



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

**Date:** 21 February 2022

**Language:** English

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**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”).<sup>1</sup>
2. On 27 October 2020, the Single Judge rejected Mr Gucati’s application for bail,<sup>2</sup> which was upheld by the Court of Appeals Panel.<sup>3</sup> 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.<sup>4</sup>
3. On 16 July 2021, the Pre-Trial Judge transmitted the case to the Panel.<sup>5</sup>
4. On 23 August 2021, the Panel reviewed and extended Mr Gucati’s detention.<sup>6</sup>

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<sup>1</sup> 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.

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

<sup>3</sup> 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.

<sup>4</sup> 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.

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

<sup>6</sup> 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”).<sup>7</sup>

6. On 22 October 2021, the Panel ordered the continued detention of Mr Gucati, noting that it would seek information from the Kosovo Police and the Registrar regarding, respectively, the enforceability of the Proposed Conditions and the detention regime at the Specialist Chambers (“SC”) detention facilities in relation to both Accused, and would review the detention of the Accused again upon receipt of that information.<sup>8</sup>

7. On 21 December 2021, having considered the information received from the Kosovo Police and the Registrar, the Panel reviewed and extended the detention of Mr Gucati (“Eighth Detention Decision”).<sup>9</sup> The Panel also reviewed and extended the detention of Mr Haradinaj (“F00507”).<sup>10</sup> The Panel directed the SPO to file submissions on the next review of Mr Gucati’s detention by 7 February 2022 and the Gucati Defence to respond, if it so wished, by 14 February 2022.<sup>11</sup>

8. On 31 December 2021, the Haradinaj Defence appealed F00507.<sup>12</sup> The Gucati Defence did not appeal the Eighth Detention Decision.

9. On 28 January 2022, further to submissions from the Parties regarding the possible extension of the detention review timeline in view of an upcoming

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

<sup>8</sup> 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.

<sup>9</sup> F00506/RED, Panel, *Public Redacted Version of Decision on Review of Detention of Hysni Gucati (“Eighth Detention Decision”)*, 21 December 2021.

<sup>10</sup> F00507/RED, Panel, *Public Redacted Version of Decision on Review of Nasim Haradinaj (“F00507”)*, 21 December 2021.

<sup>11</sup> Eighth Detention Decision, para. 95(b) and (c).

<sup>12</sup> IA007-F00001, Haradinaj Defence, *Appeal Against Decision F00507 Denying Provisional Release of Nasim Haradinaj*, 31 December 2021, confidential.

decision of the Court of Appeals Panel,<sup>13</sup> the Panel issued an order varying the time limit for submissions set out in its 21 December 2021 decisions (“Order”).<sup>14</sup>

10. In the Order, the Panel directed the SPO to file its submissions on detention within three days of the decision of the Court of Appeals Panel or at the latest by 14 February 2022, and the Defence to respond by 17 February 2022, if they so wished.<sup>15</sup> In the event that no decision of the Court of Appeals Panel was rendered or notified by 11 February 2022, the Panel ordered the Parties to submit, by 14 February 2022, a joint request or separate requests as regards any variation of the two-month interval.<sup>16</sup>

11. No decision of the Court of Appeals Panel was rendered or notified by 11 February 2022.

12. On 14 February 2022, the SPO filed its consolidated submissions for review of detention (“SPO Submission”).<sup>17</sup> Neither Party filed a request for the extension of the timeline for detention review.

13. On 15 February 2022, the Panel directed the Gucati Defence to respond to the SPO Submission by 17 February 2022.<sup>18</sup>

14. On 17 February 2022, the Gucati Defence responded to the SPO Submission (“Gucati Submission”).<sup>19</sup>

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<sup>13</sup> Transcript, 14 January 2022, pp 3083-3084; Transcript, 21 January 2022, pp 3086-3090; Transcript, 28 January 2022, pp 3375-3376.

<sup>14</sup> F00537/CORR, Panel, *Corrected Version of the Order Varying the Time Limit for Submissions for the Next Detention Review* (“Order”), 28 January 2022.

<sup>15</sup> Order, para. 12(b) and (c).

<sup>16</sup> Order, para. 13.

<sup>17</sup> F00558, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention* (“SPO Submission”), 14 February 2022.

<sup>18</sup> F00559, Panel, *Scheduling Order on Defence Submissions on Detention Review*, 15 February 2022.

<sup>19</sup> F00561, Gucati Defence, *Defence Submissions on Detention Review* (“Gucati Submission”), 17 February 2022.

