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Ad Hoc Human Rights Court for East Timor is Below Standard

Preliminary Conclusive Report
Case of Timbul Silaen, Abilio Soares, and Herman Sediyono Et.Al.

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INTRODUCTION

East Timor, which used to be the Republic of Indonesia's 27th province, has become a new nation. For Indonesia, the establishment of East Timor as an independent state has brought a new inspiration, namely in the form of Ad Hoc Human Right Court which was initiated due to the suggestion that there had been crime against humanity in East Timor before, during and after the referendum.

The court, which has been held for the past four months at the District Court of Central Jakarta, can be regarded as an inspiration since it has become a legal landmark and the initial step in the process of justice for those who have suffered from the state apparatus' misdemeanors. It would also exhibit to what extent Indonesia can promote and protect human rights.

The Ad Hoc Human Right in essence would examine all the assumptions of and also determine the responsible parties for the chain of crimes against humanity in Timor Lorosae before, during and after the referendum in 1999.

This report would focus upon the formulation of the element of crimes upon the crime against humanity as contained in the Law No.26/2000 into the charges, and also how the element of crimes have been elaborated by both the prosecutors. and the judges in the (due process of law).

I. LEGAL PROVISIONS THAT BECOMES THE BASE OF THE COURT

The legal instrument that becomes the basic in the establishment of the ad hoc court is the Law No.26 year 2000 on Human Right Court. Thus this instrument holds an important role, since its weaknesses, especially conceptual ones, would affect its implementation.

Article 43 verse 2 of the Law regulates that Ad Hoc Human Right Courts would be established through a Presidential Decree. In the case of the ad hoc court for East Timor, there were two decrees needed, Presidential Decree No. 53 year 2001 and Presidential Decree No.96 year 2001, since the first one had been viewed as having a wide jurisdictional area (no specific parameter on period and area). The parameter is provided in the later, which limited the jurisdiction to three areas namely Liquica, Dili, and Suai, and the period to between April and September 1999. This has the impLaw upon the process in proving the systematic and widespread element in the cases of Human Right violations in East Timor during pre and post referendum period.

Law No.26/2000, especially regarding the definitions of the concepts of crimes against humanity and command responsibility adopts the definitions contained in Rome Statute for International Criminal Court.[1] However the adoptions are conducted with several distortions, which theoretically weaken the concept of crime against humanity which becomes the foundation for the Human Right Court process.

a. Concept of Crime Against Humanity

In the Ad Hoc Human Right Court, the indictment for the perpetrators is crime against humanity as formulized in the Article 9 Law No.26/2000:

[1] Hereafter Rome Statute.

"Kejahatan terhadap kemanusiaan sebagaimana dimaksud dalam Pasal 7 huruf b adalah salah satu perbuatan yang dilakukan sebagai bagian dari serangan yang meluas atau sistematik yang diketahuinya bahwa serangan tersebut ditujukan secara langsung terhadap penduduk sipil, ..."
("Crime against humanity as referred to in Article 7 point b is an action conducted as a part of an attack that is widespread or systematic which is known that the attack is directly against civilian community, ...")

The formulation above has the basic weakness namely: **one,** unclear definition of crime against humanity on three important elements: *widespread, systematic* and *intention.* This ambiguousness opens the room for various interpretation in the court.[2] Thus the procedure and process of proof for the perpetrators indicted by the same Articles[3] of the Law become difficult and the indictment itself become ambiguous.

In the practices of law dealing with crimes against humanity for example in Nuremberg trial, ICTR, and ICTY, the judges interpreted the element of "widespread" with focus on geographic width and massiveness of victims; while on the element of "systematic", the implementation of a policy indicated by a certain, repetitive, and

[2] As a comparison see the interpretation in the Rome Statutes where "intention" is clearly defined. See Article 30 verse 2 & 3, Rome Statutes regulating on *mental element*: For the purposes of this article, a person has the intent where: (20) (a) In relation to conduct, that person *means to engage in the conduct; (b) In relation to a consequence that person means to cause that consequence or is aware that it will occur ordinary course of events. (3) For the purposes of this article," knowledge" means awareness that a circumstance exists or consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.*

[3] Article 9 UU no.26/2000

methodical patterns of conduct.[4] Considering that there are no specific provision in the Law no.26/2000 which instructing the court to adopt such international customary practices and due process of international laws, thus there also unsure whether such interpretation on the element of "widespread" and "systematic" above will be used in the ad hoc Court on East Timor. Same condition applied for the element of knowledge and "intention".

Second, there is a problem occurring in the wrong translation in the Act, which is the phrase *directed against any civilian population* (Rome Statutes, Article 7), which should be translated as ditujukan terhadap populasi sipil, but has been actually translated into: ditujukan secara langsung terhadap penduduk sipil (*directly against civilian community*). The word "directly" can imply that only the direct perpetrators can be indicted with this provision. The word "civilian community" instead of "any civilian population" has limited the subject of the law by using the boundary of areas, and this has significantly limited the potential targets of the crime against humanity victims to only the citizens of the state where the crime occurs.

The ICTY and ICTR panel of judges adopted a wide understanding on "civilian population". In order to protect those who have the potential to be the victims of Crime Against Humanity, anyone who at a specific point of time is actively involved in an incident where he is of the position of defending him/herself in a certain condition can also be considered as a victim of crime against humanity in the definition of "civilian population" . This includes members of a sepa-

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[4] See for example Opinion and Judgment on Akayesu case, ICTR (Case no.ICTR-96-4-T), 2 September 1998, paragraf 580; Tihomir Blaskic case, ICTY (Case no. IT-95-14-T), 3 March 2000, para 203 and 206. See also similar determination in Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission report at Annual Meeting 48th season, (UN Doc. A/51/10) para 94-95 (Commentary on Article18 part 4): "*...committed in a systematic manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts... committed on a large scale meaning that the acts are directed against a multiplicity of victims.*"

ratist movement who have surrendered and been unarmed.[5] The adoption of such broad definition is difficult to be implemented in the Human Right Court for the case of East Timor, one of the reasons being that members of separatis movements are considered to be "armed rebels" and not "civilian population".

Another distortion in translating the concept in classifying actions that can be defined as crime against humanity is the translation of the word "**persecution**" into "*penganiayaan*" in Law No.26 year 2000. This has made it difficult for the prosecutor in proving its case, since there is no detailed definition of the word. Thus "penganiayaan" has been interpreted as defined in the Indonesian Criminal Code, whereas *Persecution* has wider meaning, which is any discriminative action that causes mental and/or physical detriments.[6] Thus, it is not narrowly limited to a direct action upon one's physique. By using the word "penganiayaan" the action of terror and intimidation towards a person or a particular civilian group based on a political belief cannot be included in the category and the prosecutor has to prove that there has been a physical action conducted and not only the effect that has occurred, whereas factually, no one can disprove the effect of the crime against humanity in East Timor before and after the referendum.

b. Command Responsibility

The Criminal provision in the Law no.26/2000 has also included

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[5] See "Opinion and Judgment" in the Tadic case (ICTY). Also in the ICTY, see the Ruling of Indictment Review related to the regulation no. 61 in the *Rules of Procedures and Evidence*, ICTY Case no. IT-95-13-R61 (Case Vukovar), April 3, 1996, Article I paragraph 29. Subsequently, ICTR in the case of Akayesu the substantial adoption of the definition also occurred.

