



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: **Trial Panel II**

Judge Charles L. Smith, III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 23 August 2021

Language: English

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Decision on Review of Detention of Nasim Haradinaj

Specialist Prosecutor

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TRIAL PANEL II,¹ pursuant to Articles 1(2), 2, 3(2)(e), 19(2), 21(3), and 40-41 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, Mr Hysni Gucati and Mr Nasim Haradinaj ("Mr Haradinaj") were arrested in relation to alleged dissemination of confidential and non-public information relating to the work of the Special Investigative Task Force ("SITF") and/or the Specialist Prosecutor's Office ("SPO").²

2. On 27 October 2020, the Single Judge rejected Mr Haradinaj's request for his immediate release from detention.³ The Pre-Trial Judge then reviewed and extended Mr Haradinaj's detention at regular intervals, namely on 24 December 2020,⁴ which was upheld by the Court of Appeals Panel,⁵ and on 24 February, 23 April and 23 June 2021.⁶

¹ F00263, President, Decision Assigning Trial Panel II, 15 July 2021.

² F00012/A03/COR/RED, Single Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020; F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020; F00020, Registrar, *Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers*, 26 September 2020, with Annex 1, confidential; F00026/COR, Registrar, *Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities*, 28 September 2020, confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*. A public redacted version of F00026 was filed on 14 October 2020; see F00026/COR/RED.

³ F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj* ("First Detention Decision"), 27 October 2020.

⁴ F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Second Detention Decision"), 24 December 2020.

⁵ IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention*, 9 February 2021, para. 66.

⁶ F00144, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Third Detention Decision"), 24 February 2021; F00189/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on Review of Detention of Nasim Haradinaj* ("Fourth Detention Decision"), 23 April 2021; F00246, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Fifth Detention Decision"), 23 June 2021.

3. On 12 March 2021, the SPO, pursuant to the aforementioned decision of 24 February 2021,⁷ disclosed a report of an arresting officer (“Report”)⁸ and a video of the arrest of Mr Haradinaj (“Video”).⁹

4. In his Fifth and latest Detention Decision, the Pre-Trial Judge ordered Mr Haradinaj to file submissions on the next review of his detention by 4 August 2021, and the SPO to file the same by 11 August 2021, with the possibility for Mr Haradinaj to comment on the SPO’s submissions by 16 August 2021.¹⁰

5. On 15 July 2021, the President of the Specialist Chambers (“President” and “SC”, respectively) assigned the present case to Trial Panel II (“Panel”).¹¹ On 16 July 2021, the Pre-Trial Judge transmitted the case to the Panel.¹²

6. On 21 July 2021, the Panel scheduled the Trial Preparation Conference for 1 and 2 September 2021 and provisionally set the Specialist Prosecutor’s Preparation Conference for 8-9 September 2021.¹³ The Parties indicated their availability for both conferences.¹⁴

7. On 4 August 2021, Mr Haradinaj filed submissions on the present review of his detention before the Panel.¹⁵ The SPO responded on 10 August 2021.¹⁶ Mr. Haradinaj replied on 15 August 2021.¹⁷

⁷ Third Detention Decision, paras 22 *in fine*, 45(c).

⁸ Disclosure 11, 083798-083799.

⁹ Disclosure 11, 081981-01.

¹⁰ Fifth Detention Decision, para. 40(b)(c).

¹¹ F00263, President, *Decision Assigning Trial Panel II*, 15 July 2021.

¹² F00265, President, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021.

¹³ F00267, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference*, 21 July 2021.

¹⁴ CRSPD51, *Email from CMU to Chambers re date of TPC*, 19 July 2021, confidential.

¹⁵ F00271, Defence for Mr Haradinaj, *Defence Submissions for Review of Detention* (“Defence Submission”), 4 August 2021.

¹⁶ F00228, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention with public Annex 1* (“SPO Submission”), 10 August 2021.

¹⁷ F00277, Defence for Mr Haradinaj, *Defence Reply to SPO Response Regarding Submissions for Review of Detention* (“Defence Reply”), 15 August 2021.

