



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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

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**Public Redacted Version of
Decision on Review of Detention of Hysni Gucati**

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TRIAL PANEL II (“Panel”), pursuant to Articles 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 (“Mr Gucati” or “the Accused”) and Mr 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 (“SITF”) and/or the Specialist Prosecutor’s Office (“SPO”).¹
2. On 27 October 2020, the Single Judge rejected Mr Gucati’s application for bail,² which was upheld by the Court of Appeals Panel.³ The Pre-Trial Judge reviewed and extended Mr Gucati’s detention at regular intervals, namely on 24 December 2020, 24 February, 23 April and 23 June 2021.⁴
3. On 16 July 2021, the Pre-Trial Judge transmitted the case to the Panel.⁵
4. On 23 August 2021, the Panel reviewed and extended Mr Gucati’s detention.⁶

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

² F00059, Single Judge, *Decision on Application for Bail (“First Detention Decision”)*, 27 October 2020.

³ IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati’s Appeal on Matters Related to the Arrest and Detention*, 9 December 2020, para. 78.

⁴ F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati (“Second Detention Decision”)*, 24 December 2020; F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati (“Third Detention Decision”)*, 24 February 2021; F00188, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati (“Fourth Detention Decision”)*, 23 April 2021; F00245, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati (“Fifth Detention Decision”)*, 23 June 2021.

⁵ F00265, Pre-Trial Judge, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021.

⁶ F00279, Panel, *Decision on Review of Detention of Hysni Gucati (“Sixth Detention Decision”)*, 23 August 2021.

5. On 15 October 2021, the Defence for Hysni Gucati (“Gucati Defence”) requested the Panel to release Mr Gucati under a series of proposed conditions to be implemented by the Kosovo Police (“Proposed Conditions”).⁷

6. On 22 October 2021, the Panel ordered the continued detention of Mr Gucati, noting that it would seek information from the Kosovo Police regarding the enforceability of the Proposed Conditions in relation to both Accused and would review the detention of the Accused again upon receipt of that information.⁸

7. On the same day, the Panel ordered the Kosovo Police to provide information as to: (i) its authority and capability to restrict the movements of individuals subject to temporary release, monitor and restrict such individuals’ communications, administer house arrest and ensure the equivalent of the aforementioned measures during hospitalisation; (ii) the enforceability of the aforementioned measures attaching to temporary release; and (iii) previous instances of enforcing such measures attaching to the temporary release of persons accused of offences against the administration of justice, in particular offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code.⁹ The Kosovo Police was further invited to provide any additional information considered to be relevant in relation to the enforcement of conditional release.¹⁰

8. On the same day, 22 October 2021, the Panel invited the Registrar to provide submissions on the detention regime at the Specialist Chambers (“SC”)’ detention facilities, namely on: (i) its approach to restrictions on visits and communications at the SC’s detentions facilities, such as ensuring safety, security, or good order in the detention facilities, preventing disorder or crime, protecting health, or protecting the safety, security, rights, or freedoms of others (notably of witnesses

⁷ F00375, Gucati Defence, *Submissions on the Sixth Review of Detention*, 15 October 2021, para. 13.

⁸ F00390, Panel, *Decision on Review of Detention of Hysni Gucati* (“Seventh Detention Decision”), 22 October 2021; F00391, Panel, *Decision on Review of Detention of Nasim Haradinaj*, 22 October 2021.

⁹ F00392, Panel, *Order to the Kosovo Police with Confidential Annex*, 22 October 2021, paras 10, 12.

¹⁰ F00392, Panel, *Order to the Kosovo Police with Confidential Annex*, 22 October 2021, paras 10, 12.

and victims); (ii) all applicable and additional restrictions, including the monitoring regime, relating to visits, telephone conversations and correspondence at the SC's detention facilities and related urgent security measures; (iii) any other relevant aspects of the security environment or detention regime at the SC's detention facilities that may have an impact on visits, telephone conversations and correspondence; and (iv) any other matter relevant to the detention regime pertaining to the Accused at the SC's detention facilities, including the enforceability of applicable and additional restrictions during any hospitalisation or admission into medical facilities of the Accused.¹¹

9. On 25 and 26 November 2021 respectively, the Panel and the Parties received the information it requested from the Kosovo Police in Albanian ("Kosovo Police Report"),¹² and from the Registrar ("Registrar Report"),¹³ (collectively "Reports").

10. On 2 December 2021, the Panel and the Parties received the English translation of the Kosovo Police Report.¹⁴

11. On 6 December 2021, the Panel invited observations from the Parties on the Reports, to be submitted in a consolidated filing with their submissions on the next detention review.¹⁵

12. On 10 December 2021, the SPO filed its consolidated submissions for review of detention ("SPO Submission").¹⁶

¹¹ F00393, Panel, *Order to the Registrar to Provide Information on the Detention Regime*, 22 October 2021, paras 9-10.

¹² F00449, *Përgjigje në kërkesë me numër KSC-BC-2020-07 të datës 22 tetor 2021*, 25 November 2021, confidential.

¹³ F00452, Registrar, *Registry Submissions Pursuant to the Trial Panel's Order to Provide Information on the Detention Regime (F00393)*, 26 November 2021, confidential.

¹⁴ F00449, *Reply to Request Number KSC-BC-2020-07, dated 22 October 2021* ("KP Report"), 25 November 2021 (distributed on 2 December 2021), confidential.

¹⁵ F00472, Panel, *Order for Submissions on the Kosovo Police and Registry Reports and on Detention Review*, 6 December 2021.

¹⁶ F00490, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention with one public annex* ("SPO Submission"), 10 December 2021, confidential.

13. On 15 December 2021, the Gucati Defence responded to the SPO Submission (“Gucati Submission”).¹⁷

II. SUBMISSIONS

14. The SPO avers that the detention of Mr Gucati remains necessary as all risks under Article 41(6)(b) of the Law continue to exist.¹⁸ The SPO submits that no conditional release regime, as envisaged by the Kosovo Police Report, can sufficiently mitigate the risks involved or be effectively enforced by the Kosovo Police.¹⁹

15. The Gucati Defence submits that the continued detention of Mr Gucati is neither necessary nor proportionate.²⁰ Therefore, the Gucati Defence requests the Panel to order Mr Gucati’s release from detention, with or without conditions, and asserts that he will comply with any conditions imposed.²¹

III. APPLICABLE LAW

16. 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.

