



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

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

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Language: English

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Prosecution response to Defence appeal of decisions denying release

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Court of Appeals Panel ('Panel')¹ should summarily dismiss the Appeal² because it is founded on deficient submissions incapable of demonstrating any error in the Decisions.³ Even if the Appeal were to be considered on its merits, the Decisions should be affirmed. The Single Judge,⁴ who had authority under the Law⁵ and Rules⁶ to order Hysni GUCATI's arrest and detention, weighed relevant considerations and, in the proper exercise of his discretion, decided that Mr GUCATI's continued detention is necessary. Having found that the Article 41(6) requirements for arrest and detention were satisfied, the Single Judge correctly determined that the release conditions proposed by the Defence did not adequately address concrete risks that Mr GUCATI will obstruct the progress of proceedings and commit further crimes.

II. BACKGROUND AND PROCEDURAL HISTORY

2. The Defence's inaccurate, incomplete, and selective recitation of facts⁷ should be assessed in light of the following detailed background and procedural history, which ultimately informed and led to the Decisions.

A. FIRST DISCLOSURE

3. On 7 September 2020, Mr GUCATI, head of the Kosovo Liberation Army War Veterans Association ('KLA WVA'), and Mr HARADINAJ, deputy head of the KLA

¹ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07/IA001/F00002, 4 November 2020.

² Notice of Interlocutory Appeal on Behalf of Hysni GUCATI ("the Appellant"), KSC-BC-2020-07/IA001/F00001, 2 November 2020 (notified 3 November 2020) ('Appeal').

³ Decision on Defence Challenges, KSC-BC-2020-07/F00057, 27 October 2020 ('Authority Decision'); Decision on Application for Bail, KSC-BC-2020-07/F00059, 27 October 2020 ('Bail Decision'; collectively with the Authority Decision, 'Decisions').

⁴ See Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, KSC-BC-2020-07/F00003, 29 May 2018. Since the filing of the Appeal, the Single Judge was appointed Pre-Trial Judge in this case. See Order for Submissions on the Conduct of Proceedings Concerning the Review of the Indictment, KSC-BC-2020-07/F00065, 11 November 2020, Confidential.

⁵ 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.

⁶ 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.

⁷ Appeal, KSC-BC-2020-07/IA001/F00001, paras 40-47.

WVA, held a press conference at which Mr GUCATI announced that the KLA WVA had received files relating to the Specialist Chambers ('SC')/SPO ('First Disclosure').⁸ Mr GUCATI then handed the floor over to Mr HARADINAJ.⁹ In Mr GUCATI's presence, Mr HARADINAJ, *inter alia*: (i) announced the names, places of residence and employment, and/or other personal data of (potential) witnesses;¹⁰ (ii) explained that the names, places of residence, telephone numbers, other personal data, statements, and information relating to the interviews of other (potential) witnesses were in the First Disclosure;¹¹ (iii) acknowledged the confidential nature of the documents;¹² (iv) acknowledged the harm and risks posed by disclosure to (potential) witnesses;¹³ (v) stated that the KLA WVA would disseminate the documents forming part of the First Disclosure;¹⁴ and (vi) repeatedly declared and demonstrated that the purpose of the First Disclosure was to obstruct the SC/SPO.¹⁵

4. On 7 September 2020, the Single Judge authorised the seizure of documents forming part of the First Disclosure, recognised the confidential and non-public nature of information from SITF/SPO investigations, and ordered that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('First Order').¹⁶

5. On 8 September 2020, the SPO served the First Order and seized documents at the KLA WVA premises.¹⁷ The seized items included confidential and non-public

⁸ Annex 1 to Request for arrest warrants and related orders, KSC-BC-2020-07/F00009/CONF/RED/A01 ('Press Conference Transcripts'), p.1.

⁹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.1.

¹⁰ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.2.

¹¹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.2-3, 5.

¹² Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.4.

¹³ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.4-5.

¹⁴ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.1, 3-5.

¹⁵ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.1-6.

¹⁶ URGENT Decision Authorising a Seizure, KSC-BC-2020-07/F00005, 7 September 2020.

