

Monitoring Progress Report # 1
Ad Hoc Human Rights Court
Against Gross Human Rights Violations in East Timor
April- September 1999

1. Foreword

Presently, the Ad Hoc Human Rights Court is holding a trial for Crimes Against Humanity in East Timor for the pre-referendum and post-referendum periods (April – September 1999). Until this moment, the court is prosecuting three case files. One is under the name Abilio Soares (the former Governor of East Timor, and another for five defendants namely, Herman Sedyono (former KDH Regent Level 2 Covalima, East Timor), Liliek Koeshadianto (former Military District Commander/DANDIM 1635 Suai), Gatot Subiyaktoro (Former Head of the District Police Department of Suai), Achmad Syamsudin (former Chief of Staff, Military District 1635 Suai) and Sugito (former Commander, Military Rayon of Suai). The third lawsuit puts forth Timbul Silaen (former Head of the District Police Department of East Timor) as the defendant. These three court files covers the Gross Violations of Human Rights incidents during the pre-referendum and post-referendum periods that occur in the months of April – September 1999, with *locus delicti* in Liquisa, Suai and Dili.

Since the beginning, the formation of the Ad Hoc Human Rights Court has invited many responses. The election of the panel of judges and the General Prosecutor are important tools in the judicial process. Since December 2001, only towards the end of the month of January, did the president issued a President's Decree. A few names of the judges elected have a bad record that increases the public's pessimism on the Human Rights Court. Until a few moments before the work commenced, the supporting facilities have not yet been completed, such as legal instruments for protection and witnesses. Finally, it appeared in the form of the Government's Regulations (PP) No.2/2002, concerning a protection program for victims and witnesses, and in Government's Regulations No. 3/2002 concerning Compensation for the victims.

Asides from that, the capability of the judges and prosecutor to comprehend and apply the understanding of Crimes Against Humanity and genocide has become a crucial point in the eyes of the public. The understanding and comprehension of this form of crime becomes the

basic skill, considering that the clauses regulated in Articles 7 and 9, Act. No. 26/2000 is actually adopted from the Rome Statutes with a few distortions that in fact, weakens the concept and complicates the process of establishing evidence. Whereas, this Ad Hoc Human Rights Court is the first trial that deals with a form of extra-ordinary crimes, and the result of the process becomes a guide for the settlement of various cases of human rights violations that occurs in Indonesia.

In relation with this, the Institutes for Policy Research and Advocacy (ELSAM) deems it necessary to observe the process of the trial. The observation in the form of this monitoring is done based on a series of examining the process of the trial. In this first progress report, the main emphasis is placed on the content of the indictments and the defendant's notes of objection, as well as the panel of judges' preliminary verdict.

2. Charges

The two charges for Abilio Jose Osorio Soares and Timbul Silaen were arranged in the form of cumulative, while the charges for Herman Sedyono, Liliek Koeshadianto, Gatot Subiyaktoro, Achmad Syamsudin and Sugito were arranged in the forms of a subsidiary/alternative.

The three charges contain indictments of accountability as criminals on gross human rights violations that were done by their subordinates (violation of command responsibility), as a superior that did not perform effectively in the correct and appropriate way (Article 42), by disregarding the information that indicates that the subordinates have done/have recently done gross human violations (Article 42 Verse 1(a) for military command and Verse 2 (a) for civil officers), and did not take the appropriate action necessary to stop the act (Article 42, Verse 1 (b) and 2(b)). The gross violations of human rights charged fall under the crimes against humanity (Article 7, Law No 26/2000) in the form of murder (Article 9(a)) and 'persecution' (9 h). The areas where these crimes against humanity occurred, covers Dili, Liquisa and Covalima (Suai) in the periods of time before the referendum in April 1999, and after the announcement of the results of the referendum in September 1999.

Within the indictments, the General Prosecutor attempts to show the element of systematic by arranging the series of events that occur in the certain period. This can be located throughout

the whole file of charges that attempts to sequence the attacks that happened in a serial chain. In Abilio's case, the attack happened in the month of April on the dates 3, 4, 5, and 6 April 1999, that is connected by similar attacks on the 17th of April, and 4-6 September 1999. The same form was used in the case files charged for attacks that happen in the surrounding areas of Suai, Covalima, and Liquisa for indictments against the former Head of the District Police Department in East Timor, Timbul Silaen.

