The failure of Leipzig repeated in Jakarta

Final Assessment on the Human Rights Ad-Hoc Tribunal for East Timor.

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Lembaga Studi Dan Advokasi Masyarakat (ELSAM)

I. Preface : The scope

The first session of the Ad-Hoc Human Right Court that started since February 21st 2001 for the gross violation of human right in Timor Lorosae that happened from April until September 1999 has ended. This is the first time in judicial history in Indonesia when the gross violation of human right conducted by high rank military, police and civilian officials is brought into the court, that is the Ad-Hoc Human Right Court. This Court is established under the provision of the Act No. 26/2000 after the failure to establish it through Government Regulation to replace Law (PerPu) by President BJ. Habibie. By establishing this Court, Indonesian Government wants the international community to see that Indonesia has a strong willingness and so determined to fulfill its obligation to bring into court those who are strongly supposed to have committed *jus congens* crimes according to international law. This is an obligation towards international community as a whole *(obligatio erga omnes).*

Is the trial against those who are allegedly responsible in the Ad-Hoc Human Right Court conducted in compliance with international principles about the fair and impartial court? This Final Assessment, based on the result of the court sessions observance (February 2001 – July 2003) tries to objectively present the process of the court sessions for the cases that deeply shocked the conscience of international community. All the aspects of the court session - the indictment composed by the state prosecutor, examination process, the charge proposed by the state prosecutor, the judge's verdict, and the session in the next stage – are scrutinized and evaluated in this Final Assessment.

II. State Prosecutor's Indictment: Proving the crimes of or protecting the defendant?

The twelve indictments proposed generally use the provisions about command responsibility in article 42. In article 42 there is a position distinction between military (verse 1) and police and other civilian (verse 2) in relation to the crime against humanity (article 7 point b and article 9 point a about murder and article 9 point h about persecution, in relation to criminal charges (article 37 for crimes against humanity in the form of murder and article 40 for crimes against humanity in the form of persecution).

According to its characteristic, the twelve indictments are divided into cumulative, alternative and mixed indictment. The cumulative indictment consists of the first charges for crimes against humanity in the form of murder and the second charges for crimes against humanity in the form of persecution. The alternative/mixed indictment consists of primary, subsidiary and more subsidiary charges. The same with cumulative indictment, the alternative/mixed indictment consists of the charges for crimes against humanity in the form of murder and persecution.

a. The weakness of the indictment's substance.

The structure of the indictment composed by the state prosecutor in this Ad-Hoc Human Right Trial suffered some fundamental weaknesses. First, for the twelve indictments, the state prosecutor stated only 5 *locus delicti*, i.e. the incident at Liquisa church complex, the residence of Manuel Carascalao in Dili, Dili Diocese, the residence of Bishop Belo in Dili and the Ave Maria church complex at Suai, Kovalima. As for *tempus delicti*, the state prosecutor only mentioned the incidents that happened on April 1999 and September 1999. This statement is so different from the result of The Inquiry Committee for Human Right Violation in Timor-Timur that found the incidence of violence and gross human right violation in Timor-Timur in more than the 5 *locus delicti* mentioned above and happened since January 1999 until October 1999.

Second, in most of the indictments, the state prosecutor merely tried to present the systematic aspect by describing the sequence of incidents that happened at the specific period of time. This model of indictment is used in the indictment for the former Head of Provincial Police (Kapolda) in Timor-Timur Timbul Silaen, Adam Damiri, Noer Muis, Tono Suratman, Hulman Gultom and Soedjarwo. As for other indictments like the indictment for Eurico Guterres, Endar Priyanto, Jajat Sudrajat, Herman Sedyono c.s, and Asep Kuswani c.s., the state prosecutor is hardly able to construct the systematic aspect in the indictment.

Meanwhile, in the twelve indictments, the state prosecutor presented the widespread aspect by showing the widespread *locus* geographically and the victim massiveness. The widespread *locus delicti* is showed by the incidence of attack that started in one specific place/locus and then expanded to other place/locus in the same region, whereas the victim massiveness is showed by the number of victim who is dead and seriously injured.

For the indictment with more than one *tempus delicti / locus delicti*, the state prosecutor did not find a big difficulty in constructing the widespread aspect either through geographical *locus* or through victim massiveness. But, for the indictment with only one *tempus delicti* and *locus delicti*, the state prosecutor faced difficulty to construct the widespread aspect that based on geographical *locus* so that the state prosecutor only presented the widespread aspect based on the victim massiveness.

Third, almost all the perspective used in the indictment tried to ignore the linkage between militia groups with oppressive state apparatus, i.e. military and police. By ignoring the context for the emergence of pro-integration militia as the direct actors in the existence and security policy of the military, the indictment changed the scope of the incident from a crime against humanity to a horizontal conflict among civilian groups.

In the indictment, the existence of militia is described as a distinct and separated phenomenon from the military institution. Even the definition of militia is not found in the indictment. This group is identified merely as one faction in the horizontal pro and contra conflict for independence. This is why the indictment failed to show the emergence of militia as a group that "by design" is established as a part of wider security policy in Timor-Timur. This is also the reason for the disappearance of the direct role played by military and civilian officials in the gross violation of human rights conducted by the pro-integration militia.

