



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 21 April 2022

**Language:** English

**Classification:** Public

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### Decision on Review of Detention of Hysni Gucati

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**Specialist Prosecutor**

Jack Smith  
Valeria Bolici  
Matthew Halling  
James Pace

**Counsel for Hysni Gucati**

Jonathan Elystan Rees  
Huw Bowden  
Eleanor Stephenson

**Counsel for Nasim Haradinaj**

Toby Cadman  
Carl Buckley  
Almudena Bernabeu García

**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>

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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.

3. On 16 July 2021, the Pre-Trial Judge transmitted the case to the Panel.<sup>5</sup> The Panel reviewed and extended Mr Gucati's detention on 23 August 2021,<sup>6</sup> 22 October 2021,<sup>7</sup> 21 December 2021,<sup>8</sup> and 21 February 2022.<sup>9</sup>

4. On 7 April 2022, the SPO filed its consolidated submissions for review of detention ("SPO Submission").<sup>10</sup>

5. On 14 April 2022, the Gucati Defence responded to the SPO Submission ("Gucati Submission").<sup>11</sup>

## II. SUBMISSIONS

6. The SPO avers that the continued detention of Mr Gucati remains necessary as all established reasons for detention continue to exist.<sup>12</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>13</sup>

7. The Gucati Defence submits that the continued detention of Mr Gucati is neither necessary nor proportionate.<sup>14</sup> Therefore, the Gucati Defence requests the

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<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.

<sup>7</sup> F00390, Panel, *Decision on Review of Detention of Hysni Gucati* ("Seventh Detention Decision"), 22 October 2021.

<sup>8</sup> F00506/RED, Panel, *Public Redacted Version of Decision on Review of Detention of Hysni Gucati* ("Eighth Detention Decision"), 21 December 2021.

<sup>9</sup> F00562, Panel, *Decision on Review of Detention of Hysni Gucati* ("Ninth Detention Decision"), 21 February 2022.

<sup>10</sup> F00586, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention* ("SPO Submission"), 7 April 2022.

<sup>11</sup> F00590, Gucati Defence, *Defence Submissions on Detention Review* ("Gucati Submission"), 14 April 2022.

<sup>12</sup> SPO Submission, paras 1, 3-16.

<sup>13</sup> SPO Submission, paras 1, 17-19.

<sup>14</sup> Gucati Submission, para. 6.

Panel to order Mr Gucati's release from detention, with or without conditions, and asserts that he will comply with any conditions imposed.<sup>15</sup>

### III. APPLICABLE LAW

8. Pursuant to Article 41(6)(a) and (b) of the Law, the Specialist Chambers ("SC") shall only detain a person when there is a grounded suspicion that the person has committed a crime within 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.

9. 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.

10. 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.<sup>16</sup>

11. 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>17</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

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<sup>15</sup> Gucati Submission, paras 19-20.

<sup>16</sup> See also IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention* ("Haradinaj Appeal Detention Review Decision"), 9 February 2021, para. 55.

<sup>17</sup> Haradinaj Appeal Detention Review Decision, para. 55.

place, the detention of the Accused remains warranted.<sup>18</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>19</sup>

12. 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>20</sup>

#### IV. DISCUSSION

13. 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>21</sup> Detention cannot be maintained lightly and the burden to demonstrate that detention is necessary is on the SPO.<sup>22</sup> It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release.<sup>23</sup>

14. The Panel further notes the developments that occurred in the trial proceedings since its last detention review decision (the submission of the Parties'

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<sup>18</sup> 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.

<sup>19</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>20</sup> Veseli Appeals Detention Review Decision, para. 15.

<sup>21</sup> Ninth Detention Decision, para. 22; 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.

<sup>22</sup> Ninth Detention Decision, para. 22; Eighth Detention Decision, para. 20; Seventh Detention Decision, para. 13. *See also* Thaçi Appeal Decision, para. 17.

<sup>23</sup> Ninth Detention Decision, para. 22; 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.

final trial briefs, the presentation of their closing statements, and the closing of the case), and has taken them into consideration for the purpose of the present decision.