Meanwhile, the element of widespread illustrates *locus geografis* (geographic location) and the massivity of numbers of victims. This commenced with attacks on one particular locus and spreads to other areas within the same region. As seen in Abilio's case file, *locus delicti* at the crime scene spreads from Father Rafel Santos's residence at Liquisa Church Complex, which includes Bishop Bello's residence, until Ave Maria Church Complex. Throughout the whole incident, massive numbers of victims mostly consists of civilians. The total number of victims from these three different locations is calculated to be at least 47 lives.

Tabel 1: Details of the Indictment and Articles used as the base for the Charges

Name of Defendant	Form of Indictments: CUMULATION		
Abilio Jose Osorio Soares		Indictment I Murder	Indictment II 'persecution'
	Articles Charged	Article 42 verses (2) a and b; Jis Articles 7 letter b; Article 9 letter a; Article 37	Article 42 Verse (2) a and b; Jis Article 7 letter b Article 9 letter h; Article 40
	Crime Scene	Liquisa Church Complex; Ave Maria Church Complex, Covalima Regency; Bishop Belo's Residence, Aleandro Isaac and Manuel Viegas Carrascalao Dilli Regency; or, at east within the province of East Timor	
	Tempus Delicti	3,4,5,6 April 1999; 17 April 1999; 4,5,6 September 1999; (or particular periods throughout the months of April and September 1999)	3,4,5,6 April 1999; 17 April 1999; 4,5,6 September 1999; (or particular periods throughout the months of April and September 1999)
	Total Number of Victims	1. Liquisa Church Complex: 22 people 2. Manuel Viegas Carascalao's residence: 12 people 3. Bishop Bello's Residence: 10 people 4. Ave Maria Church Complex: 27 people 5. Diocese Dilli : 46 people	1. Liquisa Church Complex: 21 people 2. Manuel Viegas Carascalao's Residence: 4 people 3. Bishop Bello's Residence: 1 person

	Content of Charges	<ol style="list-style-type: none"> 1. Criminally accountable for gross human rights violations conducted by his subordinates. 2. Have the knowledge or disregarding the information that clearly states that his subordinates are doing or have just done gross human rights violations. 3. Did not exercise control over his subordinates according to the right manner and conduct. 4. Did not perform or take the appropriate actions that were necessary, such as coordinating with the officials who had the authority to prevent or stop the actions of the subordinates involved or turned in the perpetrators to the officials authorized to conduct investigations-inquiries and prosecution, therefore causing 'persecutions' towards the civilians. 	<ol style="list-style-type: none"> 1. Criminally accountable for gross human rights violations conducted by his subordinates. 2. Disregards information that clearly states that his subordinates are doing or have just done gross human rights violations. 3. Did not exercise control over his subordinates according to the right manner and conduct. 4. Did not perform or take the appropriate actions that were necessary, such as coordinating with the officials who had authority to prevent or stop the actions of the subordinates involved or turned in the perpetrators to the officials authorized to conduct investigations-inquiries and prosecution, therefore causing 'persecutions' towards the civilians.
Timbul Silaen	Articles Charged	Article 42 Verse (2) a and b; Jis Article 7 (b); Article 9 letter a; Article 37	Article 42 Verse (2) a and b; Jis Article 7 (b); Article 9 letter h; Article 37
	Locus Delicti	Liquisa Church Complex; Ave Maria Church Complex, Covalima Regency; Aleandro Isaac and Manuel Viegas Carrascalao Residence, Dili Regency; (or at least within the East Timor Province)	Liquisa Church Complex; Ave Maria Church Complex, Covalima Regency; Aleandro Isaac and Manuel Viegas Carrascalao Residence, Dili Regency; (or at least within the East Timor Province)
	Tempus Delicti	6 and 17 April 1999; 5 and 6 September 1999; (or at certain times within the months of April and September 1999)	6 and 17 April 1999; 5 and 6 September 1999; (or at certain times within the months of April and September 1999)
	Number of victims	<ol style="list-style-type: none"> 1. Liquisa Church Complex: 22 people 2. Manuel Viegas Carascalao's residence: 12 people 3. Ave Maria Church Complex: 27 people 	

