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ONE SOUTH PACIFIC. ONE REGIONAL COURT. THREE CASE STUDIES

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I INTRODUCTION

A Pacific court encompassing original and appellate jurisdiction as well as competence for alternative dispute resolution (ADR) is a natural and necessary outcome of current regional planning.

The foundation for this initiative was laid 40 years ago.[1] The need for one Pacific court has grown since then alongside the process of self-determination of a united Pacific, best expressed by the Pacific Islands Forum (Forum) in its various policy declarations.

The small size of Pacific populations makes the Pacific region particularly exposed to external threats, whether those are problems associated with globalisation, security or sweeping economic changes.[2] At the same time, the demands on the Forum's member states to keep up with international obligations are outstripping the capacities of many inherited colonial systems of law and justice.

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1 It was in 1966 that the then Chief Justice of the High Court of the Western Pacific, Sir Jocelyn Bodilly, proposed the creation of a common supreme and appeal court for all the British islands of the Pacific. See Mere Pulea "A Regional Court of Appeal for the Pacific" (1980) 9(2) Pacific Perspectives 1.

2 Richard Dictus, United Nations Resident Coordinator "Opening Ceremony Remarks" (Asia Pacific Forum of National Human Rights Institutions, Suva, 31 July 2006).

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

This paper suggests that, until we embrace some common framework and mechanism of law and justice in the Pacific, the region will remain vulnerable to these external threats, in particular transnational crime.[3] We have reached a pivotal point in this debate and must now act quickly to create one Pacific court.

Parts II, III and IV of this paper will look at three case studies that illustrate the threats, weaknesses and challenges confronting the region's legal systems.[4] Part V will then offer for consideration a common regional framework and mechanism of law and justice that will describe the immediate benefits of having one Pacific court.

II DRUGS: THE CASE OF STATE v YUEN YEI HA & ORS[5]

On 9 June 2004, a large drug enterprise was ended following a police operation targeting a group of persons associated with warehouse premises at Laucala Beach Estate near Suva, Fiji. When police officers entered the warehouse, they found enough chemicals to manufacture more than 800 kilograms of methyl amphetamine hydrochloride, the illicit drug otherwise known as "ice". Dr Anne Coxon, an expert forensic scientist employed by the Institute of Environmental Science and Research Limited in Auckland, New Zealand, and an authorised drugs analyst, examined the exhibits from the warehouses. In her opinion, the premises at Laucala Beach were an active laboratory in the manufacturing process of "ice". She found:[6]

- all the chemicals and equipment required for the manufacture of methyl amphetamine hydrochloride were present at the address;

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3 A more technical paper on the subject will be presented by the author to the Pacific Conference of Chief Justices in 2007.

4 The case studies are provided for academic purposes only and the comments are not for attribution.

5 *State v Yuen Yei Ha & Ors* [2005] FJHC 165; HAC 0012.2004 (27 July 2005).

6 This information, taken from Dr Ann Coxon's forensic report for the prosecution, formed part of the summary of facts for the sentencing.

- chemicals, reaction mixtures and mixtures from a number of different stages during the manufacture of methyl amphetamine were present, including a large quantity of ephedrine hydrochloride (475 kilograms) and powder that was mainly chloroephedrine hydrochloride (1238 kilograms); and,
- a quantity (2.8 kilograms) of methyl amphetamine hydrochloride "final product" had been manufactured.

It was conservatively estimated by specialist staff of the New Zealand Police that the chemicals found in this clandestine laboratory could generate 800 kilograms of "ice".

The scale of the operation is underscored by two facts: first, the gang was importing 40-foot container loads of precursor substances; secondly, the estimated street value of the manufactured drug was Fiji$1 billion.

A United Nations (UN) drug report on the danger of organised crime and drug manufacturing in the Pacific has observed:[7]

> The Pacific islands connect some of the world's largest drug producers with the largest drug markets in the world. It is a strategic, if not perilous, location with regard to the global illicit drug trade.

