

*The Asia Foundation*

*Restorative Justice in East Timor:  
An Evaluation of the Community Reconciliation Process  
of the CAVR*

*Professor Spencer Zifcak*

***Restorative Justice in East Timor:  
An Evaluation of the Community Reconciliation Process  
Of the CAVR***

***Introduction***

The idea that justice can be done in societies in political transition through the institutional mechanism of a Truth and Reconciliation Commission is one that has captured the imagination of many nations in the past decade. The newly independent nation of Timor Leste, with its tragic history of civil war, imperial oppression and ultimately successful liberation, is one of the most recent to have adopted the Commission model. My purpose in this report is to provide an evaluation of this fledgling, yet enormously important, Timorese initiative and in particular of the community reconciliation process initiated as part of it.

In the past two years, the East Timorese Commission for Reception, Truth and Reconciliation (CAVR) has undertaken the complex and hugely ambitious task of encouraging national, local and interpersonal reconciliation in the wake of massive civil strife. It is timely, then, to examine the nature of that task, the manner of its execution and the formidable challenges it poses for a nation still in the midst of critical, political, economic and social transition.

A Truth and Reconciliation Commission, when functioning effectively, may be considered as the quintessential institutional embodiment of a process of restorative justice. Professor John Braithwaite has defined restorative justice as:

“...a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been hurt by the injustice and to discuss, and hopefully agree, on what might be done to heal that hurt, to repair the harm.”<sup>1</sup>

The definition fits well where the restorative element is interpersonal in nature. In the East Timorese context, however, the CAVR is charged not only with effecting reconciliation between individuals in local communities, but also with engendering a wider process of national restoration. This, among other things, will involve the creation of a collective, social dialogue having a similar reconciliatory purpose. This dialogue is founded principally on the desire to right what is perceived as a collective, moral imbalance - a breakdown in national, political relationships that is so fundamental that its end has been violence and war.

In this report, I will be concerned principally with interpersonal reconciliation. Inevitably, however, this process bears upon and influences the larger project of national understanding, restoration and healing. These connections too will be mapped where relevant and appropriate.

---

<sup>1</sup> Braithwaite, J (2003) ‘Restorative Justice During and After Armed Conflict’, *Proceedings of the Commonwealth Law Conference, Melbourne, 2003*.

A Truth and Reconciliation Commission is, inevitably, the product of a political settlement designed to effect a peaceful transition from disorder to order. In the East Timorese case, the Commission formed part of multi-faceted endeavour by the United Nations transitional administration (UNTAET) and the shadow East Timorese cabinet, to secure justice following the infliction of atrocities on a scale that remains barely credible.

On the best estimates that are available, it would seem that more than one quarter of the then entire population of East Timor perished in the years that followed the Indonesian invasion of 1975. Should this be the case, and it is one of the Commission's tasks to attempt as accurate an estimate of the death toll as possible, this would constitute one of the gravest cases of genocide in the last century.<sup>2</sup> During the 24 year occupation, several large-scale massacres occurred, of which those at Craras and Santa Cruz cemetery are among the best known.

The most recent instance, of course, was the mayhem initiated immediately after the East Timorese people indicated in the referendum of 1999 their overwhelming desire see their country independent. In the military and militia-prosecuted violence that surrounded the ballot, some 500,000 citizens were displaced, 250,000 of whom fled to Indonesian West Timor. Approximately 60,000 houses were burnt, most governmental buildings were razed to the ground, and an estimated 1350 people lost their lives.<sup>3</sup>

Given the scale of these most fundamental transgressions of human rights, it was not thought feasible politically, either by the domestic political leadership or by the people, to consider that those principally responsible should be covered by any general or specific amnesty, as had occurred in the South African case. Consequently, prosecution for crimes against humanity was adopted as the primary strategy for the achievement of transitional justice. Nevertheless, it was not the only strategy adopted. Under the formidable influence of the former guerrilla leader and now President of Timor Leste, Xanana Gusmao, the idea that national and interpersonal reconciliation should be attempted in the interests of achieving national healing and a lasting, peaceful settlement of remaining differences also took hold. And it was in response to this pressure that restorative justice joined retributive justice as twinned approaches for the achievement of the new political settlement.

In institutional terms, the combination was expressed in a threefold division of responsibility. To prosecute those who had committed crimes against humanity, a Serious Crimes Unit was established under UN auspices. In parallel, the Dili District Court was given exclusive jurisdiction over genocide, war crimes, murder, sexual offences and torture committed between January 1 and October 25 1999. Within the court, two special panels were created to exercise this specific jurisdiction. The

---

<sup>2</sup> The most recent official considerations of the scale of the atrocities in East Timor are contained in: UN Document A/54/660, United Nations General Assembly, 'Situation of Human Rights in East Timor', Note by the General Secretary, December 10 1999; UN Document A/54/26, S/2000/59 'Report of the International Commission of Inquiry on East Timor to the Secretary-General', January 31 2000; Komnas HAM, 'Report of the Indonesian Investigation into Human Rights Violations in East Timor', 31 January 2000.

<sup>3</sup> For a graphic account of the events of 1999, see Martinkus J (2001) *A Dirty Little War*, Sydney: Random House.

serious crimes panels consist of two international judges and one local judge. Appeals from the panels are heard by a newly established Court of Appeal.

Those who committed serious crimes that fell outside the definition of crimes against humanity in the relevant UN regulation, were to be proceeded against in the ordinary criminal courts of the land. Their prosecution is now in the hands of the Office of the General Prosecutor, and their cases are heard in the Dili District Court in the same manner as those of any other person alleged to have engaged in criminal activity.

The CAVR forms the final component of the institutional framework. In exercising its responsibility for community reconciliation, the Commission is concerned with minor political crimes committed at any time in the past 25 years. Perpetrators willing to come forward and admit to such crimes are not prosecuted but are channelled instead into community reconciliation hearings the purpose of which is to bring them together with their victims, to forge new understandings between the parties and to provide for appropriate mechanisms of reparation and reintegration. In addition, at the national level, the Commission has been given the responsibility to uncover and 'tell the truth' about the violence that swept the land. This narrative, it is hoped, will assist in ensuring that the horrors and errors of the past will become widely known and hence be less likely to recur.

On the surface, this political settlement appears as a balanced and co-ordinated response to the challenge of achieving political and criminal justice. Beneath that surface, however, there are many practical gaps, cracks and problems which will be examined in detail later in this report.<sup>4</sup>

However, one in particular requires special mention from the outset as it is relevant to every aspect of the justice project including community reconciliation. This is the absence from the country, and hence from the relevant jurisdictions, of the significant majority of perpetrators of grave political crimes. The most important perpetrators, from Generals, to corporals, to militia leaders have fled East Timor and live either across the border in West Timor or even further West in Java and elsewhere in the Indonesian archipelago. In consequence, the achievement of political and legal justice has been compromised dramatically from the beginning.

Despite this, and perhaps because of it, the CAVR has played and will play a significant role in the achievement of just outcomes. This is particularly because it is mandated to narrate the national story of civil war and occupation, a story which will at least speak of the perpetrators and their atrocities even if they cannot be called to account. It has also become clear that through the community reconciliation process, the Commission has already done much to right wrongs committed in towns, villages and hamlets across the country. How this has been achieved, the problems that have been encountered and the implications of the reconciliation process for the resolution

---

<sup>4</sup> There have been major problems with the operation of both the Serious Crimes Unit and with the Special Panels of the District Court. As to these see, for example, Cohen, D (2002) 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' *Analysis from the East-West Center*. Vol 61, August 2002; and Human Rights Watch (2003) 'Justice Denied for East Timor' January 9, 2003 at [www.hrw.org](http://www.hrw.org).

of local, legal disputes in the future forms the essential subject matter of the remainder of this evaluative study.

Conformably, the study is in three parts. In the first and principal part, the legal framework for the community reconciliation process is described and a detailed evaluation of that process is undertaken.

In the second, the relationship between the CRP and the formal, district court system is considered and problems between the two and in particular with the latter are made clear.

This is by way of preface to the third part, in which it is argued that the conduct and success of the CRP provides valuable lessons for the resolution of local, legal disputes. The CRP model, when combined with customary law and dispute resolution mechanisms, may therefore point the way to a more effective administration of local law and justice as a complement to the proper and continuing expansion of the formal, district court system.

*Part 1*

*The Community Reconciliation Process of the CAVR*

**Part 1**  
***The Community Reconciliation Process of the CAVR***

***The Legal Framework for Community Reconciliation***

The Commission's principal objectives as set down its governing regulation are to inquire into human rights violations that took place in the context of East Timor's political conflicts, to establish the truth with respect to alleged widespread violations, to refer specific violations to the Office of the General Prosecutor with recommendations for prosecution where appropriate, to promote reconciliation and to assist in reception and reintegration of individuals guilty of minor offences into their local communities.<sup>5</sup>

The Commission has both a central and regional structure. At the centre it is comprised of 7 Commissioners.<sup>6</sup> The Commissioners must be people of high moral character, not having a high political profile, with a demonstrated commitment to human rights and the capacity to exercise impartial judgment. At least 30% of the Commissioners must be women and, in fact, there are two female members. The Commissioners were appointed by the UN's transitional administrator after an extensive process of community consultation. The Commission is chaired by Aniceto Guterres, a well-qualified and highly respected human rights lawyer.

Commissioners are also appointed at regional level.<sup>7</sup> The governing regulation creates six regional offices of the Commission and 30 regional commissioners have been appointed, five for each region. The Regional Commissioners are required to have the same qualifications as those described for central commissioners previously.

The Commissioners, whether national or regional, must act independently, without bias and must be separate from any political party, government, or governmental administration. They may not make any private use or profit of information they receive in their official capacity. All information they receive in that capacity, except that disclosed in public, shall be confidential and may not be divulged except according to law. In addition, they may not engage in any activities that may involve them in either the actuality or perception of a financial conflict of interest. Any commissioner acting in contravention of these duties may be removed by the President upon the recommendation of two-thirds of the remaining Commissioners in circumstances indicating incapacity, incompetence or the forfeiture of public trust.<sup>8</sup>

In the promotion of community reconciliation, the Commission is authorised to facilitate Community Reconciliation Processes (CRP's).<sup>9</sup> These processes may be established in relation to any criminal or non-criminal acts committed between April 1974 and October 1999. Crucially, however, nothing related to the establishment or

---

<sup>5</sup> UNTAET Regulation 2001/10, 13 July 2001, *On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, Section 3.

<sup>6</sup> UNTAET Regulation 2001/10, s.4

<sup>7</sup> UNTAET Regulation 2001/10, ss 10, 11.

<sup>8</sup> UNTAET Regulation 2001/10, s.6

<sup>9</sup> UNTAET Regulation 2001/10, ss.22-33.

conduct of CRP's may prejudice either the exercise of the Serious Crimes Unit's authority to pursue individuals in relation to serious crimes or the jurisdiction of the Serious Crimes Panels in the District Court to hear and determine the cases brought before them. The Commission may give priority to CRP's that relate to the political activities of 1999.

A CRP may be initiated only where a person has made a full admission of responsibility based on their full appreciation of the consequences of such an admission and has made a specific request to participate in the process. This admission and request must be made in a written statement containing a full description of the relevant acts, an explanation of the connection between the acts and political conflict and identify the specific community in which the deponent wishes to undertake the process of reconciliation and reintegration.

Once having received and accepted such a statement, the Commission will convene a CRP. This process brings together the perpetrator and his or her victims in a public forum, the purpose of which is to determine whether the two parties may be reconciled and, if so, what reparation should occur. Where an agreement to reconcile is reached its terms are lodged with the Office of the General Prosecutor. A failure by the perpetrator to fulfil the terms of the agreement opens that party to prosecution for the offences admitted.

A CRP is commenced when a perpetrator submits a written statement to the Commission declaring his or her participation in criminal activity in a political context and requesting that a reconciliation hearing be convened. At the time of providing the statement, however, the deponent must be informed that a copy of the statement will be sent to the Office of the General Prosecutor and that its contents may be used against him or her in a court of law should the Prosecutor choose to exercise jurisdiction.<sup>10</sup>

Under its governing regulation, the Commission is required to forward all statements submitted to it for the purpose of initiating reconciliation proceedings to the General Prosecutor's office for review. If that Office determines that it wishes to exercise its exclusive jurisdiction to prosecute, the Commission must notify the deponent that it can no longer proceed with the request for a reconciliation hearing. In determining whether or not to exercise its exclusive jurisdiction, the Office must take into consideration the views of the Commission's CRP Statements Committee.<sup>11</sup> This committee determines whether, in the view of the Commission, a matter is best proceeded with by the Commission or by referral for further investigation and action by the prosecutor's office.

In doing so, the Commission takes into consideration whether or not a deponent's statement discloses significant criminal activity. Schedule 1 of the Regulation provides that the following criteria will be taken into consideration by both the Commission and the Office in determining whether prosecution or reconciliation should be preferred: the nature and severity of the crime committed, the total number of criminal acts engaged in; and the deponent's role the commission of

---

<sup>10</sup> UN Regulation 2001/10, s.23(3).

<sup>11</sup> UN Regulation 2001/10, s.24

the crime. These criteria have been expanded upon in a memorandum of understanding agreed upon by the two organisations. Reconciliation may not be proceeded with where a deponent discloses the commission of a serious crime, that is, a crime in the nature of a crime against humanity.<sup>12</sup>

A great difference between the South African Commission and this one, as noted previously, is the absence of any provision for amnesty. Whereas in South Africa a perpetrator, even of very serious offences, emerged to admit his or her responsibility for politically motivated crimes on condition of amnesty, there is no such prospect in East Timor. Those who come forward must do so voluntarily and in the full knowledge that their actions may result in prosecution even if this is not their intent in making their admissions. No certainty exists that they will be referred for reconciliation, that is, towards a restorative form of justice and away from the retributive form. The crossover of jurisdiction combined with the absence of amnesty has meant that, for the most part, only people who believe that they have engaged in quite minor criminal infractions have come forward with a view to engaging in an act of reconciliation with their community.

Further, during a reconciliation hearing, should a perpetrator admit to the commission of serious offences not included in their original statement, or should credible evidence emerge from another source that the person had engaged in other serious transgressions, the hearing must be adjourned and the relevant matters referred to the General Prosecutor for further consideration.<sup>13</sup> Consequently, deponents are not required to make any statements that may result in self-incrimination. If they do so inadvertently they are required to be warned by the Commissioner in charge of proceedings of the serious consequences that may follow from so doing.

After the hearing, the Community Reconciliation Agreement must be forwarded to the District Court for registration. The Agreement will be registered unless the court considers that the act of reparation contained therein exceeds what is reasonably proportionate to the criminal activity disclosed or that the terms of the agreement violates human rights principles.<sup>14</sup> Acts of reparation may include community service, financial or in-kind reparation, public apology or other similar acts of contrition. Once the agreement is registered, a temporary stay of prosecution comes into effect with respect to the acts referred to in the deponent's statement.<sup>15</sup>

When a deponent fulfils the terms of the agreement, he or she is no longer subject to any criminal or civil liability for the acts disclosed. No immunity may be granted, however, in relation to any serious criminal offence. If a deponent fails to fulfil the terms of the agreement, he or she shall be guilty of an offence and may be liable either to a fine or imprisonment.<sup>16</sup>

Finally, the relevant regulation also sets down broad guidelines for the conduct of community reconciliation hearings.<sup>17</sup> The organisation of hearings is the

---

<sup>12</sup> UN Regulation 2001/10, Schedule 1.