Fourth, the state prosecutor's indictment also ignored the linkage between the gross violation of human right and the previous incidents so that some violence conducted by military officials and the militia groups established by military became unidentified. Otherwise, the indictment exactly presented the problem in Timor-Timur as a tension and a horizontal conflict between the pro independence fighters and pro integration groups who both unsatisfied with the referendum process.

By using that perspective, the indictment is hardly able to strongly support the charges for command responsibility. The central element in this indictment should be the effort to express an appropriate measure to determine whether the conduct and policy of civilian or military authority can be categorized as an information negligence and also ineffective. This is highly connected with the concept of *omission* (to let something happened) and *commission*

(order/command). However, the indictment itself lacked some supporting data that is very important, such as the structure of command, the line of policy and control, and the number and ratio of officers on duty compared with the region and the populace. There should be the data also about the linkage between the militia groups and military. Without these important data it is not easy to categorized the conduct of the civilian/military officers as one form of *commissions*.

Fifth, to express the element of systematic crimes, the major point that should be stated by the state prosecutor in the indictment is that all the incidents happened as a result of the existing military policy or highly connected to the existence of some kind of organization. Because of the failure of the state prosecutor to formulate the idea contained in the explanation for article 9 above, the indictment only categorizes the offence as *omission*, that is to have a blind eye on the offence being done by subordinates and failed to do the required steps, such as to prevent, to stop and to bring to justice the subordinates who have committed a criminal offence. It can be said that the indictment in this ad hoc human rights tribunal was minimal, eventhough the articles on criminal charges looked very dashing with criminal charges more than 20 years.

In order to show the command responsibility the indictment also had no clear statement. This was because in their indictment, the prosecutors only taken the command responsibility by its formal term. For example, Timbul Silaen was only stated as commandant of the Security Control Command in Timor Timur after *the New York Agreement* on May, 5th 1999. Whereas, this formal meaning of command responsibility is insufficient to show the existence of crimes against humanity. What is needed is the whole authority that included in exercising the command he got. Because of that, the indictment should have showed the whole authority in order to explain the whole strength used and facilities used. In other words, the indictment should have showed what command responsibility meant in practice, how it worked.

b. Inaccuracies in composing the indictment

Inaccuracy in composing the indictment happened for the dossier several defendants who are from military, police and bureaucracy. The indictment used article 55 of Criminal Code (about crime of participation). Usage of this article became questionable in relation to the position of the defendants when the crime happened and the prosecutor forgot article 41 Act No. 26/2000 that also regulated a crime in the form of an attempt, criminal conspiracy or provision of assistance in a crime in the context of human rights violation in line with article 8 and 9 Act No. 26/2000.

Other inaccuracy in the indictment with several defendants with different status happened when the prosecutor charged the defendants with the same offence. In the case of attack towards Ave Maria church in Suai where there were 5

defendants, in the first indictment all the defendants were charged with article 42 (1) Act No. 26/2000, an offence than can only be charged towards the defendant from military. Meanwhile, among the 5 defendants there were also from police and former Regent (civilian). Consequently, the elements of the indictment could not be fulfilled in the examination process and some of the defendants could not be found guilty. This inaccuracy has implied the failure to prove the indictment.[1] The same inaccuracy happened in the case of attack towards the residence of Rafael priest where the defendants with different status were charged with article 42 without elaborating the subsection for the first primary indictment and second primary indictment. It seemed that the prosecutor got confused in composing the indictment about the defendants with different status and just wanted to catch the defendants. By using the article 42 without precisely stated the subsection has implied that the article 42 should be proved as whole, subsection 1 and 2. Since not all the elements of article 42 could no be fulfilled the defendants should be let free.[2]

[1] This assumption was proved in the verdict of the panel of judges for the defendants who were charged with article 42 subsection 1. Regent Herman Sedyono and Gatot Subyaktoro could not be proved as military higher officials so that the primary indictment was not proved. See the verdict for Herman Sedyono Cs.

[2] This inaccuracy had made the panel of judges failed to prove article 42 (1) for the defendants form military and police or civilian an the same time. Since the defendants were from military, police and former regent the elements stated in the article 42 (1) could not be fulfilled so that the indictment was not proven. See the verdict for Asep Kuswani Cs.

III. Examination Process: Minimum, Without Exploration

a. Examination Procedure

- the sequence of witness examined

During the court session there is no case where a victim-witness is the first to testify as stipulated in article 160 of Criminal Procedure. Otherwise, at the early stages of the court session witnesses from the same institution with the defendant are the first to testify. The state prosecutor has no clear explanation as to why the victim-witness could not be present to testify in the first place. This showed that from the beginning the state prosecutor lacked readiness and seriousness to prove the indictment by failing to facilitate the victim-witness to testify at the early stage of the session.[3]

This lack of seriousness was so evident when there were several victim-witnesses who finally come to the courtroom for certain dossiers but also were taken to be a witness for other dossiers and asked to testify by ignoring the right procedure for that.