	Content of Charges	<ol style="list-style-type: none"> 1. Did not perform accordingly the authority and responsibility to protect and preserve the peace and order of the people. 2. Responsible for the murders done by his subordinates under his authority, effectively under his command. 3. Did not exercise control over his subordinates according to the right manner and conduct. 4. With the knowledge or consciously disregarding the information that clearly stated that his subordinates were doing or have just done gross human rights violations. 5. Did not take the appropriate and necessary actions within the power of his authority to prevent or stop the act or turn in the perpetrator to the officials for inquiries, investigation and prosecution. 	<ol style="list-style-type: none"> 1. Did not perform accordingly the authority and responsibility to protect and preserve the peace and orderliness of the people. 2. Responsible for the murders done by his subordinates under his authority, effectively under his command. 3. Did not exercise control over his subordinates according to the right manner and conduct. 4. With the knowledge or consciously disregarding the information that clearly stated that his subordinates were doing or have just done gross human rights violations. 5. Did not take the appropriate and necessary actions within the power of his authority to prevent or stop the act or turn in the perpetrator to the officials for inquiries, investigation and prosecution.
Herman Sedyono, Liliek Koeshadian to	Form of Indictments	SUBSIDIARY/ALTERNATIVE	
		MURDER	'PERSECUTION'
	Articles Charged	Article 7(a) jis Article 9 (a); Article 37, Article 42 Verse 1 sub (a), (b).	
	Crime Scene		
	Tempus Delicti	6 September or at least, within the month of September 1999	
	Number of Victims	Ave Maria Church, Suai = 27 people	
	Content of Charges	Did not exercise control over his subordinates/troops. Disregarding information that clearly stated that his subordinates/troops have just done gross human rights violations. Did not take actions to prevent or to stop those acts and bring the perpetrators to the authorized officials to inquire, investigate and prosecute.	

Carefully examine the charges compiled by the General Prosecutor, it is astonishing that the prosecutor only focussed on the incidents that happened within the period April-September 1999, without connecting it with other incidents that has happened prior to that. This could be a weak point of the indictments, taking into account that the meaning of crimes against humanity requires that the act is a part of attack towards the civilians that has a widespread and systematic nature. Widespread refers to the geographic width or the massiveness of

victims, while systematic refers to the existence of a policy that is systemized to allow or even encourage the incident of gross human rights violations. These elements will be hard to be proven, if the incidents of gross human rights violations are released from the dynamics of the development of conflicts within East Timor. The efforts in order to connect the dynamics of the development of conflicts within East Timor, prior to this is important to explain why this incident happened within the three Regencies (East Timor has 14 Regencies). It will fulfil the requirements of widespread and systematic. If this is not done, then the following incidents that happen will be case-by-case wise in nature.

The perspective used in the charges in reality eliminates the interconnection of these civil groups of militia with the country's oppressive apparatus, the Indonesian National Armed Forces (TNI), and the Republic of Indonesia's Police. The loss of the context of the birth of the pro-integration civil militia groups who became the direct perpetrators with the presence and security policy from the military, therefore, the context of the incident evolved into a horizontal conflict between groups of civilians. The presence of the militia was explained as a separate entity from the military institution. Even the meaning of this civil militia group, cannot be located in the charges. This group is identified as one of the parties of the horizontal conflicting pro-integration and anti-integration parties. This resulted in charges that does not have the ability to demonstrate its existence as a "deliberate" group formed as a part of the security policy in East Timor.

This context may result in the missing link in the chain to demonstrate the direct role of the military and civil government officers in the gross Human Rights violations done by the civil pro-integration militia. The break in the inter-connection of the gross Human Rights violations with the incidents that occurred prior to these ones resulted in the non-appearance of various violent acts done by the military officials and the groups of civil militia formed by them. On the contrary, the formula of the indictments present the conflicts in East Timor as tension between horizontal conflicts of pro-integration and pro-independence groups that were not satisfied with the referendum process.

The result of using this perspective, also affects the indictments severely in supporting the charge of command responsibility. The most important point of this indictments lie in the effort to show the right measurement to prove that the act or policy done by the person wielding authority (civil or military) may be classified as disregarding information and

ineffective. This is directly related to the comprehension of omission and commission. However, the charge is lacking significantly important data like the structure of command, the line of policy and control, as well as the size, amount and the comparison of officials available for the size of the regions and population, and the relation between civil militia groups with the TNI/ABRI. Therefore, it is difficult to formulate the acts of the civil and military officials that may be categorized as “violation by commission.”

However, a few points in the letter of indictments can become the beginning to aid the panel of judges in establishing the evidence particularly for the forms of omission and commission, by allowing the acts of civil or military officials as an active support, allowance or even help for the acts done by the pro-integration civil militia¹.

