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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number: **KSC-CC-2024-25**

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 15 November 2024

Language: English

File name: Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights

Classification: Public

Public Redacted Version of Decision on the Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights

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Applicant
Hashim Thaçi

Specialist Prosecutor
Kimberly P. West

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge
Roumen Nenkov, Judge
Romina Incutti, Judge

Having deliberated remotely delivers the following Judgment

I. PROCEDURE

1. On 26 August 2024, Mr Hashim Thaçi ("Applicant") made a referral to the Specialist Chamber of the Constitutional Court ("Referral" and "Chamber", respectively) under Article 113(7) of the Constitution of the Republic of Kosovo ("Constitution"), Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 20 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("SCCC Rules").[1] The Applicant was represented by Luka Misetic.

2. In the Referral, the Applicant complained about violations of his fundamental rights under Article 29(3), Articles 30(5) and (6), Article 31(2), and Article 36 of the Constitution, and Article 6 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") with regards to the regime of special investigative measures ("SIMs") imposed on him while in detention on remand pending trial at the Specialist Chambers ("SC") Detention Facilities.[2]

3. On 28 August 2024, the President of the SC, pursuant to Article 33(3) of the Law,

[1] KSC-CC-2024-25, F00001, Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights, confidential, 26 August 2024.
[2] Referral, para. 5.

assigned the above Chamber to rule on the Referral.[3]

4. On 30 August 2024, the Chamber decided, pursuant to Article 20 of the Law and Rule 5 of the SCCC Rules, that the official language of the proceedings shall be English.[4] Among others, the Chamber also decided to invite the Specialist Prosecutor's Office ("SPO"), should it wish to do so, to file written submissions in response to the Referral, and the Applicant, should he wish to do so, to file written submissions in reply.[5]

5. On 17 September 2024, the SPO filed its written submissions on the Referral.[6]

6. On 25 September 2024, the Applicant filed its written submissions in reply to the SPO.[7]

II. THE FACTS

A. TRIAL PROCEEDINGS IN CASE 06 AND DETENTION OF THE APPLICANT

7. The Applicant is facing charges before Trial Panel II for six counts of war crimes and four counts of crimes against humanity allegedly committed from at least March 1998 through September 1999 in Kosovo as well as in Northern Albania.[8]

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[3] KSC-CC-2024-25, F00002, Decision to Assign Judges to a Constitutional Court Panel, confidential, 28 August 2024. As regards the venue of the proceedings, see KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019; F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

[4] KSC-CC-2024-25, F00003, Decision on the Working Language and Further Proceedings, confidential, 30 August 2024 ("Decision on the Working Language and Further Proceedings"), para. 3 and Disposition, para. 1.

[5] Decision on the Working Language and Further Proceedings, para. 4 and Disposition, paras 2-3.

[6] KSC-CC-2024-25, F00004, Prosecution response to 'Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights', confidential, 16 September 2024, with Annex 1, confidential ("SPO Response").

[7] KSC-CC-2024-25, F00005, Reply to "Prosecution response to 'Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights'", confidential, 25 September 2024, with Annex 1, confidential ("Applicant Reply").

[8] KSC-BC-2020-06, F00026/RED, Public redacted version of Decision on the confirmation of the indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, public, 30 November 2020 (confidential version filed on 26 October 2020), paras 15, 39, 41-42, 127, 129.

8. On 5 November 2020, pursuant to an arrest warrant issued on 26 October 2020 by the single judge,[9] the Applicant was arrested and has remained in detention on remand pending trial at the SC detention facility.

9. The Applicant's arrest was deemed necessary because the single judge found, *inter alia*, that the Applicant had an incentive, the means, and the opportunity to interfere with witnesses, victims or accomplices, and, consequently, obstruct the progress of criminal proceedings.[10]

10. At the time of his arrest, pursuant to Article 12(3) of the Rules of Detention, the Applicant was provided with a copy of the following relevant documents: (i) the Rules of Detention; (ii) the Practice Direction on Visits and Communications; (iii) the Law; (iv) the Rules of Procedure and Evidence.[11] The Applicant was therefore made aware of the fact that the Chief Detention Officer keeps a log of all visitors, all telephone calls sent or received and all correspondence sent or received.[12] He was also made aware of the possibility and conditions of the monitoring of his visits, telephone conversations and correspondence.[13]

B. PROCEEDINGS BEFORE THE SINGLE JUDGE

11. On [REDACTED], the SPO submitted a strictly confidential and *ex parte* request to a single judge seeking access to information about the Applicant's visits and

[9] KSC-BC-2020-06, F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, public, 5 November 2020 (confidential version filed on 26 October 2020) ("Thaçi arrest warrant").
[10] KSC-BC-2020-06, F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, public, 26 November 2020 (confidential version filed on 26 October 2020), para. 29. *See also* Thaçi arrest warrant, para. 6.
[11] KSC-BC-2020-06, F00065/RED, Public Redacted Version of 'Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities', filing F00065 dated 8 November 2020, 18 November 2020 (confidential version filed on 8 November 2020), para. 27 ("Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities"). *See also* SC-BD-08/Rev1/2020, Registry Practice Direction, Rules of Detention, Article 12(3).
[12] Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, para. 27. KSC-BD-09/Rev1/2020, Registry Practice Direction on Detainees, Visits and Communications ("Practice Direction on Visits and Communications"), Articles 10, 16, 18.
[13] Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, para. 27. Practice Direction on Visits and Communications, Articles 15, 17, 19.

communication at the SC Detention Facilities since 1 January 2023.[14] Specifically, the SPO alleged that it had received credible and highly concerning information that [REDACTED].[15] According to the SPO, [REDACTED].[16]

12. On [REDACTED], the single judge found a grounded suspicion that the Applicant "[has] been, [is], or [is] about to commit offences under Article 15(2) of the Law".[17] The single judge granted the SPO Request and ordered the Registrar to disclose previously recorded and monitored information by providing the SPO with immediate access to visit logs, correspondence logs, withheld correspondence, if any, telecommunication logs and digitally recorded telephone conversations pertaining to the Applicant from [REDACTED] to [REDACTED]. [18]

13. In [REDACTED], the single judge issued multiple strictly confidential and *ex parte* decisions renewing the authorisation to disclose Detention Facilities information to the SPO and authorising the SPO to conduct SIMs ("Decisions on SIMs").[19]

14. Authorisation of this disclosure and monitoring regime by the SPO was renewed by the single judge and was operational until [REDACTED].[20]

15. On 17 November 2023, the Applicant became aware that the single judge authorised the SPO to covertly audio-record non-privileged visits to the Accused in the Detention Facilities after being notified of an SPO urgent request to Trial Panel II in KSC-BC-2020-06 ("Case 06") to modify the detention conditions applicable to the

[14] [REDACTED].
[15] [REDACTED]. *See also* [REDACTED].
[16] [REDACTED]. *See also* [REDACTED].
[17] [REDACTED].
[18] [REDACTED].
[19] [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].
[20] [REDACTED]. *See also* [REDACTED].