In many occasions the judges had to say a warning for the prosecutor to seriously bring the witnesses to the courtroom. It also happened to the witnesses who had been invited but many times did not showed up in the court session. The panel of judges have to order the prosecutor to bring the witnesses. The prosecutor always said that the witness had been invited but it was revealed in the court session that the witnesses could not come to the court primarily because of financial problem and a long distance. Sometimes they had to pay with their own money to come as a witness.

- Written testimony

Almost all the testimonies of the sworn witnesses who could not attend the court session was read. This is stipulated in article 162 of Criminal Procedure Code where stated that the witness who can not attend the court session due to a certain reason his/her testimony can be read. If this testimony is given under an oath its value is compatible with the testimony that the witness say in the courtroom.

Most of the written testimonies come from the victim-witnesses whose testimonies gave many supports to the indictment of the prosecutor. It was the

[3] As an exception, the only victim-witness who was examined at the beginning of the witness examination process was witness Manuel Viegas Carascalao who testified for the case with Major General Adam Damiri.

testimony of these victim-witnesses that qualified as an important testimony and clearly showed the participation of the security officers. Since they were present when the incident happened they could give a clear explanation about the incident of the crime against humanity.

- The time limit of examination

According to the provision of Act No. 26/2000 the time limit for the examination in the court session is 180 days. This time limit for examination also affected the process of witness examination and the process of evidence examination. The first three dossiers finished not more than the time limit but for the next dossier the judges took more time for examination due to the insufficiency of the search for material fact. The provision of this time limit that primarily intended for a better decision of the court and to prevent the possibility of unimportant delay has tended to be an obstacle of the search for justice adequately.

The extension of the time of court session is stipulated in a decision by the judges especially due to the insufficiency of the number of victim-witness who could testify and the inadequate process of examination. This extension was one of the breakthrough made by the judges in addressing the weakness of the law and the effort to find and search for truth from the case being examined.

- Examination through teleconference

Examination process through teleconference is used because the victim-witness was reluctant to attend the court session for security reason. Provided that the number of victim-witness who was present was insufficient and the inadequate process of examination the panel of judges decided to do the examination of the victim-witness through teleconference. The legal reason for the usage of teleconference was that the search for the substantive truth was needed in every criminal case. In this context, the judges highly realized that the testimony of the victim-witness was very important in the search for the substantive truth and the preceding examination process was counted insufficient without the testimony from the victim-witness.

The usage of teleconference was easily accepted by the parties in the case since the Code of Criminal Procedure as a code of procedure for the human rights ad hoc Tribunal say nothing about the examination process through the means of teleconference. However, the usage of teleconference was legally justified because the provision about the protection of victim-witness implied the possibility of the usage of teleconference. Moreover, in the practice of international tribunal the teleconference mechanism is widely used.

- The rights of the defendant

From the investigation until the examination in the courtroom none of the suspects and the defendant was detained. Eventhough this treatment is justified by the law but considering the provision about the condition for detainment in Act No. 26/2000 and Criminal Procedure Code the requirement to detain the suspects and the defendants was met.

Most of the defendants especially those who were from military or police were still active and hold a position in their unit. In this position, there was a great possibility that the defendants would try to destroy the evidences or redo the crime that being charged to them. Moreover, the crime that being charged to them was a crime against humanity that was a serious crime with minimum sanction of 10 years imprisonment.

This showed clearly that the defendants had received a certain privilege since the investigation until examination process in the courtroom. The defendants also had a full access to the witnesses who would be present in the courtroom since the defendants still hold their position in their unit.

Considering that the defendants were still active in their unit, it meant that the defendants' institution still gave a protection to the actor of crimes against humanity. This condition was highly dangerous. The protection for the defendants from their own institution was unfair and opened the possibility to manipulate the witnesses who were from the same institution with the defendants.

The defendants should be counted responsible individually since the Law stipulated that the defendant is charged with individual responsibility. The defendants were individuals who were charged with a crime against humanity and were not the representative of their institution. Consequently, the support from their institution in the from of the defendant's supporters, even the general several times, who come to the courtroom, was highly irrelevant.

B. The Process of witness examination

- victim-witness

Along the examination process, the state prosecutor was only able to present 7 victim-witnesses to the courtroom. These 7 victim-witnesses gave testimonies for almost all the cases that being tried by Human Rights Ad-Hoc Tribunal for East Timor.

But, eventhough the prosecutor succeeded in presenting the victim-witnesses to the courtroom, the prosecutor failed to use this opportunity to collect the necessary information about the incident of gross violation of human rights and the participation of the defendants in the gross violation of human rights that happened in East Timor. This was due to the poor knowledge and lack of effort to

explore from the prosecutor about the gross violation of human rights in East Timor. Beside that, almost all the questions the prosecutor asked to the witnesses were taken from the questions already written in the witness examination proceedings (BAP). In other words, the prosecutor failed to follow the real condition and development in the court session.

