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CONCLUDING COMMENT: PACIFIC "SUPER COURTS"

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I INTRODUCTION

The apex of a regional approach to international criminal law in the South Pacific appears to be the establishment of a regional jurisdiction and court. This short comment offers the views of the organisers of the "Regionalising International Criminal Law" conference on the rationale for the establishment of such Pacific "super courts".[1]

II A PACIFIC TRANSNATIONAL CRIMINAL COURT

Regionalism may offer an opportunity for a jurisdiction over regional transnational crimes. The authors of the papers in this book, and in particular Justice Gerard Winter,[2] explore the reasons for such a court and the changes in Pacific policy which seem to point towards it. The major motivating factor appears to be incapacity. There is no doubt that many Pacific island countries (PICs) do not have the infrastructure to deal with serious cases of transnational crime. The major hurdles are political: the limited willingness of PICs to "diminish" their sovereignty sufficiently to establish such a

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1 A term used by a journalist after the conference.

2 See in this book Justice Gerard Winter "One South Pacific. One Regional Court. Three Case Studies" chapter 11.

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jurisdiction; and, negative reaction from powerful states (like Australia) that currently dominate control of the existing regional system of transnational criminal law.

The technical legal issue of delegation by each PIC of its jurisdiction over serious transnational crimes to the region as a whole is resolvable through regional treaty and national implementing legislation. More difficult are the capacity issues that such a court would face. It would require a significant budget, which would mean external assistance from foreign donors. It would also require a prosecutorial arm. Perhaps the major problem facing such a court would be that it would have to rely on local investigation for the necessary evidence, although regional mechanisms of law enforcement cooperation could be of assistance in this regard. Nevertheless, all these issues are at least theoretically surmountable and there is significant advantage in the concentration of resources and expertise at a regional level.

One issue not discussed in this book is whether a regional court might provide a way of avoiding non-legal obstacles to regional cooperation in the suppression of crime. In other words, would a regional "super court" be a better option in neutralising legal barriers raised against the establishment and exercise of extraterritorial jurisdiction for essentially political reasons?[3] An example of the syndrome in operation in the Pacific is the recent fracas between Papua New Guinea (PNG) and Solomon Islands, on the one hand, and Australia, on the other, in what Australian Foreign Minister Alexander

3 This is what one might term the "Lockerbie syndrome", because of the difficulties the United Kingdom and the United States, on the one hand, and Libya, on the other, experienced in making the Montreal Convention "work": for the United Kingdom and the United States, getting custody of the alleged Lockerbie bombers from Libya; and, for Libya, attempting to respect the constitutional right of Libyan nationals not to be extradited. See *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Montreal Convention) (23 September 1971) 974 UNTS 178, art 7.

Downer described as another example of poor governance in the Pacific.[4]

Australian authorities sought the arrest of the recently appointed Solomon Islands' Attorney-General, Julian Moti, for sex crimes committed against a 15-year old girl in Vanuatu in 1997. Sex crimes are a serious problem in Solomon Islands with allegations of sexual abuse of under-age females being made against foreign fishermen and members of the Regional Assistance Mission to Solomon Islands (RAMSI).[5] Australia had jurisdiction because Moti was an Australian citizen at the time of the alleged offence (he has since renounced his citizenship). He originally escaped Australia's efforts by hiding in Solomon Islands' High Commission in Port Moresby. He was then smuggled on a PNG military flight to Honiara and arrested and detained at destination by RAMSI officials, on illegal entry charges.

The case features all the problems that plague the system of transnational criminal law. The Australian legislation is classic long-arm legislation, usually justified out of the necessity of suppression of these crimes because local suppression is ineffective. Moti was committed to trial in Vanuatu, and, on appeal, that committal proceeding was found to be irregular.[6] A further committal proceeding resulted in a Vanuatan magistrate holding that Moti had no case to answer, but there are rumours of corruption in this decision.[7] Australia sought legal assistance to pursue the matter. This assistance

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4 Comments reported by the Australian Broadcasting Corporation on 16 October 2006, and cited in European Centre on Pacific Issues "Australia Threatens to Pull Solomons, PNG Aid" <http://www.ecsiep.org> (last accessed 17 December 2006).

