



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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Decision on Review of Detention of Nasim Haradinaj

Specialist Prosecutor

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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 and Mr Nasim Haradinaj (“Mr Haradinaj” or “the Accused”) 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 Haradinaj’s request for his immediate release from detention.² The Pre-Trial Judge reviewed and extended Mr Haradinaj’s detention at regular intervals, namely on 24 December 2020,³ which was upheld by the Court of Appeals Panel,⁴ and on 24 February, 23 April and 23 June 2021.⁵

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

² F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj* (“First Detention Decision”), 27 October 2020.

³ F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* (“Second Detention Decision”), 24 December 2020.

⁴ IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj’s Appeal Against Decision Reviewing Detention*, 9 February 2021, para. 66.

⁵ F00144, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* (“Third Detention Decision”), 24 February 2021; F00189/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on*

3. On 16 July 2021, the Pre-Trial Judge transmitted the case to the Panel.⁶
4. On 23 August 2021, the Panel reviewed and extended Mr Haradinaj's detention.⁷
5. On 15 October 2021, the Defence for Mr Gucati requested the Panel to release Mr Gucati under a series of proposed conditions to be implemented by the Kosovo Police ("Proposed Conditions").⁸
6. On 22 October 2021, the Panel ordered the continued detention of Mr Gucati and Mr Haradinaj, 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.⁹
7. On 21 December 2021, having considered the information received from the Kosovo Police and the Registrar, the Panel reviewed and extended Mr Haradinaj's detention ("Eighth Detention Decision").¹⁰ The Panel directed the SPO to file submissions on the next review of Mr Haradinaj's detention by 7 February 2022 and the Haradinaj Defence to respond, if it so wished, by 14 February 2022.¹¹

Review of Detention of Nasim Haradinaj ("Fourth Detention Decision"), 23 April 2021; F00246, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Fifth Detention Decision"), 23 June 2021.

⁶ F00265, President, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021.

⁷ F00280, Panel, *Decision on Review of Detention of Nasim Haradinaj* ("Sixth Detention Decision"), 23 August 2021.

⁸ F00375, Gucati Defence, *Submissions on the Sixth Review of Detention*, 15 October 2021, para. 13.

⁹ 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.

¹⁰ F00507/RED, Panel, *Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj* ("Eighth Detention Decision"), 21 December 2021.

¹¹ Eighth Detention Decision, para. 95(b) and (c).

8. On 31 December 2021, the Haradinaj Defence appealed the Eighth Detention Decision.¹²

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

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.¹⁵ 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.¹⁶

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”).¹⁷ Neither Party filed a request for the extension of the timeline for detention review.

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

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

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

¹⁵ Order, para. 12(b) and (c).

¹⁶ Order, para. 13.

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

13. On 15 February 2022, the Panel directed the Haradinaj Defence to respond to the SPO Submission by 17 February 2022.¹⁸

14. On 17 February 2022, the Haradinaj Defence responded to the SPO Submission (“Haradinaj Submission”).¹⁹

II. SUBMISSIONS

15. The SPO avers that the continued detention of Mr Haradinaj remains necessary as all established reasons for detention continue to exist.²⁰ 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.²¹

16. The Haradinaj Defence asserts that the SPO fails to qualify the importance of the existence of a grounded suspicion justifying Mr. Haradinaj’s detention and that the risk posed by Mr Haradinaj could be adequately managed by bail conditions.²² Therefore, the Haradinaj Defence submits that Mr. Haradinaj’s continuing detention is unnecessary and disproportionate.²³

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

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

¹⁹ F00560, Haradinaj Defence, *Defence Response to Prosecution Consolidated Submissions for Review of Detention* (“Haradinaj Submission”), 17 February 2022.

²⁰ SPO Submission, paras 2, 5-10, 12-16.

²¹ SPO Submission, paras 2, 19.

²² Haradinaj Submission, paras 8, 49.

²³ Haradinaj Submission, para. 8.

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

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.²⁵ 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.²⁶ 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.²⁷

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

²⁴ 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.

