Institute For Policy Research and Advocacy (ELSAM)
Monitoring Report on Ad Hoc Human Rights Court
Against Gross Human Rights Violations in East Timor
Jakarta, Indonesia

Report No. 2

April- September 1999

I. Introduction

In April 2002, the panel of judges that looks into the case prosecuted in Ad Hoc Human Rights Court (HRC) for Gross Human Rights Violation had decided upon preliminary verdict. In the preliminary verdict, the panels of judges believe that Ad Hoc HRC has absolute and relative competence in prosecuting gross human rights violation in East Timor. Asides from that, charges concluded by the general attorney have fulfilled their formal and material requirements. (See Progress report I for further details on charge letter and court competence).

In Progress Report #2, the process of the court, especially the proving of the charge, will be discussed further. Elements in the articles of the charge and the responsibility of the General Attorney to prove those elements, as well as the tendency of witness information in courts held until late April 2002 will be available in this part. Asides from that, it will also cover the capability of judges and attorneys in exploring the information given in the court and followed by an analysis on the information given by the witnesses.

II. The Proving Process

2.1. Elements of the Charge

Two charges are concluded from three files. First, two files each in the name of Abilio Jose Osorio Soares and Timbul Silaen both in form of alternative charge and both have relatively same articles of charge. Second, one file in the name of Liliek Koeshadiyanto and friends in form of subsidaire charge.

A. Elements of the charge in the name of Abilio Jose Osorio Soares and Timbul Silaen are as follow:

a. The first charge:

1) Those convicted are police officers or civilians; who are direct superiors of the perpetrators of gross violations of

Human Rights.
2) The gross violations of Human Rights committed by the subordinates are considered crimes against Humanity in form of murder.
3) The act committed by the subordinates is a part of a systematic and widespread crime against humanity directed to the civilians.
4) The convicted knew or disregarded the information of the act committed by his subordinates intentionally.
5) The convicted did not do proper and necessary actions to prevent or stop the act and to hand the perpetrators over to officers in charge to be inquired, investigated and prosecuted.
6) If those elements are proved then the convicted can be sentenced to death or life imprisonment or imprisonment for at most 25 years and at least 10 years.
b. The Second Charge
In the second charge, the elements are relatively the same with the first charge. The minor differences are:
1) The crime against humanity committed by the subordinates is in form of 'persecution'.
2) Imprisonment sentence is for at most 20 years and at least 10 years.

B. One file representing 5 (five) convicts organized in form of subsidaire charges. Since the charges are in subsidaire form, the elements mentioned here are only primary charges. The primary charges are as follow:
Primary Charges: the elements contained in the primary charges are as follow:
1) Those: Convicts are military commands or someone that effectively act as one.
2) Responsible for the crime of gross violation of Human Rights committed by troops under his command with effective controlling, or under his authority with effective controlling.
3) Gross violation of Human rights committed by troops under the convict's command is a crime against humanity.
4) The act is a part of a widespread and systematic crime against humanity directed to civilians.
5) The criminal act is a result of improper troops controlling:
a. Convict knew or based on the situation should know that the troops is committing or just committed gross violation of Human rights, and
b. Convicts did not do proper and necessary action in his authority to prevent or stop the act or to hand the perpetrators to officers in charge for inquiry, investigation and prosecution.
6) If the elements are proved, the convict will be sentenced to death or life imprisonment or imprisonment for at most 25 (twenty five) years and at least 10 (ten years).

Note:
1. It is not easy to understand the intention of the General Attorney in organizing the articles of the charge. The structure is different with the charges on behalf of Timbul Silaen dan Abilio Jose Osorio Soares.
2. Asides from that, the General Attorney is not strict enough in deciding the role of the convicts in the charge, whether they violate article 42 verse 1 (command responsibility) or as advice maker (equal to perpetrators). The ambiguity happened because the General Attorney includes article 55 verse 2 of the Criminal Act. The general Attorney should differentiate the role of the convicts by making a different charge.

