

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Date: 27 January 2012

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REQUEST FOR REVIEW OF DECISION
ON PRIVILEGED TELEPHONE CALLS

The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic, pursuant to Rule 65 (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”), hereby requests that the President of the Tribunal reverse the decision of the Registrar to continue to monitor privileged telephone calls between Dr. Karadzic and his Legal Advisor Peter Robinson.

2. Rule 65(A) provides that “each detainee shall be entitled to communicate fully and without restraint with his legal representative, with the assistance of an interpreter if necessary.”

3. Rule 65(B) provides that all such communications shall be privileged, subject to exceptions which are not relevant here.

4. Rule 65(B) further provides that “prior to such communications being monitored, the detainee and his counsel shall be notified by the Registrar of the reasons for the monitoring. The detainee may at any time request the President to reverse any decision made by the Registrar under this Rule.”

5. The United Nations Detention Unit (UNDU) refuses to allow Dr. Karadzic to have privileged telephone conversations with his Legal Advisor Peter Robinson because of a policy that prohibits privileged calls to mobile phones. Because Mr. Robinson does not have a land line telephone in The Netherlands, this has resulted in a denial of privileged telephone communications between Dr. Karadzic and his Legal Advisor and has allowed the UNDU to monitor all of Dr. Karadzic’s telephone conversations with his Legal Advisor.

6. Dr. Karadzic requested that the Registrar reconsider this rule and allow him to have privileged conversations with his Legal Advisor.¹ On 24 January 2012, the Registrar refused, claiming that “mobile phones can easily be handed over to unauthorized persons.”² Dr. Karadzic now requests the President to reverse the decision of the Registrar to monitor his telephone conversations with his Legal Advisor.

7. The jurisprudence of the Tribunal provides that a decision of the Registrar will be quashed if (1) he failed to comply with the requirements of the relevant legal authorities; or (2) he failed to observe basic rules of natural justice and procedural

¹ A copy of Dr. Karadzic’s letter is attached as Annex “A”.

² A copy of the Registrar’s letter is attached as Annex “B”

fairness towards the person affected by the decision; or (3) he has taken into account irrelevant material or failed take into account relevant material; or (4) he reached a conclusion that is unreasonable, in the sense that it is a conclusion that no sensible person who has properly applied his mind to the issue could have reached.³

8. It is established case law that the proportionality principle applies to administrative decision making in the context of international detention. The proportionality principle was interpreted by the Trial Chamber in *Hadzihasanovic et al.*, as prescribing the judges, when interpreting Rule 65 of the ICTY RPE, to consider whether the measure was 'suitable, necessary and if its degree of and scope remain in a reasonable relationship to the envisaged target'.⁴ Although this concerned provisional release, it may help to understand the notion as applied in respect to intramural matters.

9. Examples of application of the proportionality principle to intramural matters are found, *inter alia*, in *Norman*, in relation to the gravity or quantum of the imposed sanction for sending a letter out of the SCSL Detention Centre;⁵ in *Ngeze*, in relation to restrictions of the detainee's wife's visits⁶ and, also in that case, in relation to the right to equal treatment.⁷ Further, the ICTY Registrar himself, in *Lukic & Lukic*, defended his decision to grant a Prosecutor's request under Rule 64 of the ICTY Rules of Detention to suspend the detainee's non-privileged communications for a period of two weeks by arguing, *inter alia*, that his decision was proportionate, in accordance with the four-prong *Kvocka*-test for administrative review.⁸

10. Also the principle of least intrusiveness has been recognized in the international criminal tribunals' case law relating to detention issues. In *Stakic* and in

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

⁴ ICTY, *Decision Granting Provisional Release, Prosecutor v. Hadzihasanovic et al*, Case No. IT-01-47-AR72, T. Ch., 19 December 2001, par. 8. See, also, SCSL, *Decision on the Urgent Defence Application for release from Provisional detention, Prosecutor v. Moinina Fofana*, Case No. SCSL-2003-11-PD, T. Ch., 21 November 2003, par. 42.

