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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-95-5/18-PT

Date: 12 February 2009

Original: English

**THE VICE PRESIDENT OF THE INTERNATIONAL TRIBUNAL**

**Before:** **Judge O-Gon Kwon, Vice-President**

**Acting Registrar:** **John Hocking**

**Decision of:** **12 February 2009**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

**PUBLIC**

# DECISION ON RADOVAN KARADŽIĆ'S REQUEST FOR REVERSAL OF DENIAL OF CONTACT WITH JOURNALIST

**The Office of the Prosecutor**
Mr. Alan Tieger
Mr. Mark B. Harmon

**The Accused**
Radovan Karadžić

1. On 18 November 2008, Radovan Karadžić ("the Applicant") filed before the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") a "Request for Reversal of Denial of Contact with Journalist" ("Application"). On 25 November 2008, in accordance with Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the President withdrew from considering the Application, owing to a conflict of interest with his prior role as presiding judge on the Applicant's pre-trial bench. I was assigned to hear the Application in the President's place.[1] On 24 December 2008 the Registrar filed "Registrar's Submission Pursuant to Rule 33(B) of the Rules Regarding Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist" ("Submission").[2]

## I. BACKGROUND

2. On 16 October 2008, the Applicant wrote to the Registrar requesting permission to meet face to face with journalist Zvezdana Vukojević of Revu Magazine ("Request"). In the Request, the Applicant stated that having observed others discuss his situation in the media, he wished to respond in the same fora.[3]

3. On 10 November 2008, the Registrar denied the Request, basing his decision on Rule 64*bis* of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention").[4] Rule 64*bis*(A) states that the Registrar may grant a detainee permission to use the communication facilities at the United Nations Detention Unit ("UNDU") to contact the media. Rule 64*bis*(B) obliges the Registrar to have regard to two factors when deciding whether to grant such permission: (i) whether such communication could disturb the good order of the UNDU, or (ii) whether such communication could interfere with the administration of justice or otherwise undermine the Tribunal's mandate.

4. The Registrar concluded that both prongs of Rule *64bis*(B) were satisfied, citing the threat posed to the safety and security of the UNDU and the risk that sensational reporting could interfere with the administration of justice or otherwise undermine the Tribunal's mandate ("Impugned Decision").[5]

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[1] Order on Request for Reversal of Denial of Contact with Journalist, 25 November 2008.
[2] The Submission was provided to me on 20 January 2009.
[3] Application, para. 3; Annex A.
[4] Submission, para. 9. *See also* Application, Annex B.
[5] Application, para. 5; Annex B.

# II. SUBMISSIONS

## A. Application

5. The Applicant argues that the Registrar's denial of the Request constitutes an unreasonable restriction on his right to freedom of expression.[6] Citing the International Covenant on Civil and Political Rights [7] as well as United States[8] and European[9] jurisprudence, the Applicant argues that according to the law on human rights, the Registrar must apply the principle of proportionality when considering the Request. According to the Applicant, any restriction on a detainee's right to freedom of expression must be carefully balanced against the interests of the relevant prison authorities.[10] In the Applicant's submission, the Impugned Decision constitutes a disproportionate response to the objectives of the Registrar to maintain the good order of the UNDU, and to prohibit interference with the administration of justice or the Tribunal's mandate.[11]

6. The Applicant argues that the safety and security of the UNDU is a hollow basis for denying the Request, owing to the wealth of publicly available information about the UNDU, including a virtual tour available on the Tribunal's website.[12] In any event, the Applicant contends that the Registrar was obliged to consider alternative arrangements—for example, allowing remote communication with Ms. Vukojević—which he did not.[13]

7. The Applicant also objects to the second ground upon which the Registrar denied the Application: the potential for interference with the administration of justice and achievement of the Tribunal's mandate. The Applicant contends that this conclusion is clearly disproportionate to the limitation imposed upon his freedom of expression, and out of line with United States and European Jurisprudence.[14]

8. The Applicant notes the "hyperbole that accompanied his arrest" and alleges that he was widely demonised by the media, including in statements by the Prosecutor of the Tribunal and

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[6] Application, paras. 7–8.
[7] *Ibid.*, paras. 7–8. The Applicant cites Article 19 of the International Covenant on Civil and Political Rights.
[8] *Ibid.*, para. 11–17.
[9] *Ibid.*, para. 21–28.
[10] *Ibid.*, paras. 30–31, 39
[11] *Ibid.*, para. 36
[12] *Ibid.*, paras. 33–34, Annexes C and D.
[13] *Ibid.*, para. 35.
[14] *Ibid.*, para. 36.

former ambassador Holbrooke. The Applicant contends that "it is only fair" that he also be entitled to express his views.[15]

9. The Applicant also notes that the Impugned Decision provides no explanation of the reasons upon which the decision was reached. The Applicant cites ICTR jurisprudence requiring the Prosecutor to provide details of the perceived threat when making an application to the Registrar to limit an accused's visitation rights.[16]

