

CHAPTER 5

HUMAN RIGHTS IN EAST TIMOR

Human rights abuses in East Timor since 1975

Death toll

5.1 At its most extreme, abuse of human rights involves the taking of human life. The number of deaths caused during the period of Indonesian rule is a measure of the extent of human rights abuses in East Timor.

5.2 Mr John Dauth, Deputy Secretary, DFAT, told the Committee that he did not think anyone would be able to offer a figure as to the number of people who had met violent ends and been the victims of the civil disorder and oppression over the 25 years: 'I do not think such a figure exists in anybody's knowledge. It is possible, of course, to get all sorts of accounts from people who have been there and they vary in credibility. What is clear is that many people have died.'¹ He also said, 'It is sadly the case that there have been a number of times when large numbers of people have died.'²

5.3 Professor Graeme Hugo also drew attention to the difficulty of obtaining a definitive figure for the loss of life that had resulted from the Indonesian invasion and subsequent occupation. Referring to the deficiencies of the pre-1975 Portuguese population records, which had been used as the basis for projections, he said:

I believe, at least with the existing information we have, that it is virtually impossible to calculate demographically what the loss of life, other than by natural causes, has been.

If we were to have some accurate population information from the pre-Indonesian period, if there were in the Portuguese records, an age-sex distribution of the population from the 1970s, it would give us the possibility of making some quite accurate estimates, I would say, of the extent of that undoubtedly significant loss of life in the process of Indonesia taking over and running East Timor.³

5.4 Mr Francisco Soares, a member of the East Timorese community in Perth, told the Committee that as a consequence of the Indonesian invasion, more than 200,000 people had been killed: 'It is one-third of the population and it is genocide'.⁴

1 Mr Dauth, *Committee Hansard*, 13 August 1999, p. 232.

2 Mr Dauth, *Committee Hansard*, 13 August 1999, p. 232.

3 Professor Hugo, *Committee Hansard*, 19 July 1999, p. 55.

4 Mr Soares, *Committee Hansard*, 20 July 1999, p. 194.

5.5 This estimate was, in general terms, supported by Professor James Cotton, who referred to a statement made in November 1979 by Dr Mochtar Kusumaatmadja, then Indonesian Foreign Minister, that 120,000 people had died in connection with famine, civil war and the occupation: ‘Years have passed since then, so between that number and 200,000 is probably a reasonable figure, which is a frightening proportion.’⁵ Dr William Maley also agreed that ‘a couple of hundred thousand over twenty-four years is quite a plausible figure’.⁶

5.6 Mr Rob Wesley-Smith referred to the 1993 Joint Standing Committee on Foreign Affairs, Defence and Trade report, *Australia’s Relations with Indonesia*, which said that, since 1975, ‘the evidence suggests that at least 200,000 East Timorese have died from causes directly or indirectly attributable to integration by Indonesia’.⁷

5.7 Mr Jim Aubrey explained how this widely quoted estimate had been arrived at:

it becomes a simple exercise in statistical projection to approximate a total fatality figure of East Timorese from the 1975 invasion through the subsequent 24 years ... In the period of 1960 to 1970, the population annual growth rate in East Timor was 1.7 per cent. This figure contrasts conservatively with the current rate of 2.35 per cent and with the 1980s rate of 3.02 per cent. The pre-invasion population in 1975, based on census and demographic studies, is reported to have been around 690,000. Projecting this figure with the conservative 1.7 per cent growth rate to the year 1995 gives an estimated population of 966,643. The last Indonesian census was conducted in 1995. According to this data the population of East Timor for that year was 840,000 people. Even without subtracting a figure for Indonesian transmigrants, the contrast between the 1995 Indonesian census and the projected population total for 1995 leaves 126,924 people missing ... relying on Indonesian government statistics for transmigration from the 1997 statistical yearbook of Indonesia, compiled by the Department of Information, we are told that East Timor had 58,856 transmigrants by the end of 1995. It now becomes possible to subtract the transmigration figure from the Indonesian census total for 1995, leaving 780,863 bona fide East Timorese people. Subtracting this figure from the projected population total for 1995 gives a conservative indication based upon all the available empirical evidence of the number of East Timorese men, women and children who have perished under the Indonesian occupation—185,780 ... This information was available in 1980 when the first Indonesian census was made giving a population total of 555,000. The projected population

5 Professor Cotton, *Committee Hansard*, 13 August 1999, p. 281. Professor Cotton subsequently wrote that ‘the total number of fatalities during the period of Indonesian numbered at least 120,000 and could have been as high as 200,000’ (‘The Emergence of an Independent East Timor: National and Regional Challenges’, *Contemporary Southeast Asia*, vol. 22, No. 1, April 2000, p. 3).

6 Dr William Maley, *Committee Hansard*, 11 November 1999, p. 862.

7 Mr Wesley-Smith, *Committee Hansard*, 8 September 1999, p. 369. The passage quoted is on page 96 of the Committee’s report.

figure of 1980 is 750,677. This leaves an absence of 195,677 East Timorese ... it is not unreasonable to make allowance for the conservative growth rate used throughout the population projection, and the possibility that the number of transmigrants in East Timor has been underestimated by Indonesia's department of information. Therefore, it is highly possible that the estimate of East Timorese who perished during the invasion and under the subsequent 24 years of Indonesian occupation far exceeds the often quoted 200,000. Only when East Timor is independent can the empirical evidence be gathered to substantiate the estimation.⁸

5.8 Mr James Dunn wrote that, in the mid-1970s, East Timor's population was growing at a rate of between 1.8 and 2.1 per cent per annum and, therefore, had conditions been normal, by 1995 about one million Timorese would have been living in the province, or 300,000 more than the current estimate of the indigenous population. He wrote: 'Most of this massive loss of population is clearly attributable to the conditions created by the Indonesian invasion, and the East Timorese people have been denied international acknowledgment of what has been, in relative terms one of the worst disasters of its kind in modern history.'⁹ On 24 September 1999, Mr Dunn told the Committee of a massacre near Bobonaro in 1976, which he had reported on to the United Nations in 1977, where between 1,200 and 2,000 refugees had been killed by Indonesian troops: 'In places like that, there will be areas where there have been mass killings and probably are mass graves.'¹⁰

5.9 In August 2000, the United Nations Chief Prosecutor in East Timor, Mr Mohamed Othman, a Tanzanian lawyer and former chief prosecutor at the Rwandan International Criminal Tribunal, began the task of compiling a report on atrocities committed after the 1975 invasion. The United Nations human rights chief in Dili, Mr Patrick Burgess, announced on 25 August 2000 that Mr Othman would lead a team examining whether there was a systematic campaign of violence following the imposition of Indonesian rule.¹¹ On 4 October 2000, Mr Othman was appointed Prosecutor-General for East Timor by Secretary-General Kofi Annan, with exclusive responsibility to investigate and prosecute international crimes committed in connection with the popular consultation of 30 August 1999. He was also given

8 Mr Aubrey, *Committee Hansard*, 27 August 1999, p. 314.

9 James Dunn, *Timor: A People Betrayed*, Sydney, ABC Books, 1996, p. 284. In evidence to the Senate Standing Committee on Foreign Affairs and Defence's inquiry into human rights in East Timor, Mr Dunn said the 'actual loss of life could be up around 200,000 people' (*Committee Hansard*, 9 June 1982, p. 401). Xanana Gusmão said in an interview in 1990 that he believed that 'more than 200,000' people had died over the previous 15 years from fighting, famine and disease (*Background Briefing*, 28 October 1990).

10 Mr Dunn, *Committee Hansard*, 24 September 1999, p. 612. During its 1982-83 inquiry into the human rights and conditions of the people of East Timor, the Senate Standing Committee on Foreign Affairs and Defence received evidence from eyewitnesses to massacres and other flagrant abuses of human rights. This evidence was kept *in camera* to protect witnesses in East Timor.

11 Mark Dodd, 'War crimes lawyer to study 1975 invasion', *The Sydney Morning Herald*, 26 August 2000; Ian Timberlake, 'East Timor militia accused to be charged', *Agence France-Presse*, 29 August 2000.

responsibility for laying the foundation for the future office of Attorney General for East Timor.¹²

5.10 On 10 October 2000, a warrant for the arrest of Mr Eurico Guterres, leader of the East Timorese Aitarak militia group, was submitted simultaneously to the Head of the Indonesian Diplomatic Mission in Dili and to the Indonesian Attorney's General in Jakarta. The arrest warrant, the first to be issued in connection with the violence in 1999, was signed at the request of the Prosecutor-General of East Timor by Judge Alexandre Corte Real, one of three judges serving on the territory's Special Panel for Serious Criminal Offenses, and related to Mr Guterres' involvement in two 1999 massacres, in Liquiça and Dili. Mr Sergio Vieira de Mello requested Attorney General Marzuki Darusman to ensure that the competent authorities in Indonesia enforce the warrant and that Guterres be surrendered so that he can face justice in East Timor. The request was made pursuant to the Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, signed on 6 April 2000 by Mr Vieira de Mello and Mr Marzuki Darusman, in which UNTAET and Indonesia pledged to facilitate the transfer of people from one jurisdiction to another.¹³

The human rights record, 1975—1999

5.11 'No people on earth has seen a greater portion of its population perish under tyranny since the nightmare of the European Holocaust', declared the Central Conference of American Rabbis in a statement on East Timor in June 1997. The statement continued:

Despite world outrage over these events, and despite the United Nations resolutions calling for immediate Indonesian withdrawal from East Timor, the occupation, and the cruel abuses of human rights attendant upon it, continue to this day. For more than twenty years East Timor has now lived under a brutal military occupation. Arbitrary arrests, torture and extrajudicial executions are everyday occurrences, as are programs of compulsory relocation, confinement in concentration camps, and systematic starvation. The occupying forces have deprived the Timorese of the most basic freedoms of expression and assembly; the Timorese language, Tetum, has been suppressed and many forms of cultural expression banned. Political opposition is punished by detention, torture and death. Contact with the outside world has been severely restricted, and were it not for the courage of the several foreign journalists who witnessed the event, even the appalling massacre of more than two hundred peaceful Timorese

12 *Daily News* (Dili), 5 October 2000; 'Tanzanian appointed U.N. prosecutor general for East Timor,' *Xinhua*, 9 October 2000.

