KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-07**
Before:	**The Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Kai Ambos
Registrar:	Fidelma Donlon
Date:	9 December 2020
Original language:	English
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Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to 33(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of an interlocutory appeal filed by Hysni Gucati ("Gucati")[2] against the Single Judge's decisions related to the legality of his arrest and his application for bail.[3] The Specialist Prosecutor's Office ("SPO") responded on 13 November 2020.[4] Gucati filed his reply on 19 November 2020.[5]

I. BACKGROUND

1. On 25 September 2020, the Single Judge, Judge Nicolas Guillou, issued warrants for the arrest of Gucati and Nasim Haradinaj,[6] upon request of the SPO,[7] along with orders for their transfer to the detention facilities of the Specialist Chambers in The Hague.[8] The arrest warrant for Gucati was issued for offences

[1] F000002, Decision Assigning a Court of Appeals Panel, 4 November 2020.
[2] F00001/A01, Notice of Interlocutory Appeal on Behalf of Hysni Gucati ("the Appellant"), 3 November 2020, and Notice of Interlocutory Appeal on Behalf of Hysni Gucati ("the Appellant"), 3 November 2020, Annex 1 ("Appeal").
[3] F00057, Decision on Defence Challenges, 27 October 2020 ("Decision on Defence Challenges"); F00059, Decision on Application for Bail, 27 October 2020 ("Decision on Request for Bail").
[4] F00003, Prosecution Response to Defence Appeal of Decisions Denying Release, 13 November 2020 ("Response").
[5] F00004, Appellant Reply to Prosecution Response, 19 November 2020 ("Reply").
[6] F000128/A01/RED, Public Redacted Version of Arrest Warrant for Hysni Gucati, 25 September 2020 ("Arrest Warrant"); F00012/A03/COR/RED, Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj, 26 September 2020 (original version filed on 22 September 2020). See also F00012, Decision on Request for Arrest Warrants and Transfer Orders, 24 September 2020 (strictly confidential and *ex parte*, reclassified as public on 9 October 2020) ("Decision on Arrest Warrants").
[7] F00009/RED, Public Redacted Version of 'Urgent Request for Arrest Warrants and Related Orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, with public Annexes 1-2, 1 October 2020 ("SPO Request for Arrest Warrants"). The SPO request is based on Articles 35(2), 39(3) and 41 of the Law and Rules 48, 50, 53 and 55 of the Rules. See SPO Request for Arrest Warrants, para. 1.
[8] F00012/A02/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 24 September 2020; F00012/A04/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 24 September 2020.

against the administration of justice punishable under the Kosovo Criminal Code by virtue of Article 15(2) of the Law.[9]

2. On 25 September 2020, the Suspects were arrested in Kosovo.[10] Gucati was transferred to the Specialist Chambers' detention facilities the same day.[11]

3. On 30 September 2020, Gucati filed three motions challenging the lawfulness of his arrest and one motion for his release on bail.[12] On 9 October 2020, the SPO filed a consolidated response opposing the requests.[13]

II. STANDARD OF REVIEW

4. Article 45(2) of the Law stipulates that:

> Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel […].

5. At the outset, the Court of Appeals Panel observes that neither the Law nor the Rules specify the standard of review to be applied to interlocutory appeals.[14] However, Article 46(1) of the Law does specify the grounds on which appeals against judgement can be filed:

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[9] Arrest Warrant, paras 1-3.
[10] F00015, Notification of Arrest Pursuant to Rule 55(4), 25 September 2020; F00016, Notification of Arrest Pursuant to Rule 55(4), 25 September 2020.
[11] F00018, Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers, 25 September 2020, with confidential Annex 1.
[12] F00032, Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): Request for Assignment of a New Judge to Determine Challenge, 30 September 2020; F00033, Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): Request for Disclosure, 30 September 2020; F00034, Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant Was Issued Without Lawful Authority, 30 September 2020 ("Challenge to the Lawfulness of the Arrest"); F00038, Application for Bail, 30 September 2020.
[13] F00045, Consolidated Prosecution Response to Defence Motions Challenging Lawfulness of Arrest and Requesting Release, 9 October 2020.
[14] Rule 113(6) of the Rules is the only exception, specifying that a Party can seek certification to appeal a decision concerning victim participation "only on grounds of an error of law".

(i) an error on a question of law invalidating the judgement;

(ii) an error of fact which has occasioned a miscarriage of justice; or

(iii) [an error in sentencing].

6. Article 46(2) of the Law further provides that "[a]n appeal is not a trial *de novo*".

7. The Law states in relation to errors of law that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.[15]

8. Regarding errors of fact, the Law provides the following:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[16]

9. The Specialist Chambers are not unique in lacking explicit statutory elaboration of standards of review for interlocutory appeals. The Statutes and Rules of Procedure and Evidence of the ICTY, ICTR, IRMCT, ICC, SCSL and STL are also silent on this point.

10. The Court of Appeals Panel notes that these tribunals elaborated applicable interlocutory standards through their respective jurisprudence, including for discretionary decisions. The Panel therefore considers that it has the same authority to determine the standard of review applicable to interlocutory appeals filed before

[15] Article 46(4) of the Law.
[16] Article 46(5) of the Law.

the Specialist Chambers. Accordingly, the Panel will apply the standard already provided for appeals against judgements *mutatis mutandis* to interlocutory appeals.

11. The Law clearly stipulates that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other criminal courts.[17] The Court of Appeals Panel considers that these subsidiary sources can also guide the Judges' reflection in instances where primary sources do not provide guidance on a specific matter such as the standard to be applied to interlocutory appeals. In light of this, the Court of Appeals Panel considers that it has the inherent right to set its standard of review taking into account the relevant case law of international criminal tribunals.

12. It is not any and every error of law or fact that will cause the Court of Appeals Panel to overturn an impugned decision. A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law.[18]

13. The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding. It is not any error of fact that will cause the Panel to overturn a decision by a lower level panel, but only one that has caused a miscarriage of justice. In determining whether a finding was

[17] Article 3(3) of the Law.
[18] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, 29 November 2017 ("*Prlić et al.* Appeal Judgement"), para. 19; ICTR, *Prosecutor v. Nyiramasuhuko et al*., ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al*. Appeal Judgement"), paras 30, 31; IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ("*Karadžić* Appeal Judgement"), para. 15; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013 ("*Taylor* Appeal Judgement"), para. 25; STL, *Prosecutor v. Ayyash et al*., STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, para. 10.

reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.[19]

14. If the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[20] The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[21]

