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The Tension Trials — A Defence Lawyer's Perspective of Post Conflict Intervention In Solomon Islands

Introduction

There has been much debate as to the name to be given to the conflict which Solomon Islands endured in recent years and which the Regional Assistance Missions to Solomon Islands came to put an end to. The tension seemed as good a word as any to the ordinary Solomon Islander and much as the phrase "the troubles" is used to define the violence and bloodshed which besieged Northern Ireland for decades then the phrase "the tension" is what the Solomons appears to be stuck with.

It is now over five years since the arrival of the Regional Assistance Mission to Solomon Islands and whilst there are any number of papers available as to the success or otherwise of the mission there is a dearth of any statistical analysis of the prosecution of offences following the intervention.

This is surprising given the amount of resources which has gone into the justice sector in terms of providing personnel (ranging from judges to magistrates, prosecutors to defence lawyers and transcription trainers). Whilst the emphasis on the programmes being managed by AusAID under the RAMSI umbrella and contracted to GRM international may well be focused on capacity development what was clear from the outset was that in-line personnel would be required to actually process the large number of cases.

For individual agencies concerned the lack of capacity to undertake any accurate statistical analysis was not surprising given the initial resources available (poor accommodation, lack of equipment and quite often lack of electricity). In the period January 2003 to October 2003 the Public Solicitor's Office had received the princely sum of $6o AUD from the national budget (salaries were separate) and there was one computer in the office which belonged to the magistrates' court.

However, there were around 180 matters, involving many accused) committed from the magistrates court to the High Court for trial in the period 2003 – 2008 with many of these being tension related matters and involving anywhere from a single accused to 14 accused. The tension trials commenced in 2005 with the trial of Harold Keke and others for the 2002 murder of a government Minister, Fr Augustin Geve, and are continuing today with a very recent committal hearing for Harold Keke and 12 others on various murder and abduction charges.

Unlike in Australia there were not very many pleas of guilty and the majority of matters proceeded to trial. Some have speculated this is largely due to the fact that the mandatory penalty for murder is life imprisonment. Anecdotally, in tension matters where murder is not charged there has been a higher rate of guilty pleas, but still a relatively low one.

Any analysis of cases before the Solomon Islands courts following the intervention of the Regional Assistance Mission to Solomon Islands is going to be limited because of the sheer volume of materials available and the actual number of cases which have been

processed through the courts. It is surprising, given the resources put into the criminal justice process and how important it was perceived to be by the funder, that there has been little statistical data maintained and analysed. However, what needs to be considered is how the system prepared itself to cope with the volume of cases and also the overall outcome of the cases which, to a certain extent, was not quite the outcome which Canberra expected. There was clearly more than just a hope that these cases would be open and shut and that convictions would follow as night follows day.

AusAID was a key player in the legal sector – it brought the majority of the funding and the personnel notwithstanding the emphasis on the "Regional Mission". It had to reconcile the fact that here it was engaged outside its comfort zone – the work required of those employed in the programme was very much in-line and independent, although with significant emphasis on training, mentoring, and capacity development. The result was a dichotomy between whether the primary focus was on the completion of cases within a given time frame, in which case the legal offices needed lawyers to appear in the cases (and lots of them bearing in mind that one case was potentially to have 14 accused), or whether the primary focus was on developing local capacity to a level that could finalise the process appropriately.

In the run up to the arrival of the Regional Assistance Mission there was a degree of confusion as to what the police would be coming to do. The report in one newspaper was that only "new crime" would be investigated. The reality caught many within the justice sector by surprise with many arrests and remands in custody within the first few months of the intervention. It was clear that the criminal justice system would have difficulty in coping.

In the 5 years from the first arrests, following the intervention, the criminal justice system has changed. Bail on a murder charge was virtually impossible following the first arrests and now it is the norm – although not until people had served three to four years on remand for offences for which they were subsequently acquitted! A sense of outrage at the length of pre-trial detention was initially the province of the defence lawyers but there has been a shift and the judges have taken it on board.

One case illustrates the point well. In the so-called "Selwyn Saki" trial my client, accused of taking part in the murder of a Guadalcanal militant leader, was acquitted and released, after almost 4 and a half years in custody. He was a young man, aged in his twenties, married, no prior criminal history and had longstanding ties to the Honiara area. In most circumstances he would have been regarded as a good candidate for bail. In the post-conflict context of Solomon Islands he gave up over 4 years of his life. It is cases such as this that have provided the ammunition for compelling legal arguments based on the Constitutional right to trial without unreasonable delay (or earlier release), and led to the bailing in more recent times of numerous people charged with murder.

Judiciary and Magistrates

A number of judicial appointments (both to the High Court and the magistrates' court) were funded under RAMSI. However, questions do in fact arise as a result of this funding not least because of the lack of security of tenure of those appointed. The fact is that decisions regarding their tenure may in form be the decision of an independent constitutional body but ultimately that decision is made by RAMSI/AusAID who hold the purse-strings. Contracts are regularly due for renewal and there is a risk of a perception that decisions made by those appointed could impact on renewal etc. Magistrates are particularly identified as being part of the "RAMSI mission" with all its organisational values and priorities and they are then expected to sit in judgment on individuals who have expressly been targeted by RAMSI for prosecution with their reputations widely circulated in expatriate social circles.

Of course what this raises is a broader issue around foreign assistance to the judiciary in a post-conflict context. Whilst Solomon Islands has constitutional protections for the independence of the judiciary these could be perceived as, and can be, easily circumvented because of the system surrounding the funding of positions. This is not to assert that anyone was less than independent in the discharge of their judicial role, but the perception issues are valid and ought be in the minds of those involved in the process.

In one highly politically sensitive case involving the remand in custody of two government ministers following the riots of 2006 allegations of impropriety of an expatriate magistrate were raised. The merits of the complaint were never publically resolved, but the very fact that the role of an expatriate judicial officer became a lightning rod for political messaging around the role of RAMSI is food for thought about how the process could be better managed.

A number of alternatives readily spring to mind. One would be to treat the judicial arm of Government as one which RAMSI should step back from. The United Nations or the Commonwealth Secretariat could have been funded by Australia to provide support by way of non-renewable fixed term contracts of an appropriate period, say 2-3 years. In this way there could be no perception of any judicial officer pandering for re-appointment, or any perception of untoward control.

