

**UNITED
NATIONS**



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: 21 August 2013
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Submission date: 21 August 2013

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DEPUTY REGISTRAR'S SUBMISSION
REGARDING THE ACCUSED'S REQUEST FOR REVERSAL OF LIMITATIONS OF
CONTACT WITH JOURNALIST: SUDDEUTSCHE ZEITUNG MAGAZIN [sic]**

Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Mr. Radovan Karadžić

Standby counsel
Mr. Richard Harvey

INTRODUCTION

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”) of the International Criminal Tribunal for the former Yugoslavia (“Tribunal”), and further to the accused Radovan Karadžić’s (“Accused”) public “Request for Reversal of Limitations of Contact with Journalist: *Süddeutsche Zeitung Magazin*” [sic], filed on 7 August 2013 (“Request for Reversal”), the Deputy Registrar respectfully makes the following submission.

BACKGROUND

2. On 1 August 2013, the Accused submitted a request to the Registry to be permitted a face-to-face interview with two reporters of the *Süddeutsche Zeitung Magazin*, a German print media (“Request”). Pursuant to the Request, which notably appears to originate from the reporters rather than the Accused himself,¹ the interview was to cover the Accused’s biography, daily life, the history of the Balkans, the civil war, and novels written by him. In support, the Request refers to a TV report by the BBC, filmed in the United Nations Detention Unit (“UNDU”), which according to the Request had set a “new precedent for access of serious mainstream media” to detainees at the UNDU. Furthermore, the Request states that the *Süddeutsche Zeitung Magazin* would “naturally conduct the interview with due diligence regarding the ongoing trial, especially security and witness protection”. Finally, the Request asserts that one of the journalists in question has corresponded with the Accused before and has been in close contact with the Accused’s Legal Adviser for a couple of years.
3. By letter of 2 August 2013, the Registrar denied the request (“Impugned Decision”),² pursuant to Rule 61(B) 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”), which prohibits face-to-face contact with detainees for the purpose of obtaining “information which may be subsequently reported in the media”. The Accused was informed, however, that the Impugned Decision was without prejudice to any further request for an interview with reporters of the *Süddeutsche Zeitung Magazin* under an alternative modality. The Accused was further informed that the BBC visit referred to in the Request had not included access to detainees nor permission to meet with any detainee, rather the BBC had been permitted to film an empty part of the UNDU. The Accused was

¹ See Annex A to the Request for Reversal.

² See Annex B to the Request for Reversal.

informed that the *Süddeutsche Zeitung Magazin* was welcome to apply for such a visit through the Tribunal's Media Office.

4. In the Request for Review, the Accused asks the President to reverse the Impugned Decision based on an alleged error of the Registrar to consider a face-to-face interview in the Tribunal's main building ("Main Building"), which according to the Accused would not violate Rule 61 of the Rules of Detention.

APPLICABLE LAW

5. The jurisprudence of the Tribunal provides that the judicial review of an administrative decision by the Registrar is concerned with (1) compliance with the legal requirements of the applicable rules and regulations; (2) observance of the basic rules of natural justice and procedural fairness; (3) consideration of relevant material and non-consideration of irrelevant material, and (4) reasonableness of the conclusion reached.³ The party challenging the administrative decision bears the burden of showing that (1) "an error of the nature described has occurred," and (2) "such error has significantly affected the Registrar's decision to his detriment."⁴
6. The Request for Review was filed pursuant to Rules 61(B) and 64bis(C) of the Rules of Detention. Pursuant to Rule 61(B):

[t]he 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 in the media. Rule 64bis(C) shall apply *mutatis mutandis* to decision taken by the Registrar under this Sub-Rule.

Rule 64bis(C) provides:

[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.

³ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Public, "Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić", dated 7 February 2003 ("Kvočka Decision"), para 13.

⁴ Kvočka Decision, para. 14.