¹⁷ Prosecution report pursuant to decision KSC-BC-2018-01/F00121, KSC-BC-2020-07/F00008, 21 September 2020, Confidential.

information, including the identities, personal data, and evidence of (potential) witnesses.¹⁸

B. SECOND DISCLOSURE

6. On 16 September 2020, Mr GUCATI and Mr HARADINAJ held a press conference ('Second Press Conference') at which Mr GUCATI stated that the KLA WVA had received another set of documents relating to the SC/SPO ('Second Disclosure').¹⁹ While showing one of the documents, Mr GUCATI named two persons who had cooperated with the SITF and demonstrated his familiarity with contents of at least part of the Second Disclosure.²⁰ Mr GUCATI then handed the floor over to Mr HARADINAJ.²¹

7. In Mr GUCATI's presence, Mr HARADINAJ, *inter alia*: (i) repeated the name of one of the persons already identified by Mr GUCATI;²² (ii) named another person who cooperated with the SITF;²³ (iii) revealed other confidential and non-public information relating to the confidential investigations;²⁴ (iv) told those present at the Second Press Conference that the documents were available for anyone and told those present to take them;²⁵ (v) acknowledged that publication of witness names is illegal;²⁶ (vi) and yet promised to continue disseminating any documents brought to the KLA WVA;²⁷ and (vii) repeatedly declared and demonstrated that the purpose of the Second Disclosure was to obstruct the SC/SPO.²⁸

¹⁸ Confidential Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F00009 dated 22 September 2020, KSC-BC-2020-07/F00009/CONF/RED, 1 October 2020, Confidential ('Arrest Request'), para.6.

¹⁹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.6.

²⁰ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.7, 10.

²¹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.7.

²² Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.7.

²³ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.7.

²⁴ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.7-8, 10.

²⁵ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.9.

²⁶ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.9.

²⁷ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.10.

²⁸ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.6-12.

8. On 17 September 2020, the Single Judge authorised the seizure of documents forming part of the Second Disclosure, recognised the confidential and non-public nature of information from SITF/SPO investigations, and ordered that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('Second Order').²⁹ Later that day, the SPO served the Second Order and seized documents at the KLA WVA premises.³⁰ The seized items included documents (i) relating to confidential SITF investigations, including the identity and/or personal data of (potential) witnesses; and (ii) forming part of the documents seized on 8 September 2020 and subject of the Second Order.³¹

9. During the seizure, in response to a query as to why the KLA WVA had not notified the SPO or Kosovo authorities rather than handing the documents over to the media, Mr GUCATI stated that the KLA WVA does not 'recognise' the SPO.³² Mr GUCATI signed for service of the Second Order.³³

C. THIRD DISCLOSURE

10. On 22 September 2020, Mr GUCATI and Mr HARADINAJ held a press conference ('Third Press Conference') at which Mr GUCATI stated that the KLA WVA had received documents, which they believed had been leaked from the SC/SPO ('Third Disclosure').³⁴ Mr GUCATI acknowledged that they had not been authorised to reveal the names in the Third Disclosure.³⁵ He then showed one of the documents and stated:³⁶

We told [...] the special court investigators that we will publish all documents we receive,[...]. We want to tell the truth to the citizens of Kosovo that this court is trying by all means to 'lay

²⁹ Decision Authorising a Seizure, KSC-BC-2020-07/F00007, 17 September 2020.

³⁰ Prosecution report pursuant to decision KSC-BC-2018-01-F00123, KSC-BC-2020-07/F00028, 29 September 2020, Confidential ('Second Prosecution Report').

³¹ Arrest Request, KSC-BC-2020-07/F00009/CONF/RED, para.8.

³² Second Prosecution Report, KSC-BC-2020-07/F00028, para.2.

³³ Second Prosecution Report, KSC-BC-2020-07/F00028, para.5.

³⁴ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.12.

³⁵ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.12-13.

³⁶ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.13.

bare' the KLA, but they will not succeed. It is in vain with all these falsifications they have made.

