



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** **Pre-Trial Judge**  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 23 June 2021

**Language:** English

**Classification:** **Public**

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**Decision on Review of Detention of Hysni Gucati**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for Hysni Gucati**  
Jonathan Elystan Rees  
Huw Bowden

**Counsel for Nasim Haradinaj**  
Toby Cadman  
Carl Buckley

**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 41(10) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 25 September 2020, Hysni Gucati and Nasim Haradinaj were arrested in relation to alleged dissemination of confidential and non-public information relating to the work of the Special Investigative Task Force and/or the Specialist Prosecutor's Office ("SPO").<sup>2</sup>

2. On 27 October 2020, the Pre-Trial Judge rejected Mr Gucati's application for bail,<sup>3</sup> which was upheld by the Court of Appeals Panel.<sup>4</sup> Mr Gucati's detention was then reviewed and extended by the Pre-Trial Judge at regular intervals, namely on 24 December 2020,<sup>5</sup> 24 February and 23 April 2021.<sup>6</sup>

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<sup>1</sup> KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

<sup>2</sup> KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential.

<sup>3</sup> KSC-BC-2020-07, F00059, Single Judge, *Decision on Application for Bail ("First Detention Decision")*, 27 October 2020, public.

<sup>4</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to the Arrest and Detention ("Decision on Appeal of First Detention Decision")*, 9 December 2020, public, para. 78.

<sup>5</sup> KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati ("Second Detention Decision")*, 24 December 2020, public.

<sup>6</sup> KSC-BC-2020-07, F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati ("Third Detention Decision")*, 24 February 2021, public; F00188, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati ("Fourth Detention Decision")*, 23 April 2021, public.

3. On 1 June 2021, Mr Gucati filed submissions on the present review of his detention.<sup>7</sup> The SPO responded on 11 June 2021.<sup>8</sup>

## II. SUBMISSIONS

4. Mr Gucati submits that he should be released, with or without conditions, as his continued detention is no longer necessary or proportionate.<sup>9</sup> Mr Gucati repeats his earlier submissions that the alleged dissemination of non-public material and the risks related to its dissemination have been at the heart of the Pre-Trial Judge's past decisions. In Mr Gucati's submission, the SPO however cannot produce in evidence a single non-public document for the dissemination of which he was allegedly responsible, or call at trial a single witness to testify that they were threatened or intimidated, or faced other serious consequences as a result of Mr Gucati's actions.<sup>10</sup> Further, Mr Gucati recalls his good character, compliant conduct during the arrest and detention, and strong ties in his hometown.<sup>11</sup>

5. The SPO responds that the continued detention of Mr Gucati remains necessary as there has been no relevant change in the circumstances, and, in fact, the Article 41(6)(b) risks have increased.<sup>12</sup> The SPO also indicates that Mr Gucati repeats his earlier arguments, which have already been rejected by the Pre-Trial Judge in the last review of Mr Gucati's detention.<sup>13</sup>

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<sup>7</sup> KSC-BC-2020-07, F00214, Defence, *Submissions on the Fourth Review of Detention* ("Defence Submission"), 1 June 2021, public.

<sup>8</sup> KSC-BC-2020-07, F00228, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention* ("SPO Submission"), 11 June 2021, public, with Annex 1, public.

<sup>9</sup> Defence Submission, paras 11, 17-18 (with references to KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public, para. 5; F00087/RED, Defence, *Submissions on the Review of Detention by 27<sup>th</sup> December 2020*, 17 December 2020, public, para. 27; F00112, Defence, *Submissions on the Second Review of Detention of Hysni Gucati*, 2 February 2021, public, para. 9).

<sup>10</sup> Defence Submission, paras 6-7, referring to KSC-BC-2020-07, F00170, Defence, *Submissions on the Third Review of Detention*, 1 April 2021, public, paras 4-8.

<sup>11</sup> Defence Submission, para. 12.

<sup>12</sup> SPO Submission, para. 1.

<sup>13</sup> SPO Submission, para. 3, referring to the Fourth Detention Decision, paras 11, 18-19, 24-25.

