). Mauritius is truly a success story. At independence, the economic and social prognosis was dire. Pacific 2020 concludes that: "[t]he driving force behind Mauritius's success appears to have been the quality of its domestic institutions. … Respect for the rule of law and property rights made Mauritius attractive to investors" (at 23). The institutions of Mauritius were the same as those of Fiji and Solomon Islands and Mauritius was single-minded in the years following independence – but the comparison is not an exact one. Mauritius has no indigenous people, the concept of law was an integrated part of its culture at independence, and the ACP treaty process with the European Communities presented very special economic opportunities. Although Mauritius is perhaps alone in Africa in changing government only by the ballot box, it did in the early years defer elections in the interest of stability and growth.

37 Rt Hon Helen Clark, Prime Minister of New Zealand "Address at the Opening of the Australian and New Zealand Society of International Law 14th Annual Conference" (ANZSIL Annual Conference, Wellington, 29 June 2006), available at <http://www.beehive.govt.nz> (last accessed 1 December 2006).

> Strong, stable institutions allow the rule of law to flourish, just as the rule of law is a foundation for fair and stable governance. …
>
> In co-operation with Australia and with the Chief Justices of our two countries, we have recently established the Pacific Judicial Development Programme. It will support Pacific countries to enhance the competence of their judicial officers and the supporting court officials, and of the processes they use for the administration of justice.
>
> We are also hoping that this year's Pacific Islands Law Officers Meeting (PILOM) will address how other obvious skills gaps in Pacific legal arrangements, in areas like police prosecutions, public law, law reform and legal drafting, can be filled.
>
> New Zealand is also working to strengthen governance mechanisms which will increase respect for human rights in the region.
>
> We are promoting the establishment of a dedicated human rights desk within the Forum Secretariat which can help advance respect for human rights within the region, and co-ordinate and facilitate support for Forum members from UN and other agencies.
>
> This should help with adherence to and implementation of the key international human rights instruments.

Her statement makes two things clear:

- the Pacific structures are not working in the same manner as the similar Australian and New Zealand structures; and,
- it is implied that someone will pay to produce strong stable institutions so that the rule of law may flourish.

The verbs are telling: enhance, strengthen, increase, promote, advance, coordinate, facilitate.

III REGIONALISING RESPONSES

National legislation[38] within the region already covers a number of matters of international or transnational criminal law interest. There is, for instance, a reasonable level of complementarity of laws. Moreover, most countries provide for the transfer of criminal suspects and for the exchange of information of interest to law enforcement authorities.[39] That is a good start.

The existing legislative measures are, however, presented as exceptional because of the underlying principle of the territoriality of crime.[40] The link between crime and national sovereignty is of long standing, but there are also clear exceptions to that principle, such as the well-established rules on offshore murder in the British colonial systems.[41] The question of prosecution of anti-social behaviour led, within the British colonial regime, to a special system for surrender of individuals in order to facilitate their prosecution in the territory of the offending.[42] At an international non-colonial level, the parallel was the extradition system, which is based typically on a range of extradition treaties.

The 20th century saw an increase in the long-arm jurisdiction of states with significant developments in the facilities for cross-border cooperation in respect of the apprehension of criminal offenders and the exchanging of information, both about potential offenders and

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38 Inspired by international needs over the last 15 years.

39 For instance, extradition laws and Acts dealing with the proceeds of crime and the giving of mutual assistance in criminal matters are in place throughout the region.

40 In the Commonwealth, see for instance *Huntington v Attrill* [1893] AC 150 (PC); *Government of India v Taylor* [1955] AC 491 (HL).

41 See, for instance, Murders Abroad Act 1817 (UK) 57 Geo III, c 53: "[w]hereas grievous Murders and Manslaughters have been committed … in the *South Pacific* Ocean, as well on the High Seas as on Land, in the Islands of *New Zealand* and *Otaheite*, and in other Islands, Countries and Places not within His Majesty's Dominions".

42 The "Fugitive Offenders Act 1881 (UK)" system.

about their property. The net result in 2006 is that there are many exceptions to the rule on territoriality of crime, and this not just to deal with those matters which are criminal at international customary law, but also to deal with terrorist activities, behaviour related to those activities and the prosecution of crimes against morality. Into this arena have come the initiatives with the goal of establishing an international criminal law which will apply uniformly to all individuals in all states in respect of an agreed set of human behaviours. A modest and complementary proposal would be for the states of the region simply to reverse the rule relating to the territoriality of crime and enact that any criminal behaviour perpetrated anywhere can be prosecuted by the interested state in the forum in which the accused is present. This would make the present exceptions part of the general rule and would potentially give rise to a new set of exceptions, which this time would not be the major criminal activities, but rather the smaller ones such as traffic offences.

One of the difficulties in the area of international and transnational criminal law is the tradition of territoriality of crime. There is, however, a number of commonly admitted exceptions. There are the long-arm laws, for instance, extraterritorial jurisdiction in respect of crimes committed on the high seas and the recent legislation on paedophile activities.[43] Other examples include countries that use nationality as the connecting factor for crime,[44] reporting requirements (for instance, proceeds of crime, mutual assistance and financial transactions) and extradition.

If, however, criminal process and criminal judgments were treated in the same way as civil matters, then the focus would shift away from complementarity of legislation or treaty-based rules and the question of extradition would also become less contentious.

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43 See, for instance, Crimes Act 1961 (NZ), s 7A.

44 This is thrown into stark relief when a foreign national who has served a sentence for a serious crime challenges a deportation order to the country of nationality on the basis of double jeopardy.

