Monitoring Progress Report # 6

Ad Hoc Human Rights Court

Observing Dossiers of
Adam Damiri, Tono Suratman
and Eurico Gutteres

September 2002

Institute for Policy Research and Advocacy

Observing Dossiers of Adam Damiri, Tono Suratman and Eurico Gutteres*

1. Preface

Since initiated in February 2002, the ad hoc human right trial has processed 12 dossiers of gross human right violation in East Timor. Three dossiers has reached the verdicts which are considered to be controversial and has caused mixed reaction from the public inside and outside the country. The "not guilty" verdict has invited criticism both from inside and outside country, but it doesn't seems to give any significant improvement to the trial quality of cases that follow later.

Because of the jurisdiction of this trial is to investigate the case which is called crime against humanity, we could say that the trial is investigating the most dangerous crime, executed systematically, related to the policy of government agency (police and/or military) or some political entity (organization). It means the crime against humanity is a crime related with the state's or an organization's policy. So, the crime against humanity is a brutal action which is sponsored, facilitated and carried out by the government or organization to accomplish or promote its political will. Thus the most essential aspect of it is the fact that the actor is a part of state agency. That principle and spirit make this ad hoc human right trial different from ordinary criminal trial.

With the perspective of jurisdiction and definition of crime against humanity as explained above, we want to focus to the

---

* Draft, subject to revision.

trial of the three persons who take the command. First, Eurico Guterres, the leader of an organization with the purpose of winning the referendum for the integration to Indonesia. To reach that purpose, Eurico had established PPI, an organization that spread out its branches in the regency. In order to strengthen his political movement to win the referendum, he established armed civilian force by training and recruiting a lot of people to support his political will. The armed militia initial existence in East Timor was in February 1999, before the referendum was held.

PPI in its entire activity coordinated with the province government agency, police and Indonesian army. In this context we can see the second important aspect which is Indonesian Army contribution. Adam Damiri and Tono Suratman were the effective territorial authority and aware of the presence and the motives of PPI, because the organization was open and extensive as well as blatant in accomplishing its political will. In fact PPI was often supported by Indonesian Army or Police, an apparent fact since there had been Indonesian Army and Police member who were actively involved in PPI either as instructors or as political advisors.

From the two aspects stated above, the three suspects who were *de facto* authority and moved freely in the region could be determined as individuals who had major control in the area, and thus, with their respective position, the court verdict of these three persons would be clear indication to determine the quality of this ad hoc court.

First, if the trial fails to prove these three suspects as guilty then the entire trial process will be meaningless because the other defendants were under the effective command authority of these

three defendants. If they guilty, then the other defendants shall be guilty also.

Second, criminal quantification of these three persons will also be a measurement to the quantification of other suspects, either in information multiplication, evidence collection, witness information and supporting documents as evidence.

Third, if fair and just, the verdicts of these three persons will be a good precedence for the implementation of gross violation of human right as meant in Act No. 26/2000. If not then this Act has to be changed in such a way a long with the procedural law in order to achieve the meaning of the provisions of the Act.

The three chosen dossiers are that of Adam Damiri, Tono Suratman and Eurico Gutteres.

2. Special Notes

❖ Indictment

Generally, there's no significant improvement in the indictment structure. Like other previous case files, the indictments focus on crime against humanity in form of murder and unjust treatment as stipulated in section 7b and 9a Law No. 26 year 2000. Related with this action, the defendant in their position as the high official of army and the leader of Pro-Integration Group (Eurico Gutteres) by criminal law are considered to be responsible to the action that had been done by the staff under their authority, as arranged in section 42 of the Law.

Table 1. table of indictment in three documents

No	Name	Position	Indiction	Locus and Tempus Delicti
1	Tono Suratman	Regiment Wira Dharma Commander	Failed to take any appropriate and required action within his authority , thus his staff together with pro integration group had attacked the pro independence or civilians in Batublete with amount of dead victims 2 people. At the church Liquisa: 20 people. At Manuel Carascalao residence: 12 people dead.	Batublete or the border of Liquisa and Maubara at pastor Rafael dos Santos residence church liquisa area.Manuel Viegas Carascalao residence in Dili
2	Adam Damiri	Damiri Commander of Kodam IX / Udayana 15 June 1998 – 27 November 1999	As Commander of Kodam IX/Udayana whose military authority in East Timor. Province he should have been aware of the several Indonesian Army member in East Timor who had committed gross human right violation but he didn't prevent or stop the attack and take the perpetrators to the authorities to be inspected, investigated and prosecuted.	**6 April 1999** -> attack of civilian who took shelter at the church Liquisa area at pastor Rafael dos Santos residence by the pro integration red white and army member. **17 April 1999** -> Attack of Manuel Viegas Carascalao residence after the mass rally which was led by governor of East Timor and Eurico Gutteres. **5 September 1999** -> Diocese Dili started with physical clash between pro integration group who checked every pro independence group for men who would leave East Timor.