<sup>13</sup> UN Regulation 2001/10, s.27(5).

<sup>14</sup> UN Regulation 2001/10, s.28

<sup>15</sup> UN Regulation 2001/10, s.31

<sup>16</sup> UN Regulation 2001/10, ss. 30,32

<sup>17</sup> UN Regulation 2001, ss.26,27

responsibility of the relevant Regional Commissioner. This Commissioner may convene a local panel to conduct the hearing upon the receipt of a perpetrator's statement. The panel must consist of between three and five members. It is comprised of the Regional Commissioner together with members of the community with which the deponent wishes to reconcile. As far as possible, the members of the panel should be representative of the community from which they are drawn. Panel members are chosen, therefore, after consultation between the Regional Commissioner and the community. The Commissioner is required to ensure an appropriate measure of female representation.

The panel may determine its own procedures.<sup>18</sup> It is required, however, to hear from the deponent, victims of the deponent's acts should they be present and from any other members of the local community who may have information relevant to the proceedings. The CRP panel is entitled to question the deponent in relation to his or her oral and written statements and may in the course of that questioning request further information with respect to the identity of those who instigated, organised and took part in the acts in relation to which the deponent's statement has been made. A refusal to answer such questions without reasonable excuse may result in the matter being referred back to the Office of the Prosecutor General for further consideration and action.

The regulation, therefore, provides community reconciliation panels with considerable scope to determine the manner in which the reconciliation process will be undertaken. In practice, however, a certain measure of consistency in the way in which the hearings have been conducted developed across the country. This community process is described and analysed in the sections that follow.

### ***Community Reconciliation: A Caveat with Respect to Evaluation***

The fundamental idea underlying the practical operation of Truth Commissions appears to be this. If perpetrators and victims can be brought face to face in circumstances that encourage forgiveness and redemption rather than punishment and, further, if the truth of history can be told so that a nation may understand where morally it had lost its way, then more just and peaceful communities and societies are likely to ensue.

Just to say this, however, discloses how much the idea still represents a faith rather than a certainty. Speaking generally, it seems to me that the jury is out with respect to the evidence. It is simply too soon to know for sure that the idea can work. However meritorious it may be, the effect of its practice remains to be determined.

The reason is not difficult to discern. When one speaks of forgiveness, redemption and understanding, one speaks of essentially private emotions and thoughts whose manifestations in behaviour may take many years to become evident. One may say that one forgives and embraces one's abuser in the context of an active reconciliation process but what one feels and how one will react over time remains largely unknown.

---

<sup>18</sup> UNTAET Regulation 2001/10, s.27

Similarly, it is comforting to think that when people understand the historical facts and moral consequences of their previous indecent behaviour towards one another, then a new and better society will come into existence. But whether it will and whether it can, remains as yet to be seen. The essentially personal and private nature of forgiveness and redemption, and the slowness with which public, political behaviour can be expected to change, make early assessments of success problematic.<sup>19</sup> The point has been made lucidly by Priscilla Hayner in her recent, formidably comprehensive study of the work of 22 similar commissions across the globe:

“It is perhaps only fair to first recognize that truth commissions have caught the wind of popularity long before they have been fully understood, and before the effect of commissions in the past has even been properly studied. Much of this book makes this clear, especially in regard to the untested assumptions and assertions that are sometimes made on the subject of reconciliation and the healing of wounds...Clearly the popularity of truth commissions is a reflection of a real grappling for tools to respond to the challenges that arise with the fall of repressive regimes. It is abundantly clear that domestic judicial systems cannot cope with the great demands for accountability for massive crimes, even in the rare case where there is a functioning and trustworthy judicial system, nor can any international court fully respond to these needs...Truth Commissions are thus turned to with great expectation and hope, although often with little appreciation for the complexity of the process and the difficulty of achieving hoped for ends. I do not necessarily intend to suggest that the contribution of these commissions will necessarily be minimal or unimportant, only that we should be realistic in our expectations, and about the ability of any short term process to satisfy such huge and multi-faceted demands.”<sup>20</sup>

Nevertheless, the ideal is a worthy one. It can be traced back to the founding beliefs of many of the world's religions, not least Christianity. The President of the South African Commission, Archbishop Desmond Tutu, made the link explicitly in his preparatory remarks to that Commission's final report:

“Having looked the best of the past in the eye, having asked and received forgiveness and having made amends, let us shut the door on the past – not in order to forget it but in order not to allow it to imprison us. Let us move into the glorious new future of a new kind of society where people count, not because of biological irrelevancies or other extraneous attributes, but because they are persons of infinite worth created in the image of God...”<sup>21</sup>

Somewhat less grandly but again similarly, the South African Commission's report made this aspiration tangible in the following terms:

---

<sup>19</sup> For a recent, generally favourable assessment of community initiatives with respect to restorative justice see Strang, H and Braithwaite, J (Eds) (2001) *Restorative Justice and Civil Society*, Cambridge University Press.

<sup>20</sup> Hayner P (2002) *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, pp.250-251.

<sup>21</sup> *Final Report of the Truth and Reconciliation Commission of South Africa*, Chairperson's Foreword (Volume 1, Chapter 1, para 91).

“Given the magnitude of this exercise, the Commission’s quest for truth should be viewed as a contribution to a much longer-term goal and vision. Its purpose in attempting to uncover the past had nothing to do with vengeance; it had to do, rather, with helping victims to become more visible and more valuable citizens through the public recognition and acknowledgement of their experiences...In addition by bringing the darker side of the past to the fore, those responsible for violations of human rights could also be held accountable for their actions. In the process they were given the opportunity to acknowledge their responsibility to contribute to the creation of a new South African society.”<sup>22</sup>

Similar sentiments have been present in the creation of the East Timorese Commission. In opening the Commission’s new premises, situated in the former, much feared buildings of Balide prison, the President, Xanana Gusmao, described reconciliation as follows:

“Why the need for reconciliation?

We need to know the truth  
 We need to remember  
 We need to come to terms with and accept  
 We need to learn from  
 We need to forgive  
 We need to heal and  
 We need to move forward.”<sup>23</sup>

The President of the Commission said in words redolent of those of his counterpart in South Africa:

“Our work is to transform our experience of the dark yesterday into a positive tomorrow. In doing this we must first remember the past, look at what has happened and face the painful truth. Then we will use this truth as a solid foundation for our transformation, for the reconciliation of our past differences, We will learn from our history, and the lessons will help us prevent our mistakes being made in the future.”<sup>24</sup>

Given the idealistic nature of the enterprise, it is plain that to succeed, whether in the short or long term, the Commission’s processes must be procedurally as fair, sensitive and rigorous as they can be. The ritual must be right.

Even if it is, however, it needs still to be borne in mind that we tread in the early days of this particular social experiment. Evaluative studies such as this will assist in pushing forward the boundaries of our understanding. Nevertheless, even detailed

---

<sup>22</sup> Ibid, Volume 1, Chapter 5, paras 27-28.

<sup>23</sup> Address by His Excellency, Xanana Gusmao, at the inauguration of the newly rehabilitated former Balide Prison as the National Office of the CAVR (Truth and Reconciliation Commission), Dili, 17 February 2003.

<sup>24</sup> The President of the Commission, Aniceto Guterres, Speech at the Inauguration of the Newly-Rehabilitated Balide Prison as the National Office of the CAVR, February 17,2003.

studies such as this must necessarily draw their conclusions tentatively and in the expectation that in at least some respects their findings may, perhaps, be found wanting given the passage of time. With that background and caveat in mind, I proceed to a consideration of the CRP in practice.

### ***Community Reconciliation: Formulating the Idea***

The idea that East Timor should create a Commission came early. The CNRT National Congress recommended the establishment of the Commission in August 2000. Between September and December 2000 a Steering Committee was established, under the general direction of the UNTAET Human Rights Unit, to discuss the merits of the proposal and, if thought desirable, to explore the appropriate models and methods for its implementation in the local context.

The Steering Committee consulted widely. It decided to recommend that a Commission should be established. There were several factors particularly influential in the formation of that conclusion.<sup>25</sup> At that time, the new, Timorese legal system was barely functional. New courts had only just been established, new judges were being appointed from a very small pool of legally qualified practitioners, few if any lawyers had practical experience in the prosecution and defence of specialist cases of this kind and the law itself was in a state of developmental flux.

In these circumstances, there was no way in which the formal legal system could possibly deal with the wide range and huge number of politically motivated crimes committed in the period surrounding the independence ballot in 1999 let alone handle the investigation, prosecution and trial of those involved in such crime during the preceding quarter century of Indonesian occupation.

At least in relation to minor political crime, then, some new, more informal mechanism was required to hear and determine cases and make the appropriate dispositions. Failing that, countless perpetrators and collaborators would walk free, unaccountable for their decisions and actions.

Given the scale of the violence and the spread of involvement by individuals in villages and districts throughout the country, the determination of individual responsibility for specific offences was clearly made difficult if not impossible. Besides which the notion of individual guilt in the circumstances that had prevailed was a problematic one. People were press-ganged into involvement, signed up simply to feed or defend their families, switched sides, helped and resisted at the same time, engaged in only the most minor kinds of support activity and generally reacted as one might expect in an atmosphere fraught with fear and danger.

An extensive investigation in any formal way of the role of every individual suspected of participation in or collaboration with militia activity and the attribution of individual responsibility for the multiplicity of actions engaged in would have

---

<sup>25</sup> See further *Summary of Issues Raised during the consultations on the Commission for Reception, Truth and Reconciliation*, Appendix to *Update on the Establishment of the Commission for Reception, Truth and Reconciliation*, Steering Committee for the Commission of the Human Rights Unit, UNTAET, 12 March 2001.

taken years. The country did not have those years. Accountability, if it was to mean anything, required realization quite quickly.

Local living circumstances and local culture, too, appeared to require a different kind of solution. In villages and towns people live in extraordinarily close proximity to one another. During the conflicts, perpetrators and their victims lived in homes only metres apart. Families in the same locality were pitted one against the other. Close relatives found themselves on opposite sides of the political and military divide. Communities were constantly disrupted. Bitterness and anger festered between individuals and groups who walked past each other each day. The conflicts ceased but, inevitably, the antagonisms continued.

In squashed situations like these, two things were required. Somehow, perpetrators and victims needed to be given space to settle their differences safely and peacefully. And communities at large required a means to repair their gutted social fabric. The as yet non-functional court system could not meet such needs. The system was not structured to provide the means for indiscretions and crimes to be openly acknowledged by their perpetrators and forgiven by victims and communities alike in accordance with local cultural tradition. The trial of offenders in distant forums also gave communities no opportunity to discuss with the actors and among themselves how destructive events had occurred and how damaged social relations could be repaired. The creation of a Truth and Reconciliation Commission, on the other hand, appeared to constitute a mechanism in which both kinds of resolution could occur.

For these reasons, among others, the Steering Committee recommended the Commission's establishment. The consultation also provided some guidance as to its mandate and methods of operation. It revealed that the overwhelming majority of people were in favour of formal trials for the perpetrators of serious crimes. At the same time, however, there was substantial support for the adoption of a less formal, reconciliatory mechanism to determine matters relating to those who committed minor politically motivated offences.

The people expressed a clear desire that the mechanism chosen should operate in a manner that was consistent with and incorporated aspects of the existing system of customary law and justice. At the same time, they endorsed the view that the mechanism itself should be established and defined by national law and should be consistent with international human rights principles. There was clear preference for a decentralized, village based mechanism for the resolution of disputes. This should not be a private affair, however, but should occur within the province of and with the participation of the entire local community. As will readily be appreciated from the description of the CAVR's governing regulation, all of these elements were incorporated into the legal practices and procedures finally agreed upon.

Even with all this, there was considerable skepticism and apprehension among those responsible initially for developing the community reconciliation process. As the then Head of the Human Rights Unit put the matter:

“This was quite a big risk to take. We had international experts flying and telling us it was unprecedented and that it wouldn't work. Local political leaders said that deponents wouldn't come forward and that communities wouldn't

embrace it. But to us, here, it seemed the only sensible way forward. And as the whole thing became better known and developed a momentum, the process just took off.”

The character of the community reconciliation process is explored in the next section prior to evaluating the measure of its success.

### ***Community Reconciliation: A Summary of the Process***

The form a Community Reconciliation Process (CRP) should take has been defined partly in the Commission’s governing regulation and partly in guidelines it has issued. Where the Commission accepted a perpetrator’s statement as appropriate for referral to community reconciliation, the responsibility for convening a reconciliation panel was delegated to the relevant Regional Commissioner. The Commissioner then selected a panel of between 3 and 5 people from the local community into which the perpetrator wishes to be reintegrated. The Regional Commissioner acted as Chair of the Panel.

A reconciliation hearing has generally been conducted in the following manner although inevitably there were some district and local variations.

1. The Chair of the Panel introduces the reconciliation process, explains how events will unfold and places the proceedings within their proper legal context. He or she makes reference to the fact that the matter has been considered and approved for hearing by the Office of the General Prosecutor. The Chair indicates that the agreement reached at the end of the proceedings will have formal legal effect by virtue of the agreement’s registration with the District Court. Introductory remarks are also made by village leaders and sometimes by the traditional elders. The Catholic Church is represented by the local priest who introduces the Church’s perspective and then leads a prayer for the success of the proceedings.
2. The perpetrator/deponent is asked to read his statement to those present at the hearing who include the victims of the crimes concerned where applicable and members of the local community who have chosen to attend. Following the reading, the deponent may make any further oral statement that he or she wishes by way of elaboration, explanation or apology. The deponent’s statement is followed by questions from the Panel seeking such further clarification as it wishes in relation to the circumstances described. As set down by regulation, these questions are addressed frequently to issues such as the identity of others involved in the acts disclosed and to the character of the chain of command that was in operation during the instigation, planning, organising and implementation of the politically criminal activity with which the hearing is concerned.
3. The victims present are asked to respond to the statements made by detailing the impact of the crimes committed against them or members of their families. They are also invited to ask questions of the perpetrator to clarify his or her precise role in the admitted criminal activity, to elaborate on the circumstances of that activity, to name others involved either in the

crime or its organisation and to test the credibility of the evidence and admissions that have been presented in the context of their own experience of the events under consideration.

4. The members of the community present are invited to make any statements or ask any questions of the perpetrator in relation to the matter. As far as possible the Panel Chair seeks to ensure that such statements and questions are relevant to the criminal activities admitted to and that they are posed in a way that will not create undue discord and unrest.
5. Upon the conclusion of the process of questioning, which can be extensive, a conciliation conference is convened, chaired by the Regional Commissioner. The conference consists of the members of the panel, the perpetrator or perpetrators and the victims present. The purpose of the conference is to determine the nature of the act or acts of reparation that the perpetrator should be required to undertake. Every effort is made to determine the content of the reparation by consensus. In the absence of consensus a final decision with respect to reparation is made by the Commissioner.
6. The outcome of the conciliation process is embodied in a Community Reconciliation Agreement. Where the perpetrator does not agree with the reparation proposed, the Panel refers the matter back to the Commission which may then refer it to the General Prosecutor.
7. The reconciliation process is followed and complemented by a reconciliation ceremony conducted in accordance with customary law and practice. Customary practice differs widely from district to district but will normally include rolling out a mat at the commencement of the hearing, seating those directly involved in reconciling with one another on the mat and sharing some common activity such as chewing on beetle nut, the sacrifice of a chicken or pig accompanied by ritual incantations and a rolling up of the mat at the conclusion to signify a formal recognition of the reconciliation effected. When that ceremony is successfully completed, a celebratory feast is held for the entire community. This signals the acceptance by the wider community of the process of reintegration and community healing that has taken place.
8. The Community Reconciliation Agreement, finally, is sent to the District Court for registration. Registration constitutes the agreement as an order of the Court. Registration proceeds automatically unless the Court considers that the act of reconciliation specified is not reasonably proportionate as reparation for the criminal acts concerned or that it violates recognised human rights principles.