13 'Arrest Warrant For Eurico Guterres', *UNTAET News*, 11 October 2000; Mark Dodd, 'Hand over militia head, says UN', *The Sydney Morning Herald*, 12 October 2000.

demonstrators at a Dili cemetery in 1991 would have gone unrecorded and unprotected.¹⁴

5.12 The United Nations Special Rapporteur on Torture, Professor P. Koojimans, said, in January 1992, that in East Timor ‘torture is said to be practised rather routinely’ in police and army interrogations, and that he had heard of ‘no case of the courts having concluded that a detention was illegal or that a statement was obtained under duress’.¹⁵ He recommended that Indonesia ratify its signature to the 1984 United Nations Convention against Torture, but this was not done until 28 October 1998.¹⁶ The December 1997 report of Professor Koojimans’ successor as Special Rapporteur on Torture, Mr Nigel S. Rodley, detailed 27 cases in East Timor which had been brought to his attention, of which the following gives the general tenor:

Aliança Soares dos Santos (female), reportedly detained, along with seven members of her family, in Atabae, Bobonaro district on 5 December 1996. All of the family members were allegedly beaten and Aliança was allegedly tied up, threatened with a knife and taken to KORAMIL (Sub-District Military Command) in Ermera. She was allegedly subjected to torture, including rape by an Indonesian Armed Forces soldier, who threatened to kill her if she reported the rape. She was subsequently transferred to a Rajawali batallion camp at Luli Rema and allegedly twice raped by a sergeant. She was released on 16 December 1996. The Government confirmed that she had been temporarily arrested, though on a different date, but said that there was no evidence that she had been raped.¹⁷

5.13 The Committee received evidence that torture was used routinely as a means of control:

it became a routine, a way of life, over in East Timor for a while, and much of it probably was able to occur without necessarily the endorsement of all members of the Indonesian military, but the climate was so unstable and there was virtually complete impunity for actions. As a result, it was a very pervasive process.¹⁸

5.14 The February 1998 report of the Secretary-General on the human rights situation in East Timor found that ‘Indonesia’s overwhelming military presence has an enormous impact on the human rights situation and is undoubtedly the cause of

14 Resolution adopted by the 108th Annual Convention of the Central Conference of American Rabbis in June 1997.

15 *Visit of the Special Rapporteur to Indonesia and East Timor*, U.N. Doc. E/CN.4/1992/17/Add.1, paras. 73, 74.

16 Canada. Department of Foreign Affairs and International Trade, *For the Record 1998: the UN Human Rights System*, vol. 3, ‘Asia: Indonesia’.

17 *Report of the Special Rapporteur, Mr Nigel S. Rodley: Summary of cases transmitted to Governments and replies received*, E/CN.4/1998/38/Add.1

18 Mr Paris Aristotle, Director, Victorian Foundation for the Survivors of Torture, *Committee Hansard*, 27 August 1999, p. 304.

serious tensions as people are at all times reminded that they are under a repressive military occupation'. The Secretary-General reported that, in June and July 1997, military teams rounded up systematically large numbers of people, detaining them for days or weeks without a warrant or detention order, and intimidating or torturing them so that the army could get information about possible guerrillas. He said sources also indicated that torture continued to be endemic in East Timor, a method used to get information about suspected guerrilla activity or to force confessions:

Standard methods include application of electric shocks, burning the skin with lighted cigarettes, placing the hand or foot under a chair or table leg which the interrogator then sits on; and kicking and severe beating, sometimes with pieces of plywood, pipe or electric cable. The perpetrators can be any branch of the military, including the police, but the most feared interrogators are those from Kopassus, the army special forces, and the various joint counterinsurgency teams they command.¹⁹

5.15 The Special Rapporteur on Violence against Women referred to East Timor in her 1998 report to the Commission. She indicated that she had received a large number of submissions regarding sexual violence in East Timor by Indonesian Security Forces: 'Among the violations complained of are sexual violence, rape, forced marriage, forced prostitution and the intimidation of female relatives of suspected activists. Indonesian State authorities have not responded in accordance with their international obligations. No cases have thus far resulted in prosecution.'²⁰

5.16 An investigation of the Indonesian national family planning program (*Keluarga Berencana Nasional—KB*) in East Timor by Miranda E. Sissons of the Yale Center for International and Area Studies, was drawn to the attention of the Committee by the East Timor Human Rights Centre.²¹ Sissons found that, set in a context of wide-scale repression and fear, the KB program in East Timor consistently violated recognised standards of family planning and reproductive health care as defined by the Beijing Declaration of the United Nations Fourth World Conference on Women. The design and implementation of the KB program in East Timor had caused serious violations of women's human rights under both international and Indonesian domestic law. The majority of East Timorese people perceived the KB program as a deliberate, politically-inspired means of controlling the local population in both literal and demographic terms. The resulting fear of violence and covert sterilisation had undermined the efficacy of the government health system and, in a number of cases, had significantly affected women's access to education. Abuses such as covert, forcible injection of young women with hormonal contraceptives, and continuing military involvement in the program, had contributed to a strong belief by the local

19 United Nations Commission on Human Rights, *Situation in East Timor, Report of the Secretary-General*, 25 February 1998, E/CN.4/1998/58, pp. 15-7.

20 E/CN.4/1998/54, paras. 26-27.

21 Miranda S. Sissons, *From One Day to Another: Violations of Women's Reproductive and Sexual Rights in East Timor*, Melbourne, East Timor Human Rights Centre, 1997.

population that the KB program was used by the Indonesian Government as a politically-motivated instrument to deliberately undermine the survival of the East Timorese as a national group. Fear of the KB program severely undermined the efficacy of the government health system in East Timor, resulting in a mortality rate double that in the rest of Indonesia and, in the case of infant mortality, among the highest in the world.

5.17 The uneasy 18 months of political freedom East Timor experienced following April 1974, when the new Portuguese Government announced that it would free all its colonies, was brought to an end in December 1975, when Indonesian forces invaded with considerable brutality. A civil war in June-July 1975 between UDT and Fretilin supporters created divisions that took many years to heal among the Timorese, including among the expatriates. These divisions were fully exploited by certain Indonesian officers before and following the invasion.

5.18 From 1976-78, many East Timorese fled from the invading forces into the mountains. Deaths from warfare, bombing and starvation are estimated, using census data, to be between 100,000 and 200,000. Indonesian actions also contributed to starvation—many villagers in contested areas were completely moved to less fertile areas controlled by Indonesia (some of this land was reportedly later given to migrants and army personnel). Real or suspected opponents of Indonesian rule were often badly treated and there were some notorious mass-killings, such as those at Kraras (200 reported killed in 1983), Lacluta (up to 400 reported killed in 1981) and at Hauba near Bobonaro (where 100 men were reported killed in 1984).²²

5.19 During a visit to Australia shortly after his dismissal as Apostolic Administrator of Dili in May 1983, Monsignor Martinho da Costa Lopes gave an interview, in which he said:

For us of the Church it was terrible, there was no one the people could go to for help except us, and we could do so little. Each time I went to the commander and complained; for years I did this. Maybe it helped for a short while, but really nothing, the military treated us with contempt, so after five years I started to speak out. I spoke in the church against the military. I told them that if they wished to kill me they knew where I was ... Your Mr Whitlam said bad things about me, I know this, yes. I cannot worry about such people. I must say what is true. The people relied on me to do this.²³

5.20 From the mid-1980s, the Indonesian authorities introduced the 'smiling policy' to win acceptance by 'top-down' economic and social development schemes, such as sending hundreds of Timorese students to universities in Java and Bali.

22 John G. Taylor, *East Timor, the Price of Freedom*, London, Zed Books, 1999, pp. 101-2, 111; Ross Warnke, 'Timor: tales of torture', *The Age*, 14 May 1982; *Committee Hansard, in camera evidence*, 14 May 1982; Peter Millership, 'Timor Bishop accuses military of massacring 84 villagers', *Reuters*, 1 March 1984.

23 Michele Turner, *Telling East Timor: Personal Testimonies, 1942-1992*, Sydney, UNSW Press, 1992, pp. 166-7.

Amnesty International submitted that the ‘smiling policy’ did not make army abuses more acceptable. ‘The first trials of political prisoners took place in late 1983. Most lacked basic fairness and many relied on evidence obtained by duress. Amnesty International knows of only a handful of political trials in East Timor that have not lead (sic) to a conviction. Nearly 200 people were convicted.’²⁴

5.21 East Timor was opened to most foreign visitors in 1989 and increasingly pro-independence groups sought to use public demonstrations to publicize their aims. ‘Indonesian authorities reacted with mass arrests before and after the visits of President Suharto in 1988, Pope John Paul II in 1989, U.S. Ambassador Monjo in 1990 and before the aborted UN sponsored Portuguese delegation in October 1991.’²⁵

5.22 Amnesty International submitted that a memorial procession for Sebastião Gomes Rangel, who had been killed by Indonesian agents, ended in tragedy when between 100 and 270 people were killed by Indonesian troops at the Santa Cruz cemetery in November 1991. Up to 200 unarmed demonstrators ‘disappeared’ after being detained. At subsequent court-martials the army portrayed this as the reaction of a few troops incensed by the (slight) wound experienced by an intelligence officer who remonstrated with some of the demonstrators at the start of the procession. This account did not match the accounts of eye-witnesses who spoke of a well-organized force that fired systematically at the crowd.²⁶ The Committee received an eyewitness account of the events in Dili of 12 November 1991 from Mr Russell Anderson:

