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**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-55-ES

Date: 16 April 2020

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Carmel Agius, President

Registrar: Mr. Olufemi Elias

Decision of: 16 April 2020

PROSECUTOR

v.

RADOVAN KARADŽIĆ

CONFIDENTIAL

**DECISION ON REQUEST FOR REVIEW OF REGISTRAR'S
DECISION ON VIDEO COMMUNICATIONS**

Counsel for Mr. Radovan Karadžić:

Mr. Peter Robinson

1. I, Carmel Agius, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seised of a complaint filed by Mr. Radovan Karadžić (“Complaint” and “Karadžić”, respectively),¹ pursuant to Regulation 10 of the Regulations on the Complaints Procedure for Detainees (“Complaints Procedure”),² concerning the implementation of video communications³ at the United Nations Detention Unit (“UNDU”) in The Hague, The Netherlands.⁴ On 30 August 2019 and 31 August 2019, respectively, the Registrar of the Mechanism (“Registrar”) and Karadžić filed submissions in compliance with the order for submissions I issued on 1 August 2019.⁵ I am also seised of a motion filed by Karadžić on 14 March 2020, requesting the immediate implementation of video communications at the UNDU as a temporary measure pending the issuance of a decision on the Complaint.⁶

I. BACKGROUND

2. On 15 November 2016, at a status conference in the case of *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Karadžić raised certain issues related to the conditions of his detention, including the possibility to communicate with his “nearest and dearest” using Skype,⁷ a commercially available video communication application. Judge Theodor Meron, in his capacity as the Pre-Appeal Judge in that case, invited the Registrar to look into the possibility of making this application available, subject to security and overriding considerations.⁸

3. At the following status conference on 6 March 2017, Judge Meron stated that he believed that Skype should be available to detainees at the UNDU and that he wished to see some progress made in relation to the issue. He then asked for the Registrar to be informed of his view.⁹

¹ Appeal of Registrar’s Decision on Video Calls at the UN Detention Unit, 29 July 2019 (with Annexes A, B, and C and confidential Annex D).

² Complaints Procedure, MICT/25, 5 December 2018, Regulation 10.

³ In the course of the litigation on the matter at the heart of the present Decision, namely the ability for Karadžić to see his family members when he is communicating with them, I note that various terms have been used. Except in the case of direct quotes, the present Decision will use the term “video communications” instead of video calls, for the sake of clarity and consistency.

⁴ Complaint, paras. 1, 42.

⁵ Registrar’s Submission in Compliance with the President’s “Order for Submissions” of 1 August 2019, 30 August 2019 (“Submission on Complaint”); Reply Brief: Appeal of Registrar’s Decision on Video Calls at the UN Detention Unit, 31 August 2019 (“Reply to Submission on Complaint”). See also Order for Submissions, 1 August 2019 (“Order for Submissions”), p. 3.

⁶ Motion for Immediate Implementation of Video Calls at the UN Detention Unit, 14 March 2020 (“Motion for Immediate Implementation”), paras. 1, 41.

⁷ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Status Conference, T. 15 November 2016 (“15 November 2016 Transcript”) p. 6.

⁸ 15 November 2016 Transcript, pp. 7–8.

⁹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Status Conference, T. 6 March 2017 (“6 March 2017 Transcript”) p. 29.

4. On 8 May 2017, the Registrar denied Karadžić's request to be allowed to use Skype, or an equivalent means of communication, at the UNDU, on the basis of regulatory and security risks that introducing video communications at the UNDU may pose.¹⁰ Karadžić submitted a complaint in relation to this decision on 12 May 2017.¹¹

5. On 29 August 2017, the then-President, Theodor Meron, granted the request for review in part and remitted the matter to the Registrar for reconsideration.¹² My predecessor considered that the possibility of awaiting the establishment of a nationwide secure platform that would allow detainees in Dutch prisons the opportunity to use secure video communications, which was then being explored by the Dutch Custodial Institutions Agency of the Ministry of Security and Justice ("DJI") and which was not expected to be operational before 2020, did not represent a satisfactory resolution of the problem.¹³ In reaching this decision, my predecessor took into account, *inter alia*, the fact that, since issuing the Registrar's 8 May 2017 Decision, the Registrar had committed to exploring the use of specialised video teleconferencing equipment and software applications as a potential platform ("VTC" and "VTC platform", respectively) to make secure video communications available at the UNDU.¹⁴

6. On 11 October 2017, having reconsidered the Registrar's 8 May 2017 Decision, the Registrar dismissed the complaint without prejudice, on the basis that it was not justified at the time, and informed Karadžić that a decision on whether video communications could be made available to all UNDU detainees through the proposed VTC platform would be made following a thorough assessment of the pilot project on video communications at the UNDU that was about to begin ("Pilot Project").¹⁵

7. On 5 November 2018, Karadžić filed a complaint renewing his request for review of the Registrar's 8 May 2017 Decision.¹⁶ Karadžić argued, *inter alia*, that the Registrar failed to

¹⁰ Letter from the Registrar to Karadžić, dated 8 May 2017 ("Registrar's 8 May 2017 Decision"), attached as Annex H to *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Appeal of Registrar's Decision on Skype, 12 May 2017 ("12 May 2017 Complaint"), Registry Pagination ("RP") 5164.

¹¹ 12 May 2017 Complaint, para. 1.

¹² *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Request for Review of Registrar's Decision, 29 August 2017 ("Decision on the 12 May 2017 Complaint"), p. 5.

¹³ Decision on the 12 May 2017 Complaint, p. 3.

¹⁴ Decision on the 12 May 2017 Complaint, p. 4.

¹⁵ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Public Redacted Version of 11 October 2017 Re: Reconsideration of my Decision on your Complaint Concerning the Acting Commanding Officer's Decision to Deny your Request to Allow the use of Skype or an Equivalent Means of Communication, 19 October 2017, p. 3.

