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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-04-79-AR65.1

Date: 17 October 2005

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **17 October 2005**

PROSECUTOR

v.

Mićo STANIŠIĆ

DECISION ON PROSECUTION'S INTERLOCUTORY APPEAL OF MIĆO STANIŠIĆ'S PROVISIONAL RELEASE

Office of the Prosecutor:

Ms. Carla Del Ponte

Counsel for the Accused:

Mr. Branko Lukić

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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 ("International Tribunal") is seized of the "Prosecution's Appeal Brief in Relation to Trial Chamber's Decision on Mićo Stanišić's Motion for Provisional Release" ("Prosecution's Appeal"), filed on 22 August 2005.

I. PROCEDURAL BACKGROUND

2. On 19 July 2005, Trial Chamber II ("Trial Chamber") granted the motion of Mićo Stanišić ("Accused") pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") for provisional release to Belgrade, Republic of Serbia ("Impugned Decision").[1]

3. On 22 July 2005, the Prosecution filed the "Prosecution's Urgent Motion to Stay Decision on Provisional Release Concerning the Accused Mićo Štanisić," which the Appeals Chamber dismissed.[2] That same day, the Prosecution filed the "Prosecution's Application for Leave to Appeal the Decision on Provisional Release of Mićo Štanisić" pursuant to Rule 65(D) and (F) of the Rules.

4. On 8 August 2005, a revised version of the International Tribunal's Rules entered into force[3] whereby, *inter alia*, Rule 65 was amended to eliminate the requirement that a party must first seek leave from a Bench of three appeals Judges to appeal a Trial Chamber's decision on provisional release. The amendment to Rule 65 establishes that any decision rendered by a Trial Chamber under that Rule shall be subject to appeal as of right before the Appeals Chamber.[4] Consequently, the President of the International Tribunal issued an Order on 15 August 2005 notifying the parties in this case that the timing for briefing the appeal of the Impugned Decision would run from the date of that Order.[5]

5. Following the filing of the Prosecution's Appeal, Counsel for the Accused ("Defence") filed the "Defence Motion Objecting to the Prosecution's Appeal Brief in Relation to Trial Chamber's Decision on Mićo Stanišić's Motion for Provisional Release" on 30 August 2005 ("Defence's Response"). The Prosecution has not filed a reply.

[1] Decision on Mićo Stanišić's Motion for Provisional Release, 19 July 2005.
[2] Decision on Prosecution's Motion to Stay Decision on Provisional Release Concerning the Accused Mićo Stanišić, 22 July 2002. *See also* Corrigendum to Decision on Prosecution's Motion to Stay Decision on Provisional Release Concerning the Accused Mićo Stanišić, 15 August 2005.
[3] IT/32/Rev.36.
[4] *See* Rule 65(D).
[5] Order Assigning Judges to a Case Before the Appeals Chamber, 15 August 2005, p. 2.

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II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[6] The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.[7] Consequently, the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[8] The party challenging a decision on provisional release must demonstrate that the Trial Chamber has committed a "discernible error."[9] The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[10]

III. APPLICABLE LAW

7. The Appeals Chamber considers that under Rule 65(A), once detained, the accused may not be released except upon an order of a Trial Chamber. Pursuant to Rule 65(B), such an order may be issued only after the Trial Chamber: (1) gives the host country and the State to which the accused seeks to be released the opportunity to be heard;[11] and (2) is satisfied that the a) accused will appear for trial if released; and b) will not pose a danger to any victim, witness or other person. Where a Trial Chamber finds that one of these two conditions has not been met, it need not consider the other and must deny provisional release.[12]

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[6] *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski* Decision"), para. 5.

[7] *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision on Joinder"), para. 3 (holding that a Trial Chamber exercises its discretion "in determining whether provisional release should be granted . . . .").

[8] *Id.*, para. 4

[9] *Id.*, para. 5.

[10] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10. The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations . . . ." *Milošević* Decision on Joinder, para. 5.

[11] The Appeals Chamber notes that this requirement does not apply where the Trial Chamber denies provisional release. *See Prosecutor v. Todović*, Case No. IT-97-25/1-AR65.1, Decision on Provisional Release, 6 October 2005, para. 29; *Prosecutor v. Nsengimana*, Case No. ICTR-2001-69-AR65, Decision on Provisional Release, 23 August 2005, p. 4.

[12] *See, e.g., Boškoski* Decision, para. 24 (noting that because the Trial Chamber found that the Appellant's release would pose a significant risk of flight, it was not necessary for the Trial Chamber to consider whether the Appellant would also pose a danger to others in denying him provisional release); *cf. Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 10.