No	Name	Position	Indiction	Locus and Tempus Delicti
				6 September 1999 -> Attacking and burning diocese Dili by the pro integration group together with TNI member. **6 September 1999 ->** the attack of a church in suai area by the pro integration group together with TNI member
3	Eurico Gutteres	Deputy Commander, Pro-Integration Warriors (PPI)	According to the criminal law is responsible for the gross human right violations which were done by his staff, who were under his authority and effective control, thus falling under the category of murder and unjust treatment. This had been done by neglect of information and failing to take appropriate and required action within his authority to prevent or stop the action, as well as failing to hand over the perpetrators to be inspected, investigated and prosecuted. In front of East Timor Governor Office, and Manuel viegas Carrascalao's residence on Saturday17 April 1999	In front of East Timor Governor Office, and Manuel viegas Carrascalao's residence on Saturday17 April 1999

Observing the indictment composed by the ad hoc prosecutor for the three defendants, there are two basic aspects related with the process of substantiation that should be scrutinized:

1. Using of command responsibility clausal in the indictments

Like all other cases on trial, the three files also use the basic indictment of command responsibility especially related to gross human right violation in form of neglect leading to manslaughter and unjust treatment done by their inferiors under their effective control.

Observing the process of the trial of the previous cases, the usage of the clausal would actually be of more trouble rather than easing the prosecutor's effort in substantiating his case. In Timbul Silaen's case for example, the ad hoc prosecutor's indictment was not proven because in the substantiation process there had been no definite proof of the involvement of police members in the violation as indicted. The perspective used, which deemed the chaotic situation in East Timor as the result of higher politic tension has caused more difficulty in proving the (governmental) institution as supporting one side.[1]

Aside from that, using of command responsibility concept in this classification is more difficult. There are two types of command responsibility. First, direct command responsibility of issuing order which is against the law (by commission). Second, command responsibility of action against the law which is done by the staff although it's not by direct order from the commander

---

1 Difficulty of main proving is proving procedure follow the ordinary law proving procedure where the witness must see with his own eyes and hear with his own ear. Meanwhile in various attack panic situation made people hard to recognize detail.

(by omission). [2]

The difficulty of military law responsibility on the omission category covers four areas:

1. higher official responsibility who doesn't issue the order to take action against the law although articulating that action to his staff.
2. responsible of his staff action; usually a commandant has direct command line and control, but him/her fails in upholding it.
3. responsible of his staff action, where commandant has control line and command although indirect, him/her fails in upholding it.
4. responsible of all of his staff's actions under the general command line of a senior officer, or general staff higher including army chief, due to failure in making policy and procedures to prevent the occurred violation and to bring the perpetrators to justice and due to failure in doing so.

The previous case files had encountered difficulty in proving it, especially because the defendant's position was classified as a commandant who had no direct control of his staff who were suspected of committing gross human right violation. Aside from that, the prosecutor has also failed in proving that there had been lack of policy/mechanism to prevent the violation that occurred.

Perhaps one of references which can help in the application of this clausal is the substantiation of the indictment in the trial of General Tomoyuki Yamasita in 1945, although this Yamasita

2 In this case, commandant is responsible because fail to take action to (1) prevent the incident. (2) general review which possible to prevent. (3) investigate the incident. (4) investigate and punish the actor.

case was a war crime. In this trial, Yamasita was deemed guilty and subjected to capital punishment. The base of the indictment was that the defendant in his capacity should have known that there had been gross human right violation committed. The main consideration of this indictment was the failure to take prevention of violation. Considering the crime was grave and extensive in time and area, it must have been purposely allowed or even secretly ordered by the defendant.

2. *The command responsibility by the classification of neglect in Eurico Gutteres' indictment*

Aside from that, the main concern is the application of crime by omission in Eurico's indictment. This is highly inappropriate considering that in the prosecutor's elaboration of the incident, it is clear that there was an order issued to those under his effective control to do crime.[3] This would only hinder the substantiation process in the trial. In fact, it's quite possible that this faulty strategy would free the defendant of all charges.

❖ Testimony

Generally there's no quality improvement in witness cross-examination.. In these three dossiers, there have been 4 victim witness of the 15 witness presented in the trial.

Like in the former cases, some witnesses in giving their testimony was often revealing their personal opinion. It can be found in several points in Manuel V. Carascalao's testimony.[4]

Beside that, in witness cross-examination process, there has

3 See the indictment concept especially which related with great meeting incident on 17 April in front of East Timor Governor Office.