III. DISCUSSION

A. PRELIMINARY MATTERS

1. Gucati's Appeal Filed as of Right

15. Article 45(2) of the Law provides that interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion

[19] ICTY, *Prlić et al.* Appeal Judgement, para. 21; ICTR, *Nyiramasuhuko et al*. Appeal Judgement, para. 32; IRMCT, *Karadžić* Appeal Judgement, para. 17; SCSL, *Taylor* Appeal Judgment, paras 26-27.
[20] See, for example, ICTY, *Prosecutor v. Haradinaj et al*., IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal Against Decision on Remand on Provisional Release, 8 December 2009, para. 5; IRMCT, *Prosecutor v. Turinabo et al,* MICT-18-116-AR68.2/3, Decision on Prosecution Appeal Against the Decision Granting Fatuma Provisional Release, 9 August 2019, para. 5; IRMCT, *Prosecutor v. Turinabo et al,* MICT-18-116-AR68.5, Decision on Prosecution Appeal Against the Decision Granting Turinabo and Ndagijimana Provisional Release, 5 August 2019, para. 6; ICC, *Prosecutor v. Abd-Al-Rahman,* ICC-02/05-01/20_177, Judgment on the Appeal of Mr Muhammad Ali Abd-Al-Rahman Against the Decision of the Pre-Trial Chamber II of 14 August 2020 entitled "Decision on the Defence Request for Interim Release", 8 October 2020, paras 13-15; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-601-Red, Judgment on the Appeal of Mr Al Hassan Against the Decision of the Pre-Trial Chamber I entitled '*Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense*', 19 February 2020, paras 37-40; SCSL, *Prosecutor v. Fofona*, SCSL-04-14-AR65, Appeal Against Decision Refusing Bail, 11 March 2005, para. 20.
[21] *Ibid.*

challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification.[22]

16. Gucati filed the Appeal as of right,[23] notwithstanding the Single Judge's invitation to seek certification to appeal the Decision on Defence Challenges.[24] Before addressing the merits of Gucati' submissions, the Court of Appeals Panel must satisfy itself that the Appeal is validly filed as an appeal as of right.

17. The Court of Appeals Panel considers that Gucati's first ground of appeal does not constitute a challenge to the jurisdiction of the Specialist Chambers since his submissions do not pertain to personal, territorial, temporal or subject matter jurisdiction, but rather challenge the legality of his arrest.[25] The Panel, however, finds that a challenge to the legality of a person's arrest falls into the broader category of challenges to detention on remand for which an appeal lies as of right.[26]

18. Gucati's second ground of appeal – challenging the Single Judge's finding that his continued detention is necessary – clearly relates to his detention on remand for which an appeal lies as of right.

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[22] Article 45(2) of the Law.
[23] Appeal, paras 4-7; Reply, para. 23.
[24] Decision on Defence Challenges, para. 47.
[25] It is noted that in the *Tolomir* case, the ICTY Appeals Chamber found that challenges to the legality of the arrest of a person could not be considered as an appeal on jurisdiction. See ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.2, Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009, paras 11-13, referring to ICTY, *Prosecutor v. Nikolić*, IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003, p. 3.
[26] The judgement of the Specialist Chamber of the Constitutional Court issued on 26 May 2020 provided that the period to be taken into consideration in determining the length of detention pending trial for the purposes of Article 29(2) of the Constitution of Kosovo and Article 5(3) of the ECHR begins on *the day the accused is taken into custody* and ends when he or she is released or the charge is determined, even if only by a panel of first instance. See KSC-CC-PR-2020-09/F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, ("Judgment of the Specialist Chamber of the Constitutional Court of 26 May 2020") para. 62 (emphasis added). See also ECtHR, *Buzadji v. the Republic of Moldova*, no. 23755/07, Judgment, 5 July 2016, para. 85 (stating that the period to be taken into consideration when considering pre-trial detention "starts when the person is arrested").

19. For these reasons, the Appeal is admissible in this respect. While this determination is a prerequisite for the Court of Appeals Panel to exercise its jurisdiction, this is, however not sufficient to justify its intervention. Proceedings before the Court of Appeals Panel are corrective in nature. Accordingly, any ground of appeal that fails to comply with formal requirements on appeal, and particularly the failure to provide reasoning or set forth basis for an appeal, may be dismissed *in limine*.[27]

2. Formal Requirements on Appeal

20. The Court of Appeals Panel observes that on appeal, Gucati repeats arguments that were rejected by the Single Judge, largely fails to substantiate any allegation of error,[28] or simply states that the Single Judge was wrong.[29]

21. The SPO responds that the Appeal should be dismissed because Gucati merely disagrees with the Single Judge without demonstrating any errors.[30] Gucati replies by clarifying that he intends to raise an error of law with regard to his first ground of appeal while his second ground of appeal raises a "question of judgement".[31] The Court of Appeals Panel finds that these arguments should have been provided in the Appeal and not raised for the first time in reply, so that the opposing party is not deprived of an opportunity to respond.[32]

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[27] See, for example, ICC, *Prosecutor v. Bemba Gombo et al*., ICC-01/05-01/13-2275-Red, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Magenda Kabongo, Mr Fidèle Balala Wandu and Mr Narcisse Arido Against the Decision of the Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, para. 530. See also Article 46(2) of the Law, which states that an appeal is not a trial *de novo*.

[28] Compare Appeal, paras 8-15, 17-25, 30-31 with Challenge to the Lawfulness of the Arrest, paras 1-17. See also Response, fn. 63.

[29] Appeal, paras 53, 56, 58.

[30] See, for example, Response, paras 21, 30.

[31] Reply, paras 9, 10, 12-15, 18-19, 21-23.

[32] IRMCT, *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Motion for Access to Prosecution Requests for Assistance and Responses Thereto, 18 April 2019, fn. 22. See also Article 50(1) of the Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers (KSC-BD-15), which states that "briefs in reply submitted pursuant to Rules 179(3) and 186(3) of the Rules shall […] be limited to arguments in reply to the brief in response".

22. The Court of Appeals Panel is mindful of relevant jurisprudence allowing summary dismissal of similarly ill grounded and unsubstantiated arguments.[33] The Panel has nevertheless decided to consider the Appeal, given that the challenges raised therein relate to Gucati's fundamental rights, including his right to liberty.

B. GUCATI'S FIRST GROUND OF APPEAL: ALLEGED ERROR CONCERNING SINGLE JUDGE'S AUTHORITY TO ISSUE ARREST WARRANT

23. Gucati submits that his arrest was not lawful and that he should be released in accordance with Article 41(2) of the Law.[34] According to Gucati, the Law provides for only two possibilities to detain a person before trial.[35]

24. In Gucati's view, Article 39(3) of the Law provides the Pre-Trial Judge with the power to issue an arrest warrant and this power cannot be exercised before the filing of an indictment.[36] Gucati contends that Rule 57(1) of the Rules, which relates to the detention of a suspect, does not allow for the issuance of an arrest warrant by a Single Judge either.[37] Gucati emphasises that for a detention to be lawful, it must be effected in conformity with the applicable substantive and procedural provisions.[38] Moreover, Gucati argues that his arrest should have been ordered by the SPO according to Article 35(2)(h) of the Law[39] and that the failure to do so deprived him of the additional protections offered to a suspect during the investigative stage.[40]

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[33] ICTY, *Prosecutor v. Milošević,* IT-98-29/1-A, Judgement, 12 November 2009, para. 17; ICTY, *Prosecutor v. Strugar,* IT-01-42-A, Judgement, 17 July 2008, paras 18-24; ICTY, *Prosecutor v. Brđanin,* IT-99-36-A, Judgement, 3 April 2007, paras 17-31.
[34] Appeal, paras 8-31; Reply, paras 21, 38.
[35] Appeal, paras 12-15, 26-28; Reply, paras 24, 26, 29-35 (referring to the power of the Pre-Trial Judge under Article 39(3) of the Law and the power of the SPO under Article 35(2)(h) of the Law).
[36] Appeal, paras 12-15, 26, 28, 30; Reply, paras 24-26.
[37] Appeal, para 25; Reply, paras 27, 34-36. According to Gucati, Rule 57(1) only applies to detention ordered by the SPO under Article 35(2)(h) of the Law. See Appeal, paras 25-26; Reply, para. 27.
[38] Reply, paras 2, 39.
[39] Reply, para. 37.
[40] Reply, para. 38.

