REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

DILI DISTRICT COURT

**THE SPECIAL PANELS FOR SERIOUS CRIMES**

Before:
Judge Phillip Rapoza

CASE NO. 05/2003

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

-AGAINST-

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

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# Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto

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For the Deputy General Prosecutor:
Nicholas Koumjian
Wambui Ngunya

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## Procedural History

1. On 24 February 2003, the Deputy General Prosecutor filed an indictment with the Special Panels 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 in the form of murder, deportation, and persecution. Moreover, the indictment alleges that the defendants are responsible both as individuals and as persons having command responsibility over others (UNTAET Regulations 2000/16 and 2000/30 as amended by 2001/25). On the same date, the Deputy General Prosecutor also filed a Request for Warrants of Arrest for all defendants, including Wiranto.

2. On 25 June 2003, the Court dismissed the Request for Warrants of Arrest on the ground that the Deputy General Prosecutor had not presented to the Court a description of the evidence supporting the indictment, as required by Section 24.2 of the Transitional Rules of Criminal Procedure (UNTAET Regulation 2000/30, as amended).

3. On 26 June 2003, the Deputy General Prosecutor filed a new Request for Warrants of Arrest for all defendants named in the indictment.

4. Between 26 June 2003 and 17 September 2003, the Deputy General Prosecutor filed seventeen (17) volumes of documentation in support of the charges. The material was contained in a total of thirty-four (34) binders amounting to over 13,000 pages and including statements from over 1500 witnesses.

5. On 7 November 2003, the Special Panels issued an arrest warrant with respect to the defendant Lt. Colonel Yayat Sudrajat.

6. On 28 January 2004, the Deputy General Prosecutor filed a motion pursuant to Section 27.2 of the Transitional Rules of Criminal Procedure to request a public warrant application hearing in the case of defendant Wiranto.

## Statement of the issue

The Deputy General Prosecutor (hereinafter DGP) has filed a motion in which he asks for a public hearing of an adversarial nature on his previous written Request for a Warrant of Arrest in the case of Wiranto. The Transitional Rules of Criminal Procedure (hereinafter TRCP) do not provide for such a hearing, nor has the DGP ever requested such a proceeding in any other case before the Special Panels for Serious Crimes.

The DGP presented his motion for a hearing pursuant to TRCP Sec. 27.2 which states that "[a]fter a case is assigned to a panel or a judge, any party may at any time lodge a motion with the court . . . for appropriate relief." [1]

[1] At Par. 11 of his motion, the DGP conflates his original Request for Warrants of Arrest pursuant to TRCP Sec. 19A with his motion for a hearing

The issue before the Court is whether the request of the DGP for a public hearing on his application for an arrest warrant as to Wiranto constitutes "appropriate relief" within the meaning of TRCP Sec. 27.2.

**What the Deputy General Prosecutor is requesting**

It has always been the practice before the Special Panels for Serious Crimes for the Deputy General Prosecutor to request in writing a warrant for the arrest of a defendant. The request, in turn, has routinely been accompanied by written documentation, including witness statements, that support the issuance of the warrant. The amount of evidence submitted varies depending on the complexity of the case and the number of defendants.

The judge to whom the written request is made reviews all the prosecutor's submissions in chambers and determines "[i]f there are reasonable grounds to believe that a person has committed a crime"(TRCP Sec. 19A.1). If the judge concludes that there is reason to believe that the defendant committed a crime and that a warrant is required for his apprehension, he or she shall order the issuance of an arrest warrant (TRCP Sec. 9.2).

In the case of every arrest warrant issued by this Court, the judge has considered the prosecutor's written submissions in chambers without a hearing. This is the same procedure that was used in the present case in which the DGP filed over 13,000 pages of documentation containing over 1500 witness statements. That material was reviewed by the Court with respect to the allegations concerning Lt.

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pursuant to TRCP Sec. 27.2. Motions pursuant to TRCP Sec. 27.2, such as the one now before the court, "may be oral or written at the discretion of the court." There is no equivalent provision for requests made pursuant to TRCP Sec. 19A.

