

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. 7

East Timor's Ad Hoc Human Right Trial*

I. Administration problems related with Judicial resources (Judge)

International standards, regarding to independent trial demands competent party to provide adequate resources so that the court can perform their functions properly .

In monitoring process, ELSAM found a number of problems related to judicial resource of the ad hoc panel of judges for human right trial. These problems have the potential of raising direct effect in the fall of competent trial's principles. During the monitoring, there are a number of problems identified that are related to each other: lack of judge quantity, lack of judge staffs, the insufficient financial support for judges, lack of infrastructure support (office, computer, notebook, printer, etc), delayed wages transfer, lack of literature resources, references, library, internet, etc.

• Judges Quantity

ELSAM noted that there are 23 judges in East Timor ad hoc trial for human right, who are assigned to processing 9 cases, and every case needs 5 judges. From the total of judges, there are 17 judges serving as member of panel in more than one case. This composition shows that many judges assigned to more than one case (look at Table)

List of judges assigned to more than one case

No Name Case that were investigated and Schedule

1 Andi Samsan Nganro • Case of Sujarwo (Chief Judge): Tuesday • Case of Tono Suratman (Chief judge): Wednesday

2 Rocky Panjaitan • Case of Adam Damiri (Member judge): Tuesday • Case of Eurico Guterres (Member judge): Thursday

3 Adriani Nurdin • Case of Hulman Gultom (Chief judge): Wednesday • Case of Noer Muis (Chief judge): Wednesday

4 Cicut Sutiarmo • Case of Asep Kuswani, Adios Salova, Leonito Martins (Chief judge): Wednesday • Case of Yayat Sudrajat (Chief judge): Thursday

5 Rudi M Rizky • Case of Adam Damiri (Member judge): Tuesday • Case of Hulman Gultom (Member judge): Wednesday • Case of Noer Muis (Member judge): Wednesday • Case of Eurico Guterres (Member judge): Wednesday

day

6 Kabul Supriadi • Case of Sujarwo (Member judge): Tuesday • Case of Endar Prianto (Member judge): Monday • Case of Tono Suratman (Member judge): Wednesday

7 Heru Sutanto • Case of Sujarwo (Member judge): Tuesday • Case of Tono Suratman (Member judge): Wednesday

8 Amiruddin Abudaera • Case of Sujarwo (Member judge): Tuesday • Case of Endar Prianto (Member judge): Monday • Case of Tono Suratman (Member judge): Wednesday

9 Winarno Yudho • Case of Hulman Gultom (Member judge): Wednesday • Case of Noer Muis (Member judge): Wednesday • Case of Eurico Guterres (Member judge): Thursday

10 Komariah Emong • Case of Adam Damiri (Member judge): Tuesday • Case of Eurico Guterres (Member judge): Thursday

11 Abdurrahman • Case of Asep Kuswani, Adios Salova, Leonito Martins (Member judge): Wednesday • Case of Jajat Sudrajat (Member judge): Thursday

12 Muhammad Guntur Alfie • Case of Asep Kuswani, Adios Salova, Leonito Martins (Member judge): Wednesday • Case of Jajat Sudrajat (Member judge): Thursday

13 Rachmad Syafei • Case of Asep Kuswani, Adios Salova, Leonito Martins (Member judge): Wednesday • Case of Jajat Sudrajat (Member judge): Thursday

14 Sulaiman Hamid • Case of Adam Damiri (Member judge): Tuesday • Case of Endar Prianto (Member judge): Monday

15 Binsar Gultom • Case of Sujarwo (Member judge): Tuesday • Case of Tono Suratman (Member judge): Wednesday

16 Jalaluddin H • Case of Asep Kuswani, Adios Salova, Leonito Martins (Member judge). • Case of Jajat Sudrajat (Member judge): Thursday

17 Kalelong Bukit • Case of Hulman Gultom (Member judge). • Case of M Noer Muis (Member judge)

The implication of this condition is the burden for the judges who are involved in the trial of more than one case will have bigger burden, not to mention when the judges have to also serve in the trials of other cases in the common criminal and/or civil court .

The consequences of judges processing more than one case are: first, difficulty in scheduling the sessions, such as in several sessions have been cancelled because the chair judge of case A is still serving in the session of case B. second, the judges will have less time to focus on the case they handle.