²⁵ Haradinaj Appeal Detention Review Decision, para. 55.

²⁶ 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.

²⁷ 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.

determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.²⁸

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.²⁹ Detention cannot be maintained lightly and the burden to demonstrate that detention is necessary is on the SPO.³⁰ It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release.³¹

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 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.³² The SPO adds that, since the last detention review, all

²⁸ Veseli Appeals Detention Review Decision, para. 15.

²⁹ Eighth Detention Decision, para. 20; Seventh Detention Decision, para. 13. *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.

³⁰ Eighth Detention Decision, para. 20; Seventh Detention Decision, para. 13. *See also* Thaçi Appeal Decision, para. 17.

³¹ Eighth Detention Decision, para. 20; Seventh Detention Decision, para. 13. *See also* 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.

³² SPO Submission, para. 4.

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).³³

25. The Haradinaj Defence submits that a grounded suspicion that Mr Haradinaj committed an offence within the jurisdiction of the SC and the severity of the sentence risked are insufficient to justify his detention in and of itself.³⁴ The Haradinaj Defence argues that the right to liberty encompassed by Article 5 ECHR affords Mr Haradinaj a presumption in favour of bail and can be split into two phases, including: (a) the early stages following an arrest on suspicion of having committed an offence; and (b) the following period pending trial or prior to conviction. As time progresses, the justificatory threshold for continued detention becomes steadily more difficult to satisfy.³⁵

26. The Panel is indeed mindful that, under the case-law of the European Court of Human Rights (“ECtHR”), the persistence of a “reasonable suspicion” is a condition *sine qua non* for the validity of a continued detention but, after a certain lapse of time, “reasonable suspicion” alone no longer suffices.³⁶ Accordingly, a distinction is drawn between a first phase, when the existence of “reasonable suspicion” is a sufficient ground for detention and the phase after a “certain lapse of time”³⁷, when other “relevant and sufficient” reasons to detain a suspect are required.³⁸ Some of the justifications deemed to constitute “relevant” and “sufficient” reasons under ECtHR case-law include: the risk that the accused will fail to appear for trial; the risk that the accused, if released, would take action to

³³ SPO Submission, para. 5.

³⁴ Haradinaj Submission, paras 9-10, 15.

³⁵ Haradinaj Submission, paras 11-13, 16-17.

³⁶ ECtHR, *Labita v. Italy* [GC], [no. 26772/95](#), 6 April 2000, para. 153; ECtHR, *Kudła v. Poland* [GC], [no. 30210/96](#), 26 October 2000, para. 111; ECtHR, *Idalov v. Russia* [GC], [no. 5826/03](#), 22 May 2012, para. 140.

³⁷ ECtHR, *Buzadji v. the Republic of Moldova* [GC], [no. 23755/07](#), 5 July 2016, para. 95.

³⁸ ECtHR, *Buzadji v. the Republic of Moldova* [GC], [no. 23755/07](#), 5 July 2016, paras 92, 96, 102.

prejudice the administration of justice; or commit further offences; or cause public disorder.³⁹ The Panel notes in this regard that Article 41(6) of the Law reflects this jurisprudence by requiring, for the arrest *and detention* of a person, the fulfilment of two prongs: (i) the existence of a grounded suspicion that he or she has committed a crime within SC jurisdiction (Article 41(6)(a) of the Law); *and* (ii) that there are articulable grounds to believe that three specific types of risks exist (Article 41(6)(b) of the Law). The first prong reflects the ECtHR's requirement of a persisting "reasonable suspicion", whereas the second prong reflects the condition that "relevant" and "sufficient" reasons must exist for continued detention. In its interpretation of ECtHR case-law, the Haradinaj Defence appears to overlook not only the prongs of Article 41(6) of the Law, but also the fact that this Panel has consistently applied and reviewed them in each of its previous detention decisions and also in the present one.