8. The Appeals Chamber further considers that in rendering a decision on provisional release under the requirements of Rule 65(B), a Trial Chamber is required to provide a reasoned opinion.[13] Thereby, it is obliged "to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision."[14] What exactly constitute the relevant factors to be considered and the weight to be given to them depend upon the particular circumstances of each case.[15] This is due to the fact that "[d]ecisions on motions for provisional release are fact intensive and cases are considered on an individual basis . . . in light of the particular circumstances of the individual accused."[16] The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the case is due for trial and the accused is expected to return to the International Tribunal.[17]

III. DISCUSSION

9. The Appeals Chamber notes that in this case, the Trial Chamber took the following factors into consideration as relevant for reaching the Impugned Decision: the gravity of the crimes charged against the Accused and the likely length of sentence if convicted; the circumstances of the Accused's surrender; the government guarantees of the Republic of Serbia and the guarantees of the Council of Ministers of Serbia and Montenegro to ensure the presence of the Accused for trial; the Accused's prior senior position in Republika Srpska *vis-à-vis* the reliability of the guarantees; the cooperation of the Accused with the Prosecution; the potential duration of pre-trial detention of the Accused; and the likelihood that the Accused will pose a danger to any victim, witness or other person related to his case upon release.[18]

10. In its Appeal, the Prosecution submits that the Trial Chamber committed six discernible errors in the Impugned Decision. Three are alleged as errors of fact and the other three as errors of law relating to the Trial Chamber's assessment of relevant factors and the weight to be accorded to those factors. The Prosecution maintains that even if the alleged errors do not separately require the Appeals Chamber to quash the Trial Chamber's decision, when considered together, they do lead to that result. The Prosecution argues that a correct determination of the law and facts would show that

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[13] *Prosecutor v. Šainović & Odjanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, ("*Šainović & Odjanić* Decision"), para. 6.
[14] *Ibid.*
[15] *See, e.g.*, the non-exhaustive list of factors laid out in the *Šainović & Odjanić* Decision at para. 6 when assessing whether an accused will appear for trial.
[16] *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005, para. 7; *see also* *Šainović & Odjanić* Decision, para. 7; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002 ("*Mrkšić* Decision"), para. 9.
[17] *Šainović & Odjanić* Decision, para. 7.

there is a danger that the Accused will not appear for trial and that there is a risk to witnesses posed by the Accused upon provisional release. [19] The Appeals Chamber now considers each alleged error in turn.

A. The Accused's Surrender

11. The Prosecution argues that the Trial Chamber made an error of fact when it concluded that the Accused's surrender to the International Tribunal was voluntary while also noting that his surrender was conditioned upon him receiving a government guarantee from the Republic of Serbia to support a subsequent request for provisional release. The Prosecution submits that even if it were found that the Accused's surrender was partially voluntary, its value is undermined because the surrender was also conditional.[20]

12. The Appeals Chamber recalls that the voluntariness of an accused's surrender is relevant to the Trial Chamber's determination as to the degree of cooperation that may be expected from the accused when the time comes for him or her to appear for trial if provisionally released.[21] The Appeals Chamber notes that the Trial Chamber took into consideration the following information obtained from the Accused before concluding that his surrender was voluntary. On 7 March 2005, the Accused was in Belgrade, Republic of Serbia, when he was informed by the Minister of Interior of Republika Srpska, entity of Bosnia and Herzegovina, that the authorities of Republika Srpska had been served with an indictment against him by the Prosecution. At that time, the Accused was with the Minister for Local Administration of the Republic of Serbia. The Accused immediately suggested that he should be transferred to the International Tribunal; however, the government of the Republic of Serbia indicated that it could not do so until necessary transport preparations were made. That same day, the Accused voluntarily reported to the Agency for Security and Information of the Republic of Serbia and gave a signed statement documenting his presence in Belgrade and his willingness to immediately be transferred to The Hague ("Accused's Statement").[22] In that document, the Accused stated the following:

> The only condition I have is to be transferred to the Tribunal in The Hague as swiftly as possible, having in mind readiness of Republic Government to provide me with all guaranties [*sic*] necessary for my provisional release. . . .[23]

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[18] Impugned Decision, paras. 9-18.
[19] Prosecution's Appeal, paras. 6-9.
[20] *Id.*, paras. 30-32.
[21] *Cf. Mrkšić* Decision, para. 8.
[22] Impugned Decision, paras. 10-11; Motion Providing Additional Information, para. 3.
[23] Defence Motion in Complience [*sic*] with the Chamber's Order Requesting Additional Information and Staying the Consideration of Mićo Stanišić's Motion for Provisional Release, 7 July 2005 ("Motion Providing Additional Information"), Annex IV.

