

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. 9

“CRIME AGAINST HUMANITY WITHOUT ACCOUNTABILITY”

Introduction

The Ad Hoc Human Rights Court for the East Timor Case up to now has issued verdicts for 6 dossiers. At the first phase the defendant Abilio Soares (former East Timor governor) has been judged guilty and was prosecuted to 3 years of imprisonment, whereas Brigjend (Pol)(Police Brigadier General). Drs. Timbul Silaen (former Head of Regional Police Force for East Timor) and Herman Sedyono et. al (for the attack of Ave Matia church in Suai) has been judged not guilty of the gross violation of Human Rights in East Timor.

In the second phase Eurico Guterres (former vice commander of PPI/Commander of Aitarak) has been judged guilty and prosecuted to 10 years of imprisonment, while Endar Priyanto (former Military Division Commander (Dandim)1627 Dili), Asep Kuswani (former Military Division Commander (Dandim)1638 Liquica), Adios Salova (former Head of Regiment Police Force (Kapolres) Liquica) and Leonito Martins (former Head of Regency of Liquica) have been judged “not guilty” and was released from all charges put forth by the Ad Hoc prosecutors.

Legal Basis and Principles Employed by The Judges as the Ground of the Judgment

By reviewing some of the judgments of the court, where only two defendants have been judged guilty, both civilians (Abilio Soares and Eurico Gutteres), the assumption that this court in general has failed in determining the parties accountable for the gross violation of Human Rights in East Timor is reaffirmed. The absence of guilty verdict on defendants from TNI and Police circle has invoked questions on how the facts have been revealed in the trials, how the judges have been extracting the legal facts revealed in the trials and based on what grounds the judges have been extracting the legal facts as well as how the judges have been applying the legal facts extracted with the provisions indicted upon the defendants.

In this position, the deliberation of the judges has become very important in explaining and constructing the appropriate decision accordingly to their position as the organ of the court that is assumed to comprehend law. In the context of Human Right Court, the judges' knowledge of law should include the particulars concerning if there is a lack of necessary legal instruments and/or an urgency for legal interpretation. The Ad Hoc Human Rights Court that is legally processing cases related to crime against humanity is the first ever in the judicial history of Indonesia. Legal problems, both formal and material in nature, often arise in the process of the trial, creating hindrances in the process of the trial.

In the practice of the judicial system, absence of law often results in the widening gap between the execution of law and justice. In this condition, the role of court becomes crucial in interpreting the law and not only observing the provisions literally. Aside from that, the provisions of law should also be reviewed from their relation with the judicial practices concerning similar cases. This would represent the real legal condition, thus the gap between positivist law and the law developing in the society can be avoided or at least minimized.

Law No. 26 year 2000 about Human Rights Court is a law that much adopts the provisions, norms, and principles of International Law. By observing the process of the Ad Hoc Human Rights Court thus far, it can be seen that the law itself is quite insufficient in international-legal-standard-trials concerning gross violations of human rights. The limitations of the national legal instrument require the judges to refer to relevant international jurisprudence and judicial practices in order to ensure the verdicts reached would be relevant with the spirit and objectives of the enactment of Law No.26 year 2000.

Analysis on the legal principles or basis used by the judges to construct their judgments is an important factor, because they affect the application of law upon the facts revealed in the trials. The most important measuring stick is the legal principles and basis used by the judges in the substantiation process to extract the legal facts from the evidences presented in the trials and the legal basis or principles utilized in analyzing the elements in the articles upon which the defendants are indicted.

The Substantiation System and The Judges' Perspectives upon the Victims' Testimony

The substantiation method to summarize legal facts is basically bound to article 183 of the Criminal Procedural Law (KUHAP) which sets the condition that there should be two legal evidences from which the judges draw the belief that a crime has been committed and the defendant is the accountable party. To be considered legal, the evidences should conform to article 184 (1) KUHAP, which if related to the article 183, then a defendant can only be judged guilty if his/her crime can be proven with at least two legal evidences.

The above substantiation method is the method adopted in common criminal trials, whereas since the crime against humanity is an extra-ordinary crime, it requires a different substantiation method or system. The international judicial practices can serve as a relevant guideline, including in the positioning of victim-witnesses' testimony against those who are not victims.