¹⁶ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Renewal of Appeal of Registrar's Decision on Skype, 5 November 2018 ("5 November 2018 Complaint").

implement the Decision on the 12 May 2017 Complaint and requested that the Registrar be ordered to implement video communications at the UNDU no later than 31 December 2018.¹⁷

8. On 4 February 2019, I issued a decision on the 5 November 2018 Complaint wherein I, *inter alia*, urged the Registry of the Mechanism (“Registry”) to implement a VTC platform at the UNDU, as soon as practicable, and requested that the Registrar submit a detailed report on the status of the matter within ten days.¹⁸

9. On 14 February 2019, in compliance with the Decision of 4 February 2019, the Registrar filed a report on the status of the Pilot Project.¹⁹ The Registrar indicated, *inter alia*, that: (i) the second phase of the three-phase Pilot Project, which entailed designing, implementing and testing the recording of video conversations, and testing necessary safety and security measures, was underway; (ii) the decision to move to phase three would depend on test results from phase two indicating that the system was reliable, robust, and secure; and (iii) he would take a decision on video communications at the UNDU once the three phases of the Pilot Project had been completed, a full assessment had been conducted, and a recommendation had been made by the Commanding Officer of the UNDU (“Commanding Officer”).²⁰

10. On 14 March 2019, Karadžić filed a motion requesting that I order the Registrar to provide progress reports, within ten days and every ten days thereafter, outlining efforts to implement video communications at the UNDU and addressing why the low-tech and non-tech solutions that Karadžić had proposed could not be implemented in the interim.²¹

11. On 28 June 2019, Karadžić submitted a complaint to the Commanding Officer, pursuant to Regulation 4(A) of the Complaints Procedure (“Complaint to the Commanding Officer”).²² Karadžić objected to the conditions of his detention insofar as the UNDU had failed to make video communications available to him so that he could see his family when speaking to them.²³ Karadžić asserted that he rarely sees his family because it is expensive for them to travel to The Hague to

¹⁷ 5 November 2018 Complaint, paras. 1, 26, 28.

¹⁸ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Karadžić’s “Renewal of Appeal of Registrar’s Decision on Skype”, 4 February 2019 (“Decision of 4 February 2019”), p. 3.

¹⁹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Registrar’s Submission of Report on Status of Video Communication Pilot Project at the United Nations Detention Unit, 14 February 2019 (“Submission of 14 February 2019”), paras. 1, 3–4.

²⁰ Submission of 14 February 2019, paras. 3–8.

²¹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Motion for an Order Requiring Progress Reports on Skype, 14 March 2019, paras. 1, 34–35 (“Motion to Require Reports”). I note that the Registrar filed a response to the Motion to Require Reports. See Registrar’s Submission on Karadžić’s “Motion for an Order Requiring Progress Reports on Skype”, 3 April 2019 (“Submission of 3 April 2019”).

²² Complaint, Annex A, RP 45.

²³ Complaint, Annex A, RP 45.

visit him and that the failure to make video communications available infringes on his right to family life.²⁴ On 3 July 2019, the Commanding Officer responded that he was not in a position to address the concerns raised in the Complaint to the Commanding Officer since they appeared to be a reiteration of the Motion to Require Reports, which was pending before me as President (“Commanding Officer’s Decision”).²⁵

12. On 10 July 2019, Karadžić submitted a complaint to the Registrar, pursuant to Regulation 7(A) of the Complaints Procedure (“Complaint to the Registrar”).²⁶ Karadžić asserted, *inter alia*, that the Commanding Officer erred in refusing to address the substance of the Complaint to the Commanding Officer, and that the failure to provide video communications, given the availability of this technology, violates Karadžić’s right to family life.²⁷

13. On 23 July 2019, further to the Submission of 14 February 2019 and the Submission of 3 April 2019, the Registrar filed a submission informing me, *inter alia*, that he had decided to terminate the Pilot Project, without proceeding to the next phase (“Registrar’s Decision on Pilot Project”).²⁸ The Registrar based his decision on a recommendation contained in a confidential and *ex parte* summary report from the Commanding Officer (“Commanding Officer’s Report”)²⁹ wherein the Commanding Officer recommended against proceeding with the next phase of the Pilot Project or instituting a VTC platform.³⁰ In the Commanding Officer’s view, “the results of testing and the assessment of security risks indicate that VTC calls cannot be used by Detainees in a manner that does not compromise the security and good order of the UNDU in line with the Mechanism’s [Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Mechanism or Otherwise Detained on the Authority of the Mechanism (“Rules of Detention”)]”.³¹ The Commanding Officer’s Report: (i) outlined remaining technical issues encountered during the Pilot Project; (ii) identified the recording or live-streaming to social media platforms of calls made through the VTC platform as a “high security risk”; and (iii) indicated that the recent unauthorised use of UNDU communication facilities would have presented a greater risk and harm to the Mechanism had they included visuals.³²

²⁴ Complaint, Annex A, RP 45.

²⁵ Complaint, Annex B, RP 43.

²⁶ Complaint, Annex C, RP 41–40.

²⁷ Complaint, Annex C, RP 41–40.

²⁸ Registrar’s Submission on the Video Communication Pilot Project at the United Nations Detention Unit, 23 July 2019 (public with confidential and *ex parte* annex) (“Registrar’s Decision on Pilot Project”), para. 7.

²⁹ Registrar’s Decision on Pilot Project, para. 7. *See* Registrar’s Decision on Pilot Project, Annex, RP 26–21.

³⁰ Registrar’s Decision on Pilot Project, paras. 6–7, Annex, RP 22.

