

Strengthening the Rule of Law in the Pacific through International Crime Cooperation

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Abstract

The rule of law as demonstrated through law enforcement, good political governance and an effective legal system has been identified as necessary for security, social stability, sustainable development and economic growth. Instability, corruption and lawlessness, which have at times plagued Pacific Island communities, are a clear indication of a weak rule of law. Organised criminal groups tend to target weak and vulnerable countries struggling with poor governance structures and social and/or political unrest, as is the case in many Pacific Island Countries. The aim of this article is to give a brief overview of the prevalence of transnational crime in the Pacific and its interrelationship with the rule of law. The article will then examine the range of international crime cooperation initiatives implemented in the Pacific to deal with transnational crime and the positive effect these initiatives have had on strengthening the rule of law.

Introduction

Whilst the Pacific Islands are culturally, educationally and socially diverse, there is a degree of similarity in their respective levels of governance, corruption and law enforcement capacity. The instability, corruption and lawlessness that have at times plagued Pacific Island Countries are a clear indication of a weak rule of law. In recent years there has been a strong focus on measures to strengthen the rule of law in the Pacific, and there have been endless projects and initiatives developed to address this goal. Given the significance of the rule of law and the myriad of initiatives to strengthen it in weakened countries, agreement about its meaning and effect is remarkably elusive. The rule of law is rarely, if ever, a discrete legal principle in its own right; rather, it is an approach to governance on which the efficacy of law and constitutionalism rests. At the most basic level it can be said that there are three core principles to the rule of law. First, the population must be governed by general rules that are laid down in advance. Second,

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these rules must be applied and enforced; and third, disputes about the rules must be resolved effectively and fairly.¹ Efforts to strengthen the rule of law in the Pacific could be more successful if they focused on the specific difficulties experienced by Pacific Island Countries rather than the overarching, somewhat abstract goal of strengthening the rule of law. This article will consider the prevalence of transnational crime in the Pacific and how measures to combat this threat through international crime cooperation can strengthen the rule of law in the Pacific. The article will begin by considering exactly what is meant by the 'rule of law', the term 'transnational crime' and the relationship between the two. The article will then provide an overview of the Pacific region and the Pacific Islands Forum, and some explanation as to why Australia is concerned about the current situation in the Pacific. It will consider the prevalence of transnational crime in the Pacific and outline the benefits of using international crime cooperation to combat transnational crime. It will then describe regional efforts to combat this threat, explain why such efforts may not be effective and provide a case study of the Australian Federal Police Law Enforcement Cooperation Program in the Pacific, which has had some success. Finally the article will outline the positive effect that international crime cooperation can have on strengthening the rule of law in the Pacific.

I. What is the Rule of Law?

The rule of law, as demonstrated through law enforcement, good political governance and an effective legal system, has been identified as necessary for security, social stability, sustainable development and economic growth. Both the World Bank and the Organisation for Economic Cooperation and Development identify the rule of law as one of the major components of the good governance promoted by them as essential for development.² An effective rule of law then underpins and enables security, social stability, sustainable development and economic growth.

In 1995 the Asian Development Bank ('ADB') adopted a policy on good governance and identified its four basic elements: accountability, participation, predictability and transparency.³ Accountability is imperative to making public officials answerable for government behaviour and responsive to the entity from which they derive their authority. Accountability also means establishing criteria to measure the performance of public officials, as well as oversight mechanisms to ensure that the standards are met.⁴

At the grassroots level, participation implies that government structures are flexible enough to offer beneficiaries and affected others the opportunity to improve the design and implementation of public programs and projects. Predictability refers to the existence of laws, regulations and policies to regulate society and their fair and consistent application.⁵ Transparency refers to the availability of information to the general public and clarity about government rules, regulations, and decisions. Transparency in

1 Cheryl Saunders & Katherine Le Roy (eds), *The Rule of Law* (2003) at 5.

2 Saunders & Le Roy, above n1 at 2.

3 Asian Development Bank, *Governance: Sound Development Management* (1995) at 8.

4 Ibid.

5 Id at 10.

government decision-making and public policy implementation reduces uncertainty and can help inhibit corruption among public officials.⁶

Conceptually, the four elements of governance indicated above tend to be mutually supportive and reinforcing. Accountability is often related to participation, and is also the ultimate safeguard of predictability and transparency. Similarly, transparency and information openness cannot be assured without legal frameworks that balance the right to disclosure against the right to confidentiality, and without institutions that accept accountability. Again, the predictability in the functioning of the legal framework would be helpful in ensuring the accountability of public institutions. At the same time, predictability requires transparency, because without information about how similarly placed individuals have been treated, it may be difficult to ensure adherence to the rule of equality before the law. Finally, a transparent system facilitates governmental accountability, participation and predictability of outcomes.⁷

2. What is Transnational Crime?

To some, transnational crime amounts to what is stereotypically referred to as ‘organised crime’ while others distinguish between it and international crime. International crimes are those prohibited by international law, including treaties and custom (for example, aggression, piracy and war crimes). However, at its most basic ‘transnational crime’ generally refers to any crime that crosses international borders, for example, through the occurrence of criminal activity in more than one jurisdiction or because the proceeds of the crime have moved from one jurisdiction to another.⁸

This is reinforced by article 3(2) of the *United Nations Convention Against Transnational Organized Crime* which provides that an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.⁹

6 Id at 12.

7 Id at 13.

8 Herbert Morais, ‘Fighting International Crime and its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law’ (2005) 50 *Villanova Law Review* 583 at 584.

9 *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 December 2000, UN Doc A/55/383 (Annex I) (entered into force on 29 September 2003); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 December 2000, UN Doc A/55/383 (Annex II) (entered into force 25 December 2003); *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, supplementing the *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 December 2000, UN Doc A/55/383 (Annex III) (entered into force 28 February 2004); *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, supplementing the *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 December 2000, UN Doc A/55/255 (Annex) (entered into force 3 July 2005).