5 See Rory Callinan "Generation Exploited" (27 March 2006) *Time Magazine* South Pacific 18.

6 *Moti v Vanuatu Public Prosecutor* [1999] VUCA 5.

7 See "Kalotrip Denies Moti Bribes Claim" (16 October 2006) *Vanuatu Daily Post* <http://www.vanuatudaily.com/news/currentweek.php?subaction=showfull&id=1161033530&archive=&start_from=&ucat=1&> (last accessed 26 November 2006).

was denied by two partner nations in the Pacific. The relevant question is why? One possible answer is that neither state believed that Moti would receive justice in Australia. Another response is that members of the corrupt elite were protecting one of their own. The second reason, even if true, does not preclude cynical political reliance on the former. The "Lockerbie Syndrome" is about more than just the difficulty of articulating criminal justice systems and suspicions about the quality of justice in another criminal justice system. It involves, inter alia, distrust of the political motives of the requesting state, suspicion of bias, a reflex against the projection of power by a powerful state and a reflexive self-protection of local elites. Transfer of the matter to a regional court may serve to neutralise such distrust, which may in turn serve as a powerful rationale for the establishment of such a court, but only if that court is perceived by all parties within the region, including powerful states like Australia, to be effective and unbiased.

III A PACIFIC INTERNATIONAL CRIMINAL COURT

None of the papers in this book explores the possibility of a regional court for the South Pacific with jurisdiction over the core international crimes. Nevertheless, examination of a selection of events from the contemporary history of the region suggests there may be a rationale for such a court. This examination primarily focuses on recent events in three PICs: Solomon Islands, PNG and Timor-Leste. Each of these jurisdictions has faced significant turmoil over the past 15 years. Some of this turmoil has resulted in conduct that could be defined as core international crimes, and particularly as crimes against humanity. These three examples illustrate two principal benefits of a possible regional court: first, the capacity to address the commission of core crimes of international concern; and, secondly, alleviating reliance on external assistance through addressing, as a non-political and neutral body, significant internal lawlessness.

A Solomon Islands

The "renegade militant"[8] General Harold Keke will perhaps be remembered as one of the South Pacific's most notorious warlords. In 1998, Solomon Islands faced political meltdown. Despite winning a third motion of no confidence, the government of the day, the Solomon Islands Alliance for Change led by Prime Minister Bartholomew Ulufa'alu, was further weakened by demands of the Guadalcanal provincial administration for compensation for the loss of land and murdered citizens. These demands, along with heightened ethnic tensions, were wilfully instigated, it was alleged, in order to undermine the government.[9] The ensuing fighting between the indigenous people of Guadalcanal (the *Isatabu*) and migrants from the neighbouring island of Malaita resulted in the commission of horrific atrocities. After becoming a leader of the Guadalcanal Liberation Army (GLA), Keke sought to have the Malaitain people removed from Guadalcanal. Keke refused to agree to any peace settlements. He funded the GLA through corruption and hostage-taking,[10] and was said to be responsible for a number of atrocities, including torture and beheadings.[11]

While Keke surrendered to RAMSI forces on 13 August 2003 and was subsequently tried and convicted for the murder of father

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8 Selwyn Manning "Solomons Harold Keke Surrenders to Australian Force" (13 August 2003) *Scoop* Auckland <http://www.scoop.co.nz/stories/HL0308/S00096.htm> (last accessed 17 December 2006).

9 See Frank Short "Still Waiting for Justice in Solomon Islands" (Pacific Islands Report, Pacific Islands Development Program, East-West Center, Honolulu, 2006), available at <http://www.archives.pireport.org/archives/2006/September/09-08-com1.htm> (last accessed 1 December 2006).

10 BBC News "Profile: Harold Keke" (18 March 2005) <http://news.bbc.co.uk/2/hi/asia-pacific/3090297.stm> (last accessed 1 December 2006).

11 BBC News "Solomons Rebel Jailed for Murder" (18 March 2005) <http://news.bbc.co.uk/2/hi/asia-pacific/4360299.stm> (last accessed 1 December 2006).