13. On 11 March 2005, the Accused was contacted by the Agency for Security and Information of the Republic of Serbia and told that the arrangements for his transfer had been finalized. That same day, the Agency transported him from his home to the airport where he was transferred to The Hague. The Accused was never taken into custody by the Republic of Serbia or Republika Srpska prior to his transfer to the International Tribunal. In light of the above, the Trial Chamber rejected the Prosecution's concern that coercive measures had been used to ensure the Accused's transfer to the International Tribunal and found that the Accused's surrender was, in fact, voluntary.[24]

14. The Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber made a discernible error of fact in reaching this conclusion. An act is voluntarily done where it is made of one's own free will without compulsion.[25] In this case, there was no evidence before the Trial Chamber that the Accused was compelled to surrender to the International Tribunal. Rather, a number of factors pointed to the willingness of the Accused, including his request to be transferred immediately, the fact that the Accused was never taken into custody, and the Accused's Statement. The authorities of Serbia and Montenegro subsequently confirmed that the Accused surrendered to the custody of the International Tribunal out of his own free will.[26] The Prosecution rightly points out that the Trial Chamber, in its interpretation of the Accused's Statement, noted that "the Accused's surrender was conditional to him receiving . . . a government guarantee from the Republic of Serbia in support of his provisional release."[27] However, the Trial Chamber properly concluded that this was no basis for doubting the voluntariness of the Accused's surrender.[28] Where an accused's surrender is contingent upon certain conditions being met, this circumstance goes not to the factual determination of its voluntariness, but to the weight to be given to that surrender.[29] The Appeals Chamber finds that the Prosecution also fails to demonstrate how the Trial Chamber erred in terms of the weight given to the Accused's voluntary surrender.

B. The Guarantees

15. The Prosecution alleges two errors with regard to the Trial Chamber's consideration of the guarantees provided by the Council of Ministers of Serbia and Montenegro and the government guarantees of the Republic of Serbia ensuring that the Accused will appear for trial before the

[24] Impugned Decision, paras. 10-11; Motion Providing Additional Information, para. 3.
[25] *See, e.g.*, Black's Law Dictionary, 8th ed. (2004) at p. 1605 (defining "voluntary" as, *inter alia*, "unconstrained by interference; not impelled by outside influence").
[26] Impugned Decision, para. 11 and fn. 17.
[27] *Id.*, para. 11.
[28] *Ibid.*
[29] *Prosecutor v. Pandurević*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, 3 October 2005 ("*Pandurević* Appeals Decision"), para. 8; *see also Prosecutor v. Pandurević*, Case No. IT-05-86-PT, Decision on Vinko Pandurević's Application for Provisional Release, 18 July 2005 ("*Pandurević* Trial Decision"), para. 18.

International Tribunal. First, the Prosecution argues that the Trial Chamber erred as a matter of law by giving undue weight to the guarantees. The Prosecution submits that the Trial Chamber failed to take into account the continuing inability of Serbia and Montenegro to arrest Zdravko Tolimir and General Ratko Mladić. The Prosecution points out that the Trial Chamber's reliance upon the guarantees was contrary to the approach taken in the decision on provisional release in *Prosecutor v. Pandurević*[30] whereby the Trial Chamber in that case concluded that there was only "some likelihood" that the authorities in Serbia and Montenegro would be willing to arrest the accused to stand trial before the Tribunal if required, after his provisional release to Belgrade.[31]

16. Second, the Prosecution contends that the Trial Chamber erred as a matter of law in failing to give any weight to the fact that the Accused was Minister of Interior of Republika Srpska in 1992 with overall authority and responsibility for the functioning of the police forces when assessing the reliability of the guarantees.