Applicant.[21]

16. Between 24 November 2023 and 24 January 2024, pursuant to requests from the Applicant,[22] and through confidential redacted and *ex parte* versions, all the relevant filings related to the monitoring and detention records were disclosed to the Applicant.[23]

17. On 4 December 2023, the single judge ordered the Applicant, should he wish to do so, to file one single consolidated challenge against the decisions on the Monitoring and Records SIMs,[24] and granted an extension of time to challenge the single judge's decisions on SIMs in light of the number of decisions.[25]

18. On 7 February 2024, the Applicant filed a request for leave to appeal several decisions on SIMs.[26] The SPO filed a consolidated response to the Certification Requests on 4 March 2024,[27] and the Applicant replied on 13 March 2024.[28]

19. On 28 March 2024, the single judge granted the Applicant leave to appeal one issue with regard to Decisions [REDACTED] only ("Certified Issue"),[29] namely: "[w]hether the Single Judge erred by failing to give sufficient reasons for his finding of "grounded suspicion" that Mr Thaçi had, was or would commit offences under Article 15(2) of the Law".[30]

[21] KSC-BC-2020-06, F01933/RED, Public redacted version of 'Prosecution urgent request for modification of detention conditions', public, 22 November 2023 (confidential version filed on 17 November 2023), with Annexes 1 to 5, confidential.
[22] [REDACTED]; [REDACTED].
[23] [REDACTED]; See also [REDACTED].
[24] [REDACTED].
[25] [REDACTED].
[26] [REDACTED].
[27] [REDACTED].
[28] [REDACTED].
[29] [REDACTED].
[30] [REDACTED]. *See also* [REDACTED]; [REDACTED].

C. APPEAL PROCEEDINGS

20. On 11 April 2024, the Applicant filed an appeal on the Certified Issue regarding Decision [REDACTED].[31]

21. On 4 July 2024, a Panel of the Court of Appeals Chamber ("appeals panel") issued its decision.[32] In relation to the issue relevant to this decision, the appeals panel found that the Applicant had "failed to demonstrate that the Single Judge was required to explicitly engage with and interpret the standard of grounded suspicion or that he failed to apply the accepted standard".[33]

III. ALLEGED VIOLATIONS

22. The Applicant complained before the Chamber of the single judge's failure to provide a reasoned opinion for the imposition of the SIMs.[34] As a result, the Applicant asserted that the imposition of the SIMs was without a legal basis[35] and in violation, as such, of Article 31(2) of the Constitution and Article 6(1) of the Convention.[36]

23. Further, the Applicant complained that the recording and monitoring of his non-privileged conversations was a violation of his right to privacy only possible with a legal basis.[37] Considering the above, the Applicant alleged a violation of his right to privacy under Article 36 of the Constitution and Article 8 of the Convention.[38]

24. Additionally, the Applicant complained that the imposed regime of surveillance amounted to a violation of his right to Counsel under Articles 29(3) and 30(5) of the Constitution and Article 6 of the Convention.[39]

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[31] [REDACTED].
[32] [REDACTED].
[33] [REDACTED].
[34] Referral, para. 46.
[35] Referral, para. 54.
[36] Referral, para. 33.
[37] Referral, para. 58.
[38] Referral, para. 56.
[39] Referral, paras 59-62.

25. Lastly, intrinsically linked to the violation of his right to Counsel, the Applicant claimed that the imposition and operation of the SIMs, conducted without legal basis violated his right to silence, under Article 30(6) of the Constitution and Article 6 of the Convention.[40]

IV. JURISDICTION

26. The Chamber observes that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in relation to a decision issued by a judge of the SC in proceedings against him. The Referral therefore relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

V. SCOPE OF REVIEW

27. The Chamber recalls, at the outset, its supervisory function as regards the work of the SC and the SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.[41] Pursuant to Article 49(1) of the Law, the Chamber shall be the final authority on the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

28. As regards the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber notes that, by virtue of Article 22(2) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.[42] Indeed, the Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by the international instruments enumerated in Article 22 of the Constitution "have

[40] Referral, paras 63, 65.
[41] See, similarly, KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018, public, 20 February 2019 ("*Decision on M. Hasani referral concerning SPO order*"), para. 24.
[42] See, for example, KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022, para. 34, with further references to case law.

the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution".[43] The Chamber recalls in this regard that the Applicant's complaints relate to Article 29(3), Articles 30(5) and (6), Article 31(2), and Article 36 of the Constitution, and Article 6(1), Article 6(3), and Article 8 of the Convention.

29. Concerning the assessment of the Referral, the Chamber notes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by the Constitution "shall be interpreted consistent with the court decisions of the European Court of Human Rights" ("ECtHR"). Further, the Kosovo Constitutional Court has consistently recognised the application of Article 53 of the Constitution in its review of constitutional referrals.[44] It has also stated that "the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]".[45] In that light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the jurisprudence of the ECtHR in its review of the Applicant's Referral.[46]

30. Lastly, the Chamber recalls that its task, under Article 113(7) of the Constitution and Article 49(1) and (3) of the Law, is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms as guaranteed by the Constitution.[47] Accordingly, the Chamber does not decide on the Applicant's guilt or

[43] Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.
[44] See, for example, Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017,* KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 37; *Constitutional review of decision Pn II no. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the decision Pml no. 300/16 of the Supreme Court of 12 December 2016,* KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43.
[45] See Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added).
[46] See, similarly, *Decision on M. Hasani referral concerning SPO order*, para. 26.
[47] KSC-CC-2022-15, F00010, Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, public, 13 June 2022

innocence.[48] Likewise, it is not the Chamber's role to decide whether the findings of the criminal chambers were correct in terms of facts or law.[49] Otherwise, it would be acting as an appeal chamber, which would disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution.[50]

31. The Chamber may only question such findings where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of fundamental rights and freedoms guaranteed by the Constitution.[51] For instance, this may occur in situations of manifest errors of assessment that no reasonable court could have ever made,[52] unreasonable conclusions regarding the facts that are so striking and palpable on the face of it that a court's findings could be seen as grossly arbitrary,[53] or manifestly erroneous interpretation and application of the relevant law or reasoning that has no legal foundation or is so palpably incorrect that it may be construed as grossly arbitrary or as amounting to a denial of justice.[54]

VI. PRELIMINARY MATTERS

32. First, the Chamber needs to determine which constitutional rights of the

("*Decision on H. Thaçi referral concerning jurisdictional challenge*"), para. 41; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 19/2022 of the Supreme Court of 15 February 2022*, KI 74/22, Judgment, 7 November 2023 (5 December 2023), para. 72.