ACCUSED'S SUBMISSION

7. The Accused argues that the Registrar erred in failing to consider authorising a face-to-face interview in the Main Building, which would in his view not violate Rule 61 of the Rules of Detention.⁵ In support of this argument, the Accused refers to the fact that he was allowed to interview prosecution witnesses prior to their respective testimonies in the holding cell of the Main Building and that there were several journalists among these witnesses.⁶
8. The Accused further argues that any restrictions of the rights of an accused are subject to the proportionality principle, and that a detainee's right to freedom of expression needs to be balanced against the interests of the prison authorities.⁷ With regard to a possible disclosure of confidential information to the journalists, the Accused states that he has communicated with journalists on more than 30 occasions and never disclosed any confidential material.⁸ In his view, the Registrar should have considered alternatives to written correspondence, as "such contact lacks the spontaneity of oral communication and the ability to follow-up or clarify the answers". The Accused further suggests that a Court Officer could sit in on the interview to ensure that no confidential information is disclosed to the journalist.⁹

DEPUTY REGISTRAR'S SUBMISSION

9. It is respectfully submitted that in reaching the Impugned Decision, the Registrar fully complied with the four-prong standard for proper decision making, as set out in the Kvočka Decision.

I. The Registrar complied with the applicable legal framework.

10. In considering the Request for Review and issuing the Impugned Decision, the Registrar applied the Rules of Detention, the relevant jurisprudence of the Tribunal, and the Registry Protocol for Contacts Between a Detainee and the Media ("Media Protocol").¹⁰
11. First and foremost, as confirmed by the Vice-President, Rule 61(B) of the Rules of Detention entails a total ban on face-to-face interviews with journalists.¹¹ The Vice-

⁵ Request for Review, para. 6.

⁶ Request for Review, paras 14-16.

⁷ Request for Review, para. 19.

⁸ Request for Review, para. 13.

⁹ Request for Review, paras. 28, 30.

President has further repeatedly held that the risk of potential disclosure of confidential information to a journalist in a direct conversation between a detainee and a journalist - even if inadvertent - is unacceptable.¹² It is on this basis that the Request was denied.

12. The Accused mistakenly implies that Rule 61(B) of the Rules of Detention applies only to media interviews at the UNDU and argues that the Registrar should have considered granting an in-person interview in the Main Building instead. However, the Rules of Detention, which regulate conditions of detention of the Tribunal's detainees, are not location-specific: they apply, *mutatis mutandis*, to the Main Building, external medical facilities, or any other premise within the Host Country where a detainee may be temporarily held. To confine their application only to the UNDU would mean that the conditions of detention in any other location where detainees might be held on the Tribunal's authority would be unregulated, so that detainees, once outside the UNDU, could, for example, use communication facilities to arrange escape or to intimidate witnesses, or have free access to contraband. This cannot be the case.

II. *The Registrar observed the basic rules of natural justice and procedural fairness.*

13. The Registrar observed the basic rules of natural justice and procedural fairness by considering the Request despite the fact that it was seemingly completed by the journalists and not by the Accused as required under the Media Protocol.¹³ The Registrar further considered alternative modalities for the Accused's contact with the *Süddeutsche Zeitung Magazin* (the Registrar invited the Accused to carry out a written interview with the *Süddeutsche Zeitung Magazin*, in accordance with the Media Protocol) and invited the journalists to apply for a visit to an unoccupied area of the UNDU, in line with their implied interest in visiting the detention facility. The Accused and the journalists chose not to take advantage of these offers.

¹⁰ With regard to the Media Protocol, see Annex, "Procedure for Contacts With the Media- Information for Detainees".

¹¹ See *Prosecutor v. Radovan Karadžić*, Decision on Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist, dated 12 February 2009 ("First Karadžić Media Decision"), para. 16: "[...] Rule 61 of the Rules of Detention imposes a total ban on face to face visits between detainees and journalists."

¹² *Id.*, para. 21: "[...] I note another important consideration with respect to the administration of justice is the potential for confidential information to be disclosed. [...] Allowing [this] is obviously unacceptable." *Prosecutor v Radovan Karadžić*, Decision for Reversal of Limitations of Contact with Journalists dated 21 April 2009 ("Second Karadžić Media Decision"), para. 21; see also Decision for Reversal of Limitations of Contact with Journalist: Russia Today, dated 6 November 2009 ("Third Karadžić Media Decision"), para.29: "It has previously been established that a live audio or visual recording is not permissible due to concerns related to the administration of justice, notably the risk of (inadvertent) disclosure of confidential information."