17. The Appeals Chamber first considers the Prosecution's arguments with regard to the Accused's senior position in Republika Srpska in 1992. The Appeals Chamber recalls its previous holding that "the weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant, notably because of the position he held prior to his arrest."[32] The rationale behind taking into consideration an accused's prior position is that he or she may possess very valuable information on a government providing a guarantee that could be disclosed to the International Tribunal.[33] This would serve as a disincentive for a government to enforce its guarantee to arrest an accused after provisional release, if needed, to stand trial.[34]

18. The Prosecution argues that even though the Accused was not in a senior position within the Republic of Serbia itself, as Minister of Interior of Republika Srpska, he worked closely with officials at the highest political and military levels in the Serbian Ministry of Interior and the Socialist Federal Republic of Yugoslavia ("SFRY") as part of an alleged joint criminal enterprise. Therefore, the Prosecution submits that it is just as likely that the Accused has embarrassing or confidential information about the Republic of Serbia as if he had been a high-ranking government official in that government.[35]

19. The Appeals Chamber finds that the Trial Chamber erred in its conclusion that it need not weigh the Accused's senior position prior to his transfer because there was no information before it

[30] *See Pandurević* Trial Decision.
[31] Prosecution's Appeal, paras. 26-29.
[32] *Šainović & Odjanić* Decision, para. 7.
[33] *Mrkšić* Decision, para. 9.
[34] *Ibid.*
[35] Prosecution's Appeal, paras. 22-25.

suggesting that the Accused held a position in the Republic of Serbia, the government providing the guarantee and the country to which he was to be provisionally released. The fundamental question before the Trial Chamber is not whether the Accused held a position in the same government as that providing the guarantee.[36] Rather, it is to consider "what would occur if the relevant authority were obliged under its guarantee to arrest the accused person seeking provisional release"[37] in light of the Accused's former position, regardless of where it was held. Thus, the Trial Chamber is simply to consider whether the evidence suggests that an accused, by virtue of a prior senior position, may have any information that would provide a disincentive for the State authority providing a guarantee on behalf of the accused to enforce that guarantee.[38]

20. The Appeals Chamber nevertheless finds that this error of law did not affect the Trial Chamber's decision. The Prosecution fails to substantiate its arguments that weight should have been given to the Accused's prior position in Republika Srpska under the circumstances of this case. The Prosecution refers generally to evidence in other trials and observations by the media in support of its argument of interaction between the Republic of Serbia and Republika Srpska in 1992. It also states that allegations in the indictment against the Accused *vis-à-vis* his contacts in 1992 with officials within the SFRY show that officials in the Republic of Serbia might be fearful that he would provide damaging confidential information to the International Tribunal with regard to them. The Appeals Chamber considers that the Prosecution does not specifically refer to any evidence in other trials or statements in the media and fails to demonstrate that this evidence proves interaction between the Republic of Serbia and Republika Srpska generally or specifically with regard to this case. In addition, the Prosecution does not provide specific information that would prove that the Accused had contact with authorities in SFRY in 1992 and that this would be relevant today with respect to the government guarantees provided by the Republic of Serbia. The Prosecution merely refers to allegations as yet unproved in the indictment against the Accused that he "worked in concert with other members of the joint criminal enterprise including, *inter alia*, the Serbian MUP . . . as well as military and political figures from the Socialist Federal Republic of Yugoslavia ("SFRY")."[39] Finally, the Appeals Chamber notes the readiness of the Republic of

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[36] The International Tribunal has, in previous cases, considered an accused's prior senior position in assessing the weight of government guarantees regardless of whether that senior position was held in the government providing the guarantee. *See, e.g., Pandurević* Trial Decision, para. 19; *Pandurević* Appeal Decision, para. 13; *Prosecutor v. Prlić et al.*, Case Nos. IT-04-74-AR65.1, AR 65.2, AR 65.3, Decisions on Motions for Re-Consideration, Clarification, Request for Release and Applications for Appeal, 8 September 2004, para. 41; *Prosecutor v. Prlić et al.*, Case No. IT-04-74, Order on Provisional Release of Jadranko Prlić, Order on Provisional Release of Slobodan Praljak, Order on Provisional Release of Bruno Stojić, Order on Provisional Release of Valentin Ćorić, Order on Provisional Release of Milivoj Petković, Order on Provisional Release of Verislav Pušić, 30 July 2004.

[37] *Mrškić* Decision, para. 9.

[38] *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69-AR65.1, Decision on Prosecution Appeal Against Decision Granting Provisional Release, filed confidentially on 3 December 2004 ("*Stanišić* Decision"), para. 38.

[39] Prosecutor's Appeal, para. 24 (internal quotations omitted).

Serbia to assist in the transfer of the Accused to the custody of the International Tribunal. This suggests that it will be equally cooperative in returning him to The Hague to stand trial.

