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JUDICIAL LEADERSHIP PROMOTING AND INCREASING THE USE OF MEDIAITON: PNG EXPERENCES AND LESSONS

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Abstract

Compared globally, there has been some unprecedented development and use of mediation in PNG led by her Judiciary in pursuit of peace and happiness through the prompt resolution of conflicts. This keynote highlights the development and use of mediation, judicial pronouncements in favour of mediation, the imposition of tougher penalties for bad faith at mediation or failure to negotiate and settle, identifications of cases not suitable for mediation, a system of monitoring and evaluating mediation services, system of mediator training with additional requirements for co-mediations, establishing mediator standards and discipline through a three tier process, having a simple process to enforce mediated agreements and many more.

It also highlights recent developments, which includes judges resolution to refer all cases to mediation except a limited and defined set of questions that are inappropriate for mediation, lawyers resolving to try mediation first, allocation of a week each month specifically for mediation and scheduling mediators for mediation duties, making mediation an integral part of a new electronic case management system with ability to capture all relevant data and produce better reports, the judiciary championing reforms to modernize arbitration and other forms of ADR such as judicial dispute resolution (JDR) and finishes with assistance to other Judiciaries.

The address concludes with a summation and lessons that can be learned from the PNG Judiciaries leadership for other judiciaries and leaders for the promotion of global peace and security.

Part 1 - Introduction

1. We are gathered together under the one big umbrella of Asia Pacific Mediation Forum. Delegates have come from all over Asia and some of us from the Pacific and further afield. May I on behalf of all of us, thank Professor Chang Hee Won and his team of hard-working conference organising committee who have done a wonderful job of enabling us to come and have a taste of "Peace in Asia" by experiencing the extra ordinary peace of Jeju Island, South Korea. May I also acknowledge and thank the past and present owners and custodians of the land upon which this facility stands and we are gathered here today and the next few days.

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2. Our conference theme "***PEACE IN ASIA: Stepping Up the Role of Conflict Resolution***" has called each one of us to commit our respective times, effort, money, other resources and come to historical Jeju to share our varied experiences in the promotion and support for peace not only in Asia and the regions we all represent but globally. For every single step we take to promote and maintain peace adds to all the efforts globally put together to produce global peace.

Part 2 - Peace defined

3. What do we or what does the world mean when we talk about "peace"? According to the Cambridge English Dictionary, "peace" means "freedom from war and violence, especially when people live and work together happily without disagreements". The Merriam-Webster dictionary elaborates on this definition in terms of talking about peace in 4 different settings, namely a state of:

(1) tranquillity or quietness, for example freedom from civil disturbance or a state of security or order within a community provided for by law or custom;

(2) freedom from disquieting or oppressive thoughts or emotions;

(3) harmony in personal relations; and

(4) or period of mutual concord between governments.

4. These are the basic ingredients that help determine whether there is peace or not. Now with the advancement of technology and skills and expertise, we are able to measure the level of peace in the world by reference to the position in most of the countries. Globally, the Global Peace Index (GPI),[1] an Australian initiative, by Stephen Killelea,[2] measures the relative position of nations' and regions' peacefulness. The GPI is a report produced by the Institute for Economics and Peace (IEP) based in Sydney with branches in New York, Mexico City and The Hague. With initial launching in May 2007, subsequent reports have been released annually. The total number of countries covered have increased from an initial 121 countries to now 163 countries.

5. According to this year's GPI, Iceland, New Zealand, Portugal, Austria, and Denmark are reported as the most peaceful countries. On the other hand, Somalia, Afghanistan, Syria, South Sudan, Yemen, and Iraq are reported as the least peaceful countries. Two years ago, the 2017 GPI indicated a less peaceful

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[1] This discussion is based on Wikipedia write up located at https://en.wikipedia.org/wiki/Global_Peace_Index

[2] AM, an Australian IT entrepreneur.

world over the past decade, with a 2.14 per cent deterioration in the global level of peace, growing inequality in peace between the most and least peaceful countries, a long-term reduction in the GPI Militarization domain, and a widening impact of terrorism, with historically high numbers of people killed in terrorist incidents over the past 5 years.

6. At this point in our shared and collective human history one would have thought there would be more peace. Unfortunately, the evidence around us speak of the opposite. With global warming, climate change and related environmental issues now well and truly confronting us, our world is made no safer and more peaceful than it was years back. More and more conflicts are likely to and are already facing humanity with some island and low-lying countries beginning to sink.