³¹ Registrar’s Decision on Pilot Project, Annex, RP 22, *referring to* Rules of Detention, 5 November 2018.

³² Registrar’s Decision on Pilot Project, paras. 4–5. *See also* Annex, RP 25–22.

14. On 24 July 2019, the Registrar issued a confidential decision denying the Complaint to the Registrar (“Impugned Decision”), which in relevant part reads:³³

I note that there is no right to video communication for detainees of the UNDU in the Rules of Detention or the applicable Regulations. However, as repeatedly reported on by the Registry, the UNDU has been engaged since September 2017 in a comprehensive pilot project on video communication for detainees at the UNDU to determine how and whether video communication can be used by detainees in a reliable, safe and secure manner, in line with the Mechanism’s Rules of Detention. I submitted a report to the President on the progress of the pilot project on 14 February 2019, and informed the President in my subsequent submission of 3 April 2019 that I would submit a further report once meaningful results have been produced by the testing and risk assessment phase of the pilot program. Given that the [Complaint to the Commanding Officer] asserted—consistent with your previous complaints—that the UNDU had ‘fail[ed] to make video calls available to me and my fellow detainees’ and explicitly acknowledged that a Motion to compel the Registrar to submit progress reports on the pilot program dated 14 March 2019 was still pending before the President, I find no error in the Commanding Officer’s decision to dismiss your Complaint since the matter is before the President.

On 23 July 2019, subsequent to the issuance of [the Commanding Officer’s Decision], the Commanding Officer submitted a report to me on the outcome of the testing and risk assessment phase of the pilot project, which I filed on the record before the President. In his report the UNDU Commanding Officer identified, *inter alia*, a high security risk associated with the video communication system at the UNDU which cannot be effectively mitigated, and accordingly recommended that the pilot project be terminated. As noted in [the Registrar’s Decision on Pilot Project], I have accepted the recommendation of the UNDU Commanding Officer and have decided not to proceed with the third phase of the pilot project. I have instead instructed the Commanding Officer to explore other means of communication, such as e-mail, that may enhance the communications of detainees at the UNDU. In addition, the Registry shall continue to monitor the progress with respect to the implementation of the [DJI’s] project to establish a nationwide secure platform for video communications [(“DJI Video Communication Project”).

15. On 25 July 2019, Karadžić withdrew the Motion to Require Reports.³⁴

16. On 29 July 2019, Karadžić filed the Complaint, seeking review of the Impugned Decision and asserting that I should reverse the Impugned Decision and provide a deadline for the Registrar to implement video communications at the UNDU.³⁵

17. On 1 August 2019, I issued the Order for Submissions, in which I considered that I would benefit from receiving submissions from the Registrar addressing: (i) Karadžić’s argument that the UNDU is violating his right to family life by not allowing video communications with his family; (ii) the availability of other means of communication that may enhance the communications of UNDU detainees and a timeline outlining when these alternatives may be implemented; and (iii) any other submissions on the Complaint.³⁶ I ordered the Registrar to file a submission addressing these issues no later than 30 days from the issuance of the Order for Submissions, and

³³ Complaint, Annex D, RP 38 (internal references omitted).

³⁴ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Withdrawal of Motion for an Order Requiring Progress Reports on Skype, 25 July 2019, p. 2.

³⁵ Complaint, para. 42.

³⁶ Order for Submissions, p. 2.

for Karadžić to file a submission in response, if any, within ten days of receiving the Registrar's submission.³⁷ In the Order for Submissions, I also acknowledged receipt of the Complaint and found that the interests of justice required that my decision be issued after 14 calendar days of my receipt of the Complaint.³⁸

18. On 13 March 2020, as the COVID-19 pandemic unfolded, I asked that the Registrar provide me with an overview of the measures taken to prevent its introduction and spread at the UNDU. I was subsequently informed that a policy, developed using evidence-based medicine and advice from the World Health Organisation, the European Centre for Disease Prevention and Control and the Dutch National Institute for Public Health and the Environment, is in place at the UNDU. As a result of this policy, and in line with prevailing social distancing measures within the Netherlands, visits to UNDU detainees are presently not allowed. Detainees are instead encouraged to use other means of communication. Further measures that are being implemented to protect UNDU detainees include: (i) encouraging staff exhibiting symptoms associated with the virus to stay at home; (ii) avoiding unnecessary transports and movements; and (iii) postponing or putting on hold non-urgent care or daily activities.³⁹

19. On 14 March 2020, citing the COVID-19 pandemic, Karadžić filed a further motion requesting the immediate implementation of video communications at the UNDU, as a temporary measure, pending the issuance of a decision on the Complaint.⁴⁰

II. STANDARD OF REVIEW

20. An administrative decision of the Registrar is subject to review by the President for procedural or substantive unfairness.⁴¹ However, a judicial review of an administrative decision is not a rehearing.⁴² Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgement.⁴³ Rather, a judicial review of an administrative decision made by

³⁷ Order for Submissions, p. 3.

³⁸ Order for Submissions, p. 3. *See* Complaints Procedure, Regulation 11(c).

³⁹ *See* Informal communication from Registry to *Chef de Cabinet* and Principal Legal Advisor, dated 14 March 2020.

⁴⁰ Motion for Immediate Implementation, paras. 1, 41.

⁴¹ *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Decision on Complaint Filed by Dick Prudence Munyeshuli Pursuant to Rule 94 of the Rules of Detention, 9 August 2019 ("*Turinabo et al.* Decision"), para. 13; *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Decision on Complaint Pursuant to Rule 94 of the Rules of Detention, 1 July 2019 (confidential; made public on 5 August 2019) ("*Ngirabatware* Decision"), para. 16. *See also* *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Public Redacted Version of Decision on Request for Review of Registrar's Decision, 1 August 2017 ("*Karadžić* Decision"), para. 10.