Mr GUCATI then handed the floor over to Mr HARADINAJ.³⁷

11. In Mr GUCATI's presence, Mr HARADINAJ, *inter alia*: (i) stated that the documents, based on his understanding, concerned a draft indictment;³⁸ (ii) referring to the contents of the documents, named five potential accused persons;³⁹ (iii) identified one (potential) witness by name;⁴⁰ (iv) identified other persons and locations mentioned in the document;⁴¹ (v) invited those in attendance to look at, record, and publish the contents of the documents;⁴² (vi) stated that the KLA WVA would accept and disseminate further confidential and non-public information;⁴³ and (viii) repeatedly declared and demonstrated that the purpose of the Third Disclosure was to obstruct the SC/SPO.⁴⁴

12. At the end of the Third Press Conference, Mr GUCATI 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'.⁴⁵

13. On 22 September 2020, the SPO issued an order for the production of documents forming part of the Third Disclosure and that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('Third Order').⁴⁶ That same day, the SPO served the Third Order and seized documents at the KLA WVA premises.

³⁷ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.13.

³⁸ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.13.

³⁹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.13-14.

⁴⁰ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.14.

⁴¹ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.14.

⁴² Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.14-16, 19-20, 22-23.

⁴³ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.14-16, 20-21.

⁴⁴ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, pp.12-23.

⁴⁵ Press Conference Transcripts, KSC-BC-2020-07/F00009/CONF/RED/A01, p.23.

⁴⁶ Annex 1 to Prosecution notice and related request, KSC-BC-2020-07/F00010/A01, Confidential.

D. ARREST AND RELATED PROCEEDINGS

14. On 24 September 2020, the Single Judge issued, *inter alia*, the Arrest Warrant.⁴⁷
15. On 25 September 2020, Mr GUCATI was arrested in Kosovo and transferred to the Detention Centre.⁴⁸
16. On 29 September 2020, the Defence submitted, *inter alia*, the (i) Authority Motion,⁴⁹ challenging the Single Judge's authority to issue the Arrest Warrant; and (ii) Bail Motion,⁵⁰ requesting Mr GUCATI's release subject to certain conditions.
17. On 2 October 2020, the SPO responded, submitting that, *inter alia*, the Bail Motion and Authority Motion should be dismissed in their entirety.⁵¹
18. On 27 October 2020, following further filings related to the hearing and resolution of the Authority Motion and Bail Motion,⁵² the Single Judge issued the Decisions, dismissing, *inter alia*, the Authority Motion and Bail Motion.
19. On 30 October 2020, the SPO filed a strictly confidential and *ex parte* indictment before the Pre-Trial Judge for confirmation.⁵³

⁴⁷ Arrest Warrant for Hysni GUCATI, KSC-BC-2020-07/F00012/A01, 24 September 2020, Confidential and Ex Parte ('Arrest Warrant'). *See also* Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00012, 24 September 2020 ('Arrest Decision').

⁴⁸ Report on the Arrest and Transfer of Hysni Gucati to the Detention Facilities, KSC-BC-2020-07/F00031, 30 September 2020, Confidential and *Ex Parte*.

⁴⁹ 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 ('Authority Motion').

⁵⁰ Application for Bail, 29 September 2020, KSC-BC-2020-07/F00038 ('Bail Motion'). *See also* Transcript of First Appearance, 1 October 2020, pp.17-21.

⁵¹ Consolidated Response to Defence Motions Challenging Lawfulness of Arrest and Requesting Release, KSC-BC-2020-07/F00045, 9 October 2020.

⁵² Request for Oral Hearing, KSC-BC-2020-7/F00052, 20 October 2020, Confidential; Prosecution Response to Defence Request for an Oral Hearing, KSC-BC-2020-07/F00053, 21 October 2020, Confidential; Request for an Oral Hearing: Further Note re Prosecution Response to Defence Request for an Oral Hearing, KSC-BC-2020-07/F00054, 21 October 2020, Confidential; Request for an Urgent Response from the Specialist Chambers: Relating to F00052 and F00054, KSC-BC-2020-07/F00056, 27 October 2020.

⁵³ Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07/F00063, 30 October 2020, Strictly Confidential and *Ex Parte*. *See also* Order for Submissions on the Conduct of Proceedings Concerning the Review of the Indictment, KSC-BC-2020-07/F00065, 11 November 2020, Confidential.

