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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 April 2011

Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Patrick Robinson, President**

Registrar: **Mr. John Hocking**

Decision of: **21 April 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC REDACTED *EX PARTE*

DECISION ON REQUEST FOR REVERSAL OF DECISION TO MONITOR TELEPHONE CALLS

The Accused:

Radovan Karadžić

Stand-by Counsel:

Mr. Richard Harvey

1. **I, PATRICK ROBINSON,** 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 Reversal of Decision to Monitor Telephone Calls" filed on 28 January 2011 ("Request for Reversal") by Radovan Karadžić ("Karadžić"). On 17 February 2011 the Registrar of the Tribunal ("Registrar") filed a submission, pursuant to Rule 33(B) of the Rules of Procedure and Evidence ("Rules"), in response to the Request for Reversal.[1] Karadžić filed a reply to the Registrar's Submission on 18 April 2011.[2]

I. SUBMISSIONS

A. Request for Reversal

2. Karadžić's Request for Reversal addresses two main issues: the first concerns the alleged disclosure by Mr. Timothy McFadden ("Mr. McFadden"), a former Commanding Officer of the United Nations Detention Unit ("UNDU" or "Facility"), of information allegedly obtained from the recording and monitoring of Slobodan Milošević's telephone calls at the UNDU, to representatives of the Government of the United States of America ("First Issue"); and the second concerns Karadžić's objections to the Registrar's decision authorising the monitoring of Karadžić's telephone conversations at the UNDU ("Impugned Decision")[3] ("Second Issue").

3. With regard to the First Issue, Karadžić alleges that a United States diplomatic cable sourced from *Wikileaks* ("Purported Diplomatic Cable") reveals that Mr. McFadden disclosed to representatives of the United States Government, information that could only have been obtained from the monitoring of Slobodan Milošević's telephone calls at the UNDU ("Alleged Disclosure").[4] Karadžić submits that the Alleged Disclosure constituted an abuse by UNDU authorities of the telephone monitoring regime in place at the Facility.[5] Karadžić states that although he "does not have standing to complain about the violation of the rights of President Milosevic [*sic*]", he

[1] Registrar's Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić's Request for Reversal of Decision to Monitor Telephone Calls, 17 February 2011 (public with confidential and *ex parte* annex) ("Registrar's Submission").
[2] Reply Brief: Request for Reversal of Decision to Monitor Telephone Calls, 18 April 2011 ("Reply"). On 22 February 2011, Karadžić filed a "Motion for Access to Confidential and *Ex Parte* Annex" ("Motion for Access") in which he requested access to the confidential and *ex parte* annexes to the Registry's Submission ("Annexes to the Registrar's Submission") ("Access Request"), or in the alternative, that I not consider the Annexes to the Registrar's Submission in arriving at my decision on the Request ("Alternative Request"). Karadžić further requested four days from the time of the issuance of the decision on the Motion for Access to file his Reply ("Filing Request"). On 15 April 2011, I issued the "Decision on Motion for Access to Confidential *Ex Parte* Annex", in which I denied the Access Request, and granted the Alternative Request, and Filing Request.
[3] Karadžić annexes to the Request for Review, a memorandum dated 13 January 2011 in which the Registrar states his decision to renew the monitoring of the telephone conversations of, *inter alia*, Karadžić for a further period of 30 days.
[4] Request for Reversal, paras 10-12.
[5] *Ibid.*, paras 2, 13.

nonetheless requests that I, *proprio motu*, appoint a Trial Chamber "to determine whether an *amicus curiae* should be appointed pursuant to Rule 77(C)(ii) to investigate the interference with the proper administration of justice" arising from the Alleged Disclosure ("First Request").[6]

4. Karadžić also submits that, in view of the Alleged Disclosure, "[i]t is unknown to what extent, if any" UNDU officials or the Registrar may have disclosed to third parties information sourced through the monitoring of Karadžić's telephone conversations.[7] Karadžić thus requests that I order the Registrar to file a submission, pursuant to Rule 33(B) of the Rules, containing sworn statements from the current Commanding Officer of the UNDU and all UNDU Commanding Officers since July 2008, indicating the instances in which they discussed the content of Karadžić's telephone conversations at the UNDU with third parties, "and the information revealed in those discussions" ("Second Request").[8]

