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*Reflections on Justice
on the 10th anniversary of
East Timor's Independence
Referendum*

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*In tribute to the memory of the late
Eddie Mabo*

AN ADDRESS

BY Ms. KIRSTY SWORD GUSMÃO

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I acknowledge the traditional custodians of this land, the Darumbai people, and their elders past and present. I acknowledge the elders who have gathered at Rockhampton from throughout Australia. I pay my respects also to the memory of Eddie Mabo. I dedicate this address to his memory and to his family, especially his daughter, Jessie, who is my friend and who shares my commitment to women and children. I feel honoured to have received the invitation from Professor Greg Reinhardt to be with you at this important conference. I also acknowledge the presence here earlier today of another friend of Timor-Leste and of my family, Her Excellency the Governor-General, Quentin Bryce.

My involvement with justice issues began in the 1980's. I was a student of modern languages at Melbourne University when I became involved in the cause of the East Timorese. The courage and determination of the people of Timor-Leste in defending their right to self-determination in the face of the oppressive Suharto regime pricked my conscience as an Australian and spurred me to action. In breach of international law, the Indonesian army had invaded and annexed East Timor some 10 years earlier. As an Australian, growing up in a democracy and with all the benefits of a quality education, I felt I had a moral duty to contribute to righting a wrong. As the first First Lady of Timor-Leste and now as the wife of the Prime Minister, I continue to be spurred to action by that very same sense of duty and by a deep awareness of the personal legacy of having been brought up in a country blessed by peace and democracy and robust national institutions, of having

been educated to think creatively, independently and analytically. It is a legacy I strive to share with the women and children that populate my world.

Just as the lives, languages and cultures of Indigenous Australians were assailed by colonialism, so were the lives of the East Timorese. Just as Indigenous Australians were cast to the margins, not achieving political emancipation until the referendum in 1967, so were the East Timorese during the years of foreign occupation treated as second rate citizens in their own land. Just as Indigenous women lost children to the stolen generations, so did East Timorese lose children to Indonesia, many of whom remain adrift. Just as Indigenous Australians experienced massacres and other crimes, so did the East Timorese. It was the massacre of 200 of our young people, at the Santa Cruz Cemetery in 1991 which propelled the cause of our people to the world stage. Although a narrow ribbon of sea divides the East Timorese and their Indigenous brothers and sisters, their shared experiences unite them. There is much scope for dialogue in relation to matters of justice as between the East Timorese and Indigenous Australians. At a recent conference in Dili, Aboriginal Australians and East Timorese discussed common issues of reconciliation. The dialogue will continue in 2011. Peoples who have known oppression quickly find a common language. My husband has always said that the East Timorese people have learnt about democracy and justice, and their fundamental importance, from having been deprived of them in living memory. The systematic violation of their human rights informs their understanding.

As we build our infant justice system in East Timor, we are addressing the complex issues which arise when a traditional justice system and a western styled justice system intersect. This is a complex area which is receiving much attention at home. Just as this area of the

law poses challenges for Australia, some of which are to the fore at this conference, so too there is much for East Timor to address.

I have dedicated this address to Eddie Mabo and to his family. Let me tell you a little about Eddie's legacy in East Timor.

Land law in East Timor is a terrible mess. During the Portuguese era, some lands were surveyed and titles were issued. During the Indonesian era, Indonesian titles issued, some in conflict with earlier titles. The legitimacy of many Indonesian titles is questionable. Following the invasion of 1975, many left East Timor and possession of their lands was assumed by those remaining. There are lands which have never been surveyed but which are, by years of possession and use, recognised as the property of a person or family. And there are extensive tracts of land which are best recognised as communal lands but which at this time have no legal status.

As you might imagine, dealing with these claims and the process generally of establishing a principled land law has proven one of the great challenges of nation building. After ten years of searching for solutions, a land law has been formulated. A hallowed principle of our new land law is the sanctity of community land. Where a village or other community organises the use of land and other natural resources by norms of a social and cultural nature, then so long as such lands are the subject of shared use, our law requires our registrar of properties to register such lands as communal property.