Pursuant to TRCP Sec. 27.2, the court may allow a party to make a motion in oral form for reasons of economy, such as when an oral hearing is taking place, without first requiring that the party's request be reduced to writing. Similarly, the court may require that the motion be filed in writing should the circumstances so dictate.

In either case, TRCP Sec. 27.2 does not address how the resulting motion is to be heard by the court. Further consideration of the issue, however, is irrelevant for our purposes as the only motion that the DGP has filed in the instant matter pursuant to TRCP Sec. 27.2 is the present one which was submitted in writing and on which the DGP has not requested an oral hearing. The previous request of the DGP for an arrest warrant pursuant to TRCP Sec. 19A was not a motion filed pursuant to TRCP Sec. 27.2 and is not subject to its provisions.

Colonel Yayat Sudrajat, and a warrant issued for his arrest on 7 November 2003. The same material has been under review with respect to the allegations against Wiranto and the other six defendants.

The DGP is now requesting that he be allowed to use a different procedure to obtain an arrest warrant for the defendant Wiranto. The DGP's motion does not request that a hearing, already provided for by the Rules, be open to the public. Rather, it proposes a new type of hearing that does not now exist and it is that hearing that he requests be open to the public. Thus, the DGP does not merely propose opening what is now a closed hearing. He is proposing that, for the first time, such a hearing take place and that it be open to the public.

Moreover, the DGP also proposes that defendant Wiranto be permitted to attend[2] and to be represented by counsel at the proposed hearing concerning the issuance of his arrest warrant.[3] At the hearing, the DGP's witnesses would testify and be subject to cross-examination by Wiranto's attorney.[4] Similarly, Wiranto would have the opportunity to be heard and to present his own witnesses.[5] The DGP further proposes that Wiranto be permitted to participate in the hearing without actually being present and to testify by video-link.[6]

In summary, the DGP's proposal amounts to a radical change in the procedure for issuing arrest warrants in the case of defendant Wiranto.

**Introduction to discussion section**

There is no provision in the Transitional Rules of Criminal Procedure for a public, adversarial hearing on the question of whether an arrest warrant should issue. Nor is such a proceeding provided by the rules of any international criminal tribunal with jurisdiction over crimes against humanity and other serious offenses. These include the International Criminal Court, the International Criminal Tribunal for

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[2] Were the defendant to attend the hearing on his own arrest warrant, he would effectively be submitting himself to the jurisdiction of the Special Panels, obviating the need for an arrest warrant to bring him before the Court, although the possibility of his pretrial detention would remain an issue for the Court to decide.

[3] "The proposed procedure would afford General Wiranto with an opportunity to be represented at the hearing. He could himself attend or send legal counsel..." Motion, Par. 12(e).

[4] "[W]itnesses could be questioned by the court or counsel..." Motion, Par.12(c).

[5] "[T]he court could provide counsel an opportunity to be heard or to suggest their own witnesses." Motion, Par. 12(e).

[6] "[T]he 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." Motion, Par. 12(f). If public reports are to be credited, the Prosecutor General has already offered the defendant this accomodation without first obtaining a ruling from this Court on the motion under consideration.

the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

The DGP does not request that a hearing which is already provided for by the Rules be made open to the public. Rather, he proposes a new form of hearing that does not now exist and it is that hearing that he requests be open to the public.

The DGP's motion essentially calls for the Court to establish an entirely new procedure designed for the case of the defendant Wiranto. Moreover, it affords this particular defendant the unique opportunity both to participate in the proceedings and to seek to persuade the court not to issue the arrest warrant against him. Not only do the rules not provide for such an intervention by a defendant, but this is an option that has never been provided to any other defendant in any other case, either before the Special Panels or, so far as can be determined, before any comparable tribunal.