### III. APPLICABLE LAW

6. Pursuant to Article 41(6)(a) and (b) of the Law, the Specialist Chambers (“SC”) shall only detain a person when there is a grounded suspicion that the person has committed a crime within the SC’s jurisdiction; and there are articulable grounds to believe that the person (i) is a flight risk; (ii) will obstruct the progress of the proceedings; or (iii) will commit further offences. Article 41(12) of the Law provides for alternative measures to prevent these risks, including, among others, bail, house detention, promise not to leave residence and prohibition on approaching specific places or persons.

7. Pursuant to Article 41(10) of the Law, until a judgment is final or until release, upon the expiry of two months from the last ruling on detention on remand, the Pre-Trial Judge shall examine whether the reasons for detention on remand still exist, and extend or terminate it. This also follows from Rule 57(2) of the Rules.

### IV. DISCUSSION

8. With regard to the present review of detention, the Pre-Trial Judge recalls that the SPO bears the burden of showing that the detention of Mr Gucati is necessary.<sup>14</sup> The Pre-Trial Judge also recalls that it is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release.<sup>15</sup>

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<sup>14</sup> See, for example, KSC-BC-2020-06, IA004, F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release* (“Thaçi Interim Appeal Decision”), 30 April 2021, public, para. 17; IA001, F00005, Court of Appeals Panel, *Decision on Kadri Veseli’s Appeal Against Decision on Interim Release* (“Veseli Interim Appeal Decision”), 30 April 2021, public, para. 14.

<sup>15</sup> See KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017* (“SCCC 26 April 2017 Judgment”), 26 April 2017, public, para. 115.

#### A. GROUNDED SUSPICION

9. In relation to his aforementioned argument as to the absence of certain items from the evidence or witnesses to be called by the SPO at trial, Mr Gucati submits that, if the SPO cannot prove his guilt at trial, he should be released from detention, even if grounded suspicion exists.<sup>16</sup> In this regard, the Pre-Trial Judge recalls that a prerequisite for the lawfulness of the continued detention is the persistence of a “grounded suspicion”. It will be for the trial panel to assess whether or not the SPO has discharged its burden of proof as regards the alleged guilt of Mr Gucati.<sup>17</sup>

10. For the purposes of the present review, the Pre-Trial Judge recalls that, subsequent to Mr Gucati’s initial detention, the Pre-Trial Judge carried out a detailed examination of specific materials and information as to whether there exists an even higher threshold of suspicion against Mr Gucati, namely, a well-grounded suspicion required for the confirmation of charges under Article 39(2) of the Law. The Pre-Trial Judge confirmed the existence of a well-grounded suspicion that Mr Gucati committed the offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code, as set out in Article 15(2) of the Law.<sup>18</sup> There have been no developments in the case negating these findings. For the purposes of the present review, the Pre-Trial Judge is thus satisfied that there is a grounded suspicion against Mr Gucati as required by Article 41(6)(a) and (10) of the Law.

#### B. NECESSITY OF DETENTION

11. The Pre-Trial Judge recalls that, in determining whether the grounds under Article 41(6)(b) of the Law allowing for a person’s detention exist, the standard to be applied is less than a certainty, but more than a mere possibility of a risk

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<sup>16</sup> Defence Submission, paras 6, 8.

<sup>17</sup> In this connection, *see* SCCC 26 April 2017 Judgment, para. 201.

<sup>18</sup> KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment*, 11 December 2020, public, paras 103, 109, 113, 117, 121, 125.

materialising.<sup>19</sup> These grounds must be “articulable” in the sense that they must be specified in detail by reference to the relevant information or evidence.<sup>20</sup> It should also be emphasised that, when deciding on whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks in Article 41(6)(b),<sup>21</sup> namely to ensure the person’s presence at trial, to prevent his or her obstructing the criminal proceedings or committing further offences.<sup>22</sup>

## 1. Risk of Flight

12. Insofar as the SPO submits that the risk of flight continues to exist by reference to the findings made by the Pre-Trial Judge in the earlier reviews of Mr Gucati’s detention,<sup>23</sup> it should be recalled that, in the last review of detention, the Pre-Trial Judge was satisfied that the risk of flight could be sufficiently addressed by a set of conditions.<sup>24</sup>

13. It thus follows that Mr Gucati’s continued detention may not be justified on the ground of the risk of flight.

## 2. Risk of Obstructing the Proceedings

14. Mr Gucati submits that the lack of any meaningful disclosure means that he is not in a position to obstruct the proceedings. No identities of witnesses and

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<sup>19</sup> Veseli Interim Appeal Decision, paras 17 *in fine*, 19.