[48] *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 41; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 224/220 of the Supreme Court of Kosovo of 17 September 2020,* KI 31/21, Resolution on inadmissibility, 5 May 2021 (21 May 2021), para. 35.

[49] KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020 ("*Decision concerning single judge decision*"), para. 36. See also Kosovo, Constitutional Court, KI 31/21, cited above, paras 35-36.

[50] *Decision concerning single judge decision*, para. 36; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017,* KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), para. 87. See also ECtHR, *Kemmache v. France (no. 3)*, no. 17621/91, 24 November 1994, para. 44.

[51] *Decision concerning single judge decision*, para. 36; ECtHR, *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, para. 170; Kosovo, Constitutional Court, KI 37/18, cited above, para. 41.

[52] ECtHR, *Dulaurans v. France*, no. 34553/97, 21 March 2000, paras 33-39. See also ECtHR, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, 5 February 2015, para. 62.

[53] ECtHR, *Khamidov v. Russia*, no. 72118/08, 15 November 2007, paras 170-175.

[54] ECtHR, *Anđelković v. Serbia*, no. 1401/08, 9 April 2013, paras 24-29; *Bochan v. Ukraine (no. 2)* [GC], cited above, paras 60-65.

Applicant the Referral concerns. In this regard, the Chamber notes that the Applicant complained that the single judge failed to provide a reasoned opinion for the imposition of the regime of surveillance.[55] In this respect, the Applicant relied on Article 31(2) of the Constitution, and Article 6(1) of the Convention, which provides for the right to a fair trial. The Chamber recalls that by virtue of Article 22(2) of the Constitution, Article 6 of the Convention applies at the constitutional level.[56] The right to a fair trial is also set out in Article 31 of the Constitution.

33. Having carefully considered the Applicant's submissions, the Chamber is of the view that the complaint regarding the lack of a reasoned decision is more appropriately characterised as alleged violations of Article 36(1) and (3) of the Constitution and Article 8 of the Convention, rather than Article 31(2) of the Constitution and Article 6 of the Convention.

34. In reaching this conclusion, the Chamber has been guided by the jurisprudence of the ECtHR, which has characterised complaints made under both Articles, akin to the Applicant's complaints, as alleged violations of Article 8 of the Convention, rather than Article 6 of the Convention. Indeed, the ECtHR in the *Potoczka* and *Adamco v. Slovakia* cases focused on Article 8 of the Convention because it determined that the primary concern is the intrusion into the applicant's private life rather than the fairness of the proceedings as such.[57] The Chambers notes that the ECtHR case law

[55] Referral, para. 46.
[56] As regards the incorporation of the Convention and its Protocols into the law of Kosovo at the constitutional level, see Kosovo, Constitutional Court, *Ćemailj Kurtiši and the Municipal Assembly of Prizren*, KO 01/09, Judgment, 27 January 2010 (18 March 2010), para. 40.
[57] ECtHR, *Potoczka and Adamco v. Slovakia*, no. 7286/16, 12 January 2023 ("*Potoczka and Adamco v. Slovakia*"), paras 42-43. In this case, relying on Articles 6 and 8 of the Convention, the applicants complained that: (i) the warrant had not contained any reasons and identification of the issuing judge, and (ii) during the implementation of the warrant, the issuing court had failed to monitor the continued existence of the reasons for the phone tapping. The ECtHR, being the master of the characterisation to be given in law to the facts of a case (see, for example, *Margaretić v. Croatia*, no. 16115/13, para. 75, 5 June 2014; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, para. 126, 20 March 2018), considered that, on the facts, the above complaints are to be examined under Article 8 of the Convention.

referred to by the Applicant also characterises complaints of unduly reasoned opinions under Article 8 of the Convention due to the nature of the interference with the private life of the applicants.[58] The Chamber notes in this respect that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 of the Convention and their monitoring amounts to an interference with the exercise of the rights under Article 8 of the Convention.[59]

35. The Chamber is further mindful that the ECtHR's jurisprudence requires that reasons be given when measures interfering with prisoners' correspondence are taken, such that the applicant and/or his advisers can satisfy themselves that the law has been correctly applied and that decisions taken in this respect are not unreasonable or arbitrary.[60] In other words, the requirement that the authorisation decision be reasoned serves as a safeguard against violations of the right to privacy.

36. Accordingly, the right to privacy and the requirement of a reasoned opinion of any interference thereof, which both fall under Article 8 of the Convention, will be analysed together, and only insofar as it relates to Decision [REDACTED]. Indeed, the Chamber emphasises that the leave to appeal was granted solely in relation to the issues raised in Decision [REDACTED], limiting the scope of the Referral to matters concerning the disclosure of previously collected Detention Facilities records. Covert monitoring was authorised [REDACTED], in Decision [REDACTED], which was not certified for appellate review, and not challenged in the Referral.

37. However, before the Chamber can examine the Referral on its merits, it must first

[58] Referral, para. 35. See ECtHR, *Liblik and Others v. Estonia*, nos. 173/15, 181/15, 374/15, 383/15, 386/15 and 388/15, 28 May 2019 ("*Liblik and Others v. Estonia*"), paras 125, 130, 132-143; *Dragojević v. Croatia*, no. 68955/11, 15 January 2015 ("*Dragojević v. Croatia*"), paras 78, 94-98.
[59] *Potoczka and Adamco v. Slovakia*, cited above, para. 69; *Dragojević v. Croatia*, cited above, para. 78. *See also*, ECtHR, *P.G. and J.H. v. United Kingdom*, no. 44787/98, 2 August 1984, para. 42; ECtHR, *Copland v. United Kingdom*, no. 62617/00, 3 April 2007, paras 43-44.
[60] ECtHR, *Onoufriou v. Cyprus*, no. 24407/04, 7 January 2010, para. 113.

ascertain whether the complaints are admissible.[61] The Chamber thus turns to the assessment of certain admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules, which arise in the present proceedings.