Bob Muntz and I decided we should leave. I had taken ten hurried steps north along the cemetery [*sic*] wall and was glancing back to see the helmets of the military front line bobbing up and down, jogging or marching towards the crowd. The crowd began to walk backwards, walk away some were already running. Suddenly a few shots rang out continued by an explosive volley of automatic rifle fire that persisted for 2 to 3 minutes. It sounded like the whole fifteen in the front row had their fingers pressed firmly on the trigger. They were firing directly into the crowd. I ran like everybody else. I took a quick glance around and saw people falling. I realised that I would be shot in the back if a bullet lodged into my body. Most people, especially in that initial burst of fire would have been shot in the back running away ... In my opinion it was a cold blooded butcheress [butcherous] massacre. Statements about orders like ‘don’t fire’ being mistaken for ‘fire’ do not ring true. The firing went on and on. The foreigners who were not brandishing or throwing anything received the same treatment as the East Timorese. The only difference was the foreigners, those still alive, were able to flee the country and tell what had happened.²⁷

24 Amnesty International Australia, submission no. 43, p. 18.

25 Amnesty International Australia, submission no. 43, p. 18.

26 Amnesty International Australia, submission no. 43, p. 18.

27 Russell Anderson, submission no. 64, pp. 8, 12.

5.23 It has never been made clear why Indonesian troops opened fire on the demonstrators.

5.24 According to Amnesty International, ‘After Santa Cruz, access to East Timor was heavily restricted, the ICRC was obstructed in its work and there were many arrests of suspected pro-independence sympathizers. There were also mass detentions during the visits of official delegations. These intensified after the arrest of Mr Xanana Gusmão in December 1992.’²⁸

5.25 In December 1992, the Joint Committee on Foreign Affairs, Defence and Trade reported that:

Witnesses who gave *in camera* evidence ... talked of the fear engendered by a military whose presence was all pervasive, which was inclined to use summary detention and arrest. They spoke of a system of surveillance of the population which restricted movement and interrogated youths for speaking to foreigners or for singing pro-independence songs. The tension in East Timor, described by the numerous submissions to the Indonesian inquiry, would seem to be the result of a long history of repression of the province since the invasion of 1975.²⁹

5.26 It was not until the 1990s that human rights bodies were formed in East Timor. After 1992, the Catholic Church formed an informal Justice and Peace Commission, which tried to monitor human rights abuses. However, it lacked staff until November 1996. In early 1999, the Catholic Dioceses of Dili and Baucau each had a Justice and Peace Commission’s attached to it.

5.27 In 1997, another human rights body, Yayasan HAK, (Hukum, hak Azasi dan Keadilan—Law, Human Rights and Justice) was formed with the support of various East Timorese NGOs. It had a staff of Timorese lawyers able to collect information on human rights abuses, to assist detainees during police questioning and to represent those brought to trial.³⁰

5.28 Komnas HAM established a Dili office in July 1996 but this never worked successfully. It did not have the support of the the East Timorese until the appointment of a well-known NGO activist, Florentino Sarmiento, as head of Komnas’ Dili office in late 1998, improved local attitudes to Komnas HAM.³¹

5.29 In December 1998, the Justice and Peace Commission of the Dili Diocese reported that it had received the following number of cases:

28 Amnesty International Australia, submission no. 43, p. 19.

29 *A Review of Australia's Efforts to Promote and Protect Human Rights*, Canberra, 1992, p. 71.

30 Amnesty International Australia, submission no. 43, p. 8.

31 Amnesty International Australia, submission no. 43, p. 8.

212 cases of arbitrary arrest and detention—a decrease since 1997

54 cases of arbitrary executions—three times the number in 1997

19 cases of apparent ‘disappearances’

89 cases of torture—four times the number reported in 1997

14 cases of rape.³²

5.30 Yayasan HAK published its first annual report in March 1998—it had taken on 128 criminal and 30 civil complaints. In a later report covering the first half of 1998, the Justice and Peace Commission noted 25 killings by security personnel and 10 disappearances while Yayasan HAK reported 23 killings and 17 disappearances. The Yayasan HAK report made the following comment on the use of torture:

Generally, every arrest of a civilian in East Timor is accompanied by torture or mistreatment (*penyiksaan*). And the arrest and torture are not only done by the police, the agency empowered to arrest [under the Indonesian government's criminal code], but by agencies that are not empowered to arrest, such as the military and groups of civilians armed by ABRI (Halilintar, Makikit, Alfa, Saka, and others). And generally, those civilians arrested and tortured are those presumed to be behind political activities—clandestine activities such as a secret meeting, organizing resistance against the government, providing logistical support or materially supplying the guerrillas in the forest. ... Generally, it only takes a suspicion or a report from an intelligence agent for the security forces to go and directly arrest a person. In the majority of cases, the arrest is not based on an arrest warrant. ... The form of the torture generally inflicted on the victim involves kicking, stomping, hitting with an iron rod, removing the fingernails or smashing them under table legs, electric shock on all parts of the body (including the genitals), burning with cigarettes, dunking in dirty water, among other tortures.³³

5.31 Amnesty International submitted that:

In March 1997, hundreds of young people held a peaceful demonstration in Dili during the visit of Mr Jamsheed Marker, the Personal Representative of the United Nations Secretary General, to Dili. They hoped to tell him of their concerns. Instead they were assaulted by police and 33 were eventually tried either for ‘expressing hatred towards the Government’ or for assault on the police and 17 eventually received one year sentences. An investigation by Komnas HAM showed that many were so seriously beaten that they

32 Amnesty International Australia, submission no. 43, p. 9.

33 Quoted in Amnesty International Australia, submission no. 43, p. 9.

could not eat for four days and that they had been denied medical care for several days.³⁴

5.32 Both sides resorted to violence. According to Amnesty International:

On May 28th, [1997] one day before the Indonesian General Elections, Falintil forces attacked a police station in Dili. There were co-ordinated attacks in other places, including attacks on polling booths and an attack which killed 18 police travelling in a truck at Quelicai near Baucau. In all about 40 people, including civilians, were reported killed in the largest Falintil attack for many years.

Amnesty International condemned the killings of civilians and recognized the right of the Indonesian authorities to arrest those responsible. There were many arrests, particularly around Dili and Baucau and there were allegations of torture. The capture and death of resistance leader David Alex near Baucau on June 25th [1997] lead [sic] to further arrests near Baucau.³⁵

5.33 After President Soeharto's resignation in May 1998, human rights abuses decreased and security forces did not interfere with public rallies and demonstrations in major towns. Amnesty recorded positive developments in 1998, which included:

a suggestion that soldiers responsible for human rights abuses would be held accountable for their actions—Indonesian authorities reacted promptly when Herman das Dores Soares (21) was shot dead by soldiers as he was collecting wood near Manatuto on 16 June, 1998—the soldiers offered no assistance so that he bled to death. An Indonesian soldier, Agus Medi, was given a 10 year sentence for shooting him, far heavier than any previously imposed for killing civilians.

In November 1998, the Indonesian Government allowed the UN Special Rapporteur on Violence Against Women to visit East Timor and in February 1999 the UN Working Group on Arbitrary Detention was also given access to the territory.

The ability of East Timorese in Dili at least to hold peaceful political demonstrations and discussions without immediate arrests.

The release of some 60 political prisoners and the movement of Xanana Gusmão from Cipinang Prison to house arrest in Jakarta.³⁶

5.34 However, this more tolerant approach did not last long and serious abuses became more frequent from late 1998.

34 Amnesty International Australia, submission no. 43, p. 4.

35 Amnesty International Australia, submission no. 43, p. 4.

36 Amnesty International Australia, submission no. 43, p. 5.

5.35 In smaller towns, the East Timorese did not have so much political freedom. The growing recruitment of paramilitary groups led to human rights abuses. The authorities maintained restrictions on human rights monitoring, particularly during military operations. Amnesty International submitted:

Paramilitary forces, which had already been armed in December 1998, were increasingly involved in killings, torture and illegal detention, either alone or with regular units. Indonesian authorities made no effort to restrain these abuses.

...

Unlawful killings, 'disappearances', arbitrary detention and torture all continued to be reported in the context of ABRI's operations against the East Timorese National Liberation Army (Falintil).³⁷

5.36 Reflecting on 'the slow civil war in East Timor which had killed around 200,000 people between 1975 and 1998', Minister for Foreign Affairs Alexander Downer said on 17 July 2000: 'Those breaches of human rights built and built and built opposition to Indonesian rule in East Timor'.³⁸

Violence within East Timorese society

5.37 Dr Geoffrey Hull said that there were rivalries among the East Timorese people themselves and that cardinal to the establishment of a lasting peace was education. The fact that most people were not educated lent itself to the natural divisiveness in East Timorese society. He noted that East Timor had 15 indigenous languages, some even unrelated to each other, which mirrored its history of a collection of warring tribes. Only Portuguese colonialism and the need for resistance against common enemies united them. The natural tendency in East Timorese society was division, as manifested in 1974-75.³⁹

5.38 Evidence indicated that, during the Indonesian occupation, there were two levels of violence: one between Indonesians and the East Timorese, and the other at a more domestic level. Professor James Warren, Murdoch University, saw it as a milieu that had been created consciously and intentionally:

it is a classic example of low intensity warfare and counter-insurgency techniques. The Kopassus ... had been trained to operate in communities to create a climate of terror, hysteria and violence ... The violence is meant to create a situation ultimately where it is necessary then to step in to restore order ... So I would argue as to whether in fact you are talking about culture

37 Amnesty International Australia, submission no. 43, p. 6.

38 'Increasing Interconnectedness: Globalisation and International Intervention', Speech by the Hon Alexander Downer, MP, Minister for Foreign Affairs, to the Sydney Institute, Sydney, 17 July 2000; Peter Allport, 'Irian Jaya is part of Indonesia, says Downer', *AAP*, 17 July 2000.

