



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: 21 April 2009

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THE VICE-PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge O-Gon Kwon, Vice-President

Acting Registrar: Mr. John Hocking

Decision of: 21 April 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON REQUEST FOR REVERSAL OF LIMITATIONS
OF CONTACT WITH JOURNALIST**

The Accused

Mr. Radovan Karadžić

1. **I, O-GON KWON**, Vice-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 (“International Tribunal”) render the following decision in relation to the “Request for Reversal of Limitations of Contact With Journalist” (“Second Request”), filed before me by Radovan Karadžić (“Applicant”) on 20 March 2009.

I. BACKGROUND

2. On 16 October 2008, the Applicant wrote to the former Registrar requesting permission, pursuant to 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”), to participate in a face to face interview at the United Nations Detention Unit (“UNDU”) with journalist Zvezdana Vukojević from Revu magazine.¹ On 10 November 2008, the former Registrar denied the Request on the grounds that such contact with the media on the premises of the UNDU posed a threat to the safety, security and good order of the UNDU and that the possibility of sensational reporting could interfere with the administration of justice or otherwise undermine the Tribunal’s mandate (“Decision of 10 November 2008”).² On 18 November 2008, the Applicant filed before the President of the International Tribunal a request to reverse the Decision of 10 November 2008 (“First Request”). On 25 November 2008, pursuant to Rule 15(A) of the Rules, the President withdrew from considering the First Request in light of his prior role of Presiding Judge in this case and assigned myself to consider the First Request in his place.³ On 12 February 2009, I granted the First Request in part, ordering, *inter alia*, that the Applicant be “permitted to contact Ms. Vukojević remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate” (“Decision of 12 February 2009”).⁴

3. On 11 March 2009, the Acting Registrar (“Registrar”) informed the Applicant that, in accordance with his discretion to set the modalities of this contact, as referred to by the Vice-President in the Decision of 12 February 2009, he had decided that:

¹ Request for Reversal of Denial of Contact with Journalist, 18 November 2008 (“First Request”), Annex A.

² First Request, Annex B.

³ Order on Request for Reversal of Denial of Contact with Journalist, 25 November 2008.

⁴ Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, 12 February 2009, (“Decision of 12 February 2009”).

[...] Ms. Vukojević should contact [the Applicant] in writing, and that any response from [the Applicant] should be transmitted to her in writing.⁵

The Registrar noted that:

In reaching this decision, the Registrar made an assessment of the logistical arrangements that would be required to facilitate contact between [the Applicant] and Ms. Vukojević, and has also taken into account the importance of ensuring the security, safety and good order of the United Nations Detention Unit [...] (“Impugned Decision”).⁶

Following the Applicant’s filing of the Second Request, on 26 March 2009, I issued an order inviting the Registry to file a response in relation to it.⁷ Accordingly, the Registrar filed the “Registry Submission Regarding the Request for Reversal of Limitations of Contact with Journalist” (“Registry Submission”) on 3 April 2009. In response, on 7 April 2009, the Applicant filed the “Motion for leave to Reply and Reply Brief: Request for Reversal of Limitations of Contact with Journalist” (“Reply”).

II. APPLICABLE LAW

4. Rule 64 of the Rules of Detention provides:

- (A) Without prejudice to the foregoing provisions on communications and visits, the use of communication facilities available at the Detention Unit, by a detainee, with the sole purpose of contacting the media directly or indirectly, shall be subject to the approval of the Registrar.
- (B) In his decision, the Registrar may consult with the Commanding Officer and shall have regard to whether such contact with the media:
 - i. could disturb the good order of the Detention Unit; or
 - ii. could interfere with the administration of justice or otherwise undermine the Tribunal’s mandate.
- (C) A detainee may at any time request the President to reverse a denial of contact made by the Registrar under this Rule. The President may decide to review the Registrar’s decision, or if the President determines that the denial of contact constitutes an infringement on the right of the accused to be tried fairly, refer the request to the Trial Chamber to determine.

⁵ Second Request, Annex A.

⁶ *Ibid.*

⁷ Order Setting a Deadline for Registry Submission in Relation to ‘Request for Reversal of Limitations of Contact with Journalist’, 26 March 2009.