In the judgment for defendant Eurico Guterres, the panel of judges employs legal basis from national law as well as the jurisprudence in international judicial practices concerning the trial for gross violations of human rights. In determining legal facts from the testimony of witnesses and other evidence, the panel has compared between the national criminal procedural law as the basic provision, especially concerning case substantiation (see table) with the international legal practice, of which the judges quoted from a case in the jurisdiction of ICTY which set aside the principle “one witness is not a witness”, since in that particular case many potential witnesses were afraid of revenge. In the deliberation in the judgment, the panel has adopted the legal fact from witnesses who are most likely to be more trustworthy, namely the victim-witnesses, who experienced and witnessed the incident first-hand, and whose testimonies were interrelated and corroborating one with another. The affirmation from the panel that has put more trust to the victim-witnesses’ testimonies is related to the extraction of the legal fact that there was involvement between the defendant in that trial and other parties in committing omission with the attack.

In the case of Endar Priyanto, the panel of judges gives no detailed explanation on the involved considerations and legal basis in concluding the legal facts. The panel of judges in this case has employed testimonies of victim-witnesses but does not firmly adopt them as legal facts by still elaborating upon the testimonies of other witnesses. The panel is reluctant to firmly conclude that there were members of TNI involved in the attack of Manuel Carasca-lau’s residence.

In the case of Asep Kuswani, et, al, the panel of the judges in extracting the legal facts has not succeeded in proving the involvement of TNI members and police officers in the attack of Father Rafael’s residence/ Liquica church complex. The presence of the victim-witnesses’ testimonies that firmly confirmed the participation of members of TNI and police in the attack are not adopted as a legal fact by the judges, due to the testimonies of other witnesses negating them.

Comparing the three cases, the system of substantiation adopted in the three cases is accordingly to the substantiation system stipulated in the KUHAP. However, each panel attains a different perspective in valuing the testimony of a victim witness. Theoretically, there is an opportunity in employing the testimonies of a victim witness, which usually has to stand on their own due to the small number of victims willing to testify, if the judges can interrelate the testimonies of the individual witnesses.

Legal Basis and Principles in Elaborating the Elements/ Articles of the Indictment

In the above dossiers, one can see a basic difference in the elaboration of the elements of the articles the defendants are indicted upon. The difference is concerning the basis of the judges’ consideration in elaborating the elements of the articles the defendants are indicted upon by employing international jurisprudence and norms that are relevant with the case on trial.

In the case of Eurico Guterres, the panel of judges firmly refers to the practices of the Nuremberg and Tokyo trials, ICTY and ICTR in the elaboration on individual responsibility. The judges also employ international provisions in elaborating command responsibility (see table). The considerations in the elaboration of each element indicted are

always explained by utilizing the practices in the international human right courts, the developing legal doctrines, and the principles and stipulations of international law. The panel judges firmly states that the principles of international law are relevant with the gross violations of Human Rights in East Timor.

In the case of Endar Prianto, there are not many cases in the international human rights courts nor the international law's doctrines and principles employed in the considerations of the elaborations of the elements in the articles the defendant is indicted upon. The panel of judges only refers to the case of Akeyesu in the ICTR as a comparison in explaining command responsibility.

In the case of Asep Kuswani et. al, the panel of judges in elaborating the elements of the articles of the indictment does not include any case-comparison nor international law's provision. The judgment is constructed by employing the logic of common criminal code without offering neither adequate references nor sources from the international practices in interpreting and elaborating each element contained in each article of the indictment.

By reviewing the cases of Eurico Guterres, Endar Prianto and Asep Kuswani et. al, one can already assess the quality of each judgment. An important aspect is the awareness of the panel of judges that the existing national legal instrument for the Ad Hoc Human Rights Court is insufficient, making legal interpretation crucial, since in absence of law judges are obliged to do so. From the three cases it can be seen that there are difference in the interpretations of Law no. 26 year 2000.

Gross violation of Human Rights and Crime Against Humanity in the Judgments

The judgments of the three dossiers, namely: Eurico Guterres, Endar Priyanto and Asep Kuswani et. al, concerning two gross violations of human rights namely the attack upon the residence of Manuel Viegas Carascalao and the attack of the residence of Father Rafael, state that the incidents are proven to be gross violations of human rights as stipulated in Article 9 letter a and 9 letter h Law No 26 year 2000, namely crime against humanity in form of widespread and systematic attack, knowing the attack is targeted upon civilians, by murder and torture. (see table)

Gross Violations of Human Rights in the Judgment

CASE IN THE INDICTMENT IN THE JUDGMENT

EURICO GUTERRES Crimes against Humanity based article 9a (murder) and article 9h for torture in Law No 26 year 2000 Substantiated