7. Peace in society and the world is dependant amongst others on the prompt, efficient and effective resolution of conflicts or disputes as they arise. Most of the world has evolved from an eye for an eye and a tooth for a tooth to war fares era to a more civilized and structure form of resolving conflicts. At the highest for many have been and still is the formal courts domestically and the various international and regional courts or tribunals at the global level. Much of the resources and focus has been and continues to be given to the formal courts. Naturally this has and continues to cause more and more disputing parties to turn to the Courts for a resolution of their conflicts. That has in turn caused the problem of backlogs in the courts' lists with final outcomes arrived at, if at all, after much delay. By than some parties have died or a have been liquidated whist others have made adjustments resulting in the pursuance of other businesses or pursuits, or in the worst-case scenario, armed conflicts as the only inevitable consequence. A case on point for Papua New Guinea (PNG) is the Bougainville crisis.

8. The Bougainville conflict is a case which perfectly illustrates the kind of adverse consequences that could follow if the relevant authorities, government and private sector alike fail to address the conflicts or problems as they occur. The people of Bougainville claimed compensation for various environmental damages and sought at the same time a recognition of the real landowners instead of agents selected and recognized by the then multibillion-dollar Bougainville gold and copper mine (BCL) with the endorsement of the State of PNG. The State and BCL failed to address the landowners' claim promptly and have them resolved. Realising that they were getting nowhere, they resorted to taking matters into their own hands. They took up arms and closed the mine. A lot of lives and properties were destroyed. After 10 years of a bloody conflict,

peace talks took place with New Zealand's facilitation. That resulted in an agreement that gave autonomy to the people of Bougainville with a referendum to determine their political future. The Referendum is coming up on 23rd November 2019.[3]

9. Appreciating the fact that delayed resolution of conflicts can result in unacceptable and destructive out comes such as in the case of Bougainville, the PNG Judiciary's leadership took steps in 2000 to address its backlog problem. That was with a view to arriving at expedited outcomes, reduce or eliminate its backlog problem and minimise costs of litigation. A judicial committee, called the ADR Committee, led by a judge, with membership drawn from practicing lawyers, magistrates, other judges, the academia and members of the society was set up. The Committee went to work in earnest and made various recommendations on the way forward for the establishment and use of Court annexed mediation and ADR. Unfortunately, the then leadership of the Judiciary did not act on those recommendations. That was worsened with leadership changing twice and without anything meaningful done. Fortunately, that position changed in 2010 with now recently retired Chief Justice Sir Salamo Injia being appointed as Chief Justice.

Part 3 – Steps Taken by the PNG Judiciary

(1) Legislative Enactment

10. The first unprecedent step the PNG Judiciary took was initiating and ensuring the enactment of appropriate legislation and rules of court which herald a formal introduction of mediation and other forms of dispute resolution. Traditionally, the executive arm of government initiates public policy and introduces legislation and the legislative arm of government passes legislation or Acts of Parliament while the Judiciary only interprets and applies legislation passed by Parliament. In this case, the legislative reform came from the leadership of the judiciary. This saw the enactment of the first ever substantive amendment to the National Court Act.[4] The provisions introduced by the amendment provide for two important aspects. Firstly, they empowered the judges to order mediation at any stage of the proceedings with or without the consent of the parties. Then to make mediation orders effective and serve their purpose, judges are vested with additional powers to appoint a mediator and issue various other orders to ensure court ordered mediations do take place and return to the Court within a specific but shorter time frames. Secondly, the provisions introduced by the amendment vested wider powers in the judges to

[3] For more on the Bougainville Crisis see: https://en.wikipedia.org/wiki/Bougainville_Civil_War

[4] Part IIA – Mediation, ss.7A – 7E

promulgate appropriate court rules elaborating on the provisions made in the National Court Act for mediation and other forms of ADR. Pursuant to that mandate, the judges promulgated the *Rules Relating to the Accreditation, Regualtion and Conduct of Mediators* or in short called, the ADR Rules.