Even if one accepts that assistance to the judiciary should only take place within the RAMSI framework, non renewable fixed term contracts could have been utilized.

The Lawyers

Lawyers were appointed to both the office of the Director of Public Prosecutions and the Public Solicitors Office in order that the very large number of cases could be processed in the absence of Solomon Islands lawyers whose small numbers would have led to severe delays and some of whom were extremely reluctant to get involved in tension matters. Again funding and security of tenure was highly controversial with a degree of circumvention of the proper procedures – whilst fully compliant with the public service

appointments the funding or non-funding was ultimately determinative and that decision was in reality in the hands of a few individuals.

One issue was, of course, RAMSI remuneration of the lawyers involved. This can be compared in some senses to the judicial appointments issue, though as members of the executive arm of Government the same conventions as to strict independence do not apply.

In its dealings with personnel funded through AusAID/RAMSI there has been considerable inconsistency which has not gone unnoticed by Solomon Islanders. Reasons given for non-extension of contracts included a "three year" rule whereby the maximum period personnel can stay is three years (applied in a number of cases or at least it being made clear no contract would be offered) yet this is not universally applied and was a cause for concern for head of agencies and others within the system. The upper echelons of RAMSI would say that there is no such policy but they are not responsible nor do they care what is transacted as between the individual and the Australian Management Contractor. In the case of those not under contract but funded (such as those enjoying constitutional independence) rules were implemented as regards one but not others. The distinct impression given to Solomon Islanders to whom these justifications were given was that these were disingenuous excuses to secure the removal of individuals on a variety of grounds and a degree of favouritism and nepotism shown to those who mix in the right social circles. If you socialised with the right people you were safe. There was disappointment that their wishes or the wishes of heads of agencies were circumvented and staff morale, particularly amongst Solomon Islanders, was acutely affected. A study into capacity development identified that the wishes of Solomon Islands staff in the justice agencies was to see an end to the constant changing of personnel.

Of course, the managing contractor gets paid for recruitment and engagement so they would have no real concern at high personnel turnover.

At the end of the day Solomon Islanders were on the relevant constitutional committees for appointment but the best they could resolve was that a particular individual could stay if they were to accept Solomon Islands Public Service scales of pay which in effect was impossible. To an extent those Solomon Islanders have been exasperated by the process and have now disengaged from it.

Nevertheless there was awareness in the community and in legal circles that RAMSI lawyers were funded largely by Australia, this included lawyers in the PSO and DPP, including the Public Solicitor and (for a while) the position of DPP.

The issue was very much one of confidence. The lawyers in the Public Solicitor's Office had to prove themselves to their clients. To prove that their commitment to RAMSI was not inconsistent with their commitment to doing their very best to secure acquittals of individuals whom RAMSI had been integrally involved in the investigation, arrest and incarceration of.

That confidence was achieved which was good for the criminal justice system. This enabled good outcomes for the clients and facilitating the processing of the very large volume of cases before the Courts.

Issues

Whilst there are many aspects of the tension trials which are worthy of significant attention, it seems that some useful starting points are:

- whether RAMSI believed that the criminal justice system could effect political transformation of Solomon Islands:
- whether the nation has accepted the results of the tension trials; and
- the impact of the tension trials on the reconciliation process.

RAMSI and the Participating Police Force emphasised time and time again that no-one was above the law (in fact a press release on the loth September 2008 re-emphasised this). However, what was clear from the defence perspective was that the police had their list of targets and, for a few individuals, were extremely anxious to see them remanded in custody. It was clear that at a political level there were views of individuals, their guilt and the necessity to have them in prison. The first fifteen months of RAMSI saw a government minister arrested, remanded in custody, tried and sentenced (sentence subsequently reduced on appeal) and a further government minister arrested and remanded in custody. The enabling legislation for the RAMSI intervention received unanimous support in Parliament.

If RAMSI believed they could use the criminal justice system to effect a political transformation of the Solomons they misunderstood the nature of politics in the Solomons. A former highly ranking police officer who was jailed in 2004 for tension related matters and released in 2007. He was elected this year as a member of the national parliament. He initially received sentences of 14 years from mainly expatriate magistrates funded by RAMSI, which were reduced on appeal to 5 years (albeit the Court of Appeal indicated this should have been 7 years but declined to intervene since he had been released). There was a sense of incredulity on Australia's part as to how this could happen but that is to miss the point. This man was a respected member of the community and had been for many years. He had become embroiled in the conflict, lost his position as a result of criminal charges and had served a significant period in custody. Whilst there is little focus on rehabilitation it is clear that the community which elected him felt that he had been rehabilitated. There appears to be no great social stigma attached to having been to prison (nor, I should add, is it a badge of honour).

This public rehabilitation perhaps speaks of a level of understanding that Solomon Islanders have of the nature of the conflict and the motivations (and failings) of many who took part, an understanding that is not easily shared by Australian officials perhaps, who seemed to most often take the line that the conflict was one essentially between competing groups of "criminals" who "took advantage" of ethnic issues to steal, rape and murder.

While there is a degree of truth to that, it is a simplistic and incomplete view of what happened.

A question does arise as to whether RAMSI officials operated in good faith when approaching the issue of the criminality of elected officials? For example, did they wait until Sir Allan Kemakaza was out of politics before they arrested him? Was that political? The co-accused who gave evidence against him had told of his involvement at the time of their arrest in 2003 and as mitigation at their sentencing in 2005 alleging that Sir Allan had ordered them to do it (he was then the Prime Minister). The charges did not come until some time after he left office. The equal pursuit of the "big fish" was something which RAMSI made much of but the Kemakeza case could suggest that this was not the case.

Despite evidence of his involvement being with police from 2003 they waited until he no longer led the Government to move on him. The question must be asked, did they shy away from arresting their major political ally in Solomon Islands, the head of Government, for fear that the toppling of his Government would fragment the political alliance he led, and perhaps lead to the end of RAMSI?

It is a fair question, and one which has never been publically answered.