3. Note of Objection and Preliminary Verdict

On account of these indictments, the prosecutors of the defendants through a Note of Objection ask the court to halt examinations. This halt is based on a few objections towards the indictments that covers:

1. The background of the conflict in East Timor is a civil war that began since 1974 until the referendum in 1999. The conflict in East Timor has existed since 1974, especially between groups that want independence and the pro-integration groups. The incident before and after the referendum appears to be a spontaneous reaction because the pro-integration group detected dishonesty in the referendum process conducted by UNAMET, therefore, what happened could not be called gross human rights violation, as regulated in Act No. 26/2000.

2. Court's Jurisdiction

In relation with the court's jurisdiction, there are two objections put forth in the note of objection of the defendants:

¹ Refer to the indictments addressed to Herman Sedyono, Liliek koeshadianto, etc page 2; Also refer to the indictment files of Timbul Silaen page 3. In this file, it is even reiterated that as a man of authority, the defendant did not do any prevention towards the words said by Eurico Guterres in the Pam Swakarsa gathering on the 17th of April 1999, that is suspected to cause the Aitarak and Besi Merah Putih (Red White Iron) to attack the civilians suspected as pro-independence masses. In a different part of the same indictments, Abilio, the governor of the East Timor province held a meeting with the regents encouraging the formation of a political organization to face the referendum process, by the name of Forum Persatuan demokrasi dn Keadilan (FPDK – The United Forum of Justice and Democracy), Barisan Rakyat East Timor (BRT – The East Timor People's Front) and the PAM SWAKARSA organization in each level 2 districts to hold the aspirations of the pro-integration people. The financial support came from the APBD funds.

1. The problem put forth is not a gross human rights violation as regulated in Acts No. 26/2000; therefore, the court does not have an absolute authority to try the case.
 2. The incident of gross human rights violations occurred in the region of East Timor. Based upon Act no. 26/2000 jo Presidential Decree 56/2001, then the Ad Hoc Human Rights Court has no relative competence to try the case.
3. The application of the Retroactive Principle
- The application of the Retroactive Principle is a form of waive towards the principle of Legality (*nullum delictum nulla poena sine lege*). Based on Act No. 26/2000, Ad Hoc Human Rights Court uses the retroactive principle to try gross Human Rights violations. The application of the Retroactive Principle in Act No. 26/2000, is considered as an opposition to the determination in the 2nd amendment of Article 18 (i) UUD 1945 and UU no 39 year 1999 Article 18 (2) concerning Human Rights². Therefore, if the examination continues, then the court is actually perpetrating a violation of Human Rights.
4. Command Responsibility means someone to be held accountable for a deed one didn't commit directly (done by one's subordinates). This opposes the basic principle of sentencing according to criminal law, because a criminal accountability is by nature individually sustained by the perpetrator³.
 5. The procedure is not in accordance with the existing law
- The Inquiry and Prosecution on the part of the judiciary has violated the time limit determined by the regulations, therefore the matters of indictment is automatically invalid by law⁴.
6. The formal requirements in the indictment are not fulfilled.
- A few objections concerning the formal requirements in the indictments as regulated in Article 143 Verse 2 Criminal Code, are as follows:
1. The identity of the defendant in the indictment is wrong⁵ (*error in persona*)
 2. The indictments are unclear (*obscur libelle*)

² Appeared as a whole throughout the defendant's Note of Objection.

³ Refer to Abilio Jose Osorio Soares' Note of Objection

⁴ Refer to the Note of Objection for the defendant G Timbul Silaen; Inquiry began since 18th April 2000 and the indictments was only issued on 19th February 2002. Based on the determination in Act No. 26/2000 the time limit for an Inquiry is a maximum of 240 days

⁵ In the indictments towards Timbul Silaen

The facts used by the General Prosecutor in his indictments are contradictory. Therefore, the indictments are unclear⁶.

3. The adoption of Article 55 Criminal Code by the General Prosecutor is an error, because it should be based on Act No. 26/2000⁷.

Towards the Note of Objection from the defendant, the panel of judges in the Ad Hoc Court that handles the three case files decided to reject the defendant's demands and on the contrary decided to continue the trial on the examination of the main case.

