



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 Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Fidelma Donlon

**Date:** 9 February 2021

**Original language:** English

**Classification:** Public

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**Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention**

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**Specialist Prosecutor's Office:**

Jack Smith

**Counsel for Nasim Haradinaj:**

Toby Cadman  
Carl Buckley

**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)<sup>1</sup> acting pursuant to Article 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 the “Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj” filed on 5 January 2021,<sup>2</sup> challenging, *inter alia*, the “Decision on Review of Detention of Nasim Haradinaj” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 15 January 2021 that the Appeal should be summarily dismissed, but nonetheless presented arguments on the issues raised by Haradinaj in case the Court of Appeals Panel would decide to address the merits of the Appeal.<sup>4</sup> Haradinaj filed his reply on 20 January 2021.<sup>5</sup>

## I. BACKGROUND

1. On 25 September 2020, Haradinaj was arrested in Kosovo pursuant to an arrest warrant issued by the Single Judge.<sup>6</sup> He was transferred to the Detention Facilities of the Specialist Chambers in The Hague on 26 September 2020.<sup>7</sup>

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<sup>1</sup> F00002, Decision Assigning a Court of Appeals Panel, 6 January 2021.

<sup>2</sup> F00001, Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, 5 January 2021 (“Appeal”).

<sup>3</sup> F00094, Decision on Review of Detention of Nasim Haradinaj, 24 December 2020.

<sup>4</sup> F00003, Prosecution response to Defence appeal on review of detention of Nasim Haradinaj, 15 January 2021 (“Response”).

<sup>5</sup> F00004, Defence Reply to Specialist Prosecutor’s Response to Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, 20 January 2021 (“Reply”).

<sup>6</sup> F00016, Notification of Arrest Pursuant to Rule 55(4), 25 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020); F00012/A03/COR/RED, Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj, 26 September 2020 (original version filed on 24 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 Request for Arrest Warrants dated 24 September 2020”).

<sup>7</sup> F00020, Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers, 26 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020).

2. On 29 September 2020, Haradinaj's first appearance before the Single Judge took place.<sup>8</sup> The same day, he filed a request for his immediate release from detention.<sup>9</sup> On 27 October 2020, the Single Judge rendered a decision rejecting this request.<sup>10</sup>
3. On 29 October 2020, the President assigned the Pre-Trial Judge to this case.<sup>11</sup>
4. On 30 October 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Co-Accused Gucati and Haradinaj.<sup>12</sup>
5. On 9 December 2020, the Pre-Trial Judge issued an order inviting the Parties to file submissions by 18 December 2020 for the purpose of conducting a review of Gucati's and Haradinaj's detention, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules.<sup>13</sup>
6. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment and ordered the SPO to submit a revised indictment, as confirmed.<sup>14</sup> On 14 December 2020, the SPO submitted the Indictment.<sup>15</sup>
7. On 18 December 2020, Toby Cadman was appointed as new Counsel for Haradinaj in replacement of Bastiaan Martens.<sup>16</sup> Haradinaj's initial appearance was

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<sup>8</sup> See e.g. T. 29 September 2020.

<sup>9</sup> F00030, Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, 29 September 2020 ("Haradinaj Motion dated 29 September 2020").

<sup>10</sup> F00058, Decision on Request for Immediate Release of Nasim Haradinaj, 27 October 2020.

<sup>11</sup> F00061, Decision Assigning a Pre-Trial Judge, 29 October 2020. Prior to this decision, the President had assigned the same Judge as Single Judge; see F00003, Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, 29 May 2018.

<sup>12</sup> F00063, Submission of Indictment for Confirmation and Related Requests, 30 October 2020, strictly confidential and *ex parte*, with Annexes 1 and 2, strictly confidential and *ex parte*.

<sup>13</sup> F00073, Order for Submissions on the Review of Detention, 9 December 2020 ("Order for Submissions dated 9 December 2020").

<sup>14</sup> F00074/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 11 December 2020.

<sup>15</sup> F00075, Submission of confirmed Indictment, 14 December 2020 (strictly confidential, reclassified as public on 14 December 2020), with Annex 1 (strictly confidential) ("Indictment"), and Annex 2 (strictly confidential, reclassified as public on 14 December 2020) ("Public Redacted Indictment"). See also Public Redacted Indictment, para. 48.

<sup>16</sup> F00086, Notification of the Appointment of Counsel to Nasim Haradinaj, 18 December 2020. On 21 December 2020, Carl Buckley was approved as Co-Counsel for Haradinaj. See F00092, Notification

held before the Pre-Trial Judge on the same day,<sup>17</sup> and the Parties filed written submissions on Haradinaj's continued detention.<sup>18</sup>

8. On 24 December 2020, the Pre-Trial Judge issued the Impugned Decision ordering Haradinaj's continued detention, dismissing Haradinaj's request that the time-limit for filing submissions on detention be extended, and further denying his request for an oral hearing on the matter.<sup>19</sup>

9. In the Appeal, Haradinaj alleges several violations of the European Convention on Human Rights ("ECHR").<sup>20</sup> Haradinaj further submits that the Impugned Decision was based on an incorrect interpretation of governing law, and/or so unfair or unreasonable to constitute an abuse of discretion.<sup>21</sup> Despite this introductory statement, Haradinaj does not clearly identify the alleged errors of law or abuse of discretion in his subsequent submissions.