The eventual charges against Kemakeza came at a precarious time in Solomon Islands' politics; during the clash between the Sogavare and Howard governments particularly over the Julian Moti affair. The election of the Prime Minister in 2006 had led to civil unrest (which Australia alleged was orchestrated by a few individuals) and a number of politicians were arrested and charged with riot-related offences and then offences relating to Julian Moti's arrival in the country following his arrest and bail in Papua New Guinea.

The raid on the office of the Prime Minister in October 2006 and the rumour that he was to be arrested on his return to the Country sent shivers through the higher echelons of government/society.

What was clear from the outset of RAMSI was that the police clearly had their targets and this was selective – in one of the Malaita Eagle Force briefs of evidence there was a chart compiled by the RAMSI police which set out the organizational structure of the MEF and it was clear that there was a concerted effort to get the evidence to charge the high ranking members.

Australian diplomats and senior members of RAMSI were privately openly hostile to certain ex-militant leaders and their attempts to seek bail and defend charges. One dinner party conversation involved a senior diplomat openly proclaiming that "people would die" if a certain ex-militant leader succeeded in his bail application.

AusAID raised the issue of a means and merit test for the provision of aid in criminal matters. It was suspected that their concern was aid for wealthy ex-militants who were using Australian funded legal expertise and doing perhaps too well.

Certain ex-militants were viewed by RAMSI officials almost as all powerful phantoms with omnipotent power and influence, ultimate "svengaliesque" gangsters still controlling the country's political processes from their prison cells in Rove.

Again, this could be viewed as a simplistic view of the Solomon Islands political process, and an emergence of a view prevalent among many in RAMSI that if only you could lock up the all powerful and corrupt political elites you would solve the countries problems.

The premise of the intervention was the risk of a "failing state" disintegrating on Australia's doorstep. The underlying reasons for the problems was viewed as poor governance, the police and the ongoing armed conflict. Many respected public figures (who were largely above politics) did feel that what subsequently developed within RAMSI was a political agenda carrying with it a lack of respect for sovereignty.

The second question is whether the nation has accepted the results of the tension trials and whether the tension trials have enhanced the reputation and standing of the courts? Anecdotally it appeared that many Solomon Islanders would readily go along with the notion that once charged a person is likely to be guilty – or least have done something wrong because otherwise the police would not have charged them. It is not very different from other jurisdictions where as a defence lawyer you are immediately at a disadvantage because your client is in the dock facing a jury or a judge. However, whilst there have been a number of convictions (and pleas) there have been a large number of acquittals which has seen many of the "big fish" released following acquittal on the most serious of charges (particularly murder or attempted murder). As a result, the prison population (particularly those related to the tension matters) has dwindled considerably – not of course that this has prevented AusAID from agreeing to fund a significant increase in the capacity of the prisons to house more people. The lawyers from the Public Solicitor's Office were largely credited for the acquittals and whilst there was no question of animosity as a result (other than perhaps from the funding agency) there were questions asked as to why this had happened.

The concept of a "reasonable doubt" and acquittals of notorious leaders, are confusing for the general populace but the trial process informed the community as to what the criminal law does and what judges will accept as appropriate behaviour on the part of the police. Acquittals sent a highly powerful message regarding the independence of the courts. People whom everyone knows have done "something" have been set free. Some might say that undermines public confidence and perhaps in a limited sense it does, but it ultimately sends a powerful message that the courts are independent, fair, and decide matters on the basis of evidence not "common knowledge". It was fairly intriguing how many expatriate officials and police involved in the law and justice sector seemed also to struggle with such a fundamental concept.

It would seem from anecdotal observations that the nation has not really accepted the results of the tension trials with the perception being that whilst Harold Keke and Ronnie Cawa are firmly behind bars many others have walked free. It could be that the results of trials have largely gone ignored and that they are perhaps seen as "western justice" or

something external. In some cases traditional reconciliation and compensation was attended to either before the intervention or following the intervention.

A more difficult question is whether the trials have assisted in reconciliation? Part of the initial role of Public Solicitor was attending regularly on many inmates in the prison to reassure them as to the process. However, what was clear from those visits and dealing with several hundred former militants from all sides was how well the former militants from Guadalcanal and Malaita interacted in the prison — the Sunday hymn singing whilst quite disruptive for the taking of instructions was a moving experience. The real risk is that the criminal justice system may have actually prevented reconciliation processes outside the prison walls. There are many reasons for this and not least because whilst charges are outstanding there is unlikely to be any acceptance of culpability for what occurred — particularly where an accused is facing life imprisonment. Another thing which was particularly apparent was an opposition on the part of Canberra to even contemplate any form of truth and reconciliation process whilst the RAMSI process was underway.

This goes back to the prevailing idea that the corrupt elite needs to be cut off at the neck; that any form of truth and reconciliation commission is 'soft justice' that will not help to rid the country of its 'gangster' politicians who are blamed for the conflict.

However, delays in the system, the large number of acquittals and the adversarial nature of the process all hamper any future truth and reconciliation process. Obviously, what could be pointed out is that the Solomon Islands itself decided to use its own domestic tribunals rather than go down the road of any truth and reconciliation process or alternatively international tribunals.

Whilst there were some reconciliations it is clear that the criminal trial process hampered reconciliation and that a mix of criminal justice and a truth and reconciliation process may have resulted in a stronger reconciliation at a national level than has been achieved by the criminal justice process alone.

One other consideration is whether the trial process has assisted in ameliorating the trauma of the conflict? In a number of cases there are examples of people being forced to execute others (including relatives). Former militants are prosecuted, often facing significant terms of imprisonment and therefore are forced to deny what they have done. This prevents personal healing (and whilst far from being a conflict specialist I would presume that admitting to yourself what you have done is essential to recovery and forgiveness from the other party). At the end of the criminal trial process the question will be whether this was the best way to deal with former combatants? Of course the family of victims often want a trial; a process to verify what has happened and to try and seek some answers. But would they always demand a trial leading to life imprisonment? Would some be willing to reconcile traditionally? Would that be socially and societally useful? It must be remembered that many of the witnesses are from the same communities as the families of the accused.