4 This witness is examinated for three different dossiers in one time

never been any witness who could provide definite information on the direct involvement of military and/or police officers in the attack. Most witnesses also had not seen or heard directly the inquired details of the incidents. This has reduced the probability of substantiating the indictment, which so far has been referring to the substantiation procedure as regulated in the Law on criminal procedure.

On the other hand, in several witness cross-examination, sometimes judges inquired upon facts that were not appropriate to be asked by that particular witness, like in Manuel Viegas Carascalao's cross-examination, where a judge asked whether the defendant could explain the structure of *pamswakarsa* and militia, whether the mass rally had been planned and who issued the invitation for the rally.[5]

The witnesses testimony for the three defendants was not different compared to that of the witnesses in the previous cases' trials that had been ruled by the panel of judges. There is only a few information from the witnesses which can be used to prove the prosecutor's indictment, in fact, it seems that the testimonies given are mostly against the content of the prosecutor's indictment.

If there's somewhat different information, it would be the information from the victim witness, which up to presently only amounts to one, and he did not see the attack incident at his home. Nevertheless the amount of information which was told by the witness is quite valuable, such as about his son's death, whose corpse was full of terrible wounds and his neck was al-

5 See the proceeding of manuel V. Carascalao inspection trial

most broken. Also his information about the period of time between the rally and the attack, and how the response from the authorities was minimum and etc. Should the victim witnesses or witnesses who were present in the incident be presented in the trial, the prosecutor will find it easier to prove the indictment.

Judging from the quality and testimony of the witnesses, it is difficult to hope for this trial be able to prove the defendant is guilty. Perhaps the prosecutor can solve this problem by finding innovative means to cross examine the essential witnesses, such as by teleconference.

List of the names of the witnesses for the three defendants

Defendant	*Name of Witness*	*Information*	*Date*
Adam Damiri	MANUEL VIGAS CARASCALO	Victim witness	20/08/2002
	KIKI SAHNAKRI		03/09/2002
	ZAKY MAKARIM		

Defendant	*Name of Witness*	*Information*	*Date*
TONO SURATMAN	MUJIONO	Former Wadanrem 164 WD	12/08/2002
	ADIUS SALOVA	Former Kapolres Liquisa	19/08/2002
	ASEP KUSWANI	Former Dandim Liquisa	26/08/2002
	MANUEL VIGAS C	Victim witness	
	JHON REA	Kapuskodalops Polres Liquisa	02/09/2002
	DAMIANUS DAPPA	Kasat Sabhara Polres Liquisa	
	FRANS SALAMALI	Danton Brimob BKO in Polres Liquisa from Polda Tim-tim (police force)	

Defendant	*Name of Witness*	*Information*
EURICO	MANUEL VIGAS CARASCALO	Victim witness
GUTERRES	BASILIO DIAS ARAUJO	Integration officer
	Dominggus Boavida	Victim witness
	Julio de sausa	Victim witness
	Jose Apad	Maubara Head of Regency
	Letkol Sujarwo	Defendant (Dandim Dili)
	Alfredo de Sanchez	Victim witness

3. Recommendation

Observing the quality of trial process so far, there are two important basic weaknesses: the inability to form substantiating argument and use evidence which supports the indictment, and the lack of comprehension of the concepts used in the indictment, including there is no comprehensive understanding about the East Timor problem. Thus there are several important recommendations that should be heeded if the quality of the trial process is to improve:

1. The prosecutor has to be brave in using new evidence tools such as:
   - ❖ Telegram mail from Pangdam IX Udayana to TNI commander in which it is mentioned that the security apparatus (TNI/POLRI) was involved in Father Rafael's residence attack
   - ❖ Finding alternative ways in cross-examining witnesses such as by teleconference or holding the trial at the place where the incidence happened.

2. Composing new basic arguments to prove civil command law responsibility in order not to repeat the failure in the previous cases, such as by referring to available international jurisprudence (Yamasita case and Nuremberg trial) and using the provision that regulates military structure and organization in Act No 2 Year 1988 for example section 9.

3. The trial process must be supported with available institutional equipment such as the readiness of appellate court and supreme court's personnel whose competency and proper knowledge about the human right is verifiable.

Issued in Jakarta, 13 September 2002.



Institute for Policy Research and Advocacy (ELSAM) is an advocacy policy organization which exist since August 1993 in Jakarta. Its main goal is to participating in efforts to enhancing and protecting civil and political rights in general, according to Indonesia's Constitution and Universal Declaration of Human Right

Address:
Jl. Siaga II No. 31, Pejaten Barat, Pasar Minggu, Jakarta, INDONESIA 12510
Phone: +61-21-797.2662 or 7919.2564
Faximile: +62-21-7919.2519
Email: elsam@nusa.or.id or
advokasi@indosat.net.id
Website: www.elsam.or.id