## II. SUBMISSIONS

15. The SPO avers that the continued detention of Mr Gucati remains necessary as all established reasons for detention continue to exist.<sup>20</sup> The SPO submits that, in light of the closing of the evidence in the case and the impending trial judgment, the Article 41(6)(b) risks justifying detention remain as high as ever and no conditions can sufficiently mitigate them.<sup>21</sup>

16. The Gucati Defence submits that the continued detention of Mr Gucati is neither necessary nor proportionate.<sup>22</sup> 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.<sup>23</sup>

## III. APPLICABLE LAW

17. 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.

18. 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.

19. 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

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<sup>20</sup> SPO Submission, paras 2, 5-10, 12-16.

<sup>21</sup> SPO Submission, paras 2, 19.

<sup>22</sup> Gucati Submission, para. 6.

<sup>23</sup> Gucati Submission, paras 20-21.

ruling on detention on remand, the Panel shall examine whether the reasons for detention on remand still exist, and extend or terminate it.<sup>24</sup>

20. 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.<sup>25</sup> The Panel must therefore assess, *proprio motu*, 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.<sup>26</sup> In any event, the Panel should not be expected to entertain submissions that merely repeat arguments that have already been addressed in its previous decisions.<sup>27</sup>

21. 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*.<sup>28</sup>

#### IV. DISCUSSION

22. 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 starting point.<sup>29</sup> Detention cannot be maintained lightly and the burden to

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<sup>24</sup> 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.

<sup>25</sup> Haradinaj Appeal Detention Review Decision, para. 55.

<sup>26</sup> KSC-BC-2020-06, IA008-F00004/RED, 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.

<sup>27</sup> KSC-BC-2020-06, IA006/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention*, 1 October 2021, para. 17.

<sup>28</sup> Veseli Appeals Detention Review Decision, para. 15.

<sup>29</sup> Eighth Detention Decision, para. 20; Seventh Detention 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

demonstrate that detention is necessary is on the SPO.<sup>30</sup> It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release.<sup>31</sup>

23. The Panel further notes the developments that occurred in the trial proceedings since its last detention review decision (the closing of the Defence cases and of the evidentiary proceedings), and has taken them into consideration for the purpose of the present decision.

#### A. GROUNDED SUSPICION

24. The SPO recalls 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.<sup>32</sup> The SPO adds that, since the last detention review, all remaining evidence has been presented and nothing in that evidence vitiates the conclusion that a grounded suspicion continues to exist within the meaning of Article 41(6)(a) of the Law.<sup>33</sup>

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

26. 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

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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.

<sup>30</sup> Eighth Detention Decision, para. 20; Seventh Detention Decision, para. 13; Sixth Detention Decision, para. 12; Thaçi Appeal Decision, para. 17.

<sup>31</sup> Eighth Detention Decision, para. 20; 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.

<sup>32</sup> SPO Submission, para. 4.

<sup>33</sup> SPO Submission, para. 5.

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.<sup>34</sup> Moreover, the Panel’s conclusion in its decision under Rule 130 of the Rules that the Accused had a case to answer in relation to all six counts of the Indictment<sup>35</sup> corroborates the finding that grounded suspicion within the meaning of Article 41(6)(a) of the Law continues to exist.<sup>36</sup> Lastly, without prejudice to the Panel’s final determination regarding the charges, the evidence presented by the Parties until the closing of the evidentiary proceedings does not appear to invalidate the finding that grounded suspicion within the meaning of Article 41(6)(a) of the Law still exists.

27. 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.

## **B. NECESSITY OF DETENTION**

28. 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.<sup>37</sup> These grounds must be “articulable” in the sense that they must be

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<sup>34</sup> Eighth Detention Decision, para. 24; 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.

<sup>35</sup> F00450, Panel, *Decision on the Defence Motions to Dismiss Charges*, 26 November 2021, paras 41, 49, 58, 67, 76, 84, 88.

<sup>36</sup> Eighth Detention Decision, para. 25.

<sup>37</sup> Eighth Detention Decision, para. 27; 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.



specified in detail by reference to the relevant information or evidence.<sup>38</sup> The SPO must accordingly demonstrate the existence of any of these risks against the threshold of articulable grounds to believe.<sup>39</sup> A Panel must provide specific reasoning and rely on concrete grounds when authorising continued detention.<sup>40</sup> 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.<sup>41</sup>

## 1. Risk of Flight

29. 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 recognise it.<sup>42</sup> The SPO asserts that, in his capacity as former Head of the KLA War Veterans Association ("KLA WVA"), Mr Gucati can call upon the resources of the organisation to assist in any attempt to flee.<sup>43</sup> The SPO also asserts that Mr Gucati knows that the trial judgment is imminent and the prospect of a conviction gives the highest incentive yet to flee.<sup>44</sup>

30. 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

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<sup>38</sup> Eighth Detention Decision, para. 27; 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.