### B. Registrar's Submission

10. The Registrar submits that freedom of expression is not an absolute right, and the conditions set out in Rule 64*bis* of the Rules of Detention are fully consistent with the principle of freedom of expression as espoused in the International Covenant on Civil and Political Rights.[17] The Registrar provides numerous examples from domestic legal systems where an accused's access to the media is restricted during the pre-trial stage of criminal proceedings, and makes a distinction between the situation of an accused person detained on remand and a convicted person.[18]

11. Regarding the first prong of Rule 64*bis*(B) of the Rules of Detention, the Registrar submits that he acted properly when he concluded that to grant the Request could compromise the security of the UNDU and the safety of the detainees.[19] According to the Registrar, to grant the Request could lead to public disclosure of confidential information, such as the equipment of the UNDU and its guards, security devices, details of the changing of the guards, details of the security checks of the detainees as well as the general interaction between the guards and detainees.[20]

12. The Registrar submits that at present, only consular representatives, defence team members, family and close friends are permitted to visit detainees at the UNDU, and a departure from this principle could potentially endanger the safety and security of the detainees.[21] The Registrar also noted that to grant the request would place an "undue burden on the UNDU administration", both in terms of the one-off logistical arrangements and the prospect of other detainees making similar requests.[22]

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[15] *Ibid*, para. 37.
[16] *Ibid.*, para. 38.
[17] Submission, paras. 15–16.
[18] *Ibid.*, paras. 29–30.
[19] *Ibid.*, paras. 18–23.
[20] *Ibid.*, para. 20.
[21] *Ibid.*, para. 21.The Registrar also notes that such an approach has been upheld by the European Court of Human Rights. Submission, para. 29. *See Messina v. Italy* (No. 2) (Application no. 25498-94), 28 September 2000.
[22] *Ibid*, paras. 22–23.

13. The Registrar submits that the second prong of Rule 64*bis*(B) of the Rules of Detention is also satisfied, as granting the Request could interfere with the administration of justice and undermine the Tribunal's mandate.[23] The Registrar accepts that the proposed topic of discussion with Ms. Vukojević—an alleged agreement with former Ambassador Holbrooke not to pursue the Applicant's prosecution—is a political issue.[24] Consequently, the Registrar contends that the Tribunal's facilities should not be used as a political platform, being mindful of the Tribunal's efforts to maintain peace and promote reconciliation in the former Yugoslavia. According to the Registrar, detainees should not be granted permission to use the Tribunal's resources for political purposes, and if they wish to discuss the merits of their case, the courtroom is the appropriate forum to do so.[25]

14. Also under the second prong of Rule 64*bis*(B) of the Rules of Detention, the Registrar notes that the Applicant's case is currently in the pre-trial stage of proceedings, and the appearance of the Applicant in the media has the potential to influence witnesses or have an intimidating effect.[26]

15. Finally, the Registrar notes that the Applicant did not seek alternatives to a face to face interview in the Request. In the Submission, the Registrar states that the Registrar has taken into account all means by which the Applicant may communicate with the media, and concludes that "any form of contact with the media for the purpose of making political statements or discussing the merits of the accused's case would raise the same concerns as those outlined above".[27]

## III. DISCUSSION

16. Though not raised in either party's filings, I note that Rule 61 of the Rules of Detention imposes a total ban on face to face visits between detainees and journalists.[28] The Applicant made it clear that he sought a face to face meeting with Ms. Vukojević, "with the purpose of writing an article in her magazine".[29] Provided that detainees have alternative means of communication with the media (as envisaged by Rule 64*bis*), Rule 61 does not appear to be an unreasonable restriction *per se*. Therefore, the Registrar was acting within his powers under this Rule when he issued the Impugned Decision. However I note that Rule 61 is not the basis upon which the Application was made, therefore my opinion on this matter is inconsequential.

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[23] *Ibid.*, paras. 24–28.
[24] *Ibid.*, para. 26.
[25] *Ibid.*, paras. 24–26.
[26] *Ibid.*, para. 28.
[27] *Ibid.*, paras. 31–32.

17. I am mindful of the guidance of the Appeals Chamber in *Kvočka* that "judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal [...] [it] is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in with he reached it". In deciding whether to grant the Request, the Registrar must have regard to the conditions set out in *Kvočka*, namely compliance with laws, compliance with the rules of natural justice and procedural fairness, consideration of only relevant material and compliance with basic standards of reasonableness.[30]

18. The Registrar states in the Submission that determinations under Rule 64*bis* are made on a case by case basis,[31] however the practice described by the Registrar in the Submission undermines this contention. The only instance cited by the Registrar where communication with the media has been authorised was to allow a detainee to request that information be withdrawn from a magazine.[32] This evinces a blanket denial of all interactive contact with the media, which would run contrary to the doctrine of procedural fairness.

19. I shall now consider the Registrar's assessment of the first prong of Rule 64*bis* (B), whether contact with the media could disturb the good order of the UNDU. In the Impugned Decision, the Registrar considered the safety and security of the UNDU only in the context of the Applicant's request for a face to face interview with Ms. Vukojević. In the Submission, however, the Registrar went further, indicating that he would deny the Applicant any form of contact with the media because the purpose of the Applicant's contact would disturb the good order of the UNDU.[33] I do not consider this conclusion reasonable. It seems quite apparent to me that it is possible for the Applicant to contact the media in such a way that does not compromise the security and safety of the UNDU as described in the Registrar's Submission.[34]

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[28] Rule 61(B) of the Rules of Detention reads in part: "The Registrar shall refuse to allow a person to visit a detainee if he has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported to the media".