25. The SPO responds that Gucati largely repeats arguments that were rejected by the Single Judge, without demonstrating any errors. According to the SPO, the new argument advanced by Gucati, namely that only the SPO can arrest an individual during the investigation stage, is illogical and baseless.[41]

26. When addressing the question of his competence in issuing an arrest warrant, the Single Judge observed that since a Pre-Trial Judge is assigned only upon the filing of an indictment, any arrest of a suspect would necessarily have to be ordered and reviewed by a Single Judge assigned pursuant to Article 33(2) of the Law.[42] The Single Judge further found that the Specialist Chambers' provisions do not limit the competence for issuing an arrest warrant to the Pre-Trial Judge.[43]

27. While the Court of Appeals Panel, for the reasons explained below, agrees that the competence for issuing an arrest warrant is not the sole prerogative of the Pre-Trial Judge, the Panel nonetheless finds that the Arrest Warrant issued by a Single Judge is wrongly based on Article 39(3) of the Law.[44] Clearly, Article 39(3) of the Law expressly refers to the power of the Pre-Trial Judge to issue an arrest warrant upon the filing of an indictment and does not apply to the powers that a Single Judge may have when assigned pursuant to Article 33(2) of the Law.[45]

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[41] Response, paras 24-26. In addition, according to the SPO, this argument ignores Article 41(3) of the Law as well as other provisions of the Specialist Chambers which provide the judges with the authority to order arrest and detention of persons before confirmation of an indictment. Response, paras 23-26. Whether Article 41(3) of the Law provides some clarity on this point is unpersuasive as it refers to detention "without an order from the Specialist Chambers". Instead, Article 41(3) of the Law relates to the power of the SPO to order the arrest of a person during the investigative stage of the proceedings according to Article 35(2)(f) of the Law.

[42] Decision on Defence Challenges, para. 30.

[43] Decision on Defence Challenges, para. 30.

[44] Appeal, paras 12-15. See also Decision on Defence Challenges, p. 1; Arrest Warrant, p. 1. Other findings of the Single Judge on this matter also refer to Article 39(3) of the Law and to the powers of the Pre-Trial Judge. See, for example, Decision on Request for Arrest Warrants, para. 8.

[45] See Article 39(3) of the Law. See also F00003, Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, 29 May 2018 ("Decision Assigning Single Judge").

28. The Court of Appeals Panel considers however that the reliance on Article 39(3) of the Law in the Arrest Warrant does not necessarily render Gucati's detention unlawful as long as the issuance of an arrest warrant by the Single Judge was otherwise permitted by the Specialist Chambers' legal framework and the material conditions provided for by the applicable procedural provisions on detention have been met.

29. In this respect, the Panel first recalls the equal status of all Judges of the Specialist Chambers, independent of their concrete assignment. The Court of Appeals Panel further observes that, unlike the provisions explicitly setting forth the powers and functions of the Pre-Trial Judge,[46] the Trial Panel,[47] the Court of Appeals Panel and the Supreme Court Panel,[48] the power attributed to a Single Judge is defined only under the broad chapeau of Article 33(2) of the Law. According to this provision, a Single Judge may be assigned to deal with a matter which requires the assignment of a Judge other than the Pre-Trial Judge.[49]

30. A review of the relevant Specialist Chambers' provisions is useful to determine whether, in the absence of an explicit provision granting a Single Judge the power to issue an arrest warrant against a suspect, such power nonetheless exists. The Court of Appeals Panel is mindful of the fact that where there is a conflict between the Law and the Rules, the Law shall prevail.[50] The Panel further finds the doctrine of "harmonious interpretation" adopted by the Specialist Chamber of the Constitutional Court to be instructive in this respect.[51] In its review of the Rules, subject to being

[46] Article 39 of the Law.
[47] Article 40 of the Law.
[48] Articles 46 and 47 of the Law.
[49] Article 33(2) of the Law. The Decision Assigning Single Judge also noted the "broad scope" of Article 33(2) of the Law. See Decision Assigning Single Judge, para. 14.
[50] See Rule 4(2) of the Rules. See also Article 19(3) of the Law, which states that the Rules shall be consistent with this law.
[51] This is a general doctrine in (comparative) constitutional law, see for France ("concordance pratique") Morand, C.-A., "Vers une méthodologie de la pesée des valeurs constitutionnelles" in *De la Constitution. Études en l'honneur de Jean-François Aubert*, Helbing & Lichtenhahn 1996, p. 57; for Germany ("praktische

bound by the plain meaning of the text, the Specialist Chamber of the Constitutional Court "does not construe a rule in isolation but in the context of the other rules and the relevant provisions of the Law as to harmonise therewith".[52]

31. First, Rule 2 of the Rules defines an arrest warrant as issued by the Specialist Chambers against a suspect, an accused or a witness pursuant to Article 41(6) or Article 42(8) of the Law. The general reference to the "Specialist Chambers" cannot be interpreted as excluding Single Judges or as referring exclusively to Pre-Trial Judges. The same reasoning applies to Article 41(6) of the Law, according to which only the Specialist Chambers or the Specialist Prosecutor shall order the arrest and detention of a person. If the Law intended to limit the Judges' power to issue an arrest warrant exclusively to the Pre-Trial Judge, it would have said so.

32. Rule 48(2) of the Rule states in relevant part that a "Panel" may issue arrest warrants as necessary for the purposes of the investigation. Rule 2 of the Rules defines a Panel as either a Panel or an individual Judge. Rule 53 of the Rules provides that a Panel may issue an arrest warrant if it is satisfied that the conditions set out in Article 41(6) of the Law are met.

33. In addition to provisions referring to the "Specialist Chambers" or to a "Panel" and not exclusively to the Pre-Trial Judge, other provisions envision the possibility that an arrest warrant be issued before an indictment has been confirmed. For example, Rule 57(1) of the Rules refers to the detention of a suspect before the

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Konkordanz") Hesse, K., *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, C.F. Müller 1999 (reprint 20th ed. 1995), para. 2 mn. 72. In the U.S., albeit common law is less striving for systematic coherence, the same principle is, arguably, captured by the interpretive rule of the "Harmonious-Reading Canon" (meaning that the provisions of a text should be interpreted in a way that renders them compatible, not contradictory), cf. Scalia, A. and Garner, B.A., *Reading Law: The Interpretation of Legal Texts*, Thomson Reuters 2012, pp. 383-388.

[52] Judgment of the Specialist Chamber of the Constitutional Court of 26 May 2020, para. 16. See also KSC-CC-PR-2017-01, The Specialist Chamber of the Constitutional Court, Judgment, 26 April 2017, para. 14 ("Judgment of the Specialist Chamber of the Constitutional Court of 26 April 2017").

assignment of a Pre-Trial Judge and provides that the suspect's detention shall be reviewed by a Single Judge assigned pursuant to Article 33(2) of the Law.

34. Rule 71(1) of the Rules further demonstrates that the issuance of an arrest warrant by a Judge independently of an indictment is possible, by providing for provisional measures for the preservation of assets and referring to measures that can be taken where "an arrest order or arrest warrant has been issued or an indictment has been confirmed […]". The Court of Appeals Panel recalls in this respect that an arrest warrant is issued by a Judge while an arrest order is issued by the SPO.[53] Therefore, provisional measures for the preservation of assets can be ordered when an arrest warrant was issued by a Judge, whether or not an indictment has been filed.