Concerning the objection on Absolute Competence and Relative Competence, the Panel of Judges views the Ad Hoc Human Rights Court as having Absolute Competence to try the gross Human Rights violations that happen before the formation of the Human Rights Court based on Act No. 26/2000 (Article 43 Act No. 26/2000). Meanwhile, concerning Relative Competence, the panel also views the State Court of Central Jakarta authorized to try criminal acts done outside the region of Indonesia by a citizen of Indonesia (Article 86 Criminal Code). Besides from that, Relative Competence is also recorded in Article 2 Presidential Decree No 96 year 2001, that gives authority to the Ad Hoc Human Rights Court to decide and examine cases of gross Human Rights violations that happened in East Timor in the months April-September 1999 and in Tanjung Priok in the month of September 1984⁸.

Tabel 2 : Preliminary Verdict and the Basic Considerations applied

The objection put forward in the note of objection	Case Files	The panel of judges considerations over the defendants objections
1. Concerning Competence		
1. Absolute Competence	Herman Sedyono Et.al. ⁹	Charges against Sugito are a part of a systematic and widespread attack where the act can be categorized as a crime against humanity.
2. Relative Competence	Timbul Silaen Abilio Jose Osorio Soares Herman	The team of legal advisors are not very careful in reading Act No.26/2000, particularly Article 43 Verse 2 & 3 that regulates the Ad Hoc Human Rights Court ¹⁰ . Based on the determination in Article 5, Act No 26/2000, the Ad

⁶ Refer to Abilio Jose Soares' Note of Objection, Timbul Silaen, Herman Sedyono, Et.al.

⁷ Refer to the indictments towards the defendant Sugito

⁸ The injunction of the Note of Objection towards Herman Sedyono, Lilik Koeshadianto, Et.Al on 9th April 2002.

⁹ Refer to Herman Sedyono's Note of Objection, the charges against Sugito is a common criminal act, and not a gross Human Rights violation

¹⁰ Refer to the Preliminary Verdict of Timbul Silaen, Abilio Jose Osorio Soares

	Sediyono, Et.al.	Hoc Human Rights Court has the right to bring to trial the case of gross Human Rights violations outside the region of Indonesia, if the perpetrator is a citizen of Indonesia. Based on Article 86 Criminal Code, the State Court of Jakarta has the authority to try a criminal act done in a foreign country ¹¹ .
2. Concerning Act No 26/2000		
1. In relation to the principle of legality because of the usage of the principle of retroactivity	Timbul Silaen Abilio Herman Sediyono, Et.al..	Based on the judicial principle of immunity against the gross Human Rights violations, it didn't seem fair in comparison with the principle of legality. Practiced by the international law in cases such as, Nuremberg, Tokyo, and Rwanda, the principle of <i>Nulum Delictum Noella Poena Sine Lege Iure</i> , gross human rights violations are deeds that shake the value of humanity and threaten International peace and security. The inter-related Article 18 Act no 39/1999 and Article 28i UUD 45 if viewed partially, may create partial understanding. Article 28i should be connected with Article 28j as found in the explanation of Act no.26/2000; that each crime against humanity may involve the retroactive principle, based upon how it is stated in Article 28j of the 1945 Constitution. The principle of retroactivity is an <i>ius cogens</i> that has to be adhered to without ratifications.
2. The legal power of Act No. 26/2000 is unclear and contradictive	Abilio Jose Osorio Soares	The panel of judges do not have the authority to examine the legislations unless based on the determination in Article 26 Act No 14 of 1970 concerning the elements of the judges' power. The legislations were formed in the correct manner and binds legally. Based on the determination of Article 24 (1), the second amendment of the 1945 Constitution that the court of constitution to examine the legislation until today has not been formed. The application of the Retroactive Principle in the Legislation is an exception that is consciously done by the Legislator.
3. Inquiry Process		
1. The inquiry that exceeded the time-limit	Timbul Silaen ¹² Herman Sediyono	This reason becomes insignificant after the case is given over to the court according to the legal procedures. It is not enough to state that the indictments should not be accepted.
2. The application of the regulations that is considered not having any legal power	Herman sediyono Et.al. ¹³	With the rejection of Government Regulation 1/199 concerning the Human Rights Court by the Indonesian Legislative Assembly, the Inquiry that commenced based