Police officers from Singapore, Hong Kong, New Zealand, Australia and Fiji were involved in the operation. The estimated cost was over Fiji$2 million. The extent of the region's trade or trans-shipment of drugs is illustrated by further seizures in Vanuatu and the Marshall Islands.[8]

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7 United Nations Office on Drugs and Crime Regional Centre for East Asia and the Pacific (UNODC) *Regional Profile on Drugs and Crime in the Pacific Islands* (Internal Document 3/2004, UNODC, Bangkok, 2003) 9 [Regional Profile on Drugs and Crime in the Pacific Islands], available at <http://www.unodc.un.or.th/material/document/2004/Regional%20Profile%20Pacific%20Island.pdf> (last accessed 10 December 2006).

8 Regional Profile on Drugs and Crime in the Pacific Islands, above n 7, 12.

The conduct of large-scale transnational police operations is a complex process that relies heavily on the capacity and integrity of regional law and justice systems. The Pacific region lacks any regional mechanism to provide legal oversight for any suspected regional crime. Each country involved assumes jurisdiction regarding each procedural part of the operation that passes across its borders. Multiple jurisdictions of varying capacities cannot adequately provide for the lawful investigation, interdiction and pursuit of suspects involved in regional crime or the associated evidence of their criminal activity.

The termination of such a large operation is always a difficult decision. The country of termination assumes national jurisdiction and then only for the crimes committed within its borders. At a time when most other nations had a maximum sentence of life imprisonment for this type of offending, the maximum available penalty in Fiji then for the manufacture of "ice" was a sentence of eight-year imprisonment. That has now dramatically changed, however, to life imprisonment. The case does illustrate that the sentencing imperatives of denunciation and deterrence become irrelevant when the available punishment does not really fit the significance of the crime.

National capacity-building and harmonisation of law between individual states, using a patchwork approach, does not offer a complete and integrated regional solution to these difficult problems. In the absence of a regional framework and mechanism of law and justice, these efforts cannot really achieve the desired effect of deterring transnational crime across the region. The patchwork approach assumes that similar capacities and standards of criminal procedure will apply to the transplanted law. That is too big an assumption to make in countries with few resources and which

struggle to mobilize a police force[9] or provide recording and transcription services to their courts.[10]

How much more effective would it be if one judge from one regional court operating from one registry could have managed this case from the outset? What better regional deterrence would there have been if these borderless criminals were interdicted for the regional crime of drug manufacture? How much more effective could the sentence have been if it were delivered, not just on behalf of one nation, but the entire region, for a regional crime with an agreed regional penalty?

III FISH: THE CASE OF STATE v HUNG KUO HUI AND WAIKAVA MARINE INDUSTRIES LIMITED[11]

Waikava Marine Industries Limited was the charterer of a Taiwan-owned, Belize-registered, fishing vessel, the Lian Chi Sheng (Lian). During the months of March, April and May 2004, without a licence or ministerial approval, the Lian fished illegally inside Fiji's archipelagic waters and territorial sea.

In the same vein as other states that have ratified the UN Convention on the Law of the Sea, Fiji extends its sovereignty beyond its land territory and internal waterways over its archipelagic waters and territorial sea[12] and may exercise sovereign rights through to the outer border of its exclusive economic zone (EEZ).[13]

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9 Comments of Fiji Commissioner of Police Andrew Hughes in untitled address to National Rotary meeting (Suva, July 2006).

10 At the time of writing, Fiji still requires its judges and magistrates to write down the evidence and submissions made in any trial.

11 *State v Hung Kuo Hui & Waikava Marine Industries Limited* (24 February 2006) HC Suva HAC 0040.2004 Winter J.

12 United Nations Convention on the Law of the Sea (UNCLOS) (10 December 1982) 1833 UNTS 3, art 2(1).

13 UNCLOS, above n 12, art 56(1).

In 2003, the ship and her charterers held an offshore licence to fish inside Fiji's territorial sea. In December of that year, when the licence expired, it could not be renewed and the ship was only permitted to fish in Fiji's EEZ. However, the ship put to sea, in defiance of her permit, and almost exclusively fished in Fiji's archipelagic waters during March, April and May 2004.