#### A. GROUNDED SUSPICION

15. 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 as corroborated by the Panel's decision under Rule 130 of the Rules.<sup>24</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>25</sup>

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

17. 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. It is further recalled that the "well-grounded suspicion" threshold for the confirmation of an indictment is higher than the "grounded suspicion" required for continued detention.<sup>26</sup> Moreover, the Panel observes that the Court of Appeals Panel has

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<sup>24</sup> SPO Submission, para. 3.

<sup>25</sup> SPO Submission, para. 4.

<sup>26</sup> Ninth Detention Decision, para. 26; Eighth Detention Decision, para. 24; Seventh Detention Decision, para. 14; Sixth Detention Decision, para. 13. *See also* IA007/F00004, Court of Appeals Panel, *Consolidated Decision on Nasim Haradinaj's Appeals Against Decisions on Review of Detention*, 6 April 2022, para. 29; IA008/F00004, Court of Appeals Panel, *Consolidated Decision on Nasim Haradinaj's Appeals Against Decisions on Review of Detention*, 6 April 2022, para. 29 (together "Consolidated Haradinaj Appeal

confirmed that the Panel's conclusion that the Accused had a case to answer in relation to all counts in the Indictment,<sup>27</sup> suitably corroborates the finding that a grounded suspicion within the meaning of Article 41(6)(a) of the Law continues to exist.<sup>28</sup> The Panel also reiterates that, without prejudice to its 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 a grounded suspicion within the meaning of Article 41(6)(a) of the Law still exists.<sup>29</sup> According to the Court of Appeals Panel, the Panel's reliance on its decision under Rule 130 of the Rules, coupled with the latter finding, reflects that it considered all of the evidence which had been presented at the time of its two previous detention review decisions.<sup>30</sup> In the view of the Panel, no new circumstances have intervened that would affect the aforementioned findings.

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

## **B. NECESSITY OF DETENTION**

19. With respect to the grounds for continued detention, Article 41(6)(b) of the Law sets out three alternative bases (risks) on which detention may be found to be necessary.<sup>31</sup> These grounds must be "articulable" in the sense that they must be

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Detention Review Decision"); 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>27</sup> F00450, Panel, *Decision on the Defence Motions to Dismiss Charges*, 26 November 2021, paras 41, 49, 58, 67, 76, 84, 88.

<sup>28</sup> Consolidated Haradinaj Appeal Detention Review Decision, paras 29-30; Ninth Detention Decision, para. 26; Eighth Detention Decision, paras 25-26.

<sup>29</sup> Ninth Detention Decision, para. 26.

<sup>30</sup> Consolidated Haradinaj Appeal Detention Review Decision, paras 29-30.

<sup>31</sup> Ninth Detention Decision, para. 28; 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,

specified in detail by reference to the relevant information or evidence.<sup>32</sup> The SPO must accordingly demonstrate the existence of any of these risks against the threshold of articulable grounds to believe.<sup>33</sup> A Panel must provide specific reasoning and rely on concrete grounds when authorising continued detention.<sup>34</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>35</sup>

## 1. Risk of Flight

20. 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>36</sup> The SPO asserts that, in his capacity as former Head of the Kosovo Liberation Army War Veterans Association ("KLA WVA"), Mr Gucati can call upon the resources of the organisation to assist in any attempt to flee.<sup>37</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>38</sup>

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para. 50; ECtHR, *Grubnyk v. Ukraine*, [no. 58444/15](#), 17 September 2020, para. 115; ECtHR, *Korban v. Ukraine*, [no. 26744/16](#), 4 July 2019, para. 155.

<sup>32</sup> Ninth Detention Decision, para. 28; 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>33</sup> Ninth Detention Decision, para. 28; 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>34</sup> Ninth Detention Decision, para. 28; Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

<sup>35</sup> Ninth Detention Decision, para. 28; Eighth Detention Decision, para. 27; Seventh Detention Decision, para. 17; Sixth Detention Decision, para. 16. *See also* *Thaçi Appeal Decision*, para. 22.

<sup>36</sup> SPO Submission, para. 7.

<sup>37</sup> SPO Submission, para. 8.

<sup>38</sup> SPO Submission, paras 9, 11.