<sup>20</sup> Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 defines “articulable” as: “the party offering the information or evidence must specify in detail the information or evidence being relied upon”. Thaçi Interim Appeal Decision, para. 23; Veseli Interim Appeal Decision, para. 18.

<sup>21</sup> As regards being “risks”, *see, for example*, ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, 5 July 2016, para. 88; ECtHR, *Zohlandt v. the Netherlands*, no. 69491/16, 9 February 2021, para. 50; ECtHR, *Grubnyk v. Ukraine*, no. 58444/15, 17 September 2020, para. 115; ECtHR, *Korban v. Ukraine*, no. 26744/16, 4 July 2019, para. 155.

<sup>22</sup> As regards the obligation to consider “alternative measures”, *see* SCCC 26 April 2017 Judgment, para. 114. *See also* ECtHR, *Buzadji v. the Republic of Moldova* [GC], para. 87 *in fine*; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, para. 140 *in fine*.

<sup>23</sup> SPO Submission, paras 1-3.

<sup>24</sup> Fourth Detention Decision, paras 15-16.

nothing from the batches 1-3, save for the publicly available information, have been disclosed. As regards the material classified as “confidential” that has been disclosed, Mr Gucati argues that it contains no such sensitive information as to justify his continued detention.<sup>25</sup>

15. As regards the aforementioned argument of Mr Gucati on the classification of the material as “confidential”, the SPO indicates that this cannot change the current classification absent a justified request under Rule 82(5).<sup>26</sup> Further, the SPO argues that Mr Gucati’s network of the KLA war veterans remains willing to obstruct the proceedings. In particular, the SPO refers to an interview given by the acting chairperson of the KLA War Veterans’ Association (“KLA WVA”) on 4 June 2021, during which he stated, in relation to the SC’s files, that “we will make public any material we receive that is in everybody’s interest”.<sup>27</sup>

16. The Pre-Trial Judge first recalls that there are grounds to believe that Mr Gucati intentionally participated in and continued with the unauthorised dissemination of confidential and non-public information and threatened potential witnesses.<sup>28</sup> This indicates that Mr Gucati may also obstruct the progress of the proceedings through dissemination of confidential and non-public information, which may in addition jeopardise the safety of witnesses.

17. In this connection, it is recalled that currently Mr Gucati has access, through the disclosure process, to the evidence classified as “confidential”. Insofar as Mr Gucati appears to disagree with this classification, the Pre-Trial Judge notes that, in any event, the material contains information about the confidential nature

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<sup>25</sup> Defence Submission, paras 14-16.

<sup>26</sup> SPO Submission, footnote 11.

<sup>27</sup> SPO Submission, para. 5; Annex 1 to the SPO Submission, pp. 5 (in Albanian), 10 (translation into English from Albanian).

<sup>28</sup> Third Detention Decision, paras 25-28; KSC-BC-2020-07, F00012, Single Judge, *Decision on Request for Arrest Warrants and Transfer Orders*, 24 September 2020, public, para. 29, with Annexes 1-4, public.

of the leaked documents and witness contacts.<sup>29</sup> Furthermore, since the last review of detention, Mr Gucati has received access to further confidential information.<sup>30</sup> The dissemination of that information would pose a risk to the conduct of the proceedings. Mr Gucati, as head of the KLA WVA, has the means to disseminate such information by communicating with the media or his network of the KLA WVA.<sup>31</sup> As the interview given by the KLA WVA's acting chairperson on 4 June 2021 suggests, the KLA WVA would be willing to disseminate any files of the SC.

18. Further, the Pre-Trial Judge is not persuaded that Mr Gucati's character or his compliant conduct during the arrest and detention indicate that Mr Gucati will not obstruct the proceedings. In particular, the Pre-Trial Judge recalls that this risk is predicated, *inter alia*, on Mr Gucati's vow to continue to disclose confidential and non-public information,<sup>32</sup> and his failure to abide by the orders of the Single Judge.<sup>33</sup> In this regard, the Pre-Trial Judge also considers that Mr Gucati's new awareness of the full account of the SPO case and the approaching trial further confirm the risk that he will obstruct the proceedings.