⁵ SCSL, *Decision on Request to Reverse the Order of the Acting Registrar under Rule 47(A) of the Rules of Detention of 6 June 2005, Prosecutor v. Hinga Norman*, Case No. SCSL-04-14-RD47, President, 29 June 2005, par. 19.

⁶ ICTR, *Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005, Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, President, 14 September 2005, par. 9.

⁷ ICTR, *Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005, Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, President, 14 September 2005, par. 16, referring in footnote 16 to relevant ECtHR jurisprudence.

⁸ ICTY, *Decision on Milan Lukic's Appeal against the Registrar's Decision of 18 November 2008, Prosecutor v. Lukic & Lukic*, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 8.

Brdanin and Talic, for example, it was considered an aspect of the notion of proportionality that ‘if it is sufficient to use a more lenient measure, it must be applied’.⁹

11. The same transpires from *Ndindiliyimana*, where the detainee had submitted a request to the ICTR President for a reversal of the prohibition of contact between him and his visitors to the UNDF.¹⁰ The Registrar had denied the detainee’s request for a visit of two of his friends to the UNDF. The request was denied by the Registrar following a request by the Prosecutor to prohibit the contact. The reason for this prohibition of contact was, according to the Prosecutor, that ‘contact between the accused and his intended visitors ‘could prejudice or otherwise affect the outcome of the proceedings against the detainee or any other investigations’.¹¹ The President, however, noted that there are other ways than a complete prohibition of contact. He held that;

‘[t]he Registrar may impose conditions under which the requested visit is to take place, to cater for the Prosecutor’s concerns as well as the interests of the safe administration of the UNDF. These conditions may be along the lines ordered in the Ntagerura case. In that case, I reversed the decision prohibiting the accused from being visited, and ordered that the visit take place in the presence of an official of the UNDF, and that neither the accused nor the visitor be permitted to discuss his case. In imposing these conditions, I addressed the Prosecutor’s concerns and at the same time respected the accused’s visiting rights’.¹²

12. Rule 3 of the European Prison Rules states that ‘[r]estrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed’. Article 2 of the Dutch Penitentiary Principles Act (“Penitentiare Beginselenwet”) provides that detainees and prisoners shall be subjected to no other restrictions than those necessary in light of the aim of imprisonment or in the interests of maintaining order or security within the institution.

⁹ ICTY, Order to the Registry of the Tribunal to Provide Documents, *Prosecutor v. Stakic*, Case No. IT-97-24-T, T. Ch. II, 5 July 2002; ICTY, Decision on the Motion for provisional Release of the Accused Momir Talic, *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-T, T. Ch. II, 20 September 2002.

¹⁰ ICTR, The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for prohibition of Contact Pursuant to Rule 64, *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-T, President, 25 November 2002.

¹¹ ICTR, The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for prohibition of Contact Pursuant to Rule 64, *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-T, President, 25 November 2002, par. 7.

¹² ICTR, The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for prohibition of Contact Pursuant to Rule 64, *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-T, President, 25 November 2002, par. 12, referring to ICTR, The President’s Decision on the Defence Application made pursuant to Rule 64 of the Rules of Detention, *Prosecutor v. Ntagerura*, Case No. ICTR-96-10A-T, President, 21 May 2002. Footnote omitted.

13. The decision of the Registrar not to allow privileged communications between Dr. Karadzic and his legal advisor via mobile telephone is unreasonable, disproportionate, and techno phobic.

14. As demonstrated in the attached declaration of Peter Robinson, the ICTY stands alone among international tribunals in refusing to allow privileged communications on mobile phones. Detainees at the International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, and International Criminal Court are allowed to have privileged communications with their legal teams on mobile phones.¹³ Given that SCSL and ICC detainees are housed in the same facility as Dr. Karadzic, it is simply unreasonable for the ICTY Registrar to insist on listening to Dr. Karadzic's privileged communications with his Legal Advisor on a mobile phone.