21. With regard to the Prosecution's arguments that the Trial Chamber gave undue weight to the guarantees because it did not take into account that the authorities in Serbia and Montenegro have failed to "fully cooperate" with the International Tribunal, the Appeals Chamber disagrees. The fact that the Trial Chamber did not explicitly mention other accused still at large such as Zdravko Tolimir and General Ratko Mladić does not prove that the Trial Chamber did not take this factor into account. The Trial Chamber noted that there had been an increase in the number of indictees surrendering to the custody of the International Tribunal from Serbia and Montenegro in recent months, but did not state that all indictees had surrendered. Furthermore, the Prosecution fails to demonstrate that it was unreasonable for the Trial Chamber to give weight to the guarantees in light of this increased cooperation. In this regard, the Appeals Chamber notes the most recent report of the President of the International Tribunal to the Security Council whereby he observed that "[c]o-operation with Serbia and Montenegro has improved markedly in the last six months."[40]

22. The Prosecution's reference to the Trial Chamber's decision in *Prosecutor v. Pandurević* is not helpful. It is true that the Trial Chamber in that case also noted the increased cooperation with the International Tribunal by Serbia and Montenegro and nevertheless only gave "some" weight to the same guarantees provided in this case. However, the Appeals Chamber recalls that Trial Chambers have coordinate jurisdictions and that a Trial Chamber's decision is not binding on another Trial Chamber.[41] Furthermore, the reliability of a guarantee must be assessed under the particular circumstances of each case.[42] Depending on those circumstances, "[a] Trial Chamber may accept such a guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept the same authority's guarantee as reliable in relation to Accused B, without there being any inconsistency (or "double standards") involved in those two decisions."[43] Such is the situation here. In *Pandurević*, the Trial Chamber concluded that the guarantees provided by Serbia and Montenegro could only be given some weight in light of the former senior position of the accused.[44] However, in this case, as noted above, it has not been established that the Accused's former senior position carries any weight in questioning the reliability of the guarantees. Furthermore, as previously noted, the full cooperation of the Republic of Serbia in this case in

[40] Assessments and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004), 25 May 2005, para. 19.
[41] *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Judgement, 24 March 2000, para. 114.
[42] *Mrškić* Decision, para. 9.
[43] *Ibid.*
[44] *Pandurević* Trial Decision, para. 19.

transferring the Accused to the International Tribunal's jurisdiction suggests that it will, in the future, enforce its guarantee to return the Accused to be tried before the International Tribunal.

C. The Accused's Cooperation with the Prosecution

23. The Prosecution submits that the Trial Chamber erred in its factual finding that there was no indication of a lack of cooperation by the Accused with the Prosecution while in the custody of the International Tribunal. The Prosecution argues that the Accused made an interview with the Prosecution contingent upon him first being able to review the Prosecution's supporting materials. However, after three months of being in possession of the materials, he still failed to make himself available. The Prosecution argues that in light of this fact, the Trial Chamber improperly concluded that the Accused's behaviour was consistent with cooperation and credited him with a potential willingness to cooperate. The Prosecution contends that the Accused's disingenuousness in suggesting cooperation while simultaneously withholding it is "a factor that undercuts the reliability of his assurances to the court, reflects an underlying lack of cooperation, and is relevant to the question of whether the Accused will appear for trial."[45]

24. The Appeals Chamber does not agree. Contrary to the Prosecution's argument, the Trial Chamber did not credit the Accused with a potential willingness to cooperate with the Prosecution while in pre-trial detention. After considering the Accused's declaration that he was not yet in a position to be interviewed by the Prosecution as he had not yet seen the Prosecution's supporting materials, the Trial Chamber explicitly stated that "[t]here is no indication of cooperation with the Prosecution . . ."[46] At the same time, the Trial Chamber concluded that it could not find that there was a lack of cooperation either and that the issue could not be considered further at this early stage in the case.[47] The Prosecution fails to demonstrate how the Trial Chamber's decision that this factor was, at the time, a neutral one, was unreasonable. Furthermore, the Appeals Chamber notes the Defence's response that while it is true that it had some of the supporting materials in its possession during the three months, it also only recently received additional materials disclosed by the Prosecution, which it needed to review prior to the Accused's interview.[48] The Prosecution did not reply to this claim. In any event, the Appeals Chamber emphasizes that even if it found that the Trial Chamber erred by failing to conclude that there was a lack of cooperation by the Accused, this error would not result in prejudice because "an accused before this International Tribunal is not obliged to assist the Prosecution in proving its case."[49] A Trial Chamber may not penalize an

