



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Single Judge Panel**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 9 October 2020

Language: English

Classification: Public

**Consolidated Prosecution response to Defence motions challenging lawfulness of
arrest and requesting release**

Specialist Prosecutor's Office

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees

Duty Counsel for Nasim Haradinaj

Bastiaan Martens

I. INTRODUCTION

1. The Single Judge should dismiss all four Motions.¹ Considering the Assignment Decision² and the Single Judge's resulting authority under the Law³ and Rules,⁴ the First Motion and Third Motion, which challenge the Single Judge's authority and scope of his assignment, necessarily fail. Further, as the Arrest Request and complete supporting materials⁵ were already notified to the Defence for Mr GUCATI ('Defence'), the Second Motion requesting such information is moot. Finally, contrary to the Fourth Motion, Mr GUCATI's continued detention is necessary.

II. SUBMISSIONS

A. THE SINGLE JUDGE HAS AUTHORITY

2. The Defence fails to identify any error in the Single Judge's assignment or exercise of his authority in this matter.⁶ The Law and Rules provide for the arrest,

¹ Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): Request for Assignment of a New Judge to Determine Challenge, 29 September 2020, KSC-BC-2020-07/F00032 ('First Motion'); Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): Request for Disclosure, 29 September 2020, KSC-BC-2020-07/F00033 ('Second Motion'); Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority, 29 September 2020, KSC-BC-2020-07/F00034 ('Third Motion'); Application for Bail, 29 September 2020, KSC-BC-2020-07/F00038 ('Fourth Motion', collectively with the First Motion, Second Motion, and Third Motion, 'Motions'). *See also* Transcript of First Appearance, 1 October 2020, pp.7 (setting the deadline for a consolidated response to the Motions), 17-21 (requesting bail pending determination of the Motions). The request for bail pending determination of the Motions should be dismissed for the same reasons as the Fourth Motion. *See* Section II(C) below.

² Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, 29 May 2018, KSC-BC-2020-07/F00003 ('Assignment Decision'). *See also* Rules on the Assignment of Specialist Chambers Judges from the Roster, KSC-BD-02.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ Confidential Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, KSC-BC-2020-07/F00009/CONF/RED, 1 October 2020, with two annexes ('Arrest Request'). *See also* Public Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, KSC-BC-2020-07/F00009/RED, 1 October 2020, with two public annexes.

⁶ First Motion, KSC-BC-2020-07/F00032, paras 4-5; Third Motion, KSC-BC-2020-07/F00034, paras 6-17.

transfer, and detention of persons prior to confirmation of an indictment.⁷ A Single Judge, once assigned, may exercise such authority.⁸ Indeed, the Assignment Decision explicitly envisaged the issuance of, *inter alia*, arrest warrants and transfer orders as falling within the functions for which the Single Judge was assigned.⁹ Contrary to Defence submissions,¹⁰ the Single Judge's assignment continues to encompass all matters prior to the filing of an indictment. This includes the Motions and any future challenges under Article 41(2).¹¹

B. THE DEFENCE HAS BEEN PROPERLY INFORMED

3. The Arrest Warrant¹² fully informed Mr GUCATI of the reasons for his arrest,¹³ and provided the Defence all necessary information to enable exercise of Mr GUCATI's right to challenge the lawfulness of arrest and conditions of detention.¹⁴ As noted above,¹⁵ the Arrest Request and complete supporting material have also been

⁷ Article 39(3). Other provisions of the Law and Rules, read together, including with Article 39(3), acknowledge the authority to issue warrants, decisions, and orders relating to arrest, transfer, and detention during the investigative stage. *See, for example*, Articles 35(2)(h), 39(4); Rules 48(2), 57(1). The Specialist Chamber of the Constitutional Court has found that the Rules – including Rule 57(1), which specifically concerns detention before assignment of a Pre-Trial Judge – comply with Chapter II the Constitution of the Republic of Kosovo. *In relation to Rule 57(1)*, see Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 22 May 2020, KSC-CC-PR-2020-09, paras 58-75.

⁸ Article 25(1)(a), (f), 33(1)(a), (2). In the Rules, a 'Panel', which is defined as including an 'individual judge' assigned pursuant to Articles 25(1) and 33 (*see* Rule 2(1)), has authority to issue warrants, decisions, and orders related to arrest, transfer, and detention. *See, for example*, Rules 48(2), 50, 53, 56, 57(1).

