

**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-05-88-A
Date: 16 July 2012
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. John Hocking

Decision of: 16 July 2012

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC REDACTED VERSION

**DECISION ON PROSECUTION MOTION FOR THE
APPOINTMENT OF INDEPENDENT COUNSEL TO REVIEW
MATERIAL POTENTIALLY SUBJECT TO LAWYER-CLIENT
PRIVILEGE**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušković for Mr. Vujadin Popović
Mr. John Ostojić and Mr. Theodor Scudder for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

1. The Appeals Chamber 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege”, filed confidentially with confidential annexes by the Office of the Prosecutor (“Prosecution”) on 18 November 2011 (“Motion”). The defendants in this case, namely, Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Milan Gvero and Vinko Pandurević (“Defendants”) did not file responses to the Motion.

I. BACKGROUND

2. On 2 December 2009, the Ministry of Interior of the Republic of Serbia (“Serbian Authorities”) conducted searches of residences associated with two former officials of the Main Staff of the Army of Republika Srpska and handed over the material seized to the Prosecution on 22 January 2010.¹ While reviewing and indexing the seized material, a Prosecution investigation team identified “what appeared to be material potentially originating from defence counsel in the *Popović et al.* case”.² Conforming to a protocol issued by a Prosecution Senior Trial Attorney,³ the Prosecution investigation team identified, isolated, and placed this material on a single DVD and then, without reviewing the material, turned it over to the Prosecution Chief of Operations together with the 11 original DVDs received from the Serbian Authorities that contained the original seized material.⁴ The Prosecution asserts that no further inspection of the material was conducted and all documents and communications related to the potentially privileged material were deleted from the Prosecution’s hard-drives.⁵

3. On 9 March 2010, the Serbian Authorities submitted additional material to the Prosecution from which further potentially privileged material was identified upon initial review.⁶ The OTP Protocol was also followed in relation to this material.⁷

¹ Motion, para. 2; Confidential OTP Report of Investigator Blaszczyk Tomasz [REDACTED] dated 29 January 2010, annexed to the Motion (“OTP Report of 29 January 2010”), paras 1-2.

² Motion, para. 2; OTP Report of 29 January 2010, paras 2-3.

³ Confidential “[REDACTED] Search Material Protocol” issued by Peter McCloskey on 25 January 2010, annexed to the Motion (“OTP Protocol”), p. 2.

⁴ Motion, paras 2-3; OTP Report of 29 January 2010, paras 5-15.

⁵ Motion, para. 3; OTP Report of 29 January 2010, para. 16.

⁶ Motion, para. 4.

⁷ Motion, para. 4.

II. SUBMISSIONS

4. In order to satisfy its ongoing disclosure obligations, the Prosecution requests the Appeals Chamber to appoint an independent counsel to review the potentially privileged material received from the Serbian Authorities on 22 January 2010 and 9 March 2010 (“Potentially Privileged Material”) for the limited purpose of determining whether any lawyer-client privilege applies.⁸ In this manner, if any material subject to lawyer-client privilege is identified, the privilege holders can be given the opportunity to bring a lawyer-client privilege claim.⁹ The Prosecution also requests that the competent judicial authority be designated to adjudicate any dispute which may arise between the appointed independent counsel and any potential privilege holder as to whether privilege applies to some or all of the Potentially Privileged Material.¹⁰

5. In support of its request, the Prosecution argues that the appointment of an independent counsel would avoid exposing Prosecution staff to the Potentially Privileged Material and would thus safeguard the rights of potential privilege holders as well as the Defendants’ fair trial rights.¹¹ The Prosecution further asserts that, “[f]or the same reason, Chambers should avoid reviewing the Potentially Privileged Material”.¹² The Prosecution submits that the Potentially Privileged Material should be reviewed by a party that has “no conflict of interest with the *Popović et al.* case or any other related case before the Tribunal”.¹³