10. Extrapolating the grounds alleging violations of the ECHR from the Defence submissions, the Court of Appeals Panel considers Haradinaj's core assertions to be that: (i) his initial detention was unlawful;<sup>22</sup> (ii) the review of his detention was procedurally unfair;<sup>23</sup> and (iii) the Impugned Decision is insufficiently reasoned<sup>24</sup> and fails to properly assess whether the SPO demonstrated that continued detention was

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of Approval of Co-Counsel for Nasim Haradinaj, 23 December 2020, para. 10. Prior to that, Haradinaj was represented by Bastiaan Martens, and Co-Counsel Hendrik Sytema. See Notification of Reception, para. 3; F00071, Notification of the Appointment of Counsel to Nasim Haradinaj, 2 December 2020; F00082, Notification of Approval of Co-Counsel for Nasim Haradinaj, 17 December 2020; F00083, Decision Approving the Withdrawal of Counsel, 18 December 2020; F00092/A01, Annex 1 to Notification of Approval of Co-Counsel for Nasim Haradinaj, 23 December 2020 (confidential).

<sup>17</sup> See T. 18 December 2020, pp. 47-67 ("Initial Appearance Hearing").

<sup>18</sup> F00090/COR, Corrected Submissions on the Review of Detention by 27 December 2020, 21 December 2020 (original version filed on 18 December 2020) ("Haradinaj Submissions dated 18 December 2020"); F00088, Prosecution consolidated submissions on review of detention, 18 December 2020 ("SPO Submissions dated 18 December 2020").

<sup>19</sup> Impugned Decision, paras 22-51.

<sup>20</sup> Appeal, paras 33-35, 44-53, 59-61, 66, 69-74, 80, 83, 89, 100-106, 108.

<sup>21</sup> Appeal, para. 32.

<sup>22</sup> Appeal, paras 33(a), 34-52.

<sup>23</sup> Appeal, paras 33(b)-(c), 60-79.

<sup>24</sup> Appeal, paras 33(d), 80-89.

warranted.<sup>25</sup> Finally, Haradinaj submits that the Pre-Trial Judge “applied the wrong test” regarding his request for an oral hearing.<sup>26</sup>

## II. STANDARD OF REVIEW

11. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements under Article 46(1) of the Law.<sup>27</sup> Article 46(1) of the Law specifies the grounds on which appeals against judgement can be filed:

- (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].

12. 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.<sup>28</sup>

13. 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

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<sup>25</sup> Appeal, paras 33(e), 53-59, 90-93.

<sup>26</sup> Appeal, paras 33(f), 94-106, 109.

<sup>27</sup> F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“Gucati Appeal Decision”), paras 4-13.

<sup>28</sup> Article 46(4) of the Law.

have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup>

### III. DISCUSSION

#### A. ADMISSIBILITY OF CHALLENGES REGARDING THE INITIAL DETENTION

15. Article 41(10) of the Law and Rule 57(2) of the Rules require the Judge/Panel to review a decision on detention on remand upon the expiry of two months from the last ruling on detention or at any time upon request of the Accused or the SPO, or *proprio motu*, where a change in circumstances since the last review has occurred. The purpose of this periodic review is to ascertain whether reasons for detention on remand still exist. These provisions are a strong safeguard against the undue prolongation of pre-trial detention. A supplementary safeguard is provided by Article 45(2) of the Law, according to which interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand.<sup>32</sup> Article 41(10) of the Law further reaffirms that parties may appeal against a ruling on detention on remand to the Court of Appeals Panel.

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<sup>29</sup> Article 46(5) of the Law.

<sup>30</sup> Gucati Appeal Decision, para. 14.

<sup>31</sup> *Ibid.*

<sup>32</sup> See also Rule 170(1) of the Rules, according to which, where an appeal lies as of right, the Appellant may file an appeal within ten days of the *impugned decision* (emphasis added).

16. The Court of Appeals Panel observes that the scope of the appellate review lies strictly within the confines of the Impugned Decision, unless the appellant demonstrates that substantive issues relevant to the review of his detention were properly submitted at first instance but ignored by the Pre-Trial Judge, entailing a failure to provide a reasoned opinion. The periodicity of the review cannot be used as a means to introduce new arguments falling outside the scope of the Impugned Decision before the Court of Appeals Panel. Such arguments are inadmissible.

17. Haradinaj challenges the lawfulness of his initial detention and alleges a violation of Article 5(4) of the ECHR caused by the lack of reasoning in the Impugned Decision on this matter.<sup>33</sup> He further alleges violations of his right to be promptly brought before a judge and to have an automatic review of the merits of his detention, in violation of Article 5(3) of the ECHR.<sup>34</sup>

18. In particular, Haradinaj refers to Rule 52(2) of the Rules providing that any person arrested pursuant to this rule shall be brought before a Panel within forty-eight hours of his arrest.<sup>35</sup> Recalling that he was detained by the Specialist Chambers since 26 September 2020, he submits that he should have been presented to a judge by 28 September 2020 at the latest and a first decision on the merits of his detention should have been issued within the same timeline.<sup>36</sup> However, he alleges that he was only presented to a judge on 29 September 2020 for the purpose of his first appearance and a decision on his detention was not issued before the order of 27 October 2020.<sup>37</sup>

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<sup>33</sup> Appeal, paras 33(a) and (d), 34-52, 56-59, 82-84, 108. Haradinaj submits that the lack of reasoning of the Impugned Decision violates Articles 5(4) and 6(1) of the ECHR. Appeal, paras 82-83. In the Reply, Haradinaj argues that the Appeal is properly lodged and that issues related to his initial detention impact the entirety of the proceedings without being limited to a single act or decision. Reply, para. 5. See also Reply, paras 6-16.