The procedure proposed by the DGP is designed to do more than merely inform a judge who must determine whether to issue an arrest warrant. Rather, the proposal serves an entirely different purpose and addresses an entirely different audience. In addition to the Court, the audience for such a proceeding is the "media and public throughout the world."[7] Moreover, the purpose of the proposed hearing goes far beyond determining whether there exist "reasonable grounds to believe that a person has committed a crime" (TRCP Sec. 19A.1). Rather, it is to afford "the media and public throughout the world" the opportunity to evaluate the charges and to "contribute to the establishment of a historical record."[8]

Whatever may be the value of such considerations, they are not the purpose of the arrest warrant process. Rather, they are among the many benefits to be realized from a true public trial that produces a final verdict of guilt or innocence.

## Discussion

### A. There is no provision in the Transitional Rules of Criminal Procedure for a public hearing of an adversarial nature on the issue of whether an arrest warrant should issue.

The Transitional Rules of Criminal Procedure provide that "[a] court shall decide every case submitted for its consideration in accordance with the present regulation and the applicable law" (TRCP Sec.3). The regulations and law to which the Rules refer, in turn, make no provision for a public hearing of an adversarial nature on the issue of whether an arrest warrant should issue. What is more important, there is no provision in the Rules for any type of hearing on such a request. Decisions on arrest warrants are made by the judge in chambers solely on the basis of the documentary submissions by the prosecutor.

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[7] Motion, Par. 12 (a).

[8] Motion, Pars. 12(a) and 13.

It is not that the Rules are silent on how arrest warrants are to issue, necessitating invention on the part of the Court. Rather, the procedure for issuing an arrest warrant under the Rules is clear and in no way contemplates a public hearing of the type proposed by the DGP. The DGP originally requested arrest warrants pursuant to TRCP Secs. 9.8, 19A and 24.3. Those provisions, taken together, set out a very clear procedure for requesting and processing an arrest warrant.

The prosecutor makes a written request for an arrest warrant and provides the Court with documentary support for the charges, including statements of victims, witnesses, suspects, defendants and others. The Court, in turn, must review the evidence and determine whether there are "reasonable grounds" to believe that the defendant has committed the crime charged and that an arrest warrant is required for his apprehension (TRCP Sec. 19A.1).

It is only after an arrest warrant is executed and a suspect or defendant is arrested that the Rules first provide for a hearing. Section 20 of the Transitional Rules of Criminal Procedure provides for a "review hearing" within 72 hours of arrest at which the suspect or defendant has the right to be represented by counsel. At that hearing the person under arrest may contest the lawfulness of his apprehension and the need for continued detention. In turn, the Court has several options. It may: confirm the arrest and further detain the suspect; order substitute restrictive measures; or order the individual's release (TRCP Sec. 20.6(a)-(c)). "The review hearing shall be closed to the public, unless requested otherwise by the suspect" (TRCP Sec. 20.2).

The next phase of the proceedings involving an appearance before the Court is the "preliminary hearing" at which the Court must ensure that the defendant is familiar with the contents of the indictment and understands the nature of the charges against him. The Court shall also rule on any motions or requests for evidence or additional investigation. The defendant, who has the right to be represented by counsel, may also make a statement concerning the charges, including either a plea of not guilty or an admission of guilt as to all or any portion of the charges. Additionally, the Court shall set a date for trial. Once again, the Court has the opportunity to consider whether the defendant's continued detention is necessary (See, generally, TRCP Sec. 29). The preliminary hearing is open to the public.

The final phase of a criminal case is the trial, which "shall be open to the public" (TRCP Sec. 28.1). It is at the trial that the parties are, for the first time under the rules, "entitled to call witnesses and present evidence" (TRCP Sec. 33.1). Similarly, the parties have the right to cross-examine witnesses presented by the other side (TRCP Sec. 30.6). In all respects the trial is closely regulated by the rules which describe how the proceedings shall be conducted (See TRCP "VI. Public Trial," Secs. 26-39). In the event that a defendant chooses to admit his or her guilt pursuant to TRCP Sec. 29A, the change of plea is also offered at a public hearing.

Every phase in the criminal process before the Special Panels for Serious Crimes thus has a concrete legal basis in the Transitional Rules of Criminal Procedure. The Rules dictate how arrest warrants are to be issued, and they do not provide for a public hearing for that purpose. The type of adversarial proceeding sought by the

prosecutor is called for only at the time of trial when the issues are joined and the evidence is put to the ultimate test.