Besides the poor knowledge and lack of exploration from the prosecutor, the presence of the victim-witness in the courtroom did not yield a maximum result because the witness could not speak bahasa Indonesia fluently. This has caused that the witness could not give in orderly fashion and clearly the information about the gross violation of human rights that had happened. Consequently, the lawyers of the defendant could easily oppose this disorder information from the witness if it come against the defendant.
Other obstacle that involved in this poor quality of the witness testimony was the absent of law/regulation provided for the protection of witness, especially for the victim-witness. This obstacle could be seen clearly when the victim-witness testified in the courtroom that was full of Special Troops Command personnel and pro-integration people. The victim-witness looked so afraid and became nervous in answering the question posed to him/her.

By these obstacles, the victim-witness's testimony did not have substantial effect in supporting the indictment of the prosecutor. These victim-witnesses did not give the detailed and clear description of the parties in the criminal offence especially from military and police. They also could not explain the link between the militia and security officers.

- Non victim-witness

Most of the non victim-witnesses came from military, police and former government officer either as subordinate or higher officer to the defendant when the gross violation of human rights happened. The other non victim-witnesses had no hierarchical relation with the defendant, such as ordinary civilian, former Foreign Minister, former President and other people who known and understand what happened before and after the referendum. Non victim-witness also included the other defendants.

Generally, these non victim-witnesses gave almost the same answer and tend to defend the position of the defendant. The same thing happened with a charge witness who gave the information that support and defend the position of the defendant. Most of the witnesses who came from Army and Police who were proposed by the prosecutor gave the information that opposed the indictment composed by the prosecutor. This condition clearly showed that the prosecutor had no adequate capacity to explore the witness' s testimony in line with the Examination Proceedings (BAP). The role of the prosecutor was mostly taken over by the panel of judges who made a deeper exploration towards the testimony.

Several testimonies, especially from the witness who in the Examination Proceedings tend to support the indictment, withdrawn the Examination Proceedings. This withdrawal was intended to correct the term “attack” and “clash”. There was also a witness who withdrawn the Examination Proceedings as a whole. Some important points withdrawn from the Examination Proceedings were significant information such as acknowledgement about an attack, coordination meeting between government and military official, the sound of gun fire, and the establishment of civilian security groups. Withdrawal also happened for the information about the linkage between the establishment of civilian security groups and the policy or support from local authority either in administrative or technical relation such ac establishment and training.

Against the witness who withdrawn Examination Proceedings the prosecutor did not try to explore deeper as to why the witness did it so that the witness testimony became different from the investigation level. The panel of judges had no clear position whether agreed to or opposed the withdrawal but more concerned with the quality of the testimony in relation to other testimonies.

Substantially, the prosecutor’ s exploration to prove the indictment by bringing the witnesses to the courtroom could be said as failed or unsuccessful. In proving the command responsibility as an important charges towards the defendant, the prosecutor failed to prove that the actors of the gross violation of human rights were subordinates or staff under the defendant’ s effective control. The strongest stance in the testimonies said the actors of the crime were civilian groups with no linkage with the defendants.

- Expert witness

The number of expert witness the proposed by the prosecutor to the court was lesser than the expert witness proposed by the defendants’ s lawyer. Usually, the prosecutor proposed only one expert witness while the defendants’ s lawyer proposed more than 2 expert witnesses and with different qualification such as the expert on international law, criminal law and psychology of mass.

The defendants’ s lawyer mostly used the presence of the expert witness to defend the position of the defendant in relation to the incident of gross violation of human rights that happened in East Timor and to questioned the opinion that the defendants were responsible in the incident of the gross violation of human rights in East Timor. Most of the information from the expert witness dealt with the concept of crimes against humanity and command responsibility. The expert witness who are the expert on psychology of mass primarily tried to explain the phenomena of clash that happened in East Timor.

It was clear that the defendants proposed more expert witnesses than the prosecutor did. It showed that from the beginning the prosecutor had no

adequate capacity to prove the indictment. Meanwhile the existence of expert witness is very important to explain some unclear provisions in Act No. 26/2000. It was clear from the verdict issued by the panel of judges that the opinion of the expert witness was frequently used as reference to explain the element of the article that was charged against the defendant.

Table: Comparison of witnesses proposed to the court by the prosecutor

Dossiers	Witness proposed by prosecutor	Witness proposed by defendant's lawyer	Expert witness proposed by prosecutor	Expert witness proposed by defendant's lawyer	Written testimony
Herman Sedyono Cs.	15 people	8 people	-	2 people	4 people
Abilio Soares	17 people	8 people	-	1 people	-
Hulman Gultom	15 people	2 people	1 people	1 people	2 people
Soedjarwo	8 people	7 people	1 people	-	6 people
Asep Kuswani Cs.	10 people	7 people	1 people		10 people
Tono Suratman	18 people	5 people	1 people	2 people	3 people
Endar Priyatno	12 people	8 people	1 people		10 people
Yayat Soedrajat	17 people	3 people		1 people	9 people
Eurico Gutteres	11 people	1 people			7 people
Timbul Silaen	16 people	9 people		3 people	4 people
Adam Damiri	16 people	8 people	1 people	5 people	4 people

C. Examination of other evidences

State prosecutor presented different evidence for each dossier. But, in general the evidences consisted of several kind of weapon used for the crime, victims' clothes, some documents related to the referendum and reports about the riots happened in East Timor.