⁹ Assignment Decision, KSC-BC-2020-07/F00003, para.13. *See also* Assignment Decision, KSC-BC-2020-07/F00003, p.5 (making clear that the assignment lasts for all matters prior to the filing of an indictment).

¹⁰ First Motion, KSC-BC-2020-07/F00032, para.5.

¹¹ *Contra* First Motion, KSC-BC-2020-07/F00032, paras 4-5. The Defence has provided no reason why that should not be the case, and nor is there any such reason, noting, in particular, the availability of an appeal as of right for decisions relating to detention on remand (Article 45).

¹² Public Redacted Version of Arrest Warrant for Hysni Gucati, 24 September 2020, KSC-BC-2020-07/F00012/A01/RED ('Arrest Warrant').

¹³ Article 41(4).

¹⁴ Article 41(2).

¹⁵ *See* para.1 above.

notified to the Defence. The Second Motion, which requests such information,¹⁶ is therefore moot.

C. MR GUCATI'S CONTINUED DETENTION IS NECESSARY

4. For the same reasons set out in the Arrest Warrant, the requirements under Article 41(6) for Mr GUCATI's continued detention are fulfilled.¹⁷

5. Defence submissions misrepresent the Single Judge's findings concerning the crimes and largely ignore the circumstances leading to Mr GUCATI's arrest.¹⁸

6. The Single Judge has found that there is grounded suspicion that Mr GUCATI attempted or committed conduct amounting to (i) 'a serious threat or other means of compulsion to induce another person from making a statement or to make a false statement or to otherwise fail to state true information' to the Specialist Chambers ('SC') and Specialist Prosecutor's Office ('SPO') (KCC¹⁹ Article 387);²⁰ (ii) 'a harmful act with the intent to retaliate for providing truthful information' to the Special Investigative Task Force and/or SPO (KCC Article 388);²¹ and (iii) a violation of the secrecy of proceedings (KCC Article 392).²²

7. On at least three recent occasions, Mr GUCATI participated in the unauthorised dissemination of confidential and non-public information, including the names, places of residence, and/or other personal details of potential witnesses.²³ Mr GUCATI also publicly stated that he would continue to do so.²⁴ The repeated dissemination of

¹⁶ Second Motion, KSC-BC-2020-07/F00033, paras 8-11. Insofar as the Defence relies on Article 21(6), the disclosure obligations, and related timelines, materialise upon confirmation of an indictment. *See also* Rules 102-112. A person only attains 'accused' status upon confirmation of an indictment against him/her. *See* Rule 86(6)(a).

¹⁷ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, paras 4-6. *See also* Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, Section III.

¹⁸ Fourth Motion, KSC-BC-2020-07/F00038, para.6.

¹⁹ Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) ('KCC').

²⁰ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, para.1.

²¹ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, para.2.

²² Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, para.3.

²³ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, paras 1-3. *See also* Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, Sections II-III.

²⁴ *See, for example*, Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, paras 9-10; Annex 1 to Arrest Request, KSC-BC-2020-07/F00009/CONF/RED/A01, p.14.

confidential information persisted even after Mr GUCATI had been personally served with a judicial order, in respect of earlier disclosures, which specifically ordered him to refrain from their dissemination and cautioned him that violation may constitute a criminal offence.²⁵

8. Indeed, after issuance of two judicial orders relating to earlier disclosures, on 22 September 2020, Mr GUCATI publicly stated:²⁶

We told [...] the special court investigators that we will publish all documents we receive, if they are not capable of preventing [them from] being leaked. We want to tell the truth to the citizens of Kosovo that this court is trying by all means to 'lay bare' the KLA, but they will not succeed. It is in vain with all these falsifications they have made.