Augustine Geve,[12] many still call for justice to be done. They cite the failure to establish a commission of inquiry following the trial and conviction of mere "foot soldiers", such as Harold Keke, as evidence of failed justice.[13] Former Police Commissioner Frank Short is at a loss to explain why "those responsible for plotting, conspiring and instigating the conflict, the so-called 'big-fish'",[14] have not been quickly identified and prosecuted. Short fears that the establishment of a commission has been avoided because of the uncomfortable implications of such an investigation.

A regional court would ensure individual criminal accountability for the instigators of such activities by removing the decision to investigate and prosecute from the unstable government or RAMSI. It might also help to ensure security and reconciliation through justice.

B Papua New Guinea

Many of the difficulties associated with the administration of justice within PNG, although of serious concern to its citizens and the governments of neighbouring states, are nonetheless issues of domestic law enforcement. A Human Rights Watch report released in September 2005 alleged widespread police abuse of children in custody.[15] This was addressed, if only partially, by the PNG

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12 Keke was found guilty of murder on 18 March 2005. See Minister for Foreign Affairs, Hon Andrew Downer MP and Minister for Justice and Customs, Hon Christopher Ellison MP "Solomon Islands: Harold Keke Found Guilty" (Press Release, 18 March 2005) <http://www.foreignminister.gov.au/releases/2005/joint_ellison_solomon_islands_180305.html> (last accessed 1 December 2006).

13 Short, above n 9.

14 Short, above n 9.

15 See Human Rights Watch "Making their Own Rules: Ongoing Impunity for Police Beatings, Rape, and Torture in Papua New Guinea" (Vol 17, No 8(C), September 2005) <http://hrw.org/reports/2005/png0905/png0905text.pdf> (last accessed 1 December 2006). See also Human Rights Watch "Still Making their Own Rules: Ongoing Impunity for Police Beatings, Rape, and Torture in Papua New Guinea" (Vol 18, No 13(C), 29 October 2006) <http://hrw.org/reports/2006/png1006/png1006web.pdf> (last accessed 1 December 2006).

authorities with the dismissal of more than 100 police officers.[16] Police corruption and the failure of the Australian-sponsored Enhanced Cooperation Program (ECP), under which Australian Federal Police worked alongside officers of the Royal PNG Constabulary, have led to a distrust of the police and difficulties between the governments of PNG and Australia. While in 2005 the PNG government was not suspected of ordering any politically motivated killings, concern about police violence has since increased.[17]

A regional international criminal court may be useful in facilitating the reconstruction of such inter-state relations. It may have the potential to facilitate independence and stability within the region with little political fallout.

C Timor-Leste

When it comes to atrocities within the South Pacific, criminal trials have been largely rejected in favour of commissions of inquiry. The recent events in Timor-Leste are no exception.[18] On 17 October 2006, the Independent Special Commission of Inquiry for East Timor (Special Commission) submitted its report to the National Parliament of Timor-Leste. The mandate of the Special Commission was to establish the facts and circumstances surrounding the events of 28-29 April and 23-25 May 2006. It concluded that:[19]

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16 United States Department of State "2005 Country Reports on Human Rights Practices: Papua New Guinea" (Bureau of Democracy, Human Rights, and Labor, Washington, March 2006) <http://www.state.gov/g/drl/rls/hrrpt/2005/61623.htm> (last accessed 18 October 2006).

17 United States Department of State, above n 16.

18 Not to be confused with the response to the struggle for independence discussed in this book by Alison Ryan "The Special Panels for Serious Crimes of Timor-Leste: Lessons for the Region" chapter 5.

19 United Nations High Commissioner for Human Rights "Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste" (Office of the High Commissioner for Human Rights, Geneva, 2 October 2006) para 224,

- there was no massacre by the FALINTIL – Forças Armadas de Defesa de Timor-Leste (F-FDTL) of 60 people at Taci Tolu on 28-29 April 2006;
- Major Reinado and the men of his group were "reasonably suspected of having committed crimes against life and the person" in the confrontation in Fatu Ahi;
- the President did not "order or authorize" the criminal actions of Major Reinado's armed men;
- Taur Matan Ruak, the Chief of Defence Force, was not criminally responsible for the death of unarmed officers of the *Polícia Nacional de Timor-Leste* by F-FDTL soldiers after the ceasefire of 25 May 2006;
- the Minister of Interior Rogerio Lobato, the Minister of Defence Roque Rodrigues and the Chief of Defence Force Taur Matan Ruak were accountable for the illegal transfer of weapons to civilians; and,
- there should be further investigation into the possible liability of Prime Minister Mari Alkatiri for weapons offences.

