# 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. 3

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Foreword

The Ad Hoc Human Rights Court for East Timor has went on for nearly four months now, since the commencement of the first trial in the month of February 2002.

At this point, the examination process has begun examining the witnesses. This process is the continuance right after the allegations and responses, as well as the Preliminary Verdict of the Counsellor ad hoc Human Rights Court panel of judges in further response towards the objections the Counsellor has put forward in connection with the case where court prevails over the case's authority. Therefore, the witness examination process is based on the attempt to obtain information regarding the legal facts that are involved with the items in the charges in the letter of allegations of the ad hoc General Attorney. This effort is done through questioning the witnesses that come forward to the stand. These questions are given to find the element of crime from the allegations, in this case, concerning crimes against humanity and command responsibility . It is expected that through the knowledge of the witnesses of the incident, it can help find the legal facts required in locating the truth in court.

Therefore, in this phase, the ability of the General Attorney to formulate clearly the elements of crime from the charges that has been formulated to become one important factor. As regulated in the regulations regarding the establishment of proof in the Criminal Conduct, the witnesses' information will be the main evidence in the court process . There are three important things that will be iterated further in this report: (1) General monitoring throughout the whole process of examining the witnesses for one month, (2) the content of the testimony, and (3) The procedureof examining the witness, which includes the rights of the witness within the court - particularly, in relation with witnesses who are victims.

1. General Overview

Until this moment, the court is still in the process of examining the witnesses. Since the initial examination that began in the month of February, there have been at least 31 witnesses (refer to the table).

From all the 31 witnesses, there are only three witnesses who are victims or family members of the victims that could be presented in the ad hoc Human Rights Court on East Timor. This is far from a ideal proportion, keeping

in mind how many people have been victimized as charged by the Attorney. The failure of the General Attorney of the Republic of Indonesia to present other witnesses, who are victims, makes the composition of the process of examining witnesses imbalanced to be able to be called as a fair witness process.

The incapability to produce witnesses who are victims proportionally with other witnesses actually demands the panel of judges objectivity to proceed with the necessary actions required, such as, replacing the presence of the witnesses by reading the witness judicial procedure or even discovering breakthroughs that may improve and aid the examination of the case .

Asides from that, the larger portion of the witnesses produced by the General Attorney comes from the Indonesian Armed Forces or the Police Department (ABRI / POLRI) that have the tendency to give information that doesn't strengthen the allegations compiled. Observing some of the examinations that are in court are on the contrary to strengthening the General Attorney's charges. First of all, the witnesses hold important positions in the organizational structure of the ABRI / POLRI that were examined in the initial process of the witness examination . Meanwhile, the Counsellor has also produced witnesses that weaken (a decharge) the charges against the defendants. The procedure of the examination of the witnesses in the Ad Hoc Human Rights Court refers to the regulations on establishment of evidence as regulated in the Criminal Code. The examination of witnesses is regulated in Articles 159-182 Criminal Conduct.

2. Investigation for the element of crime during the examination of the witnesses

Keeping in mind the case investigation is based on the judicial procedure as regulated in the Criminal Code, the testimonies play a vital role. Testifying in the court is one of the strongest evidence that may influence the judges' evaluation on the allegations charged on the defendants. By referring to this judicial process, the facts brought to trial will be the main thing that will become the foundation for the judges to make a decision on the case.

Therefore, the whole process of examining the witness is based on the allegations formulated by the ad hoc attorney. The whole case files will focus the charges on two important things. First, it regards the form of the crimes against humanity (article 7 Act No 26/2000). According to the allegations formulated by the ad hoc General Attorney, it is both in the form of murder and 'assault' (article 9 Act No 26/2000) as a part of an attack that is widespread and systematic (known as an attack) targeted to civilians. Second, related with the command responsibility from the defendants that comes from both the military and civil. The defendants having authority are accountable criminally on the gross human rights violations conducted by one's subordinates. As the superior, the defendants are charged as incapable to conduct and effective and appropriate control (article 42 Act No. 26/2000) .

The process of proving this charge has a few important focuses in relation to the efforts of the ad hoc General Attorney to transcend the element of crime from the crimes against humanity and command responsibility in the examination of the witness. In the element of crimes against humanity, the biggest challenge lies the establishing the evidence of a systematic and widespread element . Asides from that, the attorney should also be able to differentiate the meaning of murder in the context of crime against humanity and the general meaning of murder as a Criminal Act. In a court of crime, the defendants are usually the person who is accountable in one's position as the direct perpetrator or as an instigator or an accomplice to the crime . Meanwhile, the crime against humanity decides that actions are generally done individually, but can also be based on a collective action . In this light, there are a few elements that become an important foundation, that is, there is an authorized policy-maker that forms the series of incidents that resulted in an individual act, can be categorized as an understanding of crimes

against humanity.