• Administrative support (judge staffs)

In correlation with technical support, one thing monitored is the support of judge staffs for judges in performing their job. In this trial, it is found that number of all judge staffs is 14 persons. This number of staffs is divided to assist the judges in the 9 cases, meaning there are several of them who assist the judges of more than one case meanwhile the staffs weren't divided properly. (Look at staffs Table).

List of Staffs in human right ad hoc Trial

No Name of Staffs Case that was helped

1 Sri Sunaryati Case of Adam Damiri

- 2 Siti Agustiani Djamilah Case of Adam Damiri
- 3 Pipit Rustami Case of Soejarwo
- 4 Mahdi Case of Hulman Gultom
- 5 Uripan Case of Hulman Gultom
- 6 Mathius B Situru Case of Asep Kuswani, and friends Case of Tono Suratman
- 7 Rafitalina Case of Endar Prianto
- 8 Parmin Case of Endar Prianto
- 9 Churiah Saragih Case of Tono Suratman
- 10 Lindawati Case of Jajat Sudrajat
- 11 Yanwira Case of Jajat sudrajat
- 12 Ida Iskandar Case of jajat sudrajat
- 13 Widiastuti Case of Eurico Guterres
- 14 Case of M Noer Muis

According to ELSAM, the numbers of staffs is not adequate because in assisting the judges, some are also assisting cases outside human right ad hoc case. It caused apprehension, because the schedule and responsibility of the judges (from previous explanation) in examining the case is already full added by the insufficient number of staff. The insufficiency of administrative support for the judges causing not only the inability of judges to perform legal research, but also to write, type, edit, and peruse all court cases' files they work on. Beside that administrative needs that should be provided immediately for the judges are often delayed, for example the need for court transcript, which should be provided immediately.

- Insufficient Library Facility

Library facility including all references and internet is a very important point. Every judge needs this facility. But in the East Timor's human right court, ELSAM has observed that the requirements for the judges cannot be facilitated sufficiently.

There is a library for judges in the court building, but the books are mostly common law books. Specific books on human rights violation that needed by the judges are rarely found and mostly written in English. Some judges usually search and find their references by their own.

For ad hoc judges of the human right trial, maybe this is their first duty as a judicial officer, but even for career judges who have enough experiences in judging criminal cases, processing gross human right violation based on UU No 26 year 2000 is also a new experience. So references related with trial for gross human right violation, in this case criminal against humanity, is very important for the judges in examining those cases.

In some 'intermediate verdict' judges have been seen trying to include some jurisprudence and international references, but to facilitate better and more specific references on ICTY and ICTR will give immense contribution for the judges.

- Material resources

Related with material resources, ELSAM observed that infrastructure situation is pitiful; all ad hoc human right trials are conducted in a single room.

Computer facility is even worse; too few computers used compared to the amount of the judges. Computers are

not linked by LAN, which would have enabled efficient information management from many resources. In some observation, to overcome such problem, some judges have resorted to using their personal facility.

Accommodation is another issue, since most of the judges do not reside in Jakarta. Accommodation becomes a very important issue in order to support judges for the trial. To overcome the problem, usually the judges personally try to find their own living arrangement.

Remuneration and transport support has also become obstruction for the judges. It is found that the amount of money of travel order (Surat Perintah Jalan, SPJ) is Rp. 150.000 (one hundreds and fifty thousand rupiahs) per judge for one trial, including transportation, accommodation, meal, etc and this fund usually comes late.

II. Court Administration

• Postponed Trial

The recent condition of the monitoring conducted by ELSAM has shown that there is a decline of the quality of the trial in most of the cases. There have been so many postponed trials. ELSAM has noted the reasons behind the action being first, the absence of the judge for some reason or the other. Second, a dense trial schedule that cannot accommodate the burden of the trial.⁴ Third, the prosecutors' failure in bringing forth the scheduled witnesses (see the postponed trials' table)

Table of Postponed Trial

Case Total Postponed

Adam damiri 2

M Noer Muis 2

Tono Suratman 1

Soedjarwo 4

Eurico Gutteres 4

Asep Kuswani 2

Jajat Sudrajat 3

Endar priyatno 5

Hulman Gultom 1

• Delayed trial

In the monitoring process conducted by ELSAM the trials have always been late from the designated time. The delay is caused by some problems, such incomplete panel of judge, confusion on the room schedule or the designated room is still used for the session of another trial of civil case.