## B. The Transitional Rules of Criminal Procedure do not give a judge reviewing a request for an arrest warrant the discretion to conduct a public hearing of an adversarial nature.

As the Court has previously noted, there is no provision in the Transitional Rules of Criminal Procedure that permits the procedure proposed by the DGP. Indeed, the Rules contemplate an entirely different method for processing criminal cases from the one envisioned by the prosecutor. The DGP asserts that there is no rule prohibiting the type of public, adversarial proceeding that he is proposing. From this proposition, he deducts that it is within the discretion of the Court to conduct a public hearing of the type that he requests

The initial premise of the DGP is flawed. The absence of a rule specifically prohibiting the procedure that he advocates does not constitute a sound legal basis to conduct such a proceeding.

Once again, we note that there is already in place a procedure for the review of evidence relative to the issuance of an arrest warrant: the judge is to conduct an in-chambers review of the documentation submitted by the prosecutor. This is the procedure that has been used in every case, for every defendant, who has appeared before the Special Panels, including Wiranto's co-defendant, Lt. Colonel Yayat Sudrajat.

Moreover, the in-chambers review of evidence supporting an arrest warrant request is part of a clearly delineated system for processing criminal cases from investigation (TRCP Secs. 13-18), to arrest and detention (TRCP Secs. 19-23), indictment (TRCP Secs. 24-25), and trial (TRCP 26-39). In this context, the rules provide only three types of hearing in a criminal case: review hearings (TRCP Sec. 20), preliminary hearings (TRCP Sec. 29) and trials (TRCP 28).

The in-chambers review of evidence in support of a request for an arrest warrant is thus contemplated by the Transitional Rules of Criminal Procedure and well-established in practice. Consequently, there is no reason whatsoever for the Rules to specifically exclude alternate means for performing the same function.

Essentially, the DGP asserts that under the Rules, that which is not prohibited is allowed. This proposition runs contrary to the very nature of the Rules themselves. The Rules constitute a form of positive legislation supplying a concrete legal foundation for the manner in which criminal cases shall be processed. Their purpose is to ensure that procedures are clearly stated in order to ensure both the integrity of the court's proceedings as well as the rights of those subject to the court's authority.[9]

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[9] The proposition that the Court may establish the proceeding requested by the DGP in the absence of any rule prohibiting such a hearing generates other problems as well. In the absence of any rule providing for the requested procedure, the Court would also

Although the Rules empower the Court to engage in certain judicial actions, they bind the Court as well, restricting the manner and the circumstances in which the judicial power may be used. To suggest "that which is not prohibited to the Court is allowed" not only runs contrary to the very nature of the Rules, but amounts to a dangerous invitation to judicial mischief. In the worst case, it amounts to a *carte blanche* for judges to impose their own preferences and permits them to make the rules rather than follow them. This is the antithesis of a basic principle of the rule of law, that a judicial system must be one of "laws and not of men."

## C. No international criminal tribunal with jurisdiction over crimes against humanity and other serious crimes provides for a public hearing of an adversarial nature on the issuance of an arrest warrant.

The Transitional Rules of Criminal Procedure provide that "[o]n points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply" (TRCP Sec. 54.5). There is no international principle or practice that would support the type of procedure proposed by the DGP.

No other criminal tribunal with jurisdiction over crimes against humanity and other serious crimes provides for a public, adversarial hearing on the initial issuance of an arrest warrant. This includes the International Criminal Tribunal for the Former Yugoslavia (ICTY) (see, Articles 19-20; Rules 54-60), the International Criminal Tribunal for Rwanda (see, Articles 18-19; Rules 54-60), the International Criminal Court (see, Article 58; Rule 117) and the Special Court for Sierra Leone (see, Rules 47, 54-56). Although practices vary among the various courts with respect to how warrants are issued and indictments are treated, there is not one court in which the prosecutor conducts a public, adversarial hearing on the initial issuance of an arrest warrant. There is no precedent in international criminal procedure for such a proposal.