Having set down this summary, this study proceeds now to evaluate the Community Reconciliation Process as a whole. The process consisted of no less than 200 such hearings that took place throughout Timor Leste. The evaluation will be organised in five parts: Process, Perspective, Participation, Product and Prosecution. Its strengths and weaknesses will be considered in relation to each.

These evaluative observations should be preceded however by the following remarks. First, it should be borne in mind that that community reconciliation hearings are not, and should not be expected to be, judicial in nature with all that that characterisation implies. As one would expect in a local village context, they are considerably and appropriately less formal. Further, their purpose is not to reach a judgment with respect to culpability in relation to the activities concerned but, rather, to find a locally relevant means to mend broken relationships where possible and desirable. Consequently they resemble what in western legal systems is termed mediation more than arbitration.

Secondly, and in that context, it seems to me to be appropriate to say from the outset that in my considered view the CRP, taken generally and on its own terms, has been a very significant success. The fears of its founders and the scepticism of its original critics have again, speaking in the broad, failed to materialise.

This is not to say that weaknesses have not existed. They have and will presently be delineated. Nor is it to say deny that the process operated subject to very severe practical and legal limitations. It did, and these too will become evident.

However, these weaknesses and limitations should clearly be read in the context of the program's overall, and to some extent unexpectedly, high level of achievement. It is upon the foundation of that achievement that, in the second and third parts of this report, I conclude that the CRP has much to offer in providing one important foundation for the extension and modernisation of customary law and justice as part of the overall restructuring of Timor Leste's formal and informal justice systems.

### ***Community Reconciliation: The Process***

#### **(i) The Community Reconciliation Panels**

The prescribed composition of Community Reconciliation Panels was thoughtful and constructive. In choosing to make panels representative of important community interests, including minority interests, the framers of local reconciliation sought not only to promote fairness in deliberation but also inclusiveness. The insistence that women be represented was appropriate and guidelines suggesting that a representative of a younger generation take part added to the breadth of discussion.

Village heads often sat on the panels, giving proper recognition to their standing and knowledge of local circumstance. Traditional elders were represented less frequently but this did not seem to be a major issue. It was a reflection of the steady movement of authority that had taken place over many years from such elders to a village leadership chosen more consensually by the local community. The ceremonial and religious leadership of the elders was situated and acknowledged appropriately in the adat process that followed the formal hearings. Similarly the Catholic Church was represented through its priests on some panels, but more often their contribution was made at the commencement of proceedings by leading prayers for their success and encouraging all present to approach reconciliation with open hearts and minds, in a spirit of Christian forgiveness.

The Regional Commissioner chaired the proceedings. The constancy of his or her membership of the panels introduced measure of consistency into the proceedings across the relevant District. In combination, these decisions about Panel composition lent the process a local credibility in may not have possessed had the membership been convened from outside the community or have been composed less representatively.

Panel selection was not without its difficulties in some instances however. The selection and authority of Regional Commissioners was not always greeted with universal approval, coming as it did top-down from the Commission, rather than bottom-up from the villages. In Baucau, for example, neither of the two Commissioners appointed were liked. One had been a long-term member of the UDT party who, while immensely capable, had, in the view of many in the district community, engaged in questionable political activity ever since the civil war. The other Commissioner had been married to a senior Indonesian army officer and was seen generally as biased in favour of deponents. So strong was the community feeling on this matter that she was later shifted to the Dili District to continue her work.

Generally speaking the problems concerning the selection of Commissioners were not as serious as this but certainly, the credibility lent to the process depended at least in part upon the judiciousness of the relevant appointments. This, in turn, had another effect. Since panel appointments were in the gift of the Commissioners, much depended upon their judgment. Clearly then, the better the judgment about who should be chosen for panels, the more likely it was that the process would be conducted capably and smoothly. Inevitably, panels varied in their capacities and interests and so, consequently, did the conduct of the proceedings.

For the most part, however, the panels operated reasonably well. Occasionally instances of bias were reported, magnified when it was discovered that panel members were related to either deponents or their victims. By virtue of their involvement in sub-district and village affairs, members of the panel could be expected to have considerable knowledge of the events that took place there. They could be expected consequently to have views about the manner in which political criminality was directed and organised and about who bore responsibility for it. Again, it would be hardly surprising if such views were to colour their perspective on reconciliation proceedings before them and the proper nature of the reparation that should be made.

To take one example, in an early hearing, the local village chief who was a member of the panel intervened during its course to say that although he was expected to act independently he knew that the perpetrator was not guilty of accusations levelled against him by some members of the community that were present. Nothing further from the community was heard on the matter. To be fair, examples of direct intervention such as these were relatively rare. Nevertheless, the general point with respect to actual and perceived bias is an important one.

It suggests in the context of the general circumstances described, however, that effective education of panel members with respect to the strict requirements of impartiality and fair procedure is critical and that the message may need continuous reinforcement. The existence of close relationships between members of the panel and

participants were inevitable in communities as tightly knit as these village communities were. Perhaps the problem, although it should not be overstated, might also have been alleviated to some extent, if a process of voluntary self-exclusion from particular cases had been instituted.

(ii) Introductions

The formal introductions to hearings were conducted consistently and well. It was only right that the proceedings should be commenced with initial remarks from the different strands of leadership existent in the relevant localities. In almost all cases, the District Commissioner made an opening statement on behalf of the CAVR, followed by the village head, a representative of the church. A ceremonial contribution was added by a traditional elder. This too lent the process an inclusiveness that was important in retaining the communities' confidence.

At the same time, however, the consistency of content in these introductory remarks seemed on occasions to present a problem for victims and others whose attitude towards reconciliation in the particular case may not have been favourable. Introductory statements almost without exception proceeded from the premise not only that reconciliation was a good in itself but that it was end desired, if not required, in the particular case. The substance and weight of this view no doubt put pressure on victims in particular to engage in acts of reconciliation when, in less loaded circumstances, they may not have been quite so ready and willing to do so.

(iii) Deponent's statements and presentations

Deponents' oral statements were of varying length and quality. Some spoke for a considerable time explaining their part in militia activity. Others added only an apology to the written statement that had been prepared and read previously. Some presented defensively. Others appeared open and frank. Some exhibited genuine contrition, seeming at times on the verge of tears. Others expressed that contrition but neither their oral statement nor their body language gave one faith in its authenticity.

Whatever the case, the importance lay in the space and the occasion. This was an opportunity for those who had taken part in destructive activity, whether as primary or secondary actors, to stand before their victims and their community, to state their case, explain their situation, add to the community's knowledge of sometimes terrible events and request understanding and forgiveness. The occasion and the confession was consonant with pre-existing custom and tradition and it provided all with the opportunity to move forward once again with a measure of harmony and in a way that local people knew, understood and accepted.

As just noted, not every deponent grasped that opportunity with both hands. Blame shifting appeared frequent, no doubt many underplayed their role, sometimes confessions appeared partial and inconsistent, more rarely there was a certain condescension or dismissiveness in attitude and presentation. Nevertheless, many hundreds of individuals came forward voluntarily to admit before their victims and their communities that they had acted wrongly. This was the essential starting point for reconciliation and for the most part it worked well.

#### (iv) Victims' Contributions

The value of the space given to victims to make their public statements was no less significant. This space provided a venue for vindication. In circumstances, as in the Timor Leste, where oppression had occurred for decades accompanied by violence against not only active opponents of the occupying forces but also against the ordinary citizenry, it is not uncommon for those oppressed to question their own positions and to wonder whether, in some way or another, they might bear some responsibility for their victimization. For most victims, finally, to be offered an apology and an expression of remorse for their pain and suffering they had been caused represented a tremendously important personal opportunity. It was acknowledged, at last, that their had been 'right' on their side. And that acknowledgment laid the foundation for reconciliation from that side.

Their statements in response permitted victims to express openly and publicly their 'story', perhaps for the first time in their lives. It also provided the chance for them to say to their persecutors, and to their wider communities that they had suffered, been damaged and to explain how. Victims' statements in this respect were frequently emotional and, to all observers present, distressing. The hope, however, was that for victims themselves, the effects would be cathartic and that the catharsis would endure. It is too early yet to say whether it will.

The remarks in the previous paragraph relate principally to victims' opening statements. For a considerable number, however, the remainder of the hearing was not experienced quite so constructively. The reason for this is plain enough. A CRP is initiated by a perpetrator. His or her aim is to make a confession and issue an apology so that reconciliation and reintegration with the local community may occur.

Victims do not commence the process but are called upon to participate in it. They do so in the context of a hearing whose entire rationale is to effect some form of reconciliation between them and their former tormentor. Frequently, this rationale will be made explicit from the outset by the Regional Commissioner concerned and the process, then, is conducted in the context of this understanding. It would be unsurprising, therefore, if victims did not feel themselves to be under considerable pressure to effect a public reconciliation. This is so even though some of the crimes considered have been quite significant in the context of the local community.

In one hearing I observed, for example, one perpetrator accepted responsibility for burning down 19 houses in tandem with militia colleagues. This was a lot. Yet, the final agreement was that the matter should be resolved by the issue of a public apology alone. Even allowing for cultural difference, this mediated form of reparation appeared, at least to my eyes, to be just a little inadequate. The victim's discontent was evident. This is not at all to suggest that such mediated agreements, however inadequate they may seem, should not be reached. Their form must, finally, be in the discretion of the panel which in turn operates within the norms of the local community. It is, however, to suggest that as part of the relevant procedure, it may have been beneficial for the Chair to indicate to victims that while the purpose of the hearing was to effect a reconciliation, such an outcome may not be possible. Consequently, they should not have felt obliged to repair the relationship, such as it was, on terms with which they felt discontented.

(v) Questions from the floor

The process of questioning that followed the initial statement provided victims and members of the wider community with an opening through which they could explore more widely and deeply the actions of the perpetrator and the wider circumstances within which those events occurred. In many of the hearings I observed, for example, victims wished to know more about why deponents had felt it necessary to do what they did, the identity of those under whose orders they had acted, where the others responsible were and what opportunities existed for those actors too to be brought before that hearing or another similar one.

More distressingly, questions were frequently addressed to deponents who had confessed to acting in concert with others who were known to have killed their relatives and friends about the circumstances of their deaths and the whereabouts of their remains. The desire to be reunited with the remains of the dead was an enormously powerful thread in very many proceedings. Most deponents, however, had acted well down the chain of command and could not enlighten their interrogators whose loss and sadness in this respect therefore continued unabated.

At the same time, however, while the opportunity to ask questions was an important one, the conduct of questioning was frequently unsatisfactory. There were a number of reasons for this. Unsurprisingly, deponents were reluctant to travel too widely in the answers. Speaking very generally and impressionistically, they tended to minimise their own role in the political violence that had unfolded. Frequently, when confronted with accusations that their role had been more significant than claimed, deponents either denied this without elaboration, or claimed mistaken identity, or took the Nuremberg defence or blamed others who were across the border in West Timor for forcing their participation. Clearly in some cases one or all of these positions would have been justified. The frequency of resort to them, however, suggested more was known than admitted.

In the face of careful or defensive answers of this kind, questioning needed to be acute and concerted. Most often, however, it was not. This may be attributed in part to the unsurprising fact that panel members, victims and community members were not practised in the art of digging forensically for the truth. In my observation, many inconsistencies in testimony simply went unremarked.

The problem was exacerbated by the fact that panels generally adopted a procedural rule that as many people as possible should be permitted to participate. This meant, however, that individual questioners were confined to one or two questions, denying them then the possibility of more intensive follow up. Again in the interests of maximising participation, panels also allowed in many questions that simply lacked relevance. This took time and sidetracked proceedings. On certain occasions, questions were posed aggressively but had bite at the same time. Panels sought to defuse conflict, however, and so questioners who may have unearthed further relevant information were requested alter their tone, change the direction of their examination, or were stopped at the next available opportunity in favour of the next person in line.

In most cases observed, when disagreements arose between deponents and their questioners, panel members would endeavour to mediate, urging the protagonists either to find common ground or to set aside their differences in the larger interest of achieving the reconciliation that was assumed to be the object of the proceeding. The general effect of all this appeared to be that deponent's were generally successful in fending off awkward and perspicacious questions. This produced a measure of victim dissatisfaction in its wake.

#### (vi) Community Reconciliation Agreements

Consistently with local custom and tradition, a Panel would not impose the terms of a Community Reconciliation Agreement. Instead, the Panel and the parties would endeavour to agree upon the reparation required by consensus. This consistency with the importance attached to reciprocity and exchange in local custom was clearly a good thing. Similarly it was beneficial to reconciliation for victims to be involved and to have their say about what form of restitution would be appropriate. While the Commission issued general guidelines to their Regional representatives about the kinds of acts of reparation that may be appropriate in different categories of case, the agreements reached also reflected locality specific sentiment.

As the Community Reconciliation Process developed, however, there was a tendency towards a convergence upon simple apology as the preferred outcome to proceedings. Reconciliation agreements that involved, for example, monetary compensation or compensation in kind became rarer over time. This is a source of some surprise given the traditional emphasis on reciprocal exchange as a means of settling differences. In this context, however, the trend appears to have been generated by a number of different factors.

Given the economic plight of most East Timorese, it was plain in the villages that even relatively small amounts of monetary or in-kind compensation may be beyond the means of deponents who, in any case, may have been prevented from reaching their full earning capacity as a result of their political involvement. As will have become evident in the preceding analysis, great emphasis was placed by panels upon the achievement of some final reconciliation agreement on the day of the hearing. There may have been some reluctance, therefore, to impose conditions on deponents which required continuous monitoring and invited the prospect of further intervention and reassessment in the future.

Similarly, given the reconciliatory frame within which the hearings were conducted, victims sometimes felt under considerable pressure to accept the terms of an agreement proposed by the panel, or suggested by the wider community as part of the mediatory inquiry. Time and again in interviews, community members expressed a desire simply to 'move on'. A straightforward apology embodied in a legal document signed by all parties combined with a commitment not to take part in any similar activities became, then, the quickest and easiest means of obtaining some form of closure, which in turn signalled 'success.'

#### (vii) Traditional Ceremony

The ‘adat’ ceremony that closed proceedings became and unexpectedly important part of the reconciliation process. The Steering Committee that had structured the process had recognised that it was essential that Western-style mediation and traditional Timorese forms of dispute resolution be combined in some form or another. The Commission adopted the suggestion and encouraged District Commissioners and panels to ensure that traditional elders were involved in some suitable manner. The ceremonials varied significantly from district to district and even from village to village. They tended to be more elaborate in rural constituencies and less so in urban ones. All, however, involved the traditional custom of rolling out the mat upon which the traditional rites and forms of reconciliation would take place. Rolling the mat up at the conclusion was the principal symbolic representation of the successful conclusion of the proceeding.