[29] Application, Annex A.

[30] *Prosecutor v. Kvočka et al.*, Case No IT-98-30/1-A, "Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić", 7 February 2003, para. 13.

[31] Submission, para. 31.

[32] *Ibid.*, footnote 20.

[33] "[t]he Registrar submits that any form of contact with the media for the purpose of making political statements or discussing the merits of an accused's case would raise the same concerns as outlined above [...] Such contact would disturb the good order of the UNDU and/or interfere with the administration of justice or otherwise undermine the Tribunal's mandate." Submission, para. 32.

[34] *See* Submission, para. 20, where the Registrar lists information concerning the equipment of the UNDU and its guards, security devices, details of the changing of the guards, details of the security checks of the detainees as well as the general interaction between the guards and detainees as information which, if made public, could compromise the security and safety of the UNDU.

20. Regarding the second prong of Rule 64*bis* (B), the Registrar submits that the Applicant should not be allowed to use the Tribunal's facilities to make political speeches, and insofar as the Applicant wishes to discuss the merits of his case, he should not be permitted to do so outside the courtroom. I note that the alleged immunity agreement is somewhat different in character to the political statements by other accused cited in the Submission.[35] The Applicant does not seek to influence or comment upon the political situation in the former Yugoslavia, and irrespective of the relevance of the immunity agreement to the merits of the Applicant's case, I fail to see how discussion of it in the media would compromise achievement of the Tribunal's mandate. I therefore do not consider it reasonable for the Registrar to conclude that the topic for discussion alone is a reason to prohibit communication with Ms. Vukojević.

21. The Registrar raises the potential for eligible witnesses in the Applicant's case to be influenced or intimidated. I note another important consideration with respect to the administration of justice is the potential for confidential information to be disclosed, particularly confidential information which pertains to witnesses. Allowing either of these events to occur is obviously unacceptable. The Tribunal has a long tradition of vigilance when it comes to information security and the protection of witnesses. However I consider that two precautions—monitoring the Applicant's communication with Ms. Vukojević, and warning Ms. Vukojević of her obligations as a member of the press and her exposure to contempt proceedings before the Tribunal—constitute adequate safeguards to ensure that the administration of justice is not compromised. I note that under Rule 58(A) of the Rules of Detention, the Commanding Officer has the power to impose conditions of supervision on communications between detainees and others as he or she deems necessary.

22. I also consider the personal circumstances of the Applicant to be relevant to the Impugned Decision, particularly as the Registrar has not cited any behaviour on the part of the Applicant which indicates that he intends to undermine the Tribunal's mandate. The Applicant has not made an excessive or unreasonable number of requests of this nature, and the topic for discussion is limited and has been disclosed to the Registrar. These are relevant facts for the Registrar to take into account when considering the request, more so than speculation as to the type of report Ms. Vukojević may publish.[36]

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[35] *See* Submission, footnote 13, in which the Registrar cites examples from *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54 and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T where the Presiding Judge in those cases prevented each accused from making political statements in court.

[36] In the Impugned Decision, the Registrar states that since "the possibility of sensational reporting cannot be excluded", there is a risk that granting the Request could interfere with the administration of justice or the Tribunal's mandate. *See* Application, Annex B.

23. For the reasons outlined above, I do not consider that the Registrar acted properly when he arrived at the Impugned Decision. I find the conclusion reached with regard to the first prong of Rule 64*bis*(B) to be unreasonable. In relation to the second prong of Rule 64*bis*(B), the Registrar's failure to meaningfully consider alternative means of communication which would allow preservation of the interests in Rule 64*bis* contravenes the basic rules of procedural fairness and leads to an unreasonable and disproportionate restriction on the Applicant's freedom of expression. I would therefore grant the request in part, and allow the Applicant to have remote, monitored contact with Ms. Vukojević once Ms. Vukojević has been put on notice of her obligations before the Tribunal and the consequences should she fail to comply with them.

## IV. DISPOSITION

24. For these reasons, pursuant to Rules 15(A) and 21 of the Rules and Rule 64*bis* of the Rules of Detention, I hereby grant the Application in part, and order as follows:

(a) The Applicant is permitted to contact Ms. Vukojević remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate.

(b) All communication between the Applicant and Ms. Vukojević will be monitored by Registry personnel.

(c) Ms. Vukojević shall be put on notice that any failure to comply with her obligations as a member of the media pursuant to the rules and requirements of the Tribunal will expose her to investigation and possible prosecution for contempt.

25. The Application is denied in all other respects.

Done in English and French, the English text being authoritative.

Judge O-Gon Kwon
Vice President

Dated this twelfth day of February 2009
At The Hague
The Netherlands

**[Seal of the Tribunal]**