The DGP suggests that Rule 61 of the Rules of Procedure of the ICTY provides a type of hearing similar to the one that he proposes. The public hearing provided by Rule 61 has nothing to do with the issuance of the initial warrant of arrest. Indeed, the proceeding occurs after a warrant of arrest has already been issued and only if, within a reasonable time thereafter, the warrant has not been executed and personal service has not been made (ICTY Rule 61(A)). According to the rule, the judge must also be satisfied that the court registrar and the prosecutor have taken "all reasonable steps to secure the arrest of the accused" (ICTY Rule 61(A)(i)). Even then, a hearing cannot occur unless "the whereabouts of the accused are unknown" (ICTY Rule 61(A)(ii)).

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have to determine the exact form of the proceedings, the procedural rules to be employed and the evidentiary rules to be used. In the case of a public trial, which is clearly called for by the Rules, all of these issues are also resolved by the Rules (See TRCP "VI. Public Trial," Secs. 26-39).

The most obvious point to be made at this juncture is that the proceedings just described are provided for by a specific rule, ICTY Rule 61. A similar procedure is to be found in the rules of the ICTR (See ICTR Rule 61). Thus, the procedure is not an individualized judicial response to the necessities of the moment in a particular case. Rather, in both tribunals the hearing is provided for by a fixed rule that is triggered in predetermined circumstances that do not apply to this case.

The setting for a Rule 61 hearing is very different from the one before this Court. In a Rule 61 case, the original arrest warrant has already issued and has not been served, despite the prosecutor's best efforts. Moreover, the whereabouts of the defendant are unknown.

In the present matter, no arrest warrant has even issued. Moreover, if one were to issue, the best efforts of the prosecutor may yet bear fruit. Suffice to say, it is premature to judge what will be the results of his efforts. In any event, we have not reached the stage where we can say that "all reasonable steps" have been exhausted to secure the defendant's arrest.[10] In any event, unlike in a Rule 61 situation, the DGP cannot claim that "the whereabouts of the accused are unknown."

There is no international principle or practice recognizing the use of public hearings for the issuance of arrest warrants in the manner proposed by the DGP.

## D. The public policy considerations enumerated by the prosecutor for conducting a public hearing of an adversarial nature do not supply a legal basis for conducting such a hearing.

The public policy considerations that the DGP propounds do not supply a concrete legal foundation for the proceeding that he has requested. Reasons of sound public policy may affect the exercise of judicial discretion, but there is no discretion to be exercised in the present case absent a legal provision authorizing the procedure that he requests.

It is the function of this Court to follow the rules, not to make them. We are bound by the rules that we have been given and it is for others, not the judges of this Court, to determine whether a different set of rules would better serve the interests of justice.

Nonetheless, we pause to address several of the DGP's contentions:

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[10] Although the DGP notes the "difficulties in bringing [the defendant] before the Special Panel, " Motion, Par. 21, the Prosecutor General has been publicly cited as stating that the issuance of a warrant for Wiranto would involve Interpol in the arrest process, increasing the opportunities for his apprehension. See "ET Prosecutor Accuses UN Judges of Delaying Warrants," Suara Timor Lorosae, 16 January 2004, p. 12.

## 1. Transparency of the proceedings

As the prosecutor has correctly noted, the present matter is one of "great public interest" to "[t]he media and public throughout the world."[11] From this proposition the DGP deduces that a public proceeding is required to consider the issuance of an arrest warrant against Wiranto and to provide transparency.[12]

There is no doubt that transparency is fundamental to a fair and just legal system. But principles of transparency must not be decided on an *ad hoc* basis in which high-profile defendants are treated differently from others. Indeed, the least defendant to come before the courts is entitled to the same amount of transparency as any other. This is why the rules of transparency must be the same for everyone. Put another way, it is why transparency must be determined by the rules of the legal system itself and not merely by the weight of public interest in a case. It is best not to confuse transparency with mere publicity.