The ‘adat’ process was invested with considerable meaning and significance, although again the extent of this varied particularly again as between rural and urban areas. The significance was not derived not merely from custom but more potently from faith and belief of a spiritual nature. Among other things, deponents were required to take oaths that they would not again act in error. To breach that oath, according to the spiritual tradition, may bring down severe adverse consequences not only on the person concerned but also on their family and perhaps across generations. Clearly, the force attached to swearing the oath varied directly with the extent of the deponent’s belief in the system and the sanction. However, it appeared evident that the investiture of significance in the ritual was substantial in many parts of the country and therefore as part perhaps of the significant majority of the hearings.

For many participants, therefore, settlement through the ‘adat’ ceremony was as important, if not more important than that achieved through the hearing process. Similarly, the binding effect of the agreements reached is as attributable to the commitments made during the customary rites as it is to the legal agreement that was the community reconciliation’s final product.

In my view, had this combination not been sought and implemented actively, the meaning attached to the reconciliation process may have been lessened significantly. Of course, there are major problems with traditional justice mechanisms conducted in accordance with customary law and tradition. I deal with these in greater detail in Part III of this report. Nevertheless, ceremony, although not incorporated directly in the resolution of matters between deponents and victims, added substantially to the weight accorded to the reconciliation proceedings as a whole.

#### (viii) The Registration of Agreements

The registration of community reconciliation agreements with the District Court was a procedure designed to add legal authority and gravity to the undertakings given by deponents to their victims and communities. Considerable weight was placed at the introduction to and conclusion of proceedings to the legal framework of their conduct and the legal effect of their signed and documented accord. Registration conferred on the final agreement the status of an order of the Court. Consequently, the Court is able to impose legal sanctions for the non-observance of any of the undertakings made by

deponents during the course of their hearings. Thus far, only one case of a deponent failing to fulfil his agreed upon obligation has come to light and this must be regarded again as an indicator of success.

At the same time, however, the process of registration itself has clearly failed. This is because the District Courts have not yet devised a process through which such registration may occur and consequently it has not occurred. The problem seems to stem from the view of at least some of the members of the Court that registration requires a review of the evidence in order to ensure that the agreement reached is lawful and that the reparation proposed is proportionate, in human rights terms. Any such comprehensive review would take considerable time, time that the Court is unable currently to devote to the procedure.

As I write, discussions continue on the manner in which this impasse may be resolved. One solution might be for the Court to register agreements automatically on the assumption that their terms comply with those required by regulation. The assumption would not be unreasonable since, if anything, the terms generally impose lenient if not almost non-existent requirements for reparatory acts. Registration, however, could be subject to contestation by the affected party if they were thought to be too harsh or in conflict with human rights standards.

### ***Community Reconciliation: Participants' Perspectives***

The attitude of participants in the CRP – deponents, victims and the local community - has been the subject of considerable contemporaneous review. The CAVR itself undertook an internal evaluation in mid 2003. UNDP and the Judicial System Monitoring Project (JSMP) also commissioned evaluations which canvassed participants' perspectives extensively. These have been published within weeks of this study.<sup>26</sup> Each of the other studies focused more intensively on participants' reflections than this one has. Readers wishing to pursue this aspect may wish therefore to consult them. I confine myself here, therefore, to summary commentary on the perspectives of the key actors and, where appropriate, focus on particular observations that add to the detailed attitudinal portrait developed elsewhere.

By way of preface, it should also be said that the published evaluations, as might be expected, are in broad agreement about how participants viewed the community reconciliation process. Certainly, there are differences of emphasis, but the picture is similar.

In summary, it appears that participants have generally been content with and supportive of the process. For the significant majority, it is one that has been experienced as a success. This reflects considerable credit upon its organisers, centrally and regionally. Again, therefore, the evaluative comments made below should be read in that light. While some critical observations have been made by participants, and will be reported, the considerable value of the process to most of those who took part in it has emerged very clearly.

---

<sup>26</sup> Pigou P (2004) *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation*, UNDP Timor Leste; Kent L (2004) *Participants' Perspectives on the CAVR's Community Reconciliation Process*, Judicial System Monitoring Program, Timor Leste.

### (i) Deponents

Of the three categories of person principally involved, deponents were the group that expressed most satisfaction. Deponents were almost exclusively male, had been pro-autonomy in their political sympathies and, with few exceptions, had engaged only in minor criminal activity such as house burning, the destruction of livestock, acts of threat and intimidation, aiding in forced deportation and acting as guards and transportation agents. Post 1999, many deponents returned to their communities from West Timor or elsewhere in East Timor. Upon their return to their towns and villages, many experienced significant social difficulties. In rare cases, they were upbraided and assaulted. More commonly, they experienced a form of social isolation which varied in intensity from effective confinement to their homes to non-recognition in everyday social intercourse. Deponents' principal motivation for coming forward to engage in the CRP, therefore, was to effect their reintegration into the local communities of which they had formerly been part in every normal way.

The deponents interviewed for this study reported that the successful conclusion of the reconciliation process had resulted, for the most part, in a considerable easing of social tension and a considerable lessening of the social isolation they had experienced previously. It was quite evident that this had come as a great relief not only them but also to their families who had felt a similar measure of ostracism.

For some, the presentation of their side of the story openly and publicly in their community had also represented an opportunity to situate their acts in context and to correct misinformation and incorrect impression. Where this was done genuinely, it involved the deponent in explaining their inferior place in the relevant chain of command, the lack of control they were able to exercise in the circumstances, the precise and minor nature of their actions and the attribution of principal responsibility to others. Of course, those who were less sincere sought also to adopt each of these expedients.

The deponents interviewed also expressed the common view that the process of community reconciliation should continue. Many said they were aware of others in similar situations who were now willing to come forward to make statements but who, because the process had come to a close, were no longer able to do so. This was a source of concern. Some deponents said that they had expected to be joined on the community platform by those of their associates who had committed more serious offences. They expressed some puzzlement that little, if anything, appeared to have been done to make sure this happened. For most, however, the principal outstanding concern was that the agreements into which they had entered had not yet been registered with the District Court. This was a residual source of trouble and completion in this way was earnestly sought.

### (ii) Victims

The picture for victims was more ambiguous however. For victims interviewed here, the key to forgiveness was truth. In many cases, victims were satisfied on this score. But in many others there was a feeling, although admittedly the sample was small, that deponents had not been as truthful as they should have been and that the panel had not drawn them out fully.

Some felt too that the hearing process itself had placed them under pressure to reconcile where they had been somewhat reluctant to do so. There was a certain resignation about this. Victims, like deponents and their communities, wished to move on. And so, even where there was some dissatisfaction about the manner in which deponents had presented and the content of their stories, victims said they had felt disinclined to break up the momentum towards individual and community healing by walking away from the process. That, they thought, had been good for the community, but residual hurts and resentments stayed with them individually.

There was an even more serious problem, however. There were many victims present at hearings who had not been the subject of mistreatment by the particular deponents who had come forward but who had suffered badly at the hands of others with whom the deponents had associated. In hearing after hearing, this class of victim and indeed many others in the community expressed openly their deep resentment and frustration that serious perpetrators of human rights abuse had not been brought to justice. ‘Where were they’ they asked and ‘why were they not here?’

They knew the answer of course. Most were across the border in Atambua or in the case of the military further west in Java. But the frustration still spilled over into the CRP and, at least from the victim’s perspective, lessened its perceived efficacy. As one interviewee put the matter poignantly:

“The deponents have achieved their justice but victims’ hearts are still broken.” (Interviewee, Baucau)

Victims, finally, spoke often of the need for some form of monetary compensation for the suffering they had endured, personally and economically. It was not that they expected deponents to provide this. Their indigent circumstances were parallel to the victims’ own. Rather, it seemed that they had hoped that with the advent of a new nation and a new, sympathetic government some form of tangible, practical assistance would be made available to enable them to rebuild their lives financially and to provide some monetary recognition of their great personal trials. At the time of writing, however, it does not appear as if the national government possesses the necessary resources to enable such compensation to occur.

### (iii) The Panel Members

Unsurprisingly, panel members were almost universally of the view that the community reconciliation process had gone very well. Many cited the fact that reconciliation had been achieved in almost every case as the principal indicator of success. They were proud of their achievements and frequently cited special cases:

“In one of our cases, two families had been feuding for 25 years, since the civil war in 1975. But by the end of the hearing their members were hugging and crying with one another.” (Interviewee, Manatutu).

They expressed regret that the CRP had come to a close. They believed that many more hearings could have been conducted productively and that many new deponents were ready and willing to come forward, having seen how the process

worked and assessed its constructive impact. They sympathised with victims' concerns regarding the non-prosecution of senior military and militia. Although some expressed the opinion that the CRP could be extended to deal with serious offenders, most held to the strong, common view that those alleged to have engaged in serious crime should properly be prosecuted in the courts.

Some expressed concern for their own economic futures now that the Commission had reached the end of its mandate. They too hoped for this reason that one outcome of the Commission's report would be that the Government would reinstitute community reconciliation as a continuing process, associated perhaps with a reformed system of community justice. They believed they had begun the task of building a local capacity in this respect and looked forward to the prospect that their contribution might have ongoing influence and effect.

### ***Community Reconciliation: Participation***

By any account, the extent of community participation in the reconciliation process must be considered substantial and impressive. Just over 1500 deponents came forward to take part. The Commission estimates that just over double that number would still like to do so. 200 hearings were organised and conducted in every part of the country in just 15 months. Just over 100 of those took place in the last 3 months of the CRP's existence. Attendances by community members at the hearings varied with the size of the villages and towns in which they were conducted. But even conservatively calculated, more than 30,000 people were involved in these community level meetings, a significant proportion of the total adult population. This occurred despite the very considerable logistical difficulties. These related among other things to the frugality of transport, the roughness of terrain, extensive familial responsibilities and the economic barriers to ready participation.

This extensive participation is noteworthy not just as an indicator of success but also because of its cultural significance. In Timor Leste, individuation is a much less important phenomenon than it is in most developed Western nations. The sense of community and one's adherence to it remains primary. The idea that individual rights might trump community responsibilities remains a nascent one. Similarly, in the context of reconciliation, the idea that the parties to be reconciled are simply the perpetrator and the victim gives way, at least in part, to an understanding that this reciprocal acknowledgment and forgiveness forms part of a much wider process of community re-understanding, reintegration and redress.

“The hoped for outcome is a redressive process leading to mutual recognition of the transgression and a satisfactory final resolution of the conflict it has produced. In many cases, the success of this relies upon a collective assessment that adequate recompense has been paid, either in suffering or in suitable goods. Frequently, and especially in societies in which exchange is a major medium and marker of social interaction, the compensation is not designed to profit the family or individual who has been wronged, but rather to

provide an opportunity for a feast or distribution of wealth which creates the public symbolic closure of the issue and amounts to a form of reconciliation.”<sup>27</sup>

What is being dealt with in the present context therefore is ‘community’ reconciliation in the true sense of the word. It is a process in which the wounds inflicted by the community, through the agency of some of its members, must once again be addressed and then repaired by that community. The foundation for that repair rests historically in the fundamental criterion of exchange. It rests traditionally upon the customary processes of traditional justice in which dispute resolution has never rested simply in the province of some impartial and distant tribunal but has been taken, in addition or in the alternative, to be the responsibility of the locality and its membership.

It is in this context that the high attendance at community reconciliation hearings assumes its proper importance. It is indicative of and a factor contributory to what became, during the period of the Commission, a new adaptation of a culturally appropriate means of local dispute resolution.

### ***Community Reconciliation: Product and Outcome***

In this section I encapsulate the principal outcomes of the community reconciliation process. As will have become evident, the conduct of the hundreds of reconciliation hearings has been a large and complex exercise. In examining it, it is easy to become buried in the detail. It is important, therefore, to stand back and review the reconciliation programme as a whole. In doing so, the analysis may also be enriched by introducing elements not strictly within the programme’s ambit but which bear upon the success of the overall national reconciliation enterprise nevertheless.

#### **(i) Community Reconciliation Agreements**

To begin with, then, the primary outcome of the process clearly has been the successful conclusion of community reconciliation agreements between many hundreds of individuals and their victims or, where no victims were identifiable, with members of their wider communities. Very few hearings broke down.

In this the role of community reconciliation panels was critical. The panels handled a hearing process in which frequently sensitive subject matter was spoken about, and in which the prospect of angry if not violent exchange was always a possibility, with very considerable dexterity. This was particularly the case given that panel members had no prior experience of mediation of this kind, were given brief but effective training and then had to learn what to do in effect as they went along. It is notable but unsurprising in this regard, that panels were considerably more effective in their conduct of hearings towards the end of the process than they were at its beginning.

As noted in the preceding section, reconciliation was not only individual but collective. Township and village communities were involved actively and in large

---

<sup>27</sup> Mearns D (2002) *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources Institute, p.17.

numbers as participants in the proceedings and had their influence upon their outcome. In so doing, the wider community may have come better to recognise what had occurred in their locality, how individuals there had acted wrongly, what responsibility might properly be attributed to the community leadership, and what needs to be done to mend the social fabric that had been rent asunder in the conflicts. In so far as the appropriate lessons are learnt, this is likely to be enormously constructive.

At its conclusion, there is a sense in which the CRP has become a victim of its own success. It is apparent that there are many more individuals who had engaged in minor politically motivated crime and other related activity who wish now to come forward. In Liquica, for example, 182 deponents participated in hearings but more than 300 others had expressed the desire to take part only to be told that, with the end of the CRP's mandate, this would no longer be possible. On a rough estimate, it may reasonably be suggested that that only one-third of those who have expressed an interest in facing their communities with a view to reintegration have been able to do so.

This then leaves the question of what, if anything, may now be done to accommodate the large unmet demand. With 1540 cases processed, there may be up to 3000 more which could be heard. It is for this reason that most participants who were interviewed expressed the strong view that the reconciliation process should be continued even after the CAVR's term had ended. Given the strength and breadth of this feeling, the Commission may wish to make a recommendation to this effect in its final report in September, making it a matter that the Government will have seriously to consider. If there is not to be a dysfunctional discontinuity in the process, it may be appropriate for the Commission to signal its intention in this regard so that the Government may begin to formulate its attitude and strategy in the intervening period. My own discussions with senior members of government suggest that any such recommendation may be favourably received.

#### (ii) Melding with the Formal Justice System

A further, very significant product of the process has been the successful manner in which it was integrated with the formal and informal justice systems. Plainly there are continuing difficulties with the process of registering CRA's. Nevertheless, giving regulatory force and effect to agreements reached, thus tying them into the formal justice system was an innovative mechanism that added a proper measure of gravity and consequence to community reconciliation.

#### (iii) Melding with the Traditional Justice System

The mesh between community reconciliation and the informal, traditional justice system was no less important and constructive. Centrally, the process derived significance and weight from its inter-relationship with the formal justice sector. Locally, it was accorded greater force and respect from its relationship to and congruence with processes of customary law. The addition of adat processes at the conclusion of the regular, mediation proceedings enhanced the understanding and acceptability of community reconciliation across the country. There were, of course, differences in the degree to which these processes were regarded as significant in

different localities. Further, in some instances the regulatory framework and customary law contradicted one another. Overall, however, it is clear that in designing the process to incorporate elements of traditional justice, its founders made it more likely that the reconciliation process would achieve its objectives in practice and that the agreements made would endure.