Money laundering, illegal immigration, arms smuggling, drug trafficking, people trafficking and, of course, terrorism are the most widely referred to examples of transnational crime. However, there are many more examples including pirating or theft of intellectual property, digital child pornography, cybercrime and fraud. This list is likely to continue to grow as criminals find new ways to exploit all the opportunities that globalisation and technological advancement provide.¹⁰

While it is difficult to find reliable evidence on the extent of transnational crime, the dynamics of globalisation have certainly led to a higher integration of financial and other markets, the rapid execution of transactions and the easier movement of people, goods and capital across national borders. It can be argued that, as legitimate transnational enterprises and operations have multiplied, so have illegitimate ones. The opportunities for illegal gain have increased at the very time when it would seem much easier to cover criminal tracks. Another important aspect is that States seem to be losing more and more of their sovereignty and autonomy. As a consequence, official controls are weakening, and international norms and control bodies with real teeth are underdeveloped or lacking.¹¹ It can then be said that while transnational crime is by no means a new phenomenon, with globalisation and greater mobility of people and resources across national borders, it has become increasingly pervasive, diversified and organised.¹² Transnational crime is now recognised as a national security concern with the capacity to weaken the rule of law and undermine the stability and security of individual States as well as the stability of political and economic relationships between States.¹³

Quite apart from the threat posed by transnational crime itself, the prevalence of transnational crime also increases the risk of other threats. Terrorists use transnational crime groups to move money, people and material around the globe. Governments and rebels sell natural resources through transnational crime groups to finance wars. Of particular relevance is that the prevalence of transnational crime and related corruption weakens a State's capacity to maintain or establish the rule of law.¹⁴ Transnational crime has become what is seen to be one of the defining problems of the twenty-first century because of the enormous discrepancies between developing and developed countries, the presence of many weak States in which transnational crime groups can operate and an international demand for the goods and services which these groups provide. As strategies are developed to counter the threat of transnational crime, it is imperative that the fight be based not just on attacking the most visible manifestation of the problem

10 Camille Goodman & Victoria Bickford, 'Issues in Transnational Crime in the South Pacific' (Paper presented at the Australian and New Zealand Society of International Law Fourteenth Annual Conference, Wellington, 29 June – 1 July 2006).

11 Nikos Passas (ed), *Transnational Crime* (1999) at xiv.

12 See generally Association of Southeast Asian Nations ('ASEAN'), *ASEAN Plan of Action to Combat Transnational Crime* (1999) <www.aseansec.org/16134.htm> accessed 6 December 2008.

13 Andy Hughes, 'Liaison Officers Play a Major Role in Australia's Fight Against Transnational Crime' *AFP News*, June 1999 at 10.

14 Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (December 2004), UN Doc A/59/565 (2004) at 4 <www.un.org/secureworld/> accessed 6 December 2008.

but also the more general conditions which allow these groups to operate. This will require more attention to the problem of States with a weak rule of law, lack of harmonisation of regulation and the failure to have effective law enforcement cooperation across borders.¹⁵

3. The Relationship Between the Rule of Law and Transnational Crime

The absence of good governance and a weakened rule of law provide the environment in which transnational crime can thrive. 'Relative immunity' from law enforcement in States with a weak rule of law makes them attractive to criminals to use as bases for the provision of illicit goods and services compared to areas where the risks are higher. Governments in such States may also prove unwilling rather than unable to suppress these activities because they fear the disruptive effects of suppression — a major concern in countries already suffering from political and social unrest — or because they benefit from the criminal activity through corruption or bribery.¹⁶ At the same time, transnational crime can lead to instability, lawlessness and corruption and has the capacity to weaken the rule of law further.

Thus a weak rule of law is both a precursor to and a symptom of transnational crime.¹⁷ People involved in transnational crime are attracted to countries with a weak rule of law, and the social and economic consequences of a weak rule of law allow transnational crime to prosper. At the same time, the population of a country struggling with a weak rule of law can often become disaffected and turn to transnational crime in an attempt to express this discontent and to make economic gains not otherwise available to them.

Internal threats to human security in the Pacific, as elsewhere, foster an environment conducive to threats from external sources. So, while transnational crime, border security and terrorism are critical issues, they are fostered by other domestic factors such as a weak rule of law, lack of good governance, slow economic growth, social tension, land issues, poverty, environmental degradation and impeded access to basic social services.

Combating transnational crime has a direct impact on strengthening the rule of law. At the same time, transnational crime cannot be combated by law enforcement means alone. An environment has to be created in which the social, political and justice systems can function properly, with the right powers, restraints and checks and balances to enable the community to have confidence and for business to thrive.¹⁸ There must be an

15 See generally Louise Shelley, 'The Nexus of Organised International Criminals and Terrorism' (2002) 40 *International Annals of Criminology* (1–2) 85–92.

16 Phil Williams and Ernesto Savona, 'Problems and Dangers Posed by Organised Transnational Crime in the Various Regions of the World' in Phil Williams and Ernesto Savona (eds), *The United Nations and Transnational Crime* (1996) at 38.

17 Mick Keelty, 'Challenges to Peace and Justice in the Asia-Pacific Region and the Role of the AFP in Peacekeeping and Responding to These Challenges', speech, Australian Centre for Peace and Conflict Studies, University of Queensland, 1 April 2005.

appreciation of the comprehensive nature of threats and the interrelationship between a weak rule of law and external threats, such as transnational crime.

In the same way, strengthening the rule of law not only ensures good governance, which reduces opportunities for transnational crime, it also strengthens States' law enforcement capacity to combat transnational crime. The development of effective law enforcement and criminal justice infrastructure must be achieved within the broader context of continued progress in economic, social and governance issues.¹⁹ Therefore measures to strengthen the rule of law are key components of an effort to combat transnational crime and vice versa.