5. With respect to the Second Issue, Karadžić requests that, pursuant to Regulation 22 of the Regulations to Govern the Supervision of Visits to and Communication with Detainees ("Regulations on Detainee Communications"),[9] I reverse the Impugned Decision on the basis that no good cause exists to justify the measure of monitoring his telephone calls at the UNDU ("Third Request").[10] Karadžić argues that since the start of proceedings against him before the Tribunal, neither he nor members of his defence team have disclosed the identities of protected witnesses, breached any non-disclosure or confidentiality orders, or engaged in witness intimidation.[11] Karadžić also argues that there has never been any indication that he might try to escape from the Tribunal's custody.[12] Karadžić also contends that, since the start of his detention at the Facility, he has never disturbed the good order and security of the UNDU.[13] Karadžić thus submits that "the Registrar's inclusion of him in its blanket orders to record every conversation of every detainee is unreasonable".[14] He further submits that the Registrar's decision authorising the monitoring of his telephone calls at the UNDU violates European standards governing the right to privacy, and the interception and monitoring of the communications of prisoners in detention facilities.[15]

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[6] *Ibid.*, paras 14, 27.
[7] *Ibid.*, para. 15.
[8] *Ibid.*, paras 15 and 27.
[9] IT/98/REV.4, amended August 2009.
[10] Request for Reversal, paras 1, 27. *See also ibid.*, paras 8-9.
[11] *Ibid.*, para. 8.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*, para. 9.
[15] *Ibid.*, paras 16-22. Karadžić alleges that the Registrar's decision constitutes an interference with his right to privacy, in violation of Article 8 of the European Convention on Human Rights. *See* Request for Reversal, paras 16-17 and 22. *See* Request for Reversal, para. 18. Karadžić further contends that the Registrar's decision violates Rule 24 of the European Prison Rules ("EPR"). *See* Request for Reversal, paras 21-22.

6. Karadžić also argues that the very existence of a regime, which requires the Registrar to justify the monitoring and recording of detainees' telephone calls, and renew the authorisation granted to do so every 30 days, and which provides a right of appeal of the Registrar's decisions in this regard, "indicates that the blanket recording of all calls of all detainees during the entire period of their detention is unreasonable even under ICTY standards".[16] Karadžić submits that "the monitoring of detainee communications, on the basis of reasonable suspicion, or even some "'spot' monitoring", would be reasonable to ensure the good order and security of the detention unit", but that the indiscriminate monitoring of all detainee communications is "unwarranted, excessive" and subject to abuse similar to the Alleged Disclosure.[17]

B. Registrar's Submission

7. With regard to the First Request, the Registrar submits that Karadžić lacks the legal standing "to invoke a possible violation of Mr. Milošević's rights and to request the initiation of contempt proceedings".[18] The Registrar thus submits that the First Request should be denied.[19]

8. With respect to the Second Request, the Registrar submits that Karadžić has failed to provide any information indicating that present or former UNDU staff members have discussed with third parties information sourced from the monitoring of Karadžić's calls.[20] The Registrar thus argues that Karadžić himself acknowledges that "it 'is unknown to what extent, if'" any Registry or UNDU personnel may have discussed information obtained from recording and monitoring of Karadžić's at the UNDU.[21] The Registrar further contends that the information annexed to the Request for Reversal: (1) makes no mention of Karadžić and refers instead to another detainee; and (2) relates to alleged incidents that occurred five years prior to Karadžić's detention at the UNDU.[22] The Registrar characterizes the Second Request as a "fishing expedition", and thus requests that it denied.[23]

9. With regard to the Third Request, the Registrar submits that the Impugned Decision complies with European and international standards on the treatment of prisoners, as well as Rule 58(C) of the Tribunal's Rules Governing the Detention of Persons Awaiting Trial or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention"),[24] and Regulations 20 and 21 of