¹⁷ F00499, Gucati Defence, *Defence Submissions on the Kosovo Police and Registry Reports and on Detention Review* (“Gucati Submissions”), 15 December 2021, confidential.

¹⁸ SPO Submission, paras 1, 6-13.

¹⁹ SPO Submission, paras 1, 16.

²⁰ Gucati Submission, para. 8.

²¹ Gucati Submission, paras 33-34.

17. 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.

18. 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.²²

19. While it is not required to make findings on the factors already decided upon in the initial ruling on detention, the Panel must examine these reasons or circumstances, and determine whether they still exist to satisfy itself that, at the time of the review decision, grounds for continued detention still exist.²³ To do so, the Panel must, *proprio motu*, assess whether it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.²⁴ Although the two-month review is not strictly limited to whether or not a change of circumstances occurred in the case, such a change can nonetheless be determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.²⁵

IV. DISCUSSION

20. At the outset, the Panel recalls that, in line with Article 21(3) of the Law, any analysis of continued detention must accept the presumption of innocence as its

²² See also IA002-F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention* ("Haradinaj Appeal Detention Review Decision"), 9 February 2021, para. 55.

²³ Haradinaj Appeal Detention Review Decision, para. 55.

²⁴ KSC-BC-2020-06, IA008-F00004, Court of Appeals Panel, *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention* ("Veseli Appeals Detention Review Decision"), 1 October 2021, para. 14.

²⁵ Veseli Appeals Detention Review Decision, para. 15.

starting point.²⁶ Detention cannot be maintained lightly and the burden to demonstrate that detention is necessary is on the SPO.²⁷ It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release.²⁸

21. The Panel further notes that various circumstances have arisen since its last decision (including the report received from the Kosovo Police and the close of the SPO case), which have a bearing on the present matter and which the Panel has therefore taken into consideration for the purpose of the present decision.

A. GROUNDED SUSPICION

22. The SPO submits that the Panel has previously found there to be grounded suspicion within the meaning of Article 41(6)(a) of the Law, following the Pre-Trial Judge's finding of an even higher "well-grounded suspicion" in the Confirmation Decision.²⁹ The SPO adds that, since the last detention review, the Panel held in its decision on the Defence motions to dismiss charges ("Rule 130 Decision") that the evidence, if accepted, is capable of supporting a conviction beyond reasonable doubt on all six counts charged.³⁰ According to the SPO, these developments further confirm that a grounded suspicion continues to exist within the meaning of Article 41(6)(a).³¹

²⁶ Seventh Decision, para. 13; Sixth Detention Decision, para. 12. *See also*, 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.

²⁷ Seventh Detention Decision, para. 13; Sixth Detention Decision, para. 12; Thaçi Appeal Decision, para. 17.

²⁸ Seventh Detention Decision, para. 13; Sixth Detention Decision, para. 12; 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.

²⁹ SPO Submission, para. 3.

³⁰ SPO Submission, para. 4, referring to F00450, Panel, *Decision on the Defence Motions to Dismiss Charges* ("Rule 130 Decision"), 26 November 2021.

³¹ SPO Submission, para. 4.

23. The Gucati Defence makes no submissions in relation to grounded suspicion under Article 41(6)(a) of the Law.

24. Article 41(6)(a) of the Law requires a grounded suspicion that Mr Gucati committed an offence within the jurisdiction of the SC. In this regard, the Panel recalls that the Pre-Trial Judge confirmed the indictment against Mr Gucati 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. The Panel further recalls that the “well-grounded suspicion” threshold for the confirmation of the indictment is necessarily higher than the “grounded suspicion” required for continued detention.³²

25. As regards the impact of the Rule 130 Decision on the above finding, the Panel stresses that the legal test under that rule does not require an evaluation of whether the Accused is guilty or not; the test is not whether the Panel *would* in fact enter a conviction on the SPO evidence, if accepted, but whether it *could*.³³ That being said, the Rule 130 Decision determined, following an adversarial testing of the evidence presented by the SPO, that the Accused had a case to answer in relation to all six counts of the Indictment. As such, the Panel’s findings in the Rule 130 Decision corroborate and support the finding that grounded suspicion within the meaning of Article 41(6)(a) of the Law still exists.

26. In light of the foregoing, the Panel is satisfied that there continues to be a grounded suspicion against Mr Gucati as required by Article 41(6)(a) of the Law.

³² Seventh Detention Decision, para. 14; Sixth Detention Decision, para. 13. *See also* Veseli Appeal Detention Review Decision, para. 21; F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment* (“Confirmation Decision”), 11 December 2020, para. 28..

³³ Rule 130 Decision, paras 18, 20.

B. NECESSITY OF DETENTION

27. 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.³⁴ These grounds must be “articulable” in the sense that they must be specified in detail by reference to the relevant information or evidence.³⁵ The SPO must accordingly demonstrate the existence of any of these risks against the threshold of articulable grounds to believe.³⁶ A Panel must provide specific reasoning and rely on concrete grounds when authorising continued detention.³⁷ 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.³⁸

1. Risk of Flight

28. The SPO submits that a risk of flight exists for Mr Gucati who testified that he made public the batches because he is opposed to the SC and does not trust it, as it collaborates with “criminals who have been against [his] nation and country”.³⁹ Furthermore, the SPO asserts that, in his capacity as former Chairman of the KLA War Veterans Association (“KLA WVA”), Mr Gucati can call upon the resources

³⁴ Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* 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.

³⁵ Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123, which 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.

³⁶ Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, para. 15.

³⁷ Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

³⁸ Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

³⁹ SPO Submission, para. 7.

of the organisation to give him the means to flee.⁴⁰ The SPO observes that the upcoming conclusion of the trial and the possibility of a serious sentence in the event of a conviction may heighten the incentive to evade the KSC proceedings.⁴¹

29. The Gucati Defence submits that both the Pre-Trial Judge and the Panel have repeatedly found that any risk of flight in Mr Gucati's case can be adequately managed by alternative measures.⁴² Therefore, the Gucati Defence claims, continued detention may not be justified on the ground of risk of flight.⁴³

30. The Panel recalls that, in its last two decisions on continued detention, it found that any potential risk of Mr Gucati fleeing could be sufficiently mitigated.⁴⁴ The Panel does not accept the SPO argument that Mr Gucati's testimony regarding his reasons for making the batches public, and his opinion of the SC, show an increased risk of flight.⁴⁵ While the Panel cannot completely exclude the risk that Mr Gucati would flee if released, it remains satisfied that any such potential risk could be sufficiently mitigated by a set of alternative measures.