27. Accordingly, Article 41(6)(a) of the Law requires a grounded suspicion that Mr Haradinaj 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 Haradinaj having found that a "well-grounded suspicion", within the meaning of Article 39(2) of the Law, existed that he committed offences under SC jurisdiction. 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.⁴⁰ Moreover, the Panel's conclusion in its decision under Rule 130 of the Rules that the Accused had a case

³⁹ See e.g. ECtHR, *Porowski v. Poland*, [no. 34458/03](#), 21 March 2017, para. 139; ECtHR, *Isayeva v. Azerbaijan*, [no. 36229/11](#), 25 June 2015, para. 86. As regards the risk of causing public disorder, see ECtHR, *Letellier v. France*, [no. 12369/86](#), 26 June 1991, para. 51.

⁴⁰ Eighth Detention Decision, para. 24; Seventh Detention Decision, para. 14. 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.

to answer in relation to all six counts of the Indictment⁴¹ corroborates the finding that grounded suspicion within the meaning of Article 41(6)(a) of the Law continues to exist.⁴² 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.

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

B. NECESSITY OF DETENTION

29. 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.⁴³ These grounds must be "articulable" in the sense that they must be specified in detail by reference to the relevant information or evidence.⁴⁴ The SPO must accordingly demonstrate the existence of any of these risks against the threshold of articulable grounds to believe.⁴⁵ A Panel must provide specific reasoning and rely on concrete grounds when authorising continued detention.⁴⁶

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

⁴² Eighth Detention Decision, para. 25.

⁴³ Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17. 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.

⁴⁴ Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17. 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.

⁴⁵ Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17. See also KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, para. 15.

⁴⁶ Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17. See also *Thaçi Appeal Decision*, para. 22.

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.⁴⁷

1. Risk of Flight

30. The SPO submits that a risk of flight exists for Mr Haradinaj, who testified that he made public the batches because he is opposed to the SC and does not recognise it.⁴⁸ The SPO asserts that, in his capacity as former Deputy Head of the KLA War Veterans Association ("KLA WVA"), Mr Haradinaj can call upon the resources of the organisation to assist in any attempt to flee.⁴⁹ The SPO also asserts that Mr Haradinaj knows that the trial judgment is imminent and the prospect of a conviction gives the highest incentive yet to flee.⁵⁰ Moreover, the SPO claims that Mr Haradinaj's uncooperative behaviour during his arrest further suggests he is a flight risk.⁵¹

31. The Haradinaj Defence submits that there is no evidence before the Panel to suggest that there is a risk that Mr Haradinaj would seek to flee the jurisdiction of the SC.⁵² The Haradinaj Defence claims that the danger of absconding "cannot be gauged solely on the basis of the severity of the sentence risked"⁵³ and that Mr Haradinaj has a significant number of protective factors mitigating his risk of flight from Kosovo, including his family and a network of close associates, both within and outside of the KLA WVA.⁵⁴ In this regard, the Haradinaj Defence

⁴⁷ Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17. *See also* Thaçi Appeal Decision, para. 22.

⁴⁸ SPO Submission, para. 8.

⁴⁹ SPO Submission, para. 9.

⁵⁰ SPO Submission, paras 10,12.

⁵¹ SPO Submission, para. 11.

⁵² Haradinaj Submission, para. 20.

⁵³ Haradinaj Submission, para. 21, *citing* ECtHR, *Tomasi v. France*, [no. 12850/87](#), 27 August 1992, para. 98.

⁵⁴ Haradinaj Submission, para. 22.

argues that membership of the KLA WVA and the expression of opposition to the operation of the SC are not factors increasing the likelihood that Mr Haradinaj would attempt to abscond or be assisted in the same by his membership.⁵⁵ Furthermore, the Haradinaj Defence rejects the SPO claim that Mr Haradinaj was evasive during his arrest.⁵⁶

32. The Panel recalls that, in its Eighth Detention Decision, it found that the risk of Mr Haradinaj fleeing could be mitigated by a set of alternative measures.⁵⁷ The Panel does not accept the SPO argument that Mr Haradinaj's testimony regarding his reasons for making the batches public, and his opinion of the SC, show an increased risk of flight.⁵⁸ Furthermore, while the Panel accepts that proximity to judgment has been found to be a factor raising the risk of flight,⁵⁹ the Panel is not in a position to evaluate how Mr Haradinaj may see his prospects at this stage. Therefore, in the present circumstances, the Panel does not consider that the proximity of judgment raises the risk of Mr Haradinaj fleeing. While the Panel cannot completely exclude the risk that Mr Haradinaj would flee if released, it remains satisfied that any such potential risk could be sufficiently mitigated by a set of alternative measures.