Anecdotal information was that there were some 200 files at the police headquarters which had not led to any arrests (many of these murder allegations). A decision was made that the majority would not be taken any further – the reasons are not clear and it may well be that lack of evidence is a key factor. However, a decision not to investigate further means that there has been a selective investigation of offences and again the police targeting those they had in their sights. The community and in particular those whose relatives are still missing as a result of the conflict feel no sense of satisfaction with the process. On a recent court tour in Guadalcanal a magistrate explained how he had made numerous enquiries of the police regarding his father who went missing in the conflict (likely to have been killed) and how the police refuse to investigate. Assuming lack of evidence/firm leads as the reason for inaction on the part of police the issue as to how this should be addressed is pivotal for the purposes of reconciliation, healing and society. Another former militant sought assistance in raising with the police their lack of willingness to investigate the murder of his father in 1999.

Papering Over The Cracks

Having dealt with the above questions there are a number of areas in which RAMSI support has sought to paper over a number of cracks in the criminal justice system. These include juvenile justice, interference, delay and amnesty.

Solomon Islands Parliament has limited sitting periods and rarely legislates. Legislative reform, particularly in criminal law, is pretty rare. This made it difficult for practitioners from outside jurisdictions to adjust and from a RAMSI perspective led to a degree of confusion and a conflict between international norms and standards and domestic requirements.

One controversial area in the trial process has been the prosecution of juvenile offenders. Individuals such as Billy Kelly Kelly (accused of killing one of the Melanesian Brothers in 2003) and Matthias Pese could also be viewed as victims of war. They were, during their most formative years, brought up on the Weathercoast of Guadalcanal in the context of an ever increasingly bloody conflict and prevented from having a normal upbringing. They were then kept in prison on remand for years (with adult prisoners because, in the case of Kelly Kelly there was, until recently, no juvenile facility). Such conditions were cruel and this was a destructive approach, it was unbalanced and paid little regard to the realities of the conflict and the realities of their childhood. It also ignored international best practice and this in the context of RAMSI pouring millions of dollars into the prison. A juvenile facility was eventually opened but it was too late for Kelly Kelly.

Miranda Forsyth's article, "Duress as a criminal defence in Solomon Islands" in the Journal of South Pacific Law criticised both the counsel and the judges involved in a number of important cases in Solomon Islands relating to the defence of duress to murder and this included the case of Kelly Kelly who was just over 14 when the killing took place and almost 18 when convicted and sentenced. All of the counsel for the accused involved in those duress cases mentioned were lawyers from the Office of the Public

Solicitor. Unfortunately the author's discussion about the Kelly Kelly case fails to mention the defendant's pre-trial application for a stay of proceedings on the basis of an abuse of process. This application focused closely on the age of the accused both at the time of the commission of the offence (child soldiers and international norms) and also in regard to the trial. That application failed as did a subsequent bail application following a lengthy period of pre-trial detention. The criticisms which the author makes in relation to this case could have been more usefully directed to the decision to prosecute in the first place.

One interesting aspect of the work as a defence lawyer was how others would roll their eyes at the mention of Amnesty International and their fair trial guidelines or any suggestion of non-compliance. However, during the relevant period, significant rulings were made by the courts on issues such as the treatment of juveniles (no mandatory life sentence) and the treatment of prisoners in circumstances where the court found breaches of international rights.. Importantly the Solomon Islander Chief Justice cited the Amnesty Guidelines a number of times in judgments and embraced the concept of international benchmarks.

A real problem in the operation of the criminal justice system relates to the way it dealt with powerful individuals in Solomon Islands. This cannot be denied. Witness interference and or reluctance to give the evidence anticipated has been seen. From a defence perspective this was overstated by RAMSI and prosecutors in order to try and deny bail to individuals, but it has to be accepted as a real issue. However, what is not acceptable is for the powers that be to blame the failure of the prosecutions purely and simply on the intimidation or otherwise of witnesses. In one instance where the police (Australian investigators) had paid substantial sums of money to a witness he came up to proof so the threats could not have been so overbearing.

The other factor is that of delay in progression of matters. As indicated above matters are still being processed, some 5 years after RAMSI arrived. In some cases this is 8 years after offences occurred. Is that satisfactory? Did RAMSI (having provided the police etc) have an obligation to provide more resources so that people could be tried within a reasonable time? In fact, the resources to the criminal justice system are being reduced so that the tension trial process will take even longer. Of course, budgetary considerations are the reasons given but the allocation from the Australian treasury for RAMSI has not diminished.

Delay and length of pre-trial detention was a critical issue in 2006 (some three years after the RAMSI intervention) and was addressed following criticisms made by the Public Solicitor's Office. Whilst waiting times are down and the length of pre-trial detention has been significantly reduced, there are still matters awaiting trial which have been in the system for an unreasonable period. There are many reasons for this such as accused facing multiple charges which must be tried sequentially and circumstances where accused have been convicted of some offences and are serving life sentences. In a recent decision, the High Court found that a period of pre-trial detention was unreasonable in circumstances where an accused facing multiple murder charges arising from the tension had been acquitted of murder following trial and had a conviction for murder quashed by

the Court of Appeal following an unsafe conviction in the High Court. He is yet to face retrial on that as well as trial on other murder offences – his cases are not listed this year and so he faces a five to seven year wait from his arrest to the final determination of his matters. Fortunately he is now on bail but spent from the age of 18 to 23 in custody. He had been sentenced to a short period for membership of an unlawful organization. Again, only the Guadalcanal people faced this charge so it appeared rather unfair in the circumstances.

In the five years since RAMSI arrived there has been a marked shift on the issue of bail. It became much more the norm as a result of significant effort on the part of defence lawyers in highlighting the reality of the situation often in the face of criticism from the prosecutors who would argue in any matter that there was no right to make a bail application in the High Court by a politician after bail had been refused by a magistrate in a hearing where the prosecutor had submitted words to the effect "how can you release this man on bail when he needs to be brought to court under armed escort". Perception was initially everything. As it became clear that people were or might be found not guilty so the mindset changed. The problem even for those facing multiple murder charges is whether given the presumption of innocence they should be held in custody for a substantial period and eventually be acquitted and walk free?