A Prosecution

Using the civil law analogy for jurisdiction to sue, the prime factors are typically the presence of the defendant and the availability of a suitable forum remedy. The civil cases are most obviously in the field of breach of obligation, but status and property are also common matters of international litigation. Litigation is commenced by the interested party and it is the parties who must pay. There are some practical limits to suing on a foreign civil claim. One is typically the amount involved and whether the cost of suing in a foreign country is warranted in monetary terms. There is also the question of available remedies. The forum jurisdiction will provide only remedies known to it; it will not provide the remedies of a foreign jurisdiction. A forum is unlikely to make an order which would be of no effect; for instance, an order relating to foreign-situated land.

Issues that would need to be considered in the criminal context involve the question of double jeopardy. Furthermore, if crime were able to be prosecuted anywhere, there may also be the question of the repatriation or deportation of a convicted person at the end of the process.[45]

A basis would need to be established for the situations in which criminal suit could be commenced outside the territory where the offence is committed. Provisions for arrest could follow the threshold requirements for an extradition proceeding. Prosecution in the forum as for a forum crime could proceed if the facts alleged provided prima facie the basis for a criminal prosecution at the place of commission of the offence.

The costs would be borne by the prosecutor.[46] The types of offences might be limited by reference to the maximum penalties

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45 The prosecuting country and the forum country may need to agree on matters of cost (such as trial, detention, repatriation). See the Pitcairn Trials Act 2002 (NZ).

46 These costs will limit the number of situations in which prosecutions will be commenced offshore.

involved and the penalties might be restricted to fines and imprisonment. Fines would be paid to the forum state.

Jurisdiction to prosecute foreign committed crime should lie only with a country[47] whose laws are alleged to have been broken.

B Recognition

There is no reciprocal recognition and enforcement of criminal judgments and orders,[48] and there is no common approach to the matter of prescription in criminal law.[49]

The basic rules for criminal law recognition – both recognition and enforcement – would be that judgment should be final, not have been obtained by fraud and be the decision of a duly constituted court with jurisdiction in the matter.[50]

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47 In some countries there is the possibility of private prosecution. The standing of the prosecutor would be a matter for the forum to decide.

48 See above n 44.

49 In the civil context, there are differing approaches to this question. At common law (and still in New Zealand and many PICs), limitation of actions is a procedural matter (*Huber v Steiner* (1835) 2 Bing NC 202; 132 ER 80) and thence for the forum law. In other countries, limitation is now, by statute, a substantive matter: see, for example, Foreign Limitations Periods Act 1984 (UK). Note the following recent Australian extradition case for some comment on related matters: *Moloney v New Zealand* [2006] FCA 438.

50 These principles of jurisdiction, finality and absence of fraud would draw on the common law principles as established by *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] AC 670 (PC); *Nouvion v Freeman* (1889) 15 App Cas 1; and, *The Duchess of Kingston's Case* (1776) 2 SLC 644, respectively. Traditionally, civil law awards had to be for a liquidated sum of money (for instance, *Sadler v Robins* (1808) 1 Camp 253). More recently, however, there are also examples of injunctions being enforceable in a foreign jurisdiction. See the Reciprocal Enforcement of Judgments Act 1934 (NZ), s 8B. That in itself opens up the possibility of penal sanctions for contempt following the failure to honour the injunction.

C Summary

This suggestion involves judicial processes. This is unlike much of the activity which in recent years has had aspects of denial of due process and has shown increasing moves to executive control in respect of particular offences of international interest.

The proposal is for local legislation which would enable foreign-committed crime to be prosecuted in any forum where the defendant is present.[51]

This system would probably, as a first step, be better than a treaty arrangement. A treaty gives uniformity but involves a two-stage process: first, there is the agreement to the treaty, which involves compromise; and, secondly, there is the legislating of the treaty, which typically also involves some compromise. More time and more compromise are involved with a treaty than simply legislating locally. It is, therefore, likely to be better to have just the one local step. Legislating to allow a foreign government to prosecute a foreign-committed crime can be done unilaterally. Furthermore, such a first step in a developing area has often in the civil context been a precursor to treaty arrangements.[52]

The advantages of this system would be as follows:

- it is unilateral;
- it would stimulate a review of national law to ensure that crime at international law[53] is a national crime;
- it would encourage more ready compliance with extradition requests;

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51 It would be for the Forum, or a similar body, to promote a law identified by key features, rather than a model text – although both a list of key features list and a model text could be provided.

52 For example, international adoptions and cross-border custody.

53 For example, slavery, piracy, genocide and torture.

- it could obviate the need to remove an individual across state boundaries;
- the current formal concerns about political implications, due process or the nature of penalty in the country requesting extradition would no longer be relevant;
- the offender could choose jurisdiction, but could not escape prosecution; and, finally,
- it would make international criminal behaviour general, rather than an exception.

An accused, by crossing a state boundary, would, apart from choosing jurisdiction, also in effect be selecting the prison, the criminal justice system, the trial process, access to witnesses, lawyers and legal aid.

As a practical matter, it would likely be more costly than extradition. For instance, the availability of witnesses would impact not only on the prosecutor but also on the defendant. This situation is, however, not novel; it is confronted also by those who pursue a civil claim in a foreign forum.[54]

IV CONCLUSION

The conclusion is that the systems of the countries of the region are good. They are generally well designed to cope with all reasonable demands that may be made of a state legal system. It is also a fact that in many cases these systems do not function as efficiently as they might. Sometimes, this is because of lack of financial resources; sometimes, it is because of the scarcity of international law specialists.

As a first step towards the development of a regional criminal law, it is suggested that countries should abrogate the current rule relating to the territoriality of crime and legislate to ensure that the major international crimes are offences under national law. Following that, a treaty regime should be easily established.

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54 With the benefit of a *forum non conveniens* plea. The defendant in a criminal case may too agree to an extradition request.