You will see in East Timor's approach a marked similarity to the High Court's approach in *Mabo*, and its recognition of special collective rights vested in a group by virtue of long residence and community use of land or its resources. The language of our land law when

dealing with communal property is almost identical to the language of *Mabo*. After much careful consideration, what has prevailed is a *Mabo* type approach. In East Timor, communities who meet the criteria will achieve lawful title. In this outcome, we see the guiding hand of Eddie Mabo.

I had the pleasure of meeting Jessie Mabo at the opening of the Australian Democracy Exhibition at Old Parliament House in Canberra in May this year. She tells me her father was modest. In his wildest dreams, he would not have imagined that his endeavours would have a world wide impact upon the determination of the property rights of traditional landowners. It is only proper that we pay tribute to the memory of this remarkable man.

I want also to pay tribute to the memory of the late Ron Castan QC. Ron was the lead counsel in the *Mabo* case. He was a champion of the cause of the East Timorese and I am honoured and humbled to have delivered a public lecture in Melbourne in September last year at Monash University's Castan Centre for Human Rights. At our courts, we hold much of his library. It was his gift to our country. In East Timor's new land law, we find the spirit of Eddie Mabo, and in our law courts, the spirit of Ron Castan.

In my earlier years, I did not ever expect that breaches of international law, crimes of a brutal occupation, the ways in which societies punish, family violence, children's justice, and the experiences of victims of crime would become part of my daily life. But this is what has happened. Inevitably, perspectives about these issues evolve when one is immersed in them. I would like to share several of these with you tonight and to reflect upon the role of our leaders' commitment to reconciliation and forgiveness and to traditional forms of justice and conflict resolution in shaping our approaches to justice and judicial systems.

My husband's eagerness to reconcile with Indonesia and East Timorese pro-integrationists has drawn much criticism over the years. I admit that in the beginning I couldn't quite fathom the apparent ease with which Xanana seemed prepared to forgive.

One of the most graphic examples of the power of communities to forgive, to heal, and to move forward was seen when a man I know and admire, Indonesia's recently re-elected President, Susilo Bambang Yudhoyono, made a presidential visit to Dili in 2004. In an act of political courage, President Yudhoyono, visited the Santa Cruz Cemetery. He entered the cemetery and paid his respects. Lining the streets were thousands of our people. Many had lost relatives in the massacre. Many were crying. With disregard for the security considerations, President Yudhoyono engaged with the assembled crowd. He spoke to the people. He shook their hands. He comforted a weeping man. On this day, wounds began to heal and wrongs were forgiven. It did not require courts for this to be achieved.

This commitment to reconciliation and the fact that our fledgling courts could not cope with the volume of cases of crimes committed between 1999 and the first years since independence led us to an effective community-based reconciliation process facilitated by our Truth, Reception and Reconciliation Commission. We continue to explore how this community level restorative justice mechanisms can be integrated into our formal legal system, both as a means of relieving pressure on our resource poor judiciary and of ensuring culturally appropriate and sensitive approaches to crime and punishment. We relish the opportunity to continue to engage with Australia and New Zealand in this exploration.

In the following cases, it is difficult to imagine how a fledgling formal justice system could possibly have achieved the positive outcomes which were enabled by the adoption of traditional, uniquely Timorese mediation.

- The 2006 crisis saw a serious outbreak of violence involving youths in the neighbouring Beto Tasi/Beto Timor villages of Dili – the chefe de sucos successfully negotiated a commitment not to reoffend involving youth groups from the two villagers, with restitution being in the form of two cows. It established precedents for the way in which other communities dealt with punishment of offenders, restitution and rehabilitation.
- In early 2008, in an effort to encourage members of our police and defence forces to publicly bury the hatchet following the bloodshed of the crisis involving the two institutions during the 2006 crisis, the government organised a reconciliation parade. The highlight of this very formal, ceremonial event was the presentation by the forces of plastic flowers to one another. I guess it was an acceptable gesture in the absence of olive branches ...
- The peaceful surrender a year ago of the 60 renegade soldiers responsible for the February 11 2008 assassination attempts – all predictions were that the operation to round up the soldiers under a joint PNTL-FFDTL command would be an abject failure and result in massive bloodshed. Instead, not a single shot was fired in the operation and the group's weapons were publicly handed in to the President as part of their surrender. The leader of the renegade soldiers and his followers are presently standing trial in Dili.
- The resettlement of over 90% of the internally displaced persons – in light of the complexities of the land title issues I referred to earlier this is no mean feat. Cast your minds back to the images of lawlessness, of cars set ablaze in the forecourt of the government palace, which featured in news bulletins around the world at