VII. ADMISSIBILITY

A. SUBMISSIONS

1. Applicant Referral

38. The Applicant argued at the outset that, by filing an appeal before the appeals panel raising the same challenges as in the Referral, he exhausted all remedies.[62] Further, the Applicant argued that the Referral is timely as it was filed within the two-month limit, running on the first working day after the notification of the final ruling.[63]

39. The Applicant argued that the Referral is not premature because: "(i) proceedings can be challenged at the investigation phase, as recognised by both the ECtHR and under the Kosovo Criminal Procedure Code 2022, Law No. 08/L-032 ("KCPC"); and (ii) contrary to the jurisprudence cited by the SPO, Mr Thaçi's fair trial rights have been violated through the impact of the SIMs on the trial in Case 06".[64]

40. The Applicant recalled that, according to the ECtHR's jurisprudence, a violation of Article 6 of the Convention can occur during pre-trial stages, however, the Applicant contended that the pre-trial stage is not the issue at hand in this case because the SPO used the material collected during the SIMs in Case 06.[65] The Applicant

[61] See *Decision concerning a decision of the single judge*, para. 37. See also Kosovo, Constitutional Court, Constitu*tional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), para. 68; *Constitutional review of decision Pml* no. 313/2018 of the Supreme Court of 10 December 2018, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), para. 30; *Constitutional review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017*, KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), para. 35.
[62] Referral, para. 22.
[63] Referral, para. 23.
[64] Referral, para. 24.
[65] Referral, paras 25-26.

argued that "[t]he door has therefore been opened for the Constitutional Court to exercise its "supervisory jurisdiction", and determine whether the error of the Single Judge in reaching a "grounded suspicion" finding violated Mr Thaçi's right to a reasoned opinion, and led to the imposition of SIMs which then violated the rights which had already attached by virtue of his status as an accused in Case 06."[66]

41. The Applicant submitted that it was certainly open to the SPO to draw a line between the investigations into alleged witness interference and its prosecution of the Applicant in Case 06, and to keep the two cases entirely separate, as was done in the *Bemba* case at the International Criminal Court.[67] Instead, the SPO has actively blended the two proceedings, when considered advantageous to its own interests.[68]

42. The Applicant made a distinction between the present Referral and the Decision on the Referral of Driton Lajçi[69] where the Constitutional Court acknowledged that Article 30 of the Constitution and Article 6(3) of the Convention may be relevant before a case is sent for trial, but concluded that "[s]ince there has been no trial, the Chamber at this stage cannot speculate whether and what impact, if any, the impugned summons and interview procedure will have on the fairness of a trial, if any, as a whole."[70] The Applicant argues that, in the present case, although the violation in question again stems from SPO investigations, the results of these investigations have been incorporated by the SPO into ongoing proceedings, and substantive submissions can therefore be offered as to their impact on the fairness of Case 06 as a whole.[71]

43. Further, the Applicant observed that the Constitutional Court held that "[i]t is not […] the role of the Constitutional Court to determine, as a matter of principle,

[66] Referral, para. 29.
[67] Referral, para. 26.
[68] Referral, para. 26.
[69] KSC-CC-2019-07, F00013, Decision on the Referral of Driton Lajçi Concerning Interview Procedure by the Specialist Prosecutor's Office, public, 13 January 2020 ("Decision on the referral of Driton Lajçi").
[70] Referral, para. 30.
[71] Referral para. 30.

whether particular types of evidence may be admissible. Rather, the question which the Chamber would have to answer is whether the proceedings, as a whole, including the way in which the evidence was obtained, were fair".[72] The Applicant submitted that he is not asking the Constitutional Court to rule on the admissibility of material gathered through the SIMs but to consider whether the evidence was unlawfully collected and whether the fairness of the proceedings in Case 06 has been impacted by the way in which the unlawfully collected evidence was then put before the finders of fact.[73]

44. The Applicant recalled that the Constitutional Court found that, in order to determine whether the applicant was a victim of a violation of his right to a fair trial under Article 6(1) of the Convention, "the outcome of such proceedings may be relevant".[74] The applicant submitted that he "is not claiming generally to be the victim of an unfair trial for which the outcome may be relevant, but rather is asking the Constitutional Court to consider that his fundamental and core rights to privacy, to counsel, and not to incriminate himself were obliterated by a nine-month regime of surveillance conducted without sufficient legal basis".[75]

45. Finally, the Applicant acknowledged that he was made aware that non-privileged conversations and visits could be passively monitored and the condition under which the monitored information could be disclosed to the SPO.[76]

2. SPO Response

46. The SPO submitted that the Referral challenges only findings arising from Decision [REDACTED], a decision which authorised the collection of pre-existing SC Detention Facilities records - visitor logs, call logs, and non-privileged recordings.[77]

[72] Referral para. 31.
[73] Referral, para. 31.
[74] Referral, para. 32.
[75] Referral, para. 32.
[76] Referral, para. 60.
[77] SPO Response, para. 6.