[45] Prosecution's Appeal, paras. 13-14.
[46] Impugned Decision, para. 16.
[47] *Ibid.*
[48] Defence's Response, para. 12.
[49] *Stanišić* Decision, para. 14.

accused for exercising the right not to incriminate oneself while in the custody of the International Tribunal by drawing an adverse inference from the accused's lack of cooperation with the Prosecution or by conditioning provisional release upon such cooperation.[50]

D. The Threat Posed by the Accused to any Victim, Witness or Other Person

25. The Prosecution argues that the Trial Chamber erred in two respects when finding that the Accused, if released, would not pose a threat to any victim, witness or other person. The Prosecution claims that the Trial Chamber committed a factual error when it found that there is no information indicating that the Accused has connections or contacts to locate prospective witnesses in Bosnia and Herzegovina or elsewhere while on provisional release in the Republic of Serbia. The Prosecution maintains that because the Accused was once the Minister of Interior of Republika Srpska, specific information as to his contacts and connections is not required as his position "manifestly resulted in extensive and highly-placed contacts." Furthermore, in light of these contacts, the Prosecution argues that the geographic distinction drawn by the Trial Chamber is not conclusive. There is a significant risk, in the Prosecution's view, that the Accused, while in the Republic of Serbia, will call upon his contacts in Bosnia and Herzegovina and elsewhere to attempt to intimidate potential witnesses in this case.[51]

26. The Prosecution also submits that the Trial Chamber erred as a matter of law in failing to take into account that the Accused is now in possession of the identities of potential Prosecution witnesses. This is so because during his initial pre-trial detention by the International Tribunal, he had the opportunity to review the Prosecution's supporting materials. The Prosecution states that now that the Accused has this information, it "enhances the risk that the Accused may use his contacts to exert undue influence over potential prosecution witnesses."[52]

27. The Appeals Chamber finds that these two alleged errors fail to demonstrate that the Trial Chamber's conclusion was unreasonable. The Trial Chamber considered the Prosecution's argument in the context of the Accused's prior senior position in Republika Srpska and rejected it on the basis that there was no information as to such retained connections or contacts or evidence that the Accused has, in fact, ever sought to contact or intimidate victims or witnesses or intends to do so.[53] While the Trial Chamber noted that the Accused has been in Belgrade since 1994 and that most of the victims and witnesses are likely to be in Bosnia and Herzegovina,[54] it did not primarily base its decision on these observations. In its Appeal, the Prosecution fails to subsequently provide

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[50] *Ibid. See also Šainović & Odjanić* Decision, para. 8.
[51] Prosecution's Appeal, paras. 17-21.
[52] *Id.*, paras. 15-16.
[53] Impugned Decision, para. 18.

specific information as to the Accused's alleged contacts; instead, it merely argues that the Accused's prior senior position assumes such connections and that he retains them. It states that such specific additional information is only required for low-level accused. The Appeals Chamber does not agree. Furthermore, even if the Trial Chamber failed to give sufficient attention to fact that the Accused, due to his prior senior position, is likely to still have important connections in Bosnia and Herzegovina or elsewhere, the Prosecution has failed to provide any evidence showing that the Accused would represent a concrete risk of harm to victims and witnesses upon release. No information has been provided showing that he has influenced or threatened them in the past or intends to do so in the future.[55]

28. In addition, the Appeals Chamber dismisses the Prosecution's argument that the Trial Chamber erred in failing to take into account the Accused's recently obtained knowledge of potential Prosecution witnesses as an indicator of the increased risk that the Accused will pose to witnesses. As there was no evidence before the Trial Chamber that the Accused has the contacts or intent necessary for exerting influence over witnesses, victims or other persons, it was not obliged to take into account the fact that material recently disclosed to the Accused by the Prosecution provided him with knowledge of potential Prosecution witnesses. In any event, the Appeals Chamber notes that if the Accused has retained the high-level contacts the Prosecution claims he has, it would be reasonable to conclude that he would have been able to identify potential witnesses prior to obtaining this knowledge from the Prosecution, and could have threatened them before the issuance of his indictment and his transfer to the Tribunal. Again, there is no information that he has done so or that he intends to do so. The fact that he has been informed by the Prosecution of potential witnesses does not provide support for the argument that he now has that intent.

IV. DISPOSITION

29. On the basis of the foregoing, the Prosecution's Appeal is **DISMISSED.**

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

Done this 17th day of October 2005.
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[54] *Ibid.*
[55] *Cf. Stanišić* Decision, para. 43.