[6] See Bassiouni, *Crimes Against Humanity in the International Law*, Kluwer Law International, 1999, p247. Compare the definition of the "persecution" in the ICC or ICTY Statute with the definition of "penganiayaan" stated in article 9(h) of the Law No. 26/2000. "Penganiayaan" as defined in the such Law is actually equivalent to the definition of "assault" which refers to direct assault towards one's physique.

(*command responsibility*). However, Article 42 verse 1 of the Law has contained several weaknesses with major legal consequences. The definition of command responsibility in the Law is elaborated as follows:

"military commander or someone who effectively acts as a military commander should/could be held accountable on a criminal action under the jurisdiction of Human Right Court that is conducted by the troop under his or her effective command and control, ..." (*"komando militer atau seseorang yang secara efektif bertindak sebagai komando militer dapat dipertanggungjawabkan terhadap tindak pidana yang berada dalam yurisdiksi pengadilan HAM, yang dilakukan oleh pasukan yang berada dibawah komando dan pengendaliannya yang efektif, ..."*)

The usage of the word "dapat" (*should/could*) and not "akan" or "harus" (*shall*), implicitly stating that the command responsibility in gross violation of human right cases regulated in the Law is not something compulsory nor automatic. This Article reaffirms the interpretation of "crime against humanity" as contained in Article 9 as directed to direct perpetrators. Thus the prosecutor should show and prove the urgency to try the commanders and not only the direct perpetrators.

Further more, Article 42 verse 1 (a) conditions the commanders to *"should have known that the troops are committing or has just committed gross violation of human rights"* Whereas the source provision in the Rome Statutes, which is Article 28 verse 1 (a) clearly explains that the military commander should have known that the troops conduct or is about to conduct a crime.[7]

This distortion is neglecting the responsibility of the person in command to prevent a crime. Though this neglect is corrected in Article 42 verse 1 (b) with the phrase "the *military commander failed to conduct the appropriate and necesary action under his or her jurisdiction in preventing or ceasing the action ...*" however there is no strict definition and parameter on what is considered as "appropriate" and "neces-

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[7] Article 28 verse 1 (a) Rome Statutes: *"That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;"* (underlined by writer)

sary" action that should be conducted by the commander.[8] This Article is also implying for the court has to focus the attention to the process, whether or not the action is appropriate, whether or not the action is necessary (obligation of conduct), and automatically neglecting the fact whether the action conducted by the person in command successfully prevent or halt the crime (obligation of result).

When in fact, not only one has to be responsible as a direct perpetrator, instigator or assistant, a superior has to be criminally accountable for dereliction of duty and negligence. The standard of International Customary Law for "dereliction of duty" and "negligence" in broad interpretation states that a person in charge shall be criminally accountable if: (1) he/she should have had knowledge of illegality that had occurred, was occurring, or was about to occur at the hands of subordinates; (2) he/she had an opportunity to act; and (3) such a person failed to take reasonable corrective action under the circumstances.[9] Whether a person should have had knowledge must be tested circumstantially and with respect to a reasonable person in the same general position as the accused. Thus reasonable anticipation is quite relevant.[10]

Article 7(3) of ICTY Statutes also interpretatively reflect the standard of international customary law. The article recognizes the criminal accountability of a person if he/she knew or had reason to know the behavior of his/her subordinates. The sentence is related with the failure in preventing a crime, obscuring an action that violates the law by the subordinate or to punish those who are going to commit or have committed a crime. Though the article is not focusing on

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[8] Such obscure definitive parameter of command responsibility is also found in Article 42 verse 2 regulating on superior responsibility (police and civil official).

[9] See article by Jordan J. Paust "Superior Orders and Command Responsibility" in M Cherif Bassiouni (ed.), *International Criminal Law*, Volume I, Kluwer International, 1999, at 236-237; Also see the article by Anthony D'Amato, *Superior Orders vs Command Responsibility*, American Journal of International Law, 80th edition (1986), at. 604, 607-608; More elaborate explanation can be seen in the writing of William Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, Military Law Review, edisi 97 (1982).

[10] See M Cheriff Bassiouni, ibid.

the situation when a subordinate will or has committed a crime, there is no indication that the criminal accountability would be eliminated if the action has been conducted by the person in charge but the crime/violation by the subordinate still occurred.[11]

c. Inappropriate Law of Procedure

Law No.26 year 2000 does not specifically include all the aspects that is needed in ensuring a fair trial. Although it is the basis of a court that process extra ordinary crimes, the Law is not equipped with an extra-ordinary criminal procedural law, and actually explicitly referring to the common procedural of criminal law (Criminal Code of Procedure = KUHAP), and diminish the chance of using other alternative procedural law.[12]

Meanwhile, KUHAP as the basis of the procedural law used by the Ad Hoc Human Right Court has several basic weaknesses when applied in processing cases of crime against humanity since the KUHAP was not composed with the context of processing cases related to gross violation of human rights, which procedural law is more specific. Articles of KUHAP has low co-responsiveness with the international law standards in processing the perpetrators of gross violation of human rights such as the procedural law of several International Tribunals for instance the Nuremberg, Tokyo and Yugoslavia Trial. This is a shame, because for a court of extra ordinary crimes, an extra ordinary procedural law is required, especially because the existing criminal procedural law is inappropriate for the Human Right court. For example in the verification section. In KUHAP it is regulated that acceptable means of verification includes (1) testimony, (2) expert statement, (3) official letter and/or document, (4) hard evidence, and (5) defendant's statement. These five would not be adequate in proving gross violation of human rights,

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[11] As emphasized by the Report of UN Secretary General about Conflict Resolution 808, UN Doc. S/25704 (1993) paragraph 56.

[12] Article 10 Law no.26/2000

since in proving it the prosecutor would need a wider parameter.

Similarly in the proving procedures, should the witnesses and all evidence have to be presented upon the court. This may pose to be a problem due to the fact that the crime scene (*tempus delicti*) is in East Timor, which is far from the court. KUHAP does not regulate the possibility of implementing long-distance testimony (teleconference or videoconference).[13] Aside from that, the witness would find it difficult to attend the session of the court in order to give his/her testimony because there is no specific formulization on witness accommodation and protection. This is not to mention the problems that may arise in relation with the extradition of witnesses from East Timor to Indonesia.