39 Dr Hull, *Committee Hansard*, 10 September 1999, pp. 511-2.

and human behaviour, that we are talking about a culture where there was, prior to the presence of these militias, a culture of violence. I do not think that necessarily has been the case—I think it has been fostered; I think it has been nurtured.⁴⁰

5.39 Drawing on her experience in East Timor, Dr Gaynor Dawson, a consultant with AusAID and the Asian Development Bank, told the Committee that violence was widespread and had limited previous development projects. ‘Intimidation and terrorism had disrupted people’s lives. People have been forced to leave their traditional lands for security reasons. Killings are often followed by the mutilation of bodies. It is a culture of violence which pervades daily life.’ The solution to problems was seen generally as violence. While she was there, doctors in the hospital had been beaten because of the deaths of patients, and teachers were beaten if they did not give good marks to students. In one case she saw on Atauro Island, the water for a water supply and sanitation project was diverted by a village head for commercial purposes. When people in the village protested, the village head had employed thugs from Dili to beat the protesters. Dr Dawson urged that aid projects should address conflict resolution and assist the reconciliation process at the local level. Local conflicts and intimidation, which would affect the successful implementation of aid projects, needed to be addressed and resolved before project implementation. Approaches should ensure that communities developed strategies and had the capacity to resolve conflicts themselves after the project ended.⁴¹

5.40 In 1998, a coalition of pro-independence factions and interests formed the CNRT (*Conselho Nacional da Resistência Timorese*). They put aside their differences and presented a united and, therefore, more formidable opposition to Indonesian occupation. Although independence has since been achieved, the CNRT is continuing to operate but will soon be replaced by new political parties, which are being formed to contest elections in a multi-party system. History has shown that violence has achieved nothing worthwhile for the East Timorese people and it will be a constant reminder to them as they participate in a new political system.

5.41 It will take time, patience and determination to instil in the whole East Timorese population, after being subjected to prolonged and severe violence, the need to put aside violence as a means of settling differences and abide by the rule of law. This will particularly apply in communities where pro-integrationists return to live with those who suffered at the hands of the militias. The legal and judicial systems need to be widely understood and respected if they are to achieve their purpose. As argued by Dr Hull, literacy and other areas of education will help people to understand the concept of rule of law and to use legal processes rather than violence to deal with grievances. The Church, too, as a highly respected institution in East Timor, has a key role to play in promoting the rule of law.

40 Professor Warren, *Committee Hansard*, 20 July 1999, p. 104.

41 Dr Dawson, *Committee Hansard*, 20 July 1999, pp. 100-01.

Responsibility for militia violence leading up to and following the 30 August 1999 vote

5.42 During its 1999 hearings, the Committee sought to elucidate who was responsible for the violence that occurred in East Timor during the course of that year. At the final hearing on 9 December, when DFAT Deputy Secretary, Mr John Dauth, was asked whether he still held to the view he had expressed at an estimates hearing on 5 May 1999⁴² that the militias were armed and organised by local commanders operating outside the TNI's chain of command, he said:

Our knowledge of what was going on, of course, has never been precise. There has been an enormous amount of information available to us, including information from intelligence sources ... with the passage of time, the complicity of TNI became clearer and clearer to us. There is no doubt that, for example, by August, when I appeared before this committee, we were very much more concerned about the level of complicity, about the numbers of people in TNI engaged in active complicity with militia and about the extent to which the broader TNI chain of command was involved.⁴³

5.43 At the Committee's hearing on 13 August 1999, when asked about the presence of Kopassus special forces in East Timor, Mr Dauth replied:

Just precisely what the make-up of the Indonesian military in East Timor is I am not really able to say, not because I am hiding anything but because we do not have definitive information on that.⁴⁴

5.44 This statement seemed to be at odds with alleged statements made by DFAT in discussions on East Timor between Australian and United States officials held in Washington on 16 and 17 August 1999, which read: 'There was agreement that fundamental security problems remained, including the presence of Kopassus forces and hence the potential for mischief, especially in western regencies.'⁴⁵ At the hearing on 9 December 1999, Mr Dauth explained:

I think the real answer to this question, and to so many other questions of this sort, is that it comes back to what I have said already: an enormous amount of information has been available to us. In both advising government and trying, with the best will in the world, to be helpful in the hearings of this Senate committee and others, we have to be careful, judicious and conservative about offering judgments. It does not serve the

42 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard* (estimates hearings), 5 May 1999, pp. 288-89.

43 Mr Dauth, *Committee Hansard*, 6 December 1999, p. 1023.

44 Mr Dauth, *Committee Hansard*, 13 August 1999, p. 230.

45 Quoted in John Lyons, 'The Secret Timor Dossier', *The Bulletin*, 12 October 1999, p. 29. The information in the article was based allegedly on leaked documents from the Defence Intelligence Organisation.

public record or your deliberations very well for us to be offering half-baked judgments. I am not suggesting in any way that the judgments made in the discussion in Washington were half-baked, but I would want to be extremely careful in what I said for the record for a Senate inquiry because there is a particular significance to hearings of this sort. It is possible to have conversations in private and to rely a bit more selectively on some of the information available to us in coming to judgments, but I think it is quite a different thing to come to a public hearing of a Senate inquiry and make firm judgments. I for one will not come along and mislead the Committee, and I was not then and I will not now.⁴⁶

5.45 On 15 September 1999, when it was put to General Sanderson that, rather than so-called ‘rogue elements’ being responsible for the violence, it had become apparent that such operations were under fairly direct control, he responded:

I have no evidence to substantiate that view one way or the other. There are indications quite clearly that there has been an engagement of parts of the Indonesian military with militia. The extent of that I think we will have to determine in the fullness of time. Whether that has been with rogue elements of the militia or not, I do not know. One thing I am relatively sure of—and this is not a personal opinion—is that there is a significant power struggle going on in Jakarta at the moment.⁴⁷

5.46 The view that there were divided counsels in the Indonesian Government, and the TNI, which were reflected in contradictory policies and approaches being followed by the Indonesian civil and military administration in East Timor, was supported by Mr Mark Plunkett, who said, ‘there seemed to be dual-streams or tri-streams of command’.⁴⁸

5.47 At the hearing on 20 September, Mr Robert Lowry took a firmer view, saying:

It has been quite obvious right from the start that the current governor strongly supported autonomy within Indonesia. Several of the spokesmen for the militia and the pro-autonomy group came from within the government. But it is also clear that these people could not have taken such militant action, as you have described before, without the consent of the Indonesian military. There are very strict rules and laws relating to the control of firearms in Indonesia. This man was obviously breaking those laws and he was doing it at least with the tacit approval of the authorities.⁴⁹

5.48 Dr Harold Crouch said he thought, in retrospect, that General Wiranto had, from the outset:

46 Mr Dauth, *Committee Hansard*, 9 December 1999, p. 1026.

47 General Sanderson, *Committee Hansard*, 15 September 1999, p. 547.

48 Mr Mark Plunkett, *Committee Hansard*, 15 September 1999, p. 547.

49 Mr Lowry, *Committee Hansard*, 20 September 1999, p. 559.

accepted the holding of the referendum and decided the military was going to make sure that Indonesia won. The debate then became a question of: is it rogue elements on the ground in East Timor or is it the military as an institution? I think it became increasingly obvious that it must have been the military as an institution. Part of the evidence for that is sort of people that Wiranto was appointing in command positions in East Timor, and particularly the former intelligence chief, Major General Zacky Anwar Makarim, who was appointed as liaison officer to UNAMET. From his public statements, he was clearly committed to keeping East Timor for Indonesia, and it was not possible that he was appointed without Wiranto's approval. He was a person who also had links with the disgraced General Prabowo. Then later, at the time of the referendum, General Sjafrie Sjamsuddin, another of Prabowo's guys and who was the commander in Jakarta during the disorders in May last year [1998], was also sent to East Timor. These people could not have just gone there without Wiranto's approval. So it was clear that it was not just rogue elements in the military but that Wiranto was giving his approval, as part of policy, to make sure that Indonesia won the referendum.

At some point their intelligence people must have got the message that they were not going to win. But I doubt that they thought they were going to lose so badly. After the referendum, the questions became: was this completely planned or did it run out of control and, if it ran out of control, did it run out of control from day one or was it that the military leadership in Jakarta said, 'Let's have a bit of destruction just to teach them a lesson' and maybe after a few days it really ran completely out of control?'⁵⁰

5.49 Dr Crouch did not know whether the Indonesian military intended to destroy Dili in the way that it happened. But the way in which refugees were forced out of East Timor was evidence of planning. Dr Crouch said that the Indonesians had announced earlier that they expected 200,000 refugees in the event of a vote for independence in the referendum. As only 90,000 people voted to stay with Indonesia, it appeared they might not get the 200,000 for whom they had prepared. Accordingly, it appeared that they started forcing people out of East Timor to show that there were as many East Timorese as expected, who really wanted to stay with Indonesia. The only question was: 'at what point did they lose control, if indeed they did lose control?'⁵¹

5.50 Documents found by the East Timorese Human Rights Foundation (*Yayasan Hukum Hak Asasi dan Keadilan*) since the Indonesian withdrawal from East Timor provide confirmation of the support of the TNI for the militias. For example, in Vikeke (Viqueque), researchers from the Foundation found a log book detailing the weapons distributed to the local Wanra militia and pro-Jakarta leaders. Also found was a document produced by the Dili police department in August 1999, *Operation Remember Lorosae II*, a plan to 'evacuate' 258,710 persons to West Timor and other

50 Dr Crouch, *Committee Hansard*, 20 September 1999, pp. 579-80.

51 Dr Crouch *Committee Hansard*, 20 September 1999, p. 580.

parts of Indonesia in case the vote was for independence. Another of the documents found was an order cabled from General Subagyo Hadi Siswoyo, TNI Chief of Staff, to Colonel Tono Suratman, commanding officer in Dili, on 5 May 1999: 'Prepare a security plan to prevent civil war that includes preventative action (create conditions), policing measures, repressive/coercive measures and a plan to move to the rear/evacuate if the second option [independence] is chosen.'⁵²

5.51 Visiting Manila on 5 February 2000, President of the CNRT, Mr Gusmão, and CNRT foreign policy spokesman, Dr Ramos-Horta, said that the former Indonesian armed forces chief, General Wiranto, was directly responsible for the destruction and violence in East Timor during 1999, and that credible witnesses could testify against him. Dr Ramos-Horta said:

I say I do not have any doubt whatsoever that Wiranto as defence minister and the commander in chief of the armed forces was directly implicated in the preparation, in the training, in the funding and the execution of destruction and killing in East Timor. If there is going to be a war crimes tribunal, we would be able to testify with witnesses that would prove beyond reasonable doubt that General Wiranto is responsible for war crimes and crimes against humanity in East Timor.