One real perception, at least among defence lawyers, was that initially the bench was reluctant to bail ex-militants in the post-conflict environment. A common submission was along the lines of, "this person was a member of the feared MEF/GLF, how could you even consider bailing him?". As the years of the intervention passed however attitudes did seem to soften and people accepted that the stability of the society could not be seen to rest simply on the incarceration of a relatively small group of people. The ex-militants who have been bailed (and presumably those who had not been arrested, charged and detained) seem, in the main, to have resided peacefully in their communities.

The issue of amnesty and immunity from prosecution was also a theme running through the tension trials. The legislative provision was badly drafted and was not done in anticipation of the RAMSI (or any other) intervention but was more as an inducement for peace and to get weapons out of circulation. The police were unwilling to contemplate exercising any kind of discretion in their prosecution of those who may qualify under the legislation or perhaps should qualify. Amnesty was only available for the judge and it was clear that claims to amnesty would be fought vigorously. RAMSI did not consider whether to support any amnesty proposal but rather put its resources into trying to make sure that any such claims were defeated. In the end, the law was left in a great state of uncertainty particularly with the procedure for such a claim to amnesty. What circulated as rumour was that if amnesty were to be allowed then everyone would walk free. In fact, amnesty was applicable in the minority of cases because of the time limitations on offences under the relevant legislative provisions. Without any real consultation or research it is difficult to say what the effect of a more generous application of amnesty would be. It would not mean that the very worst offenders would be exonerated for the terrible offences which were committed but would help the reconciliation process and the rehabilitation of those caught up in the conflict. It must be remembered that many communities in Guadalcanal and Malaita supported the militants and to a degree (and

certainly this was the case in Guadalcanal) relied upon them for protection from attack. The prosecution of the offences did not take into account the background or history to the conflict whereas the community was much more willing to do so.

Checks And Balances

The Public Solicitor's Office very much saw itself as a check and balance on the intervention, in particular in relation to the police and prosecution in the tension matters and the prison and its treatment of inmates. This of course led to lawyers feeling vulnerable with respect to funding and subject to the ill-informed criticism of the chattering expatriates working within the system.

The Public Solicitor's Office played a key role in keeping RAMSI accountable in the courts. There were numerous findings by the courts of unacceptable and unlawful conduct on the part of Participating Police Force (largely Australian Federal Police) in the investigation of matters. Of course this would be so in any jurisdiction but what is significant in Solomon Islands is that it was imperative to get it right because much of what was perceived to be wrong in Solomon Islands prior to the intervention related to its police force. The reality of the police actions in the intervention calls into question the AFP's training, and whether RAMSI has provided a proper example of compliance with the law. A number of examples are available.

In the first tension trial which involved Harold Keke and the murder of Fr Geve (R v Keke and Ors) officers breached the Constitution in failing to accord accused members of Guadalcanal Liberation Front full constitutional rights when they were arrested on the Weathercoast. This was also found in the trial of militants involving the killing of one of the Melanesian Brothers (Br Sado).

In the trial involving the murder of Officer Adam Dunning and the attempted murder of three other participating police force officers, ex-militants faced a variety of charges (R v Tatau and Ors). The Court excluded from evidence the admissions of one of the accused of shooting at a RAMSI vehicle because Australian officers had unlawfully offered an inducement to the suspect, that man was immediately set free.

The other four accused were later all acquitted after the judge found that police had failed to build a case beyond reasonable doubt against the men. The court also excluded admissions from one of the other on the basis of impropriety and unfairness. The case was interesting because the police built their case around the most unreliable of evidence (cell confessions) and the flimsiest of circumstantial evidence.

Sitting members of parliament Charles Dausabea and Nelson Ne'e stood trial on charges alleging that they orchestrated the riots in April 2006. Former Foreign Minister, Alex Bartlett (who had a large number of charges against him) also stood trial. The court was told of written agreements that Solomon Islands Police Commissioner, Shane Castles (not a RAMSI official but funded by Australia and very closely identified with RAMSI) made with two crucial witnesses, under these agreements the witnesses received significant

financial and other assistance on the condition they kept the agreements secret and gave evidence in Court only in accordance with their police statements. The agreements were in a form that violated judicial rulings on such matters and attempts to keep them secret clearly violated Solomon Islands law governing disclosure of relevant information to defence lawyers.

Such a bungle in a high profile case in Australia would almost certainly have seen pressure on the Commissioner to resign for signing such damaging and foolish agreements. It was only following the issue of subpoenas that such payments came to light and there was reluctance on the part of the police to disclose. Again, the prosecution relied upon the worst type of witness (those who had a significant interest in giving evidence). They had much to gain by giving evidence – such as reduced sentence or financial reward). The three accused were acquitted of all charges. The further significance of the matter was the interest taken by Mick Keelty, Commissioner of the AFP, immediately following the riots and commenting upon the accused Charles Dausabea. Such comments appeared at the time to be in contravention of the recognized need for restraint on police and prosecutors commenting on the guilt or otherwise of individuals who are to face court. All three had spent significant periods on remand in highly political circumstances. The whole episode was in the context of the Julian Moti dispute waged between Australia and the Sogavare government. This context included the Foreign Minister Downer writing an open letter to the people of the Solomons in which he attacked Mr. Ne'e and Mr. Dausabea.

In R v Iro and Ors (2005), also known as the "Casino Robbery" a number of men faced trial charged with armed robbery. The case perhaps provided some light relief following a diet of murders for the courts and the lawyers. However the High Court excluded admissions to the offence after a finding that an AFP officer had unfairly interviewed the suspect and unfairly denied him access to a lawyer. The judge had the following comment to make:

> *Yet these two officers see nothing unfair about the process. This is the most astonishing and at the same time disappointing evidence the court has heard so far in this trial. A badly interpreted interview when a suspect who wanted a lawyer is talked into agreeing to something else that would not permit his lawyer to explain to him his right to maintain his silence. It is coupled with questions and statements from the interviewing officer which attempt to dress up the interview into a meaningful application of the Judges Rules when in truth it merely serves to pay scant lip service to them.*

In reality the officers had little experience of conducting records of interview but also showed a blatant disregard for the rights of an accused in custody.

Another example is the "Special Constables" case. In a 2006 case admissions made as to involvement in the murder of two police officers were excluded from evidence after the Judge found that AFP officers had unfairly questioned a suspect. The accused, along with four of the five co-accused, was subsequently acquitted.

