

DISTRICT COURT OF DILI

BEFORE THE SPECIAL PANEL FOR SERIOUS CRIMES



Case No: 05/2003

**MOTION TO REQUEST A WARRANT APPLICATION HEARING PURSUANT
TO SECTIONS 27.2 AND 19(A) OF UNTAET REGULATION 2000/30, AS
AMENDED BY REGULATION 2001/25**

THE DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

**WIRANTO
ZACKY ANWAR MAKARIM
KIKI SYAHNAKRI
ADAM RACHMAT DAMIRI
SUHARTONO SURATMAN
MOHAMMAD NOER MUIS
YAYAT SUDRAJAT
ABILIO JOSE OSORIO SOARES**

**For the Prosecutor: Nicholas Koumjian
Wambui Ngunya**

The Prosecutor hereby makes a motion pursuant to Section 19A of UNTAET Regulation 2000/30 as amended by 2001/25 for the Special Panel for Serious Crimes to hold an oral and public hearing on the issuance of an arrest warrant in Case Number 05/2000 against the first listed accused, Wiranto.

BACKGROUND FACTS

1. On 24 February 2003, the Deputy General Prosecutor for Serious Crimes filed an indictment with the Special Panel for Serious Crimes charging Wiranto, Zacky Anwar Makarim, Kiki Syahnakri, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat, and Abilio Jose Osorio Soares with Crimes Against Humanity: Murder, Deportation and Persecution, pursuant to her authority under UNTAET Regulations 2000/16 and 2000/30 as amended by 2001/25.
2. On 24 February 2003, the Deputy General Prosecutor for Serious Crimes requested the Special Panel for Serious Crimes to issue an arrest warrant for General Wiranto and the other accused named in the indictment.
3. On 26 and 27 June 2003, the Deputy General Prosecutor filed the corresponding supporting material with the Special Panel for Serious Crimes. The material was quite voluminous, consisting of 17 binders with 1,311 documents and statements totalling over 13,000 pages.
4. The Special Panels informed the Office of the Deputy General Prosecutor for Serious Crimes that the warrant applications would be considered one at a time to ensure an individual determination that for each accused reasonable grounds existed for the issuance of a warrant.
5. On 11 November 2003 a Judge of the Special Panels signed a warrant of arrest against Yayat Sudrajat, one of the accused persons on this indictment. To date, no decision has been issued on the applications for arrest warrants for the other seven accused.
6. For the reasons explained in this motion, the Deputy General Prosecutor for Serious Crimes requests the Special Panel to hold a public hearing in order to determine whether there are reasonable grounds to issue an arrest warrant against General Wiranto.

AUTHORITY TO RULE ON APPLICATION FOR ARREST WARRANT

7. The authority of the court to issue a warrant of arrest is provided for under Section 19(A) of Regulation 2000/30, as amended, which states:

19(A)(1): If there are reasonable grounds to believe that a person has committed a crime, the public prosecutor may request the Investigating Judge to issue a warrant for the arrest of that person in accordance with the rules established in the present section.

8. Section 9.3 of UNTAET Regulation 2001/30 as amended states in relevant part:

9.3: Except as otherwise provided in the present regulation, a warrant or order from an Investigating Judge shall be obtained for the following measures:

- a) arrest of a suspect*
- b) detention or continued detention of a suspect...*

9. However, once the Prosecutor has filed an indictment against an accused the above powers of the Investigating Judge are transferred to the Special Panels. Section 24.3 of UNTAET Regulation 2001/30, as amended states in relevant part:

24.3: When the indictment is presented to the court, the powers of the Investigating Judge terminate, except the powers of the investigating Judge described in Section 9.3 (c) through (j) of the present regulation.

10. In previous cases where an indictment has been filed against an accused not in custody, the Special Panel for Serious Crimes has issued warrants of arrest.¹

IT IS WITHIN THE AUTHORITY OF THE SPECIAL PANEL TO HOLD AN ARREST WARRANT HEARING

11. Section 19(A) requires that the Prosecutor shall make a request for the judge to issue a warrant of arrest. The Rules of Procedure clearly provide that it is within the discretion of the Court to decide whether to consider

¹ The Special Panel has issued numerous warrants for the arrest of individuals after the issuance of an indictment.

the motion in an oral hearing or only through written submissions. Section 27.2 of Regulation 2000/30, provides:

27.2: After the case is assigned to a panel or judge, any party may at any time lodge a motion with the court, other than a preliminary motion as described in the preceding subsection,² for appropriate relief. Motions for appropriate relief may be oral or written at the discretion of the Court.

