The Palau Restorative Justice Program  
Presented by the Honorable Michael J. Rosenthal  
Minister of Justice

International Association of Youth and Family Judges and Magistrates  
XVI World Congress 2002

It is an honor to speak at this International Association of Youth and Family Judges and Magistrates, XVI World Congress 2002, and to be in the presence of so many distinguished jurists and members of government and non-governmental entities. I would like to thank UNICEF for sponsoring my attendance and the organizers for allowing me to speak on the issue of Restorative Justice in Palau.

Background

The Republic of Palau is an archipelago of more than 300 islands located in the most western of the Caroline Islands group of the Pacific, just north of the equator. Palau is north of Indonesia, east of the Philippines, and southwest of Guam. The total land area of Palau is approximately 800 square miles. The Country has a population of approximately 20,000, about one quarter being foreign workers.

Contact with Europeans occurred as early as the 1500’s, but there was no significant interaction until 1783, when a British vessel, the Antelope, shipwrecked in the southern lagoon of Palau. Both the Spanish and Germans claimed Palau as their territory in the late 1800’s, and in 1909 Germany began mining operations in Palau. In 1914 Japan took control of Palau under a League of Nations agreement, using it as a base of operations for all of Micronesia. At the end of World War II, Palau became a trust territory of the United States. In 1981 Palau adopted a Constitution which is modeled after the Constitution of the United States. In 1994, Palau became an independent nation and the 185th member of the United Nations. Palau has continued its relationship with the United States through a Compact of Free Association in which the United States provides military defense and financial assistance.

The Republic of Palau is governed by a National, and sixteen State, governments. Each State has its own form of constitutional government that includes roles for traditional leaders. The National Government has an Executive, Judicial and Legislative Branch. The President, Vice President, and twenty-five member bicameral legislature, are all popularly elected. The Ministry of Justice is one of eight Cabinet level Ministries in the Executive Branch, and contains the Office of the Attorney General, Bureau of Immigration and the Bureau of Public Safety. The Ministry is responsible for the majority of law enforcement in the Country, including investigating and prosecuting crimes and incarcerating prisoners.

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Judicial power is vested in the Palau Supreme Court which consists of a trial and appellate division. Criminal cases are charged through information prepared by the Office of the Attorney General and some misdemeanors are charged with criminal citations issued by police officers. Punishments range from a fine and several days in jail to life imprisonment, but do not include the death penalty.

In September of 1998, I was confirmed by the Palau National Congress as the Special Prosecutor for the Republic of Palau. In February of 2001, I was confirmed as Minister of Justice. I have the distinction and honor of being the only non-Palauan to have served as a Minister in the history of the Republic.

Traditional Society

The traditions and customs of Palau are very complex and the following presents only a simplified and generalized description. The traditional system appears to play an important role in the acceptance and success of Restorative Justice in Palau. Traditional and customary practices, which have developed over thousands of years, continue today.

Villages are at the heart of the traditional Palauan social system. Each village has from seven to eleven clans, ranked from the highest to the lowest. Each clan has a chief, who is almost always male, and is chosen by the women of the clan. Matrilineal members have the most power in the use of land and the selection of the chiefs.

The four highest clans are considered the corner posts of the village. The chief of the highest ranked clan leads the village council of chiefs which historically met in a Bai, a traditional Palauan structure. The fundamental role of the council of chiefs is to maintain harmony in the village with a focus on showing respect for chiefs and elders. In the past this included bowing to chiefs and stepping off a footpath to allow an oncoming chief or elder to pass. The council of chiefs sets rules for each village and if a person disobeys, that person and his or her entire family can be called upon to address the infraction. Sometimes fines are levied against the chief or elder of the clan. Fines can be in the form of Palauan money but most often a fine is in the form of having to share fish or other food, or provide assistance to the victim and his or her family. With victimless infractions, the fine would be paid to the chief or work would be performed for the village.

In determining the punishment for infractions one chief serves as a prosecutor while two other chiefs sit in judgment. Decisions are final and non-appealable. While a fine is the most common result of a violation, punishments include loss of property, exile and in the past, even death. In cases of murder, a male who murders another male, may be required to act as the son of the family who has lost their son. Even today the traditional system imposes punishments for infractions of customary law.