Transparency is clearly provided for under the Transitional Rules of Criminal Procedure. Each criminal case proceeds in stages including the issuance of an arrest warrant, presentment of indictment, detention hearing, preliminary hearing and trial. Each phase in the process is subject to different levels of public disclosure depending on the judicial function being performed, the interests of the defendant and the public's need to know. Every stage of the criminal process need not be performed in public session for the system to have transparency.

Procedures range from the consideration, in chambers, of requests for arrest warrants, as in the present matter, all the way to a public trial guaranteed by the rules to be "open to the public" (TRCP Sec. 28.1). It is at the latter stage that all of the considerations raised by the DGP are implicated and it is at trial that the entire case comes before the Court for its consideration.

The administration of justice should be blind to considerations of the status of the defendant or the charges against him, as well as the anticipated level of public interest in his case. The concept of a "case of great public interest" has no legal meaning in terms of the application of the Rules. Before the Court all cases have the same interest, the same importance and the same single objective: to see that justice is done.

## 2. Dispelling misconceptions

The DGP also asserts that a public hearing is necessary to "dispel any misconceptions that the charges . . . are directed at either the Indonesian state or the Indonesian people" (Motion, Par. 12(a)).

The Court considers that any belief that the charges in the present case are directed against the Indonesian state or the Indonesian people would indeed be both erroneous and unfortunate. The Special Panels for Serious Crimes have no jurisdiction over nation states or entire populations. Indeed, Section 14.1 of

[11] Motion, Par. 12 (a).

[12] Motion, Pars. 13-15.

UNTAET Regulation 2000/15 stipulates that the Special Panels shall exercise their jurisdiction only over "natural persons". There is no provision in the enabling regulations of the Special Panels to judge either states or peoples.

Furthermore, it should be clear from the indictment filed with the Court that the accusations contained therein are against eight individuals, as "natural persons." Nowhere in the indictment are either the Indonesian state or the Indonesian people charged with legal responsibility for the crimes alleged. Culpability rests with individual persons and not an entire people, a fact that the indictment makes very clear.

### 3. Efficient review of the evidence

The DGP claims that a full hearing on the issuance of an arrest warrant would constitute a more efficient means of reviewing the evidence supporting his request. This is hardly the case. An in-chambers review of the documentary evidence already submitted may require time in light of the number and gravity of the charges, as well as the volume of the material submitted, but it is hardly inefficient. Indeed, the primary resources that it requires are judicial time and patience .

To create a procedure involving a public, adversarial hearing requires the coordinated presence of numerous participants, including lawyers, court staff, transcribers, interpreters, security personnel and witnesses. As envisioned by the DGP, the event would also involve the potential presence of the defendant, his legal counsel, or both, as well as witnesses that the defendant may choose to call on his own behalf. Alternatively, the DGP has suggested that the defendant be allowed to participate by video-link from Indonesia, raising additional technical issues that would have to be resolved.

The procedure proposed by the DGP is a trial in all but name.[13] But the law does not provide for trials because of their efficiency, but, rather, because of their necessity. It is only in the give and take of trial proceedings that the truth can emerge, permitting the Court to determine whether the guilt of a defendant has been demonstrated by the heavy burden of proof beyond a reasonable doubt.

At this very preliminary stage, that type of process is not called for because the sole issue is whether the prosecutor's evidence satisfies a lesser standard: that is, whether there are "reasonable grounds to believe" that the defendant has committed an offence for which he should be arrested. At this stage, we essentially take the evidence in the light most favourable to the prosecutor and it is on that basis that we determine whether an arrest warrant shall issue.

There is no purpose in conducting what would amount to an adversarial proceeding to make a legal determination on the limited issue of the issuance of an

[13] The DGP correctly states that the proceeding that he proposes does not literally constitute a trial since it does not involved the issuance of a verdict concerning the defendant's guilt or innocence (See Motion, Par. 19). The Court here evaluates the structure of the proceeding in terms of its efficiency, not its legal consequences.

arrest warrant. Nor is it a stage in the process at which the defendant should be either required or enabled to mount a defence.

Finally, should an arrest warrant be issued and later executed on the defendant, he would be brought before the Court and the case would be tried. In this circumstance, the goal of efficiency would not be realized as the matter would, for all practical purposes, be tried twice: once at the hearing on the request for an arrest warrant and again at the final trial on the merits.