II. SUBMISSIONS

8. Mr Haradinaj maintains that his detention is not necessary and he should be released.¹⁸ Mr Haradinaj emphasises that there is no requirement of a change in circumstances for detention review and reiterates that the test is whether the reasons for detention still exist, and – if there exists any risk – whether it can be mitigated by the imposition of conditions.¹⁹ Should the SPO advance another position, Mr Haradinaj requests the submission to be rejected.²⁰ Mr Haradinaj further maintains that there is no evidence suggesting that the Article 41(6)(b) risks have increased.²¹ In particular, Mr Haradinaj avers that no evidence has been disclosed indicating that: (i) he threatened or otherwise intimidated any witness;²² (ii) he would seek to leave the jurisdiction or evade the proceedings;²³ (iii) he would obstruct the proceedings;²⁴ (iv) he would commit further offences.²⁵ Mr Haradinaj contends that it is unclear how he could obstruct the proceedings considering that the documentation noted within the indictment has been seized.²⁶ Further, asserting that he cannot be held responsible for the actions of others and that there is no evidence that the interview of the acting chairperson of the Kosovo Liberation Army War Veterans Association (“KLA WVA”) on 4 June 2021 was given at his behest, Mr Haradinaj submits that the latter cannot fairly be relied upon when assessing Mr Haradinaj’s risk factors.²⁷ In relation to the circumstances of his arrest, Mr Haradinaj submits that, upon being aware that officers were to arrest him, he remained stationary and did not seek to evade arrest, but rather, wanted to wait for local police to arrive which, he contends, is neither tantamount to

¹⁸ Defence Submission, paras 2-3, 8, 43 (with reference to F00239, Defence for Mr Haradinaj, *Defence Submissions for Review of Detention*, 17 June 2021); Defence Reply, para. 36.

¹⁹ Defence Submission, para. 10.

²⁰ Defence Submission, para. 11.

²¹ Defence Submission, paras 12-40, 42.

²² Defence Submission, para. 42(a).

²³ Defence Submission, paras 20, 26.

²⁴ Defence Submission, para. 42(c).

²⁵ Defence Submission, paras 36-37.

²⁶ Defence Submission, paras 32-34.

²⁷ Defence Submission, paras 38-40; Defence Reply, paras 23-28.

seeking to evade arrest nor demonstrate a flight risk.²⁸ He also reiterates his position that the Video shows only the “very end portion” of his arrest.²⁹ Lastly, Mr Haradinaj maintains his submission made before the Pre-Trial Judge that he can be released subject to conditions, noting that no evidence suggests that he would fail to comply with any conditions that the Panel may seek to impose.³⁰

9. The SPO responds that the detention of Mr Haradinaj remains necessary as there has been no relevant change in the circumstances, and, in fact, the Article 41(6)(b) risks have increased.³¹ The SPO submits that Mr Haradinaj incorporates by reference his earlier arguments, which have already been rejected by the Pre-Trial Judge in the last review of Mr Haradinaj’s detention.³² The SPO avers that the Pre-Trial Judge’s findings in the last review of Mr Haradinaj’s detention continue to be true in all respects.³³ While acknowledging that the applicable standard is whether the reasons justifying Mr Haradinaj’s detention still exist, the SPO submits that determining the existence of such reasons inevitably concerns consideration of what has changed, if anything, since the previous ruling on detention.³⁴ In this regard, the SPO highlights that Mr Haradinaj concedes that circumstances have not changed since his last detention review, and submits that Mr Haradinaj fails to articulate new conditions which could mitigate the risks.³⁵ In particular, referring to the statement of the KLA WVA’s acting chairperson that he would make public more SC confidential material if he were to obtain them,³⁶ the SPO submits that Mr Haradinaj’s network of KLA war veterans remain willing to obstruct the proceedings.³⁷ The SPO submits that the Panel

²⁸ Defence Submission, para. 25.

²⁹ Defence Submission, para. 20.

³⁰ Defence Submission, paras 3, 42(d), 43; Defence Reply, para. 36.

³¹ SPO Submission, para. 1.

³² SPO Submission, para. 5.

³³ SPO Submission, para. 2.

³⁴ SPO Submission, para. 6.