19. In that light, the Pre-Trial Judge finds that the risk that Mr Gucati will obstruct the progress of the proceedings continues to exist.

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<sup>29</sup> KSC-BC-2020-07, F00141, Pre-Trial Judge, *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021, confidential; F00136, Pre-Trial Judge, *Decision on Non-Disclosure of Certain Witness Contacts*, 22 February 2021, confidential.

<sup>30</sup> KSC-BC-2020-07, F00210, Pre-Trial Judge, *Decision on Prosecution Requests and Challenges Pursuant to F00172*, 26 May 2021, confidential.

<sup>31</sup> First Detention Decision, para. 17.

<sup>32</sup> First Detention Decision, para. 17; KSC-BC-2020-07, F0009/A01/RED, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders* ("Annex 1 to SPO Request for Arrest Warrants"), 1 October 2020, public, p. 13.

<sup>33</sup> First Detention Decision, para. 17; KSC-BC-2020-07, F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, public, paras 11-13, 21-22; KSC-BC-2020-07, F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, public, paras 11-13, 21-22.



### 3. Risk of Committing Further Offences

20. For the above reasons, the Pre-Trial Judge finds that the risk that Mr Gucati may commit further offences by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information remains.

### 4. Conclusion

21. The Pre-Trial Judge concludes that there remains a risk that Mr Gucati will obstruct the progress of the proceedings or commit further offences. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the application of alternative measures.

#### C. CONDITIONAL RELEASE

22. Mr Gucati repeats his earlier submissions proposing alternative measures to detention in the light of the argument that the SPO has not produced for trial the documents allegedly disseminated.<sup>34</sup> The SPO submits that the Pre-Trial Judge has previously concluded that these measures do not sufficiently mitigate the Article 41(6)(b) risks.<sup>35</sup>

23. The Pre-Trial Judge observes that, if released from detention, Mr Gucati could easily obtain access to various means of communication in order to disseminate or receive electronically, or through the mail, confidential or non-public information. Insofar as the Pre-Trial Judge could order the measures proposed by Mr Gucati or other measures in Article 41(12) of the Law, such as house detention, in combination with restrictions on communication with other persons either

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<sup>34</sup> Defence Submission, paras 11, 13, referring to KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public, para. 5; F00087/RED, Defence, *Submissions on the Review of Detention by 27<sup>th</sup> December*, 17 December 2020, public, paras 27-29; F00112, Defence, *Submissions on the Second Review of Detention of Hysni Gucati*, 2 February 2021, public, para. 9.

<sup>35</sup> SPO Submission, paras 2-3.

directly or through other means, the Pre-Trial Judge is not persuaded that Mr Gucati would actually comply with such restrictions.

24. In particular, the Pre-Trial Judge recalls that in his public statements Mr Gucati has vowed to continue to disclose confidential and non-public information<sup>36</sup> and has failed to abide by the orders of the Single Judge.<sup>37</sup>

25. In that light, the Pre-Trial Judge is not persuaded that even monitoring of Mr Gucati's compliance with restrictions on communication while in house detention would suffice to prevent the risks present. Additional measures, such as installing a keylogger on Mr Gucati's personal computer or ordering limited access to a controlled mobile telephone without internet connection, would not prevent Mr Gucati from employing other electronic devices belonging to, for example, his family or acquaintances, or from passing on confidential and non-public information to other persons. The array of communication mediums available is so varied that it is only through the communication monitoring framework applicable at the SC's detention facilities that Mr Gucati's communications can be effectively restricted.

26. It thus follows that the risks of obstructing the proceedings and committing further offences can only be effectively managed at the SC's detention facilities. In these circumstances, the Pre-Trial Judge finds that Mr Gucati's continued detention is necessary in order to avert the risks in Article 41(6)(b)(ii) and (iii) of the Law.

#### D. PROPORTIONALITY OF DETENTION

27. Mr Gucati indicates that he has now been in pre-trial detention for approximately eight months, and the longer a person remains in pre-trial

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<sup>36</sup> First Detention Decision, para. 17; Annex 1 to SPO Request for Arrest Warrants, p. 13.