The implication from the delayed of the trial process is the insufficient time needed to conduct full examination to the present witnesses. With the limitation of allocated time, prosecutor, judge and attorney will be unable to explore witness properly.

III. Prosecutor Barrier

In criminal procedural law, the party who should prove the indictment is the general prosecutor by carrying out valid evidence, witnesses or other form of evidence. Ideally, prosecutor should, as hard as possible, prove his indictment and master his case. But what happens in the ad hoc human right trial in Central Jakarta State Court presently is that the prosecutors seem to be not trying hard enough in proving their indictment. The obligation of the prosecutor as the representation of the state to indict the defendant has remained unfulfilled. Several indicators

have been used to value the degree of seriousness of the prosecutor in proving his indictment.

- Presenting victim's witness

KUHAP (criminal procedural law) stipulates that in presenting witness, victim witnesses should be put forth first before other witnesses though it is not compulsory.

The importance of victim witness in ad hoc human right trial is to gather the legal facts, the scene of the incident, and their knowledge (seen and heard) about the gross human right violation in East Timor, since these witnesses are the people who were directly involved in the violation of the human right, or at least witnessed or heard the incident for their representation in site.

In monitoring, ELSAM has noticed that the prosecutor has been unable to present witnesses to support his indictment. The absence of these victim witnesses has given more reason to doubt the seriousness of the prosecutor in obtaining the trust of the victim's witnesses, most are residing in Timor Lorosai, to come and give their testimony before the court. Second, because the inconsistency of the general prosecutor itself in carrying out PP (Governmental Regulation) No. 2 year 2002 on the witness protection of the gross human right violation⁵.

Table of witness composition proposed by general prosecutor (until September 30, 2002)

Case Victim's Witness Non Victim's Witness

Adam damiri 1 3

M Noer Muis 5 9

Soedjarwo 1 8

Tono Suratman 1 9

Eurico Guterres 6 7

Asep Kuswani 2 11

Jajat Sudrajat 2 11

Endar priyatno 1 9

Hulman Gultom 4 11

Currently, on the trial process, the importance of the victim witnesses doesn't seem to hold the attention of the prosecutor, as if the general prosecutor is already pleased with presenting witnesses who are clearly unable to support his indictment, or, even worse, those who give testimony in favor to the defendant, since most of the witnesses brought to the court by the prosecutor are members of TNI/Polri. The excuses behind why the prosecutor can't bring victim witnesses are very unreasonable, since they claim that the victim witnesses fear the government inability in guaranteeing their security.

Even worse, unable to bring witnesses from Timor Lorosae, none of the prosecutors comes with another effort or idea to bring the witnesses before the court, such as picking up witnesses directly from Timor Lorosae or by conducting teleconference or by suggesting to hold some sessions of the trial in Timor Lorosae.

- Prosecutor exploration deepness (questions material)

Ideally, a prosecutor who wants to prove his indictment will at least try to find as many facts from witnesses brought to the court, try to explore information which can support or having a strong argument for his indictment. However in this ad hoc human right court we have never had this ideal condition.

Almost all prosecutors explore witnesses only by asking questions taken from BAP (Case Statement during the

Investigation Process), while witnesses from BAP are mostly having position related to the defendant, like ex-member of staff or their superior. Consequently most of the witnesses (from BAP) tend to defend the defended or their institution.

The trial (witness cross-examination) become very odd, supposedly witnesses brought by the prosecutor are against the defended but in reality, most of them are in favor to the defended. So, the testimony given becomes useless, since substantially they do not give supporting information to prove the indictment. However, the prosecutors seem to not care, as if they have successfully done their job by the presence of the witness no matter which side the witness come for or support.

Fact exploration based on the question and information taken from BAP will not prove anything as to the relation among defended and the incident. Since basically those questions are more general. Besides, if there is some information that appears to attack the defended, the witness will promptly retract that information.