There are some dossiers that have less – even nothing- evidence than other dossiers. This is truly questionable since the state prosecutor could use the

evidence provided for one dossier to other dossier because the indictment for those dossiers is the same crime with the same *tempus delicti* and *locus delicti*.[4]

The state prosecutor didn't use maximally the evidences in the form of letter or official document to support the indictment. Even for the evidence in the form of document already attached to the examination document, the prosecutor failed to explore it maximally. It is the presiding judges who were active questioning the document presented as evidence.

The existence of these documents would help to explain the role of the defendant in the gross violation of human rights and the steps taken by the defendant in relation to the violation. It is the presiding judge who showed a serious effort to find and to present evidences. The prosecutor who was obliged to prove its indictment seemed to has no seriousness in the effort to find the required evidences. Even in several trials the state prosecutor did not bring the evidence without clear and adequate reason.

D. The Protection of Witness and Victim

The protection of witness and victim in the case of gross violation of human rights is stipulated in article 34 Act No. 26/2000 and Government Regulation No. 2/2002. Based on these regulations and in line with Criminal Procedure Code (KUHAP) the witness is provided with the protection against mental and physical threat, the protection in the form of identity concealment and the right to be heard in the trial with no defendant present.

Generally, it can be said that physical protection for the witness has been provided since there was no witness or victim-witness who were physically hurt because of their testimonies. But the mental protection was really insufficient especially for those witnesses present in the courtroom. The victim-witnesses were psychologically unprotected because the courtroom were full of the defendant' supporters who frequently posed statements that psychologically influenced the witness. The victim-witnesses were also directly exposed to the defendants, their lawyers and the defendant' supporters in the courtroom.

In the courtroom, the victim-witness got confused frequently by the questions posed by the parties. The witness who was not fluent in Indonesian language was denied to use the available interpreter' help. The witness also experienced filthy words posed by the defendant' lawyers that made the witness angry.

Witness protection mechanism in the form of identity concealment and the right to be heard without the presence of the defendant as stipulated by Government Regulation No. 2/2002 was never used. Neither the prosecutor proposed the witness examination in such a way to protect the witness who was heard in the

[4] For example, see the evidence proposed by the prosecutor in the case of Timbul Silaen.

trial nor the judge taken the necessary steps to protect the witness especially when the witness were testifying in the trial.

IV. The Prosecutor’ charges : Half-hearted.

A. Crime against humanity and its actor.

Generally, the prosecutor succeeded to prove the charge of the crime against humanity as stated in the indictment. It is proved that there happened many incidents that could be categorized as the crime against humanity indicated by the dead victims and so many citizens who got hurt by persecution. However, the number of victim in the indictment is different from the number of victim found during the examination process.

If the existence of the crime against humanity has been proved, the actors to the crime could be easily determined too. Among the state prosecutors there was disagreement about the actors to the crime. Generally speaking, the actors of the crime against humanity could be categorized as pro-integration militia (depend on its locus delicti), military-supported militia, and the militia who were not stopped by the military during the incident.

B. Command Responsibility and defendant’ responsibility

The offence of command responsibility was applied differently in the twelve dossiers based on the position of each defendant. The defendants were from military, police and civilian officers. Based on the position of each defendant the prosecutor elaborated the charges according to article 42 Act No. 26/2000 on command responsibility.

In eleven charges composed by the state prosecutors there were two characteristics of the command responsibility. First, it was command responsibility if the defendant has subordinates who have committed a crimes against humanity. Second, it was command responsibility if the defendant’ subordinates, although did not themselves commit crimes against humanity, failed to prevent others from committing such a crime.

Related to the two characteristics above, the indictment tried to prove the command responsibility of the defendants by showing a direct link between the defendant and his subordinates who committed the crimes to which the defendants should be responsible. If the defendant’ subordinates could not be charged for committing crimes against humanity, the command responsibility was proved by showing that with the authority in their hands, the defendant should have taken necessary steps to prevent the incident from happened. Here, the defendants could be charged with command responsibility in the context that they had the power and authority but failed to take necessary steps to prevent the incident

C. The criminal charges

The state prosecutor charged the defendants with minimum charges of 10 years, except 3 defendants who were charged of more than 10 years (10 years and 3 months, 10 years and 6 months).

This minimal charges showed that the prosecutors had no determination and only followed the minimal requirement of the law.

V. The Judges' decision: Vague and Ambiguous

A. The existence of the crimes against humanity

All the twelve dossiers showed that the gross violation of human rights in the form of crimes against humanity had happened. All the judges' decision concluded that the crimes against humanity had happened in the form of murder and torture according to article 9 a and 9 b Act No. 26/2000.