(2) Comprehensive ADR Rules

11. The ADR Rules constituted the second unprecedent step the judicial leadership took in PNG and possibly globally as well. These rules, do a number of important things namely, amongst others:

(1) formally establish the ADR Committee with its composition, powers and functions which are very broad;

(2) set standards and a code of conduct for mediators;

(3) provide for the mediation process and stipulate the duties and responsibilities of parties, their lawyers and mediators;

(4) prescribe mediation skills training and accreditation with a fit and proper person test built in;

(5) establish a three-tier mediator disciplinary process starting of administratively to adjudication with a final appeal process;

(6) requiring all matters to go to mediation unless on application by the parties a matter is ordered to remain in the litigation track;

(7) provide for bad faith at mediation and penalties; and

(8) provide for a simple process for the enforcement of mediated agreements.

(3) Establishing a System of Court Annexed Mediation

12. In order to successfully implement Court Annexed Mediation, the PNG Judiciary establish an ADR Track. This track is manned by two fully accredited mediator Judges[5] who attend to all cases referred to mediation either by conducting the mediations themselves or overseeing that being done. They are supported by a dedicated administrative ADR Division of the Court. It is headed by an Assistant Registrar with 6 other staff employed full time to assist in the administration of mediation or ADR cases. The division has mediation conference facilities and is locate in the front entrance of the Court rooms to remind parties and lawyers of the need to resolve disputes through mediation rather than by litigation. It has conference and other facilities to support

[5] Initially Kandakasi J (now DCJ) and later Shepherd J.

mediation services which are presently basic but will be better when the Courts new building becomes operational.

13. The Judiciary appreciates that appropriate or inappropriate mediator conduct can either advance or pull back the years of hard work put into building a system of court annexed mediation. It has therefore sufficiently provided for the safeguards. This includes a requirement for mediators to meet integrity and good standing in the society or community tests to ensure only persons who meet these requirements receive training and ongoing support in the carrying out of their duties and responsibilities. Apart from prescribing the requirements in the ADR Rules, the Judiciary through the Committee administers the mediator standards right from the point of one applying to be trained as a mediator. Prospective mediators' other professional training, work, their experiences and skills, whether they have any criminal or disciplinary records are all important factors that are considered before one is given approval to receive training. In the training they cover the mediator skills, mediator code of conduct, the Courts ADR system and an undertaking not to mediate on their own until they have been fully accredited. At the end of the process, they are assessed through role plays and only those who show they understand the mediation process and can apply the appropriate mediator skills in each part of the mediation process are passed and issued with a certificate of having done so.

14. Post training, the young mediators are required to apply for provisional accreditation as mediators. Included in their application are their having successfully completed the mediator skills training, a clear criminal and other disciplinary records, character and professional references and an undertaking not to mediate on their own. The ADR Committee initially processes the application and if it is satisfied that all requirements are met by an applicant, recommendation is then made to the Accrediting Council for the application to be granted. The Accrediting Council which comprises of the Chief Justice, the Chair of the ADR Committee, the Chief Magistrate and the Registrar of the National and Supreme Courts, considers the applications and decides whether or not to grant them.

15. A successful applicant is granted provisional accreditation and he or she becomes a Provisionally Accredited Mediator (PAM) and is required to do at least 5 co-mediations with an experienced mediation with the last two being fully conducted by the PAM. Those who demonstrate an understanding of the mediation process and the kind of skills required at each stage and have those applied have the option of shortening the co-mediation requirements. Others

who feel inadequate have asked to do more to build their confidence level and that has been permitted.

16. Through this, the focus has not been on the number of mediators but the quality of the persons the Court is able to accredit and have them on its list as accredited mediators. Because of the emphasis on the quality of mediators, there has been no complaint against any mediator that has gone past the initial steps of a complaint being lodged and that being processed and responded to. As of today, only three complaints against mediators were received. One wished that the mediator was his adjudicator. The second one was seeking to opt out of a mediated agreement and raised the issue of not understand the terms of the mediated agreement. That was despite that party in the mediation process having requested and received the support of two persons as her interpreters and support persons in addition to having acknowledged the interpretations and understanding the terms of the agreement. The third one decided not to defend himself and instead volunteered to have his name being removed from the list of accredited mediators and undertook not to mediate, which wish was granted. That was in a case of a PAM asking for fees when he was not.