⁴² *Turinabo et al.* Decision, para. 13; *Ngirabatware* Decision, para. 16; *Karadžić* Decision, para. 10.

⁴³ *Turinabo et al.* Decision, para. 13; *Ngirabatware* Decision, para. 16; *Karadžić* Decision, para. 10.

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 or she reached it.⁴⁴

21. Accordingly, the President may quash an administrative decision if the Registrar: (i) failed to comply with legal requirements; (ii) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached (the “unreasonableness” test).⁴⁵

22. 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.⁴⁶ The party challenging the administrative decision bears the burden of demonstrating that an error of the nature enumerated above has occurred and that this error significantly affected the administrative decision to his or her detriment.⁴⁷

III. DISCUSSION

A. Submissions related to the Complaint

23. In the Complaint, Karadžić requests that I reverse the Impugned Decision and provide a deadline for the Registrar to implement video communications at the UNDU.⁴⁸ Karadžić asserts that the Registrar erred in refusing to make video communications available to him, contending that the Impugned Decision violates his right to family life, given the length of his detention at the UNDU and the distance from his family, who he sees twice a year due to the prohibitive cost of such visits.⁴⁹ Karadžić argues that video communications provide a way to mitigate the violation of his right to family life and that the technological and security concerns cited by the Registrar are not an excuse for such a violation when video communications are available to prisoners around the world.⁵⁰ Finally, Karadžić argues that, “while the standard of review [for] discretionary decisions of

⁴⁴ *Turinabo et al.* Decision, para. 13; *Ngirabatware* Decision, para. 16; *Karadžić* Decision, para. 10.

⁴⁵ *Turinabo et al.* Decision, para. 14; *Ngirabatware* Decision, para. 17; *Karadžić* Decision, para. 11.

⁴⁶ *Turinabo et al.* Decision, para. 15; *Ngirabatware* Decision, para. 18; *Karadžić* Decision, para. 12.

⁴⁷ *Turinabo et al.* Decision, para. 15; *Ngirabatware* Decision, para. 18; *Karadžić* Decision, para. 12.

⁴⁸ Complaint, para. 42. *See also* Reply to Submission on Complaint, para. 10. I note that there is a typographical error in the numbering of the paragraphs in the Reply to Submission on Complaint. To avoid confusion, I will refer to the last paragraph of the Reply to Submission on Complaint as paragraph 10.

⁴⁹ Complaint, paras. 1, 36–42. *See also* Reply to Submission on Complaint, paras. 3–4, 8–10.

⁵⁰ Complaint, paras. 40–42. *See also* Reply to Submission on Complaint, para.10.

the Registrar is a deferential one, this appeal presents a question of law, which should be determined by the President on a *de novo* basis”.⁵¹

24. The Registrar submits that the decision not to allow video communications does not violate the right to family life of UNDU detainees.⁵² In this respect, he asserts that the Rules of Detention, which are based on human rights law and internationally accepted principles and standards for the treatment of persons deprived of their liberty, and the Regulations on the Supervision of Visits to and Communications with Detainees (“Regulations on Communications”)⁵³ explicitly recognise and guarantee the right of detainees to family life by providing the right to receive visits from and communicate with family, friends, and others by letter and telephone on a regular basis.⁵⁴ According to the Registrar, none of the internationally accepted principles and standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules,⁵⁵ provides for a right of detainees to video communications as a way to ensure the right to family life during detention.⁵⁶ He further asserts that the right to family life is not absolute and may be restricted in order to safeguard the interests of the administration of justice and the security and good order of the UNDU.⁵⁷

25. Referring to the results of the Pilot Project, the Registrar submits that the video communications system carried a serious security risk that could not be effectively mitigated.⁵⁸ He emphasises that the risk posed by the use of video communications is real, having been tested and documented during the Pilot Project, and not “an excuse” as Karadžić contends.⁵⁹ He argues that the risk cannot be ignored under any standard of diligence, and particularly not when there have been recent incidents where detainees, including Karadžić himself,⁶⁰ used UNDU communication facilities to make public statements without prior approval.⁶¹ The Registrar submits that “[t]he UNDU must, and has, assessed such risks in light of the high profile of detainees in the Unit, the gravity of the crimes for which they have been accused or convicted, and the potential impact that a

⁵¹ Complaint, para. 35.

⁵² Submission on Complaint, paras. 6–11.

⁵³ Regulations on Communications, 5 December 2018, MICT/23.

⁵⁴ Submission on Complaint, para. 6, *referring to* Rules 70–71, Rules of Detention.

⁵⁵ The United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by United Nations General Assembly Resolution 70/175 of 17 December 2015.

⁵⁶ Submission on Complaint, para. 6.

⁵⁷ Submission on Complaint, para. 7, *referring to* Rule 70(4) of the Rules of Detention and Regulation 1(A), Regulations on Communications.

⁵⁸ Submission on Complaint, para. 9.

⁵⁹ Submission on Complaint, para. 9.