15. The European Court of Human Rights has struck down restrictions on privileged communications between a detainee and his lawyers where they were disproportionate and unreasonable.¹⁴

16. The reason given by the ICTY Registrar for insisting on monitoring privileged telephone calls is unreasonable. He claims that mobile phones may be passed to other persons. This assumes that the lawyer will violate his undertakings to the Tribunal. A lawyer of a mind to do that can easily pass his land line phone to a third party as well, or employ a call forwarding service to other phones, including mobile phones. The other Tribunals, and Dutch prison authorities, deal with this by verifying the identity of the lawyer at the commencement of the call. This is a proportional measure which allows for privileged communications and guards against abuse. The ICTY Registrar's absolute ban on privileged calls to mobile telephones violates the proportionality principle.

16. The ICTY, with its e-court equipped modern courtrooms and its presence on the web, Facebook, and Twitter, prides itself on uses of modern technology to fulfill its mandate. The insistence by the Registrar that privileged telephone calls cannot be allowed to mobile telephones is unreasonable and appears to be nothing more than a pretext for monitoring the privileged telephone calls of Dr. Karadzic.

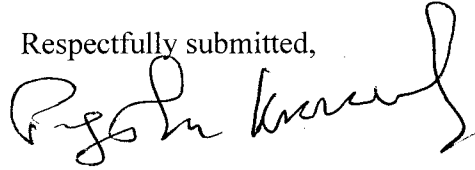
¹³ The declaration is attached as Annex "C".

¹⁴ *Case of Jankauskas v Lithuania*, ECtHR Application #59304/00, *Judgement* (24 February 2005) at paras 18, 21-22.

17. Therefore, it is respectfully requested that the decision of the Registrar prohibiting privileged telephone calls between Dr. Karadzic and his Legal Advisor Peter Robinson on mobile telephones be reversed.

Word count: 1839

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Radovan Karadzic", written in a cursive style.

Radovan Karadzic

ANNEX "A"

IT-95-5/18-T
12 January 2012D58964
TR

Dr. Radovan Karadzic

12 January 2012

Ms. Jaimee Campbell
Office of Legal Aid and Detention
International Criminal Tribunal for the
former Yugoslavia
Churchillplein 1
The Hague

PUBLIC → [Handwritten signature]

Dear Ms. Campbell,

I am requesting that I be allowed to make privileged calls to the mobile telephone of my Legal Advisor Peter Robinson.

I have been informed by the United Nations Detention Unit that they will not allow me to make any privileged telephone calls to a mobile phone. Because Mr. Robinson does not have a land line telephone in the Netherlands, this prevents me from having privileged telephone conversations with him.

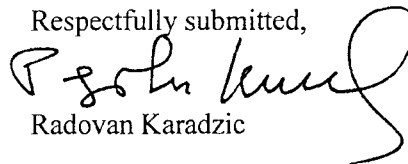
The rule that privileged telephone calls are not allowed to mobile phones is a senseless one in this day of modern communications. To the extent that there is a greater danger that Rupert Murdoch or others may listen in to my privileged communications with my Legal Advisor if we communicate over a mobile phone, I am willing to accept that risk.

The existing rule serves only to ensure that the UNDU personnel are able to monitor my conversations with my Legal Advisor. This to me is a greater invasion of my attorney-client privilege than any hacker who might overhear the conversations on a mobile phone. Indeed, the only known breach of confidentiality from telephone communications at the UNDU in the last 15 years has been when former Commander Timothy McFadden revealed to representatives of the United States government the contents of overheard communications of President Milosevic.

Therefore, I am requesting that you reconsider the rule which prohibits detainees from making privileged telephone calls to mobile phones. Should you decline to permit such communications, I would intent to appeal your decision to the President of the Tribunal.

Thank you for your consideration.