31. The Panel therefore finds that Mr Gucati's continued detention may not be justified on the ground of the risk of flight.

2. Risk of Obstructing the Proceedings

32. The SPO submits that, since the last detention review, the Panel has found that there is evidence capable of supporting a conviction for each count of the Indictment against Mr Gucati, and that the Defence has received disclosure of particularly sensitive information concerning SPO investigations into the process

⁴⁰ SPO Submission, para. 7.

⁴¹ SPO Submission, para. 9.

⁴² Gucati Submission, para. 9.

⁴³ Gucati Submission, para. 9.

⁴⁴ Seventh Detention Decision, para. 19; Sixth Detention Decision, para. 17. *See also* Third Detention Decision, para. 40; Fourth Detention Decision, paras 15-16; Fifth Detention Decision, paras 12-13.

⁴⁵ SPO Submission, para. 7.

by which the batches of materials arrived at the KLA WVA. The SPO asserts that these circumstances, together with the ability of the Accused to draw on the resources of the KLA WVA, give the Accused additional means and opportunity to obstruct the proceedings.⁴⁶ The SPO also asserts that the evidence led on the conduct of the Accused in September 2020 shows that his willingness and ability to obstruct the progress of KSC proceedings is real. The SPO also argues that the fate of witnesses in former KLA trials further demonstrates the risks posed by the easily mobilised supporters and sympathisers of the Accused, and notes the climate of intimidation of witnesses in previous Kosovo cases.⁴⁷ The SPO argues that the risk of Mr Gucati disseminating confidential information has never been higher.⁴⁸

33. The Gucati Defence asserts that, contrary to the SPO's claim, none of the disclosures ordered might prejudice ongoing SPO investigations.⁴⁹ To the contrary, the Gucati Defence submits that all disclosures ordered were disclosed in a form designed not to reveal anything which might prejudice ongoing SPO investigations, or negatively impact the security, well-being and privacy of witnesses and other individuals.⁵⁰ The Gucati Defence also argues that the cases relied upon by the SPO are old and demonstrate neither a current nor a previous climate of witness intimidation.⁵¹

34. The Panel recalls the Pre-Trial Judge's finding that there was a well-grounded suspicion, *inter alia*, that Mr Gucati: (i) intentionally participated in the unauthorised dissemination of protected information and threatened (potential)

⁴⁶ SPO Submission, paras 10-11 *referring to* the Rule 130 Decision.

⁴⁷ SPO Submission, para. 11.

⁴⁸ SPO Submission, para. 12.

⁴⁹ Gucati Submission, para. 10.

⁵⁰ Gucati Submission, para. 10.

⁵¹ Gucati Submission, paras 11-12.

information providers;⁵² (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA, which contained, *inter alia*, names of (potential) information providers;⁵³ (iii) made various accusations regarding such persons for having allegedly interacted with the SITF/SPO;⁵⁴ and (iv) vowed to continue to publish such information in the future,⁵⁵ despite being ordered by the Single Judge to refrain from doing so.⁵⁶ As noted, any analysis of continued detention must take as a starting point the Accused's presumption of innocence. The Panel nevertheless takes into consideration these findings when determining whether there are articulable grounds to believe that Mr Gucati's release poses a risk of obstructing the present proceedings.

35. Furthermore, the Panel observes that Mr Gucati, by virtue of the presentation of the SPO case, is now aware of the details of the SPO case and of a large body of incriminating evidence, including confidential information received through the testimony of witnesses in private sessions, confidential exhibits and the material which has been disclosed to him through the disclosure process. In particular, the Panel agrees with the SPO that the Defence recently received, through the disclosure process, highly sensitive information, the dissemination of which would jeopardise witness security and ongoing SPO investigations.⁵⁷ In this regard, the Panel notes the Gucati submission that material was disclosed in a form which was designed not to, and did not, reveal any information which might

⁵² Confirmation Decision, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

⁵³ Confirmation Decision, paras 101, 106.

⁵⁴ Confirmation Decision, paras 111, 115.

⁵⁵ Confirmation Decision, para. 102.

⁵⁶ Confirmation Decision, paras 101, 106. *See also* F00005, Single Judge, *Urgent Decision Authorising a Seizure*, 7 September 2020, paras 11-13, 21-22; F00007, Single Judge, *Decision Authorising a Seizure*, 17 September 2020, paras 11-13, 21-22; F0009/A01/RED, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders*, 1 October 2020, p. 14; First Detention Decision, para. 17; Fifth Detention Decision, paras 18, 24.

⁵⁷ F00413, Panel, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, 3 November 2021, para. 95(b); F00435, Panel, *Public Redacted Version of Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201*, 15 November 2021, para. 26.

prejudice ongoing investigations, or negatively impact the security of witnesses.⁵⁸ The Panel emphasises, however, that disclosure to the Defence and the Accused is premised on, *inter alia*, the confidentiality obligations of Counsel and the communication restrictions which apply to the Accused while in detention. It cannot be equated to disclosure to the public. This is confirmed by the fact that the highly sensitive material disclosed to the Defence retains a confidential classification. Moreover, the Panel notes the statement, made by Mr Gucati during his testimony, that he would make public any SITF, SPO or SC materials that would arrive at the KLA WVA.⁵⁹ The Panel is mindful that the weight of this statement will have to be assessed with the totality of evidence at the end of the trial. That being said, for the purpose of ascertaining a risk under Article 41(6)(b)(ii), the Panel views this statement as a confirmation of the vows expressed earlier by Mr Gucati and noted by the Pre-Trial Judge and this Panel in previous detention decisions.⁶⁰ The Panel further confirms its finding that, as head of the KLA WVA, Mr Gucati, if released, would have the means to disseminate information received through the disclosure process, or any other protected material he may obtain after release, by communicating with the media or with the assistance of others within the KLA WVA.⁶¹

36. The Panel considers that these observations, assessed together with the Pre-Trial Judge's findings summarised above, lead to the conclusion that there is a risk that Mr Gucati, if released, would disseminate confidential information which, in turn, would risk obstructing the conduct of the present proceedings. As

⁵⁸ Gucati Submission, para. 10.

⁵⁹ Transcript, 6 December 2021, p. 2218, lines 21-24: "Every time they come [...] I will make them public."

⁶⁰ See *supra* para. 34.

