

In: KSC-CC-2024-25 Before: President Judge Ekaterina Trendafilova
Registrar: Dr Fidelma Donlon Filing Participant:

Specialist Counsel for Hashim Thaçi Date: 26 August 2025

A. STAMMENT OF VIOLATION

The intervention of the Constitutional Court is necessary to protect Mr Hashim Thaçi's fundamental rights to counsel, privacy, and silence. For months, the SPO was authorised by the Single Judge to secretly surveil Mr Thaçi in the Detention Unit even though there was no credible indication that he had committed any crime. The illegal surveillance by the Prosecution of an accused in the custody of the Kosovo Specialist Chambers threatens the integrity of the proceedings and will taint the legacy of this institution's commitment to fundamental human rights. 2. It is hard to imagine a greater advantage to a prosecuting authority than a direct portal into the private opinions and feelings of an accused while on trial. Covert recording of the private views of an Accused in detention about the strengths and weaknesses in the prosecution case or his own case, the strategy for his defence, the progress of the trial, and the relative strength of the witnesses, as well as the performance of the courtroom lawyers and Judges, is a gift to any prosecution team. Add to this, access to the accused's private discussions about his physical and mental health, and his most intimate exchanges with family was a violation of human rights and privacy.

The SPO secured for itself unprecedented access to Mr Thaçi's non-privileged conversations, through a regime of special investigative measures ("SIMs") that was operational for nine months.

No safeguards were put in place to ensure the integrity of the proceedings in this case. The SPO did not set up a separate legal team to

review the results of the SIMs, or an independent counsel to review the material collected and sieve out privileged or case.

The SPO was covertly recording the private and personal conversations of its accused in the KSC's flagship trial, and then sought to rely on these conversations to bolster its case against them, this taint is likely to become the emblematic feature of the KSC.

5. The problem - and the issue at the heart of the present referral - is that the SIMs were illegal and a violation.

These SIMs could only be imposed where there was a "grounded suspicion" that Mr Thaçi had committed, was committing, or was about to commit a crime under Article 15(2) of the KSC Law.

Mr. Thaçi is the victim of these violations, and an authorised person entitled to submit this referral. Article 113(7) of the Constitution provides that "[i]ndividuals" are authorised to refer "violations of their individual rights and freedoms".

B. STATEMENT OF VIOLATION.

Mr Thaçi's most private conversations, revealing his opinions and feelings, have been shared throughout the KSC, and read by the very prosecutors seeking to secure a conviction against him. Conversations about his physical and mental health, his thoughts on the trial and the SPO evidence, and his most intimate exchanges with [REDACTED] have been shared and read by many. This kind of encroachment on his right to privacy is only possible with a legal basis. In the absence of a lawful order, Mr Thaçi's right to privacy has been violated.

C. VIOLATION OF THE RIGHT TO COUNSEL.

. Unlawful covert monitoring also encroaches on the right to counsel. The right of a person charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial. 72 Articles 29(3) and 30(5) of the Constitution require that everyone charged with a crime shall have assistance of legal counsel of his/her choosing, and be able to freely communicate with counsel. Importantly, the ECtHR has held that the aims pursued by the right to legal counsel include the prevention of a miscarriage of justice; a counterweight to the vulnerability 71 Constitutional Court Judgment of 26 April 2017, para. 65. 72 ECtHR, *Salduz v. Turkey*, no. 36391/02, Grand Chamber, Judgment, 27 November 2008 (“*Salduz v. Turkey*”), para. 51; *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber, Judgment, 13 September 2016, para. 255; *Simeonovi v. Bulgaria*, no. 21980/04, Grand Chamber, Judgment, 12 May 2017, para. 112; *Beuze v. Belgium*, no. 71409/10, Grand Chamber, Judgment, 9 November 2018 (“*Beuze v. Belgium*”), para. 123. Date original: 26/08/2024 14:45:00 Date public redacted version: 20/10/2025 12:15:00 KSC-CC-2024-25/F00001/RED/25 of 30 PUBLIC KSC-CC-2024-25 25 26 August 2024 of suspects in police custody; and ensuring respect for the rights of an accused not to incriminate him/herself and to remain silent. 73 60. Mr Thaçi was represented by Specialist Counsel during the operation of the SIMs and was aware that non-privileged conversations and visits could be passively monitored. 74 He also knew that this monitoring could not be shared with the SPO without the Rule 34 conditions having been met. These conditions reflect the fundamental nature of the right to legal representation, which protects detainees from the irretrievable prejudice that arises when incriminating statements made without access to a lawyer are then relied on to support a conviction.75 Further protection arises from the