III. SUBMISSIONS

A. Application

5. The Applicant submits that the Registrar abused his discretion in the Impugned Decision when he restricted the Applicant's contact with Ms. Vukojević to written communication.⁸ The Applicant submits that interviews by written questionnaire "lack[] the spontaneity of oral communication, and the ability to follow-up or clarify the answers" and that the media has little interest "in such 'canned' exchanges".⁹ The Applicant argues that human rights principles of proportionality required the Registrar to impose the least restrictive means when limiting the Applicant's freedom of expression, and that in the present case, monitored telephone contact constituted the least restrictive means.¹⁰ Accordingly, the Applicant requests, pursuant to Rule 64bis of the Rules of Detention, that the President reverse the Impugned Decision and allow the Applicant to be interviewed by Ms. Vukojević via a monitored telephone call.¹¹

6. In support of his argument, the Applicant cites United States and European Court of Human Rights jurisprudence and Article 3 of the European Prison Rules, pursuant to which limitations on a prisoner's freedom of expression are subject to a proportionality test.¹² The Applicant further notes that the ICTY and ICTR Appeals Chambers have applied a proportionality principle when balancing the rights of the accused, including the right to be present at trial and the right to a fair and expeditious trial.¹³

7. The Applicant also asserts that the drafters of the International Tribunal's Rules of Detention intended those Rules to conform with the Dutch Penitentiary Principles Act, which authorizes a prison director to permit a detainee to converse with media representatives through visits or telephone conversations and does not mention communication through written correspondence.¹⁴

8. The Applicant further notes that the Impugned Decision fails to provide any reasons for choosing the most restrictive form of communication, citing ICTR jurisprudence that requires the Prosecutor to provide specific details of the threat or prejudice feared when requesting that the

⁸ Second Request, para. 5.

⁹ *Ibid.*

¹⁰ Second Request, paras 5 and 18.

¹¹ Second Request, paras 1 and 18.

¹² Second Request, paras 6-10.

¹³ Second Request, para. 13.

¹⁴ Second Request, paras 11-12 (citing Dutch Penitentiary Principles Act, Article 40).

Registrar prohibit contact between an accused and a visitor.¹⁵ Additionally, the Applicant notes that in the Decision of 12 February 2009, the Vice-President “rejected as unreasonable the Registrar’s conclusion that any contact with the news media would disturb the good order of the UNDU”, and asserts that similarly, it was unreasonable for the Registrar to conclude, without citing concrete elements, that any form of communication other than in writing would also disturb the good order of the UNDU.¹⁶

B. Registrar’s Submission

9. The Registrar submits that the Impugned Decision is in line with Rule 64*bis* of the Rules of Detention as well as the Decision of 12 February 2009.¹⁷ The Registrar notes that in the Decision of 12 February 2009, the Vice-President held that the Accused may contact Ms. Vukojević “remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate” and asserts that it was accordingly within the Registrar’s discretion to determine the most appropriate form of contact.¹⁸

10. The Registrar observes that in the Decision of 12 February 2009, to ensure the protection of confidential information, the Vice-President ordered the Registry to monitor communication between the Accused and Ms. Vukojević and to warn Ms. Vukojević that failure to comply with the Rules and requirements of the International Tribunal would expose her to contempt proceedings.¹⁹ The Registrar submits that in the Impugned Decision, in order to implement this instruction, he took into account both “the monitoring facilities available at the UNDU” and “the type of media for which the interview is intended (that is, print or broadcast media)”.²⁰

11. In terms of the monitoring facilities available at the UNDU, the Registrar asserts that those facilities do not have the capacity to effectively protect confidential information if contact takes place via the telephone.²¹ The Registrar explains that the spontaneous nature of telephone calls creates the risk that confidential information will be revealed not only to the journalist but also to the public.²² The Registrar further explains that although the UNDU has the capacity to monitor and record telephone calls, it is not able to delay the transmission and receipt of the spoken word,

¹⁵ Second Request, paras 14-15.

¹⁶ Second Request, para. 16.

¹⁷ Registry Submission, para. 16.

¹⁸ *Ibid.*

¹⁹ Registry Submission, para. 17.

²⁰ *Ibid.*

²¹ Registry Submission, para. 18.

