



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-T
Date: 23 March 2012
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision of: 23 March 2012

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON REQUEST FOR REVIEW
OF DECISION ON PRIVILEGED TELEPHONE CALLS**

Office of the Prosecutor

Mr. Alan Tieger and Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

1. **I, THEODOR MERON**, 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”), am seised of the “Request for Review of Decision on Privileged Telephone Calls”, filed by Radovan Karadžić (“Karadžić”) on 27 January 2012 (“Request”). The Registrar of the Tribunal (“Registrar”) responded on 10 February 2012.¹ Karadžić filed a reply on 14 February 2012.²

I. BACKGROUND

2. On 12 January 2012, Karadžić submitted a letter to the Head of the Office for Legal Aid and Detention Matters of the Tribunal (“OLAD”) requesting that he be permitted to make privileged calls to the mobile telephone of his legal advisor, Peter Robinson (“Legal Advisor”).³ Karadžić stated that he is currently prevented from having privileged telephone conversations with his Legal Advisor because his Legal Advisor does not have a landline telephone in The Netherlands.⁴ He also asserted that the rule prohibiting privileged telephone calls to mobile telephones is “senseless”.⁵

3. On 24 January 2012, the Head of OLAD denied Karadžić’s request.⁶ She stated that pursuant to standard policies of the Registry of the Tribunal (“Registry”) and the United Nations Detention Unit (“UNDU”), mobile telephones cannot be designated as privileged.⁷ She further stated that “privileged telephone communication can only be established to an authorized landline between the self-representing accused and his legal advisor due to reasons of security, confidentiality and in order to protect the integrity of the privileged facilities provided to accused in the UNDU.”⁸

II. STANDARD OF REVIEW

4. The following standard has been set for the review of administrative decisions made by the Registrar:

A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgment [*sic*] in accordance with Rule 119 of the Rules of Procedure and Evidence [of the Tribunal]. A judicial

¹ Registry Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić’s Request for Review of Decision on Privileged Phone Calls, 10 February 2012 (“Response”).

² Reply to Registrar’s Submission Re Privileged Telephone Calls, 14 February 2012 (“Reply”).

³ See Request, Annex “A” (Letter from Radovan Karadžić to Jaimee Campbell, Head of the Office for Legal Aid and Detention Matters, 12 January 2012).

⁴ Request, Annex “A”, p. 1.

⁵ Request, Annex “A”, p. 1.

⁶ See Request, Annex “B” (Letter from Jaimee Campbell, Head of the Office for Legal Aid and Detention Matters, to Radovan Karadžić, 24 January 2012) (“Impugned Decision”).

⁷ Impugned Decision, p. 1.

⁸ Impugned Decision, p. 1.

review of an administrative decision made by the Registrar [...] is concerned initially with the propriety of the procedure by which [the] Registrar reached the particular decision and the manner in which he reached it.⁹

Accordingly, an administrative decision may be quashed if the Registrar:

- (a) failed to comply with [...] legal requirements [...], or
- (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
- (c) took into account irrelevant material or failed to take into account relevant material, or
- (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test).¹⁰

5. Unless unreasonableness has been established, there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled.¹¹ The onus of persuasion lies on the party challenging the administrative decision to show both that: (1) an error of the nature enumerated above has occurred, and (2) such an error has significantly affected the administrative decision to his detriment.¹²

III. APPLICABLE LAW

6. Rule 65(A) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal¹³ (“Rules of Detention”) states that:

Each detainee shall be entitled to communicate fully and without restraint with his legal representative, with the assistance of an interpreter where necessary.

7. Rule 65(B) of the Rules of Detention states that:

All such communications shall be privileged, unless the Registrar has reasonable grounds to believe that the privilege is being abused in an attempt to:

- i. arrange an escape;
- ii. interfere with or intimidate witnesses;
- iii. interfere with the administration of justice; or

⁹ *Prosecutor v. Miroslav 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 (“Žigić Decision”), para. 13. *See also The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010 (“Karadžić Decision”), para. 9.

¹⁰ *Karadžić Decision*, para. 9. *See also Žigić Decision*, para. 13.

¹¹ *Žigić Decision*, para. 13. *See also Karadžić Decision*, para. 10.

¹² *Karadžić Decision*, para. 10. *See also Žigić Decision*, para. 14.