20. On 3 November 2020, the Appeal was notified. It challenges the (i) authority of the Single Judge to arrest and detain Mr GUCATI ('First Ground');⁵⁴ and (ii) Single Judge's decision to deny conditional release ('Second Ground').⁵⁵

III. SUBMISSIONS

A. THE APPEAL SHOULD BE SUMMARILY DISMISSED

21. The Appeal is based on deficient, evidently unfounded submissions that do not justify detailed analysis by the Panel and should be summarily dismissed in the interest of fair, efficient, and effective proceedings.⁵⁶ In particular, as set out below,⁵⁷ the Appeal: (i) merely repeats arguments that were unsuccessful before the Single Judge, without demonstrating that their rejection constituted an error warranting the Panel's intervention; (ii) ignores express provisions of the Law; (iii) misrepresents and ignores relevant parts of the factual record and Decisions; (iv) proposes additional release conditions not raised before the Single Judge; and (v) otherwise fails to substantiate alleged errors and demonstrate how they materially affected the Decisions.⁵⁸

22. Should the Panel consider the Appeal on its merits, the Decisions should be affirmed, including for the following reasons.

⁵⁴ Appeal, KSC-BC-2020-07/IA001/F00001, paras 8-31 (under the heading 'First Ground of Appeal – The Appellant's arrest and detention was not lawful and release should be order pursuant to Article 41(2) of the Law' (emphasis removed)).

⁵⁵ Appeal, KSC-BC-2020-07/IA001/F00001, paras 32-58 (under the heading 'Second Ground of Appeal – The Appellant should be granted bail' (emphasis removed)).

⁵⁶ ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ('Krajišnik Appeal Judgment'), para.16.

⁵⁷ See paras 25-26, 30-32.

⁵⁸ See, similarly, *Krajišnik Appeal Judgment*, paras 17-27; IRMCT, Appeals Chamber, *Prosecutor v. Orić*, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para.14; ICC, Appeals Chamber, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20 OA2, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on Defence Request for Interim Release', 8 October 2020 ('*Abd-Al-Rahman Decision*'), para.16.

B. FIRST GROUND: THE SINGLE JUDGE HAD AUTHORITY TO ORDER MR GUCATI'S ARREST AND DETENTION

23. As correctly found by the Single Judge in the Authority Decision,⁵⁹ (i) the Law and Rules provide for the arrest, transfer, and detention of persons prior to confirmation of an indictment;⁶⁰ and (ii) a Single Judge or Pre-Trial Judge, once assigned, may exercise such authority.⁶¹

24. The Defence does not substantiate any error of law, let alone show that any such error materially affected or invalidated the Authority Decision.⁶²

25. In its First Ground, the Defence largely repeats, word for word, submissions already unsuccessful before the Single Judge⁶³ and does not attempt to demonstrate that the Single Judge's rejection of these submissions constituted an error warranting the Panel's intervention.

26. The only Defence argument not already considered and rejected by the Single Judge – namely, that only the SPO, not a SC judge, may arrest and detain a person during the investigative stage⁶⁴ – is illogical and baseless. It ignores Article 41(3), which provides that a SC judge must decide on the detention or release of any person

⁵⁹ Authority Decision, KSC-BC-2020-07/F00057, paras 29-31.

⁶⁰ 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. *See also* Authority Decision, KSC-BC-2020-07/F00057, para.29 (considering that the standard for arrest ('grounded suspicion') is lower than that required for an indictment ('well-grounded suspicion'), indicating that a person may be arrested without an indictment having been submitted against that person).

⁶¹ 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). *See also* Authority Decision, KSC-BC-2020-07/F00057, para.30.

⁶² *Krajišnik* Appeal Judgment, para.12. *See also Abd-Al-Rahman* Decision, paras 14, 16.

⁶³ *Compare* Appeal, KSC-BC-2020-07/IA001/F00001, paras 8-15, 17-25, 30-31 *with* Authority Motion, KSC-BC-2020-07/F00034, paras 1-17.

⁶⁴ Appeal, KSC-BC-2020-07/IA001/F00001, paras 26-29.

deprived of their liberty without an order from the SC,⁶⁵ and other provisions of the Law and Rules, which provide SC judges authority to order arrest and detention before confirmation of an indictment.⁶⁶

C. SECOND GROUND: THE SINGLE JUDGE CORRECTLY FOUND THAT CONTINUED DETENTION IS NECESSARY

27. As correctly found by the Single Judge in the Bail Decision, Mr GUCATI's continued detention is necessary and proportional because, as required by Article 41(6): (i) there is grounded suspicion that he committed crimes within the SC's jurisdiction; (ii) there are concrete risks that he will flee, obstruct proceedings and commit further crimes;⁶⁷ and (iii) conditions proposed by the Defence do not adequately address risks that Mr GUCATI will obstruct proceedings or commit further crimes.⁶⁸ Further, since the Bail Decision, in the interest of expeditious proceedings, including minimising the length of any detention on remand, an indictment has already been submitted and is currently under review.