In their efforts to prove the crimes against humanity, the committee of judges did not use the same reference especially in explaining the widespread and systematic element, an attack towards civilian and the meaning of the existence of the policy from the authority and other organization. This different perception in explaining the above elements was highly reasonable. Since there was no clear definition about those elements in the Act itself, the committee of judges interpreted the related articles according to their knowledge and reference.[5]

There was also a different account about the number of victim who were dead or tortured among the dossiers that based on the same case. This only explained that the case of gross violation of human rights in East Timor was tried separately with each dossier and there was no necessary connection between one and other decision of the judges.

B. About the actors of the gross violation of human rights.

Generally, the conclusion about the actors of the gross violation of human rights pointed the pro-integration militia. For the incident happened in Dili, the actors were militia from Aitarak and Besi Merah Putih, in Liquisa the militia from Besi Merah Putih and also Aitarak, whereas in Suai Kovalima the militia from Mahidi and Laksaur.

Specifically, in some decisions, the judges also mentioned the participation of the security officers in the crimes against humanity that happened. The fact that the field actors for the crimes against humanity were civilian groups implied to the responsibility of the defendant. But only the defendant from militia (Eurico Guteres) who has a direct link to the actors of the crime against humanity. The actors from military and police were vaguely stated in some decisions of the

[5] In several dossiers, to elaborate the widespread and systematic element the panel of judges used some references, including the opinion of the law expert and the conception that already used in the practice of international tribunal. But for other dossiers, the explanation about the elements of crime against humanity did not mention the reference. See the verdict for the defendants Herman Sedyono Cs. and the defendants Asep Kuswani Cs.

judges. The military and police were frequently stated as being blind to the incident and failed to take preventive actions so that the crime against humanity did not happen.

C. The command responsibility and the defendant's responsibility.

On the offence of command responsibility (article 42 Act No. 26/2000), the committee of judges had different interpretation among themselves. This different interpretation would have an implication to the responsibility of the defendant as the higher officer to the actor of the crime against humanity.

One interpretation said that command responsibility meant that there was the line of command between the actor and the defendant as a higher officer. The decision that used this kind of interpretation never let the defendant free if the defendant's subordinates has been proved of committing the crime against humanity. In this context, the command responsibility always required the existence of the subordinates who had committed the gross violation of human rights and the effective command from the defendant. If there was no relation between the actor of the crime against humanity and the defendant organizationally and the effective control, the defendant could not be counted responsible. This kind of interpretation did not consider the defendant as the party with the power and authority to prevent the violation of human rights from happening.[6]
However, the other interpretation said that the command responsibility also included the failure to act or to take reasonable actions. Here the position of the defendant with his/her authority become an important element to determine the role of the defendant in the gross violation of human rights. This interpretation tried to explain that the higher officer was responsible not only to the crime committed by subordinates in his/her effective control but also to the crime that happened because of his/her failure to control his/her troops properly or to prevent the gross violation of human rights from happening in his/her own territory.[7]

D. The minimal sanction

[6] See the verdict for Herman Sedyono Cs. and for Asep Kuswani Cs. In these two verdicts, the way to prove the responsibility of the defendants started by answering the question about the existence of the crime against humanity, the actors of the crime and whether the defendants were responsible for the gross violation of human rights. The conclusion of the verdicts said that the gross violation of human rights truly happened and the actors were pro-integration militia with no organizational relation with and effective control from the defendants so that the defendants could not be count responsible.

[7] See the verdict for Lieutenant Colonel Soejarwo that explained that even thought the troops under the defendants control were not the active actor, but the troops were the passive actors who should prevent. The defendants had the authority to stop and to control the troops to behave effectively and appropriately.

According to the law, the minimum sanction for crime against humanity in the form of murder and torture is 10 years' imprisonment. Among the defendant, it was only Eurico Guterres who was sentenced to this minimal legal requirement. Other defendants who were found guilty and responsible were only sentenced under 10 years and up to 5 years.

The reason behind this minimal sanction related to the principle of justice. Eventhough these defendants were guilty in the crime against humanity but they were not the only parties who should be responsible. There were other parties who should be responsible too. Moreover, the defendants were not the direct actors and only found guilty for failing to take appropriate actions.

A legal reason used by the judges who sentenced the defendant under 10 years was that in the practice of international tribunal there was no stipulation about minimal sentence. Even the Statute of Rome that was the foundation for the establishment of International Criminal Court did not mention about a minimal sentence.[8] The reason stated in the verdict was that Act No. 26/2000 was preceded by Regulation to replace law (Perpu) No. 1/1999 on Human Rights Tribunal that stipulated minimal sentence of 5 years. If Act No. 26/2000 that stipulated minimal sentence of 10 years contradicted with Perpu No. 1/1999, the judges used the principle in article 1 (2) Indonesian Criminal Code (KUHP). The principle said that the defendant will be punished with the lighter sanction when there were two sanctions applicable to the offence.[9]

Table : **Comparison between the charges of the Prosecutor and the verdict of the Judges of the Human Rights Tribunal.**

No	Dossier	Charges of Prosecutor	Verdict	Committee of Judges
1	Abilio Jose Osario Soares (Governor of Timor Timur)	10 years and 6 months	3 years	1. Emmi Marni Mustafa 2. Roky Panjaitan 3. Rudi M. Rizki 4. Komariah Emong S. 5. Winarno Yudho
2	Timbul Silaen (Head of Propincial Police, Timor Timur)	10 years	Free	1.Andi Samsam Nganro 2.Ridwan Mansyur 3.Kabul Supriyadi 4.Amiruddin Abudaera 5.Heru Susanto

[8] Almost all the verdicts under 10 years' imprisonment used this reason.