4. The Pacific Region

This article focuses on the member States of the Pacific Islands Forum (the 'Forum'). The Forum is a regional intergovernmental organisation founded in August 1971 which comprises 14 independent and self-governing States in the Pacific: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea ('PNG'), Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, along with Australia and New Zealand.

The Forum Island Countries²⁰ are geographically isolated and sparsely populated. Their remoteness and very small size mean that they are often places lacking in sufficient human, financial and other resources to significantly influence a weakened rule of law.²¹

Despite the cultural diversity in the region most Pacific Island Countries are struggling with instability, corruption, lawlessness and transnational crime, all of which provide a clear indication of a weak rule of law. Civil conflict has continued to impact severely on the stability of PNG and the Solomon Islands, and Fiji has been subject to a number of coups, most recently in December 2006.²² Tonga experienced destructive riots in late 2006, Vanuatu has been subject to instability within the police force and the Nauruan government has suffered significant instability due to discontent over poor financial management. Civil unrest can be triggered by poor governance, flawed political systems, poor leadership, unequal access to political processes and a lack of democratic participation. This situation is exacerbated in societies in a transition from traditional to modern systems of organisation and governance, and in which the benefits of development are not shared equally.²³

18 Ibid.

19 See generally Rob McCusker, 'Transnational Crime in the Pacific Islands: Real or Apparent Danger?' (2006) *Trends and Issues in Crime and Criminal Justice*, no. 308.

20 'Forum Island Countries' is a term used within the Pacific Islands Forum and the Secretariat, and in this article, to describe Forum members exclusive of Australia and New Zealand. It is used interchangeably with 'Pacific Island Countries'.

21 Keith Wilson, 'The Pacific Zone – Legal Issues in Regional Security' (Paper presented at the Australian and New Zealand Society for International Law Fifteenth Annual Conference, Canberra, 28–30 June 2007).

22 Senate Foreign Affairs, Defence and Trade Committee, *A Pacific Engaged: Australia's Relations with Papua New Guinea and the Island States of the Southwest Pacific* (2003) at 173.

23 Id at 176.

5. Why is Australia Concerned about the Pacific Region?

The Pacific has long been considered vital to Australia's security.²⁴ For Australia, the proximity of the troubled Pacific Island nations to its own shores means that it has a vested interest in helping to maintain security in the region and in becoming increasingly engaged.²⁵

The dangers of a weakened or collapsed State being used as a base by criminal or political groups which could pose a threat to Australia are significant, especially when those groups are able to hide behind the legal sovereignty of a local government dependant upon their goodwill.²⁶ In today's globalised world, a threat to one is a threat to all. The erosion of State capacity or the rule of law anywhere in the world weakens the protection of every State against threats such as transnational crime. Every State requires international cooperation to make it secure.²⁷ Thus the protection of vulnerable nations within our own region in particular is a major priority for Australia. It is imperative that Australia remains closely engaged concerning issues of governance, law and order and stability throughout the Pacific region.

Even if Australians are not directly involved as victims or offenders, crime in the Pacific can have significant implications for Australian interests. There are crimes that, although they occur abroad, reverberate strongly in Australia. To the extent that illegal trafficking in firearms overseas contributes to conflict and instability in our region, Australia's national security is at risk. Of no less significance is the potential for corruption to facilitate further criminal activity. The weakening of law enforcement or regulatory capabilities in one of Australia's near neighbours can greatly enhance the capacity of criminals to use that jurisdiction as a 'safe haven', a staging area for a variety of criminal or terrorist activities or as a trans-shipment point for contraband. What appears at first glance to be an internal matter in a nearby nation may ultimately have an impact on the streets of Australia.²⁸

The situation in the Pacific also directly impacts Australia's own ability to combat transnational crime. At an operational level, external operations have highlighted for the Australian Federal Police ('AFP') the difficulty of staging off-shore operations to combat transnational crime in Pacific Island Countries, where the regimes are weak and the law enforcement resources poorly developed. Not only are such activities costly in resource terms to Australia, but technical and legal difficulties are also evident. For example, extradition or mutual assistance can be difficult in situations in which the legal and technical frameworks in the external country concerned do not support the kinds of

24 Sean Kikkert, 'A South Pacific Police Force?' (2004) 8 *Journal of South Pacific Law*(2) at [4] <<http://www.paclii.org/journals/fjSPL/vol08no2/7.shtml>> accessed 7 January 2009.

25 Christopher Richter, 'Security Cooperation in the South Pacific: Building on the Biketawa' (2004) 8 *Journal of South Pacific Law* (2) at [10–11] <<http://www.paclii.org/journals/fjSPL/vol08no2/2.shtml>> accessed 7 January 2009.

26 Michael O'Connor, 'Australia and the Arc of Instability' (2006) 50 *Quadrant* 8 at 12.

27 Secretary-General's High-Level Panel on Threats, Challenges and Change, above n14 at 1.

28 See generally Peter Grabosky & John McFarlane, 'The Potential of Crime to Undermine Australia's National Security' (2007) 3 *Security Challenges* 131.

forensic demands made in Australia. Joint operations are also difficult where there is a substantial technological and training gap between Australian law enforcement agencies and police forces in the Pacific Island Countries. There can also be problems with maintaining confidentiality of operations in very small communities.²⁹ Capacity building in international crime cooperation can assist in overcoming these difficulties and has clear flow-on effects for Australia.

6. The Prevalence of Transnational Crime in the Pacific

The level and range of information on transnational crime in the Pacific Islands region are variable in terms of availability, quality and reliability.³⁰ This of course means the credibility of claims of major threats to the islands from transnational crime remains questionable. However, it can be said that transnational crime has had a steadily increasing impact on Pacific Island Countries over the last 25 years.