²² *Ibid.*

and it is unable to guarantee that a conversation between the Applicant and Ms. Vukojević would not be broadcast live or tape recorded.²³

12. The Registrar notes the Applicant's argument that the media has little interest in written correspondence and argues that if the Registrar was required to take such a factor into consideration when determining the appropriate form of contact, the need to protect confidential information would outweigh it.²⁴ The Registrar also argues that the freedom of expression is not an unfettered freedom and that detainees at a detention facility are not entitled to unrestricted access.²⁵

13. With regard to the type of media for which the interview is intended, the Registrar submits that when determining that contact via written communication would be most appropriate, he took into consideration that *Revu* magazine is a print publication.²⁶

14. Addressing the Applicant's assertion "that the Registrar failed to provide reasons for choosing the most restrictive form of communication", the Registrar notes that the Impugned Decision "expressly invokes the discretion granted by the Vice-President in setting out the appropriate modalities for the contact".²⁷ The Registrar also submits that in reaching the Impugned Decision, he considered "the logistical arrangements necessary for facilitating contact" as well as "the security, safety and good order of the UNDU".²⁸

15. Finally, the Registrar argues that that the Impugned Decision complies with the four-part standard for proper administrative decision-making as established by the Appeals Chamber in the *Kvočka et al.* case and that "allowing contact via written correspondence is the only measure which guarantees the Accused's right to freedom of expression whilst adequately protecting the good order of the UNDU and the administration of justice".²⁹

C. Reply

16. The Applicant requests leave to reply to the Registry Submission "in order to sharpen the focus of the issues before the Vice President".³⁰ In his Reply, the Applicant asserts that it was unreasonable for the Registrar to conclude in the Registry Submission that contact via telephone

²³ *Ibid.*

²⁴ Registry Submission, para. 19.

²⁵ *Ibid.*

²⁶ Registry Submission, para. 20.

²⁷ Registry Submission, para. 21.

²⁸ *Ibid.*

²⁹ Registry Submission, paras 13-14 and 22-23.

³⁰ Reply, para. 3.

would create the risk that confidential information would be disclosed.³¹ In support of his argument, the Applicant notes the Vice-President's conclusion in the Decision of 12 February 2009 that monitoring the Applicant's communication with Ms. Vukojević and warning her of her obligations as a journalist as well as her exposure to contempt proceedings before the International Tribunal provides adequate safeguards against this risk.³² The Applicant argues that the Registrar does not dispute that it is possible to implement both of these precautions if contact takes place via telephone and suggests that in order to ensure that no confidential information is disclosed, the Registrar can also review Ms. Vukojević's article before it is disseminated".³³

17. The Applicant also notes that the Decision of 12 February 2009 "specifically contemplated telephone calls as one of the means of communication that was possible".³⁴ Additionally, the Applicant argues that in the Decision of 12 February 2009, the Vice-President considered that the personal circumstances of the Applicant and the journalist are relevant to the Registrar's determination of the contact to be permitted and that "[t]he Registrar has failed to point to any conduct on the part of Dr. Karadžić that would give rise to the belief that he would disclose confidential information, or any record or conduct of the journalist that would give rise to the belief that she would not obey the warnings and rules of the Tribunal".³⁵

IV. DISCUSSION

18. As a preliminary matter, I note that neither the Rules nor the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal³⁶ provide for the right of reply to a Registry submission pursuant to Rule 33(B) of the Rules. Nevertheless, I consider that in the instant case, it is in the interests of justice to grant the Applicant's request for leave to reply to the Registry Submission, given the importance of the issues raised therein, which impact upon the rights of accused detained at the UNDU.

19. I note that in the Decision of 12 February 2009, I authorized the Applicant to contact Ms. Vukojević "remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate".³⁷ It was therefore within the Registrar's discretion to determine the appropriate modalities of the contact in accordance with this guidance. In determining whether the

³¹ Reply, paras 5-6.

³² Reply, para. 8.

³³ Reply, para. 9.

³⁴ Reply, para. 10.

³⁵ Reply, para. 11.

³⁶ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, Rev. 3, 16 September 2005.