21. 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.<sup>39</sup> Therefore, the Gucati Defence claims that continued detention may not be justified on the ground of risk of flight.<sup>40</sup>

22. The Panel recalls that, in its last four decisions on continued detention, it found that any potential risk of Mr Gucati fleeing could be sufficiently mitigated.<sup>41</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>42</sup> Furthermore, the Panel has also previously determined that, even though it accepts that proximity to judgment has been found to be a factor raising the risk of flight, it is not in a position to evaluate how Mr Gucati may see his prospects at this stage and, thus, does not consider that the proximity of judgment increases the risk of Mr Gucati fleeing.<sup>43</sup> Therefore, in the present circumstances, the Panel does not consider that the proximity of judgment raises the risk of Mr Gucati fleeing. In the absence of further submissions by the SPO in relation to the present decision, the Panel, although not completely excluding the risk that Mr Gucati could flee if released, remains satisfied that such a potential risk may be sufficiently mitigated by a set of alternative measures.

23. Therefore, the Panel finds that Mr Gucati's continued detention may not be justified on the ground of the risk of flight.

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<sup>39</sup> Gucati Submission, para. 7.

<sup>40</sup> Gucati Submission, para. 7.

<sup>41</sup> Ninth Detention Decision, para. 31; 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>42</sup> Ninth Detention Decision, para. 31.

<sup>43</sup> Ninth Detention Decision, para. 31.

## 2. Risk of Obstructing the Proceedings

24. 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>44</sup> It adds that Mr Gucati is now aware of all confidential information received at trial.<sup>45</sup> The SPO also asserts that, when this is considered against the climate of intimidation of witnesses in previous Kosovo cases, the risk of the Accused disseminating confidential information has never been higher.<sup>46</sup>

25. The Gucati Defence responds that the SPO has not demonstrated that detention is necessary on the basis that there is a risk of Mr Gucati obstructing proceedings.<sup>47</sup> It asserts that no disclosure has been ordered which might prejudice ongoing SPO investigations, but that any material which the Panel has ordered to be disclosed in a form which was designed not to, and did not, reveal anything which might prejudice ongoing SPO investigations, or negatively impact the security, well-being and privacy of witnesses and other individuals.<sup>48</sup> The Gucati Defence further submits that the SPO has not demonstrated how the dissemination of specific pieces of information might prejudice ongoing SPO investigations, or negatively impact the security, well-being and privacy of witnesses and other individuals.<sup>49</sup> It adds that the burden is on the SPO and not upon Mr Gucati to demonstrate the existence of reasons warranting his release.<sup>50</sup> Furthermore, the Gucati Defence avers that, contrary to the SPO's submission, Mr Gucati did not vow to continue to disseminate SITF/SPO information during his testimony.<sup>51</sup> Lastly, according to the Gucati Defence, Mr Gucati has attended every day of his

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<sup>44</sup> SPO Submission, para. 12.

<sup>45</sup> SPO Submission, para. 13.

<sup>46</sup> SPO Submission, para. 14.

<sup>47</sup> Gucati Submission, para. 13.

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

<sup>49</sup> Gucati Submission, para. 9.

<sup>50</sup> Gucati Submission, paras 4(b), 9.

<sup>51</sup> Gucati Submission, para. 10.

trial, he has continued to be cooperative and compliant during the trial, he has given evidence and answered every question asked, there has been no allegation that he has attempted to disseminate information in the last 18 months, and the Panel has never had cause to exercise its powers under Rule 61(2) of the Rules.<sup>52</sup>

26. 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>53</sup> (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA, which contained, *inter alia*, names of (potential) information providers;<sup>54</sup> (iii) made various accusations regarding such persons for having allegedly interacted with the SITF/SPO;<sup>55</sup> and (iv) vowed to continue to publish such information in the future,<sup>56</sup> despite being ordered by the Single Judge to refrain from doing so.<sup>57</sup> In view of the nature of the well-grounded suspicion in the context of the present case,<sup>58</sup> the Panel, while recalling that any analysis of continued detention must take as a starting point the Accused's presumption of innocence, takes into consideration these findings when determining whether there are articulable grounds to believe that there is a risk of Mr Gucati obstructing the present proceedings.