<sup>39</sup> Eighth Detention Decision, para. 27; 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.

<sup>40</sup> Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

<sup>41</sup> Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

<sup>42</sup> SPO Submission, para. 8.

<sup>43</sup> SPO Submission, para. 9.

<sup>44</sup> SPO Submission, paras 10,12.

managed by alternative measures.<sup>45</sup> Therefore, the Gucati Defence claims, continued detention may not be justified on the ground of risk of flight.<sup>46</sup>

31. The Panel recalls that, in its last three decisions on continued detention, it found that any potential risk of Mr Gucati fleeing could be sufficiently mitigated.<sup>47</sup> The Panel reiterates its rejection of the SPO argument that Mr Gucati's testimony that he made public the batches because he is opposed to, and does not recognise, the SC shows an increased risk of flight.<sup>48</sup> Furthermore, while the Panel accepts that proximity to judgment has been found to be a factor raising the risk of flight,<sup>49</sup> the Panel agrees with the Gucati Defence that it cannot evaluate how Mr Gucati may see his prospects at this stage.<sup>50</sup> Therefore, in the present circumstances, the Panel does not consider that the proximity of judgment raises the risk of Mr Gucati fleeing. 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.

32. 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

33. The SPO submits that the evidence led on the conduct of Mr Gucati in September 2020 shows that his willingness and ability to obstruct the progress of SC proceedings is real.<sup>51</sup> The SPO asserts that Mr Gucati is now aware of all

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<sup>45</sup> Gucati Submission, para. 7.

<sup>46</sup> Gucati Submission, para. 7.

<sup>47</sup> Eighth Detention Decision, para. 30; 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.

<sup>48</sup> SPO Submission, para. 8.

<sup>49</sup> SPO submission, fn. 19, citing ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, *Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj*, 26 October 2005, para. 11.

<sup>50</sup> Gucati Submission, para. 7.

<sup>51</sup> SPO Submission, para. 13.

confidential information received at trial and therefore has the maximum means and opportunity to obstruct the proceedings.<sup>52</sup> The SPO also asserts that when this is considered against the climate of intimidation of witnesses in previous Kosovo cases, as referred to by DW1253 in his evidence, the risk of the Accused disseminating confidential information has never been higher.<sup>53</sup>

34. The Gucati Defence responds that, contrary to the SPO's claim, no disclosure has been ordered which might prejudice ongoing SPO investigations.<sup>54</sup> To the contrary, the Gucati Defence submits that any disclosure ordered has been disclosed in a form which was designed not to, and did not, reveal anything the disclosure of which might prejudice ongoing SPO investigations, or negatively impact the security, well-being and privacy of witnesses and other individuals.<sup>55</sup> The Gucati Defence submits that DW1253's evidence does not demonstrate a current climate of intimidation of witnesses in that it concerned a completely different time period in Kosovo.<sup>56</sup> Furthermore, 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.<sup>57</sup>

35. 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) information providers;<sup>58</sup> (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA, which contained, *inter alia*, names of

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<sup>52</sup> SPO Submission, para. 14.

<sup>53</sup> SPO Submission, para. 15.

<sup>54</sup> Gucati Submission, para. 9.

<sup>55</sup> Gucati Submission, para. 9.

<sup>56</sup> Gucati Submission, para. 10.

<sup>57</sup> Gucati Submission, paras 11-12.

<sup>58</sup> Confirmation Decision, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

(potential) information providers;<sup>59</sup> (iii) made various accusations regarding such persons for having allegedly interacted with the SITF/SPO;<sup>60</sup> and (iv) vowed to continue to publish such information in the future,<sup>61</sup> despite being ordered by the Single Judge to refrain from doing so.<sup>62</sup> 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.

36. 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 prejudice ongoing investigations, or negatively impact the security of witnesses.<sup>63</sup> The Panel notes, however, that Mr Gucati, by virtue of his participation in the trial, was provided access to much more material than claimed by his Defence. In particular, Mr Gucati is now aware of the details of a large body of confidential information, including evidence received through the testimony of witnesses in private session, confidential exhibits and the material which has been disclosed to him through the disclosure process. The Panel repeats 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. This is confirmed by the fact that the highly sensitive material disclosed to the Defence retains a confidential classification. If released, Mr Gucati

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<sup>59</sup> Confirmation Decision, paras 101, 106.