⁶¹ Seventh Detention Decision, para. 22. See also First Detention Decision, para. 17; Fifth, Detention Decision, para. 17; Sixth Detention Decision, paras 20-21. See also in this regard SPO Submission, Annex 1.

the Panel has previously held,⁶² it does not consider that the Defence's submissions regarding Mr Gucati's good character and compliant conduct during his arrest and detention⁶³ have any bearing on the Accused's willingness or capability (or absence thereof) to disseminate such information.

37. In light of the foregoing, the Panel finds that there remain articulable grounds to believe that, if released, Mr Gucati 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

38. The SPO submits that the vow of Mr Gucati to continue to disseminate SITF/SPO information demonstrates that he would continue to obstruct the proceedings if he were to be released. Considering Mr Gucati's previous conduct when given confidential information, the SPO argues that there is every reason to believe that detention remains necessary to prevent the commission of further offences.⁶⁴

39. The Gucati Defence submits that Mr Gucati has attended every day of his trial, and has continued to be cooperative and compliant during the course the trial itself. He has already given evidence and answered every question asked.⁶⁵

40. The Panel recalls its findings regarding the risk of obstructing the proceedings and, more specifically, Mr Gucati's past conduct, including his recent vow during his testimony to continue to publish SITF/SPO/SC-related information, and finds that there remain articulable grounds to believe that, if released, Mr Gucati will

⁶² Seventh Detention Decision, para. 23; Sixth Detention Decision, para. 21.

⁶³ Gucati Submission, para. 7; F00270/COR, Gucati Defence, *Corrected Version of Submissions on the Fifth Review of Detention*, 5 August 2021, para. 14.

⁶⁴ SPO Submission, para. 13.

⁶⁵ Gucati Submission, para. 13.

commit offences either in repetition of those charged or which he has previously threatened to commit. The Panel reiterates that this finding, based on the threshold of articulable grounds to believe, is without prejudice to the determination it will make in relation to the charges after having heard and assessed all relevant evidence and arguments put forth by the Parties at trial.⁶⁶

4. Conclusion

41. The Panel concludes that there remains a risk that Mr Gucati will, if released, obstruct the present proceedings and commit offences either in repetition of those charged or which he has previously threatened to commit. The Panel will now assess whether the application of alternative measures can adequately address these risks.

C. MEASURES ALTERNATIVE TO DETENTION

42. Article 41(12) of the Law sets out a number of options to consider in order to ensure the Accused's presence at trial, to prevent reoffending, or to ensure the successful conduct of proceedings.⁶⁷ 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.⁶⁸ The Panel must therefore consider *proprio motu* all reasonable alternative

⁶⁶ Seventh Detention Decision, para. 25; Sixth Detention Decision, para. 23.

⁶⁷ Article 41(12) of the Law; Sixth Detention Decision, para. 25.

⁶⁸ Seventh Detention Decision, para. 27; Sixth Detention Decision, para. 25. *See also* SCCC 26 April 2017 Judgment, para. 114; 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* ("SCCC 22 May 2020 Judgment") 22 May 2020, para. 70. *See also* ECtHR, *Buzadji v. the Republic of Moldova*, Grand Chamber, [no. 23755/07](#), 5 July 2016, para. 87 *in fine*; *Idalov v. Russia*, Grand Chamber, [no. 5826/03](#), 22 May 2012, para. 140 *in fine*.

measures that could be imposed, and not only those raised by the Defence or the SPO.⁶⁹

43. As held by the Court of Appeals Panel, when assessing: (i) whether alternative measures can be effectively enforced and (ii) whether any proposed conditions can sufficiently mitigate the identified Article 41(6)(b) risks, the competent Panel must enquire into the enforceability of the alternative measures.⁷⁰

1. The Kosovo Police Report

44. The Panel welcomes the detailed description provided by the Kosovo Police in response to the Panel's questions regarding the regime of conditional release. The Kosovo Police Report provides detailed answers to the Panel's questions regarding the restriction of movements,⁷¹ monitoring and restricting communications,⁷² house arrest,⁷³ medical facilities,⁷⁴ the enforcement of the terms of conditional release and previous instances of conditional release for offences identical to those charged.⁷⁵

45. The Panel notes that while the Proposed Conditions, as previously put forward by the Gucati Defence, encompass many of the measures described in the Kosovo Police Report, the conditional release regime described in the report ("Proposed Regime") covers a broader range of procedures and measures. The Panel will accordingly assess the impact of the relevant measures in the broader context of the Proposed Regime, in order to determine whether they amount to

⁶⁹ Seventh Detention Decision, para. 27; 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* ("Selimi Appeal Decision"), 30 April 2021, para. 86; KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, para. 24.

⁷⁰ Veseli Appeals Detention Review Detention, paras 48-53.

⁷¹ KP Report, pp 2-6.

⁷² KP Report, pp 7-11.

⁷³ KP Report, pp 11-19.

⁷⁴ KP Report, pp 20-21.

⁷⁵ KP Report, pp 21-26.

alternative, more lenient measures that could sufficiently mitigate the risks set out in Article 41(6)(b) of the Law.

2. The Registry Report

46. In its report, the Registry provided detailed descriptions of the SC detention regime, including all applicable restrictions to telephone calls, visits, correspondence.⁷⁶ It also elaborated on additional restrictions and urgent security measures that can be applied as necessary.⁷⁷ The Registry has also provided information about, *inter alia*, restrictions applicable to media communications and the availability of internal and external medical facilities.⁷⁸

47. The Panel agrees with the submission of the Gucati Defence that the question is not whether the Kosovo Police can implement measures which match those of the SC detention facilities, but whether the measures can sufficiently mitigate any potential risk.⁷⁹ The Panel will accordingly rely on the Registry Report to the extent that it needs to assess whether, in the absence of the measures available at the SC detention facilities, the Kosovo Police can sufficiently mitigate the risks under Article 41(6)(b) of the Law with other measures.

3. The SPO Submission

48. The SPO submits that no conditions of release in Kosovo can mitigate the risks and requests the Panel to determine that the Proposed Regime is insufficient to justify release, and that the Kosovo Police cannot effectively enforce them.⁸⁰ The SPO argues that Mr Gucati has a demonstrated track record of not following the orders of the SC, and thus there is no reason to believe that he would genuinely

⁷⁶ Registry Report, paras 13-35.

⁷⁷ Registry Report, paras 36-42.

⁷⁸ Registry Report, paras 51-66.

⁷⁹ Gucati Submission, para. 23.