³⁵ SPO Submission, para. 5.

³⁶ SPO Submission, para. 4.

³⁷ SPO Submission, para. 4.

is not required to make findings on the factors already decided upon in previous rulings on detention.³⁸ Lastly, the SPO emphasises that the length of pre-trial detention must be balanced against the Article 41(6) risks and the circumstances of the case as a whole and that the proceedings are moving expeditiously and, on this basis, avers that Mr Haradinaj's continued detention remains proportionate.³⁹

10. In his Reply, Mr Haradinaj underlines that the burden of establishing the reasons for ordering continued detention rests with the SPO. Mr Haradinaj accordingly submits that requiring him to argue why he should be released, in advance of the SPO setting out its ground for why he should not be released, constitutes an improper reversal of the burden of proof.⁴⁰ Mr Haradinaj adds that the risk of absconding should be assessed in relation to his character, morals, home and personal ties with the country in which he is being prosecuted, which, he submits, should be understood as Kosovo in light of the domestic nature of the SC.⁴¹ Mr Haradinaj further avers that the SPO is unable to prove that he sought to evade arrest and to demonstrate that no reasonable conditions could mitigate his flight risk.⁴² Mr Haradinaj also submits that several factors – such as the actions of others in the KLA network,⁴³ a reasonable suspicion,⁴⁴ “previous issues”⁴⁵ – while relevant, are insufficient to justify continued detention.

³⁸ SPO Submission, para. 6

³⁹ SPO Submission, paras 2-3, 14.

⁴⁰ Defence Reply, paras 8, 12.

⁴¹ Defence Reply, paras 14-15.

⁴² Defence Reply, paras 11, 15, 19-22.

⁴³ Defence Reply, para. 25.

⁴⁴ Defence Reply, para. 30.

⁴⁵ Defence Reply, paras 31-35.

III. APPLICABLE LAW

11. Pursuant to Article 41(6)(a) and (b) of the Law, the SC shall only detain a person when there is a grounded suspicion that the person has committed a crime within its 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 repeat the criminal offence, complete an attempted crime or commit a crime which the person threatened to commit.

12. Article 41(12) of the Law provides for alternative measures to prevent or mitigate these risks, including, among others, bail, house detention, promise not to leave residence and prohibition on approaching specific places or persons.

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

IV. DISCUSSION

14. At the outset, the Panel recalls that any analysis of continued detention must take the presumption of innocence as its starting point.⁴⁶ Detention cannot be maintained lightly and the burden to demonstrate that the detention of Mr Haradinaj is necessary is on the SPO.⁴⁷ The Panel also recalls that it is not incumbent upon Mr Haradinaj to demonstrate the existence of reasons warranting his release.⁴⁸ The Trial Panel observes

⁴⁶ See, albeit in relation to pre-trial detention, 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 Appeal Decision"), 30 April 2021, para. 17. See also KSC-BC-2020-05, F00158, Trial Panel I, *Fifth Decision on Review of Detention*, 23 July 2021, para. 14.

⁴⁷ Thaçi Appeal Decision, para. 17.

⁴⁸ 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, para. 115.

in this regard that the Pre-Trial Judge's practice in relation to detention review was to receive submissions from the Defence first, and submissions from the SPO thereafter, with the possibility for the Defence to reply.⁴⁹ The Panel notes that such a procedural arrangement does not displace the onus that rests exclusively upon the SPO to establish, in every instance, that the conditions for detention continue to be met. Nonetheless, the Panel decides that, going forward, it will receive first the submissions of the SPO and thereafter submissions from the Defence, for ease of review.

15. Accordingly, with regard to Mr Haradinaj's disagreement with the SPO's approach of "no relevant change in the circumstances", the Panel confirms that the test to be applied to the present review of detention at two-month intervals under Article 41(10) of the Law is whether the reasons for detention on remand still exist.⁵⁰ The Panel proceeds to the review of Mr Haradinaj's detention with this in mind.