Restorative Justice in Palau

As a former prosecutor with more than ten years of experience in the United States Federal Government and the Republic of Palau National Government, it is evident to me that Court systems and prison facilities do not necessarily address the fundamental needs of society.
Incarceration usually does not cure the root of the problem which has caused criminal activity and rehabilitation is usually the exception, thus leaving high rates of recidivism. Additionally, studies throughout the World have shown that the Court process results in satisfaction to victims of crimes in only about 20% of all cases.

In May 2001 UNICEF Pacific invited me to attend a regional Child Justice conference in Nadi, Fiji, at which the concept of Restorative Justice was presented. By June of 2001, the Ministry of Justice had established the Palau Restorative Justice Program (“PRJP”) and began sending cases to the office as an alternative to criminal court prosecution. The goal is to settle disputes, restore victims and society generally, reduce recidivism and to save time and money by reducing the number of cases that go to trial. The PRJP presently has one Restorative Justice Coordinator (“RJ Coordinator”), who is in charge of the overall program, two part-time Restorative Justice Mediators, who assist in running conferences, and three support staff.

Some general parameters have been set for the types of cases which are referred to the PRJP. The program is not available when the actions involve illegal drugs, prostitution, child abuse or homicide. The PRJP is usually not available when: (1) actions involve a sex offense or substantial violence; (2) the offender has a felony conviction within the past three years; (3) the offender has pending felony charges; or (4) the crime is without a victim. However, a case-by-case determination is made in each matter and special consideration is given to youthful offenders.

If a case appears appropriate for PRJP, the victim and the offender are contacted independently to determine if they want to participate, and more than ninety-five percent agree. Some cases which are initially determined not to be appropriate for PRJP, and sent to the Attorney General for prosecution, are later referred to PRJP. This may happen, for instance, when a victim, who has been the subject of abuse by a spouse expressly states that she or he is unwilling to go to court. With PRJP, an abuse case that would otherwise have gone unrecognized by the justice system, gets processed in a positive way. The PRJP allows an opportunity for the accused and the victim to identify and acknowledge the abusive behavior, work to restore the relationship and address the problems associated with the abuse.

After the parties agree to participate in the program, a conference is held at the Ministry of Justice with traditional leaders, family and community members. The conference proceeds under the leadership of the RJ Coordinator or one of the Mediators. At the conference the offender must acknowledge the improper actions, accept responsibility, and the victim must have the opportunity to tell the offender about the consequences of the criminal act. All participants at the conference, including the offender and the victim, determine the appropriate terms to restore the victim and society. A list of those terms are set forth on an information sheet (Attachment 1). The terms are placed in a written agreement (Attachment 2) which all participants sign and which the offender must complete within one year or sooner. When an offender performs community service, the person supervising the offender is requested to advise when the offender
completes performance, or has failed to perform. To date, there have been few cases in which the offender has failed to perform the terms of the agreement.

If the offender fulfills the terms of the agreement no criminal case is filed and the offender has no criminal record. If the offender fails to fulfill the terms of the agreement, or commits another crime during the term of the agreement, the case may be referred to the Office of the Attorney General for prosecution. No statements or evidence obtained in the Restorative Justice process, is used against the accused in a subsequent prosecution.

Each PRJP agreement requires that the offender complete several terms. When there has been a loss to the victim, the offender will be required to make the victim whole through payment of restitution or replacement of a damaged or stolen item. The offender is often required to give something back to the community. Instead of imposing a fine, however, which would be sent to the National Treasury, offenders make a contribution of a certain dollar amount of food or supplies to a group such as the Senior Citizens or the Belau National Hospital. The majority of agreements also include a religious and behavioral health component. The PRJP is not intended to be a free ride and sentences imposed by the Court are considered for comparison. However, it is important that the members of the conference have the latitude to decide the correct restoration.

As Palau is a small Country, and many victims and offenders are related through family and clan, healing wounds and resolving issues is critical. In the Court system the accused may never speak and instead has a hired or appointed advocate act on his or her behalf. A basic precept of the PRJP is that the offender and the victim meet face to face with members of the community to begin a healing process. In the large majority of cases victims appear to genuinely forgive the offenders and let go of their anger.