2.2. Information Given by Witnesses in Court

To prove the elements of the charge, until late April 2002 the general attorney has name the following witnesses:

Abelio Soares file (file I)

No Name Position Inquiry date Note
1 M .Nur Muis Former danrem 17 April 2002
2 Herman Sedyono Former Bupati Covalima 17 April 2002 Convict in file III
3 Suprapto Tarman Former Bupati Ailio 18 April 2002
4 Tono Suratman Former Danrem 18 April 2002
5 Timbul Silaen Former East Timor Kapolda 24 April 2002 Convict in file II
6 Domingus Soares Former Bupati Dilli 25 April 2002
7 Mudjiono Former East Timor Vice Commander Korem 25 April 2002

Timbul Silaen file (file II)

No Name Position Inquiry Date Note
1 Wiranto Former Menhankam/Pangab 4 April 2002
2 Adam Rahmat damiri Former Pangdam Udayana 11 April 2002 Convict in east Timor case.
3 Mohammad Noer Muis 11 April 2002
4 Joseph Josua Sitompul Former East Timor Polri kapusdiklat Polda 18 April 2002
5 Leo Pardede Former Kapusdalops Polda East Timor 1997-1999 18 April 2002
6 Muafi Sahudji Former Wakapolda east Timor 1997-1999 25 April 2002

Herman Sedyono etc. file (file III)

NO Name Position Inquiry date note
1 Sony Iskandar Former driver of kasdim Acmad syamsuddin (Convict IV) 23 April 2002
2 I Wayan Suka Antara PLN Suai security instructed by Dandim 23 April 2002
3 Sulistyono Former Truck Driver in kodim 1635 Suai 23 April 2002
4 Jehezkiel Berek Former Wakapolres Covalima 30 April 2002
5 Jacobus Tanamal Former Kapusdalop Polres Covalima 30 April 2002
6 Yopi Lekatompessy Former Kapolsek Kota Covalima 30 April 2002

Information received above that is brought to court tends to be similar, The information is as follow:

1. About the referendum
It all begin with the 1st Option, when the president had the idea of giving special autonomy to East Timor in the end of 1998. Then in early january 1999 the 2nd Option is given. Both are discussed in tripartit agreement. After

the 1st and 2nd Options given, the situation in East Timor changed drastically for a different new policy is made. This new policy ensures that the conflicting parties should be considered as respected parties.

2. About the party in charge of security

The party who is responsible for the security in referendum process is the police for international society refused to have TNI interference in the referendum process. In security matter, the transfer of KODAL from Pangdam to Kapolda in May 1999 and it is effective until the formation of the transitional government. However, since chaos occurred on 4 September 1999 just after the announcement of the referendum, on 5 September 2002 KODAL is returned to Pangdam. On 7 September 1999, military alert situation is announced in all East Timor.

3. The Cause of Chaos

After the chaos on 4th September, the situation got worse, sporadic and anarchy actions that troubled KamtibMas took place in Dili and other 4 districts at night on 5 September. It is caused by the announcement of the referendum that is scheduled for 7 September 1999 was put ahead of schedule to 4 September 1999. It is suspected that the referendum committee and UNTAET cheated, yet the complaint did not get satisfying response. Basically the aggression is the result of an old and long lasting hatred in the pro-integration society toward the anti-integration society for the terror and murder committed by the anti-integration society toward the pro-integration society. The conflicting parties are Pro-Integration Group and Anti-Integration Group. On the other hand, Police and TNI were not involved in the conflict and violation committed by those parties is not violation against Human Rights since it had not been introduced at that time.

4. About the victims

In the incidents on 5 and 17 April 1999 and in September 1999, there were dead victims in civilians but the number is indefinite. Some of the injured are international citizens. Many houses are burnt down by their owners.

5. Action taken by the person in charge of security or the command in dealing with chaos or security problem

The security in the referendum was well maintained as the referendum could be carried out well. In dealing with the chaos, actions according to the procedure and protap have been taken and in result the chaos did not spread and it was successfully localized. In dealing with those who are considered as perpetrators, inquiries and prosecution have been conducted. The convicts had done their job well by reporting all events and the progress of the situation to their superiors as well as taking necessary actions. The reason why the officers could not deal with the chaos faster is because the perpetrators were in big number and they were very emotional while the number of officers was limited.