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

2. Risk of Obstructing the Proceedings

34. The SPO submits that the evidence led on the conduct of Mr Haradinaj in September 2020 shows that his willingness and ability to obstruct the progress of

⁵⁵ Haradinaj Submission, para. 25.

⁵⁶ Haradinaj Submission, para. 27.

⁵⁷ Eighth Detention Decision, para. 31.

⁵⁸ SPO Submission, para. 8.

⁵⁹ 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.

SC proceedings is real.⁶⁰ The SPO asserts that Mr Haradinaj is now aware of all confidential information received at trial and therefore has the maximum means and opportunity to obstruct the proceedings.⁶¹ 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.⁶²

35. The Haradinaj Defence responds that the SPO reference to the conduct of Mr Haradinaj and to the content of proceedings manifestly fails to present a substantiated risk that Mr Haradinaj is in fact at risk of obstructing proceedings, if provisionally released.⁶³ The Haradinaj Defence submits that the SPO submissions fail to engage with the fact that Mr Haradinaj has no possession of the documents concerning the instant matters, all of which, it is the SPO's case, have been seized.⁶⁴ The Haradinaj Defence claims that Mr Haradinaj acted in the public interest and as a result of the SPO's leak of material, which, it alleges, amounts to police incitement or entrapment.⁶⁵

36. The Panel recalls the Pre-Trial Judge's finding that there was a well-grounded suspicion, *inter alia*, that Mr Haradinaj: (i) intentionally participated in the unauthorised dissemination of protected information and threatened (potential) information providers;⁶⁶ (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA,⁶⁷ which contained, *inter alia*, names of

⁶⁰ SPO Submission, para. 13.

⁶¹ SPO Submission, para. 14.

⁶² SPO Submission, para. 15.

⁶³ Haradinaj Submission, paras 30, 35, 39.

⁶⁴ Haradinaj Submission, paras 31-32, 37-38.

⁶⁵ Haradinaj Submission, paras 33-34.

⁶⁶ Confirmation Decision, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

⁶⁷ Confirmation Decision, paras 101-102, 106, 108. *See also* F00009/RED/A01, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders* ("Annex 1 to SPO Request for Arrest Warrants"), 1 October 2020, pp. 8-9, 11; Second Detention Decision, para. 38; Third Detention Decision, para. 34; Fifth Detention Decision, para. 21.

(potential) information providers;⁶⁸ (iii) made various accusations regarding such persons for having allegedly interacted with the SITF/SPO;⁶⁹ (iv) encouraged others to disseminate such information and declared that he sought to discredit the work of the SC;⁷⁰ (v) repeatedly stated that he would continue to disseminate SPO/SITF-related documents, despite the Single Judge's orders to the KLA WVA forbidding such dissemination.⁷¹ 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 Haradinaj poses a risk of obstructing the present proceedings.

37. As regards the Haradinaj Defence's argument that Mr Haradinaj has no possession of the documents concerning the instant matters, because they have been seized by the SPO,⁷² the Panel reminds the Haradinaj Defence that Mr Haradinaj, by virtue of his participation to the trial, 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. In this regard, the Panel recalls the statement, made by Mr Haradinaj during his testimony, that he would make public any SITF, SPO or SC materials that would

⁶⁸ Confirmation Decision, para. 106.

⁶⁹ Confirmation Decision, paras 111, 115.

⁷⁰ Confirmation Decision, paras 101, 108, 120. *See also* Annex 1 to SPO Request for Arrest Warrants, pp. 10-11, 14-17, 20, 24; Second Detention Decision, para. 38; Third Detention Decision, para. 34; Fifth Detention Decision, para. 21.