A. GROUNDED SUSPICION

16. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires a grounded suspicion that Mr Haradinaj committed a crime within the jurisdiction of the SC. In this regard, the Panel notes that the Pre-Trial Judge confirmed the indictment against Mr Haradinaj having found that a well-grounded suspicion within the meaning of Article 39(2) of the Law existed that he committed offences under SC jurisdiction.⁵¹ The Panel further recalls that the threshold required for

⁴⁹ See IA002-F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention*, 9 February 2021, para. 43, fn. 82.

⁵⁰ See KSC-CC-PR-2020-09, F00006, Specialist Chamber of the Constitutional Court, *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 ("SCCC 22 May 2020 Judgment"), paras 66-68. See also ECtHR, *Makarenko v. Ukraine*, no. 622/11, 30 January 2018, paras 41, 44, 91.

⁵¹ F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 11 December 2020.

continued detention (grounded suspicion) is necessarily lower than that required for the confirmation of an indictment (well-grounded suspicion).⁵²

17. In relation to Mr Haradinaj's submission that no witness evidence has been disclosed indicating that he threatened or otherwise intimidated any witness,⁵³ the Panel observes that this pertains to the evaluation of the evidence in support of the charges, which will occur at trial, when the Panel will assess what weight to give to the evidence and whether the SPO has discharged its burden of proof as to relevant allegations contained in the indictment and in relation to the alleged guilt of Mr Haradinaj.⁵⁴

18. In light of the foregoing, the Panel is satisfied that there remains a grounded suspicion against Mr Haradinaj as required by Article 41(6)(a) of the Law.

B. NECESSITY OF DETENTION

19. With respect to the grounds for continued detention, Article 41(6)(b) of the Law sets out three alternative bases (risks) on which detention may be found to be necessary.⁵⁵ These grounds must be "articulable" in the sense that they must be specified in detail by reference to the relevant information or evidence.⁵⁶ The SPO must accordingly demonstrate the existence of either of these risks against the threshold of articulable grounds to believe.⁵⁷ Furthermore, a Panel must provide specific reasoning and rely on concrete grounds when authorising continued

⁵² Confirmation Decision, para. 28.

⁵³ Defence Submission, para. 42(a).

⁵⁴ SCCC 26 April 2017 Judgment, para. 201.

⁵⁵ Cf. 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.

⁵⁶ 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 Appeal Decision, para. 23.

⁵⁷ KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, para. 15.

detention.⁵⁸ That being said, in determining whether any of 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 certainty, but more than a mere possibility of a risk materialising.⁵⁹

20. In this regard, the Panel notes that, as maintained by Mr Haradinaj, the prerequisite of a grounded suspicion is not sufficient, on its own, to justify continued detention after the passage of time.⁶⁰ The Panel shall accordingly address the existence of the Article 41(6)(b) risks.

1. Risk of Flight

21. With regard to flight risk, the Panel takes note of the Registry's report on Mr Haradinaj's arrest and transfer, which provides a detailed account of the events as they unfolded.⁶¹ In particular, the Panel observes that the Registry's report recounts the evasive manoeuvres taken by Mr Haradinaj while in a taxi, his attempt to run from arresting officers as he exited the taxi, and his lack of cooperativeness until the Kosovo police became involved.⁶² This also follows from the Report of the arresting officer submitted by the SPO.⁶³

22. Mr Haradinaj's arguments – namely that the Video shows only the “very end portion” of his arrest, that he was on his way to attend an appointment at a local television station and that he was solely seeking to “protect himself by having Kosovo Police present”⁶⁴ – do not cast doubt on the aforementioned account of the events in

⁵⁸ Thaçi Appeal Decision, para. 22.

⁵⁹ Thaçi Appeal Decision, para. 22.

⁶⁰ Defence Reply, para. 30.

⁶¹ F00047, Registrar, *Confidential and Ex Parte Version of Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities*, Filing KSC-BC-2020-07/F00026/COR dated 28 September 2020, 14 October 2020, confidential and *ex parte*, paras 3-7, with Annex 1, confidential redacted and *ex parte*. See also F00026/COR/RED, Registrar, *Public Redacted Version of 'Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities'*, filing KSC-BC-2020-07/F00026/COR dated 28 September 2020 (“Public Redacted Version of Report on Arrest and Transfer”), 14 October 2020, paras 3-7.