<sup>34</sup> Appeal, paras 34, 44-52.

<sup>35</sup> Appeal, paras 36-48.

<sup>36</sup> Appeal, paras 37-38.

<sup>37</sup> Appeal, paras 39, 43-47.



19. In the Response, the SPO submits that Haradinaj's initial detention was lawful, that his rights were fully respected and that, in any event, Haradinaj fails to identify any error warranting the intervention of the Panel.<sup>38</sup> According to the SPO, a first decision on Haradinaj's detention is to be found in the Decision on Request for Arrest Warrants dated 24 September 2020.<sup>39</sup>

20. The SPO submits that less than four days in total elapsed from the moment Haradinaj was arrested to his first appearance before the Single Judge.<sup>40</sup> The SPO further argues that Haradinaj was not arrested pursuant to Rule 52(2) of the Rules dealing with arrests pursuant to orders from the SPO, but rather pursuant to Rule 53 of the Rules dealing with arrests ordered by the Specialist Chambers.<sup>41</sup>

21. In Reply, Haradinaj accepts the SPO's argument that his arrest was conducted pursuant to Rule 53 of the Rules. He opposes the rest of the SPO's arguments and reiterates that the procedure underpinning his initial detention violates the requirements of Article 5(3) of the ECHR.<sup>42</sup>

22. Given that the present appeal is directed against the Impugned Decision, which deals with Haradinaj's *continuing* detention, his challenges to the lawfulness of his *initial* detention as well as the alleged violations he argues regarding his right to prompt access to a judicial authority and consideration by the judicial authority of the merits of the detention, are not properly brought before the Panel.

23. In addition, Haradinaj's assertion that he made "detailed arguments" on the lawfulness of his initial detention in his submissions but that the Impugned Decision fails to address them,<sup>43</sup> is misleading. Haradinaj did not challenge the lawfulness of

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<sup>38</sup> Response, paras 25-33.

<sup>39</sup> Response, para. 32.

<sup>40</sup> Response, para. 30.

<sup>41</sup> Response, paras 26-29.

<sup>42</sup> Reply, paras 6-16.

<sup>43</sup> Appeal, paras 56-59.



his arrest and initial detention nor did he previously raise any issue of undue delay before the Single Judge or the Pre-Trial Judge, who consequently did not rule on these issues.<sup>44</sup> He cannot therefore validly argue that the Impugned Decision lacks reasoning on these points.

24. The Haradinaj Submissions dated 18 December 2020, merely refer to “the circumstances upon which Mr Haradinaj was arrested, transferred and taken into custody, the length of time it took for him to be produced before a judge”.<sup>45</sup> In support of his request for an oral hearing, he further argues that access to investigation files is essential to challenging the lawfulness of his detention and that the Judge has the duty to ensure that the right to be promptly brought before a Judge is respected.<sup>46</sup>

25. These assertions are neither sufficiently developed nor properly argued and thus cannot be considered to have been put before the Pre-Trial Judge for his determination. Accordingly, the Panel finds that Haradinaj has failed to meet the requirements for a consideration of the merits of his challenges related to his initial detention.<sup>47</sup>

26. Recalling that the scope of the appellate review lies strictly within the confines of the Impugned Decision, the Panel considers that the statutory limitations of its functions dictate dismissing Haradinaj’s challenges regarding his initial detention

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<sup>44</sup> The Panel notes that during his first appearance, Haradinaj was expressly asked whether there were any issues he wanted to raise with regard to his arrest, transfer or detention. Haradinaj responded: “No, everything was done in conformity with the orders that you have issued. They behaved politely. I, of course, do not accept the arrest and the transfer”. See T. 29 September 2020, p. 16. In addition, in the motion Haradinaj filed the same day, on 29 September 2020, reference is made to the fact that Haradinaj was “arrested on the street and promptly transferred to The Hague”. See Haradinaj Motion dated 29 September 2020, p. 2.

<sup>45</sup> See Haradinaj Submissions dated 18 December 2020, para. 3. See also Haradinaj Submissions dated 18 December 2020, para. 18, where Haradinaj clearly states that he will make submissions on three points: the application to extend the time-limit for the filing of submissions on detention; that Haradinaj can be appropriately released with or without conditions; and that the review of detention should in any event be dealt with by way of an oral hearing.

<sup>46</sup> Haradinaj Submissions dated 18 December 2020, paras 49, 53.

<sup>47</sup> Reference is made here to Appeal, para. 33(a) and (d), in part.

without prejudice to the Defence's ability to challenge the basis of Haradinaj's detention before the competent lower panel.