Transnational criminal activities are of increasing concern throughout the region.³¹ These activities include money laundering through tax havens established in a number of Pacific Island Countries (Nauru, Cook Islands and Vanuatu), drug trafficking through the region (especially through Palau, Fiji and PNG), a small trade in illegal weapons, and the (legal though dubious) sale of passports by some Pacific Island Countries as fundraising ventures.³² Of more recent concern has been the onset of illegal migration into the region (in particular from southern China to PNG, Solomon Islands and Fiji). An estimated 10,000 illegal immigrants, mostly from China, were reckoned to have entered PNG in the past two or three years.³³ The appearance of criminal syndicates from East Asia and the accompanying pursuits of gambling, prostitution and drug trading in some Pacific capitals are also exercising regional police forces and agencies.³⁴ However, it should be noted at the outset that the transnational criminal activity that has manifested itself in the region has largely been directed at supplying markets elsewhere, and has been planned and financed from elsewhere.

The following examples provide an indication of the extent of transnational crime in the Pacific. In October 2000, 350 kilograms of heroin intended to supply the Australian, North American and Canadian markets were seized in Fiji. In the same year an Asian crime syndicate attempted to transfer a massive 1.2 tonnes of amphetamine precursors to another unknown destination. In 2001, 90 kilograms of cocaine which transited the Pacific by way of a small pleasure craft from South America were seized and in Tonga 100 kilograms of cocaine were seized.

29 Mick Keelty, 'Transnational Crime, Police Peace Operations and Asia-Pacific Security' (2001) 70 *Platypus Magazine* 16 at 19.

30 See generally McCusker, above n19.

31 David Hegarty, 'Intervention, Regionalism, Engagement: New Forms of Security Management in the South Pacific?' (Paper presented at the 18th Asia Pacific Roundtable, Institute of Strategic and International Studies, Malaysia, 30 May to 2 June 2004) at 4.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

In April 2003, the Secretary-General of the Pacific Islands Forum revealed a ‘frightening increase in the movement of small arms in the Pacific’, which he saw as the cause of ‘destabilisation’ in some countries and areas in the region.³⁵ The trend for some Pacific governments to seek alternative sources of revenue through questionable activities, such as the sale of passports, flags of convenience and money laundering, is also potentially quite destabilising.³⁶

Although on a global scale these transnational criminal activities may not be significant, in small Pacific States the problem is magnified because of their lack of infrastructure and of monitoring and enforcement capabilities to effectively manage these issues.³⁷ The threat of transnational crime has also been exacerbated by both the region’s porous borders and the inability of governments to control them, as well as the susceptibility of these economically weakened States to well-funded criminal or terrorist organisations.³⁸ At a more basic level law enforcement agencies in the region lack the necessary infrastructure, equipment, resources and legal framework with which they could successfully counteract transnational crime.³⁹ Law enforcement agencies in various Pacific Island Countries have been unable to prevent breakdowns in law and order and in some cases have been entirely ineffective in dealing with the public disorder which impacts politically, socially and economically on their communities. This has allowed transnational crime to gain a stronger foothold within the Pacific Islands. Regional power politics and perceptions complicate the process, and risk weakening links and networks in the area of legal cooperation.⁴⁰

7. Forum Efforts to Combat Transnational Crime

The Forum was founded in August 1971 in response to specific political and economic concerns among leaders of the newly independent Pacific Island States. Regional cooperation to combat transnational crime has been a focus of the Forum since at least 1992. The Forum’s efforts in this regard have been met with mixed results. There has been a real increase in regional cooperation between law enforcement agencies in particular, but the enactment and use of comprehensive, harmonised and up-to-date legal frameworks on international crime remain an ongoing challenge.⁴¹

The Forum’s first response to the threat of transnational crime and perceptions of the growth of transnational economic and drug offences in the region was to adopt the *1992 Honiara Declaration on Law Enforcement Cooperation* (*‘Honiara Declaration’*),⁴² which provides for regional cooperation in the suppression of transnational crime in the Pacific

35 Senate Foreign Affairs, Defence and Trade Committee, above n22 at 177.

36 Ibid.

37 Ibid.

38 Richter, above n25 at 2.

39 John Broome, ‘Transnational Crime in the Twenty-First Century’ (Paper presented at the Transnational Crime Conference, Canberra, 9–10 March 2000).

40 See generally Wilson, above n21.

41 Shennia Spillane, ‘Possibilities and Pitfalls: Regionalising Criminal Law in the Pacific Islands Forum’ (Paper presented at the Regionalising International Criminal Law Conference, Wellington, 18–20 August 2006).

and remains to this day the key framework for the Forum's engagement in transnational criminal law matters. The declaration identified priorities and established a framework within which to pursue further cooperation.⁴³ 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.⁴⁴

Forum leaders set out the rationale for the declaration in its opening paragraphs:

An adverse law enforcement environment could threaten the sovereignty, security and economic integrity of Forum members and jeopardise economic and social development. The threats to the stability of the region are complex and sophisticated, and the potential impact of transnational crime is a matter of increasing concern to regional states and enforcement agencies. The Forum agreed that there is a need for a more comprehensive, integrated and collaborative approach to counter these threats.⁴⁵

In 2001, the Forum recognised that the potential threat of transnational crime in the Pacific had been realised. It stated that there was 'clear evidence of serious transnational crime moving into the region and posing serious threats to the sovereignty, security and economic integrity of [F]orum members'.⁴⁶ The Forum indicated that these threats included money laundering, terrorist recruitment, identity fraud, West African fraud, people smuggling, the issuance of passports of convenience, electronic crimes, small arms trafficking and organised crime.

The *2002 Nasonini Declaration on Regional Cooperation* ('*Nasonini Declaration*')⁴⁷ was issued by leaders in response to the international security environment following the events of September 2001. It draws upon the *Honiara Declaration* and updates it to address potential terrorist activities in the region. It also refers to the United Nations Security Council Resolution 1373 (2001)⁴⁸ on the financing of international terrorism and the eight special recommendations of the Financial Action Task Force on money laundering.⁴⁹

42 *Honiara Declaration on Law Enforcement Cooperation* ('*Honiara Declaration*'), Twenty-Third Pacific Islands Forum, Honiara, Solomon Islands, 8–9 July 1992 <www.cbsi.com.sb/fileadmin/PDF/SIFIU/Honiara-Declaration.pdf> accessed 17 December 2008.