⁶² Public Redacted Version of Report on Arrest and Transfer, paras 3-7.

⁶³ Disclosure 11, 083798-083799.

⁶⁴ Defence Submission, paras 20-25.

the Registry's report or the Report. The Panel observes that Mr Haradinaj rejected being arrested by the SPO and insisted upon the involvement of the Kosovo police.⁶⁵

23. The Panel is not persuaded by Mr Haradinaj's submission that his behaviour was neither tantamount to seeking to evade arrest nor demonstrative of a flight risk.⁶⁶ Rather, like the Pre-Trial Judge before it, the Panel finds that Mr Haradinaj's conduct during his arrest indicates that he will try to evade the proceedings. Similarly, and in light of Mr Haradinaj's actions at the time of his arrest, the Panel concurs with the Pre-Trial Judge that other considerations (namely, Mr Haradinaj's non-recognition of the SC,⁶⁷ his EU citizenship enabling him to travel with ease, and his ability, as deputy head of the KLA WVA, to call upon the resources of the organisation to assist in any attempt to flee) could reasonably be regarded as factors supporting the suggestion of Mr Haradinaj being a flight risk.

24. In light of the foregoing, the Panel finds that Mr Haradinaj remains a flight risk.

2. Risk of Obstructing the Proceedings

25. The Panel recalls the Pre-Trial Judge's findings that there is a well-grounded suspicion that Mr Haradinaj intentionally participated in the unauthorised dissemination of protected information and threatened (potential) information providers.⁶⁸ While, as said above, any analysis of continued detention must take as a starting point the presumption of innocence, the Pre-Trial Judge's above findings may be considered when determining whether there are articulable grounds to believe that Mr Haradinaj poses a risk of obstructing the present proceedings. In particular, the Panel recalls that it has been determined that there is a well-grounded suspicion that Mr Haradinaj published on repeated occasions SPO/SITF-related documents received

⁶⁵ Public Redacted Version of Report on Arrest and Transfer, paras 4-7.

⁶⁶ Defence Submission, para. 25.

⁶⁷ Transcript of Hearing, 29 September 2020, p. 17, line 13 to p. 18, line 5.

⁶⁸ Confirmation Decision, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

by the KLA WVA,⁶⁹ which contained, *inter alia*, names of (potential) information providers.⁷⁰ Furthermore, the Pre-Trial Judge found that there was well-grounded suspicion that Mr Haradinaj made various accusations regarding such persons for having allegedly interacted with the SITF/SPO,⁷¹ encouraged others to disseminate such information and declared that he sought to discredit the work of the SC.⁷² There is also well-grounded suspicion that Mr Haradinaj repeatedly stated that he would continue to disseminate SPO/SITF-related documents, despite the Single Judge's orders to the KLA WVA forbidding such dissemination.⁷³

26. The Panel further notes that, as a result of the finalisation of the disclosure process and the filing of the SPO Pre-Trial Brief, Mr Haradinaj is aware of the full extent of the SPO case and has access to evidence classified as confidential.⁷⁴ The Panel further observes that the disclosed material contains, *inter alia*: (i) declarations and charts describing the alleged confidential nature of the leaked documents; (ii) identifying information of SPO staff members; and (iii) summaries of sensitive information, including SPO investigative methods and contacts with individuals whose identity is

⁶⁹ Confirmation Decision, paras 101-102, 106, 108. *See also* F00009/RED/A01, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders* ("Annex 1 to SPO Request for Arrest Warrants"), 1 October 2020, pp. 8-9, 11; Second Detention Decision, para. 38; Third Detention Decision, para. 34; Fifth Detention Decision, para. 21.

⁷⁰ Confirmation Decision, para. 106.

⁷¹ Confirmation Decision, paras 111, 115.

⁷² Confirmation Decision, paras 101, 108, 120. *See also* Annex 1 to SPO Request for Arrest Warrants, pp. 10-11, 14-17, 20, 24; Second Detention Decision, para. 38; Third Detention Decision, para. 34; Fifth Detention Decision, para. 21.