⁷¹ Confirmation Decision, paras 101-102, 106-108. *See also* F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, para. 22; F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, para. 22; Annex 1 to SPO Request for Arrest Warrants, pp. 5-6; F00009/RED/A02, Specialist Prosecutor, *Annex 2 to Request for Arrest Warrants and Related Orders*, 1 October 2020, p. 8.

⁷² SPO Submission, para. 14.

arrive at the KLA WVA.⁷³ 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 Haradinaj and noted by the Pre-Trial Judge and this Panel in previous detention decisions.⁷⁴

38. Furthermore, the Panel confirms its finding that, as the former Deputy Head of the KLA WVA, Mr Haradinaj, 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.⁷⁵

39. 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 Haradinaj, if released, would disseminate confidential information which, in turn, would risk obstructing the conduct of the present proceedings.

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

⁷³ Transcript, 13 January 2022, p. 3024, lines 3-4: "[...] I will act the same, because I am convinced that I acted rightly [...]".

⁷⁴ See *supra* para. 36. See also Eighth Detention Decision, para. 35.

⁷⁵ Seventh Detention Decision, para. 23; Sixth Detention Decision, paras 27-28; First Detention Decision, para. 17; Fifth Detention Decision, para. 17.

3. Risk of Committing Offences

41. The SPO submits that the vow of Mr Haradinaj to continue to disseminate SITF/SPO information demonstrates that such incidents would continue if he were to be released. Considering Mr Haradinaj'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.⁷⁶

42. The Haradinaj Defence responds that the SPO submissions that there is a risk of further offences merely repeats its abstract concerns regarding the risk that Mr Haradinaj will disseminate information to which he has no access.⁷⁷

43. The Panel recalls its findings regarding the risk of obstructing the proceedings and, more specifically, Mr Haradinaj'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 Haradinaj 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.⁷⁸

4. Conclusion

44. The Panel concludes that there remains a risk that Mr Haradinaj 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

⁷⁶ SPO Submission, para. 16.

⁷⁷ Haradinaj Submission, para. 40.

⁷⁸ Eighth Detention Decision, para. 40; Seventh Detention Decision, para. 26; Sixth Detention Decision, para. 29.

now assess whether the application of alternative measures can adequately address these risks.

C. MEASURES ALTERNATIVE TO DETENTION

45. 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.⁷⁹ 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.⁸⁰ 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.⁸¹

46. 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.⁸²

⁷⁹ Article 41(12) of the Law; Sixth Detention Decision, para. 25.

⁸⁰ Eighth Detention Decision, para. 42; Seventh Detention Decision, para. 28; Sixth Detention Decision, para. 31. *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*.

⁸¹ Eighth Detention Decision, para. 42; Seventh Detention Decision, para. 28; Sixth Detention Decision, para. 31. *See also* 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.

⁸² Veseli Appeals Detention Review Detention, paras 48-53.

5. Parties' Submissions

47. The SPO recalls its previous submissions that the Proposed Conditions remain insufficient and the Kosovo Police cannot effectively enforce them.⁸³ 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.⁸⁴ According to the SPO, it is only through the communication monitoring framework applicable at the SC's detention facilities that the communications of Mr Haradinaj could be effectively controlled with a view to sufficiently mitigate the risks.⁸⁵

48. The Haradinaj Defence submits that Mr. Haradinaj's risk factors are manageable on bail.⁸⁶

6. The Panel's Findings

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

(a) Risks

50. As regards the risk of flight, the Panel found in the Eighth Detention Decision that any remaining risk of Mr Haradinaj fleeing could be sufficiently mitigated by the regime proposed by the Kosovo Police ("Proposed Regime").⁸⁷ The Panel reiterates its findings that the guarantees provided by the Proposed Regime could ensure that Mr Haradinaj 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

⁸³ SPO Submission, para. 17.

⁸⁴ SPO Submission, para. 19.