27. As to the Gucati Defence's submission that material was disclosed in a form which was designed not to, and did not, reveal any information which might

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<sup>52</sup> Gucati Submission, paras 11-12.

<sup>53</sup> Confirmation Decision, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

<sup>54</sup> Confirmation Decision, paras 101, 106.

<sup>55</sup> Confirmation Decision, paras 111, 115.

<sup>56</sup> Confirmation Decision, para. 102.

<sup>57</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>58</sup> *See* Consolidated Haradinaj Appeal Detention Review Decision, para. 45.

prejudice ongoing investigations, or negatively impact the security of witnesses, the Panel has already determined that Mr Gucati, by virtue of his participation in the trial, was provided with access to much more material than claimed by the Gucati Defence, and if he is released, Mr Gucati would be able to disclose that information to the public.<sup>59</sup> Moreover, in relation to Mr Gucati's testimony that he would make public any SITF, SPO or SC materials that would arrive at the KLA WVA, the Panel has already determined that, while the weight to be attached to this statement will have to be assessed with the totality of evidence at the end of the trial, the statement confirms, for the purpose of ascertaining the risk under Article 41(6)(b)(ii) of the Law, the vows expressed earlier by Mr Gucati and noted by the Pre-Trial Judge and this Panel.<sup>60</sup> 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>61</sup>

28. 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>62</sup> it does not consider that the Defence's submissions regarding Mr Gucati's good character and compliant conduct during his arrest,

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<sup>59</sup> Ninth Detention Decision, para. 36. *See also* Consolidated Haradinaj Appeal Detention Review Decision, paras 43, 46-47.

<sup>60</sup> Ninth Detention Decision, para. 36; Eighth Detention Decision, para. 35.

<sup>61</sup> Ninth Detention Decision, para. 37; 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.

<sup>62</sup> Ninth Detention Decision, para. 38; Eighth Detention Decision, para. 36; Seventh Detention Decision, para. 23; Sixth Detention Decision, para. 21.

detention and trial have any bearing on the Accused's willingness or capability (or absence thereof) to disseminate such information.

29. 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**

30. 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.<sup>63</sup> It argues that, considering Mr Gucati's previous conduct when given confidential information, there is every reason to believe that detention remains necessary to prevent the commission of further offences.<sup>64</sup>

31. The Gucati Defence responds that the SPO has not demonstrated that detention is necessary on the basis that there is a risk of Mr Gucati obstructing proceedings.<sup>65</sup> The Gucati Defence's submissions in support of its assertion have been set out above in connection with the risk of obstruction.

32. 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

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<sup>63</sup> SPO Submission, para. 15.

<sup>64</sup> SPO Submission, para. 16.

<sup>65</sup> Gucati Submission, para. 13.

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>66</sup>

#### 4. Conclusion

33. 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

34. 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>67</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>68</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>69</sup>

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<sup>66</sup> Ninth Detention Decision, para. 42; Eighth Detention Decision, para. 40; Seventh Detention Decision, para. 25; Sixth Detention Decision, para. 23.

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

<sup>68</sup> Ninth Detention Decision, para. 44; 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>69</sup> Ninth Detention Decision, para. 44; 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*

35. 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.<sup>70</sup>

## 1. Parties' Submissions

36. The SPO recalls its previous submissions that the conditions of detention in Kosovo proposed by the Kosovo Police<sup>71</sup> remain insufficient and the Kosovo Police cannot effectively enforce them.<sup>72</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>73</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>74</sup>

37. The Gucati Defence maintains its position that the measures which the Kosovo Police proposes to implement can sufficiently mitigate any potential risk.<sup>75</sup>

## 2. The Panel's Findings

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

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*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.*

<sup>70</sup> Veseli Appeals Detention Review Detention, paras 48-53.

<sup>71</sup> F00449, *Reply to Request number KSC-BC-2020-07, dated 22 October 2021, 25 November 2021, confidential.*

<sup>72</sup> SPO Submission, para. 18.

<sup>73</sup> SPO Submission, para. 19.

<sup>74</sup> SPO Submission, para. 19.

