

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

THE VICE PRESIDENT

Before: Judge O-Gon Kwon, Vice President

Acting Registrar: Mr. John Hocking

Date Filed: 20 March 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REQUEST FOR REVERSAL OF
LIMITATIONS OF CONTACT WITH JOURNALIST

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic hereby requests, pursuant to Rule 64 *bis* of the ICTY Rules of Detention, that the President reverse the decision of the Registrar to restrict contact between him and journalist Zvezdana Vukojevic of the Dutch publication Revu to written communication.

2. Rule 64 *bis* provides that:

- 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.

Statement of Facts

3. On 12 February 2009, the Vice President reversed the decision of the Registrar banning contact between him and journalist Zvezdana Vukojevic of Revu Magazine. The Vice President granted contact with the journalist "remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate."¹

4. After dragging his feet for a month, the Registrar informed Dr. Karadzic on 12 March 2009 that:

In line with the discretion to set the appropriate modalities for this contact, referred to the Registrar by the Vice-President, the Registrar has decided that Ms. Vukojevic should contact you in writing, and that any response from you should be transmitted to her in writing. In reaching this decision, the Registrar made an assessment of the logistical arrangements that would be required to facilitate contact between you and Ms. Vukojevic, and has also taken into account the importance of ensuring the security, safety, and good order of the United Nations

¹ *Decision on Radovan Karadzic's Request for Reversal of Denial of Contact With Journalist* (12 February 2009) at para. 24(a)

Detention Unit.²

Argument

5. Dr. Karadzic respectfully contends that the Registrar abused his discretion by restricting contact between him and the journalist to written communication. Interviews by journalists are not conducted by written questionnaire because such contact lacks the spontaneity of oral communication, and the ability to follow-up or clarify the answers. Indeed, there would be little media interest in such “canned” exchanges. Dr. Karadzic contends that pursuant to the proportionality principle, the Registrar was required to impose the least restrictive measure limiting Dr. Karadzic’s right to free expression—in this case, monitored telephone contact.

6. The proportionality test is utilised in the United States. A prisoner’s right of freedom of expression may be restricted when in conflict with the need to maintain internal security within the corrections facilities themselves.³ However, a proportionality test is used to determine whether the restriction on the right to freedom of expression is reasonable, given the interests of the prison authorities and the alternative means of exercising the right that remain open to the inmate.⁴ Included in this assessment is whether the regulation is an ‘exaggerated response’ to prison concerns.⁵

7. The same is the case in Europe. Freedom of expression is guaranteed by Article 10 (1) of the European Convention on Human Rights. The principle that limitations on a prisoner’s right to freedom of expression must be subject to a proportionality test has been recognized by courts which have applied Article 10 of the ECHR. In *R (Hirst) v Home Secretary*, a refusal to allow access to a prisoner, who was an advocate of prisoners’ interests, to live radio shows was invalidated. Elias J., in the High Court Judgement, held that where the law permits interference with a prisoner’s right to freedom of expression to occur, the government must show that the means used to impair the right go no further than is necessary to accomplish those legitimate objectives.⁶

² The Registrar’s letter is attached as Annex “A” to this request.

³ *Pell v. Procunier*, 417 U.S. 817,822-23 (1974)

⁴ *Turner v. Safley*, 482 U.S. 78, 89-91 (1987)

⁵ *Turner v. Safley*, 482 U.S. 78, 90 (1987)

⁶ [2002] EWHC 602; [2002] UKHRR 758. Paragraph 40.

8. The same conclusion may be drawn from the *Yankov* Judgement of the European Court of Human Rights. The case concerned a prisoner who had criticized the way prisoners were treated. The Court, when applying the proportionality test, found that an interference with the freedom of expression can be justified because of the need to ensure that civil servants enjoy public confidence in conditions free of undue perturbation, but solely where there is a real threat in this respect.⁷

9. The Court held that while the right to freedom of expression is subject to exceptions, those exceptions must be construed strictly, and the need for any restrictions must be established convincingly.⁸

10. Rule 3 of the European Prison Rules (EPR) states that '[r]estrictions placed on persons deprived of their liberty *shall be the minimum necessary* and proportionate to the legitimate aim for which they are imposed'. This Rule 'emphasizes the limits to the restrictions that may be placed on prisoners'.⁹

11. The ICTY when drafting the Rules of Detention in light of the Tribunal's location in the Netherlands also 'took care to ensure that the regime it prepared for the Detention Unit was consistent with the Dutch prison system in all relevant aspects'.¹⁰ Article 40 of the Dutch Penitentiary Principles Act (*Penitentiare beginselenwet*) provides that the prison director can give his or her permission for a detainee to have a *conversation* with a representative of the media. It does not state that the prison director can permit a detainee to communicate with the media but explicitly uses the term 'het voeren van een gesprek' (to have a conversation with).

12. Paragraph 2 provides explicitly for the possibility that the director stipulates conditions in this respect. The commentary to the Penitentiary Principles Act (*Memorie van Toelichting, par. 15d*) specifically provides that such conditions apply equally to telephone conversations as to visits of representatives of the media to a detained person. No mention is made of (written) correspondence. Apparently, the Dutch legislature did

⁷ ECHR *Yankov*, Judgement, 11 December 2003, Appl 39084/97, par. 141.