¹³ In the Impugned Decision the Accused was reminded that whilst the Registrar appreciates that the Accused may support a request submitted by a media outlet, he must complete any further request personally in line with the Media Protocol. This provides certainty as to the Accused's reasons for requesting the contact with the media, and accordingly assists in the decision making process.

III. *The Registrar considered only relevant material and did not consider irrelevant material.*

14. In reaching the Impugned Decision, the Registrar only considered relevant material, such as the Rules of Detention, the Media Protocol, and the jurisprudence of the Tribunal. In this regard, the Accused's reference to the proofing sessions he held at the Main Building with prosecution witnesses who were journalists is misleading and irrelevant. The purpose of these interviews was not to obtain information to be reported in the media (which is the reason for the prohibition of in-person interviews with journalists under Rule 61(B) of the Rules of Detention). Rather, the Accused was authorised to interview the journalists regarding their upcoming testimonies in order to facilitate his participation in the proceedings as a self-represented accused. Each witness-journalist so interviewed signed a specific non-disclosure undertaking which acknowledged that the sole purpose of the interview was to discuss issues relevant to the case brought against the Accused before the Tribunal.¹⁴

IV. *The Impugned Decision is reasonable and proportionate.*

15. The Impugned Decision is reasonable and proportionate, and the Accused fails to show that the Impugned Decision was detrimental to him. In particular, the Impugned Decision does not affect the Accused's ability to be interviewed by *Süddeutsche Zeitung Magazin* and hence exercise his right to freedom of expression.

16. The Tribunal's jurisprudence is clear: the restriction of detainees' contact with the media to written interviews is proportionate and protects the detainees' right to freedom of expression while keeping the risk of disclosure of confidential information to a minimum.¹⁵ Written correspondence between the Accused and journalists can be thoroughly reviewed by Registry staff to ensure that no sensitive information is revealed therein. Unlike face-to-face interviews, written correspondence allows the Registry to verify information provided by the Accused and consult the Chamber, where necessary on sensitive matters.

17. In contrast, the Accused's suggestion to have a Court Officer sit in on a live interview would not provide sufficient protection against the risk of disclosure of confidential information. In the first place, this would provide no protection against disclosure to the

¹⁴ That one of the respective journalists subsequently published an article in which he describes the witness proofing session with the Accused and his subsequent testimony does not alter the reason for authorisation of the meeting. Whether the journalist violated the non-disclosure undertaking he signed before the interview is a separate matter which is currently under examination by the Registry.

¹⁵ See Second Karadžić Media Decision, para. 21.

journalists themselves. In addition, Court Officers do not have knowledge of all the confidential records and information available in a voluminous case such as that of *Karadžić*, and their responsibilities, unlike those of the Chamber and the parties, are not related to substantive issues of law and fact. They cannot therefore be relied upon to judge whether confidential information has been disclosed without further consultation. For the same reasons, other Registry staff members are similarly unsuited to assume this proposed role.

18. The Accused has not explained why providing that his interview should take written form violates his freedom of expression, particularly given that the *Süddeutsche Zeitung Magazin* is a print media. His argument that a written interview is “less spontaneous and does not leave room for clarifications” is not convincing and has been unsuccessfully raised by the Accused before.¹⁶ Indeed, it appears to represent the interests of the journalists, who submitted the original request, rather than of the Accused himself. While the reporters and the Accused may prefer to meet in person, the Accused is not dependent on a face-to-face interview to exercise his freedom of expression.
19. In this regard, the Registrar respectfully recalls the Acting President’s finding that “the preference of a particular broadcast media regarding the format of the information received cannot define or qualify a detainee’s right to freedom of expression.”¹⁷ The Acting President further held that while a detainee is generally allowed to communicate with the media, this right does not comprise the form in which such communication takes place.¹⁸ The specification that communications between the Accused and the *Süddeutsche Zeitung Magazin* shall be carried out in writing does not violate the Accused’s freedom of speech for he remains free to communicate his messages to the media according to the procedure set out in the Media Protocol.
20. Finally, experience has shown written correspondence to be conducive to effective communication. In the conduct of over 30 written interviews of the Accused authorised and facilitated by the Registry so far, not once has a journalist written back to request clarification of any issue.¹⁹ However, the Registry remains available to facilitate follow up questions in the future, where reasonably necessary.