5.52 Mr Gusmão said:

We met Wiranto before consultations in June in Jakarta. In this meeting we asked him to disarm militias and he told us that 'I can disarm them in two days'.⁵³

Holding to account those responsible for crimes

5.53 DFAT told the Committee that one of the key challenges facing East Timor in its transition to independence would be to address, in a substantive and just way, the crimes committed before and after the ballot. The investigation of human rights abuses in East Timor and the bringing to justice of the perpetrators of serious crimes were seen to be an important part of the healing and reconciliation process.⁵⁴

5.54 'Operation Indictment: War Crimes committed by Indonesian military and security forces against the peoples of East Timor', prepared by Mr G.E. Lambert, a retired Justice of the Family Court of Australia, identified facts relating to 44 cases that occurred during the period between September 1975 and March 1999 which could, in the opinion of Mr Lambert, cause a war crimes tribunal validly to find that they constituted war crimes perpetrated by personnel of Indonesian military and paramilitary forces against citizens of East Timor.⁵⁵

52 Richard Lloyd Parry, 'Conclusive proof TNI planned reign of terror', *The Independent*, 7 February 2000.

53 'Wiranto responsible for Timor atrocities: Gusmao', *Agence France-Presse*, 6 February 2000.

54 Mr Dauth, *Committee Hansard*, 6 December 1999, p. 993.

55 Mr G.E. Lambert, attachment to submission no. 47.

5.55 The United Nations High Commissioner for Human Rights, Mrs Mary Robinson, made a report on 17 September 1999 following a visit to Darwin and Jakarta, in which she said there was ‘overwhelming evidence that East Timor has seen a deliberate, vicious and systematic campaign of gross violations of human rights. I condemn those responsible in the strongest terms’. She urged the Indonesian Government to co-operate in setting up an international commission of inquiry on the alleged human rights violations.⁵⁶

5.56 Mrs Robinson’s report was considered by a special session of the United Nations Commission on Human Rights, which resolved on 27 September 1999 to establish an international commission of inquiry to gather and compile systematically information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor since January 1999. The resolution of the Human Rights Commission was endorsed by the United Nations Economic and Social Council on 15 November 1999. The International Commission visited Darwin, Dili and other centres in East Timor, and Jakarta between 23 November and 8 December 1999, and its report was released by the Secretary-General in New York on 31 January 2000.⁵⁷ It found that there was no doubt that the evidence it had gathered clearly demonstrated a pattern of serious violations of fundamental human rights and humanitarian law. It recommended the setting up of an international human rights tribunal consisting of judges appointed by the United Nations with the participation of members from East Timor and Indonesia, which should sit in East Timor and Indonesia.⁵⁸

5.57 In its resolution establishing the International Commission, the Commission on Human Rights also requested its Special Rapporteurs on torture, on extrajudicial executions and on violence against women to carry out a fact-finding mission in East Timor. This joint mission visited Dili, Suai, Maliana and Oecusse during 4 to 10 November 1999, and its report was presented to the General Assembly by the Secretary-General on 10 December. It recommended:

Rapid action should be taken to meet the most pressing need of UNTAET with regard to expertise in forensic anthropology and pathology, autopsy facilities, medical professionals, in particular those qualified to conduct medical examinations of possible victims of rape and sexual abuse, criminal investigation with appropriate equipment and logistical support, human

56 United Nations Economic and Social Council, *Report of the High Commissioner for Human Rights on the human rights situation in East Timor*, 17 September 1999, E/CN.4/S-4/CRP.1.

57 On the same date the report of the Investigative Commission on Violence in East Timor of the Indonesian National Human Rights Commission (Komnas-HAM), was made public in Jakarta. The Indonesian national inquiry had been set up after the Indonesian Government had refused to accept the international commission.

58 United Nations, *Report of International Commission of Inquiry into human rights violations*, General Assembly/Security Council, 1 February 2000.

rights investigators, human rights training and liaison officers, and relevant staff for an effective information storage and retrieval system.⁵⁹

5.58 In its January 2000 report, the International Commission of Inquiry into Human Rights Violations blamed Indonesia's army and the militia it organised for a campaign of killings, rape, arson and other atrocities in East Timor in the period leading up to and following the 30 August 1999 ballot, and called for an international tribunal to try the culprits.⁶⁰

5.59 A similar view of the responsibility of the TNI (*Tentara Nasional Indonesia*—the Indonesian army) was taken by the Indonesian National Human Rights Commission's (Komnas-HAM) Investigative Commission on Violence in East Timor (KPP-HAM), which, in its final report of 31 January 2000, recommended that six generals, including former armed forces chief General Wiranto, and some 40 other persons (military and police officers, government officials and militia leaders) should be formally investigated in connection with the violence that occurred following the 30 August vote.⁶¹

5.60 Amnesty International appeared before the Committee on 4 November 1999. At that time, Amnesty's researcher on East Timor, Ms Lucia Withers, and her associates were in Dili working with NGOs gathering testimony and preparing for a forensic workshop with an Argentinian forensic specialist to assist the Timorese NGOs with the preservation of evidence for the UN commission of inquiry.⁶² Mr Des Hogan emphasised that non-government organisations were no substitute for international action:

The very fact that we are having to give this forensic workshop in Dili points to the fact that the evidence was never secured. When they went in, Interfet did not have any clear mandate about how they were going to secure or investigate sites which could go forward to any UN investigation.⁶³

5.61 Amnesty believed that there was *prima facie* evidence of crimes against humanity, and possibly war crimes, when account was taken of the systematic nature of intimidation and killings and the large scale of civil deportation that took place. War crimes included extensive destruction and appropriation of property in cases where there was no military justification. The statute of the International Criminal

59 United Nations General Assembly, *Situation of human rights in East Timor*, 10 December 1999, A/54/660.

60 United Nations Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, January, 2000.

61 Indonesia. National Human Rights Commission (Komnas-HAM), *Report on the Investigation of Human Rights Violations in East Timor*, 31 January 2000, (English translation).

62 Mr O'Connor, *Committee Hansard*, 4 November 1999, p. 784.

63 Mr Hogan, *Committee Hansard*, 4 November 1999, p. 789.

Court contained a provision to the effect that attacks on Red Cross premises, such as occurred in Dili on 6 September, were counted as a war crime.⁶⁴

5.62 Amnesty pointed out that crimes against humanity and war crimes carried individual responsibility, and that those who gave the approval and the orders for such things to occur might be considered to be more guilty than the people who actually carried them out. It was important both for East Timor and Indonesia that accountability exist. Every country had an obligation to assist in the investigation and prosecution of crimes under international law if no international tribunal was established, although Amnesty did have some reservations about the ability of the Indonesian justice system to bring to account those accused of war crimes and crimes against humanity.⁶⁵

5.63 Amnesty saw the Australian Government having an important role in supporting the establishment of an appropriate tribunal to try those accused of war crimes and crimes against humanity, and in providing support by seconding technical experts and by sharing information in its possession that shed light on the chain of command, on 'the people actually responsible and going back as far as possible, either to the provincial level or to the military district level from Bali, to elucidate the responsibility of those senior officers'.⁶⁶ There was provision in the statute of the International Criminal Court for intelligence information to be shared on a confidential basis, and a precedent for this had been set in the sharing of information from the United States and British Governments with the tribunal on Yugoslavia.⁶⁷

5.64 The East Timor Evidence Project of the International Commission of Jurists (ICJ), Australian Section, was designed to obtain 'from East Timorese refugees and evacuees in Australia and from other persons who have some direct knowledge of recent events in East Timor the evidence that those persons would be able to give to a properly constituted tribunal, whether that be an international criminal tribunal, a commission of inquiry or a court having jurisdiction over such matters at some time in the future.'⁶⁸ By announcing and setting up the project in September 1999, the ICJ had three things in mind. First, it hoped to deter perpetrators of offences against customary international law in East Timor. Secondly, the ICJ wanted to obtain the available evidence while it was still fresh and uncontaminated. Thirdly, the ICJ wanted to produce a body of evidence to demonstrate the scale of the events in East Timor, as well to support the establishment of an international criminal tribunal having jurisdiction to examine those matters.⁶⁹

64 Mr Anthony O'Connor, *Committee Hansard*, 4 November 1999, p. 785.

65 Mr Anthony O'Connor, *Committee Hansard*, 4 November 1999, p. 786.

66 Mr Anthony O'Connor, *Committee Hansard*, 4 November 1999, p. 786.

67 Mr Anthony O'Connor, *Committee Hansard*, 4 November 1999, p. 787.

68 Mr Nicholas Cowdery, *Committee Hansard*, 4 November 1999, pp. 736-37.

69 Mr Nicholas Cowdery, *Committee Hansard*, 4 November 1999, p. 737.

5.65 The ICJ said that the commission of crimes against customary international law fell into three categories: crimes against humanity, genocide and war crimes. The definitions and elements of those offences were being established through the work of the international tribunals at The Hague and the work for the establishment of the International Criminal Court. There was a need for people to be taught about the elements of those offences, what was required to establish them, and how to identify evidence that might be produced to support allegations of the commission of those offences.⁷⁰

5.66 Justice Dowd said the ICJ believed it and other international agencies had a duty to gather evidence, which should be used at a war crimes tribunal, as had been done in Rwanda and the former Yugoslavia. He said:

We believe the East Timorese are now in the process of reconciliation, but we cannot stand back and say, 'Let's not make a fuss; let them all wash over', with international war crimes. We cannot just ignore them. We have a duty to the East Timorese people—those who died and for those in the future in case there are border intrusions—to see that, if there are war crimes, they are dealt with, as in other conflicts, by appropriate bodies. If we do not do something about war crimes, they will continue.⁷¹