35. In light of the above, the Court of Appeals Panel finds that the interpretation put forward by Gucati suggesting that there is a lacuna in the Specialist Chambers' provisions cannot be upheld. Rather, the Court of Appeals Panel is satisfied that a harmonious interpretation of the Specialist Chambers' provisions confirms that a Single Judge assigned pursuant to Article 33(2) of the Law has the power to issue an arrest warrant before the filing of an indictment.[54]

36. The Court of Appeals Panel now turns to Gucati's apparent allegation of prejudice as a result of the additional protections he argues he would have had if he had been arrested by the SPO.[55] Specifically, Gucati contends that if his arrest had been ordered by the SPO, a decision on his detention would have been taken within 48 hours of his arrest as required by the Article 41(3) of the Law. Instead, a decision on his detention was only taken by the Single Judge on 27 October 2020. In addition, Gucati submits that, in accordance with Rule 57(1) of the Rules, any request for an

[53] Rule 2 of the Rules.
[54] See also Decision Assigning Single Judge, paras 13-14.
[55] Reply, paras 35-38.

extension of his detention should have been justified by the need to conduct further investigations, which the SPO failed to provide since the hearing of 1 October 2020.[56]

37. The Court of Appeals Panel finds that Gucati's argument is without merit. Contrary to Gucati's assertion, the decision on his detention was not taken on 27 October 2020, when the Single Judge issued the Decision on Defence Challenges or the Decision on Request for Bail. Rather, it was taken on 25 September 2020 with the issuance of the Decision on Arrest Warrants and the issuance of the Arrest Warrant.[57] These documents provided Gucati with a concise statement of the facts underpinning his arrest, a legal finding that the criteria enumerated under Article 41(6) of the Law were met, and his rights upon arrest.[58]

38. The Court of Appeals Panel further finds that Rule 57(1) of the Rules does not refer to the Single Judge's duty to decide on detention, but instead to his power to review whether the initial conditions for the detention continue to be met. In the present case, the hearing that took place on 1 October 2020 was a first appearance hearing under the provisions of Article 41 of the Law and Rule 55(6) of the Rules.[59] The purpose of this hearing was not to review Gucati's detention under Rule 57(1) of the Rules.[60]

39. Accordingly, the issuance of an arrest warrant by a Judge, in this case the Single Judge, offered Gucati rather more than less protection. The Court of Appeals Panel finds that by requesting the act of deprivation of liberty to be scrutinised and supervised by an independent judicial authority, the SPO went above and beyond

[56] Reply, paras 35-38.
[57] See fn. 6 above.
[58] Arrest Warrant, paras 1-10; Decision on Arrest Warrants, paras 18-36.
[59] Transcript 20 October 2020, p. 8. See also Transcript 20 October 2020, p. 26.
[60] Given that a Pre-Trial Judge has been assigned to this case, Rule 57(2) of the Rules applies and requires that Gucati's detention be reviewed within two months from the last ruling on detention. See F00061, Decision Assigning a Pre-Trial Judge, 29 October 2020. – The Panel notes in passing that the date of the last ruling on detention is 27 October 2020. See Decision on Defence Challenges, Decision on Request for Bail.

what was required by the Law and acted in accordance with the very purpose of Article 5 of the ECHR, namely to protect the individual from arbitrariness.[61]

40. For the foregoing reasons, the Court of Appeals Panel finds that Gucati does not demonstrate that the Single Judge committed an error of law. The Panel therefore dismisses Gucati's first ground of appeal.

C. GUCATI'S SECOND GROUND OF APPEAL: ALLEGED ERROR CONCERNING SINGLE JUDGE REFUSAL TO GRANT BAIL

1. Preliminary Observation: The Concept of Discretion

41. The concept of discretion employed by the case law cited elsewhere in this decision and discussed by the SPO and by Gucati,[62] has for a long time sparked heightened controversy in legal-philosophical discourse and is far from clear.[63] While it is generally agreed that discretion involves choice, there is little consensus on further defining elements,[64] not least because it can be approached from legal, empirical, sociological, jurisprudential, psychological, and functional perspectives.[65] Black's Law Dictionary defines discretion as 'freedom in exercise of judgment; the power of free decision-making'.[66] Jowitt's Dictionary of English Law provides the definition of "a

[61] See, for example, ECtHR, *Witold Litwa v. Poland,* no. 26629/95, Judgment, 4 April 2020, para. 78; ECtHR, *S. V. and A. v. Denmark*, no. 35553/12, 36678/12 and 36711/12, Judgment, 22 October 2018 ("*S. V. and A. v. Denmark* Case"), para. 74; ECtHR, *Ruslan Yakovenko v. Ukraine*, no 5425/11, Judgment, 4 September 2015, para. 45; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, Judgment, 13 December 2012, paras 230, 231. See also F00120, Urgent Request for arrest warrants and related orders, filing KSC-BC-2020-07/F0009 dated 22 September 2020, 1 October 2020, para. 32, clearly showing the SPO's commitment to act in conformity with Gucati's fundamental rights.

[62] SPO Response, para. 28; Gucati Reply, paras 9-14.

[63] The Panel draws here on a forthcoming paper by Alexander Heinze and Shannon Fyfe, to be published in Ambos, K., Duff, A., Roberts, J. and Weigend, T., *Core Concepts in Criminal Law and Criminal Justice.* Volume 2, Cambridge University Press 2021. For a good overview from a comparative and international perspective, see also Meyer, F., "Discretion", in Dubber and Hörnle (eds), *Oxford Handbook of Criminal Law*, Oxford University Press 2014 ("Meyer, *Discretion*"), pp. 913 ff.

[64] G.C. Christie, "An Essay on Discretion" (1986) 5 *Duke Law Journal* ("Christie, *Discretion*"), p. 747.

[65] Meyer, *Discretion*, p. 922. See also Fletcher, G.P., "Some Unwise Reflections About Discretion" (1984) 47 *Law and Contemporary Problems*, pp. 269 ff.

[66] Garner, B.A. (ed.), *Black's Law Dictionary* (11th Edition), Thomson West 2019, p. 585.

man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind".[67] The Compact Oxford English Dictionary, drawing on Isaacs early work,[68] refers to "[t]he action of discerning or judging", "[t]he faculty of discerning".[69] Meyer provides, on the basis of a thorough overview, a broad definition referring to "the legal powers given to a judge to choose from among a number of possibilities, each of them lawful in the context of the system."[70]

42. These kinds of nutshell definitions are largely informed by the modern legal philosophical debate which probably started with the seminal work of Davis from 1969 who, besides stressing the freedom of choice,[71] focuses on facts: "Exercising discretion may be a part of finding facts and applying law, and finding facts may be a part of exercising discretion".[72] Facts are then complemented by "values, and influences",[73] as what the Court of Appeals Panel could call the normative (value-based) side of discretion. For the judicial context highly relevant is Rosenberg's distinction between primary and secondary discretion.[74] While the former refers to the already mentioned "wide range of choice" of the decision-maker, secondary discretion "has to do with hierarchical relations among judges", especially in the context of appellate review, as a "review-restraining concept", where "the rules of review accord the lower court's decision an unusual amount of insulation from