¹⁶ See Second Karadžić Media Decision.

¹⁷ Third Karadžić Media Decision, para. 29.

¹⁸ *Ibid.*

¹⁹ Importantly, however, there were several instances in which the Registry had to return the Accused’s answers to the Accused for reformulation, in order to ensure that no confidential information was disclosed or no contentious issues *sub iudice* were discussed.

CONCLUSION

21. The Registrar submits that the Impugned Decision is entirely within the framework of the *Kvočka* test for proper administrative decision making. More specifically: (1) the Registrar complied with the relevant legal requirements, in particular Rule 61(B) of the Rules of Detention; (2) the Registrar observed the basic rules of natural justice and procedural fairness by giving the request reasoned consideration and by offering alternative means to ensure the Accused can exercise his right to freedom of expression; (3) the Registrar considered only relevant material and disregarded irrelevant material; and (4) the Registrar's conclusion is proportionate and reasonable in the context of the Rules of Detention and the jurisprudence of the Tribunal, and specifically in this case does not violate the Accused's Freedom of Expression.
22. As the Accused has failed to meet the burden of showing the contrary, the Registrar respectfully submits that the Request for Review should be dismissed.
23. The Registrar remains available to provide any additional information, at the President's discretion.

Respectfully submitted,




Kate Mackintosh
Deputy Registrar

Dated this 21st day August 2013
At The Hague,
The Netherlands.

ANNEX

27 July 2009



United Nations
Nations Unies



International
Criminal Tribunal
for the former
Yugoslavia

Registry

Tribunal Pénal
International pour
l'ex-Yougoslavie

Greffe

PROCEDURE FOR CONTACTS WITH THE MEDIA – INFORMATION FOR DETAINEES

Introduction

The purpose of this paper is to set out the procedure for the contacts between a detainee and the media, pursuant to Rule 64bis(A) 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”) of the International Criminal Tribunal for the former Yugoslavia.¹

Submission of Requests

A detainee who wishes to contact the media shall submit a written request to this effect (“Request”) to the Registrar through the UNDU Commanding Officer. The detainee shall provide details about the requested contact with the media through the completion of the ‘Request for Media Contact’ attached herewith as Annex A. The detainee shall provide, as an attachment to the Request, any relevant documentation, such as correspondence between the detainee and the media on the matter.

Correspondence from the Media

A media agency or a media representative seeking contact with a detainee for the purposes of media reporting must first approach the detainee with its reporting proposal. If the detainee consents to the reporting proposal, based on the correspondence he received from the media representative, and wishes to seek the Registrar’s approval, the detainee must submit a ‘Request for Media Contact’ attached as Annex A to this Protocol to the UNDU, attaching the correspondence from the media agency or representative.

Registrar’s Decision

The contact with the media shall take place only if granted by the Registrar.

Face-to-face contacts are not allowed.²

Other forms of contacts with the media may be granted, unless the Registrar has reasons to believe that the particular contact requested could disturb the good order of the UNDU or could interfere with the administration of justice; or otherwise undermine the Tribunal’s mandate in accordance with Rule 64bis of the Rules of Detention.

A copy of the Registrar’s decision shall be communicated to both the detainee and the media representative, where relevant.

¹ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT/38/Rev. 9.

² Rule 61(B) of the Rules of Detention; *See also* IT-95-5/18-PT, *Prosecutor v. Radovan Karadžić*, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, 12 February 2009 (“Decision”), para. 16.

Contact Granted

In the event that the detainee's Request is granted, the decision will enumerate practical arrangements such as the format in which the contact is to take place, languages to be used, the maximum length of the interview if taking place over the telephone, the media outlet in which the piece is to appear, etc.