¹³ IT/38/Rev.9, 21 July 2005.

iv. otherwise endanger the security and safety of the Detention Unit.

Prior to such communications being monitored, the detainee and his counsel shall be notified by the Registrar of the reasons for monitoring. The detainee may at any time request the President to reverse any decision made by the Registrar under this Rule.

IV. SUBMISSIONS

8. Karadžić submits that the Registrar's decision not to allow him to have privileged communication with his Legal Advisor via mobile telephone is "unreasonable, disproportionate, and techno phobic",¹⁴ and he requests that the Impugned Decision be reversed.¹⁵ In particular, Karadžić challenges the Registrar's rationale that mobile telephones can easily be passed to other persons, and notes that a lawyer can just as easily pass his landline telephone to a third party or employ a call-forwarding service to other telephones.¹⁶ Karadžić adds that detainees at the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the International Criminal Court ("ICC") are permitted to have privileged communications with their legal teams via mobile telephone, and he notes that SCSL and ICC detainees are housed in the same facility as Tribunal detainees.¹⁷ Karadžić also submits that a principle of proportionality applies to administrative decision-making in the context of international detention,¹⁸ and contends that the Registrar's ban on privileged calls to mobile telephones violates this principle.¹⁹ Finally, Karadžić states that his Legal Advisor does not have a landline telephone in The Netherlands, which "has resulted in a denial of privileged telephone communications" and "has allowed the UNDU to monitor all of [Karadžić's] telephone conversations with his Legal Advisor."²⁰ In this respect, Karadžić asserts that the Registrar has made the decision "to continue to monitor" his privileged telephone calls.²¹

9. The Registrar responds that Karadžić continues to enjoy the right to have privileged communications with his recognised legal associates and that the Request should be dismissed.²² According to the Registrar, it is "consistent and longstanding" policy that privileged telephone communication from the UNDU can only be authorised to a direct landline between an accused and

¹⁴ Request, para. 13.

¹⁵ Request, paras 1, 17. *See also* Request, para. 6.

¹⁶ Request, para. 16A. I note that Karadžić has designated two paragraphs as paragraph 16 in the Request. For ease of reference, these paragraphs will be referred to herein as paragraphs "16A" and "16B", respectively.

¹⁷ Request, para. 14. *See also* Request, Annex "C" (Declaration of Peter Robinson, Legal Advisor, 27 January 2012).

¹⁸ *See* Request, paras 8-12.

¹⁹ Request, para. 16A. Karadžić submits that a more proportionate way of dealing with the Registrar's security concerns would be for the prison authorities to verify the identity of the lawyer at the commencement of the telephone call. *See* Request, para. 16A.

²⁰ Request, para. 5.

²¹ Request, para. 1. *See also* Request, paras 14, 16B.

²² Response, paras 3, 9. *See also* Response, paras 4-5.

his defence counsel or, in the case of a self-represented accused, his legal associate.²³ The Registrar submits that the underlying rationale for this policy is the increased security risks inherent in the use of mobile telephones, as they can easily be lost, transferred, or used in surroundings that may jeopardise the integrity of privileged communications.²⁴ Furthermore, the Registrar submits that the practice of other international tribunals and courts is irrelevant because the Tribunal and, in particular, the UNDU, has its own security regime based on its specific needs and experience.²⁵ The Registrar states that Karadžić was aware of this policy when his legal associates were assigned, and adds that the Legal Advisor, who is resident at The Hague, can easily arrange for a landline in The Hague for the purpose of privileged communications.²⁶ The Registrar contends that Karadžić and his Legal Advisor's preference to use a mobile telephone for their communications does not amount to a monitoring of Karadžić's privileged communications.²⁷

10. In reply, Karadžić submits that while the prohibition on privileged calls to mobile telephones is a consistent and longstanding UNDU policy, advances in technology have made "the prohibition disproportionate to any legitimate security concerns."²⁸ He argues that the Registrar's concerns regarding mobile phones "make[] no sense",²⁹ and do not "justif[y] the monitoring of all mobile telephone conversations" between himself and his Legal Advisor.³⁰ Karadžić further submits that the Registrar ignores the fact that landline telephones, like mobile telephones, can also be transferred to unauthorised persons, and that the Registrar presumes that lawyers would knowingly violate UNDU rules.³¹ Finally, Karadžić asserts that although his Legal Advisor could obtain a landline telephone in The Hague, this would not allow for privileged communication when his Legal Advisor is in the field interviewing witnesses or when he is not in his apartment in The Hague.³²

V. DISCUSSION

11. I recall that Rule 65(A) of the Rules of Detention provides that "[e]ach detainee shall be entitled to communicate fully and without restraint with his legal representative", subject to the

²³ Response, para. 6.