[67] Jowitt, W. et al., *Jowitt's Dictionary of English Law*, Thomson 1977, p. 624. See also Gill, N. et al, "The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals" (2018) 27(1) *Social and Legal Studies*, pp. 49, 51.
[68] Isaacs, N., "The Limits of Judicial Discretion" (1923) 32 *Yale Law Journal*, pp. 339-343.
[69] Wiener, E.S.C. and Simpson, J.A. (eds), *The Compact Oxford English Dictionary*, Oxford University Press 1987, p. 444 [756]: "The action of discerning or judging", "[t]he faculty of discerning".
[70] Meyer, *Discretion*, p. 924 (referring to Barak, A., *Judicial Discretion*, Yale University Press 1989, p. 90).
[71] Davis, K.C., *Discretionary Justice*, Louisiana State University Press 1969, p. 15 ("[a] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction").
[72] *Ibid.*, p. 16.
[73] *Ibid.*
[74] Rosenberg, M., "Judicial Discretion of the Trial Court, viewed from above" (1971) 22 *Syracuse Law Review* ("Rosenberg, *Discretion*"), pp. 635-637.

appellate revision".[75] For Dworkin, while also referring to the importance of choice,[76] the standards guiding discretion are more important than the concept itself.[77] He famously asserts: "Discretion, like a hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept".[78] Dworkin further distinguishes between a "strong" sense and two "weak" senses of discretion, his second "weak" sense resembling Rosenberg's – here especially relevant – secondary discretion explaining the limited scope of the (appellate) review.[79]

43. Against this background it is not surprising that in domestic jurisdictions the standard of judicial review is limited. Thus, in England and Wales the threshold is one of 'unreasonableness', i.e. judges only intervene "when an administrative authority has acted so unreasonably that no reasonable authority could so act".[80] Generally speaking, courts will only interfere with discretionary decisions under limited and exceptional circumstances conditions.[81] In Germany and England/Wales combined, those conditions are: first, where the exercise of discretion is based on an erroneous interpretation of the law; second, where it is exercised on patently incorrect conclusion

[75] *Ibid.*, pp. 637, 638, 643 ff. (at p. 648 also referring to 'appellate deference'). See also Christie, *Discretion*, pp. 747, 748.
[76] Dorkin, R., "Judicial Discretion" (1963) 60(21) *The Journal of Philosophy*, p. 624 ("[…] force the judge to *choose* a solution […] exercise of judicial choice or discretion […]" (emphasis in original)).
[77] Dworkin, R., *Taking Rights Seriously*, Harvard University Press 1977, p. 31 ("[t]he concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority").
[78] *Ibid.*
[79] *Ibid.*, pp. 32-33 ("Sometimes, we use the term in a different weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official […].").
See also Christie, *Discretion*, p. 750.
[80] Künnecke, M., *Tradition and Change in Administrative Law – An Anglo-German Comparison*, Springer 2007, p. 15; Kischel, U., *Comparative Law*, Oxford University Press 2019, mn. 289.
[81] For England and Wales, see, for example, *English Court of Appeals, R v West Sussex Quarter Sessions*, 1973; English Court of Appeals, *Charles Osenton v. Johnston*, 1942; English Court of Appeals, *Holland v. Holland*; for Germany, see, for example, Bundesgerichtshof (German Federal Court of Justice), BGHSt. 6, 298-300; BGHSt. 10, 327-329; BGHSt. 18, 238.

of fact; or third, where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[82]

44. Thus, while it is clear, that discretion speaks to the finality of a decision of the trier of fact in the sense of the limited authority of a (hierarchically) higher entity to overturn the decision, this does not answer the question as to which decisions can be considered as discretionary ones and how they can be differentiated from non-discretionary decisions. Indeed, scant attention is not only paid to this question by domestic jurisdictions[83] but also by the international criminal tribunals. An important reason for this lacuna is the difficult distinction between non-discretionary and discretionary decisions. In fact, since legal terms and provisions are by definition normative and thus ambiguous, one may argue that all decisions are discretionary ones.[84] What is certain however – even from a semantic point of view – is that discretion too involves some sort of constraint.[85] The present decision is not the place to delve into this matter further but it suffices to affirm that decisions on pre-trial detention and provisional release are traditionally characterised as discretionary

[82] See for Germany BGHSt 4, 255; BGHSt 5, 283; BGHSt 6, 199, 200; BGHSt 9, 71, 72; BGHSt 22, 267; 39, 200. See also BGH JR 1955, 190; JR 1956, 426; BVerfGE 9, 223; BVerfGE 12, 333. The Panel notes in passing, though, that in Germany the judicial review of undefined legal concepts – where the official authority does not enjoy discretion but *Beurteilungsspielraum* (margin of appreciation or scope for judgment, equivalent to the concept of 'interpretive judgment' in the Common Law tradition) – is unlimited. Indeed, judges are even entitled to exercise a *de novo* review, *i.e.* they define the undefined/vague concepts themselves and do not ask whether the agency's application was correct (cf. Kischel, U., *Comparative Law*, Oxford University Press 2019, mn. 290).

[83] See crit. Rosenberg, *Discretion*, pp. 535, 653 ("scant attention […] *where* it ought to be given and *how* it ought to be given" (emphasis in original)).

[84] See also Meyer, *Discretion*, pp. 913, 923 ("All matters of legal interpretation (or adjudication) are to some inevitable extent discretionary in nature"), also p. 928.

[85] For an illustrative example, see Greenawalt, K., Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges", (1975) 75(2) *Columbia Law Review*, p. 365: "When a person's choice is not constrained at all we would not ordinarily use the term 'discretion'. We say an official has 'discretion' to pick employees for a company, but we do not say a child has 'discretion' to choose the flavour of ice cream he wants".

decisions.[86] The relevant international case law has adopted the same position.[87] The Court of Appeals Panel will return to the relevant provions, especially the ones of the Specialist Chambers, below.

2. Assessment of Gucati's Second Ground of Appeal

45. In his second ground of appeal, Gucati challenges the Decision on Request for Bail. Gucati acknowledges the Single Judge's finding that the conditions proposed in his application for bail ("Proposed Conditions") adequately addressed the risk of flight.[88] Gucati submits, however, that the Single Judge erred in deciding that the Proposed Conditions were insufficient to address the risk that he may obstruct the proceedings or that he may commit further offences.[89] Gucati further argues that the Single Judge was wrong in dismissing other arguments he submitted in addition to the Proposed Conditions.[90]

46. The SPO responds that the Single Judge correctly exercised his discretion and appropriately found that Gucati's continued detention is necessary.[91] The SPO contends that Gucati's misrepresentation of the facts underpinning his arrest further

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[86] See e.g. Gottfredson, M.R. and Gottfredson, D.M., *Decision Making in the Criminal Justice System. Toward the Rational Exercise of Discretion* (Second Edition), Springer 1988, pp. 82-91 (dedicating a whole chapter on pre-trial release decisions). See also Gatgens, E., *Ermessen und Willkür im Straf- und Strafverfahrensrecht*, Peter Lang 2007, pp. 278 ff.

[87] See fn. 20 above. See also ECCC, *Prosecutor v. Chea and Samphan*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, paras 19, 53; on the ECCC and generally see Starygin, S., "Judicial Discretion in ECCC Decisions on Pre-Trial Detention Against the Backdrop of the Case-law of the International Criminal Tribunals" (2011) 11 *International Criminal Law Review*, pp. 315–358.