fundamental prohibition on prosecutors communicating with a represented accused contained in Article 16 of the KSC Code of Professional Conduct. These protections are obliterated by unlawful covert surveillance.

D. STATEMENT OF VIOLATION

At the time that he was monitored and surveilled, Mr Thaçi's right to counsel had already attached. He had a reasonable expectation that his communications would remain private from the SPO absent a lawful court order. Instead, and in the absence of a lawful order, the SPO now has access to many hours of recordings and transcripts of Mr Thaçi's statements and conversations given in the absence of counsel. These recordings and transcripts contain discussions of Mr Thaçi's private opinions about the strengths and weaknesses in the prosecution case, the strategy for his defence, the progress of the trial, and the relative strength of the SPO witnesses, and the credibility and respective performances of SPO witnesses. None of this information would ever normally be available to a prosecuting authority. ⁷³ *Beuze v. Belgium*, paras. 125-130. ⁷⁴ KSC-BD-09-Rev1, Registry Practice Direction on Detainees: Visits and Communications, Articles 15, 17. ⁷⁵ *Salduz v. Turkey*, para. 55; *Beuze v. Belgium*, para. 128. Date original: 26/08/2024 14:45:00 Date public redacted version: 20/10/2025 12:15:00 KSC-CC-2024-25/F00001/RED/26 of 30 PUBLIC KSC-CC-2024-25 26 26 August 2024 62.

The ECtHR has stressed that the right to counsel requires not only that the counsel is permitted to be present when the suspect or accused is giving information the police or prosecuting authorities, but that counsel is allowed to actively assist the suspect during this questioning, and to intervene to ensure respect for the suspect's rights.⁷⁶ The nine-month regime of SIMs obliterated these

safeguards. Rather than questioning Mr Thaçi in the presence of his counsel, who could ensure that the complementary rights of silence and against self-incrimination were operational, the SPO instead covertly recorded him for months while keeping Specialist Counsel in the dark. This extraordinary procedure was conducted without a legal basis. The aims pursued by the right to legal counsel, namely the prevention of a miscarriage of justice, and as a counterweight to the vulnerability of those in custody, were entirely absent. Mr Thaçi's right to counsel has been violated. V

E. STATEMENT OF VIOLATION - THE RIGHT TO SILENCE

The violation of Mr Thaçi's right to counsel is intrinsically linked to the violation of his right to silence. Article 30(6) of the Constitution provides that a person charged with a criminal offence must "not be forced to testify against oneself or admit one's guilt." While the right of an accused not to incriminate himself is not expressly contained in the ECHR, the ECtHR has held that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6".⁷⁷ 76 ECtHR, *Soytemiz v. Turkey*, no. 57837/09, Second Section, Judgment, 27 November 2018, paras. 44-46, 27. 77 ECtHR, *Murray v. United Kingdom*, no. 18731/91, Grand Chamber, Judgment, 8 February 1996, para. 45. Date original: 26/08/2024 14:45:00 Date public redacted version: 20/10/2025 12:15:00 KSC-CC-2024-25/F00001/RED/27 of 30 PUBLIC KSC-CC-2024-25 27 26 August 2024 64. The ECtHR has held that the right to counsel serves to ensure that procedural steps taken to present a case against an accused do not lead to testimony being given under duress or against the accused's will; in other words, to ensure the privilege against self-

incrimination is not violated. 78 Where access to counsel was delayed, and where the suspect was not notified of the privilege against self-incrimination or the right to remain silent, the ECtHR has held that it will be even more difficult for the investigating party to show that the proceedings as a whole were fair

STATEMENT OF VIOLATION.