In the "DBSI attempted murder" case admissions made by two men to AFP Officers in an investigation were excluded after the judge found that the police had breached fundamental procedural rules governing the interviewing of suspects. The case involved a machete attack on a bank manager at the height of the conflict.

Another example of the role of the police was the search warrant executed on the office of the Prime Minister on the afternoon of the bail application for Julian Mod in the High Court. Though not unlawful there was criticism from the judge as to the protocol employed. Of course RAMSI would say that was a Solomon Islands Police operation but that was not the public perception – the perception was of a breach of sovereignty by Australian officers.

RAMSI have not been subjected to any real investigative scrutiny and have largely relied on a few journalists and civil society organisations, interested in police accountability, to avoid accountability or scrutiny. Any in-depth analysis or feedback is largely paid for by RAMSI themselves and AusAID send in "Techical Advisory Groups" to assess project/programme effectiveness but reserve a right of veto –presumably to ensure they do not end up looking too bad out of it. The question in the case of Solomon Islands would be what would be the reaction in Australia if a series of similarly high profile cases led to acquittals, following police bungles and impropriety? Resignations would be demanded. What have the AFP/RAMSI learned from these experiences? It has certainly not been to engage in a meaningful analysis of the problems and to consult with defence lawyers as to where the problems lie. It has been more to close ranks and become more reluctant in areas such as disclosure etc.

Tied into that is the success or otherwise of capacity building or development efforts. Much of the focus is on this issue and on the RAMSI website one will see little mention of the trials and much focus on individuals and capacity development. Whilst capacity development is an essential aspect of the mission the past 24 months has seen RAMSI lose sight of its initial objectives and in a sense betray the expectations of the people of Solomon Islands to deal with and process the cases which they started. This was an "intervention" and the self appointed sheriff of the Pacific was coming in to clean up with a little help from its friends in the region but it was made very clear Australia was in charge and was footing most of the bill.

It is very easy to make generalisations as regards the interactions observed between Australians and Solomon Islanders in the professional contexts; police, lawyers etc. This has thrown up a number of interesting challenges for both Solomon Islanders and intervention personnel alike. It has had a significant impact on the perception of RAMSI. Much of it revolves around cross-cultural issues, suspicion of Solomon Islands police force as a result of the recent history, the power imbalance of the donor –vs – recipient (which in turn leads to a lack of discussion and consultation), the degree of interaction by intervention personnel with work colleagues and the general populace and the power of language.

However, having originally worked as a volunteer with significant cross-cultural training and coming from the U.K. gave something of an advantage. Having seen many different

expatriates over a period of 9 years it was clear that relationships were complicated particularly as between Australians and Solomon Islanders. There was a perception that officers from other Pacific Islands nations were a token gesture - the perception was that they were not allowed to drive nor carry weapons – and so what did that mean for the Solomon Islands police officers? The intervention police were highly suspicious of the solomons police force and many former officers went to prison either sentenced or on remand and some who were acquitted were even reinstated. The AFP subsequently established the International Deployment Group and sought input in terms of the cultural context of the countries in which they work.

Even at high government levels the fact that this was largely Australian money being used meant that the Solomon Islands' public servants felt pressured and that there was no equality of relationship with the funder calling the shots under the auspices of there being discursive dialogue and active participation. One example of this is on the issue of alternative sentencing. It came up time and time again with the last two governments stating their commitment to it. RAMSI/Ausaid was reluctant to engage in funding activities and ultimately the government policy requiring funding assistance for implementation came to nothing because of that reluctance. Some money was put in but the concept fell in and out of favour over five years.

The most generous analysis of the situation would be that those Australian government officials (AusAID) were oblivious to the fact that they were really pushing their agenda without realising they were doing so. Individual agencies, such as the Public Solicitor's Office, saw Solomon Islands personnel increase four fold as more new graduates came through the system but clearly they could not jump straight into serious criminal advocacy and so expatriates were still required to do the bulk of the advocacy. Adjusting to working with expatriates was difficult for many Solomon Islanders but on the whole the defence lawyers were adept at adapting to changing cultural environments and had considerable exposure to Solomon Islanders particularly since all of the clients were Solomon Islanders (as opposed to police who were accommodated on a base with little interaction outside of work). One of the key aspects was understanding and speaking pidgin english which for many Australians proved an impossible task but also for some was done so badly it served to confuse rather than assist particularly by Magistrates from the bench.

He Who Pays The Piper Calls The Tune

As in any western criminal justice system funding for all aspects of the system comes largely from the public purse so that judges, magistrates, prosecutors and defence lawyers are all reliant on the public purse for their funding. However, RAMSI added a new dimension, that of external funding. Whilst Constitutional independence was assured for most Constitutional Postholders the whole system was reliant upon funding and having to justify any requests for funding. Externally funded personnel were vulnerable to the non-extension of contracts on no grounds other than "budgetary constraints" and decisions were taken out of the hands of the relevant heads of agencies and the relevant

constitutional committees. Perceptions of social interaction having more of an impact on contract extensions were rife. The Public Solicitor's Office was perceived as too successful (or at the least there were far too many acquittals) and so was subject to unreasonable criticism ranging from "fishing exercises" on requests to produce documents and "obstructive" whereas what was in fact occurring was the vigorous and fearless defence of those least popular in society who had much to lose. Further criticism was made for representing some of the more controversial accused who perhaps had the funds to represent themselves but rather than making any actual court challenge to that criticisms were made – at one point it had to be pointed out to an individual at AusAID that their comments on the representation of individuals was an interference with the constitutional independence of the office.

The regular criticism by RAMSI officials of the PSO representing apparently well resourced militants who could perhaps have afforded private lawyers, highlights a fundamental tension or ambiguity about the role of RAMSI in the criminal process. On one hand there was general acceptance that the highly trained and experienced expatriate DPP prosecutors (who included in their ranks at various times eminent Australian prosecutors like Chris Ryan SC, Robert Barry, Mark Hobart SC, Terry Thorpe, and the latter engagement of the Deputy Director of Public Prosecutions from Queensland in an advisory role) should prosecute all matters save in the case of the latter.