[88] Appeal, para. 37.

[89] Appeal, paras 32-38, 47-58. See also Reply, para. 19. Gucati generally argues that the orders made by the Single Judge were complied with. Gucati further provides an overview of his interpretation of the events alleged in the SPO request for arrest warrants. See Reply, paras 40-46, 56. Under the subtitle "Background and procedural history", the SPO responds with its own interpretation of the events alleged in the SPO request for arrest warrants. See SPO Response, paras 3-13, 32. The Parties are reminded that they will have the opportunity to address the substance of this case during trial, if the Pre-Trial Judge decides to confirm the indictment submitted by the SPO. See, for example, Response, para. 19.

[90] Appeal, para. 58.

[91] Response, paras 27-30.

demonstrates that his release would entail concrete risks.[92] To the SPO's view, Gucati merely repeats arguments that failed at trial[93] and it contends that Gucati's proposal to strengthen the Proposed Conditions should be dismissed.[94]

47. Gucati replies that the decision as to whether the grounds for detention under Article 41(6) of the Law are met is a question of judgement, not an exercise of discretion.[95] Gucati further submits that even when the grounds for detention under Article 41(6) of the Law are met, this does not necessarily means that detention must be ordered.[96]

48. At the outset, the Court of Appeals Panel will address the nature of decisions on provisional release. The Panel sees some merits in Gucati's submission that if the grounds for detention under Article 41(6) of the Law are not met, there is no discretion and detention cannot be ordered.[97] Indeed, this interpretation reflects the plain meaning of Article 41(6) of the Law, according to which the Specialist Chambers or the SPO "shall only order" the arrest and detention of a person when the conditions detailed within the same Article are met.

49. The very fact that there is discretion does not mean, as explained above, that a judge may circumvent the plain meaning of the Law. Discretion is a rules-based concept, it does not allow for lawless, arbitrary decisions. Thus, in the case at hand, the Judge has the discretion to evaluate the circumstances of a detained person who applies for provisional release. The weight to be attributed to guarantees such as the Proposed Conditions may depend on numerous factors. Because of the fact-specific

[92] Response, paras 2, 31- 32.
[93] Response, para. 30.
[94] Response, para. 33.
[95] Reply, paras 9, 10, 12-14, 19. There are some inconsistencies in Gucati's arguments. He also submits that to the extent that the Single Judge had any discretion in the matter, his release should be ordered in light of the arguments developed in the Appeal. Gucati Reply, para. 20.
[96] Reply, para. 16. Gucati recalls that the deprivation of liberty is the exception rather than the rule and that the right of liberty as well as the presumption of innocence comes down firmly in favour of the individual. See Reply, para. 17.
[97] Reply, paras 9-10.

nature of provisional release decisions,[98] the Single Judge is better placed to assess these factors. Accordingly, the Court of Appeals Panel will not intervene, unless the appellant demonstrates the existence of a discernible error.

50. This concept of discretion and the way it applies is, for example, well reflected in the rules of the ICTY, ICTR, and IRMCT dealing with the procedures for provisional release applications as they require that trial chambers "satisfy themselves" that if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person.[99] For the ICC, Article 60(2) of the Rome Statute provides a test for the determination of applications for pre-trial release: if the pre-trial chamber is "satisfied" that the conditions set forth in Article 58(1) of the Rome Statute for the issuance of a warrant of arrest[100] are met, the person shall continue to be detained.[101]

51. In comparison, while provisional release is envisioned at the Specialist Chambers,[102] there is no specific provisions on the standard to be applied by a Judge

[98] The ICTY Appeals Chamber has observed that because of the fact-specific nature of provisional release decisions, the relevant criteria are best assessed by the Trial Chambers, and that the Appeals Chamber will not reverse such a decision absent a showing of discernible error. See, for example, ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 14, *citing* ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 15.

[99] See ICTY, ICTR Rule 65(B) of Procedure and Evidence; IRMCT Rule 68(B) of Procedure and Evidence. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.

[100] Article 58 of the Rome Statute (Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear), para. 1: "[a]t any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."

[101] ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-1, Under Seal, Decision on the Prosecutor's Application for a Warrant of Arrest of Mbarushimana, 28 September 2010 ("*Mbarushimana* Decision"), paras 47-50.

[102] See Articles 41(5), 41(12) of the Law; Rule 56 of the Rules.

when considering a request for provisional release.[103] The Law, however, implicitly empowers the Judge to assess whether the Proposed Conditions "eliminate all the Article 41(6)(b) risks" as correctly stated by the Single Judge.[104] The Court of Appeals Panel therefore considers that, similarly to the procedure applied at the ICC, if a Specialist Chambers Judge addressing a request for provisional release is "satisfied" that the conditions set forth in Article 41(6)(b) of the Law are met, the person shall continue to be detained. In that sense, provisional release decisions are discretionary.

52. The Panel will now turn to address Gucati's specific challenges.

3. The Risk That Gucati May Obstruct the Proceedings or Commit Further Offences

53. Gucati submits that the Single Judge erred in deciding that the Proposed Conditions were insufficient to address the risk that he may obstruct the proceedings or that he may commit further offences.[105]

54. Gucati further argues that the Single Judge failed to properly address each of the Proposed Conditions that he erroneously qualified as "personal assurances"[106]. He also wrongly concluded that Gucati failed to abide by the orders of the Single Judge.[107]

55. In support of his assertion that the conditions for bail are met, Gucati repeats some of the arguments he submitted to the Single Judge either during his initial appearance or in his application for bail.[108] He further suggests that the Proposed

[103] On that matter, Gucati also submits that the provisions for arrest and detention at the ICC and the ICTY are different from the Specialist Chambers' provisions. Reply, paras 8-9.
[104] Decision on Request for Bail, para. 2.
[105] Appeal, paras 32-38, 47-57. See also Reply, para. 19.
[106] Appeal, para. 55.
[107] Appeal, para. 56. See fn. 89 above.
[108] Compare F00038, Application for Bail, 30 September 2020, para. 6, with Appeal, paras 47-52. Gucati repeats that there is no suggestion of force or threats being used; no suggestion of actual harm being caused to any person; that the maximum custodial sentence for similar offences is rather low; that he is a man of good character, a family man; and that he cooperated with the SPO during his arrest. See also Transcript 1 October 2020, p. 18, line 5, to p. 21, line 2.

Conditions could be strengthened in order to satisfy the Court of Appeals Panel that bail should be granted.[109]

56. The Court of Appeals Panel recalls the relevant provisions of Article 41(1) and (6) of the Law:

> 1. No one shall be deprived of his or her liberty by or on behalf of the Specialist Chambers or Specialist Prosecutor, save in such circumstances and in accordance with such proceedings as are prescribed by this Law and the protections enshrined in Article 29 of the Constitution.
>
> [...]
>
> 6. The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
>
> a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
>
> b. there are articulable grounds to believe that:
>
> i. there is a risk of flight;
>
> ii. he or she will [...] obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
>
> iii. [there is a risk that] he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

57. The Court of Appeals Panel finds no merit in Gucati's contention that the Single Judge failed to properly address each of the Proposed Conditions. The Decision on Request for Bail shows that the Single Judge clearly assessed the Proposed Conditions in accordance with Article 41(6)(b) of the Law.[110]

[109] Appeal, paras 54, 57. Gucati offers to include a requirement, for example, that he does not enter Pristina, and/or a requirement that he has access to a single electronic device for communication only, the details of which he is to provide to the SPO.
[110] Decision on Request for Bail, paras 6, 17-20.