⁷³ Confirmation Decision, paras 101-102, 106-108. *See also* F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, para. 22; F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, para. 22; Annex 1 to SPO Request for Arrest Warrants, pp. 5-6; F00009/RED/A02, Specialist Prosecutor, *Annex 2 to Request for Arrest Warrants and Related Orders*, 1 October 2020, p. 8.

⁷⁴ F00181/A01, Specialist Prosecutor, Pre-Trial Brief, 9 April 2021, confidential; Fifth Detention Decision, para. 22.

protected.⁷⁵ If it were to occur, the dissemination of such information would create a risk to the conduct of proceedings.

27. Furthermore, the Panel agrees with the Pre-Trial Judge that Mr Haradinaj, as a deputy chair of the KLA WVA, would have the means to disseminate information received through the disclosure process or any other protected material he may obtain once released by communicating with the media or with the assistance of others within the KLA WVA.⁷⁶

28. In light of the foregoing, the Panel finds that there are articulable grounds to believe that, if released, Mr Haradinaj will obstruct the present proceedings by disseminating or facilitating the dissemination of confidential or otherwise protected information and thereby threaten or influence witnesses, victims or accomplices.

3. Risk of Committing Offences

29. Given the above findings regarding the risk of obstructing the present proceedings and, in particular, in light of Mr Haradinaj's past conduct, including his vow to continue to publish SITE/SPO-related information, the Panel considers that there are articulable grounds to believe that, if released, Mr Haradinaj will commit offences either in repetition of those charged or which he has previously threatened to commit. This finding, based on the threshold of articulable grounds to believe, is without prejudice to the determination that the Panel will be asked to make in relation to the charges once it has heard and assessed all relevant evidence and arguments put forth by the parties at trial.

⁷⁵ F00210, Pre-Trial Judge, *Decision on Prosecution Requests and Challenges Pursuant to F00172*, 26 May 2021, confidential; 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.

⁷⁶ First Detention Decision, para. 17; Fifth Detention Decision, para. 17. *See also* in this regard SPO Submission, Annex 1.

4. Conclusion

30. The Panel concludes that there remains a risk that Mr Haradinaj will flee, obstruct the progress of the proceedings, and commit offences either in repetition of those charged or which he has previously threatened to commit. The Panel will assess below whether these risks can be adequately addressed by the application of alternative measures.

C. MEASURES ALTERNATIVE TO DETENTION

31. As regards measures alternative to detention, Article 41(12) of the Law sets out a number of options to be considered in order to ensure the accused's presence at trial, to prevent reoffending or to ensure successful conduct of proceedings. In this respect, the Panel recalls that detention should only be continued if there are no alternative, more lenient measures reasonably available that could sufficiently mitigate the risks set out in Article 41(6)(b) of the Law.⁷⁷ The Panel must therefore consider *proprio motu* all reasonable alternative measures that could be imposed and not only those raised by the Defence or the SPO.⁷⁸

32. At the outset, the Panel recalls that the absence of change of circumstances does not preclude the review of detention. Accordingly, the Panel rejects the SPO's argument that Mr Haradinaj concedes that circumstances have not changed since his last detention review and fails to articulate new conditions which could mitigate the risks,⁷⁹ insofar as it suggests that it would rest upon Mr Haradinaj to demonstrate that

⁷⁷ SCCC 26 April 2017 Judgment, para. 114; SCCC 22 May 2020 Judgment, para. 70. *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*.

⁷⁸ KSC-BC-2020-06, IA003/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, para. 86; KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, para. 24.

⁷⁹ SPO Submission, para. 5.

release conditions could mitigate the risks or that the absence of change of circumstances would render detention review unnecessary.

33. That being said, for the purpose of the present review, neither the SPO nor Mr Haradinaj make any new specific submissions on proposed alternative measures. It remains that the Panel shall consider whether any such reasonably available measures could mitigate the aforementioned risks. With this in mind, the Panel assesses the possibility for conditional release against each of the three risks.