<sup>60</sup> Confirmation Decision, paras 111, 115.

<sup>61</sup> Confirmation Decision, para. 102.

<sup>62</sup> 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.

<sup>63</sup> Gucati Submission, para. 9.

would be able to disclose that information to the public. In this regard, the Panel recalls 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.<sup>64</sup> 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) of the Law, the Panel reiterates its view that this statement is a confirmation of the vows expressed earlier by Mr Gucati and noted by the Pre-Trial Judge and this Panel in previous detention decisions.<sup>65</sup>

37. 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.<sup>66</sup>

38. 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 the Panel has previously held,<sup>67</sup> it does not consider that the Defence's submissions regarding Mr Gucati's good character and compliant conduct during his arrest, detention and trial<sup>68</sup> have any bearing on the Accused's willingness or capability (or absence thereof) to disseminate such information.

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<sup>64</sup> Transcript, 6 December 2021, p. 2218, lines 21-24: "Every time they come [...] I will make them public."

<sup>65</sup> See *supra* para. 35. See also Eighth Detention Decision, para. 35.

<sup>66</sup> Eighth Detention Decision, para. 35; 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.

<sup>67</sup> Eighth Detention Decision, para. 36; Seventh Detention Decision, para. 23; Sixth Detention Decision, para. 21.

<sup>68</sup> Gucati Submission, para. 5. See also *id.*, paras 11-12.

39. 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**

40. The SPO submits that the vow of Mr Gucati to continue to disseminate SITF/SPO information demonstrates that such incidents would continue 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.<sup>69</sup>

41. The Gucati Defence submits that the SPO has not demonstrated that detention is necessary on the basis that there is a risk of Mr Gucati committing further crimes in the event that he is released.<sup>70</sup>

42. The Panel recalls its findings regarding the risk of obstructing the proceedings and, more specifically, Mr Gucati's past conduct, including his 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 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 assessed all relevant evidence and arguments put forth by the Parties at trial.<sup>71</sup>

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<sup>69</sup> SPO Submission, para. 16.

<sup>70</sup> Gucati Submission, para. 13.

<sup>71</sup> Eighth Detention Decision, para. 40; Seventh Detention Decision, para. 25; Sixth Detention Decision, para. 23.

#### 4. Conclusion

43. 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

44. 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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

45. 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

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<sup>72</sup> Article 41(12) of the Law; Sixth Detention Decision, para. 25.

<sup>73</sup> Eighth Detention Decision, para. 42; 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* [GC], [no. 23755/07](#), 5 July 2016, para. 87 *in fine*; ECtHR, *Idalov v. Russia* [GC], [no. 5826/03](#), 22 May 2012, para. 140 *in fine*.

<sup>74</sup> Eighth Detention Decision, para. 42; 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.

sufficiently mitigate the identified Article 41(6)(b) risks, the competent Panel must enquire into the enforceability of the alternative measures.<sup>75</sup>

## 1. Parties' Submissions

46. The SPO recalls its previous submissions that the Proposed Conditions remain insufficient and the Kosovo Police cannot effectively enforce them.<sup>76</sup> The SPO asserts that, since the last review, nothing has changed that would affect these considerations, or the conclusion that the Proposed Conditions are insufficient to mitigate the risks presented under Article 41(6)(b) of the Law.<sup>77</sup> According to the SPO, it is only through the communication monitoring framework applicable at the SC's detention facilities that the communications of Mr Gucati could be effectively controlled with a view to sufficiently mitigate the risks.<sup>78</sup>

47. The Gucati Defence maintains its position that the measures which can be implemented by the Kosovan Police can sufficiently mitigate any potential risk.<sup>79</sup>

## 2. The Panel's Findings

48. The Panel shall consider whether any measures could mitigate the aforementioned risks.

### (a) Risks

49. As regards the risk of flight, the Panel found in the Eighth Detention Decision any potential risk of Mr Gucati fleeing could be sufficiently mitigated by a set of alternative measures, including the regime proposed by the Kosovo Police ("Proposed Regime").<sup>80</sup> The Panel reiterates its findings that the guarantees

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<sup>75</sup> Veseli Appeals Detention Review Detention, paras 48-53.

<sup>76</sup> SPO Submission, para. 17.

<sup>77</sup> SPO Submission, para. 19.

<sup>78</sup> SPO Submission, para. 19.

<sup>79</sup> Gucati Submission, para. 14.

<sup>80</sup> See *supra* para. 31. See also Eighth Detention Decision, paras 30, 54.