II. SUBSTANCE AND QUALITY OF INDICTMENT

The indictment is an important base in a criminal procedure, because based on what contained in it the judges process a case, meaning it becomes the parameter on to what extent the judges can probe and pass a verdict upon a case. The indictment should be based upon investigation based on the witnesses' testimony and other evidence, including expert opinion or the coroner's report.[14]

The first three indictments that has been passed so far substantially show that the defendants are being indicted by the following points: **First,** on crime against humanity (Article 7 Law No.26/2000), in form of killings and persecution (Article 9 Law 26/ 2000) as a part of widespread or systematic attack targeting on civilians. **Second,** is related to *command responsibility* of the defendants both from military and civilians background, due to the background that they as

[13] It should be noted that though not regulated in the KUHAP, in the criminal case of Bulog Corruption, the Panel of Judges headed by Lalu Mariyun made a breakthrough by permitting teleconference or video conference for the testimony of BJ Habibie who resides in Germany (see, amongst various sources, *Hukum Online*, June 5, 2002). This can be a precedent in the criminal law system in Indonesia.

[14] More elaboration upon this subject see Dr. Andi Hamzah, SH., *Hukum Acara Pidana Indonesia*, Sapta Artha jaya, Jakarta, 1996. Page 172-173.

commanders failed to provide effective control in correct manner (Article 42 Law No.26/2000). [15]

However, the prosecutor failed to convince that the manslaughter and the persecution can fall into the definition of widespread due to the failure of showing the impLaw of the incidents factually, thought the evidences are a lot and out in the open. The indictments cannot even show the geographical correlation between the events, and they do not prove the systematic element. This is so because the prosecutor cannot describe what is meant by "a chain of actions upon civilian population as an extension of a power holder's policy or the policy of an organization".[16] Thus in all the indictments we would not be able to get the comprehensive overview that the crimes were indeed systematic or widespread.

Substantially, in order to show the systematic element of crimes the main backbone of the case that the prosecutor should have proposed in the indictment is the occurrence of an incident as the result of the policy of the authority or related to an organization. As the result of the prosecutor in formulizing what is meant by the elaboration of Article 9 as mentioned before the indictment is formulized as violation by *omission*, by letting the subordinate committing violation without taking the actions that should have had been conducted, namely preventing, stopping and punishing the subordinates who had conducted criminal actions. Thus it can be stated that the indictment of the Ad Hoc Human Right Court is a minimal one though the criminal sanction articles seemed to be significant ones, with the possible penalization of imprisonment for more than 20 years.

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[15] See *progress report Monitoring Pengadilan HAM Ad Hoc 1&2* (ELSAM Monitoring Team); The incapability in controlling is conducted by ignoring the information that the subordinate has committed gross violation of human rights (article 42 verse 1(a) for military and verse 2(a) for civil officials also for not taking appropriate actions to stop this conduct [article 42 verse 1 b and 2 (b)]

[16] Explanation on Article 9 Law no.26/2000: "...suatu rangkaian perbuatan yang yang dilakukan terhadap penduduk sipil ***sebagai kelanjutan kebijakan penguasa atau kebijakan yang berhubungan dengan organisasi***". (... a serial of actions committed against civilian community *as a result of a state policy or a policy related to organization*)

In proving command responsibility the indictment also does not contain accurate formulation. This is because the prosecutor in the indictment only emphasized upon the formal requirements, such as for Timbul Silaen was only stated as the Commander of the Security Control Commando for East Timor post *New York Agreement* on May 5, 1999. Whereas in proving crime against humanity it is not enough to only present formal command responsibility, but also has to include all of the authority of the person in executing a command. Thus the indictment should have shown the entire network of command by conveying all the forces and facilities utilized,[17] and if necessary all open statements and documents supporting the statements. In other words the indictment should have shown the real command responsibility and how it works.

The stark obscurity of the command responsibility can be seen in the indictment of Abilio Soares as the Governor. The indictment was based upon the attack at the Liquisa Church on April 6, 1999, the residence of Manuel Viegas Carrascalao on April 17 1999, at the Dili Diocese on September 4-5, 1999, at the residence of Archbishop Bello on September 6, 1999, at Ave Maria Church complex, Suai, on September 6, 1999. Whereas the indictment towards Timbul Silaen is composed based on the attacks at the Liquisa Church, Manuel Carrascalao's residence, Dili Diocese, Archbishop Bello's residence, Ave Maria Church in Suai, and upon Herman Sediyono and partners the incidents they were indicted upon was only the attack at the Ave Maria Church in Suai. In the attacks of several places (Liquisa, Suai and Dili), they occurred on a reasonably long period of 6 months and has cost the loss of several lives.

The indictment posed upon Abilio Soares concerning the attack consists of having committed gross violation of human rights in the form of murder and persecution as a part of crime against humanity (article 7 verse b, Law No.26/2000). The murder and persecution was committed on the crime scene mentioned above. The indictment was formulated as follows: The defendant

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[17] Supra Note 9

" **consciously ignoring clear information that his subordinates namely Liquisa and Cavalima regents, Vice Commander of PPI, Eurico Guterres, and other mass-organizations such as Pam Swakarsa under the management of the provincial government in Dili had been conducting or had conducted gross violation of human rights in the form of manslaughter upon pro-independence population in the church complex in Liquisa, Ave Maria church complex or other places in the province of East Timor. Upon the incidents the defendant failed to take necessary and appropriate actions** within his authority to prevent or stop such actions where the defendant had not conducted preventive measures or necessary steps in the form of ordering security apparatus **to prevent the clashes between pro-integration and pro-independence groups or gave in the perpetrators to the authorities for inquiry, investigation and indictment."**[18]

The indictment upon Timbul Silaen and Herman Sediyono and partners was formulated on different form but with the same substance with the indictment of Abilio Soares which referred to article 42 verse 1 and 2.

Upon Abilio Jose Soares, for instance the prosecutor constructed the indictment by elaborating several incidents, especially the ones at Liquisa Church, Manuel Viegas Carrascalao's and Uskup Bello's residence, in Dili district, and at Ave Maria Church, in Suai, Kovalima. In all the incidents Abilio was deemed involved because **(1)** there had been a meeting of all regents lead by the Governor in which there had been instruction given on the necessity to form political organizations as umbrella organizations for the political aspiration of pro-integration. The Muspida meeting[19] lead by Abilio decided upon the establishment of the political organization of the pro-integration group in every regency named FPDK. The pro-integration political

[18] Unofficial translation.

[19] Muspida Meeting (Musyawarah Pimpinan Daerah- Regional Leaders Discussion) usually attended by the authorities of a region from all aspects such as the Governor, Danrem (Commander of Military Resiment), Kapolda (Head of Regional Police Force), General Prosecutor and Judicial body. This meeting can be considered as the forum of strategic-policy making on provincial level.

groups later on would be known as Pamswakarsa (civilian armed militia who has a war commander and a vice-commander). (2) All Pamswakarsa activities had been funded by APBD (region's budget of income and funds) of each regency.

However, the indictment concerning the two key ponts was obscured by the prosecutor. The obscurity occurred since the prosecutors only indicted Abilio Soares, Timbul Silaen and Herman Sediyono and partners as parties who "**mengetahui secara sadar, mengabaikan informasi** " (consciously ignoring information) and..."***tidak mengambil tindakan yang layak dan diperlukan***[20] (failed in taking the necessary and appropriate actions) within their authority in stopping the conduct, where the defendants also had not conducted preventive actions." With such formulation of indictment the prosecutor denied the key point which was the base of the indictment, since the defendants were put upon trial only for their negligence and not for their active involvement in all the incidents as the key actors who had sponsored, facilitated and coordinated the movement of the militia groups in order to defend the pro-integration. Since it emphasized on negligence the prosecutor in the indictment could not at all convey the motive of the Muspida meeting and the expenses in the regional budget for the armed pamswakarsa groups.