A HEARING TO DETERMINE THE ISSUANCE OF ARREST WARRANTS WOULD SERVE THE INTERESTS OF JUSTICE

12. The Prosecution submits that in this case a public oral hearing on the motion is appropriate and serves the interests of justice for the reasons discussed below.

- a) A public hearing is the most transparent manner to deal with a legal decision of great public interest. This motion is of public interest worldwide but particularly to the citizens of Indonesia and East Timor. The media and public throughout the world will be in a better position to evaluate the fairness of the process and the basis for the charges if the evidence is presented as openly as possible while maintaining necessary measures to ensure the safety of witnesses.
- b) A transparent public hearing will dispel any misconception that the charges filed by the Office of the Deputy General Prosecutor for Serious Crimes are directed at either the Indonesian state or the Indonesian people. Rather, the hearings will make clear that the charges concern the individual criminal responsibility of specific individuals, in this particular case, the allegations that General Wiranto violated International Law by failing to punish or prevent Crimes against Humanity committed by those acting under his effective control.
- c) The hearing would be the most effective method for the Special Panel to carefully scrutinize the evidence submitted by the Office of the Deputy General Prosecutor for Serious Crimes. With the consent of the court, key witnesses could be questioned by the

² Section 27.1 states, "*Preliminary motions may be raised prior to the commencement of that trial. Such motions are those which: (a) allege defect in the form of the indictment (b) seek severance of counts joined in one indictment or separate trials in cases of co-accused; or (c) raise objections based upon refusal of a request for assignment of counsel.*"

court or counsel and asked to clarify or expand upon their statements. By observing the live testimony of the witnesses, the court could better judge their credibility. The court could address any questions regarding the evidence or applicable law directly to the prosecution and any counsel that appear for the Accused.

- d) Because of the voluminous and complex evidence in this case, this procedure would be more expedient than the current method where the judge reads through the evidence and, when questions arise, requests written clarification, awaits the prosecution's response, and then proceeds with his or her review.
- e) The proposed procedure would afford General Wiranto with an opportunity to be represented at the hearing. He could himself attend the hearing or send legal counsel to the Special Panels to represent him. Subject only to those redactions necessary to protect witnesses, the prosecution would provide counsel for General Wiranto with copies of the evidence to be considered by the court and the court could provide counsel an opportunity to be heard or to suggest their own witnesses.
- f) Should General Wiranto choose not to attend the hearing for fear of being arrested, the Office of the Deputy General Prosecutor for Serious Crimes would ask the court to consider affording General Wiranto the opportunity to testify via video-link from Indonesia. He could provide the court with his statement and answer the questions of the court and prosecution. Of course, should General Wiranto chose to exercise his right to remain silent, this would not be held against him in any way.

A WARRANT APPLICATION HEARING SHOULD BE TRANSPARENT AND OPEN TO THE PUBLIC

- 13. The proposed arrest warrant application hearing offers a unique opportunity to publicly review the evidence and contribute to the establishment of a historical record. The issues to be addressed in the arrest warrant application include the Prosecution's allegations that massive crimes were committed against the civilian population of East Timor in 1999, that they were organized and that General Wiranto, as the superior of all military and police forces in East Timor, failed to take reasonable measures to prevent the crimes or punish the perpetrators.
- 14. The proposed procedure offers the accused the best opportunity to publicly refute the charges against him. Should the prosecution fail to

prove that reasonable grounds exist for the charges, the accused would benefit from being publicly exonerated.

15. However, should the Court find that reasonable grounds do exist to believe General Wiranto is responsible for the crimes alleged and that the warrant should be granted, it is critical that the governments of Timor Leste, Indonesia, and third party governments who would be asked to execute the arrest are confident that the order was arrived at through a transparent process and is in fact supported by substantial evidence. The prosecution submits that an oral public hearing can best provide the transparency necessary to instill this confidence in the court's order.³