6. The Existence of the militias

The militias appeared as a reaction toward announced options. It was initiated by the aggressive Pro-independence group who believes that they have equal rights, intimidating and assaulting the society, terrorizing the Pro-integration group. There were an exodus of medical officers and teachers that were not from East Timor as well as the formation of groups to do partial counter attack against Pro-Integration group that intimidates, terrorizes and assault. The groups were formed as a reaction from the Pro-integration group. Therefore, there was no

structural relation neither was relation among them. Asides from that, there were civilian groups which are Wanra and Kamra. In the field, Wanra is drilled by Kodim and Kamra by the Police.

2.3. General Attorney and the Panel of Judges' Exploration in Discovering Material Truth.

The General Attorney

As a party responsible for proving elements of charge, the general attorney until late April 2002 had not been able to bring witnesses to prove the elements. The general attorney is incapable in using existing data as reference or comparison to the information from the witnesses. Some of the examples are as follow:

1. About the cause of Chaos

The general attorney did not try to dig further into the witness knowledge of why chaos happened. The general attorney should pursue the witness with more questions on the source of information where the witness believe that the chaos occurred because of the announcement of the referendum, fraud claim and the dissatisfying response of the claim. Therefore, it is possible to confirm whether the information is a fact or just their analysis.

2. About the involvement of TNI or Polri in the chaos

A witness confessed that there were some TNI/Polri members that commit violation during the preparation to the referendum itself. The general attorney did not investigate further who those 'members' might be. If the witness was not sure, the general attorney should have asked about the source of information. Regarding he report or the investigation file, the general attorney should have asked where they came from, so that he would find out: the identity of TNI/Polri 'member' that commit perpetration, the relations between TNI/Polri members and the convicts, as well as the type of violation committed.

The Panel of Judges

The panel of Judges, in the case of criminal act or the violation of Human rights should act proactively in order to find the material truth. The Panel of Judges has the authority to reject the presence of witnesses that are irrelevant to the charge or those whose knowledge is not relevant according to the law. The examples are as follow:

1. The information owned by witnesses named by the general attorney is predominantly reports. This means that the witness does not really know the exact situation of violation of human rights claimed by the general attorney. Therefore, the witness is not relevant to be named. Asides from that, the information needed in the court should be relevant with the elements of charge and not with other elements. Thus instead of wasting time, the panel of judges should have rejected the presence of witness whose information is received from others or those who does not know the violation of human rights claimed.

2. Asides from that, the panel of judges also did not try to look into information received from witness like: witness saying that there was spoken (by phone) and written report made to the superior. What the panel of judges could have done is to ask what it is like, how many reports are made, where to find the report and whether this report could be given to the general attorney. And if it can be handed over to the general attorney, the panel of judges can order the general attorney to bring these evidences to the court.

3. Regarding the action taken by the convicts to deal with the problem, the panel of judges should have inquired supporting evidences to prove that the action had been taken in accordance to the protap and also as optimum as possible. For example, when there is a witness saying that an investigation had been carried out, the panel of

judges should have asked about the identity of perpetrators investigated, who the victims might be, the proof in form of report and so on.

2.4 Analysis on the witness and their information

Note: The analysis is done by using law on witness. Since HRC Law no. 26/2000 does not regulate proving tools completely, this Law refers to Criminal Code no. 8 year 1981. Asides from that, an analysis is also conducted based on the elements of charge made by the general attorney.

1. The party inquired first as witness should be the victim witness (article 160 verse 1 sub verse b Criminal Code). However, until late April 2002 none of witness inquired in the trial is victim witness. Witnesses summoned are convicts in other cases of gross violation of human Rights in East Timor or those who have or had relations with convicts either as superior or as subordinate.