⁶⁰ Submission on Complaint, para. 9, *referring to* Decision on Conditions of Detention: Listening and Monitoring of Telephone Calls, 6 May 2019; Further Decision on Conditions of Detention: Listening and Monitoring of Telephone Calls, 10 May 2019; *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Decision on Conditions of Detention: Listening and Monitoring of Telephone Calls, 16 November 2018.

security breach might have on the security and good order of the UNDU, on the Mechanism as a whole and on the affected communities”.⁶² The Registrar contends that, given the Commanding Officer’s assessment that this security risk weighed against pursuing video communications, his decision to accept the Commanding Officer’s recommendation and to terminate the Pilot Project was patently reasonable, based on legal requirements, and took into account all relevant material.⁶³

26. With respect to other means of enhancing the communications of UNDU detainees, the Registrar submits that the Commanding Officer is looking into ways of further expanding the means of communication with family currently available.⁶⁴ Citing the “small number of detainees and their increasing age”, the Registrar indicates that the focus is on the specific needs and individuality of care of the detainee population.⁶⁵ To this end, the UNDU has been examining how communication by email could be used securely to allow detainees more immediate written communication.⁶⁶ The proposed email system would be free of charge, could be managed within existing and predicted resources, and would operate within the existing regulatory framework.⁶⁷ The Registrar also indicates that the Registry continues to monitor closely the progress of the DJI Video Communication Project.⁶⁸

27. Finally, the Registrar asserts that Karadžić’s argument, that since the Complaint raises a question of law it should be reviewed on a *de novo* basis, is incorrect and ignores the fact that the established standard of review already allows the President to quash a decision that does not comply with legal requirements.⁶⁹

28. In the Reply to Submission on Complaint, Karadžić refutes the Registrar’s argument that internationally accepted principles and standards do not provide for a right of detainees to video communications as a way to ensure the right to family life during detention.⁷⁰ Karadžić asserts that the Registrar’s failure to make video communications available is incompatible with practices in the Host State or enforcement States where United Nations prisoners are serving their sentences, and the Nelson Mandela Rules, which provide that “prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) [b]y

⁶¹ Submission on Complaint, para. 9, *referring to* Rule 74 of the Rules of Detention.

⁶² Submission on Complaint, para. 10.

⁶³ Submission on Complaint, para. 10.

⁶⁴ Submission on Complaint, para. 12.

⁶⁵ Submission on Complaint, para. 12.

⁶⁶ Submission on Complaint, para. 12.

⁶⁷ Submission on Complaint, para. 12.

⁶⁸ Submission on Complaint, para. 14.

⁶⁹ Submission on Complaint, paras. 3–4.

⁷⁰ Reply to Submission on Complaint, para. 3.

corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and (b) [b]y receiving visits”.⁷¹

29. Karadžić asserts that the Registrar’s security concerns are “unfounded, disproportionate, technophobic, and frankly, political”.⁷² He argues that the total prohibition on video communications is disproportionate to legitimate concerns of safety, security, and crime prevention and is aimed at avoiding embarrassment should a call be recorded and disseminated.⁷³ He contends that the same risk exists with telephone calls, yet there is no total ban on telephone calls.⁷⁴ In his view, there is nothing about video communications that presents a greater risk that the recipient will violate the Rules of Detention and publicly disseminate a recording of the detainee, and any such risk can be proportionally mitigated, as with telephone calls, by vetting and restricting the persons who can receive such calls.⁷⁵ Karadžić submits that he is only requesting that video communications be made available for communication with members of his immediate family.⁷⁶ Karadžić further submits that only four detainees, all over 60 years old, are presently in the UNDU and that the claim that greater restrictions need to be placed on him and his fellow “senior citizens” for security reasons is unsustainable.⁷⁷

30. Finally, Karadžić submits that making email available to detainees is no reason to deny video communications, which he argues allows detainees, whose families cannot afford to visit regularly, to see their families whereas email does not.⁷⁸

B. Submissions related to the Motion for Immediate Implementation

31. Citing the COVID-19 pandemic, Karadžić submits that, as a temporary measure pending the issuance of a decision on the Complaint, I should order the Registrar to immediately implement video communications at the UNDU.⁷⁹ He asserts that, because of the pandemic, he and his fellow UNDU detainees are unlikely to be able to receive visits from family and friends in the near future, emphasising that detainees and their spouses are at increased risk of the virus due to their advanced age.⁸⁰ Karadžić contends that being allowed to use video communications during this stressful

⁷¹ Reply to Submission on Complaint, para. 3 (emphasis omitted).

⁷² Reply to Submission on Complaint, para. 9.

⁷³ Reply to Submission on Complaint, paras. 4–7.

⁷⁴ Reply to Submission on Complaint, para. 5.

⁷⁵ Reply to Submission on Complaint, para. 5.

⁷⁶ Reply to Submission on Complaint, para. 5.

⁷⁷ Reply to Submission on Complaint, para. 7.

⁷⁸ Reply to Submission on Complaint, para. 8.

⁷⁹ Motion for Immediate Implementation, paras. 1, 41.

⁸⁰ Motion for Immediate Implementation, para. 40.

period would minimise the effects of social isolation and decrease anxiety about the well-being of loved ones.⁸¹

32. The Registrar did not file a submission in relation to the Motion for Immediate Implementation.

C. Preliminary Matter

33. As a preliminary matter, I will address Karadžić's argument concerning the standard of review.⁸² I consider that the Complaints Procedure, which came into effect in December 2018, is a procedure for the judicial review of administrative decisions and not an appeal process, as Karadžić seems to suggest.⁸³ As such, I am of the view that the standard of review that applies when administrative decisions of the Registrar are reviewed⁸⁴ applies equally to complaints filed before me pursuant to Regulation 10 of the Complaints Procedure. In this respect, I reiterate that a judicial review of an administrative decision is not a rehearing.⁸⁵ Consequently, I am not persuaded by Karadžić's unsupported assertion that the Complaint "presents a question of law which should be determined by the President on a *de novo* basis",⁸⁶ and do not find that it is appropriate to depart from the well-established standard of review.

34. As Karadžić takes the position that I should conduct a *de novo* review, I note that he does not identify which of the four grounds for administrative review he seeks to rely upon. I also note that, when the Complaint was filed, none of my decisions which set out the standard of review applicable for complaints filed under the Complaints Procedure was available publicly.⁸⁷ Although it was incumbent upon Karadžić to specify the nature of the error being alleged,⁸⁸ considering that he did not have access to the decisions in which I set out the applicable standard,⁸⁹ in the present case it is in the interests of justice to for me to nevertheless consider the arguments raised in the Complaint.