58. Specifically, the Single Judge recalled that Gucati participated in the unauthorised dissemination of confidential and non-public information and that the dissemination persisted even after Gucati was ordered on two occasions to refrain from doing so.[111]

59. The Single Judge found that none of the Proposed Conditions would adequately guarantee that Gucati would not obstruct the progress of proceedings or that he would not commit further crimes.[112] The Single Judge further found that "[a]ny personal assurances to refrain from such conduct cannot be relied upon in light of [Gucati's] public statements vowing to continue to disclose confidential information and his failure to abide by the orders of the Single Judge".[113]

60. The Court of Appeals Panel considers that the manner in which the Single Judge refers to Gucati's conduct must be understood in light of his analysis and eventual finding under Article 41(6) of the Law that the evidence establishes a "grounded suspicion" that Gucati "committed a crime within the jurisdiction of the Specialist Chambers".[114] The Panel notes that Gucati does not challenge the Single Judge's finding in this respect.[115]

61. In any event, the Court of Appeals Panel recalls relevant ICC jurisprudence according to which "the extent of the reasoning will depend on the circumstances of the case", and that the obligation to provide reasons "will not necessarily require reciting each and every factor that was before the [relevant chamber] to be

[111] Decision on Request for Bail, paras 16-18.
[112] Decision on Request for Bail, paras 18, 20.
[113] Decision on Request for Bail, paras 17, 19.
[114] See Article 41(6) of the Law.
[115] See Appeal.

individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion".[116]

62. In addition to the allegations presented by the SPO, a review of the Decision on Request for Bail further shows that the Single Judge also implicitly considered the position held by Gucati, who is the Head of the KLA War Veterans Association. Indeed, the Single Judge observed that, if released, there is a risk that Gucati would continue to disseminate confidential information by communicating freely with the media or his network of KLA veterans or publishing the material himself. [117]

63. The Court of Appeals Panel sees no error in the Single Judge's reliance on the allegations presented by the SPO and on Gucati's position as indicating contact and network that could create the risk that Gucati may obstruct the proceedings or that he may commit further offences.[118]

64. The Court of Appeals Panel finds that Gucati merely disagrees with the Single Judge[119] and provides his own interpretation of the events that occurred on 7, 16, 17 and 22 September 2020.[120] An appellant's mere disagreement with the conclusions that the first instance Panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.[121]

65. In view of the foregoing, the Court of Appeals Panel finds – in line with the standard of review explained above – that Gucati fails to demonstrate that the Single

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[116] ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-177, 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 the Defence Request for Interim Release", 8 October 2020, para. 42.
[117] Decision on Request for Bail, paras 16-18.
[118] See, for example, ICC, *Mbarushimana* Decision, paras 48-50; ICC, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09-3, Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al-Bashir, 4 March 2009, para. 233.
[119] Appeal, para. 38.
[120] Appeal, paras 40-46. See also above, fn. 88.
[121] ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-3249-Red, Public Redacted Version of Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", 20 May 2015, para. 18.

Judge's findings were not reasonable and that he committed a discernible error in his assessment as to whether Gucati's detention is necessary under Article 41(6) of the Law.

66. In reaching this conclusion, the Court of Appeals Panel is mindful of the additional conditions proposed by Gucati in the Reply, such as the requirement, for example, that he does not enter Pristina, and/or allow him access to a single electronic device for communication only, the details of which he is to provide to the SPO.[122]

67. The Court of Appeals Panel is of the opinion that the additional conditions proposed by Gucati would not have changed the decision of the Single Judge. In that regard, the Panel recalls that in determining the necessity of detention, "[t]he question revolves around the possibility, not the inevitability, of a future occurrence".[123] In the specific context of this case, the Panel finds that Gucati does not demonstrate how the additional conditions he proposes mitigate the risk or the possibility that he may obstruct the proceedings or that he may commit further offences.

4. Other Arguments Presented in Addition to the Proposed Conditions

68. Gucati argues that the Single Judge was wrong to disregard his cooperation upon arrest, the lack of an indictment, the non-violent nature of the offences under investigation, the lack of alleged actual threats or harm, and the possible minimal penalties associated with the relevant offences ("Additional Arguments").[124]

69. In the Decision on Request for Bail, after having reached his conclusion that Gucati's detention was necessary, the Single Judge referred to the Additional Arguments. He took note of these factors but found that they did not undermine the assessment of the risk that Gucati could obstruct proceedings and commit further

[122] Appeal, para. 54.
[123] ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-283, Judgment on the Appeal of Mr Callixte Mbarushimana Against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011, para. 60.
[124] Appeal, para. 58.

crimes or make continued detention unreasonable or disproportionate in the circumstances.[125]

70. The Court of Appeals Panel observes that the Single Judge did not address in detail each of the submissions listed above, but is of the view that he had no obligation to do so.[126] Indeed, the Panel recalls its finding that Gucati failed to demonstrate that the Single Judge committed a discernible error in his assessment as to whether Gucati's detention is necessary under Article 41(6) of the Law. There was no absolute requirement for the Single Judge to take into account factors other than those provided for in Article 41(6) of the Law before ordering that detention shall continue.

71. With regard to the possible minimal penalties associated with the relevant offences, the Court of Appeals Panel notes that the public interest of protecting the integrity of proceedings through effective prosecution of offences against the administration of justice cannot be underestimated. Offences against the administration of justice, while not as grave as the core crimes under Articles 13 and 14 of the Law, are serious offences.

72. The Court of Appeals Panel takes the present opportunity to stress that the nature of the offence as well as the severity of the penalty are important factors to consider when deciding whether detention is necessary in the circumstances of a specific case. In that regard, the ECtHR confirmed that detention pursuant to Article 5(1)(c) of the ECHR embodies a proportionality requirement. As a consequence, the ECtHR applies a proportionality test when considering whether an applicant's detention on remand was strictly necessary to ensure his presence at the trial or whether other, less stringent, measures could have been sufficient for that purpose.[127]

[125] Decision on Request for Bail, para. 24.
[126] See para. 61 above.
[127] ECtHR, *S. V. and A. v. Denmark*, para. 161; ECtHR, *Ladent v. Poland,* no. 11036/03, Judgment, 18 March 2008, para. 55; ECtHR, *Ambruszkiewicz v. Poland,* no. 38797/03, Judgment, 4 May 2006, paras 29-32.