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, and would return to the SC whenever ordered to do so to be present during proceedings.<sup>81</sup> The Panel considers that, since the last review, no circumstances have intervened that would affect the aforementioned findings.

50. As regards the risk of obstructing proceedings, the Panel found in the Eighth Detention Decision that, in the absence of the measures available at the SC detention facilities, no alternative measures, including the Proposed Regime, would 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.<sup>82</sup> The Panel considers that, since the last review, no new circumstances have intervened that would affect the above findings. The Panel therefore reiterates that it is only through the communication monitoring framework applicable at the SC's detention facilities that the communications of Mr Gucati could be effectively controlled with a view to sufficiently mitigate the risks.<sup>83</sup>

51. As regards the risk of committing offences, the Panel reiterates its view that, considering the above findings regarding the mitigation of the risk of obstructing the proceedings, no alternative measures, including the Proposed Regime, can sufficiently mitigate the risk that Mr Gucati will commit offences either in repetition of those charged or which he has previously threatened to commit.<sup>84</sup> The

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<sup>81</sup> Eighth Detention Decision, para. 54.

<sup>82</sup> Eighth Detention Decision, para. 79.

<sup>83</sup> Eighth Detention Decision, paras 88-89.

<sup>84</sup> Eighth Detention Decision, para. 80.

Panel considers that, since the last review, no new circumstances have intervened that would affect these findings.

(b) Additional Measures

52. The Panel previously considered that no further additional measures could be imposed that would: (i) ensure the effectiveness of the specific measures of the Proposed Regime, (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.<sup>85</sup>

53. The Panel finds that, since the last review, no new circumstances have intervened that would affect these considerations or the conclusion that any additional measure is insufficient to mitigate the risks presented under Article 41(6)(b) of the Law.

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

(c) Conclusion

55. The Panel accordingly finds that no alternative measure is sufficient 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.

56. As the Panel has 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.

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<sup>85</sup> Eighth Detention Decision, para. 83.

#### D. REASONABLENESS OF DETENTION

57. The SPO submits that, since the last review, the evidence presentation closed and the trial judgment is expected shortly.<sup>86</sup> On this basis, the SPO submits that the detention of Mr Gucati continues to be reasonable and proportionate.<sup>87</sup>

58. The Gucati Defence observes that, by 21 February 2022, the Accused will have been in detention for seventeen months, and claims that no sentence of that length has been imposed in any previous comparable case.<sup>88</sup> The Gucati Defence therefore submits that continuing detention pending judgment, when weighed against the Article 41(6) risks and the circumstances of the case as a whole, is unreasonable.<sup>89</sup>

59. 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 detention is unreasonable and the person needs to be released.<sup>90</sup> The Panel is accordingly under an obligation to ensure that the time spent in detention is reasonable, including during trial.<sup>91</sup>

60. The Panel observes that Mr Gucati has been in detention for almost seventeen 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 Haradinaj Defence presented its case,<sup>92</sup> both Defence teams closed their cases,<sup>93</sup> the Panel closed the evidentiary proceedings, ordered the Parties to file their final trial briefs

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<sup>86</sup> SPO Submission, para. 21.

<sup>87</sup> SPO Submission, para. 22.

<sup>88</sup> Gucati Submission, para. 17.

<sup>89</sup> Gucati Submission, para. 19.

<sup>90</sup> Selimi Appeal Decision, para. 79.

<sup>91</sup> SCCC 22 May 2020 Judgment, para. 63.

<sup>92</sup> 11-28 January 2022.

<sup>93</sup> F00549, Gucati Defence, *Defence Notice of the Closing of its Case*, 2 February 2022; F00550, Haradinaj Defence, *Defence Notice of the Closing of its Case*, 2 February 2022.

by 3 March 2022 and scheduled the closing arguments for 14-18 March 2022.<sup>94</sup> The Panel expects to render a judgment as soon as practicable afterwards.

61. 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, none 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.

62. The Panel notes that this ruling is without prejudice to the upcoming decision of the Court of Appeals Panel on the Haradinaj Defence's appeal against F00507.

## V. DISPOSITION

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

- a. **ORDERS** Mr Gucati's continued detention;
- b. **ORDERS** the SPO to file submissions on the next review of Mr Gucati's detention by **Thursday, 7 April 2022**;
- c. **ORDERS** the Gucati Defence to respond to the SPO submissions, if it so wishes, by **Thursday, 14 April 2022**.



**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Monday, 21 February 2022

At The Hague, the Netherlands

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<sup>94</sup> F00553, Panel, *Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules*, 3 February 2022.