[16] Request for Reversal, para. 23.
[17] *Ibid.*, para. 24.
[18] Registrar's Submission, para. 7.
[19] *Ibid.*
[20] *Ibid.*, para. 9. *See also ibid.*, para. 23.
[21] *Ibid.*, para. 9, citing Request for Reversal, para. 15.
[22] Registrar's Submission, para. 9. *See also ibid.*, para. 25.
[23] *Ibid.*, para. 10. *See also ibid.*, para. 25.
[24] IT/38/Rev.9, amended 21 July 2005.

the Regulations on Detainee Communications. The Registrar further submits that the Impugned Decision conforms to the basic rules of natural justice and procedural fairness.[25] The Registrar contends that "[g]ood prison practice" and various international and European instruments permit the systematic monitoring of the non-privileged telephone calls of detainees, where provided in the relevant detention facility's rules, in order to ensure the safety and good order of the facility.[26] The Registrar thereby asserts that "[e]ffectively this means that as long as monitoring is justified pursuant to the criteria set out in Regulation 20(A) or (B), the Registrar may continue to order such monitoring and need not provide further reasons".[27]

10. The Registrar also submits that Regulation 20(B) of the Regulations on Detainee Communications provides specific bases for the monitoring of non-privileged detainee telephone calls, which include instances where an order for non-disclosure has been issued by a Judge or Chamber of the Tribunal. In this respect, the Registrar contends that, "[a]ll cases tried before the Tribunal involve orders for the protection of victims and witnesses under Rule 75 [of the Rules]" and that consequently, "[t]he prevention of a violation of these orders is sufficient to justify systematic monitoring, independent of the considerations under Regulation 20(A)".[28]

11. The Registrar further contends that neither Rule 58(C) of the Rules of Detention, n or Regulation 20 of the Regulations on Detainee Communications "require the Registrar to provide the detainee with a decision for having ordered monitoring or recording which provides reasons beyond those set out in Regulation 20(A) or (B)".[29] In this context, the Registrar points to the fact that the amended version of Regulation 20(A) of the Regulations on Detainee Communications, excludes, *inter alia*, the previous requirement that reasonable grounds be demonstrated as a prerequisite to the Registrar's issuance of an order authorising the monitoring or recording of detainee telephone conversations at the UNDU.[30]

12. The Registrar also submits that Regulation 21(C) of the Regulations on Detainee Communications includes "satisfactory legal safeguards against arbitrary application of the

[25] Registrar's Submission, para. 11. *See also ibid.*, paras 12-13.
[26] *Ibid.*, para. 14. In this context, the Registrar cites the following instruments: (1) International Covenant on Civil and Political Rights ("ICCPR"); Standard Minimum Rules for the Treatment of Prisoners, 1977, Economic and Social Council Resolution 663 (XXIV), 31 July 1957, para. 37; (3) Basic Principles for the Treatment of Prisoners, General Assembly Resolution 45/111, 14 December 1990, para. 5. The Registrar also cites *Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2, at 93 (1990), para. 9.2, in which, the Registrar submits, the Human Rights Committee "has expressed a view that it 'accepts that its is [*sic*] normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence', provided that 'any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application'." In this regard, the Registrar notes that the Human Rights Committee was interpreting Articles 10 and 17 of the ICCPR.
[27] Registrar's Submission, para. 14.
[28] *Ibid.*, paras 15-16.
[29] *Ibid.*, para. 19.

monitoring regime", and is thus procedurally fair.[31] The Registrar thus points to the requirement in Regulation 21(C) that detainees and their counsel be informed within 24 hours of the Registrar's decision to monitor the relevant detainee's telephone communications. The Registrar also avers to Regulation 22 of the Regulations on Detainee Communications, which provides detainees with right to request that the President reverse the Registrar's decisions made pursuant to Regulation 21.[32]

13. The Registrar submits that the Impugned Decision was based on his determination that the requirements of Rule 58(C) of the Rules of Detention, and Regulations 20 and 21 of the Regulations on Detainee Communications were satisfied, that in this regard "only relevant material was considered" in arriving at the Impugned Decision, and that the procedure under Regulation 21 was respected.[33]

