

Progress Report VIII
Human Right Ad Hoc Court for East Timor
Institute for Policy Research and Advocacy

Introduction: Eurico Guterres' Position in the Crime Against Humanity in East Timor

There is no doubt that the chain of events before and after the referendum in East Timor is a crime. The crime was in form of terror, manslaughter, abduction until it reached the peak in form of extermination, along with the migration of hundreds of thousand refugees. All the defendants in the Human Right Ad Hoc Court are individuals suspected of having executed, sponsored or facilitated the chain of crimes. Those acts of crime in Indonesian system of positive law are quantified as crime against humanity.¹

In order to substantiate that the crime against humanity existed and occurred, Eurico Guterres has been standing on trial. As the Vice Commander of Pasukan Pejuang Integrasi (Pro-Integration Troop) he adopted a very important role in East Timor's field condition pre and post referendum. It can even be said that Eurico Guterres was the *icon* of the chain of violence along with his Aitarak militia throughout the referendum process. Almost everyone in East Timor at the time, especially in Dili, knew that Eurico was free in doing his activities due to the space and freedom provided by the security apparatus. Eurico, with the Aitarak militia, was free to mobilise other militias from Liwuisa up to Suai, Meliana to Los Palos and equip them with TNI/Police standard or generic weapons.

Bearing in mind all the incidents East Timor pre and post Referendum and the actions taken by the militia units united in Pasukan Pejuang Integrasi, thus the trial process of Eurico Guterres is very important and critical in understanding and mapping the most accountable parties.

Throughout pre and post Referendum armed civilian groups and paramilitary engaged in activities hand in hand with small units of TNI. Trained Citizens (*Rakyat Terlatih* = Ratih) were deemed to be a part of Indonesia's civilian defence in East Timor. They were recruited

¹ see article 7, Law No.26/2000

under the jurisdiction of the Department of Domestic Affairs, but trained and operated by the local TNI units. At the same time emerged other groups known as perlawanan rakyat (people's struggle) and keamanan rakyat (people's security). The establishment of armed militias was initiated by the founding of Gadapaksi in mid 1990's.

At the end of 1998, where the increase of political tension in the effort of finding solution to the East Timor problem in international forum, several paramilitary groups more militant in nature were established. Along with the militia groups previously existed, these militia groups were allegedly engaged in intimidating people, marching into houses and searching them and even committing sexual violence and murder. All these actions were directed specifically to members of the society whom they suspected as adopting the pro-independence stance. Their role became more pronounced before, during and after the referendum.²

The previous elaboration is ample evidence of the close relation, structurally and operationally, between the pro-integration armed militia with Indonesia's security apparatus, especially TNI, which theoretically fits the thesis of TNI's "complete and effective control" upon the military operation in East Timor which involved the militia.

Eurico should have been positioned at that context in his trial at the Human Right Ad Hoc Court. In reality, however, throughout the substantiation process both the prosecutor and the counsellor have been positioning Eurico (and his civilian militia) outside the context of military operation and the "complete control" of TNI. This implies denial upon the notion that Eurico has been executing criminal actions within the knowledge of and supported by TNI as Indonesia's security apparatus, whereas this notion is what makes the case as fitting to be tried by the ad hoc human right court. Should Eurico's position is unhinged from TNI's, he should have been tried as a common criminal and not as a perpetrator in the context of crime against humanity.

Judging from the whole process of Eurico's trial thus far, it is apparent that there is a lack of seriousness in the chain of construction indicted upon him. This is so because throughout the process of the trial, it is as if Eurico was acting upon his personal will with no relation

whatsoever with the various security apparatus operation and the political ambition planned in Jakarta and Dili at the time. This statement is not meant to imply that Eurico as an individual is an innocent party in his various criminal actions that he had executed in the name of integration with Indonesia. Eurico should still be maximally accounted for all the crimes indicted upon him.

Assessment on the *Requisatoir* (Criminal Charges) of Eurico Guterres

On Thursday, 31 October 2002, the *requisatoir* for Eurico Guterres' case was issued by the Prosecutor (Muhammad Yusuf and Dien Murdinah) after 5 months of trial. It is also the first charges amongst the 9 case dossiers of the second phase trials in the ad hoc human right court for East Timor which has taken place in the Central Jakarta Court. Thus there would be several points of assessment that are crucial to be responded.