Respectfully submitted,



Radovan Karadzic

ANNEX "B"



United Nations
Nations Unies



International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

24 January 2012

Dear Mr. Karadžić,

Re: Privileged telephone calls to mobile phone of your legal advisor Peter Robinson

I refer to your letter to the Office for Legal Aid and Detention Matters ("OLAD") of 12 January 2012 ("Letter"), in which you request to be permitted to have privileged phone calls to the mobile telephone of your legal advisor Mr. Peter Robinson.

As you have been previously informed by the Registry, pursuant to standard Registry and United Nations Detention Unit ("UNDU") policies, cell phones cannot be designated as privileged. In this regard, 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. This policy is applied equally to all detainees at the UNDU.

Therefore, I have to inform you that the UNDU is not in a position to establish a privileged telephone line to the cell phone of your legal advisor Mr. Robinson. You may communicate with Mr. Robinson only by way of privileged telephone call to an authorized landline from the UNDU.

In your Letter, you argue that the rule which prohibits privileged calls to mobile phones is a senseless one in this day of modern communications. While the Registry is aware of the benefits of mobile communication, the Registry at the same time has to take into consideration the difficulties that might arise from such practice from a security point of view, as mobile phones can easily be handed over to unauthorized persons, thus defeating the purpose of a designated telephone line for privileged calls.

Finally, for future correspondence I would like to remind you to refrain from filing internal correspondence on the case record. As advised to you previously, this practice adds additional workload for Registry sections, and does not add to or change the quality or content of our response.

Should you wish to pursue this matter further, I call your attention to paragraphs 1 to 4 of the Regulations for the Establishment of a Complaint Procedure for Detainees.¹

Should you have any questions or need additional information on the matters raised herein, please do not hesitate to contact my office.

Yours sincerely,

Jaimee Campbell
Head of the Office for
Legal Aid and Detention Matters

¹ Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal.

To: Mr. Radovan Karadžić
UNDU

Cc: Mr. Peter Robinson
Legal Advisor to Mr. Radovan Karadžić

ANNEX "C"

Declaration of Peter Robinson

I, Peter Robinson, do hereby declare under penalty of perjury that the following is true and correct:

1. I am assigned by the Tribunal as Legal Advisor to Dr. Radovan Karadzic.
2. I do not have a land line in the Netherlands and can only be reached by mobile telephone.

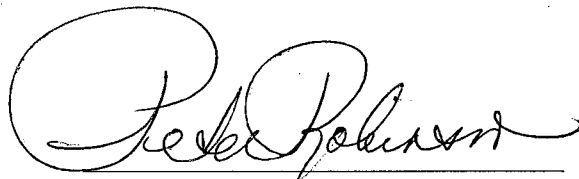
3. From 2002-10, I was Lead Counsel for Joseph Nzirorera at the International Criminal Tribunal for Rwanda (ICTR). During that time, I was able to have privileged telephone calls with my client on my mobile telephone. In order to have a privileged telephone conversation, I simply called the United Nations Detention Facility, identified myself as Mr. Nzirorera's lawyer, and was connected to my client who spoke to be from a privileged line. It made no difference whether I was calling from a land line or mobile phone.

4. I have contacted some of my colleagues who have clients at other international tribunals to determine the practice at those institutions.

5. I have been informed by Courtenay Griffiths, Lead Counsel for Charles Taylor at the Special Tribunal for Sierra Leone, that he is able to have privileged telephone conversations with Mr. Taylor over his mobile phone. Mr. Taylor is housed at the same United Nations Detention Unit in The Hague as Dr. Karadzic.

6. I have been informed by David Hooper, Lead Counsel for Germain Katanga, and Arthur Vercken, Lead Counsel for Callixte Mbarushimana at the International Criminal Court, that they have been able to have privileged telephone conversations with their clients over their mobile phones. Detainees of the International Criminal Court are housed in the same United Nations Detention Unit in The Hague as Dr. Karadzic.

DATED: 27 January 2012

A handwritten signature in black ink, appearing to read "Peter Robinson", written over a horizontal line.