#### (iv) Legislative Shape and Sanction

The detailed regulatory framework that governed the conduct of the CRP provided legal certainty to the process and was of very considerable assistance in defining the relationship between the Commission and the other institutions which together were designed to implement a comprehensive strategy for achieving transitional justice. One might quarrel with the content of parts of the regulation, particularly that which defined the relationship between the CAVR and the Office of the General Prosecutor, but to have the interaction's key aspects embodied in law was clearly beneficial. I return to that particular inter-institutional relationship presently.

#### (v) Community Security

Although its extent is difficult to gauge, it should also be noted that the community reconciliation process is likely to have made a significant contribution to the maintenance of community safety. Without the advent of the process and the considerable measure of its success, it is likely that incidents of retributory violence would have continued to occur sporadically across the country. The CRP provided a context in which continuing resentment and distress could be dealt with openly, and in a way that named and shamed those who were its cause. This no doubt took some heat out of damaged interpersonal relationships. As a community process too, reconciliation brought a measure of closure to conflicts that had occurred in the local setting and in doing so is likely to have strengthened community sentiment that it was time to move on. That sentiment was evident in statements and comments made across the country in numerous hearings. This settling, in turn, may have exercised a moderating influence amongst the people within towns and villages where much violence and suffering had occurred.

Not every product of the CRP was positive however. It revealed many problems in its wake. I deal now briefly with the most significant of these.

#### (vi) Uncovering the Truth?

It is right to say that the process succeeded in producing agreements to reconcile between many individuals and within many communities. In my view it was much less successful, however, in uncovering the truth of what had occurred in those communities. I referred earlier to the difficulties that panels and victims had in digging out the facts of militia activity and individual responsibility for it. In essence these difficulties arose from the interrogatory inexperience of the participants. This inexperience, combined with fragmentary knowledge of the precise nature of the political activity and a lack of preparatory research frequently stymied local efforts to obtain reliable evidence about what had occurred.

Understandably deponents were defensive in the face of questioning about their role and that of others. Further digging by the panel and victims, however, often failed to unearth answers to questions that were earnestly desired. At times this was a source of considerable distress to victims, particularly when what was being sought was clarification about how relatives had died and where their bodies might be located.

In observing the hearings it became apparent that however much the truth was desired, it was not in the end the principal consideration upon which reconciliation would be founded. Rather, a decision by victims or the community to re-embrace and reintegrate their former antagonists appeared to rest more critically upon the level of contrition they had demonstrated and upon the panel's and the community's judgment of their character and social acceptability, including their family's acceptability and standing. The conclusion that community reconciliation was a success, therefore, needs to be tempered by the knowledge that the truth did not always win out. In its absence, then, forgiveness and a desire to leave a conflicted past behind became the key.

#### (vii) Looking after Victims' Interests

The desire to leave the past behind and by doing so commence the process of rebuilding interpersonal and community relationships had another problematic effect. In significant numbers of hearings it had the effect of putting individual victims' interests to one side in favour of the wider community interest. While culturally understood and appropriate, it left some victims unhappy and unresolved. Having been brought into the process by the desire of the perpetrator to reconcile, these victims left it with their antagonists in a better social situation and legal position but with their own feelings mixed and troubled.

The problem should not be overstated. Many victims experienced the process, and in particular, the shaming of perpetrators, as something positive. But minority who did not were, in my estimation, sufficiently numerous to raise questions about how more could have been done to accommodate their legitimate and heartfelt interests. For the panel to have made it clear at the commencement of proceedings that victims were not required to reconcile if they felt uncomfortable with the prospect might have been helpful in this regard.

In a different vein, another means of dealing with victims' inevitable, continuing pain and lack of personal resolution would have been to extend the Commission's program of victims' hearings and healing workshops, the purpose of which was to bring victims of political violence and trauma together to speak of their common experience and in so doing endeavour to ameliorate some of their psychological distress. This program appears to have been very successful but reached only a very small proportion of the target population. The wider introduction of such a programme is another initiative the Commission might consider recommending in its final report.

#### (viii) Victim Compensation?

Similarly, and more generally, it became evident in the course of this study that the provision of financial compensation to victims was an exceptionally important

issue. A universal program of compensation, even if only symbolic in monetary terms, was supported by almost everyone interviewed. Such a program, if implemented, would make an important contribution to national reconciliation by affording tangible, public recognition to those who had suffered. It would indicate to them and to everyone else in the wider community that their sacrifice had been, noticed, appreciated and meritorious. It would also serve to defuse the feeling often expressed that many pro-autonomy supporters who had occupied remunerated public positions had retained those positions and the influence they brought with them, while others who had struggled for independence had not been appropriately recognised and rewarded for their struggle.

Regrettably, a comprehensive program of compensation is likely to remain beyond the financial capacities of a Government and nation whose economic plight remains grave. Nevertheless, the Commission may wish to consider recommending that compensatory recognition for victims in an appropriate, if yet imprecisely defined form, be introduced. My discussions with senior ministers suggest that such a proposal would be greeted favourably, at least in principle.

#### (ix) A Justice Gap

Finally, and most importantly, the key problem disclosed during the reconciliation process was the absence of prosecution and trial for those who it was known had committed crimes against humanity and other serious politically related offences, whether during the events of 1999 or previously. Most people interviewed regarded the community reconciliation process as a qualified but significant success.

At the same time, most regarded the continuing de facto immunity of serious and middle-level perpetrators from any prosecutory and other judicial or quasi-judicial process as an unqualified failure. In many hearings there was a simmering discontent expressed commonly and in similar terms that the process of reconciliation could not ultimately be successful if those principally responsible for the mayhem that had occurred were not brought to justice. This they believed should occur both in the formal court system and, for East Timorese perpetrators, also in some semi-formal process before their own communities. One interviewee expressed the matter as follows:

“Those who were resistance actors must reconcile with those who were pro-autonomy. We are old now and if we do not reconcile the cycle of revenge will continue into the next generation and this would be a great tragedy. But the resolution must be case by case. For those who committed serious crimes, reconciliation is insufficient. The answer must first be their prosecution in the formal courts. Then they can return to their villages. For those whose crimes were more minor, community justice or reconciliation like that of the CAVR will probably be enough.”

#### ***Community Reconciliation and Prosecution***

The demarcation referred to by the interviewee just cited was, as noted previously, built into the regulation governing the CAVR’s operation. As indicated in a preceding section of this report, the governing regulation provides every statement

provided to the Commission must be forwarded to the Office of the Prosecutor General (OPG) for review. Such statements, while being confidential to the Commission do not maintain their confidentiality in the face of OPG review. The OPG, then, is required to review the statements within 14 days of their receipt. The purpose of the review is to determine whether a statement discloses evidence of the commission of serious crime. If it does, then the case is withdrawn from the CAVR's jurisdiction and any further investigation and prosecution is vested in the Prosecutor's Office. In short, the final decision about whether a matter was appropriate for prosecution in the formal court system or for resolution through that of community reconciliation was one vested in the OGP rather than in the Commission.

Further, if during a community reconciliation hearing credible evidence emerged that the perpetrator concerned had engaged in serious crime, the relevant panel was required to terminate the proceedings and refer the matter back to the OPG for further consideration and action. A perpetrator who made a statement that tended towards this conclusion was also required to be advised that he or she was not under any compulsion to make any further admissions that may result in self-incrimination.

This arrangement was reflective of three important underlying policy decisions. First, nothing in the actions of the Commission should prejudice the exclusive jurisdiction granted to the OPG and the Special Panels of the Dili District Court to investigate, prosecute and try cases concerning the commission of serious politically-motivated crime including crimes against humanity. Secondly, the formal court process and the community reconciliation process were designed to operate in tandem. The former would handle serious crime, the latter would hear and resolve cases of minor crime. Thirdly, the priority accorded to the OPG and thence to the formal court system was founded on the desire to develop and strengthen the nascent district court system. As the Commission's principal legal adviser put the matter:

“In addition, an entirely new legal system was being set up, in a context in which there was no existing public confidence in the law. It was felt that the procedures of the Commission should not affect the development of this fragile process, as a strong and independent legal system is perhaps the most fundamental building block in the construction of the new nation. Maintaining full support for these principles outweighed the degree to which this policy decision might hinder the truth-seeking goals.”<sup>28</sup>

While the policy reasons for this particular allocation of responsibility may clearly be understood, the allocation itself became problematic for a number of interconnected reasons.

First, a decision had to be made about where the line between serious and less serious crime should be drawn. Schedule 1 to the Commission's governing regulation clarified this matter to some degree, but taxing and difficult decisions in this respect had still to be taken. In consequence, some cases that in normal circumstances should have been considered serious slipped through the net and were endorsed for

---

<sup>28</sup> See Burgess P (2004) 'Justice and Reconciliation in East Timor: The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts', Unpublished Paper, April 2004.

reconciliation. Similarly, some cases that might effectively have been dealt with through reconciliation were withdrawn for formal investigation.

Secondly, practical considerations intervened to influence the decision-making process. Owing to the severe resource constraints under which it operated, the Serious Crimes Unit determined that it could proceed only to investigate and prosecute crimes against humanity, and even within that context only those cases that had involved either murder, rape or torture. This left a vast gulf into which fell numerous cases in which serious crimes had been committed, although these fell short of those enumerated above, but which remained sufficiently grave to be inappropriate for determination by the Commission through the reconciliation process. Responsibility for these, then, was allocated in principle if not in practice to the ordinary prosecution service and the ordinary district court system. As shall be seen, however, this service and system were not in a position to act effectively to bring this very large number of middle-band of perpetrators to justice. And so they went into limbo and most remain there.

Thirdly, and most importantly from the CAVR's point of view, the allocation of responsibility in all probability denied it an opportunity to hear and resolve cases that had fallen into the gulf but still tended towards the more minor end of the criminal spectrum. The effect of the interaction of the relevant provisions was clear. Any well-informed perpetrator of a moderately serious criminal act was likely to be deterred from engaging with the Commission's community reconciliation processes. This is because, at the time of making a deposition, any such person could not have been sure whether their action would result in their being accepted by the Commission as suitable for participation in a local reconciliation procedure or, instead, being considered by the General Prosecutor as appropriate for criminal prosecution. This crossover of jurisdiction, combined with the absence of confidentiality, meant that it was highly likely that only people who believed that they have engaged in quite minor criminal infractions came forward with a view to reconciliation with their community.

One may, of course, regard the preceding difficulties from two quite different perspectives. If one favours the idea that those responsible for politically related criminal activity should be prosecuted and punished, then the fact of the General Prosecutor's exclusive jurisdiction and the capacity of that Office to withdraw proceedings from the Commission in favour of criminal proceedings will cause little heartache. If, on the other hand, one favours reconciliation and reintegration as the outcomes of choice even where moderately serious crimes have been committed, the incapacity of the Commission to exercise its choice about how best to proceed, will be a source of significant concern.

Since neither view embodies a monopoly of wisdom on the subject of political justice in East Timor, an appropriate middle course needed to be found. In practice, this appears to have happened, at least to the limited extent allowable by law. Extensive consultation occurred between the CAVR and the OPG to determine which route was most appropriate in any particular case. A series of semi-formal criteria developed to assist with that decision. It was clear that no person admitting to actions in the nature of crimes against humanity would proceed to reconciliation. Beyond this, however, criteria such as the degree of seriousness of the crime concerned, the extent of individually attributable responsibility for it and whether the crime was committed

as a single instance or part of a systematic pattern of violence or destruction became central in determining whether restorative or retributive justice should be pursued. Inevitably, some mistakes were made. But the consultation process worked tolerably well.

Having said this, however, the gulf created by the chosen division of responsibilities and their deterrent effect remains to be filled. Many individuals exist who have committed political crimes short of crimes against humanity but more serious than those considered appropriate for referral to reconciliation. This large, 'middle-band' are unlikely to make themselves known. Their nominated course is investigation and prosecution by the ordinary authorities and courts of the land. But those legal and judicial institutions remain highly underdeveloped. In the absence of a very significant injection of personnel and resources, it is unlikely that this 'middle' system will be capable of undertaking the task assigned to it, not just for months but for years<sup>29</sup>.

There is every prospect then, that intermediate offenders may evade any form of responsibility or accountability for their actions. The inequity inherent in such a situation is apparent. Perhaps in retrospect it may then have been better if some limited form of amnesty had been introduced to encourage these perpetrators to embark upon reconciliation. Restorative justice, clearly, is better than none at all. As it is, however, a somewhat messy situation remains, one which in turn may still rebound on the Commission in the medium term.

### ***Conclusion***

In conclusion, then, both strengths and weaknesses in the CRP may readily be identified. As will be evident from the preceding discussion, not all the weaknesses were within the Commission's own capacity to control. But from those that were, significant lessons can be learnt, not only for the future of community-based reconciliation in Timor Leste but also for other national commissions that may choose to adopt a CRP type model in the future.

It would be wrong, however, to focus in too concentrated a manner on the weaknesses. Because taken overall the process, in my view, has been a considerable success. Much has been achieved in a very short time frame. And many innovations introduced, particularly that of the community reconciliation panels, have proven their value against expectation.

This generally positive reflection needs, of course, to be qualified. As pointed out at the commencement of the report, a firm conclusion about the success of the CRP in particular and of the Commission in general is not capable finally of being made for some time still. A short term Commission represents not the end of reconciliation but its beginning. The hope is that the beginning is positive and that the process, which involves the deepest settling of feelings over emotionally long periods of time, will end well. To return again to Priscilla Hayner:

---

<sup>29</sup> For a more detailed consideration of the problems of the courts with respect to the prosecution and hearing of alleged human rights abuse see Judicial System Monitoring Project (2001) *Justice in Practice: Human Rights in Court Administration*, JSMP and more generally the Project web site at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

“In choosing to remember, in recognizing that it is impossible to forget these events, a country will be in a stronger position to build a more stable future, less likely to be threatened with tensions and conflict emerging from the shadows of a mysterious past. A formal effort to address these painful memories can begin a process that may well need to continue long after a short-lived commission, but can make a vital contribution in recognising what has long been denied. In the end, a truth commission should not attempt to close these issues. Instead, if done well, it should hope to transform this history from a source of silent pain and conflict to a point of public understanding and acknowledgment, so that the future is not continually hampered by an unresolved past.”<sup>30</sup>

In the case of the CRP, there has been a very good beginning in a process of interpersonal reconciliation that will take a considerably longer time yet to complete.

---

<sup>30</sup> Hayner P (2002) *supra*. P.254

*Part II*

*Addressing Past Violations:  
The Legal System in Crisis*

## *Part II*

### *Addressing Past Violations: The Legal System in Crisis*

The problem of how to bring the perpetrators of serious politically-motivated crime to justice in Timor Leste remains one of the most pressing before the Government and the nation. However successful the community reconciliation process might be considered to be, its primary emphasis and concern has been with effecting the reception and reintegration of minor perpetrators into their local communities. For the most part, more serious offenders remain free. In both reconciliation hearings and interviews attended and conducted for the purpose of this study, people's discontent with this imbalance has been palpable. It is a source of concern that needs urgently and effectively to be addressed if national reconciliation, understood broadly, is to have its best chance of success. The obstacles, however, remain formidable. There is no easy solution in view.