The Special Commission also recommended that all criminal cases should be handled "impartially and without political interference within the national judicial system, led by independent and international judges, prosecutors and defence lawyers specially assigned to the cases that resulted from the events of April and May 2006."[20]

A permanent regional court could have served two purposes in the circumstances of Timor-Leste. First, it could have rendered the

available at <http://www.ohchr.org/english/docs/ColReport-English.pdf> (last accessed 1 December 2006).

20 United Nations "Independent Special Commission of Inquiry for Timor Leste" (Press Release, 17 October 2006), available at <http://www.unhchr.ch/huricane/huricane.nsf/0/E8406BEBCC3A297DC125720A0025ECD7?opendocumen> (last accessed 1 December 2006).

Special Commission redundant. This would have saved the need for a doubling-up of investigative resources between the Special Commission and any subsequent prosecution. Secondly, a regional court could have led any subsequent prosecution in place of an ad hoc tribunal that will, in all likelihood, have to be established to address the recommendations of the Special Commission.

From the above discussion, it can be seen that a permanent regional international criminal court could serve a number of important functions. Given the involvement of governmental authorities in the perpetration of criminal offences in Timor-Leste and Solomon Islands in particular, a regional court could facilitate both internal and regional stability through the prosecution of senior governmental authorities. Furthermore, with an expansion of a regional court's jurisdiction to include transnational criminal activity in addition to the core crimes of international criminal law, such a court would significantly contribute to the provision of stability within the region. While such assistance is currently provided by Australia to a large degree, a regional court provides the benefit of political neutrality. This may assist in the rebuilding of currently strained inter-state relations.

IV A COURT WITH JURISDICTION OVER INTERNATIONAL AND SERIOUS TRANSNATIONAL CRIMES

The Caribbean attempt in 1990, with Pacific support, to create an international criminal tribunal with jurisdiction over transnational "treaty crimes", appeared to be misconceived because international courts dealt with international crimes. Treaty or transnational crimes were really only crimes before national courts. The Caribbean states would have been wiser to have supported a regional court with jurisdiction over treaty crimes. There is no doctrinal reason why such a court should not exercise jurisdiction over these offences, provided every state in the region delegates its national jurisdiction appropriately. However, it is also worth pointing out that when the United Nations Security Council was debating whether to refer the Darfur situation to the International Criminal Court (ICC), the United

States proposed the creation of a new regional criminal court to sit at the site of the International Criminal Tribunal for Rwanda, to be administered jointly by the African Union and the United Nations.[21] This example serves as a reminder that, at least in the eyes of the United States, there is no doctrinal barrier to a regional Pacific "super court" taking jurisdiction over the core international crimes as well as transnational crimes. Nuremberg and Tokyo were after all simply multi-national regional courts with jurisdiction over the core crimes.

Indeed, such a court might be considered appropriate given the limited resources of both the ICC and PICs to deal with core crimes that occur within the region. Such a South Pacific regional court would have to be integrated in some way into the existing system of international criminal law or it may provide an opportunity for external powers such as the United States to undermine the existing system of international criminal law. Such a court might provide an opportunity for the development of a genuinely regional criminal law.

In our view, any such regional court, in order to be both effective and legitimate, would have to:

- determine a clear set of goals and the method it would use to achieve those goals;
- describe its own jurisdiction and its relation with national jurisdictions and with the ICC;
- be staffed largely by nationals of PICs and, where necessary to use international personnel, have an active plan for capacity-building of the former coupled with a programme for the phased withdrawal of the latter;
- include on the bench a judge from the territorial jurisdiction in order to ensure knowledge of, and respect for, local custom;

21 John R Crook "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC" (2005) 99 AJIL 501, 501-502.

- focus its efforts on the "big" rather than the "small" fish in order to make effective use of scarce resources and avoid reinforcing a sense of injustice among the local community; and,
- have a standing protocol governing all the details of its relationship with national transitional justice processes, such as truth and reconciliation commissions and national grants of prosecutorial immunity.