Fiji's fisheries resources are precious. In an effort to manage the resource wisely, Fiji has joined other Pacific nations in the Forum Fisheries Agency (FFA).[14] Treaty arrangements require foreign ships using Fiji's waters for harvesting fish to carry onboard an automatic location communicator (ALC). The ALC reports on ship activity via satellite through a vessel monitoring system (VMS) to various national stations. The VMS operator in Fiji was able to ascertain that the Lian had been fishing illegally. In April 2004, the charterer, Waikava, was twice warned about these infringements. The charterer and the ship appear to have ignored the warnings.

A series of charts were produced in court that plotted the progress of the ship. The last chart dramatically shows her track as she slowly sailed around Fijian waters long lining at will between March and May 2004. Such was the concern of Fiji's fisheries protection officers that the Fijian warship Kikau was dispatched to intercept the Lian.

Once located by the warship Kikau in territorial waters, the Lian would not respond to visual or radio signals and tried "to make a run for it". She steamed off trailing her long lines behind her. It was not until the warship went to action stations and manned her 50mm cannon that the Lian surrendered and was boarded. Photographs were taken by the fisheries protection officers. Fresh shark fins were found neatly stacked in a freezer and frozen shark fins were stacked in another space. The Lian was supposed to be hunting tuna. It appears that, not only was she illegally fishing inside territorial waters, but she was also targeting the more lucrative shark for the valuable fins.

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14 For an overview of the activities of the Forum Fisheries Agency (FFA), see its website <http://www.ffa.int/> (last accessed 16 October 2006).

Pacific island states can only protect their most valuable marine resources from the considerable threats of exploitation by sending consistent and clear messages to owners, charterers, skippers and crew that conduct of this type will not be tolerated, that penalties will be severe and that forfeiture of seized ships is inevitable. We are long past free-range harvesting of the sea by fish pirates. The resource being protected is of great significance and value. Therefore, a sense of proportion dictates a high level of penalty and the inevitability of forfeiture.

After fishing in Fiji throughout March and April 2004, the Lian discharged a cargo of fish in Vanuatu. Its value is unknown. However, one witness, a Vanuatu maritime policeman, reported the fish holds were full of shark, mahi-mahi, barracuda, marlin, tuna and tuna-like species. The charter arrangement was for such valuable cargo to be sold in Fiji so the nation may gain same benefit from the use of its natural fish resources. Fiji saw none of this money. Fiji was unable to prosecute for, or seize, the cargo. This time, the pirates got away with their unlawful fishing and the money from the catch undoubtedly ended up in the owners' accounts.

It is clear that fish is a precious and valuable Pacific resource. The need to provide the best protection and management of fish stocks not only relates to catch earnings. Many Pacific islanders rely on locally caught fish as part of a staple diet. For these reasons, any threat to the integrity of the resource must be treated seriously.

The detection and prosecution of "fish piracy" calls for specialised skills. The FFA has mastered those skills, but it lacks a regional mechanism to enforce the law. There are bound to be ongoing territorial and licensing disputes and prosecutions of foreign-registered vessels. So, why is it that one Pacific court, fish resource division, does not seamlessly preside over such matters? If that had been so in this case, there is no doubt that the value of the unlawful cargo offloaded in Vanuatu would have been returned to Fiji. In fact, this author has little doubt that the ship would have been seized while in Port Vila, and the entire prosecution swiftly brought to its conclusion.

IV BORDER CONTROL: A PACIFIC BRIEFING[15]

The management of risks at Pacific national borders is effected by a number of factors. First, the growth of globalised technology, trade and international travel creates new opportunities for the evasion of border controls. As long as immigration malpractice, including people-smuggling, continues to be a high-profit, relatively low-risk, enterprise, the level and sophistication of fraud and misrepresentation can be expected to grow.[16] Secondly, international terrorism and instability are becoming increasingly a Pacific reality as the capacities for Pacific border control are limited and the free movement of malcontents and their materials through the Pacific has become a soft option. Thirdly, economic, demographic and political pressures worldwide can be expected to result in a continued growth in the number of persons seeking to come and live in the Pacific or near neighbouring Australia and New Zealand, both by lawful and unlawful means.