Further, both the detainee and the media representative will be required to sign the undertakings attached herewith as Annex B. By signing the undertaking, the detainee and the media representative acknowledge that they are aware of the conditions under which the contact is granted, and that a departure from these conditions may result in the imposition of sanctions and, where appropriate, the initiation of contempt proceedings under Rule 77 of the Rules of Procedure and Evidence of the Tribunal.³

Additionally, the detainee will be informed of the fact that his contact with the media will be monitored.⁴

Upon the issuance of a decision granting the contact, necessary arrangements will be undertaken by the Registry in order to facilitate the contact.

The decision of the Registrar granting contact will be immediately revoked should the detainee and/or the media representative refuse to sign the undertaking.

Contact Denied

In the event that the detainee's Request to contact the media is denied, the Registrar shall explain the reason(s) for denial and inform the detainee of his right to seek review of the decision by the President of the Tribunal.⁵

³ Decision, para. 24(c).

⁴ Decision, para. 24(b); Regulations 1 to 28 of the United Nations Detention Unit Regulations to Govern Supervision of Visits to and Communication with Detainees shall apply *mutatis mutandis*.

⁵ In accordance with the Rules of Detention, a detainee may request review of any such decision pursuant to the Complaints Procedure.

ANNEX A

REQUEST FOR MEDIA CONTACT		
Case name and number:		
Name of the Detainee submitting the Request:		
Detailed reasons for the Request (attach a separate sheet if necessary):		
Information regarding the Media Agency/Media Representative with whom contact is sought (please attach any correspondence received from the Media Agency or Representative):	Name of the Media Agency:	
	Full name of Media Representative: Professional Title:	
	Contact information for Media Agency and/or Representative (address, telephone, email, website):	
Proposed topic(s) to be discussed with Media Agency/Media Representative (attach a separate sheet if necessary):		

Information regarding the proposed publication:	Type of media through which the reporting is to take place (e.g. television, radio, magazine, internet):	
	Name of publication or station/channel and programme, or website:	
	Projected publication or broadcast date:	
Requested form of contact (via written correspondence, telephone call, other):		
Other relevant information:		
Date of the Request:		
Signature of the Detainee:		
To be filled in by UNDU		
Request #: _____	Received on: _____	Received by: _____
Approved or Rejected:		

ANNEX B

UNDERTAKING
For Detainee

- 1) I, _____,
(Name of detainee)
 understand that I have been authorised to contact

(Name of media representative and media organisation)
 (“Media Representative”) by way of _____
(Specify the modalities)
 in accordance with Rule 64bis(A) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal of the International Criminal Tribunal for the former Yugoslavia (“ICTY”).
- 2) During my contact with the Media Representative, I undertake not to address any issues that:
- a) would amount to a disclosure of confidential information;
 - b) may have the effect of influencing or interfering with present or prospective witnesses before the ICTY; or
 - c) may have the effect of disturbing the good order of the UNDU, interfering with the administration of justice or otherwise undermining the Tribunal’s mandate
- 3) I further undertake not to make or comment upon false or defamatory statements about ICTY Judges and staff members or statements regarding Judges and staff members outside their official capacity; any statement containing obscene or otherwise offensive language; statements aiming to influence the Judges or staff members of the ICTY or the outcome of the proceedings.
- 4) I understand and accept that I shall not disclose in any form:
- a) The layout, configuration or physical description of the United Nations Detention Unit (“UNDU”), including the locations of detainees within the UNDU; or
 - b) Any other information relating to the UNDU or any other detainee which is not in the public domain.

- 5) I undertake to fully comply with the conditions for the contact, as set out in the Registrar's decision.

I acknowledge that any breach of this undertaking may lead to the imposition of sanctions such as, but not limited to, restrictions of my right to contact with the media and/or the instigation of contempt proceedings against me under Rule 77 of the Rules of Procedure and Evidence where applicable.

Signature: _____

Done this _____ day of _____
(Day) (Month, year)

At The Hague,
The Netherlands.