43 Neil Boister, 'New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific' (2005) 9 *Journal of South Pacific Law* (2) at [3] <<http://www.paclii.org/journals/fjspl/vol09no2/1.shtml>> accessed 7 January 2009.

44 Spillane, above n41.

45 Above n42.

46 *Ibid.*

47 *Nasonini Declaration on Regional Cooperation* ('*Nasonini Declaration*'), Thirty-Third Pacific Islands Forum, Suva, Fiji Islands, 15–17 August 2002 <www.forumsec.org.fj/_resources/article/files/Nasonini%20Declaration%20on%20Regional%20Security.pdf> accessed 17 December 2008.

48 SC Res 1373, UN SCOR (4385th mtg), UN Doc S/Res/1373 (2001).

49 Senate Foreign Affairs, Defence and Trade Committee, above n22 at 191.

The Forum's 'Pacific Plan', adopted in 2005, challenges member governments to consider the prospects of moving beyond regional cooperation towards greater regional integration in a range of priority areas, including regional security.⁵⁰ In essence, the plan recognises that small size and isolation pose particular challenges to Forum Island Countries, and aims to identify where the region can gain the most by sharing resources, adopting joint or harmonised governance measures and aligning policies.⁵¹

8. Evaluation of Forum Efforts to Combat Transnational Crime

The *Honiara Declaration* was a major achievement for the Pacific in the fight to combat transnational crime. However, its implementation has been and remains a source of concern to the Forum. In the early years Forum leaders commended progress in the implementation by members of their *Honiara Declaration* commitments; however by 1996 they were recognising the need to examine ways to take forward the objectives of the *Honiara Declaration* more effectively. Leaders expressed their concern over the lack of progress in implementing the *Honiara Declaration* in 1997, 1998 and 2001. They set deadlines of first 2000 and then 2003 for all members to have enacted the legislative priorities of the declaration but neither target was achieved.⁵²

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 countries' 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.⁵³ 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 of Border Management Issues.⁵⁴ These mechanisms reduce duplication and maximise the effectiveness of legal and law enforcement assistance in the region by enabling the Secretariat to act as a hub for coordination of activities among the regional specialised law enforcement agencies (police, immigration and customs) and among external partners, and between these groups.⁵⁵ Several pieces of model legislation have been produced and training and assistance of numerous types have been provided to officials of member governments with Forum support.⁵⁶

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 Declaration* and *Nasonini Declaration*. 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 also

50 Spillane, above n41.

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

to use regional models to harmonise legislation between jurisdictions, and in that way, make legal cooperation between Pacific Island Countries 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, transnational organised crime, terrorism, weapons, drugs and sexual offences.⁵⁷

Although technical assistance has been given particularly in the drawing up and adaptation of model legislation to local conditions, Pacific Island Countries face a general problem of law reform. Enactment of the Forum-produced model legislation by member countries has been disappointing notwithstanding that in-country drafting and implementation assistance is offered by the Secretariat and others.⁵⁸ Poor coordination and communication between officials, high implementation costs and low law enforcement capacity compound the problems of implementation.⁵⁹ Even if enacted and applied, no provision has been made for actually monitoring the effectiveness of this legislation in the suppression of transnational crime.

Another aspect on the limits on law is that implementation capacity has to be built alongside legal frameworks. 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. This involves making sure the frameworks are appropriate and realistic in the first place, and then ensuring that the training, resources and public awareness to make them work are all part of the strategy. A good law needs to be a key part of this process, but cannot be the only part, nor will it always be the first step.⁶⁰

9. Evaluation of Other Efforts to Combat Transnational Crime

Aside from the work done by the Pacific Islands Forum, there have for many years been hundreds of thousands of dollars invested into law enforcement training and development activity in the Pacific by other donors. However, there has been little relative improvement in the outcomes or procedures of law enforcement nor its effectiveness. This failure to translate training outputs and investment into improved and more efficient law enforcement practices can be seen as a result of the under-appreciation of localised factors impacting on law enforcement (most significantly the culture of those leading and working in law enforcement agencies, and chronic under-resourcing creating an inability within agencies to support and maintain procedures, skills and systems suggested by training projects), and a lack of coordination by donors, aid agencies and training providers.⁶¹

57 Ibid.

58 Ibid.

59 Boister, above n43 at [6].

60 Spillane, above n41.

61 Pacific Islands Forum, *Pacific Plan: Law Enforcement*, accessible from <http://www.pacificplan.org/> at 278.

The last five years have seen the implementation of several key multinational coordinated law enforcement activities and developments which focus on international crime cooperation and have more effectively challenged crime and lawlessness in the Pacific on a number of levels. These developments have indicated a greater determination and stronger links and relationships between regional and international law enforcement agencies, and an ability and willingness amongst law enforcement agencies to unite and confront the challenges posed by transnational crime.⁶² However, the struggle to combat transnational crime is onerous; it requires sustained political will and bureaucratic commitment. The fight against transnational crime in the Pacific is hampered by continuing instability and a low level of law enforcement capacity across the region.⁶³

Development of a regional response to transnational crime has not arisen from strong evidence of actual damage caused to Forum Island Countries 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 Forum Island Countries.⁶⁴ The regional agenda is also driven by imperatives to comply with onerous international obligations which Forum Island Countries had little or no active role in creating.