Information taken from airline tickets used by people refused entry to Fiji has enabled immigration authorities to identify the routes used by people smugglers and other persons of interest. Nationals from the People's Republic of China (PRC) who travel to the Pacific region depart China, enter Hong Kong and either go to Korea (Incheon) or Japan (Narita), before flying to Fiji and onward to Vanuatu or to other Pacific islands. Indians may travel to Singapore or Hong Kong and again to Incheon or Narita before entering Fiji. The same route is used by Pakistanis, Sri Lankans and Malaysians.[17] The table below reveals

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15 The author is grateful to the Australian Immigration Compliance Team at Suva, Fiji, for this material.

16 Adam Graycar and Rebecca Tailby "People Smuggling: National Security Implications" (Australian Defence College, Canberra, 14 August 2000) 6, available at <http://www.aic.gov.au/conferences/other/graycar_adam/2000-08-smuggling.pdf> (last accessed 18 November 2006).

17 For recent examples, see *State v Sanjay Patel* HC Nadi Criminal Case No 1220/2005 S M Shah; *State v Jason Zhong* HC Nadi Criminal Case No 518/2001 S M Shah.

that the reasons for the bulk of entry refusals were the absence of onward or return tickets, the lack of visas and document irregularities. Only the larger groups have been selected, as a conservative example of the local experience. The total number of passengers refused entry for 2004 was 213.

Table 1. 2004

Nationality	Irregular documents	No visa	Forged passport	No onward or return tickets	Bona fides
PRC	2	11		2	
India	9			4	25
Korea			1		
Sri Lanka		2	1		
Bangladesh					3
Nigeria				3	6

In 2005, the total number of refused entries into Fiji was 229.

Table 2. 2005

Nationality	Irregular documents	No visa	Forged passport	No onward or return tickets	Bona fides
PRC	6	26	6	1	6
India	9		5	1	25
Nigeria	3		2	4	1
Ghana		1	1		9
Bangladesh	1				8
Pakistan		6			4

In addition to the information in the tables above, analysis reveals that the predominant methods used were sophisticated and included

photo-substitution of passports, use of fake Fiji wet stamp and false and stolen passports.

It is reported that for the same period, in addition to these border interdictions, 503 individuals had overstayed their visitor's permit and 220 others were given prohibited immigrant notices barring re-entry to Fiji for 12 months.[18] These border issues are not exclusive to Fiji. In Vanuatu, the evidence shows that the same routes are in use for people-smuggling. Following arrival in Vanuatu, these passengers exit the country on false passports with the intention of travelling to New Zealand, the United States and Canada. They regularly use electronically eligible documents to avoid examination of the passport prior to their entry. A recent increase in the numbers of these unlawful travellers has led to the Vanuatu government agreeing to the placement of an Australian border specialist at Port Vila's Bauerfield Airport. Recently, in Tonga, several Indian nationals with false Tongan passports were interdicted on arrival. Finally, in New Caledonia, a recent spate of Chinese nationals travelling on false Canadian passports has been detected by intelligence units both in Canada and Australia.

From a combination of intelligence, global trends and actual reports received by the Pacific Immigration Directors' Conference (PIDC) Secretariat, it is reported that, in 2003, the illegal immigrant population in the region was around 4500; in 2004, the estimated figure reached 9000; and, in 2005, numbers approximated 21,000.[19]

Pacific island states have widely varying border control capacities. The desire to have one Pacific court available to resolve immigration status disputes, particularly at appeal level, would offer the great

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18 See Sofia Shah "People Smuggling and Illegal Immigrants in Fiji" (2006) IX(1) The Legal Lali (Law Journal of the Office of the Attorney-General, Fiji) 49-53, available at <http://www.ag.gov.fj/default.aspx?page=legallali> (last accessed 18 November 2006).