17. The ADR Division has a system of monitoring and evaluating the mediation process. This is done in two ways. First is by having an open door policy receiving complaints either specifically against the ADR Division, mediators, or the Court or generally, which the Committee always keeps a lookout for and addresses them. The other is through a pre-prepared feedback form given to parties, lawyers and other users of the mediation or ADR services. These are usually given out to these stakeholders to feedback either anonymously or openly. The feed backs are then collated and a report produced at the end of each year.

18. Through the feedbacks the Judiciary has received amongst others the following good results from about 98 respondents:

(1) 60% stated that mediation increased their trust and confidence in the court system;

(2) 92% stated that the Courts should support and use mediation more;

(3) 100% stated going to mediation was safe, comfortable, user friendly and more secure;

(4) 91% stated that if they were involved in another dispute, they would refer the matter to mediation;

(5) 96% stated they would recommend mediation to a colleague, friend or a relative as a good way to resolving their conflicts;

(6) 87% thought the mediation process assisted in identifying the real issues in dispute between parties.

(7) 91 % thought that the mediation process assisted them to understand the other party's views;

(8) 87% thought that the mediation process gave them opportunities to develop options for settlement;

(9) Parties and lawyers surveyed estimated that settling the case through mediation resulted in an average estimated saving per party of between 80,000 Kina (USD 39,000) to over millions (USD450,000) of kina and a similar amount or much more in funds or business opportunities locked up in litigation.

(4) Judicial pronouncements

19. The National and Supreme Courts have called for more use of ADR to resolve disputes both before and after these legislative enactments. In *Public Officers Superannuation Fund Board v. Sailas Imanakuan* (2001) SC677,[6] the Supreme Court for example stated:

> "... Courts are there only to help resolve or determine disputes that cannot be resolved by the parties themselves despite their best endeavours to do so. All human conflicts and disputes are capable of settlement without the need for court action. That is possible only if the parties are prepared to allow for a compromise of their respective positions. People in other jurisdictions are already recognizing the benefits of settling out of court as it brings huge savings to the parties in terms of costs and delay and help maintain good relations between the parties. This is why in other jurisdictions, out of court settlements are actively being pursued through what has become known as Alternative Dispute Resolutions or ADRs."

20. After the enactment of the mentioned legislation, in *PNG Ports Corporation Ltd v. Canopus No 71 Ltd* (2010) N4288, the National Court in the context of the international and domestic developments encouraging the use of mediation said:

> "All these now make it abundantly clear if not already done, the need for parties to seriously explore and exhaust out of Court settlement before coming to Court. If all parties involved in a dispute did that, they would be only appropriately reserving the courts for the hearing and determination of cases, which have merit that warrant only judicial

[6] Effectively endorsed by the Supreme Courts subsequent decision in NCDC v. Yama Security Services Pty Ltd (2003) SC707

consideration and determination….Thus, unless a case falls into such a category, most of the disputes should be settled and should never get to court. Hence, if they enter the courts without first exhausting out of court settlement options, the very first issue for the courts and the parties to address and resolve should be resolution of the matter through out of court settlement discussions which should take place under the shadow of the Court…. If such discussions fail, parties should be able to agree on what the relevant facts are and which of those facts are disputed and why and clearly set out or disclose the existence of a meritorious issue or issues, which warrant judicial consideration and determination. The parties should then be able to persuade the Court that, there is such an issue for the Court's consideration. Then on being satisfied that there is such an issue for trial, the Court can allow the parties to progress their matter to trial expeditiously."

21. In the context of the case then before it, which was a case of one of the parties refusing to have the matter settled until after the Court had intervened said:

> "What this [mediation developments] means then is that, a party who fails to give any serious consideration and fails to make good faith efforts toward resolving a dispute out of Court should be responsible for the other party's costs. Where as in this case, one of the parties has taken all of the right steps toward having a dispute resolved through the parties own negotiations or with the assistance of a mediator or an independent and neutral third party and the matter subsequently settles after much costs have been incurred, the party concerned should be responsible for the costs thrown away on a solicitor and client basis, unless the parties otherwise agree."