The absence motive made the armed Pamswakarsa groups as a group of people gathering with no motive that can be directly related to the defendants as the leaders in the attempt to win the referendum and defend their position by terror and intimidation, wheras the militia (pam-swakarsa) had been established in almost all regencies and supported by the regional budget. Therefor the indictment of Abilio, Timbul Silaen and Herman Sedyono and partners, which was "consciously know, neglecting information and not using his/their authority in preventing" was misleading since the authority of Abilio Soares as a Governor, Timbul Silaen as the Kapolda (Head of Regional Police Force) and Herman Sediyono as the regent had been used in sponsoring and facilitating Pamswakarsa for the victory of Pro-integration. Thus automaticaly it is impossible that these people, who had been

[20] Bold characters by the writer.

used their authority in sponsoring and facilitating the human rights violations, has also been using their authority to prevent and to take aprropriate and necessary actions. Such impossibility of Abilio, Timbul Silaen and Herman Sediyono and partners in using their authority had caused all the incidents elaborated by the prosecutor in the indictment and not visa-versa.

In the aspect command responsibility as implied by Article Pasal 42(a) "*seorang atasan..... bertanggungjawab secara pidana terhadap pelanggaran hak asasi manusia yang diberat oleh bawahannya yang berada dibawah kekuasaan dan pengendalian yang efektif*" (A super ordinate... is criminally accountable for the gross violation of human rights committed by the subordinates under his/her effective authority and control) in the context of gross violation of human rights in East Timor, it should not have been interpreted as caused by the ineffective control but because Abilio Soares, Timbul Silaen and Herman Sediyono and partners had exercised effective control because they had clearly established, supported and funded the activities of Pam-swakarsa in every regency and had been discussed in the Muspida meeting and the meeting of all regencies and the governor. The prosecutor should have proven the command network that had implemented the result of both meetings.

The low quality of the indictments has a negative impact upon the prosecutor's and judges' elaboration in the witness cross-examination.

III. PROCESS AND QUALITY OF WITNESSES' TESTIMONY

Witnesses' testimony is a crucial evidence in strengthening an indictment. Thus a witness should be relevant to the case, has knowledge or directly witness the incident. Thus in the context of crime against humanity, in proving both systematic an widespread, those directly related in the making of policies and implementing the policies should be called to testify. At this point the ability of the prosecutor in clearly formulizing the element of crime contained in the

indictment becomes a significant factor, since it is regulated in the regulation of verification in the KUHAP, that the testimony of witness is the main evidence in the process of a trial.[21] There are several important issues that would be elaborated further in this report, which generally includes the monitoring of the whole process of witness cross-examination, the content of the testimony and the right of the witness, especially in relation with victim-witness.

A. Proving the *element of crime* in witness cross-examination

Witness cross-examination firstly is based on the attempt to obtain an explanation on the legal flaw related to the points in the indictment. This attempt is done through questions posed to the witnesses on the court. The questions should be aimed in locating the element of crime from the indictment, in this case the *crimes against humanity* and *command responsibility*.[22] It is expected that the knowledge of the witnesses on the incident would assist in locating the needed legal flaw in finding the truth on the trial. This is especially important due to the weak indictment presented by the prosecutor, making the witness cross-examination the pillar in proving the elements of crime in this case. Moreover, the provision contained in the criminal procedural law has emphasized on the importance of the courts' facts in witness cross-examination. The witness testimony fit to be used is the one given in the court.

The process in proving the indictment has several important concerns especially in relation with the ad hoc prosecutor in deriving the element of crime of the crime against humanity and command responsibility in examining the witness. In the element of crime in crime

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[21] The conduct of witness examination in the Ad Hoc Human Right Court refers to the regulation of verification conduct as contained in the KUHAP. Witness examination is regulated in article 159-182 of KUHAP. Also see specific regulation concerning testimony as evidence in KUHAP article 184 (1)

[22] See Progress report 1&2 ELSAM on Ad Hoc Human Right Court on East Timor, ELSAM 2002.

against humanity, the biggest challenge is in proving the systematic and widespread element.[23] Aside from that the prosecutor also has to be able to differentiate between manslaughter in crime against humanity and in the general understanding of criminal law. In the criminal code, the criminal is the person who is accountable for an action based on his/her position as the direct perpetrator or as the instigator or assistant.[24] Whereas in Crime Against Humanity, the action-though conducted individually-occurred due to a collective action).[25] In this sense there is also another important element that serves as an essential foundation: *there is a party who hold policy athority which has caused the formation of a chain of incidents which made the individual action can be categorized in the definition of crime against humanity*

Aside from that by considering the weak composition of indictment in conveying the stated elements, the process of witness cross-examination becomes an essential pillar in proving the element of crime of the cases. This is especially so considering the regulation in KUHAP on witness examination recognizes the importance of the fact of a trial concerning witness examination. The testimony of witness used as evidence is what a witness states upon the court.[26]

The witness examination process is colored by the elimination of some crucial content of Preliminary Inquiry Report (Hereafter referred to as BAP: *Berita Acara Pemeriksaan*) done by the witnesses. In the case of Herman Sedyono and friends, almost all of the witnesses have withdrawn their testimonies as contained in the BAP regarding several important points such as the occurrence of attack, coordinative meeting between government and military apparatus, the sound

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[23] The definition related to the verification of systematic planning in many cases almost all involve the authority of the parties holding the bureaucracy authority.

[24] See the regulation in KUHP book II

[25] See M. Cherif Bassiouni, *Crimes Against Humanity in The International Law*, Kluwer Law International, 1999, page 247.

[26] See article 185 (1) KUHAP; the regulation minimize the possibility in implementing alternative model in the witness examination by judge, especially in relation with victim-witness.

of gun and the formation of civilian security forces.[27] The excuse of the withdrawals range from external pressure up to that the given testimony was merely the witnesses' opinion and thus not fit to be brought up in the testimony upon the court. Upon this issue neither the judges nor the prosecutor pursue in the cross-examination session of the trial. Similarly this also has occurred in the case of Abilio and Timbul Silaen.

The withdrawal of testimony that have been conducted upon several important parts in relation with the recognition of the interrelation between the establishment of civilian security unit with the policy or support of the power holder authority on the regional level, may it be in the administrative relation or in the technical relation such as training and supervision Thus in witness examination there has been almost total absence in the recognition of the occurrence of the attack. In later development the judges and the prosecutor has also used the word "clash" or "riot" instead of words representing the fact of the attack. The use of the word has the implication in the fulfillment and the proving of the element of crime in the indictment.[28]

Another example would be that in the cross-examination of Adam Damiri as a witness, the existence of militia was denied and in the same session,[29] the witness has also withdrawn his statement that Pam Swakarsa is a transformation of Pejuang Pro Integrasi (Pro Inte-

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[27] See *Daily Report of Ad Hoc Human Right Court* (ELSAM); Witness Sonny Iskandar withdrew the content of the entire BAP with the excuse that he had been under duress. In the investigation the witness had significantly remarked his involvement in the attack of Ave Maria Church in Suai. I wayan Suka Antara withdrew the result of the investigation as contained in the BAP in relation with the sound of shooting, regents coordinative meeting with Kodim when the incident occurred, and the word attack. Jehezkiel Berek withdrew the testimony saying that the establishment of the civilian militia had been enforced by the local regent.