6. In the alternative, the Prosecution seeks guidance from the Appeals Chamber on the appropriate procedure for the Prosecution to adopt in order to protect the rights of potential privilege holders and to safeguard the fair trial rights of the Defendants, while enabling it to comply with its obligations under the Tribunal’s Rules of Procedure and Evidence (“Rules”) and the Statute of the Tribunal (“Statute”).¹⁴

III. DISCUSSION

7. The Appeals Chamber recalls that, pursuant to Rule 97 of the Rules, all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure in the absence of the client’s consent or voluntary disclosure to a third party. This privilege is vital to the defence of an accused or appellant by allowing for the open communication

⁸ Motion, paras 6-9.

⁹ Motion, para. 7.

¹⁰ Motion, paras 10, 12.

¹¹ Motion, para. 8.

¹² Motion, para. 8.

¹³ Motion, para. 9.

¹⁴ Motion, paras 11, 13.

between attorney and client necessary for effective legal assistance as guaranteed under Article 21(4)(d) of the Statute. In the circumstances of this case, the Appeals Chamber finds that should the Prosecution take steps to fulfil its disclosure obligations, a risk would arise that privileged communications would be exposed to the Prosecution to the detriment of the Defendants. This creates a conflict for the Prosecution, which must meet its disclosure obligations under Rules 66 and 68 of the Rules while currently in possession of the Potentially Privileged Material.

8. Despite it being within the ambit of the Appeals Chamber to review the Potentially Privileged Material, there also exists a risk that communications between any of the Defendants and their legal counsel could be revealed to the Appeals Chamber. Additionally, as the Potentially Privileged Material comprises a voluminous amount of documentation,¹⁵ should the Appeals Chamber review the Potentially Privileged Material there will be a considerable delay in the appellate proceedings. In light of the above, and out of concern for efficiency and expeditiousness, the Appeals Chamber considers that the best course of action under the circumstances presented is for a Judge of the Tribunal not sitting on the *Popović et al.* Bench to review the Potentially Privileged Material in order to determine whether lawyer-client privilege attaches to any of the material in question.

9. The Appeals Chamber recalls the function of the President of the Tribunal (“President”) to coordinate the work of the Chambers, which includes the power to assign the resolution of judicial matters to a Trial Chamber, a bench of three judges, or a single judge.¹⁶ Accordingly, the Appeals Chamber finds it appropriate to refer the matter to the President and to request that the President designate a Judge to review the Potentially Privileged Material.

IV. DISPOSITION

10. For the foregoing reasons, pursuant to Rules 54 and 107 of the Rules, the Appeals Chamber hereby **GRANTS** the Motion **IN PART**, in that it:

RESPECTFULLY REQUESTS the President:

- A. To designate a Judge (“Designated Judge”) to review the Potentially Privileged Material *in camera*;
- B. To consider directing the Designated Judge:

¹⁵ See OTP Report of 29 January 2010, paras 2, 10.

- i. to identify to the Prosecution the material he or she does not consider to be protected under Rules 70(A) or 97 of the Rules;
- ii. to identify to any potential privilege holder the material he or she considers to be potentially protected under Rules 70(A) or 97 of the Rules and provide a brief description of each item, with a view to allowing any identified potential privilege holders the opportunity to make an *ex parte* lawyer-client privilege claim;
- iii. to thereafter provide to the privilege holder any of the material identified under (ii) above for which the Designated Judge finds that an identified privilege holder has established a lawyer-client privilege claim;
- iv. to return to the Prosecution the material identified under (i) above and those parts of the material identified under (ii) above for which the designated Judge finds that an identified privilege holder has not established a lawyer-client privilege claim; and

ORDERS the Prosecution to continue refraining from further inspection of the Potentially Privileged Material unless the Designated Judge orders otherwise.

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



Judge Patrick Robinson
Presiding

Dated this sixteenth day of July 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

¹⁶ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, para. 69.