ENDAR PRIYANTO Crimes against Humanity based article 9a (murder) and article 9h for torture in Law No 26 year 2000 Substantiated

ASEP KUSWANI Crimes against Humanity based article 9a (murder) and article 9h for torture in Law No 26 year 2000 Substantiated

The panel of judges in the judgment of Eurico Guterres states: “that in this case based on the facts revealed in the court there were violence, murders, tortures subjected upon the community and arson with similar pattern in almost all parts of East Timor which consisted of 13 regencies.”.....”that the violence, murders, tortures committed by the Pro-Integration group were a part of the plan and strategy to make the pro-integration side win in the referendum, when that objective was also in line with the government’s policy, which is to make East Timor remain to be a part of the united republic of Indonesia.”.....”based on the above consideration the panel of judges view this element is proven since it has been proven by law.

The panel of judges in the judgment of Endar priyanto states:”with the above understandings as guidelines along with the legal facts revealed from the testimony of the witnesses, the testimony of the defendants as well as other efforts of proof, the panel views that the incidents on April 17, 1999 as gross violations of human rights based on the following reasons, first, the attack had claimed victims, dead or wounded, who were civilians, second, the incidents had been executed systematically, which can be seen from how organized the group of attackers and pro-integration/autonomy in using generic weapons, blades, arrows to consciously commit murder and torture, resulting in death and injury that they intended to be afflicted upon the victims. There was a sufficient time-span for the group to assemble until it reached hundreds in number. Third, that the groups was organized is proven by the fact that there were leaders of the pro-integration/autonomy group”

The Panel of judges in the judgment of Asep Kuswani case stated that:”based on the above line of reasoning according to the court’s opinionall the elements contained in article 9a has...that the indictment of the prosecutor stating that there have been gross violations of Human Rights in form of murder has been fulfilled”.....” thus since all the elements concerning torture have been fulfilled, the elements of torture on grounds of difference in opinion, ethnic, race, religion, sex or other reasons have been proven.

Based on the above opinions of the panels it can be seen that up to the level of determining whether or not there have been gross violations of human rights as stipulated in Article 9a and 9 h Law No 26 Year 2000, the panels for the three cases have agreed with the prosecutors’ indictment.

The Perpetrator of Crime Against Humanity In the Judgment

It has been explained that at the phase of determining whether or not there have been gross violations of human rights as stipulated in Article 9a and 9 h Law No 26 Year 2000, the panels of judges have succeeded in determining that the incidents were gross violations of human rights. However, at the phase of determining who the actual perpetrators are for the crime against humanity, each panel has shown stark differences (see table):

The Perpetrators of the Crime Against Humanity in the Judgments

CASE IN THE INDICTMENT IN THE JUDGMENT

EURICO GUTERRES The perpetrators are the troops of or the group named aitarak and the troops of fighters for

integration (pasukan pejuang intergrasi), with troops of TNI. The perpetrators are the militia groups aitarak and besi merah putih along with members of TNI from Maubara who participated in the attack after the mass ceremony in the lawn of the East Timor Governor Office, and the security apparatus committed negligence in preventing or stopping the attack.

ENDAR PRIYANTO The perpetrators are Militia groups and members of TNI from Dilli and Liquisa The perpetrators are the pro-integration group Besi merah putih, whereas the existence of perpetrators who were TNI members from Military Rayon Commando of Maubara has been denied by several other witnesses

ASEP KUSWANI dkk The perpetrators are the Besi Merah Putih group, TNI members and members of RI Police Force The perpetrators are the besi Merah Putih group.

The panel of judges in Eurico Guterres' judgment stated:....."that the panel of judges believes that from the existence of facts as elaborated above, the participating mass group attacked the refugees was a part of the members of Aitarak and Besi merah putih whose emotions were provoked after listening to the defendant's speech, and enacted his intent to murder the anti-integration group by attacking the refugees."

The panel of judges in the judgment of Endar Priyanto stated:....." that based on the legal facts revealed during the trial, it is clear and proven that the perpetrators of the attack were a part of the pro-integration group (besi merah putih) using generic weapons, blades and arrows upon the victims who were in the residence of Manuel Viegas Carascalao on 17 April 1999."....."that though the prosecutor in his indictment stated that there were TNI membersand from the facts revealed in the trial, there were TNI members from the Koramil Maubara, which was not included in the jurisdiction area of Military Division Command (Dandim) 1627 Dilli, whose presence was however denied by several other witnesses."