Asides from this distortion, the translation of the concept within the classification of acts, under the definition of crimes against humanity, specifically involving the translation of "persecution", as 'assault' in Act No.26/2000, also creates a new challenge to establish a solid evidence that may not be easy on the judge .

In relation to command responsibility, the greatest challenge faced by the court is to establish solid evidence against the incapability to do an effective control. Also, the evidence regarding the qualification of disregarding information and taking the necessary appropriate actions to stop the gross human rights violations becomes an important point in investigations. This challenge increases, with the case related to command responsibility; the court is faced with actions not done directly by the nation's apparatus (civil or military), but on the contrary the actions done by the Civil Militia. Particularly, in regard to the chain for the establishment of evidence that direct control between the officials (civil/military) with the civil militia that conducted the direct violations. Similar difficulties were experienced in the establishment of evidence towards humanity crimes that involve the civil militia in the International Tribunal's case for Yugoslavia and Rwanda .

The weaknesses in compiling a charge should also be taken into account by considering the mentioned elements: the process of examining the witnesses becomes an important pillar of evidence on the elements of crime in this case. Moreover, keeping in mind the regulations in Criminal Conduct, concerning the examination of witnesses, provides recognition on how important facts are in a court during the examination of a witness. The witness' information that is used as evidence is what the witness has stated in court .

The process of examining the witness is coloured by the revocation of various important sections of the witnesses' testimony by the witnesses themselves in the BAP (Examination Records). In the case of Herman Sedyono Et.al, almost all the witnesses revoked their earlier testimonies as recorded in the BAP for a few items of significant information, such as the confession of attacks, coordinative meetings between government officials and military officials, the sound of gunshots and the formation of civil security groups, are all revoked during the examination in court . The reasons for revocation begin from acknowledging pressure, or statements in the explanation that were priorly intended as personal opinions, therefore, does not fulfil the qualification as a testimony. On this matter, the panel of judges as well as the General Attorney did not elaborate further during further examinations in the courtroom. In the files of Abilio and Timbul Silaen, the same thing happened.

The revocation of testimonies are also done on other crucial sections that were related to the testimony that there were inter-connections between the formation of civil security forces with the policy or support from those holding the power of authority in the regional level, such as in technical relations like guidance and trainings. Therefore, in the further examination of the witnesses throughout the month of May, the testimony stating that there had been attacks were almost none. In further developments, the panel of judges including the General Attorney also used the word 'clashes' as an understood substitute for these 'attacks'. The usage of the word itself imposes an implication on the fulfilment and evidence of crime in the allegations .

Another example of the problems found during the examinations of Adam Damiri's witnesses, was that the meaning of militia is stated as non-existent . Further on, in the same examination, the witnesses also revoked their iterations that stated the Pam Swakarsa was a reformation of the Pro-Integration Defenders .

In another part, the testimonies throughout the month of May is still coloured with statements that are classified as

opinions, and even feelings. This is also imposed in the questions forwarded by the panel of judges themselves to the witnesses. A few questions forwarded by the General Attorney or Counsellor does not wholly direct to testimonials in the form of legal facts concerning the incidents. In the examination of Adam Damiri, there were even questions asking the witnesses judgements of the decisions made by the Goevernor of East Timor, Ailio, in handling the security:

…

Q: Accordint to your knowledge, it exists. So, within the clash that was charged by attorney, the governor was involved. Do you think the Governor has no role whatsoever, and that this Governor always puts a lot of efforts?
A: He did.
Q: Was his effort maximum?
A: It was.
Q: To solve the problem?
A: Yes.
Q: Thank you! Sir, General.

The defendant's legal counsellor mainly forwards these questions. There is an abundant of questions that are personal by nature, asking the witness for their judgement on the incident, and not to confirm and validate the occurrence of the incident itself. There are other questions that often appear that is a confirmation by nature and dichotomised, as in yes-no answers, that is also leading the witnesses. This is particularly, in relation with the background found in the Note of Objection on the procedure of the trial and the allegations of the attorney .

The panel of judges in several examinations of the witnesses did similar things as demonstrated in the examination of Emilio Bareto, a witness who was a victim for the Timbul Silaen case file, as seen below:

…

Judge : You feel secure, right. Although like that, then suddenly an attack came. Seeing that, do you feel any disappointment on the security outside?
Witness : Disappointed

….

Panel of judges: By saying disappointed, why are you disappointed?
Witness: Because the condition could not be handled

….