⁸⁵ SPO Submission, para. 19.

⁸⁶ Haradinaj Submission, para. 41.

⁸⁷ See *supra* para. 32. See also Eighth Detention Decision, paras 31, 52.

proceedings.⁸⁸ The Panel remains accordingly satisfied that Mr Haradinaj would remain in house arrest if ordered so and would comply with measures aimed at monitoring his whereabouts. The Panel considers that, since the last review, no circumstances have intervened that would affect the aforementioned findings.

51. As regards the risk of obstructing proceedings, the Panel found in the Eighth Detention Decision that no alternative measures, including the Proposed Regime, would sufficiently mitigate the risk of Mr Haradinaj obstructing the proceedings by disseminating or facilitating the dissemination of confidential or otherwise protected information and thereby threatening or influencing witnesses, victims or accomplices.⁸⁹ The Panel considers that, since the last review, no new circumstances have intervened that would affect these 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 Haradinaj could be effectively controlled with a view to sufficiently mitigate the risks.⁹⁰

52. 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 Haradinaj will commit offences either in repetition of those charged or which he has previously threatened to commit.⁹¹ The Panel considers that, since the last review, no new circumstances have intervened that would affect these findings.

⁸⁸ Eighth Detention Decision, para. 52.

⁸⁹ Eighth Detention Decision, para. 77.

⁹⁰ Eighth Detention Decision, paras 86-87.

⁹¹ Eighth Detention Decision, para. 78.

(b) Additional Measures

53. 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.⁹²

54. 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).

55. 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

56. The Panel accordingly finds that the no alternative measure is sufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law in relation to Mr Haradinaj and that any additional conditions imposed by the Panel would not affect this conclusion.

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

⁹² Eighth Detention Decision, para. 83.

D. REASONABLENESS OF DETENTION

58. The SPO submits that, since the last review, the evidence presentation closed and the trial judgment is expected shortly.⁹³ On this basis, it submits that the detention of Mr Haradinaj continues to be reasonable and proportionate.⁹⁴

59. The Haradinaj Defence submits that Mr Haradinaj's detention interferes with his right to liberty and that the proportionality of this interference must be assessed against the legitimate interest it pursues, *i.e.* the protection of the confidentiality of the proceedings.⁹⁵ The Haradinaj Defence claims that the likelihood that Mr Haradinaj would take any steps to interfere with the confidentiality of the proceedings is minimal, and therefore his detention is unnecessary and disproportionate.⁹⁶

60. 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.⁹⁷ The Panel is accordingly under an obligation to ensure that the time spent in detention is reasonable, including during trial.⁹⁸

61. The Panel observes that Mr Haradinaj 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 Haradinaj spent in detention, including in the past two months. Accordingly, since the last detention review, the Haradinaj Defence presented its case,⁹⁹ both Defence teams closed their

⁹³ SPO Submission, para. 21.

⁹⁴ SPO Submission, para. 22.

⁹⁵ Haradinaj Submission, paras 45-46.

⁹⁶ Haradinaj Submission, paras 47-48.

⁹⁷ Selimi Appeal Decision, para. 79.

⁹⁸ SCCC 22 May 2020 Judgment, para. 63.

⁹⁹ 11-28 January 2022.

cases,¹⁰⁰ the Panel closed the evidentiary proceedings, ordered the Parties to file their final trial briefs by 3 March 2022 and scheduled the closing arguments for 14-18 March 2022.¹⁰¹ The Panel expects to render a judgment as soon as practicable afterwards.

62. 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 Haradinaj 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 Haradinaj's continued detention is necessary and reasonable in the specific circumstances of the case.

63. 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 the Eighth Detention Review.

¹⁰⁰ 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.

¹⁰¹ 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.

V. DISPOSITION

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

- a. **ORDERS** Mr Haradinaj's continued detention;
- b. **ORDERS** the SPO to file submissions on the next review of Mr Haradinaj's detention by **Thursday, 7 April 2022**;
- c. **ORDERS** the Haradinaj 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