It is beyond the scope of this report to enter upon a discussion of how justice, comprehensively conceived, may be achieved. At the same time, however, there is much in the community reconciliation process that commends itself as forming part of an answer to the justice question, particularly as this is posed locally. The terms of reference for this inquiry ask that the report address two, further important matters in this context:

- An assessment of implications of real or perceived shortcomings in addressing past violations; and
- The dynamics of the CAVR against the background of traditional concepts of justice and of emerging formal judicial institutions and processes in East Timor, and an assessment of factors in the community reconciliation process with the most relevance to the development of East Timor's justice system.

The first of these matters is considered in this second part of the report. It does so in two sections. First, the legal framework for the administration of justice is described. Secondly, the nature and scale of the institutional problems associated with addressing past violations is considered.

The next matter is dealt with in the final part of the report. In that part, based on the positive experience of the CAVR, modest proposals are made for the adaptation of existing systems of local justice. This adaptation may allow such systems to complement the formal district court system and, in doing so, assist in the resolution of at least some outstanding justice issues.

#### *Formal Courts and Prosecutions: The Legal Framework*

Earlier in the report, I outlined the three interconnected pieces of the nation's political justice framework. These were the establishment of a Serious Crimes Unit and the Special Panels of the Dili District Court, the District Court System itself and the CAVR. I now return to describe the legal provisions governing the first two components.

The Serious Crimes Unit (SCU) was established by UNTAET in the year 2000 following a resolution of the UN Security Council.<sup>31</sup> Its purpose is to conduct investigations and prepare indictments to assist to bring to justice those responsible for crimes against humanity and other serious crimes committed in East Timor in 1999. Since the independence of Timor Leste on 20 May 2002, the SCU has worked under the legal authority of the Prosecutor-General of the RDTL.

The Office of the Prosecutor-General (OPG) is divided into two sections: Ordinary Crimes and the Serious Crimes Unit. Each section is headed by a Deputy General Prosecutor. The relevant UNTAET regulation provides that the Deputy General Prosecutor shall have the exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes in any competent court.<sup>32</sup> The SCU assists the Prosecutor in this task.

In three further resolutions, the Security Council demanded that those responsible for serious crimes committed in 1999 in East Timor be brought to justice.<sup>33</sup>

In addition to the SCU, therefore, UNTAET established in 2000 two Special Panels of judges within the Dili District Court with exclusive jurisdiction to deal with crimes against humanity and other serious, politically motivated criminal offences.<sup>34</sup> A special panel within the Court of Appeal was also introduced to hear and determine appeals in relation to such cases<sup>35</sup>.

The Special Panels are to deal with the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture. In relation to murder, rape and torture, the Panels were however confined to hearing cases with respect only to such crimes as were committed between 1 January and 25 October 1999. No such temporal limit applied to the other serious crimes specified.<sup>36</sup> The Special Panels in the District Court are comprised of two international judges and one East Timorese judge. The same composition is specified for the Panel in the Court of Appeal except that in cases of special importance, a Panel of five judges may be convened, having three international judges and two East Timorese judges.

Politically motivated crimes that did not fall within the categories specified above were to be heard and determined in the Dili District Court and such other District Courts as were established in the regions. District Courts have jurisdiction in all matters as courts of first instance.<sup>37</sup> The regulation governing the establishment and operation of the District Courts provided that District Courts may be established in 8 regions. At the time of writing, however, courts had been established only in Dili,

---

<sup>31</sup> UN Security Council Resolution 1272 (1999).

<sup>32</sup> UNTAET Regulation 2000/16, s.14(4).

<sup>33</sup> UN Security Council Resolutions 1264 (1999), 1319 (2000), 1338 (2001).

<sup>34</sup> UNTAET Regulation 2000/15, s.1.1

<sup>35</sup> UNTAET Regulation 2000/15, s.1.2

<sup>36</sup> UNTAET Regulation 2000/15, s.2.3

<sup>37</sup> UNTAET Regulation 2000/11, s.6

Baucau, Suai and Oecussi.<sup>38</sup> The judges of the Court are required to be independent and impartial.<sup>39</sup>

Prosecutions for serious, politically motivated crimes not falling within the categories of serious crime previously listed, are the responsibility of the Ordinary Division of the OGP. This Division is concurrently responsible for the investigation and prosecution of all ordinary criminal and civil cases.

### *Formal Courts and Prosecutions: Issues and Problems*

It has never seriously been suggested that either a process like the CRP or one founded upon traditional systems of community justice would be appropriate to hear and determine cases in which crimes against humanity and other similar offences are alleged to have been committed. It has been the consistent view of the Government and the people of Timor Leste alike that such cases should be prosecuted in national and international courts. Nevertheless, it is worth considering briefly, the halting progress achieved by the SCU and the Special Panels established with the Dili District Court. This is because it provides one important part of the context within which future needs and developments in the formal justice system should be considered.

Since its inception, the SCU has filed 81 indictments with the Special Panel for Serious Crimes at the Dili District Court. In these indictments, 369 individuals have been charged.<sup>40</sup> Those indicted include the former Head of the Indonesian armed forces, General Wiranto, another 36 Indonesian military officers, 4 Indonesian Chiefs of Police, 65 East Timorese members of the Indonesian armed forces, the former Governor of East Timor and 4 District Administrators. Regrettably, however, 281 of the 369 indicted individuals reside in Indonesia. Consequently they are beyond the reach of the nation's courts.

It is sobering to note, further, that of the estimated 1422 murders committed in the relevant period in 1999, more than half remain un-investigated as at May 2004. All of these, of course, represent pending prosecutions and trials. These figures do not include other cases in which crimes against humanity, rape, torture and force deportation are involved. Nor do they include additional cases of disappearances and attempted murder, which also require prosecutorial attention. Despite this, SCU staffing has been progressively reduced since July 2003. Its resources are spread incredibly thinly

The Special Panels have heard and determined 40 cases in the last 3 years. It is estimated that by June 2004, there will be 70 more cases either at trial or pending before the Panels. It is possible but unlikely that all 70 cases will be heard and determined by the time the SCU's mandate ends at the end of 2004. Consequently, the SCU's work during the remainder of its tenure is likely to be occupied fully with the prosecution of these cases.

---

<sup>38</sup> UNTAET Regulation 2000/11, s.7

<sup>39</sup> UNTAET Regulation 2000/11, s.2 as amended by Regulation 2001/25.

<sup>40</sup> See Serious Crimes Unit Update X/03, 22 December 2003, Office of the Deputy Prosecutor for Serious Crimes.

In other words, it is unlikely that any new investigations will be initiated, despite the very large number of deaths and other serious incidents whose examination remains outstanding. Unless significant additional resources are forthcoming, either from the international community or the national government, at this stage there appears to be nowhere further to go. According to the Prosecutor General, therefore, the answer can only lie in there being sufficient political will, nationally and internationally, to permit the prosecution process to continue.<sup>41</sup>

One other solution might be the establishment of an international ad hoc tribunal established by the UN on the model of the former Yugoslavia and Rwanda to take over and try the cases those indicted for crimes against humanity and other similar offences. Within the Government, feelings about the desirability of this option appear mixed. One senior justice minister told me, however, that this was the only viable solution:

“We can deal with this only if the UN establishes an international tribunal. The Indonesians say that our tribunal is local, and cannot therefore try its nationals. Consequently, there must be a positive decision from the UN.”

At the time of writing, it seems regrettably that there is little international political momentum for adopting this course.

The operation of the ordinary prosecution service and the District Courts is more directly relevant to the content of this study. This is because it was in this forum that the missing ‘middle-band’ of alleged offenders, many of whom were expected to but declined to come forward for reconciliation with their communities, were supposed in the alternative to be prosecuted and tried.

There is a general recognition that such a group exists and that its numbers are substantial. It is known in the villages and acknowledged in the corridors of power that a small but significant number are still at large in towns and districts. The very significant majority, however, are believed to have fled to and remain in West Timor. It is assumed reasonably that they have not returned because to have done so would have opened them to the prospect of prosecution even if their intention had been to engage with the CRP. There are very many crimes short of murder, rape and torture that would still have been regarded by the OPG as sufficiently serious to be withdrawn from reconciliation in favour of prosecution before the ordinary courts.

A further significant group of alleged ‘middle-band’ offenders ought also to be mentioned in this connection. These are the 79 persons who did in fact make statements to the CAVR in the hope that their cases would be endorsed for community reconciliation but who instead found their cases withdrawn by the OPG either upon initial assessment or upon further evidence of serious crime emerging during the course of their hearings. These cases are now subject to formal investigation by the Office. To this point, however, no action has been taken with respect to the persons concerned and no action is in prospect. There is no doubt that ‘middle-band’ offenders who remain in Timor Leste should be pursued and

---

<sup>41</sup> Personal Interview

prosecuted. Even if this is the intention, however, the OPG and the District Courts appear presently to be ill-equipped to investigate and try such cases.

The present, dire situation of the District Court system has been described extensively by the Judicial System Monitoring Project (JSMP).<sup>42</sup> What follows here is a brief, updated summary of the relevant position.

The District Court System is presently short of judges. There are 22 judges of the Court, centrally and regionally. Given present caseloads, this is a very small number. The hearing and determination of both criminal and civil cases, however, has been made even more difficult recently by the decision of the President of the Court of Appeal to send a complement of 7 judges to Portugal for a year for judicial education and training. In itself the decision to provide further judicial education to judges who clearly require it is unexceptional. However, the absence of fully one – third of the Court has created tremendous problems in managing its burgeoning caseload. It is proposed to send one third of the Court for training each year. Consequently, the severe shortage of judicial personnel is likely to continue unabated during that period.

The resources available to judges are also extremely limited. Judges share computers and printers. They do not have internet access which would be of tremendous assistance in providing them with the legal information they require. They are not provided with adequate transport. Some have their own cars, others ride motorcycles and express the quite reasonable view that this latter form of transport is insufficiently safe and secure. They share landlines, restricting the privacy of their communications and also potentially prejudicing their security. The Court library is small and there is no designated librarian. Court registry staff work effectively but under very considerable pressure. There is no computerized case management system. The number of court interpreters is plainly inadequate to meet the demand for their services.

The situation in the regional courts is even more severe than in Dili. In July 2003, two of the four judges in Baucau went to Lisbon. Another required maternity leave. The Court's record in dealing with cases had been regarded as good with hearings conducted three days a week but in September 2003, the remaining judges decided they could no longer function effectively in the district and returned to Dili. As one judge explained:

“We were provided with a building, yes, but we had no telephone, no internet, no transport, not even the toilet was installed. So we had no option but to return home to Dili.”<sup>43</sup>

The Court commenced functioning again at the commencement of 2004 but its resource problems remain severe.

The Court in Suai does not operate in Suai. It operates in Dili. The decision not to hear cases regionally appears to have been owed to the facts that most criminal

---

<sup>42</sup> JSMP (2003) ‘Dili District Court: Final Report’, November 2003; JSMP ‘Justice in the Districts’, December 2003.

<sup>43</sup> Personal Interview

suspects from Suai were held in Becora prison in Dili, inadequate accommodation was provided, no public defenders were located there and the shortage of judges in the busy Dili District Court required the attendance of Suai judges in support.

In Oecusse, there have been long periods in which no judges have been available to sit. The logistical difficulties associated with the maintenance of the Court in the enclave and the travel of its judges and support staff there have severely retarded its work. Now, as part of the Portuguese training program the only judge allocated to Oecusse has been sent overseas. After that, the Court effectively ceased to function. It has from time to time been revived when Judges from Suai have been sent to deal with the most important matters. But the problems are grave.

The effect of all this has been to produce a huge backlog of cases in both criminal and civil lists. While precise figures are difficult to obtain, it appears that there are more than 300 cases pending in each list. The best estimate is that at current rates of completion, existing listed cases will take up to 3 years to finalise. Of course, in the interim, many more will arrive for hearing.

The position is mirrored in the OPG. It too lacks the resources to manage the investigations and prosecutions on its books. Quite simply, there are too few prosecutors employed, and those that are employed are still learning their profession, to deal with the current volume of work. The Prosecutor General informed me that the Office had a backlog of 1803 cases. During 2003, 338 cases had been finalized, another 754 had been mediated or settled.

This sounds like reasonable progress until it is understood that partly in response to the magnitude of the caseload and partly owing to inexperience, some prosecutors have taken it upon themselves to mediate cases prior to their arrival at court. In the civil sphere this may not cause too much heartache as long as the terms of the settlement are lodged with and approved by the Court. But mediation by prosecutors in criminal cases is clearly a source of significant concern. Quite simply, it should not be open to prosecutors to intervene in criminal proceedings in a manner which has them, in effect, determining criminal culpability and penalty.

The conclusion that should be drawn from all this is plain. The judicial system in Timor Leste is in crisis. Without a new strategy and without a very substantial injection of new personnel, managerial expertise and administrative support, the system is at risk of becoming entirely dysfunctional. Combined with the fact that most perpetrators of serious and moderately serious crimes are not present in the country, this conclusion holds a number of implications relevant to the present study.

First it does not appear that, in the absence of an international tribunal, any person responsible for directing or failing to prevent the systematic and widespread program of crimes against humanity committed in 1999 will be brought to justice.

Secondly, it is highly likely that those individuals responsible for committing more than half of the murders that took place in that year will not be prosecuted and tried.

Thirdly, it may be impossible to implement any recommendation made by the CAVR, following its examination of the political events that took place between 1975-1999, that prosecutions be launched against persons who it alleges may have committed serious politically motivated crime during that period.

Fourthly, there appears to be no capacity within the judicial system for the investigation, prosecution and trial of 'middle-band' offenders to take place.

Fifthly, and similarly, the 79 pending cases withdrawn by the OPG from the community reconciliation process are highly unlikely to be proceeded with.

These last two factors will create a very substantial inequity. Many hundreds of individuals who had engaged in minor crime have chosen to subject themselves to a difficult, legally mandated process of confession and reconciliation and subsequently entered into legally binding reparatory agreements. At the same time, however, many hundreds of others who committed considerably more serious crimes avoided or eschewed the reconciliation process and by doing so obtained effective immunity from prosecution or any other legal process. This is manifestly unfair. Should this situation continue, it may in the medium term bring a measure of discredit on the community reconciliation process itself as participants and community members realize progressively that more serious offenders have evaded both legal and community processes and sanctions altogether.

Finally, the extent of the crisis in the formal court system indicates strongly that, even with an increase in governmental assistance, it alone will be unable effectively to manage the problems that now beset it.

This suggests, then, that one part of an overall strategy to deal with the crisis may to complement the formal court system with a local, community justice system founded upon customary law and practice but adapted to contemporary circumstance. That, in turn, opens the way for a consideration of what the positive experience of the CRP might have to offer by way of compatible, complementary additions to the existing practice of local, community justice so that the formal and informal justice systems may constructively combine. It is to that consideration that I turn in the third part of the report.

***Part III***

***Community Reconciliation and Local Justice:  
Combination and Reform***

### *Part III*

#### *Community Reconciliation and Local Justice: Combination and Reform*

In this third part of the report, I examine how the positive experiences of the CRP may contribute to the constructive adaptation of the existing Timorese local justice system. The examination is prompted by two principal considerations. First, a suitably modified local justice system may be able to assume the jurisdiction required to ensure that persons who have committed serious political crimes but who have not fallen within the ambit of either the CRP or the Special Panels of the District Court are brought to justice. This is a crucially important objective. Secondly, a modified system may be able to provide an appropriate complement to the formal court system. The effective combination of the two would do much to ease the present crisis in the courts while, in the longer term, enhancing the justice system's credibility substantially in the wider community.