¹¹ Refer to the Preliminary Verdict of Abilio Osorio Soares

¹² Refer to Timbul Silaen's Files; The inquiry of the defendant commenced since 18th April 2000 and should've been completed by the month of Desember 2000

		on that Government Regulation is still valid as long as it does not contradict Act No. 26/2000 until it is stated as invalid by Act No. 26/2000.
5. Indictments		
1. The application of Article 55 Criminal Code in the indictments	Herman Sedyono, Et.al.. ¹⁴	The application of this article does not contradict the law because it is only a general determination that states the roles of each defendants
2. The error in mentioning the identity of the perpetrator in the indictment	Herman Sedyono ¹⁵	This change is not included in the category as intended in Article 144 (2) Criminal Code that results in a loss on the defendant's side, therefore, not strong enough to void the indictments.
3. Inaccurate indictments, obscure libel, contradictive	Timbul Silaen Herman Sedyono, Et.al..	The indictments have fulfilled the requirements in Article 143 Verse 2 letter b Criminal Code by stating the time of criminal act, reiterating the material acts charged, the indictments has completely satisfies the elements required in the Legislation. The Court decided that the case should be proven in the examination ¹⁶ .
4. error in persona	Timbul Silaen ¹⁷ Herman Sedyono, Et.al.. ¹⁸	Objection is beyond the determination in Article 156 Criminal Code, therefore, it is not considered as a valid objection legally. Objection has included the elements of the case and should be proven in court ¹⁹ .
5. Negligent in attaching Article 43 Act No. 26/2000	Drs. Herman Sedyono, Et.al.	This reason cannot be used to void the indictments legally. Although it is not attached in the Article, the incident charged is clear enough. In fact, there are other regulations of sentences asides from Article 43.
6. The persecution perpetrators have never been examined and brought on trial	Herman Sedyono, Et.al.	This is not a reason to void the General Prosecutor's charges as there is no regulation that determines who must be brought to trial first in an examination and the case sentenced.
7. Objections on the grounds that "command responsibility" is not fulfilled	Herman Sedyono, Et.al..	The objection must be proven in the case material examinations so that this reason will not be discussed further.
8. Objection on the application of	Herman	The attachment of the Presidential Decree 3/1999 was a

¹³ Refer to Herman Sedyono, and friends' Note of Objection, Inquiry is deemed not valid for applying the Government's Regulations No 1 year 1999 that has no legal power any longer.

¹⁴ Refer to Herman Sedyono's Files, the Ad hoc General Prosecutor adopted Article 55 Verse 1(2) CRIMINAL CODE to demonstrate the defendant's role as encouraging a criminal act.

¹⁵ Refer to Herman Sedyono and friends' Note of Objection: The prosecutor wrongly stated the defendant's identity. The defendant is stated to be a Christian, when in fact, he is a Moslem

¹⁶ Refer to the Preliminary Verdict for Herman Sedyono, Et.al.

¹⁷ Refer to Timbul Silaen's Note of Objection; the indictment *error in persona*, since 4th September there had been a handover of authority from the District's Police Department to the Armed Forces, whereas the security duties before that date has received a confession from a delegate of the UN, Jamseed Marker, on the success of the security during the referendum.

¹⁸ Refer to Herman Sedyono's Files, indictment against Gatot Subyaktoro is considered as an error in persona because the defendant is not the accountable person for the security and orderliness of the District Police of East Timor

¹⁹ Refer to the Herman Sedyono, Et.al.'s Note of Objection

Presidential Decree 3 of 1999 that is invalid legally	Sedyono	mis-type error, because the following explanation shows that it is intended to be Presidential Decree 43/1999. This reason will not cause the indictment to be voided.
9. Objection towards the error of the date of the referendum's announcement date.	Drs. Herman Sedyono, Et.al.. Et.al	The court determines this as an element of the case
10. The date on the indictment is not valid, because it is based on the Government Regulations No 1 Year 1999 that is presently invalid	Herman Sedyono, Et.al.	The opinion of the defendant's prosecutor that this Government Regulation is no longer in use is not correct, because even though the Indonesian Legislative Assembly have rejected it, it still has a legal power until the RUU put forward by the government in place of it is put into effect, so that there is no legal gap. Therefore, the Inquiry may still continue as long as it does not contradict Act No. 26/2000.

Applying the Retroactivity Principle is considered as a deviation, not a violation. Rather, it is a form of exception that is recognized in the study of law²⁰. Besides from that, the application of this principle is not in disregard of the Legality Principle in the Criminal Law. The panel of judges enforced that the application of the Retroactive Principle is based upon the principle to seek justice first, before the effort to uphold the absoluteness of the law. Because Crimes Against Humanity is in the form of an extraordinary crime that is recognized universally as the common "enemy" of the human race, therefore, it has to be prosecuted and punished. Upholding the Legality Principle should not be the facility of impunity for the Crime against Humanity perpetrators.