The SPO contended that the covert monitoring was authorised months later, in Decision [REDACTED], which is not challenged in the Referral.[78] Therefore, the SPO claimed that the Applicant's arguments relating to surveillance and covert monitoring are misleading, irrelevant, and entirely outside the scope of this Chamber's review.[79]

47. The SPO contended that the SIMs at issue in this Referral were deployed to investigate obstructive conduct by the Applicant – conduct which led to the modification of his detention conditions by Trial Panel II, in a decision which expressed concern as to his conduct.[80] The SPO recalled that the investigative stage, which precedes any pre-trial or trial proceedings that may result, is still ongoing.[81] As such, canvassing the Constitutional Court, at this point, is procedurally premature, and renders this Referral inadmissible – because both the investigation and the related *Thaçi et al*. trial remain ongoing.[82] Therefore, the SPO argued that the Applicant has not exhausted all remedies open to him in either case.[83] According to the SPO, it cannot be said that proceedings are concretely "final" or that any final decision on the alleged rights violations has been reached.[84]

48. Referring to the *Bemba et al.* case, the SPO contended that it is an accepted principle of law that an accused cannot invoke rights to privacy, counsel, or silence to shield the ongoing commission of criminal conduct, and to avoid judicial scrutiny.[85] Moreover, the SPO asserted that the Detention Facilities conversations obtained through the SIMs, which were necessary in the absence of any reasonable alternative,

[78] SPO Response, para. 6.
[79] SPO Response, para. 6.
[80] SPO Response, para. 7.
[81] SPO Response, para. 4.
[82] SPO Response, para. 4.
[83] SPO Response, para. 4.
[84] SPO Response, para. 13.
[85] SPO Response, para. 5.

are entirely non-privileged material.[86] The SPO submitted that the rights to counsel and silence were therefore not engaged, and thus could not have been infringed.[87]

49. The SPO recalled that the Constitutional Court's jurisprudence held in the Decision on the Referral of Driton Lajçi[88] that where proceedings are at an early stage, before a trial, any referral cannot relate to a trial before a court within the meaning of Article 31 of the Constitution, or Article 6 of the Convention.[89] The SPO contended that in the Decision on the Referral of Driton Lajçi, the Constitutional Court also declined to speculate on the impact an alleged violation might have on the fairness of a trial, if any.[90] The SPO added that the Applicant will have the opportunity to raise these issues before a competent Pre-Trial Judge, and thereafter with the Constitutional Court following any final ruling in the proceedings.[91]

50. According to the SPO, the Applicant dismissed the significance of the *Lajçi* precedent and attempts to distinguish it by effectively collapsing two separate case files into one, arguing that the SIMs impact the fairness of the *Thaçi et al.* trial "as a whole".[92] The SPO asserted that if accepted, this premise would undermine the very role and function of the Constitutional Court, allowing the Applicant to seise the Constitutional Court improperly, and repeatedly, across different case files, at different times.[93]

51. The SPO noted that, the ECtHR's and the Kosovo Constitutional Court's case law relied upon by the Applicant, concerned the question of whether the proceedings as a whole have been fair after their completion.[94]

[86] SPO Response, para. 5.
[87] SPO Response, para. 5.
[88] Decision on the Referral of Driton Lajçi.
[89] SPO Response, para. 8.
[90] SPO Response, para. 8.
[91] SPO Response, para. 9.
[92] SPO Response, para. 9.
[93] SPO Response, para. 9.
[94] SPO Response, para. 11.

52. The SPO recalled that it is not the Constitutional Court's role to decide whether the findings of criminal chambers were correct in terms of facts or law, nor to act as another appeals chamber, given the limits placed on its jurisdiction by virtue of Articles 113 and 162(3) of the Constitution. The SPO asserted that the Referral impermissibly asks this Chamber to ignore the binding limits of its powers, by asking it to "correct the errors" of the single judge and Court of Appeals.[95] According to the SPO, this Chamber may question such findings only where they are "flagrantly and manifestly arbitrary," in a manner that gives rise in itself to a violation of the Constitution.[96]

53. For the reasons cited above, the SPO claimed that the Referral is inadmissible because it was made in the context of an ongoing investigation, relates to the ongoing trial in *Thaçi et al.*, and the criminal chambers have not issued any final ruling concerning the alleged rights violations.[97] According to the SPO, the Applicant has therefore not exhausted all effective remedies provided by law to address the alleged violations and nothing in the Referral gives rise to even an appearance of a violation of the Constitution.[98]

3. Applicant Reply

54. The Applicant replied that he never implied that [REDACTED] authorised covert monitoring, and acknowledged that these additional measures were authorised in the later decision [REDACTED].[99] However, the Applicant submitted that the "grounded suspicion" finding in [REDACTED] relied on [REDACTED], as well as additional information arising from the SIMs authorised in [REDACTED], and is therefore the "fruit of the poisonous tree".[100] The Applicant contended that, as such, if

[95] SPO Response, para. 16.
[96] SPO Response, para. 17.
[97] SPO Response, para. 1.
[98] SPO Response, paras 1, 50.
[99] Applicant Reply, para. 5.
[100] Applicant Reply, para. 5.

the grounded suspicion finding in [REDACTED] is insufficiently reasoned, this topples the entire house of cards.[101]

55. The Applicants noted, in line with the procedure in the *Bemba* case, that he has repeatedly sought to keep the two proceedings separate to avoid issues of fragmentation and fairness.[102] According to the Applicant, the SPO instead chose to treat the investigations as an extension of Case 06 and repeatedly placed investigative results in front of Trial Panel II.[103]

56. The Applicant noted that both the Defence and the SPO agreed that alleged violations of an accused's rights which occur during the pre-trial phase can be challenged.[104] However, the Applicant contended that the limitation according to which that challenge can only ever be brought after the trial has been completed and a verdict rendered exists nowhere in the Constitution or the Law, nor has the Constitutional Chamber ever drawn this line, finding only that the outcome of proceedings may be relevant.[105] According to the Applicant, such a prohibition would require cases where there has been a pre-trial violation "so decisive as to render the proceedings as a whole unfair" to nonetheless continue to completion before a constitutional remedy was available, "with a manifest waste of judicial time and resources".[106]

B. CHAMBER'S ASSESSMENT

1. Alleged Violation of Article 36 of the Constitution and Article 8 of the Convention

57. The Chamber notes that the Applicant appears to have fulfilled, in principle, most of the admissibility requirements provided for in the Constitution, the Law, and

[101] Applicant Reply, para. 5.
[102] Applicant Reply, para. 9.
[103] Applicant Reply, para. 9.
[104] Applicant Reply, para. 12.
[105] Applicant Reply, para. 12.
[106] Applicant Reply, para. 12.

the SCCC Rules. However, recalling that leave to appeal was granted only regarding the issues raised in Decision [REDACTED],[107] the Chamber finds it necessary to emphasise that it is only with respect to Decision [REDACTED] that the remedies have been exhausted. The Chamber is of the view that Decision [REDACTED] cannot be interpreted as underlying the entire subsequent surveillance regime, Decision [REDACTED] in particular, as each decision was granted following individualised assessments, which incorporated other considerations than those in Decision [REDACTED].