²⁴ Response, para. 6.

²⁵ Response, para. 8.

²⁶ Response, para. 7.

²⁷ Response, para. 7.

²⁸ Reply, para. 2.

²⁹ See Reply, paras 3, 5.

³⁰ Reply, para. 6. More specifically, Karadžić contends that: (i) he would not want to have a privileged conversation with someone who had found the lost mobile telephone; (ii) UNDU officers could verify the person on the telephone line when he makes a privileged call; and (iii) people in the surrounding area overhearing a conversation would only hear the "lawyer's end", and "not the privileged communication of the accused. See Reply, paras 3, 5.

³¹ Reply, para. 4.

³² Reply, para. 7.

limitations provided for in Rule 65(B) of the Rules of Detention. I consider that although the Registrar is correct in his assertion that Karadžić continues to enjoy a nominal right to privileged telephone communications with his legal advisors,³³ in practice, he has been unable to exercise this right fully. While this is partly due to the fact that Karadžić's Legal Advisor does not have a landline telephone in The Netherlands, it is also clearly attributable to the challenged UNDU policy, which prohibits the use of mobile telephones for privileged communications between detainees and their attorneys.

12. In this regard, I recall the Registrar's submissions emphasising the challenged policy's underlying rationale, including the security concerns as well as the specific needs and experience of the Tribunal and the UNDU.³⁴ However, I consider that many of the security concerns described by the Registrar with respect to permitting privileged communications over mobile telephones exist with landlines, and often, to the same degree. I also note that additional measures can be implemented that may alleviate certain security concerns with regard to the use of mobile telephones.³⁵ Consequently, I am unable to find any compelling security justifications to support maintaining a distinction in treatment with regard to privileged communications between landlines and mobile telephones.

13. Furthermore, while the Tribunal has no obligation to mirror the standards of other tribunals,³⁶ the practice of other international tribunals and the ICC may be relevant when considering whether a challenged policy or decision is reasonable. I recall Karadžić's submission that the ICTR, SCSL, and ICC maintain policies that allow detainees to have privileged communications with their legal teams by placing calls to mobile telephones.³⁷ I am unable to ascertain how the security concerns and experiences of the Tribunal are distinct from those of the ICTR, SCSL, and ICC, and how such concerns justify prohibiting the use of mobile telephones for privileged communications.

14. I also recall that the Registrar notes that the challenged policy "is consistent and longstanding".³⁸ Although this policy may have been reasonable in light of the circumstances in which it was originally implemented, technological advances have indisputably increased the use and prevalence of mobile telephones for the purposes of communication. The Registrar has given no indication that the challenged policy has been amended in light of or to take account of these changes.

³³ Response, paras 3, 9.

³⁴ See Reply, paras 6, 8.

³⁵ See, e.g., Reply, para. 3.

³⁶ See Response, para. 8.

15. Having considered the rights of the detainee provided for in the Rules of Detention and the concerns raised by the Registrar, I find that the challenged policy and the Impugned Decision are unreasonable.³⁹

16. As for Karadžić's claims concerning the Registrar's alleged decision "to continue to monitor" his privileged telephone calls with his Legal Advisor,⁴⁰ Karadžić has failed to point to any evidence suggesting that the Registrar has engaged in impermissible monitoring of Karadžić's privileged communications.

VI. DISPOSITION

17. For the foregoing reasons, I hereby **GRANT** the Request, and **DIRECT** the Registrar to establish, within 21 days of the filing of this decision, a revised policy concerning privileged telephone communications which will permit Karadžić to make privileged telephone calls to his Legal Advisor's mobile telephone subject to appropriate security measures.

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



Judge Theodor Meron
President

Dated this 23rd day of March 2012
At The Hague,
The Netherlands

[Seal of the Tribunal]

³⁷ See Request, Annex "C", paras 3, 5, 6. See also Request, para. 14.

³⁸ Response, para. 6.

³⁹ Karadžić Decision, para. 9.

⁴⁰ See Request, para. 1. See also Request, paras 5, 16B.