27. As correctly recalled by the Pre-Trial Judge, Haradinaj is not precluded from challenging the basis of his detention under Article 41(2) and (10) of the Law and Rules 56(3) and 57(2) of the Rules.<sup>48</sup> The Panel furthermore recalls its prior finding 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 under Article 45(2) of the Law.<sup>49</sup>

#### B. OTHER CHALLENGES RAISED BY HARADINAJ

28. For the Court of Appeals Panel to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. In addition, the Panel may dismiss submissions as unfounded without further reasoning if a party's submissions are "obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".<sup>50</sup> The Panel recalls that "an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".<sup>51</sup>

29. When applying these basic principles, the Panel has in the case before it identified the following arguments as warranting summary dismissal: (i) arguments irrelevant to the Impugned Decision or arguments raised for the first time on appeal; (ii) arguments that fail to identify the challenged findings or misrepresent the

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<sup>48</sup> See e.g. Impugned Decision, paras 25, 49.

<sup>49</sup> Gucati Appeal Decision, para. 17.

<sup>50</sup> ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement"), para. 16; ICTY, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para. 14; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 16; ICTY, *Prosecutor v. Orić*, IT-03-68-A, Judgement, 3 July 2008, paras 13-14.

<sup>51</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para. 69.

findings; and (iii) mere assertions unsupported by any evidence, undeveloped assertions, or failures to articulate errors.<sup>52</sup> This observation is particularly important in the context of a review which takes place in such a periodic and thus frequent manner. The Panel's functions cannot be effectively and efficiently carried out without focused, structured, clear and well-reasoned submissions by the parties.<sup>53</sup> Accordingly, the Panel will identify within its discussion which of Haradinaj's arguments are summarily dismissed.

### **1. Challenges Regarding the Fairness of the Proceedings**

30. Haradinaj challenges the procedure undertaken by the Pre-Trial Judge for the purpose of obtaining submissions from the Parties prior to rendering the Impugned Decision.<sup>54</sup> He argues that the procedure was unfair and violated the ECHR since he was not given an opportunity to consider the SPO Submissions dated 18 December 2020 prior to the filing of his own.<sup>55</sup> He was further deprived of the possibility to respond to the SPO on that matter.<sup>56</sup>

31. Haradinaj argues further that the Pre-Trial Judge "applied the wrong test" regarding his request for an oral hearing.<sup>57</sup> This is because the Pre-Trial Judge dismissed his request for an oral hearing by reference to a prior finding made in relation to another accused.<sup>58</sup> Haradinaj submits that in doing so, the Pre-Trial Judge failed to provide adequate reasoning in support of his determination and violated relevant provisions of the ECHR.<sup>59</sup>

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<sup>52</sup> See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement"), paras 13, 112; *Krajišnik* Appeal Judgement, paras 16-27; ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, paras 18-31.

<sup>53</sup> See e.g. *Krajišnik* Appeal Judgement, para. 16.

<sup>54</sup> Appeal, paras 33(c), 60-79.

<sup>55</sup> *Ibid.*

<sup>56</sup> Appeal, paras 33(b)-(c), 60-79, 84.

<sup>57</sup> Appeal, paras 33(f), 94-106, 109.

<sup>58</sup> Appeal, paras 84-89, 94-95.

<sup>59</sup> Appeal, paras 33(d), 59-74, 80, 82-85, 89, 100-102, 105-106; Reply, para. 25.

32. Finally, Haradinaj claims that the Pre-Trial Judge erred in finding that an oral hearing was not warranted because he had received sufficient information on the issue.<sup>60</sup> Instead, the Pre-Trial Judge should have considered whether there had been an adversarial process in which Haradinaj had had the opportunity to respond to the SPO Submissions dated 18 December 2020.<sup>61</sup>

33. In the Response, the SPO submits that the Order for Submissions dated 9 December 2020 was issued in accordance with the Specialist Chambers provisions that do not, in any event, explicitly mandate the procedure to be followed in terms of review of detention.<sup>62</sup> According to the SPO, Haradinaj had access to the relevant material to challenge his detention and the SPO Submissions dated 18 December 2020 do not contain any argument which could not have been foreseen by the Defence.<sup>63</sup>

34. The SPO further responds that a decision to grant an oral hearing is a matter of discretion and Haradinaj merely repeats arguments that failed before the Pre-Trial Judge without demonstrating any error.<sup>64</sup>

35. In the Reply, Haradinaj maintains that irrespective of whether discretion applies, the procedure set forth in Article 5(3) and (4) of the ECHR had to be respected. He further adds that the Pre-Trial Judge should have considered whether Haradinaj was afforded an effective opportunity to be heard.<sup>65</sup>

36. The Court of Appeals Panel will address first Haradinaj's submission that he was not given an opportunity to consider or respond to the SPO Submissions dated 18 December 2020.<sup>66</sup> In terms of background, the Panel recalls that the Order for Submissions dated 9 December 2020 invited the Parties to file submissions by

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<sup>60</sup> Appeal, para. 97.

<sup>61</sup> Appeal, paras 96-100, 104.

<sup>62</sup> Response, paras 41-42.

<sup>63</sup> Response, paras 42-43.

<sup>64</sup> Response, paras 51-53.

<sup>65</sup> Reply, paras 18-22, 25.

<sup>66</sup> Appeal, paras 33(c), 60-79, 84.