One of the difficulties is the problem of 'disconnect' between declarations of regional priorities, and the priorities identified and acted upon at the national level.⁶⁵ A crucial element of considering more ambitious regional activity on international criminal law is to be sensitive to the very large number of demands which inundate the often tiny governments of Forum Island Countries on a daily basis. Transnational crime is an issue for the Pacific, but it is not the only issue, nor is it the most pressing one. 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.⁶⁶ In this context it is understandable that issues like fishing rights, climate change, health and education take a higher place in the minds of under resourced ministers and bureaucrats than transnational crimes, which do not have apparent ill effects on their own people. In fact, some of these crimes even bring in benefits to local economies (such as tax havens and passport sales).⁶⁷

Mechanisms to suppress transnational crime must show respect and sensitivity to the limited resources and relative priorities facing the Pacific Island Countries. In addition, attempts to put in place new laws and institutions to address threats such as terrorism

62 Id at 277.

63 Senate Foreign Affairs, Defence and Trade Committee, above n22 at 194.

64 Neil Boister, 'Regional Cooperation in the Suppression of Transnational Crime in the South Pacific: Threat Assessment by the Pacific Forum' (Paper presented at the Australian and New Zealand Society for International Law Twelfth Annual Conference, Canberra, 18–21 July 2004).

65 Spillane, above n41

66 Ibid.

67 Ibid.

may be more successful if linked with appropriate actions to address security problems posing more direct threats to the Pacific Island Countries.⁶⁸ It should also be noted that the fourteen Forum Island Countries are not homogenous in their legal systems, their priorities and capacities or in the major threats facing them.⁶⁹ Therefore, it may be more appropriate to take an issue-by-issue approach rather than to tackle the regional integration of transnational criminal law enforcement capabilities comprehensively or all at once. This would logically start in areas where there is evidence of real danger or damage to island communities themselves, and this also may differ from country to country. Once regional laws and mechanisms are seen to be feasible and beneficial in such areas, others may follow.⁷⁰

10. International Crime Cooperation as the Most Effective Means of Combating Transnational Crime

One of the major difficulties involved with transnational crime is the gap between the reach of predominantly State-based law enforcement agencies and the global reach of transnational crime groups.⁷¹ The simple fact is that, nowadays, crime knows no borders while police forces have to recognise their territorial limitations.⁷² In most circumstances, the capacity of a State to intervene operationally against transnational crime is limited to its own jurisdiction. Nevertheless, there are a number of strategies that can be employed at the national and regional levels to deal with this threat.

International crime cooperation is the most effective means by which to overcome the obstacles presented by these territorial limitations. The basic investigative tools apply transnationally, as they do nationally, but the emphasis is on sound liaison relationships, good information and intelligence exchanges, a sound understanding of the law enforcement systems in place in other jurisdictions, a preparedness to consider mutual support and/or joint operational approaches and professional trust.⁷³

In operational terms there are three main tools that make up international crime cooperation, namely, police-to-police assistance, mutual legal assistance and extradition. Police-to-police assistance is informal cooperation that is provided by one country's police force to the police force of another country. Examples of police-to-police assistance include providing general intelligence, operational briefings and information obtained from voluntary interviews. Mutual assistance is the process countries use to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions. Mutual assistance is also used to recover the proceeds of crime. Extradition is the process by which one country sends a person to another country to face criminal charges or serve a sentence.

68 Ibid.

69 Ibid.

70 Ibid.

71 Hughes, above n13 at 10.

72 Robert Cornall, 'Australia's Response to Transnational Crime in the Region' (2005) 4 *Public Administration Today* 61 at 62.

73 John McFarlane, 'Transnational Crime, Corruption, Crony Capitalism and Nepotism in the Twenty-First Century' in Peter Larmour & Nick Wolanin (eds), *Corruption & Anti Corruption* (2001) at 142.

Police-to-police cooperation is the bedrock upon which the other forms of international crime cooperation are based. It is the least formal mechanism and as such offers the most immediate benefit to countries that may lack the formal legal frameworks required for other forms of international crime cooperation, such as extradition and mutual legal assistance.

Weak and vulnerable States, which do not have sufficient capacity themselves, are able to combat transnational crime more effectively through international crime cooperation. International crime cooperation can also provide countries with the resources necessary to initiate transnational crime programs and to develop the necessary political will and mechanisms. International crime cooperation can be bilateral in the form of assistance by international organisations or multilateral in the form of regional cooperation among neighbouring countries.⁷⁴

International crime cooperation also allows operational links and collaboration to extend beyond the Forum Island Countries, and provides them with access to external sources of information and intelligence. Combating transnational crime requires concerted action at all levels and international crime cooperation, complemented by collaborative ties at the regional and subregional levels, is therefore essential. This assistance will be all the more effective if it is given with a full understanding of broader security concerns, including a weakened rule of law, and addresses specific local concerns side by side with international priorities.

II. Case Study: Australian Federal Police Law Enforcement Cooperation Program

The AFP provides a range of functions including operation training and logistics support to bolster the capability of overseas policing counterparts. It also works to enhance coordination of intelligence and information exchange with law enforcement partners. The AFP through its Law Enforcement Cooperation Program has established the Pacific Transnational Crime Network ('PTCN') to combat transnational crime in the Pacific region.⁷⁵

Since 2002, Transnational Crime Units ('TCUs') have been established in Fiji, Samoa, Tonga, Vanuatu, PNG and the Federated States of Micronesia. The TCUs were established in partnership and with the support and agreement of the governments, police commissioners and other key law enforcement agencies of participating countries. The initiative was also supported by the Pacific Islands Chiefs of Police. The TCUs provide a proactive transnational crime intelligence and investigations capacity in each of the participating countries. Dedicated teams of police, customs, and other law enforcement and border protection agencies from the host country work closely to

74 Asian Development Bank & Organisation for Economic Cooperation and Development, *Progress in the Fight Against Corruption in Asia and the Pacific: Papers Presented at the Joint ADB-OECD Conference on Combating Corruption in the Asia-Pacific Region: Seoul, Korea, 11-13 December 2000* (2001) at 243.