⁸⁰ SPO Submission, paras 14-30.

follow them.⁸¹ First, the SPO avers that the Proposed Regime is insufficient and that the Kosovo Police Report remains defective in key areas, namely in that: (i) the surveillance of residence conditions foresee a use of limited resources by the Kosovo Police that is not proportionate to the gravity of the risks;⁸² (ii) activities and visits inside the residence cannot be meaningfully monitored;⁸³ (iii) the communication device restrictions proposed by the Kosovo Police are both incomplete and ineffective;⁸⁴ and (iv) the Kosovo Police has provided no information on the training of the officers due to monitor the correct implementation of the Proposed Regime.⁸⁵ The SPO submits that the risks which flow from these shortcomings would be more effectively addressed by practices and officers of the SC detention facilities.⁸⁶ Secondly, the SPO submits that even if the Proposed Regime was sufficient to justify release, the Kosovo Police is unable to effectively enforce it.⁸⁷ The SPO argues that some parts of the Kosovo Police Report call into question the Kosovo Police's understanding of the risks and necessary measures.⁸⁸

49. The SPO further argues that, while there are well-intentioned and able officers within the Kosovo Police, corruption within Kosovo's criminal justice system is widely recognised. It notes previous instances where the Kosovo Police interfered with the course of justice and asserts that some Kosovo Police leaders have connections to the KLA, and by extension, to the KLA WVA.⁸⁹ The SPO concludes

⁸¹ SPO Submission, para. 15.

⁸² SPO Submission, para. 17.

⁸³ SPO Submission, paras 18-19.

⁸⁴ SPO Submission, paras 20-21.

⁸⁵ SPO Submissions, para. 22.

⁸⁶ SPO Submission, paras 17-22.

⁸⁷ SPO Submission, para. 14

⁸⁸ SPO Submission, para. 23.

⁸⁹ SPO Submission, paras 25-27.

that no conditions can mitigate the risks, and the Kosovo Police Report reinforces that conclusion.⁹⁰

4. The Gucati Submission

50. The Gucati Defence submits that the Proposed Regime is beyond proportionate to the level of any risk in terms of: (i) monitoring or alternatively blocking communications; (ii) personal searches; (iii) 24/7 security surveillance; and (iv) police monitoring.⁹¹ The Gucati Defence relies upon the Kosovo Police's confirmation that the Kosovo Police: (i) has extensive experience of enforcing conditional release in cases of offences against the administration of justice without any serious obstacle being encountered;⁹² (ii) is able to undertake any measures on order by the SC;⁹³ (iii) has the technological ability and capacity to enforce the Proposed Conditions;⁹⁴ (iv) will deploy sufficient numbers of police officers to enforce the Proposed Conditions;⁹⁵ and (v) has appropriate arrangements to secure medical attention for an individual under house arrest.⁹⁶

51. The Gucati Defence also submits that the SPO's assertions that Mr Gucati cannot be trusted to comply with any condition imposed is inconsistent with (i) his daily attendance and his continued cooperative and compliant conduct during the course of the trial;⁹⁷ and (ii) the repeated findings of the Pre-Trial Judge and the Panel that any risk of flight can be sufficiently mitigated by the imposition of conditions.⁹⁸ Furthermore, the Gucati Defence argues that the SPO's attack on the

⁹⁰ SPO Submission, para. 30.

⁹¹ Gucati Submission, para. 15.

⁹² Gucati Submission, para. 16.

⁹³ Gucati Submission, para. 17.

⁹⁴ Gucati Submission, para. 18.

⁹⁵ Gucati Submission, para. 19.

⁹⁶ Gucati Submission, para. 20.

⁹⁷ Gucati Submission, para. 13.

⁹⁸ Gucati Submission, para. 25.

Kosovo Police and Kosovo's criminal justice system is unjustified and not evidence-based.⁹⁹

52. The Gucati Defence notes that the annex to the SPO Submission does not mention the current General Director of the Kosovo Police who authored the Kosovo Police Report, and therefore requests the Panel to ignore the attacks made against his predecessors.¹⁰⁰ The Gucati Defence submits that there is no good reason to doubt the assurances provided by the Kosovo Police General Director.¹⁰¹

5. The Panel's Findings

53. The Panel shall consider whether any measures, either the Proposed Regime or other measures, could mitigate the aforementioned risks.

(a) Risk of Flight

54. As the Panel previously found, any potential risk of Mr Gucati fleeing could be sufficiently mitigated by a set of alternative measures. The Panel is further satisfied that the guarantees provided by the Proposed Regime could ensure that Mr Gucati would report to the relevant police station, would surrender travel documents, would be prevented from leaving the country [REDACTED], and would return to the SC whenever ordered to do so to be present during proceedings.¹⁰²

(b) Risk of Obstructing the Proceedings

55. The Panel recalls its previous finding that, if released from detention, Mr Gucati 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

⁹⁹ Gucati Submission, para. 26.

¹⁰⁰ Gucati Submission, paras 27-29.

¹⁰¹ Gucati Submission, para. 30.

¹⁰² KP Report, pp. 2-6.

possession by other means. The Panel found in the Seventh Detention Decision that no alternative measures, such as house detention coupled with restrictions on communication with other persons, would effectively prevent Mr Gucati from employing other electronic devices belonging to, for example, his family or acquaintances, or from passing on confidential information to other persons. The Panel also found that it was only through the communication monitoring framework applicable at the SC's detention facilities that Mr Gucati's communications could be effectively controlled. The Panel further noted that Mr Gucati 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.¹⁰³

56. The Panel indicated, however, that it will reassess this finding upon receipt of information from the Kosovo Police and the Registry.¹⁰⁴ The Panel will accordingly assess whether, in the absence of the measures available at the SC detention facilities, relevant conditions in the broader context of the Proposed Regime can sufficiently mitigate the risk of Mr Gucati obstructing the proceedings by disseminating or facilitating the dissemination of confidential or otherwise protected information and thereby threatening or influencing witnesses, victims or accomplices.

57. For the purposes of this assessment, the Panel will review the enforceability of measures in the broader context of the Proposed Regime as regards: (i) monitoring communications at the person's residence or place of house arrest; (ii) monitoring the person's media communications; (iii) monitoring the person's communications at external medical facilities; (iv) any other considerations affecting the implementation of measures of the Proposed Regime; and (v) any

¹⁰³ Seventh Detention Decision, para. 29. *See also* Fifth Detention Decision, paras 23, 25; Sixth Detention Decision, paras 25, 27.

¹⁰⁴ Seventh Detention Decision, paras 30-33.

other alternative or additional measures, that the Panel could impose to mitigate the relevant risk.