18 December 2020 for the purpose of conducting a review of detention.<sup>67</sup> Haradinaj's application for an extension of time to file submissions on the review of detention was denied by the Pre-Trial Judge during the Initial Appearance Hearing. The Impugned Decision further dismissed Haradinaj's request for reconsideration on that matter.<sup>68</sup>

37. Contrary to Haradinaj's assertion, the Impugned Decision did address his request for an extension of time. The Pre-Trial Judge recalled that he had already dismissed this request during the Initial Appearance Hearing and that Haradinaj had failed to demonstrate that reconsideration was warranted.<sup>69</sup> However, the Panel notes that the argument developed by Haradinaj in the Appeal is different to the one initially raised before the Pre-Trial Judge. Haradinaj was not, at that time, relying on an argument relating to the adversarial nature of the proceedings. He was rather arguing that his request for extension of time should be granted because his new Counsel, Mr Cadman, had just been appointed and had not had enough time to prepare.<sup>70</sup>

38. As recalled above, arguments raised for the first time on appeal warrant summary dismissal,<sup>71</sup> when these arguments could reasonably have been raised at first instance.<sup>72</sup> Moreover, if Haradinaj objected to the procedure put in place by the Pre-Trial Judge and wanted to see the SPO's submissions before filing his own, he could and should have challenged the Order for Submissions dated 9 December 2020, in which both Parties were requested to file their submissions by Friday,

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<sup>67</sup> Order for Submissions dated 9 December 2020".

<sup>68</sup> Impugned Decision, paras 22-25.

<sup>69</sup> See Impugned Decision, paras 22-25. In particular, the Pre-Trial Judge further noted that (i) the initial appearance was postponed at the request of Haradinaj; (ii) Haradinaj had chosen to change his Counsel on the eve of his initial appearance; (iii) Haradinaj had been assisted since 17 December 2020 by Co-Counsel, Hendrik Sytema; and (iv) new Counsel for Haradinaj, Mr Cadman, had provided extensive submissions on continued detention within the original deadline. Impugned Decision, para. 24.

<sup>70</sup> Haradinaj Submissions dated 18 December 2020, paras 18-28.

<sup>71</sup> See above, para. 29.

<sup>72</sup> IRMCT, *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.

18 December 2020.<sup>73</sup> This challenge would, if at all, have come before this Panel only if leave to appeal had been sought and granted, pursuant to Article 45(2) of the Law.

39. The Panel turns now to Haradinaj taking issue with the Pre-Trial Judge's reference to a prior finding made in relation to another Accused.<sup>74</sup> In the Impugned Decision, the Pre-Trial Judge recalled a decision he rendered on 18 December 2020, denying Gucati's request for an oral hearing, and denied Haradinaj's request for the same reasons.<sup>75</sup>

40. Haradinaj had stated in his own submissions that he was joining Gucati's application.<sup>76</sup> A review of his submissions reveals that he largely developed the same arguments as his Co-Accused, namely that an oral hearing would allow him to supplement his submissions if needed and to respond to the SPO.<sup>77</sup> The Pre-Trial Judge in fact provided Haradinaj with a clear reason as to why his request was denied: "the Pre-Trial Judge finds that he has sufficient information to issue the present decision and no further submissions, whether written or oral, are warranted at this stage".<sup>78</sup>

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<sup>73</sup> Order for Submissions dated 9 December 2020, para. 11.

<sup>74</sup> Appeal, paras 84-89, 94-95.

<sup>75</sup> Impugned Decision, para. 48. See also F00089, Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters, 18 December 2020, para. 16. The Pre-Trial Judge in particular noted "the impending deadline of the two-month review, which would be jeopardised if further submissions from the Parties were permitted. This does not preclude the Defence from submitting separate challenges on detention or applications for interim or conditional release under Article 41(2) and (12) of the Law and Rules 56(3) and 57(2) of the Rules."

<sup>76</sup> Haradinaj Submissions dated 18 December 2020, para. 38. See also Initial Appearance Hearing, p. 66.

<sup>77</sup> Compare Haradinaj Submissions dated 18 December 2020, paras 37-54 with Gucati's submissions, F00087/RED, Submissions on the Review of Detention by 27<sup>th</sup> December 2020, 18 December 2020 (original version filed on 18 December 2020), paras 31-34.

<sup>78</sup> Impugned Decision, para. 48.

41. The Panel recalls that a decision on whether to hold an oral hearing is a matter of discretion.<sup>79</sup> As Haradinaj fails to establish any abuse of discretion on this matter, the Panel does not find any error which warrants its intervention.

42. Notwithstanding the above, the Panel finds some merit in Haradinaj's argument that he should have been allowed to respond to the SPO in order to respect the adversarial nature of the proceedings and the requirements of Articles 5 and 6 of the ECHR.<sup>80</sup>

43. Although the Specialist Chambers' legal framework does not prescribe a specific procedure for the review of detention by the Pre-Trial Judge, according to Article 5(4) of the ECHR, the proceedings must ensure equality of arms between the parties, that is, both the prosecution and the accused must have the opportunity to present their case and have knowledge of and comment on the observations made or evidence adduced by either party.<sup>81</sup> The Panel further notes that if parties are unable to respond to each other's arguments, those arguments are shielded from the scrutiny

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<sup>79</sup> See Gucati Appeal Decision, para. 77 referring to 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-01/05-01/13-558, Judgment on the appeal of Mr Aimé 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 Aimé Kilolo Musamba'", 11 July 2014, paras 47-48.