The examination proceeds in three parts. First, I provide a summary of the existing system of local, community justice and the principles that underlie it. Next, I summarise the views of local communities and senior governmental and judicial officials to the local system and prospect of its combination with the formal justice system. Then, I take four innovations introduced within the framework of the CRP and apply them to generate several proposals for compatible and complementary reforms to the existing practice of local justice.

#### *Traditional Justice: The Legal Framework*

As is remarked in many studies of traditional justice in East Timor, no one system of traditional justice exists in the country. There are in fact many such systems. A recent study of local mediation by the Peace and Democracy Foundation, for example, identified no less than 63 different forms based on different dialects and places.<sup>44</sup> Having said that, however, it is possible, at the same time to identify certain key underlying principles and practices common to most existing systems. This identification is not easy because what is described derives from an oral rather than written tradition. Nevertheless, there have been several recent academic studies of the subject and what follows here is a précis of their findings, combined with my own observations of customary law and ritual in the reconciliation context.<sup>45</sup>

The system of local, customary justice derives from two principal sources: the first is ancient narratives including ancient myths and rituals. The second is stories founded in more recent historical experience recited by the *lian nain*, that is the

---

<sup>44</sup> Peace and Democracy Foundation, Dili, (2003) *Preliminary Report: Research on Customary Dispute Resolution and a Draft Mediation Model for Timor Leste*.

<sup>45</sup> See for example Fox J J (Ed) *The Flow of Life*, Canberra: Australian National University Press; Fox J J and Sather C (1996) *Origins, Ancestry and Alliance*, Canberra: Australian National University Press; Babo-Soares D (2000) *A Brief Overview of the Role of Customary Law in East Timor*, Paper presented to a symposium on East Timor, Indonesia and the Region, Universidade Nova de Lisboa; Babo-Soares D (2002) *Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor*; Mearns D (2002) *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International.

customary elders whose role is as holders of the law. These stories provide what might loosely be described as precedents of proper behaviour.

Since law is 'held' by traditional elders, it follows that behavioural rules at village level are founded principally upon respect for one's elders and the primacy of one's family's interests. Traditional courts then consist of an elder or a council of elders who are respected as having the authority and wisdom to make decisions concerning disputes that arise between individuals and families in the village. This authority is crystallised in a series of 'metaphors for living'. These metaphors in turn provide the foundation for making decisions with respect to what constitutes right or wrong behaviour. Not unlike modern legal systems, the traditional court then is expected to make its decisions on the basis of the facts before it and the metaphors or principles that have guided proper conduct in cases of a similar kind in the past.

It is important to note in this regard, that the composition of local tribunals has changed somewhat in recent years, partly in response to the incursion of colonial systems of law. To a significant degree, the responsibility for local dispute resolution has now shifted from the traditional 'holders of the law', to chiefs of the villages, the *chefe de suco* and the *chefe d'aldeia*. While the two act frequently in concert, it has become increasingly the case that substantive decision-making, albeit on a similar foundation, has shifted to the chiefs, while ritual and ceremony remains the province of the *lian nain*.

The system of traditional law operates hierarchically. Disputes between families, whether over marriage, property or other matters, will generally be left to the families themselves to resolve. The family elders will convene to endeavour to reach an appropriate compromise. If individuals or families are unsuccessful in resolving their disagreements, the matter will then be referred to the *chefe d'aldeia* (neighbourhood chief) who will seek to mediate. Should this attempt fail, the dispute is referred upwards again, this time to the *chefe de suco*, the head of the village. He may convene a council of elders consisting of the members of the traditional and administrative leadership. The local priest may also become involved. The Council is more likely to be convened if the matter in dispute is one concerning local custom or tradition, therefore having some value as a precedent of sorts in similar future cases. An inability to resolve the disputation in the village, depending on the continuing seriousness of the disagreement, may then be referred to the police and the engagement with the civil authorities begins. The police will also become involved if there are disagreements between neighbourhoods or villages, particularly where there appears to be the risk of disorder. This, in turn, may lead to the disagreement being taken before the courts.

Customary law and practice is founded upon certain key guiding principles. The principles most relevant to the present study are the following. First, a strong emphasis is placed in local justice systems upon reciprocity and exchange. In western systems of law, evidence is considered, a determination made and a penalty determined, all in an arbitral fashion. In traditional law, by contrast, a determination is made but remains contestable by the parties. Further, the penalty is one that is negotiated between the tribunal and the parties, in a manner seeks not only to punish the guilty party but also to place all parties in a position that equates roughly to that which prevailed before the misconduct took place. This reflects the belief that the

wrongdoing creates a debt that must be repaid not only to the person harmed but also to the wider community if the matter in question is to be finalised. Sanctions, therefore, have both a personal and social dimension. In the personal dimension, the offender may incur social isolation or exclusion. However, such a consequence may not necessarily follow if suitable reparation can be made which compensates not only the victim for the harm he or she has suffered but also restores a sense of balance to the community as a whole. This constitutes the social dimension of the sanction.

Secondly, consistent with the principal of reciprocity, every effort is made to mediate proceedings whether civil or criminal. The essential precondition for successful mediation is a full and frank admission of responsibility by the perpetrator or instigator concerned. If such an admission is made, it is then expected that the victim or opposing party will act in a forgiving manner and seek to agree upon the terms of an exchange.

Thirdly, the notion of justice has a strong temporal dimension. Decisions are made and suitable reparations are decided upon. Both decision and reparation, however, are designed to achieve not only a mediated settlement in the present between the specific parties to the dispute but also to contribute to the well-being of the wider community in the future. The idea is to heal past mistakes and by so doing promote future harmony.

Fourthly, the process has a strong spiritual as well as secular aspect. It follows that local dispute resolution proceedings will normally be followed by the taking of oaths and the conduct of appropriate rituals. These are believed to legitimise the proceedings in the transcendent realm. The failure to take an oath is widely believed to invalidate the preceding proceedings. The failure to abide by the oath, is thought to bring down substantial adverse consequences not only upon the relevant participant but on their families and, perhaps, through generations. Bobo-Soares has described the significance oath and ritual graphically in the following terms:

“The objective of the Oath is twofold. First, it demonstrates that social stability has been recovered and the status of the previously deemed social malefactor has been re-established. Likewise, the balance between cosmos and secular world has also been re-established. Secondly, it provides protection and closes down the chapter of that specific conflict. Social order, indeed social life, is therefore restored.”

Fifthly, the idea of reconciliation is deeply embedded within local systems of justice. This follows from the significance attached to reciprocity and exchange as the foundation for an agreement that will settle matters between the parties so that they may resume normal social relations. The resumption of normal social relations in turn has the effect of contributing to the continuing social and spiritual well-being of the community as a whole. This is why the punishment of an offender by a distant, formal court and the service of their sentence in a distant penal institution seems so unsatisfactory. It makes no advance either in the process of individual reparation or community healing.

*Nahe Biti* or grassroots reconciliation is well known and translated literally means the laying down of the mat. It is accompanied by its own special set of customs

and rituals. When the mat on which participants are asked to sit is unfolded the process of reconciliation begins. It is not concluded until the mat is taken up by the local religious leader and folded. The participants may also chew on beetle nut share a meal together and drink from common vessels to signify that they intend to place their conflicted past behind them. More elaborately in some areas, the throats of chickens and pigs are cut, the blood is poured into cups of tua and the parties drink from the cups to signal their concurrence with the decision that has been mediated. It is important to note that each of these rituals has a meaning, significance and binding effect that travels very much further the simple acknowledgement of an accord. These rituals also signify and cement the community's assent within a traditional legal and religious framework. As one CAVR Commissioner put it to me:

“it is ancestral tradition, spirituality, magic that provides the most important binding element to these agreements. If these are transgressed, then the community is wronged...the person who breaks the agreement may be punished under traditional law or by ‘the other.’<sup>46</sup>

It with an understanding of these structures and principles that we may proceed to consider how the traditional justice system may constructively be adapted to enable it to take its place as an integral part of the administration of democratic Timor Leste's overall system of justice.

Before doing so, however, I give some introductory consideration to the attitude of senior governmental and judicial officers, and the attitudes of local people more generally, to community justice and the prospect that it might provide an appropriate and effective alternative to the existing formal court system.

### *Attitudes to the Local Justice System*

#### (i) The Local Community

To understand the perceptions and opinions of local people about the administration of justice in their country, we are fortunate to have the excellent and comprehensive survey undertaken by the Asia Foundation, published in February 2004. Readers interested in this question should refer to the survey itself which canvasses the issues and problems extensively. Here, I summarise the results relevant to this study, combined with additional observations obtained during my own research.

Unsurprisingly, in the light of what has been delineated above, the participants in the survey stated that access to the formal court system was a matter of considerable concern. They believed that the quality of justice and the level of service provided by the system was clearly inadequate.

Local people's perception of the justice system in the country as a whole, however, embraced both the formal court system and traditional 'adat' processes. There was a strong view that both systems had their contribution to make and that

---

<sup>46</sup> Personal Interview

each contribution should be utilized appropriately. The proper role of the two systems, however, should be distinguished.

Reflecting the almost universal view of those interviewed for this study, participants in the Foundation survey indicated clearly that the formal court system was the system most appropriate for the resolution of serious crimes, contractual disputes, disputes with governmental agencies and police abuse. On the other hand, the local, community justice system was the most appropriate for the resolution of minor crime and for solving neighbourhood and familial disputes. Of the two systems, those surveyed indicated that they felt more comfortable with the systems of local justice than they did with engagement with the formal court system.

Participants said that were generally positive about the way in which the formal system operated. They believed that for the most part it operated fairly and provided equal treatment across the country. At the same time they identified an extensive list of problems with it. The principal problems identified in the Foundation study and this one were these.

The formal courts were regarded as both inaccessible and dysfunctional. The cost of proceedings in the system operated as a substantial disincentive to its use. Its use of Portuguese as the official language was also seen as alienating. Local people had little knowledge or experience of the system and did not understand the law and procedure that governed its practice. There was a strong residual feeling, deriving from the experience of colonial rule, that the formal court system may not operate in the people's best interests. It was likely that it would operate in the interests of the rich and powerful rather than giving equal weight to the situation and argument of ordinary citizens. Almost a third of the respondents believed that court personnel were open to corruption. The formal courts were regarded as distant. Their proceedings lacked relevance to the affairs of the local community. There was no sense in which the proceedings were owned by the local community. In this context, it was felt by many that while the courts might be successful in delivering individual justice, communal understandings of justice more consonant with traditional culture and values were insufficiently influential in determining the form and outcome of legal proceedings.

Speaking generally, the traditional system of justice were favoured. Most survey respondents indicated that they were comfortable in bringing a problem to either the *chefe de suco* or to traditional adat leaders for consideration. The adat system was widely considered as fair and accessible. It was efficient and affordable. The system was also regarded as more accurately reflecting people's culture and values than the formal court system did. It was better understood and more familiar not least because its proceedings were conducted in the local language and in a manner that most people had already known and experienced. Consonant with traditional values its emphasis was more conciliation than arbitration. Compensatory exchange operated as its principal currency. In the traditional system a strong emphasis was placed on achieving lasting reconciliation. This reconciliation was not only effected between the perpetrator and victim but between their families and within the community at large. This emphasis on community in the view of many made it more likely that decisions would be respected and observed.

Participants, however, acknowledged that the system of traditional justice had its own problems. Different decisions might be reached in similar cases. Decision makers may on occasions be biased, either because of their own interests or because they may rely too heavily on prior, personal knowledge of the matters in dispute. Some participants also felt that the decisions of village chiefs may be subject to political influence and interference. A significant minority of interviewees in the Foundation survey believed that decisions made in accordance with customary law may breach human rights standards. Again, a significant minority believed that the system of traditional justice resulted in the unfair treatment of women, particularly in relation to cases of domestic violence. Nevertheless, over half of the interviewees still believed that such cases should be handled in accordance with the local custom and process rather than by the formal court system. Cases of rape, in contrast, were sufficiently serious to be referred to that system for prosecution and trial.

Taking all this into consideration it was significant that 75% of the participants in the Foundation survey indicated that the traditional system of justice required reform if it were to operate more effectively.

#### (ii) Ministers and Jurists

In senior governmental and judicial circles, reservations are held about the co-optation of customary law and justice. These are both similar and different from those expressed immediately above.

The primary reservation held by many is that consonant with the development of a modern, functioning democracy, Timor Leste should devote its full attention to ensuring that the formal court system operates in a unified, comprehensive and fair way and in a manner that is consistent with the rule of law. The idea of developing parallel systems of law is unattractive in this context, particularly as systems of local justice vary considerably between districts, sub-districts, towns and villages across the country. The problems associated with having varying procedures and standards in criminal proceedings are of particular concern in this regard.

“As a nation, we have been in operation only 20 months. We must have short, medium and long term policy goals. These must all be directed in one way or another towards our formal justice system operating effectively. We cannot simply hand justice back to traditional leaders acting in accordance with local culture...If minor crimes are to be dealt with locally, then strict preconditions must apply and there must be consistency across the board.”<sup>47</sup> (Justice Minister)

This view is commendable. The problem, however, is that pure reliance on the formal court system is impractical in present circumstances. The personnel, skills and resources are simply unavailable to support it. Consequently, there is an acknowledgment that, at least for an interim period that may stretch for some years, formal and traditional justice must operate in tandem. If this is the case, however, politicians, judges and representatives of NGO's alike are clear that the manner in which local justice is conducted must be defined by law and that significant adaptations must be made to ensure procedural fairness and consistency of outcomes.

---

<sup>47</sup> Personal Interview

“The District Courts are not functioning. This is owing to the number and skill of judges, to logistics and the fact that local people are still unfamiliar with formal court processes. People are not sufficiently informed of procedures for bringing cases to permit the system to work. So, it may be desirable that the formal court system be supplemented by traditional justice mechanisms. Until the district system is functioning effectively, then systems of traditional justice may be necessary to provide part of the answer to unmet need. Of course, matters like judicial independence are things we understand but cannot readily be transposed into the traditional justice arena... We must be careful if we intervene to introduce some measure of consistency in local systems that we do not destroy the process. What might be desirable is some amalgam of traditional justice and the reconciliation processes now begun. It would provide a good beginning if the crimes to be dealt with by the formal court system and the crimes by reconciliation/traditional justice could be defined by law”<sup>48</sup> (Judge of the Court of Appeal).

There was a keen appreciation among actors in government, the judiciary and in NGO’s that a local justice system that remained fixed and unreformed would be an unsuitable partner for the national courts. The principal concern here was that solutions arrived at locally might be fundamentally in breach of human rights standards to which the government and country was fully committed:

“Serious crimes could not be dealt with by the local justice system. To take just one example, rape is unacceptable. But in some local communities the crime may be swept aside simply by the families concerned throwing a party and making up. We could not allow this to happen.”<sup>49</sup> (Justice Minister)

The interviewees in this study wrestled with the question of what additional measures needed to be grafted onto the local community justice system in order to ensure that it operated fairly, consistently, comprehensively and in accordance with the rule of law. Several very constructive suggestions were made, a number of the most important of which were encapsulated in the following statement from a Judge of the District Court:

“As a jurist I don’t favour handling criminal cases through the traditional system. However because of limited resources, if a viable alternative were to exist one may consider its use. However, there would need to be preconditions. The government would have to review the situation carefully. There would have to be legislation to govern and legitimate the process, to ensure common standards across the country for specific classes of cases both civil and criminal. There needs to be some guarantee of justice as equal for all. One could also create CAVR type panels across the country to complement existing local justice systems. But even then it would be best if there were some direct connection with the formal justice system. Perhaps there should be judicial oversight of the system by judges within each district.”<sup>50</sup>

---

<sup>48</sup> Personal Interview

<sup>49</sup> Personal Interview

<sup>50</sup> Personal Interview

This would appear to me to be an appropriate set of adaptations with which to begin. I explore them and others in the section that follows.