⁸¹ Motion for Immediate Implementation, paras. 40–42.

⁸² See *supra*, para. 23.

⁸³ See Complaint, paras. 1, 35. I also note that the cover page of the Complaint refers to it as the "Appeal of Registrar's Decision on Video Calls at the UN Detention Unit".

⁸⁴ See *supra*, paras. 20–22.

⁸⁵ *Turinabo et al.* Decision, para. 13; *Ngirabatware* Decision, para. 16; *Karadžić* Decision, para. 10.

⁸⁶ Complaint, para. 35.

⁸⁷ See e.g. *Turinabo et al.* Decision, paras. 13–15; *Ngirabatware* Decision, paras. 16–18.

⁸⁸ See *supra*, para. 22.

⁸⁹ See *supra*, n. 87.

D. Merits of the Complaint

35. At the outset, it is important to emphasise that the circumstances that led to the Complaint are very different from the usual detention-related complaints, which generally arise from isolated incidents. Rather, the feasibility of making video communications available to UNDU detainees has been an ongoing concern for several years.⁹⁰ In this respect, I note that Karadžić first asked for video communications to be made available in 2016.⁹¹ My predecessor believed that Skype should be available to UNDU detainees and informed the Registrar that he wished to see some progress made in relation to the issue.⁹² The Registrar began exploring this possibility in earnest in 2017, following my predecessor's determination that waiting until 2020, when the platform for video communications being considered by the DJI was expected to be operational, was not considered to be satisfactory.⁹³ I also note that, upon initiating the Pilot Project, the Registrar indicated that a decision would be made following a thorough assessment of the Pilot Project, and that the Pilot Project was not yet complete and no such decision had been reached when the Complaint to the Commanding Officer and the Complaint to the Registrar were made. The Registrar's Decision on Pilot Project was ultimately made the day before the Registrar issued the Impugned Decision. In my view, the tandem proceedings—namely the Registrar's reporting on the status and the outcome of the Pilot Project—and the separate chain of litigation relating to the Complaint, have made the present Decision more complex.

36. Turning to the Impugned Decision, I note that the Registrar found no error in the Commanding Officer's decision to dismiss the Complaint to the Commanding Officer on the basis that the matter was pending before me as President.⁹⁴ I consider that this conclusion misapprehends the record, as the only related matter pending before me when Karadžić filed the Complaint to the Commanding Officer was the Motion to Require Reports—in which Karadžić requested that I order the Registrar to provide reports outlining the progress of his efforts to implement video communications at the UNDU and explaining why his proposed solutions could not be implemented by the Registrar in the interim.⁹⁵ By contrast, in the Complaint to the Commanding Officer, Karadžić objected to the conditions of his detention insofar as the UNDU had failed to make video communications available and alleged that this failure infringed on his right to family life. Although the Complaint to the Commanding Officer and the Motion to Require Reports were

⁹⁰ See *supra*, paras. 2–10.

⁹¹ See *supra*, para. 2.

⁹² See *supra*, para. 3.

⁹³ See Decision on the 12 May 2017 Complaint, p. 3. See also 6 March 2017 Transcript, p. 29.

⁹⁴ Complaint, Annex D, RP 38.

⁹⁵ See *supra*, para. 10.

both connected to the availability of video communications at the UNDU, I consider that Karadžić's arguments and the relief that he sought in the motion pending before me were fundamentally different from those raised with the Commanding Officer. Further, while these differences may not have been apparent to the Commanding Officer, whose function does not require legal training, they should have been evident to the Registrar for whom such expertise is critical to the discharge of his functions. In light of the foregoing, I am of the view that it was unreasonable for the Registrar to conclude that the Commanding Officer did not err in refusing to address the substance of the complaint before him. Nevertheless, as the Registrar himself addresses Karadžić's contention that the failure to provide video communications violates his right to family life elsewhere in the Impugned Decision, I am not persuaded that the Registrar's error significantly affected the administrative decision to Karadžić's detriment.

37. With respect to the Registrar's response to the contention that the failure to provide video communications violates Karadžić's right to family life, I observe that he begins by noting that, in the Rules of Detention or the applicable regulations, there is no right to video communication for UNDU detainees.⁹⁶ The Registrar then refers to the Pilot Project and the reports on its progress filed before me in February and April 2019.⁹⁷ Later in the Impugned Decision, I note that the Registrar refers to the Commanding Officer's Report which was "filed on the record before the President".⁹⁸ The Registrar indicates that the Commanding Officer had: (i) identified "a high security risk associated with the video communication system at the UNDU which cannot be effectively mitigated",⁹⁹ and (ii) "recommended that the pilot project be terminated".¹⁰⁰ The Registrar concludes by referring to the Registrar's Decision on Pilot Project and indicating that he had accepted the Commanding Officer's recommendation and had decided not to proceed with the third phase of the Pilot Project.¹⁰¹ Having reviewed the Impugned Decision as a whole, I first note that the Registrar does not explicitly indicate that he has decided not to make video communications available at the UNDU until such a possibility is made available through the DJI; he merely indicates that he has decided not to proceed with the Pilot Project and that he has "instead instructed the Commanding Officer to explore other means of communication, such as e-mail, that may enhance the communications of detainees at the UNDU". Second, I note that the Registrar has not provided reasons for reaching his explicit decision not to proceed with the Pilot Project and what I consider to be an implicit decision not to make video communications available at the UNDU. I

⁹⁶ Complaint, Annex D, RP 38. *See also supra*, para. 14.

⁹⁷ Complaint, Annex D, RP 38. *See also supra*, para. 14.

⁹⁸ Complaint, Annex D, RP 38. *See also supra*, para. 14.