The panel of judges in the judgment of Asep Kuswani case stated that:....."Considering that based on the above elaboration the court views the incident happened on 6 April 1999 at the residence of Father Rafael within the Liquisa Church complex as an attack from one group, namely the BMP, upon another party, namely the pro-independence refugees who were at time in fear and seeking a safe refuge."....."based on the above facts thus the perpetrator of the violation is the Besi merah putih group."

From the three dossiers, only in the case of Eurico Guterres the panel of judges decides that the perpetrators in the attack were the members of TNI accordingly to the indictment of the prosecutor, whereas in the cases of Endar Priyanto and Asep Kuswani the panel of judges of each case is of the opinion that there is not any proof that there were members of TNI involved. In the case of Eurico Guterres the panel of judges does only state there was an attack by military members, but also the security apparatus at the time neglected to do the appropriate actions.

Upon this issue the panel of judges in Eurico's trial states: "that from the testimonies of the witnesses which truth is credible, since one with the other are interrelated and corroborating and thus the panel judges can obtain the legal fact which truth can be affirmed, that the militia attacking Manuel Carrascalao's residence on 17 April 1999, consisted of pro-integration Militia from the Dili Aitarak group, and the Besi Merah Putih group as well as several TNI members from Maubara whose names have been mentioned by the witnesses"(page 102)

....” Considering that based on the above facts, there was an act of omission committed by the defendant upon his subordinates in the attack upon Manuel Carrascalao. This omission was not only exercised by the defendants but also by the military apparatus, Danrem (Military Regiment Commander) Tono Suratman, authorized civilian officials, including the governor and the Mayor of Dili, along with other security apparatus who ought to have been responsible. (page 150)

Command Responsibility “Crimes Against Humanity” in the Judgment

The implication of the judgments on the perpetrators of crimes against humanity as elaborated above in turn affects in determining who should be accountable for the crimes as stated in the indictments (see table)

Perpetrator in the Judgment

CASE IN INDICTMENT IN JUDGMENT

EURICO GUTERRES The one criminally accountable is the defendant based on civilian command responsibility. The defendant is responsible on the conduct of his subordinates. Aside from him, the judges state that Tono Suratman, the Governor of East Timor, the Mayor of Dilli, and other TNI apparatus have exercised omission on the attack.

ENDAR PRIYANTO The one accountable is the defendant based on military command responsibility. The defendant can be held responsible because there is no proof that his subordinates within the command line has participated in launching the attack.

ASEP KUSWANI et. al Asep Kuswani : accountable based on his position as a military and civilian commander
Leonito Martins : accountable based on his position as a military and civilian commander
Adios Salova : on his position as a military and police commander
The defendant Asep Kuswani cannot be held criminally accountable since there is no proof that his subordinates have conducted the attack. Leonito Martin cannot be held responsible because there is no proof that there was any relation between the defendant and the perpetrators. Adios Salova cannot be held responsible because there is no proof that there was any relation between the defendant and the perpetrators.

The panel of judges in the judgment for the case of Eurico Guterres stated :”Considering that since there has been a fault of the defendant namely the members of Aitarak and BMP who attacked Manuel Carrascalao’s residence as the result of the defendant failing to exercise correct and appropriate control upon his defendants whereas the defendant as the vice-commander (of PPI) and the commander of aitarak acquired the ability to prevent the deeds of his sub-ordinates and thus for the misdemeanors of his sub-ordinates he can be accountable as their superior or a leader of PPI.””Considering that based on the above facts there has been omission exercised by the defendant on his subordinates in the attack of Manuel Carrascalao’s residence. This omission was not exercised only by the defendant but also by the military apparatus, Danrem Tono Suratman, authorized civilian officials, including the governor and the Mayor of Dili, as well as other security apparatus who should also be accountable.” (page 150)

The Panel of Judges of Endar Prianto case stated that:”from the legal facts revealed in the trial the defen-

dant knew that there was a gross violation of Human Rights at the residence of Manuel Viegas Carascalao on 17 April 1999 from the report of witness Salmon Manafe, however in that incident it is not proven that there was any involvement of TNI members from Kodim 1627 Dilli”.....”that though above it is stated that the defendant knew and acquired the information, but since as elaborated above there was no subordinate of the defendant proven to have committed gross violation of human rights and aside from that the defendant did not neglect the informationthat since the gross violation of human rights committed by the subordinate of the defendant is not proven, in relation with the principles of command responsibility, thus the panel concludes that the defendant should not be considered criminally accountable on gross violation of Human Rights, which is not proven to have been conducted by his subordinates”

The Panel of Judges in the judgment for the case of defendant Asep Kuswani states:”the first defendant Asep Kuswani did not have any hierarchal command and effective control relation with BMP which was included in the pro-integration group and on the other hand BMP was not a troop under the jurisdiction and effective control of defendant Asep Kuswani,...that defendant Asep Kuswani cannot be held accountable for the gross violation of human rights”.