34. As regards the risk of flight, the Panel recalls that Mr Haradinaj: (i) has already attempted to evade the SPO officers during the arrest; (ii) has expressed that he does not recognise the SC; (iii) could easily travel with his EU citizenship to jurisdictions that do not have extradition agreements with Kosovo; and (iv) has already failed to comply with the orders of the Single Judge on two prior occasions.⁸⁰ In that light, the Panel is not persuaded that Mr Haradinaj would, for example, remain in house detention or would comply with any other alternative measure imposed upon him by the Panel with a view to ensure Mr Haradinaj's presence at trial. The Panel is of the view that no reasonably available alternative measures would sufficiently mitigate the risk of flight.

35. As regards the risks of obstruction and committing offences, the Panel concurs with the Pre-Trial Judge's finding that, if released from detention, Mr Haradinaj could obtain access to various means of communication in order to disseminate electronically, or through the mail, confidential information received through the disclosure process, or additional information which may come into his possession by other means.⁸¹ The Panel further concurs with the Pre-Trial Judge's finding that no alternative measures, such as house detention coupled with restrictions on communication with other persons, would effectively prevent Mr Haradinaj from

⁸⁰ First Order, para. 22; Second Order, para. 22.

⁸¹ Fifth Detention Decision, para. 29.

employing other electronic devices belonging to, for example, his family or acquaintances, or from passing on confidential information to other persons.⁸² 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 Haradinaj's communications can be effectively controlled and subject to any necessary limitation.⁸³ Furthermore, the Panel considers that Mr Haradinaj would also be in a position to share confidential information with other members of the KLA WVA with a view to such members disseminating the information. As a result, the Panel considers that there is no basis to conclude that any of the measures foreseen in Article 41(12) of the Law, or any other reasonably available measures could mitigate the aforementioned risks in the present case.

36. In light of the foregoing, the Panel finds that the risks of fleeing, obstructing the proceedings and committing offences either in repetition of those charged or which Mr Haradinaj has previously threatened to commit can only be effectively managed at the SC's detention facilities. In these circumstances, the Panel finds that Mr Haradinaj's continued detention is necessary in order to avert the risks in Article 41(6)(b)(i), (ii) and (iii) of the Law.

D. REASONABLENESS OF DETENTION

37. As regards the length of detention, the Panel recalls that the duration of time spent in detention is a factor that needs to be considered along with the risks in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention is unreasonable and the person needs to be released.⁸⁴ The

⁸² Fifth Detention Decision, para. 31.

⁸³ Fifth Detention Decision, para. 31.

⁸⁴ KSC-BC-2020-06, IA003/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, para. 79.

Panel is accordingly under an obligation to ensure that the time spent in detention is reasonable, including during trial.⁸⁵

38. The Panel notes in this regard that Mr Haradinaj has now been in detention for approximately eleven months since his arrest. During this time, significant steps were taken for the preparation of the case for trial. Notably, since the last detention review, important developments occurred in the case: following its assignment by the President,⁸⁶ and its receipt of the case file from the Pre-Trial Judge,⁸⁷ the Panel promptly scheduled trial preparation conferences for early September and ordered submissions from the Parties to be filed prior to those hearings, with a view to starting the trial as soon as practicable.⁸⁸

39. In light of these developments, as well as the fact that there are continuing risks of fleeing, obstructing the proceedings and committing offences either in repetition of those charged or which Mr Haradinaj has previously threatened to commit, none of which can be sufficiently mitigated by the application of reasonable alternative measures, the Panel finds that Mr Haradinaj's detention for a further two months is necessary and reasonable in the specific circumstances of the case.

⁸⁵ SCCC 22 May 2020 Judgment, para. 63.

⁸⁶ F00263, President, *Decision Assigning Trial Panel II*, 15 July 2021.

⁸⁷ F00265, President, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021.

⁸⁸ F00267, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference*, 21 July 2021.

V. DISPOSITION

40. For the above-mentioned reasons, the Panel hereby:

- a. **ORDERS** Mr Haradinaj's continued detention;
- b. **ORDERS** the SPO to file submissions on the next review of Mr Haradinaj's detention by **Friday, 8 October 2021**;
- c. **ORDERS** Mr Haradinaj to respond to the SPO submissions, if he so wishes, by **Friday, 15 October 2021**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 23 August 2021
At The Hague, the Netherlands