## 4. Defendant to participate in the proceedings

Although the DGP goes to great pains to ensure that the defendant is not prejudiced by a public hearing on the request for an arrest warrant, the prosecutor's efforts create a new problem. The procedure proposed by the DGP, instead of prejudicing the defendant, in fact benefits him by giving him an opportunity to be heard at a stage at which no other defendant has been entitled to intervene. He has indeed been singled out, but for advantageous treatment unavailable to other defendants.

All defendants must be equal before the law. Whether a defendant is treated more or less favorably than the law provides, the issue of equal treatment is before us.

The rule of law requires that the same legal procedures be applied to all persons. Accordingly, it requires that parties not be singled out for either adverse or beneficial treatment. Most frequently, this principle is invoked to ensure that criminal procedures are not used unfairly against a defendant and to ensure that each defendant's rights to due process and a fair trial are respected.

Equal treatment before the law, however, is not a rule designed solely to protect the rights of the accused. Rather, it is a principle by which we ensure the integrity of the criminal justice system. It does so by promoting stability of legal rules and by ensuring that the same rules apply to all and not just to some. The principle that laws should not be made with respect to particular persons thus protects the integrity of the legal system as a whole.

It is of no legal significance that a particular defendant might submit himself to a procedure established specifically for him and which may be beneficial to his interests. The very fact that a defendant may wish to comply with the new procedure could suggest that it is works to his benefit and should serve as a caution when establishing different forms of procedure in the case of a particular individual.

Other suspects charged with serious crimes before the Special Panels could easily question why they were not given the same opportunity to intervene before warrants issued for their arrest. Similarly, they could ask why they were deprived the opportunity to be heard and to cross-examine the witnesses against them before they were apprehended. They could, with good reason, claim that the law was not applied evenly and impartially.

The creation of new procedures for only certain defendants would undermine the integrity of the legal system and the public's confidence that all are equal before the law.

### 5. Interests of the victims

The Court takes very seriously the interests of all victims of serious crimes. Those interests are completely consistent with the provisions of the Transitional Rules of Criminal Procedure. The Rules describe in detail the manner in which victims shall be treated and the rights that they shall be provided. For example, the Rules provide that any victim "has the right to be heard at a review hearing" (TRCP Sec. 12.3). Victims may appear at other stages in the process as well (TRCP Sec. 12.5).

The pre-eminent right of a victim to be heard is the right to be heard at trial. There, the victim has the opportunity to have his or her day in court before the judges, the parties, and the public.

However, the rights of victims do not constitute a basis for creating proceedings where none are called for by the Rules. This is what the DGP has requested with respect to the issuance of arrest warrants. The position of victims is not improved by ignoring the very Rules which are the source of their right to be heard.

## E. To establish a criminal procedure to be uniquely applied in the case of a particular defendant violates basic principles of the rule of law.

The role of the Special Panels for Serious Crimes has been to adjudicate cases involving grave violations of human rights, including genocide, war crimes, crimes against humanity, murder, sexual offences and torture. Over the course of its brief existence, the Special Panels have rendered verdicts in forty-eight (48) cases. Similarly, the Special Panels have issued a significant number of arrest warrants upon the request of the prosecutor, including one in the present case for the co-defendant, Lt. Colonel Yayat Sudrajat.

The Special Panels have served another role as well. By following the rule of law, they have demonstrated that even the most serious criminal cases can be adjudicated in a manner that is fair and just. Moreover, they have ensured, in the face of the most serious charges, that "All persons shall be equal before the courts of law" (TRCP Sec. 2.1).

The rule of law lies at the heart of organized society and supplies the foundation for social peace, public order and justice for all. The cornerstone of that foundation is the principle that all persons are equal before the law and that the rules that govern us are the same for everyone.

It is fundamental that "[c]riminal justice shall be administered by the Courts according to the law" (TRCP Sec. 2.2). The guiding principle of the Special Panels thus has been a strict adherence to the law. This has included close attention to the Transitional Rules of Criminal Procedure which apply to all proceedings before the Court, even those involving serious human rights

violations. The Court has always followed the law, knowing that without the law there can be no justice.