<sup>80</sup> Appeal, paras 84, 89. See also Haradinaj Submissions dated 18 December 2020, paras 41-43, 46-52, 54.

<sup>81</sup> ECtHR, *Çatal v. Turkey*, no. 26808/08, Judgment, 17 April 2012, para. 32 ("In the context of the review of a detainee person's continued detention pursuant to Article 5 § 4 of the Convention, the proceedings must be adversarial and must ensure 'equality of arms' between the parties, namely the prosecutor *vis-à-vis* the detained person"), see also paras 33-35; ECtHR, *A. and others v. The United Kingdom*, no. 3455/05, Judgment, 19 February 2009, paras 203-204; ECtHR, *Ghavalayan v. Armenia*, no. 50423/08, Judgment, 22 October 2020, para. 91. The Panel notes that "adversarial" is to be understood narrowly in this context, i.e., meaning "that the parties, in principle, have the right to be informed of and to discuss any document or observation presented to the court for the purpose of influencing its decision"; see ECtHR, *Venet v. Belgium*, no. 27703/16, Judgment, 22 October 2019, paras 42-43; see also ECtHR, Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security <[https://echr.coe.int/documents/guide\\_art\\_5\\_eng.pdf](https://echr.coe.int/documents/guide_art_5_eng.pdf)> (updated on 31 December 2020) ("ECtHR, Article 5 Guide"), paras 260, 263.



of the other party which in turn may affect the Pre-Trial Judge's determination of the issues raised.<sup>82</sup>

44. Finally, turning to Haradinaj's allegation of prejudice, the Panel recalls that, when a party alleges on appeal that its right to a fair trial has been infringed, it must demonstrate that this violation caused prejudice such that it amounts to an error of law invalidating the challenged decision.<sup>83</sup>

45. While Haradinaj contends that he was prejudiced by the Impugned Decision,<sup>84</sup> he fails to argue whether his own submissions would have been different or whether he would have been able to address any of the SPO's arguments in a specific way had he been able to respond to the SPO Submissions dated 18 December 2020. Rather, as recalled in the Impugned Decision, new Counsel for Haradinaj, Mr Cadman, provided extensive submissions on continued detention within the original deadline, after his oral request for a variation of the time-limit was denied.<sup>85</sup> Accordingly, Haradinaj has failed to demonstrate that the Pre-Trial Judge committed an error of law or abused his discretion.

46. The Court of Appeals Panel therefore dismisses Haradinaj's challenges to the fairness of the proceedings.<sup>86</sup> In light of this finding, the Panel dismisses Haradinaj's request that the Impugned Decision be vacated, and the matter remanded to the Pre-Trial Judge for further consideration.<sup>87</sup>

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<sup>82</sup> The Panel notes that, in the Impugned Decision, the Pre-Trial Judge adopted the following procedure regarding the next periodic review of detention on remand in this case: "Finally, in order to facilitate the next two-month review of detention, the Pre-Trial Judge orders Mr Haradinaj to file submissions on whether reasons for his continued detention still exist by Monday, 1 February 2021. Responses and replies to this submission shall follow the timeline set out in Rule 76 of the Rules". See Impugned Decision, para. 50.

<sup>83</sup> *Haradinaj et al.* Appeal Judgement, para. 17; ICTR, *Renzaho v. Prosecutor*, ICTR-97-31-A, Judgement, 1 April 2011, paras 196, 210.

<sup>84</sup> Appeal, paras 75-79, 97-106. See also Appeal, para. 93.

<sup>85</sup> Impugned Decision, para. 24.

<sup>86</sup> Reference is made here to Appeal, para. 33(b), (c), (f) and 33(d), in part.

<sup>87</sup> Appeal, paras 109-110.

## 2. Challenges Regarding the Reasoning of the Impugned Decision

47. In support of his assertion that the Impugned Decision was not properly reasoned, Haradinaj argues that he “specifically raised the issue of not having sight of the Prosecution position in terms of release, further, whether the procedure was compatible with Article 5, and further, that an oral hearing was required as per Article 5 of the Convention and without such a hearing, it constituted a violation of Article 5(3) of the ECHR”.<sup>88</sup> He further argues that the failure to address Article 5 of the ECHR in the Impugned Decision constitute a violation of Article 6(1) of the ECHR.<sup>89</sup> The SPO responds that Haradinaj fails to establish that the Impugned Decision was not reasoned and misrepresents its contents.<sup>90</sup>

48. The Panel notes that some of these submissions are addressed elsewhere in this decision, namely the issue of not being able to consider or respond to the SPO Submissions dated 18 December 2020 and the issue of not granting the request for an oral hearing.<sup>91</sup> As for the general allegation that the Impugned Decision violates Articles 5 and 6 of the ECHR on the basis that it is insufficiently reasoned, the Panel considers that these assertions are vague and lack sufficient support and argumentation.<sup>92</sup> Therefore, they must be summarily dismissed.

49. The Panel observes that the Impugned Decision is based on the relevant Specialist Chambers provisions, including Article 41(10) of the Law and Rule 57(2) of the Rules. After recalling the applicable law, the Pre-Trial Judge assessed whether reasons for detention on remand still existed, including the grounds set out in Article 41(6) of the Law.<sup>93</sup>

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<sup>88</sup> Appeal, para. 84.

<sup>89</sup> Appeal, para. 89.