- **Legal Facts on Witness Examination**

In the charges³, the prosecutor clearly stated that: *There have been nineteen (19) witnesses examined which consist of: 18 A Charge witnesses, consisting of 11 persons providing direct testimony and 7 persons whose statements in the Investigation Note (BAP) were read out and out of these 7 witnesses 5 of whose statements were read out were under oath and 1 a de charge witness gave his statement under oath accordingly to his belief.* (see Table)

| No | Name | Status according to prosecutor |
|----|------------------------|--------------------------------|
| 1 | ALFREDO SANCHES | A Charge |
| 2 | JULIO DE SOUSA | A Charge |
| 3 | DOMINGOS BOAVIDA | A Charge |
| 4 | MANUEL. V. CARRASCALAO | A Charge |
| 5 | BASILIO DIAS ARAUJO | A Charge |
| 6 | JOSE AFAT | A Charge |

² Selengkapnya lihat artikel Ben Saul "Was the Conflict in East Timor Genocide and Why Does It Matter?" dalam Melbourne Journal of International Law, vo.2, issue 2, 2001, hal. 445-448

³ See criminal charges of the case of gross violation of human rights in East Timor upon defendant Eurico Guterres by Ad Hoc prosecutor Muhammad Jusuf, SH MM and Dien Murdinah, SH. page 9 No IV.

| | | |
|----|-----------------------------|--------------------|
| 7 | SOEDJARWO | A Charge |
| 8 | ABILIO J.O. SOARES | A Charge |
| 9 | JOAO D.S. TAVARES | A Charge |
| 10 | AGUSTINUS B. PANGARIBUAN | A Charge |
| 11 | DOMINGGOS M.D. SOARES | A Charge |
| 12 | LEANDRO ISAAC | BAP A Charge |
| 13 | VICTOR dos SANTOS (APIN) | BAP A Charge |
| 14 | SANTIAGO do SANTOS | BAP A Charge |
| 15 | FLORINDO de JESUS | BAP A Charge |
| 16 | MARIA C. CARRASCALAO | BAP A Charge |
| 17 | JUANICO DASIVA | BAP A Charge |
| 18 | SUPARNO | BAP A Charge |
| 19 | MARCELINO MARTIN XIMENES | A de Charge |

The assumption that the 18 witnesses (11 were cross-examined and 7 had their statements read out) were giving out testimonies against the defendant (a charge) is by far too optimistic of a notion. **Saying that those 18 were witnesses summoned by the prosecutor in hope for them to fortify the indictment would be more correct. The statement saying that these 18 witnesses have been giving testimonies *against* the defendant should be re-clarified.**

According to the result of the monitoring, indeed the 18 have given out their testimony, but only few of them fortifying the indictment, which in fact were the 5 witnesses whose statements were read out upon the court, whereas the rest of them gave testimonies which have no significant effect to the indictment. (see table)

Daftar Saksi dan Penilaian kualitas pemeriksaan Kesaksian Selama Monitoring

| No | Name of Witness | Status | Nature of Testimony/Statement |
|----|------------------------|---------------|-------------------------------|
| 1 | ALFREDO SANCHES | Victim | Fortifying Indictment |
| 2 | JULIO DE SOUSA | Non-victim | Not significant |

| | | | |
|----|------------------------------|--|------------------------------|
| 3 | DOMINGOS BOAVIDA | victim | Not significant |
| 4 | MANUEL. V. CARRASCALAO | Victim | Not significant |
| 5 | BASILIO DIAS ARAUJO | Non-victim | Not significant |
| 6 | JOSE AFAT | Maubara Head of Administration Area | Fortifying Indictment |
| 7 | SOEDJARWO | Dandim 1627 Dilli | Not significant |
| 8 | ABILIO J.O. SOARES | East Timor Governor | Not significant |
| 9 | JOAO D.S. TAVARES | Present in the mass rally | Not significant |
| 10 | AGUSTINUS B PANGARIBUAN | Kasatserse Polres Dilli (police) | Not significant |
| 11 | DOMINGGOS M.D. SOARES | Dilli Head of Regency | Not significant |
| 12 | LEANDRO ISAAC* | CNRT Member | Fortifying Indictment |
| 13 | VICTOR dos SANTOS (APIN)* | victim | Fortifying Indictment |
| 14 | SANTIAGO do SANTOS* | victim | Fortifying Indictment |
| 15 | FLORINDO de JESUS* | victim | Fortifying Indictment |
| 16 | MARIA C. CARRASCALAO* | victim | Fortifying Indictment |
| 17 | JUANICO DASIVA* | Non-victim | Not significant |
| 18 | SUPARNO* | Non-victim | Not significant |