58. Pursuant to Rule 14(f) of the SCCC Rules, the Chamber may declare inadmissible a referral, or specific parts thereof, for reasons related to the examination of the merits. More specifically, a referral, or a specific claim in the referral, may be deemed inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right. For the purpose of this assessment, the Chamber again refers to and applies the standards of the ECtHR, as it is obliged to do pursuant to Article 53 of the Constitution.[108]

59. Turning to the Applicant's complaint as legally characterised under Article 36 of the Constitution and Article 8 of the Convention,[109] the Chamber observes that, in essence, the Applicant complained of the lack of reasoned opinion of the Decision [REDACTED] ordering the Registrar to disclose Detention Facilities information to the SPO rendering the interference with his right to privacy unlawful.[110]

60. According to the jurisprudence of the ECtHR, some measure of control over prisoners' correspondence is acceptable and is not in itself incompatible with the

[107] Certification Decision, para. 51(a)(i).
[108] Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 76/2020 of the Supreme Court of 8 April 2020*, KI 110/20, Resolution on inadmissibility, 3 November 2021 (22 November 2021), paras 44-48; Kosovo, *Constitutional Court, Request for constitutional review of judgment Pml no. 325/2020 of the Supreme Court of 16 December 2020*, KI 11/21, Resolution on inadmissibility, 25 March 2021 (31 May 2021), paras 42-46.
[109] *See above*, paras 33-36.
[110] Referral, para. 58.

Convention.[111] However, such control must not exceed what is required by the legitimate aim pursuant to Article 8(2) of the Convention.[112] The Chamber notes that interference is justified only if it is: (i) "in accordance with the law"; (ii) pursues one or more of the legitimate aims referred to in paragraph 2; and (iii) is "necessary in a democratic society" in order to achieve the aim or aims.[113] While it may be necessary to set up surveillance measures and to monitor detainees' contact with the outside world, including telephone contact, the rules applied must afford the prisoner appropriate protection against arbitrary interference and abuse by the national authorities.[114]

61. The Chamber observes that the wording "in accordance with the law", of Article 8(2) of the Convention, requires the interference both to have some basis in domestic law and to be compatible with the rule of law.[115] To that end, the ECtHR conducts a two-step test to determine if the interference is "in accordance with the law", namely whether: (i) the interference has statutory basis; (ii) and the quality of said basis, in the sense that it must be clear, accessible to the person concerned and foreseeable as to its effect.[116] The requirement that a decision be reasoned is a broader obligation that applies to the overall compliance with Article 8(2) of the Convention, particularly under the necessity analysis, rather than being confined to the assessment of the legal

[111] ECtHR, *Silver and Others v. the United Kingdom*, no. 5947/72, 25 March 1983 ("*Silver and Others v. the United Kingdom*"), para. 98; ECtHR, *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, para. 45.
[112] *Potoczka and Adamco v. Slovakia*, cited above, para. 69; ECtHR, *Doerga v. The Netherland*, no. 50210/99, 27 April 2004 ("*Doerga v. the Netherlands*"), para. 44.
[113] *Liblik and Others v. Estonia,* cited above, para. 126. *See also* ECtHR, *Konstantin Moskalev v. Russia*, no. 59589/10, 7 November 2017, para. 46; ECtHR, *Avilkina and Others v. Russia*, no. 1585/09, 6 June 2013 (*"Avilkina and Others v. Russia"*). *See also* ECtHR, *Lebois v. Bulgaria*, no. 67482/14, 19 October 2017 ("*Lebois v. Bulgaria*"), para. 65.
[114] *Doerga v. the Netherlands*, cited above, para. 53.
[115] ECtHR, *Zubkov and Others v. Russia*, no. 29431/05 and 2 others, 7 November 2017, ("*Zubkov and Others v. Russia*") para. 123.
[116] ECtHR, *Roman Zakharov v. Russia [GC]*, no. 47143/06, 04 December 2015 ("*Roman Zakharov v. Russia*"), para. 228. See also ECtHR, *Lavents v. Latvia*, no. 58442/00, 28 November 2002 ("*Lavents v. Latvia*"), para. 135; Lebois *v. Bulgaria*, cited above, para. 66-67; *Silver and Others v. the United Kingdom*, cited above, para. 88.

basis.[117] While this requirement is often considered by the ECtHR under the necessity condition, it should not be conflated with the two-step test, which focuses solely on the statutory basis and quality of the law.

62. The Chamber notes that the preliminary consideration in the ECtHR's assessment of any complaint of unlawful surveillance in breach of Article 8(2) of the Convention is the quality of the law.[118] The ECtHR has developed minimum safeguards to assess the quality of the law and avoid abuses of power.[119] The second consideration is the evaluation of the interpretation of the law by the domestic courts, the indication with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities, and in particular whether the domestic system, as applied by the domestic authorities, afforded adequate safeguards against various possible abuses.[120]

63. Following the ECtHR's case law, the authorisation decision is deemed duly reasoned when it is lawful, necessary and legitimate.[121] For instance, when it mentions specific facts indicating probable cause and revealing reasonable suspicion against the individual, when it demonstrates investigative constraints and that other or less

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[117] *Dragojević v. Croatia*, cited above, para. 89. See also ECtHR, *Kvasnica v. Slovakia*, no. 72094/01, 9 June 2009, paras 83-84.

[118] *Zubkov and Others v. Russia,* cited above, paras 123, 126.

[119] In the context of surveillance: ECtHR, *Centrum för rättvisa v. Sweden*, no. 35252/08, 25 May 2021, para. 249: "(1) the nature of offences which may give rise to an interception order; (2) a definition of the categories of people liable to have their communications intercepted; (3) a limit on the duration of interception; (4) the procedure to be followed for examining, using and storing the data obtained; (5) the precautions to be taken when communicating the data to other parties; and (6) the circumstances in which intercepted data may or must be erased or destroyed". *See also Weber and Saravia v. Germany*, cited above, para. 95. In the context of detainees' correspondence: ECtHR, *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, paras 176 and 180-184; ECtHR, *Niedbała v. Poland*, no. 27915/95, 4 July 2000, paras 81-82; *Lavents v. Latvia*, cited above, para. 136. *See* Guide on Article 8 of the European Convention on Human Rights, para. 564: "Legislation is incompatible with the Convention if it does not regulate either the duration of measures to monitor prisoners' correspondence or the reasons that may justify them, if it does not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in the relevant sphere, or if it leaves them too wide a margin of appreciation."