75 Australian Federal Police, <www.afp.gov.au/international/liaison/LECP/achievements> accessed 6 December 2008.

proactively develop intelligence and initiate investigations into transnational crime threats.⁷⁶

The primary functions of the TCUs include collection, collation, analysis and dissemination of tactical intelligence, target development, management of issue-specific investigations and establishment of in-country networks in support of their activities. Each TCU has a secure database, secure email system for communications across the network and with all other Pacific Island Countries and each team maintains a surveillance and intelligence capability.⁷⁷

The AFP has developed extensive training development programs which run parallel to the TCU program, and have included intelligence, surveillance, operational security and attendance of TCU members on the National Strategic Intelligence Course, Major Investigations Management Workshops, Online Child Sex Exploitation Team training and drug investigations programs. Importantly, the TCU network and the AFP have been able to utilise key relationships with the Drug Enforcement Administration, the Pacific Islands Forum and Interpol to enhance training and capacity development opportunities.⁷⁸

Following the establishment of the TCUs in each country as operational teams, there was the need for a place or centre to instigate the role of coordinating the individual efforts of the TCUs and to coordinate the transnational criminal intelligence that has become available for the benefit not only of the individual countries, but for the benefit of the Pacific region as a whole. In May 2004 the Pacific Transnational Crime Coordination Centre ('PTCCC') was established in Fiji. The PTCCC moved to Apia, Samoa in 2008, after the December 2006 military coup in Fiji led to deterioration in regional relations.

The 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 twenty law and border enforcement officers from Pacific Island Countries, with a high number of this group being drawn from countries that do not have a TCU resident. The PTCCC provides a gateway into the network for other law enforcement agencies by acting as a regional one-stop-shop for all law enforcement enquiries. It also coordinates the flow of information between the TCUs and foreign law enforcement agencies. Its major functions are to coordinate the collection, collation and dissemination of intelligence throughout the Pacific region from Pacific law enforcement agencies and to provide intelligence support to other law enforcement agencies.⁷⁹

The role of the PTCCC is to:

- Coordinate the collection, collation, analysis and dissemination of tactical and strategic law enforcement intelligence;
- Identify and develop target opportunities in the Pacific region;

⁷⁶ See generally 'A New Network in the Pacific' (2005) *Platypus Magazine* (December) 5.

⁷⁷ *Ibid.*

⁷⁸ *Id.* at 6.

⁷⁹ *Ibid.*

- Build the capacity of law enforcement officers of the Pacific; and
- Engage regional and international law enforcement agencies.⁸⁰

The primary functions of the PTCCC are varied, but include:

- Coordinating the collection, collation, analysis and dissemination of tactical and strategic law enforcement intelligence throughout the Pacific region from and to law enforcement agencies;
 - Producing of regular intelligence product on TCUs in the region
 - Disseminating of relevant intelligence product obtained from partner agencies
- Identifying target opportunities in the Pacific region based on analysis of contributed intelligence from TCUs and other law enforcement agencies;
- Providing intelligence support to other law enforcement agencies in the Pacific region;
- Providing a management ‘decision making’ support mechanism and high quality intelligence briefing documents for transnational crime investigations;
- Brokering collaboration with key law enforcement partners in the Pacific region including the South Pacific Chiefs of Police Conference, other police agencies, law enforcement agencies, Interpol and multilateral bodies (Oceania Customs Organisation, Pacific Immigration Directors’ Conference, Pacific Islands Forum);
- Providing capacity building and professional development for participating law enforcement agencies;
- Undertaking intelligence development of transnational crime matters; and
- Providing after-hours response capacity to assist with urgent critical law enforcement transnational crime enquiries.⁸¹

The PTCCC is the gateway of the PTCN and is available to facilitate and assist regional and international law enforcement agencies in terms of timely sharing of intelligence. The PTCCC provides regular intelligence bulletins based on information obtained from all law enforcement agencies in the Pacific region. The exchange of intelligence in the Pacific region relies on all partners contributing intelligence. The PTCCC is actively engaging with regional law enforcement agencies to collect, analyse and disseminate timely and accurate intelligence product back to Pacific Island Countries.⁸² Only a few countries within the region have access to Interpol as most do not have the financial resources to secure access. However, with the establishment of the PTCN it is now possible for all the countries in the region to share intelligence through an established secure network — the South Pacific Law Enforcement Network (also known as SPLEXNET). This network now covers all the countries in the region as well as Australia and New Zealand. Timely sharing of information is vital to countering the emerging threat of transnational crime in the region.

80 Oceania Customs Organisation, ‘Pacific Transnational Crime Coordination Centre (PTCCC)’, *The Quarterly News*, 18 September 2004 at 3.

81 Ibid.

82 Ibid.

Another vital role taken on by the PTCCC is acting as the gateway for the PTCN where it engages and establishes links with both regional and international law enforcement agencies. Links to other law enforcement agencies around the world are further enhanced by the presence of Interpol within the PTCCC and access to the AFP International Network in 27 countries across the world. These links provide the TCU network and Pacific Island Countries with the unique ability to access law enforcement information and have enquiries undertaken on their behalf in a practical and simplified manner.⁸³ The PTCCC has made a great impact on enhancing communication between law enforcement agencies in the whole Pacific region — something which was non-existent in the past.