5.67 Justice Dowd made the point that direct evidence was not required to obtain a conviction. Juries were able to convict on inferences and accumulation of evidence. It was not essential to observe a crime occurring to convict and, in fact, most convictions occurred without that kind of eyewitness evidence. Crime scene preservation and putting together criminal prosecutions was an art which police forces did all the time:

It is not difficult to get courts to draw inferences from such things as who was their commander at the time, what conversations were held, what units were there and evidence from individuals about units being there ... The East Timorese themselves may ultimately try people, whether they are locals or Indonesians. It may happen in another country; it does not have to be international. We just believe that evidence should be preserved so that the people of the future can make a decision as to what prosecutions will occur.⁷²

5.68 Mr Michael O'Connor of the Australia Defence Association expressed the view that, as far as possible, prosecutions for human rights violations should be pursued within East Timor on the basis of the ordinary criminal law that was in effect at the time, on the principle that the rule of law would be served by people observing

70 Mr Nicholas Cowdery, *Committee Hansard*, 4 November 1999, p. 737.

71 Justice Dowd *Committee Hansard*, 4 November 1999, p. 741.

72 Justice Dowd, *Committee Hansard*, 4 November 1999, p. 741.

criminals being dealt with by their own courts under their own laws. Murder, rape, arson or malicious damage were criminal offences under Indonesian law.⁷³

5.69 Later in his evidence, Mr O'Connor went on to say that:

While we need to apply criminal law in East Timor to those who can be tracked down and dealt with in that way, there probably is a need for an international human rights tribunal to try to track down those who are outside the jurisdiction of East Timor.⁷⁴

5.70 On 18 August 2000, the Indonesian People's Consultative Assembly passed a decree blocking prosecution of troops involved in abuses in provinces such as East Timor, Aceh and Irian Jaya. The decree stated: 'The right not to be prosecuted based on a law which can be applied retroactively [is a] human right which cannot be diminished under any conditions'. The decree banning retroactive prosecution of human rights cases effectively ruled out charges against senior officers, because Indonesia's criminal code did not recognise culpability by those in command. Only those who carried out orders could be charged and prosecuted. The Chairman of Indonesia's Commission for Missing Persons and Victims of Violence, Mr Munir, dismissed claims by some politicians that soldiers or police could still be tried over past abuses under the criminal code: 'All laws and bills which carry a retroactive principle will be defeated by this article of the Constitution', he said. 'The criminal code does not recognise human rights crimes, such as war crimes and crimes against humanity.' The decree gave reason for the United Nations to set up its own war crimes tribunal to try Indonesians over crimes committed in East Timor during the period of Indonesian rule. The United Nations has set up a major crimes unit in Dili to investigate war crimes, crimes against humanity, torture, rape and murder. United Nations officials have said it is possible that Indonesian soldiers could be extradited to East Timor to stand trial for crimes committed there.⁷⁵

5.71 On 7 August 2000, Justice Dowd publicly renewed the call from the ICJ for an international criminal tribunal to bring to justice those responsible for last year's massacres in East Timor. He said in an interview on the SBS radio program *World View*:

The Indonesian Government has persuaded the United Nations that they are going to effectively prosecute. In my view, that is unlikely to occur, because I don't think they'll get witnesses prepared to give evidence, nor do I think they'll get adequate statements, and the only way that this can be achieved is by the establishment of an international war crimes commission.

5.72 The call followed a demand by Mrs Mary Robinson earlier, on 7 August 2000, for Indonesia to act against those who perpetrated the atrocities. Speaking at a

73 Mr Michael O'Connor, *Committee Hansard*, 18 November 1999, p. 912.

74 Mr Michael O'Connor, *Committee Hansard*, 18 November 1999, p. 916.

75 Lindsay Murdoch, 'Blanket amnesty for officers: they were only issuing orders', *The Sydney Morning Herald*, 19 August 2000.

press conference in Dili before leaving for Jakarta after a three-day visit to East Timor, Mrs Robinson stressed that the violence occurred while East Timor was under United Nations guardianship around the time of the popular consultation. The Human Rights Commissioner said that this meant that the United Nations must ensure that Indonesia's judicial process was credible: 'The most important thing is to bring perpetrators to justice. That can either be done by the courts in Indonesia or by the courts here in East Timor. Or, if necessary, it can be done by an international tribunal. I don't rule out the need—if it comes to that—for an international tribunal.'⁷⁶

5.73 On 13 October 2000, Indonesian Foreign Minister Alwi Shihab rejected a call by Dr Ramos-Horta for the establishment of an international war crimes tribunal, saying that Indonesia was a sovereign country and would take responsibility for prosecuting persons responsible for human rights violations arising out of the post ballot violence in East Timor.⁷⁷ Indonesian prosecutors had named 22 suspects, including prominent militia leader Eurico Guterres, but not General Wiranto.

5.74 The Committee believes that justice should prevail, whether it is carried out by Indonesia, East Timor or by an international tribunal. Given the difficulties of getting hold of Indonesian suspects residing in Indonesia, it is preferable to let justice take its course through the Indonesian justice system. If, on completion of that process, the international community remained dissatisfied with the outcome, it should press for the establishment of an international tribunal to instigate its own proceedings against alleged perpetrators of the violence.

International Commission of Jurists' offer

5.75 The Committee heard evidence from the ICJ that, in September 1999, they had approached the Department of Defence to offer the services of forensic experts in Australia, including the Victorian Forensic Institute and a number of retired police officers, to assist Interfet with crime scene preservation, advice and evidence in East Timor.⁷⁸ After four unsuccessful attempts to get an answer, the ICJ had been told by Commodore Geoff Earley, Director-General of Defence Legal Office, that an inter-departmental committee of the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Department of Defence had already made a decision not to accept the offer of assistance but to defer to the inquiry then being conducted by the United Nations Human Rights Commissioner.

5.76 Justice Dowd's comment on this advice was that it was 'hopelessly inept in that Mary Robinson's inquiry, at the request of the Secretary-General, is not about crime scene preservation. They are doing an inquiry as to what has happened. They are seeking to set up a war crimes tribunal or some sort of tribunal ... Crime scene

76 UNTAET briefing, 7 August 2000.

77 Edith M. Lederer, Associated Press writer, *Indonesia Rejects E. Timor Tribunal*, included in ETISC, *Timor Today*.

78 Justice Dowd, *Committee Hansard*, 4 November 1999, p. 739.

preservation is an art form where, obviously, the defence forces in East Timor have a difficult task to do. However, they are coming upon crime scenes and, with a bit of advice, they can do it better.⁷⁹

5.77 Justice Dowd gave his reasons for attempting to bypass the Department of Foreign Affairs and Trade by approaching directly the Department of Defence:

I have no confidence in the Department of Foreign Affairs and Trade in terms of cooperation. The advice that has been my understanding has tended to be very frustrating in terms of not offending the Indonesians. In talking to various officers I have constantly had a lack of cooperation from Foreign Affairs ... It was a matter of making [our offer of assistance] available, because it did not seem to me to be a Foreign Affairs matter.⁸⁰

5.78 At the hearing on 11 November 1999, Air Commodore Kerry Clarke, representing the Department of Defence, confirmed that the ICJ had been asked by the inter-departmental committee to refer its offer to the United Nations, in particular the UNHCR (United Nations High Commissioner for Refugees) and OCHR (Office of the Commissioner for Human Rights).⁸¹ Air Commodore Clarke said that a small team had been established as part of Interfet to investigate reports and to document locations and evidence. The ‘documented track’ assembled by this team had been handed over to the United Nations. The United Nations Commissioner for Human Rights had subsequently commented very positively on the processes that had been put in place by Interfet commander, General Cosgrove, to manage the evidence.⁸²

5.79 Mr Michael Scrafton, Head of the East Timor Policy Unit of the Department of Defence, explained that the inter-departmental committee was a standing strategic policy co-ordination group, chaired by the Department of Foreign Affairs and Trade or the Department of the Prime Minister and Cabinet.⁸³ He said: ‘in the inter-departmental consideration, one of the issues was the extent of the Interfet mandate which, you might recall, gave responsibility—however realistic it was—to Indonesia to actually manage a legal administration on the ground in East Timor.’⁸⁴

5.80 When the Committee asked whether the Department of Foreign Affairs and Trade had approached the International Commission of Jurists to see what advice they were prepared to give, the response from the Department was that it was not a matter primarily for that portfolio, but primarily for the Australian Federal Police.⁸⁵

79 Justice Dowd, *Committee Hansard*, 4 November 1999, p. 735.

80 Justice Dowd, *Committee Hansard*, 4 November 1999, p. 739.

81 Air Commodore Clarke, *Committee Hansard*, 11 November 1999, p. 848.

82 Mr Scrafton, *Committee Hansard*, 11 November 1999, p. 848.

83 Mr Scrafton, *Committee Hansard*, 11 November 1999, p. 848.

84 Mr Scrafton, *Committee Hansard*, 11 November 1999, p. 849.

85 Mr Dauth, *Committee Hansard*, 9 December 1999, p. 1030.

Displaced persons in West Timor

5.81 At the hearing of 6 December 1999, Mr John Dauth, Deputy Secretary, DFAT, told the Committee, ‘Without a doubt, the most pressing humanitarian problem is the situation of up to 150,000 displaced East Timorese remaining in West Timor’.⁸⁶

5.82 The Government of Indonesia had indicated that those wishing to return to East Timor should be able to do so, but there was clear evidence that militias were still intimidating refugees. The United States Ambassador to the United Nations, Mr Richard Holbrooke, and Assistant Secretary of State for East Asian and Pacific Affairs, Mr Stanley Roth, visited militia-controlled camps in Kupang and Atambua on 22 November 1999. During the visit to Atambua, Mr Holbrooke said: ‘The Indonesians have to move into their new democratic era and they cannot do that as long as they are stuck in the mud—literally—of the refugee camps, which is the mud of the crimes of the past.’⁸⁷