⁸ ECHR *Yankov*, Judgement, 11 December 2003, Appl 39084/97, par. 129

⁹ Commentary to the EPR under Rule 3.

¹⁰ *Report 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*, 19 August 1994, A/49/342-S/1994/1007, par. 99.

not envision interviews conducted through correspondence which also does not appear to be the practice in Dutch penal institutions when permission for interviews is granted. Interviews, when permitted, are conducted through telephone or visits.

13. The ICTY and ICTR Appeals Chambers have itself applied a proportionality principle when balancing the rights of the accused, such as the right to be present at one's trial, to the need for a fair and expeditious trial.¹¹ The Appeals Chamber has also applied the proportionality test to restrictions on the right of an accused to self-representation—requiring that limitations on the right be the least restrictive measures available.¹²

14. In deciding to limit the contact between Dr. Karadzic and the journalist to written communication, the Registrar's failed to apply any proportionality principles at all or to provide any reasons for choosing the most restrictive form of communication.

15. At the ICTR, a decision by the Registrar to deny a meeting between a detainee and a visitor was overturned by the President, who said:

The Prosecutor is required to furnish the Registrar with reasons for requesting a prohibition of contact between the accused and his intended visitors. Such reasons should not constitute a mere repetition of the empowering rule, but should specify the particular threat or prejudice that is feared and be substantiated by information to enable the Registrar to make an informed decision.¹³

16. In the Vice-President's decision in Dr. Karadzic's case, he rejected as unreasonable the Registrar's conclusion that any contact with the news media would disturb the good order of the UNDU.¹⁴ The Registrar has thereafter, without citing any concrete elements, concluded that any form of communication other than in writing would also disturb the good order of the UNDU. This too is unreasonable.

¹¹ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of Decision on Future Course of Proceedings* (16 May 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.10, *Decision on Nziirorera's Interlocutory Appeal Concerning his Right to be Present at Trial* (5 October 2007); *Zigiranyirazo v. Prosecutor*, No. ICTR-2001-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006)

¹² *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004),

¹³ *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64* (25 November 2002) at para. 9

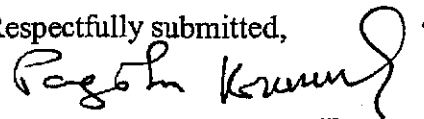
¹⁴ *Decision on Radovan Karadzic's Request for Reversal of Denial of Contact With Journalist* (12 February 2009) at para. 19

17. It is indeed very possible to organize the interview to take place via the telephone while control may take the form of, for example, active monitoring and recording in line with Rule 58(3) of the Rules of Detention.

18. The Registrar's failure to choose the least intrusive restriction on Dr. Karadzic's right to freedom of expression made no effort to apply principles of proportionality as required by human rights law. It is respectfully requested that the decision be reversed and the Registrar be ordered to allow Dr. Karadzic to be interviewed by the journalist in a monitored telephone call.

Word count: 1733

Respectfully submitted,



RADOVAN KARADZIC¹⁵

¹⁵ The assistance of legal intern Denis Abels, working under Professor Goran Sluiter at the University of Amsterdam Faculty of Law, is gratefully acknowledged.

11 March 2009



United Nations
Nations Unies



International
Criminal Tribunal
for the former
Yugoslavia

Registry

Tribunal Pénal
International pour
l'ex-Yougoslavie

Greffier

Dear Mr. Karadžić,

Re. Contact with a journalist

I write to you in relation to your request to contact Ms. Zvezdana Vukojević, a journalist from the Revu magazine ("Request").

As you are aware, in his "Decision on Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist" ("Decision")¹, the Vice-President allowed your Request and instructed the Registry to set up appropriate arrangements including the modalities for this interview.

In line with the discretion to set the appropriate modalities for this contact, referred to the Registrar by the Vice-President,² the Registrar has decided that Ms. Vukojević should contact you in writing, and that any response from you should be transmitted to her in writing. In reaching this decision, the Registrar made an assessment of the logistical arrangements that would be required to facilitate contact between you 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 ("UNDU").

In order to safeguard the integrity of the judicial process and ensure the proper administration of justice, please be advised that both you and Ms. Vukojević will be required to sign an undertaking, which shall be transmitted to each of you separately, together with a further letter detailing the conditions under which contact will be permitted. Thereafter, Ms. Vukojević will be invited to write to you, following which you may respond to her correspondence. Please be reminded that the relevant provisions of the UNDU Regulations to Govern the Supervision of Visits to and Communications with Detainees shall apply to this correspondence.

Should you have any questions regarding the above, please do not hesitate to ~~contact the Associate Legal Officer~~ ~~in the Registry~~. *Gate*

Yours sincerely,

PP. P. Osure

Anna Osure,

Deputy Head of the

Office for Legal Aid and Detention Matters

To: Mr. Radovan Karadžić
UNDU
Cc: Mr. Peter Robinson
(per email)
Mr. Goran Petronijević
(per email)
Ms. Zvezdana Vukojević

¹ IT-95-5/18-PT, Decision on Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist, dated 12 February 2009.

² *Ibid.* paragraph 24 (a).

PUBLIC ANNEX "A"