2. Witnesses summoned should be prevented from seeing each other before giving information in the trial. This is to prevent them from influencing each other and thus their information is no longer independent. Witnesses summoned should not be prisoners or people within one department because there is possibility that they see each other and prepare advantageous information in court.

3. Witnesses summoned by the general attorney should be a de charge witness (one that is for the convicts - summoned by the convict and his lawyer) and not a charge witness (one that against the convicts - summoned by the general attorney. For example, testimony saying that no member of TNI/Polri was involved in the chaos or testimony that the convicts had taken preventive action and investigation so that the chaos could be localized.

4. Witness information has to be information received from one in accordance to a criminal act that he heard, saw or experience and by also mentioning the reason he has information. Witness information is not opinion or assumption acquired through personal thoughts or information of an incident he obtained from other people's story (testimonium de auditu). However, some witnesses summoned by the general attorney is not in accordance with the Criminal Code since they received some information not from hearing, seeing or experiencing themselves but from reports, information, newspaper or radio and so on.

5. The argument given by the witness that the cause of the chaos is UNAMET fraud being the trigger of the anger of the pro-integration group fell by itself since UNAMET has reported that that fraud did occurred but it was not so significant as to change the overall result of the referendum and the Indonesian government had officially acknowledged it. However, the general attorney and the panel of judges let this argument stand without referring it to written evidences attached in KPP HAM report on East Timor.

6. Some witnesses who knew the incident and were on the spot stated that they forgot. Thus they could not explain how the incident happened in details. However, no effort was made by the general attorney and the panel of judges to help witness recall the incidents he experienced.

7. The testimony made by these witnesses has not been able to prove the general attorney's charge that the subordinates under the control of the convicts have committed violations against human rights in form of murder or assault and that the convicts did not try to stop or investigate the act committed by their subordinates.
a. Since testimony made in the court has not been able to show that, for instance, A as a subordinate of the convict has committed murder or assault toward one or more civilians, it also failed to prove that the murder and assault is a part of a systematic and widespread attack and that after the convict knew, he did nothing to stop or investigate the incident
b. The testimony of the witness indicates that the cause of chaos and the conflicting parties are the anti-integration and pro-integration groups while TNI/Polri's involvements in drilling, training and weapon stocking were not admitted by the witness. Thus, it is not easy to prove their involvement in this incident.
c. The testimony also strengthens convicts' position and crumbles the elements of charge, especially the information about their efforts in dealing with the chaos. The witness stated that if the convicts remained in their offices and did nothing, Father Bello might be dead by now or that the chaos would not only occur in 4 district but also in all parts of East Timor.

III. Conclusion

In terms of its capacity to prove the charge, the inquiry process of witness summoned by the general attorney until late April 2002 is still a concern. The general attorney seemed hesitant and less explorative. Witnesses summoned by the general attorney were not strong enough to prove the charge put by the general attorney. The indictments include "attack on civilians" as part of the charge, however, during the witness examinations the whole Court System (i.e. Attorney, Judges, and Defendants) seem to "agree" to use the term "chaos" instead.

This witness inquiry process has the implication to the proving of elements by the general attorney in his attempt to prove that the chaos in East Timor was a widespread one and that it was a part of TNI/Polri security policy in East Timor. The testimony tends to crumble the charge put by the general attorney. Meanwhile, the general attorney and the panel of judges failed to explore and dig further into the existing facts and testimony to prove the charge and the existence of systematic elements. Instead the witnesses are given the chance to conclude their own analysis and opinion on the incident, not to testify as regulated in the Criminal Code.

Therefore, in order to make the witness inquiry process more effective and efficient it is advisable for the general attorney to put priority to victim witnesses or witnesses with no direct relation to convicts kin or professional. The general attorney should avoid summoning fellow convicts since they have no proving obligation and their statement can be used against them. They should also avoid summoning witnesses with the potential of becoming the convicts in the violation against Human Rights case. Therefore, the general attorney should put forward other victims or evidences. The general attorney should also refer to the letters or statements made by the convicts or witnesses, charge files, and reports given by relevant parties.

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WSD**HANDA**CENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

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