In the words of Judge Wald of the International Criminal Tribunal for the Former Yugoslavia,

> The rule of law . . . requires that courts acknowledge the statutes and rules that bind them in the exercise of their powers, even when those restraints interfere with understandable aspirations to maximize human rights norms. Courts must lead the way in following the law if there is to be a rule of law. [14]

There can be no legitimacy in a process where the rules change according to the identity of the defendant. The rules are the same for everyone and they cannot be selectively applied without jeopardizing basic principles of legal fairness. The law, especially the criminal law, shall treat all persons the same, with no person being treated either more or less favourably than any other.

Difficult cases provide a temptation to depart from established legal procedures in order to achieve a particular result. It is a temptation that will be resisted by any judicial tribunal that respects the rule of law and the impartial administration of justice.

## F. The Court shall continue its in-chambers review of the documentation filed by the prosecutor supporting his request for the issuance of an arrest warrant and allows him 30 days within which to file any additional material in support of the request.

As previously noted, it has been the routine practice of the DGP to interview victims, witnesses, suspects and defendants and to submit their statements to the court in support of a request for an arrest warrant. Moreover, the DGP has transmitted such interviews to the Court on an ongoing basis even after the request for a warrant has been filed.

The Rules permit the prosecutor to continue his investigation even after a request for an arrest warrant has been made. Indeed, after indictment the prosecutor has a "continuing duty" to disclose to the defendant any evidence "coming later into [his] possession" (TRCP Sec. 24.7). This was the procedure followed in the present case in which statements from over 1500 witnesses were submitted to the Court in support of the request for a warrant over a four month period following the filing of the request for an arrest warrant.

Thus, the DGP has the authority under the Rules to continue his investigation into the present case if he feels that there is further evidence to be gained. Similarly, as he has done in the past, the DGP can submit to the Court any additional statements that come

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[14] *Prosecutor* v. *Tadic*, Case No. IT-94-1-A-R77, 'Separate Opinion of Judge Wald Dissenting from the Finding of Jurisdiction' (27 February 2001), p. 5.

into his possession which support his pending request for an arrest warrant. Those statements may be of victims, witnesses, suspects or the defendant himself.

If the defendant Wiranto is willing to submit to an interview by the DGP, the prosecutor has the same right in this case, as he does in any other, to file the resulting interview with the Court if he feels it supports his request for an arrest warrant.

Accordingly, within thirty (30) days from the entry of this decision, the DGP may file with the Court for its consideration in chambers, any further material supporting his request for an arrest warrant. This may include statements of victims, witnesses, other suspects or the defendant, whether recorded by audiovisual means or reduced to writing.[15]

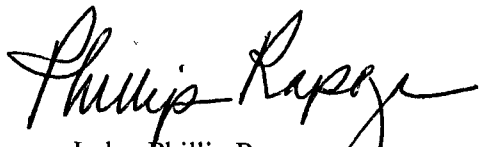
**Conclusion**

For the foregoing reasons, the Court concludes that the request of the DGP for a public hearing on his application for an arrest warrant as to Wiranto does not constitute "appropriate relief" within the meaning of TRCP Sec. 27.2.

## DECISION AND ORDER

For the reasons stated above, the Deputy General Prosecutor's Motion to Request a Warrant Application Hearing is denied.

The Court further orders that the Deputy General Prosecutor shall be allowed thirty (30) days from the entry of this Decision and Order to file with the Court, for its consideration in chambers, any additional material supporting his request for an arrest warrant for Wiranto. This may include statements of victims, witnesses, other suspects or the defendant, whether recorded by audiovisual means or reduced to writing.



Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 18 February 2004

*(The original of the above decision was rendered in English, which shall be the authoritative version.)*

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[15] Nothing in this decision prevents the defendant from voluntarily submitting himself to the jurisdiction of the Special Panels for Serious Crimes so that a public trial of the charges against him can be conducted in accordance with the Rules.