(i) *Monitoring communications at the person's residence or place of house arrest*

58. The Panel notes that, under the current regime applicable at the SC detention facilities, all communications, including telephone calls, correspondence and visits, are passively monitored, except certain privileged communications and “private visits” for certain close family members and within limited time periods.¹⁰⁵ In addition, in person and video visits are, as a rule, conducted within the sight and general hearing of SC Detention Officers.¹⁰⁶ The Registrar may also impose additional measures for telephone calls and video- or in-person visits, including active monitoring and after-the-fact-listening.¹⁰⁷ An actively monitored telephone conversation or visit may also be terminated immediately in order to, for example, prevent the unauthorised disclosure of confidential information or, if it is perceived that a detainee is using coded language, interference with the safe and secure conduct of proceedings.¹⁰⁸ Furthermore, any item received from outside the SC detention facilities, including any item introduced by a visitor, is also subject to security controls.¹⁰⁹

59. Furthermore, by virtue of its responsibility for the administration and servicing of the Specialist Chambers, the Registry, through the Witness Protection and Support Office, is also responsible for the implementation of court-ordered or otherwise necessary protective measures, security arrangements, and other appropriate assistance for witnesses and others who are at risk on account of

¹⁰⁵ Registry Report, paras 18-20, 25-28, 30-32, 34, 51, 53-54. *See also* Practice Direction on Visits and Communications, KSC-BD-09-Rev1, Articles 19(5), 21-23, 24(1).

¹⁰⁶ Registry Report, para. 30.

¹⁰⁷ Registry Report, paras 20, 31, 37.

¹⁰⁸ Registry Report, paras 27, 41.

¹⁰⁹ Registry Report, para. 49.

testimony given by witnesses.¹¹⁰ Thus, the Registry is in the unique position of managing and administering the SC detention facilities, including the monitoring of communications, while having access to the specifics of the present proceedings, relevant confidential information and details regarding any protected witnesses, victims and others at risk on account of testimony given by witnesses in the present case.

60. Moreover, the Panel notes that the SC detention officers are highly qualified personnel, [REDACTED], and receive training on applying the visits and communications regime at the SC detention facilities.¹¹¹

61. Against this background, the question arises whether the Proposed Regime could ensure an alternative system of monitoring communications at a residence or house of arrest in Kosovo that would sufficiently mitigate the risk of Mr Gucati obstructing the proceedings.

62. In this regard, the Panel notes the following indications in the Kosovo Police Report: (i) [REDACTED];¹¹² (ii) [REDACTED];¹¹³ (iii) [REDACTED];¹¹⁴ (iv) upon court order, the Kosovo Police could monitor internet and mobile phone use [REDACTED];¹¹⁵ (v) upon court order, the Kosovo Police could disrupt communications [REDACTED];¹¹⁶ and (vi) the Kosovo Police could conduct personal searches [REDACTED].¹¹⁷

63. In relation to specific measures aimed at preventing contact with witnesses or other persons connected to the case, the Kosovo Police indicates that it does not

¹¹⁰ Registry Report, para. 21.

¹¹¹ Registry Report, para. 44.

¹¹² KP Report, pp 5, 15.

¹¹³ KP Report, pp 5, 12.

¹¹⁴ KP Report, p. 12.

¹¹⁵ KP Report, p. 7.

¹¹⁶ KP Report, pp 8, 17.

¹¹⁷ KP Report, pp 8, 15, 18.

possess the personal details of such individuals, but, if such information is provided, it would ensure that no contact would take place between the person on conditional release and these individuals.¹¹⁸ In the absence of this information, the Kosovo Police indicates that it would restrict the movements and communications of the person under conditional release to achieve the same result.¹¹⁹

64. The Panel notes that, regardless of whether Mr Gucati would be released at his residence (family home) or to another place (house of arrest), immediate members of his family would have to have access to that building, either by virtue of residing there or in furtherance of family and privacy rights. Accordingly, any assessment of the Proposed Regime must take the presence of immediate family members and their rights into consideration. In this light, the Panel makes the following observations.

65. Under the Proposed Regime, the interior of Mr Gucati's residence or house of arrest would remain unmonitored and the oral communications between Mr Gucati and his immediate family members would not be subject to any oversight by the Kosovo Police. Therefore, the Proposed Regime does not address the possibility that, in the course of unmonitored conversations with family members, Mr Gucati could ask a family member to pass on an oral message or a hidden written note, or he could transmit covert messages for the purposes of obstructing SC proceedings.

66. Although the Kosovo Police does not address this option,¹²⁰ the Panel assumes that, were it to order, as an additional measure, the covert monitoring of conversations,¹²¹ the Kosovo Police would be in position to implement such measures. Nonetheless, due to their highly intrusive nature, these measures are

¹¹⁸ KP Report, p. 8.

¹¹⁹ KP Report, p. 8.

¹²⁰ KP Report, p. 7.

¹²¹ Rules 2, 31, 34-35 of the Rules and Article 87.1.2 of the Kosovo Criminal Procedure Code.

subject to stringent conditions in the SC legal framework and could not be ordered as a matter of course for conditional release.¹²² Even if such measures could be ordered, the Kosovo Police, in the absence of the relevant information regarding witnesses, victims and others, could not recognise coded or obscure language used by Mr Gucati to pass on oral messages or hidden written notes, through his family members. Such considerations apply similarly for monitored visits with pre-approved visitors. In summary, it would be impractical and highly intrusive for the Kosovo Police to attempt to monitor every verbal or written communication between Mr Gucati and members of his family, or pre-approved visitors, in the location where he would be detained.

67. Furthermore, under the Proposed Regime, the [REDACTED] would leave large parts of the property unmonitored. Accordingly, these measures do not adequately prevent the possibility of covert transmission of oral or written messages by persons who can approach the apartment or building in a clandestine manner.

68. Under the Proposed Regime, internet and telephone communications could be either monitored [REDACTED] or disrupted [REDACTED]. The Proposed Regime also includes personal searches, [REDACTED]. The Panel notes that some of these measures, due to their highly intrusive nature, are subject to stringent conditions in the SC legal framework and could not be ordered as a matter of course for conditional release.¹²³ The Panel would also have to take into consideration the privacy rights of Mr Gucati's immediate family members and acquaintances, who would also be subjected, while residing or present at the residence, to such measures.

¹²² Rules 2, 31, 34-35 of the Rules and Article 87.1.4, 1.5, 1.11 of the Kosovo Criminal Procedure Code.