the height of the 2006 crisis. Now picture this. In May, Xanana and the children and I, along with members of the government and scores of children and youths marched from the government palace to the park in the centre of Dili to celebrate its opening. For over two years following the 2006 crisis, this park housed many hundreds of internally displaced families. It was one of the most infamous IDP camps, with almost weekly incidents involving rock-hurling youths from the camp and passers-by. Today the park, dubbed the 5th of May park, is a beautifully landscaped play-ground featuring swings, slides and other play equipment and quiet corners for reflection and relaxation. The site's transformation from a place reminiscent of fear and conflict into a place of tranquility and recreation for children and families is emblematic of the broader changes and shifts within Timor-Leste, the moving on from conflict to peace and from emergency assistance to development.

Traditional forms of conflict mediation and resolution can only be sustainable and guarantee just solutions, however, when we have strong institutions in place, when the language of our courts is a language understood by the bulk of our population, and when there is respect for international values and principles as enshrined in the myriad treaties and conventions to which Timor-Leste is a signatory. Although in Timor Leste we have witnessed, just as you have in Australia, so much that is positive about community based restorative justice solutions, so too have we observed that tradition frequently stands as a barrier to the honouring of our international obligations, particularly in matters pertaining to gender equality. Domestic violence, a problem of huge dimensions in our country, has not been considered a public crime in our penal code to date although this may change if draft legislation currently being debated by our law-makers is approved by our parliament later this year. Offenders and their victims are most commonly encouraged by local village

authorities, the police and family members to resolve the problem within the home. If our parliamentarians decide to favour traditional justice mechanisms for the resolution of domestic violence cases, are we honouring our obligations to women, and guaranteeing their rights under CEDAW? I doubt that we are.

A year and a half ago, I received a visit from the daughter of one of our neighbours, an educated woman and a primary school teacher who for many years assisted me with caring for my children at the weekends. The girl informed me, amidst a flood of tears, that her father had just beaten her mother severely. Whilst it wasn't the first time, in fact I was very aware that domestic violence had been a regular feature of this family's life for over two decades, I urged the girl to bring Brigida to the house immediately. I spent the evening mopping up Brigida's blood – she had been hit across the face and had her abdomen kicked and trampled upon by her husband – and settling the smallest of her five children. I offered Brigida and her children refuge in my home and the following morning took her for a medical check-up at the Dili National Hospital. Having previously had recourse to traditional forms of mediation in dealing with past violence and seeing their failure to curb her husband's violent behaviour, Brigida decided to press charges against her husband this time. With no support from her own family, the village authorities, Church, Police or many of her friends, this took a great deal of courage and resolve. With the help of the staff of the women's NGO, FOKUPERS, which operates Dili's only women's shelter for victims of domestic violence, Brigida succeeded in taking the case to court. After having spent close to six months residing at the shelter with her youngest children, Brigida presented details of her case in court. As the police had lost the medical reports provided by Dili National Hospital or simply failed to hand them over to the office of the Prosecutor General, and one key witness lied in court, the Judge ruled that the perpetrator had not committed an offence.

This story highlights the fragility of our state institutions and underscores the need for their strengthening in the interests of defending the fundamental rights of our citizens. It also demonstrates how the interests of the most vulnerable, particularly women, are often poorly served by both traditional justice and the formal legal system.