<sup>90</sup> Response, para. 47.

<sup>91</sup> See paras 36-38, 42-45.

<sup>92</sup> Reference is made here to Appeal, paras 33(d), 84.

<sup>93</sup> Impugned Decision, paras 17-42.

50. The Court of Appeals Panel is mindful of the direct application of the ECHR under Article 22(2) of the Kosovo Constitution and Article 3(2)(e) of the Law.<sup>94</sup> The Panel also recalls that the Specialist Chamber of the Constitutional Court (“Constitutional Court”) has competence to review the Rules to ensure their compliance with Chapter II of the Kosovo Constitution. In its assessment of whether a provision complies with the fundamental rights and freedoms guaranteed by Chapter II of the Kosovo Constitution, the Constitutional Court is guided by ECtHR case law.<sup>95</sup> The Panel further notes that Rule 57 of the Rules on the review of detention was expressly submitted to the scrutiny of the Constitutional Court, which found that its wording, as amended, complies with Chapter II of the Kosovo Constitution.<sup>96</sup>

### **3. Challenges Related to the Assessment of the Standard for Continued Detention**

51. Haradinaj submits that the Pre-Trial Judge failed to properly assess whether the grounds for continued detention were satisfied.<sup>97</sup> According to Haradinaj, the Pre-Trial Judge failed to consider whether the grounds put forward by the SPO remained “relevant and sufficient”.<sup>98</sup>

52. Haradinaj argues that, in its submissions, the SPO merely relied on prior findings of the Single Judge to claim that the requirements of Article 41(6) of the Law warranting continued detention were met.<sup>99</sup> Moreover, in his view, the SPO asserted without “reference to any discernible facts” that the confirmation of the Indictment, including the additional count of obstructing official persons in performing official

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<sup>94</sup> See e.g. Appeal, paras 4, 28-29.

<sup>95</sup> See e.g. 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, 22 May 2020 (“Constitutional Court Judgment dated 22 May 2020”), para. 16.

<sup>96</sup> See Constitutional Court Judgment dated 22 May 2020, paras 64-68, 75.

<sup>97</sup> Appeal, paras 53-55, 90-93, 103. In his Reply, Haradinaj maintains the position as set out in his Appeal. Reply, paras 16, 24.

<sup>98</sup> Appeal, paras 33(e), 53, 55.

<sup>99</sup> Appeal, para. 54.

duties, increases the risks set out in Article 41(6)(b) of the Law since the last ruling on detention.<sup>100</sup>

53. Haradinaj further argues that the Pre-Trial Judge failed to assess whether Haradinaj poses an identifiable danger to any victim or witness.<sup>101</sup> He also submits that any risk posed by an individual must be “real and identifiable” and that there must be an assessment of whether the accused would pose a concrete danger.<sup>102</sup>

54. The SPO responds that the Pre-Trial Judge properly assessed and concluded that the requirements of Article 41(6)(a) and (b) of the Law continued to be met.<sup>103</sup> In the SPO’s view, Haradinaj’s mere disagreement with the conclusions of the Pre-Trial Judge do not suffice to establish a clear error.<sup>104</sup>

55. The competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist.

56. The Court of Appeals Panel finds that the Pre-Trial Judge fulfilled his duty in that regard.<sup>105</sup>

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<sup>100</sup> Appeal, para. 54.

<sup>101</sup> Appeal, paras 90-93, 103.

<sup>102</sup> Appeal, paras 90, 92.

<sup>103</sup> Response, paras 34-35. The SPO contends that the Impugned Decision makes it clear that the reasons for which the requirements of Article 41(6)(b) of the Law are met in relation to Haradinaj are “very real”. See Response, para. 50.

<sup>104</sup> Response, paras 36, 49.

<sup>105</sup> Impugned Decision, paras 31, 35-36, 41.

57. The Panel notes that Haradinaj does not challenge the Pre-Trial Judge's findings on the existence of a well-grounded suspicion that offences were committed as required by Article 41(6)(a) of the Law.<sup>106</sup>

58. The Panel observes that Haradinaj does not identify any error in the Pre-Trial Judge's findings that the risks set out in Article 41(6)(b) of the Law continue to be met. He rather argues that the Pre-Trial Judge should have considered whether the grounds put forward by the SPO were "relevant and sufficient".<sup>107</sup> The Panel deduces that Haradinaj is relying here on the jurisprudence of the ECtHR.<sup>108</sup> According to this jurisprudence, justifications which have been deemed "relevant" and "sufficient" (in addition to the existence of reasonable suspicion) have included the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, and the risk of reoffending.<sup>109</sup>

59. The criteria enumerated above are similar to those contained in Article 41(6)(b) of the Law and they have been assessed by the Pre-Trial Judge in the Impugned Decision. In that regard, the Pre-Trial Judge was satisfied not only that the risk of flight continues to exist, but also that there remain grounds to believe that the progress of proceedings may be obstructed and further crimes committed.<sup>110</sup>

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<sup>106</sup> Appeal, para. 55. Haradinaj did not challenge the existence of a grounded suspicion that offences were committed before the Pre-Trial Judge either. See Impugned Decision, para. 27.

<sup>107</sup> Appeal, paras 33(e), 53, 55.