<sup>37</sup> First Detention Decision, para. 17; First Order, paras 11-13, 21-22; Second Order, paras 11-13, 21-22.

detention the higher the burden on the SC to justify continued detention.<sup>38</sup> Mr Gucati also submits that there is no imminent trial date and that, due to repeated disclosure failures on part of the SPO, the case is not likely to be listed for trial until much later this year.<sup>39</sup>

28. The SPO, on the other hand, argues that there have been no unjustified delays, the Pre-Trial Judge's revised calendar aims to transmit the case to a trial panel in less than a month,<sup>40</sup> and, besides, the Defence requested to extend the initial transmission date. The SPO further submits that the Defence has made no effort to attempt to reach any agreed facts, which might expedite the proceedings, not even on the date or place of birth of the Accused.<sup>41</sup>

29. In relation to the length of Mr Gucati's pre-trial detention, the Pre-Trial Judge notes that significant steps have been taken for the preparation of the case for trial. In particular, on 9 April 2021, the SPO filed its Pre-Trial Brief.<sup>42</sup> Furthermore, the SPO has finalised the disclosure, subject to the receipt of material that may emanate from a third party request.<sup>43</sup>

30. The Pre-Trial Judge has continued to make all necessary rulings to ensure that the case is prepared properly and expeditiously for trial. The Pre-Trial Judge adjusted the date for the filing by the Defence of its Pre-Trial Brief and the

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<sup>38</sup> Defence Submission, paras 3, 17.

<sup>39</sup> Defence Submission, paras 9, 17.

<sup>40</sup> SPO Submission, paras 4, 6, 8.

<sup>41</sup> SPO Submission, para. 7.

<sup>42</sup> KSC-BC-2020-07, F00181, Specialist Prosecutor, *Submission of Pre-Trial-Brief, Witness and Exhibit Lists, and Rule 109(c) Chart*, 9 April 2021, public, with Annexes 1-4, confidential.

<sup>43</sup> KSC-BC-2020-07, F00224, Pre-Trial Judge, *Revised Calendar for the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference ("Revised Calendar")*, 9 June 2021, public, para. 20. As regards the determination of requests in respect of the Pre-Trial Judge's decision on the SPO's motion for non-disclosure of certain items, these have been decided; see KSC-BC-2020-07, F00236, Pre-Trial Judge, *Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos*, 15 June 2021, confidential; F00237, Pre-Trial Judge, *Decision on the Defence Motion for Clarification of Decision F00210*, 15 June 2021, confidential.

tentative date for the transmission of the case file to a trial panel.<sup>44</sup> In this regard, the Pre-Trial Judge notes that the Defence has filed an application to vary these dates,<sup>45</sup> which is yet to be decided. Also, the recent decision of the Court of Appeals Panel<sup>46</sup> may affect the dates currently set by the Pre-Trial Judge. However, the Pre-Trial Judge will make any adjustments that may be deemed appropriate so as to ensure the expeditiousness of the proceedings.

31. Against this backdrop, and the fact that the risks of obstructing the proceedings and committing further offences exist and they cannot sufficiently be addressed by the application of alternative measures, the Pre-Trial Judge finds that Mr Gucati's detention for a further two months is necessary and proportional in the specific circumstances of the case.

## V. DISPOSITION

32. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** Mr Gucati's continued detention;
- b. **ORDERS** Mr Gucati to file submissions on the next review of his detention by **Wednesday, 4 August 2021**; and
- c. **ORDERS** the SPO to file submissions on the next review of Mr Gucati's detention by **Wednesday, 11 August 2021**; with the possibility for Mr Gucati to comment, if he so wishes, on these submissions by **Monday, 16 August 2021**.

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<sup>44</sup> Revised Calendar, para. 29.

<sup>45</sup> KSC-BC-2020-07, F00241, Defence, *Defence Application to Vary the Consolidated Calendar*, 18 June 2021, public; F00242, Defence, *Defence Application to Vary the Consolidated Calendar*, 21 June 2021, public.

<sup>46</sup> KSC-BC-2020-07, IA004, F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Wednesday, 23 June 2021  
At The Hague, the Netherlands