[28] When referring to the definition of crime against humanity in Law No 26/2000, there is the condition that the action (manslaughter and persecution) is a part of a widespread or systematic attack which is directly targetted upon civilians.

[29] See the report on the cross examination of Adam Damiri as a witness for the case of Abilio J. Osorio Soares on May, 8 2002

gration Warrior).[30]

The witness' testimony should be an explanation of a person on a criminal incident; what she/he has heard, seen and experienced, by stating the reason of his/ her knowledge. A testimony cannot be only an opinion or estimation gained from his/her own tought or knowledge gained only by hearing other person's story (*testimonium de auditu*). However in several parts the content of the testimonies given there have been statements that can be classified as only opinion or expression of witnesses' feeling.[31] This is not unrelated with the questions issued by even the judges to the witnesses. Several questions by the prosecutor also did not direct to answers that could be a legal fact in proving the element of crimes which are the base of the indictments.

Such practice occurs due to the fact that most of the witnesses in the three cases are also defendants in this court. Thus new information or information that can enforce the indictment cannot be presented in maximum capacity Since the initial cross-examination has been dominated by witnesses who are also defendants, they tend to negate or neglect issues raised by the prosecutor. The witness could even blatantly stated the prosecutor had no understanding of the real problem. Thus the witness examination has been more like a pledoy from one defendant testifying for another, emphasizing on how critical the situation in East Timor had been because suddenly the two groups had been attacking each other. Thus the judges and the prosecutor have been carried away with the "clash" or "chaos" scenario as stated by the defendants in every opportunity.

Thus the witnesses' testimony has been virtually useless in strengthening the indictment thus the prosecutor has been often caught off balance when trying to probe deeper into the answers, opinion or statement given by the witnesses previously. Whereas the prosecutor and judges should have probed deeper to identify the chain of command existing in the period of before, during and after the referen-

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[30] ibid. The withdrawal of testimony was conducted with no apropriate excuse, and the judges and the prosecutor did not pursue this further

[31] See the testimony of Wiranto and Adam Damiri for the case of Abilio Soares.

dum. In the context of chain of command, elaborations upon the existence and positions of units at the time, the person in command of intelligence operations and the person in charge of the central operation were not inquired. Thus the witness-examination session often became the campaign stage for the defendants or their media in trying to cover the other defendant.

Whereas the victims brought from East Timor as victim-witnesses were cross-checked later. Until 30 June 2002, there were only three victims from different incidents, one of them from Suai, namely Domiggas dos Santos Mauzinho for the case of Herman Sudiyono.[32] The other two were Emilio Bareto and Joao Perreira for the case of Timbul Silaen and both also were presented as witnesses in the case of Abilio Soares. In the incident in Suai the indictment contained manslaughter, but to the witness there was no question posed by the judges and the prosecutor how it had happened. The witness even remained undefended when subjected to the counselor's badgering, causing the witness, who was not fluent in Indonesian, became badly flustered.[33]

In general the whole process and the quality of the witnesses' testimony has done nothing in strengthening the indictment material which is manslaughter and persecution and furthermore cannot be used in proving crime against humanity that is systematic and widespread. Also, the claim that there was "neglect of information and the appropriate actions failed to be taken" has remained unproven. Thus the whole testimony only strengthen the defendant's position and prove that what had happened in East Timor before and after the referendum happened spontaneously as the reaction of the masses who had been disappointed by the faulty practices in the referendum.

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[32] There have been three victim-witness or family-of-victim witness who failed to attend the trial, namely Armendo de Deus Granan Deiro, Frez da Costa, and Tobias dos Santos (all for the case of Herman Sedyono, et. all).

[33] See explanation on "right for a translator" in the other section of this report.

B. Witnesses examination procedures

As for witnesses investigation procedures monitoring, observer found some basic errors which are inappropriate with the standard norms of witnesses investigation according to the procedural law which directly connected with a running court administration system for ad hoc Human Rights Court.[34]

Witnesses who should not go into the court room for they will be examined as witness, always go into the court to see the examination of the other witness, or sit outside the court room while hearing the process of other witness investigation process.[35] Human Rights court in Central Jakarta's' court room doesn't have a specific waiting room for witness which guarded by officer, so that the witness can't enter the court room or at least prohibit them to listen to the previous investigation process.[36] This shows that Human Rights court doesn't have such a mechanism that limit persons who qualified as a persons who cant enter the room (listening to the process) to be prohibited because the person is a witness.

Base on the order regulation for witness, witness who should be examined first is the witness who come from victims' party (Article 160 verse 1 sub b KUHAP). But, until the end of April 2002, witnesses who have been examined none came from the victim party. The present witnesses are other defendant from different cases of Human Rights violation in East Timor, or they who are related with the defendant both leader or lower rank. In some observation of witness examination in the court, the contrary happened, where witnesses who have higher rank in the ABRI/POLRI structures exam-

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[34] The regulation of witness examination can be seen in KUHAP article 159 and 160.

[35] Observers have seen several of the witnesses follow the process of the trial, there have also been witnesses who attend the witness examination of the other witness on the same case or different ones.

[36] Usually the witness wait for his/her turn to testify not in a special room but has been given the liberty to sit outside the courtroom where one can clearly hear the process of the trial through the existing sound system,/ amplifier, thus a witness can hear the testimony of the other witness examined before him/her.

ined in the beginning of the process. [37]

Witnesses proposed by the prosecutor are also more to act as *a de charge* (support defendant rather than against them—supposedly proposed by defendant's Lawyer) rather than *a charge* witnesses (against defendant). For example: a witness said that no one TNI/Polri element involved in the "chaos" or a witness who said that the defendants has done prevention or investigation acts so that the chaos can be localize etc.

Base on the observation of the trial process, especially in the witnesses investigation in the trial, particularly related with victims witnesses, some special attention should be made. There are at least three major points related with the witnesses investigation procedures, namely: (1) security protection and guarantee (2) witness rights during the trial (3) trial schedule.