Two years ago I found myself in the middle of a wrangle involving a group of orphans and the founder of the orphanage where they resided since 1999. I was patron of the orphanage. In essence, the founder believed that educational opportunities should be pursued for the children in Malaysia, severing all family ties. With no time line for return, no confirmed funding or any other guarantees for the physical well-being of the children, a unilateral decision was made to relocate 17 children, many of whom were under the age of 18. In a developed nation with legal frameworks designed to protect the rights of children without parents and with established processes whereby legal guardianship is determined, this case would have resulted in kidnapping charges being laid given that the travel documents of the minors were signed by the founder of the orphanage as opposed to a parent or legal guardian. However, in Asia's poorest nation, what happened in effect was that 7 minors were able to be lured on the promise of a better life to a neighbouring country and not a single alarm bell sounded for anyone in either government or our immigration service. When UNICEF and I drew attention to the case in the light of the potential for human trafficking, we were accused, including by members of the children's families, of trying to deny the children their right to get a decent education abroad. In short, it was a period of high drama and sharp learning curves for everyone concerned, and I must say that in the absence of experience, of precedents, of national laws to guide its response, the government departments charged with child protection conducted themselves with the utmost integrity and professionalism. Against the background in East Timor of a lack of laws

concerning children, I appreciated the opportunity today to observe the session convened by Justice Michelle May concerning children and the courts.

Solutions to such vexed cases lie in the strengthening of our national institutions but also importantly in creating an educated, literate population, aware of their rights and obligations as citizens. As a teacher, a mother and as Goodwill Ambassador for Education, I find myself again and again at conference after conference repeating the message that education is at the crux of every single development challenge we face. An educated population is a healthy population, an educated people are a prosperous people and a nation which can meet its human resource needs from within its own national boundaries can enjoy true independence.

Alola, the name of my Foundation, is the nickname of Juliana dos Santos, a girl kidnapped at the age of 15 by a militia leader in the wake of the post-referendum violence. She was taken across the border into West Timor as a war trophy by her captor. Out of the experience of advocating on Juliana's behalf grew an interest in the broader issues of gender-based violence. Fundasaun Alola is one of the only home-grown women's organizations working at the grass-roots level to educate women in their communities on issues related to their health and well-being; issues such as the importance of exclusive breast-feeding, reproductive health and rights, family planning and immunisation, nutrition. Our motto is "STRONG WOMEN, STRONG NATION". We adopted this slogan because we believe that whilst girls drop out of school for cultural or economic reasons and whilst women die in child-birth through lack of access to skilled birth attendants, there can be no meaningful development in our young nation.

The road we have to travel in addressing these issues is still long, but I would like to share with you a snap-shot of how far we have come. Literally from the ashes, Timor-Leste now enjoys the ranking of second fastest growing economy in the world with a growth rate of 12.8 %. Our 2007 parliamentary and presidential elections were administered for the first time by our National Electoral Commission with no foreign technical assistance. The Commission has in fact been called upon to provide advice to the National Electoral Commission of Guinea Bissau. Spending on health, education and agriculture doubled in 2008 and a program of 9 years compulsory, free education has been announced. But most significant of all has been the government's ability to consolidate peace.

I would like to thank the AIJA for its kindness in extending an invitation to me to attend this conference. This is a wonderful opportunity to learn and to build on my friendships with fellow travellers in the difficult world of justice. I want to commend the AIJA for its willingness to reach out beyond Australia and New Zealand and to draw neighbouring countries, most of whom are poor and would not otherwise be able to attend, into the learning environments the AIJA so usefully creates. The issues I have canvassed today – property rights, family violence, the involvement of communities in justice solutions, and the interface between western legal systems and traditional justice systems are complex. The exposure conferences such as this offer to us in the developing world is invaluable. Opportunities for dialogue are to be relished, as they assist all of us, from developed and developing nations, to formulate our own culturally appropriate plans of attack. Innovative approaches to justice solutions, and the evaluation of them, albeit emerging from developed countries with different cultural underpinnings can, nonetheless, very usefully inform developing countries as to their approaches. The more that we can rely upon community-based restorative solutions, without compromising the rights of women and children, and

our international treaty obligations, means that we can reserve our courts, which are expensive to maintain, to the areas where they are truly needed.

On 30th August, just three weeks from now, we will gather with many visitors from abroad to celebrate the tenth anniversary of the triumph of our democracy, just as tonight we take pleasure in the enduring success of the indigenous courts and the voice they rightly give to indigenous peoples. In conclusion, I extend to you, friends, an invitation to be present at the celebration of our 10 years of independence! With your help, we have made giant strides. As we move into the second decade of our independence, we will continue to seek your guidance and goodwill. Our commitment to justice as a pillar of our democracy is the promise of peace and well-being we make to our people.

Obrigada barak. Thank you.