14. The Registrar further contends that as the Alleged Disclosure does not pertain to Karadžić, and as Karadžić has failed to provide information implicating present and former UNDU personnel in disclosing information, obtained from the recording and monitoring of his telephone conversations at the UNDU, to third parties, Karadžić has failed to demonstrate the violation of his rights as a result of the Impugned Decision.[34] The Registrar further asserts that "even if [...Karadžić] could claim violation of his rights by reference to an alleged abuse of the monitoring regime in the case of another detainee" the Third Request should nonetheless be denied, as Karadžić has failed to demonstrate that the reversal of the Registrar's decision to record and monitor his telephone calls would sufficiently remedy an incident which allegedly occurred several years ago, and involved individuals who are no longer Tribunal staff members.[35]

C. Reply

15. Karadžić contends, *inter alia*, that "[c]ontrary to the Registrar's submissions", the case law of the European Court of Human Rights ("ECtHR"), does in fact require the provision of reasons for any monitoring of detainee communications.[36] Karadžić further reiterates that if the Registrar is not required to provide reasons for his decisions, the right of appeal to the President pursuant to Regulation 22 of the Regulations on Detainee Communications is ineffectual.[37]

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[30] *Ibid.*, para. 18.
[31] *Ibid.*, para. 21.
[32] *Ibid.*
[33] *Ibid.*, para. 22.
[34] *Ibid.*, para. 23.
[35] *Ibid.*, para. 24. *See also ibid.*, para. 25.
[36] Reply, para. 4. *See also ibid.*, paras 5-16.
[37] *Ibid*, para. 12.

II. APPLICABLE LAW

16. Rule 58(C) of the Rules of Detention provides that "[t]he Registrar may order that non-privileged telephone conversations be recorded or monitored as provided for in the Regulations to govern the supervision of visits to, and communications with, detainees". The relevant provisions of the Regulations on Detainee Communications are as follows:

Regulation 20

The Registrar may order that telephone conversations be recorded or monitored:

(A) to ensure the detainee does not attempt to:

(i) arrange escape;
(ii) interfere with or intimidate a witness;
(iii) interfere with the administration of justice; or
(iv) otherwise disturb the maintenance of security and good order in the detention unit; or

(B) if an order for non-disclosure has been made by a Judge or a Chamber pursuant to the Rules of Procedure and Evidence.

Regulation 21

(A) If one of the situations listed in Regulation 20 arises, the Registrar may order all telephone calls to and from that detainee, other than with counsel and diplomatic representatives, to be recorded or monitored for a period not exceeding thirty days.

(B) Renewals of the period, which shall not exceed thirty days, shall be reported to the President.

(C) The detainee and his counsel shall be notified of the Registrar's decision within twenty-four hours.

Regulation 22

The detainee may at any time request the President to reverse any decision of the Registrar taken under Regulation 21.

III. STANDARD OF REVIEW

17. 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 judgement in accordance with Rule 119 of the Rules of Procedure and Evidence. A judicial 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.[38]

Accordingly, an administrative decision will be quashed if the Registrar: failed to comply with the relevant legal requirements; failed to observe any basic rules of natural justice or procedural fairness; took into account irrelevant material or failed to consider relevant material; or reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the 'unreasonableness' test).[39]

IV. DISCUSSION

18. As the First Request relates exclusively to the deceased accused Slobodan Milošević, I do not consider it appropriate to address this request and its attendant issues in the context of the *Karadžić* case.[40] [REDACTED]. The First Request is therefore denied without prejudice [REDACTED].

19. The Second Request, appears to be premised on the reasoning that the Alleged Disclosure, which relates to information concerning Slobodan Milošević, warrants the inference that disclosures of a similar nature might have been made with respect to information regarding Karadžić, by persons serving as Commanding Officers of the UNDU since the start of Karadžić's detention at the Facility in July 2008 ("Inference"). However, I am of the view that, based on the information provided by Karadžić in his Request for Reversal, no reasonable basis presently exists for drawing any such Inference. Thus, I first note that, the Purported Diplomatic Cable, which is the basis of the Alleged Disclosure, makes no mention whatsoever of Karadžić. Rather, its scope of reference is confined to Slobodan Milošević, and to alleged occurrences pre-dating July 2008. Secondly, the