Until the end of June 2002, from whole 31 witnesses, there are only three victims witnesses/victims family testified before the trial. They are: Dominggas dos Santos Muzinho (Herman Sedyono and friends' case), Joao Perreira and Emilio Bareto (Timbul Silaens' case) and Abilio Soares. It is very far from the ideal proportion, considering the vast amount of victims claimed by the prosecutor. The Indonesian prosecutors' mistake to bring other victims witnesses made the witness composition become unbalanced to be called a fair witnessing process. The inability to bring the victim witnesses equal with other parties actually required the judges' sense to rule necessary actions, such as replace the absentees with reading of the BAP or even to find innovations that can help the case investigation process. [38]

In the witnesses investigation process for Abilios' case, named Emilio Bareto and Joao Perreira, prosecutor did nothing in the summoning of the witness as indicated in the procedural law. Two wit-

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[37] See observation report of Human Right Ad Hoc Court HAM ad hoc ELSAM untuk pemeriksaan Jend. Wiranto, Abdul Muis, dimana proses dipenuhi sorak sorai dari pengunjung yang mendukung loyalitas terdakwa pada Indonesia, dan mengecam PBB dan dunia internasional dalam persoalan timtim, April-Mei 2002.

[38] See also Article 162 (1) KUHAP,"... *atau tidak dipanggil karena jauh tempat kediaman atau tempat tinggalnya, ...maka keterangan yang telah diberikan itu dibacakan*". (...not called because the residence is too far... thus the given explanation is read")

nesses, Emilio Bareto and Joao Perreira, which happened to be present at the court to testify for Timbul Silaens' case, suddenly summoned by the prosecutor of Abilio Soares' case without any previous arrangement and preparation. The investigation process conducted in turn for both of the cases (Timbul Silaen and Abilio Soares), when Emilio Baret investigate in the court for Timbul Silaens' case, Joao Perreira investigate in Abilios' trial and so on.

C. Security guarantee for victims witnesses

On the process of witnesses examination process in this case victims testimony, from those three cases, it has been planned to have 14 victims witnesses which would be brought by the prosecutor cooperate with UNTAET, [39] with specification as follows:

Case	Planned	Examined	Absent excuse
Timbul Silaen security reason Abilio Soares Victims has not explained by the prosecutor. 2 persons (taken from other cases' witnesses: Timbul Silaen case): 1. Emelio Bareto 2. Joao Fereira Not clear	**10 persons:** 1.Emilio Bareto 2.Joao Fareira 3.Jose Menez Soares 4.joao Bernandido 5.Maria Fereira Soares 6.Nelio Mesquita da Costa Rego 7.Vicente AG Sousa 8.Jose Gaetano Da Costa 9.Don Bosco Salganya 10.Marecelino Martins Ximenez	**2 Persons** 1.Joao Fareira 2.Emilio Bareto	Security problems: 5 persons (from East Timor) and unknown address: 3 persons (from NTT)

[39] In order to smooth the cross-examination session, the General Attorney with UNTAET cooperate which was formalized in the form of MoU which in essence stating that UNTAET id ready in helping Indonesia's General Attorney in processing the cases, in terms of investigation or presenting the witness from East Timor.

Herman S, and friends	**4 Persons** 1.Dominggos dos Santos Mauzinho 2.Fres Da Costa 3.Tobias Dos Santos 4.Armando De Deus	**1 person** 1.Dominggos Dos Santos Mauzinho	Resigned for security reason
Abilio Soares	Victims has not explained by the prosecutor	2 person (taken from the cases' witnesses: Timbul Silaen case): 1.Emelio Bareto 2.Joao Fareira	Resigned for security reason

The description above has shown us that the absence of the victims' witnesses for all cases mainly because security problems which include physical and physiological security. The issues confirmed by the explanatory letter by RDTL General Attorney, Longhuinos Monteiro, which read by prosecutor before the court in June 5th, 2002, is that because there are no security guarantee for victim witnesses. Even though in the examination of some witnesses who has been brought to the court on May 30th 2002 security has prepared on three platoon of security forces (in the form of one platoon of police mobile brigade, one platoon of regional police (*Polda*) and one platoon of police pioneer troop), still most of the witnesses are afraid to be examined in Indonesia.[40]

Beside physical security, fair trial principles requests for a physiological protection.[41] Beside that, Article 34(1) Law No. 26/2000,

[40] The main problem that causes the victim-witness are afraid to attend the trial is related with the psychological security. The factors that can be identified as psychological threats according to the observation thus far are: (a) the witness is afraid of the defendant since the defendant is a powerful person in his/her area, (b) the witness is afraid of the defense lawyers (concerning the number attending each session and the intimidation the may impose in the examination), (c) the people attending the trial, especially from the pro-integration society, and the press.

[41] See *Fair Trial Manual* Amnesty International

also stipulated that: "*Setiap korban dan saksi dalam Pelanggaran Hak Asasi Manusia yang berat berhak atas perlindungan fisik dan* **mental** *dari ancaman,* **gangguan**, *teror, dan kekerasan dari pihak manapun.*" (Every victim and witness in Gross Human Rights Violations is entitled to physical and **physiological** protection from threat, **intimidation**, terror, and violence from all parties). Unfortunately Presidential Decree (PP) No.2, 2002 which regulated Witness and Victim Protection is not equipped with prevailing security procedures.

Even though there was no direct physical attack or threat has been experienced by the victims witnesses who are willing to testify, witnesses will found it difficult to testify freely with shouting and agitating observers, while outside the court there are groups who always stage demonstration against them. In the beginning of the trials regarding gross human rights violations in East Timor court were attended by TNI chief officer and other high rank officer. Then, every trial was always attended by pro-integration groups and observers who always yelled at the witness. Such a condition can be categorized as a form of pressure, and the bailiff should have been instructed to provide order in the process.

Problems relating with the security sometimes emerged from the defense lawyers who may at times provoke and tend to threat the witness. On several occasions the judges have warned the defense lawyers.[42] In one witness cross-check section, the witness became tensed and pressed, unable to face the defense lawyers and even rejected to answer most of the questions coming from the defense lawyers.

Beside security problem for the witness, financial constraint is what made the court unable to present victims' witnesses or their families. Human rights court is not equipped with sufficient money to do such procedures, while United Nation through UNMISET (*United Nations Mission of Support in East Timor*) unable to give financial aid since such thing can become bad precedent for future case.

Furthermore, there is no clear extradition agreement between In-

[42] The audio visual documentation of ELSAM on the examination of Dominggas Dos Santos Mauzinhoas a witness, 28/5/2002

donesian and East Timor government. Before, the process related with extradition conducted based on memorandum of understanding (MoU) between Department of Foreign Affair with UNTAET. Recently, East Timor is no longer governed by UNTAET but has formed their own government with support from UN through UNMISET, and there are questions about authority transfer to East Timor or UNMISET.

Related with those security problems, actually the East Timoresse Prosecutor office has try give input to the process of victims' witnesses investigation which can't be brought to the court in Indonesia, through teleconference or by video recording or audio[43] But the offer has not been responded by Indonesian party.

D. Witness Right to Interpreter

Interpreter is an important element in the witness investigation process especially victims' witness who came from East Timor who do not perfectly understand Indonesian language, the language that used in the court. That is the reason why this Human Rights court should be equipped with interpreter who understand both Indonesian and Tetun.

In the 28th May, 2002, in the trial for Herman Sedyono and friends' case, Dominggos dos Santos Mauzinho was brought to the court to testify. The prosecutor informed that the witness could not understand Indonesian language too well, so an Indonesian-Tetun interpreter was in order.