The view taken as Public Solicitor was that there was constitutional mandate (in reference to criminal representation) to provide representation to all in criminal matters. This view was buttressed by one view that in an intervention situation such as this it is incumbent on the prevailing intervening power to equally resource and fund the defence. While the Solomon Islands private bar has gone from strength to strength in recent years it is undeniable that the real expertise and experience in criminal matter lay within the PSO. To exclude certain ex-militants from this quality representation (on the basis of their wealth) would have undermined the role of the office in facilitating fair trials and thus potentially undermined community acceptance of the process. In the post conflict context this would have undermined the process of reconciliation and transition to the rule of law.

These views perhaps illustrate an ambiguity or uncertainty within RAMSI about its role. An uncertainty which can be said to arise from its curious structural foundations, which are both its strength and its weakness. On one hand RAMSI portrays itself as a partnership between the Solomon Islands Government and the region, the mere provision of assistance with sovereignty and decision making still resting in the hands of the Government. However this message fails to convey accurately the dominance, authority and power that RAMSI had, particularly in its early years.

The message, for its incompleteness, also fails to conceptualise and articulate the responsibility that comes from intervening dramatically in a conflict in the way that RAMSI did. When you intervene in an ethnic conflict, disband militias, arrest hundreds of people, profoundly unbalance the existing power hierarchies and dynamics (however undesirable many of them were) it is untenable to then suggest that you do not have a full

responsibility to tailor programmess, particularly in the law and justice context, with the reality of the post conflict environment always at the fore.

Of course, RAMSI has done this to a degree, and credit must be given, people have been represented and trials have been fair. But the way in which questions of legal aid, reconciliation, remand, resourcing for trials, staffing etc have been approached is indicative of or proof that many RAMSI officials have failed to fully understand the context of their presence. RAMSI is not just a collaborative aid project. It is a powerful organisation with discrete values and priorities that has intervened in Solomon Islands with dramatic and long-term effects. It has brought with it policy imperatives which it has sought to implement. Sometimes it appeared that officials failed to appreciate this context and, of course, the special responsibility it brings.

The unique collaborative model that is RAMSI has at times been a clever way for RAMSI to avoid responsibility and criticism for their actions and inactions. When RAMSI conduct was criticised after the 2006 riots the public relations machine was quick to point out that RAMSI was merely there to assist with ultimate responsibility for policing resting with the Solomon Islands Police. Yet the Solomon Islands Police witnesses in the riot trial almost to a man and woman testified that the RAMSI/PPF officers took control of the situation at Parliament House and they simply followed orders.

On many resourcing issues for the office (including such things as transport to the Provinces and even psychiatric assessments) AusAID was quick to point to the fact that was a SIG concern and remuneration had to be sought through that process. This was an incredible additional burden to a small budget.

Of course, had RAMSI been a more unilateral intervention involving the ceding of sovereignty in some way from the Solomon Island's Government and Parliament, the result may have been a shorter RAMSI mission. But the model used has had the unfortunate effect of diluting the real responsibility that RAMSI assumed when they intervened.

Representation of people from both sides and from all levels of society was such as to enable the process to go smoothly and for all accused to have confidence in the office. The Public Solicitor's Office enjoyed a great reputation both with those accused and with the public at large. The fact of the matter is that from the outset it was thought that convictions were just a natural consequence of the charges being laid and the cases being processed and, as for the "big fish", the powers that be did not want to see them walk free. Notwithstanding that assumption they did indeed walk free!

Added to that there has been a tradition of the Public Solicitor acting in public interest cases and, as has happened in the past, I was called upon to advise, assist and represent such people as the Governor-General (including the challenge in 2007 to his recalling of Parliament which ultimately led to the removal of Sogavare); the Chief Justice (as Chair of the Judicial and Legal Service Commission including in a case involving the removal of an Attorney-General); the Prime Minister (on a challenge to the terms of reference of

the Commission of Inquiry into the April 2006 riots); the Deputy Prime Minister (on a challenge to the search of the Prime Minister's Office); the Speaker of Parliament (on many matters involving the alleged abuse of power by the executive); and the President of the Bar Association (on a challenge to the issue and execution of a search warrant and ensuring the immediate protection of legal professional and other privilege surrounding documents relating to the Mod affair). Australian officials made is discomfort of my involvement more than clear in rather inappropriate ways. However, it ought be made clear that this was not at a high level within RAMSI (Special Coordinator) but rather the day to day management of the programmes run by RAMSI.

In fact the distinct impression was that at the higher level it was seen as a benefit that Australia could say it was funding all those involved. Unfortunately that did not filter through to the lower ranks so to speak and that was where the power base was.

Having RAMSI/AusAID officials (both directly employed by the Commonwealth of Australia and those employed through an Australian Management Contractor) based in the Ministry of Justice along with policy advisers made it difficult for public servants to properly identify any real separation – save for this RAMSI/AusAID had significant funds but made the decisions as to what would have to be paid out of RAMSI funding and what would come from government budget. Public servants felt pressured into agreeing to the budget because at the end of the day the money was not theirs. Often the government picked up large expenses which were largely incurred as a result of the intervention. Infrastructure such as courtrooms, prisons and expensive refits of rented commercial accommodation funded through RAMSI are all short term with little thought going into long term advantages. These were very expensive undertakings.

The attitude of some (and by this a handful and probably only from 2005 onwards) of the not so high ranking officials who ultimately had the decision on the funding was often lamentable in terms of it being made clear it was some great benevolent gesture on their part. As if it was their money and the recipient ought be grateful for anything. It was always made clear that there was the support of the Ministry/Government or other individual and this was part of RAMSI commitment to the rule of law.

Conclusion

The issues discussed are not unique to Solomon Islands in the context of a post-conflict intervention and the difficulties highlighted have no easy answer. For example, on the issue of tenure of appointments safeguards would be required to enable removal of appointees for good cause and, perhaps, swiftly regardless as to whether the funding remains in its current form or is channeled through an external organisation such as the United Nations or Commonwealth Secretariat. There is certainly room for improvement on the current system.