22. Four years later in *Abel Constructions Ltd v. W.R. Carpenter (PNG) Ltd (2014) N5636*, the National Court gave a list of cases or issues that are inappropriate for mediation in terms of the cases presenting:

"• real possibility of setting a legal precedent through a judicial determine which would clarify the law or inform public policy;

• case of any settlement out of court is not in the public interest;

• case in which protective orders such as injunctions are required immediately;

• clear case warranting summary judgment;

- genuine dispute requiring the Court to give a declaratory relief;
- family disputes especially involving child abuse, domestic violence, etc, is presented;
- a case of either or both of the parties are in a severely disturbed emotional or psychological state, such that they cannot negotiate for themselves or others;
- a genuine dispute requiring interpretation of a constitutional or other statutory provision;
- a genuine dispute over the meaning and application of a particular provision in a contract or an instrument, a determination of which will help finally determine the dispute;
- preliminary issue such as questions on jurisdiction, condition precedents, statutory time bar and issues of disclosure of valid cause of action which require determination before anything else; or
- a case in which public sanction as in a criminal case is needed for public health, safety and good order."[7]

23. It has been noted in that case and elsewhere that, in some cases, and more so after a determination of preliminary issues such as the ones presented in the third dot point and the second last item in the above list, the substantive matters could still be referred to mediation[8] unless such reliefs are permanent in nature. This author has in at least three cases granted interim injunctive orders and directed the parties to resolve their disputes through mediation. This they did successfully resulting in a final disposal of the cases within two months of filing.

24. Young, in what could be taken as detailed look at this aspect in her article "*The 'What' of Mediation: When Is Mediation the Right Process Choice?*" concludes and this author agrees that:

> "As mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties' communication, in identifying their underlying interests, in narrowing the issues in conflict, or in helping them to more carefully evaluate their

[7] At paragraph 18 of the judgment. This has been reiterated *in Wantok Gaming Systems Ltd v. National Gaming Control Board* (2014) N5809 and *Alex Awesa v. PNG Power Limited* (2014) N5708.
[8] See the decision of the PNG Supreme Court in *Heni Totona v Alex Tongayu* (2012) SC1182 as an example.

litigation option, it can move the dispute towards a quicker, more cost-effective resolution."[9]

25. In the *PNG Ports Corporation Ltd v. Canopus* (supra) case, the Court ordered a party who failed to take any meaningful step to have the matter resolved promptly meet the other party's costs on a party's own solicitor and client costs or on full indemnity basis. Similar orders and decisions have been arrived at in a number of subsequent cases. In *Alex Awesa & Anor v. PNG Power Limited* (2014) N5708, the Court ordered the parties to go to mediation for the second time, but this time with the defendant meeting the mediators and parties' costs for its earlier failure to take meaningful steps to have the matter mediated.

26. In *Koitaki Plantations Ltd v. Charlton Ltd* (2014) N5656, the Court dismissed the plaintiff's claim and ordered judgement against it on a cross claim against it by the defendants. That was on the basis of the plaintiff acting in bad faith which impeded a court ordered mediation from taking place in a case that failed to present any issue which warranted only a judicial consideration and determination. Similar judgments were given in a number of other cases as in the case of *South Pacific – PNG - Seafoods Co Ltd v. The NEC* (2017) N6888, in a case of breach of contract by the State.[10] In other cases, parties have been ordered to go back to mediation but at the costs of the party guilty of bad faith at mediation as was the case in *Kanga Kawira v. Kepaya Bone* (2017) N6802

27. Further, the Judiciary has demonstrated a readiness to uphold mediated agreements provided the basic essential elements for a legally binding contract or agreement are present.[11] This readiness to uphold mediated agreements exist even in cases where an individual fails to sign a mediated agreement on an issue that concerns an individual's interest or rights which are exercisable through the sanctioning, approval or endorsement by his group as against others as in the case of a clan or tribal settings.[12] The same applies to a case in which one party to a mediated agreement claims lack of capacity in their own capacity as contracting parties.[13]

(5) Case Docketing System (CDS)

28. Instead of having a general Court list of all cases entering the court system the then Chief Justice, introduced in 2010 a case docketing system

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[9] October 2006, http://www.mediate.com/articles/young18.cfm.

[10] See for a similar cases *Wantok Gaming Systems Ltd v. National Gaming Control Board (2014) N5809*; *Roger Meckpi v Luke Fallon (2017) N6708*, for a similar outcome with costs on solicitor and own client basis

[11] *Hargy Oil Palm Ltd v. Ewasse Landowners Association Inc* (2013) N5441

[12] See *Nathan Koti & Others v. His Worship David Susuame & Nabura Morrisa & Others* (2017) N6586.