The SPO covertly recorded Mr Thaçi's statements without his knowledge, which it now asserts are incriminating. Given the errors outlined above, this surveillance was conducted without a legal basis. As such, Mr Thaçi's right to silence was also violated by the imposition and operation of the SIMs. IX. CLASSIFICATION & DOCUMENTS IN SUPPORT 66. This referral is filed as confidential because it refers to confidential filings and materials from other proceedings at the KSC. The Defence has not attached any documents to this referral in accordance with Articles 32, 59(1) and 59(2) of the Practice Direction on Files and Filings, since all documents referred to are either authorities from other courts which are available in the public domain, or are filings within the custody of the KSC. If the assigned Panel is unable to access any of the materials referred to herein, the Defence will file supplemental submissions attaching them. 78 ECtHR, Jalloh v. Germany, no. 54810/00, Grand Chamber, Judgment, 11 July 2006, paras. 97-102, 109- 123. 79 Beuze v. Belgium, para. 146. Date original: 26/08/2024 14:45:00 Date public redacted version: 20/10/2025 12:15:00 KSC-CC-2024-25/F00001/RED/28 of 30 PUBLIC KSC-CC-2024-25 28 26 August 2024 X. CONCLUSION AND RELIEF SOUGHT 67. Mr Thaçi has been detained by the KSC for three years and nine months. The impact of lengthy incarceration, prior to a conviction, and in the absence of provisional release, is already significant and severe.

International standards for detention exist because, as a group, detainees are inherently vulnerable to manipulation and abuse by detaining and prosecuting authorities. As such, the covert surveillance and recording of an accused's private conversations is exceptional. Under the KSC framework, it may only occur where the conditions of Rule 34 are met. 68. The Rule 34 requirements are rigorous because SIMs encroach on fundamental rights of the accused, including the right to privacy, the right not to incriminate oneself, and the right to benefit from the advice of counsel before making incriminating statements.⁸⁰ Against this backdrop, it was essential that the legal basis to authorise this encroachment against a KSC detainee was carefully reasoned. The sole paragraph provided by the Single Judge in no way provided sufficient reasoning to justify the extraordinary measure being sought, and the ultimate regime that was imposed. This was an error, with the capacity to impact the overall legitimacy of Case 06. The present referral is admissible, and the Constitutional Court is mandated to correct the errors of the Single Judge and Court of Appeals Panel on this question. 69. In light of the above submissions, the Defence respectfully requests the Constitutional Panel grant the following relief: DECLARE that the finding of the Appeals Panel upholding the Single Judge's adjudication of the Certified Issue violates Mr Thaçi's right to a reasoned opinion under Article 6(1) of the ECHR and Article 31(2) of the Constitution; 80 KSC Law, article 21; ECHR, articles 6, 8. Date original: 26/08/2024 14:45:00 Date public redacted version: 20/10/2025 12:15:00 KSC-CC-2024-25/F00001/RED/29 of 30 PUBLIC KSC-CC-2024-25 29 26 August 2024 DECLARE that Mr Thaçi's rights under Article 29(3), Article 30(5), Article 30(6) and Article 36 of the Kosovo Constitution, and Article 6(1), Article 6(3) and Article 8 of the ECHR have been violated by imposition and operation of the SIMs; QUASH

the finding of the Appeal Decision; and REMAND this finding to the Appeals Panel assigned pursuant to the Original Court of Appeals Panel Assignment, for reconsideration of the Certified Issue

Respectfully submitted, Luka Misetic Counsel for Hashim Thaçi
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