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[38] *Prosecutor v. Miroslav Kvočka et al*, Case No. IT-98-30/I-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka* Decision"), para. 13. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Reversal of Limitations of Contact with Journalist: Profil Magazine, 11 October 2010 ("*Karadžić* Decision of 11 October 2010"), para. 16; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds, 17 December 2009 ("*Karadžić* Decision of 17 December 2009"), para. 18; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Radovan Karadžić's Request for Reversal of Limitations of Contact with Journalist: Russia Today, 6 November 2009 ("*Karadžić* Decision of 6 November 2009"), para. 22; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Radovan Karadžić's Request for Reversal of Limitations of Contact with Journalist: Le Monde, 28 October 2009 ("*Karadžić* Decision of 28 October 2009"), para. 14; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009 ("*Karadžić* Decision of 7 May 2009"), para. 10; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist, 12 February 2009 ("*Karadžić* Decision of 12 February 2009"), para. 17; *Prosecutor v. Vesselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 ("*Šljivančanin* Decision"), para. 22.

[39] *Kvočka* Decision, para. 13. *See also Karadžić* Decision of 11 October 2010, para. 16; *Karadžić* Decision of 17 December 2009, para. 18; *Karadžić* Decision of 6 November 2009, para. 22; *Karadžić* Decision of 7 May 2009, para. 10; *Karadžić* Decision of 28 October 2009, para. 14; *Karadžić* Decision of 12 February 2009, para. 17; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("*Krajišnik* Decision"), para. 30; *Šljivančanin* Decision, para. 22.

[40] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18.

Purported Diplomatic Cable, and the Alleged Disclosure based thereon, are as yet unverified, and do not therefore provide a solid basis from which the Inference may be reasonably be drawn. Accordingly, the Second Request is denied in its entirety.

20. I now turn to the Third Request. Regulation 20 of the Regulations on Detainee Communications grants the Registrar the discretion to order the recording or monitoring of detainees' telephone conversations at the UNDU ("Monitoring Order") in the circumstances outlined under sub-paragraphs (A) and (B) of Regulation 20. Regulation 20(A) allows the Registrar to issue a Monitoring Order as a safeguard against attempts by detainees to commit any of the four offences listed under Regulation 20(A) ("Four Offences"). Regulation 20(A) does not stipulate any further preconditions to the issuance of a Monitoring Order under its provisions. The Registrar's ability to issue a Monitoring Order pursuant to Regulation 20(A) is therefore not contingent upon the satisfaction of any additional criteria, such as an assessment of whether a detainee's behavioural history warrants the issuance of a Monitoring Order.

21. Similarly, Regulation 20(B) of the Regulations on Detainee Communications does not stipulate any further prerequisites for the issuance of a Monitoring Order beyond the existence of an order for non-disclosure issued by a Judge or Chamber of the Tribunal pursuant to the Rules ("Non-Disclosure Order"). Thus, the mere fact of such a Non-Disclosure Order is, in and of itself, a sufficient basis for the Registrar to issue a Monitoring Order. In this context, I note that there are Non-Disclosure Orders in force, which affect the *Karadžić* case.[41] It therefore follows that the existence of the non-disclosure orders relating to the *Karadžić* case, constitutes an adequate basis upon which the Registrar may issue a Monitoring Order concerning Karadžić's telephone communications.

22. Furthermore, Regulation 21(A) of the Regulations on Detainee Communications simply states that the Registrar may issue a Monitoring Order "[i]f one of the situations listed under Regulation 20 arises". Regulation 21(A) does not impose any further prerequisites or restrictions on the Registrar's discretion beyond: first, the exclusion of privileged telephone conversations between detainees and their counsel, and detainees and diplomatic representatives; and second, the durational restriction of all Monitoring Orders to 30 days, subject to renewal pursuant to Regulation 21(B) of the Regulations on Detainee Communications.