[9] This was the reason used by the panel of judges chaired by Andi Samsan Nganro with the defendant Lieutenant Colonel Soejarwo who was punished with 5 years' s imprisonment.

3	Herman Sedyono (Regent of Kovalima) Liliek Koehadiayanto (Head of District Military Command in Kovalima) Gatot Subyaktoro (Head of District Police in Kovalima) Achmad Syamsudin (Administrative section head of District Military Command in Kovalima) Sugito (Commander of Army administrative unit in Suai)	From 10 years up to 10 years and 6 months	Free	1. Cicut Sutiarso 2. Andriani Nurdin 3. M. Guntur Alfie 4. Rachmat Syafei 5. Abdurrachman
4	Endar Prianto (Head of District Military Command in Dili)	10 years	Free	1. Amril 2. Eddy Wibisono 3. Amiruddin Abudaera 4. Kabul Supriyadi 5. Sulaiman Hamid
5	Soejarwo (Head of District Military Command in Dili)	10 years	5 years	1. Andi Samsan Nganro 2. Binsar Gultom 3. Kabul Supriyadi 4. Heru Susanto 5. Amiruddin Abudaera
6	Hulman Gultom (Head of District Police in Dili)	10 years	3 years	1. Andriayi Nurdin 2. Sunarjo 3. Rudi M. Rizki 4. Kalelong Bukit 5. Sulaiman Hamid
7	Asep Kuswani (Head of District Military Command in Liquica) Adios Salova (Head of District Police in Liquica) Leonito Martens (Regent of Liquica)	10 years	Free	1. Cicut Sutiarso 2. Jalaluddin 3. Rachmat Syafei 4. Abdurrachman 5. Amiruddin Abudaera
8	Yayat Sudrajat (Commander of task force of Tribuana)	10 years	Free	1. Cicut Sutiarso 2. Jalaluddin 3. Abdurrachman

				4. Guntur Alfie 5. Amiruddin Abudaera
9	Adam Damiri (Commander of Military Command IX Udayana)	Free	Years	1. Emmi Marni Mustafa 2. Rocky Panjaitan 3. Rudi M Rizki 4. Komariah Emong S 5. Sulaiman Hamid
10	Tono Suratman (Commandant of Military Resort 164)	10 years	Free	1. Andi Samsan Nganro 2. Binsar Gultom 3. Kabul Supriyadi 4. Heru Susanto 5. Amiruddin Abudaera
11	Nur Moeis (Commandant of Military Resort 164)	10 years	5 years	1. Andriani Nurdin 2. Sunarjo 3. Rudi M Rizki 4. Kalelong Bukit 5. Sulaiman Hamid
12	Eurico Guterres (Vice Commander of PPI/ Commandant of Aitarak)	10 years	10 years	1. Herman H. Hutapea 2. Rocky Panjaitan 3. Rudi M. Rizki 4. Emong Komariah 5. Winarno Yudho/ Kalelong Bukit.

E. The Guilty Defendants were not detained

The panel of judges did not issue an order of detention for the defendant who had been found guilty. The judges only followed the gesture of the prosecutor who from the beginning of the examination did not require the suspect and the defendant to be detained. This treatment towards the defendants were unusual since the crime that had been conducted was characterized as extraordinary crimes in the form of crimes against humanity and there was a

great possibility for the defendants to redo the crimes since they were still in power.

Several judges' verdicts said as an argument that the defendants were guilty and convincingly had done crimes against humanity as a human-cursed crime. It was said also that punishment was most needed to do justice for the victims and as a preventive measure through the deterrent effect. But all of these statements become obsolete without issuing an order to detain the defendants.

The panel of judges had an ambiguous stance towards the defendants. In one hand, the judges explained that the crimes against humanity is an international crime that shocks the conscience of mankind and that international community named it as a common enemy of mankind so that all country should wage war against it. The judges also said that a punishment for the actor of the crime against humanity was absolutely necessary and that the absence of this punishment would become a virtual license for the actor or others to redo the crime in the future. The reason mentioned by the judges for not issuing the order of detention was that the defendants were cooperative during the trial and there was no worry that they will escape or redo the crime. It meant that for the judges the defendant were not dangerous at all. It could be concluded from this fact that the panel of judges did not pay a serious attention at the position of the defendants who most of them were still active and hold an important position, and consequently had the capacity to redo the crime. Beside that, the judges also failed to fully understand the essence of the crime against humanity and the important of punishment for the actor.