⁹⁹ Complaint, Annex D, RP 38. *See also supra*, para. 14.

¹⁰⁰ Complaint, Annex D, RP 38. *See also supra*, para. 14.

consider that the requirement that the Registrar provide “a reasoned written decision”, as set out in in Regulation 8(C) of the Complaints Procedure,¹⁰² is not only important to enable detainees to exercise their right to have the decision reviewed, but it also enables me as President to understand and review the Registrar’s decision.¹⁰³ I, therefore, consider the absence of meaningful written reasons in the Impugned Decision to be an error by the Registrar, as he failed to observe one of the basic rules of natural justice or to act with procedural fairness towards Karadžić.

38. Nevertheless, while the Impugned Decision itself is devoid of reasoning, I note in this respect that in the Impugned Decision the Registrar refers to a separate submission, namely the Registrar’s Decision on Pilot Project. I further note that he appears to base the Impugned Decision entirely on facts and conclusions contained in this separate submission. I am therefore of the view that, rather than remanding the Impugned Decision to the Registrar for him to provide the requisite reasoned written decision, it is in the interests of judicial economy and fairness for me to, on an exceptional basis, examine the reasoning provided in the Registrar’s Decision on Pilot Project.¹⁰⁴

39. Turning to the Registrar’s Decision on Pilot Project, I note that therein, the Registrar made an explicit decision to terminate the Pilot Project without proceeding with the third phase. I also consider that he again reached an implicit decision not to make video communications available at the UNDU until such a possibility is made available through the DJI.¹⁰⁵ In reaching these conclusions, the Registrar relied almost exclusively the Commanding Officer’s assessment that video communications cannot be used by detainees in a “manner that does not pose a risk to the administration of justice, including the violation of any judicial orders, interfering with or intimidating witnesses, or endangering the safety of any person, or pose a risk to the safety and security of the UNDU or any persons in that building, in line with the [...] Rules of Detention”.¹⁰⁶ While I consider that it was reasonable for the Registrar to take the Commanding Officer’s recommendation into account in reaching his decision, this should not have been his only consideration.

40. The Registrar has a duty to exercise due diligence when making policy decisions that will affect all UNDU detainees. As the person ultimately responsible for the administration and

¹⁰¹ Complaint, Annex D, RP 38. *See also supra*, para. 14.

¹⁰² *See also* Complaints Procedure, Regulation 9(B).

¹⁰³ *Cf. Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017, para. 180; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, para. 729; *Augustin Bizimungu v. The Prosecutor*, Case No. ICTR-00-56B-A, Judgement, 30 June 2014, para. 18; *Prosecutor v. Enver Hadžihanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008, para. 13.

¹⁰⁴ I note that Karadžić received a copy of the Registrar’s Decision on Pilot Project as it was filed in connection with parallel proceedings that were originally initiated by Karadžić himself.

¹⁰⁵ *See* Registrar’s Decision on Pilot Project, paras. 7–9. *See also* Submission on Complaint, paras. 10, 14.

¹⁰⁶ Registrar’s Decision on Pilot Project, para. 7. *See also* Complaint, Annex D, RP 38.

servicing of the Mechanism and who serves as its channel of communication,¹⁰⁷ the Registrar has access to a wide range of information that he can and, in my view, reasonably could have drawn upon in reaching his decision in order to fulfil this duty. I consider that information on the availability of human and financial resources, as well as specific information on how video communications may result in violations of judicial orders, interference with or intimidation of witnesses, endangerment of persons, or risks to the safety and security of the UNDU or any persons in that building, would have been particularly salient for the purpose of allowing the Registrar to make a fully informed decision.

41. In the Registrar's Decision on Pilot Project, I observe that the Registrar refers to a number of factors that led the Commanding Officer to recommend against proceeding to the next phase of the Pilot Project and against introducing a VTC platform at the UNDU, including that: (i) the ease with which calls made through the VTC platform could be recorded or live-streamed to social media platforms on the internet was identified as a high security risk; (ii) there was a "lack of mitigating measures to prevent such an occurrence"; and (iii) "such a risk was heightened since [such] calls cannot be live-monitored due to technical limitations and resource constraints at the UNDU".¹⁰⁸ Notably absent, however, is any indication that the Registrar sought information on the gravity of the security risk, the availability of mitigating measures, or the technical limitations and resource constraints, which would have allowed him to conduct his own assessment and to reach his own conclusion.

42. More specifically, there is no indication that the Registrar turned his mind to the fact that the potential for recording detainees' video communications or live-streaming them to social media platforms applies equally to their telephone communications. Nor is there any indication that the Registrar questioned the suggested lack of mitigating measures to prevent a call from being recorded or live-streamed, or undertook his own analysis of the availability of measures in the Rules of Detention and related regulations. This is particularly surprising given the range of measures provided for in the Regulations on the Supervision of Visits to and Communications with Detainees ("Regulations on Visits and Communications").¹⁰⁹ For instance, there is no indication that the Registrar considered: (i) facilitating live-monitoring by limiting the number and duration of calls or by setting specific times for calls;¹¹⁰ or (ii) ensuring compliance by requiring detainees and their

¹⁰⁷ See Rules of Procedure and Evidence of the Mechanism, Rule 31(A).

¹⁰⁸ Registrar's Decision on Pilot Project, para. 5.

¹⁰⁹ Regulations on Visits and Communications, MICT/23, 5 December 2018.