Fact exploration like this will hardly prove the indictment for crimes against humanity related with command responsibility or superior order. The questions of the prosecutors tend to be more technical as to the actions taken by the defended when the incident happened, usually on whether or not the action taken was proper while there is no criterion whatsoever about "proper action" that should have been taken, but from the perception of the attorney, judge or prosecutor.

- Bring evidence outside witness

The failure of the prosecutors are not apparent just when they have to bring victim's witness before the law, but also when they have to bring other evidences such as letter, direction etc. In the court recently, there is only one evidence brought by the prosecutor: telegraph letter from Pangdam Udayana which ordered TNI and Polri to support Pro-Integration on the incident of Liquica attack on April 6th, 1999 (brought up in Adam R. Damiri and Tono Suratman's case), unfortunately the evidence is still in doubt for it is only a copy and doesn't have 'sign' as a valid evidence. For that, this evidence presence is still powerless regarding to KUHAP. According to a member of the National Human Right Commission's Ad-Hoc Commission of Inquiry for East Timor, that there were a lot of evidences given to the prosecutors but up until now none of them brought to the court.

If the prosecutor has the courage to make a legal breakthrough, he can use some interpretations of KUHAP provisions, which seem very weak if used in gross human right violation case. With his interpretation, the prosecutor can present other evidence, like visual (video recording or photos, some information from mass media, and even look for another documentation, such investigating documents in TNI or Polri's headquarter doing which prosecutor has the power of. However, the prosecutors never did that.

On the cross examination of the victim's witness Manuel Carascalao on Adam R. Damiri's case, he presented a video recording-on April 17th 1999 incident in Dili-to the board of judges, and then the evidence was given to prosecutor to be used. But up until now the evidence has never been used by the prosecutor.

The prosecutors, in presenting the evidence, are rigidly adhering to the KUHAP. They never try to build a precedent in investigating process. If prosecutors still do so, their indictment to crime against humanity will find only problem.

- Prosecutor's courage

Principally, a court is under judge's authority. But it is more to the procedural matter where the judges hold the control of the court to ensure order and balance. Other matters related to directing witness, regarding to the observation, prosecutor did not have the nerve to object. For questions that are not relevant to the case, prosecutor never

try to object. The prosecutors cannot maintain the situation or condition when the witness should be qualified as an a charge witness to keep their statement accordingly to the prosecutor's stance. There have been some witnesses brought by the prosecutor actually retract their statement as noted in the BAP. Consequently, some of witness brought by prosecutor turn against the prosecutor when they are being cross-examined in the court and attack the content of the indictment.

IV. Judge's Breakthrough?

Judge has the obligation to conduct trial in order to uphold rules and justice. By this, a judge as a law instrument shall explore, understand and comprehend just values that stand in the society⁶.

By observing the fact where prosecutor were unable to brought victim's witnesses in front of the court or the lack of evidence provided by prosecutor in supporting his indictment, a new dilemma is emerging, whether this condition should continue or is there a need for law breakthrough by the judge. It has been a principle in international law that crimes against humanity is *hostis humanis generis* (the major enemy of mankind) where the subject can be trialled wherever and whenever (universal principle) since there should be no crime escape punishment. So then, court execution is a mandatory to mankind everywhere.

It is a dilemma for the judge of East Timor's ad hoc human right case in performing their duty. At one side, prosecutor has been unable to bring victim's witnesses and submit evidence, and at the other side the judge are aware of many evidence that can be used.

To respond to the issues, it is true that Indonesian positive law has not regulated it clearly and concretely, whether the judge in performing his job and finding material legitimacy can take actions that have not been regulated in Indonesian positive law-but has become a need considering that this case is not a common case, but it is a case of crime against humanity-like looking for another evidence that cannot be brought upon by the prosecutor⁷ or to conduct teleconference⁸ since the prosecutor has been unable to present victim's witnesses or to conduct in situ trial (in Timor Lorosae).

To overcome above problems, the most possible thing to do is to conduct case investigation outside State Court Building or to conduct in situ trial/plaatsonderzoek as can be concluded from section 230 article 4 KUHAP which stated that, aside from the court room, a trial can be performed outside the court building⁹, which means that this trial can be performed whether in the building (Jakarta Pusat State Court Building), or outside the building, in the places where the incident happened as mentioned by prosecutor in his indictment (Manuel Carascalao and father Rafael's house) or to conduct the trial in Timor Lorosae (plaatsonderzoek), so that victim's witnesses can easily be presented upon to the court and then be heard by all party (judge, prosecutor, attorney and defended).