This loose treatment to these guilty and responsible actors of the crimes against humanity contradicted with the treatment to the same actors in other parts of the world. All the suspects and defendants of international tribunal for the former Yugoslavia or Rwanda were detained and were targeted as wanted-persons if they had not been arrested yet.[10]

F. Compensation, Restitution and Rehabilitation.

Compensation, restitution and rehabilitation are the rights of the victim of the gross violation of human rights in line with article 35 Act No. 26/2000. A further explanation and procedure on compensation, restitution and rehabilitation is Government Regulation No. 3/2003. This regulation put it clearly that compensation, restitution and rehabilitation can only be given if it is stated in verdict. It means that the decision about the compensation, restitution and rehabilitation should be stated in the verdict.

[10] See the progress report XI by ELSAM.

However, for all cases in which the defendants were found guilty and should be responsible the verdicts did not say anything about the compensation, restitution and rehabilitation for the victims. From the beginning of the trial there was no discourse about the possibility of compensation for the victims. Neither prosecutor nor the judges ever mentioned about the possibility of compensation, restitution and rehabilitation for the victims.

VI. **The Process after the first level verdict**.

A. The appeal to the High Court

All the defendants who found guilty appealed to the High Court while the prosecutor appealed to the Supreme Court for cases with free verdict..

The quite different phenomena happened when the prosecutor and the lawyers of the defendants appealed to the High Court simultaneously. Both parties rejected the punishment for the defendants stated in the verdict. This happened because from the beginning the prosecutor defended that the defendants were not guilty and asked for free verdict. Here the verdict was different from the demand of the prosecutor.

For the time being, there was no an official decision about the result of examination in this appeal level. Until now, it was not clear for the defendants whether their cases were being examined or not in the appeal level. This is very important since there is a time limit for the examination in the appeal level according to Act No. 26/2000.

B. Appeal to the Supreme Court

The prosecutor appealed to the Supreme Court all the defendants who got a free verdict. Until now, it is not clear which cases have been appealed to the Supreme Court. There should be 6 cases that have been appealed to the Supreme Court since there were 6 defendants who got free verdict. As happened for the appeal to the High Court, it was not clear when the cases would be examined and finished in the appeal to this Supreme Court. The time limit for the appeal process in the Supreme Court is 90 days. There was a big question here given that the verdicts for Timbul Silaen and Herman Sedyono Cs. had been issued last year and these cases had also been appealed to the Supreme Court with no clear result until now.

VII. Conclusion and Recommendation

Assessment of all aspects of the trial crime against humanity in East Timor after the referendum by Human Rights Ad-hoc Tribunal reminded us about the failure of Leipzig Court after World War I. As already known, after World War I, with Versailles Peace Agreement international community started to admit the obligation to try a serious international crime. Versailles Peace Agreement proposed to establish a criminal tribunal for King Wilhelm and an obligation for Germany to bring to justice individuals in the lower rank in the special tribunal established in Leipzig. But this initiative failed. The King received a political asylum in Netherlands. This also happened for the tribunal in Leipzig that clearly showed the lack of political will in Germany to bring to justice its own citizen. This seemed to happen again in Human Rights Ad-Hoc Tribunal in Jakarta.

The conclusion above will be more elaborated in the following conclusion:

1. The prosecutor as representing the public (including the victims) to bring to justice the actors of a serious crime clearly did not apply the principle that said "prosecutions are to be taken in good faith and with due diligence" that had become international standard. This was evident in the process of composing the inaccurate indictment, minimum evidences and witnesses, and lack of strong exploration from the prosecutor. In conclusion, we could detect here a hidden intention of the prosecutor not to try fairly the defendants.

2. The poor quality of indictment and the weak evidence from the prosecutor had become a very limited material for the panel of judges to find the fault of the defendants. The verdict of the judges were highly depend on the evidence and testimony proposed by the prosecutor. The result has already been mentioned: most of the defendants did not find guilty and some of them got minimum penalty, even under the minimum penalty (3 years). The most important verdict was the guilty verdict for Adam Damiri (former Udayana Commander). A willingness about the obligation towards *erga omnes* in this case was not showed adequately.

3. To find individual criminal responsibility in the human rights crime that happened in East Timor is the primary goal of the trial. Failing to find the actors who were responsible for the crime would mean that the brutality that happened there became our "collective sin" as a nation. But this human rights Ad-Hoc Tribunal was supposed to be a mechanism to stop the collective crime circle. The Tribunal had failed to fulfill the role completely, as also happened in Leipzig trial.

Based on the above conclusions, ELSAM found it important to do some improvements to avoid the same failure. We recommended the following steps:

1. Amendment to Act No. 26/2000 on Human Rights Tribunal should be done especially on the provision about “crime against humanity” by giving a clearer account about the elements of the crime. It really needed for the prosecution.

2. The adjustment of the Rule of Procedure should be done. Human Rights Tribunal should be provided with a more specific Rode of Procedure. It was appropriate here the suggestion to adopt “Rule of Procedure and Evidence” used in the International Criminal Court (ICC).

3. The goal of the Human Rights Ad-Hoc Tribunal is to find individual criminal responsibility of the defendants. It is suggested that this Tribunal banned all the symbols of institution in the courtroom (such as uniform and others). What was being tried was not institution, but individuals allegedly misused their authority.

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