This is in line with the practice of other human rights bodies[128] and the international criminal tribunals.[129] Most importantly, the Charter of Fundamental Rights of the European Union for the first time explicitly makes clear that "[a]ny limitation on the exercise of rights and freedoms" is "[s]ubject to the principle of proportionality".[130]

73. The Court of Appeals Panel is fully aware of the severe restriction of fundamental rights of a person caused by a deprivation of liberty. It is also aware of the importance of a proportionality requirement in this regard.[131] Indeed, it notes that

[128] See IACtHR, *Dorzema et al. v. Dominican Republic*, Judgment, 24 October 2012, para. 133; IACtHR, *Panday v. Suriname*, Judgment, 21 January 1994, para. 47. In these cases, the IACtHR has considered that "no one may be subjected to detention or imprisonment for reasons and by means that – although they are classified as legal – may be considered incompatible with respect for the fundamental human rights, because they are, *inter alia*, unreasonable, unpredictable or *disproportionate*." (emphasis added). See also, IAComHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, Principle III ("Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and *proportionality*, to the extent strictly necessary in a democratic society" (emphasis added). See also, under Article 9 of the ICCPR, HRCom, *Mikhail Marinich v. Belarus,* Communication no. 1502/2006, Views, 19 August 2010, para. 10.4; HRCom, *Kulov v. Kirghizistan*, Communication No. 1369/2005, Views, 19 August 2010, para. 8.3; HRCom, *Fongum Gorji-Dinka v. Cameroon*, Communication no. 1134/2002, Views, 17 March 2005, para. 5.1; HRCom, *Mukong v. Cameroon*, Communication no. 458/1991, Views, 10 August 1994, para. 9.8.

[129] See ICTY, *Prosecutor v. Blagojević et al.,* IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, 28 March 2002, para. 18 ("Moreover, when interpreting Rule 65, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when (1) it is suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, that measure must be applied"). See also ICTY, *Prosecutor v. Hadžić*, IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of the Proceedings, 4 March 2016, paras 24-25; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Anselme Nzabonimpa's Second Motion for Provisional Release, 19 June 2019, para. 20. This is also in line with the practice of domestic jurisdictions, see, for example in Germany, BVerfGE 19, 342, 347-48; BVerfGE 20, 45, 49.

[130] Art. 52(1) of the Charter goes on to clarify that such "limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." See also Art. 49(3) of the Charter where the principle is for the first time mentioned explicitly regarding penalties; thereto Ambos, K. *European Criminal Law*, Cambridge University Press 2018 ("Ambos, *European Criminal Law*"), pp. 145-146.

[131] See Judgment of the Specialist Chamber of the Constitutional Court of 26 April 2017, paras 112-114. See generally Steiker, C.S., "Proportionality as a Limit on Preventive Justice", in Ashworth, A., Zedner, L. and Tomlin, P (eds), *Prevention and the Limits of Criminal Law*, Oxford University Press 2013, pp. 194 ff. (referring explicitly to pre-trial detention at p. 198); Billis, E., Knust, N. and Rui, J.P. (eds), *Proportionality in Criminal Control and Criminal Justice*, Hart 2021 (forthcoming).

the longer a person remains in pre-trial detention the higher the burden on the Specialist Chambers to justify continued detention.[132] However, in the case at hand, the Panel considers, noting that Gucati has been detained since 25 September 2020 and that more than two months after his arrest an indictment against him has yet to be confirmed,[133] that detention is still proportional at this early stage of the proceedings.

74. The Court of Appeals Panel accordingly dismisses Gucati's submission that the Single Judge was wrong to disregard the Additional Arguments. Having found that Gucati failed to demonstrate that the Single Judge committed a discernible error, the Panel dismisses Gucati's second ground of appeal.

D. GUCATI'S REQUEST FOR HEARING

75. In the Reply, Gucati submits that an oral hearing should be granted ("Request for Hearing") given that: (i) the Appeal concerns one of the core fundamental human rights, namely the right to liberty; (ii) the Appeal raises a novel point; and (iii) a request for an oral hearing at first instance was refused by the Single Judge.[134]

76. The Court of Appeals Panel recalls that Rule 170(3) of the Rules provides that "unless otherwise decided by the Court of Appeals Panel, interlocutory appeals shall be determined on the basis of written submissions". The Panel further observes that the Request for Hearing was presented by Gucati in the Reply rather than in the Appeal, thus depriving the SPO of an opportunity to respond in this respect. The Panel will nonetheless rule on this request, as its ruling will not prejudice the SPO.

77. The decision to grant an oral hearing is a matter of discretion.[135] Gucati does not argue and does not attempt to demonstrate that the Single Judge abused his discretion

[132] See, for example, IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Order to Show Cause, 1 October 2019, paras 11-13.
[133] See, for example, Response, para. 19.
[134] Reply, para. 40.
[135] See, for example, ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 17. See also ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-

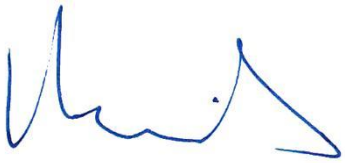
when deciding not to convene a hearing. Moreover, such a request may be regarded as unnecessary when, as in the present case, the information before the Court of Appeals Panel is sufficient to enable the issuance of its decision. Accordingly, Gucati's request in this respect is dismissed.

IV. DISPOSITION

78. For these reasons, the Court of Appeals Panel:

REJECTS the Request for Hearing; and

DENIES the Appeal in its entirety.



Judge Michèle Picard,
Presiding Judge

Dated this Wednesday, 9 December 2020

At The Hague, the Netherlands.

01/13-558, Judgment on the Appeal of Mr Aîme Kilolo Musamba Against the Decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the *Demande de mise en liberté provisoire de Maître Aime Kilolo Musamba*", 11 July 2014, paras 47-48.

V. ANNEX: DEFINED TERMS AND ABBREVIATIONS

Appeal

KSC-BC-2020-07/IA001/F00001/A01, Notice of Interlocutory Appeal on Behalf of Hysni Gucati ("the Appellant"), 3 November 2020, and Notice of Interlocutory Appeal on Behalf of Hysni Gucati ("the Appellant"), 3 November 2020, Annex 1 (public)

BGH

Bundesgerichtshof ([German] Federal Court of Justice)

BGHSt

Bundesgerichtshof für Strafsachen (Criminal Law Panels of the BGH)

BVerfGE

Bundesverfassungsgericht Entscheidungen (Decisions of the [German] Constitutional Court)

Court of Appeals Panel or Panel

Panel of the Court of Appeals Chamber of the Kosovo Specialist Chambers

ECCC

Extraordinary Chambers in the Courts of Cambodia

ECHR

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

ECtHR

European Court of Human Rights

ff.

Refers to page or line mentioned and two or more pages or lines after it

fn.

footnote (footnotes)

Gucati

Mr. Hysni Gucati

HRCom

Human Rights Committee

IAComHR

Inter-American Commission of Human Rights

IACtHR

Inter-American Court of Human Rights

ICC

International Criminal Court

ICCPR

International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTY

International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

IRMCT

International Residual Mechanism for Criminal Tribunals

JR

Juristische Rundschau

KLA

Kosovo Liberation Army

Law

Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office

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p. (pp.)

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Reply

KSC-BC-2020-07/IA001/F00004, Appellant Reply to Prosecution Response, 19 November 2020 (public)

Response

KSC-BC-2020-07/IA001/F00003, Prosecution Response to Defence Appeal of Decisions Denying Release, 13 November 2020 (public)

Rome Statute

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002

Rules

Rules of Procedure and Evidence before the Kosovo Specialist Chambers (updated version entered into force on 2 June 2020)

SCSL

Special Court for Sierra Leone

Specialist Chambers

Kosovo Specialist Chambers

SPO

Specialist Prosecutor's Office

STL

Special Tribunal for Lebanon

Suspects

Mr. Hysni Gucati and Mr. Nasim Haradinaj

Transcript

Transcript from hearings in the present case, all references are to the official English transcript, unless otherwise indicated