[13] See the decision in *John Illius v. Chris Bias (2018) N7618*

(CDS). That saw judges being allocated cases for each of them to manage from beginning to final disposition. In 2015, most judges were not able to go past 200 cases except for two judges who disposed more than 800 cases each. Of the two, one of them used mediation and ADR processes and skills to bring about final outcomes without long drawn out trials. The other's large number of disposals was on account of summary determinations of cases for want of prosecution.

29. Last year saw good improvement in the number of cases disposed by judges. Out of a total of over 30 judges, two judges disposed over 800 cases each, another two over 600 cases each and one other over 300 cases and a couple more over 100 cases each. With the exception of the one disposing off over 300 cases, most of the judges were able to reach their respective disposition levels through summary determination for want of prosecution and for other technical reasons in addition to substantive trials and final decisions. The one disposing of 300 was mainly by applied ADR or judicial dispute resolution (JDR). That was in addition to the judge concerned also managing and conducting mediations in a number of more involved cases with long litigation histories in the extractive resource sector which play a significant part in the country's economy. Through these mediations it uncovered other potential or hidden disputes which could have entered the Court system had it not being for mediation resolving the disputes. Most of the cases resolved by mediation or a form of ADR are not likely to enter the Supreme Court's list on appeal or reviews because the parties themselves arrived at the outcome and the Court made orders in terms of the parties' own agreements.

(6) Judges Resolution

30. In 2012, the judges resolved to have 60% of all the pending and incoming cases resolved by mediation. Unfortunately, not many of the judges honoured their own resolution as the disposals of last year shows. This gave rise to a resolution on 28th June 2019 to have all cases on the Courts' lists referred for resolution by mediation. Strategies are now being developed to make the judges accountable to their own resolutions and dispose of at least 150 cases per judge per year or over 6,000 cases each year by all judges to match the number of new cases entering the Court. It is proposed that a list disclosing the names of each judge, how many cases each of them have referred to mediation, how many cases each of them have disposed in the year and how many cases are pending on their respective lists. Then each judge will be asked to commit to increase referral of cases to mediation unless they can dispose of all of the cases on their respective lists within the next 12 months. Thereafter at the end of each

month the list is expected to be updated and circulated amongst the judges. It is hoped that this will enable the judges to increase their referral of cases to mediation.

(6) Awareness and education

31. In the beginning as the Judiciary set out to develop and implement Court Annexed Mediation and ADR it packaged and delivered several awareness workshops, talks and lectures. These efforts covered the whole of the country. All available media and or medium of communication were used, from radio talk back shows, to news coverages, publications and or public talks. Through the workings of the Committee, the only Law School in the country is offering mediation and ADR as a compulsory course. After graduating with a bachelor of laws degree for those who want to become lawyers, ADR is a core course component at post graduate Legal Training Institute of PNG. The Judiciary is committed to more awareness and education on the peaceful and prompt resolution of conflicts continuing into the immediate future and beyond.

(7) Increasing use of Mediation

32. The Judiciary as made concerted efforts to promptly, finally and fully resolve some issues of National importance. This includes the multibillion dollar Exxon Mobil LNG project, a large scale oil palm development project covering more than twice the size of Singapore, re opening of Bougainville's Panguna gold and copper mine, closer of the Misima gold mine, identifications of the genuine landowners for land taken by government for the construction of a police barracks and similar issues for a number of new gold mine projects, namely Wafi-Golpu and Mt Kare gold mine projects. Included in that list are various logging and marketing contracts and arrangements with landowners, the State and so-called developers. Others include cases in which no court proceedings have been filed but judge mediators have intervened at the provincial or regional levels to stop tribal conflicts or wars which can be very destructive.

33. Choosing to mediate in these cases has been deliberate. The main reason was to try and promptly, fully and finally resolve the issues so as to enable the State, the people and developers to make informed decisions about the projects without much delay and costs. It was also to promote and or advance the mediation awareness efforts as these kinds of projects receive media attention either for the good or wrong reasons.

34. The combined effect of all of the foregoing efforts is giving rise to more and more people now beginning to ask for and are using mediation to resolve

their disputes. Given that, there is a growing trend of lawyers and parties asking for mediation in their Court proceedings. In one case for example, a senior lawyer initially opposed to mediation but later converted by a successful mediation in one of his cases, went to the National Court in a new matter on behalf of his client and asked for injunctive orders as well as an order for mediation to resolve the substantive matter. The Court granted both orders and within a month of the orders, mediation took place and enabled the parties to resolve the substantive matter. There is now more and more of this kind of cases coming through the system. This is happening with the Court consistently encouraging, asking and in appropriate cases, ordering matters to be resolved by mediation or a form of ADR before proceeding further in the litigation path.