The PTCCC also takes on the role of building the capacity of Pacific law enforcement. It is a multi-agency team drawn from law enforcement agencies of Pacific Island Countries. These law enforcement officers have been put through appropriate training and they possess broad law enforcement experience and sound law enforcement intelligence skills and knowledge. The centre also provides capacity building and professional development for law enforcement agencies in the Pacific region and the opportunity for law enforcement officers from each of the Pacific Island Countries to undertake short- and long-term attachments to work in the centre. In line with its core functions, the PTCCC is staffed by Pacific law enforcement agencies.⁸⁴

The AFP has also established the position of a Law Enforcement Training Coordination Officer in the Pacific Islands Forum Secretariat in Fiji to:

- Coordinate law enforcement training throughout the region;
- Introduce a law enforcement training package that is certified and accredited by key stakeholders such as the University of the South Pacific and is of particular relevance to the Pacific region; and
- Raise the training capacity within the region by the qualification of Pacific law enforcement training personnel.⁸⁵

One of the major achievements of the PTCN was the investigation by the Fiji TCU that led to the seizure on 9 June 2004 of precursor chemicals that had the potential to produce up to 1000 kilograms of crystal methamphetamines. Apart from local investigations, this operation involved the exchange of intelligence with the Royal Malaysian Police, AFP, New Zealand Police and Hong Kong Police and resulted in arrests in Fiji, Malaysia, Hong Kong and Australia.⁸⁶

Other significant achievements include arrests and seizures related to illegal fishing, drug trafficking, arms smuggling, fraud and dealing in false passports, recommendation to government on legislative changes, the recovery of significant unpaid duties after seizures of undeclared goods and the deportation of figures involved in criminal activities in Fiji, PNG and Vanuatu.⁸⁷ These successes provide tangible achievements which develop political will for further international crime cooperation mechanisms.

83 See generally above n76.

84 *Ibid.*

85 See n75

86 Oceanic Customs Organisation, above n80 at 4.

87 Above n76 at 7.

However, the most important outcome of the PTCN with the PTCCC has been the increase in regional law enforcement capacity and the collaboration and sharing of information which is occurring at a regional level.⁸⁸ This increase in capacity in what is ostensibly police-to-police assistance has also developed interest in and the capacity for more formal mechanisms of international crime cooperation including mutual legal assistance and extradition.

12. How International Crime Cooperation Strengthens the Rule of Law

Transnational crime in itself can make it difficult for a country to strengthen its rule of law. However, measures to deal with transnational crime, in particular international crime cooperation initiatives, can greatly strengthen the rule of law in weakened States.

Whilst the threats to the stability of Pacific Island Countries are complex and sophisticated, reducing the destabilising impact of the threat of transnational crime allows the State to focus on other domestic issues. This allows the State greater capacity to exercise its sovereign responsibility and strengthen the rule of law. By taking steps to combat transnational crime through international crime cooperation, a State is able to increase its law enforcement capacity and develop the tools and resources to deal more effectively with other domestic threats including corruption, domestic crime and general lawlessness.

This is clearly demonstrated by the positive impact of the PTCN. At the most basic level the work of the PTCN in investigating the extent of transnational crime in the region has allowed the Pacific Island Countries to make a more informed assessment of the impact of transnational crime in their country and the priority to be given to international crime cooperation measures. It has also developed the capacity of the Pacific Island governments to more effectively combat transnational crime and provided the means to develop international and regional relationships to strengthen international crime cooperation measures. The PTCN works because it is directed to the priorities of each individual country, is staffed by officers from the region and works at the operational level without the need for formal legal frameworks, which can be costly and resource intensive for small Pacific Island Countries. Police-to-police assistance, as demonstrated in the case study of the PTCN, is the bedrock upon which the more formal frameworks for international crime cooperation can be built and is an important step in developing the political will for such frameworks.

International crime cooperation allows the Pacific Island Countries to engage more directly in the international community. They are able to work with other countries and see firsthand the direct benefits of a strong rule of law, for example, more efficient government administration, and greater accountability and transparency, which again increases demand for a strengthened rule of law. It also becomes apparent that the Pacific Island Countries may have greater access to international crime cooperation if the rule of law were strengthened. Many countries will not provide international crime

88 Spillane, above n41.

cooperation where there are concerns that the criminal justice system of the other country does not guarantee procedural fairness, its legal and technical framework does not support forensic demands, or that its prison conditions do not meet certain human rights standards. This again creates strong internal demand for measures to promote good governance and a strong rule of law.

States in the Pacific are already expressing demand for and an interest in international crime cooperation. They recognise the prevalence of transnational crime in the Pacific region and the threat that it poses to their societies. The Pacific Island Countries want to work as part of the wider international community to combat this universal threat, and so there is a strong demand for initiatives that enable Pacific Island Countries to develop their capacity for international crime cooperation. Aid generally, and capacity building in particular, work best where there is internal demand for such assistance and a recognition of the issues on a domestic level. This demand indicates that international crime cooperation initiatives are likely to be successful in the region. These initiatives and their outcomes can then create demand and political will for broader measures to strengthen the rule of law, which will in turn increase the effectiveness of such programs and have a beneficial impact on the rule of law.

The process to strengthen the rule of law is a long and ongoing process which offers few concrete achievements or milestones in the short-term. International crime cooperation on the other hand often produces tangible results both in the short-term and the long-term, for example, the seizure of drugs and proceeds of crime. Events such as these are widely reported and have a major impact on maintaining the political will and motivation for longer term measures to strengthen the rule of law.

Conclusion

The rule of law is an abstract concept and measures to strengthen the rule of law can often be aspirational and too broad to have any concrete impact. The specific problems faced by countries with a weak rule of law must be looked at and dealt with individually. Measures developed to deal with a specific issue will be more effective than those with a broad focus. The success of these measures will have flow-on effects which further strengthen the rule of law. This is demonstrated in the case of efforts to combat transnational crime in the Pacific through international crime cooperation.

International crime cooperation is the most effective means of combating transnational crime, in particular programs such as the PTCN which feed directly into the needs of Pacific Island Countries and operate without the need for formal legal frameworks. These programs provide an accurate assessment of the impact of transnational crime in the Pacific region and encourage the use of international crime cooperation mechanisms to combat transnational crime. Any reduction in transnational crime in the Pacific will have a direct impact on the rule of law; moreover, international crime cooperation has flow-on effects that develop political will and demand for other measures to further strengthen the rule of law.