19 See John Tanti, Australian Federal Police Law Enforcement Capacity Development Adviser "Presentation to Suva Police College" (Suva, no date, unpublished).

benefit of a consistent approach to these often complex cases. An experienced court would complement the capacity development and humanitarian jurisprudence that will continue to expand as the impact of people movement within the region increases.

V ONE PACIFIC COURT

A The Foundation

Regional cooperation in respect of law and justice has a long, but accidental, history in the Pacific region.[20] It began in the pre-independence period with the colonial joint administration of justice across broad areas of the Pacific. It was then followed in the post-independence period by regional "club" cooperation expressed in a number of quite separate ways. Examples include:

- judicial exchanges and meetings;
- the annual Pacific Islands Law Officers' Meeting (PILOM);
- the Pacific Judicial Development Programme (PJDP);
- the development of specialised regional law enforcement organisations;
- the adoption of declarations on regional policy; and,
- the Pacific Plan.[21]

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20 See Greg Urwin, Secretary-General, Pacific Islands Forum Secretariat "Keynote Address by Mr Greg Urwin, Secretary General Pacific Islands Forum Secretariat at the Pacific Islands Chiefs of Police Conference" (Pacific Islands Forum Secretariat, Suva, 12 September 2005); Greg Urwin, Secretary-General, Pacific Islands Forum Secretariat "Regional and Global Cooperation on Law and Justice" (2004 Attorney General's Conference, Warwick Hotel, Korolevu, 3-4 December 2004) paras 2-4 [Regional and Global Cooperation].

21 Forum Secretariat "The Pacific Plan for Strengthening Regional Cooperation and Integration" (Pacific Islands Forum, Suva, 2005), reproduced in Pacific Islands Forum "Kalibobo Roadmap on the Pacific Plan" (Annex A to the Thirty-Sixth Pacific Islands Forum Communiqué PIFS(05)12, Madang, Papua New Guinea, 25-27 October 2005) [Pacific Plan], available at <http://www.forumsec.org> (last accessed 17 November 2006).

The Pacific Conference of Chief Justices (PCCJ) has met annually for the last 40 years. The connection between these leaders in the law is strong, their collective influence far-reaching and their impact on Pacific jurisprudence during that time remarkable. As jurists, their collective wisdom is seldom the subject of fanfare, but is both noticed and respected.

PILOM has, of course, played a very considerable role in developing regional cooperation in the law and justice sector, for example, with the adoption of the 1992 Honiara Declaration on Law Enforcement Cooperation (Honiara Declaration),[22] which PILOM had a major role in drafting. The continuing training and exchanges under this scheme and the PJDP are supporting existing judicial and legal networks that greatly enrich and harmonise our unique law of the Pacific.

The Honiara Declaration, along with the 2000 "Biketawa" Declaration and the 1997 Aitutaki Declaration,[23] underpinned ongoing programmes run in the Pacific regarding law and justice matters. These instruments, although informal, formulated policy for key regional efforts to combat transnational crime through regional law enforcement cooperation. Together, these declarations identified, as regional priorities, arrangements for extradition, mutual assistance in criminal matters, the forfeiture of the proceeds of crime, money-laundering and drug issues. More recently, the 2002 Nasonini Declaration on Regional Security (Nasonini Declaration) reaffirmed the importance of the Honiara Declaration, particularly in its provision of a foundation to address the new and heightened threats to security

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22 South Pacific Forum "Declaration by the South Pacific Forum on Law Enforcement Cooperation" (Attachment to the Twenty-Third South Pacific Forum Communiqué SPFS(92)18, Honiara, Solomon Islands, 8-9 July 1992) [Honiara Declaration].