<sup>108</sup> Under Article 5(3) of the ECHR, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2) whether such grounds were "relevant" and "sufficient". See e.g. ECtHR, *Merabishvili v. Georgia*, no. 72508/13, 28 November 2017 ("*Merabishvili v. Georgia*"), para. 222; ECtHR, *Buzadji v. The Republic of Moldova*, no. 23755/07, 5 July 2016 ("*Buzadji v. Moldova*"), para. 87; ECtHR, *Idalov v. Russia*, no. 5826/03, 22 May 2012, para. 140.

<sup>109</sup> *Merabishvili v. Georgia*, para. 222; *Buzadji v. Moldova*, para. 88. See also ECtHR, Article 5 Guide, paras 200, 207-220; Schabas, W.A., *The European Convention on Human Rights: A Commentary*, Oxford University Press 2015, pp. 251-252; Meyer, in Wolter, *Systematischer Kommentar Strafprozessordnung*, vol. X, Wolters Kluwer 5<sup>th</sup> ed 2019, marginal numbers ("mn"). 225, 230 ff.; Esser, in Becker/Erb/Esser/Franke/Graalman-Scheerer/Hilger/Ignor, *Löwe Rosenberg Strafprozessordnung*, vol. XI, de Gruyter 26<sup>th</sup> ed 2012, Art. 5 EMRK/Art. 9, 10, 11 IPBPR mn. 249 ff.

<sup>110</sup> Impugned Decision, paras 33, 39, 41.

60. With regard to the flight risk, the Pre-Trial Judge recalled that Haradinaj attempted to evade SPO officers by vehicle and on foot during his arrest, as well as other findings on the matter that remain of concern.<sup>111</sup> He also observed that the filing of the Indictment provided further support for this risk.<sup>112</sup> In that regard, the Pre-Trial Judge found that the Indictment highlighted the seriousness of the charges and made the possibility of conviction more concrete, constituting an added incentive for Haradinaj to flee.<sup>113</sup>

61. Haradinaj fails to explain which “discernible facts” the SPO could have been expected to provide to show that the confirmation of the Indictment, including the additional count, increases the risks set out in Article 41(6)(b) of the Law.<sup>114</sup> The Panel accordingly sees no error in the Pre-Trial Judge’s finding. The Panel further recalls that there is relevant jurisprudence supporting the finding that the filing of an indictment reflecting the gravity of the offences, alongside the potential sentence, should be taken into account as one of the factors that has a bearing on detention and as part of the assessment of the flight risk.<sup>115</sup>

62. Turning to Haradinaj’s allegation that the Pre-Trial Judge failed to assess whether he poses an “identifiable danger to any victim or witness”, here again no relevant error is identified.<sup>116</sup> The Panel, however, understands this as being a reference to the wording of Article 41(6)(b)(ii) of the Law concerning “specific

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<sup>111</sup> Impugned Decision, para. 31.

<sup>112</sup> Impugned Decision, para. 32.

<sup>113</sup> *Ibid.*

<sup>114</sup> Appeal, para. 54.

<sup>115</sup> See ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-163, Decision on the “Defence Request for Interim Release”, 19 May 2011, para. 41. See also ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR65.1, Decision on Ante Gotovina’s Appeal against Denial of Provisional Release, 17 January 2008, para. 15; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.2, Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release, 28 September 2005, para. 12.

<sup>116</sup> Appeal, para. 91.

circumstances indicat[ing] that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices”.<sup>117</sup>

63. While the Impugned Decision could be clearer on that point, the reference to the allegation that Haradinaj revealed the names of individuals related to confidential investigations and encouraged the media to do the same, as well as the relevant material quoted in support of this finding, shows that the Pre-Trial Judge considered that Haradinaj may put at risk (potential) witnesses through the disclosure of confidential and non-public information.<sup>118</sup>

64. Finally, the Court of Appeals Panel dismisses the remainder of Haradinaj’s unsubstantiated assertions.<sup>119</sup> The Panel recalls that 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 an error.<sup>120</sup>

65. In view of the foregoing, the Court of Appeals Panel therefore dismisses Haradinaj’s argument related to the failure to properly assess the standard for continued detention.<sup>121</sup>

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<sup>117</sup> The Panel recalls that according to Article 41(6)(b)(ii) of the Law, the risk to consider is whether there are articulable grounds to believe that the Accused “will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will *obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices*” (emphasis added).

<sup>118</sup> See Impugned Decision, para. 38 referring to F00009/RED/A01, Annex 1 to Request for arrest warrants and related orders, 1 October 2020 (original version filed on 22 September 2020).

<sup>119</sup> The Panel refers notably to the argument that any risk posed by an individual must be “real and identifiable” and that there must be an assessment of whether the accused would pose a concrete danger. Appeal, paras 90, 92.

<sup>120</sup> Gucati Appeal Decision, para. 64. See also Response, paras 36, 49; *contra* Reply, paras 16, 24.

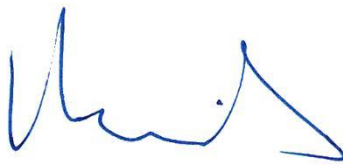
<sup>121</sup> Reference is made here to Appeal, para. 33(e).



#### **IV. DISPOSITION**

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

**DENIES** the Appeal in its entirety.



**Judge Michèle Picard,  
Presiding Judge**

Dated this Tuesday, 9 February 2021

At The Hague, the Netherlands