One of the advantages of the PRJP is its flexibility which the Court and prosecutors often do not have due to various rules of procedure and laws. In some cases referred to PRJP, for instance, the victim has some culpability, and the offender may also have been victimized. The Restorative Justice process allows for both parties to be treated as victim and offender, requiring some type of restoration from both. Other cases, such as assault and battery or trespass cases have originated from a land dispute. The PRJP allows the parties to get to the root cause, deal with that issue, reach a resolution, and prevent the situation from recurring in the future. In some instances, victims do not participate because they have left the island or do not want to participate. Cases have proceeded in the PRJP without victims and had successful outcomes, which is a far better than taking no action at all.

There are numerous factors on which success of the program can be gaged, as follows:

$ save time and money of the Court and prosecutors by reducing the number of cases that proceed to trial;

$ settle disputes and cure root problems which have caused criminal activity;
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$  restore victims;
$  reduce recidivism;
$  encourage respect for laws and society;
$  keep able and intelligent persons out of jail; and
$  satisfy victims of crime.

All indications suggest that the overall PRJP has been successful based on the above factors. In part this success can be attributed to:
$  traditional Palauan customs and values which are consistent with the principles of restorative justice;
$  a dedicated, competent and respected staff;
$  consistency in case outcomes;
$  flexibility; and
$  the desire to heal wounds in a close society

Of the many successful matters handled by PRJP there is one case that did not end in a positive result. A youth of twenty-three was referred to the program about a year ago. The RJ Coordinator believed strongly that this intelligent young man could benefit from the program and could become a productive law-abiding member of society if only given the chance. However, this young man continued to commit offenses while in the PRJP. The RJ coordinator took the extraordinary step of inviting this man into his home to live. Still the young man continued to commit criminal offenses, including firing an air rifle at a police officer. Despite the criminal conduct, the RJ coordinator continued to persuade me that the PRJP could work and that we should make an exception to the policy which would have required that the individual be removed from the program because of other offenses committed. I agreed until the number of criminal cases reached nine, and then decided the program could not work in this instance. The evidence suggests this individual has continued to engage in illegal acts and will soon be spending a good part of his life as a tenant in the Koror Jail.

This is an excellent illustration of the limits of the PRJP. There are some situations which simply cannot be resolved through this program. The PRJP was in fact never intended to replace the Court and Penal systems in Palau, but merely be a supplement. This example also makes us acutely aware of the need to put our resources where they will do the most good.

As of today, after over approximately one and a half years, more than 300 cases have been referred to the Palau Restorative Justice Program. Prior to the PRJP there were approximately 400 criminal cases charged per year by the Office of the Attorney General. Thus, about 50 percent of all criminal cases have been referred to Restorative Justice. While this is one measure of success, it will take time to judge the ultimate results of the PRJP. In part, to accomplish this, the PRJP has recently begun using a Microsoft Access database to track all its cases, a copy of which can be made available for copying.
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The PRJP was created without any legislation. Cases are referred under the broad concept of prosecutorial discretion, which allows the Executive Branch to decide which cases to prosecute. Proceeding without legislation has allowed flexibility and the ability to initiate the program quickly. This has also, for now, resulted in no specific funding for the program and only minimal funds and resources have been diverted from other parts of the Ministry to run the PRJP. The biggest challenge facing the program is the inability, with limited resources, to follow up on persons who have entered into agreements and continuing contact at the conclusion of the program. In the future it is hoped that the traditional leaders and members of the community will play an ever increasing role in these matters.

Although the program is open to all persons, it is anticipated that youthful offenders are a focus. Conferences with youth always include parents and relatives who, after gaining a better understanding of the problems, can provide guidance and support to these children. It is a learning and healing process that necessarily involves the family. The program also has the benefit of limiting the number of youthful offenders sentenced to imprisonment in compliance with the Convention on the Rights of the Child.

Today, the prison population in Palau, a nation of 20,000, is nearing 100, higher than in any other time in the history of the Country. This is placing a great strain on the prison facility, which was never intended to handle so many prisoners. The additional costs for food, electric, water and other bills are many thousands of dollars. This increase can be attributed better investigations and prosecutions and mandatory minimum sentences of 25 years for trafficking hard drugs and 15 years for possession of firearms. Based on present trends it appears that the prison population will continue to grow. Palau simply cannot afford to continue to waste its most valuable resource, the youth of Palau. If ever a program like restorative justice was needed in the Nation, the time is now, and it is hoped that the program will have a significant influence in shaping the community and criminal justice system for the future of the Republic.