* BAP Read Out

- **Balance of Witness Composition**

It should be also noted that the comparison between the amount of witnesses proposed by the prosecutor and the counsellor is very unbalanced. The prosecutor presented 18 witnesses, whereas the defence presented only one, namely: **MARCELINO MARTIN XIMENES**. This is a very important fact, which should have raised the question on why the defence only presented one witness. The judges should have paid attention to this fact, because if the process of witness cross-examination runs unbalanced then it might be an indication that the trial of that particular case fails to uphold fair trial principles. Whereas a defendant in a criminal case is entitled to “examine or, be examined, the witnesses against him/her and

present and examine the witnesses on his/her behalf with the same conditions applied to witnesses testifying against him/her.’⁴.

The lack of a *de charge* witness who could be presented was due to several factors, namely: *first*, most of the prospective witnesses lived in Attambua so it was hard to bring them forth. *Second*, the lack of financial resources of the defendant and his team of counsellor to cover the expenses for presenting the *a de charge* witnesses⁵. Responding to the difficulty of the defence in bringing forth the *a decharge* witnesses, the Chief Judge of the panel that is processing the Eurico Guterres dossier, Herman Keller Hutapea stated that it was the interest of the defendant and the panel of Judges had provided the opportunity to the team of counsellor, but since the defence had gone over the limit of time given thus the panel of judges were compelled to enforce the limit.⁶.

- **The Charges issued by the Prosecutor reaffirms the assumption that what happened in East Timor merely clashes between civilians with no relation to the military.**

The assumption upheld in the trials of ad hoc human rights court for East Timor upon the post referendum incidents is that their background of these occurrences was the enmity between the pro-independence and pro-integration group. This is so because the whole exploration process in examining testimonies has always been directed to that direction with no significant effort to link it with the policy of military/TNI at the time.

Even in the charges against Eurico Guterres the prosecutor in its elaboration still affirms this scenario. For example, the prosecutor explains that it is true that in early 1999 the general situation of Dili was tensed, even more so due to the establishment of pro-independence and pro-integration groups. This situation frequently lead to physical clashes, especially in the

⁴ Judicial System Monitoring Program, East Timor Prosecutor Vs Joni Marques and 9 others, Dili East Timor, March 2002 page 25.

⁵ In the trial session on 26 September 2002, defendant and his team of counselor stated that the *a de charge* witnesses who would be presented upon the court amounted to 4 people, all of whom lived in Atambua, NTT. However, due to financial constraints the prospective witnesses found it difficult to go to Jakarta, thus the defendant and his team of counselor could only present 1 *a de charge* witness.

⁶ See court transcript on 26 September 2002

areas near Dili such as Maubara, Liquica, Turiscai, Alas and Ainaro.⁷ This statement is reaffirmed by various testimonies, such as from Soedjarwo⁸, Abelio Soares⁹.

- **The charges against Eurico should have been upon the ground of commission**

The charges against Eurico Guterres in the indictment dossier of the prosecutor stated that the defendant has allegedly violated article 42 verse (2) a and b. This article essentially elaborated that the defendant is guilty of letting the occurrence of *crimes against humanity* by his/her inferiors in the context of civilian commando. Thus the charges reinforced that the defendant has committed crime by *omission*, not by ordering or executing the action of crime. The prosecutor's reasoning in implementing the ground of *omission* is a weakness of its own¹⁰, because the defendant should have been charged on grounds of crime by commission.

Elsam's earlier criticism and hypothesis that the prosecutor should have built the indictment on grounds of crime by commission is proven in the charges. In the prosecutor's elaboration in the Requisitoir against Eurico Guterres, it is found that many of the prosecutor's explanations and explorations of the testimonies given are bent upon the direction that Eurico Guterres has been guilty of crime by *commission*.

In the charges the prosecutor admitted and elaborated that: *accordingly to the testimony of Basilio enforced by the explanation of the defendant, even according to the testimony of Manuel V Carascalao, Santiago dos Santos¹¹, and Maria C Carrascalao the defendant in addressing the rally had spoken the words "the family of Imanuel Viegas Carrascalao should*

⁷ See the Indictment of Eurico Guterres hal 65.

⁸ See Soedjarwo's testimony in the charges on page 22, elaborating on various clashes between pro-integration and pro-independence groups.

⁹ See the testimony of Abelio in charges against Eurico on page 26, stating that the pro-integration group was re-activated by the increased activities of Fretilin, such as the commencement of foreign training.