23 South Pacific Forum "Aitutaki Declaration on Regional Security Cooperation" (Annex 2 to the Twenty-Eighth South Pacific Forum Communiqué SPFS(97)13, Rarotonga, Cook Islands, 17-19 September 1997); Pacific Islands Forum "'Biketawa' Declaration" (Attachment 1 to the Thirty-First Pacific Islands Forum Communiqué, Tarawa, Kiribati, 27-30 October 2000).

in the region in the wake of the events of 11 September 2001.[24] The Nasonini Declaration emphasised the urgent need for regional cooperation on law and justice issues.[25] In a very Pacific way, these declarations of policy do not bind state parties and rely more on "club rules" for compliance at national level.[26]

The Pacific Plan aims to deliver real benefits to the people of the Pacific by coming up with practical steps to achieve four goals: economic growth, sustainable development, good governance and security.[27] The Plan recognises that the Pacific region has moved into a new historical period, one which calls for a quite fundamental re-assessment of the approaches taken to the issues it faces.[28] The immediate post-colonial period, in which the countries of the region gained and shaped their jurisprudence by using the Westminster, French or American systems as a model, has ended. The concept of Pacific regionalism in law-making is having an increasing influence on justice systems. Forum island countries are now much more

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24 Pacific Islands Forum "Nasonini Declaration on Regional Security" (Annex 1 to the Thirty-Third Pacific Islands Forum Communiqué PIF(02)8, Suva, Fiji, 15-17 August 2002) paras 1, 3 [Nasonini Declaration].

25 Nasonini Declaration, above n 24, paras 4, 6.

26 See Neil Boister "New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" (2005) 9(2) J Sth Pac L <http://www.paclii.org/journals/fJSPL/vol09no2/1.shtml> (last accessed 18 November 2006), and, in particular, his reference at note 62 to Christine Chinkin "Normative Development in the International Legal System" in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 21. See also Asian Development Bank-Commonwealth Secretariat *Towards a New Pacific Regionalism. A Joint Asian Development Bank-Commonwealth Secretariat Report to the Pacific Islands Forum Secretariat* (vol II, Pacific Studies Series, Asian Development Bank, 2005) 37-49 [ADB-ComSec Joint Report], available at <http://www.adb.org/Documents/Reports/PacificRegionalism/vol2/default.asp> (last accessed 18 November 2006).

27 Pacific Plan, above n 21, para 4.

28 Pacific Plan, above n 21, paras 1-3. See also Regional and Global Cooperation, above n 20, paras 22-23.

comfortable about working together for their joint and individual benefit using their own law, developed from our common customs, similarities and outlook, not something transplanted from more powerful international partners.

Regionalism does not imply any limitation on national sovereignty.[29] Rather, a stronger identification of national interests through complimentary support of partner nations, where states are not treated the same, just equal and Pacific capacity across a range of services is shared. Harmonised governance, shared resources, aligned policies and regional development do assume, however, a common body of regional law and the mechanism to enforce it. That part of our Pacific progress, which began as an idea in 1966,[30] was nudged along in 1972,[31] revisited in 1989,[32] then stalled largely on sovereignty issues in the 1990s, is now firmly back on the agenda. We have reached the pivot point in this discussion.

B Indirect and Uncoordinated Growth of Pacific Law

Our Pacific indirectness and penchant for a prolonged consensus process has led pragmatic policemen, demanding non-governmental organisations and our powerful partners, such as UN agencies,[33] to grow enforcement, immigration, resource and environmental law in Forum states by their own indirect means.

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29 Pacific Plan, above n 21, para 6.

30 See above n 1.

31 See Sir Moti Tikaram "Address to the First South Pacific Judicial Conference" (Samoa, January 1972). See also Pulea, above n 1, note 21.

32 See *Report on a proposed Pacific Charter of Human Rights prepared under the auspices of LAWASIA, May 1989* (LAWASIA, 1989) (reprinted in *Essays and Documents on Human Rights in the Pacific* (1992) 22 VUWLR Monograph 4, 99), prepared following the LAWASIA Meeting on the Pacific Charter of Human Rights (Apia, 15-17 May 1989).

33 At the time of writing, there were no less than 14 such agencies permanently based in the Pacific. See Dictus, above n 2.