Besides that, based on the practice of the International Criminal Court, from the International Tribunals for war criminals in Nuremberg and Tokyo, the Ad Hoc International Criminal Court for Yugoslavia and Rwanda, the District Court for Jerusalem for gross Human Rights violations, until Adolf Eichman's viewing genocide, all applies the Retroactive Principle deviated in the name of justice²¹. Simultaneously, the International Judicial Practice also enhances the application for international jurisdiction towards gross Human Rights violations, that in turn will also deviate the application of the principle *ne bis in idem* ---to some extents, with few prerequisites, because with the existence of an international jurisdiction, every nation have the responsibility to try extra ordinary criminal perpetrators without considering the incident, the perpetrator's country, as well as victims. If the settlement on the national level could not perform its function independently and fairly, the existence of an International

²⁰ Refer to the injunction of the Preliminary Verdict for Abilio Jose Osorio Soares read on 4th April 2002

²¹ *ibid*

Judiciary System to uphold justice may become a deviation of *ne bis in idem* in Criminal Law²².

The panel of judges' considerations were the first step forward, keeping in mind the whole clause regarding gross Human Rights crimes that become the basis of the trial adopted from the Rome Statutes –with some distortions. By it, on the national level, Indonesia have not got the experience that can be referred to as a guide for the panel of judges. The effort seen in the practice of the court at International Level that adopts the clauses from the same Rome Statutes is an inevitable choice. Also, putting on trial gross Human Rights violators, and extraordinary crimes, have become a *ius cogens*, that is a legal norm that has to be adhered to and followed without any need of ratifications so that all nations are binded legally to perform it (*obligatio erga omnes*), and if necessary, waives the Legality Principle and the regulations of National Laws, including the *ne bis in idem* Principle and the Retroactivity Principle.

It should be noted that in reality, there are sources as guides, which until this moment have not been utilized both by the prosecutors, nor the panel of judges. One of them is the result of a similar court, or at least related with the case being tried that comes from Crime Against Humanity Court done in East Timor, as in the case of Los Palos by the UN transitional government for East Timor²³.

The efforts done by the Ad Hoc General Prosecutor by excavating elements of crime against humanity, in the indictments compiled, must be the basis of investigation that is done on the main case. This is because, the efforts to prove the important elements in Crimes Against Humanity is the element of attacks directed towards the civilians; widespread; and systematic, that requires diligence and hard work from the Ad Hoc panel of judges that tries the cases.

4. The Courtroom Process

In the Courtroom process, there are a few problems in the administration of the related courts with an information access during the trial. Among others, there are no official fixed schedules regarding the trials in the formal publication board at court. Therefore, the public

²² Refer to the injunction of the Preliminary Verdict for Herman Sedyono, Lilik Koesdiyanto, Et.al.

²³ This case puts on trial several pro-integration militia apprehended while waiting for a pick-up ship to take them to the Eastern West region. They confess their involvement in a number of murders and torture of East Timor civilians. Some of them gave testimonies that reveal the role of the Armed Forces in the formation of militia groups.

does not know exactly where and when the trials will be held. Besides from that, there is no order or mechanism that allows the public to access a number of basic documents, like the indictments.

In relation to the atmosphere of the courtroom, the presence of groups that are rightfully suspected of a neat organization, gives the public viewing the court a feeling of insecurity. These groups are among others Front Pembela Bangsa Indonesia (FPBI – Defenders of Indonesia Front), East Timorese groups that are attired in costumes with slogans like ‘*korban penipuan PBB*’ (Victims of UN’s fraud), several groups from the Armed Forces and policemen dressed as thugs, in turn occupies the visitors seats available. The presence of these groups often makes the Courtroom noisy, and some even smoke and turn on their communication equipment.

Meanwhile, the panel of judges do not give any attention to upholding the rules and regulations of the court. Therefore, in every trial session, this kind of situation continues to take place. The audience often cheers and give applauses, accompanied by shouts when the defendant’s prosecutor and the witness present gives words of sympathy for the Indonesian Armed Forces, as fighters defending the unity of our nation. Such climates in a courtroom indicate the existence of a contempt of court. If the climate of the court persists, it provides a difficulty for the prosecutor to produce his witnesses to the court.

Jakarta, 29 April 2002.