5.83 The visit of Mr Holbrooke and Mr Roth was referred to by Mr Dauth as important in highlighting the situation in West Timor.⁸⁸ Mr Dauth told the Committee that the United Nations, Australia, the United States and many other countries had been pressing Indonesia strongly to bring the militias under control and to promote secure access to all refugee camps in West Timor. Commitment on a continuing basis to facilitating the return of displaced persons from West Timor was necessary if the international community was to be reassured of Indonesia’s *bona fides*, Mr Dauth said.⁸⁹

5.84 Approximately \$3 million was allocated specifically for health and other activities in West Timor, in addition to the \$2 million already provided, in the \$23 million contributed by Australia in response to the consolidated international humanitarian appeal for East and West Timor.⁹⁰

5.85 The return and resettlement of the displaced East Timorese still in West Timor was largely being managed for the international community by UNHCR.⁹¹ Mr Plunkett referred to the outstanding record of the UNHCR in its protection offices, particularly the resettlement of some 350,000 people in Cambodia: ‘there are mechanisms and *modus operandi* used by UNHCR which would enable the

86 Mr Dauth, *Committee Hansard*, 6 December 1999, pp. 991-2.

87 Tim Johnston, ‘Timor camps test for Jakarta—Holbrooke’, *Reuters*, 22 November 1999.

88 Mr Dauth, *Committee Hansard*, 6 December 1999, p. 991; and 9 December 1999, p. 1029.

89 Mr Dauth, *Committee Hansard*, 6 December 1999, pp. 991-2.

90 Mr Dawson, *Committee Hansard*, 6 December 1999, p. 995. The \$23 million formed part of the total increase of \$60 million in the Australian aid program funding for East Timor in the financial year 1999-2000 which the Minister for Foreign Affairs and Trade, Mr Downer, announced on 22 November.

91 Mr Dawson, *Committee Hansard*, 6 December 1999, p. 998.

facilitation of people making a request to return to be returned ... I could easily see a UNHCR model being used so long as people had access to it.’⁹²

5.86 Mr Pat Walsh, Australian Council for Overseas Aid, argued that the Indonesian military-backed militias were the primary obstacle to resolving the issue of large numbers of East Timorese being kept in West Timor against their wishes. He said that delays in their return would disadvantage efforts to gather evidence on human rights abuses because much of the best evidence on abuses in Timor during 1999 was still with them: ‘They are not going to talk until they are home. It is also likely that their relatives in Timor will not talk until their family members are back in East Timor.’⁹³

5.87 On 3 February 2000, the head of UNTAET, Mr Sérgio Vieira de Mello, stated that the number of displaced East Timorese still in West Timor was 110,000 according to the UNHCR, but 174,000 according to the Indonesian Government.⁹⁴ The Governor of the province of East Nusa Tenggara, of which West Timor forms part, Mr Piet Tallo, said on 15 February that there were 158,000 East Timorese in refugee camps in West Timor as at the end of January 2000.⁹⁵ Visiting Dili on 8 June, Mr Tallo called for the repatriation of the estimated 120,000 remaining in West Timor: ‘I feel the time has come for them to go back home. It is a tremendous burden to shelter them’.⁹⁶

5.88 On 31 July 2000, President Abdurrahman Wahid ordered the immediate closure of refugee camps in West Timor following international pressure to stop pro-Jakarta militias from using them as bases to launch attacks into East Timor. Foreign Minister Alwi Shihab said the approximately 120,000 East Timorese refugees would be registered and told to immediately choose whether to remain in Indonesia or return home. More than 160,000 East Timorese had returned home in the previous ten months, but the remaining refugees were said by Indonesian officials to be either afraid of retribution, or were being intimidated or forcibly prevented from leaving by the militias. The international community subjected Indonesia to new pressure to close the camps and disband the militias after a United Nations peacekeeper from New Zealand was shot dead in East Timor on 24 July, allegedly by militiamen who had crossed the border.⁹⁷ The refugee camps were regarded as both a haven for the militias and a potential recruiting ground. The consensus of opinion is that while the refugee camps remain in operation, there will be continuing militia incursions into East Timor.

92 Mr Plunkett, *Committee Hansard*, 15 September 1999, p. 549.

93 Mr Walsh, *Committee Hansard*, 18 November 1999, p. 898.

94 ‘Annan to visit camps in West Timor, UN says’, *Agence France-Presse*, 4 February 2000.

95 ‘Governor wants rid of burdensome East Timor refugees’, *Jawa Pos*, 15 February 2000.

96 ‘W Timor Governor calls for repatriation of E Timor refugees’, *Deutsche Presse-Agentur*, 8 June 2000; Mark Dodd, ‘West Timor wants to empty camps’, *The Sydney Morning Herald*, 9 June 2000.

97 *Deutsche-Presse Agentur*, 31 July 2000.

5.89 On 3 August 2000, the United Nations Security Council expressed its 'profound concern' at the continuing presence of large numbers of Timorese refugees in West Timor, as well as the intimidation by militia towards the refugee population and staff of the UNHCR. Calling for 'a more determined involvement' by Indonesia in dealing with these problems, the Council urged the Indonesian authorities to restore law and order and ensure the protection of refugees and humanitarian personnel in West Timor. It also called on them to separate former military personnel, police and civil servants from the refugees and to arrest those militia extremists trying to sabotage the resettlement process.⁹⁸

5.90 Despite the urging of the Security Council, the situation in West Timor did not improve to any degree over the next month. On 7 September 2000, following the murder of a militia leader, militias stormed the UNHCR office in Atambua and murdered three UNHCR staff. As a result, United Nations agencies operating in West Timor evacuated all their staff from the province. The task of feeding and providing other basic services to the remaining 120,000 refugees was left to Indonesian authorities and NGOs to cope as best they could.

5.91 Indonesia came under renewed international pressure to disarm and control the militias and prevent their continued harassment of the refugees. An ultimatum by the Indonesian Government to the militias to voluntarily surrender their weapons to Indonesian authorities by 24 September 2000, was extended to 27 September 2000. In a report to the United Nations Security Council on 29 September 2000, the Permanent Representative of Indonesia, Dr Makarim Wibisono, referred to the surrender of weapons on 24 September 2000:

This included a voluntary hand-over of 888 home assembled weapons, 34 standard weapons, 4 grenades and 1000 rounds of ammunition. My delegation would like to stress that the process of disarming the militias did not just begin on 24 September 2000 but the process was long underway since December 1999, which resulted in the seizure of 817 firearms comprising of 214 standard weapons, 603 home assembled weapons, 19,926 ammunition and 66 grenades. Mindful of the complexity of this process and to ensure that it was conducted in an orderly, peaceful and complete manner, the Indonesian Government had extended the period from 24 September to 27 September 2000. Since then, an additional 215 weapons, including 4 units of M-16s, 13 grenades and 1900 ammunition have been surrendered.

5.92 Despite the surrender of many weapons and ammunition, it is generally accepted that the militias still retain many of the weapons that they had acquired, especially their military-style weapons. However, the Indonesian authorities have apparently taken a less lenient approach to the militias and their activities. There is also some evidence of a withdrawal of TNI support for militias operating in East Timor forcing them to return to West Timor. Nevertheless, militia intimidation of

98 'Security Council urges Indonesia to help end cross-border attacks in East Timor', *UN News*, 3 August 2000.

refugees has continued. An UNHCR spokesman, Kris Janowski, was reported on 11 November 2000 as saying that 'Returning refugees are still reporting a strong militia presence in the refugee camps, and while the pro-Jakarta gangs are no longer brazenly carrying weapons, their intimidation tactics and other pressure on the refugees remain strong'.⁹⁹ Another UNHCR worker based in Suai, East Timor, Joan Allison, also reported continuing militia intimidation in the refugee camps.¹⁰⁰

5.93 The investigation of the murder of the three UNHCR workers was proceeding and six men had been arrested in connection with the murders. They were due to be tried in November 2000. Meanwhile, the security situation in West Timor has not been considered safe enough for the return of aid workers. However, some UNHCR staff returned temporarily to West Timor in mid November to assist with the return of 450 (including 65 family members) East Timorese, who were enlisted in the Indonesian military, to East Timor. Some 800 of the 2,800 East Timorese serving in the Indonesian Army had already returned home, encouraged by East Timor's new leaders.¹⁰¹

5.94 A United Nations Security Council delegation visited Timor and then Jakarta in mid November 2000 to review implementation of UNSC resolution No. 1319/2000, which demanded the disarmament of civilian militias and an investigation into the murder of the three UNHCR workers in Atambua. The delegation also investigated the plight of the remaining of the estimated 120,000 East Timorese refugees in West Timor and their return to East Timor.

5.95 The key to the resolution of the twin problems of the return of East Timorese refugees to East Timor and implementation of effective security in both East and West Timor is the disarming and disbanding of the East Timorese militias. There is evidence that the Indonesian authorities are beginning to assert some control over the militias in the face of mounting international pressure to resolve both problems. Local TNI resistance to reigning in the militias is weakening and there is evidence that the militias, while still intimidating refugees, are not as dangerous as they were prior to the Indonesian Government's requirement for the surrender of their weapons.

5.96 Although the situation in West Timor is looking more hopeful, there is still much to be done to return the estimated 120,000 refugees who are still living in refugee camps. A long-term solution also still has to be found for the militias, who have been carrying on the struggle against an independent East Timor. It is not in the interests of East Timor, Indonesia or the international community to have armed militias continuing their attempts to destabilise East Timor. Indonesia has enough internal security problems without a continuing militia problem in West Timor. It would also be blamed by the international community if foreign troops were forced to

99 AAP news report, carried on NINEMSN Internet news report 12:36 AEDT, 11 November 2000.

100 Bronwyn Curran, *Ex-Timor militias still threaten, intimidate refugees: UN official*, Agence France-Presse (AFP) 13 November 2000.