The establishment of stand-alone secretariats, such as the Oceania Customs Organisation, the PIDC, the South Pacific Chiefs of Police Conference and the Asia Pacific Human Rights Forum, are examples of this phenomenon.[34] These organisations have all been in existence for many years, they all emphasise strategic planning and vision, coordination and integration of aims, but again, in that indirect Pacific way, stand outside any formal regional structures that will mandate implementation of their good ideas by anything other than good will.[35]

The Pacific Transnational Crime Coordination Centre (PTCCC), an initiative of the Australian Federal Police designed to provide operational coordination and intelligence services to regional law enforcement agencies, acts as a hub supporting the Pacific Transnational Crime Network comprising the PTCCC in Suva and Transnational Crime Units in Fiji, Tonga, Samoa, Vanuatu, Papua New Guinea and soon the Federated States of Micronesia. Together, they represent a very strong example of the type of regional collaboration and good will that can support national capacities.[36]

Leaving aside territorial, commercial and other reciprocities, but adding to these ad hoc arrangements such as the Pacific Financial Intelligence Unit and the FFA, a picture starts to form of an informal, fast-growing and extensive body of regional law and justice initiatives created only out of our Pacific connection. That is as it should be; but what of the accompanying and necessary regional law framework to bind these initiatives together and provide them with one seamless Pacific structure?

The harmonisation of Pacific law by the process of transplanting law and systems or capacity-building in separate states does tend to go only so far as national borders. It fails to address the development of the same law across the region. Increasingly, resources, environment,

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34 See Regional and Global Cooperation, above n 20, para 12.

35 See ADB-ComSec Joint Report, above n 26, 47-49.

36 See Regional and Global Cooperation, above n 20, paras 13-14; Tanti, above n 19.

criminals, terrorists and citizens are largely borderless. The economic, political and social development of the Pacific necessarily demands the development of regional law. For that reason, it is desirable to have a system of administration of justice which, although recognising the legislative foundations and applicable law of Pacific island states, ensures that the maintenance of regional law and order is in harmony and lies in the hands of those who have an understanding of Pacific custom, culture and aspirations.[37]

C Law and Justice: The Future

The Eminent Persons' Group (EPG),[38] whose report led to the Pacific Plan, identified law and justice as one of the sectors that would benefit from strengthened cooperation and integration. In particular, the EPG suggested greater shared effort and the pooling of resources in judicial and public administration processes for meeting international legal demands and regional law enforcement aimed at transnational crime. The EPG also suggested the establishment of a regional panel of judges and a common list of Pacific prosecutors.

The long-term goals for the Pacific Plan, articulated by a joint Asia Development Bank-Commonwealth Secretariat Report,[39] included the establishment of a Pacific ombudsman, and in the future:

- expanded judicial training and education through PILOM (this is already underway);

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37 See Pulea, above n 1.

38 See Sir Julius Chan, Bob Cotton, Dr Langi Kavaliku, Teburoro Tito and Maiava Iulai Toma *The Eminent Persons' Group Review of the Pacific Islands Forum* (Forum Secretariat, Suva, April 2004), available at <http://www.pacificplan.org/tiki-download_file.php/?fileId=41> (last accessed 15 December 2006).

39 ADB-ComSec Joint Report, above n 26. See also the various background papers for the Pacific Plan, available at <http://www.pacificplan.org/tiki-page.php?pageName=Pacific+Plan+Documentshttp://www.forumsec.org> (last accessed 18 November 2006).

- creation of a register of judges and public prosecutors to serve on appellate and trial courts in different countries (this already happens informally);
- harmonised court structures, names, jurisdictions and procedures; and,
- creation of a regional final court of appeal.

The foundation for a common court is clearly evident from the region's political development and jurisprudential history. The pressing need for Pacific states to address international law requirements, not just individually, but in a regionally harmonised way, is another reason. The pragmatists are rushing ahead, as pragmatists will, and, in many de facto ways, creating law through national processes in a regional vacuum, leaving the region vulnerable to criminal, economic and other global interests. Enforcement agencies have assumed a mandate from declared policy and, in response to global pressure, rushed in to create quite elaborate intra-regional networks. However, they are frustratingly left with no real regional law to apply, no regional mechanism to enforce it and no single regional court to oversee the legality of any investigative process.