¹²³ Rules 2, 31, 34-35 of the Rules and Article 87.1.4, 1.5, 1.11 of the Kosovo Criminal Procedure Code.

69. Even if the Panel ordered, as an additional measure, some form of interception of telecommunications, the Kosovo Police, in the absence of the relevant information regarding witnesses, victims and others, could not recognise coded or obscure language used by Mr Gucati, or a family member or acquaintance on his behalf, to pass on messages through internet or telephone communications. Were the Panel to order, as an additional measure, any disruption of communications, the Panel sees merit in the SPO submission that [REDACTED] involve a highly complex effort and their continued efficacy cannot be assumed.¹²⁴ The Panel also notes that [REDACTED], as proposed by the Kosovo Police to cater for privileged communications, would create a significant loophole in the monitoring regime and would allow Mr Gucati to send, in a clandestine manner, unprivileged messages during that time. Personal searches, [REDACTED] cannot adequately address the aforementioned risks, as none of these measures could prevent the transmission of coded or obscure language or the use of [REDACTED] as an opportunity to communicate with the outside world.

70. The Panel understands that the Kosovo Police would be more prepared to address these risks if it had access to the specifics of the present proceedings, relevant confidential information and details regarding any protected witnesses, victims and others at risk on account of testimony given by witnesses in the present case. The Panel considers, however, that such information cannot safely be shared with the Kosovo Police due to the risk that it could be leaked and confidential information in this case would be compromised. The Panel notes in this regard that: (i) the SC mandate specifically foresees that filings and sensitive records would be introduced and maintained exclusively outside Kosovo;¹²⁵ (ii) such information cannot be shared broadly by virtue of its nature, especially

¹²⁴ SPO Submission, para. 20.

¹²⁵ Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, p. 9.

in view of other considerations set forth below; and (iii) through the [REDACTED] and training of its personnel, the Registry is uniquely equipped for the protection of such information in view of the specific challenges affecting the conduct of SC proceedings.

(ii) *Monitoring media communications*

71. The Panel notes that, under the current regime applicable at the SC detention facilities, communications between detainees and the media are subject to the prior authorisation of the Registrar.¹²⁶ While visits by media personnel are not allowed, the Registrar may permit communications with the media through written correspondence or by telephone, subject to monitoring and certain other restrictions.¹²⁷

72. Against this background, the question arises whether, in the absence of these measures, the Proposed Regime could ensure an alternative system of monitoring media communications that would sufficiently mitigate the risk of Mr Gucati obstructing the proceedings.

73. In this regard, the Panel notes the following indications in the Kosovo Police Report: (i) [REDACTED]; (ii) [REDACTED]; (iii) the police can impose the aforementioned restrictions on movement and communications; and (iv) it can immediately inform the SC of any violation of the aforementioned rules and wait for a decision.¹²⁸

74. The Panel notes at the outset that the Proposed Regime does not include a prior authorisation of communications with the media. This means that the Kosovo Police would not be able to scrutinise intended media communications with a view to preventing the obstruction of SC proceedings through the

¹²⁶ Registry Report, para. 51.

¹²⁷ Registry Report, paras 51-55.

¹²⁸ KP Report, pp 9-10.

dissemination by the media of protected information. Even if the Panel ordered an additional measure to the Kosovo Police to subject any media communication of Mr Gucati to a prior authorisation, it could not effectively prevent unauthorised contacts due to the reasons described in paragraphs 65-69.

(iii) Monitoring communication at external medical facilities

75. The Panel notes that, under the current regime applicable at the SC detention facilities, there is a reduced need for detainees to visit external medical facilities.¹²⁹ The transport to and security arrangements at the external medical facilities are overseen by the relevant Host State authority.¹³⁰

76. Under the Proposed Regime, first aid and medical assistance would be provided at the residence or house of arrest of the person under conditional release.¹³¹ Should the person need to be transferred to a hospital, [REDACTED] the Kosovo Police would be responsible for such transport.¹³² The same measures as those proposed for the residence or house of arrest are proposed in relation to external medical facilities.¹³³

77. The Panel notes that it lacks information as to the efficacy of the security arrangements implemented by the Host State during any outpatient or hospitalisation care, so it cannot draw a comparison between those arrangements and the ones proposed by the Kosovo Police. This does not, however, prevent the Panel from assessing whether the Proposed Regime could involve measures that would sufficiently mitigate the risk of Mr Gucati obstructing the proceedings.

78. The Panel notes that, despite the specific questions asked in this regard, the Panel did not receive detailed answers from the Kosovo Police on how measures

¹²⁹ Registry Report, para. 64.

¹³⁰ Registry Report, paras 64-66.

¹³¹ KP Report, p. 20.

¹³² KP Report, p. 20.

¹³³ KP Report, pp 20-21.

applicable at Mr Gucati's residence or house of arrest can be adapted to a public location. For instance, the Panel has received no detailed information on whether medical personnel would be vetted [REDACTED] or how effective the [REDACTED] would be. In any event, even if the Kosovo Police provided further information, for the reasons expressed in paragraphs 65-69, the Panel is not satisfied that the Proposed Regime could prevent the transmission of coded or obscure language or the use of any [REDACTED] as an opportunity to communicate with the outside world. Furthermore, the Panel is acutely aware of the highly intrusive nature of any measures for the monitoring, interception or disruption of communications applied to a public place, such as a hospital, and the resulting interference with privacy rights of an increased number of individuals.

(iv) Conclusion

79. In light of the above, the Panel finds that the conditions listed in the Proposed Regime cannot sufficiently mitigate the risk of Mr Gucati obstructing the proceedings by disseminating or facilitating the dissemination of confidential or otherwise protected information and thereby threatening or influencing witnesses, victims or accomplices.

(c) Risk of Committing Offences

80. Considering the above findings regarding the mitigation of the risk of obstructing the proceedings, the Panel finds that the Proposed Regime cannot sufficiently mitigate the risk that Mr Gucati will commit offences either in repetition of those charged or which he has previously threatened to commit.

(d) Other considerations affecting the implementation of the Proposed Regime

81. The Panel notes that the Kosovo Police is a professional law enforcement organisation and it asserts that it carries out its tasks pursuant to lawful orders of the judicial authorities.¹³⁴

82. Notwithstanding this assertion, the Panel takes note of the SPO's submissions regarding the alleged corruption within Kosovo's criminal justice system and purported previous instances of interference by officers of the Kosovo Police with the course of justice.¹³⁵ The Panel further notes that the SPO relies on recent findings of international and regional organisations (including EULEX, the European Commission, the United Nations and the Council of Europe) as well as on media articles in support of its assertions relating to corruption within Kosovo's criminal justice system.¹³⁶ The Panel is not in a position to verify the reliability of these sources. That being said, the Panel, having reviewed these sources, cannot exclude the possibility that certain individuals within or associated with the Kosovo Police, who are connected to the Accused in this case, may be inclined to resort to corrupt or questionable practices with a view to interfere with the course of justice at the SC.