101 AAP news report, carried on NINEMSN Internet news report 12:36 AEDT, 11 November 2000.

stay in East Timor longer than planned because of continuing militia action. East Timor, too, needs a stable security environment in order to establish itself as an independent sovereign nation. Although Australia and other members of the international community should do everything possible to assist Indonesia overcome its problems in West Timor, West Timor is Indonesian territory and, consequently, primary responsibility resides with Indonesia.

Electoral information data base

5.97 Australian Electoral Commissioner Bill Gray told the Committee that the voter register, which had been compiled for the 30 August 1999 ballot, could be used to give a rollcall of the East Timorese people. He said: 'It is a very important piece of information. It is in the hands of the United Nations now, and I think it will become a very important and relevant point of reference for any of the work that may then be conducted in respect of missing persons and the issues and events that occurred there immediately following the ballot.'¹⁰²

5.98 UNTAET had asked the Australian Electoral Commission (AEC) to help image the voter registration records permanently.¹⁰³ Imaging them was important because not all of the information that was on the records was captured in the data entry process for the conduct of the ballot. Because of the time constraints which UNAMET was facing in getting the lists ready for the ballot, the data that were captured were essentially those which were needed for the production of the lists of voters.¹⁰⁴

5.99 The AEC and the United Nations Electoral Assistance Division in New York had discussed a process for putting information that was only in the multi-part stationery registration forms into more permanent form, using a method of digital imaging. The advantage of doing this was to enable the permanently recorded information to be available in one form or another at different sites, which could be useful for reconciling the population in the territory with who was there in the period before the ballot. AusAID had given the AEC positive indications on funding the project.¹⁰⁵ On 29 August 2000, UNTAET announced that the Australian Government was preparing to donate this database, on CD-ROMs, to the East Timor National Archives.¹⁰⁶

East Timorese asylum seekers

5.100 The attention of the Committee was drawn to the situation of East Timorese asylum seekers in Australia, numbering around 1,650, whose applications to be

102 Mr Gray, *Committee Hansard*, 11 November 1999, p. 91.

103 Mr Maley, *Committee Hansard*, 11 November 1999, p. 891.

104 Mr Maley, *Committee Hansard*, 11 November 1999, p. 892.

105 Mr Maley, *Committee Hansard*, 11 November 1999, p. 894.

106 UNTAET briefing, 29 August 2000.

granted residence in Australia on the grounds of refugee status had been delayed for many years because of Government policy to regard them as holders of Portuguese citizenship, which would require them to seek asylum as refugees in Portugal. They rejected the contention that they were Portuguese citizens, and consequently became involved in very lengthy appeal processes entailing great hardships. Sr Susan Connelly explained the circumstances:

If we just look at the composition of the 1,500 asylum seekers, you would recall that most people who came to Australia prior to 1995 were given refugee status fairly readily. It was after the event of the Australian public rising up in horror at the suggestion that a certain Indonesian would be named as ambassador to Australia ... General Mantiri ... Mantiri made some quite disgraceful comments about the Santa Cruz massacre, and it was after his appointment was knocked back that Indonesia complained about the ready access of Australia to refugees. It was then that screws started to be put on people seeking refugee status.¹⁰⁷

5.101 Sr Connelly and Ms Elizabeth Biok referred to the desire of the asylum seekers to obtain educational qualifications in Australia. Ms Biok explained:

Most of the asylum seekers are young people. Most of them would have been under 25 when they arrived and most of them were young people who were active in the independence movement and who were forced to flee because of their involvement in Santa Cruz and the clandestine movement and the demonstrations in the early 1990s. Most of them came to Australia between 1992 and 1995. Most of them want to go back to East Timor and have always wanted to go back to build a new Timor, but the one line they all have is, 'We want to go back with skills. We want to go back with something to build up.'¹⁰⁸

5.102 Ms Biok and Sr Connelly pointed out that the asylum seekers, as persons having non-resident status, were not eligible for state assistance for tertiary education, and were unable to obtain stable employment. They said that it would be in accord with Australia's aspirations for an independent East Timor if the asylum seekers could be given the opportunity to obtain educational qualifications in Australia so that they might have the option of returning to make a contribution to re-building their country.

5.103 Dr Kenneth Chan proposed, in view of the long delay in resolving their status, that they be given a once-only grant of amnesty and allowed to remain: 'I do not think that, in all fairness, we should keep people on hold indefinitely and not come to a decision of this issue ... It only requires a government decision that they agree to do this.'¹⁰⁹

107 Sister Connelly, *Committee Hansard*, 3 November 1999, p. 682. Ian McPhedran, 'Three-way tussle over the fate of Timorese', *The Canberra Times*, 28 July 1995.

108 Ms Biok, *Committee Hansard*, 4 November 1999, p. 744.

109 Dr Chan, *Committee Hansard*, 11 November 1999, p. 840.

5.104 Portuguese Ambassador Justo da Silva informed the Committee that, in the twenty-three years since the Indonesian occupation of East Timor in 1975, not a single East Timorese had made a request of the Portuguese Embassy in Canberra, or of the consulates of Portugal, for Portuguese nationality: ‘It means a lot. It means that East Timorese want to be East Timorese ... not a single one of the 20,000 East Timorese here in this country has asked for a Portuguese passport.’¹¹⁰ The Portuguese Embassy had issued a statement on the matter on 3 June 1998, which said, referring to the test case of Mr Jong Kim Koe:

As other East Timorese asylum seekers in Australia, Mr Koe has never applied for Portuguese citizenship, therefore there is no basis for him to enjoy protection from the Portuguese authorities. Portugal has consistently stated that the attribution of Portuguese citizenship to East Timorese born persons presupposes an individual and voluntary application that reveals the wish to become a Portuguese national. It means that East Timorese are not automatically Portuguese nationals. Portuguese nationality laws were not designed to force the assimilation of East Timorese people into the Portuguese State, but to positively provide them with the right of exercising a free choice on what concerns their nationality until self determination is settled in the Territory. The application of Portuguese nationality laws must be done in accordance with the right to self-determination of the people of East Timor, as required by Article 293 of the Portuguese Constitution and international law.¹¹¹

5.105 Ms Biok referred to the decision of the Minister for Immigration and Multicultural Affairs to request an adjournment of the test case that he appealed to the Full Bench of the Federal Court—this was the case of Mr Lay Kon Tji, where Justice Finkelstein of the Federal Court had ruled on 30 October 1998 that the asylum seekers did not have effective protection of the Portuguese Government and that the continued refusal of the Australian Government to offer protection was illegal.¹¹² Ms Biok asked that the asylum seekers be granted a visa that ensured that they would have access to tertiary education to gain the skills that would be needed in Timor.¹¹³

5.106 On 29 June 2000, Ms Biok confirmed that the situation for the 1,600 asylum seekers was still uncertain. After the Federal Court cases were conceded, approximately 30 cases returned to the Refugee Review Tribunal for a merits determination in relation to the current situation in East Timor. The Principal Member of the Tribunal then referred a test case to the Administrative Appeals Tribunal to be heard by a three member tribunal, to be held in Darwin where the individual concerned resided from 17 July. All the issues of citizenship and fear of persecution were to be determined in the context of the changed political situation in Timor. Ms

110 Ambassador da Silva, *Committee Hansard*, 13 August 1999, p. 274.

111 Embassy of Portugal, Press Communiqué, 3 June 1998.

112 Leigh Murray, ‘1,600 Timorese refugees may stay in Australia: govt.’, *AAP*, 8 October 1999.

113 Ms Biok, *Committee Hansard*, 4 November 1999, p. 745.

Biok wrote: 'It is my view that it is too early to assume that there is security and stability here [in East Timor], as there is no operational police force and the court system is not hearing any case. In addition, there is a lot of hostility to persons returning from overseas.'¹¹⁴

5.107 The individual whose case was heard as the test case was a 31-year-old ethnic Chinese East Timorese man who came to Australia in 1994 as an Indonesian citizen with a temporary visa and applied for a protection visa. He claimed to fear for his life because of brutal and discriminatory treatment by Indonesian authorities of East Timorese such as himself who were regarded as anti-Indonesian. The asylum application was rejected in 1995 by the Ministry for Immigration and Multicultural Affairs on the grounds that he was a Portuguese citizen and that Portugal was obliged to offer him protection under the Refugees Convention. He appealed to the Refugee Review Tribunal which transferred the hearing to the AAT.

5.108 The Administrative Appeals Tribunal (AAT) found on 5 October 2000 in its decision on the test case in Darwin in favour of the asylum seeker's application for refugee status. The AAT ruled that he had a real and substantial fear of persecution if he were to return to East Timor. The Tribunal also found there was no effective protection available for him in East Timor, Portugal or Indonesia: 'The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. We have reached the conclusion that UNTAET cannot at this stage give adequate protection for the applicant from persecution by reason of his ethnicity. The return of the applicant to a country [Indonesia] which regarded the applicant and his family as anti-Indonesian would not afford him effective protection'. Although born in what was until 1975 a Portuguese colony, the Tribunal could not find that the man was a Portuguese citizen under Portuguese domestic law. The AAT found that the case should be sent back to the Refugee Review Tribunal with a direction that the applicant was 'a person to whom Australia has protection obligations under the Refugees Convention'. The AAT decision implied that Australia could not send the other 1,600 East Timorese asylum seekers to Portugal. The Tribunal also found that the United Nations Transitional Administration for East Timor (UNTAET) could not adequately protect ethnic Chinese from racial persecution, which could imply that other ethnic Chinese East Timorese would also be allowed to stay in Australia.¹¹⁵

5.109 The Committee believes that, in light of the AAT decision, the other 1,600 cases be processed by the Refugee Review Tribunal as quickly as possible.

114 Ms Biok, supplementary submission, 29 June 2000; Dennis Schulz, 'Spotlight on Timorese asylum seekers in Australia', *The Age*, 17 July 2000.

115 'East Timorese man gains refugee status', *AAP*, 5 October 2000; Andrew Clennell, 'Landmark ruling gives hope to 1,500 East Timor refugees', *The Sydney Morning Herald*, 6 October 2000.