Conducting trial outside a state court building has been regulated in joint instruction of Chair of Supreme Court, Minister of Justice and Public Attorney No. KMA/35/1981, No. M.01.PW.07.10 tahun 1981, No. INSTR.001/JA/3/1981 on the Improvement Trial and Resolution Criminal Cases, which mentioned that trial can be conducted outside state court building, where the incident take place, where most of the witnesses live and or where the defendant is detained in order to bring justice.

Investigation or trial in situ where the incident took place and most of the witnesses live can be conducted with certainty¹⁰:

- Initiative could come from both prosecutor or judge
- Initiator obliged to prepare the trial

- All institution obliged to support the financial necessity, including transportation and other cost.

Understanding fact and condition of the trial process in gross human right violation in Timor Lorosae, both prosecutor and judge should have the initiative to make a breakthrough to conduct plaatsonderzoek, with the reason that prosecutor has been unable to present victim's witnesses from Timor Lorosae and sufficient evidence is needed for the trial. If this plaatsonderzoek is conducted, obviously truth that is expected from this trial is legal material where all party involved (prosecutor, judge, attorney, defended) can defend their arguments equally and based on facts and evidences (include testimony from victim's witness). Thus the truth can be revealed in the court and the panel of judges can fulfill people's sense of justice (especially the victims) and not only to meet rules of the law.

Related to that, the judge's position has become very critical in taking strategic steps not only to 'claim' prosecutor's role in investigating witnesses but also to attain breakthroughs in law in order to meet material legitimacy. Throughout the trial, formal (procedure) problems mostly became obstruction. The limitation of criminal procedural law became an effective shield used to obstruct the trial into a comprehensive fact search to find material legitimacy¹¹.

Judge, in this position, has become a very important part to the process towards finding this material legitimacy, and concerning this issue we have principle of judge faith¹². This principle is appropriate with the substantiation system according to the negative ordinance (negatief wettelijk), which is the judge is given full authority to estimate the strength of evidence obtained in the trial in judging whether one person guilty or not guilty..

In the case of gross human right violation in Timor Lorosae, judge has the authority to conduct efforts toward finding material legitimacy. Problem that arises afterward is whether the judge can explore or conduct efforts to look for evidence outside from the material proposed by prosecutor in order to find material legitimacy.

For example, in the investigation process for Adam Damiri's case, the attorney objected because they think the judge has used illegal evidence and violated rules on finding and using evidence in the trial by using evidence that has not been proposed by prosecutor for that case, but for another case¹³. The Judge was accused of being partial since he/she is searching evidence that proved the indictment.

In fact the objection was not too reasonable since first, East Timor case is a group of cases that are principally fused in the crime against humanity in East Timor, the segregation into several cases was basically intended to ease prosecution process an sich, since the prosecutor is restrained by time and resources limitation; second, evidence proposed by the judge used as supplementary evidence, and this is regulated by KUHAP¹⁴.

Minimal evidence that has been proposed by prosecutor-the responsible party for proving the indictment-has forced the judge to conduct efforts to find other evidences aside from what prosecutor has to offer. Judge may have the knowledge of those evidences outside what offered by prosecutor, and that knowledge can be obtained from anywhere. Evidences found by judge can only be clarified or confirmed by consulting witness, defendant or expert witness¹⁵.

Judge has the authority to conduct rechtsvinding appropriate with chapter 27 UU No. 17 year 1970 on judicial authority. This regulation is the law base for the judge to conduct breakthrough or to explore norms in the society¹⁶. Legal problems, which occur in this human right trial, become relevant to be linked with the judge authority to conduct "law invention". In the middle of KUHAP's flaws and demand for international standard human right trial, the most responsible party to "interpret law" is the judge of the human right trial itself.

The courage of the judge to exercise legal breakthrough towards the procedural law-including offering evidence outside the case, though objected by the attorney of the defendant-is very positive in order to find material legiti-

macy and achieving justice for the victims.

Jakarta, October 7th, 2002