### ***Community Justice and Reconciliation: Proposals for Adaptation and Coherence***

This consideration of a modest series of proposals with respect to traditional justice needs to begin with a caveat. I am not an expert in customary law and practice nor would I pretend to be. Consequently, the proposals here ought to be read as preliminary and suggestive rather than concluded. It is not my intention that they be considered immediately for implementation but rather as one point of departure among many in a continuing deliberation and dialogue about Timor Leste's justice system. That more research needs to be undertaken is I think evident. The view is shared at the most senior levels of Government. In discussing the matters dealt with here, the nation's Minister for Justice told me that:

“A consideration of the interaction between the formal court system and traditional justice is one of the primary matters on the agenda of the current National Dialogue on Justice Administration. It may be that we need to constitute local tribunals. Certainly, the local system must operate in a way that is consistent across the country. To determine how we should approach this is something that I think now requires considerable new research and consultation.”<sup>51</sup>

It is perhaps best then to begin by making clear the underlying principles upon which the proposals are based. They are as follows:

- The existing system of customary law and justice, which has evolved over many centuries, should be modified to the minimum extent possible consistent with the values of a newly democratic polity
- The local justice system should be conducted in a manner that reflects the importance of adherence to due process.
- The local justice system similarly should be concerned with the achievement of substantive fairness so that, for example, its outcomes should as far as possible be consistent with international and national, constitutionally based human rights standards.
- The local justice system's present emphasis upon grassroots reconciliation should be preserved and enhanced.
- In the spheres of both criminal and civil law, an operational distinction should continue to be drawn between serious matters and non-serious matters. Serious matters should remain within the province of the formal court system. Non-serious matters may be dealt with by the local, community justice system.

---

<sup>51</sup> Personal Interview

- To as great an extent as possible, given existing inter-regional, legal and customary differences, the local justice system should promote national consistency in both procedures and outcomes.
- The local justice system should be regulated by law. A legal framework endorsed by the parliament should provide the foundation for its operation.
- To as great and extent as possible, adaptations made to the local justice system should be such as have been demonstrated to work in practice in related contexts.

It is from the last principle that I move now to a consideration of how the positive experience of the CRP may contribute to further discussion and deliberation upon local justice reform.

### ***The Community Reconciliation Process and the Reform of Local Justice***

There are four positive aspects of the experience of the CRP which, in my view, may be of particular significance in the development of a reformed local justice system.

First, the CRP managed successfully to set in place its practices and procedures in a manner that was complementary to and supplemented by those characteristic of existing customary law and practice. This is a complementarity that ought also to be sought when considering the melding of the existing formal and informal justice systems.

Secondly, perhaps the major innovation of the CRP was the creation of community reconciliation panels. These operated at a village level throughout the country in a way that was widely accepted by local communities. In so doing, the panels introduced a measure of representativeness, impartiality and procedural fairness into local reconciliation proceedings. Their re-creation in the context of the administration of local justice may bring with it similar benefits and advantages.

Thirdly, the CRP was connected directly to the formal court system and to the national prosecution service. This relationship was crucial and for the most part operated effectively. A similar linkage should also be created in the future between the formal justice system and its local counterpart.

Fourthly, the CRP operated within the context of legislation that regulated its workings in some detail. Generally considered, the governing legislation was appropriate and well adapted to local situations and circumstances. The legislation also gave legal force and effect to the outcomes of local reconciliation proceedings, giving them weight and import. It would seem to be an essential prerequisite for the reform of the existing system of local justice that it be contained similarly within a national legal framework determined and endorsed by the national government and parliament.

In the remainder of this section of the report, I explore the implications of each of these four positive innovations in more detail.

(i) Complementarity between the CRP and Traditional Law and Custom

It will be apparent from the preceding discussion that the process of community reconciliation was one that resonated with local communities, being familiar to them from its resemblance to *Nahe Biti*. While some of the structural and procedural aspects of the CAVR's community reconciliation process were novel, its designers sought consciously to embrace existing custom and tradition within the new form. This developed in harmony with the principles, processes and rituals of *Nahe Biti* and in doing so gathered significant local credibility.

It accorded important formal roles to village chiefs and the *lian nain*. It adopted traditional ritual and ceremony as an active and significant supplement to the legislatively mandated mediation procedures. It provided for participation by the entire local community. And, as importantly, as anything, by embracing traditional rites, it added a gravity to agreements reached that is likely to add significantly to their enduring effect.

The lesson is clear. In the future development of any modified, legislatively sanctioned local justice system, all of these components should similarly be adopted and incorporated. So, for example, it may be appropriate to provide that village heads preside over, or at least participate actively, in the hearing and determination of local disputes. Similarly, the *lian nain* should continue to play their ceremonial role. Provision should be made for community involvement in the proceedings and in the negotiation of their outcomes. If these things are done, the decisions that are made are likely to be accorded their proper respect.

It should be noted that the implementation of these suggestions, may to different eyes, be regarded as inconsistent with certain fundamental legal principles, for example, the separation of executive and judicial power. Nevertheless, the principles of minimum interference and prior operational success would appear to dictate that some modification of the fundamental principle is appropriate and workable.

(ii) Community Justice Panels

Without doubt, the key innovation of the CRP was the creation of community reconciliation panels. Their acceptance and success suggests that the panel idea might also constructively be extended into the operation of the local system of justice.

There are several important considerations that tend to towards this conclusion. The first is concerned with ensuring that local proceedings are conducted in a way that is procedurally as fair as possible. Significant weight needs to be attached therefore to making the person or body conducting local proceedings as impartial as possible. It is one of the principal criticisms of the existing system of local justice that the decision-maker or decision-makers may be biased. The problem was summarised aptly by Dr David Mearns in his research on models for justice in East Timor:

“In many districts, the arbitrariness of the judgments and the potential for bias and the exercise of vested interest were seen as real problems with the local system. Since most local systems relied on strong political leaders who were often not descended from customary leaders and were not ‘traditional’ anyway, this was considered a particularly difficult problem.”<sup>52</sup>

There are many potential sources of bias in present local systems. Village heads may be biased on the basis of their political affiliation, as noted above. Bias may be introduced by virtue of the decision-maker’s familial, tribal or cultural ties. Favourable treatment may be procured by corruption. In small communities, proceedings may tend towards predetermined outcomes, simply by virtue of the decision-makers’ prior knowledge of and attitude towards the disputants or the circumstances of the dispute. Local people’s experience of justice under the Indonesian regime, which was notoriously corrupt and politically influenced, still makes them cautious about embracing any new system whether formal or informal.

So, it is clearly critical to eliminate bias introduced in these ways. It is also crucial to minimise or remove any and every other source of partisanship if the local justice system is to be perceived as a credible complement to the formal courts. The reinvention of community reconciliation panels as community justice panels may provide one proven and effective means of achieving this outcome.

The interposition of community justice panels into systems of local justice could provide a number of very important benefits in this and other respects. The panels broaden the range of decision-makers beyond one person. This makes it far more difficult for those seeking to bribe or improperly influence the local tribunal. Procuring one vote is much easier than procuring five.

The establishment of a central or regional body to monitor and vet local appointments also lessens the prospect that inappropriate candidates will be selected. In the CRP, panel members were chosen by the CAVR’s regional commissioner in consultation with the local community. Some similar process of district based selection, perhaps by the District Administrator in consultation with local communities, could serve the same purpose.

If modelled on community reconciliation panels, local panels are likely to be more representative of the plurality of community interests than one village chief would be. The requirement in the CRP that female representation be included and the suggestion that there be a representative of the younger members of the local community added significantly to the quality of judgments made and the credibility of the process.

The panels were given important early training in applying relevant law and ensuring fair procedure. Their sophistication in doing so increased significantly during the course of the CRP. A similar program of education for new members of community justice panels could be expected to reap similar, significant rewards.

---

<sup>52</sup> Mearns D (2002) *Looking Both Ways: Models for Local Justice in East Timor*, ALRI, pp.53-54.

The representativeness of the panels and their progressively greater skill in conducting hearings also drew the wider community into the process. Community members, particularly for minority groups felt that their interests were better represented, and the effective conduct of hearings allowed for extensive and appropriately moderated involvement in proceedings by community members who chose to participate in them. Consequently, the sense of community ownership of the process was enhanced.

For all these reasons, it would seem sensible to incorporate panels into local systems of justice. The panels would usually be chaired by the village chief, thereby acknowledging his (or her) role and position. The chief would be surrounded however by other community leaders, representing important interests according to their significance and distribution in the local community. The benefits of such an arrangement may be very substantial indeed.

I note that without the positive experience of the CRP, such a proposal might have been regarded as too radical an alteration to the existing system of local justice. That experience, however, and the credibility attached to it during the course of the process by local people across all districts, suggests that this reform's time may well have arrived. Of course, its commencement could be hastened and its credibility enhanced, if former members of the community reconciliation panels formed the kernel of the membership of the new community justice panel structure.

### (iii) Connection with the Formal Court System

The CRP was connected directly to the formal court system and the prosecution service. The Office of the Prosecutor General was responsible for determining whether cases fell into a class that was appropriate for reconciliation. It could also withdraw cases from reconciliation where it appeared that a deponent had participated in serious crime. The formal court system exercised a supervisory jurisdiction. It was required to register Community Reconciliation Agreements. In doing so, it was responsible for determining whether the reparation proposed in the agreements was proportionate to the circumstances and in accordance with human rights principles. If not, the agreement would not take effect.

In exploring constructive adaptations to the local justice system, it would seem sensible and appropriate for a similar linkage between it and the formal court system to be made. There are several reasons for this.

First, the intention in permitting the local justice system to play a complementary role in the administration of justice is not that local justice should operate separately but rather that it should be fully integrated so that a unified system of justice is created. Consistent with the rule of law, all people should be treated equally before the law. The creation of separate systems of justice would severely undermine this principle.

Secondly, therefore, appropriate linkage mechanisms should be created. These should allow the ready movement of cases from one jurisdiction to the other where this is in the interests of achieving justice. At the same time, there should be no confusion about which jurisdiction should be approached in the first instance.

Thirdly, therefore, in criminal cases a vetting process similar to that conducted by the Office of the Prosecutor General might constructively be set in place to determine which cases were appropriate for resolution at local level and which should be handled at district level through the courts. A similar process would need to be constructed for civil matters. Effective vetting would streamline justice administration considerably. The broad criteria for making such decisions would be defined by law.

Fourthly, the court's supervisory jurisdiction with respect to proportionality and the observance of human rights principles was not used during the CRP. This was because the system of registration broke down. But in any case, the agreements mediated tended towards leniency rather than harshness. Nevertheless, the requirement that the courts should be the final arbiters in relation to serious matters such as the observance of human rights is a good one. Given that human rights are protected explicitly by the Constitution, in accordance with democratic principle it should be the judicial arm of government which takes ultimate responsibility for ensuring their protection.

For similar reasons a further link should also be created. Cases determined in the system of local justice should be subject to appeal to the courts by the party whose interests have adversely been affected. Consideration might also be given to allowing village chiefs or panels to refer matters to the courts where matters are too complex or where the appropriate decision is uncertain.

If a unified system of justice is desired, then a path should be open to litigants to have their cases determined in the final instance by the highest court in the land upon the law applicable throughout the land. The appellate mechanism would ensure that this possibility was open and that national law could develop on the basis of knowledge of and experience with the full range of legally contested matters that arose within Timorese society.

#### (iv) A Regulatory Framework

It follows, finally, from what has just been said that the local justice system's operation and its relationship to the formal court system should be determined and regulated by law. The weight and importance attached to the CRP was in part owed to the legislative authority upon which it rested. The relevant regulation set out in detail the way in which the reconciliation process was to operate. It provided a measure of clarity to implementation. It ensured procedural fairness and consistency across the country. It made the outcomes legally enforceable in the courts. These are all matters that should also properly be governed by law in devising an adapted local justice system.

An overarching regulation, debated by and adopted by the national parliament, might then govern the following matters, among others:

- The general and specific jurisdictions of the local justice system including:
  - The definition of serious and non-serious crimes and the mechanism to be used to determine the appropriate category

- The definition of serious and non-serious civil matters and the mechanism to be used to determine the appropriate category.
- The composition of local courts, however constituted, including:
  - The method of selection of local chairpersons and panel members, if panels are to be used
  - The qualifications required of chairpersons and panel members
  - Their terms and conditions of office including provisions for their appointment and removal
  - The composition of local courts for particular kinds of case, for example in relation to more serious criminal offences or more complex civil matters
  - The method of decision-making to be adopted, e.g. consensus, majority decision etc.
- The powers of local courts including:
  - The power to summon witnesses
  - The power to penalise witnesses providing untruthful evidence
  - The penalties for non-observance of decisions
  - The method by which decisions may be enforced and
  - Whether any of the powers listed above should be exercised exclusively by the formal courts rather than local tribunals.
- The procedural rules to be adopted at local hearings including:
  - The general requirement to act in accordance with due process
  - The requirement that all parties, including members of the wider community, be entitled to be heard
  - The requirement that the person or persons constituting the local court act impartially and independently
  - The circumstances appropriate to referring a case for resolution by reconciliation and those appropriate for referral for resolution by some form of arbitral process
  - The particular process to be adopted for reconciliation and arbitration respectively
  - The role to be assigned to traditional elders, traditional law and traditional ritual and ceremony.
- The supervisory jurisdiction of the formal courts including:
  - The power to review cases on the grounds that the decisions reached are disproportionate to the circumstances or in conflict with international and national human rights standards, for example in relation to their treatment of women
  - The power to resolve inconsistencies between national and customary law and the criteria in accordance with which such inconsistencies should be resolved
  - The power to hear appeals from decisions of the local courts

- The power to review the legality of decisions taken and
- The power to review the constitutionality of decisions taken.

### ***Conclusion***

This list, like all the proposals contained in this section is, as I emphasised at the outset, only suggestive. My hope is that the proposals made, founded as they are on the positive experience of the CRP, may act to enliven discussion and debate on the future shape of Timor Leste's justice system.

One critical reason why that debate must proceed expeditiously and in earnest is to avoid the prospect that those guilty of serious politically motivated crime will walk free of sanction. The great risk is that they will, unless a method is devised of drawing them into a properly constituted and resourced system of justice, both local and central.

De facto immunity for political criminals would not only constitute a great wrong in itself, it is likely also to adversely affect perceptions of the CRP. Given the generally positive experience of the community reconciliation process, this would be a great pity.

My purpose in this last section of the report, therefore, has been to propose one way forward in creating an integrated system of justice, building, as it does, on the experience of the CRP. It may not be the best way, and in the course of devising it, much may have been missed. If, however, the proposals contained here serve to contribute to a wider debate in the Timorese community about how the justice system in Timor should best be constituted and through such a discussion assists in that system's positive development, then this work's purpose will well and truly have been served.

\*\*\*\*\*