(8) Featuring mediation weeks in annual calendar of the Court

35. This year the Judiciary as taken a few more steps to prompt an increase use of mediation. One of the steps taken is a deliberated decision to feature mediation in the Courts annual calendar. This was done as of this year. A week each month from April 2019 is allocated for mediation. It is purely of mediation where judges, lawyers and others have to schedule their programs subject to any mediation case listed for that week. This was done in response to mediators saying they are not getting enough opportunity to mediate and lawyers and judges giving excuses of having conflicting court and mediation appointments. Hence, the objective here is to prioritise mediation, enable mediators to practice mediation, PAMs to progress to fully accredited mediators, increase disposal of cases by mediation, reduce or eliminate the Courts backlog problem and enable expedited disposal of cases at less costs.

(9) Open communication with the lawyers

36. Commencing this year for the first time in PNG and certainly in other jurisdictions, the PNG Judiciary decided to hold open, fair and frank conversations with the practicing lawyers. The lawyers welcomed this unprecedented move. It has been agreed that these conversations will be held three times each year, one in the beginning of the year, the second in the middle of the year and the final one before the end of the year.

37. There two main objectives of these conversations. The first is to allow for the judges through the Chief Justice and the Deputy Chief Justice to tell the lawyers what the judges think of lawyers and the judge's expectation of the lawyers while the lawyers do likewise of the judges. The second is for lawyers to identify the problems and challenges together and arrive at possible solutions collectively so the nation or the society is given quality judicial and other

conflict or dispute resolution services. Two such communications have taken place with certain problems mutually identified with their possible solutions. One of the most important resolutions arrived at was for the lawyers to advise their clients appropriately and attempt to resolve their conflicts by mediation and other forms of ADR first and only failing there, go to courts.

(10) Organising and successfully delivering two international conferences

38. In furtherance of its leadership in promoting the use of mediation and ADR, the PNG Judiciary successfully organised and delivered two international conferences in March and September 2019 respective. The first was on International Mediation and Arbitration and the other was the Commonwealth Magistrates and Judges Association Conference in September. The first focused on international mediation and arbitration while the second was on the rule of law. Mediation featured in that conference as a necessary part of the rule of law landscape. Parts of what is covered in this address were presented at both these conferences. This has led to some understandings reached with a number of judiciaries to work with the PNG Judiciary for those other judiciaries to take the kinds of steps PNG has taken to promote mediation and increase its use to deliver quality judicial services to their people.

Part 4 - Part of a Global Trend

39. What is happening in PNG is not unique to PNG except only to the extent that her Judiciary is championing the increased use of mediation and other forms of ADR. These developments are a part of a global movement. In recent times, ADR and in particular mediation has taken the world by storm. On 23rd May 2012, the then Secretary General of the United Nations, Ban Ki-moon issued a circular asking member states to embrace and use mediation as a preferred form of conflict resolution.[14] Earlier, on 13th June 2008, the European Union issued a directive in similar terms.[15] Following the EU directive, Italy enacted legislation for compulsory mediation before litigation. Singapore and New Zealand have very active ADR practices with some emphasis on mediation. In 2011, Australia past its *Civil Procedure Act 2011*, requiring litigants to attempt to resolve their disputes through mediation first before litigation. Nearly all of the South Pacific Island countries have embraced ADR[16] and in particular mediation, with some form of mediation skills training and awareness

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[14] "*Saying an 'An Ounce of Prevention is Worth a Pound of Remedy', Secretary General"* UN General Assembly GA/11242 (found at http:www.un.org/News/Press/docs/2012/ga11242.doc.htm

[15] EU Directive 2008/52/EC on certain aspects on civil and administrative matters (reference in http:www.kennedys-law.com/article/mediationineurope.