<sup>75</sup> Gucati Submission, para. 14.

## (a) Risks

39. As regards the risk of flight, the Panel found in the Ninth Detention Decision and Eighth Detention Decision that 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>76</sup> The Panel reiterates its findings 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, and would return to the SC whenever ordered to do so to be present during proceedings.<sup>77</sup> The Panel considers that, since the last detention review, no circumstances have intervened that would affect the aforementioned findings.

40. As regards the risk of obstructing proceedings, the Panel found in the Ninth Detention Decision and 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>78</sup> The Panel considers that, since the last review, no new circumstances have intervened that would affect the above findings. The Panel does not accept the Gucati Defence’s assertion that the measures proposed by the Kosovo Police can sufficiently mitigate any potential risk. The Panel sees no reason to depart from its previous finding that it is only through the communication monitoring framework applicable at the SC’s

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<sup>76</sup> See *supra* para. 22. See also Ninth Detention Decision, paras 31, 49; Eighth Detention Decision, paras 30, 54.

<sup>77</sup> Ninth Detention Decision, para. 49; Eighth Detention Decision, para. 54.

<sup>78</sup> Ninth Detention Decision, para. 50; Eighth Detention Decision, para. 79. See also Consolidated Haradinaj Appeal Detention Review Decision, paras 54-57.



detention facilities that the communications of Mr Gucati could be effectively controlled with a view to sufficiently mitigate the risks.<sup>79</sup>

41. 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>80</sup> The Panel considers that, since the last review, no new circumstances have intervened that would affect these findings.

#### (b) Additional Measures

42. 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>81</sup>

43. 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.

44. 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

45. 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

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<sup>79</sup> Ninth Detention Decision, para. 50; Eighth Detention Decision, paras 88-89.

<sup>80</sup> Ninth Detention Decision, para. 51; Eighth Detention Decision, para. 80.

<sup>81</sup> Ninth Detention Decision, paras 52-54; Eighth Detention Decision, para. 85.

to Mr Gucati and that any additional conditions imposed by the Panel would not affect this conclusion.

46. 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.

#### **D. REASONABLENESS OF DETENTION**

47. The SPO submits that, since the last review, this trial continued to move expeditiously, the case closed and the trial judgment is expected shortly.<sup>82</sup> It is of the view that, given, *inter alia*, the closing of the case, the lengthy custodial sentence requested for a conviction, and the heightened risks if released, the detention of Mr Gucati continues to be reasonable and proportionate.<sup>83</sup>

48. The Gucati Defence observes that, by 21 April 2022, the Accused will have been in detention for nineteen months, and claims that no sentence of that length has been imposed in any previous comparable case.<sup>84</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>85</sup>

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<sup>82</sup> SPO Submission, para. 21.

<sup>83</sup> SPO Submission, para. 22.

<sup>84</sup> Gucati Submission, para. 17.

<sup>85</sup> Gucati Submission, para. 18.

49. 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>86</sup> The Panel is accordingly under an obligation to ensure that the time spent in detention is reasonable, including during trial.<sup>87</sup>

50. The Panel observes that Mr Gucati has been in detention for almost nineteen 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. Specifically, since the last detention review, the Parties have filed their final trial briefs<sup>88</sup> and presented their closing arguments.<sup>89</sup> The Panel expects to render a judgment as soon as practicable.

51. 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.

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<sup>86</sup> Selimi Appeal Decision, para. 79.


<sup>87</sup> SCCC 22 May 2020 Judgment, para. 63.

<sup>88</sup> F00565, Specialist Prosecutor, *Prosecution Final Brief*, 3 March 2022; F00566, Haradinaj Defence, *Final Trial Brief on Behalf of Nasim Haradinaj*, 3 March 2022; F00567, Gucati Defence, *Final Trial Brief on behalf of Hysni Gucati*, 4 March 2022.

<sup>89</sup> Transcript, 14-17 March 2022, pp 3420-3855.

**V. DISPOSITION**

52. For the above-mentioned reasons, the Panel hereby **ORDERS** Mr Gucati's continued detention until the pronouncement of the Trial Judgment.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Thursday, 21 April 2022

At The Hague, the Netherlands