23. With regard to Karadžić's submission that the Registrar is required to provide a detainee with reasons for the issuance of a Monitoring Order, I reiterate that the circumstances provided

under Regulation 20(A) and (B) of the Regulations on Detainee Communications do, as noted above, constitute the bases for the issuance of a Monitoring Order. Thus, an inmate informed, pursuant to Regulation 21(C) of the Regulations on Detainee Communications, that a Monitoring Order has been issued on the bases provided under Regulation 20(A) and (B) of the Regulations on Detainee Communications, has been provided with reasons for the issuance of the Monitoring Order.

24. Moreover, with specific regard to the ECtHR case law cited by Karadžić, I note that the Tribunal does not regard ECtHR jurisprudence as binding but rather persuasive. Furthermore, I consider that the general case law cited by Karadžić, is circumstantially distinguishable from the current case.

25. Thus, a number of the cases to which Karadžić refers, pertain to instances in which prison authorities employed the more stringent measure of restricting or completely prohibiting detainee communications, either between detainees within the relevant detention facility, or between detainees and the outside world.[42] In the instant case, no such limitations or prohibitions have been imposed with respect to Karadžić's telephone communications. Rather, the security measure with which the instant case is concerned, is the monitoring of Karadžić's telephone communications, which constitutes the gravamen of Karadžić's Request for Reversal.

26. Also, with specific regard to the *Ndindiliyimana* Decision, which concerned the limitation of a detainee's contact with the outside world, I note a further critical distinction between that and the instant case, namely that the Rules of Detention of the International Criminal Tribunal for Rwanda considered in the *Ndindiliyimana* Decision, expressly required the demonstration of reasonable grounds as a prerequisite to the issuance of an order limiting detainees' contact with the outside world.[43] As noted above, the Regulations on Detainee Communications contain no such requirement with respect to the issuance of Monitoring Orders concerning detainees at the UNDU.

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[41] *See* for example, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Third Order on Chart of Protective Measures for Witnesses, 23 November 2010 (confidential Annex A, and confidential Annex B *ex parte* the Accused); [REDACTED].

[42] *Prosecutor v. Nuon Chea*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09), Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008; *Prosecutor v. Ieng Sary*, Case No. 002-19-09-2007-ECCC/OCIJ (PTC05), Decision on Appeal Concerning Contact Between the Charged Person and His Wife, 30 April 2008; *The Prosecutor v. Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, The President's Decision on the Appeal filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda, 6 June 2005; *The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-2000-56-T, Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64, 25 November 2002 ("*Ndindiliyimana* Decision").

[43] *Ndindiliyimana* Decision, paras 8-11. Thus, Rule 64 of the Rules of Detention of the International Criminal Tribunal for Rwanda, as cited at para. 2 of the *Ndindiliyimana* Decision, provides in relevant part as follows:

> The Prosecutor may request the Registrar, or in cases of emergency, the Commanding Officer, to prohibit, regulate or set conditions for contact between a detainee and any other person *if* the

27. I also note with regard to the *Jankauskas* Decision that prison authorities in that case indiscriminately included within the scope of its monitoring activities, the applicant's privileged communications between himself and his counsel and those between himself and State authorities, without providing reasonable cause.[44] However, in the instant case, as noted above, the Monitoring Regime to which Karadžić's telephone communications are subject, pursuant to Regulations 20 and 21 of the Regulations on Detainee Communications, expressly excludes privileged communications between detainees and their counsel, and detainees and diplomatic representatives. The *Popov* Decision likewise involved circumstances in which prison authorities included the applicant's privileged correspondence with counsel, within the scope of the monitoring measure employed in that case.[45]

28. Furthermore, in the *Čiapas* Decision, the ECtHR observed that:

> [...] even the form of censorship as allowed by the decisions of the prosecutor [...] - be it opening up, reading, stopping, withholding or another form of control – was not specified, effectively amounting to a *carte blanche* for the authorities to have an excessive hold on the applicant's communication with the outside world [...].[46]

Likewise, in the *Popov* Decision, the ECtHR noted that:

> The monitoring measure under the rule of Article 91 of the CES was not limited as to its length or scope. This provision did not specify the manner of its exercise. No reasons were required to warrant its application. The CES made no provision for an independent review of the scope and duration of monitoring measures [...][47]