[120] *Dragojević v. Croatia*, cited above, para. 89.

[121] *Liblik and Others v. Estonia,* cited above, para. 126. *See also* ECtHR, *Konstantin Moskalev v. Russia*, no. 59589/10, 7 November 2017, para. 46; *Avilkina and Others v. Russia*, cited above. *See also* ECtHR, *Lebois v. Bulgaria*, no. 67482/14, 19 October 2017 ("*Lebois v. Bulgaria*"), para. 65.

intrusive methods were considered or exhausted, when a clear linkage between the suspected criminal activity and the need for surveillance can be established and when a proportionality test balancing individual rights with public interest has been conducted.[122]

64. Within the SC framework and pursuant to Rule 34(1)-(2) of the Rules, a special investigative measure as identified in Rule 2 of the Rules may only be undertaken when there is a grounded suspicion that a crime listed in Rule 34(1) of the Rules has been, is being or is about to be committed. Such measures may be undertaken in respect of, *inter alia*, a person who: (i) has committed, is committing or is about to commit any of the crimes set out in Rule 34(1) of the Rules, or one who (ii) receives or transmits communication intended for or emanating from the suspect or Accused, or whose communication device the suspect or Accused is using.

65. Pursuant to Rules 31(1) and 34(2) of the Rules, a special investigative measure must be necessary for the investigation, unavoidable (i.e. the evidence cannot be obtained by other, less intrusive but equally effective means), as well as proportionate (i.e. the resulting interference with the concerned person's right(s) must be proportionate to the legitimate aim of the investigation and should not negate the essence of the guaranteed right(s)). Pursuant to Rule 64 of the Detention Rules, personal data collected in relation to the Registrar's detention function can be "disclosed" in the context of a criminal investigation.

66. Turning to the present circumstances, the Chamber notes, as a preliminary matter, that the question at issue under Article 36 of the Constitution and Article 8 of the Convention, as submitted by the Applicant in his submissions,[123] relates to the judicial authorisation as set forth in Decision [REDACTED]. In this regard, the

[122] See for examples of sufficiently reasoned examples of decisions authorizing SIMs: ECtHR, *Draksas v. Lithuania*, no. 36662/04, 31 July 2012; ECtHR, *Ringwald v. Croatia*, no. 15894/11, 27 January 2015; ECtHR, *Adomaitis v. Lithuania*, no. 14819/04, 20 January 2015 and ECtHR, *Bosak and Others v. Croatia*, no. 37006/13, 25 October 2016.
[123] Applicant Reply, para. 5.

Chamber will therefore only focus on the second step the ECtHR test, namely whether the authority duly reasoned the decision ordering the interference and complied with the legal basis.

67. The Chamber notes that the cases referred to by the Applicant – namely *Liblik v. Estonia* and *Dragojević v. Croatia* – focused on the failure of the authority to comply with the requirement under domestic law to set out the reasons for their decisions.[124] In both cases, the ECtHR considered the surveillance authorisation to be insufficiently reasoned and thus unlawful, violating Article 8 of the Convention[125]

68. The Chamber notes that the reasoning from the national authorities, both in *Dragojević* and in *Liblik*, is significantly less comprehensive and fact-specific than Decision [REDACTED].[126] In *Dragojević,* the judicial orders were based only on the existence of the request for the use of secret surveillance and the statutory phrase that "the investigation could not be conducted by other means or that it would be extremely difficult".[127] No actual details were provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences had been committed and that the investigation could not be conducted by other, less intrusive, means.[128] In *Liblik*, the judicial authorisation decision included only superficial and declaratory statements, whereas the prosecutors' authorisations did not contain any reasoning.[129]

69. In the present case, the single judge referred in Decision [REDACTED] to [REDACTED].[130] The single judge further noted that [REDACTED].[131] The Chambers

[124] Referral, para. 35; *Liblik and Others v. Estonia*, cited above, para. 134; *Dragojević v. Croatia*, cited above, para. 89.
[125] *Liblik and Others v. Estonia*, cited above, para. 142; *Dragojević v. Croatia*, cited above, para. 101.
[126] *Liblik and Others v. Estonia*, cited above, para. 11; *Dragojević v. Croatia*, cited above, para. 9.
[127] *Dragojević v. Croatia*, cited above, paras 9, 11, 13, 17.
[128] *Dragojević v. Croatia*, cited above, para. 95.
[129] *Liblik and Others v. Estonia*, cited above, para. 137.
[130] [REDACTED].
[131] [REDACTED].

notes that the single judge was persuaded based on the information before him that there was a grounded suspicion that the Applicant has been, is, or is about to commit offences under Article 15(2) of the Law from the SC Detention Facilities and provided reasoning therefore in Decision [REDACTED].[132] The Chamber observes that the single judge further found that the requested information was necessary to [REDACTED].[133]

70. Moreover, the single judge was convinced that the requested information was only available through the monitoring system employed by the SC Detention Facilities.[134] The single judge therefore reasoned that the requested measure was the least intrusive and most effective means of obtaining the requested information.[135]

71. Finally, as regards the proportionality of the interference with the rights of the Applicant vis-à-vis the legitimate aim of the investigation, the single judge observed that the nature, duration and scope of the requested measure were tailored to the need to ascertain whether the non-privileged visitor, correspondence, telephone logs and digital recordings of calls from or to the Applicant provide evidence regarding allegations of obstruction of justice.[136] The single judge found that, to the extent that the SPO abides by the conditions outlined in the Rules and that decision, including the requirements regarding the duration and scope, as well as the retention of the obtained material, the requested measure meets the proportionality requirement.[137]

72. The Chamber considers that Decision [REDACTED] did not merely rely on abstract, generalized or declaratory reasoning. Rather, a *prima facie* review reveals that the reasoning includes arguments that are fact-specific with respect to establishing a grounded suspicion, as well as an analysis of the necessity, unavoidability, and

[132] [REDACTED].
[133] [REDACTED].
[134] [REDACTED].
[135] [REDACTED].
[136] [REDACTED].
[137] [REDACTED].

proportionality required to justify the impact on the Applicant's right to privacy under Article 8(2) of the Convention. In light hereof, the Chamber is of the view that Decision [REDACTED] complies with the ECtHR's standards in this regard.[138] Similarly, the appeals panel extensively considered the Applicant's arguments as to the breach of his right to privacy, and gave reasoned assessments in rejecting his arguments.[139] In these circumstances, the Chamber does not detect any appearance of a violation of the Applicant's rights under Article 36 of the Constitution and Article 8 of the Convention. Accordingly, this complaint must be declared inadmissible in accordance with Rule 14(f) of the SCCC Rules.