The panel of judges in the judgment for defendant Adios Salova states:...” between defendant Adios Salova there was no command relation nor effective control upon BMP and likewise BMP was not under the command and effective control or under the power and effective control of the defendant”.

The panel of judges in the judgment for defendant Leonito Martins state:...” there was no and did not acquire the relation of... superior-subordinate within the power of control of order upon the BMP and in turn BMP was not a troop under the jurisdiction and effective control of the defendant”.

From the three case dossiers, also only the panel of judges from Eurico Guterres case that has succeeded in pointing out the existence of one’s command responsibility for the conducts of one’s subordinates. Whereas the panels of judges for Ender Priyanto and Asep Kuswani et. al. have failed in showing the command responsibility in both cases. The argument of the judges was merely “no proof that shows the subordinate-superior relation between the perpetrators and the defendant, thus the defendant is free from the command responsibility”

The Victims’ Right for Compensation in the Judgment

The granting of compensation, restitution and rehabilitation for victims of gross violation in Human Rights in East Timor ought to have been announced in the judgment of the judges, accordingly to Governmental Regulation (PP) No 3 Year 1999 on compensation, restitution, and rehabilitation for the victims in the Ad Hoc Human Right Court for East Timor. However, in reality, none of the panels of judges in the three cases includes the rights of the victims in their judgments. This is so even though in the deliberation on gross violation of Human Rights, all panels decide that there have been gross violation of Human Rights in East Timor. (see Table).

Right of Victims in the Verdict

CASE JUDGMENT

EURICO GUTERRES Not mentioned in Judgment

ENDAR PRIYANTO Not mentioned in Judgment

ASEP KUSWANI et. al. Not mentioned in Judgment

This absence of the fulfillment of the victims' right for compensation is bizarre, considering the panels' agreement that gross violations of Human Rights resulting in victims have occurred in East Timor (see table)

Amount of Victims in the Indictments and Judgments

CASE IN INDICTMENT IN JUDGMENT

EURICO GUTERRES 12 dead3 injured 11 dead3 injured

ENDAR PRIYANTO 12 dead3 injured There were victims dead or injured, but of indefinite number

ASEP KUSWANI et. al 22 dead21 injured 5 dead20 injured

Thus the failure in including the right of the victims in the judgments has violated and diminished the right of the victims for compensation, restitution and rehabilitation. Not on this is a violation to the Government Regulation (PP) No 3 on compensation, restitution and rehabilitation for victims, it also violates the International principles concerning this right as contained in the Boven Principle.

Summary

The judgment of the Judges for the three cases (except the case of Eurico Gutteres) in general has shown the Ad Hoc Human Right Court's failure in determining the accountable parties for the gross violations of Human Rights in East Timor.

The Court's judgments for the three dossiers have shown similar patterns with the three previous judgments, which is the indication of the tendency to put away civilians as to be the accountable parties for the gross violation of Human Rights in East Timor and to rescue the military personnel from prosecution.

This court has failed in comprehending and relating the definition of command responsibility with the incidents that happened in East Timor where the superiors/commanders ought to have been accountable for, and thus this Ad Hoc Human Rights may not be a good precedent to the future Human Right Court processes.

The judgments of the AD Hoc Human Right Court thus far is a possible serious threat to the upholding and protection of Human Rights in Indonesia, and serve as an indication that the legal system developed has failed thus far in struggling against crime against humanity.

The court has also failed in providing justice for the victims of gross violations of Human Rights in East Timor by neglecting to address the victims' rights to reparation, namely for compensation, restitution and rehabilitation, in

the judgments issued..

These failures have been initiated by the failure of the prosecutors in exercising its functions and duties effectively in proving the indictment, and thus this proves the lack of will, seriousness, and sincerity of the prosecutors in executing their duties.

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