Registrar abused his discretion in setting these modalities, I must bear in mind the standard for judicial review of administrative decisions as set forth by the Appeals Chamber in *Kvočka et al.*, pursuant to which such a decision may only be quashed if the Registrar has: (1) failed to comply with the relevant legal requirements; (2) failed to observe basic rules of natural justice and procedural fairness; (3) taken into account irrelevant material or failed to take into account relevant material; or (4) has reached unreasonable conclusions.³⁸

20. In the Impugned Decision, when determining that written correspondence constituted the most appropriate mode of contact between the Applicant and Ms. Vukojević, the Registrar appropriately took into account the two requirements of Rule 64bis(B) of the Rules of Detention; namely, “the importance of ensuring the security, safety and good order of the [...] UNDU” and the need to “safeguard the integrity of the judicial process and ensure the proper administration of justice”.³⁹ In the Registry Submission, the Registrar clarifies that contact between the Applicant and Ms. Vukojević via telephone “could disturb the good order of the UNDU or interfere with the administration of justice or otherwise undermine the Tribunal’s mandate”⁴⁰ because the monitoring facilities at the UNDU lack the technical capacity to effectively protect confidential information conveyed in a telephone conversation.⁴¹ Specifically, the Registrar submits that the spontaneous nature of telephone conversations creates the risk that confidential information could be revealed to the journalist or the public at large and that the UNDU facilities are unable to delay the transmission and receipt of the spoken word or provide safeguards against the live broadcast or tape-recording of a telephone conversation.⁴²

21. I reiterate my observation in the Decision of 12 February 2009 that the potential disclosure of confidential information pertaining to witnesses is an unacceptable risk.⁴³ In light of this critical consideration as well as the Registrar’s explanation set forth above regarding the UNDU monitoring facility’s inability to ensure the protection of confidential information conveyed over the telephone, I find that the Registrar reasonably concluded that written correspondence constitutes the most appropriate form of contact between the Applicant and Ms. Vukojević. In this regard, I note that unlike instantaneous contact over the telephone, all written correspondence from the Applicant to

³⁷ Decision of 12 February 2009, para. 24(a).

³⁸ *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. *See also* Decision of 12 February 2009, para. 17.

³⁹ *See* Impugned Decision, at Request, Annex A.

⁴⁰ Registry Submission, para. 15.

⁴¹ *See infra*, para. 11.

⁴² *Ibid.*

⁴³ Decision of 12 February 2009, para. 21.

Ms. Vukojević can be thoroughly checked by Registry staff to ensure that no confidential information is contained therein before the correspondence is conveyed to Ms. Vukojević.

22. The Applicant suggests that if his Request for a monitored telephone interview is granted, in order to ensure the protection of confidential information, the Registrar can review Ms. Vukojević's article before it is disseminated to the public.⁴⁴ I note, however, that implementing this extra precaution would not alleviate the risk of disclosure to Ms. Vukojević at first instance, who herself is not entitled to access confidential information from the International Tribunal's proceedings.

23. With regard to the Applicant's argument that the Registrar abused his discretion in the Impugned Decision by failing to provide reasons for choosing the most restrictive form of contact,⁴⁵ I reiterate that it was within the Registrar's discretion to determine the most appropriate modality of communication within the parameters I set forth in the Decision of 12 February 2009. I note that one such parameter consisted of contact "remotely via written correspondence" – the very mode of communication that the Registrar selected.⁴⁶

24. I recognize that, as the Applicant submits, the Registrar has not provided any evidence that the Applicant has conducted himself in a manner that gives rise to the belief that he would intentionally disclose confidential information; nor has the Registrar submitted any information indicating that Ms. Vukojević would not obey her obligations toward the International Tribunal.⁴⁷ Nevertheless, given the relatively large number of protected witnesses appearing in proceedings before the International Tribunal as well as the high volume of confidential information generated in those proceedings, there is a considerable risk that confidential information could be inadvertently disclosed during a telephone conversation, which must also be taken into account.

25. In light of the foregoing, I find that the Applicant has failed to provide a basis for quashing the Impugned Decision. The Impugned Decision complied with the relevant legal requirements, namely, Rule 64*bis* of the Rules of Detention and the Decision of 12 February 2009, and constituted a reasonable exercise of the Registrar's discretion under those requirements. Furthermore, the Impugned Decision took into consideration relevant factors and observed basic rules of natural justice and procedural fairness, appropriately balancing the Applicant's right to freedom of expression with the obligation of ensuring that confidential information from proceedings before the International Tribunal is not inappropriately disclosed.

⁴⁴ See *infra*, para. 16.

⁴⁵ See *infra*, para. 8.

⁴⁶ Decision of 12 February 2009, para. 24(a).

⁴⁷ See *infra*, para. 17.

V. DISPOSITION

26. On the basis of the foregoing, I **DISMISS** the Request.

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

Done this 21st day of April 2009,
At The Hague,
The Netherlands.



Judge O-Gon Kwon
Vice-President