But in the reality, there has been no persuasive attempt to arrange an interpreter by Human Rights Court ad hoc in this trial. UNMISET has initiated this by bringing Indonesian-Tetun Interpreter from East Timor. This good will then can not be implemented because the interpreter was overruled by the judge. Judge council lead by Cicut Sutiarso rejected the interpreter with the reason that there was no letter and certificate as an interpreter. The judge council then finally

[43] The right not to see the defendant directly has been regulated in the Government Regulation Article 4 on Witness Protection.

decided to use Indonesian and would only use interpreter if one is considered as necessary, without any clear criteria and limitation about the scale of necessity.

Until the end of witnesses investigation process, the language that been used is Indonesian. This caused the witnesses can not response quickly and become stuttering when asked with fast intonation and unfamiliar terms. Thus, judges, prosecutor or Prosecutor always repeated the questions. Even the witness, on the most occasion had to positioned in the "yes" or "no" question because her limitation in Indonesian language. This condition automatically reduced the testimony exploration.

The reason of the rejection for interpreter assistance is not appropriate, consider Tetun is an uncommon language used in international-standard communication. So, the request for certification is an impossible request. When in fact, having an interpreter if they don't understand or unable to speak in a language used in the court is a right to ensure a fair trial, as provided in Article 14 point 3 (f) International Covenant for Civil and Politic Rights (ICCPR).[44] Alongside with the statement is the regulation about witness according to JUHAP article 177, that a judge can appoint an interpreter if the witness or defendant does not understand Indonesian language.

E. Court Calendar of Witnesses Examination Process

In May 19th, 2002, the court with Herman Sedyono and friends case, the judge council chair by Cicut Sutiarso gave an ultimatum to the prosecutor to present all the victims witnesses and ending the testimony process within a week. This judge order is a result of the consequence of article 31 Law No. 26, 2000, which stated that in the case of gross human rights violation, the trial and the verdict should be done by the human right court in at most 180 days since the case was brought to the court. The order off course, will bring another

[44] Also see Amnesty International, *Fair Trial*, Blackmore Ltd. Dorset, 1998. Although prioritized for the defendant, but can also be implemented in the case of witnesses who are unable in communicating with the language used the the process of the trial.

consequence which is "contradiction" in the principles of justice.

Observing the problems of the prosecutor to present victims' witness, there is a big possibility that almost all of the victims witnesses who are needed to testify will be unable to testify within a week. As the result, composition of the testimony will go far from proportional. Fair and just trial will become more impossible. Meanwhile, in order to reach testimony proportionality the court needs to rule for more time for the prosecutor to present all victims witnesses to testify, and the same should be applied to the Prosecutor of the defendant. However, this would extent the duration of the trial. If until the 180th day since the case transferred to the court there is still no verdict by the judge council, then it is possible that the court would be "terminated due to the procedure of law".

IV. THE EXPLORATION OF THE PROSECUTOR AND ASSEMBLY OF JUDGES IN CONVEYING MATERIAL PROOF AND EVIDENCE

In a trial the defendants, witnesses, and the counselors have been building the impression that what happened in East Timor was a spontaneous chaos as the effect of the disappointment upon UNAMET's misconducts or the provocation of the pro-liberation. This argument should not have been valid due to the flaw that the government of Indonesia has approved the result of the referendum and has been given the opportunity to forward objections should there was any. Furthermore, the attacks had been occurring since April 2002.

Unfortunately throughout the trial both the Judges and the prosecutor have been agreeing to or even trapped by the argumentation of the witness and the defendants., causing the part of the indictments regarding manslaughter and persecution as part of the attacks disappeared from the prosecutor and judges' elaboration.

As the party responsible in proving the elements of its indictment until the end of April 2002, the prosecutor up to presently has not been able to present the witnesses expected to prove the elements,

not to mention it has been weak in using or utilizing data as reference or comparison in cross-checking the witnesses' testimony such as in the instances of:

On the Cause of the "chaos"

The prosecutor has failed in probing deeper on the cause of the so-called "chaos", accepting without challenge the explanation that the chaos was over the disatisfaction towards the result of the referendum and the judges have also failed in pursuing the subjects, to know whether the statement was fLaw or mere opinion of the witnesses.

The involment of TNI and Indonesian Police Force (Polri) in the "chaos"

There was testimony on that throughout the period between the preparation and implementation of the referendum there were members of TNI or Polri who violated the rules and the Prosecutor did not probe upon the identity of those people. Id the witness did not know for sure, then the prosecutor should ask the source of the witness' knowledge.

The Assembly of Judges both in criminal or gross violation of Human Rights cases should Law pro-actively in conveying the material truth. They also have the authority in rejecting or overulling witnesses or knowledge or statements irrelevant to the case, which they rarely practiced. The examples are as follows:

1. The statements of the witnesses presented by the Prosecutors have been derived from reports since they weren't directly involved in the human right violations indicted, thus these witnesses should have been deemed as irrelevant to be presented.
2. The Assembly of Judges also did not try to further convey the statements of the witnesses. The existence of reports of the defendants to their superordinates is not questioned, there was no call kfrom the assembly for the proof of such reports may it be the verbal or written ones.
3. On the management of the defendants, the assembly of judges sgould have questioned whether the supporting evidence has been

managed accordingly to the prevailing rules and legislation. For example, when the witness stated that the investigation upon the culprit of the chaoss had been conducted, then the judges could inquire about who were being investigated, who were the victims, and what was the result of the investigation.

V. PROBLEMS REGARDING THE COURT ADMINISTRATION

A Competent, independent, and impartial trial equals to a fair trial. Thus good administration is the key to the good conduct of court.[45] Administration here includes all the working system of a court such as the supervision and control on the administrative staff, judges, prosecutor, preparation of budget, maintenance of the court's building, registration, case files, document publication etc.

A. Access of Information on the Trials

During the process of the trial so far, beginning from April to June 2002, there has been no mechanism or rule of conduct related to information on the trial, may it be on the scheduling of the trial nor any information board. The information related to the schedule can only be known when the observers come to the previous trial since the next schedule would only be determined then. And the scheduling of the trial is not communicated through any media such as board of information. And though there is a computer placed in the front of the building for information upon the trial, this computer is often displaced or in off condition.

The access to the information has become a very worrisome problem when there were new cases processed without no available information for the public, thus the initial phases of the trial process for

[45]The principles have been recognized by various International instruments such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights .

the new cases went by unnoticed. [46] Bearing in mind that this trial should be an open trial, the public should have access to information and documents related to the processes of the trial. However, this also has remained to be a problem, since no formal mechanism is set up in obtaining the documents.[47]

B. The Room for the Trial

Initially the Ad Hoc Human Right Court only used one room on the 3rd floor, Room I for the trial processes of the cases of Herman Sedyono (Tuesday), and the other two cases (Timbul Silaen and Abilio) (Thursdays in turn) However, disorder started to occur when this mechanism was not possible anymore due to the amount of witness. The implication of this disorder is that sometimes there often was squabbles over a room for each case. On May 23, 2002 the disorder was so bad that the judges, counselors, prosecutors and members of the press did not know where their trial session was supposed to take place. Though it may seem trivial, such lack of management is really an obstruction to the smooth operation of the trial.