Forum leaders, while clinging to independence and sovereignty, have nonetheless recognised the Pacific way forward is through greater regional cooperation and resource sharing. They have announced policy accordingly in the Pacific Plan. Finally, the opportunity is there in the midst of this globalisation to grab and define a *Lex Pacifica*, our pacific place and our way of doing things. Our strength does not lie in separate, often competitive and frequently duplicated development of capacity or transplanted legal systems, but in a Pacific that has a united, relevant and powerful rule of law, preferably underwritten by a proper treaty.[40]

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40 See Boister, above n 26.

A good starting point may be to take up the Pacific Plan suggestion of accrediting Pacific judges and prosecutors to the region. This would only formalise what in effect happens by default already.[41] There is a long history of a peripatetic judiciary well able to sit in any part of the Pacific because of a common law background. Accreditation as a Pacific judge would encourage formal portability and availability of this most valuable human resource between Pacific nations. It would also ensure the conservation and development of the considerable knowledge these individual jurists hold in criminal, public and human rights law. The accreditation process could be by way of nomination, submission and approval by the PCCJ.

It would also be most desirable to start from the top down and form a "regional court of appeal" to which decisions of the highest tribunals from state parties could be referred by the countries concerned for final decision. Again, there is already a number of mobile appeal court judges who sit in several Pacific jurisdictions. As such, the conceptual basis is not so remote.[42]

In the author's view, however, our aim should be to establish one Pacific regional court with original and appellate jurisdiction to administer justice and hear cases referred to it by state parties or ordered to it by state courts; in the latter instance, on the application of citizens, the state or law, border, human rights, resource and environmental agencies.

In a second paper on this topic, to be delivered at an upcoming meeting of the PCCJ, this author will suggest that a permanent registry and main court should be created in one Forum country with the current capacity to provide both the space and support for the chambers. This set of chambers would be under the full-time

41 Judicial exchanges between courts of appeal in the Pacific region are a regular occurrence. The lending of prosecutors for sensitive and serious cases, such as the post-coup crimes in Fiji, remains a regular practice.

42 The Chief Justice and President of the Court of Appeal from Fiji are but two examples.

supervision of a president and two justices; the latter being selected for three-year terms by their national state, and all the judges being approved by the consensus vote of the PCCJ.

The court could have jurisdiction to hear certain types of trans-Pacific cases, such as: transnational serious crimes, transnational environmental and resource offences, human rights cases and any type of case properly referred to it by state parties or citizens. The court would also be empowered to dispose of trade and treaty disputes. Along with state judges, it could constitute the quorum for a peripatetic Pacific appellate court able to sit in any Pacific country in person or electronically. In addition, the envisaged court would have a strong ADR capacity, able to use mediation and arbitration to resolve any significant referrals of commercial, national or regional disputes.

VI CONCLUSION

> If I am not for myself, who will be for me?
> If I am not for others, what am I?
> And if not now, when?[43]

It is suggested that our greatest challenge as lawyers, academics and jurists is to redefine our relationship with the wider world through the jurisprudence of *Lex Pacifica*. The need to quickly strengthen the systems and mechanisms of regional justice in a coordinated and planned manner in the Pacific is now a rule of law imperative.

Recent history has seen the Pacific legal systems overtaken by both the time and circumstance of globalisation. We cannot change the times or alter much the circumstances we are in. However, we can wisely adapt to them by using the existing cooperation between all stake-holders to build a common South Pacific regional court. The Pacific Plan recognises this, the foundation for one South Pacific court has been well laid in the region's legal history, and we are already sharing many of the related resources.

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43 Rabbi Hillel, Jewish Scholar and Theologian (30 BC-9 AD).

As we embrace some common framework and mechanism of law and justice in the Pacific and so begin to find our place in the world, the region will flourish and be well equipped to overcome any future challenge to its prosperity and rule of law.