[16] Graham Hassall "*Alternative Dispute Resolution in Pacific Islands Countries"* located at http://www.paclii.org/journals/fJSPL/vol09no2/4.shtml

workshops, mainly sponsored by the World Bank through its business arm, the International Finance Corporation (IFC) and the Pacific Judicial Development Program funded by the Australian and New Zealand Governments. Recently, the PNG Judiciary has been asked and it has agreed to provide technical assistance to a few Pacific Island countries' judiciaries with one formal memorandum of understanding (MOU) signed with the Solomon Islands Judiciary. Another one is in draft while a few discussions are being held with a few jurisdictions in Africa. The MOUs spell out the kinds of assistance required and the level of assistance that will be provided. There has also been some scoping work done regionally especially in Samoa. The scoping mission[17] revealed that a whole lot of people prefer mediation to Court ordered outcomes provided the mediators have the same quality and standing as do judges in society.

Part 5 – What is Ahead

40. In addition to the continuing programs on most of the initiatives and or programs, the PNG Judiciary as a number of important projects to implement in the immediate future. These include the following:

(1) Continue to provide leadership in taking all of the necessary steps to enable PNG to have a most modern arbitration bill enacted into law. Presently, it us under going public and stakeholder consultations. It will then promulgate arbitration rules and establish an administration system and process to manage and deal with matters referred to arbitration;

(2) Take all steps necessary to enable PNG to become a signatory to the recent Singapore Convention on the Recognition and Enforcement of Mediated agreements. Upon that being achieved the Judiciary will take the necessary steps to assist PNG to pass a National mediation Act to give effect to the convention;

(3) Continue with developments with piloting by the early December 2019 an integrated electronic cases management system (IECMS) that is set to bring about efficiency especially in the management and timely disposal of cases. The system will come with an ability to identify cases for mediation earlier on before much time, effort and money is wasted in the litigation path. Then once a matter is referred to mediation the system will assist in manage of those cases and appropriately report for all

[17] Carried out by this author and the Assistant Registrar ADR, Jean Kalamo of the PNG Judiciary in 2017.

purposes. More on this in the session 1 – 3 at 11:45 -12:45 in the Baekrok Hall B

Part 6 – Summary, Lessons and Conclusion

41. In summary:

(1) With a very few exceptions, most people globally love and crave for "peace" which means some tranquillity or quietness, with freedom from civil disturbance or a state of security or order within our respective countries or communities. Peace also means free from disquieting or oppressive thoughts or emotions with people living in harmony with one another and our environment and in one concord.

(2) Now with the advancement of technology and skills and expertise, we are able to measure the level of peace in the world using the Global Peace Index, or the GPI.

(3) In 2017 GPI indicated a less peaceful world over the past decade, with a 2.14 per cent deterioration in the global level of peace, growing inequality in peace between the most and least peaceful countries, a long-term reduction in the GPI Militarization domain, and a widening impact of terrorism, with historically high numbers of people killed in terrorist incidents over the past 5 years.

(4) Global warming, climate change and related environmental issues have the potential and are already challenging global peace and peaceful co-existences.

(5) Our peace, global peace, is dependent amongst others on the prompt, efficient and effective resolution of conflicts or disputes as and when they arise and where ever they may be located.

(6) Neither the Courts or the judicial process with their huge backlog problem nor the mediation and other forms of conflict alone have the ability to solve all the domestic, regional and global problems.

(7) As the Bougainville conflict has demonstrated beyond argument unless we can *step up the Role of Conflict Resolution* and resolve conflicts or disputes as they arise promptly, they all present time bombs that could go off any time with much destruction and loses along the way.

(8) Leadership at all levels, from the mighty and powerful to the less so mighty and powerful, whether that be Presidents or Prime Ministers, Chief Justices or Judges CEOs of corporate giants or and others in government or in the communities who are in positions of influence need to think outside the box and go outside of their traditional or defined or accepted roles and do all they can within their power, position and means to have conflicts resolved expeditiously, before they escalate into armed or other serious conflicts resulting in waste of more costs, time and other resources and of course energy and human life.

(9) The PNG Judiciary's experience is one little experience in a corner of the Pacific Ocean. Imagine if that were replicated by all the judiciaries in the world and with the support of all parties and mediators ready, willing and available for immediate deployment to meet the challenges of the world, WHAT A WONDERFUL WORLD THAT WOULD BE.

42. Peace I wish and leave with you all as we Step Up the Role of Conflict Resolution by renewing our resolve to do more for our respective immediate domestic front, Asia, the Pacific and the big Global Village.

Thank you for listening