2. Alleged Violation of Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention

73. The Chamber notes that the Applicant's complaint concerns specific aspects of fair trial guarantees contained in Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention. In particular, it concerns the Applicant's right to counsel and the right to silence. The Chamber observes that, in essence, the Applicant asked the Chamber to consider whether the proceedings including the way in which the evidence was obtained, were fair.[140]

74. The Chamber is of the view that the Applicant is not in a position to assert a violation of Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention at this stage of the proceedings as the charges have yet to be confirmed and no proceedings have been undertaken as a result of the investigation. In other words, the Applicant's complaint is premature in this respect. The Chamber sees no reason to depart from its previous conclusions in the Decision on the Referral of Driton Lajçi and finds that "[s]ince there has been no trial, the Chamber at this stage cannot

[138] [REDACTED].
[139] [REDACTED].
[140] Referral, para. 31.

speculate whether and what impact, if any, the impugned summons and interview procedure will have on the fairness of a trial, if any, as a whole."[141]

75. Similarly, the Chamber observes that the criminal proceedings against the Applicant in case 06 are ongoing and that the charges at issue are yet to be decided. The Chamber further notes that, while Article 31 of the Constitution and Article 6 of the Convention guarantee the right to a fair hearing, neither lays down rules on the admissibility of evidence as such, which is, in the context of the SC, primarily a matter for regulation by the Law and the Rules and the relevant criminal chambers.[142] Specifically, this matter is regulated by Rule 138 of the Rules.

76. As the Chamber has previously held,[143] it is not, therefore, the role of the Constitutional Court to determine, as a matter of principle, whether particular types of evidence may be admissible. Rather, the question which the Chamber would have to answer is whether the proceedings, as a whole, including the way in which the evidence was obtained, were fair.[144] In this context, the Chamber recalls the panel has not yet made use of the evidence in determining the charges against the Applicant.

77. As noted above, the criminal proceedings against the Applicant are pending and the charges at issue are yet to be wholly examined and determined by the Trial Panel and, as the case may be, by a Court of Appeals and a Supreme Court panel, in accordance with their respective competence. Insofar as the Applicant complains

[141] Decision on the referral of Driton Lajçi, para. 23.
[142] Cf. ECtHR, *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, para. 83. See also Kosovo, Constitutional Court, *Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo, of 5 December 2018*, KI 63/19 and Kosovo, Constitutional Court, *Constitutional review of Judgment Pml. No 199/2018 of the Supreme Court of the Republic of Kosovo,* KI 66/19, Resolution on inadmissibility, 12 April 2021 (26 April 2021), para. 100 (in Albanian) ("*Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo*").
[143] KSC-CC-2023-21, F, Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, 29 August 2023 ("Decision on P. Shala referral"), para. 24.
[144] ECtHR, *Ayetullah Ay v. Turkey*, nos 29084/07 and 1191/08, 27 October 2020, para. 124; *Constitutional review of Judgment Pml. No. 199/2018 of the Supreme Court of the Republic of Kosovo*, para. 101.

about the fairness of pending proceedings, the outcome thereof may be relevant in determining whether the Applicant may claim to be a victim of the alleged violation of the rights set forth in Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention.[145]

78. The Chamber recalls that it falls in the first place to the criminal chambers to assess whether there is any merit to the raised procedural violation and whether this should be remedied in the course of the ensuing proceedings.[146] This approach reflects the general principle according to which compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole. In other words, fair trial rights cannot be assessed on the basis of an isolated consideration of one particular aspect or a single procedural incident. The only exception here to is the situation where a specific factor, even one impacting the early stages of the proceedings, may be found, after the determination of the charges and the completion of the proceedings by the criminal chambers, to have been so decisive as to automatically render the proceedings as a whole unfair.

79. It follows that the Applicant, at this stage of the proceedings, cannot claim to be a victim of the alleged violation of his right to fair trial pursuant to Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention. The Chamber thus finds that, at this stage of the proceedings, the Referral is premature. Therefore, the Applicant's complaints must be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the SCCC Rules.

80. Lastly, whereas the Chamber finds that the Referral must be dismissed for the aforementioned reasons, it recalls that the SC's legal framework allows the Applicant to raise alleged violations of the rights afforded to him pursuant to Articles 29(3) and 30(5) and (6) of the Constitution and 36 of the Constitution and Articles 6 and 8 of the Convention at various future stages of the proceedings, including an appeal against

[145] See Decision on P. Shala referral, para. 26 and citations therein.
[146] Decision on P. Shala referral, para. 27.

the trial judgment pursuant to Article 46 of the Law. The Chamber further notes in this respect that pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, an individual may only make a referral to the Chamber after having exhausted all the effective remedies provided for by law against the alleged violation.

C. CONCLUSION

81. Based on the foregoing, the Chamber finds that the Applicant's complaint under Article 36 of the Constitution and Article 8 of the Convention does not reveal an appearance of a violation of the Applicant's constitutional rights to privacy. It follows that this part of the Referral must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

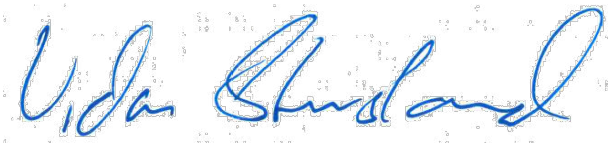
82. Based on the foregoing, the Chamber finds that the Applicant's complaint under Articles 29(3) and 30(5) and (6) of the Constitution and Article 6 of the Convention, with respect, in particular, to the Applicant's allegations on the right to counsel and the right to silence, must be declared inadmissible for being premature as available remedies have not yet been exhausted in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, as well as Rule 14(f) of the SCCC Rules.

FOR THESE REASONS,

Deciding on the Referral made by Mr Hashim Thaçi, the Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral of Mr Hashim Thaçi's inadmissible; and

2. *Dismisses* the Referral in its entirety.



Judge Vidar Stensland

Presiding Judge

Done in English on Friday, 15 November 2024
At The Hague, the Netherlands