NO RULES OF PROCEDURE PROHIBIT A PUBLIC HEARING

16. There is no legal barrier to holding the proposed hearing in open court. Rule 20 of Regulation 2000/30 concerns initial detention hearings following the arrest of a suspect. Under the Rules of Procedure, a suspect can be arrested before an indictment is issued. Rule 20.2 provides that this initial review hearing "shall be closed to the public unless requested otherwise by the suspect and ordered by the Investigating Judge."
17. The application for an arrest warrant for General Wiranto is not a detention hearing under Rule 20 and the reasons for providing accused persons the right to a closed detention hearing are not applicable in this case. A person could be arrested by the police and then released at a detention hearing with no charges filed. In that situation, there is a logical reason to protect the arrestee from public disclosure of his arrest. In the case of General Wiranto, the Deputy General Prosecutor for Serious Crimes issued a formal indictment in February 2003 and the pending charges are a matter of public record and already the subject of wide publicity.

³ The Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia provide for a similar type of hearing to that proposed here. Under Rule 61 the court has the power to order a public hearing requiring the prosecutor to submit evidence in support of the indictment. These proceedings act as a public demonstration of the evidence of crimes committed by the accused and serve to pressure states to comply with the arrest warrants issued by the court. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it issues an international arrest warrant. The Special Panel has the jurisdiction to look to other principles of law, such as those prescribed in other international criminal tribunals, pursuant to Section 54.5 of UNTAET Regulation 2000/30 as amended. Section 54.5 states that, "*On points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply.*" This provision is consistent with Section 3.1 of UNTAET Regulation 2000/15, which states that "*In exercising their jurisdiction, the panels shall apply ...where appropriate, applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict.*"

18. Moreover, detention hearings under Rule 20 are open to the public if requested by the suspect, who by definition is present at the hearing. In arrest warrant applications the suspect is not expected to be present and therefore has no opportunity to request a public hearing. In the present circumstances, the Prosecution submits that no legitimate interest of General Wiranto would be served by having the hearing closed to the public. However, should General Wiranto prefer a closed hearing, nothing prevents him from making that request known through a communication with the court explaining the reasons he opposes a public hearing. In the absence of such a request, the Prosecution submits that there is no reason for the court to bar the public from the hearing.

THE PROPOSED HEARING RESPECTS INTERNATIONAL STANDARDS OF DUE PROCESS

19. The arrests warrant application hearing proposed in this motion is not a trial *in absentia*. The hearing cannot result in a verdict on guilt nor an imposition of sentence. General Wiranto would maintain his rights to a full trial on each of the charges once he is brought within the jurisdiction of the court. The proposed arrest warrant hearing would not in any way denigrate the rights guaranteed to General Wiranto by the Rules of Procedure applicable in East Timor nor the general protections of the rights of accused under international criminal law.

A HEARING TO DETERMINE THE ISSUANCE OF ARREST WARRANTS WOULD SERVE THE INTERESTS OF THE VICTIMS AND SURVIVORS

20. Section 12 of UNTAET Regulation 2000/30 provides the right of the victim to be heard before the court. The victim has the right to be heard at a review hearing before the Investigating Judge, and at any hearing on an application for conditional release. Furthermore, Section 12.5 states:

12.5: A victim may request to the court to be heard at stages of the criminal proceeding other than review hearings."

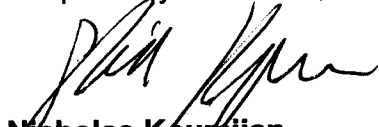
21. The purpose of Section 12 is to ensure that the victim is always a priority in proceedings before the court. In the indictment of General Wiranto, hundreds of thousands of residents of East Timor were the victims of a campaign of violence that included arson, forced deportation, torture, and murder. The Prosecution recognizes the present difficulties in bringing General Wiranto and other major perpetrators of this campaign of violence before the Special Panel. Accordingly, this arrest warrant application

hearing may be the only opportunity for the victims of this campaign of violence to explain what they experienced in a court of law. The Prosecution submits that legally and morally the Special Panels have a duty to give them the opportunity to be heard.

22. For the reasons explained above, the Deputy General Prosecutor for Serious Crimes requests the court to set a time and place for a public hearing on the pending Application for a Warrant of Arrest filed 24 February 2003 and invite General Wiranto to attend the hearing, or arrange to be represented by counsel at the hearing, and to inform the court as to whether he wishes to testify via video-link from Indonesia.

Dated this 27th day of January 2004

Respectfully submitted,



Nicholas Koumjian
Deputy General Prosecutor for Serious Crimes

	Received by	Date
Filed in Dili Court		