

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. 4

Preliminary Conclusive Report
Case of Timbul Silaen, Abilio Soares dan Herman Sedyono and partners.

INTRODUCTION

East Timor, which used to be the Republic of Indonesia's 27th province, has become a new nation. For Indonesia, the establishment of Timor Lorosae 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 Timor Lorosae 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 Act 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 BASIC 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 Act 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 impact 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.

Act 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. 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 year 2000:

"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 inclarity opens the room for various interpretation in the court. Thus the procedure and process of proof for the perpetrators indicted by the same Articles of the act become difficult and the indictment itself become ambiguous.

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 kepada 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 "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.

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. 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 Act no.26/2000 has also included (command responsibility). However, Article 42 verse 1 of the Act has contained several weaknesses with major legal consequences. The definition of command responsibility in the Act 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, ..."

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 Act 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 conducting or has just conducted 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..."

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 proper and required 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 "proper" and "required" action that should be conducted by the commander. This Article is also implying that the court has to focus the attention to the process, whether or not the action is proper, whether it is included in 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).

c. Inappropriate Law of Procedure

Act No.26 year 2000 does not specifically include all the aspects that is needed in ensuring (fair trial). Although it is the basis of a court that process extra ordinary crimes, the Act is not equipped with an extra-ordinary criminal

procedural law, and actually explicitly referring to the common procedural of criminal law (KUHAP), and diminish the chance of using other alternative procedural law. 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) letter, (4) hard evidence, and (5) defendant's statement. These five would not be adequate in proving gross violation of human rights, since in proving it the prosecutor would need a wider parameter.

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.

The three indictments that has been passed so far substantially show that the defendants are being indicted by these points: First, on crime against humanity (Article 7 Law No.26/2000), in form of killings and persecution (Article 9 Act 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 commanders failed to provide effective control in correct manner (Article 42 Law No.26/2000).

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 impact of the incidents factually, though 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". Thus in all the indictments we would not be able to get the comprehensive overview that the crimes were indeed systematic or widespread.

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 and widespread, those directly related in the making of policies and implementing the policies should be called to testify.

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 fact 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. It is expected that the knowledge of the witnesses on the incident would assist in locating the needed legal fact 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 witness examination process is colored by the elimination of some crucial content of Investigation Procedural Note (would be referred to as BAP) 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 of gun and the formation of civilian security forces. 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.

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, the witness has also withdrawn his statement that PAM SWAKARSA is a transformation of Pejuang Pro Integrasi (Pro Integration Warrior)

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 referendum. 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. There were only 3 victims from different incidents, one of them from Suai, namely Domiggas dos Santos Mauzinho for the case of Herman Sudyono. 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 counselors's badgering, causing the witness, who was not fluent in Indonesian, became badly flustered.

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 malpractices in the referendum.

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.

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.

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. 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 examined in the beginning of the process.

Witnesses proposed by the prosecutor are also more to 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 "turmoil" or a witness who said that the defendants has done prevention or investigation acts so that the turmoil can be localize etc.

Base on the observation of the trial process, especially in the witnesses investigation in the trial, especially 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 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 imbalanced 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 (Investigation Procedural Note) or even to find innovations that can help the case investigation process.

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 witnesses, 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 investigation 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, with specification as follows:

Case Planned Investigates Absent excuse

Timbul Silaen 10 persons:1. Emilio Bareto2. Joao Fareira3. Jose Menez Soares4. joao Bernandido5. Maria Ferreira Soares6. Nelio Mesquita da Costa Rego7. Vicente AG Sousa8. Jose Gaetano Da Costa9. Don Bosco Salganya10. Marcelino Martins Ximenez 2 Persons1. Joao Fareira2. Emilio Bareto Security problems:5 persons (from East Timor) and unknown address: 3 persons (from NTT)

Herman S, and friends 4 Persons1. Dominggos dos Santos Mauzinho2. Fres Da Costa3. Tobias Dos Santos4. Armando De Deus 1 person1. Dominggos Dos Santos Mauzinho Resigned for security reason

Abilio Soares Victims has not explained by the prosecutor. 2 persons (taken from other cases' witnesses: Timbul Silaen case):1. Emelio Bareto2. Joao Fereira Not clear

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 Prosecutor, 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 investigation some witnesses who has been brought to the court on May 30th, 2002, security has prepared on in the form of one platoon of regional police (Polda) and one platoon of Polris' pioneer troop, still most of the witnesses are afraid to be investigated in Indonesia.

Beside physical security, fair trial principles requests for a physiological protection. Beside that, Article 34 verse 1 ACT No. 25, 2000, also stipulated that: "Every victim and witness in Gross Human Rights Violations is entitled to physical and physiological protection from intimidation, threat, terror, and violence from all parties". Unfortunately PP No.2, 2002 which regulated Witness and Victim Protection is not equipped with prevailing security procedures.

Even though there is 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. 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 Prosecutors who may at times provoke and tend to threaten the witness. On several occasions the judges have warned the Prosecutor. In one witness cross-check section, the witness became tensed and pressed, unable to face the Prosecutor and even rejected to answer most of the questions coming from the Prosecutor.

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 UNMISSET (UNMISSET (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 Indonesian 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 UNMISSET, and there are questions about authority transfer to East Timor or UNMISSET.

Related with those security problems, actually the East Timorese 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. 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. UNMISSET 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 Sutiarmo rejected the interpreter with the reason that there was no letter and certificate as an interpreter. The judge council then finally 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 their 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 verse 3 (f) International Covenant for Civil and Politic Rights (ICCPR). 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 Sutiarmo 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 Act 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 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 fact 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 dissatisfaction towards the result of the referendum and the judges have also failed in pursuing the subjects, to know whether the statement was fact 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 act pro-actively in conveying the material truth. They also have the authority in rejecting or overruling 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 from 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 should 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 chaos 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. 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. Information Access 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 5 new cases processed without no available information for the public, thus the initial phases of the trial process for the new cases went by unnoticed.

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.

b. The Room of 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.

Regulation on the Order of the Court

Criminal procedural Law Regulation of the Head Judge

Article 217u Chair Judge lead the investigation and keep the code of conduct of the court.u 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 218u In the court room everybody have to show respect to the court.u Everybody whose behave improperly and violate code of conduct after given warning from chair judge will expelled from the court room.u In the case of violate the code of conduct as been Observer/Watcher are not allowed to wear jacket/coat and hat except peci

Act 219u 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.u Without formal letter, court security officer can examine the people. u 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.

Act 232u Before the trial begin, clerk of court, prosecutor, Prosecutor of law and observer/watcher are already take/sit in their designated place. u By the time the judge enter or leave the court room every participant must stand to honor.u During the process of the trial, everyone who goes in or out of the room of the trisl 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

VI. SUMMARY 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 fact 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.

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 Act 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.

Issued in Jakarta, July 4, 2002