In the instant case however, the form of censorship has been specified and specifically restricted to the monitoring of Karadžić's non-privileged telephone calls at the UNDU. In addition, the UNDU's Regulations on Detainee Communications specifically limit the scope of Monitoring Orders to exclude privileged and diplomatic telephone communications, limit the duration of Monitoring Orders to 30 days subject to renewal, and provide for independent review before the President, pursuant to Regulation 22 of the Regulations on Detainee Communications.[48]

> Prosecutor *has reasonable grounds for believing* that such contact is for the purposes of attempting to arrange the escape of the detainee from the Detention Unit, or could prejudice or otherwise affect the outcome of proceedings against the detainee, or of any other investigation, or that such contact could be harmful to the detainee or any other person or may be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 and Rule 75 of the Rules of Procedure and Evidence. [...] (Emphasis added.)

[44] *Case of Jankauskas v. Lithuania*, ECtHR, Application no. 59304/00, Judgment, 24 February 2005 ("*Jankauskas* Decision"), paras 18, 21-22.
[45] *Case of Boris Popov v. Russia*, ECtHR, Application no. 23284/04, Judgment, 28 October 2010 ("*Popov* Decision"), paras 112-115.
[46] *Case of Čiapas v. Lithuania*, ECtHR, Application no. 4902/02, Judgment, 16 November 2006 ("*Čiapas* Decision"), para. 25.
[47] *Popov* Decision, para. 107.
[48] *See* Regulations 21 and 22 of the Regulations on Detainee Communications.

29. Moreover, in the *Doerga* Decision, the ECtHR based its decision on the lack of specificity in the detention facility policies with regard to defining the instances in which detainees' telephone communications could be monitored.[49] Thus, at the time the monitoring order was issued with respect to the applicant's communications in 1995, the applicable regime was dictated by Circular No. 1183/379 of 1 April 1980 of the Deputy Minister of Justice of The Netherlands, which stated, in relevant part, as follows:

> Every closed institution must have telephone rules, which must be tailored to the penitentiary's regime and to its staff capacity and facilities and must be submitted to me for approval. These rules should include the following: ...
>
> - the way in which the content of the calls is monitored (it must be possible to listen to the calls by way of retrospective check); the rules must specify whether all calls are monitored on the Governor's instructions; ... [50]

In this regard, the ECtHR noted that:

> [...] the possibility for the penitentiary authorities to monitor and record prisoner's telephone conversations was provided for in circular no. 1183/379 of 1 April 1980. This circular stipulated that further rules on the manner in which the content of such conversations was to be monitored were to be laid down in a set of internal regulations to be determined in respect of each penitentiary institution.[51]

The Internal Regulations issued by the Marwei penitentiary in which the applicant in the *Doerga* Decision was detained, provided that:

> It is possible that an instruction may be given by the Governor or on his behalf, by way of a spot check and/or if there are grounds for doing so, to record your telephone conversation. Partly to protect your privacy, only the head of security or his deputy will listen to such tape recordings. They are responsible for ensuring that the tapes are not retained and that they are erased immediately.[52]

In arriving at its final determination in the *Doerga* Decision the ECtHR stated as follows:

> The Court finds that the rules at issue in the present case are lacking both in clarity and detail in that neither circular no. 1183/379 nor the internal regulations of the Marwei penitentiary give any precise indication as to the circumstances in which prisoners' telephone conversations may be monitored, recorded and retained by penitentiary authorities or the procedures to be observed.[53]

By contrast, in the instant case, Regulation 20 of the Regulations on Detainee Communications, pursuant to which the Monitoring Order concerning Karadžić's telephone communications was issued, sets out specific circumstances, under sub-paragraphs (A) and (B) of its provisions, wherein the telephone communications of detainees at the UNDU may be monitored.

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[49] *Case of Doerga v. The Netherlands*, ECtHR, Application no. 50210/99, Judgment, 27 April 2004 ("*Doerga* Decision"), paras 21-25, 52-54.
[50] Cited *ibid*, para. 21. *See also ibid.*, para. 46.
[51] *Ibid.*, para. 46.
[52] *Ibid.*, para. 22.
[53] *Ibid.*, para. 52.