Panel of Judges: With the militia, like that. How are you disappointed? Are you very disappointed, a little disappointed, or, how were you?
Witness : A little disappointed because I was one of the victims there.

Even in relation with a witness who was a victim, the questions from the legal counsellor are questions that trap the witness. During a witness' examination:

…..Beloved Madam, I beg for your honesty. Fatimah worked after you became a witness or before you became a witness? You don't need to look at the foreigner on your right, I know he was guiding you all along; you don't have to look at him. Look at me. If you have to look at the judge, just listen you don't have to look at my face. Madam, look at the judge only. Please Madam, look there. You're like being taught! My beloved Madam, Madam, Fatimah works after you became a witness or before you became a witness? (The witness did not answer) Thank you Madam, if you don't want to answer, I don't want to force you. But, from your bottom of your heart, my beloved madam, were your daughters raped or wanted to be raped? Madam, please answer, madam, raped or wanted to

be raped?

Asides from this, during the examination of several other witnesses, the questions forwarded by the General Attorney were actually out of the context of the case and tend to show contempt towards the court, thus resulting in a strong reaction from the panel of judges.

Counsellor: "… in the Soya village there was a riot. Now, say the Republic of Indonesia Police and the Army secured it; will it later be brought to court? With the witness' knowledge will the attorney and the Human Right Defenders secure the riots in Indonesia, so that he will not be brought to the Human Rights Court?
The panel of judges: (knocking the mike) You do not have to answer it, it was only an opinion.
(and still answered by the witness).
Counsellor: "….the hostaging of Suai's Danramil by Falintil, because it is an act of law, and during that time in the province of East Timor, does the witness know? Were they brought to a Human Rights Court?
Witness: No.
Counsellor: So, if a pro-independence group does a violation of Human Rights, the case is not brought trial, but the others are.

3. Witness Examination Procedure:

Based on the observation in the judicial process, particularly in the phase of examining the witnesses, there are a few particular points, especially related with victims who become witnesses. There are three important things related with the procedure of examining the witnesses that covers: (1) guarantee of security, (2) the witnesses' rights during the trial, (3) the schedule of the trials.

3.1. Regarding the Witnesses' Security

Until the 31st of April 2002, there are only three witnesses who are either a victim or the family member of a victim who had testified in court, produced by the General Attorney. Each of them are: Dominggas dos Santos Muzinho (for the Herman Sedyono, Et.al. case), Joao Perreira and Emilio Bareto (for the case of Timbul Silaen) .

There are three witnesses who are victims, or family members of the victim who cancelled their appearance. They are Armendo de Deus Granan Deiro, Frez da Costa, and Tobias dos Santos (all for the case of Herman Sedyono, Et.al). According to the District Attorney RDTL, Longhuinos Monteiro, the absences of these witnesses are because there is no security guarantee for the witnesses .

The Head of the Legal Information of Kejagung RI, Barman Zahir SH, in his press conference on the 5th of June 2002, considers Monteiro's reasons are unfounded, because the government of Indonesia has specifically guaranteed their safety, not only in the courtroom, but also at their accommodation and transportation.

Other than physical protection, the principles regarding a fair justice and the requirement of psychological protection is needed. Article 34 verse 1 Act. No. 26/2000, states that: "Every victim and witness within the gross Human Rights Violations have the right to all physical and mental protection from threats, disturbance, terror, and other violence from any other parties." Unfortunately, the government's regulations no. 2/2002, determining the Witness and Victims Protection is not equipped with the regulations regarding strict safety procedures.

Indeed, physical attacks as well as direct threats has not happened yet, or experienced by any of the victims who are willing to give their testimony. Even so, the witnesses will have difficulties in providing their testimony freely, if the visitors in the courtroom are allowed to scream and ridicule, while outside the courtroom there are groups that continuously demonstrating. The Indonesian Armed Forces Commander and a series of elite leaders initially attended the trial for gross Human Rights Violations in East Timor. Then, in every trial, there are always pro-integration groups and visitors that either cheer or ridicule the witness. Such a condition can be categorized as a form of pressure. These conditions should have been called to order by the court authorities. There should be a real effort from the authority of the courtroom to provide peace during the justice process.

Other problems related with this security are the questions the Legal Counsellor puts forward that tend to corner the witness and threat is implicated. In such events, the panel of judges have warned the legal counsellor several times. In one of the examinations, even the witness can perceptibly seen to be tensed and depressed, unwilling to face the legal counsellor . Furthermore, even unwilling to answer the greater part of a question that comes from one of the legal advisors, while other questions coming from different counsellors can be answered flawlessly.