¹⁰ Lihat Progres report terdahulu mengenai kritisi terhadap dakwaan delik omission dalam surat dakwaan para terdakwa kasus Tim-Tim.

¹¹ Saksi mendengar Eurico Guterres memberi komando bahwa bahwa semua pemimpin CNRT harus dihabiskan dan khusus keluarga Manuel Carascalao harus dihabiskan. Lihat juga tuntutan JPU hal 46

be exterminated”¹² or the prosecutor in its charges has stated that: based on the testimony of Leandro Isac¹³ the defendant even lead the rally on motorcycle just before the attack of refugees who were taking shelter at the residence of Manuel Carascalao.¹⁴

- **Minimal Criminal Charges**

The criminal charges of the prosecutor against Eurico Guterres stated that Eurico Guterres is legally and convincingly proven according to the Law of being guilty of gross violation of human rights as contained in the **first indictment** namely based on article 42 verse (2) a and b jis article 7 point b, article 9 point a and article 37 Law No 26 year 2000, and the second indictment, namely of violating article 42 verse (2) a and b jis article 7 point b, article 9 point h and article 40 Law No 26 year 2000. The charges demand for **10 years** of imprisonment.

The criminal charges on Eurico by the prosecutor can be regarded as a minimal charge because article 9 point a of Law No 26 year 2000 stipulates that the maximum penalty is 25 years and the minimal is 10. Whereas article 9 point h of Law No 26 year 2000 stipulates that the maximum criminal penalty is 20 years and the minimal is 10. In the charges Eurico clearly has legally and convincingly been proven of having violated the provisions. We consider the proposed penalty is contradicting the earlier elaboration of the prosecutor, so we assumed that the proposed penalty was pre-prepared at the initial stages of the court, originating from the plan of indictment (rentut) of the General Attorney.

Summary

Observing the trial process of Eurico Guterres as the defendant until the stage of charges and comparing it with the other case dossiers, there are several points that should be noted:

¹² See Criminal Charges Against Eurico Guterres page 76

¹³ in his testimony Leandro Isac stated that *“the commander of militia who was present were Eurico Guterres who was the leader of aitarak militia who issued a political statement that the leader of CNRT should be exterminated and the witness even possessed a copy of Eurico’s statement. See also the charges of the prosecutor, page 39.*

¹⁴ See the Charges against Eurico Guterres page 78

- In the statement of charges there is an improvement on the prosecutor's side, namely by referring to the practices of international law upon similar typology with Eurico Guterres' case. However, the prosecutor still committed the same mistakes as in the three dossiers that have been decided upon by the judges
 - o **First**, the elaboration in the charges is so "confident", but with unbalanced whereas the proposed penalty. Eurico is charged with the minimal penalty of 10 years of imprisonment.
 - o **Second**, the charges with the ground of omission, whereas in the substitution process and witness cross-examination the prosecutor directed its efforts to prove that Eurico has committed crime by commission. This is unavoidable because even from the initial steps of the trial Eurico's indictment should have been positioned on grounds of by commission.
 - o **Third**, the prosecutor's lack of ability in translating "command responsibility" in the Eurico Guterres' dossier. the prosecutor is often trapped in the ambiguity of structural command responsibility and the field command responsibility. This has very fatal consequences: if what is meant is field command responsibility, the indictment of Eurico should have been grounded on crime by commission, whereas if what is meant is the structural command responsibility (assuming that the hierarchical relation between TNI and pro-integration militia is proven), thus Eurico's position as the Vice Commander of PPPI is questionable, why not Joao Tavares, the commander of PPPI himself, stands on trial?

- Compared to the charges of the defendant from the military circle, the defence for Eurico seemed to be not maximal. This is evident from the unbalanced composition of *a decharge* witness if compared to the *a charge* witness (1:10). Aside from that, the witnesses from TNI gave testimonies that are insignificant to the indictment. A third of the testimonies constituted of "mere" reading out the testimonies contained in the investigation note (BAP).

- By using article 42(2) on civilian command responsibility against Eurico Guterres, the prosecutor should have proven that his militia organisation was a "powerful" one operationally, with clear formal hierarchy, especially in decision making, funding and

in relating with other armed militias in East Timor. Only if that is proven the “effective control” can be regarded as existing.

- The failure in positioning Eurico “appropriately” and the lack of testimony from the military circle in the trial process, as well as the absence of the military high officials who were summoned by either prosecutor and defence gave the impression of Eurico being used as the scape goat of the military officials in this ad hoc court.

Jakarta, 12 November 2002.