28. The Bail Decision was discretionary.⁶⁹ Accordingly, the Panel should not conduct a *de novo* review.⁷⁰ The relevant inquiry is whether the Single Judge correctly exercised his discretion in reaching the Bail Decision, not whether the Panel agrees.⁷¹ The Panel should affirm the Bail Decision because the Defence failed to demonstrate that it was: (i) based on an incorrect interpretation of governing law; (ii) based on an

⁶⁵ See also Authority Decision, KSC-BC-2020-07/F00057, para.29.

⁶⁶ See fn.60 above.

⁶⁷ See Arrest Decision, KSC-BC-2020-07/F00012, Section IV(B). See also Bail Decision, KSC-BC-2020-07/F00059, para 12 (as the Defence did not substantiate its challenge to the existence of a grounded suspicion and did not challenge the prior assessment of the Article 41(6)(b) risks, the Single Judge did not revisit his findings thereupon).

⁶⁸ Bail Decision, KSC-BC-2020-07/F00059, paras 12, 16-20. See also Article 41(12) (identifying measures other than detention on remand which may be ordered 'to prevent reoffending or to ensure the successful conduct of criminal proceedings').

⁶⁹ Article 41(12) (providing that measures in addition to detention 'may be ordered by the Specialist Chambers'). See also ICTY, *Prosecutor v. Mladić*, Appeals Chamber, IT-09-92-AR65.1, Public Redacted Version of "Decision on Interlocutory Appeal Against Decision on Urgent Defence Motion for Provisional Release" Issued on 27 June 2017, 30 June 2017 ('*Mladić Decision*'), para.3.

⁷⁰ *Mladić Decision*, para.3. See also *Abd-Al-Rahman Decision*, para.13.

⁷¹ *Mladić Decision*, para.3. See also *Abd-Al-Rahman Decision*, para.15.

incorrect conclusion of fact; or (iii) so unfair and unreasonable as to constitute an abuse of discretion.⁷² Further, the Single Judge did not give weight to extraneous or irrelevant considerations and gave sufficient weight to relevant considerations in reaching the Decisions.⁷³

29. In reaching his decision, the Single Judge assessed the risks of Mr GUCATI's release against the proposed release conditions.⁷⁴ In this context, he correctly considered that: (i) Mr GUCATI participated in the unauthorised dissemination of confidential and non-public information; (ii) such dissemination continued after the First Order and Second Order; (iii) Mr GUCATI publicly stated that he and the KLA WVA would continue to publish all documents they received and encouraged members of the media to do the same; (iv) if released, Mr GUCATI 'would be in a position to receive, without oversight, confidential and non-public information' and 'would also have the means to disseminate such information by communicating freely with the media or his network of KLA veterans or publishing the material himself'; and (v) any personal assurances to abide by conditions cannot be relied upon in light of Mr GUCATI's public statements vowing to continue to disclose confidential and non-public information and his failure to abide by the orders of the Single Judge.⁷⁵

30. The Defence's mere repetition of submissions previously unsuccessful before the Single Judge⁷⁶ cannot demonstrate that the Single Judge's rejection of these submissions constituted an error warranting the Panel's intervention. The Defence also proposes new release conditions not presented to the Single Judge,⁷⁷ which

⁷² *Mladić* Decision, para.4. See also *Abd-Al-Rahman* Decision, paras 14-15.

⁷³ *Mladić* Decision, paras 4, 6. See also *Abd-Al-Rahman* Decision, para.15.

⁷⁴ Bail Decision, KSC-BC-2020-07/F00059, paras 12, 16-21. *Contra* Appeal, KSC-BC-2020-07/IA001/F00001, para.55.

⁷⁵ Bail Decision, KSC-BC-2020-07/F00059, para.17. 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.

⁷⁶ *Compare* Appeal, KSC-BC-2020-07/IA001/F00001, paras 32-36, 38, 47-51, 54 with Bail Motion, KSC-BC-2020-07/F00038, paras 1-6.