Political transformation is not a new concept. One issue in terms of how to do it better next time (or for the future) as regards the police having particular targets is that in a

"normal" situation it is common for police to have particular targets. In the situation where the police force has been discredited or compromised and is in the process of being rebuilt and a new foreign police force is stepping into the gap - who should be setting those targets and how should it be done in a way that would not be seen as 'politically' motivated or as interference with sovereignty? In many ways the intervening forces setting targets cannot be avoided and therefore will be open to the criticism of being politically motivated. The United Nations has faced the same criticisms in East Timor where it focused on the prosecution of what it felt were the worst massacres in Timor ; and in Kosovo the United Nations and European Union faced similar criticism for pursuing the "big fish" war criminals on both sides of the conflict and were said to be pursuing their own (the international community's) agenda rather than the people's agenda. In the context of Solomon Islands it is questionable if such a goal was a legitimate one given the mandate for the intervention and the fact that democratic elections have taken place within the period.

However, political change was not achieved albeit more emphasis has been placed on the issue of governance but largely through other programmes (such as the UNDP Parliamentary Programme). RAMSI misunderstood the nature of politics and the public perception of politics and the reality of life for the majority of the population and some RAMSI officials were all too quick to make statements to the media as to the criminality or otherwise of certain politicians.

Clearly there are positives and negatives as a result of the trial process so far. Popular understanding and acceptance of the results of the trials could have been improved by proper community education. Programmes initially funded in the first foray of RAMSI which provided community education on the processes and the individual agencies soon went out of favour and the battle lines seemed to be drawn as between the police and the defence.

The RAMSI outreach programme was to reach out to communities to provide community education. It was highly successful in explaining the role of the individuals from overseas (working in each of the areas RAMSI provided personnel) and less successful in explaining the process itself. Offices such as the Public Solicitor's Office through working alongside organisations such as Save the Children (Australia), the Family Support Centre (protection for the victims of domestic violence) and other civil society organisations was able to engage in a level of communication at community level where these issues were often at the forefront of people's minds.

Any impact on truth and reconciliation was incremental particularly as it took some time for clarity to be achieved with respect to the intervention's role and goals. That is, it did not appear at the commencement of the intervention that truth and reconciliation were particular goals or that the process for achieving this had been planned or thought through. However, that lack of pre-intervention planning, prior consultation or proper analysis meant that an unstoppable machine was put into motion with eager investigators each keen for their own case – particularly after the initial wave of investigators had 'bagged the big names'. Discretion or analysis of the holistic impact of arrests and prosecutions on the community and reconciliation was lost notwithstanding

representations from offices such as the Public Solicitor's Office. The initially non-programmatic, ad-hoc and reactionary approach taken to support the law and justice sector resulted in a narrow prosecutorial focus (given the police emphasis on the whole intervention) that only slowly broadened into a more holistic and interrelated support of the sector. However, entrenched, polarised positions on truth and reconciliation remained with little space provided for public dialogue or debate on the differing views and approaches available to the nation seeking to heal from the period of the tension.

Given the number of cases which have been left uninvestigated, the number of acquittals and apparent selective investigation and prosecution it appears that some form of truth and reconciliation is worthy of consideration by RAMSI. Indeed the current government started such a process around the 30th anniversary of Independence and indeed has stated that it is committed to such a process. Whatever the process it must take into account the fact that many have been tried already, many are yet to be tried and many face the prospect of being tried for offences not yet charged.

The problems highlighted when looking at the RAMSI approach in papering over the cracks have to some extent been addressed incrementally over time. The provision of a juvenile detention facility, reduced periods of pre-trial detention and an increased willingness to grant bail are a few examples. The issue of bail has always been contentious and AusAID were more than willing to have their personnel draft a Bail Act for Solomon Islands which after some consultation led to a proposed legislative regime for bail. It was questioned whether this was necessary and in fact has never been implemented. However, what is more interesting is how the process came about.

During the detention of Ne'e and Dausabea and amidst increasing concern as to length of pre-trial detention (a subject upon which I had written a paper raising concerns) a Solomon Islands lawyer drafted a bail provision which basically said everyone should be granted bail other than those charged with murder. The Minister responsible at that time and his Permanent Secretary decided that perhaps this was a little too political and could be seen as serving the purposes of releasing those detained by lawful process and circumventing the courts. They sought assistance from AusAID and their policy advisors in the Ministry and so the bill came about. After considerable input from the Public Solicitor's Office in April 2007 the first draft was amended and as has been indicated two years on from its inception it is yet to be given the force of law.

The conclusion to be drawn from this is that RAMSI was also rather ad-hoc and reactionary on issues of bail, delay and juvenile justice. It was highly sensitive to any commentary on these issues both in court and in the media. RAMSI ought to have engaged in a broader approach to justice from the start with an analysis of what best practices RAMSI would want to ensure during its intervention rather than the prosecutorial focus that remains today. What is now required is a consideration as to how the approach can now broaden into a more holistic approach and how such a holisitic approach could be taken from the commencement of such an intervention in the future.

The checks and balances are what are to be expected of a vigorous and fearless defence of those facing charges. What also must be acknowledged fulsomely is that RAMSI has

implemented and assisted a judicial process that has been fair and independent, and that regardless of the outcomes they had hoped for, they have let the courts work and the agencies function independently.

What RAMSI needs to evaluate is where they go from here bearing in mind there are still many cases yet to be processed through the courts (at an even slower rate than before) and to avoid the pitfalls which the past five years has held for them. The need for officials to understand the needs of the people of Solomon Islands and not simply push their own or their government's agenda is essential to RAMSI continuing and there can be no mistake that there is a desire for RAMSI to continue.

There are a number of key things RAMSI needs to do in going forward in the context of the tension trials and the criminal justice sector. Whilst a reduction in funding is a decision already made that needs to be re-evaluated and decisions as to funding and the priorities of the government be given real meaning. There needs to be consistency in the application of rules as to the funding of personnel in a consistent and transparent manner. Real dialogue with government and perhaps civil society organisations needs to be entered into with minimal agenda setting by RAMSI and final determination be left in the hands of those within the system. Of course, this may well throw up issues which RAMSI has been reluctant to address, or enter into dialogue in respect of but it must not lose sight of the process which RAMSI started and it now seems to be backing away from. This is a post-conflict intervention which now runs the risk of disintegrating and sowing the seeds of further discontent and resentment.