Other than the security problem of the witnesses, there is another difficult problem of transporting victims or family members of victims to come and testify, as funds were not available. The Human Rights Court is not equipped with funding support to perform this procedure, while the UN, through UNMISET (United Nations Mission of Support in East Timor) could not provide any funds as it may be a precedent for cases in the future.

Also, there have been no clear extradicting agreements between the overnment of Indonesia and East Timor. Throughout the process in relation, extradicting is done through a memorandum of understanding (MOU) between the Foreign Department of the republic of Indonesia and UNTAET. Presently, East timor is no longer in the hands of UNTAET, but has formed their own government with the support of the UN through UNMISET, and there are no longer any explanations regarding the authority handover of the extradicting problem from UNTAET, based on the MOU mentioned to the government of East Timor as well as UNMISET.

3.2. The right to an interpreter

In the trial on 28th May 2002, for the case of Herman Sedyono, Et.Al, the witness Dominggas dos Santos Mauzinho was called to the stand. Towards this witness, the General Attorney informed that the witness could not really speak the Indonesian language very well, so an interpreter of the language Tetun, from East Timor was provided.

The panel of judges headed by Cicut Sutiarso refused the interpreter provided with a reason that there are no letters accompanying this interpreter and the certificate for an interpreter. The panel of judges finally decided to use the Indonesian Language and the interpreter is used only when it's necessary, without a clear criteria or limitations regarding the scale of necessity.

Until the end of the examination of that witness, the language used was the Indonesian Language. This causes the witness to stumble over his words and speak unclearly when questioned with a speedy intonation and unfamiliar terms. Therefore, the judges, Attorney General and the Legal Counsellor had to repeat the questions often. The witness himself, in most opportunities was finally conditioned to answer only yes-no questions due to the limitation in language. This condition automatically reduces the exploratory depth of the witness'.

The reason behind the panel of judges rejection of the assistance of an interpreter, was not very appropriate, keeping in mind that Tetun is a language not normally used as a standard language for communication in international relationships. Therefore, the requirements for a certified interpreter could not be fulfilled. On the contrary, the right of a person to be assisted by an interpreter when one is not able to understand or speak in a language used in a courtroom is one of the guarantees of a fair trial, as noted in article 14 verse 3 (f) ICCPR (International Covenant for Civil and Political Rights) . Asides from this, in the regulations concerning witnesses, according to the Criminal Conduct article 177, the panel of judges may appoint an interpreter if the witness or defendant do not understand the Indonesian language.

3.3. Court Calendar

In the trial on 29th may 2002, in the case of Herman Sedyono, Et.al, the panel of judges headed by Cicut Sutiarso gave an ultimatum to the Attorney General to produce all his witnesses who were victims that are able to come to end the process of examination in one week's time.

The judge's order is a consequence of article 31 Act no. 26 of 2000 that states that the case for gross human rights violations is limited for a maximum of 180 days, to be examined, and settled by the Human Rights Court since the case was brought to trial. The order of the panel of judges will bring about another bout of consequences that is the "contradiction" of the principle of justice and the principle of absolute law.

Seeing the difficulty of the Attorney general in producing his witnesses, there is a great chance that all the necessary witnesses who are victims are most likely not able to be examined in one week. This results in a very unbproportional composition of witnesses. And a fair judicial system will most likely not happen.

In the meanwhile, if for the sake of the principle of proportionality of witnesses in court is to be fulfilled, a long range of time is needed for the Attorney general to produce all the witnesses to testify, and thus, for all the witnesses of the defendant later on. Therefore, the process of the court will take a longer time. And if within 180 days since the case is brought to trial, and the panel of judges does not make a decision, then it is not impossible for the trial to be cancelled "in the name of law".

However, particularly for the case of Herman Sedyono, Et.al, the panel of judges are still giving one more chance for the Attorney General to produce witnesses who are victims, even if the court calender made by the judge has been exceeded.

Jakarta, 13 June 2002.

Table: Witnesses that have testified until the end of May 2002

| Defendant No | Witness | Position | Date of Examination | Information |
|---|---|---|---|---|
| Abilio Jose Osorio Soares | 1 | M .Nur Muis | Former Danrem 164 WD | 17/4/ 2002 |
| | 2 | Herman Sedyono | Former Regent Covalima | 17 /4/2002 Defendant for Case File III |
| | 3 | Suprapto Tarman | Former Regent Ailio | 18/4/ 2002 |
| | 4 | Tono Suratman | Former Danrem 164 WD | 18/4/ 2002 |
| | 5 | Timbul Silaen | Former Head of the District Police East Timor | 24/4/2002 Defendant for Case File II |

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