C. Order of The Court

There have been extensive amount of violations in this aspect. Though mainly conducted by the observers of the trial, sometimes the defendant and the counselors has also trespassed the regulations.

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[46]Based on the observation, there have been three cases processed with no official information on the schedule: the indictment reading for caseof Sudjarwo (June 25, 2002), case of Asep Kuswani (June 19, 2002) and case of Endriyartono (June 24, 2002), Eurico Guterres (June 27, 2002). The information on the trials seemed to be reserved for certain circles and for the case of Endriartono the journalists were not even aware of the schedule.

[47]In several instances, the observers asked to the assistants and the prosecutors on how to obtain the documents related to the trials, but the answers given were various; such as can only be got at the General Attorney's Office, can only be given to certain parties, etc.

Regulation on the Order of the Court

Criminal procedural Law	Regulation of the Head Judge
Article 217 ✓.Chair Judge lead the investigation and keep the code of conduct of the court. ✓.Every instruction by the Chair Judge in order to keep the code of conduct in the court should be obey	The observer/watcher are not allowed to bring firearm/weapon
Article 218 ✓.In the court room everybody have to show respect to the court. ✓.Everybody whose behave improperly and violate code of conduct after given warning from chair judge will expelled from the court room. ✓.In the case of violate the code of conduct as been	Observer/Watcher are not allowed to wear jacket/coat and hat except peci
Law 219 ✓.Anybody are not allowed to bring firearm, weapon, explosives or any substances that can endanger the court and whoever bring such thing must keep them in the designated location. ✓.Without formal letter, court security officer can examine the people. ✓.The regulation will not diminish the possibility of charge if the possession found.	Observer/watcher are not allowed to activate/turn on their hand phone.
Law 232 ✓.Before the trial begin, clerk of court, prosecutor, Prosecutor of law and observer/watcher are already take/sit in their designated place. ✓.By the time the judge enter or leave the court room every participant must stand to honor. ✓.During the process of the trial, everyone who goes in or out of the room of the trial should pay respect.	Observer must obey the code of conduct of the court.

Violations to Regulations on the Order of the Court

Violation	Description	Explanation
Carrying sharp object/ weapon	Several TNI members are bearing knives on their persons.	No mechanism provided by the court administration.
Handphone	Often going off in the course of the trial	Rarely reprimanded by the judges
Wearing head cover or jacket	Several TNI members and other court observers	Never reprimanded by the judges and the bailiff
Eating and drinking	Often happening, sometimes the judges and the counselors are seen chewing gum.	Never reprimanded by the judges
Creating noise	Often conducted by the observers, especially on the initial phases of the trial	Rarely reprimanded
Smoking	Often conducted by observers sitting in the back row.	Rarely reprimanded
Disrespectfully going in and out of the room of the trial	Often happening	Once was reprimanded
Reading Newspaper	Can be viewed in several instances	Rarely reprimanded

In order to remind the people who come to see the process of the trial, a piece of paper containing the regulation of the proper conduct in the court room as quoted from the criminal procedural law is available in every court room[48] but these regulations remained largely

[48]In several sessions of the Ad Hoc Human Right Court, the regulation on the conduct of the court have been read out by the cleric before the panel of judges enter the court room, but this has been conducted 6 times for the tree cases and afterwards it has not been conducted anymore.

unheeded and not enforced. The violations occur mainly because the regulations are not usually enforced by the bailiff or the panel of judges.[49]

VI. SUMARY AND RECOMMENDATION

The Human Right Court is a very crucial process in promoting human rights and providing justice for the victims of gross violations of human rights. The success of the court would increase not only the credibility of the court but also Indonesia's legal system in general. It can also serve as one of the much needed proofs of TNI/ABRI public accountability. Failure in the process in the court in revealing the truth of the legal facts regarding what had happened in East Timor would also hinder TNI/ABRI in repairing its image especially in the field of upholding the law and protection towards human rights.

In general the Ad Hoc Human Right Court for the crime against humanity in East Timor has been conducted below standard, even when measured with the standards of a common criminal court. There seems to be unwillingness in fighting for or even maintaining seriousness from all the elements of the court in processing the cases, especially on the part of the prosecutor, in proving whether the party (parties) was really responsible in the gross violations of human rights occurring in 1999.

The disturbing flaw is that judging from the process that has been occurring, the prosecutor would have a slim chance in proving its charges. There is even an impression that the prosecutor is "sabotaging" its case for the benefit of the defendants through the weak indictments and the lame process in proving its case. Thus it is highly recommended that the Prosecutor General examine the prosecutors handling the cases in the Ad Hoc Court for East Timor.

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[49]In several instances the judges warned those who attend the session of the court to heed the regulation on the discipline in the court room, but this is a rare practice if compared with the amount of violation.

Of course, from optimistic light, one can say that there is enough room for improvement since the Ad Hoc Court is not finished yet. In this context, the Human Right Court Monitoring Team of the Institute for Policy Research and Advocacy recommends:

In terms of indictment, the recommendations is aimed on several issues, namely:

- For future indictments, the Prosecutor General should focus the indictments specifically in the actions related to the *element of crimes* in crime against humanity, and not blindly imply the same focus in every indictment presented. Thus there should be significant revisions conducted upon future indictments. Future indictment should include the elements of crimes against humanity as pertained in the Law no. 26 verse 9, which are murder, persecution, rape, and forced displacement.
- For the sake of justice and the accountability process of the gross violation of human rights occurring, in presenting an indictment in a trial process, the Prosecutor General should consider the levels of substantiation of the case as a whole. In proving the systematic aspect in the gross violations of Human Rights in East Timor, those who are indicted for actions *by commission* should be put forward first before those who are indicted for violations *by omission* in accordance with the accountability level as superiors.

In the examination process in general, the Prosecutor General the Judges need to observe these points:

- The Prosecutors should seriously strive in presenting witnesses that enforce the indictments and not the other way around. Special attention should be given to victim-witnesses, especially on how significant it is to present a victim as a witness in a particular indictment, since if the indictment is *command responsibility*, then the testimony would not be significant, whereas if it is to prove the defendant as the direct perpetrator of a gross violation of human rights, then the presence of victims as witnesses would be very essential indeed, and this should be prioritized.
- Bearing in mind that this particular Ad Hoc Human Right Court

is Indonesia's legal system's first experience in dealing with past human right violation, the Judges should enrich the trial process by intensively use the international law principles as their reference of judgment. The Judges also ought to be more firm in regulating the process of the trials.

- The judges should show boldness in creating legal initiatives needed, especially in the process of witness examination. The limitations of the Code of Criminal Procedural Law. used as the basis for the procedural of the ad hoc court require the both the judges and the prosecutors to have the initiative in fully implementing the Government Regulation no. 2/2002 on the Witness and Victim protection, especially regarding significant matters not yet accommodated by our Code of Criminal Procedural Law.

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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 dan protecting civil and political rights and also human rights in general, according to Indonesia's Constitution and Universal Declaration of Human Rights.

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