¹¹⁰ See Regulations on Visits and Communications, Regulation 14 (allows the Commanding Officer to take into account the reasonable demands of the daily schedule of the Detention Unit and the availability of visiting facilities and staff when setting daily visiting hours for all visitors).

family members to provide strict written guarantees not to broadcast any calls, the violation of which would be considered an offence and would be subject to penalties.¹¹¹ Finally, there is no indication that the Registrar sought information about the alleged resource constraints at the UNDU or that the resources required were assessed in light of the very small number of detainees presently at the UNDU.¹¹²

43. In light of the foregoing, I find that the Registrar failed to take into account relevant material when reaching the Registrar's Decision on Pilot Project. As he relied on this decision to support the Impugned Decision, I find that the Registrar also erred in reaching the Impugned Decision.

44. Having found that the Registrar erred, I consider that it is appropriate to quash the Impugned Decision to the extent that it abandons introducing video communications at the UNDU, and to remand the matter to the Registrar for his reconsideration in line with this Decision. I am, however, not persuaded by Karadžić's argument that he has a right to video communications and that the Registrar's decision not to make video communications available to him at the UNDU violates his right to family life. I am satisfied that the Rules of Detention and the Regulations on Communications respect detainees' right to family life by providing the right to receive visits from and communicate with family, friends, and others by letter and telephone on a regular basis. I am, at the same time, of the view that making video communications available at the UNDU would *enhance* Karadžić's ability to exercise this right—particularly given the length of his detention and the distance from his family. In this respect, I echo my predecessor's view that the Mechanism should "move on with the times" and be open to taking advantage of modern technology to make video communications available to UNDU detainees.¹¹³ Having said that, I acknowledge that finding a solution may be complex. I therefore do not consider that it is appropriate to impose a deadline and I will deny the Complaint in this regard. I would, however, reiterate my earlier urging of the Registry to make video communications available as soon as practicable¹¹⁴ and, to facilitate the expeditious resolution of this matter, I consider it appropriate to order that the Registrar issue his decision no later than 15 June 2020.

¹¹¹ See Regulations on Visits and Communications, Regulations 2(iii), 3.

¹¹² I note that three convicted persons are presently being detained at the UNDU, two of whom are awaiting transfer to enforcement States and one whose case is on appeal. I also note that custodial capacity is being maintained for two individuals whose case is at trial and who are regularly on provisional release.

¹¹³ See 6 March 2017 Transcript, p. 29.

¹¹⁴ Decision of 4 February 2019, p. 3.

E. Motion for Immediate Implementation

45. In his recent filing, Karadžić seeks the immediate implementation of video communications at the UNDU in order to minimise the effects of social isolation and increased anxiety during the stressful period of the COVID-19 pandemic, as he submits that he is unlikely to be able to receive visits from his family and friends in the near future.¹¹⁵

46. Taking into account that visits to UNDU detainees have presently been suspended to protect their health,¹¹⁶ and the worldwide travel restrictions put in place to contain the pandemic, I agree that UNDU detainees are unlikely to be able to receive visits from family and friends in the near future. I am also mindful that, in this time of global pandemic, UNDU detainees are likely to have increased concern for the safety and well-being of their family members, particularly those of advanced age who may be vulnerable to the COVID-19 virus, and that they would benefit from additional means to communicate with their loved ones.

47. In this respect, I consider that the Registrar's proposal to establish an email system will be beneficial to UNDU detainees, including Karadžić.¹¹⁷ If such an email system has not yet been put in place, I would encourage the Registrar to implement such a system as soon as practicable. However, while such an email system may assist UNDU detainees to exercise their right to family life, it goes without saying that neither written communications nor telephone calls can replace face to face encounters.

48. As Karadžić seeks the immediate implementation of video communications as a temporary measure pending the issuance of a decision on the Complaint, I consider that the Motion for Immediate Implementation will become moot with the issuance of the present Decision. However, as the issue of video communications will be remanded to the Registrar for further consideration, I do not consider that the issuance of my Decision on the Complaint addresses the gravamen of the Motion for Immediate Implementation, which seeks to have such communications made available imminently. For this reason, and for the reasons outlined above, I am of the view that an interim solution, which allows for video communications on a limited basis, with such restrictions as necessary to reduce the possibility that communications are broadcast, should be explored and implemented until a more permanent solution is made available.

¹¹⁵ Motion for Immediate Implementation, paras. 40–42.

¹¹⁶ *See supra*, para. 18.

¹¹⁷ *See supra*, para. 26.

49. Accordingly, and as certain operational challenges arising from the COVID-19 pandemic may affect the implementation of an interim solution, or further technical refinements may need to be undertaken,¹¹⁸ I consider it appropriate to order the Registrar to, no later than 14 May 2020: (i) implement an interim solution to make video communications available at the UNDU; or (ii) if an interim solution cannot be implemented by this date, report on the specific impediments and provide a timeline for subsequent implementation.

IV. DISPOSITION

50. For the foregoing reasons, I hereby:

GRANT the Complaint, in part;

REMAND the matter to the Registrar for further consideration, in line with this Decision;

ORDER the Registrar to issue his decision no later than 15 June 2020;

DISMISS all other aspects of the Complaint;


DISMISS the Motion for Immediate Implementation as moot;

ORDER the Registrar to, no later than 14 May 2020, implement an interim solution to make video communications available at the UNDU, or, if an interim solution cannot be implemented by this date, report on the specific impediments and provide a timeline for subsequent implementation; and

INSTRUCT the Registrar to, no later than 30 April 2020, file on the record public redacted versions of the Impugned Decision and the Commanding Officer's Report, and a submission, if any, if he considers that the present Decision would require redactions before being made public.

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

Done this 16th day of April 2020,
At The Hague,
The Netherlands.



Judge Carmel Agius
President

[Seal of the Mechanism]

¹¹⁸ Registrar's Decision on Pilot Project, Annex, RP 22. I note in this regard that the Commanding Officer indicated that, if it was decided to implement a VTC platform, the UNDU and the Mechanism's Information Technology Services Section should undertake further comprehensive testing and refinements.



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