83. The Panel does not see this consideration as determinative, in itself, of the matter under discussion. Nonetheless, the assessment of the effectiveness of the Proposed Regime cannot be completely divorced from the aforementioned context. On this basis, the Panel cannot exclude the risk that the implementation of the Proposed Regime would be affected by the aforementioned practices.

84. Furthermore, the Panel notes the case-law of other jurisdictions according to which the position of the Accused is to be considered when assessing state

¹³⁴ KP Report, p. 22.

¹³⁵ SPO Submissions, paras 24-29; Annex 1 to the SPO Submission.

¹³⁶ SPO Submissions, paras 24-29; Annex 1 to the SPO Submission.

guarantees and that a failure to do so may amount to an error of law.¹³⁷ The Panel notes, however, that Mr Gucati does not hold an official position within the central authorities of Kosovo and that his function as the head of the KLA WVA is relevant only for the purposes set out in paragraph 35. For these reasons, the Panel is satisfied that the position or function of Mr Gucati does not affect the implementation of the Proposed Regime.

(e) Additional Measures

85. The Panel has addressed above a number of additional measures in relation to the Proposed Regime. The Panel considers that no further additional measures could be imposed that would (i) ensure the effectiveness of the specific measures, (ii) while appropriately safeguarding the rights of a significant number of individuals, including family members and acquaintances of the Accused as well as hospital or other personnel.

86. Equally, the Panel is satisfied that no additional information from the Kosovo Police is necessary at this juncture. The Panel has formulated a detailed list of questions, which left room for the Kosovo Police to provide any additional information considered to be relevant for the present determination. Therefore, the Kosovo Police has had ample opportunity to provide any information that it considered to be relevant, and any additional information would not assist the Panel any further in relation to this matter.

87. Accordingly, the Panel finds that there are no additional measures that it could order *proprio motu* that could sufficiently mitigate the existing risks.

¹³⁷ See ICTY, *Prosecutor v. Milutinović et al*, IT-05-87-AR65.1, Appeals Chamber, [Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pačković's Application for Provisional Release](#), 1 November 2005, para. 8; *Prosecutor v. Sainović et al*, No. IT-99-37-AR65, Appeals Chamber, [Decision on Provisional Release](#), 30 October 2002, para. 9.

(f) Conclusion

88. The Panel accordingly finds that the Proposed Regime is insufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law in relation to Mr Gucati and that any additional conditions imposed by the Panel would not affect this conclusion.

89. As previously found, it is only through the communication monitoring framework applicable at the SC's detention facilities that Mr Gucati's communications could be effectively controlled with a view to sufficiently mitigate the risks of him obstructing SC proceedings or committing further crimes.

D. REASONABLENESS OF DETENTION

90. The SPO submits that the trial continues to move expeditiously and will be concluded soon, noting that there has been no unjustified delay.¹³⁸ On this basis, it submits that the detention of Mr Gucati continues to be reasonable and proportionate.¹³⁹

91. The Gucati Defence observes that, by 22 December 2021, the Accused will have been in detention for 15 months, *i.e.* the equivalent stage at which he would be eligible for early release under Article 51 of the Law from a 22-month imprisonment sentence.¹⁴⁰ The Gucati Defence submits that no sentence of that length has been imposed in any previous similar case.¹⁴¹

92. As regards the length of detention, the Panel recalls that it must consider the duration of time spent in detention along with the risks in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued

¹³⁸ SPO Submission, para. 32.

¹³⁹ SPO Submission, para. 33.

¹⁴⁰ Gucati Submission, para. 31.

¹⁴¹ Gucati Submission, para. 32.

detention is unreasonable and the person needs to be released.¹⁴² The Panel is accordingly under an obligation to ensure that the time spent in detention is reasonable, including during trial.¹⁴³

93. The Panel observes that Mr Gucati has been in detention for almost fifteen months since his arrest. The Panel further notes that significant developments occurred in the case during the time that Mr Gucati spent in detention, including in the past two months. Accordingly, since the last detention review, the SPO finished the presentation of and closed its case,¹⁴⁴ the Panel issued a decision on motions to dismiss charges,¹⁴⁵ the Defence Preparation Conference took place,¹⁴⁶ and, notably, the Gucati Defence presented its case,¹⁴⁷ followed by the opening statement of the Haradinaj Defence.¹⁴⁸ The Panel expects to close the case in the following two to three months and to render a judgment as soon as practicable afterwards.

94. In light of these significant developments and the continuing risks of obstructing the proceedings and committing offences either in repetition of those charged or which Mr Gucati has previously threatened to commit, neither of which can be sufficiently mitigated by the application of reasonable alternative measures at this stage, the Panel finds that Mr Gucati's continued detention is necessary and reasonable in the specific circumstances of the case.

V. DISPOSITION

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

¹⁴² Selimi Appeal Decision, para. 79.

¹⁴³ SCCC 22 May 2020 Judgment, para. 63.

¹⁴⁴ F00431, Specialist Prosecutor, Prosecution Notice of Closing Its Case, 10 November 2021.

¹⁴⁵ F00450, Panel, Decision on the Defence Motion to Dismiss Charges, 26 November 2021.

¹⁴⁶ Transcript, 2 December 2021. *See also* F00463, Panel, *Scheduling Order for the Defence Preparation Conference*, 30 November 2021.

¹⁴⁷ 3-10 December 2021.

¹⁴⁸ Transcript, 15 December 2021, pp 2663-2674.

- a. **ORDERS** Mr Gucati's continued detention;
- b. **ORDERS** the SPO to file submissions on the next review of Mr Gucati's detention by **Monday, 7 February 2022**;
- c. **ORDERS** the Gucati Defence to respond to the SPO submissions, if it so wishes, by **Monday, 14 February 2022**; and
- d. **ORDERS** the SPO, the Gucati Defence and the Registrar to file, by **24 January 2022**, public redacted versions of their respective submissions, taking into consideration the public redacted version of the present decision.



Judge Charles L. Smith, III

Presiding Judge

Dated this Tuesday, 21 December 2021

At The Hague, the Netherlands