He thereafter encouraged the media to publish the confidential information, declaring, 'You have the material in front of you, just as you made public the names of fake veterans, take the same courage'.²⁷

9. Following notification of the Arrest Warrant and the finding of a grounded suspicion that he committed crimes, Mr GUCATI's incentives to flee, obstruct proceedings, and commit further crimes have increased. As noted by the Defence,²⁸ the potential maximum sentences for offences under KCC Articles 387, 388, and 392 include substantial fines and up to ten years of imprisonment.²⁹

10. Considered in light of his increased incentives and his declared intentions and motives, as well as his means and opportunity,³⁰ any cooperation during the arrest,³¹ family or community ties,³² or personal assurances to abide by conditions³³ fail to adequately guarantee that Mr GUCATI will not flee, obstruct proceedings, or commit

²⁵ See, for example, Decision Authorising a Seizure, KSC-BC-2020-07/F00007, 17 September 2020, pp.9-10.

²⁶ Annex 1 to Arrest Request, KSC-BC-2020-07/F00009/CONF/RED/A01, p.13.

²⁷ Annex 1 to Arrest Request, KSC-BC-2020-07/F00009/CONF/RED/A01, p.23.

²⁸ Fourth Motion, KSC-BC-2020-07/F00038, para.6(f)-(h).

²⁹ Depending on the consequences or results of the unlawful conduct – for example, death, serious injury, or damage to property – sentences exceeding 10 years of imprisonment are possible (Article 388(5)) or mandated (Article 392(4)).

³⁰ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, paras 4-6. *See also* Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, Section III.

³¹ Fourth Motion, KSC-BC-2020-07/F00038, para.5(a).

³² Transcript of First Appearance, 1 October 2020, p.18.

³³ Fourth Motion, KSC-BC-2020-07/F00038, para.5(c)-(f).

further crimes. Indeed, Mr GUCATI's efforts to discredit the SC/SPO and his participation in public statements by Kosovo Liberation Army War Veterans Association ('KLA WVA') officials that they do not recognise the SC's authority³⁴ demonstrate that Mr GUCATI's personal assurances are unreliable and incapable of mitigating any risks of release. For example, Mr GUCATI, once released, would be able to communicate freely with the media, his network, and others, and thereby, consistent with his declared intentions, continue his efforts to obstruct proceedings and commit further crimes.³⁵

11. Moreover, Mr GUCATI's proposal to surrender his passport – which relates only to the risk of flight and not necessarily any other risks – does not address the fact that international travel from Kosovo is legally³⁶ and illegally³⁷ possible without a passport, including to countries with no obligation to transfer Mr GUCATI to the SC. Finally, the monetary surety proposed by the Defence³⁸ is insufficient to address the concrete risks of release, particularly when considered in light of Mr GUCATI's access to resources through the KLA WVA, estimated to include 40,000 members.³⁹

12. Accordingly, and in particular when balanced against the SPO's commitment to expeditious proceedings in this matter,⁴⁰ the Article 41(6)(b) risks in this case can only be effectively managed in the Detention Centre. Insofar as the Defence raised Mr GUCATI's health issues in connection with its request for release, it does not claim that appropriate accommodation and treatment is unavailable in the Detention

³⁴ See, for example, Annex 1 to Arrest Request, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.7, 9-10, 12.

³⁵ See, similarly, ICC, Appeals Chamber, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on [...]", 26 October 2012, para.80.

³⁶ For example, based on information available on the websites of the relevant Ministries of Foreign Affairs, a passport is not required for Kosovans traveling to, *inter alia*, Montenegro, North Macedonia, and Albania.

³⁷ Arrest Warrant, KSC-BC-2020-07/F00012/A01/RED, para.4; Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, para.20.

³⁸ Fourth Motion, KSC-BC-2020-07/F00038, para.5(a).

³⁹ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.4; Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, para.19.

⁴⁰ Transcript of First Appearance, 1 October 2020, p.15.

Centre.⁴¹ Mr GUCATI's health issues are, on their face, irrelevant to the Article 41(6)(b) risks identified above and there is no compelling reason that they justify release on humanitarian grounds.⁴²

III. RELIEF REQUESTED

13. For the foregoing reasons, the Single Judge should dismiss all four Motions.

Word count: 1942



Jack Smith

Specialist Prosecutor

Friday, 9 October 2020

At The Hague, the Netherlands.

⁴¹ See Transcript of First Appearance, 1 October 2020, pp.18, 26 (Mr GUCATI indicated that his health issues were being taken into account during his arrest and at the Detention Centre). See also KSC-BC-2020-07/F00042, 5 October 2020, Confidential, para.9.

⁴² See Rule 56(3).