⁷⁷ Appeal, KSC-BC-2020-07/IA001/F00001, para.54.

should not be considered for the first time on appeal⁷⁸ and in any event, are necessarily inadequate, insofar as they still rely on the personal assurances of Mr GUCATI.⁷⁹

31. Further, the Defence misrepresents or ignores, *inter alia*, the following parts of the factual record, which further demonstrate the concrete risks of Mr GUCATI's release and the inadequacy of the release conditions proposed by the Defence:

- i. Mr GUCATI and Mr HARADINAJ, in Mr GUCATI's presence, acknowledged that they were aware of the confidential and non-public nature of the information they were disclosing, without authorisation;⁸⁰
- ii. Mr HARADINAJ, in Mr GUCATI's presence, acknowledged the harm and risks to (potential) witnesses posed by unauthorised dissemination of confidential and non-public information identifying them;⁸¹
- iii. Mr GUCATI acknowledged that they had not been authorised to reveal the names contained in the Third Disclosure;⁸²
- iv. Mr HARADINAJ, in Mr GUCATI's presence, acknowledged that dissemination of the identities of (potential) witnesses could be illegal;⁸³
- v. Mr GUCATI and Mr HARADINAJ, in Mr GUCATI's presence, repeatedly encouraged further dissemination of confidential and non-public information relating to the SC/SPO and promised to continued publishing all documents received;⁸⁴ and
- vi. Mr GUCATI and Mr HARADINAJ, in Mr GUCATI's presence, repeatedly declared and demonstrated their intention to obstruct the SC/SPO.⁸⁵

32. Finally, the Defence erroneously claims that the Single Judge incorrectly found that Mr GUCATI failed to abide by the Single Judge's orders.⁸⁶ While the First Order

⁷⁸ See para.21 above.

⁷⁹ See Bail Decision, KSC-BC-2020-07/F00059, para.17.

⁸⁰ See, for example, paras 3, 10 above. *Contra* Appeal, KSC-BC-2020-07/IA001/F00001, para.46.

⁸¹ See, for example, para.3 above. *Contra* Appeal, KSC-BC-2020-07/IA001/F00001, para.47.

⁸² See, for example, para.10 above. *Contra* Appeal, KSC-BC-2020-07/IA001/F00001, para.46.

⁸³ See, for example, para.7 above. *Contra* Appeal, KSC-BC-2020-07/IA001/F00001, para.46.

⁸⁴ See paras 3, 6-7, 9-12 above.

⁸⁵ See paras 3, 6-7, 9-12 above.

⁸⁶ Appeal, KSC-BC-2020-07/IA001/F00001, para.56.

and Second Order related to particular documents,⁸⁷ they also generally acknowledged the confidential and non-public nature of information from SITF/SPO investigations, which should not be disseminated without authorisation.⁸⁸ Accordingly, in finding that personal assurances to abide by conditions were insufficient guarantees of compliance therewith, the Single Judge reasonably relied on, *inter alia*, Mr GUCATI's continuing participation in dissemination of confidential and non-public information after the issuance of the First Order and Second Order,⁸⁹ the latter having been personally served on Mr GUCATI.⁹⁰ The Defence ignores the evidence that, regardless of the scope of the First Order and Second Order,⁹¹ Mr GUCATI was aware of the confidential and non-public nature of the information being disseminated and that it should not be disclosed without authorisation.⁹²

IV. RELIEF REQUESTED

33. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

Word count: 3880



Jack Smith

Specialist Prosecutor

Friday, 13 November 2020

At The Hague, the Netherlands.

⁸⁷ First Order, KSC-BC-2020-07/F00005, para.22; Second Order, KSC-BC-2020-07/F00007, para.22.

⁸⁸ First Order, KSC-BC-2020-07/F00005, paras 11-13; Second Order, KSC-BC-2020-07/F00007, paras 11-13. *See also* paras 4, 8 above.

⁸⁹ *See* paras 6-7, 10-12 above.

⁹⁰ *See* para.8 above.

⁹¹ Further, certain of the documents forming part of the Second Disclosure also formed part of the First Disclosure, and were therefore subject to the First Order. *See* para.8 above.

⁹² *See* para.31 above.