30. I also note that while the Tribunal indeed "took care to ensure that the regime it prepared for the Detention Unit was consistent with the prison system of the Netherlands in all relevant respects", nonetheless, the Tribunal is not bound by, nor is it required to tailor its policy provisions to conform in their entirety with, Dutch Law.[54] Hence, the UNDU, though located "for security purposes" within a Dutch Prison Facility, is nonetheless "subject to the exclusive control and supervision of the United Nations".[55] Furthermore, the United Nations Detention Unit House Rules for Detainees ("House Rules"),[56] upon which Karadžić relies to support his submission that good cause must be demonstrated prior to the issuance of a Monitoring Order, was last amended in June 1995, prior to the August 2009 amendment of Regulation 20 of the Regulations on Detainee Communications, which removed the requirement for the demonstration of reasonable grounds as a precondition to the issuance of a Monitoring Order, and to which the House Rules are subject.[57]

31. Moreover, I consider that Regulations 20 and 21 of the Regulations on Detainee Communications comply with international standards concerning the treatment of detainee communications. In this regard I note that paragraph 37 of the Standard Minimum Rules for the Treatment of Prisoners provides that, "[p]risoners shall be allowed *under necessary supervision* to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits".[58] Similarly, paragraph 5 of the Basic Principles for the Treatment of Prisoners provides that:

> *Except for those limitations that are demonstrably necessitated by the fact of incarceration*, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.[59]

Likewise, at paragraph 9.2 of its determination in *Miguel Angel Estrella v. Uruguay*, the Human Rights Committee stated that it:

> [...] *accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence*. Nevertheless, article 17 of the [...International Covenant on Civil and Political Rights] provides that "no one shall be subjected to arbitrary or unlawful interference

[54] 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 since 1991, 29 August 1994, UN Doc A/49/342 S/1994/1007, para. 99.
[55] *Ibid.*
[56] IT/99 issued April 1995, amended June 1995.
[57] *See* Registry Submission, para. 18.
[58] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (emphasis added).
[59] Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990 (emphasis added).

> with his correspondence". This requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application [...][60]

32. Regulations 20 and 21 of the Regulations on Detainee Communications, serve as a preventative mechanism designed, through the systematic monitoring of non-privileged detainee telephone communications ("Monitoring Regime"), to forestall the attempted commission of any of the Four Offences; or any attempted violation of Non-Disclosure Orders that play the critical role of safeguarding sensitive information such as the identities of protected witnesses. The preventative purpose of Regulations 20 and 21 would therefore be frustrated by inferring a requirement that detainees must first be shown to have attempted, or committed one of the Four Offences, or breached or attempted a breach of a Non-Disclosure Order, as a prerequisite to the Registrar's ability to issue a Monitoring Order designed to prevent such occurrences in the first place. I therefore consider that the Monitoring Regime serves a necessary supervisory function demonstrably necessitated by the fact of incarceration. Furthermore, as the Registrar correctly submits, the Monitoring Regime contains express safeguards against its arbitrary application. Thus, Regulation 22 of the Regulations on Detainee Communications provides detainees with the facility of requesting the President to reverse decisions taken by the Registrar under Regulation 21. Additionally, Regulation 21(C) requires that the Registrar inform detainees and their counsel of the decision, within 24 hours.

33. I therefore consider that, in view of the above, the Registrar reasonably exercised his discretion pursuant to Rule 58(C) of the Rules of Detention, and Regulations 20 and 21 of the Regulations on Detainee Communications. Accordingly, the Third Request is denied in its entirety.

V. DISPOSITION

34. For the foregoing reasons, pursuant to Rule 58(C) of the Rules of Detention, and Regulations 20, 21 and 22 of the Regulations on Detainee Communications, I:

(a) **DENY** the First Request without prejudice;

(b) **DENY** the Request for Reversal in all other aspects.

[60] Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990), para. 9.2 (emphasis added).

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

Judge Patrick Robinson
President

Dated this 21st day of April 2011,
At The Hague,
The Netherlands.

[Seal of the Tribunal]